EXHIBIT A

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MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
April 7, 2015

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:28 p.m. on Tuesday, April 7, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E 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

GUEST LEGISLATORS PRESENT:

Senator Mark Lipparelli, Senatorial District No. 6
Senator David R. Parks, Senatorial District No. 7

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Lynette Jones, Committee Secretary

OTHERS PRESENT:

Alfred Pollard, Federal Housing Finance Agency
Jennifer Gaynor, Nevada Credit Union League
Rocky Finseth, Nevada Association of Realtors; Nevada Land Title Association
Diana Cline, SFR Investments Pool 1, LLC

Steve VanSickler, Nevada Mortgage Lenders Association; Silver State Schools Credit Union
Samuel P. McMullen, Nevada Bankers Association
Garrett Gordon, Community Associations Institute; Southern Highlands Homeowners Association
Gayle Kern, Community Associations Institute
Jon Sasser, Legal Aid Center of Southern Nevada
Pamela Scott, The Howard Hughes Corporation
Marilyn Brainard
Michael Alonso, Nevada Trust Companies Association
Mark Dreschler, Premier Trust
Gregory Crawford, Nevada Trust Companies Association; Alliance Trust Company
Bob Dickerson

Chair Brower:
I will open the hearing on Senate Bill (S.B.) 306.

SENATE BILL 306: Revises provisions relating to liens on real property located within a common-interest community. (BDR 10-55)

Senator Aaron D. Ford (Senatorial District No. 11):
I will present S.B. 306. I provided the Committee a copy of a memorandum from the Real Property Law Section, State Bar of Nevada (Exhibit C). This bill is the quintessential example of compromise legislation. Work on this bill began last year. I gathered a group of individuals to address the superpriority lien issue after the Nevada Supreme Court ruled on its effectiveness relative to canceling out a first deed of trust. Senator Hammond, the cosponsor of the bill, joined the working group, and we worked in a bipartisan manner toward developing a solution to the superpriority lien issue.

Senate Bill 306 balances the interest of all parties involved when a homeowners' association (HOA) forecloses its lien on a unit to collect past-due association assessments. The foreclosure of an HOA lien has an effect on homeowners, HOAs, banks, mortgage lenders, government-sponsored entities that insure and guarantee the vast majority of mortgages in Nevada, investors who purchase foreclosed homes and the title industry. A wide swath of entities and individuals are affected when a superpriority lien is foreclosed. Senate Bill 306 seeks to do a number of things to help this situation.

The bill provides protection for homeowners who have fallen behind in their HOA dues. It enables HOAs to effectively collect the assessments necessary to preserve and maintain the community, and it allows banks and mortgage lenders to protect their lien interests in a home when the HOA proceeds with a foreclosure. The bill creates certainty about the consequences of the HOA foreclosure so that HOA home titles do not become clouded. Under law, when the HOA has a lien on a unit within its community, the HOA can foreclose the lien through a nonjudicial foreclosure process. The HOA's lien is prior to all other liens on the unit except liens recorded before the declaration curating the community, the first mortgage lien, certain taxes and governmental charges. The HOA's lien can be prior to the first mortgage lien based upon certain maintenance and abatement charges and the amount of assessments for common expenses.

The portion of the HOA's lien is referred to as the superpriority lien. The superpriority lien is intended to balance the need for the HOA to collect assessments with the need to encourage lending for the purchase of units in HOAs. In *SFR Investments Pool 1, LLC v. U.S. Bank,* 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014), the Nevada Supreme Court determined that the foreclosure of the superpriority lien by the HOA extinguishes the first mortgage lien on the unit.

I will go through the provisions of S.B. 306 that include changes in Proposed Amendment 6077 (Exhibit D).

Section 1 amends provisions governing the superpriority lien. Section 1, subsection 1 states the collection and foreclosure costs incurred by the HOA are included in the HOA's lien.

Section 1, subsection 2, paragraph (b) and section 1, subsection 5 establish a limit on the amount of collections included in the superpriority lien.

Section 1, subsection 6 states that the HOA and its community manager are not required to hire a collection agency to take certain actions early in the process of foreclosing the HOA's lien.

Section 1, subsection 2, paragraph (d) states the HOA's lien is not prior to certain charges authorized by local government or trash collection. There has

been uncertainty about whether these charges are prior to the HOA lien and this provision treats those charges in the same manner as governmental charges.

Section 1, subsection 16 states any payment of the HOA's lien by the holder of a subordinate lien becomes a debt due from the unit owner to the holder of the lien.

Sections 2 through 7 revise provisions governing procedures for the foreclosure of the HOA's lien. Because a foreclosure of the HOA's superpriority lien extinguishes the first mortgage lien on a home and other subordinate liens, it is important lienholders receive sufficient notice of the HOA foreclosure to enable lienholders to protect their interests.

Section 2, subsection 1, paragraph (b) requires additional information to be included in the notice of default and election to sell that must be recorded by the HOA or the person conducting the sale.

Section 2, subsection 5, and section 3 require the HOA to mail an actual copy of the notice to each holder of a recorded interest on the unit being foreclosed upon by the HOA, using certified mail return receipt requested. In addition, section 2, subsection 1, paragraphs (b) and (e) require additional information be recorded by the HOA in order to create certainty as to the status of the title of the property if the HOA forecloses on the lien.

Section 2 contains an important protection for homeowners by prohibiting the HOA from proceeding with a foreclosure 30 days after sending a homeowner notice of a proposed repayment plan or right to request a hearing before the executive board. This gives the homeowner a realistic opportunity to enter into a repayment plan or request a hearing.

Section 4 is a provision designed to enhance notice of the HOA foreclosure to homeowners and to lienholders, which is one of the key components of S.B. 306. Under law, there is a 90-day waiting period after the mailing of the notice of default and election to sell; the HOA must provide notice of the foreclosure sale to certain persons. Section 4 makes the notice required for the HOA foreclosure similar to the notice required for a nonjudicial bank foreclosure.

Section 5 enacts provisions governing the manner in which a home is sold at the HOA foreclosure sale. This section intends to establish a process to ensure

a fair and reasonable price is obtained. An example is a home foreclosed upon with a $500,000 first lien interest being sold at the HOA foreclosure sale for $5,000. Section 5 seeks to address these types of issues. Section 5, subsection 2 as amended in Proposed Amendment 6077 states,

> If the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116 satisfies the amount of the association's lien that is prior to its security interest not later than 5 days before the date of the sale, the sale may not occur unless a record of such satisfaction is recorded in the office of the county recorder of the county in which the unit is located not later than 2 days before the date of sale.

Section 5 enacts sale procedures similar to procedures for a nonjudicial bank foreclosure and requires the person conducting the sale to announce at the sale whether the superpriority lien has been satisfied. This ensures persons interested in the home know what they will be buying.

Chair Brower:
You indicated section 5 includes a provision affecting the amount of the home at a foreclosure sale. I am not finding that. Can you direct me to that section?

Senator Ford:
There is no specific provision in the bill that contains this language. The notices required under section 5 will help people ascertain the actual value of the home so they will know what they are buying. If the superpriority lien has not been paid, the potential buyer will know it must be addressed.

Chair Brower:
You provided an example about a home worth $500,000 being sold for $5,000. This scenario is not prohibited by S.B. 306.

Senator Ford:
It is not prohibited, but this bill seeks to remedy that situation through the additional notices required before a superpriority lien sale can take place. Before you get to a foreclosure sale, you will know if the payment of the superpriority lien has been made.

Senator Scott Hammond (Senatorial District No. 18):
Over the last few years, home foreclosure sales were made without notification. No one knew sales were being conducted, the time of the sale or who was initiating the sale. As a result, you had situations in which homes were being sold for $5,000. What the bill seeks to do is require thorough notification so everyone will know the location, time and place sales will be conducted. The notification process will ensure more buyers show up at sales and the sale price of homes gets closer to market value.

Senator Ford:
Section 6 enacts provisions governing the period following the HOA foreclosure sale. Section 6, subsection 1 states if the holder of the first mortgage lien satisfies the superpriority lien no later than 5 days before the date of the sale, the seller does not extinguish the first mortgage lien. The remaining provisions of section 6 establish a redemption period so that after the HOA foreclosure sale, the unit owner or a lienholder may redeem the property by paying certain amounts to the purchaser within 60 days after the sale. As originally drafted, section 6 authorized successive redemptions, which would have allowed the unit owner or another lienholder to redeem the property from the prior redeemer. Proposed Amendment 6077 removes the concept of successive redemptions and instead authorizes one redemption during the redemption period. Section 6 also contains provisions to create certainty of the status of the title of the unit after a foreclosure sale.

Section 6, subsection 8 provides that the deed recorded after the foreclosure sale is conclusive proof of the default and compliance with the provisions of law governing the foreclosure process. Section 6, subsection 10 provides that failure to comply with requirements of the foreclosure process does not affect the rights of a bona fide purchaser or bona fide encumbrancer for value.

Section 7 is an additional notice provision that authorizes a person with an interest to record a request to receive a copy of the notice of default and election to sell or notice of sale. Law refers to provisions in *Nevada Revised Statute* (NRS) 107.090 regarding this notice. Section 7 incorporates the language of NRS 107.090 into statute and conforms the language to HOA foreclosures.

Section 2, subsection 7 amends provisions governing the foreclosure of the HOA lien during the period the homeowner is eligible to participate in a

foreclosure mediation program. Under law, if a home with an HOA is subject to the foreclosure mediation program, the HOA may not foreclose its lien until the home is no longer subject to the program. Section 2, subsection 7 revises language of law to specify that the HOA may foreclose its lien on a home that is subject to the mediation program if the unit owner fails to pay association fees that accrued during the pendency of the foreclosure mediation.

Section 8 requires the trustee, under the deed of trust, to notify HOAs when a homeowner is eligible to participate in a foreclosure mediation program and when the trustee receives the required certificate from the mediation program.

Senator Harris:
How does this work with the foreclosure mediation program? An example is a homeowner who is delinquent on the HOA dues and in default. The notice of default has been filed and the lender and the homeowner agree to go into foreclosure mediation. Sometimes HOA fees have not been paid for more than 16 months. Does S.B. 306 provide that as long as the homeowner pays the HOA fees during the time he or she elects and remains in the foreclosure mediation program, which takes about 9 months, the HOA cannot foreclose? Is the homeowner protected if he or she has outstanding HOA fees but pays the fees while in the mediation program?

Senator Hammond:
Yes. This is the intent of the bill. The bill will allow your scenario to unfold as described.

Senator Harris:
If homeowners elect mediation, will there be documentation with regard to the foreclosure mediation program putting them on notice that they are now required to pay their HOA fees and keep them current?

Senator Ford:
That is not in S.B. 306, but it is something we can consider.

Senator Hammond:
I do not recall seeing this language in the bill.

Senator Harris:
This is important because most homeowners in default do not anticipate they will pay fees of any kind while in mediation. It would be bad for a person in mediation to be forced out of the program because he or she was not on notice that HOA fees had to be paid.

Senator Hammond:
We will determine if a provision in the bill provides notification to homeowners of the requirement for payment of HOA dues during their participation in the mediation program.

Senator Ford:
I believe S.B. 306 strikes a balance between the interests of homeowners, HOAs, banks, mortgage lenders, government-sponsored entities, investors and the title industry. Senate Bill 306 provides all homeowners with a realistic opportunity to enter into a repayment plan and an opportunity to redeem their units if they fall behind on their HOA dues. Homeowner associations can collect assessments needed to maintain their communities. Banks, mortgage lenders and government-sponsored entities will receive enhanced notice of HOA foreclosures and greater opportunities to protect their interests. Investors in the title industry will receive greater certainty regarding the title status of units that have been foreclosed upon by the HOA.

The process of the HOA foreclosure sale will be improved to ensure the sale is conducted in a reasonable manner. Alfred Pollard, a representative for the Federal Housing Finance Agency (FHFA), is here in support of the bill. The FHFA is one of the government-sponsored entities interested in Nevada's superpriority lien statutes. Mr. Pollard will speak about how this bill will provide better security for the federal government relative to its role in underwriting Nevada loans.

Senator Hammond:
The drafting of S.B. 306 has been a collaborative effort with many entities involved. The bill presented today is important to the housing industry and the FHFA. Questions raised by Senator Harris may be answered by those who have worked on the bill and are aware of the fine details of the notification process. The bill codifies the notification process and is a great example of a collaborative effort.

Senator Ford:
The Committee must understand the version of the bill endorsed by the sponsors and the FHFA is the one I presented that includes Proposed Amendment 6077. Subsequent amendments coming forward today have not been vetted and may not be approved by governmental entities.

Senator Harris:
Did you have an opportunity to meet with Verise Campbell, Deputy Director of the Foreclosure Mediation Program for Nevada, to discuss how this bill will impact the program?

Senator Ford:
I did not.

Senator Hammond:
No.

Chair Brower:
Since the Nevada Supreme Court decision regarding HOA superpriority liens, there has been confusion and displeasure about the situation. This bill attempts to fix the issue.

Alfred Pollard (General Counsel, Federal Housing Finance Agency):
I support S.B. 306 and I will read from my written testimony (Exhibit E).

Chair Brower:
You referred to a drastic or extraordinary remedy. Can you pinpoint for the Committee what you are referring to with respect to the bill?

Mr. Pollard:
Extinguishing a first mortgage in the hundreds of thousands of dollars is a strong remedy. The goal of the remedy is to make sure someone pays or helps pay outstanding association dues. This seems to be a broader remedy than is necessary to accomplish the goal.

Chair Brower:
The lending community has experienced heartburn from the Nevada Supreme Court case. The Supreme Court case ruled that a first mortgage may be

extinguished because of an HOA foreclosure. You stated that S.B. 306 does not do away with that possibility but helps the lender avoid this situation.

Mr. Pollard:
Yes. The bill helps avoid that possibility by providing clarity and certainty. Those are the real contributions of the bill. This is a complex provision of law, but there is sufficient clarity. It will help the HOAs get payment for outstanding dues and help unit owners in some cases.

In loan modification efforts, homeowners avoid responding to messages until told, "You can lose your home." This notice prompts homeowners to either go into mediation or go directly to the servicer for assistance.

When we look at the broad picture, we are trying to help Nevada homeowners stay in their units. When they cannot, what happens? Fannie Mae and Freddie Mac get involved in the preforeclosure process with the hope that foreclosure can be avoided. The goal is to get homeowners out of foreclosure without a disproportionate remedy looming. Senate Bill 306 can help reduce that possibility, but it is still controversial from our prospective.

Chair Brower:
This is a complicated bill and a complex area of the law. The Committee will simplify it as much as possible, but some issues are complicated and cannot be made simple.

Jennifer Gaynor (Nevada Credit Union League):
We support S.B. 306 with Proposed Amendment 6077. I am not proffering an amendment to the bill, but I understand the Nevada Bankers Association has put forth one that we support. We share many concerns of the FHFA, and we appreciate the efforts made by the bill sponsors and the working group.

Rocky Finseth (Nevada Association of Realtors; Nevada Land Title Association):
We support S.B. 306. We agree with Mr. Pollard. Our main issue is the ability for Nevadans to get loans. It is about helping homeowners get into homes. If lending stops, it will create a big problem for Realtors. In regard to the Nevada Land Title Association, I want to put on the record that regardless of whether S.B. 306 is in its original form or as amended, there is no guarantee any passage of legislation will ensure the issuance of title insurance. It is decided on

a case-by-case basis. The work of the group has gone a long way toward resolving a number of our concerns.

Diana Cline (SFR Investments Pool 1, LLC):
We are members of the working group on S.B. 306. We support the version of the bill as presented by Senator Ford. After years of litigation, the Nevada Supreme Court clarified the effect of lien foreclosures containing superpriority amounts. This clarification allowed markets to have foreclosure sales where prices were no longer $5,000 for a $200,000 property. Homes were sold at market value, the same price you would see at a bank foreclosure sale. This bill cleans up some of the notice concerns we have. I have concerns about the additional amendments being proffered today.

Steve VanSickler (Nevada Mortgage Lenders Association; Silver State Schools Credit Union):
We support S.B. 306. I will read from my written testimony (Exhibit F). Enhanced notification is not sufficient to satisfy a commercially reasonable standard such as in the example of $5,000 being paid for a home worth $500,000.

Extinguishment of the first mortgage lien, addressed by the FHFA, adds additional risk that impacts access to credit in common-interest communities. The FHFA stated the regulated agencies, Fannie Mae, Freddie Mac and federal home loan banks, will no longer buy loans for properties in common-interest communities in Nevada, especially in light of the extinguishment of the first mortgage lien. That alone will add additional risk to the underwriting even if the agencies agree with other prospective changes. This additional risk will result in Nevada homeowners being denied credit, and the cost of their loans will be higher. An inability to access credit will affect the value of homes in common-interest communities. This loss of value may be dramatic due to the additional risk involved when a first mortgage lienholder can be stripped of a lien.

Chair Brower:
Have you provided your suggested changes to the Committee in writing?

Mr. VanSickler:
I submitted my suggestions, and Marcus Conklin will make sure you receive them.

Chair Brower:
I am not sure you accurately quoted Mr. Pollard; perhaps you misstated his intent. The testimony of the FHFA is clear. The Committee will review your suggestions.

Samuel P. McMullen (Nevada Bankers Association):
We support S.B. 306, but we have proposed amendments (Exhibit G) in addition to Proposed Amendment 6077. We have aggressively promoted the bill and some of its ideas. We have wrapped the whole Association around a couple of concepts. We want this bill to be HOA-positive and allow it to be helpful for other participants in what has been a complicated and interest-ridden process. We want to resolve as many issues as possible through the promotion of a few ideas.

We do not want to change the superpriority extinguishment of loans if foreclosed upon by the HOA. A better way to help everyone is the genesis of this bill. The idea for S.B. 306 has been in process since the 77th Legislative Session.

Chair Brower:
Tell the Committee the problems the Bankers Association has with the bill as presented. What would you change?

Mr. McMullen:
I want to be positive about the bill.

Chair Brower:
I thought there was a global deal on this bill. I thought the Committee would hear a presentation of a globally resolved agreed-upon bill. It is fine if this is not the case, but I want to know what you like and do not like about the bill as presented so we can weigh the pros and cons of further changes.

Mr. McMullen:
There is a lot of agreement of this bill by the parties. Most of what we agree upon is in front of the Committee. We had conversations until 7:30 p.m. last night, which raised other issues we want to address today. Some of our proposed amendments may be disagreeable, but they are small.

Chair Brower:
Run the Committee through your proposed amendments. What do the bankers not like about the bill?

Mr. McMullen:
It is not that we do not like it.

Chair Brower:
You love the bill, but you think it could be better with a couple of changes.

Mr. McMullen:
Our role is to make sure we are standing up for what we believe but also facilitating other solutions. I will present my proposed amendments for the Committee. These concepts were the topic of our discussions.

Proposed Amendment 1 addresses how we should calculate the 9-month period for measuring the superpriority lien period back from its payment. This makes it easier for those who always looked back to calculate the time period. We want to put it into a model that fits the existing situation.

The most appropriate suggestion is to look back from the payment of the superpriority lien. There may be a need for clarification about the period that covers the postnotice of default. This is the 90-day delay before you can issue a notice of sale. This could be handled in the notice of sale or notice of default, which could define the per month fee so the lender pays off the superpriority lien in full, making it current given the 9-month situation.

Chair Brower:
The Committee has your proposed amendments. I interpret page 1 as a summary of eight proposed amendments; the following pages provide more details, referencing specific sections of the bill where the proposed amendments fit.

Mr. McMullen:
I did not consider Proposed Amendment 6077 in my document of proposed amendments. I used the original draft of S.B. 306. This is why I provided a summary on the first page.

Chair Brower:
Are any of your proposed Amendments 1 through 8 already part of the revised bill as presented by the sponsors?

Mr. McMullen:
Proposed Amendment 6077 is not incorporated into my proposed changes. If my proposed amendments conflict with Proposed Amendment 6077, they will be minor issues of textual juxtaposition. We support everything in Proposed Amendment 6077. I did not have time to cross-check my proposed amendments to determine if they may change Proposed Amendment 6077.

Chair Brower:
Can you tell the Committee what sections of Proposed Amendment 6077 need further changes?

Mr. McMullen:
My proposed amendments will be in addition to Proposed Amendment 6077.

Chair Brower:
Run the Committee through each of your proposed amendments.

Mr. McMullen:
Proposed Amendment 2 addresses an issue of additional costs incurred by the HOA when it starts the notice of sale process. This amendment clarifies if a lender does not act soon enough on the right to pay off the superpriority lien before the HOA starts a notice of sale, the lender must pay additional costs.

Proposed Amendment 3 clarifies the 3-year limitation applies only to the extinguishment of the HOA's lien by either the issuance of the notice of default or judicial proceedings.

Proposed Amendment 4 is critical to the Bankers Association. This gives the HOA the option to use any address and any method of finding an address, and the lender will pay for the associated costs. This was addressed in both the original bill and Proposed Amendment 6077. We do not want HOAs going through a process in which they did not accurately provide notice or did not have a receipt or written confirmation of the mailing in the file. We want to make sure everyone receives notice to avoid the need for additional notification. This is an important part of my proposed amendments.

Senator Harris:
I am concerned about the confirmation of receipt. I have dealt with banks for many years as a homeowner advocate, and I can tell you the No. 1 problem we have is communication with banks. I am concerned because in addition to banks having a corporate presence often outside the State, there are many branches and different locations within the State. I go online to determine whom I need to contact and deal with, but the process is convoluted and frustrating. How is an HOA to know whom they must notify? When the HOA does give notice, how do they guarantee any confirmation of receipt? I have personally submitted hundreds of documents to banks, and I have a hard time getting banks to acknowledge they received the documents. When you deal with the notification process in this context, it becomes important.

This issue is the same for the HOAs. How do they get confirmation of receipt of documents or proof they submitted those documents from banks that sometimes do not know the right hand from the left, or the banks are large with many units and different individuals responsible for mail intake? I agree the notice provisions are critical, but how do you guarantee it? How do you provide guidance to HOAs to ensure they get their notices to the right party and get the confirmations of receipt you require?

Mr. McMullen:
It is a critical and important point. This is why we propose the banks pay for every cost up to notice of default and provide a trustee sale guarantee policy. The title industry indicates this is similar to a statement of condition of title that lists lenders in existence at the time the trustee sale guarantee title policy is issued. They also get what is referred to as "dated down." We have gone the extra mile because it is so important to us. We want to give HOAs a tool, and banks will pay for it when they pay the collection costs. The HOAs will have no concern about whom they attempting to notify. We had offered them a registered agent, but the HOAs did not agree because they perceived liability in transferring the corporate name to the resident agent. I do not think we can solve that concern. You deal with banks a lot, and the experience has not been great.

Senator Harris:
That is not true. I have a complicated relationship with banks, having seen banks do frustrating things. I have also seen banks do some pretty incredible things.

Mr. McMullen:
My point is that banks are not perfect. Banks have said they need a strong, targeted notice process. We started by asking for critical time deadlines based on receipt. It is important that everyone is allowed to come in and get notice, not just the first mortgage company. I cannot make the language totally comfortable, but banks understand the importance of notification. They want it to go through a process. They will set up a process approach more like special assets, special projects and special problems.

In the early stages, we discussed allowing 30 to 60 days to respond. Now we have over 90 days. In the banks' best interest, they sign the notifications and get them back as the best confirmation for us of the HOAs' compliance. They have to make sure people can get notice. You do not want a situation in which you have not confirmed you received notice, but your business records contain a mailed notification. It is a waste of time to notify and later learn it was not done correctly. The notification process is a one-shot deal that must be done correctly; otherwise, you must unwind the process.

Senator Harris:
I do not disagree with what you said. For me to be satisfied, I will need more clarity with regard to where the notice needs to be sent because it is confusing. I would hate for someone to send a notice and receive confirmation the notice did not make it to the correct branch or bank representative with the ability to keep the process going forward. I have seen this situation go awry, and then we have a serious issue on the table with a person's home.

Mr. McMullen:
Yes. Based on your experience, you could help us ensure other alternatives. I want the Committee to know this is as far as we have gotten negotiating around the table. At some point, the Committee needs to decide on the best process. We want to prevent a situation where people can game the system by saying they are not signing the notification. This gives them control over the timing, and we cannot let them have that either.

My proposed Amendment 5 says the HOA cannot proceed to notice of sale if the superpriority lien has been paid. The HOA may not proceed with a sale unless it has confirmation of receipt and the superpriority lien has not been paid.

Proposed Amendment 6 is the back part of the bill. Banks need to have a strong record of paying superpriority liens and taking over the loan in a time-sensitive manner to avoid situations in which delinquent HOA dues are pushing people out of their homes. We want to give them another option. The proposed amendment provides if you go to a foreclosure sale with a paid superpriority lien, there is a material change in terms and the notice for the sale does not work. Requirements must exist for the sale in this case. You could have a situation in which the bank pays the superpriority lien 5 or 6 days before the sale, which then requires a document be recorded 2 days before the sale.

All those people who show up for the sale need to know that circumstances have changed, including the payment of the superpriority lien. This changes the dynamics of who might show up for the sale. When the terms of sale have changed, there should be disclosure and additional notice.

Proposed Amendment 7 builds more incentive for banks to pay the superpriority lien prior to the 90-day period. This is the waiting period after the notice of default has been sent. The HOAs cannot file a notice of sale within 90 days after filing a notice of default. If banks pay before the 90 days, an important piece of information is given to the HOAs. The HOAs must be notified that the outstanding superpriority portion of the lien no longer exists and decide whether to foreclose on the nonsuperpriority lien; they may still want to foreclose and banks want an indication of the HOAs' intent to proceed. A foreclosure at this point would affect lenders rights even when no superpriority issues are involved.

Proposed Amendment 8 clarifies any lender can come in and pay the superpriority lien, not just the first mortgage. In addition, we should change statute to make it clear a second or lower lender can pay the lien, but it must first pay off the full HOA superpriority lien and then pay the nonsuperpriority delinquency. We will continue to work this out with the interested parties.

It has been the banker's position to find a way to make S.B. 306 work. This bill provides a way for everyone to win. Banks can control the priority of liens and loans and make sure HOAs get paid off in a short period of time, compared to the 20 or 21 months the process may take now.

I want to clarify we did not say you only have one 9-month period for each loan. If the bank pays off the lien and the homeowner starts to regenerate a deficiency, the bank will count up to the next 9-month period. We estimate it

will be less than 2 months before the property is processed, but it could take longer. This is not about taking property away from homeowners.

Senator Harris:
You are anticipating the possibility, not the reality, of multiple defaults along the life of the loan.

Mr. McMullen:
Yes. Banks do not want to give the impression they are trying to get away with doing the process once. Many banks cover the costs of defaulting or delinquent homeowners. Banks may get those costs at the end of the loan as part of the additional lien.

Senator Harris:
You are in a tough spot. You can have the HOA come in after 9 months of delinquent payments and say it will take the house. The bank is unsecured and does not get its money back.

I have a concern about the concept of multiple defaults. This puts HOAs in a bad position, especially if those multiple defaults are close together. I recognize you can catch it quicker in the process, but you essentially have 9 months of default before the superpriority lien gets paid off to make the homeowner current—and then the homeowner becomes delinquent again. While we are getting some money to HOAs by paying off the superpriority lien, this notion of recurrent defaults on HOA fees does not put them in any better position. I am not saying that foreclosure on a superpriority lien is the right answer. I am saying there is little protection for HOAs.

Mr. McMullen:
This is a place in which the Committee should use judgment. We were responding in the negotiation part of this bill. We said we would not harm HOAs. We want the time period to rebase as soon as liens are paid off. This will push the nonpriority lien elements over and keep them as debts owed by the unit owners; the HOA can collect as they wish but not as superpriority. This issue has multiple sides. We also do not want to give unit owners the impression they never have to pay. We talked about the theory, and banks stepping in make the most sense. Banks that have already processed one default will maintain the rest. The HOAs are in control. They may or may not

foreclose. They may decide to work it out with the homeowners. We did not get to that stage in our discussions.

Senator Segerblom:
Can we have a punitive banker registry?

Mr. McMullen:
I know that is a serious question, and my answer is no.

Senator Segerblom:
Could you have a Website that provides instructions regarding the notification process? I have tried to find a registered agent for a bank, and it is impossible.

Mr. McMullen:
Some national banks have registered agents, but there is no requirement that Nevada banks have registered agents. We are working on this. Our main concern is giving the process attention and moving it through the correct channels.

Chair Brower:
The Committee is bringing everyone together to process S.B. 306 and get it right. Have all of your proposed amendments been proffered to the primary sponsors of the bill?

Mr. McMullen:
No. We did not have time.

Chair Brower:
That is the first step.

Mr. McMullen:
The working group represents all stakeholders, and most of them are aware of my proposed amendments. The bill sponsors may have issues with my proposed amendments, but I want a consensus before bringing it to the sponsors. This is a difficult bill, and it is a group effort.

Chair Brower:
It is a work in progress.

Mr. McMullen:
The Committee will have the proposed amendments by tomorrow.

Chair Brower:
The first step is to speak with the primary sponsors of the bill, and then we will see what progress can be made. We have now heard from the lenders with testimony from Mr. VanSickler and Mr. McMullen. We heard from the federal government with testimony from Mr. Pollard. Now we are going to hear testimony from the HOA representatives.

Garrett Gordon (Community Associations Institute; Southern Highlands Homeowners Association):
We support S.B. 306. Working off Proposed Amendment 6077 and Mr. McMullen's proposed amendments, we put together a compromise amendment for the approval of the bill sponsors. I submitted a document of my proposed amendments (Exhibit H).

Mr. McMullen:
It is my understanding that Mr. Gordon's proposed amendments are in addition to Proposed Amendment 6077.

Chair Brower:
Mr. Gordon, have your proposed amendments been submitted to the primary sponsors of the bill?

Mr. Gordon:
When we received Proposed Amendment 6077, I contacted the Bankers Association to get input before speaking with the sponsors. The bill sponsors are not aware of our proposed amendments, but during the working group, we have all consistently spoken about these issues.

Chair Brower:
Did you have a conversation with Mr. McMullen about the proposed amendments?

Mr. Gordon:
Yes.

Chair Brower:
Is it true you both agree to some but not all of the proposed amendments?

Mr. Gordon:
Yes.

Mr. McMullen:
I would like to clarify that it is not just me. We did everything in a group.

Chair Brower:
We need to narrow this group in order to go forward with S.B. 306.

Mr. Gordon:
I will address the remaining issues we have with the bill. In regard to the rolling lien, if the first security interest pays off the superpriority lien during the 9-month period, it does not stop there. The superpriority lien rolls or retriggers. We are concerned about the 9-month superpriority lien retriggering or rolling in the event it is paid off.

Our next issue relates to the doughnut hole problem. The intent is to give banks notice of default when borrowers are in arrears on their assessments and there is an opportunity to cure. Under statute, 90 days go by before the HOA has a right to give notice of sale. The bank has a 90-day cure period in which the HOA can take no action and no additional costs will be incurred. What if the bank pays 60 days after the notice of default? The doughnut hole issue relates to counting what is due—not at notice of default but at the time of payment—so we can capture 2 months of additional assessments. Mr. McMullen's proposed Amendment 1 attempts to address this issue.

My next issue relates to cost. We appreciate the bill sponsors working with us on a compromise to get collection costs into statute. We have one remaining issue. If the bank comes in and cures a notice of default, we have costs in statute that we cannot exceed and cannot expect to recover. This assumes the bank cured the notice of default. What if the bank does not cure within the 90-day window, which is the period the HOA cannot take action? If the HOA goes to notice of sale, it will incur the cost of publishing and posting. This can be expensive, $800 or $900 depending upon the publication or newspaper. We propose if the bank does not cure the notice of default until after the 90-day

period, the bank will reimburse the HOA $275 for the notice of sale and the amount the HOA paid for posting and publishing the notice.

Senator Harris:
I do not want to complicate the issue, but what happens when you have a partial cure? This happens when a 50 percent payment is made to keep the homeowner in the house longer, but it is not a full cure. Based on your proposed amendment, do we apply what has been received to the most postdated delinquency?

Mr. Gordon:
Yes. Gayle Kern, who has practiced HOA law for over 25 years, is here and she can give us some examples. In law, we must send a 60-day letter to inform homeowners who are behind in their payments that they have the opportunity to challenge this with the HOA board and the option to elect a payment plan. Senate Bill 306 says if the HOA has not filed a notice of default within 3 years, we lose our right to extinguish the first mortgage lien.

We are concerned with the 3-year period. If the HOAs are working with homeowners and it takes years for dues to get caught up, we would be forced to file the notices of default and get the banks involved. This is a disincentive for HOAs to work with homeowners over long periods of time. This outlines the notice of sale issue if we are forced to go all the way through the process to make sure HOAs get reimbursed.

The first two bullet points on page 2 of Exhibit H have been retracted.

Senate Bill 306 proposes that the HOA must record a notice of satisfaction or a notice of release once the superpriority lien has been paid. If the HOA is required to publish and record this notice and incurs costs, we propose a fair amount of reimbursement in an amount not to exceed $50. This would be included in the bill.

Another issue in the bill deals with the time period in which the bank pays the HOA. The bank must do so within 5 days before the sale; if that occurs, the HOA cannot proceed to sale for 2 days. We request the bill be amended to say 2 business days. Two days is not a lot of time to do something pretty substantial. If there is a weekend or holiday, 2 business days would be our preference.

In the case of a foreclosure, S.B. 306 contemplates a 60-day redemption period in which the bank or homeowner has the ability to satisfy the lien. We request the redeemer or the lender pay the cost the home was sold for and any lingering assessments still outstanding. For example, if there is a 60-day redemption period, the redeemer or lender must pay the HOA superpriority lien plus the additional 2 months of assessments. This will ensure revenue capture for other unit owners.

My final point relates to a situation in which the HOA must credit bid. This happens when the HOA goes forward with the foreclosure but has no buyer for the property. The HOA will credit bid what it is due and take title to the home.

The bill proposes only an investor or a third-party purchaser of the property at an HOA foreclosure sale. The redemption period makes clear that the HOA cannot get paid a second time. During the HOA foreclosure, an investor purchases the property and pays the HOA in full. The bank comes in and redeems, and the HOA does not get paid a second time, which is fair. If the HOA does a credit bid, it takes title to the property short of being paid. In this case, if the bank comes in and redeems the lien, the HOA needs to get paid the amount owed the association.

Gayle Kern (Community Associations Institute):
I have represented HOAs for over 25 years in northern Nevada. With respect to the noticing process, I agree notice is required and needed. I was appalled and surprised over concern of notice not being given. This is required by statute and must be done. I have no problem that our notice is triggered, and we give notice based upon the recorded records. If a lender records something with the Washoe County Recorder's Office and does an assignment, it shows up on our Trustee Sale Guarantee and notice is sent to all those places.

I cannot be bound by limiting my ability to proceed based on someone signing for a notice or getting a return receipt notification back from the post office. I have no control of this. I can control sending the notice and show I provided it. Sometimes the recipient does not return the receipt slip, and sometimes the post office does not return it. You also have a situation in which the lender has signed for the notice and we do not receive the receipt.

Chair Brower:
Do you agree the procedure we use in court for notification is good enough in this context?

Ms. Kern:
Yes. You can include protections to make sure notice is given to the necessary parties, but you cannot limit procedure based on confirmation the notice was received. We do not have control over receipt. I only have control over providing the notice.

Chair Brower:
Mr. Gordon and Ms. Kern, I hesitate to address this issue; however, from my perspective, we want to do several things by way of S.B. 306. We want to make sure HOAs get paid, we do not want to allow an unfair foreclosure vis-à-vis the rights of homeowners and we want to make sure the lender is treated fairly. There is another issue with respect to the lender: Why should the lender ever lose its first mortgage lien because the HOA is owed a couple of thousand dollars?

Ms. Kern:
From my standpoint, this is the proverbial hammer. I agree this should be a last resort, but when you say an association is owed a couple of thousand dollars, you must appreciate that might be a lot of money to the HOA's budget. That money gets distributed to the assessment-paying homeowners. I did not participate in or conduct an HOA foreclosure until approximately 5 years ago.

Chair Brower:
I did not know there was such a thing until a couple of sessions ago. It seemed so illogical to me when I first heard about this situation and wondered if it was right. How can the HOA foreclose on a home worth $500,000 because it is owed a few thousand dollars? I now know the state of the law, and I understand the rationale.

Ms. Kern:
I want the Committee to know when a property, such as a condominium, has an HOA, the common elements paid for with homeowner dues affects collateral. The lender only has a security interest in what we call "air space." The HOA and all the assessment-paying homeowners are paying for roofs, siding and a lot

of other things involved in that collateral. Assessments take care of more than just property values, it is far greater than that.

Chair Brower:
That makes sense. Mr. McMullen, your issue is a lender should not lose its first security interest without adequate notice and an opportunity to step in and cure the problem, even if it is not the bank's obligation to do so.

Mr. McMullen:
Yes. We have offered to pay costs associated with research needed to ensure HOAs get correct addresses for notification with a receipt for their records. This is one of the primary things we are asking for. People may not know that banks have moved significantly to put the world back in order. Another idea we had, but did not include in our proposed amendments, was service of process. We will pay the costs incurred up to the notice of default at the time we pay for the superpriority lien.

Chair Brower:
We have a lot of work to do on this bill, but the issues are narrowing.

Jon Sasser (Legal Aid Center of Southern Nevada):
I do not support S.B. 306 in its current form. I was included in the working group formed by Senators Ford and Hammond. At the first meeting of the working group, the primary focus was on the notice process, but the main issue was not being addressed. At issue are the concerns of the federal government and the ability for Nevadans to get loans. Mr. Pollard's testimony did not directly answer all my questions. First, will Nevadans have the ability to get loans if we continue to allow the first security interest to be extinguished?

Chair Brower:
Mr. Pollard said they would. He did not say Nevadans could not get loans if the bill, as presented by the sponsors, was passed.

Mr. Sasser:
I do not believe he was asked that exact question. I heard him say he did not think the extinguishment was the proper or appropriate approach. He had great reservations at the end of his testimony about the extinguishment, and it is a great concern to the FHFA. It gives pause to lenders as to whether they might lend in Nevada, and it would affect agency underwriting standards.

Chair Brower:
We can clarify that information before we move forward.

Mr. Sasser:
My suggestion is to put one line in S.B. 306 to state that the sale of an HOA nonjudicial foreclosure does not extinguish the first security interest. An amendment proposed by the mortgage bankers may be forthcoming.

Another issue is the inclusion of collection costs in the superpriority lien. Dealings between collection agencies and HOA management companies have led to a lot of the problems. The HOA management companies hand it off to collection companies with a guarantee they will get their 9 months back because of the superpriority lien. It does not matter how much it costs for collections. It could cost $5,000 to collect a $200 debt. This vague area in law has not been clarified by the Nevada Supreme Court. Choosing one side over another in statute continues the present system.

Some people ask why collection costs matter as long as the bank or investor pays them. It matters because 90 percent of the time, these cases do not go to a foreclosure sale. Either the homeowner comes up with the money after collection costs start running up or in some cases, banks steps in. Collection costs are paid by the homeowner most of the time, and only 10 percent of homes go to a foreclosure sale. If HOA collection costs remain in the bill, I cannot support it.

Pamela Scott (The Howard Hughes Corporation):
We support S.B 306 in its original form with Proposed Amendment 6077. We also support the proposed amendments discussed today. One sticking point for us is the confirmation of receipt. You cannot get that by using the postal service. In my hand are letters mailed to our office from attorneys with the green return receipt slip still attached because the post office does not always make you sign for the letter. The post office will leave these in mailboxes. I tested the process by mailing myself a letter with a return receipt request, and the post office representative left the letter without my signature. I do not see how we can be asked to do confirmation of receipt.

Marilyn Brainard:
I support S.B. 306 with the proposed amendments. I submitted my written testimony (Exhibit I). You have not yet heard from a homeowner, and we have a real stake in this fight.

Chair Brower:
Is Nevada unique in allowing the extinguishment of a first mortgage lien pursuant to an HOA foreclosure? It sounds like not all states do it that way.

Senator Ford:
No, we are not unique. Some states have adopted a uniform act that deals with this. The experts here today can answer that question. I had the idea to convene a group of individuals together to talk about how we could address this issue after watching the Nevada Supreme Court hearing. I asked Senator Hammond to cosponsor the bill. Exploring this issue has been an interesting journey. Initially, we wanted to make certain banks would not sit on their rights and take no action when given notice of unpaid dues by an HOA.

We talked to banks that indicated they were not getting proper notice, and the notice they did get did not include the amount owed. We talked about strengthening the notice provisions that require banks, within a specified amount of time, to respond. If no response is received, the superpriority lien kicks in, the Supreme Court decision applies and the bank loses the first lien.

It was never our intention to undo the superpriority lien component. This is where the working group started. What came into play was the issue of a bonafide purchaser and commercial reasonableness which avoids a $5,000 sale for a $500,000 home. The idea expanded and eventually became S.B. 306. Mr. McMullen is correct in stating that judgment by Committee will be needed. Someone needs to say "enough." I thought we were done with the bill when we got Proposed Amendment 6077 after subsequent conversations and the initial bill draft. This was the point when I reached out to FHFA to request a review of the language. The FHFA indicated if the bill was amended as suggested, the agency would support it. I presented the FHFA recommended changes to the working group and noted if the bill is amended further, we will run the risk of Mr. Sasser's concerns regarding Nevadans not receiving loans coming true. There is room for more conversation about this bill. The bill is in the hands of the Committee to decide which of these amendments will be adopted. I will offer my input, but I give the Committee the full context of the bill as it stands.

I recommend the bill be considered as is with Proposed Amendment 6077. If the Committee wants to entertain further amendments, you need to be aware of the FHFA concerns.

Senator Hammond:
One of the last things I said to the working group is we need to draft a bill and if not everyone agreed to all the amendments, they should be brought to the Committee for consideration. That is what you heard today. What you have before you are ideas. We already had Mr. Pollard telling us the FHFA is not in favor of some of the proposed amendments. You can tinker with something to the point that it is no longer what you want. I am afraid this could happen with S.B. 306. We have a bill, and we are ready to go forward with Proposed Amendment 6077.

Senator Kihuen:
Mr. Sasser was part of the working group on the bill. How do you feel about his proposed amendments?

Senator Ford:
I am not certain we can accommodate Mr. Sasser. He was involved in the working group the entire time. His changes do not take us where we want to go with this bill.

I was not in support of the redemption component we added to the bill because it defeated the purpose of having a bank come to the table early if all that was needed at the end was to give banks a right to come back and pay for a foreclosed home. I thought this would be sufficient enough incentive to address Mr. Sasser's concerns by offering an additional protection afforded homeowners that does not otherwise exist.

Chair Brower:
I will appoint myself as an ex officio member of the working group. That does not mean the working group must let me know when it meets, but I volunteer to help work on the bill over the next few days. I will close the hearing on S.B. 306 and open the hearing on S.B. 264.

SENATE BILL 264: Exempts spendthrift trusts from the application of the Uniform Fraudulent Transfer Act. (BDR 10-780)

Senator Mark Lipparelli (Senatorial District No. 6):
I will present S.B. 264 with Proposed Amendment 6259 (Exhibit J). The general idea behind the bill is to keep Nevada as competitive as we can be in the area of trusts.

Michael Alonso (Nevada Trust Companies Association):
We support S.B. 264. This bill provides clarification of statute. The bill clarifies that the provisions of the Uniform Fraudulent Transfer Act do not apply to transfers made to a spendthrift trust pursuant to the Spendthrift Trust Act of Nevada. The law refers to NRS 112.230 except as provided in NRS 166.170 which is not enough and too vague. We want to clarify language to make it clear that NRS 112 applies to spendthrift trusts only in the areas of statute of limitations and burden of proof.

Chair Brower:
The first place I go to when dealing with a trust issue in the legislative context is the Probate and Trust Law Section of the State Bar of Nevada. I am informed there are no objections from the Section with respect to this bill, which gives the Committee comfort.

Mark Dreschler (Premier Trust):
We are in support of S.B. 264. The bill provides clarification, and it does not expand or modify any language in existing law. Ambiguity in law puts Nevada at a disadvantage. The trust business is competitive nationwide; when it is said we are no longer advantaged, word gets around quickly which could result in loss of business.

Chair Brower:
Do you support the bill with Proposed Amendment 6259?

Mr. Dreschler:
Yes.

Gregory Crawford (Nevada Trust Companies Association; Alliance Trust Company):
I can speak to the fact that other jurisdictions have used the inconsistency between NRS 166 and NRS 112 against us. South Dakota, Delaware, Wyoming and Alaska are fellow states that are all strong competitors in the field of attracting out-of-state trust business. These states have used this issue against

us. The intent in Nevada has always been clear, but we are often dealing with practitioners who do not deal with Nevada law on a day-to-day basis. Clarification of existing law as intended by the Legislature will put us back in a more competitive position with other jurisdictions in the United States.

Chair Brower:
This bill is straightforward, and the Committee can process it this week.

Bob Dickerson:
I oppose S.B. 264. The Uniform Fraudulent Transfer Act was enacted in Nevada in 1987. It took the place of an earlier act, the Uniform Fraudulent Conveyance Act, which was enacted around 1918. The purpose of these Acts is to prevent fraudulent acts from occurring in Nevada. They prevent individuals from transferring assets to defraud creditors.

Senate Bill 264 exempts the Nevada Spendthrift Trust Act from the provisions of the Uniform Fraudulent Transfer Act. I do not see any justification or reason for doing this. Individuals may transfer assets to a self-settled spendthrift trust without meeting the requirements of the Uniform Fraudulent Transfer Act applying to the transfer. This allows individuals to transfer their entire estate. I see no reason why you would exempt this. If an honest person acting in good faith is transferring his or her assets to a trust, there should be no problem meeting the requirements of Nevada law with respect to fraudulent transfers. The Uniform Fraudulent Transfer Act prohibits any transfer that will delay, hinder or defraud a creditor. It contains a badge of fraud a court can look to in order to determine whether a transfer violates law. Exempting transfers to a self-settled spendthrift trust opens the door to fraud. Individuals acting in good faith should have no problem complying with law or having the law apply to them.

Senator Segerblom:
Two years ago, we had this same issue with respect to transferring assets away from a spouse. Does this bill impact that issue?

Mr. Dickerson:
No. The bill you are referring did not pass Committee. The purpose of that bill was to exempt alimony and child support obligations from self-settled spendthrift trusts. Alimony and child support obligations could be satisfied and honored by an individual who established the trust.

Senator Segerblom:
This is a different issue.

Mr. Dickerson:
Yes. The primary purpose of S.B. 264 is to change the statute of limitations from a 4-year limit that applies under the Uniform Fraudulent Transfer Act to make it clear the 2-year statute of limitations under NRS 166 applies to self-settled spendthrift trusts. I suggest it goes further than simply changing the statute of limitations. The bill strikes out the word "fraudulent," and it says provisions of NRS 112 do not apply to NRS 166. This is my concern. *Nevada Revised Statutes* 166 sets out the badges of fraud the court uses to determine whether a transfer will defraud creditors.

Mr. Alonso:
Is Mr. Dickerson referring to Proposed Amendment 6259?

Chair Brower:
He referenced the amendment. Mr. Dickerson, the Committee and the testifiers in Carson City have Proposed Amendment 6259. Do you have a copy?

Mr. Dickerson:
What I have appears to be the original bill draft. I do not see the amendment.

Chair Brower:
Testifiers use the word "amendment" when referring to the bill that seeks to change statute, not an amendment that seeks to change the bill. I think Mr. Alonso identified the problem. Mr. Dickerson, let us address the details of Proposed Amendment 6259 to S.B. 264 which may take care of your concerns about the bill.

Mr. Alonso:
Section 1 of the bill has been deleted. The only thing we are doing now is amending NRS 112.230 to delete the language that says, "Except as otherwise provided in NRS 166.170 … ." This language will be replaced with language that says, "This section does not apply to a claim for relief with respect to a transfer of property to a spendthrift trust subject to chapter 166 of NRS." The Legislative Counsel Bureau confirmed this is a clarification that makes no other changes. The terminology used with respect to deleting fraudulent transfers in section 3 has been removed from the bill.

Chair Brower:
Mr. Dickerson, though you do not have Proposed Amendment 6259, I recommend you review it and let the Committee know if you still have concerns.

Mr. Dickerson:
Is the sole reason for the bill to change the statute of limitations from 2 years to 4 years?

Mr. Alonso:
No. We are not changing the statute of limitations. If the limit is 2 years under NRS 166, that stays the same. If it is a 4-year limitation under NRS 112, that stays the same.

Chair Brower:
I will close the hearing on S.B. 264 and open the work session on S.B. 164 which has been added to today's work session. The Committee questioned if there was a problem with the previously presented language in the bill; however, we determined the bill is fine as originally drafted.

SENATE BILL 164: Revises provisions prohibiting certain discriminatory acts. (BDR 18-59)

Patrick Guinan (Policy Analyst):
We had S.B. 164 in the Committee a few days ago. It was scheduled for yesterday's work session, and we understood there was an amendment coming based on the Nevada Equal Rights Commission's concerns with language in the bill. The Commission and the bill sponsor have confirmed there is no need to make any changes. This bill updates language concerning discrimination throughout statutes. The bill is clean and ready to go with the sponsor's approval on a do pass vote, if that is the pleasure of the Committee.

Chair Brower:
The Legal Division of Legislative Counsel Bureau confirmed the bill language.

SENATOR FORD MOVED TO DO PASS S.B. 164.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

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Chair Brower:
I will open the work session on S.B. 60.

SENATE BILL 60: Revises various provisions related to the Office of the Attorney General. (BDR 16-470)

Mr. Guinan:
I will read from the work session document on S.B. 60 (Exhibit K). With Chair Brower's support, there are proposed amendments from the Attorney General's Office as follows:

- Delete sections 6 through 8 regarding notification of rulings on constitutionality. Ongoing discussions with the involved parties indicate no legislative action needed at this time.

- Delete sections 12 through 15 of the bill regarding victim's services. The Attorney General elected to forgo reorganizing the Victim's Services unit pending an outside assessment of the unit's current configuration.

- Amend section 18 to provide a July 1 effective date for sections 1 through 5 and sections 10 through 11 to grant the Attorney General's Office authority over the Confidential Address Program and the Office of Military Legal Assistance beginning on that date instead of October 1.

Chair Brower:
I believe the proposed amendment is in order, but I do not have a copy.

Mr. Guinan:
The proposed amendment is in conceptual form as I read it to the Committee.

Chair Brower:
We do not have a mock-up of the proposed amendments?

Mr. Guinan:
No. The proposed amendments are in conceptual form.

Chair Brower:
The Committee will confirm the language when the mock-up is produced.

SENATOR KIHUEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 60 WITH THE CONCEPTUAL AMENDMENTS FROM THE ATTORNEY GENERAL'S OFFICE.

SENATOR FORD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

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Chair Brower:
I will open the work session on S.B. 244.

SENATE BILL 244: Establishes requirements governing a contingent fee contract for legal services provided to the State of Nevada or an officer, agency or employee of the State. (BDR 18-658)

Mr. Guinan:
I will read from the work session document on S.B. 244 (Exhibit L). There are no amendments on the bill.

SENATOR ROBERSON MOVED TO DO PASS S.B. 244.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

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Chair Brower:
I will open the work session on S.B. 329.

SENATE BILL 329: Revises provisions relating to partnerships. (BDR 7-784)

Mr. Guinan:
I will read from the work session document on S.B. 329 (Exhibit M). There is a proposed amendment submitted by Senator Lipparelli with the approval of Chair Brower. The amendment conceptually revises language in section 1, subsection 3 and section 2, subsection 6 such that the provisions of the bill will apply to "a" singular business development and only to such a development undertaken by a corporation or a limited-liability company. The amendment would also make the bill effective upon passage and approval rather than on October 1, as previously listed in the bill.

Chair Brower:
The original language was awkward, and the proposed amended language intends to remedy the problem. The various stakeholders agree the amendments work, and I have heard no objections.

> SENATOR ROBERSON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 329 WITH THE CONCEPTUAL AMENDMENT FROM SENATOR LIPPARELLI.
>
> SENATOR KIHUEN SECONDED THE MOTION.
>
> THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

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Chair Brower:
I will open the work session on S.B. 444.

SENATE BILL 444: Revises provisions governing civil actions. (BDR 3-1137)

Mr. Guinan:
I will read from the work session document on S.B. 444 (Exhibit N). There is a proposed amendment from Todd Mason supported by Chair Brower. The amendment adds language regarding when a court should be required to allow discovery in these types of cases, provides that appeals may be taken and defines the word "plaintiff" for the purposes of this bill.

Chair Brower:
We learned lessons since last Session with the revisions of the Strategic Lawsuits Against Public Participation suits scheme. The bill intends to fix some perceived problems.

Senator Ford:
The proposed amendment adds new language to section 13 that says, "An appeal may be taken from the denial or grant of a special motion to dismiss." Does this contemplate a stay of the entire case during an appeal?

Chair Brower:
I believe that is intended to be an interlocutory appeal.

> SENATOR ROBERSON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 444 WITH THE PROPOSED AMENDMENT FROM TODD MASON.
>
> SENATOR FORD SECONDED THE MOTION.
>
> THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

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Chair Brower:
I will open the work session on S.B. 446.

SENATE BILL 446: Revises provisions relating to businesses. (BDR 7-1088)

Mr. Guinan:
I will read from the work session document on S.B. 446 (Exhibit O). There are proposed amendments from Robert Kim with the support of Chair Brower. The amendments offer technical amendments to the bill. A handwritten mock-up of changes has been provided for consideration by the Committee.

Chair Brower:
This is the biennial cleanup bill from the Business Law Section of the State Bar of Nevada. The proposed amendments were reviewed with Mr. Kim at the time of the hearing.

SENATOR ROBERSON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 446 WITH THE PROPOSED AMENDMENTS FROM ROBERT KIM.

SENATOR FORD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

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Chair Brower:
I will open the work session on S.B. 464.

SENATE BILL 464: Revises criminal penalties for the consumption or possession of an alcoholic beverage by a person under 21 years of age. (BDR 15-651)

Mr. Guinan:
I will read from the work session document on S.B. 464 (Exhibit P). There is a proposed amendment from Chair Brower to prohibit the sale, possession or use of powdered alcohol. A violation of these prohibitions would constitute a misdemeanor.

Chair Brower:
This is the bill sponsored by the Nevada Youth Legislature. There is a minor amendment on the bill relating to powdered alcohol.

SENATOR KIHUEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 464 WITH THE PROPOSED AMENDMENT BY SENATOR BROWER PROHIBITING THE SALE, POSSESSION OR USE OF POWDERED ALCOHOL.

SENATOR ROBERSON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

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Chair Brower:
I will bring the Committee's attention to S.B. 451, which relates to the Indigent Defense Fund. This bill was previously heard by the Committee and should be referred to the Senate Committee on Finance due to its fiscal impact.

SENATE BILL 451: Revises provisions relating to public defenders. (BDR 14-514)

SENATOR KIHUEN MOVED WITHOUT RECOMMENDATION TO REREFER S.B. 451 TO THE SENATE COMMITTEE ON FINANCE.

SENATOR FORD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY. (SENATORS HAMMOND, HARRIS AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

* * * * *

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Chair Brower:
I will close the work session and adjourn the meeting at 6:08 p.m.

RESPECTFULLY SUBMITTED:

_____
Lynette Jones,
Committee Secretary

APPROVED BY:

_____
Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**Exhibit**		**Witness or Agency**	**Description**
	A	2		Agenda
	B	6		Attendance Roster
S.B. 306	C	3	Real Property Law Section, State Bar of Nevada	Memorandum
S.B. 306	D	12	Senator Aaron D. Ford	Proposed Amendment 6077
S.B. 306	E	8	Federal Housing Finance Agency	Written Testimony
S.B. 306	F	4	Nevada Mortgage Lenders Association	Written Testimony
S.B. 306	G	5	Nevada Bankers Association	Proposed Amendments
S.B. 306	H	2	Community Associations Institute	Proposed Amendments
S.B. 306	I	5	Marilyn Brainard	Written Testimony; Statistical Review
S.B. 264	J	3	Senator Mark Lipparelli	Proposed Amendment 6259
S.B. 60	K	1	Patrick Guinan	Work Session Document
S.B. 244	L	1	Patrick Guinan	Work Session Document
S.B. 329	M	2	Patrick Guinan	Work Session Document
S.B. 444	N	2	Patrick Guinan	Work Session Document
S.B. 446	O	9	Patrick Guinan	Work Session Document
S.B. 464	P	2	Patrick Guinan	Work Session Document

IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association, Appellant, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Respondent.	Electronically Filed Oct 22 2018 04:15 p.m. Elizabeth A. Brown Clerk of Supreme Court Case No. 70501

APPEAL

from the Eighth Judicial District Court, Department XXI
The Honorable Valerie Adair, District Judge
District Court Case No. A-13-684501-C

ANSWER TO RESPONDENT'S PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Bank of America, N.A. (**BANA**)

Bank of America Holding Corporation

BAC North America Holding Company

NB Holdings Corporation

Bank of America Corporation

Akerman LLP

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION

SFR Investments Pool 1, LLC, invokes a statutory *bona fide* purchaser rule to overturn this Court's holding that a tender of the superpriority amount preserves the deed of trust from discharge in an HOA sale. While presented as a statutory requirement, SFR merely repeats the same *bona fide* purchaser argument this Court has consistently rejected. As this Court has held, because tender extinguishes the superpriority portion of an HOA's lien, the HOA is not capable of foreclosing on that portion. The *bona fide* purchaser doctrine—whether based on statute or common law—is incapable of reinstating a lien that no longer exists. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. Adv. Op. 72 at p. 13, 2018 WL 4403296, at *6 (2018) ("A party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void," and "the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion" as a result of the bank's valid tender.).

SFR attacks only one part of the Court's opinion: the determination that BANA's tender did not involve a title "instrument." *See Bank of Am.*, 134 Nev. Adv. Op. 72 at p. 8-9, 2018 WL 4403296, at *4 (2018). Because the rehearing petition is the first time SFR has sought to argue BANA's tender was an "instrument" within the meaning of Nevada's real property statutes, that argument was waived and is barred by NRAP 40(c).

Apart from the waiver, SFR's argument is wrong on the law. BANA's check for the superpriority component was not an "instrument" that could—much less had to—be recorded. The legislative history behind the 2015 amendments to the statute confirms NRS 111.315, NRS 111.325, and NRS 106.220 did not apply to BANA's tender, and that the Legislature expects HOAs, not deed of trust holders, to record notices of satisfaction. The Court should deny rehearing.

ARGUMENT

I. The Court Should Not Impose the *Bona Fide* Purchaser Rule

SFR's petition for rehearing has one objective: to convince the Court to apply the *bona fide* purchaser doctrine. SFR's rehearing petition is solely about the *bona fide* purchaser rule because the cited statutes are not substantive; they deal only with the giving of notice to third parties. The rehearing petition fails because SFR does not present any reason for the Court to reconsider its first-principles holding that the *bona fide* purchaser doctrine does not apply to a superpriority tender. SFR misinterprets NRS 111.010, NRS 111.315, and NRS 111.325. However, even assuming for argument that SFR's interpretation is correct, it does not change the Court's central holding on the *bona fide* purchaser issue—the *bona fide* doctrine does not apply to a void sale. Since the statutes are simply codifications of the *bona fide* purchaser doctrine, they cannot change the outcome.

NRS 111.315's only purpose is to establish that recording imparts record notice to a third party. The statute says "every conveyance of real property, and every instrument . . . whereby any real property may be affected . . . ***to operate as notice to third persons***, shall be recorded . . ." NRS 111.315 (emphasis added). Even if the conveyance or instrument is not recorded, it "***shall be valid and binding between the parties thereto*** without such record." NRS 111.315 (emphasis added). Even if SFR were correct that the tender needed to be recorded (and SFR is not), failure to record would not impair the validity of the tender. It would only mean that SFR would not have had record-notice of it. That would not defeat the tender; as this court already determined:

> A party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void.
>
> * * *
>
> Because a trustee has no power to convey an interest in land securing a note or other obligation that is not in default, a purchaser at a foreclosure sale of that lien does not acquire title to that property interest.

Bank of Am. v. SFR Invs. Pool, 134 Nev. Adv. Op. 72 at p. 13, -- P.3d --, 2018 WL 4403296 at *6 (citations omitted). This Court concluded BANA's valid tender rendered the sale void "as to the superpriority portion" (*id.*) regardless of whether SFR was a *bona fide* purchaser. SFR does not challenge the Court's analysis of the *bona fide* issue or its conclusion that the doctrine does not apply to a void sale. SFR says the *bona fide* rule applies because the tender falls within the scope of

NRS 111.315 and NRS 111.325. Even if the tender fell under the statutes (it did not), the statutes' own words confirm the tender is valid even if unrecorded, and nothing in Chapter 111 contradicts the Court's conclusion that a valid tender satisfies the superpriority component and renders *bona fide* status irrelevant.

II. Waiver Bars Rehearing.

SFR waived the arguments that BANA's tender involved an "instrument" and that discharging the lien is equivalent to a "surrender" of the lien. SFR did not argue tender involves an instrument of surrender until the rehearing petition. SFR violates Rule 40(c)(1), which says "no point may be raised for the first time on rehearing." NRAP 40(c)(1). SFR argues for the first time on rehearing that BANA's tender was an "instrument." SFR admits it never made this point before, but claims it "never had an opportunity to address" this issue in its briefing. Petition at 8, n.3. SFR's excuse falls short. SFR argued in its answering brief that NRS 111.010, 111.315, and 106.220 required BANA to record a document relating to the superpriority tender. *See* Answering Br. at 13-16. SFR had an opportunity to explain why the tender involved an "instrument," but it missed that opportunity. SFR made an error in assuming one of the necessary premises of its argument without arguing for it. SFR's error is its own fault. It does not excuse its waiver.[1]

[1] SFR also failed to make a developed argument that BANA's tender was an instrument in its petition for review, which it concedes in this petition for rehearing. *See* Petition at 8, n.3.

III. No Statute Required BANA To Record any Document in Order to Discharge the Superpriority Portion.

Even assuming the record-notice statutes would have any effect on the Court's ruling, SFR's statutory argument fails because it conflates payment of a liened obligation with conveyance of a property interest. SFR asks the Court to recast two statutes that codify the *bona fide* purchaser rule for *property* instruments—deeds, mortgages, rescissions of deeds and mortgages, lien notices, etc.—to apply to payments. Adopting this theory would make a tender's effect uncertain unless it was recorded; otherwise, the tendering party (not only a holder of a deed of trust, but also a homeowner or other party with an interest) would risk having the payment nullified by a lienholder's foreclosure, even when the lien had been fully paid. To ensure it is effective, each and every tender would have to be recorded, flooding the county recorders with copies of checks, cash, and other payment documents that lack information (such as an assessor's parcel number or legal description) required in the recording system. Neither the statute's language nor the legislative intent support that impractical and absurd interpretation.

A. There was no "instrument" involved in the tender.

For any of NRS 111.010, NRS 111.315 or NRS 111.325, to apply, SFR must identify an "instrument" involved in the tender. This Court correctly held a check and cover letter are not "instruments."

SFR relies on the same definition of "instrument" from *Black's Law Dictionary* that this Court cited in the *en banc* opinion: "A written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate." *Instrument, Black's Law Dictionary* (10th ed. 2014). SFR does not argue the check was an "instrument" as the term is used[2] in the recording statutes; instead, it discusses only the cover letter that BANA's attorney attached to explain the purpose of the check.

However, it was BANA's check, not the cover letter, that constituted the tender. The *en banc* opinion confirms this, discussing "the letter included with the tender." *Bank of America*, 2018 WL 4403296134 at *1. If the letter was "included with the tender," it could not be the tender. That was the check, which is not an "instrument" under Chapter 111 or NRS 106.220. As the Court wrote in the *en banc* opinion, the "tender discharged the superpriority portion of the HOA's lien ***by operation of law***." *Id.* at *5 (emphasis added). BANA did not have to record anything after the tender for its deed of trust to remain valid.

Contrary to SFR, the letter was not a "proffered unilateral contract." The letter did nothing more than discuss the assessment rate, summarize the

[2] Article 3 of the Uniform Commercial Code classifies a check as a "negotiable instrument." *See* NRS 104.3104. The UCC term "negotiable instrument" is separate from the term "instrument" as used in Chapter 111. *See* NRS 104.3104(1) (defining "negotiable instrument" as "an unconditional promise or order to pay a fixed amount of money…").

superpriority provision of NRS 116.3116, and state that acceptance of the check would satisfy the superpriority portion and preserve the deed of trust. The cover letter did not propose any contract with the HOA, and SFR failed to produce any evidence that the HOA understood the letter as an offer for a unilateral contract. The only "rights, duties, and liabilities" the letter discussed were taken directly from NRS 116.3116(2). Under the *Black's Law Dictionary* definition, the letter was not an "instrument." Under the statutes, the letter could not surrender any interest in lands.

Finally, adopting SFR's argument would lead to absurd consequences. If an obligor has to record payment of a secured debt, payers would need to record copies of checks (or even paper currency) every time they pay an obligation subject to lien rights. Not only would this be overly burdensome, it would be practically unworkable because checks and paper currency lack assessor parcel numbers, contain no legal descriptions, and cannot be indexed under the grantor-grantee index. The same absurdities would occur if the Court holds a cover letter accompanying a payment had to be recorded if the letter lacks parcel numbers, legal descriptions, and the ability to be indexed. It is for the Legislature to enact new recording requirements; this Court should not enact via judicial opinion a new recording rule that could have profound consequences beyond this case.

Because neither the check nor the letter was "an instrument," no aspect of BANA's tender falls under the recording statutes cited by SFR.

B. NRS 111.315 further does not apply because BANA did not "surrender" the HOA's lien.

NRS 111.315 discusses the recording of (1) "every conveyance of real property" and (2) "every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected." The tender fits neither of those two categories: it is not a "conveyance," nor an "instrument setting forth an agreement" or whereby an interest in land can be affected.

1. The tender was not a "conveyance."

The *en banc* opinion held that "tender of the superpriority portion of an HOA lien discharges that portion of the lien by operation of law," as opposed to "a written legal document" releasing the lien. *Bank of Am.*, 134 Nev. Adv. Op. 72, 2018 WL 4403296 at *5. SFR disputes this holding on specious grounds and mischaracterizes BANA's tender as involving a "conveyance." "Conveyance of real property" is defined by NRS 111.010(1) as "every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law***, *by which any estate or interest in lands is created, aliened, assigned or surrendered***."** (emphasis added). The cover letter and check did not "create, alien, assign, or surrender" any "estate or interest in lands." Contrary to

SFR's argument, paying the superpriority component is not synonymous with surrendering the lien.

SFR bases its attempt to bring the tender into NRS 111.010 on the Court's conclusion that the tender "discharged" the superpriority portion of the HOA's lien. According to SFR, this conclusion implicates NRS 111.010(1) because *Black's Law Dictionary* lists both "discharge" and "surrender" as synonyms of "release." This is the sole basis of SFR's argument.[3] SFR cites no statute or judicial opinion; it relies only on its own creative interpretation of synonyms included for an entry in *Black's Law Dictionary*. SFR assumes the three words mean exactly the same thing, which is not only wrong facially, it also ignores context. Citing two synonyms of "release" is not a sufficient basis for the Court to reverse itself.

In fact, "discharge" and "surrender" do not share an identical meaning in the context of a lien. The primary definition for "discharge" is, "Any method by which a legal duty is extinguished; esp., the payment of a debt or satisfaction of some other obligation." *Discharge, Black's Law Dictionary* (10th ed. 2014). The relevant definition for "surrender" is, "The giving up of a right or claim." *Surrender, Black's Law Dictionary* (10th ed. 2014). A "discharge" occurs because the obligation is paid. A surrender occurs if the obligation is abandoned. While the lien lapses

[3] SFR made a slightly shorter version of this dictionary argument in its answering brief. *See* Answering Br. at 14-15. This is merely "reargu[ing] matters presented in briefs," NRAP 40(c)(1), and so the Court should not address it.

under both scenarios, the manner in which the lien lapses is critical. A payment discharges the lien because the purpose of the lien (*i.e.*, securing a right to payment) has been satisfied. A surrender simply gives up the lien regardless of whether payment has occurred. Only ***the lienholder*** can "surrender," that is "giv[e] up" the lien. A party cannot "surrender" something it does not possess. SFR's attempt to equate "discharge" with "surrender" is a word game—the Court should not pretend these two scenarios are synonymous.

BANA's tender was not an "instrument … by which any estate or interest in lands is created, aliened, assigned or surrendered." *See* NRS 111.010(1). It was not a "conveyance" subject to NRS 111.315 because it was not a "surrender." And, because NRS 111.325 is limited under its plain language to situations where there is a conveyance, that statute does not apply at all.

2. The letter did not set forth an agreement or affect an interest in land.

The second category NRS 111.315 governs is "every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected."[4] Even assuming BANA's tender somehow qualified as an "instrument," it did not "set forth an agreement" of any sort. The letter accompanying the check merely explained the superpriority provision and stated that acceptance of the check would be understood as acknowledgement that the

[4] NRS 111.325 omits this second category.

superpriority lien had been paid. Given that the HOA's trustee rejected the tender, SFR cannot argue any "agreement" took place.

The Court correctly concluded the tender does not affect any real property under Chapter 111. Satisfying the superpriority component does not "surrender" the lien. Instead, "it ***preserves*** a pre-existing interest, which does not require recording." *Bank of Am.*, 134 Nev. Adv. Op. 72 at p. 8 (emphasis in original). SFR does not challenge the Court's conclusion that a junior lienholder's satisfaction of a senior interest preserves the junior lien. SFR also fails to address the general rule that documents which do not create or transfer interests in land are often held to be nonrecordable. SFR's failure is critical because NRS 111.010 defines the scope of Chapter 111, and the actions included in that definitional statute—creation, assignment, alienation, and surrender—all relate to the creation and transfer of interests in land. In contrast, Chapter 116 does not deal with the creation or transfer of interests in land. It governs the rights and obligations of common interest communities. The superpriority lien arises under Chapter 116; Chapter 116—not Chapter 111—applies.

The Court should focus its analysis on Chapter 116—without importing inapplicable provisions from Chapter 111—because the Legislature created a specific foreclosure process for HOA liens. As this Court explained in the seminal *SFR Investments* opinion, the Legislature "handcrafted a series of provisions to

govern HOA lien foreclosures" rather than simply adapt to preexisting law. *SFR Invs. Pool I, LLC, v. U.S. Bank, N.A.*, 130 Nev. 742, 746, 334 P.3d 408, 411 (2014). The Legislature crafted specific rules for Chapter 116 liens—precluding SFR's attempt to import additional statutes from Chapter 111.[5]

Chapter 116 confirms SFR's argument is wrong. The HOA's lien was created when the CC&Rs were recorded. *See* NRS 116.2101 (providing that recording CC&Rs creates an HOA); and NRS 116.3116(1) (providing that all HOAs governed by Chapter 116 have a superpriority lien). Not only does recording the CC&Rs create the lien, it also perfects it: "Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessments under this section is required." NRS 116.3116(5) (2014).[6] Consistent with these provisions, the HOA did not need to record anything to commence enforcement of the superpriority lien. An association commences enforcement of its lien by giving the homeowner a notice of delinquency, but no statute requires the HOA to ***record*** anything to commence foreclosure. *See* NRS 116.31162(1)(a); *SFR Invs.* 130 Nev. at 746, 334 P.3d at 411 ("To initiate a foreclosure under NRS 116.31162 through NRS 116.31168, a Nevada HOA must ***notify*** the owner of the delinquent assessments. NRS

[5] NRS 116.1108 does not provide a means to import NRS 111.010, NRS 111.315, or NRS 111.325 into Chapter 116. NRS 116.1108 allows for supplemental general principles, not for the incorporation of inconsistent statutes from another chapter.
[6] Following the 2015 amendments, this statute is now found at NRS 116.3116(9).

116.31162(1)(a)." (emphasis added). Neither NRS 116.31162(1)(a) nor *SFR Investments* says anything that even suggests an HOA must record a document to commence foreclosure. If the HOA can begin to enforce the superpriority lien without recording anything on title, then the deed of trust holder must also be able to satisfy the superpriority lien without recording anything—especially because the act necessary to satisfy the lien is payment, something that is traditionally outside of the recording requirement.

Even if the tender were an "instrument," it is not a conveyance and it does not affect the land for purposes of Chapter 111. NRS 111.010, NRS 111.315, and NRS 111.325 do not apply.

C. NRS 106.220 does not apply.

NRS 106.220(1) states that some subordinating instruments are "not enforceable ***under this chapter or chapter 107*** of NRS unless and until it is recorded." NRS 106.220(1) (emphasis added). SFR discusses this clause, but attempts to mislead the Court by removing via ellipses language making clear that the statute does not apply. SFR also ignores the fact that BANA does not attempt in this action to enforce the deed of trust under NRS Chapters 106 or 107. Rather, SFR brought this action to enforce a foreclosure deed issued by the HOA under NRS Chapter 116 against BANA's deed of trust.

SFR attempts to mislead the Court by selectively editing NRS 106.220(1). SFR omits the clauses that limit NRS 106.220(1)'s reach to an instrument that, in addition to concerning a deed of trust, "concerns only one or more mortgages or deeds of trust of, liens upon or interests in real property, ***together with, or in the alternative,*** one or more mortgages of, ***liens upon or interests in personal property or crops***, the instruments or documents evidencing or creating which have been ***recorded prior to March 27, 1935***[.]" NRS 106.220(1). These clauses plainly limit the scope of NRS 106.220(1) to instruments that concern real estate interests together with, or in the alternative, encumbrances on "personal property or crops." Not only must an interest in personal property or crops be involved, the interest must be "recorded prior to March 27, 1935." By its own terms, this statute does not apply. SFR's solution to that problem was to edit the statute by using ellipses to excise the limiting language. SFR's slicing and dicing of NRS 106.220(1) would turn a narrow provision limited to 80-plus-year-old crop and personal property interests into a broad statute that applies to ***all*** instruments that subordinate or waive the priority of a real property interest. This is an unscrupulous interpretation of the statute. This Court should not indulge SFR's attempt to mislead it.

Finally, this statute cannot apply because it concerns instruments that "subordinate or waive as to priority" a lien or interest. NRS 106.220(1). In *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), this

Court held NRS 116.1104 does not allow HOAs to waive or subordinate their superpriority liens. *Id.* at 757-58, 334 P.3d at 418-19. If BANA's tender were an instrument that "subordinated" or "waived" the superpriority lien, NRS 116.1104 would bar it. SFR's argument implicitly entails that it is ***legally impossible*** for the holder of a deed of trust to tender the superpriority portion. This would be the absurd but inevitable consequence of adopting SFR's specious argument.

IV. Legislative History Confirms that there Was no Recording Requirement at the Time of BANA's Tender.

The 2015 amendments to NRS Chapter 116 dispel any remaining doubt as to whether NRS 106 or 111 required BANA to record its tender. Throughout our statutory lien law, the lien claimant is the party responsible for recording a lien release.[7] Nevada's other lien statutes explicitly state that the lienholder must record a satisfaction of lien after it is paid. *See* NRS 117.070(1) ("Upon payment . . . the [condominium association] management body shall cause to be recorded a further notice stating the satisfaction and the release of the lien thereof."); NRS 108.668 (hospital lien claimant must release lien upon payment or face statutory penalties); NRS 108.2437 (upon payment of a mechanic's lien, "the lien claimant shall cause to be recorded a discharge or release of the notice of lien[.]").

[7] This is reflected in the case's record—the HOA's trustee, in its letter demanding a check for the full amount of the lien from BANA, wrote, "Upon receipt of payment a release of lien will be drafted and recorded." (1JA_201).

In 2015, the Legislature enacted a similar requirement for HOAs. The amended version of NRS 116.31164(2) requires an HOA to record satisfaction of the superpriority portion of the lien before conducting a sale. NRS 116.31164(2) (October 1, 2015). During the Senate Committee on the Judiciary's hearings on this amendment, Senator Aaron D. Ford (a cosponsor of the legislation) said this provision would "remedy that situation [where a property worth $500,000 is sold for $5,000] through the additional notices required before a superpriority lien sale can take place." Senate Comm. Judic. Minutes (Apr. 7, 2015), at 5, attached as **Exhibit A**. In Senator Ford's words, "[b]efore you get to a foreclosure sale, you will know if the payment of the superpriority lien has been made." *Id*. He further explained, "Investors in the title industry will receive greater certainty regarding the title status of units that have been foreclosed upon by the HOA." *Id*. at 8.

Diana Ebron, one of SFR's attorneys in this present appeal, testified at the hearing on behalf of SFR. *Id.* at 11. She did not give any opinion from SFR that other statutes required recordation of a superpriority lien satisfaction. In fact, she testified, "[t]his bill cleans up some of the notice concerns we have." *Id*. SFR had the opportunity to respond after Sen. Ford and the other members of the committee explained these amendments, but chose not to express a belief that NRS 106 and 111 already required recordation of superpriority lien tenders.

This legislative history proves two points. First, the Legislature did not believe NRS 106.220 or NRS Chapter 111 applied to tenders of the superpriority portion. Second, the Legislature put the burden for recording a notice of satisfaction on the HOA. The introduction to NRS 116.31164 states, "[t]he sale must be conducted in accordance with the provisions of this section," making it clear that this provision governs ***the party conducting the sale***. NRS 116.31164(1). Had the Legislature believed that deed of trust holders were the parties required to record satisfactions, it would have stated that the deed of trust is extinguished unless the lender recorded a notice of satisfaction.

Legislative history further undermines SFR's argument that other recording statutes required BANA to record any sort of document after it tendered the superpriority portion of the lien in this case.

CONCLUSION

This Court got it right the first time. It should deny rehearing.

DATED this 22nd day of October, 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this answer to a petition for rehearing has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this answer to a petition for review complies with the page or type-volume limitations of NRAP 40(b)(3) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 4,132 words.

FINALLY, I CERTIFY that I have read this **ANSWER TO RESPONDENT'S PETITION FOR REHEARING**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of October, 2018.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on the 22nd day of October, 2018, the foregoing **ANSWER TO RESPONDENT'S PETITION FOR REHEARING** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[ ] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Allen G. Stephens
An employee of Akerman LLP