MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS

Seventy-Eighth Session
March 4, 2015

The Committee on Government Affairs was called to order by Chairman John Ellison at 8:36 a.m. on Wednesday, March 4, 2015, in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4404B of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman John Ellison, Chairman
Assemblyman John Moore, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Victoria A. Dooling
Assemblyman Edgar Flores
Assemblywoman Amber Joiner
Assemblyman Harvey J. Munford
Assemblywoman Dina Neal
Assemblywoman Shelly M. Shelton
Assemblyman Stephen H. Silberkraus
Assemblywoman Ellen B. Spiegel
Assemblyman Lynn D. Stewart
Assemblyman Glenn E. Trowbridge
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Jered McDonald, Committee Policy Analyst
Eileen O'Grady, Committee Counsel
Aubrie Bates, Committee Secretary
Cheryl Williams, Committee Assistant

OTHERS PRESENT:

Terry E. Rubald, Deputy Director, Local Government Services, Department of Taxation
Chris Collins, Executive Director, Las Vegas Police Protective Association Metro, Inc., and representing Combined Law Enforcement Associations of Nevada
Marlene Lockard, representing Nevada Service Employees International Union
Ronald P. Dreher, Government Affairs Director, Peace Officers Research Association, and representing the Combined Law Enforcement Associations, Washoe County Public Attorneys, and the Washoe School Principals Association
Ryann Juden, Chief of Staff, Office of the Mayor/City Council, City of North Las Vegas
Ruben R. Murillo, Jr., President, Nevada State Education Association
John Faulis, Chairman, Las Vegas Police Managers and Supervisors Association
Dagny Stapleton, Deputy Director, Nevada Association of Counties
Yolanda King, Chief Financial Officer, Clark County
Rusty McAllister, President, Professional Fire Fighters of Nevada
Michael D. Hillerby, representing American Institute of Architects Nevada
Russell Rowe, representing American Council of Engineering Companies-Nevada
Ruedy Edgington, Private Citizen, Reno, Nevada
Christine Drage, representing American Institute of Architects
Craig Galati, Private Citizen, Las Vegas, Nevada
Bill Valent, representing American Insurance and Investment
Douglas V. Ritchie, Chief Civil Deputy District Attorney, District Attorney's Office, Douglas County
Darren L. Schulz, Public Works Director, Public Works Department, Carson City, Nevada

John M. Terry, P.E., Assistant Director, Engineering, Chief Engineer, Department of Transportation
Steve K. Walker, representing Carson City, Douglas County, Lyon County, and Storey County
E. Lee Thomson, Chief Deputy District Attorney, Office of the District Attorney, Clark County
Jeff Fontaine, Executive Director, Nevada Association of Counties
Wes Henderson, Executive Director, Nevada League of Cities and Municipalities
Brian McAnallen, representing City of Las Vegas

Chairman Ellison:
[Roll was called. Rules and protocol were explained.] Assembly Bill 196 is scheduled for Friday, March 6, 2014. They already had people scheduled to present on this bill, so the hearing for that bill will be held this Friday. The first bill we will hear today is Assembly Bill 54. This will be a continuation of the previous hearings. Would anyone like a recap of the bill first? Will the presenter of the bill please come forward.

Assembly Bill 54: Revises provisions relating to local governments existing in a severe financial emergency. (BDR 31-308)

Terry E. Rubald, Deputy Director, Local Government Services, Department of Taxation
I will give a brief overview of Assembly Bill 54. There are organizational issues regarding the Committee on Local Government Finance (CLGF) in section 1. There is an expansion of the types of funds that can be withheld in the event of noncompliance with reporting or a failure to pay the Public Employees' Benefits Program. *Nevada Revised Statutes* (NRS) 354.665 and 354.671 currently allow withholding of consolidated tax. However, this would expand withholding to cover property tax and net proceeds discretions as well. There are updates to the provisions related to severe financial emergency. The local government cannot request technical financial assistance unless the Department of Taxation has placed the local government under fiscal watch. Fiscal watch means that one or more of the conditions triggering severe financial emergency might be present. However, the severity or the degree of the condition is not as great as in severe financial emergency. The Committee on Local Government Finance is more involved in the determination of whether or not a condition of severe financial emergency exists.

There are two additional conditions that are added to the list of conditions triggering severe financial emergency, including an ending fund balance that is less than 4 percent or a failure to pay the federal unemployment tax. The bill

features the notion that local governments contiguous to a city being considered for severe financial emergency would be given an opportunity to be heard during hearings. The duties and responsibilities of the Department in managing a local government after a severe financial emergency have been updated. The Department, for instance, assumes the local government's rights and obligations under the collective bargaining agreements. Bonded indebtedness could be adjusted with later maturity dates and different interest rates. Future collective bargaining agreements could be suspended. The financial manager would report to the Department.

The Department would prepare a plan of revenue enhancement and expense mitigation with priority to sustain basic functions. The Committee on Local Government Finance would approve the plan. If the plan calls for additional taxes, it would then go to the Tax Commission. The bill provides an update for the process, placing more responsibility on the CLGF. Any level of taxes would be effective at the next quarterly payment due date, rather than during the following year. Failure to comply by a local officer or employee would be grounds for conviction of a gross misdemeanor. The temporary loan from the Severe Financial Emergency Fund would have a two-year repayment plan, rather than a one-year repayment plan. It would pay for both operating costs and debt expenses.

If the severe financial emergency could not be corrected after three years, CLGF could recommend options, including dissolution or absorption by the county. The general and residential tax abatements would not apply to any increase in tax rate as a result of severe financial emergency. That is the brief overview of the entire bill. Mr. Chairman, after you have taken all of the comments, we would like to come back and provide clarifying comments regarding the concerns expressed during the last hearing.

Chairman Ellison:
Is there anyone who was not able to speak in favor of the bill during the last hearing who would like to speak now? [There was no one.] Is there anyone wishing to speak in opposition to Assembly Bill 54?

Chris Collins, Executive Director, Las Vegas Police Protective Association Metro, Inc., and representing Combined Law Enforcement Associations of Nevada:
I am the Executive Director of the Las Vegas Police Protective Association, as well as one of the board members of the Combined Law Enforcement Associations of Nevada. I am here this morning in opposition to the way the bill is currently written. However, since we have been tracking this bill, we have had great success working with Ms. Rubald and her staff at the Department of

Taxation. Even as late as this morning, I think that with their willingness to work with us, we will come to a resolution. There was some language that we talked about today that will allow us to support this bill at some point in the future, but right now we oppose the bill as it is written. I believe resolution is forthcoming.

Chairman Ellison:
Are there questions from the Committee?

Assemblyman Carrillo:
There was an amendment submitted; is this part of the discussion you are currently having? Are there any particular issues that this is addressing? You said that it is still ongoing.

Chris Collins:
The amendment (Exhibit C) that we sponsor as well as general language throughout the bill may be incorporated based on the conversations we have had with the Department of Taxation.

Assemblyman Carrillo:
It is good to hear that the Department of Taxation is working with you and that there is some common ground between you.

Chairman Ellison:
Are there any other questions from the Committee? [There were none.]

Marlene Lockard, representing Nevada Service Employees International Union:
We also remain opposed to the bill as written. However, we are very encouraged with the discussions we have been having with the Department of Taxation. There are certain provisions that are troubling, but I think the willingness of the Department to discuss those issues gives us great encouragement.

Chairman Ellison:
Are there any questions from the Committee?

Assemblyman Carrillo:
You always want to have common ground. However, when you have a bill where both sides are not happy, it is great when you can make everyone happy. I like to see that everyone is working together before we have a work session, instead of getting to a work session to find out that some of the key issues have not been addressed. It would be good to know about the progress you are making on this bill before we bring it to a work session.

Chairman Ellison:
I completely agree with Assemblyman Carrillo. I would like it if we could have a meeting in my office about your progress before we bring the bill to a work session. Assemblyman Carrillo would love to help you all reach an amicable result. Thank you for volunteering for that.

Assemblyman Carrillo:
Thank you, Chairman Ellison; I appreciate that.

Chairman Ellison:
Are there any other questions from the Committee? [There were none.]

Ronald P. Dreher, Government Affairs Director, Peace Officers Research Association, and representing the Combined Law Enforcement Associations, Washoe County Public Attorneys, and the Washoe School Principals Association:
We are also opposed to A.B. 54 in its current form. There were a couple of sections with which we have concerns: section 8, section 12, and the newly-amended section 21. As Ms. Rubald talked about a few days ago, the Department of Taxation has proposed amendments. We have had a number of discussions with them, and we are very open to talking with the Department of Taxation to reach a compromise as quickly as possible. We are close. We believe we could support the bill once we iron out some of the details and reach a compromise.

Chairman Ellison:
Are there any questions from the Committee? [There were none.]

Ryann Juden, Chief of Staff, Office of the Mayor/City Council, City of North Las Vegas:
North Las Vegas has clearly lived through the realities of current law. We witnessed firsthand the limitations of NRS, where it handcuffed us, and where it prevented us from being able to resolve our problems. The Department of Taxation correctly pointed out that the City of North Las Vegas was not in severe financial emergency. That being said, we were constructively treated as if we were in severe financial emergency because when all of the stakeholders looked at North Las Vegas and the financial situation we inherited, they looked at the next step. That was state receivership. They looked at what impact that would have on their contracts with North Las Vegas on debt obligations. They applied existing law to our conditions. Even though we were not in the confines of this bill, per se, where we would be under the control of the Department of Taxation, we saw what its application would have done to us. We have submitted a letter from Mayor Lee (Exhibit D) to the Committee

members. It outlines some of the things we have experienced. If you have any questions about that letter, I am here to answer them.

One of the primary concerns we have with existing law as well as this bill is existing law does not treat all stakeholders equally. I know there are many people on this Committee who were elected to protect the middle class and not increase taxes. Yet, those are really the only two tools that the Department of Taxation has. They have the ability to increase taxes on residents in order to cure severe financial emergency, and now they have the ability to go to collective bargaining groups to get concessions. One stakeholder who remains absent from the table is financial markets—bond insurers and bond holders. This is an important stakeholder who, if you are truly trying to cure a financial emergency, you also need to have at the table. It really highlights one of the deficiencies of existing law. I do not know if the law properly contemplated the challenges and complexities of larger entities that might have severe financial emergencies. For example, within the existing law it talks about an emergency fund that exists to help by making loans to entities having difficulties making ends meet. There is only $500,000 in that fund. That is enough for some entities in Nevada to continue operations for only a matter of hours. Clearly, the law does not speak to the challenges that a large entity could have. Those are some of the problems we have with existing law. The current proposals for change do not go far enough.

The letter (Exhibit D) discusses other options based on other states. There are 13 states in the country that have a blended form of receivership and bankruptcy. It provides real relief to entities regardless of their size. If you want to have a real discussion on how to address the realities of a severe financial emergency, you have to talk about that. In a state like Nevada, it cannot be based solely on receivership. With the financial realities of the state, as you struggle to find money for basic services and education, you cannot expect the state to simply receive a financially distressed city, and all of its debts and obligations. It is not practical. The construction does not make sense, whereas a proven method through Chapter 9 bankruptcy, or other provisions that allow real relief and the construction of a real plan for the debtor should be considered.

We are thankful in North Las Vegas. When we inherited the city, we had a $152 million long-term deficit. Within months we realized that the budget that had just been passed by the former council had a $7 million hole. Within just a few more months, we had a $25 million court order. One month later, we had a $6 million court order. All of those things we were able to resolve. We are not coming to talk to you about the provisions of this bill or bankruptcy because those are options that North Las Vegas needs available. Thankfully, we do not

need to use them at this time. However, we believe that having lived through this firsthand, we know the limitations of the law and believe, after talking with experts from across the country, that we had a fairly clear understanding of where Nevada could go or should go if they really wanted to have serious policy discussions about curing the deficiencies in existing law.

Chairman Ellison:
Have you met with the sponsor to talk about the issues you are facing and what you are proposing?

Ryann Juden:
It has been interesting. The first time we spoke to the sponsor, unfortunately, was this morning. When the bill first dropped, I reached out to executive staff to see if anyone had heard from them, and we had not. That was unfortunate because we believe that when we lived through what we did, we gained a different perspective. We applaud the Department of Taxation. We believe that many of the changes they do seek to make are good changes that would be very helpful as they deal with smaller entities. However, we still believe the law is deficient as it would apply to larger entities.

Assemblywoman Neal:
I read the letter and then I read about Chapter 9 bankruptcy. I believe you are referring to the language in section 8, subsection 1(j) of the bill. Chapter 9 bankruptcy allows for reorganization of debts and the extensions of debt maturity. However, it does not allow for the liquidation of assets and the distribution of proceeds to creditors. How do we deal with that issue of nuance? Section 8, subsection 1(j) allows the Department of Taxation to, "Meet with creditors of the local government and form a debt liquidation program." Then they expand the permissions through the new language to extend debts and to change interest rates. How do we work that out? I understand the limitations of the tools they have, but how do we work out what Chapter 9 limits under bankruptcy and what the Department of Taxation is trying to give us?

Ryann Juden:
I know it is unlawful to misrepresent any facts, so I will say that I am not a bankruptcy attorney. However, one clarification of Chapter 9 of the Bankruptcy Code as it applies to municipalities is that Chapter 9 does allow for bifurcation of debts. This means that if an entity declares bankruptcy under Chapter 9, the court creates a plan of adjustment. During that plan, they take secured and unsecured debt. For example, if a municipality has a $200 million debt on a wastewater facility, the court would look at the amount of that debt that is secured. The amount of debt that would be secured through most bond

covenants of these types of assets would be the revenue proceeds that are received; that is the part that secures the debt. A $200 million debt might only be secured up to $80 million. The remaining $120 million would be subject to discharge or reorganization under Chapter 9. That is a very important distinction of relief that Chapter 9 provides to larger, more complex entities that is not provided within NRS Chapter 354. That is one very important thing to understand.

Another important thing that Chapter 9 provides is a realistic timetable. When you look at some of the timetables within NRS Chapter 354, it clearly contemplates smaller challenges. For example, creditors that have some form of a judicial reward or a judicial proceeding has allowed them to receive a judgment from the city. Under existing law, there is a 60-day timetable where creditors meet to discuss how to discharge those obligations. The law is silent about the reality of how any attorney would look at the construction of that language. They would see that they only have 60 days to meet in good faith to work out terms, and if they do not work out terms, the law never says it will readjust things. It goes right back to where it was, which gives little incentive. There is no bargaining power at all, whereas Chapter 9 specializes in developing a plan. It clearly understands the development of a plan. One of the things it does, which this bill does not do, is realize that the experts are probably people already on the ground. Once again, the construction of current law contemplates smaller entities. When you look at some of the successes the Department of Taxation has had with applying current law, you are talking about Gabbs—269 people, or White Pine County—10,028 people. The complexities of those smaller entities are the reasons that the technical financial assistance is a tool in existing law. A city of 269 people might not have an accountant, so it would be a lot of relief for the Department of Taxation to parachute in an accountant. However, financial whiz-kids with their calculators do not provide a lot of benefit to a large entity that has a finance department with multiple accountants and a financial staff.

Assemblywoman Neal:
I hope you are able to talk with the Department of Taxation because your concern is about stability, having the right creditors at the table, making sure the banks come to the table, and making sure that the people do not get scared when receivership is talked about and there is a belief that you cannot take care of the bonds and debts. Hopefully, you can find some resolution which will offer some security to the city.

Ryann Juden:
I agree. We will work with them. It is important for this Committee to understand that one of the fundamental principles of Chapter 9 bankruptcy is

the Tenth Amendment. There are still rights and sovereignties that are held by the states. If Chapter 9 bankruptcy were allowed in Nevada, it would still require the consent of the State. We are not suggesting that municipalities or smaller entities that have financial challenges be able to go to court to file for bankruptcy. This could be, and should be, a provision that is extremely limited, that only the Governor or this body can allow. However, just having the deterrent and the power of having that provision in law is a game changer. If there is one fundamental problem with state receivership in Nevada, it is that it is widely untested and completely unknown. You have to understand the impact that it has in markets which are based on certainty and risk. We talked with multiple experts across the country, who all came to the same conclusion independently that they would be more comfortable with bankruptcy in Nevada than they are with this state receivership because they do not know what it means to their debt obligations. They do not understand it, and that is a penalty that Nevada has that impacts the state in financial markets. Changing something that does not work might not make the most sense.

Chairman Ellison:
From what I understand of your position, there is quite a distance between where you need to be and what this bill provides. We need to try to close that gap.

Assemblyman Carrillo:
You stated that there are 13 states that already have provisions similar to this. Is that correct?

Ryann Juden:
There are 13 states that have a blended form of receivership and bankruptcy.

Assemblyman Carrillo:
Are we basically reinventing the wheel, to some effect?

Ryann Juden:
To a certain effect, the existing law and the current bill not only reinvent the wheel, but at the end of the day we end up with a sort of square rock. It is not really reinventing the wheel; it is making it worse. There are a number of states that have a pure bankruptcy model—I do not have a specific number. There are other states that have a blended form of bankruptcy and receivership. That is likely something you would want in Nevada because the reality is we have small entities where existing law has all of the necessary tools to provide them with serious relief. However, we also have larger entities, which the current receivership law in Nevada does not contemplate and cannot help.

Assemblyman Carrillo:
Because of the situation in North Las Vegas prior to the last session, there are measures that have to be put in place. I understand the purpose of the Department of Taxation. However, if it has already been done and there are other models in place, it is important to consider those instead of taking a less certain path that may fail. I would like to see these other models. It is not to say that any of the other models are perfect, but with other parties involved, I think we could find some common ground.

Ryann Juden:
As I hear a camera clicking behind me, I would be remiss if I did not once again stress that North Las Vegas does not need provisions of bankruptcy. North Las Vegas did not receive relief under NRS Chapter 354. We solved our problems in spite of the statute, not because of it. We believe that because of our experience and intimate understanding of the limitations of existing law, we can provide valuable experience and help regarding this bill. I completely agree that we do not need to reinvent the wheel. In fact, I would advise against it because it is important that we adopt something in the state of Nevada that is widely understood across the country and by financial markets. It would be unwise to have a hybrid when you are dealing with financial markets.

Assemblyman Carrillo:
I am not really sure what the comment about the camera had to do with anything. Maybe I missed it. She actually has no film in that camera.

Chairman Ellison:
It is disposable.

Assemblyman Carrillo:
It is just for effect, to make you nervous.

Ryann Juden:
My comment was based on past experience. Whenever we sat in front of the press, they asked about bankruptcy. Our mayor said that any policy discussion in the state of Nevada that deals with financial emergency must include a robust discussion of bankruptcy. Somehow, the headlines the next day were, "North Las Vegas Seeks Bankruptcy!" It is a point of clarification for our good friends.

Assemblyman Trowbridge:
I think we have an extremely complex issue before us covered in 25 pages of very small print. However, when you start talking about issues relating to governmental agencies and financial insolvency, it becomes very serious. When you introduce something like Chapter 9 and receivership, there is a

potential impact on bond ratings and the consequential increase in interest rates. I would look forward to the City of North Las Vegas sharing its expertise, recognizing some of the comments you made about varying degrees of financial expertise. Some of them are smaller jurisdictions and special improvement districts. It just complicates the matter even more. Maybe more sections need to be broken out based on the size of the entity or budget in question. I am very pleased by the willingness of the various stakeholders to meet and compromise.

Ryann Juden:
I agree with your comment about the complexity of this issue. The council held a meeting where Barclays gave a presentation. They specifically discussed existing receivership law in Nevada and pointed to deficiencies and uncertainties that it creates within the market, resulting in negative impacts for not only North Las Vegas, but entities throughout the state.

Assemblyman Trowbridge:
I think we cannot ignore the successes North Las Vegas has had working its way through its problems under the current laws. It can work. It might have been easier had there been other provisions, but it did work under current law.

Chairman Ellison:
I strongly recommend that you work with the Department of Taxation to come up with something that will work for everyone. We will have a Committee meeting on it.

Ruben R. Murillo, Jr., President, Nevada State Education Association:
I am a special education teacher and the president of the Nevada State Education Association (NSEA), representing over 24,000 members. Collective bargaining is integral to productive working processes and should remain a process for collaborative solutions to financial agency concerns. We respectfully request the Committee remove provisions from the bill that waive the collective bargaining process or vote no on Assembly Bill 54.

With that being said, given the information on a proposed solution to concerns on A.B. 54, the NSEA will remain in opposition and will assess the changes and their impacts on the current language of A.B. 54.

Chairman Ellison:
Is there a specific area of the bill you would like to address, or is the NSEA generally opposed?

Ruben Murillo:
At this point in time, the NSEA generally opposes the bill.

Chairman Ellison:
Are there any questions from the Committee? [There were none.]

John Faulis, Chairman, Las Vegas Police Managers and Supervisors Association:
We are still in opposition, specifically to the sections of this bill mentioned by Mr. Dreher. However, we are hopeful that a resolution will come to the Committee and that we can work through this.

Chairman Ellison:
Are there any questions from the Committee? [There were none.] Is anyone else wishing to testify in opposition to Assembly Bill 54? [There was no one.] Is anyone wishing to testify as neutral to A.B. 54?

Dagny Stapleton, Deputy Director, Nevada Association of Counties:
The Nevada Association of Counties is neutral to the bill. We appreciate the efforts of Ms. Rubald to work with stakeholders, including counties, in her efforts to clarify the mechanisms dealing with local governments in severe financial emergency. A lot of amendments have been discussed. A representative in Clark County will discuss another amendment, which we support. We would be glad to continue working with the bill sponsor on this.

Chairman Ellison:
Are there any questions from the Committee? [There were none.]

Yolanda King, Chief Financial Officer, Clark County:
I would like to review the amendment we have submitted (Exhibit E). The amendment would be to section 12 of the bill. Ms. Rubald mentioned during the last hearing that there is a recommendation from the Department of Taxation to change the language that includes some of the language that the CLGF would make to the Tax Commission. The amendment I am proposing is to simply add, in addition to the amendments for the recommendations that the Department of Taxation has presented, that if there is a jurisdiction that is contiguous to the city under consideration for severe financial emergency, one of the recommendations includes that the provision of services by the contiguous city may be provided by that contiguous city. The reason for this is it would most likely be more efficient for a city that is closer to that jurisdiction to provide services, rather than another jurisdiction that is not in close proximity. This language is also consistent with the language included in the bill that also mentions a contiguous local government in section 7, subsections 7 and 9. This just adds to the recommendations that the CLGF may make to

include other cities that are contiguous. The CLGF may recommend that they may provide services or other things to the jurisdiction under consideration for severe financial emergency.

Chairman Ellison:
Have you talked with the sponsor of the bill? Did they agree with this as a friendly amendment, or are you speaking in opposition?

Yolanda King:
I did speak with Ms. Rubald a couple of weeks ago. She did mention in her testimony during the previous hearing that we did speak about this as a friendly amendment. Ms. Rubald was in support of the amendment I am submitting today.

Chairman Ellison:
Are there any questions from the Committee?

Assemblyman Trowbridge:
Your suggested amendment relates to expanding what is typically called mutual aid agreements used for police and fire services such that under certain circumstances the same type of relationship could exist for services such as road maintenance or building inspections. Is that correct?

Yolanda King:
Yes, that is correct. It would be expanded beyond the fire and police mutual aid agreements.

Assemblywoman Neal:
I have a problem with section 12, subsection 2(c) of the amendment (Exhibit E) because it says, "Any other action or remedy...." It is a catchall and I do not know what is encapsulated in that language. That speaks to a lot of things. However, what is the effect of the addition of the language, "including, but not limited to, the provision of services by another contiguous local government"? In the bill, there is a loan which must be repaid to get out of the hole. Will a city that is in financial distress be responsible to repay the contiguous city which takes over services?

Yolanda King:
I think that will depend on what is negotiated between the city or county that is providing the services and the entity that is receiving those services. It does not necessarily mean that if the services are provided it is an automatic reimbursement. That was not the intent. Contiguous entities may provide services more efficiently because of their close proximity.

Assemblywoman Neal:
There are currently shared services agreements. In the example of North Las Vegas, the City of Las Vegas took on some of the jail services. There was an agreement to split the costs. What is the effect of that language if it were applied to that specific scenario?

Yolanda King:
There was an agreement between the two cities as to how those payments occurred. I also understand that in addition to the jail services, there were also discussions regarding other services that could be provided. That is where this language is coming from. There are multiple entities that can come to the table to talk about what those local governments can provide to help the struggling entity. I cannot speak to what that would look like specifically until you get everyone to the table to determine if services will be reimbursed.

Assemblywoman Neal:
There was a situation that occurred with the City of North Las Vegas where the shared services committee was talking about providing services at the expense of the City of North Las Vegas. They were literally asking the City of North Las Vegas to give up property, something short of Jesus' cloak. I was absolutely horrified that was part of the negotiation and that they were taking advantage of North Las Vegas' desperation and distress. They were asking North Las Vegas to do things that no one in a normal frame of mind would have asked for. Section 12, subsection 2(c) of the amendment (Exhibit E) states, "Any other action or remedy that the Committee deems appropriate including, but not limited to, the provision of services by another contiguous local government." I want to make sure that those kinds of conversations never happen. I was so upset that I went to the city financial manager and expressed my strong disapproval. He agreed that he would be selling his birthright if he signed that deal. That is something I strongly do not want to see happen. I did not think the cities would ever play that game, but they did.

Yolanda King:
Your comment is duly noted. Speaking for Clark County, I can say that would not be our intent to take advantage of a distressed city.

Chairman Ellison:
Assemblywoman Neal, I would like to have a definition of exactly what you said to those people.

Assemblywoman Neal:
I mean to say that we might need to define what "any other action or remedy" is because it is a catchall. It might allow for types of activities of which we are not yet aware. We have very clear examples of abusive situations that people did not see as abusive at the time. They thought that if they would be helping, they would need to be paid back. It seemed fair to them that North Las Vegas relinquish some property in exchange for money. No one was upset by those conversations. They thought it was right and fair, while I was in complete disbelief. I will be the villain against everyone regarding these issues. I hope that it does not happen again.

Yolanda King:
Please keep in mind that this recommendation is coming from the CLGF, not necessarily from any of the local governments. I am simply trying to specify that some of those services can come from the other cities contiguous to the jurisdiction in question. However, I understand your concern.

Chairman Ellison:
Sometimes it is dangerous to sign in as neutral.

Yolanda King:
Yes, I am beginning to understand that.

Assemblywoman Spiegel:
Will you please clarify whether the amendment regards two contiguous cities or if it is broader than that. Could it be a combination of a city and a county, or a county and a municipality?

Yolanda King:
The language proposed by the Department of Taxation in Assembly Bill 54 already includes provisions that the county can absorb or the city could disincorporate. Therefore, the county is automatically responsible for that area. The intent was that if there was another local jurisdiction, a city, that is contiguous to the jurisdiction under consideration, they could take on responsibilities. By the way it is written, my interpretation is that the county would already be responsible. However, if there is another city in close proximity that is providing services, the committee could discuss the possibility of that city continuing to provide those services. It could be more efficient that way. It includes both, not just the cities.

Assemblywoman Spiegel:
I believe that "governmental entity" is defined in NRS to include other types of entities such as library districts. How does that work with this bill and your

amendment? What happens if a library district is in distress and wants to be absorbed by a city or county?

Yolanda King:
I think it could. I think a great example of that is North Las Vegas, which has its own library district. If it is more efficient for Clark County to provide those services to North Las Vegas, that is the intent.

Rusty McAllister, President, Professional Fire Fighters of Nevada:
I would like to provide an example of Ms. King's comments regarding services provided by a contiguous city. The City of Las Vegas has at least eight fire stations that are in very close proximity to North Las Vegas. We share a border from the far east side of the city clear to the northwest part of the valley. During North Las Vegas' financial distress, they were having to shut down a number of their fire department units every day, including rescues, engines, and ladder trucks. Las Vegas was able to help provide that service for North Las Vegas. We already have mutual aid agreements, but we were able to increase that service to provide more units across the border to give them assistance when they needed it. There are no Clark County fire stations anywhere along that border, except for on the far east side of the valley, so it made sense for the contiguous city to provide those services. Clark County would have had an extremely long travel time just to get to an emergency call.

Chairman Ellison:
Is anyone else wishing to testify as neutral to Assembly Bill 54? [There was no one.] Ms. Rubald, we looked at examples from these other municipalities that share services through mutual aid or shared service agreements. What happens when one entity in this type of agreement is in receivership and the other is not? How is that handled?

Terry Rubald:
For the entity that is unable to meet its bills, the option currently in law is to raise taxes so that they can have sufficient revenue to pay for the basic services.

Chairman Ellison:
It seems as though one entity would be forced to pick up some of that debt. Are they paid back at a certain time?

Terry Rubald:
I can give you the example of the hospital district in Tonopah several years ago. They were in severe financial emergency and, ultimately, the hospital was sold to private parties. However, the hospital district remained in existence for a

few more years so that they could continue to collect the property tax that was due to the entity to help pay off their debts.

Chairman Ellison:
Do you have any closing comments?

Terry Rubald:
I would like to clarify a few things. The first thing is that the whole purpose of the local government finance section at the Department of Taxation is to be a watchdog of the financial affairs of local governments on behalf of the public. That is why we receive copies of the local governments' budgets, audits, capital improvement plans, and debt management reports. We get all of those reports on a routine basis so that we can use the expertise of the staff to analyze whether or not a local government is financially healthy. The whole purpose of the Local Government Budget and Finance Act, as it states in the preamble, is to provide for the control of revenues, expenditures, and expenses in order to promote prudence and efficiency in the expenditure of public money. Therefore, in the case of a financially distressed local government, the purpose of the Department is to provide technical financial assistance tailored to the needs of the local government. Our purpose is really to help the local government through rough times as needed.

With that said, I would like to address the concern about whether or not a fiscal watch might be invasive in the affairs of the local government and cause too much reporting. I want to reassure this Committee that the idea of a fiscal watch is not implemented until one or more of the financial distress indicators has been triggered. Yes, the local government might have to appear before CLGF to explain how they are doing, but that is nothing new. We already do that. Local governments that have appeared before CLGF have expressed their appreciation of the advice from the CLGF and the Department many times. That includes North Las Vegas who has appeared before the Committee on several occasions over the last few years.

There was a concern expressed about keeping the Legislature in the loop once severe financial emergency has been declared. I think that is a great idea. To that end, I will submit an amendment to NRS 354.705, which would require the Department of Taxation to provide quarterly financial condition status reports regarding any local government in severe financial emergency.

There was also concern expressed about amendments to NRS 354.665 and 354.671. Those two statutes are about what to do if a local government is delinquent in submitting required reports to the Department, such as audits, debt management reports, or capital improvement plans, or if they have failed to

pay amounts due to the Public Employees' Benefits Program (PEBP). These two particular statutes have nothing to do with declaring severe financial emergency. A local government could be completely financially healthy and for some reason fail to report. These two statutes are designed to encourage timely reporting or payment to PEBP, as the case may be. If there is a reasonable answer to the delay, nothing happens. The ability to withhold consolidated tax until the required reports have been received is already provided within NRS. However, school districts and general improvement districts do not receive consolidated tax, so there is no incentive to induce those types of local governments to report in a timely manner. We need to provide an incentive for those other types of local governments and that is what the proposed language does.

There was concern expressed about the powers and duties of the Department of Taxation during severe financial emergency, particularly regarding working with collective bargaining groups. As you have heard, we have been working on a couple of amendments to address these concerns. We would like to continue to work with those union representatives to bring a solution to the Committee.

There was concern about what happens at the end of three years when a severe financial emergency continues to exist. That is what NRS 354.723 is about. We have already tried technical financial assistance; we have already been involved for a few years, but it does not look like we can right-size the budget. What happens after that? Right now, the law requires the Executive Director of the Department to determine the amount of any tax or mandatory assessment to be levied by the local government and the manner in which services provided by the local government must be limited in order to ensure a balanced budget. That is the primary goal, to ensure a balanced budget. Those findings are then submitted to the CLGF, and if they agree that severe financial emergency is unlikely to cease within three years, they make their recommendations to the Tax Commission. If the Tax Commission agrees with the CLGF and the Department after one or more hearings on the subject, the Tax Commission must submit a question to the voters at the next primary or general election about whether or not the local government should be disincorporated. If the voters say no, then the law as it currently stands requires the levy of the maximum amount of property taxes and any other taxes, and the services must be limited to ensure a balanced budget. The amendment in the bill, which basically outlines the role of the CLGF in this process, could be omitted without damaging the current process. If necessary, we would be amenable to removing the language in section 12, subsection 2 of the bill.

In response to the comments of Mr. Juden regarding Chapter 9 bankruptcy: that is certainly an option if the Legislature allowed for it. Basically, we cannot break contracts. The severe financial emergency laws take us as far as we can go without breaking contracts. Regarding the comments about section 8 of the bill and working with the bankers, the section says that we would just work with the creditors of the local government to formulate a debt liquidation program. The new amendment that adjusts bonded indebtedness by exchanging current bonds for new ones with better terms takes as much as we could from what Chapter 9 bankruptcy laws can do, which is reorganize debt. We cannot break the contracts but, through working with bankers, we can try to arrange for new terms that would be more favorable to the local government. The federal courts have a "cram down" power which allows them to break contracts. We cannot do that, but we can do everything short of that.

Those are all of my comments now; I am happy to take your questions.

Chairman Ellison:
Thank you. I appreciate the clarification.

Terry Rubald:
In the powers and duties of the Department, we would try to reorganize as much as possible to right-size the budget.

Assemblyman Carrillo:
I had emailed a few questions to you in Committee. I was unsure if you had received them.

Terry Rubald:
I did respond to your questions in an email (Exhibit F)

Chairman Ellison:
I would like to get everyone together to work this out prior to the work session. We will now close the hearing on Assembly Bill 54 and open the hearing on Assembly Bill 106.

Assembly Bill 106: Revises provisions related to public works. (BDR 28-244)

Michael D. Hillerby, representing American Institute of Architects Nevada:
I will first give a brief review of the bill. All of the pertinent language is at the bottom of page 2 of the bill. *Nevada Revised Statutes* (NRS) Chapter 338 regards public contracts and this specific part of the statute regards the elements of the contracts that can be included in the contract between public entities and design professionals, typically architects and engineers.

Ten years ago, this body passed legislation that requires the mandatory payment of the public entity's fees and costs in a negligence lawsuit once liability of the design professional is determined. It has also included language on page 2, line 30, which is the duty to defend. The duty to defend is a requirement that the design professional begin to pay the local government's defense costs from day one. Our problem is that our professional liability insurance policies will not cover such a defense. That is why we have been trying to remove that language.

After having listened to questions from the Committee during the last hearing on this bill, receiving questions since, and speaking with local governments, I would like to take a moment to clarify some things. First, I would like to clarify the difference between indemnification and the duty to defend. Indemnification means we have an obligation under law to pay our share proportionate to the liability determined either by trier of fact or through the settlement process. Duty to defend is a little bit different. Again, it is the requirement to start paying defense costs upfront.

One of the questions that has arisen is: When exactly would our professional liability insurance kick in? When would insurance providers be involved in the course of defending a lawsuit? It would not require that the design professionals themselves be sued, either by the plaintiff or a counterclaim from the public entity. Once a claim has been made and the design professionals are alerted by a letter, subpoena, or other means, we have a requirement in our policies that we notify our professional liability insurance provider that a claim has been made. At that point, they would begin participating in the defense jointly with the public entity. At that moment, the insurance provider would be paying for the defense costs of the design professional. The public entity would still be paying their own defense costs. At the end of the process, either through settlement negotiation or a decision by a trier of fact, negligence would be determined and our liability insurance policies would reimburse the costs of the public entity for any costs they incurred proportionate to our degree of liability. It does not require a lawsuit of the design professional. In many cases we are named along with the public entity, but if we are not, it does not require the government to countersue us.

The reason this has long been a problem for design professionals is because we know we have had to sign contracts that had an obligation to pay for something for which we do not have insurance coverage. The reason that fear has been manifested into reality is a couple of cases out of California where courts held that even though no negligence had been found, because there was a separate part of the contract that included a duty to defend, the design professionals, the defendants, who had been completely exonerated, were required to pay defense

fees. Again, that is absent anything that would trigger the indemnification portion. In one case the design professional had to pay $131,000 [*Crawford v. Weather Shield Manufacturing, Inc.* 44 Cal App. 4th 541 (2008)], in another, much more worrisome case, the design professional was responsible to pay a $550,000 legal bill [*UDC-Universal Development, LP v. CH2M Hill* 181 Cal App. 4th 10 (2010)]. Our concern has been made manifest by the California courts, and we are very concerned about what the end result could be. The reality of the situation is this: the design professional wants to be a party to helping defend their work. We want to continue to do work with public entities. We are there to provide help and expertise.

One of the questions that was asked was: What compels us to do that if we are absent a duty to defend? There are a variety of legal mechanisms that governments have to compel our participation in defense. Ms. Christine Drage is also here to answer some of the more specific questions you may have regarding this topic. The overwhelming experience is that we want to participate and cooperate with that, as do our insurers. We want to find out how we can settle those kinds of claims as quickly as possible and determine liability.

I hope that helps answer some of your questions. We have several people here in support to provide other testimony on their specific experiences and answer your questions.

Russell Rowe, representing American Council of Engineering Companies-Nevada:
We do not mind paying when we are liable. In fact, we have made it mandatory in statute. We do not want to pay when we are not liable. If we are not liable, there should not be a legal obligation to pay. If we agree to do that in settlement negotiations, that is fine when our insurance carrier agrees to pay those costs. We should not be contractually obligated in a manner where a court of law will hold us responsible for fees and costs when we have no liability at all. That is all we are asking.

Chairman Ellison:
Is anyone else wishing to testify in favor of Assembly Bill 106?

Ruedy Edgington, Private Citizen, Reno, Nevada:
I am an Engineer with HDR Engineering in Reno. I am in support of the bill. I would like to echo the comments of the two gentlemen up here before me. We are not trying to shirk our responsibilities, but we cannot accept a risk that is not insurable for us. I ask that you vote in favor of A. B. 106.

Christine Drage, representing American Institute of Architects:
I have represented architects and engineers in court for over 21 years, dealing with contractual issues such as the duty to defend through construction, negotiations of change orders, and through trials on the state and federal levels. I have worked closely with Mr. Hillerby and Mr. Rowe in the various industries in supporting this bill as well as previous bills, and just trying to get a clear path for insurance companies to pay for what they are supposed to cover, what public entities want them to pay for, and what we want them to pay for without creating coverage disputes.

Chairman Ellison:
Are there any questions from the Committee? [There were none.]

Craig Galati, Private Citizen, Las Vegas, Nevada:
I am with LG Architects, Inc. in Las Vegas, Nevada. It is a small business with 12 employees. The duty to defend is very burdensome for a small business. We take contracts to keep the doors open sometimes, and we have to sign these clauses. However, if something ever went awry where we would have to defend a claim, even if we were not liable, it could easily put our small business out of business. I do not think that is something that really helps anyone in this situation. If we created a liability situation and something were to be presented saying we were negligent, we understand that. That is the risk of our work. We are not trying to shirk that in any way. It is just the notion of signing a contract for $25,000 or $30,000 and potentially having to defend a claim for which we may not be liable and which could easily exceed any fees we might receive.

Chairman Ellison:
Are there any questions from the Committee? [There were none.]

Bill Valent, representing American Insurance and Investment:
I am with American Insurance and Investment in Las Vegas, Nevada, which represents architects and engineers throughout the state regarding professional liability and the general lines. We are an independent agency, so we can access directly or through brokers virtually every carrier that offers professional liability. Part of my duties includes the review of contracts for insurability purposes. I frequently see the defense requirements in contracts and suggest that they strike these provisions because they are not covered under their policies. Frequently, they will ask if I can get the coverage for them, but I am not able to do it. If I were able to do it, I would be happy to, but it is just not available in the industry. Basically, they are being asked to sign something that is uninsurable if defense is tendered. They would only be self-insured with respect to that.

Assemblywoman Neal:
I have a question for Ms. Drage. Do you think there are possibly unintended consequences of taking out the duty to defend resulting in public entities being responsible for that portion of the liability where they have not been previously in law? Is there going to be a situation where the insurance company for the public entity does not want to pay because the duty to defend is now vacated?

Christine Drage:
That would not be an unintended consequence resulting from the removal of the duty to defend from the contracts. It is really just a timing issue. For whatever reason, the insurance companies will not agree to pay up front the costs for the public entities incurred in defending plans and specifications. However, they will pay for it at the end. If the result is a settlement, mediation, or trial, at that time it is converted to indemnification and reimbursement and the insurance companies do pay at that time. It is really a matter of timing and coverage. At the end of the day, the public entities want the professional liability coverage that exists, and they require every professional to carry for all of their projects. By including the duty to defend in a contract, the public entities are giving the insurance companies a reason to decline certain aspects of coverage up front. If we eliminate that duty to defend language, the entire process stays the same, but the carrier will then bear the burden of paying through the indemnification process once it has been determined through mediation or trial that the design professional should be paying some money for damages caused by their services. If anything, the consequences of removing the duty to defend language are beneficial to the public entities because it clears the path for not having coverage disputes based on the contract for payment of indemnification dollars based upon the design professional's proportionate share of liability for any issue.

Chairman Ellison:
Are there any other questions from the Committee? [There were none.] Is anyone else wishing to testify in support of Assembly Bill 106? [There was no one.] Is anyone wishing to testify in opposition to A. B. 106?

Douglas V. Ritchie, Chief Civil Deputy District Attorney, District Attorney's Office, Douglas County:
In private practice, I used to represent design professionals and those in the construction trades. I understand the difficulty they are facing. However, the proposed amendment will shift the cost of defending the design professional's work from the design professional to public entities, the taxpayers. This issue is not about indemnification. There is no question that if a court determines that a design professional's work is negligent, the liability will be given to the design professional, who will be responsible for paying that

damage. The question is: who is going to defend the lawsuit? Public entities would love to be able to say, "Court, if we are liable, tell us how much and we will not have to worry about paying the attorney's fees that are incurred to defend this action." Current law allows for two parties to independently negotiate the terms of the contract. Parties currently sensibly say that between the design professional whose work product is in question and the public entity, it makes sense to have the design professional defend that work. Unfortunately, sometimes that requires the cost of attorney's fees.

The examples they have provided of design professionals having to pay large sums after being found not liable are definitely unfortunate. However, under the proposed bill, instead of the design professionals incurring the cost of defending their own work, the taxpayers would pay to defend the design professional's work. At the end of the day, the independent contractor would be adjudicated not negligent, but the taxpayers would have spent $550,000 defending this. The real issue here is tort reform. It is not about allowing design professionals to get out of the duty to defend their own work. One of the interesting issues that has arisen is that there is a blending of the duty to defend and the duty of indemnification. We all agree that a design professional is going to be responsible if they are adjudicated liable. The issue is: who has to pay to defend that work?

Here is a simple example: a public entity hires a design professional to design an overpass. The overpass collapses. There is an allegation that it was improperly designed. The public entity will be sued because they improperly designed an overpass and the design professional will be sued. Under this bill, they seem to think that they will not have to incur all of the attorney's fees because the public entity will have to pay those. However, that is not the case. If there is a lawsuit because someone was killed due to the defectively designed overpass, the design professional is going to have to retain counsel to defend themselves. Certainly, the public entity is not going to defend the design professional.

We are asking, why do the design professionals not defend their work when they are going to have to do it anyway? The public entity's liability is derivative of the design professional's work. We are only liable to the extent that the design professional improperly or negligently designed the product. We are asking that they defend us because of that. That is something that the current law allows us to do. We are able to negotiate up front with them regarding the terms of the contract, which is if your work is alleged to be defective, defend us while you are defending yourself.

There are issues regarding joint defense. There are other options available to attorneys. We can subpoena their witnesses. I believe the history is that the

design professionals will work with their public entities. However, if there is no duty to defend, there is no duty to cooperate with the public entity. It is quite possible that they would want to obstruct the public entity's efforts to defend itself because their liability is derivative of the design professional's work. Their liability will only attach when the public entity is adjudicated of using faulty design plans. There is a natural self-interest that the design professional would want to work with the public entity, but it is not guaranteed.

Assemblywoman Spiegel:
We just heard testimony from Mr. Valent corroborating that this component of duty to defend is not insurable for design professionals who are mostly small businesses. We will consider the event that a lawsuit is brought and the design professionals do not have insurance because the coverage mandated by the contract is not available and they are self-insured. The design professionals file for bankruptcy because they do not have the funds to cover the attorney's fees. How does that help the public entity?

Douglas Ritchie:
I think there is some confusion regarding the liability insurance. A design professional can obtain professional liability insurance. If they are sued for design negligence, their professional liability insurance will kick in. The insurance company has not only the duty to defend the design professional, but also to indemnify. The question here is about the costs that would be incurred to defend the public entity. I am not an insurance professional; I am not a broker. However, as I saw in private practice, there are carriers who will cover it. Anything can be insured, from David Lee Roth doing things to anything else, for the right price. If there is a market for it, then I would imagine that the market would be able to provide a quote for it. The difference is professional liability versus covering the public entity.

Assemblywoman Spiegel:
I actually do work in the insurance industry. One of the things I know from the contracts I have come across is that I am sometimes asked to cover things that are way beyond the scope of coverage. I would say to the public entity that I would be happy to buy the insurance if I can, but it would frequently increase the cost of the contract to the point that it would become cost-prohibitive for the public entity to use my services. If there is a mandate in the bill that there be coverage provided on the back end, instead of on the front end, if the business cannot obtain the insurance by a cost-effective means, it would end up increasing the cost. When you go to an insurer such as Lloyd's of London, it is a very different process from standard insurance. The premiums would end up being very high and would have to be passed back to the public entities. How is that in the public interest?

Douglas Ritchie:
I would point to decades of existing law and current practice. Businesses are able to enter into negotiations with public entities. They have entered into these contracts. If there is a cost, the design professionals would incorporate that into the cost of the bid. Currently, we are able to enter into affordable contracts. If it is expensive, we can negotiate that. If there is a cost for a premium of this type of coverage, it is something we would discuss with the public entity. At least we could have that discussion.

Assemblywoman Spiegel:
It seems that case law has changed the circumstances. I would hate to see our public entities having to pay a lot more for something that is not really necessary because it is only covered on the back end.

Chairman Ellison:
Does that mean you have covered Van Halen, Assemblywoman Spiegel?

Assemblywoman Spiegel:
No, I do not do that type of insurance.

Assemblyman Flores:
In the hypothetical you gave, the design professional and the public entity are being sued. The rationale is that since the design professional is already defending their work, they should also defend the public entity. Is there a scenario in which the design professional is not sued, and the public entity is sued, but the expectation is still that the design professional should defend the public entity? If yes, what is the rationale behind that? Why is the design professional held liable for that?

Douglas Ritchie:
Under the duty to defend, the public entity would say that they are being sued due to the design work of the design professional, and they would ask the design professional to defend them. It is in their contract. They are the design professional who has allegedly designed something negligently. At that point, the professional liability insurance would kick in. If not, the public entity could always file a third party complaint against the design professional. The public entity would say that a party is seeking damages from the alleged negligent design. If the public entity is liable, the design professional is also liable because they were hired for their expertise in design.

Assemblyman Flores:
Assuming this bill was to go forward, and the duty to defend was eliminated, could the public entity automatically file a complaint against the design

professional to trigger indemnification, even if the design professional was not being sued? Would that not have the same effect?

Douglas Ritchie:
If the public entity sues the design professional, then the design professional's professional liability insurance policy should kick in. They will be defending the lawsuit anyway because of their alleged design negligence.

Assemblywoman Neal:
In law, there are different sets of facts that trigger different applications of law. Are there different sets of facts that give rise to the duty to defend and the duty of indemnification? You mentioned they are being confused. In the case in California, *Crawford v. Weather Shield Manufacturing, Inc.* 44 Cal 4th 541(2008), they said, "the duty is invoked or arises only when it is embraced by the indemnity." What are the facts embraced in indemnity that do not trigger the duty to defend? Similarly, what are the facts that trigger the duty to defend that are embraced under indemnity?

Douglas Ritchie:
The duty to defend occurs as soon as a public entity is sued. There has been no adjudication as to whether or not there has been negligence. It is just an allegation that the design was defective. Under the duty to defend, as soon as that claim has been made against the public entity, we can tender that to the design professional. It is just an allegation, but the design professional has the duty to step up and defend because someone has to. Someone has to go to court to respond to the complaint.

The duty of indemnification only occurs once the adjudication of liability has been entered by the court. Once the court has listened to all of the facts and has found that there is some basis to the allegations and the value of the liability is determined, that is the duty of indemnification. The court says, "Public entity, unfortunately, your design professional was negligent. Someone was killed. Your liability is $1 million." Then we would, under the duty of indemnification, go to the design professional and tell them that they have to write a check for $1 million to us. Those are the two different duties. The duty to defend will always occur before the duty of indemnification.

Assemblywoman Neal:
When you gave the explanation, you said that adjudication triggers the duty to indemnify. Is that correct?

Douglas Ritchie:
Yes, that is correct.

Assemblywoman Neal:
The sponsors of the bill are asking for the duty to defend to kick in at the level of adjudication rather than at the beginning. If we followed the decisions in California that the duty to defend is embraced when the duty of indemnification arises, does that not meet the need of what the sponsors want? They want to be held responsible at adjudication. They do not want it to begin at allegation. It was said that the duty to defend has to be embraced within the duty of indemnification, but if adjudication happens in between, are we not still getting what the sponsor wants while also following the precedent of California?

Douglas Ritchie:
No, they are asking that there be no duty to defend. There will not be any duty to defend at any point. Only after the public entity—the taxpayers—has paid all of the attorney's fees and the court has determined liability will the design professional pay for the costs incurred. Up until that point, the design professionals are bystanders. Hopefully, they will help the public entity and provide testimony. However, they do not have any "skin in the game" until there is adjudication of liability.

Darren L. Schulz, Public Works Director, Public Works Department, Carson City, Nevada:
I am in agreement with what Mr. Ritchie said. I have also worked for consultants in the private sector, and I do see the rub in this situation. I boil it down to a matter of shifting risk. As the bill is currently written, the risk that is brought into concern from the cases in California is now being handed down to the taxpayers. Who is going to pay that difference? No one was found to be necessarily at fault, but someone has to pay the attorney's fees. Do you want that to be paid by the design professional, or do you want it to be paid by the public entity, which would be the taxpayers? I may be oversimplifying that, but that is how we see it.

Chairman Ellison:
Are there any questions from the Committee? [There were none.]

John M. Terry, P.E., Assistant Director, Engineering, Chief Engineer, Department of Transportation:
The Department of Transportation (NDOT) is opposed to Assembly Bill 106. Design professionals are currently required to defend public agencies in lawsuits resulting from their work on a project. We see no reason to change that provision. The duty to defend is standard practice in the industry. It is included in NDOT agreements. As the Chief Engineer, I believe design professionals can and should defend lawsuits that result from the work they were paid to do by a public entity such as NDOT. Service provider agreements should continue to

require the design professional to defend their projects. I am not a lawyer, but to me this is simple. The bill reads that the requirement to defend covers acts of agents or employees of the design professional or the performance of their contract. They are stretching this to suggest they would have to defend things they have nothing to do with. It says in the NRS that it only pertains to their actions. We are only asking that if there is a negligence, error, or omission that is their action, they help us defend if an outside lawsuit is brought.

Assemblyman Moore:
Hypothetically, a small design firm builds a bridge that collapses, and everyone is sued. What happens when that small company cannot afford to defend itself and goes bankrupt? What do you do with the bridge? How do you recover anything? Where do you go from there?

John Terry:
We would be there defending the suit. However, if it was their design that caused the failure of the bridge, we want the design professional to help us defend it. I do not know how to deal with the issue of their lack of resources to defend it. They were paid to do a design and that design failed. If it was clear that the design failed and it was their responsibility, they have to defend it.

Assemblyman Moore:
That would be at the point of adjudication, once they have been found liable. Is that correct? In my view as a layman, you could say that I was speeding down the road at 100 miles per hour and give me a ticket. That does not mean that I have to pay that immediately. I do not have to pay until I have gone to court and am found guilty. Until they are found negligent, they are not responsible. It is the public entity that entered into the contract. It is the public entity's name on the bottom line. The subcontractor, the small design firm, would then be in contract to you. Is that correct? They do not sign the overall contract saying they are responsible. Is that correct?

John Terry:
If they are the designer, they are responsible for it.

Assemblyman Moore:
My question is: whose name is on the bottom line? Do you have every subcontractor who works for you—because, in essence, that is what they are—sign on the bottom line? The public entity is the main signatory. The public entity contracted to build the bridge, not the design professional. The public entity sought out the design professional for their design, or the design professional may have solicited the public entity. However, you do not have every one of the subcontractors sign on the bottom line, do you?

John Terry:
We have a sealed plan with the seal of the engineer responsible in charge of the design. We are asking for that engineer in responsible charge to defend against the action that was caused by their work. You can talk about firms and subcontracts, but we are talking about the engineer that is in responsible charge for that design.

Assemblyman Moore:
I understand that. However, until the design professional is adjudicated as liable, I do not see how we can say that they have to defend themselves when it is just an allegation.

John Terry:
I am not a lawyer. It only says that the design professionals have to defend against their actions.

Douglas Ritchie:
There is a direct contract with the design professional. The design professional's name, or their firm's name, is on the bottom line. The design professionals are promising that if someone alleges that their work is defective, they will step up and defend their work. This makes a lot more sense than the public entity defending design professionals' work. The public entity hired the design professionals because of their particular expertise.

Assemblyman Moore:
You are saying that the design firm has a direct contract with the public entity for the design. Is that correct? The design professional is not a subcontractor along with everyone who is actually building it?

Douglas Ritchie:
Yes, that is correct.

Chairman Ellison:
I like the speeding ticket example.

Assemblyman Flores:
It is your interpretation of current NRS that if a design professional contributes Part C of a large project, and the public entity is sued for errors in Part A, then the design professional should not have a duty to defend Part A. Is that correct? It is my understanding that the reason this bill is here is that a design professional responsible for Part C of a contract may be held responsible to defend parts other than Part C if a suit is brought against the public entity for

any parts other than Part C under the duty to defend. Is it your interpretation that this is not happening?

Douglas Ritchie:
I am not trying to tell you what would happen now. I am trying to testify as to what would happen if this language were adopted. If design professionals' works were alleged to be defective, the public entity wants to be able to have the design professionals defend their works. There may be other claims, but the public entities are asking that the design professionals be allowed to defend their own work. This is a contractual relationship. This bill would prevent us from entering into that contractual relationship. We would like to retain the ability to negotiate with design professionals and have them defend their own work when it is alleged to be defective.

Assemblyman Flores:
I am trying to understand the policy rationale. It makes complete sense that if a design professional has a contractual obligation and it is performed negligently or defectively, the design professional has a responsibility to defend that. What I do not understand is the policy behind why the design professional is still responsible to defend the public entity when they are not liable. I want to understand the current policy rationale of why that is necessary.

Douglas Ritchie:
I am unaware of anything in case law that would include the duty to defend for a design professional whose work is not alleged to be defective. Normally, the public entity will enter into separate contracts with the different providers. There are architects, engineers, general contractors, and subcontractors. Usually there are also the duties to defend and indemnify in those contracts. The public entity would go to the responsible party whose work has been alleged to be somehow defective. Again, it is all driven by the plaintiff and their theory of the case, who they are alleging is responsible. Depending on what is alleged, the public entity will go to the responsible party and say that there is an allegation and the design professional must step up to defend their work.

Assemblyman Flores:
I think this question may be more appropriate for the presenters of the bill. It makes perfect sense that if I am being sued, I have to defend myself. It does not make sense to me that I must defend someone else even if I am not being sued. That is what I am trying to understand.

Assemblywoman Joiner:
You said that the design professionals should defend their own work. I interpret this bill as making sure that everyone defends their own work. From your

concerns about the public money, it seems as though you think this bill flips the responsibility to defend to the public entity. I do not think the bill does that. I want to make sure that the duty to defend does not flip to the public entity. I agree that each entity should defend their own work, and I think that is what this bill does.

Douglas Ritchie:
According to the language of the proposed bill, if you are dealing with just a claim of negligence against a design professional, the duty to defend will be removed. This will shift the responsibility of defending that design professional's work product from the design professional to the public entity. That is what this language will do. It will shift the duty to defend from the design professional to the public entity. You can throw in a lot of other factors, parties, defendants, or claims. However, if you narrow it down to just the language of the bill and just look at the design professional's negligence, this will shift who has to pay those attorney's fees.

Assemblyman Stewart:
If a design professional contributes Part C of a contract, it seems the problem is that in order to get the bid, they have to agree with all other parts and the issues with them. Even if they do not want to agree to those issues, they have to sign the contract to get the job. That is where I have an issue: they are not just responsible for their own work, it seems they are forced to be responsible for all other parts. Is that not what is being said?

Darren Schulz:
I do not know of any case in which a coconsultant or subconsultant was asked to defend in a case of negligence in a part of the project that person was not involved in designing. I cannot say that it has not happened, but I have not heard of it. I am not sure that it is necessarily our concern with the bill. It comes down to the primary person who is responsible.

Assemblyman Stewart:
Is that not what the two California cases decided? Even though the design professional was not negligent, they were responsible for paying the fees. It could put them out of business.

Chairman Ellison:
If a bridge collapses, there will be a court case where they have to determine if the design was bad and the Department of Transportation should have known that it was bad, if the engineer was responsible for the bad design, or if the contractor was negligent. At that point in time, the court will have to determine that one person or another is liable. Is that what you are trying to get to?

Douglas Ritchie:
In the fact pattern you have presented, the design professionals will be there defending their design. We are saying that rather than shifting that responsibility to the public entity, the design professionals should defend their work. At the end of the day, the court is going to determine who is liable and who is not. In the meantime, the design professionals need to defend their work products.

Assemblyman Carrillo:
You are saying that you want to keep everyone's feet to the fire from start to finish. Is that correct?

Douglas Ritchie:
We want the design professionals to stand up and defend their work rather than sit back and wait for the judge to determine liability, at which point they write a check. We want the design professionals to be involved from day one.

Assemblyman Carrillo:
It is almost like a construction defect lawsuit. There are many players in that and not all of them will be affected by the lawsuit. The person who supplied the dirt before the foundation is laid is even pulled into the situation. I can see your frustration with this; however, I can also understand the frustrations of the design professionals. There are people who are on the hook throughout the entire process who are not liable. From what I understand, the design professionals want to be at the table and held responsible for their work if it is a bad design. They will be accountable for their work. Everyone on the dais is a taxpayer as well, so we have the same concerns as you have.

Assemblyman Stewart:
Is there an amendment that you could come up with to make the bill more palatable for you while still protecting the design professionals? Is this just a black and white issue without possibility for compromise? Do we just have to do tort reform on this?

Steve K. Walker, representing Carson City, Douglas County, Lyon County, and Storey County:
We have had discussions with the proponents, but no one has proposed an amendment to date.

Carson City, Douglas County, Lyon County, and Storey County are all opposed to this bill.

Assemblyman Trowbridge:
I think we have an issue of developing a clear understanding of the difference between the duty of indemnification as a result of poor workmanship on the part of the design professional and the duty to defend in the event of an allegation. We also understand that there are a lot of frivolous lawsuits. There is the old joke that you could sue a ham sandwich. We have to acknowledge that the current language provides for the ability to negotiate. We also know that means that either party can agree to those terms that have been negotiated or not. We have to consider who is bidding. If we look at small, three- and four-person engineering firms, they either have to stick their necks out and assume uninsured liability or go to an insurance provider and pay an exorbitant fee for the coverage. We also have to acknowledge that insurance and bonds are folded into the bid amount.

I wonder if we are truly outsmarting ourselves because we are eliminating the smaller companies who are apt to give better bids. The larger companies who are large enough to absorb the cost might self-insure because if they are going to lose, they will have some sort of a fudge factor to cover the unknown liability. It is the same unknown liability that the public entity is assuming when they defend themselves. Are you outsmarting yourselves by eliminating smaller contractors and letting larger contractors increase the size of the bid to provide this insurance or self-insurance? I have not heard anyone say that this happens all the time. I have talked to some people who are involved in bidding projects—purchasing agents and attorneys who do this for a living. The first case that comes to mind is when a streetlight fell and caused a fatal accident. It was alleged that the streetlight was improperly designed and the county was sued. That case caused the language to be developed that calls for the duty to defend. That language has become the boilerplate for contracts. District attorneys do not want to assume the liability for additional workload. Purchasing agents do not want to change something that has been successful.

The case of the streetlight that was cited to me as the justification for the duty to defend occurred 20 years ago. I do not know of any such cases since. Because the design professionals have the duty to indemnify, they are saying they want insurance for the "ham sandwich" lawsuits. I think that "ham sandwich" insurance costs us far more than it saves. Please correct my thinking, if you would.

E. Lee Thomson, Chief Deputy District Attorney, Office of the District Attorney, Clark County:
We would like to enter our opposition to the bill as well. The phrase "unintended consequences" was used. I had a conversation with Mr. Rowe about it. There was some intention to provide an amendment, though I have not yet seen it. The way the bill is currently written, it attaches to all actions of a design professional in the performance of a contract. Not all actions by a design professional are professional services. If a surveyor was on an airport runway and the surveyor drove a truck into an airplane, there is liability. This bill removes the duty to defend from a standard, general liability contract. There is no such problem for getting insurance providers to pay for defense in that type of case. I do not think that is the intention of the sponsors of this bill, but it is something I think the Committee needs to take into consideration.

Additionally, I would point out the issue of a contractual relationship. If you look at the private sector and how private owners deal with designers, I doubt there is this type of attempt to ram a one-size-fits-all removal of a duty to defend. This is imposing on public owners something that is not out there in the rest of the market, whether or not there is currently an ability in a professional liability policy to offer that type of coverage.

I would also point out that the duty to defend is more than attorney's costs. It is providing witnesses, expertise, and documents. Is the public entity going to be responsible for paying the design professional whose design is in question to testify as a witness in court? If that is the case, I think that is an unfair burden on the public.

Chairman Ellison:
If you have testimony, please submit it because we are running out of time.

Lee Thomson:
If that is the preference of the Committee, we will submit our written testimony (Exhibit G).

Chairman Ellison:
Thank you. I think you hit on a good point, but we need to get everyone else on the record as well.

Jeff Fontaine, Executive Director, Nevada Association of Counties:
We agree with many of the previous statements made in opposition. I would just like to point out that the costs associated with defending a lawsuit are not just attorney's fees. They require expert witnesses—engineers and technical

experts. That is problematic for a lot of the smaller counties that might be involved in this kind of lawsuit to have to hire those types of experts.

Chairman Ellison:
Also, for the record, Mr. Fontaine, you were the director of NDOT for many years. There is a perspective you have because of your history.

Jeff Fontaine:
We do have NDOT representatives here who have given testimony. I am here representing the counties today.

Wes Henderson, Executive Director, Nevada League of Cities and Municipalities:
We are in opposition to A. B. 106. This bill could put our members in the position of defending third-party design professionals for their actions and then having to seek reimbursement after the fact if the defense was unsuccessful. As Mr. Ritchie and others noted, if the defense of the design professional is successful, there is no provision for the public entities to recoup their attorney's fees and other costs.

Brian McAnallen, representing City of Las Vegas:
We are also in opposition to A. B. 106. We would like to associate ourselves with the other comments made in opposition to this bill. We have also done a little analysis and talked to a consultant, Dr. William Deeb, the Director of Public Entities with Aon Risk Insurance. Our investigation indicates that this insurance is available. A lot of this relates to several issues, such as the size of the project, the scope of the work, and the professional's history. That is different than the professional liability insurance everyone has been talking about. The bottom line is that backing away from the duty to defend means that these design professionals will not be a part of the lawsuit at the beginning. Yes, the adjudication part and indemnity decided in the end will award the responsibility of all parties. However, we are running into a situation in front of us that could be a sort of duty to comply in that these design professionals, if they are not part of defending their own work, may not be cooperative in the course of the adjudication. You can run into those scenarios. The bottom line is the public entities will be on the hook to defend what could be the poor performance and design of the design professional. You are making a decision as to who is going to shoulder that burden upfront in the courtroom.

Chairman Ellison:
Thank you. I appreciate all of these comments. Is there anyone wishing to testify as neutral to Assembly Bill 106? [There was no one.] Will the sponsor of the bill please provide a closing comment?

Russell Rowe:
On behalf of the engineers, I did want to respond to Mr. Lee Thomson. We did talk and he did identify that as the bill was drafted, it did rope in general liability policies, which do provide insurance. There is no issue with the duty to defend. It is only regarding professional liability issues. We have spoken with Legal staff and they are working on language to correct that.

Chairman Ellison:
There are no proposed amendments at this time. We need to make sure we get anything like that in prior to the work session.

Assemblyman Trowbridge:
A very significant point was brought up. When a lawsuit is filed, the public entity must represent. If the result of that lawsuit is that design deficiency was the cause, is there insurance included in the design professional's indemnification? Can they be responsible for the overall cost of the case? It would eliminate a lot of the public entities' concerns if the design professional was responsible for the entire court case as well as damages if they are found responsible.

Michael Hillerby:
The professional liability insurance will cover whatever the proportionate liability is at the end. If it was completely the designer's fault, and the settlement was that it was 100 percent, the insurance would kick in. If it was also partly construction and various subcontractors' faults, each would bear their own responsibilities. We do, in fact, want to be there from the beginning, but we would like to be there with our insurance policy in hand. We will pay. We will shoulder the costs of our own defense from the beginning. If we are held liable at the end, we will shoulder our proportionate cost of the government's cost of defense. Our hope is that by our presence at the beginning, we can lower the cost of their defense if we are there with our insurer at the beginning, providing our expertise, and defending our own work. That is the whole point of this. We will be responsible for our own defense and any cost the government incurs once liability has been determined through settlement or judgment.

Assemblyman Trowbridge:
Is the determination of proportionate liability a standard part of the court's ruling?

Chairman Ellison:
If you have any more questions, please get your answers after the hearing. We will now close the meeting on Assembly Bill 106. Is anyone here for public comment? [There was no one.]

We will now close this meeting of the Assembly Committee on Government Affairs. Meeting adjourned [at 10:51 a.m.].

RESPECTFULLY SUBMITTED:

_____
Aubrie Bates
Committee Secretary

APPROVED BY:

_____
Assemblyman John Ellison, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Government Affairs

Date: March 4, 2015 **Time of Meeting: 8:36 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 54	C	Terry Rubald, Department of Taxation	Amendment
A.B. 54	D	John Lee, Mayor, City of North Las Vegas	Letter
A.B. 54	E	Yolanda King, Clark County	Proposed Amendment
A.B. 54	F	Terry Rubald, Department of Taxation	Answers to Committee Questions
A.B. 106	G	E. Lee Thomson, Chief Deputy District Attorney, Clark County District Attorney	Written Testimony