MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
May 19, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:42 a.m. on Thursday, May 19, 2011, 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 Valerie Wiener, Chair
Senator Allison Copening, Vice Chair
Senator Shirley A. Breeden
Senator Ruben J. Kihuen
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

GUEST LEGISLATORS PRESENT:

Assemblyman Marcus Conklin, Assembly District No. 37

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bryan Fernley-Gonzalez, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Steve Holloway, Associated General Contractors, Las Vegas Chapter
Richard Peel, Subcontractors' Legislative Coalition
Greg Esposito, Plumbers and Pipefitters Local 525; Plumbers and Pipefitters Local 350
Darren Enns, Secretary-Treasurer, Southern Nevada Building and Construction Trades Council

Scott Byars, Laborers Union 872
Greg Ferraro, Nevada Resort Association
Michael Mathis, Boyd Gaming; Nevada Resort Association
John Sande IV, Nevada Bankers Association
Rocky Finseth, Nevada Land Title Association
Russell Dalton, Nevada Land Title Association
Bill Uffelman, Nevada Bankers Association
Laura Parrish, Key Plumbing
Rebecca White, Roadrunner Plumbing; Aqua Plumbing
John Ramos, NAIOP
Andy Gabriel, NAIOP
Jack Mallory, International Union of Painters and Allied Trades District Council 15
Randy Soltero, Sheet Metal Workers Local 88
Warren B. Hardy II, Ex-Senator; Associated Builders and Contractors of Nevada
Richard DiFilippo, Laborers Union Local 872
Garett Leavitt, Laborers Union Local 872
Avie Havelka, Laborers Union Local 872
Pat Sanderson, Laborers Union Local 872
Bobby Witt, Mechanical Contractors Association; Ryan Mechanical
Gordon Marx, Southern Nevada Fire Sprinkler Contractors Association; Subcontractor Legislative Coalition
David Kersh, Carpenters/Contractors Cooperation Committee
John Madole, Associated General Contractors; Nevada Association of Mechanical Contractors
Robert Conway, Ironworkers Local 433

CHAIR WIENER:
We will begin today with the work session, and our first bill is Assembly Bill (A.B.) 273.

ASSEMBLY BILL 273 (1st Reprint): Revises provisions governing deficiencies existing after foreclosure sales and sales in lieu of foreclosure sales. (BDR 3-561)

LINDA J. EISSMANN (Policy Analyst):
We heard this bill, sponsored by Assemblyman Marcus Conklin, on May 3. This bill tightens the rule on deficiency judgments and relates to the junior mortgage or lienholder after a foreclosure sale. A complete summary of the bill is

contained on pages 1 and 2 of the work document (Exhibit C). The mock-up presented at the original hearing has been revised by the sponsor. This mock-up incorporates the original Proposed Amendment 6838 with a new amendment in section 5.5, pages 3 through 6, Exhibit C. It provides the limits on the amount of certain judgments apply only to an action commencing on or after the effective date of the act, upon passage and approval. At the committee hearing, Bill Uffelman had proposed to delete section 5.5. I am not clear if the current mock-up with the change in the effective date addresses his concern. I learned late yesterday of one final adjustment to section 6, the effective date.

BRYAN FERNLEY-GONZALEZ (Counsel):
In section 6, subsection 3, the reference to section 5 needs to be deleted.

SENATOR ROBERSON:
I agree with the sponsor's amendment and the need to delete the reference to section 5 in section 6, subsection 3.

> SENATOR ROBERSON MOVED TO AMEND AND DO PASS AS AMENDED A.B. 273.
>
> SENATOR BREEDEN SECONDED THE MOTION.
>
> THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR WIENER:
The work session on A.B. 273 is closed. The work session on A.B. 291 is now open.

ASSEMBLY BILL 291 (1st Reprint): Makes certain agreements between heir finders and apparent heirs relating to the recovery of property in an estate void and unenforceable under certain circumstances. (BDR 12-306)

MS. EISSMANN:
This bill, sponsored by Assemblyman William C. Horne, was heard by this Committee on May 12. It was scheduled for a work session yesterday. The Committee moved it to today's agenda. During the hearing, Chris Ferrari proposed an amendment to reduce from six months to 30 days the time when

an agreement between an heir finder and an apparent heir is void and unenforceable. An alternative amendment of 60 days was also discussed. We have a proposed amendment from Daniel Mannix and Chris Ferrari in the work document, page 2 (Exhibit D).

CHAIR WIENER:
Assemblyman Horne is amenable to reducing the six-month period to 90 days.

SENATOR ROBERSON:
This is the first time 90 days has been discussed. That would put Nevada at the extreme end of other states' limits. The only other state that puts a limit on this has a limit of 60 days. I would support the amendment of 30 days and even consider 60 days.

SENATOR COPENING:
I support the sponsor's fair compromise of 90 days.

SENATOR BREEDEN:
I agree 90 days is a fair compromise.

> SENATOR COPENING MOVED TO AMEND AND DO PASS AS AMENDED A.B. 291 WITH 90 DAYS REPLACING SIX MONTHS.
>
> SENATOR BREEDEN SECONDED THE MOTION.
>
> THE MOTION CARRIED. (SENATORS GUSTAVSON, MCGINNESS AND ROBERSON VOTED NO.)

* * * * *

CHAIR WIENER:
The work session on A.B. 291 is closed. The work session on A.B. 459 is now open.

ASSEMBLY BILL 459: Makes various changes relating to gaming enterprise districts. (BDR 41-1122)

MS. EISSMANN:
The summary of A.B. 459 is contained in a work session document (Exhibit E). This bill makes various changes to gaming enterprise districts. Richard Perkins presented this bill to us on May 13. It would include an area to the east of the existing corridor within the Las Vegas Boulevard gaming corridor. The additional area is bounded by Desert Inn Road on the north, Paradise Road on the east, and Sands Avenue on the south. There were no amendments.

SENATOR GUSTAVSON MOVED TO DO PASS A.B. 459.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR BREEDEN VOTED NO.)

* * * * *

CHAIR WIENER:
The work session on A.B. 459 is closed. We will now open the hearing on A.B. 412.

ASSEMBLY BILL 412 (1st Reprint): Revises various provisions governing mechanics' and materialmen's liens. (BDR 9-833)

ASSEMBLYMAN MARCUS CONKLIN (Assembly District No. 37):
While A. B. 412 is complicated, it is an important piece of legislation to the construction industry and opportunities for growth in that industry. The focus of this bill is to make sure entities at the bottom of the construction and development chain are paid for work done. For at least ten years, Legislators have heard many cases of contractors and subcontractors who, after completing a project, find there are no funds with which to be paid. Retention funds, usually 10 percent of the cost estimate, are held in good faith to be disbursed when a project is completed to the satisfaction of contractual agreements. The time period for payment could vary from two months to two years. It is possible during this period, claims are made of unsatisfactory work, damages or other contingencies. A common occurrence is when businesses fail, retention funds disappear. From a contractor's point of view, if a contractor is making a 10 percent profit margin on his business, he is doing well. All of the profit on a project is gone if final payments are not received. The

goal of this bill is to protect the retention money in a safe place. If a project or a company fails, the money is in a neutral place not accessible to the failed entity.

Many circumstances would be affected in a positive manner by this bill. Other testifiers will address technical issues in the bill.

STEVE HOLLOWAY (Associated General Contractors, Las Vegas Chapter):
Assemblyman Conklin is correct. In Las Vegas, contractors have not been paid for work they completed on the Fontainebleau Las Vegas, One Las Vegas condominiums, The Onyx, juhl, CityCenter, Tomorrow at the Venetian and several more. Assembly Bill 412 stops practices that have bankrupted hundreds of contractors in recent years by requiring retention money be withheld by the owners as work is completed and held until the project is completed.

Assemblyman Conklin adequately described retention as the withholding of money actually earned. A contract for $1 million would require periodic progress payments to be made at specific times for completed work that has been approved by the owner, his representatives and in most cases by the county building department. If the progress payment is $100,000, generally 10 percent of that amount is withheld by the owner until the end of the project, theoretically to ensure the contractor completes the whole project satisfactorily. Without A.B. 412, the problem arises when the project is completed and the building is occupied, the final payment is not made. One of the first cases we brought to this body in 2001 was the Venetian Las Vegas Casino, Hotel and Resort. There was $300,000 withheld by the owner, much of it retention money. The dispute over that money is still in court. Contractors who won their lawsuits in lower courts have been drawn into the Nevada Supreme Court, yet have still not been paid. Many of those contractors went bankrupt. Others, in order to stay in business, settled on 10 cents to 30 cents on the dollar of what was owed to them.

When an owner declares bankruptcy, the retention money is subject to bankruptcy court control. In other cases, an owner will threaten bankruptcy and force contractors to settle for partial payment rather than go through a lengthy and expensive court battle. The retention money is supposed to pay for work already performed. In many cases, this money is retained by the owner, even after the owner occupies the building, continues his business on the premises and utilizes the benefits of that building.

This is causing an increasing hardship on contractors and subcontractors as jobs are scarce and profit margins are narrowing in this economy. I know of no contractor whose profit margin is over 2 percent to 3 percent. Withholding 10 percent for retention not only eliminates the profit margin, it forces contractors to operate at a deficit because they have already spent money from their own pockets for expenses. The existing loopholes in the law prevent contractors from recovering these losses.

This bill proposes that retention money withheld by an owner be placed in trust in an escrow account. The owner can still make claims against the escrow account for disputed work.

The existing problems have been further exacerbated by a recent Nevada Supreme Court ruling, *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC,* 249 P.3d 501, 127 Nev. Adv. Op. 5 (Mar. 3, 2011).

Does the Committee wish to review this bill section by section?

CHAIR WIENER:
I have spent a great deal of time studying this bill. However, the members of this Committee are relatively new and may not be aware of the history of the problem the bill seeks to address, so it may help if we go over each section.

RICHARD PEEL (Associated General Contractors; Subcontractors' Legislative Coalition):
We are concerned about getting contractors, subcontractors, material suppliers and laborers paid for work, materials and equipment provided in this State. We have had a large problem with ensuring people are paid. Profit margins range from 1 percent to 3 percent. Retention funds are at 10 percent. When contractors do not get paid what is owed them in the form of progress payments, retention money and change orders—which can be as much as 30 percent of the overall contract—the expenses come out of contractors' pockets. Over the last 20 years of my practice as a construction attorney, I have seen many good, hardworking people, who employ thousands of individuals, go out of business because they have not been paid. Our goal is to pass legislation that will ensure these people get paid and stay in business.

We have presented this Committee with a proposed amendment (Exhibit F) to the first reprint of A.B. 412. As I discuss this proposed amendment, I will refer

to the first reprint, using page numbers, Exhibit F. There is one clarification of a mistake on my part. On pages 30 through 36, Exhibit F, we have added new sections. I numbered the new sections 23 through 28. Unfortunately, I did not look at page 29 to see that we already had a section 23. Starting on page 30, Exhibit F, it should read sections 24 through 29.

The purpose of the amendment is to reword and clarify certain language throughout the first reprint. We have worked diligently with various groups to come to a compromise and resolve their concerns. I will identify those sections as I proceed.

We have included in the amendment an option for owners and lessees to opt out of the provisions of section 8 through section 11 by providing a retention-amount surety bond. This will give owners direct and immediate access to the money to do whatever they want with it. The bond would be in place at the end of the project so contractors and subcontractors can get paid.

Sections 2 through 7.3, Exhibit F, pages 2 and 3, contain definitions used throughout the bill. We propose to delete section 7.4 after negotiations. We wish to make it clear, with respect to the definition of "commencement of construction" and NRS 108.225, a claim of priority is an affirmative claim regardless of who makes it. When there are multiple claimants asserting priority, each bears the burden of proof to show when their respective rights attached to the property and why a competing claimant is not entitled to the property.

In sections 6 and 7.5, Exhibit F, pages 2 and 3, it is clear the definition of "retention amount" applies to all contracts, not just those that are the subjects of sections 8 through 11. The balance of section 7.5 sets forth the maximum amount of retention that can be withheld and identifies who owns the retention amount, how it must be held and the time and manner of payment.

Section 8, Exhibit F, pages 4 through 6, applies to prime contracts of $1 million or more when an owner or lessee is authorized by contract to withhold a retention amount. On such projects, owners and lessees are required to obtain the services of an escrow agency and establish a trust account. They are also required to record a notice of establishment of a trust account with the county recorder's office in the county in which the property is located. The purpose of such recording is to give notice to contractors and subcontractors working on the project that the account has been established.

There were questions in the Assembly about how many accounts would be established. For clarification, there is only one trust account established by the owner or lessee, and it is added to as money is withheld. We have deleted the requirement the notice be provided to the building inspector or other government authority overseeing the construction. This had been the subject of section 8, subsection 2, paragraph (c), which has been deleted in this proposed amendment.

Section 8, subsection 3, Exhibit F, page 4, identifies the information that must be contained in the notice of establishment of a trust account and the form that must be used. To accommodate certain groups, we removed reference to the trust account number, previously required by section 8, subsection 3. A new provision proposed by this amendment, section 8, subsection 5, allows an owner or lessee to opt out of the requirements of sections 8 through 11 and instead provide a surety bond for the retention amount.

Section 9, Exhibit F, pages 6 and 7, identifies the requirements for retention amounts held pursuant to sections 8 through 11. Section 10, Exhibit F, pages 7 through 12, requires an owner, lessee or escrow agency to pay a retention amount to a prime contractor pursuant to NRS 624.620, subsection 1. It requires a higher-tiered contractor to pay a retention amount to a lower-tiered subcontractor as provided in NRS 624.624, subsection 1. It gives a prime contractor the right to stop work and terminate the contract if an owner or lessee does not comply with sections 8 through 11. It prohibits a building inspector or other government authority from issuing a certificate of occupancy (CO) for a project until the owner, lessee or escrow agency causes a verification of compliance to be recorded against the property and provides a recorded copy to the building inspector or other government authority. To clarify, we are not proposing to prohibit the project from going forward with a CO if the verification of compliance is provided. As long as the owner or lessee properly completes the verification of compliance, Exhibit F, page 10, indicating the status of the retention money, and gives the form to the building inspector or other government authority, the owner or lessee is free to get the CO. We want to make sure the retention money is secure. To accommodate certain groups, we have removed reference to a trust account number, Exhibit F, page 10, line 24.

Section 11, Exhibit F, page 12, establishes the duties of an escrow agency with respect to a trust account.

Sections 12.5 and 13.5, Exhibit F, pages 12 and 13, amend NRS 108.22112, the definition of commencement of construction, and NRS.108.22188, the definition of a work of improvement. These modifications make it clear for priority purposes between a mortgage, deed or other lienholder and a lien claimant that construction commences when any "lienable" work performed or any materials or equipment furnished are first visible during a reasonable inspection of the property. It confirms preparatory work performed and materials and equipment furnished can constitute commencement of construction if such work, materials or equipment is lienable and visible.

These amendments unambiguously correct and are intended to supersede the decision of the Nevada Supreme Court in *J.E. Dunn*. They are also intended to confirm the intent of S.B. No. 206 of the 72nd Session and S.B. No. 343 of the 73rd Session, when we tried to make it clear construction has commenced when lienable work is first visible from an inspection of the property.

Pursuant to discussion with banks, we have agreed to remove the word "time" from section 12.5, Exhibit F, page 12, line 36.

Section 13, Exhibit F, page 13, pertains to NRS 108.22132. We propose to retain the existing definition of "lien." We want to make it clear a claimant's lien against a construction disbursement account or the property includes the unpaid balance of a retention amount withheld from a lien claimant. Section 14, Exhibit F, page 14, makes it clear a lien claimant may include in his lien against the property the unpaid balance of a retention amount which was withheld from the lien claimant. I will skip a number of sections which revise definitions set forth in other statutory sections as they pertain to fiduciary, banking and escrow. I will focus on the intent of the bill.

Section 17, Exhibit F, pages 17 to 19, makes it clear the retention amount must be paid by an owner or lessee pursuant to NRS 624.620, and the withholding of a retention amount is subject to sections 8 through 11 of the bill, if applicable. Section 18, Exhibit F, pages 19 through 21, makes changes to NRS 624.620. It identifies the date on which a final payment is due from an owner or a lessee to the prime contractor. It also clarifies what an owner may withhold from a final payment. It makes it clear an owner, lessee or agency shall not withhold from the final payment to be made to the prime contractor more than the amounts allowed by subsection 2, paragraph (a) and subsection 4, paragraph (b) of section 18, and only if the owner, lessee or escrow agency has complied with

subsection 3 of section 18 and sections 8 through 11 of the bill, if applicable. This section, set forth in NRS 624.620, provides reasons for withholding, including incomplete work or improperly performed work, if the owner receives notice from the State or a trust fund that money has not been paid, or if a conditional waiver and release of lien rights is not provided pursuant to NRS 108.2457.

Section 19, Exhibit F, pages 21 through 24, revises the language of NRS 624.624, subsection 2, paragraph (a), subparagraph (1) to make it clear the retention amount must be paid pursuant to NRS 624.624, subsection 1, and the withholding of a retention amount is subject to the bill, if applicable. Section 19.5, Exhibit F, page 24, adds a new section to NRS 627 to make it clear a person who acts in the capacity of a construction control is acting in the capacity of an escrow agency and, as a fiduciary, must comply with sections 8 through 11 of the bill. As a result of negotiations with banks, we propose to delete sections 22.2 and 22.3 of the bill. Section 23 sets forth the effective date of the bill. It states section 1, section 5.5, section 7.3, section 12.5 and section 13.5 become effective upon passage and approval of the bill. The remainder of the bill becomes effective on July 1.

The new sections are incorrectly marked as sections 23 through 28. They should be marked sections 24 through 29, located in Exhibit F, pages 30 through 36. These sections revise NRS 108.22136, NRS 108.2214, NRS 108.226 and NRS 108.2415 through 108.2425 to allow an owner or lessee to opt out of the provisions of sections 8 through 11 of the bill if a surety bond is provided for the retention amount. These sections also make it clear a retention amount is lienable and a prime contractor and his lower-tiered subcontractors are lien claimants.

For the record, I offer these clarifications:

> By way of the language of the first reprint and the amendment, we want to make it clear that the rights and remedies provided to lien claimants, prime contractors, lower-tiered subcontractors by this bill and in the mechanic's lien statute, which is set forth in NRS 108.221 through 108.246, as well as the right to stop work statute, which is NRS 624.606 through 624.630, give those parties a private right of action and that the provisions of the bill do not apply to a government body where the government body, as owner, uses the property for a public or governmental purpose or

> the governmental body, as a lessee, is not leasing the property from a private company.

I have completed a review of our proposed amendment.

CHAIR WIENER:
Please explain the phrase "reasonably required" found on page 19, line 28, Exhibit F.

MR. PEEL:
Whenever parties enter into agreements, when the project is being completed and before the trades receive their final payments, there is usually documentation required, including waivers and releases upon final payment and pursuant to statute, and warranty information that would normally and customarily be provided by way of the prime contractor and his lower-tiered subcontractors. An example of the latter would be if a large heating, ventilation, and air-conditioning unit was installed on the property and there is a warranty attached, the subcontractors would provide the manufacturer's warranty to the owner. The owner may want to have the "as built" copy of the plans showing how the overall construction deviated from the plans submitted to the government body.

CHAIR WIENER:
Please explain the term "construction control," Exhibit F, page 24, line 23.

MR. PEEL:
A person, firm or entity may, under NRS 627, act in the capacity of a construction control—also referred to as voucher control—for purposes of processing payments on a construction project. In order for such an entity to act in that capacity, it must meet requirements set forth in NRS 627. The entity must also provide a bond to the State Contractors' Board. The purpose of the statute is to allow the entity to set up accounts internally or with a financial institution for payments to the prime contractor and lower-tiered subcontractors. Banks sometimes act in this capacity; private companies also do this. Their function is to verify work has been done and to process payments on behalf of an owner or a lender.

CHAIR WIENER:
Why did you include the opt-out provision, Exhibit F, page 6, and who was involved in those discussions?

MR. PEEL:
The mechanic's lien statute says if a lien has been recorded, an owner, lessee or person with an interest in the property can obtain a surety bond provided that person does certain things as required by the statute. That bond would become the security in lieu of the real property. In 2005, a provision was added to the statute allowing an owner or lessee to obtain a mechanic's lien release bond at the beginning of the project for 150 percent of the prime contract amount. If that bond is provided, liens would attach to the bond, not to the property. Since 2005, the use of these bonds has been infrequent. With the proposed amendment, the amount of that surety bond would be reduced from 150 percent to 100 percent of the prime contract, whether it is the total sum, the total price or the estimated budget, whichever is greater. These bonds will be more readily useable in the marketplace.

Owner groups expressed concerns about access to the retention amount. Allowing them to provide the bond for 15 percent of the total sum price or estimated budget of the prime contract, whichever is greater, would also allow them to have immediate access to those funds without requiring them to comply with sections 8 through 11 of the bill. The goal was to give them a different way to access the money immediately, with a bond in place for security.

CHAIR WIENER:
Mr. Holloway mentioned several projects that brought you to the table today. What period of time do those projects cover, and what is their dollar value?

MR. PEEL:
The Fontainebleau Las Vegas, one of the largest of those projects, is in bankruptcy court. The trades are owed approximately $300 million to $400 million on that project, which has been sold. There is $100 million being held by the bankruptcy court from the proceeds of sale. We do not know how much of this amount, if any, will go to the trades. The Florida bankruptcy court has referred that case to the Nevada Supreme Court. We are awaiting a decision.

There are millions of dollars owed from the Manhattan West project to the trades. The project was only partially completed when it was stopped. Several other large projects in southern Nevada owe substantial amounts to the trades.

I primarily represent subcontractors. Over the last several years, we have lost over 50 percent of our clients as a result of them not being paid for work, materials or equipment furnished. We estimate we will lose another 25 percent of our clients for the same reason. These are dire times. You have seen many individuals in orange shirts here today because they are concerned. Money is not being paid to prime contractors, subcontractors and labor groups. There are lots of people being hurt. We ask this Committee to pass A.B. 412 as amended by our proposal, Exhibit F.

SENATOR ROBERSON:
I share your concern. I want contractors and subcontractors to be paid. Would you explain the ruling in *J.E. Dunn*?

MR. PEEL:
The Nevada Supreme Court recognized in 2003 and 2005 changes were made to the mechanic's lien statute, but the court found preparatory work did not constitute commencement of construction for purposes of priority. In 2003 and 2005, Mr. Holloway and I worked with the groups we represent to clarify the definitions and requirements of the mechanic's lien statute. Our goal was to make the definition of "work" and the definition of "commencement of construction" clear for purposes of priority. If visible, lienable work has been performed on a property, if equipment has been placed on a property, if dirt has been turned on a property or there are other indications construction is in process or has commenced, then for purposes of priority, the lien claimants would likely be in first position to be paid. That was the intent in 2003 and 2005.

The Nevada Supreme Court ignored the legislative work done in 2003 and 2005. One of the footnotes in its decision in *J.E. Dunn* is just dicta. It states even grading work could be considered preparatory work. Yet, grading work is necessary work for any construction project. That is our concern in wanting to clarify the language with our amendment. There should be no doubt if work or the materials furnished are lienable and work is visible from a reasonable inspection of the site, lenders and title companies are provided with notice work has commenced.

SENATOR ROBERSON:
The interpretation of the lien statute regarding the difference between preparatory work and vertical construction has been an issue of contention for many years. If we clarify this statute in the manner you propose, how does that affect lien priority issues for lenders? As you know, typically, there may be site work and vertical construction with two different contractors, two different contracts and two different lenders. Would not your amendment make it more difficult in these cases to get projects started, obtain financing and keep people employed?

MR. PEEL:
No. There is a difference between a property owner cleaning up his vacant parcel because people have been dumping on it and another property owner, with a set of plans or a design concept with the intent to improve the property with construction, who hires trades to perform grading work for pad preparation and eventual vertical construction. The latter is all part of the same scheme of improvement.

The inspection needs to be reasonable. The Aladdin Resort and Casino was an example of how it should not be done. Title company representatives drove up to the property at approximately 5 a.m. in March 1997. It was dark and they did not get out of the car. They drove around the project, saw construction fencing installed, job-site trailers and temporary power installed. Other indications of the commencement of construction were very visible. Upon such evidence, a deed of trust was recorded which led to a dispute later.

We want to stop arguments about when construction commences. If a lender sees equipment and other indications of the commencement of construction, this should be clear notice the lender is in second position to be paid. It is more desirable to have tradesmen not do a job, not get paid and have to pay out of pocket and lose money because they thought they would get paid than it is to do the job and ultimately be out of business because someone else claims to be in first position to be paid. Our goal is to ensure there is enough money at the end of construction to pay entities that did the work or supplied the materials.

SENATOR ROBERSON:
Based on my experience, your proposal will make it more difficult to finance projects. We can have that debate later. Does the verification of compliance

language require an owner to verify, under penalty of perjury, the prime contractor has paid all of the subcontractors?

MR. PEEL:
The only thing the owner has to do is complete a form, a copy of which is on page 11, Exhibit F, and on page 12 of the first reprint of A.B. 412. There are three boxes, one of which an owner or lessee will check. The first box will indicate the owner has deposited the entire retention amount withheld from the prime contractor and the lower-tiered contractors into a trust account. The second box will indicate the retention amount has been partially paid to the prime contractor and the lower-tiered subcontractors to whom it is owed with the balance of the retention amount deposited into a trust account. The third box will indicate the owner has paid the full amount due to the contractors and subcontractors. The form is signed and submitted to the building inspector or other government authority.

SENATOR ROBERSON:
How can an owner verify, under penalty of perjury, the prime contractor has paid all of the subcontractors? Sometimes the owner will not know.

MR. PEEL:
At the point in a project where a CO is issued, an owner requests waivers and releases are provided pursuant to NRS 108.2457. One of the forms provided is an unconditional final waiver which will indicate the particular trade has been paid.

SENATOR ROBERSON:
There are still instances when subcontractors sue the prime contractor for failure to pay and the owner gets sued.

Many financing agreements between lenders and owners say the lender will not pay a construction disbursement on a construction loan to an owner to subsequently pay to the contractors. The pay is on a progressive basis. The owner may actually have to pay out of his or her own pocket to put the 10 percent into an escrow account before receiving any funds from the lender. Is that how you interpret this?

MR. PEEL:
No. We tried to make the process user-friendly from an owner's perspective. We considered the question of who should receive the interest on a retention amount. We were asked why we did not allow that interest to go to the contractors and subcontractors from whom the principal is withheld. If we did that, the owner would have to pay interest on the money in the account. So we decided the owner should keep the interest from the retention money to help offset the cost of the borrowed funds.

SENATOR ROBERSON:
I am not talking about the interest. I am talking about the 10 percent the owner has to deposit in the escrow account up front. If the lender has not provided that money as part of the construction loan, the owner has to take it out of pocket to deposit into the escrow account.

MR. PEEL:
The 10 percent does not have to be fully funded up front. It is funded on a progress basis. As progress payments are made, retention amounts are placed in escrow.

SENATOR ROBERSON:
I understand that NRS 108.2403 and NRS 108.2407 place certain obligations on an owner when a lessee or tenant does work on the leased space. This bill seems to place more obligations and liability on the owner on whose behalf work is not being done.

MR. PEEL:
That is not my interpretation. Those statutes require that a lessee either obtain a mechanic's lien release bond or fully fund a construction disbursement account with the funds necessary to construct the tenant improvement. There is a provision in A.B. 412 that allows when the retention amount is to be deposited in the trust account, it can be moved from the construction disbursement account to the trust account so that it is held separately. There is no additional obligation on the owner because it is the lessee who is contracting the improvement. We are concerned about what happens to those construction disbursement funds when retention is withheld. The money is moved from one account to another.

Again, we have proposed to reduce the amount of the surety bond from 150 percent to 100 percent. Owners can use that vehicle under NRS 108.2415, subsection 2.

CHAIR WIENER:
Is the language in section 7.3, Exhibit F, page 3, regarding the definition of "work performed," negotiated language? Has the strike-out of the words "or about" been negotiated?

MR. PEEL:
Yes. The same strike-out also appears in section 5.5.

GREG ESPOSITO (Plumbers and Pipefitters Local 525; Plumbers and Pipefitters Local 350):
On behalf of working men and women, we are in full support of this bill. Workers want to be paid for work performed and paid medical and pension benefits as promised. We do not want to stop or slow construction.

DARREN ENNS (Secretary-Treasurer, Southern Nevada Building and Construction Trades Council):
We represent over 20,000 construction workers, many of whom are here today after an all-night bus ride from Las Vegas because the issues in this bill are important to them. Many of these workers have been unemployed for one to two years. They are concerned about their future and care about their employers. We support A.B. 412.

SCOTT BYARS (LABORERS UNION LOCAL 872):
I represent over 100 members who worked on the CityCenter project, which has entered its second season of operation and is making money every day. Those workers still have not been paid in full for their labor by a company that has since moved out of town. We support this bill.

GREG FERRARO (Nevada Resort Association):
I oppose this bill. I testified in the Assembly in opposition to this bill as introduced. At that time, I had approached the sponsor of the bill, Assemblyman Conklin, and we agreed that time was short in the Assembly due to an approaching deadline. We are here today pursuant to our agreement to follow this bill through the Senate. We had told Assemblyman Conklin we would

sit down with the proponents and talk through our differences. This bill is complex.

For the record:

> We agree with the stated objectives that the sponsor and others have addressed today, and that is getting people paid. That is very important, and we are not here to raise objections to that at all. In fact, we support that. But the devil is in the details, especially in May. So I would like to ask Mike [Mathis] to address the bill, respond to the presentation that you just heard before us. Then lastly, I'd like to say we are committed to continue to work with Mr. [Assemblyman] Conklin and the proponents to see if we can reach some kind of agreement on this bill. And we'll pledge ourselves to do that and take whatever time you direct, Madame Chair, to try to accomplish that.

MICHAEL MATHIS (Boyd Gaming; Nevada Resort Association):
This issue Assemblyman Conklin raised in his introductory comments is difficult. We are asking, "How do you reduce the risk in financing a construction project?" One of the issues with which the Committee will struggle is the proposed fix puts all owners, good and bad, under the same net. Over the long term, I am concerned this proposal will create an unintended consequence of putting a stranglehold on development.

Mr. Peel and I have talked over the last two Legislative Sessions about this issue. In the 75th Session, Mr. Peel advocated legislation on behalf of the Associated General Contractors (AGC) and the construction industry that would have required that before a construction project began, it would be fully funded. On the surface, that does not sound controversial, but the legislation failed. The challenge was the requirement for full up-front funding did not represent the reality of construction, which has multiple phases and multiple lenders. Such a requirement is impossible on large-scale projects. This also applies to many of the concepts in this proposed amendment.

The three issues about which I will speak regarding A.B. 412 are lender priority, waivability and mutuality. This is a complex area of the law and the language is difficult. This bill cannot go into effect as it is written. For example, the definition of "work performed" includes the word "grubbing," which, under the

proposed language, would trump lender priority. There are many examples in which, if we can get past the large issues, we can work out the smaller ones.

SENATOR COPENING:
What is "grubbing," and why would it trump lender priority?

MR. MATHIS:
Grubbing is pulling weeds and clearing vegetation on a site. It is the bare minimum of initial work. The word "grubbing" appears in section 7.3, under the definition of "work performed," in the proposed amendment. This leads to the definition of "commencement of work." The intent is to clarify if work has been performed, the lender is on notice because it is visible work, and the lender will have second priority. It is a scary concept to think that pulling weeds would be notice that bank loans would be second to lien claimants.

In construction law, there are three parties: contractors, owners and lenders. They all fuel the pipeline that gave rise to the growth of our State and its construction industry.

Beginning in 2001 and continuing every biennium, there have been drastic legislative changes to NRS 108 and NRS 624. Many of the large construction disputes during that time gave rise to changes in the statutes. As a result, lien rights have been strengthened and contractors' right to stop work if they were not paid was established. Those were good changes; however, there have been problems with some changes in the law. The changes proposed by this amendment fall into the latter category.

In 2001, NRS 624.610 was changed to allow contractors to walk off a job with 15 days' notice. This change made sense. In 2005, the AGC and Mr. Peel advocated for further change to allow contractors to receive all their profits.

Recently, in a meeting with Assemblyman Conklin and the AGC, we discussed the challenges with the existing statute. I referenced this profit provision and Assemblyman Conklin responded to me, "Well, of course that is for work they performed up to the time they walked off the job." That is not correct. The language of NRS 624.610 refers to "the balance of the profit ... the contractor ... would have received if the agreement had been performed in full." This does not make sense, yet this language has been repeated in the proposed amendment with respect to the retention account.

If we establish this requirement for a retention account and the account is not funded, contractors have options. They can refrain from starting work. They can get paid for completed work, and if retention accounts have not been funded, that number should be zero. They should not have started the work knowing at the outset there were problems; or could get the balance of the profit on the jobs as if the work had been done. It makes no sense that the remedy for failure to fund a retention account should be 100 percent profit on a job that was never begun. Those type of offensive provisions are scattered throughout this bill. This goes back to the mutuality concerns I raised with the AGC.

SENATOR COPENING:
You stated these offensive provisions are laden throughout the bill. Can you give us specifics of where these offensive provisions are located?

MR. MATHIS:
An example is in section 10 of the proposed amendment, page 8, line 10, Exhibit F, in subsection 3, paragraph (b), subparagraph (2).

One of the issues that relates to waivability is that owners do not have the same projects and not all lenders have the same requirements. Requirements are being put forth that are not waivable, that one cannot contract around and that are not suited to specific circumstances of the project. In Nevada, there is a constitutional right to contract. A large part of this bill affects only those projects in excess of $1 million. If contractors or subcontractors are able to afford representation by Mr. Peel, then I do not put them in the category of uninformed parties that need that kind of protection.

The bill does not give the flexibility, in a challenging financial-development environment, to tailor agreements to the constraints of a project and its financing. I proposed, on behalf of the Nevada Resort Association (NRA), a waivability opt-out provision. It is not the surety bond fix the AGC has proposed. In our last meeting with the AGC, I explained the problem with surety bonds, if they are available, is that the premium cost ranges from 1 percent to 2 percent and they generally require 100 percent of the funds to be collateralized by the bonding company. The option of providing a surety bond is essentially prefunding the 10 percent that was referenced. This is not a solution.

I presented two options to the AGC regarding waivability. First, I suggested that publicly listed companies should be exempt from the mandatory requirement for a retention account. That is not to say that just because a public company has entered into a construction contract, said contract will proceed without disputes. The issue with any public company is not whether the funds will be there; the question is how big is the dispute and the timing of ultimately getting those funds if one is a third-, fourth-, fifth- or sixth-tier contractor. A publicly listed company would be an appropriate exemption because it would lend itself to the size of the projects and it would go to the creditworthiness of the company to ensure the money would be in place once a dispute is resolved.

SENATOR COPENING:
How many of the companies to which Mr. Peel referred as being in default, or of the companies of which you are aware have been in default, are publicly traded?

MR. MATHIS:
None of the companies Mr. Peel referred to as bankrupt were publicly traded. I would not say that a publicly traded company will never go bankrupt. The companies which Mr. Peel referred to were medium to small companies. The Fontainebleau was the largest.

The list I am suggesting is an oral list. If a party fell into any of these four categories, the proposal I presented to the AGC is that it would be exempt from the mandatory retention requirements.

The second category for exemption would be based on project size. The million-dollar threshold the AGC has proposed sets a floor that if a project is small enough, it would not be subject to the requirements. I am suggesting a ceiling. If a project is big enough, it should also be exempt from the retention account requirement. Those are projects that have unique lender issues and need custom-tailored financing. These are projects that deserve special considerations because of their beneficial impact on the communities. I have not proposed a dollar value for that exemption ceiling. The AGC has not been comfortable with either of my proposals.

I propose a third condition that would exempt a project from the retention account requirement when actual lender requirements prohibit such an account. Lenders are the missing component in these discussions.

My fourth proposal is if an owner or developer has a clean record with respect to construction disputes and liens, the owner should not be burdened with the requirements of the statute. This could be an objective standard since mechanic's liens are public records.

The *J.E. Dunn* case has been prominently referenced in A.B. 412. It was a unanimous ruling and affirmed a summary judgment by the trial court. The following is an excerpt from page 14 of the reported decision:

> Public policy also supports maintaining the visibility requirement independently of the statutory scope of lienable work. For example, in *Aladdin*, we noted that if we were to "permit mechanic's liens to … relate back to a time long before" any construction on the property was visible, "no prudent businessman would be willing to lend construction money."

That is the public policy the Nevada Supreme Court articulated in this case and the public policy the AGC is asking you to overturn. I am gravely concerned about the message this would send to the lending community, at a time when it is difficult to get their attention, about how receptive our State is to new construction. Specific issues dealing with the statute should be addressed without negating the whole Nevada Supreme Court case.

There are three states with statutes requiring retention accounts in private work jobs. None of them makes the requirement nonwaivable.

SENATOR ROBERSON:
I want workers to have jobs and get paid. It is wrong that you do not get paid in certain cases. My concern is this provision will prevent new construction. We already have over 50 percent unemployment in the construction industry. If we do not start building again, if we do not have the financing to do the building, we are not going to be able to provide jobs.

SENATOR COPENING:
Are there lenders who prohibit the creation of retention accounts? I would like to hear from bankers.

MR. MATHIS:
Mr. Peel's closing statement speaks to the waivability issue. He said he would rather have a tradesman not take a job and lose money than to take a job and

lose money if retention accounts are not set up. The issue is the concept of freedom to contract. If there was unanimity of agreement among contractors that they should not and would not work on a job unless there was a retention account set up, we would not need the mandatory requirements of this statute. The contractors would not bid the work. When I raised this with the AGC, I found there are many people from the trade community who support the bill. I am concerned about the parties who are not here, those who would be willing to execute a contract with the right owner, with the right financing in place so the contractor could make the decision to bid or not bid. If it is not waivable, there is a taking away from the owners and the contractors.

JOHN SANDE IV (Nevada Bankers Association):
Mr. Mathis did an excellent job expressing the concerns of the banking industry. The proposed amendment attempts to supersede a case that had four different holdings on four issues. We are talking about the priority rights of lienholders versus lender and when work commences. It is important to understand the factual background of *J.E Dunn*. I will read from that portion of the case:

> Before recording the deed of trust, Nevada Title Company hired a third party to perform an inspection of the property. The inspector reported that power lines had been removed from the subject property and provided photographs that depicted several signs on an adjacent property. The signs were imprinted with the name of the architectural firm, Kobi Karp, which was performing design services for the One Las Vegas project in conjunction with Dunn. The signs were not located on the specific parcel inspected by the third party, and the inspector's report ultimately concluded that no construction activity had occurred on the property as of the date Corus Bank recorded its deed of trust.

The bank was informed by its inspector that no work had commenced; if it filed its first deed of trust, it would have first priority over that project. Banks assess risk which changes according to the level of priority. This bill will affect the amount the bank is willing to lend, the interest rate of the loan, the down payment required and other factors. The court agreed that some preconstruction work had been done and removal of utility lines was not necessarily an indication that work had begun on the project. We agree with the court. In order to give the bank notice that its lien will be secondary to another lien, it is important that visible work has been done on the premises. We support Mr. Mathis' assessment of the issue.

CHAIR WIENER:
What are you thoughts about other portions of the bill?

MR. SANDE:
We have no position on the retention accounts. I am not aware of any lenders who put requirements for retention accounts in their loan packages.

ROCKY FINSETH (Nevada Land Title Association)
Joining me at the table in Las Vegas is Russell Dalton with the Nevada Land Title Association, which has concerns with the first reprint of A.B. 412. Mr. Dalton will recap those issues for the record.

RUSSELL DALTON (Nevada Land Title Association):
We oppose certain modifications to A.B. 412 as contained in the first reprint. Our focus is on the ability to establish commencement of construction and priority based on visible inspection. Those portions are sections 5.5, 7.3 and 7.4. We are concerned the words "or about" in sections 5.5 and 7.3 are vague and ambiguous. We object to all of section 7.4 and the concept of burden of proof being placed entirely upon the lender.

We were given a copy of the amendments to the first reprint proposed by Mr. Holloway of the AGC. The amendments appear to remove the portions of sections 5.5 and 7.3 to which we objected. His proposed amendment appears to remove section 7.4 in its entirety. We will remove our objections to the bill in its first reprint form if those proposed amendments are adopted.

Mr. Holloway's proposed amendment contains a new section 23 to which we object. It refers to the attempt to supersede a decision by the Nevada Supreme Court. If that reference is removed, we would remove our objection to that section. Establishment of commencement of construction is a critical factor in the ability of the title industry to insure a lender in a construction loan transaction. Without the ability to clearly establish priority by a visual inspection to determine if construction has commenced, we will be unable to provide priority coverage to a lender. In that circumstance, I would suspect the lender would be unable to provide loans to the owner in connection with the construction project.

SENATOR WIENER:
What is the impact of referencing the *J.E. Dunn* case in the amendment?

MR. HOLLOWAY:
We have agreed with the Nevada Land Title Association to remove that reference.

BILL UFFELMAN (Nevada Bankers Association):
We support the escrow provisions. I am not aware of any bank that prohibits escrow accounts for retention money. The NRA might be doing financing with entities that are not banks. Perhaps language can be added to the bill so the provision for the escrow account could be waivable due to requirements of a loan document, if the loan document provided another method agreeable to contractors to secure the retention money. We support the notion of protecting public policy to ensure everyone gets paid.

With the statement that certain sections that were intended to override the *J.E. Dunn* case are removed, we are more comfortable with the language in sections 5.5 and 7.3 because they are checklists. However, in section 7.3, the list of things considered work performed includes grubbing, even though the proponents of the bill claim that should not be considered lienable work. Perhaps this language needs to be clarified.

On page 4, Exhibit F, section 8 requires establishment of an escrow account and recording it with the county clerk before commencement of work. This constitutes a first notice to all parties. There are many contradictions built into this bill. If it became law, everyone would need to understand it. We do not want to hinder the flow of money to construction projects.

The public policy of the State should protect all parties and not hinder the flow of money into construction projects. Half of the bill should not fix one problem while creating other problems.

LAURA PARRISH (Key Plumbing):
I am a subcontractor at the bottom of the chain. I have always had a 10 percent retention held on all projects. In the past, that has not been huge because we did have a 10 percent profit. We are no longer able to make that kind of profit. We are lucky to break even. Because a lot of projects are not being completed, we never get the money owed us. We do not have the ability to sue. Even though we have filed liens, companies file for bankruptcy and we do not get paid. We have already paid our laborers, paid for our materials and paid our taxes, sometimes on money we never receive. We are small, overburdened

businesses. If we are no longer able to stay in business, we can no longer provide jobs. We cannot take any more hits. The problem must get fixed. I support this bill, as it will enable us to be paid for work performed. If owners cannot pay us, if the bankers cannot fund the project, they should not start the project.

REBECCA WHITE (Roadrunner Plumbing; Aqua Plumbing):
I agree with Ms. Parrish. We are all worried about keeping our employees. We are at the bottom of the chain and need all the help we can get.

JOHN RAMOS (NAIOP):
I signed in as neutral. We have reviewed the amendment presented by Mr. Holloway. We agree with a number of the issues raised by Mr. Mathis and Senator Roberson. We support the resolution of these issues. Primarily, we are concerned with continuing development. The commercial real estate sector has been impacted dramatically by the sluggish economy. We understand the need for all parties to work together and for contractors to be paid for work performed.

ANDY GABRIEL (NAIOP):
Senator Roberson asked a number of questions about which we were concerned and Mr. Peel addressed them. We would like to have clarification in the final legislation to address those questions. The first concern relates to numerous places in the bill where it appears that a landlord and a tenant potentially have joint responsibility for complying with certain requirements. Mr. Peel indicated that is not the intent. If a tenant is the contracting party, it is that person's responsibility to establish the retention escrow account and comply with the provisions of the bill so the landlord is not held responsible if the tenant does not comply with the statute. The language regarding this is still ambiguous.

The second point which needs clarification is the language in the "verification of compliance" notice. The person filing the notice must "verify, under penalty of perjury, that the entire retention amount withheld from the prime contractor and the lower-tiered subcontractors over the course of the construction of the improvement" has been deposited into the escrow account or the person must verify that out of any of the retention amounts that have been partially released all of the subcontractors have been paid the retentions owed to them at the time the notice is required. There is no way for the owner to verify that because he only has a contract with the prime contractor. It is the prime contractor who

makes the payments to the subcontractors from the retention he or she receives. Owners should not be forced, under penalty of perjury, to verify facts about which they have no information nor the ability to get such information.

The third issue relates to the changes which address the *J.E. Dunn* case. As we interpret the statute now, it appears to be revised to provide, in the case of two separate contracts, one for site work and one for construction of buildings. Both relate to the same project. The commencement date of the construction of the buildings contract relates back to the commencement of the site work. We understand that concept. It is likely that site work is always related to the construction of buildings. Our concern is the impact upon finding financing. Often, we see contracts with different contractors for different phases of the work. Often there are separate lenders involved appearing at different points in the course of construction. The concern is for the priority of a second lender's deed of trust if it relates back to a prior contract for work that has already been completed and paid. Our concern is borrowers may not have the ability to obtain financing.

We are not concerned with lenders who prohibit escrow accounts for retention money. We are concerned about lenders who will not fund the 10 percent retention until it is payable to the contractor. We see that in many loan agreements. If a lender is not required to fund the retention, the developer has to pay out-of-pocket during the course of construction before the project can be completed.

JACK MALLORY (International Union of Painters and Allied Trades District Council 15):

I will give one example of why there needs to be a guarantee that retention money is available to pay the obligations of a subcontractor. It is the case of Embassy Glass, a contractor that is no longer in business. This was a large glass and glazing contractor with 300 employees. In 2008, it was in debt to our benefit trust funds in the approximate amount of $7.5 million. For the time period those obligations were owed, no contributions were made for health insurance for those 300 employees. A majority of them were unaware of this fact and were unable to self-pay the employer contribution. Some employees were able to make those payments, without being reimbursed by the trust, unless the employer made the payment later. Ultimately, we were able to work with the general contractors on the various projects and attach the retentions

owed which were not sufficient to cover the obligations of the contractor. We then had to attach its accounts receivable. The contractor went out of business.

Retention is not the only problem in the construction industry. Other issues are change orders, design problems and engineering problems with projects that raise costs. These overruns are passed down to the subcontractors because they are the ones who have to overcome these obstacles during the course of the project. Change orders are usually more difficult to get paid than retention. It is not necessarily the fault of the general contractor because the contractor also has a difficult time receiving payment.

We urge you to support A.B. 412. Hopefully, the parties can work out the alleged flaws in the bill.

RANDY SOLTERO (Sheet Metal Workers Local 88):
We support A.B. 412 because it is important that contractors, subcontractors and workers get paid for work performed. I ask you to also support the workers in this room and in the overflow room today.

WARREN B. HARDY II (Ex-Senator; Associated Builders and Contractors of Nevada):
The issue before you today has been a major contributing factor to the reason many subcontractors in the State have gone out of business. It is a complex issue. We ask you to encourage the parties to work it out.

RICHARD DIFILIPPO (Laborers Union Local 872):
I support A.B. 412. I worked on the Fontainebleau project. The workforce was always afraid that salary, health and welfare premiums would not be paid. If this bill is passed, workers can concentrate on the quality and safety of their jobs instead of the money and benefits that provide for our families. During the $32 billion Las Vegas Strip construction boom, a construction worker died every six weeks. Our elected officials should protect our peace of mind, while securing our wages and benefits. Passing A.B. 412 will do that.

A mechanic's lien is important to a contractor. If a contractor should lose the option to lien, a company could exploit that loophole until the project is completed and may never pay the full amount owed, leaving the worker to suffer the loss. We are the working people who are the backbone of our great Country. Please do not make us suffer.

GARETT LEAVITT (Laborers Union Local 872):
We have 5,000 members. We support A.B. 412.

AVIE HAVELKA (Laborers Union Local 872):
I am a construction worker who had a problem with a subcontractor on one of the large projects on the Las Vegas Strip. The subcontractor had a problem with the contractor. As a result, my benefits still have not been paid. I ask that you vote yes on A.B. 412.

PAT SANDERSON (Laborers Union Local 872):
We support A.B. 412. I have worked in construction for over 45 years. My first job was clearing and grubbing for a contractor who also did excavation work and installed utilities. The contractor went out of business because he never got paid. This was in 1964. This is not a new problem isolated in southern Nevada; it is a statewide problem. We are asking for some small protections to ensure that workers who work for general contractors and subcontractors are paid for work performed. We make money for them and they should pay us. When we do not get paid, the entire State is hurt. Please take care the all the parties in the construction industry to ensure that everyone gets his or her fair share.

BOBBY WITT (Mechanical Contractors Association; Ryan Mechanical):
We are part of the Subcontractor Legislative Coalition and we support A.B. 412. In the last five years, I have lost $400,000, $60,000 of which was money in bankruptcy; the rest was retention money. Previous testifiers talked about realizing a 7 percent or a 10 percent profit, but I would be happy with a 3 percent profit. Everyone in our association is in the same position. We cannot afford to lose any more money.

GORDON MARX (Southern Nevada Fire Sprinkler Contractors Association; Subcontractor Legislative Coalition):
We have worked with the AGC on the construction of A.B. 412. This bill is important to ensure those who work on construction projects get paid. It is public policy to get workers and contractors paid. Many will say they do not want to be responsible to make sure the contractors and workers get paid, but someone has to be responsible for this. Although it has always been a problem to get paid, these difficult economic times have accentuated the problem for all employees and employers in our industry. My company, Ace Fire Systems, had a projected profit of 1 percent this year, which was never realized. The bill is crucial for the survival of many contractors and workers. This bill should not be

construed to codify contingent payment clauses. It is intended to secure the payment of retention. We support this bill.

SENATOR WIENER:
Senator Copening has offered to work with the interested parties today to continue work on the bill.

DAVID KERSH (Carpenters/Contractors Cooperation Committee):
We are dealing with complex issues and a basic principle: getting paid for work performed. We support this bill.

JOHN MADOLE (Associated General Contractors; Nevada Association of Mechanical Contractors):
We support A.B. 412.

ROBERT CONWAY (Ironworkers Local 433):
I speak in favor of A.B. 412. We have many small contractors in Nevada who are the bread and butter for the majority of the unions. Skilled craft labor unions support a majority of the hospitals in the State. The benefits paid on behalf of a majority of our members were paid by most of these small contractors before they got all of the money owed to them on many construction projects. The Fontainebleau Las Vegas was one of these projects. The contract with the Ironworkers was just over $100 million. There is no reason for a contractor to take a job if that contractor does not expect to make a profit upon its completion. Representatives of title companies and banks received a lot of money from the federal government to help them out, while most of our small contractors received nothing. I urge you to pass A.B. 412.

MR. PEEL:
I will participate in Senator Copening's meeting.

MR. MATHIS:
I will also participate. For the record:

> I personally know of loan requirements that have the lender holding the retention dollars for their benefit for a release at the end of each project. So, I think it was a little bit unclear whether there were such requirements or limitations out there. There are. Our concerns are reflective of the actual lender negotiation requirements.

CHAIR WIENER:
Let us hope that lender representatives will participate in today's meeting. I have been working with others on this measure, and it will be on our work session scheduled for tomorrow.

SENATOR ROBERSON:
I would like to participate in that meeting today.

CHAIR WIENER:
That would make it a subcommittee and require us to staff it as such. I will check with the Legal Division, Legislative Counsel Bureau, and get back to you on that. Seeing no one else who wishes to speak on A.B. 412, I will close the hearing on A.B. 412. There being no other business before this Committee, we are adjourned at 11:24 a.m.

RESPECTFULLY SUBMITTED:

_____
Leslie Sexton,
Committee Secretary

APPROVED BY:

_____
Senator Valerie Wiener, Chair

DATE: _____

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
A.B. 273	C	Linda J. Eissmann	Work Session Document
A.B. 291	D	Linda J. Eissmann	Work Session Document
A.B. 459	E	Linda J. Eissmann	Work Session Document
A.B. 412	F	Richard Peel	Proposed Amendment