Not the HOA rules I agreed to. (Open Op-ed)

Mike Kosor, Colonel USAF Ret.

A bill, SB 417, now working its way through Nevada's 82nd legislative session crosses a long held red line. If passed, rouge HOA boards will be able to target and chill the voices of owner opposition using litigation. This immense power in the hands of volunteer community boards offends first amendment rights, election rights and more. Should we not learn from the recent troubles of Tennessee's legislators?

A majority of HOA homeowners tell industry pollsters they are satisfied with their community leadership. Maybe so. Alternatively, and maybe simultaneously, many owners are frustrated seeing little recourse when their HOA boards over step their intended authority. Wherever you may come down, all owners best lay low should SB 417 become law.

Deep pockets with interests to protect, too easily change Nevada law. Combined with the high level of homeowner apathy (or intimidation) I have seen in my HOA, gives me little hope real opposition to this bill will surface- especially since the Nevad Real Estate Division (NRED) and the Ombudsman, whose mission is to advocate, inexplicably remain silent. This is exactly what the sponsors led by the national lobby organization, Community Association Institute (CAI), were looking for. If passed, SB 417 will give them a valuable precedent to market similar efforts across the country. Its passage for Nevadans will present a clear and present danger to the owners of over 600,000 units in HOAs.

For those not familiar with CAI, it is a trade group whose core mission is to enact state legislation that benefits its members, primarily community association manager and attorneys. The bill was placed on the April 11, 2023 agenda of Nevada's powerful Senate Committee on Judiciary. Sen Melanie Scheible, the Committee's Chair is the bill's defacto sponsor. She serves as my district's Senate representative.

When I became aware of what SB 417 intended, surfacing on the final day to submit legislation, I made multiple attempts to contacted Sen. Scheible. I got no response. I had met with Sen. Scheible a few years earlier seeking her support and frankly hoping to education her on long needed HOA reforms. At that time, she was not an HOA owner and had a very limited understanding of HOA laws despite her day job as a Clark County deputy district attorney. When she stepped down from her chairwoman role to champion SB 417 to her committee, I was astonished.

It became clear to me why my efforts to contact Sen Scheible went unanswered. CAI's lobbyist had her ear and apparently the ears of others on the committee long before this bill was unveiled to the public. It is clear CAI was heard. The voice and interests of owners, even constituents, is questionable. Meantime, NRED remains mute.

Understand how the HOA industry conducts its deceptive public relations campaigns. The trade group lobbyists — primarily HOA attorneys affiliated with CAI — somehow manage to convince state Legislators that those of us who advocate for HOA reform are "uneducated" or "disgruntled" homeowners.

No less than six attorneys and community mangers affiliated with CAI appeared in Las Vegas' videoconference room to speak to the eight senators gathered in Carson City. The attorney leading the effort was Adam Clarkson representing CAI's lobby arm in Nevada. He is employed by many HOAs, to include mine, which has been developer-controlled for twenty-three years. Thus, I was not surprised when he described some elected board volunteers as "not the kind of people who should be on the board." Setting aside it sounded like Clarkson was talking about me, I was struck by this legal professional and his colleagues gathered, advocating to set aside a foundational principle – elections. Inexplicably, SB 417 casts a similar blind eyed. It permits administrative removal of duly elected directors with no real due process. NRED, the regulator to be tasked- still mute.

The bill's objective is clear- permit HOA boards to stonewall owners' seeking transparency. If owners or even their elected representatives persist, the bill provides boards and industry players as proxy, a route not currently available to litigate and chill those determined to be "not good people" as Clarkson advocated. In full disclosure, I proudly raise my hand as an antagonist this bill's true sponsors wish to target.

Communications made in connection with an issue of public interest in a forum open to the public is, at least in theory, immune from civil liability. Similarly, I see homeowners appropriately seeking transparency from their HOA, immune from litigation. And the Nevada Supreme Court agrees (*Kosor v Olympia*). But, if the Nevada legislator has its way, maybe not for long.

Association attorneys routinely writing cease and desist letters to homeowners based on opposition they express to board actions made in person and/or on social media. Most all of them are baseless and are used simply to intimidate. It is also a rainmaker. The ability to bring legal actions in court, as this bill proposes, is a game changer.

Since HOAs were created, a prohibition on HOA, its employees, or agent on initiating litigation has been a respected red line. There is a good reason for this I hope needs no expounding. Just imagine the implication of having your County Commissioners bringing litigation down on those who dare to speak in opposition. Now, look at your volunteer board- assuming you even now who they are- and ask, is this the power that I want them to hold? Not the rules I agreed to.

"When you buy into a homeowners association, you are really going into business with a lot of other people you don't know," says Marjorie Murray, president and CEO of the Center for California Homeowner Association Law. Hopefully, you buy in a community you come to like the business and have no real issues with governance. If you believe CAI, a high level of HOA approval is held by a majority of owners. But what if that changes? Or you are one of the unfortunates few in a bad business? What if two or three of the owners leading your community come to see business differently?

Currently, the worst-case scenario finds your volunteer board or the company it hires mismanaging the dues collected. In rare cases, they may even commit outright fraud and embezzlement, as is occasionally reported. But **when your board or proxies start levying litigation, not just annoying fines, targeting you for exercising your rights, things change dramatically**. Then, what is your recourse?

I have been a victim of retaliatory litigation. Not as a board member, but by the developer of my community, when I sought to run for the two owner elected positions on *his* 9,000 unit Master Board. The defamation action spanned five years, with a stop before Nevada's Supreme Court. It was ultimately dismissed. The Courts ruled the developer violated Nevada law in bringing his action. After nearly seven figures in attorney fees on both sides (I thank God for my home insurer's' commitment), the developer lost his battle. He was even ordered to pay me a relatively nominal "fine." But it is my assessment his chilling litigation was a success. And likely worth his significant cost. My community saw what he did to me. They understandably want nothing of the kind. SB 417 would place the same capability in the hands of Nevada's HOAs with the purse of owners.

Owners have a right to inspect association records- both under the law and through their declarations (CC&Rs). But enforcing this right, especially where a board sees your record inspection as adverse to *their* interests or where the board is developer controlled and appointed directors "forget" their legal duty rests first with owners, it is no small feat to obtain what is rightly yours. I and many Nevada HOA owners who regularly reach out to me, understand this reality. SB 417 will give HOA boards an added ability to put crosshairs on those that try. Oh- and did I note Nevada's sole HOA regulators is mute?

Managers are paid to provide the record keeping service for the association as part of their based fee. Current law severely limits what association records owners can inspect, despite their ownership interest. I see little reason, except for the smallest of communities, why all HOA records owners have a right to inspect are not already available via the web, as are virtually every other membership or account we have. Lost fee opportunities for the manager?

A provision of SB 417 ends the $10 limit on inspection requests. It allows an association or their agents charge "actual" costs in providing for inspection. It is a doubling of the payment and a windfall subsidy to community managers. The bill fails to provide any guidance or restraints on what "actual" costs are and what can be passed on. I see it failing to conform with the cost schedules of Nevada public agencies charge for record inspections.

I acknowledge most boards are not likely to even consider, much less employ the clear Orwellian tools proposed in SB 417. I believe most directors will show the needed maturity and wisdom to abstain. But there are over 3,500 HOAs in Nevada. What are the odds you happened to be an owner in one that does fit my presumptions? Then, where is the due process when a board uses and/or abuses the tool?

I don't buy the assertion of Sen. Scheible, a material number of boards are being exposed to owners' harassment, death threats or are victims of vandalism going to the need for SB 417. Where are the facts in support? All I heard at the April 11 hearing were innuendos and a few random acts over many years. To be clear, I do not doubt some owners fail to properly channel their frustrations with the "system" that is dictating how they enjoy their home. A little empathy please.

In any case, we should not enact new laws every time there is some small miscarriage of justice. This will affect people's precious and valuable possession, their homes. Is arming community boards with the powers under consideration in SB 417, powers our elected County Commissioner do not have or even want, a viable solution? Assertions by the bill's supporters "the police cannot help", true or not, does not justify what this bill proposes.

Not once in eight years serving on HOA boards, have I been threatened, bullied, or felt police intervention was needed. Lucky? I don't think luck has much to do with it. I put more credence in my willingness to have open communications, a willingness to listen, and a demand for transparency contributing to my favorable experiences as a director- not luck. Inappropriate actions do occur. But it is far from the norm.

Some argue HOAs are a matter of contract. So don't buy if you don't want to abide by the CC&Rs. Set aside CC&Rs can be changed and a buyer not know, or knowing the rules requires a strong understanding of a law few professionals understand. HOAs are a condition of granting necessary builder permits in many, if not most developments. People often do not have a choice. So, millions of Nevadans live in HOAs. Enacting destructive legislation to make it easier to deal with a handful of owners is the wrong approach. Certainly, wrong given the impact this bill will have on free speech and our constitutional right to petition.

I cannot recall more than two owners I'd consider to have acted "out of control", or were "bad people" as Adam Clarkson asserted exist during his introduction of SB 417. My experience finds our current civil code and law enforcement more than adequate to address those very few that will not relent. OK, supporters of SB 417 see it otherwise. They are entitled to their opinion. But how about we first try greater transparency and improved communications to create neighborhood harmony. Let's not lose sight of why some HOA owners get understandably frustrated with the" system." Certainly, let's not make the system more antagonistic.

Legislators need to understand that happier, more secure homeowners, and peaceful HOA-governed communities will help our cities and communities to grow, prosper and be healthy. That goal stands in stark contrast to the heavy-handed approach this bill advances.

If our legislators and NRED want to improve HOA satisfaction, start by using the tools already in place? In 2019 an [HOA] CIC Taskforce was established by legislators. Its goal was to do what our legislators privately dread – dealing HOA legislation. Their apprehension is understandable and the Taskforce was born. It *could* operate year-round and *could* provide for a deliberate process to address the way ahead for Nevada's HOA laws. The vision was to bring together stakeholders and identify fixes to real HOA issues. Then bring vetted and actionable legislation to the biannual sessions. But the Taskforce has met only twice since it was authorized. It last met August 2020- two and half years ago. The solution CAI proposes in SB 417 was not addressed by the Taskforce. Nor were any of the proposed changes under consideration this session.

At end, the real danger of SB 417 rests in a HOA board allowed to decide who they consider to be acting inappropriately, then permit them to target these "offenders" with threats of damages, huge legal bills, even litigation, all using the purse of owners. People have a right to live without fear in their homes, free from illegal, unfair, or arbitrary actions by those who govern. **Nor should contracts create forms of governance that disenfranchised citizens from basic constitutional rights.** This an ill-conceived solution for the wrong problem. Owners should be very frightened by what SB 417 could bring, if passed.