MINUTES OF THE SUBCOMMITTEE OF THE SENATE COMMITTEE ON COMMERCE AND LABOR

Seventy-third Session
April 12, 2005

The subcommittee of the Senate Committee on Commerce and Labor was called to order by Chair Michael A. Schneider at 12:50 p.m. on Tuesday, April 12, 2005, in Room 2144 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Michael A. Schneider, Chair
Senator Maggie Carlton
Senator John J. Lee

STAFF MEMBERS PRESENT:

Kevin Powers, Committee Counsel
Donna Winter, Committee Secretary
Scott Young, Committee Policy Analyst
Jonathan Sherwood, Committee Secretary

OTHERS PRESENT:

Michael Buckley, Ombudsman for Owners in Common-Interest Communities, Real Estate Division, Department of Business and Industry
Scott Anderson, Deputy Secretary of State, Commercial Recordings Division, Office of the Secretary of State
Pamela Scott, Howard Hughes Corporation
Tami Devries, Legal Administrative Officer, Real Estate Division, Department of Business and Industry
Shari O'Donnell, Signature Homes
Robert L. Crowell, Nevada Trial Lawyers Association
Buffy J. Dreiling, Nevada Association of Realtors

Chair Schneider opened the meeting with Senate Bill (S.B.) 325.

SENATE BILL 325: Makes various changes concerning common-interest communities. (BDR 10-20)

Michael Buckley, Ombudsman for Owners in Common-Interest Communities, Real Estate Division, Department of Business and Industry, said a section in S.B. 325 dealt with the naming of associations. He said this issue concerned the Office of the Secretary of State and thus, Scott Anderson, Deputy Secretary of State, Commercial Recordings Division, Office of the Secretary of State , was going to speak about the issue.

Mr. Anderson said the provisions in section 32 of S.B. 325 mirror the provisions in chapter 78 of the *Nevada Revised Statutes* (NRS). He said his office had no objection to section 32 of S.B. 325. He said his office functions would not change, but an additional entity of a limited-liability company would be covered versus just a corporation.

Chair Schneider opened the hearing on S.B. 153.

SENATE BILL 153: Prohibits community manager who imposes fine against certain persons from soliciting or accepting any percentage of fine or any fee for collecting fine. (BDR 10-830)

Chair Schneider said there was a mock-up of a proposed amendment prepared for Senator Hardy (Exhibit C). Mr. Buckley said "Pamela Scott, Howard Hughes Corporation, had been in contact with Senator Hardy."

Ms. Scott said the language in the proposed amendment mock-up might need some work by the Legislative Counsel Bureau (LCB), but she said she could convey the intent of each section. She said:

> Section ...1, the way the original NRS 116.31145 was written, never clarified the intent. The intent of that section was to clarify that if a unit's owner sent in their monthly assessment, you couldn't apply it toward the fine. The original language didn't clarify that. This is simply an attempt to clarify the existing intent in existing law.
>
> Section ... 3, the intent is that a manager or management company who is involved in the collection of fines the associations have assessed cannot receive a percentage of those fines. It cannot be based upon the number of fines they ... are collecting. This is an attempt to put a stop to that practice. No percentage or proportion

> of those fines. It is not the Senator's intent that the monthly management fee can't be collected. Paragraph (c) is an attempt to clarify section 3 does not include the contracted monthly management fee, for the services in a contract are being provided. It is the intent your fee can never be based on a percentage or a portion of fines.
>
> Section 4 was the ombudsman's language. He has sent a message up today that he would like that section removed.
>
> Section 5 is simply to say if you have a full-service management company, and some of the large ones are full-service, and you are offering to file liens, record notices of default and go through the foreclosure process, ... you have to meet the same licensing and the same qualifications as the actual foreclosure services that are out there. I hope I have conveyed the intent of this and the LCB will have to tell you if the language conveys that.

Chair Schneider asked if the new language in section 4 of the mock-up was to be removed. Ms. Scott said yes, it was to be removed. Tami Devries, Legal Administrative Officer, Real Estate Division, Department of Business and Industry, said she spoke with the ombudsman that afternoon and the commissioner already had the authority to do what was outlined in section 4. She said regulations had been adopted regarding the issues in section 4.

Senator Carlton asked what section 5, subsection 2, paragraph (g) addressed and who is allowed to provide foreclosure services.

Ms. Scott answered:

> The original language that this section amends, which is NRS 649, subsection 2 ... says who is not a collection agency. Paragraphs (a) through (g) are the exceptions to being a collection agency and this is intended to say that nonprofit cooperatives and common-interest communities are not collection agencies and that follows federal regulation from previous years as well. Licensed real estate agents have been exempted from being a collection agency in the past as well, but now some of those are out there acting as community managers, so that section is to clarify that.

> Paragraph (g) simply says if you are a management company or … community manager who is going to be collecting … , then you are going to be governed under NRS 649, which governs other foreclosure services and you are no longer exempted from being a collection agency. You now are a collection agency. Paragraph (g) was an exemption from being a collection agency and is saying if you are doing foreclosure services you are not exempted.

Kevin Powers, Committee Counsel, said:

> … This is trying to accomplish by establishing, in statute, the circumstances under which a community manager will be determined to be acting as a collection agency. If the community manager does not engage in conducting foreclosures under the common-interest ownership act, then that community manager is not acting in the capacity of a collection agency and would not be subject to the collection-agency chapter in NRS 649. However, if the community manager does participate in the foreclosure process under the common-interest ownership act in NRS 116, then the community manager would be subject to this chapter. I think one of the consequences is that the community manager would be subject to additional regulation under that chapter; and … would have to be licensed as a collection agency; and … would be subject to the jurisdiction of the commissioner of financial institutions, who is the officer that regulates collections agencies.

Ms. Scott said, “I believe that was Senator Hardy’s attempt.” Senator Carlton asked what was the purpose of this measure.

Ms. Scott said:

> It is my understanding that there have been complaints about community management companies that feel they are exempted as collection agencies but they are out there performing foreclosure services for a fee.

Chair Schneider said the more foreclosures the community management companies could do, the more fines they can execute and the more money they would receive. He said it was a form of head-hunting. Ms. Scott said that one

could not foreclose for a fine. She said "I believe the intent here is to have an even playing field." Chair Schneider asked if two sets of books would be required for this measure. Ms. Scott said, "I believe the intent of the language is that it be clear on a person's account history what is a fine and what is a monthly assessment so there is no commingling."

Senator Carlton asked if there was any opposition to S.B. 153. No one spoke in opposition. Senator Carlton said she would recommend to amend and do pass S.B. 153 with the mock-up language and the elimination of section 4, per the ombudsman's request. Senator Lee seconded the recommendation.

Chair Schneider asked how Senator Townsend wanted to deal with the four bills in the subcommittee. Scott Young, Committee Policy Analyst, said he had not spoken with Senator Townsend regarding the bills in the subcommittee for some time. He said he had the impression that all agreeable provisions from the four bills were to go into one single bill. He said he would check with Senator Townsend and Senator Hardy for any objections to such a measure.

Chair Schneider opened the hearing on S.B. 258.

SENATE BILL 258: Makes various changes to provisions relating to common-interest communities. (BDR 10-129)

Mr. Buckley said:

> Our commission did not have the opportunity to look over this and it involves the construction-defect litigation. I don't think we have had a substantive discussion at the commission level regarding these kinds of lawsuits. As a result, we did not take a position on this.

Mr. Young said the bill originally was requested by former Senator Ann O'Connell. He said for that reason there was no one present to speak for the bill. Chair Schneider asked if there was something in the laws that required an explanation of both the positive aspects and negative aspects of a civil action. Mr. Buckley said it was in section 1, subsection 10 of S.B. 258. Chair Schneider asked if the bill would make it clearer.

Mr. Powers said:

> Subsection 10, as Mr. Buckley pointed out, does require this type of information to be provided to the unit owners at least ten days before the association commences or seeks to ratify the commencement of the civil action. They are supposed to be provided with this information in written form. ... The new language in paragraph (b) of subsection 9 ... would require a similar type of discussion of the benefits and costs of the civil action at the meeting where the determination of whether to ratify the civil action takes place. It is just providing that information again at the meeting.

Chair Schneider asked if this provision would allow the homeowners to know what is occurring.

Mr. Powers said:

> Correct. The homeowners should have already gotten that information pursuant to subsection 10 as well, in written form ten days prior to the meeting where they seek to ratify the commencement or one that has already commenced or to ratify or give approval to the association depending on what type of civil action it is.

Senator Lee said he read it as a disclosure and a knowledge that people will be educated on what to expect. He said he agreed with the disclosure in section 2.

Senator Carlton asked who would be getting the information.

Mr. Powers said:

> Senator Carlton, right now, we are just focusing on section 1 because that section does something different. Senator Lee was referring to section 2 as well. Right now, we are only focusing on section 1. As you see in subsection 9, the existing state of the law is that a common-interest community through its homeowners association cannot commence certain civil actions without the approval of the homeowners. They can commence certain civil

> actions without that approval but if it is a civil action to protect the health, safety and welfare of the members of the association, they have to seek ratification by the homeowners within 90 days after commencing the civil action. In order to get that approval before commencement or ratification approval after commencement, in subsection 10 on page 4, this is existing language: "At least ten days before an association commences or seeks to ratify the commencement of a civil action, the association provides a written statement to all units' owners that includes: ... " information concerning that civil action. Under existing law, before the meeting of approval or prior approval or ratification takes place all unit owners get the information. ... this bill, in section 1, ... says at that meeting you have to provide the owners who are at that meeting with additional information. Essentially, what was provided in the notice and any additional updated information concerning that civil action, if the civil action is for a constructional defect, pursuant to NRS 40.600 to 40.695, inclusive. With regard to that particular type of civil action involving constructional defects, there will be an additional disclosure at the meeting, even though the unit owners still would have received their written disclosure prior to the meeting, pursuant to existing law.

Chair Schneider said the provision would allow the unit owners to ask questions and be reminded of the action. He said it seemed consumer-friendly.

Shari O'Donnell, Signature Homes, offered some proposed amendments to S.B. 258 (Exhibit D). She said she was concerned with section 1, subsection 10, paragraph (b) and the fact that it was not required in writing about the discussion in the meetings regarding civil actions. She said verbal reassurances and agreements are sometimes inappropriate in the meetings. She said the agreements need to be written. She said written disclosure should also be distributed at the meetings and verbal representation should not be allowed. She said she was also concerned with not stating potential adverse consequences of civil actions such as damage to the property or the possibility of a class-action lawsuit. She said issues of refinancing the home and future-buyer issues need to be addressed as after-litigation consequences. Senator Carlton said a lot of the discussion concerning these issues occurred during the first construction-defect hearings when the language was developed. Senator Carlton said it was the

lawyer's duty to explain the potential consequences to the best of their ability, but to foresee all outcomes would be impossible.

Mr. Powers said:

> I might add that the purpose of this section is to provide notice to the unit owners to allow them to make a decision about whether to approve commencing the civil action or whether to approve or ratify a civil action that has already commenced as permitted by the section. The reasons for disclosure about the potential consequences of whether or not to file the lawsuit, or ratify or approve the lawsuit are tied to the purpose that the unit owners are there. They are supposed to determine whether or not the civil action is in the best interest of the association and either approve it or reject it. That is why the disclosure is limited to the consequences that would flow from the litigation.

Ms. O'Donnell said she would be happy if the agreements were in writing to protect consumers. Senator Carlton asked how every answer would be put in writing between the first notice and the second notice distributed at the meeting. Ms. O'Donnell said it was not really possible but critical questions needed to be put in writing. Senator Carlton said a smart consumer would ask those questions verbally and then follow up on them. Ms. O'Donnell said they would get answers such as "we have a list of lenders who will lend to you." Chair Schneider said the Committee had always done a lot of work for the consumer but homeowners needed to be aware that when they sign into an association they might lose some of their rights. Senator Carlton said the consumers were provided with the tools and needed to sometimes protect themselves. She said if overburdened with notice requirements, problems may arise in the future.

Robert L. Crowell, Nevada Trial Lawyers Association, said Senator Carlton had expressed his thoughts perfectly. He said when a homeowner discusses a case with a lawyer, there was no attorney-client privilege, but when a lawyer discussed a case with the board, there was an attorney-client privilege. He said the reason for the privilege with the board was to encourage an open discussion with the homeowner. He said if the provision set forth by Ms. O'Donnell went forward, the attorneys would lose the privilege and arm the opposition with information that might damage the client's case.

Mr. Buckley said:

> I think a representative from the Realtors is here to speak on section 2. I think one other note is the information on lawsuits is already required to be given in the resale certificate under NRS 116.4109. I am not sure we really need this and the question about the advertisement, I do not know, maybe the Realtors need to speak on that. It may be covered in the disclosure that the owner has to fill out when you sell the house.

Buffy J. Dreiling, Nevada Association of Realtors, said she was concerned with section 2 because the disclosure is already required in the common-interest communities. She said it was also required in the seller's real-property disclosure form. She said both of those provisions statutorily give the buyer a right to rescind after they have reviewed those disclosures. She said even after a contract is signed, it is contingent upon review of the disclosure documents. She said if it were required in any advertisement, how far would the disclosure have to go. She said the disclosure under NRS 40.688 was extensive. Senator Lee asked the meaning of the term "has been" in the proposed provision. Ms. Dreiling said the issue of "has been" was already covered under subsection 1. She said she would have to look at the seller's real-property disclosure form to see if that was one of the "has been" issues. She said several categories in the disclosure form included "has it ever been." She said the term "has been" could be added to the disclosure form. Senator Lee said he was concerned if a person bought property and needed to know if there were problems with the soils or other issues from a historical perspective. Ms. Dreiling said she did not have an issue with trying to capture the history and ensuring it was in the disclosure form. She said her primary concern was requiring it be provided in any advertisement. Senator Lee asked if the small advertisements in the newspapers were from licensed Realtors. Ms. Dreiling said many of the advertisements were from licensed Realtors.

Chair Schneider asked the trial lawyers to establish some language for next Legislative Session to fix the issue of disclosure. He said the important issue was to help the consumer and allow them to sue if they choose to do so.

Mr. Crowell said he believed legislation written concerning disclosure was a way to manipulate the construction-defect laws currently in place. He said any constraints placed upon the attorneys or clients in such cases provided an

advantage to the opposition in court. He agreed to meet with Chair Schneider during the interim to further discuss the issue of construction defects and disclosure. Ms. O'Donnell said she wanted to work with Mr. Crowell to discuss how information is discussed with the board.

Senator Carlton recommended no further action be taken on S.B. 258. Senator Lee concurred with the recommendation.

Mr. Powers said:

> I am just conveying the information Senator Townsend provided to me. As you know in S.B. 325, under existing law, a person may act as a community manager if they have a property-manager permit under chapter 645 of NRS issued by the Real Estate Commission or a certificate issued by the Commission on Common-Interest Communities, the certificate as a community manager. Senate Bill 325 changes that scheme by requiring by July 1, 2007, that all community managers have a certificate issued from the Commission on Common-Interest Communities, regardless of whether they also have a permit as a property manager issued by the Real Estate Commission. The Chair of Senate Commerce and Labor, Senator Townsend, has real concerns with that. He believes that a property manager who has a permit under NRS 645 is more than qualified presently to act as a community manager and should not be subject to the additional requirement of having to obtain a certificate from the Commission on Common-Interest Communities. That is essentially the idea conveyed to me by Senator Townsend.

Mr. Buckley said:

> We did have a meeting with the Real Estate Commission, who agreed with the Common-Interest Community Commission that the educational requirements and the duties of community manager are different than a property manager. There was also the issue of the fact that if you are a property manager and doing community management, you would be subject to the Real Estate Commission but also subject to the Common-Interest Community Commission, so there would be double coverage. ... We have given some

> assurances that we would have a testing or a provision where you can test ... and be converted. What I would suggest as an alternative rather than keeping the law the way it is, perhaps we can add some language in the statutes but not in the chapter that actually dealt with the transition provisions on how you can become licensed under chapter 116 and specifically setting forth the criteria so that we don't just throw the whole thing out if we can meet his concern on how you get over from chapter 645 to chapter 116. ... I have talked with Ms. Devries in the past. They did this with another licensed area and I think they have language they have used in the past that we could put in the statute. They were contemplating putting it into the regulations but we could put it in the statute.

Chair Schneider recommended Mr. Buckley and Ms. Devries speak with Senator Townsend regarding the Senator's concerns.

Chair Schneider adjourned the meeting of the subcommittee of the Senate Committee on Commerce and Labor at 1:38 p.m.

RESPECTFULLY SUBMITTED:

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Jonathan Sherwood,
Committee Secretary

APPROVED BY:

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Senator Michael A. Schneider, Chair

DATE: _____