MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
February 17, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:03 a.m. on Thursday, February 17, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 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

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

Gail J. Anderson, Administrator, Real Estate Division, Department of Business and Industry
Jonathan Friedrich
Bob Robey
Rana Goodman
Robert E. Frank
Darlene Ferrara
Chris Hansen, President, Carson River Estates Homeowners Association

Gary Lein, CPA, Commission for Common-Interest Communities and Condominium Hotels

CHAIR WIENER:
I will open the hearing on Senate Bill (S.B.) 30.

SENATE BILL 30: Makes various changes relating to common-interest communities. (BDR 10-477)

GAIL J. ANDERSON (Administrator, Real Estate Division, Department of Business and Industry):
The Commission for Common-Interest Communities and Condominium Hotels and the Real Estate Division requested S.B. 30 to clarify and make the law compatible with other existing law in the State.

Please refer to S.B. 30, the Legislative Counsel's Digest lines 1 through 9.

There was legislation passed in 2007 that required electronic transfer of payments of $10,000 and greater to make payments for utilities. Section 1 of S.B. 30 amends to add another exception for the electronic transfer to the State Treasurer for unit fees which support the common interest communities budget account to administer the programs of the office of the Ombudsman and the commission when those fees are $10,000 or greater.

Section 1, subsection 4 of S.B. 30 requires an association that utilizes electronic signature authorization to withdraw money, either from the reserve or operating account, to have written procedures for adequate internal controls to ensure security of the money and proper authorizations to withdraw the money. Because there have been compliance investigations and cases involving improper use of funds of associations, this is a very important aspect. It also sets forth a requirement for written procedures actionable under the enforcement section of the Real Estate Division. If a board does not have written procedures and utilizes electronic payments of any kind, it is a violation of law.

CHAIR WIENER:
What are the provisions for amounts less than $10,000?

MS. ANDERSON:
Section 1, subsection 3, paragraph (b) of S.B. 30 states an association can make transfers of any amount to their reserve account or for payment of utilities.

Please refer to S.B. 30, section 2, which incorporates *Nevada Revised Statute* (NRS) 116.31177 into NRS 116.31175. This section concerns financial records and provision of copies and what may be charged for the preparation and provision of copies upon request by unit owners and the Ombudsman of the State Real Estate Division. This section also clarifies which books, records and documents of the association must be made available to unit owners and what they must include without limitation, i.e., the financial statement of the association, budgets, study of reserves, existing contracts and records filed with the court relating to a civil or criminal action to which the association is a party.

Section 2, subsection 3 clarifies that the charge to prepare copies of the documents requested cannot exceed 25 cents per page.

Section 2, subsection 7 states the board may not charge a unit owner more than $10 per hour to review books, records, contracts or other documents.

There have been many issues over these two sections of laws; this section puts them into one and clarifies what the books, records and documents are, how much can be charged per hour for staff time, and that copies cannot exceed 25 cents per page.

SENATOR GUSTAVSON:
Senate Bill 30 says the board can charge actual costs up to 25 cents per page, which could add up. I recommend 25 cents per page for the first six to ten copies, with a maximum of 10 cents per page thereafter.

MS. ANDERSON:
The intent was the cost would not exceed that amount. I would be open to further clarification.

SENATOR COPENING:
In 2009, there was a specification that can be applied on the maximum amount charged per copy. Was it 25 cents?

MS. ANDERSON:
These are the two sections that have the costs we were trying to consolidate.

BRADLEY A. WILKINSON (Counsel):
There is a change from last Session which reflects the language Senator Gustavson was referring to of 25 cents per page for the first ten pages, then 10 cents per page thereafter, but it does not say actual cost.

SENATOR COPENING:
That language was agreed upon as a compromise last Session.

CHAIR WIENER:
We will consider an amendment to that section.

SENATOR BREEDEN:
If someone requests a copy of a few documents, would they still be charged $10 per hour if it takes 15 minutes?

MS. ANDERSON:
The law allows the association to charge that staff time; it is not mandatory but discretionary.

SENATOR BREEDEN:
Senator Gustavson and I can work together on this issue. I agree that charges should be made, but I do not agree to the charge of $10 per hour for only a few documents.

JONATHAN FRIEDRICH:
In the last Session, it was decided the cost would be 25 cents for the first ten pages and 10 cents thereafter. Also, if the minutes of a meeting were in electronic form, they would be sent at no charge.

I will read from my written testimony (Exhibit C).

There are a number of cases brought before the Commission for Common-Interest Communities and Condominium Hotels regarding embezzlement or misbehavior of board members. The Legislature needs to create control, not the Commission, as it takes forever to produce the written and adopted regulation.

In section 2, subsection 1, paragraphs (b) and (c) of S.B. 30, I request the words "in draft form" be added. A board will not relinquish information to a homeowner until approved.

The records and documents in section 2, subsection 2, paragraph (b) are not available to homeowners. If a homeowner requests to build a new home or an addition, plans go before the architectural committee. Those documents are not available to neighboring homeowners. When you have a situation where a person wants to build a contemporary home, not the traditional or Southwestern style often found in common-interest communities, the homeowners surrounding the proposed structure or addition have no say on what is to be built. There is an architectural committee which may or may not read plans or comprehend what is proposed. The neighboring homeowners should have access to the plans.

In section 2, subsection 3, page 3, I request the words "no charge" be added, allowing documents to be furnished electronically if available.

SENATOR COPENING:
I formed a working group of approximately 30 stakeholders from the north and south of the State, including homeowners, management and collection companies, attorneys, real estate agents, etc. We reviewed NRS 116 and created a bill to address issues you raise. People who served on that committee will testify. This committee includes three of the commissioners from the Commission for Common-Interest Communities and Condominium Hotels. Certain things will be addressed, including why the items are done, or not done, from the standpoint of how homeowners' associations (HOA) are operated. The HOA issue is complicated and hard to understand. They operate in different ways. When changing some aspect of the outside of the home, some HOAs require a homeowner go to their neighbors. Ms. Anderson can address why the language was kept general in section 1, subsection 4, as there are many different HOAs.

MS. ANDERSON:
Section 1, subsection 4 addresses a policy regarding electronic signature transmittals only, not all expenditures. Making broader requirements for policies and procedures of an association to follow seemed the right approach.

MR. FRIEDRICH:
When there is money involved, devious people find a way to circumvent the law and steal money, especially when dealing with HOAs. Large associations have more potential for embezzlement of large amounts of money.

Electronic transmittals are new procedures. The Legislature should look at the procedures, rather than leaving it up to the boards, who may or may not be sophisticated enough to do this.

BOB ROBEY:
With regard to fees, I would like to add the words "if electronically available at no charge." I requested the 2009 income tax records for my association and received them the next day at no charge because it is electronically filed. I agree with Mr. Friedrich, there is no standard for a board to put in its own electronic transfer procedures.

Is there anybody on the Committee who works for a developer, the Community Associations Institute or has already stated any conflicts of interest?

SENATOR COPENING:
I disclose that four months ago I started working for Pulte Homes. Between 2002 and 2006, I also worked for Pulte Homes. For three years, I served as the president of Sun City Aliante Community Association, Inc., which has approximately 2,100 units. That is where I gathered my experience working on HOAs and why I led the review of NRS 116. Over a year ago, and prior to starting my working group, I took other employment.

RANA GOODMAN:
My first concern is the method with which documents are given to homeowners. I live at Sun City Anthem in Henderson. At one time, I requested no more than eight or ten checks for a specific organization from my association, which should have been in a small file. Five unorganized file boxes were dumped in front of me and I was literally told to go for it. I complained to the community manager (CM). *Nevada Revised Statute* 116 requires management companies to keep documents in an organized fashion. The CM gave me a copy of the fax she received from an Ombudsman's Office investigator who told her about the requirement for organization. I was charged $10 per hour to go through the boxes to find the six checks. If they are

charging me 25 cents a page and $10 per hour, they should follow the law and keep them organized.

Section 2, subsections 8 and 9, use the words "if an official publication." I would like to see the word "if" removed and the language be made more specific with "can" or "should." The publication and television station that our association has belong to the residents; we pay for them and have the right to use them.

ROBERT E. FRANK:
I am a Sun City Anthem resident and former board member. I agree with Ms. Goodman's comments regarding the disrespectful way managers and boards can provide documents to members. This is a problem. As a former board member, I observed this behavior by the president of my board. The wording should include the resident receives the documents and any related materials. It is more than a trivial inconvenience, it is a management issue.

SENATOR COPENING:
Ms. Goodman and Mr. Frank, I know the management company of Sun City Anthem and will personally ask them to investigate your case. I will contact you if we can give you assurance this will not happen.

MR. FRANK:
I consider it the board's fault, not the management company's.

DARLENE FERRARA:
I live in Boulder City and will address issues regarding copy charges. The local rate is 10 cents a copy and should be no more.

The architecture control committee should let homeowners see plans. The committee does not want homeowners to see plans because the HOAs violate the governing covenants, conditions and restrictions (CC&Rs). After the violation is approved, HOAs will not have it removed or fine the homeowner until the property is restored. The homeowners have no alternative except expensive litigation. If the HOAs are dishonest in litigation, what protection do the homeowners have?

I requested an item be added to an agenda well in advance of a meeting. I received a copy of the agenda two days afterward, by certified mail. In the open forum meeting, the board stated it e-mailed and sent it out to me.

Give homeowners a fair shake by giving them the authority to have an administrative law judge hear their case before the Commission for Common-Interest Communities and Condominium Hotels. The laws do not protect the homeowner. In my case, the HOA perjured itself in litigation and withheld information that would have made it financially accountable. In a newsletter the HOA published, it stated it instigated the litigation. This dishonesty costs seniors thousands of dollars in retirement money. This is elder abuse and unjust enrichment. The arbitration system does not work and is costly. Arbitrators award outrageous attorney and arbitrator fees against the homeowner. The system is broken and needs to be fixed.

I receive ongoing retaliation for my insistence that the HOA enforces CC&Rs. This has got to stop from the attorneys all the way down the line to the management companies.

Section 2, subsection 10 states:

> The association and its officers, employees and agents are immune from criminal or civil liability for any act or omission which arises out of the publication or disclosure of any information related to any person and which occurs in the course of carrying out any duties required pursuant to subsection 8 or 9.

I would like that wording changed to reflect “pursuant to the federal Privacy Act of 1974.” It is a misdemeanor to release personal information, and the homeowner is entitled to civil damages in a court of law. Litigation costs are passed on to every homeowner within an association; this is wrong. Every homeowner should not absorb costs incurred from litigation to support wrongful decisions made by HOAs, board members or management companies.

SENATOR COPENING:
Have the members of your HOA received special assessments for litigation costs because of wrongful acts of board members or a management company? Generally, most of the HOAs begin factoring that as a cost of doing business and it is part of your monthly assessment.

MS. FERRARA:
I will defer to Mr. Friedrich to answer that question.

MR. FRIEDRICH:
In 2009, Rancho Bel Air did not have a budget ratification meeting. I objected and was told we did not need it, and that is in writing from the management company. I filed an arbitration suit against the board. The arbitrator was an extremely biased individual. I asked Gail Anderson and former Ombudsman Lindsay Waite of the State Real Estate Division to remove him because of his biased statements, and I had a sworn affidavit to that effect. There was a conflict of interest between my attorney and the arbitrator. The Real Estate Division refused to become involved and claimed to only "facilitate" the process, where NRS 38 states the Division is required to administer the arbitration.

The arbitration was costly and decided against me in the amount of $22,109. I refused to pay the arbitrator as I did not sign his contract. The association paid the attorneys who represented the association, plus the arbitrator's fee of almost $6,000. The arbitration was done by brief and reply brief only. No hearing was held.

I filed a Writ of Mandamus against the Real Estate Division, the arbitrator and my association. I also filed a de novo lawsuit against the association for violating both the CC&Rs and State statute. As a result of this litigation, the board increased our monthly assessments.

I have taken the long route to answer your question, but when these associations are involved in a legal battle, whether they are right or wrong, the homeowner pays. After the award was issued by the arbitrator and I filed the de novo and the writ, the HOA insurance policy went into effect and the insurance company paid the costs. What the board members do not know—and I have told them several times—is that when I win this case, the homeowners, not the insurance company, will be responsible for my legal fees of over $100,000.

SENATOR COPENING:
Does Ms. Ferrara also live in Rancho Bel Air? The question was if she had experienced a special assessment. She did defer the question to you.

MR. FRIEDRICH:
I just asked her, she said no, she did not. But this happens in other associations. As I have said before, I have become a homeowners' advocate and people ask for assistance, not only from Nevada, but as far away as North Carolina. The first thing I tell people is: I am not an attorney and there is no charge for any direction or information I have to help fight the big bully boards.

MS. FERRARA:
You asked me specifically if it resulted in legal fees being passed on to every homeowner. Indirectly, yes. As Mr. Friedrich stated, wrongful decisions made by the association have cost me in excess of $100,000 in legal fees. I am a senior in my late 60s. Homeowners pay monthly dues which go into a fund. The budget for our association for legal fees is $15,000. We have officers' and directors' insurance, which cover wrongful decisions. But why should a homeowner be forced into extremely costly litigation when the board does not tell the truth? What options are given to a homeowner? This is a totally broken system that needs to be fixed.

CHAIR WIENER:
We will have ample opportunity to pursue these additional concerns you shared with us.

I will close the hearing on S.B. 30 and open the hearing on S.B. 89.

SENATE BILL 89: Revises provisions governing audits and reviews of financial statements of common-interest communities. (BDR 10-595)

SENATOR MIKE MCGINNESS (Central Nevada Senatorial District):
Senator Copening, if you will add S.B. 89 into your comprehensive bill, and we can accomplish what we are trying to do, that is fine. Mr. Friedrich had good comments in his written testimony Exhibit C. I will defer to Chris Hansen.

CHRIS HANSEN (President, Carson River Estates Homeowners Association):
I will go through my written testimony (Exhibit D).

The Carson River Homeowners Association consists of 31 homes governed by the CC&Rs. We also have a small community water system, and whether it is large or small, this water system is regulated the same as any community water system. We have a small HOA and are required to follow NRS 116. We do not

have paid employees; we pay two independent contractors, a water systems operator and an independent bookkeeper.

When we started to fill out our report to the Ombudsman last year, we realized we needed a CPA to review our financial statements. I contacted Joseph Lane, a CPA, to do the required review. We talked several times, and Mr. Lane e-mailed me a response (Exhibit E) that the cost of doing this review would be at least $7,500 due to the standards required for CPAs. He stated that a review of our books and records by the elected board should be sufficient.

I ask you to revise the requirement that small HOAs obtain a certified public account in order to survive.

SENATOR COPENING:
Senator McGinness, we will include S.B. 89 with the larger HOA bill we are bringing forward. We will then meet and go over the proposed language to assure it meets with your approval.

GARY LEIN, CPA (Commission for Common-Interest Communities and Condominium Hotels):
I will read my written testimony (Exhibit F).

My concern with S.B. 89 relates to section 1, subsection 1, paragraph (a), the review of financial statements. I spoke to the Nevada State Board of Accountancy and the issue is that only a CPA can prepare a reviewed financial statement. It would be inappropriate for a board member to review the financial statement and present it to the homeowners at large. The amendment to S.B. 89 requires a review of the financial statement every fiscal year. Regardless of size, NRS 116.31083 requires a board of directors to review the financial statement on a quarterly basis. This implies a reviewed statement be prepared by the board of directors, which pursuant to *Nevada Administrative Code* 116.461 can only be done by a CPA.

Section 1, subsection 1, paragraph (b) states “if the annual budget of the association is $45,000 or more.” This seems to be an arbitrary number. I also do not understand how the amount of $75,000 or $150,000 was determined. Small associations would be subject to section 1, subsection 2 of S.B. 89. The language, as originally drafted, was appropriate. It requires an association have a reviewed financial statement prepared every five years, the preceding year to

the required reserve study. The statute requires the association prepare a reserve study by a reserve specialist and be adopted by the board of directors. The reviewed statement would be incorporated and utilized as part of the reserve study. It would independently verify the information utilized by the reserve study specialist.

The concern is the board of directors would review the financial statement, implying the reviewed financial statement would need to be prepared each year and given to the homeowners. This would be a violation of chapter 628 of the NRS as it relates to CPAs.

SENATOR MCGINNESS:
There should be some recognition that there is a wide disparity between a 34-unit HOA and a 25,000-unit HOA. Mr. Hansen wears different hats for the small HOA, depending on what hour it is. I will work with Senator Copening.

MR. FRIEDRICH:
I will read from my written testimony (Exhibit G).

When dealing with money—and there has been a past history of dishonesty with either board members and/or management companies—there is a possibility of embezzlement whether it is a large or small association. However, it would affect a smaller association for money to be misappropriated or embezzled.

Please see S.B. 89, section 1, subsection 3, paragraph (b), subparagraph (1), which requires asking board members, who may or may not have the expertise to understand a financial statement, be put in a position to review the financial statement. I spoke with Commissioner Lein and there are three different types of audits: a compilation—the least costly, a review and an audit—the most expensive. If you have a small association, why not require a compilation audit every year, even every two years? It will assure nobody has cooked the books or stolen money from the association. The cost of paying a CPA for this service would be less than if money was embezzled. Either way, the homeowners will pay, but at least they know they are being watched. If it is a small HOA, it has a small board, and if members knew they were being overseen by somebody, that would act as a deterrent.

MS. GOODMAN:
I will read from my written testimony (Exhibit H).

Mr. Lein's firm audits our financial records. There has never been an independent audit. I do not fault Mr. Lein, as he can only work with the figures he is given by the finance committee and management company.

Senate Bill 89 needs language added to enforce an independent audit. You can have a CPA on a finance committee who is not familiar with Nevada law. For example, the president of our board is a CPA from a California firm. He did not know what use tax is. Nevada has a sales and use tax which must be paid. The board paid a large sum to the State for the unpaid sales and use tax. We will probably have a special assessment to pay this fine.

SENATOR BREEDEN:
How much are your dues, and do you pay them annually or quarterly?

MS. GOODMAN:
It is over $900 per year. Since it is such a large association, we pay low dues; but it is still too much when there is that much in excessive funds.

MR. FRANK:
I agree with Mr. Lein's comments concerning the criteria for audit by CPAs, as I was a director at Sun City Anthem from 2007 to 2009. I am also sympathetic that a large organization has compelling reasons for audits and verifications that the small ones do not. There should be an accommodation in the statute. I understand you are trying to solve the problem, and I encourage that. I am not prepared to give you alternative language now, but this language does not work for me.

I have much experience with nonprofit organizations, not just an HOA. There is fraud and abuse of financial cash flows in small organizations, maybe even to a greater extent than larger associations because it is so tempting and out of sight. I encourage you to provide members of the small associations to have confidence there is quality oversight. I am unsure if that requires a CPA or a member of that community for the smaller associations. It is a thorny issue, not easy to solve when you have such a wide range of organizations.

I am here today because I am concerned about the definition of independent auditing. As Ms. Goodman previously commented, it is common for medium and large associations to be established through developers with particular auditors, and they stay with those auditors for more than a decade. I have experience, in

the military and other areas of government, and understand the need to have a change of eyes in terms of auditors. There should be something in the statute that encourages, if not requires, organizations to consider changing their auditors every three to five years. Auditors get stuck on how they do audits and are more easily deceived by misconduct which might occur by the management company or the boards.

What is the definition of an independent CPA? A person who does not work for a company, developer, management company or board. As Ms. Goodman previously stated, a second pair of eyes is necessary when there is suspicion or concern about the results of the audits.

In Sun City Anthem, our recent experience with accumulated, unnecessary and illegal surplus assessments at the end of the year plus taxes not paid or not returning money to homeowners are examples of having competent auditors and you still have problems. When there is suspicion from intervention affidavits being submitted by the membership to the State Real Estate Division, the Division, not just the Commission, provide a third-party independent audit.

When there are questions concerning the quality of the financial reports or the auditing process, they need to be resolved. When a large sum of money is involved and a summary audit is submitted, it is not a representation of the true situation of the association. On one hand, you have an overrequirement for small associations, and for the larger associations, an underrequirement. The auditors should be automatically changed at transition time; and the developer's auditor should not be part of the resident control board.

MR. ROBEY:
Smaller associations need help to be relieved of the burdens of the larger associations. Small associations have a problem following NRS 116 and are burdened by costs created by that chapter.

CHAIR WIENER:
I will close the hearing on S.B. 89. The meeting is adjourned at 9:29 a.m.

RESPECTFULLY SUBMITTED:

Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE:

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
S.B. 30	C	Jonathan Friedrich	Written Testimony
S.B. 89	D	Chris Hansen	Written Testimony
S.B. 89	E	Chris Hansen	E-mail Response of Joseph Lane, CPA
S.B. 89	F	Gary Lien	Written Testimony
S.B. 89	G	Jonathan Friedrich	Written Testimony
S.B. 89	H	Rana Goodman	Written Testimony