# MINUTES OF THE MEETING
# OF THE
# ASSEMBLY COMMITTEE ON JUDICIARY
# SUBCOMMITTEE

## Seventy-Seventh Session
## March 12, 2013

The Committee on Judiciary Subcommittee was called to order by Chairwoman Lesley Cohen at 8:15 a.m. on Tuesday, March 12, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT**:

Assemblywoman Lesley E. Cohen, Chairwoman
Assemblyman Richard Carrillo
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Andrew Martin

**COMMITTEE MEMBERS ABSENT**:

None

**GUEST LEGISLATORS PRESENT**:

Assemblywoman Dina Neal, Clark County Assembly District No. 7

**STAFF MEMBERS PRESENT**:

Dave Ziegler, Committee Policy Analyst
Karyn Werner, Committee Secretary
Gariety Pruitt, Committee Assistant

**OTHERS PRESENT**:

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada
John Radocha, Private Citizen, Las Vegas, Nevada
Delores Bornbach, Private Citizen, Las Vegas, Nevada
Dr. Robin Huhn, Private Citizen, Henderson, Nevada
Deane Downing DeLaCruz, Private Citizen, Las Vegas, Nevada
Paul Murad, Private Citizen, Las Vegas, Nevada
Randy Walker, representing Community Association Institute, Reno, Nevada
Terry Care, representing Terra West Management Services, Las Vegas, Nevada
Garrett Gordon, representing Olympia Companies, Southern Highlands Management Company; and Southern Highlands Community Association, Las Vegas, Nevada
Donna Toussaint, Private Citizen, Las Vegas, Nevada
Pamela Scott, representing the Howard Hughes Corporation, Las Vegas, Nevada
Donald Schaefer, Private Citizen, North Las Vegas, Nevada

**Chairwoman Cohen:**
[Roll was taken.] I would like to welcome everyone to the first Assembly Subcommittee on Judiciary, including those attending at the Grant Sawyer State Office Building and anyone listening on the Internet. Assemblyman Jason Frierson, the Chair of the Committee on Judiciary, has convened the Subcommittee to consider the legislation related to common-interest communities (CICs) and homeowners' associations (HOAs).

Before we get started, I am going to go over some ground rules. Let me remind everyone to set your cell phones and laptop computers to silent or vibrate. The audible tones are not only distracting to others, but they interfere with the recording process of the meeting. For the audience in the room, please sign in at the table by the door, indicate whether you wish to testify, and what your position is on the bill. If you do testify today, please present a business card to the Subcommittee secretary. Push the button to turn on the microphone when you are speaking, and state your name for the record. Remember to turn the microphone off when you are done.

The Assembly has adopted new standing rules this session regarding testimony in support, in opposition, or neutral on the bill. "Support" means you are in favor of the bill as written or with an amendment that has been approved by the sponsor. "Opposed" means you are not in favor of the bill as written or with the amendment that has not been approved by the sponsor. "Neutral" means

that you take no position on whether the measure should pass or fail, but would like to offer comments. In the interest of efficiency and to ensure everyone gets to participate, please avoid repetitive testimony. If your point has already been made by another witness, it is all right to say "ditto" or "me too." Confine your testimony to the bill itself. We will have an opportunity for public comment after the hearing is complete if there is another issue you would like to address. If you have written remarks, please do not read them into the record, but simply hand them to the committee secretary and give us a brief summary in your own words. Depending on how many people wish to testify, I may need to redirect your testimony or ask you to summarize so we can continue and allow others to contribute as well.

For today's business, we only have one bill on the agenda, Assembly Bill 137. Since we only have one bill today, we have more time to hear it than we would normally have. In the future, we will probably have multiple bills, so we will have less time for each bill as we come to them. Please keep that in mind.

I have asked our policy analyst, Dave Ziegler, to quickly review the background of our laws on common-interest communities and the measures the full Committee on Judiciary has already considered this session.

**Dave Ziegler, Policy Analyst:**
To refresh your memories and get the Subcommittee off to a good start, I will review the structure of the existing statutes on CICs. Then I will recap the measures that the full Committee on Judiciary has already heard this session.

Most of the existing statutes on common-interest communities appear in *Nevada Revised Statutes* (NRS) Chapter 116. The Uniform Common-Interest Ownership Act (Uniform Act) was first enacted in 1991. It came from model language from The National Conference of Commissioners on Uniform State Laws, and has been heavily amended over the years.

There are ten main subparts to NRS Chapter 116. This is a lengthy chapter with a lot of moving parts. For the Subcommittee, it may be helpful to break it down into its component parts. The first thing in NRS Chapter 116 is applicability. Most of these provisions apply to all common-interest communities in Nevada, but there are some exceptions for limited-purpose associations, nonresidential communities, and small communities with 12 or fewer units.

The second main component has to do with the creation, alteration, and termination of common-interest communities. This section covers procedures for creating and modifying common-interest communities, and such subjects as

the allocation of interest, the alteration and subdivision of units, development rights, easements, master associations, and mergers.

The third component, and one that this Committee and Subcommittee generally get quite a bit of legislation on, is management and general provisions. These sections require common-interest communities to have an HOA. They address such things as bylaws, collection of past-due obligations, election of board members and officers, powers of the HOA, powers of the executive board, removal of board members, rules of HOAs, the upkeep of common-interest communities, and other such subjects.

The next component has to do with meetings and voting. These are very detailed sections that cover meetings of HOAs and executive boards. The related subjects include agendas, participation, quorums, and voting. We have already had some bills this session that affect meetings of HOAs and their executive boards.

The next main section has to do with the liability, insurance, and fiscal affairs of common-interest communities. Financial statements, insurance, liability, operating budgets, reserves, and reserve studies are topics in this section. Again, these are important parts of NRS Chapter 116. This part also covers the fees that are imposed on CICs to pay for the Commission for Common-Interest Communities and Condominium Hotels, and for the ombudsman.

The next part of NRS Chapter 116 has to do with liens. This includes both liens against units in the common-interest communities and the foreclosures of those liens, and liens against the HOA itself. When you hear language about super-priority liens and such, this is what we are talking about.

Next we have the component that deals with the books, records, and other documents of an HOA. That is self-explanatory. It also covers the records that are necessary for the resale of a unit in a common-interest community.

Now we get to miscellaneous rights, duties, and restrictions. These are the basic miscellaneous rules in NRS Chapter 116: displaying flags, drought tolerant landscaping, parking, political signs, renting units, retaliation against unit owners, streets, and transient commercial use.

The next section gets into the protection of purchasers. This includes both the initial sale and the resale of units in common-interest communities.

Finally, an important part is the administration and enforcement of the chapter. This covers the Commission for Common-Interest Communities and

Condominium Hotels, the ombudsman, the Real Estate Division, and all of the duties and powers of those organizations. It also includes the whole subject of arbitration and mediation of disputes, hearings, violations, and implementation of the regulations and rules. That section also gets a lot of attention during legislative sessions.

There are also other laws about common-interest communities that appear in NRS Chapter 116A. They have to do with community managers and reserve study specialists. These are certified, registered professionals who work with common-interest communities.

Mediation and arbitration can also be found in NRS Chapter 38. There are rules about the mediation of claims relating to residential property within CICs. When we get into legislation that talks about the enforcement and administration of common-interest communities, it often overlaps into NRS Chapter 38.

The next thing I want to cover quickly is that the full Committee on Judiciary has already held hearings on three common-interest community bills this session. I want to remind the Committee what they were, so I will go through them in numerical order and discuss them in the version as introduced. I will not talk about any recommended or suggested amendments.

The first one was Assembly Bill 34. It came from the Real Estate Division and addresses management and general provisions, meeting and voting, and administration and enforcement. Those are three of the ten categories that I went over a moment ago. That bill defines the term "meeting of an executive board." It authorizes the Real Estate Division to certify voting monitors, and specifies when an association must hire a voting monitor. It also authorizes the ombudsman to appoint a referee for claims filed with the Real Estate Division. The bill amends the powers of executive boards, and requires an HOA to solicit at least three bids for an HOA project where possible. It also authorizes the administrator of the Real Estate Division to issue subpoenas, and includes other related provisions.

The next bill is Assembly Bill 44, introduced by the Committee on Judiciary on behalf of the Nevada League of Cities and Municipalities. It might fall under the management and general provisions part of the statute, or under the miscellaneous rights, duties, and restrictions. The bill states that, with some exceptions, an HOA may not regulate the way containers for collection of solid waste or recyclables are stored on the premises of a residential unit with curbside service.

Finally, the Committee has already considered Assembly Bill 98. This bill was introduced by Assemblyman Aizley and deals with the management and general provisions of common-interest communities, meetings and voting, and fiscal affairs. It requires a candidate for election to an executive board to be a member in good standing; makes changes to the section on bids for HOA projects, and the review of those bids; and changes the statutes on when an audit and review of financial statements are required.

I have just reviewed the structure of the statutes, breaking it down into its component parts, and recapped the measures that the full Committee has already heard this session.

**Chairwoman Cohen:**
Are there any questions from the Subcommittee? Seeing none, we will now move on to the hearing on Assembly Bill 137 and invite Assemblywoman Neal to the witness table.

**Assembly Bill 137: Revises provisions relating to landscaping within common-interest communities. (BDR 10-215)**

**Assemblywoman Dina Neal, Clark County Assembly District No. 7:**
I am here to present Assembly Bill 137. I ask for a little flexibility. I am trying to establish this bill in two legal formats. I will start out with my introduction.

I brought this bill because I strongly believe that the declarations that mandate a homeowner to landscape an enclosed backyard within a six- to nine-month time frame are an economic burden and infringe on the economic freedom of a single-family residence. I assessed the challenges that I may face with the declarations and how I could prove that this was not only unreasonable, but that the issue is within the purview of the Legislature because covenants, conditions, and restrictions (CC&Rs) are looked at as contracts. Therefore, it was pertinent to establish the authority that trumps the contract clause. I first looked to anchor this issue in Article 1, section 2 of the *Nevada Constitution*, which is the articulation of the police powers of the state; and Article 1, section 1, which states that people have the right to liberty and possession of property. Police powers of the state trump the contract clause in certain circumstances. Police powers, the fundamental right of a government in the United States to make all necessary laws, and the state police power come from the Tenth Amendment of the *United States Constitution,* which gives the states rights and powers not delegated to the federal government. States are thus granted the power to establish and enforce laws protecting the welfare, safety, and health of the public. It has been delineated to affect economic interest.

I looked at this and thought about the intent behind Article 1, to understand what rights the Nevada framers intended homeowners to keep. I read through the *Nevada Constitutional Debates and Proceedings*. As a Committee of the Whole there was actually no debate, so I had to follow the rules of construction and only look at the plain meaning of the Declaration of Rights under Article 1 of the *Nevada Constitution*. Then I decided to review case law of the United States Supreme Court and the Supreme Court of Nevada's decisions to determine the context, or when a contract clause can be construed in harmony with the reserve powers of the state to safeguard the vital interests of citizens of the state. Then I looked at some states' appellate court decisions to determine when a restrictive covenant can become unenforceable. The reason I went there is because, when you look at section 1 of the bill, it changes a restrictive covenant, which is a contract.

For the purpose of this bill, I needed to answer two questions: what does the U.S. Supreme Court say about the nexus between police powers and the contract clause; and what is considered to be unreasonable application of a restrictive covenant? The first Supreme Court case that I reviewed was *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934). This is a 1934 case that has a long legal history that is yet to be overturned. The *Blaisdell* case was a Minnesota case that landed in the Supreme Court because Minnesota wanted to postpone mortgage payments to prevent foreclosure during the recession. Here is the context that you need to catch. In *Blaisdell,* the court set up the context of when legislation affects contracts. It stated that the test of legislation is not whether the effect upon the contract is direct or merely incidental, but upon whether the end is legitimate and the means are reasonable and appropriate to that end. The Court further stated that the emergency does not create power, but an emergency may furnish the occasion to exercise power. The Court further stated that the economic interest of the state may justify the exercise of its continuing and dominant protective power, notwithstanding interference with contracts. Economic conditions may arise in which a temporary restraint of enforcement of contracts will be consistent with the spirit and purpose of the contract clause, and thus be within the range of the reserved power of the state to protect the interest of the community.

Why I went there, and why I want to park there for a minute, is because of what I provided to you in terms of the delinquency rate of mortgages (Exhibit C) and the history of those rates. Look at page 13 of the second handout, the TransUnion document (Exhibit D), and then look at page 5 in the delinquency of mortgage rates, which is the last page—I really only intended the map to be submitted. I needed to establish that there was a severe economic interest, and that there was a basic societal interest in the preservation of homes and lands

which we have possession of and are necessary for shelter and the means of subsistence.

I also went there because I looked at another Supreme Court case, *Parsonese v. Midland National Insurance Co.,* 706 A.2d 814 (Pa.1998), which was a 1998 Pennsylvania Supreme Court case that further distinguished *Blaisdell*. It added another tier of analysis and context, which stated that when there is a severe contractual impairment, it calls for strict scrutiny of the nature and purpose of the legislation involved: first, the urgency and need for the legislation; second, the emergency need to protect homeowners due to the severe economic impact; and third, whether the law itself protected a basic societal interest: preservation of homes and lands which furnish those in possession the necessary shelter and means of subsistence.

I started my argument there because I needed to argue from the strongest authority first, and because I needed to establish legislative power and purview. I contacted at least ten landscaping companies and the average price to landscape, to simply put rocks and trees in the backyard, ranged from $3,000 to $5,000. To homeowners in this horrific time, these are financial burdens and may place them in further financial crisis.

I knew that I felt strongly about this issue, but I needed to prove and establish where the law fits in terms of, if you are going to abrogate a contract, is there an economic interest where I can fall within the police power of the Legislature to then further identify that there is a need to not further burden the homeowners with making them landscape their backyard within a particular time frame? I needed to say "enclosed backyard" because that makes a difference.

I went on to further my mental exercise and looked at the U.S. Supreme Court decision *Manigault v. Springs,* 199 U.S. 473 (1905) to figure out what had happened and how this state power had been delineated. Under *Manigault v. Springs*, contracts are made subject to the exercise of the power of the state when otherwise justified:

> It is the settled law of the court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, in its various ramifications, is known as the police power and is an exercise of the sovereign right of the government to protect lives, health,

> morals, comfort, and the general welfare of the people, and is paramount to any rights under contracts between individuals…While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts will ordinarily not interfere with.

I am planting you there because, as I stated before, when I reviewed the application of the law, I asked myself what the best way to present this was. I decided to go from my strongest argument where I can get where I have the power to bring this and draw up a contract, then I will go to the appellate cases to deal with the enforcement of the actual provision and what criteria set forth deal with that.

I laid this framework out for the Committee because I needed to establish authority, scope, and limitations of a policing power articulated in the *Nevada Constitution*. I can argue that the intent of the *U.S. Constitution* is applicable to the *Nevada Constitution*, because I read the *Nevada Constitutional Debates and Proceedings* on the Declaration of Rights and it was the full intent to comport with the U.S. Supreme Court.

Now I will move into the states' appellate court decisions to deal specifically with the enforceability of restrictive covenants, which is what an HOA is. I need to set that framework. I started under the contract clause and nexus to police power because a restrictive covenant originates in a contract. I looked to Nevada cases and did not find any that dealt with the enforceability of restrictive covenants. There were cases in California, so I looked across the entire United States in order to get to the meat of what I needed to prove. I reviewed about 40 or 50 cases and narrowed it down to the cases that spoke to the issue. Under *Long v. Branham,* 156 S.E.2d 235 (N.C. 1967), which is a North Carolina Appellate Court case, the primary purpose of interpreting a covenant is to give effect to the original intent of the parties. However, covenants are strictly construed in favor of the free use of land whenever strict construction does not contradict the plain and obvious purpose of the contracting parties.

It has already been established by this Legislature that, in areas of single-family residences, unit owners have a right to occupy and use exclusively for themselves. You can find this discussion in the Nevada legislative minutes from 2005 and 2009. It is a small discussion, but when you look at the provision at the beginning of the bill where it speaks about NRS 116.330, I started to look at that, but thought if they were dealing with landscaping and the right to

occupy and use exclusively, there must have been discussion at some point that there was purview and scope for a single-family homeowner.

There is an exclusive right to a backyard. I decided I needed to establish that, if I have an enclosed backyard, you do not have the right to determine what my economic interest is and the time frame in which I must display that economic interest. How does one get the right to tell a homeowner who is paying the mortgage and $69 a month to an HOA that he must do "X" to his backyard at a cost of $3,000 to $5,000? I had to think about my legal argument and determine how I refute the people who come in opposition and say that it is reasonable. I am saying it is not reasonable.

Then I went to a California Supreme Court case, which is *Nahrstedt v. Lakeside Village Condominium Association,* 8 Cal. 4th 361, 878 P.2d 1275 (1994). In this case, the Court confronted the question of, "When restrictions limiting the use of property within a common-interest development satisfy the requirements of covenants running with the land or of equitable servitude, what standard or test governs their enforceability?" The California Supreme Court held that, "such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of the affected land that far outweighs any benefit."

I decided on the path of proving unreasonableness and the violation of fundamental public policy. First, the restrictions are evaluated for reasonableness in the light of "the restriction's effect on the project as a whole," not from the perspective of the individual homeowner. You need to understand that perspective. Ask yourself the question, what is the effect of the project of the whole on the enclosed backyard in the form of the aesthetics? There is none. If I have an 8-foot fence that encloses the backyard with a point of entry that happens to be the only point of visibility that may or may not have a screen on it, what is the effect on the project of the whole? How is the neighborhood affected by me not landscaping my backyard? I have the option of either kicking rocks or kicking dirt. If you want to deal with the issue of landscaping or dust abatement, require me to put down a tarp, but allow me the economic freedom to decide when I am going to spend my money, not yours, to landscape my yard.

The second issue that came up was whether the restriction was arbitrary. A restriction is arbitrary when it bears "no rational relationship to the protection, preservation, operation, or purpose of the affected land." The time provision is arbitrary. It serves no rational relationship to the protective operation or purpose of a single-family residence. Someone please explain to me how a 60- or 90-day time frame is not arbitrary, and what the benefit is of the time

frame to the homeowner. How does it benefit the HOA project as a whole to say within 90 days you must landscape? For what purpose? Whose purpose? To see what? For my neighbor who is going to get on a ladder and look over my gate to see my rocks?

Then I went to the third issue of when does a covenant burden? The rule is that the burden has to far outweigh any benefit. I asked the question, if it is an enclosed backyard which is for the exclusive use of the unit owner, how does this burden of limiting or making the person do this economic activity benefit the other people in the neighborhood? The benefit of landscaping my yard is exclusive to me. I am the one who will go outside and look at my yard. My neighbor is not coming over and looking at my rocks or trees. I cannot find any argument where someone could say that somehow the HOA had a larger issue or perspective that my backyard—or any person's backyard—should be landscaped than the burden that was being imposed was going to benefit me. Where does that come from?

That is why I took you through policing powers, to determine that it is in our purview to decide what is a legitimate end and what is not an appropriate end. What serves the societal interest of the people in this state? When you think about what I had to say, think about the arbitrariness of the time. Think about the restrictions when they are evaluated in terms of the reasonableness of the project as a whole, and then look at whether the restriction imposes a burden on the use of the affected land that far outweighs any benefit. Clearly, you have to land within the appellate court case which dealt with the enforceability. You then have to go back and look at the larger scope of whether, with my strongest argument, there is a societal interest that we are somehow further harming homeowners by adding another economic mandate that they do something to their property. I lean toward the stronger argument that there is a problem with the economic mandate to landscape your property when people are delinquent in their home mortgages, not only those who have a job and are employed, but also people who are losing their jobs or are part-time who are faced with this mandate. The Legislature has the authority, the scope, and the right to say that this is not a legitimate end and that the HOA is overstepping their authority.

**Chairwoman Cohen:**
Are there any questions from the Committee?

**Assemblywoman Fiore:**
Regarding the issues that we are talking about in the backyard, are the homeowners signing CC&Rs prior to moving into the home? Is it in their contracts that they have to do this?

**Assemblywoman Neal:**
Yes, and that is why I started with the police power when you can trump the contract clause for societal interest.

**Assemblywoman Fiore:**
In this presentation, especially with what you have come forth with, do you think we need to look at legislation that revises the language in the HOAs regarding this?

**Assemblywoman Neal:**
That is a possibility. I looked at that area because I felt in a normal contract situation both parties have the ability to negotiate their intent. They have the ability to modify the contract or say where they will not be bound. During a home closing, you are given your CC&Rs and you are supposed to review it within ten days. But that is not a negotiation. There is the argument that you can choose not to live in that home; you can live somewhere else that is not bound by an HOA. The question falls back to choosing not to live there, but where did the right originate that an HOA has an economic interest in a backyard? Where did that come from? I paused there because I kept trying to figure out when common property law rights became eroded to this point. You can deal with my front yard; you can ask me about my bushes; you can even tell me that my bush is dead so replace it; but if I have an enclosed backyard, how did you get an economic interest in what is for my exclusive use and is not a common area?

**Assemblywoman Fiore:**
I totally understand. I think we should think about other legislation that affects that.

**Assemblyman Martin:**
You should be commended for all of that research. Since this is our first meeting, I want to bring up that I am a former HOA president of a 216-unit condominium association. I actually ran on the platform of lessening the scope and power of the HOA.

On the subject of the backyards, I agree in general. The visibility issue is a very strong argument to say, "Hands off. Leave it alone." I am fairly sure, based on the weather patterns in Las Vegas, that it is very windy, hot, and dry. If there are a lot of backyards that are unfinished, it would be a virtual dust bowl. You mentioned in your preamble that you could put a tarp down in the backyard to secure the dirt. Obviously, the neighbors are going to have concerns about this since it is a common-interest community and that is a major concern. You are in your backyard trying to enjoy your barbeque and, because it is not

landscaped, your neighbor's yard is blowing dirt into your food. The question is, how do we address the concerns of the neighbors versus the overbearing nature of some HOAs in terms of enforcing their rules on backyard landscaping? I would like your insight on that.

**Assemblywoman Neal:**
I thought about that in two ways. In Nevada, because of our water issue, we are moving toward drought landscapes, rock landscape. I am going to answer this in two ways. When you weigh out the dust abatement issue, or the dust swirl that you may get off of the rocks in your yard, remember that we have hard dirt in Nevada. You can go outside with a shovel and it will be like rock. I started thinking about how weak that argument was.

Then I thought, if an HOA was on the high end, and the ambiguity of how these CC&Rs say you must landscape, then alter the language to say, "Or if you are not going to landscape, place a tarp down to reduce the dust." You have to deal with the ambiguity of the language. If it just says "landscape," what does that mean? Does it mean rocks, trees, 18 bushes, or what? Whenever there is an ambiguity within CC&Rs, it is viewed in light of the restriction and is construed to deal with the free use of the land. My thing was, if it played out either way, I was still going to land back on the free use of land. That then poses the question of the ambiguous CC&Rs and, if they are, you must lean in a different direction to free use. The other issue is a tarp versus landscaping.

**Assemblyman Duncan:**
I want to ask you about the *Blaisdell* decision. That is how you set the table for us. The *Blaisdell* decision was a Minnesota statute that was made during the Great Depression. It redefined real property from foreclosure and sale. In 1933, it temporarily extended real property from foreclosure and settled existing mortgages. The reasoning was because of the Great Depression. I am curious if you think this situation rises to an emergency situation in terms of the arbitrary and capricious standard that you cited from the California appellate case? I know you discussed that "within 60 or 90 days" was arbitrary and capricious. If an HOA says you must do this within a year, or two years, or three years, is there a time that it is now not arbitrary and capricious?

**Assemblywoman Neal:**
To the latter question I would say yes, because it gives more time in terms of finances. You could still run into a situation of who dictates the economic security of a homeowner. Who gives you that authority and right? Did I give it to you in the contract, because if I did, I did not mean to. That comes back to the issue of intent.

To your first question on *Blaisdell* and dealing with the economic conditions that could arise, and how you can issue a temporary restraint on the enforcement of contracts, I thought about that. Is this an emergency? I provided you with two cases, but I could have dumped 60 different articles on you. I could have brought the Attorney General's settlement. I could have brought data from 2007 until now that stated that homeowners were in a plight, that there was an issue about the ability to pay mortgages whether they were hit with a foreclosure or the unemployment rate. You have to look at it from two directions. I thought about other legislation that we have brought through this body where we said there was an emergency. The home issue was leaning toward the mortgage delinquency rates with the unemployment issue bleeding in to further exacerbate that issue. We were finding ourselves where people were not able to take care of their day-to-day business. It is up to the Legislature to declare, but in more than one format, a state of emergency. We have declared that we are in a recession. If there is just a temporary restraint on the contract, I am all right with that. The question is, what is temporary? Have we found our way out of the situation? Looking on page 5 at the map, and how many delinquencies on mortgages there are, we are still at the highest rate. We are above 9.45 percent. Does that mean we are okay, or that we should put new economic burdens on the homeowner? That is where I landed. In my opinion, I say we should think about the societal interest of homeowners and give them some slack.

**Assemblyman Duncan:**
In terms of grounding us in the law, are we not in *Blaisdell* where we are saying there is an emergency situation? Or are we just saying this is arbitrary and capricious and that is where we are hanging our hat? I read *Blaisdell* to say that there was an emergency situation, and that is what we are predicating using the police power to temporarily not enforce these contracts.

**Assemblywoman Neal:**
That is a legitimate question. I am grounding it in the police powers first. I had to look at both, but I am grounding it in police power. I say there is an emergency. I am also further establishing, rooting, and anchoring my argument in the arbitrariness. Let us say that this Committee does not see what I see, then I am giving you the second authority, which is to view the restriction in terms of unreasonableness whether it is arbitrary or places a burden. I am creating a two-step process, because it is the purview of this Committee to hand out legislation. It is my job to present arguments to you on how I plan to get you to pass this out of Committee. My strongest argument was police power. My second argument was arbitrariness and applying *Nahrstedt*, which is the California Supreme Court case, because it is persuasive. I could not just leave you with that and not give you any other case law that is persuasive.

**Assemblyman Duncan:**
I understand where you are going. You are saying there is an emergency, and if not an emergency, then here is persuasive authority from California that basically says the burden far outweighs the benefit to the community. Did that California case deal with an emergency analysis, or did they just analyze the burden analysis? Does this relieve the burden? If the homeowners have a year or two instead of 60 or 90 days, does it obviate the burden? Are you saying that this is something that homeowners should be deciding for themselves since it is their own private property?

**Assemblywoman Neal:**
I will start with your first statement. *Nahrstedt* dealt with restrictive covenants and when they are enforceable. It also dealt with the unreasonableness. Regarding the second issue of the time frame, I feel there is an inherent property right of homeowners who are paying the mortgage. If I am paying a mortgage of $956 a month and I am giving you $69 a month, I feel I have a much higher interest in my property than you do. I should have the right to determine that.

In terms of does giving it three years reduce the burden, yes. It could easily be argued that 60 to 90 days is an entirely different framework than three years. We are talking about having 36 months to work it out, get amendments if needed, and figure it out with the HOA. In that context, and logically, I would say that three years reduces the burden. I understand HOAs; I have an HOA. You can regulate my weeds all day long; you can tell me to get them out. You can tell me my bush is dead; but when you start telling me about my backyard, which is enclosed with an 8-foot gate, I have a problem. My $69 a month does not give you the right to dictate to me how and when I spend my money; it is not your money. I have the economic burden of the mortgage. I have the economic burden of the maintenance of the house; you do not.

**Assemblyman Carrillo:**
You mentioned the financial hardship. If the individual purchased a home—you are not talking about people who have lived in their homes for quite some time—they may not know to ask the question of whether it is an HOA. If the people move from a non-HOA home, they would not think of it. The sellers should give you the CC&Rs that you are going to have to follow. I am trying to understand the financial hardship that you are saying these people are under, especially if they are moving into a new home for them. How is the financial hardship a burden at that point in time? You gave a time frame of six to nine months before they were required to put landscaping in the backyard. Looking at the definition of landscaping it is trees, shrubs, rocks, and things like that.

How are we determining this financial hardship? Who is to say it is a financial hardship when you are buying a home in an HOA?

**Assemblywoman Neal:**
First, you asked who determines financial hardship. Then you asked when a person gets into a home, and they know they have CC&Rs, how come they have not set aside $3,000 in order to landscape their property. To the first question, the homeowners themselves are the ones who define financial hardship for themselves. It may be very real; it is not imagined. I need you to ask yourself the question, should an HOA have the authority to come in and review my bills and my mortgage note, and then decide if I can afford the landscaping? Since you bought the house, you need to landscape within six months.

There are situations where you find yourself paying your mortgage, your car payment and insurance, and taking care of your kids every month, and doing everything you need to do, and then you find out that you have to landscape your backyard. You may never have an extra $3,000. Maybe it will take you three years to save $3,000. Who decides the time frame of how I save that money? Did I give the HOA that right through the $69? I beg to differ. I think there is an inherent issue by throwing that term into the CC&Rs. If the new homeowner had the opportunity to negotiate the terms, that would not be one of the terms a homeowner would agree to. That would come under a contract negotiation where that term would be deleted. If CC&Rs were treated in the real format of an actual contract negotiation, that negotiation would go back and forth deleting and modifying terms that we mutually agree on. That is not how CC&Rs are delivered to a homeowner.

I can put this on the record because I know two attorneys who live in a good neighborhood and they have not been able to landscape their backyard. They make money, but the financial burden of the house and kids keeps them from having $3,000. They would put a tarp down, but they do not have that option.

**Assemblyman Carrillo:**
You mentioned the $3,000 to $5,000 for landscaping and the financial burden it causes. I am a do-it-yourself guy. I will have everything brought to the house, then I finish the project. If you have that much money, you can have the landscaping done, or you can do it piecework. That is how I did it. When I first moved into my HOA, I was required to have landscaping in my backyard within six months of moving in. I got it done, but I did it over that six month period. I stretched it out; it was not all done in one shot. I did not call a landscaping company; I did it myself. It saved me a lot of money.

I am not refuting the fact that it could be a financial burden for someone. I knew moving into the HOA would require me to do that. I looked into that prior to signing on the dotted line; I found out what my requirements were. At that time, I only paid $45 a month for my HOA dues. Now it is double that, but I appreciate that they take care of the common areas. I live in a community that I am proud to call my home. A home is your biggest financial investment.

**Assemblywoman Neal:**
To deal with your issue of financial hardship and what your situation was when you moved into your home, I believe you were gainfully employed and that goes to the first part of my argument. There were no issues of you having the money to do it. What was the stress upon you to get it done within six months? How would it have benefitted you if you would have had nine months to figure out a plan and spend your money differently?

The second issue that you brought up was when a person is invested. There is not a question that homeowners feel they are investing in their property, that it is the best thing since sliced bread to own a home. The investment question is not fair because they are investing. It is the time that it takes for them to invest. It is the time that it takes to build up their property. Who dictates that? I say the homeowner does; I say the HOA does not. I say it is unreasonable and arbitrary because of the time. If you get a final notice saying that the HOA is ready to penalize you, you will pay their attorney for sitting there reviewing your HOA dispute. Now you have the fee and the attorney fee that is associated with it that they pass on to you. You are being penalized for not being financially sound. If I gave you that right, I did not mean to.

**Assemblyman Carrillo:**
How do they make the determination that you have an unfinished backyard?

**Assemblywoman Neal:**
The way I understand HOAs is that they do not have the right to set foot on your property; they have the right to drive by. Let us say the backyard is enclosed, but you have a gate. That is all they are able to see unless they violate the rules and step onto your property. You do have to turn in an architectural review form. They will keep noticing you until it is submitted. At some point, you have to get permission for what you want to put in your backyard. In certain cases, you get a notice that you have failed to landscape your backyard, then you are required to complete an architectural review form. You respond back that you do not have any money.

**Chairwoman Cohen:**
You have referenced enclosed backyards a few times, but the bill does not delineate between enclosed backyards and open backyards. We have some condo complexes where there are open backyards.

**Assemblywoman Neal:**
I have not seen a condo that has a backyard that is not enclosed. I have not seen a single-family residence that did not have an enclosed backyard. In the older homes from the 1980s or 1990s, you might have a chain-link fence. From my understanding, they did not have HOAs in the 1980s. I may be wrong.

I can amend the bill to include that. I have not seen a newer home that did not have an enclosed backyard. I will put in "enclosed" if it will make it clearer since that is what I am referring to. There could be neighborhoods where the yards are not enclosed, but I have not seen any.

**Chairwoman Cohen:**
What is your response to concerns about neighbors who may have a two-story home that overlooks a home that is not landscaped? They have trouble selling their house because potential buyers look into their neighbors' yard that is not landscaped. It affects the sellers even though it is someone else's backyard.

**Assemblywoman Neal:**
I would challenge that as a weak argument that there may be tumbleweeds and big garage doors in the backyard. Like I said, you can put a tarp down. I do not know many people who think their neighbors' view is the one they would like to have. My neighbors have a large trampoline, and it is not ideal for me to see it, but someone moving into my house may not be concerned about my neighbors' trampoline. You would have to prove to me that the appraisal value of my property was diminished because of the neighbors' backyard.

**Chairwoman Cohen:**
Can we please address the dust abatement issue again? I have heard a lot from people who are concerned with that issue. They are saying, "I am having trouble using my backyard because my neighbors will not take care of their backyard. This has been going on for years." I received an email from someone who said it had been nine years and he still cannot use his backyard because of the dust from his neighbors' yard.

**Assemblywoman Neal:**
That is an easy fix; mandate a tarp over the ground. That is different from landscaping. I would love to see studies associated with dust abatement when

the entire Valley is going toward rock and dirt landscaping. You can drive down the highway and see rock with dirt landscaping. I would love to see how much of this Valley—because of our water issues—is moving toward rock landscaping and using dirt in creative ways. Argue the point as to which one weighs heavier on the Valley in terms of the rise of dust. That is where I would put that argument. When is there no dirt in the city?

**Assemblyman Martin:**
I am going to follow up on the dust bowl issue. You are talking about mandating a tarp, but who is mandating it? That would seem to violate the spirit of what you are trying to do in this bill. The tarp itself can be considered an eyesore. I am torn on this issue. I believe there is something to be said for overlegislating in terms of having an HOA mandate what landscaping you have in your backyard. They can be real "condo commandos" and really go too far, which I agree is a definite problem. Who is mandating the tarp? We may have to go back even farther to when the HOAs were being built. There should be some minimal level of landscaping imposed because of the obvious dust problem in Las Vegas. The question is, if someone is mandating a tarp, who is doing the mandating? Would that not be a problem in this bill?

**Assemblywoman Neal:**
Yes, it would be a problem. It still lends to the issue of arbitrariness, but it also offers a solution for the homeowner. We get into the business of legislating human behavior and we fall out of common sense. We should be telling neighbors who want to keep looking in someone else's backyard to mind their own business.

This can be done without a mandate, but if the Committee feels there needs to be language that deals with the backyard, I lean toward the permissive application of a tarp. The HOA is getting involved with the economic interest that they have no right in. I would not give up the ground that we are in a state of emergency with homeowners being unable to afford their property and to pay their mortgage on time. This is very real and it is consistent with the data on page 13 of the TransUnion credit report (Exhibit D) that shows the mortgage and unemployment connection.

I appreciate this Committee asking me these questions, but at the end of the day you have to anchor yourself in whose right it is. Is this an economic mandate, and does an HOA have the right to mandate and give an arbitrary time frame to homeowners and dictate what their financial stability is? To me, the answer is "no."

**Assemblyman Duncan:**
I hear your argument, but we are also dealing with how sacrosanct do we hold contracts in our society. Is there a presumption of reasonableness on behalf of the HOA? How do we distinguish what happens in someone's backyard with *Nahrstedt* holding that the condo complex applied the rule to everyone equally. They said that you could not have a cat or dog in your condo, and they found that to be reasonable. You are saying it is arbitrary and capricious. It seems that you are not being able to have a cat in your own home seems arbitrary and capricious, but the California Supreme Court upheld that covenant because they found it was not unreasonable and it applied to everyone. The arguments that I see on the other side off the top of my head could say it is aesthetics, it is about the dust bowl, it is about the property values, so how do we get over that burden here. Does that not open us up to a lot of lawsuits that drive up the costs for the HOA and the people who are in the HOA?

**Assemblywoman Neal:**
You asked if there was a presumption of reasonableness on the HOA. Yes, but it is also balanced against the viewpoint of the whole project. I think you were reading the language in *Nahrstedt* where you have this limitation of use of property. What is reasonable? The court will give some deference to an HOA, but they will also balance it against the common law property right, which it infringes itself upon. We need to capture it there.

What is the difference about the pet in the backyard? To me there is a distinct difference because we are dealing with an economic activity when we discuss the backyard. Although the pet was a restriction of use in terms of the free roaming of the pet, it is in a different category because the economic activity, economic impact, and economic mandate are quite different. I do not believe that is associated with the pet. Keep it in the backyard; put it on a leash. In this case, they moved in with the pet and then there was an amendment to the CC&Rs after they already lived there. I see the issues as being different because one is an economic activity mandate. I used *Nahrstedt* because there are only two cases that dealt with the enforceability of restrictive covenants. There are all kinds of cases out there, but I had to get to the contract issue. Are we getting to the point where we are eroding contract rights? Is that where you are leading or are you going somewhere else?

**Chairwoman Cohen:**
I see no other questions so I am going to move on to supporters in Carson City. There is no one, so we will move down to supporters in Las Vegas.

**Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:**
I am the homeowners' representative on the Common-Interest Communities Commission, but I am not speaking on their behalf. I am speaking as a private citizen.

As far as the CC&Rs are concerned, there are almost 3,000 HOAs in the state. If you want to buy a new, or fairly new, home, you have a very limited choice. You are almost forced into an HOA. As Assemblywoman Neal said, the CC&Rs are there and you have to take it or leave it. You do not have a choice. There is no negotiating. Although Ms. Neal suggested that the HOAs did not have the right to go into someone's backyard, the Siena Homeowners' Association has in the CC&Rs the right for their inspectors to go into a rear yard. I have seen that firsthand.

As far as condos are concerned, all of the ones that I have observed have had the landscaping done by the developer or the declarant and is usually maintained by the association. Those who will oppose this bill will come up with all kinds of creative arguments, but the bottom line is, who has to pay for all of this expense? It is the homeowner. If someone moves into a new home, he has a lot of additional expenses, such as the cost of moving, furnishings, and the normal closing expenses. As we all know, we do not have a printing press for money; we have limited resources. We have to stretch our resources as far as we can.

As for landscaping, once you start putting in landscaping other than rocks, you use water. We all know how expensive water is, besides being limited. I have offered a friendly amendment (Exhibit E) to this bill that excludes the side yards from landscaping, unless it is a corner lot then the portion that faces the street should be minimally landscaped. If you fail to landscape within the required time frame, the association has the right to start fining you. We have all heard about how high these fines can go—into thousands of dollars—which creates more of a financial burden on the homeowner. One thing that should be considered is that a developer include the cost of rock landscaping in the rear yard; that would take the bite out of the dust argument. The landscaping is there, the cost is minimal, and it is included in the sales price and the mortgage.

For all of the above reasons, I strongly support this bill. It would prevent the associations from using the heavy club of fining people, and using those fines to balance their budgets.

**Chairwoman Cohen:**
We do not have your amendment. Please speak to Assemblywoman Neal and make sure she has your information, so she can pass it on. Do we have any questions for Mr. Friedrich?

**Jonathan Friedrich:**
As a follow-up, I did speak to her assistant and told her that I was submitting it.

**John Radocha, Private Citizen, Las Vegas, Nevada:**
I am a victim of HOA bullying and abuse. I go to the HOA meetings and ask questions. If I had known that going to HOA meetings and asking questions got you into trouble, I would not have done it. I went to a meeting and asked some questions, and was told to put it in writing.

**Chairwoman Cohen:**
Please keep your comments to this bill. If you have some general comments, we will have an open comment section at the end of the hearing.

**John Radocha:**
They asked me about my backyard and I told them I was working on it. I told them that time I do have, but money I do not have. I live on a corner lot and the concrete people dumped everything there. I had to remove rocks that took me a lot of time. I was digging holes and trenches when all of a sudden they got after me. I asked if I could put some gravel in temporarily, since I was going to need it anyway; they would not let me. They gave me 30 days, but I negotiated 90 days by going to the Senior Law Project and the attorney writing a letter. They said I had to have trees, plants, and grass. They ended up fining me $8,200 and put a lien on my house. Out of 156 houses, I am the only one who cannot vote, and they have taken my parking permit away. That is retaliation and selective enforcement for what I found about the theft and fraud. You are going to hear a lot of opposition, so please do not fold under pressure.

**Assemblywoman Fiore:**
Please submit copies of those fines. I would like to see your $8,200 fine and where you cannot vote.

**John Radocha:**
I gave that to the young lady out front. They will send the five pages to you.

**Delores Bornbach, Private Citizen, Las Vegas, Nevada:**
I fully support this bill, and kudos to Assemblywoman Neal for having a very commonsense feel for people who do not have money coming out of trees in

their backyards. The emergency situation for HOAs is to let people be adults. If they are adult enough to buy a house, they are adult enough to take care of their own yard.

**Chairwoman Cohen:**
Are there any questions? I see none.

**Dr. Robin Huhn, Private Citizen, Henderson, Nevada:**
I am a board member of an HOA. I became a member because of the harassment by the HOA. I would like to see the bill be amended to be more specific. Many CC&Rs say if it is something that can be seen from the street, it has to be taken care of. I would like to see amendments about enclosures and the issue of being seen from the street. In this day and age, owning a home is not an investment. At this point, it is not the issue. There are many elderly people on fixed incomes, and single women with children that cannot afford this. In this economic environment, to ask them to landscape is unconscionable. The privacy a homeowner has is nil; homeowners do not have any privacy if they live in an HOA.

I have spoken with an investigative reporter, Ward Lucas, who has recently written a book on HOAs. He told me that the homeowner does not own the home and the property, the HOA does. Someone mentioned that there would be lawsuits; that is untrue. The homeowner cannot sue the HOA, but the HOA can sue the homeowner. Rather than sue the homeowner, they send it to collections, and get their money that way. Lawsuits are not going to be a problem. I cannot believe that the Committee members took this much time, an hour and a half, talking about this issue. I do hope that the Committee is in favor, and empathetic to homeowners.

**Chairwoman Cohen:**
Are there any questions for this witness? [There were none.]

**Deane Downing DeLaCruz, Private Citizen, Las Vegas, Nevada:**
I support A.B.137. I believe an HOA should not have control over the homeowners. That is not why they bought their homes. Homeowners have the right to do whatever they want in their backyards and should not be controlled by an HOA. I agree this meeting was far too long over an issue like this.

**Chairwoman Cohen:**
All of us on this Committee, and everyone here who has taken time to come to the committee meeting to be witnesses or to observe, have a lot of things to do, but we want to take the time to give everyone a chance to speak. This is a very important issue to everyone, so we hope you appreciate that both sides are

going to have an opportunity to speak. In the Assembly, because we are the people's house, we are concerned with ensuring that everyone has their time on all of the issues that come up.

**Paul Murad, Private Citizen, Las Vegas, Nevada:**
I want to make a disclosure that I serve on the Nevada Real Estate Commission, but I am not speaking on their behalf. I am speaking as a private citizen. I have been a real estate professional in Las Vegas for ten years. I am a real estate broker for Metroplex Realty. I have also lived in common-interest communities and in single-family HOA communities. I have served on the board of directors of an HOA, and have worked with hundreds of homeowners. My comments and perspective comes from personal experience.

I enjoy living in HOA communities. There are benefits to living there, but what started out as a service to the homeowners has turned into an industry that is more focused on profit as opposed to actually serving. That is something that you have to keep in mind: it turned from a service to an industry. Just like any industry, it has lobbyists who are paid and organized, but the homeowners do not.

Regarding this bill, in my experience over the last ten years of dealing with HOA communities and single-family homes, the dust abatement issue is not something that you should be worried about. Lots of communities that I have sold property in were on the edge of the development. For instance, if it was Aliante in North Las Vegas, a lot of the homes on the other side were in the desert. Who is going to demand that the desert be landscaped or a tarp be put on it? That is much more of an issue than homes not having the proper landscaping. We cannot take care of all of the dust issues, so let us not focus on one or two homeowners and demand they handle that issue.

As far as the communities that have open backyards, like the Sun City communities, the developers do landscape most of them. That is not an issue. The side yard is usually covered and is not in plain view of someone driving by. Maybe the wording in the bill should include anything that is behind the fence. I strongly support this bill and it will be a great relief to the homeowners.

**Chairwoman Cohen:**
Are there any questions? I see none, so we will come back to Carson City for those who are in opposition to the bill.

**Randy Walker, representing Community Association Institute, Reno, Nevada:**
We are here in opposition to the bill. Some of the CC&Rs are written for the benefit of all homeowners. In my experience as a community manager, I have

seen many different CC&Rs regarding backyard landscaping from it not being addressed in the CC&Rs to the requirement that it be landscaped and approved by the architectural committee within a certain time frame. Some CC&Rs do not even address backyard landscaping, while some do talk about it. There is a benefit to communities to have backyard landscaping restrictions. A backyard might be visible from either a common area or from a golf course. In those instances it is really important that the CC&Rs be upheld.

**Terry Care, representing Terra West Management Services, Las Vegas, Nevada:** We have already addressed the dust issue, but I would mention that a tarp can come loose. If you cannot mandate landscaping, how can you mandate a tarp?

I want to give the Committee some background. As Mr. Ziegler pointed out, in 1991, the Legislature adopted the Uniform Act. It has been amended several times since. It is not uncommon for a legislative session to see as many as 15 HOA bills. They are frequently all put before a subcommittee such as this. In the past decade, the Legislature has on rare occasions amended the Uniform Act as a matter of public policy. We have never gotten into a discussion about the terms we have heard here. The approach was that the Legislature adopted the Act that could be amended if they wanted to, which we did on occasion. Let me give you some examples.

It was in 2003 that the Legislature said people should have a right to express their patriotism, so we allowed homeowners in an HOA to fly the American flag, within reason. It must be on a staff or a pole, and you cannot paint an American flag on your garage. The Legislature said we need to amend the law so there cannot be CC&Rs and other governing documents that prohibit the practice of flying a flag; the same thing with political signs. I think that happened in 2005. People should have the right to express themselves politically, within reason. There is a restriction on the size of the signs and where they may go. In 2007, because we were still in a drought, the so-called drought resistant landscaping came about. That is when the Legislature said you cannot prohibit homeowners from putting that in, but there were restrictions. You had to submit a detailed description of that landscaping to the architectural committee. On rare occasions, the Legislature has told an HOA that it may not have in its governing documents this prohibition. But that has been few and far between.

Terra West Management Services has a difficult time understanding what the public policy would be for this bill. I understand the issue of financial hardship. People have had that throughout the Las Vegas Valley, and throughout the state for years. I would point out that it does not say "enclosed backyard," and I am not sure what the term "enclosed" would even mean. Chain link, cinderblock,

how high, we do not know. Even if it is not a case of a potential buyer looking down to the backyard of a house that is not for sale from a house that is for sale, forget all of that for a minute. Obviously, you could have the case where someone with no landscaping in the backyard sells the house, but sells it at a reduced price compared to the value of the house next door because it does have landscaping. In that instance, the fact that the homeowner does not have landscaping does have an economic impact on the next door neighbor. I am saying that that could happen although I do not have specific examples. It is not difficult to imagine those circumstances; that is the benefit that comes from the law as it is currently written.

**Garrett Gordon, representing Olympia Companies, Southern Highlands Management Company; and Southern Highlands Community Association, Las Vegas, Nevada:**

The term "economic mandate" has been used repeatedly today, and I would offer to you that this is a voluntary economic mandate. Not only does any individual buying a home have to comply with the CC&Rs, but as a homeowner you know that your neighbors have to comply with them. Assessments range from $5 to $1,000 in this state, and I would submit to you that neighbors paying a lot of money to live in certain communities know, and have the right to expect, their neighbors will complete their backyards compliant with the CC&Rs. There is a series of case laws that have not been discussed today that deal with third-party beneficiaries. The contracts are deemed property in this state and interference with that property right is considered a taking. In the event that a neighbor wants to enforce the CC&Rs to have his neighbors complete their backyard, it is his right. I would argue that it is a right under the CC&Rs that the neighbor and the homeowner signed—that everyone in the community signed—that should not be taken from that individual.

We have talked about dust control and I would only add to that dialogue that certain units are next to swimming pools. You do not want dust interfering with swimming pools, golf courses, or tennis courts. I think there are a lot of examples of not only dust going out on the streets, but on other common elements that a lot of people are paying a lot of money to enjoy.

There are five elements to restrictive covenants. First, they have to be reasonable. They cannot be punitive. I would argue that if every homeowner in the community has to comply, it would not be punitive. It has to be fair. That is defined as not creating a separate class or group of people. I would summit to you that, if you are now looking at financial burden and try to make a distinction between group A that should not have to comply with the CC&Rs because they have a financial burden, and group B that does have to comply. Now you are creating separate classes and separate groups, and you are being

arbitrary based on a standard of financial burden. It also opens up a slippery slope. A lot of CC&Rs have a requirement that you cannot park your recreational vehicle (RV) on the street. Is that a financial burden that I can no longer afford to put my RV in a storage unit? I would argue that I should be able to put it on the street because I cannot afford the storage unit. What about the front yard landscaping? What if I cannot afford to do the front yard? The sponsor has acknowledged she would not consider that unreasonable to require you to landscape the front yard, but maybe her neighbor would since she does not have the money to do her front yard. Where does this end? If you open this door, you are opening up a lot of covenants that have been in CC&Rs for months, years, and decades. You open a gamut of concerns.

The third is to preserve and enhance properties. We can all agree that improving one's backyard certainly enhances the property, especially for the neighbors who have a two- or three-story house that overlooks your tarp or dirt backyard. You have a constitutional right. The case law deals with the First Amendment freedom of speech. Forcing someone to improve their backyard at minimum standards is not a violation of any constitutional rights. It must be uniformly enforced, and that is one of the big ones based on case law. Are you enforcing the covenants uniformly? I would argue that if you start breaking it down by financial burden versus other factors, you are now violating the fifth element of restrictive covenants.

As for my client, Southern Highlands, in their CC&Rs they have the requirement to improve your backyard within 280 days of purchasing the property. Improvements are approved by a design criteria set by the board. We have heard about economic hardship and Southern Highlands has responded. Their board, in the recent months, has amended their design criteria for a minimum of rocks or a level of fake grass; a very minimal expense to be reactionary toward the economic burden. I would submit that this is more a decision of board by board handling their community on a case-by-case basis rather than legislation that can affect all communities in the state.

**Chairwoman Cohen:**
Are there any questions? I see none. We will move to Las Vegas for anyone opposed.

**Donna Toussaint, Private Citizen, Las Vegas, Nevada:**
I live in an HOA and served on my board for ten years. I am a former commissioner for the Commission for Common-Interest Communities and Condominium Hotels. The reason I am opposed after listening to the testimony is, if the amendments are made, there will be selective enforcement. People who live in communities where their backyard is shielded would not have

to follow the rules, but others would. That is really unfair. I live in a subassociation of a master and we have 300 doors. In my subsection of that, we have 38 homes and 3 of them have enclosed backyards. The rest of them look onto the common elements. This would not work for us.

**Pamela Scott, representing the Howard Hughes Corporation, Las Vegas, Nevada:**
We are speaking in opposition to this bill. Summerlin does have some covenants that require rear yard landscaping. They have one year to landscape and the minimum landscape is two inches of decorative rock. I cannot help but think that a tarp would cost more than two inches of decorative rock. We take the position with the two inches of decorative rock, when they can afford to landscape their backyard, they can reuse that rock around their trees, shrubs, et cetera. You also have the issue of fences. Just because it is enclosed does not mean it is out of view. You have golf courses and street views. Everything else that I had has been discussed, so I have nothing further to say except that Hughes Corporation is opposed to this bill.

**Assemblyman Carrillo:**
You said it is required by the Howard Hughes Corporation to have a minimum of landscaping in the back of just rock, and no shrubs or trees. Did I get that correct?

**Pamela Scott:**
Our CC&Rs that were recorded in the 1990s do require that backyard landscaping be installed within one year of purchase from the builder. The builder at Summerlin put in the front yard landscape so that is not an issue. The design criteria define minimum landscape of a rear yard as being two inches of decorative rock. That is it; no irrigation or shrubs or anything.

**Donald Schaefer, Private Citizen, North Las Vegas, Nevada:**
I am a homeowner in Sun City Aliante. I also serve on the board there. While our rear landscaping is done by the developer, it is basically rocks. Our backyards are open with few exceptions. We have both wrought iron fences and cinderblock walls for those who have pets or pools in their backyard. We have many properties that are visible from the golf course. We, as board members, have the obligation to ensure the backyards are maintained to some degree because they are visible to the public and they do deter property values if they are not maintained. Of all the other arguments that have been made, both pro and con, the biggest opposition that I have is dealing with "enclosed" and how we define that. Property values are greatly hindered if we do not maintain backyards in a reasonable time.

**Chairwoman Cohen:**
Are there any questions? [There were none.] Is there anyone else in Las Vegas who would like to speak in opposition to this bill? Seeing no one else, I do not believe we have anyone to speak in neutral.

**Assemblywoman Neal:**
I think a lot of us got caught up in what was brought forth, the tarp, but we need to leave that alone. We need to get back to the crux of my argument, which was that we are dealing with a public policy issue. I believe that, in terms of reasonableness, there is also an issue of arbitrariness when we deal with the 60- and 90-day time limit. You heard testimony from people whose backyard was landscaped by the developer. That is not even an issue for them. That is maintenance. That is not to whom I am referring to. If you already have your backyard landscaped, what is the opposition? What is the financial burden that is associated with you? Nothing. We are talking about the people who have not yet landscaped.

It is interesting to come up with a definition of "enclosed." I am open to that. For plain language of what "enclosed" means we can look in the dictionary. I will look in *Black's Law Dictionary* to see if they have a special definition for what "enclosed" means when referring to a rear yard.

I appreciate the depth of the conversation and the interesting comments. I wrote them all down. I appreciate the time for this hearing. I will bring back a small amendment.

**Chairwoman Cohen:**
Before I close the hearing on Assembly Bill 137, I want to remind everyone to get your exhibits in before 5 p.m. the day before the hearing. If not, your exhibit may not become part of the record. Our staff works very hard and it is hard to get things back and forth between Las Vegas and Carson City the morning of the hearing. If it is not in early, the Committee does not have a chance to review it before listening to your testimony. With that, the hearing on Assembly Bill 137 is closed.

We will now provide an opportunity for public comments. If anyone would like to be recognized at this time, please come up to the witness table and I will call on you.

**John Radocha, Private Citizen, Las Vegas, Nevada:**
When I got involved in landscaping, I found some problems, and have documentation of staff fraud and other things. That is when my problems started. Time continued on and I worked on my backyard. When all of this

information came out, I approached them at a meeting and told them they had put in a speed bump illegally. That was when I got myself in trouble. Where I live, there are some lawns in the backyards, some are not done, and some are half-done. I went to the Senior Law Project and an attorney got me 90 days to comply. Assemblywoman Neal mentioned $3,000 to $5,000 for the landscaping, but I had to hire people and it cost me $10,000. We need a statute of limitations for fines and liens. I would like to see that put in.

**Chairwoman Cohen:**
The meeting is adjourned [at 10:19 a.m.].

RESPECTFULLY SUBMITTED:

_____
Karyn Werner
Committee Secretary

APPROVED BY:

_____
Assemblywoman Lesley Cohen, Chairwoman

DATE: _____

## EXHIBITS

**Committee Name: Committee on Judiciary**

**Date: March 12, 2013** **Time of Meeting: 8:15 a.m.**

| Bill | Exhibit | Witness / Agency | Description |
|---|---|---|---|
| | A | | Agenda |
| | B | | Attendance Roster |
| A.B. 137 | C | Assemblywoman Dina Neal, Clark County Assembly District No. 7 | National Delinquency Survey |
| A.B. 137 | D | Assemblywoman Dina Neal, Clark County Assembly District No. 7 | TransUnion Payment Hierarchy Analysis |
| A.B. 137 | E | Jonathan Friedrich, Private Citizen, Las Vegas, Nevada | Amendment |