MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
February 24, 2015

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:01 p.m. on Tuesday, February 24, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Greg Brower, Chair
Senator Becky Harris, Vice Chair
Senator Michael Roberson
Senator Scott Hammond
Senator Ruben J. Kihuen
Senator Tick Segerblom
Senator Aaron D. Ford

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Jonathan Friedrich
John Radocha
Garrett Gordon, Community Associations Institute; Southern Highlands Homeowners Association
Angela Rock, Southern Highlands Homeowners Association; Olympia Companies
Gayle Kern, Community Associations Institute
Joseph Decker, Administrator, Real Estate Division, Department of Business and Industry
Robin Huhn
Norman McCullough

Robert Frank
Deane Delacruz
George Crocco
Robert Robey
Mark Leon
William Wright
Mark Hutchison, Lieutenant Governor
Robert Eglet, Nevada Justice Association
Tamer Botros, Las Vegas Defense Lawyers

Chair Brower:
I will open the hearing on Senate Bill (S.B.) 174.

SENATE BILL 174: Revises provisions governing eligibility to be a member of the executive board or an officer of a unit-owners' association. (BDR 10-617)

Senator Scott Hammond (Senatorial District No. 18):
The concept for S.B. 174 was brought to me by Jonathan Friedrich. This bill is a small tweak to the structure of *Nevada Revised Statutes* (NRS) 116 and makes a necessary fix to the makeup of the boards of homeowners' associations (HOAs). The intent was to cut down on collusion, malfeasance, fraud and so forth by limiting the number of related people who can serve on an HOA board at the same time.

Jonathan Friedrich:
This bill comes out of a number of abuses we have seen in southern Nevada. I have written testimony describing the need for this bill (Exhibit C).

Several simple amendments need to be made to S.B. 174. In section 1, subsection 9, paragraph (a), the word "may" should be changed to "shall." This way, there is no question about it.

In section 1, subsection 9, paragraph (a), subparagraph (1), the original language included the phrase "domestic partners." That language should be added back in since one of the cases cited in Exhibit C involved domestic partners who embezzled $300,000 from their HOA.

In section 1, subsection 9, paragraph (a), the language in subparagraph (3) somehow got twisted around when it was written. I would like it to say that if a person owns more than one unit, no other person related to that person may be on the board at the same time.

Chair Brower:
Let me remind you that if you have a proposed amendment, you need to provide it to someone on the committee beforehand. Only committee members can submit amendments for the committee's consideration. Has Senator Hammond seen your amendments?

Mr. Friedrich:
He has.

Chair Brower:
Exhibit C mentions what sound like allegations of criminal activity. Can you tell us whether any of that activity was the subject of a criminal complaint and/or prosecution?

Mr. Friedrich:
In the Autumn Chase case, I do not know what took place as a follow-up or whether the case was turned over to civil or criminal authorities. The person at the center of that case was arrested for detaining people in his home. I believe there was a civil case against him.

Chair Brower:
We often hear allegations of illegal or egregious-sounding conduct with respect to HOA activities in Las Vegas. If people see activities they think are illegal, those activities should be reported to the police. We have a hard time creating legislation based on allegations of illegal conduct if no one makes a complaint with the police.

Mr. Friedrich:
I personally made a police report to the Las Vegas Metropolitan Police regarding a violation of the provisions of A.B. No. 395 of the 77th Session. They took the report, but it went nowhere. I believe one or two other people have done the same thing. The way the statute is written, if someone complains, the complaint is confidential. The Real Estate Division will not disclose what is happening until it goes to a hearing with the Commission for Common-Interest

Communities and Condominium Hotels (CCICCH). Only at that time will the Division discuss the case in public.

Senator Hammond:
I have been in discussion with others in regard to S.B. 174, and other amendments have been brought to me. I have been in talks to see which language works best. We knew that section 1, subsection 9, paragraph (a), subparagraph (3) needed to be reworded or even eliminated. Others will testify who have suggestions for language, and we are amenable to that. We want to make sure we get a good bill. The intent of S.B. 174 is to root out any possibility of fraud or embezzlement.

John Radocha:
I live in Astoria Trails North in Las Vegas, and I am in support of S.B. 174. This bill will prohibit two people who live in the same home from being on an HOA board at the same time. In a recent case, the Real Estate Division investigated the three-person board of the Autumn Chase HOA. The Division spent over $22,800 to expose a husband-and-wife team who were stealing from the HOA. The husband had taken out a credit card in the HOA's name and used it for personal use. They kept no financial records, did not do a reserve study and kept homeowners in their home against their will after a meeting. The police arrested the husband, who pleaded no contest to two counts of coercion. Had S.B. 174 been in effect at that time, the Division would not have had to spend that $22,800 to investigate and prosecute the case. In another case, a domestic partnership embezzled $300,000 from the Cactus Springs Community Association. In that case, the homeowners were left with an empty treasury, requiring an increase in monthly assessments as well as a special assessment. That is why we need S.B. 174 to stop this behavior. I have submitted the findings of the CCICCH regarding the Autumn Chase case for the record (Exhibit D).

I ask you to please pass this bill.

Garrett Gordon (Community Associations Institute; Southern Highlands Homeowners Association):
We are here to support the intent of S.B. 174. We have an amendment to offer (Exhibit E), and we have spoken to Senator Hammond about it.

Angela Rock (Southern Highlands Homeowners Association; Olympia Companies):
We support the intent of S.B. 174. This bill speaks to not allowing certain individuals to be on an HOA board. I would like to take it one step further and state that those individuals are also not allowed to run for the board. When a person who is not eligible applies to run for the board, the management company knows the person cannot be on the board but must still allow the person's name to appear on the ballot. I recommend that the bill state the people named in the bill shall not be candidates for the board. This would allow the management company to prohibit them from being on the ballot.

Gayle Kern (Community Associations Institute):
We support S.B. 174 with the addition of the amendment in Exhibit E. This amendment proposes a new provision stating a person would not be eligible to be a candidate for the board or a member of the board based on the provisions of this chapter. The HOA would not place the person's name on the ballot, and the person would be prohibited from serving as a member or officer of the board. This would give us the ability to keep those names off the ballot when people are in violation of these prohibitions.

Our amendment also proposes deleting the language in section 1, subsection 9, paragraph (a), subparagraph (1) with respect to blood, adoption or marriage. We did not understand whether that addressed only people who lived in one unit or if it also included relatives in other units. For example, a man and wife own one unit, and the husband's third cousin owns another unit. Are all three of those people prohibited from running for the board? We thought the intent of the bill was to prevent people who live in one unit from being on the board. For that reason, we recommend deleting the language about relationships that could cause confusion and ambiguity to make it clear that it applies to people who reside together in one unit.

We also proposed an exception to the prohibitions in S.B. 174. There are many small HOAs that will have no board at all if they are not allowed to let a husband and wife serve on the board at the same time. We have to protect those small associations.

We also propose deleting section 1, subsection 9, paragraph (a), subparagraph (3) regarding the prohibition against a person who owns more

than one unit. To disenfranchise those people simply because they own more than one unit does not seem appropriate or fair.

Senator Kihuen:
Senator Hammond, are you amenable to this amendment?

Senator Hammond:
Yes, I am open to all requests. I will take all the amendments under consideration to figure out what language is best. Several people have come up with the same conclusions about the intent of the bill. I would like to work with those people. We want to cut back on the number of opportunities for fraud. Regarding the situation of those who own multiple units, we might want to consider not the number of units they own but what percentage of the units in the entire complex they own.

Joseph Decker (Administrator, Real Estate Division, Department of Business and Industry):
From the Division's perspective, the purpose of an elected HOA board is to effectively and fairly represent unit owner members of the HOA. Stacking a board to gain control of it skews that adequate representation of member unit owners and can lead to fraud or misconduct in regard to HOA funds and the obligations or authority of the board. To the extent that this bill is a step toward addressing those issues, the Division supports S.B. 174 with the amendments proposed by Mr. Friedrich and Ms. Kern.

Robin Huhn:
I have been a member of my HOA board and support S.B. 174. I have written testimony regarding the bill and proposed amendments (Exhibit F). Homeowners need to be prevented from serving on an HOA board if another person in the same home is already on the board. The chance for conflict of interest is too great. We have seen embezzlement, bias and fraud, as Mr. Friedrich mentioned. This practice is nepotism and creates an incestuous, covert relationship within the HOA. In my HOA, a husband and wife on the board are good at stonewalling actions in votes that are going on. This is not healthy for our community. There are more than enough people in the community to take one of their places on the board.

Chair Brower:
Because we have another bill to hear today, I will ask witnesses to limit their testimony to 2 minutes each. If you have more extensive written comments you would like to submit for the record, please do so.

Norman McCullough:
I have written testimony explaining my support for this bill (Exhibit G).

Robert Frank:
I favor S.B. 174 and agree with everything Mr. Decker said. This is an urgently needed statute change to reduce the kind of corruption we have seen in Nevada, where conflicts of interest have corrupted board activities. This is the right thing to do, and I strongly urge you to approve this bill.

Deane Delacruz:
I support S.B. 174. Hopefully, this will prevent the fraud that is rampant in HOAs in southern Nevada.

George Crocco:
I am in favor of S.B. 174. Having two people from the same house, whether they are husband and wife, related or cohabiting, on an HOA board at the same time is dangerous for the wellbeing of the community. It stifles decisions, limits opinions and can allow for theft of homeowners' funds when the board has only three members, as there was in the Autumn Chase situation. I agree with Mr. Friedrich's amendment to section 1, subsection 9, paragraph (a) to change the word "may" to "shall" to make sure there are no loopholes in this law.

As a homeowner who is facing a situation in which a husband and wife are attempting to be on the board of my HOA at the same time, I need the protection this bill will afford. The president and treasurer of my board both want to bring their husbands onto the board. They have put in the necessary paperwork to get their husbands' names on the ballots. They would then be four of the five people on the board. This is totally insane and ridiculous. This is why I am in favor of S.B. 174.

Robert Robey:
I support S.B. 174, which is a fantastic bill that needs to be implemented. I once attended a meeting by a snake oil salesman. He had a limited liability company (LLC), and he would buy many condominiums that were in bad shape.

All he had to do was put one condo in the name of the vice president, another in the name of the treasurer and a third in his own name, and he could run three people from the same LLC for the same board.

Senator Kihuen:
If this bill becomes law, what will happen to boards that have family members serving now? Will they have to hold new elections?

Chair Brower:
That is a great question. We will have to discuss that with counsel and the sponsor in terms of potential retroactivity.

Mark Leon:
I am a board member of Mountain's Edge Master Association. I signed in today in opposition to S.B. 174 because of my concern about section 1, subsection 9, paragraph (a), subparagraph (3). Now that I understand you may change that language, I no longer oppose the bill. I do not think it is necessary to prevent someone who owns two units from serving on the board.

William Wright:
I am a member of the Real Property Law Section of the State Bar of Nevada, but I am not here to speak on its behalf today. I signed in as being against S.B. 174. I am now leaning toward being neutral based on the proposed amendments. I agree that undue influence on the board can be a problem, and I support the intent of the bill. In the Autumn Watch situation, I do not know that this change would have made a difference if the couple in that case had been dating rather than married. The focus on marriage in this bill is inappropriate for deciding who can be on a board. If the limit is to be per unit, that would make sense. It would also be easier to draft and would be more in line with the other statutes that already exist in this area.

With regard to section 1, subsection 9, paragraph (a), subparagraph (3), it runs somewhat counter to the way NRS 116 already works. Declarants, for example, have a declarant control period where they control the entire board. That is based on the idea that they have a greater stake in the community, having 100 percent ownership from the beginning, and that stake diminishes as they sell units. By the same token, someone who purchases many units in a community has a greater financial stake in that community than other owners.

To say that a person in this situation would not have corresponding representation on the board seems counter to other sections in NRS 116.

I am also concerned because there does not seem to be a mechanism for enforcement. I understand the amendment that would allow the HOA to keep someone off the ballot, but section 1, subsection 9, paragraph (a), subparagraph (2) poses a problem. Whether someone "stands to gain any personal profit or compensation of any kind" is fact-specific. I can imagine a situation in which an HOA that keeps someone off a ballot for that reason being sued because the person contends he or she does not have any kind of personal profit, and that will draw lawsuits. I can also see a problem if a person gets elected to a board at a time when there is no question of personal gain, but later the person does stand to gain. At that point, we are going to have to figure out how to remove that person from the board. I do not see any mechanisms in the bill to deal with any of these problems. Candidates are required to fill out forms stating that they are in good standing and have no conflicts of interest. Under NRS 116, we have an advisory opinion from the Division that the HOA cannot keep people off the ballot. I agree with that, because HOAs do not enforce NRS 116; the State does. Without some sort of specific mechanism to protect the HOA when it does enforce these provisions, this language is problematic.

Chair Brower:
I will close the hearing on S.B. 174 and open the hearing on S.B. 135.

SENATE BILL 135: Revises provisions relating to witnesses. (BDR 4-44)

Senator Greg Brower (Senatorial District No. 15):
Senate Bill 135 is aimed at fixing a glitch in our current evidentiary rules governing civil litigation in Nevada. The bill intends to make NRS 50.125 exactly like Federal Rule of Evidence (FRE) 612.

It is a nuanced legal issue, and I will walk you through the scenario S.B. 135 is intended to address. It is not a purely hypothetical scenario, in that this issue was recently brought to light by a Nevada Supreme Court case decided about a year ago. Suppose Senator Ford is representing Senator Kihuen in litigation. In preparation for Senator Kihuen's testimony at a deposition or court hearing, Senator Ford shows Senator Kihuen some documents, or Senator Kihuen looks at some documents that are otherwise confidential and protected from disclosure by attorney-client privilege. If it can be shown that Senator Kihuen

later used those documents to refresh his recollection in preparation for his testimony, the other side in the litigation would be entitled to obtain copies of those documents even though they are confidential documents under attorney-client privilege. That was what the Nevada Supreme Court said recently about what is required under NRS 50.125.

The federal rule on the same issue takes a slightly different approach. Under FRE 612, given that exact same scenario, the other side could ask the court for an order compelling Senator Kihuen to give up those privileged documents, but it would be up to the court in its discretion to make that decision. Senator Ford, as Senator Kihuen's counsel, would be able to make the argument to the court that, for whatever reason, those privileged documents should not have to be given up. Practitioners whom I have talked to generally believe the federal approach is a better one, and that is what S.B. 135 adopts.

The Nevada Supreme Court teed this issue up for us in a case from last year. In that case, one of the lawyers argued that NRS 50.125 should be interpreted to read as though it was written like FRE 612 because, in that lawyer's view, it was the only logical way to approach the issue. However, the Nevada Supreme Court said that NRS 50.125 does not read like FRE 612. Until and unless the Legislature changes it to read that way, the Nevada Supreme Court was not able to interpret NRS 50.125 as though it were FRE 612. Senate Bill 135 is intended to change NRS 50.125 to read like FRE 612, which we believe is the more logical approach on this admittedly nuanced legal issue.

Senator Segerblom:
I am wondering how this would work procedurally. Normally, you would have to produce that evidence before the deposition. In this case, do you disclose it before the deposition, then go to the judge to get a decision?

Senator Brower:
The way this would typically come up is when Senator Kihuen was testifying, he would be asked, "Mr. Kihuen, did you review any documents in preparation for your testimony today?" If Senator Kihuen acknowledged that he looked at an otherwise privileged confidential memo from his lawyer, under NRS 50.125, opposing counsel would have the ability to demand the production of that privileged document. Under S.B. 135, following FRE 612, the court would decide whether—despite the confidential, privileged nature of that

document—Senator Kihuen should nevertheless be required to give it up. That is how it would come up in real life.

Senator Segerblom:
I understand how it would come up, but I am more concerned about the procedure. Do we have to stop everything, go to court and find out the decision? Under NRS 50.125, you know the document has to be disclosed and would be prepared to give it over right then when the question was asked.

Senator Brower:
I do not think that would address it. The Nevada Supreme Court decision puts into place a requirement that when a lawyer is preparing a client for testimony, the lawyer cannot show his or her client anything lest it become arguably something used to refresh the witness's recollection in preparation for testimony. The federal rule allows for more free communication between lawyer and client of privileged information and privileged documents without the absolute inevitability of that privileged document having to be produced.

Mark Hutchison (Lieutenant Governor):
My understanding is that what happens at a hearing or trial is different from what happens at a deposition. In *Las Vegas Sands Corporation v. Eighth Judicial District Court*, the Nevada Supreme Court said that NRS 50.125 just deals with hearings or trials. It is not a matter of discovery. You would have to produce the document, just as you said.

The way it works is that in the example Senator Brower was using, Senator Kihuen would say, "I have used a memo my attorney prepared to refresh my recollection." Opposing counsel would then say, "Your honor, I have to have that document." In the *Las Vegas Sands* case, the Nevada Supreme Court said that because this has to do with cross-examination and the testing of the credibility of a witness, Senator Ford would have to produce that document at the time of the hearing or trial.

In the Eighth Judicial District Court, the Discovery Commissioner has also applied NRS 50.125 to discovery. When an attorney asks for documents used to refresh a witness's recollection, it is my understanding that the Discovery Commissioner applies NRS 50.125 and requires the production of those documents as in a hearing. I do not know if that approach has changed since the *Las Vegas Sands* ruling came out or if the Nevada Supreme Court made it

clear that NRS 50.125 is a rule of evidence that applies only to hearings or trials, as opposed to a discovery rule. To the extent that the question still has to be litigated, you could make the argument that this did not apply to a document used to refresh a witness's recollection in deposition, and that the document would only have to produced if the case went to trial or hearing.

Senator Segerblom:
In a hearing, you could hand the document to the judge, and the judge could look at it and decide at that time if it had to be disclosed.

Lieutenant Governor Hutchison:
I think that is right. What this rule would contemplate is that at the time of the hearing, opposing counsel would demand the document. The witness's attorney would state that it should not be produced because it is proprietary, confidential or covered by attorney-client privilege. There would then be a hearing held on that question.

Senator Brower:
The language of FRE 612 makes it clear that two situations come into play. The one we are talking about is the one where a witness reviews a document in preparation before testifying. If, for example, Senator Segerblom is the witness at trial and I as his lawyer give him a document and ask him if it refreshes his recollection while he is testifying, clearly I would have to give opposing counsel a copy of that same document. That rule remains in place. We are only talking about the review of documents in preparation for testimony here. The federal rule makes a distinction between the two; the State rule does not at this time.

I should add that 34 states have adopted the federal language. This seems to be the trend around the Country.

Senator Ford:
It seems to me that putting our State rules in compliance or conformance with the federal rule in this arena is the right way to go.

Senator Brower:
In the *Las Vegas Sands* case decision, the Nevada Supreme Court said, "In the 40 years since the passage of FRE 612, the Nevada Legislature has had the option to bring NRS 50.125 in line with the federal rule by adding a discretionary prong, but has not." That was the fact the Nevada Supreme Court

was struggling with: that the statute did not allow it to reach any other conclusion. We think the discretionary prong from the federal rule would be a benefit to civil litigation in the State.

Lieutenant Governor Hutchison:
Our state courts are well-equipped to perform this balancing act, where the court will be asked to weigh whether writings ought to be produced based on need, versus protecting what typically is privileged information but could be confidential or proprietary information.

I appreciate Senator Brower bringing this bill. As Senator Ford said, it is the right way to go.

Robert Eglet (Nevada Justice Association):
We support S.B. 135. It is long overdue, and I echo Senator Brower's concerns about the problems this situation has caused for lawyers preparing clients for depositions. It is difficult for us to do that without risking being required to give up privileged information.

Tamer Botros (Las Vegas Defense Lawyers):
I am a board member of Las Vegas Defense Lawyers, an organization of civil defense attorneys. We support S.B. 135. As Senator Brower mentioned, under the wording of NRS 50.125, when attorneys provide their clients with memos, letters or emails for review in preparation for depositions, those documents are subject to disclosure. The solution is very simple: pass S.B. 135, which is modeled after FRE 612. It basically gives the judge discretion to review the document in chambers and excise any portions protected under attorney-client privilege and/or work-product doctrine.

Senator Harris:
I will close the hearing on S.B. 135.

Chair Brower:
The meeting is adjourned at 1:50 p.m.

RESPECTFULLY SUBMITTED:

_____
Lynn Hendricks,
Committee Secretary

APPROVED BY:

_____
Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**Exhibit**		**Witness or Agency**	**Description**
	A	1		Agenda
	B	5		Attendance Roster
S.B. 174	C	1	Jonathan Friedrich	Written testimony
S.B. 174	D	6	CCICCH	Findings in Autumn Chase Case
S.B. 174	E	1	Community Associations Institute	Proposed amendment to S.B. 174
S.B. 174	F	2	Robin Huhn	Written testimony
S.B. 174	G	1	Norman McCullough	Written testimony