This article appeared in the 1st Quarter 2012 CAMEO Connection Newsletter

Workshops are legal – for now.
By William Paul Wright, Esq.

For purposes of this article "workshops" are defined as gatherings of board members without notice and agenda, where no action is taken by those in attendance. On July 31, 2006 Nevada Real Estate Division ("Division") Administrator Gail Anderson announced the appointment of Lindsay Waite as the new Ombudsman. Not long after her appointment I was on a phone conference with other HOA industry attorneys and Ombudsman Waite, in discussion of various issues. During that conversation Ombudsman Waite asked us to inform the HOA community that she thought workshops were legal. Apparently she had spoken at a manager's breakfast and something she had said had led the audience to believe that her position was that workshops were illegal meetings. Ombudsman Waite explained during the call her belief that workshops were not illegal meetings as long as no action was being taken.

Fast forward a year or more later, and while I was on a conference call with then Chief Investigator Bruce Alitt and Ombudsman Waite, Chief Alitt stated that workshops were illegal meetings. The issue arose because I was requesting Ombudsman Waite and Chief Alitt attend a workshop with a troubled board I represented, to assist in explaining a board's responsibilities under the law, and Chief Alitt's concern was that this would constitute an illegal meeting. I responded that workshops were not illegal meetings, and reminded Ombudsman Waite of her prior position. Ombudsman Waite then stated that, after discussing the issue with Chief Alitt, she was now neutral on the issue, and thought that the Nevada Legislature or the Commission on Common Interest Communities ("Commission") should determine the legality of workshops.

In the Summer 2009 Community Insights newsletter, Ombudsman Waite reported the case of *Virginia City Highlands Property Owners Association, Board of Directors* Case No. IS-08-06-01-164 (November 2008). It was reported that in 2007 the Board of Directors for Virginia City held a workshop to discuss roads and/or road construction. The Board did not send notice and agenda of the workshop, under the belief that it was not a meeting as no decisions would be made during the gathering of Board Members and construction personnel. An Intervention Affidavit was filed with the Division by a homeowner who was aware of the gathering. The Division's investigation resulted in a recommendation for a hearing before the Commission, and in its filed charges the Division alleged that the gathering was an illegal meeting held without notice and agenda. Virginia City entered into a Stipulation with the Commission, in lieu of a hearing, which admitted to the Division's allegations. Contained within the Stipulation was the following statement:

"By holding a meeting with all of the board of directors present to discuss road construction issues within their jurisdiction without providing proper notice and agenda of the meeting, the association's Former Members were in violation of NRS 116.31083(2) and/or NRS 116.31083(4) and are subject to discipline as specified in NRS 116.785. No "workshops" are authorized because when a quorum of the association's board meets to discuss matters within their custody or control, notice and agendas must be provided as set forth herein."

The reported Virginia City Stipulation, while not precedent or binding on any other HOA, sent a chill throughout the HOA community. The quoted language above did not appear in Statute or Code, and was the Division's opinion only, but was contained in a stipulation accepted by the Commission, and seemingly was evidence of their position. Thereafter, while advising clients as to whether workshops were legal, many HOA attorneys advised that they were, but also had to advise that if a complaint was filed against a board that engaged in a workshop there was the risk that it would result in a decision similar to Virginia City.

After the reporting of the Virginia City case, I discussed this issue with several Commissioners at Commission meetings. I presented them with examples of the absurd results that would occur if every time a quorum of board members discussed matters within their custody or control it would be considered a meeting requiring notice and agenda. In the case of three-member boards, for example, I explained that no board member could discuss anything related to their HOA, in between meetings, with any other board member under this new "rule." Several Commissioners stated to me that the unintended consequences of the Virginia City Stipulation language was not contemplated by the Commission when accepting the Stipulation, and that the Stipulation was not to be taken as a policy pronouncement by the Commission. However, the language was in print, and Chief Alitt continued to insist that the Division's position was that workshops were illegal meetings, citing the Virginia City Stipulation.

On December 7, 2011, a workshop for the introduction by the Division of proposed regulation LCB File No. 11-14-11 ("Proposed Regulation") took place during a Commission meeting. The Proposed Regulation contained a definition of "action" and "meeting," and other provisions including a provision which would have made HOA meetings "open and public." Written comments in favor and against the Proposed Regulation were submitted to the Commission in advance by various parties. Former Chief Alitt and Administrator Anderson provided live testimony in favor of the Proposed Regulation, while members of the Board of Sun City Anthem and I provided live testimony against it.

I testified to the Commission that there was no need to define "action" as proposed, because "action" already meant voting on matters, and provided several sections of NRS Chapters 82 and 116 in support of the argument. I also explained, through citation to these same NRS Chapter sections, that a "meeting" is a gathering of a quorum of the board to take action, and that the proposed, expansive definition of a meeting was not only contrary to existing law, but would cripple the functioning of associations. I presented the Commission with hypothetical examples of the absurdity that would result if the proposed definition of a meeting was adopted. I urged the Commission, if it were to adopt a definition of a meeting at all, to adopt California's Davis-Sterling Act's (equivalent of NRS Chapter 116) definition which limited "meetings" to discussions involving items of business "scheduled" to be heard by a board. Finally, I reminded the Commission that the Nevada Legislature had already decided the issue of Open Meeting Law, rejecting its application to HOA's, and that it would be inappropriate for the Commission to adopt a regulation contrary to the Legislature's position. The Board Members from Sun City Anthem gave real-life examples of workshops vital to their Association's function, and detailed the expense which would result from the Proposed Regulation, including postage and related costs which would total thousands of dollars for each workshop held in their Association.

Former Chief Alitt testified that the Commission had already ruled on similar language defining a meeting in the Virginia City Stipulation, and that homeowner associations were quasi-governmental entities (to explain why public meetings were appropriate). Administrator Anderson testified that she had borrowed language from NRS Chapter 241 (Open Meeting Law) when crafting the Proposed Regulation, and that if the language was adopted, board members unable to speak to each other between meetings could simply create their agenda for the next meeting during the prior one. In rebuttal, I testified that HOA's are private corporations, not governmental, or even quasi-governmental (generally understood to be organizations which are partially or majorly funded by the government, but managed privately), that the Virginia City Stipulation was not precedent, that agenda preparation at a meeting for associations with quarterly meetings would be absurd, and that the application of Open Meeting Law, or any portion thereof, was inappropriate for private corporations. I approached the Commission at least a half-dozen separate times in rebuttal, causing Chairman Buckley to jokingly chide me that I should only make additional comment if it contained new information. Regardless, the Proposed Regulation, if adopted, would have resulted in pandemonium within our clients' organizations, and needed to be addressed forcefully.

After all testimony was heard, the Commission began deliberation. Hoping at best that the Commission would vote to reject the Proposed Regulation, CAMEO Executive Director Keri Hawkins and I watched together in excited amazement as the Commission not only unanimously rejected the Proposed Regulation, but the Commissioners took turns individually rebutting Former Chief Alitt and Administrator Anderson's various presumptions. Commissioner Buckley began by explaining that the Virginia City Stipulation was not, and was never intended to be, precedential. Commissioner West stated that workshops, including closed workshops, are important tools for boards, and that trying to overregulate bad actions can prohibit good ones. Commissioner Watkins stated that he agreed with my position that the definition of "action" is a vote, that HOA's are private corporations, that the Proposed Regulation would lead to absurd results, that boards need workshops to gather timely information (and that the Proposed Regulation would prohibit this), and that there simply were not enough complaints filed with the Division regarding workshops to warrant such a regulation. Commissioner Brainard stated that she had testified against the application of the Open Meeting Law to HOA's at the Nevada Legislature, and that she would "*go to my death*" before allowing any portion of the Open Meeting Law to be applied to HOA's. Commissioner Lien stated that he had been uncomfortable with the language in the Virginia City Stipulation due to the chance of misinterpretation, that the Stipulation was not intended to be Commission precedent, and that workshops, particularly for educational purposes, are necessary. In general, and in their own way, the Commissioners made clear that workshops are legal, proper and necessary, and that any contrary interpretation of the Commission's past actions or position was inaccurate.

During the discussion Commissioner Swank suggested that boards note in the minutes of their next meeting if they had previously had a workshop, so that homeowners are informed that it occurred. The suggestion was made to counter the impression that boards would now be engaging in "secret gatherings." Commissioner Buckley agreed, and ended the workshop by explaining to Administrator Anderson that the Commission, while not interested in any proposed regulations which attempted to regulate workshops themselves, would welcome a proposed regulation which contained disclosure requirements for a previously held workshop.

Therefore, after over two years of general confusion and misinformation, the Commission made clear that workshops are legal – for now. However, there are lessons the HOA industry should take from the Commission's discussion if we want workshops to continue to be legal. As Commissioner Watkins noted, there were very few complaints regarding workshops that had been filed with the Division. Rest assured, the "consumer advocates" who were in attendance at the Commission meeting intend to change this statistic. It is vitally important that we make sure our boards do not abuse workshops, and lend any credence to any future complaints. We would suggest the following:

1) Make sure your boards do not take action during workshops.

2) Make sure that your boards understand that workshops are for informational purposes. The Commissioners' comments during their discussion made clear that the Commission understands workshops to be gatherings where boards can obtain education, or gather information to be used later during deliberation and voting at a meeting. Homeowners are entitled to listen to the deliberations of a board prior to decision. If our boards deliberate during workshops, and then simply vote at a meeting based upon deliberations outside of the meeting, it will be viewed as abuse. That is not to say that board members may not engage in discussion during workshops; only that such discussions should not be actual deliberations towards an ultimate decision.

3) Make sure your boards include a disclosure statement in the minutes of their next meeting after a workshop is held. We would suggest the statement include the time, date and location of the workshop, and identify the participants and the subject matter. The Commission is interested in adopting such disclosure regulations in the future, and believes such disclosure is proper. The more associations who follow their suggestion now, the more favorably the use of workshops will be viewed.

4) Encourage your boards to invite homeowners to workshops unless it would prove too cumbersome for any particular workshop, or the workshop would concern subjects inappropriate for the membership at large. Homeowners can often provide information during a workshop that is useful to the board. Additionally, the more open workshops that occur, the less "secret gatherings" the "consumer advocates" can point to in later debate.

The membership of the Commission will be changing shortly as new appointments are made by Governor Sandoval which may alter the complexion and policy position of the Commission. Additionally, the 2013 Legislative Session is fast approaching. You can be certain that the "consumer advocates" will continue to pursue this issue. Let's collectively work together to make sure that they do not succeed in making workshops illegal in the future.