

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-sixth Session
March 10, 2011**

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:04 a.m. on Thursday, March 10, 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

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bradley A. Wilkinson, Counsel
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

Michael Buckley, Chair, Commission for Common-Interest Communities and
Condominium Hotels
Pamela Scott, Howard Hughes Corporation
Robert Robey
Jonathan Friedrich
Rana Goodman
Tim Stebbins
Randolph Watkins
Donald Schaefer
John Radocha

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Dr. Robin Huhn
Delores Bornbach
Heather Spaniol
Favil West

CHAIR WIENER:
I will open the hearing on Senate Bill (S.B.) 185.

SENATE BILL 185: Makes various changes relating to real property.
(BDR 10-23)

MICHAEL BUCKLEY (Chair, Commission for Common-Interest Communities and Condominium Hotels):

Cheap, quick alternative dispute resolution is a solution for these problems. That does not happen at proceedings of the Commission for Common-Interest Communities and Condominium Hotels (CCICCH). The Commission has no role in the arbitration process. The arbitration decisions are on the Real Estate Division's Website, including the costs, the outcomes and the awards.

Associations are local small governments and should be able to control their own streets with radar guns. If this government is closest to the people, the people should decide what to do.

Section 18 of the bill requires the declaration to include leasing restrictions and association obligations regarding common elements. The Commission supports the requirement on leasing restrictions. The Committee should be aware of the difference between the declaration recorded at the beginning of a project versus the public offering statement, which is given to purchasers when they acquire a unit in the project or a resale package. Issues regarding common elements should be included in the public offering statement because common elements change over the life of a project.

Nevada Revised Statute (NRS) 116.643 gives the Commission authority to pass additional disclosure requirements through regulation. We have not done that yet. We are a part-time commission that meets quarterly. We meet more often now regarding legislation. The regulatory process is slow because we start with a regulation and it goes to the Legislative Counsel Bureau. We cannot act until we get something back. Then, we have hearings to adopt the regulation. Our

regulations for NRS 116B have been in the works for over a year. Now, they are on hold again.

Section 21 of the bill requires that only a majority of the board members be unit owners. We are going back and forth on some of these issues. We should leave some of these provisions alone and not change them every Session.

Section 25 deals with lawsuit approval by the district court. The Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels could assist the court in that process because the Ombudsman is unbiased and familiar with associations.

I provided you with a copy of the Federal Housing Finance Agency's (FHFA) proposed regulation ([Exhibit C](#)). The FHFA received over 4,200 comment letters from a broad spectrum including community associations, the title industry, real estate agents, Freehold Capital, American College of Real Estate Lawyers, as well as banks and Fannie Mae and Freddie Mac. The FHFA regulation proposes to "... except from the rule private transfer fees that are paid to homeowners' associations and similar associations, and to tax-exempt non-profit organizations, where the fees are used for the direct benefit of the encumbered properties," [Exhibit C](#), page 15. The Agency also proposes to make the rule prospective, [Exhibit C](#), page 21.

Unreasonable restraints on alienation is a legal theory developed by the courts favoring the free transferability of real property. For example, in the 1980s, many courts found that banks' due-on-sale clauses were unreasonable restraints on alienation, and people should be able to sell their homes without having to pay off the banks. Congress decided that was helpful to banks. The Garn-St. Germain Depository Institutions Act permits all due-on-sale clauses to be enforceable. There is precedent for legislative action to address unreasonable restraints on alienation.

SENATOR COPENING:

Are you saying the FHFA's proposal would not favor private transfer fees unless they benefited an HOA?

MR. BUCKLEY:

Yes.

SENATOR COPENING:

Does the FHFA propose caps on transfer fees?

MR. BUCKLEY:

The proposal did not contain caps. It addresses the ability of banks to purchase property with these covenants on them, but it does not address the amount.

SENATOR COPENING:

Is there any proposal out there capping transfer fees?

MR. BUCKLEY:

I am not aware of anything other than what the market demands.

SENATOR GUSTAVSON:

Are radar guns used only in gated communities on private property? Would that affect ungated HOAs with public streets?

MR. BUCKLEY:

Nevada Revised Statute 116 does not permit the association to control public streets, only private streets.

PAMELA SCOTT (Howard Hughes Corporation):

I will read our proposed amendment to section 5, subsection 2 of this bill ([Exhibit D](#)) which sets forth exceptions to the transfer fee. A fee used by the Howard Hughes Corporation in custom-lot communities to discourage speculation and the flipping of lots could be interpreted as a transfer fee under this bill. From the beginning, it has included language in its sales documents on custom lots requiring purchasers to hold that lot for a minimum of one year. A penalty is imposed if a purchaser sold the lot in less than a year.

A schedule for the construction of a home is spelled out in the covenants, conditions and restrictions (CC&Rs) of the governing documents. The schedule covers a number of years and differs in the various custom-lot communities because of the size of the home being constructed. It could be anywhere from construction beginning within one year and completion within three years to construction beginning within two years and completion within five years.

The liquidated damages for someone failing to adhere to that schedule go to the association, not to the master developer. The initial fee in the sales contract

goes to the master developer if a lot is flipped in less than a year. That is the reason for this amendment.

ROBERT ROBEY:

We need a definition of fees. Commissioners Buckley and Favil West both said fees should be defined ([Exhibit E](#)). *Nevada Revised Statute* 111 does not represent NRS 116. We are confused about the definition of fees.

Senate Bill 185 includes revisions for costs and fees to be collected. Commissioner West testified yesterday it would be impossible to maintain the financial stability of the association without the collection of fines and costs ([Exhibit F](#)).

JONATHAN FRIEDRICH:

I own property in Summerlin West, and I gave Mr. Robey a copy of the budgets ([Exhibit G](#)), page 1, showing the association at Summerlin West allocated \$88,000 in late fees and lien fees and \$20,000 in fines and penalties. That was in the 2009 budget. In the 2010 budget, the late fees and lien fees are \$101,000; and the fines and penalties are \$15,000. There is a \$13,000 charge for the CC&R packages, [Exhibit G](#), page 3.

MR. ROBEY:

Please do not give police powers to associations. Associations are quasi governments. They do not have the three branches of government expected under the U.S. and Nevada Constitutions. Please do not change the fee structure of 10 cents a page and 25 cents a page until after the Commission sends you its recommendations. That will take two years. I will listen to the Commission regarding rate fixes for collection agencies. Some collection agency said it could do it for \$950, and it set the fee for \$1,950.

RANA GOODMAN:

I will read from my written testimony ([Exhibit H](#)).

TIM STEBBINS:

I will read from my written testimony ([Exhibit I](#)).

We have an environment where all homeowners are not created equal. Some have to pay the fee and some do not. This is not fair. If we eliminated all the fees, everyone would be equal.

RANDOLPH WATKINS:

I am a member of the Commission. I am speaking for myself, not the Commission. I am opposed to certain sections of S.B. 185. I am opposed to the Commission setting fees because it would take more than a year.

Section 17 of the bill addresses the use of radar guns. I managed a private community in California and am familiar with the use of radar guns. The safety and security force was properly trained and certified in the use of those devices. Senate Bill 185 does not address training requirements. The bill should be modified to ensure radar guns are used properly by trained and certified people. Private communities need to govern their speed. The local police departments will not enforce speed limits in private communities.

In 1999, the California Supreme Court adopted a rule of judicial deference to decision making by community association boards. That comes into play when the members of a community association seek to challenge ordinary decisions involving the exercise of management decisions. The California Supreme Court directed that lower courts defer to the board's authority in presumed expertise when a member seeks to challenge board action. This would apply when a duly constituted community association board conducted reasonable investigation and exercised good faith regarding the best interests of the association and its members. The board must exercise discretion within the scope of its authority under relevant statutes, covenants and restrictions. Section 17 of the bill needs work so the community can rely on the proper training for those using radar guns and the board's decisions based upon citations that may be written for speed.

DONALD SCHAEFER:

I oppose S.B. 185. I live in Sun City Aliante. I am a member of the board. I will focus on the transfer fee called a capital assessment fee. When the developer established Sun City Aliante, it required every homeowner to pay a fee of 0.5 percent of the sales price of the home. It was called a capital assessment fee. This fee was established so the developer would not have to invest capital for amenities in the association. When the association was turned over to board management in 2006, the board separated this fee from the operational aspects of the community. This money was set aside under a three- to five-year plan for enhancement of the community with amenities the developer had not provided. Those amenities include a craft room, solar heating for the pool, aerobics room expansion, enhanced kitchen and sound system for the community room. We

did this at no cost to the homeowner—no special assessments and no raise in the regular assessment fees.

This is important. As the community develops and ages, different needs are met without special assessments because this fee is paid by buyers as they move into the community. This capital fee has not deterred buyers from purchasing homes in our community. They are pleased to find we have a separate reserve and adequate funding to meet our bills.

I encourage the Commission not to use S.B. 185, but to use S.B. 174, which was presented by Senator Copening. It is more balanced to the homeowners' association, investors and purchasers.

SENATE BILL 174: Revises provisions relating to common-interest communities.
(BDR 10-105)

SENATOR COPENING:

Do you want to require that certain fees be established for reserves of other communities to help them become more stable?

MR. SCHAEFER:

You are correct. We have found that many small associations must defer reserve contributions because they cannot meet bills and reserve requirements when people do not pay. This capitalization fee can be used almost everywhere. A small transfer fee is almost a necessity.

SENATOR COPENING:

Is Sun City Aliante fiscally sound because of this fee and because the board members have invested well?

MR. SCHAEFER:

We are. We have made wise choices. We have the flexibility to do this because of the transfer fee that enhances the community.

JOHN RADOCHA:

I am here because what I have to say is important to me. I am on a fixed income. I am asking for justice as a homeowner. I am not talking about all boards of directors. I disagree with some of Senator Michael A. Schneider's bills; however, I agree with his comments. I would like to see the Ombudsman's Office disbanded. I have been a victim of retaliation and selective enforcement. Boards of directors use NRS 116 to satisfy their control over homeowners. I need documentation to write management and report a violation. If it is not in writing, it does not exist. *Nevada Revised Statute* 116.31175, subsection 1, paragraph (b) takes away my right to existing or nonexisting documents needed to prove retaliation and selective enforcement. *Nevada Revised Statute* 116 needs a Freedom of Information Act.

Where are homeowners' rights to vote by paper ballot for budgets and capital improvements? We receive a letter announcing a budget meeting. It is held 15 miles away at 4 p.m., not at the regular place. That is not fair. Give us our right to vote. We need our control back.

Where is the definition of capital improvements? I have written letters to the Ombudsman and have not heard anything for over three months. My understanding of a capital improvement is something permanent. If it is going to be permanent, we should be able to vote. If we put a speed bump on a private street, it is a common element. We should vote on capital improvements. The directors are taking our money and using it for what they want.

Do transfer fees go to the HOAs, the management companies or the lawyers? This bill leaves the door open to double-dipping for some of these organizations.

I will give you an example of what happens. If someone comes to visit and he parks his vehicle, he receives a sticker saying he will be towed. Yet, an ex-director's son can park his truck and boat in a fire lane for four days. We need fairness.

CHAIR WIENER:

I speak for the entire Committee. We all recognize and appreciate how extraordinarily important these issues are to the people who appear and testify. We take notes and we review that. We weigh everything with great consideration as we move measures forward. It is through the public's

participation as well as those who do this for a living that everything is weighed. We take it all seriously as we establish public policy.

DR. ROBIN HUHN:

Nevada Revised Statute 116.4109 limits the cost of a copy of the CC&Rs to \$160. When I bought my home, I received a copy of the CC&Rs, but the print was small and hard to read. When I requested another copy, I was required to pay another \$160.

I support moving the Ombudsman's program to the Office of the Attorney General. I was in the process of buying a home to use as rental income. The management company would not clarify the CC&Rs for me, nor would anyone on the board. The CC&Rs are not specific regarding rental property. If the Ombudsman was at the Attorney General's Office, there would be someone who could explain that to me.

I am opposed to the private transfer fee. I do not want to be responsible for the future of that HOA community. This fee makes me responsible for everyone in that community, even though I no longer live there.

Property management companies have no value in running HOAs. They exist to make money. They are greedy. It is a \$40 billion-a-year business.

Last week, Dr. Gary Solomon spoke about HOA syndrome. This is real. I speak to people daily, and I ask them how they feel. Everyone reports the same symptoms. I have HOA syndrome. I can be here today because I am medicated. This is because of my HOA and the harassment. I am tired, anxious, irritable and paranoid. I have a fear of going to the mailbox. My mail goes to an attorney because every time I opened the mailbox and saw the letter, I became distraught. When I talk to people all over the United States, they report the same symptoms without prompting or knowing anything about HOA syndrome.

Homeowners' associations create elder abuse. The elderly are easy prey and are on fixed incomes. Board members and property management companies know that. Many of them are elderly women whose husbands took care of their finances. When their husbands pass away, they must take care of everything. The HOA may assess a fine because she is not capable of pulling a weed. The fines keep mounting because she does not understand the process. I have heard horror stories from the elderly.

SENATOR COPENING:

Please contact me and advise me of your association. I hate to hear stories like this. If you would like me to intervene, I am happy to do that and further investigate what is happening. I would like to better understand why these things are happening. I offer my services to do that if you would like to contact me.

DELORES BORNBAACH:

I am a retired homeowner who does not live in an HOA. I am visiting my friend who is an HOA owner. I have spent time in the law library and attending legislative meetings. Working people do not have that time. After listening to these meetings, I am convinced the common denominator is money, not the welfare of people. No matter how many laws you pass, you cannot protect people from the evils of harassment, retaliation and greed.

MR. FRIEDRICH:

Who gets transfer fees? I provided you with a closing statement of the home I bought eight years ago ([Exhibit J](#)). There are three items at the bottom. The Property Group received \$175. The HOA did not receive that money. Dyson & Dyson Real Estate Associates received a transaction fee of \$200. Rancho Bel Aire received a capital contribution of \$270. Many of these transfer fees go to associations, but when a master association is involved, the fee is double. For example, if a transfer fee is \$200, \$200 goes to the subassociation and \$200 to the master association. That is \$400. The HOA does not get this. The management companies get it for these two associations. It is not enriching the HOAs.

Arbitration fees should be capped. I provided you with a copy of the final billing for an arbitration involving one homeowner versus another homeowner over a tree ([Exhibit K](#)). It totaled approximately \$8,000, [Exhibit K](#), page 3.

SENATOR COPENING:

You mentioned fees that go to the master association and the subassociation. You said those are management companies. Do you know for a fact these fees are going to the management company and not to the HOA?

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MR. FRIEDRICH:

I misspoke when I said the subassociation and master associations. I meant to say the subassociation and master associations' management company. Yes, I was informed of that yesterday.

SENATOR COPENING:

Do you know that to be factual?

MR. FRIEDRICH:

Yes. The gentleman who gave me that information is not here today.

SENATOR COPENING:

Is he with the management company?

MR. FRIEDRICH:

He is with a collection company that works on behalf of the management companies.

SENATOR COPENING:

It is secondhand information.

MR. FRIEDRICH:

I will have him get that information to you.

SENATOR COPENING:

Mr. Wilkinson, does NRS say anything about transfer fees and where they must go?

BRADLEY A. WILKINSON (Counsel):

I will look into that. I am not aware of any provision that speaks to transfer fees.

CHAIR WIENER:

Please let us know what you find out.

I will close the hearing on S.B. 185. Over the last two days, 13 people have signed in to speak in favor of this measure, 29 have signed in to speak against it and 5 have signed in to speak from a neutral position. I will open the hearing to public comment.

HEATHER SPANIOL:

After yesterday's meeting, Favil West attempted to intimidate me by stating people do not like what I am saying. Further, he especially did not like what I was saying. I am a nobody in this room. I am just a citizen trying to stand up for myself because I have been abused by an HOA board. It was uncomfortable to be confronted by Mr. West. I asked him what I could do to get away from him and, rather than telling me to walk away, he watched while I tried to write down what I was seeing. I do not know if his intention was to harm me or sue me. He was warning me of something. The only homeowners at these meetings speaking on behalf of these bills are on the CCICCH or affiliated. There are no normal average homeowners here on behalf of these bills. If these bills are passed, you are making the rich richer and those already struggling struggle harder.

SENATOR COPENING:

We received an e-mail from Mr. West clearing something up on the record. He recalls that you had said the previous speaker from Sun City Anthem was under an IRS investigation. He wanted to make it clear to the Committee that he was the previous speaker and has never been under an IRS investigation. I speculate that may have been one of the reasons he approached you.

MS. SPANIOL:

That is not what I said. When I told him that, he did not get out of my face. He made me feel uncomfortable. If something happens to me, it was probably Mr. West. I want that on record.

CHAIR WIENER:

Everyone who comes before our committees is a somebody. Everyone who shares opinions, insights and experiences has an impact on our decision making. We do not consider you a nobody. You are someone with a voice and a concern. That is what this public process is all about.

FAVIL WEST:

Senator Gustavson inquired about radar guns. Sun City Anthem checked on radar guns with the City of Henderson. The City advised us that where public streets are concerned, it is the traffic control. We put up radar advisory equipment which allows people to see their speed.

Regarding comments made on asset enhancement, our Commission of 7 people with a total committee of 49 people got involved in the asset enhancement. We put out approximately 6,000 ballots out of 7,144 homes. We had a 73 percent approval. No developer was involved in any meeting of that committee at any time. It was residents only. We made six presentations, and we allowed the developer five minutes to give his part of the presentation.

When we cap things, where do we stop? I am concerned about that. I do not like to see fees that hurt homeowners because I represent homeowners on the Commission. We have to be careful about where we start capping and where we stop capping.

People talk about fairness. Fairness is like beauty—it is in the eyes of the beholder. What may be fair to you might not be fair to me. We must find what is just. In our community, Sun City Anthem, we have no experience with seniors being mistreated. I am cofounder of a foundation that assists seniors in three communities. We have no record of any senior being harassed by a board. We have some problems where we ask the City for help. I see approximately 100 to 200 homeowners a week, and not one has said he does not like living in the association at Sun City Anthem.

MS. GOODMAN:

I want to correct Mr. West when he said nobody in our community has been mistreated. Mr. Norman McCullough testified last week on another bill, and he has been mistreated by my community. He fits into the HOA syndrome more than most. I attempted to help another elderly gentleman, 92 years old. I went to the Neighborhood Justice Center in an attempt to help him. I was told unless he was physically abused, they could not help him. He has been mentally abused by our board.

MR. WILKINSON:

There is no restriction in statute about transfer fees. The only provision is the requirement in the resale package that any transfer fees be disclosed.

MR. FRIEDRICH:

As a follow-up, there is another lady who has been abused in Sun City Anthem. She is an almost 86-year-old widow who obtained written approval to add some fencing on top of five-foot walls. She spent \$3,000 doing it. Eight months after it was completed, she was told she was in violation of the CC&Rs. She was

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told she had to remove this fencing, which she installed to keep the coyotes from attacking her little dogs in her back yard. After quite a bit of back and forth between her and the Sun City Anthem board, the board allowed her to keep the fence for up to two years and eliminated her fines of \$100 a week, but she had to apologize for appearing on Channel 13. This is abuse.

CHAIR WIENER:

There being nothing further to come before the Committee, we are adjourned at 9:19 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE: _____

<u>EXHIBITS</u>			
Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 185	C	Michael Buckley	Notice of proposed rulemaking; request for comment from Federal Housing Finance Agency
S.B. 185	D	Pamela Scott	Proposed Amendment
S.B. 185	E	Robert Robey	Commissioner Favil West's testimony
S.B. 185	F	Robert Robey	Excerpts of Commissioner Favil West's testimony
S.B. 185	G	Jonathan Friedrich	Summerlin West Community Association Approved Operating Budget-2009
S.B. 185	H	Rana Goodman	Written testimony
S.B. 185	I	Tim Stebbins	Written testimony
S.B. 185	J	Jonathan Friedrich	Closing statement
S.B. 185	K	Jonathan Friedrich	Arbitrator's Final Billing