

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 11, 2003

1:15 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 24

"An Act relating to intergovernmental agreements regarding management of fish or game."

- HEARD AND HELD

HOUSE BILL NO. 151

"An Act relating to claims and court actions for defects in the design, construction, and remodeling of certain dwellings; limiting when certain court actions may be brought; and amending Rules 79 and 82, Alaska Rules of Civil Procedure."

- HEARD AND HELD

HOUSE BILL NO. 245

"An Act relating to certain suits and claims by members of the military services or regarding acts or omissions of the organized militia; relating to liability arising out of certain search and rescue, civil defense, homeland security, and fire management and firefighting activities; and providing for an effective date."

- BILL HEARING POSTPONED

PREVIOUS ACTION

BILL: HB 24

SHORT TITLE:AGREEMENTS ON MANAGEMENT OF FISH AND GAME

SPONSOR(S): REPRESENTATIVE(S)WEYHRAUCH, WHITAKER

Jrn-Date	Jrn-Page		Action
01/21/03	0037	(H)	PREFILE RELEASED (1/10/03)
01/21/03	0037	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0037	(H)	RES, JUD
03/05/03		(H)	RES AT 1:00 PM CAPITOL 124
03/05/03		(H)	Heard & Held -- Meeting Postponed to After Session --
03/05/03		(H)	MINUTE(RES)
03/07/03		(H)	RES AT 1:00 PM CAPITOL 124
03/07/03		(H)	Moved CSHB 24(RES) Out of Committee
03/07/03		(H)	MINUTE(RES)
03/10/03	0487	(H)	RES RPT CS(RES) NT 4DP 3NR
03/10/03	0487	(H)	DP: HEINZE, GATTO, LYNN, FATE;
03/10/03	0487	(H)	NR: KERTTULA, GUTTENBERG, MASEK
03/10/03	0488	(H)	FN1: ZERO (H.RES)
03/10/03	0488	(H)	REFERRED TO JUDICIARY
04/09/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/09/03		(H)	Scheduled But Not Heard
04/11/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 151

SHORT TITLE:DWELLING DESIGN/CONSTRUCTION CLAIMS

SPONSOR(S): REPRESENTATIVE(S)MEYER

Jrn-Date	Jrn-Page		Action
03/05/03	0396	(H)	READ THE FIRST TIME - REFERRALS
03/05/03	0396	(H)	L&C, JUD, FIN
03/05/03	0407	(H)	FIN REFERRAL REMOVED
03/26/03		(H)	L&C AT 3:15 PM CAPITOL 17
03/26/03		(H)	-- Meeting Canceled --
03/28/03		(H)	L&C AT 3:15 PM CAPITOL 17
03/28/03		(H)	Moved CSHB 151(L&C) Out of Committee
			MINUTE(L&C)
03/31/03	0707	(H)	L&C RPT CS(L&C) 7DP
03/31/03	0707	(H)	DP: LYNN, GATTO, CRAWFORD, GUTTENBERG,
03/31/03	0707	(H)	DAHLSTROM, ROKEBERG, ANDERSON

03/31/03 0708 (H) FN1: ZERO(H.L&C/CED)
04/11/03 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE BRUCE WEYHRAUCH
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 24.

GEORGE UTERMOHLE, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: As the drafter of HB 24, provided comments regarding separation of powers and responded to questions.

STEPHEN WHITE, Assistant Attorney General
Natural Resources Section
Civil Division (Juneau)
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 24, provided comments, suggested an amendment, and responded to questions.

REPRESENTATIVE KEVIN MEYER
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 151.

ROBIN WARD, Co-Chair
Legislative Affairs
Alaska State Home Builders Association (ASHBA)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 151, expressing concerns about liability insurance.

THOM ANTONOVICH, Custom Builder;
President, Alaska State Home Builders Association
Wasilla, Alaska
POSITION STATEMENT: Testified in wholehearted support of HB 151; spoke on his own behalf and on behalf of ASHBA, calling the bill a step in the right direction to get more competition in the insurance market in Alaska.

ALAN WILSON

Alaska State Home Builders Association
Juneau, Alaska

POSITION STATEMENT: During hearing on HB 151, testified as a remodeler about the benefits of the notice provision and setting out the process that he perceives for the homeowner.

RICHARD TILLY, Builder and Contractor;
Member, Alaska State Home Builders Association; and
President, Interior Alaska Building Association
Fairbanks, Alaska

POSITION STATEMENT: Urged passage of HB 151.

MIKE MUSICK

Ester Construction
Ester, Alaska

POSITION STATEMENT: Testified in support of HB 151.

CHUCK SPINELLI, Owner
Spinell Homes, Inc.;
Immediate Past President
Anchorage Home Builders Association
Anchorage, Alaska

POSITION STATEMENT: Testified in strong support of HB 151.

HARLEY SUDSBURY
Sudsbury & Sons;
Vice President
Anchorage Home Builders Association
Eagle River, Alaska

POSITION STATEMENT: Testified in support of HB 151, indicating it will protect consumers and builders and will lead to more availability of the insurance that builders need.

STEVE ORR, Builder
Wasilla, Alaska

POSITION STATEMENT: Testified on HB 151, relating how his general liability insurance costs 15 times more than last year and expressing concern about the ability to price houses in the future.

JESS HALL, Builder;
Area 15 National Vice President
National Association of Home Builders (NAHB)
Palmer, Alaska

POSITION STATEMENT: Testified on HB 151, noting the bill's value with respect to rate increases and suggesting that even

more valuable is the aspect of opening communication to try to resolve problems.

SUZANNE CUNNINGHAM, Staff
to Representative Kevin Meyer
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: During hearing on HB 151, Version V, responded to suggestion by Representative Gara that the warning to consumers of the new requirements should be on a separate, one-page document, rather than in the middle of a contract.

ACTION NARRATIVE

TAPE 03-36, SIDE A
Number 0001

CHAIR LESIL MCGUIRE called the House Judiciary Standing Committee meeting to order at 1:15 p.m. Representatives McGuire, Holm, Samuels, Gara, and Gruenberg were present at the call to order. Representatives Anderson and Ogg arrived as the meeting was in progress.

HB 24 - AGREEMENTS ON MANAGEMENT OF FISH AND GAME

Number 0034

CHAIR MCGUIRE announced that the first order of business would be HOUSE BILL NO. 24, "An Act relating to intergovernmental agreements regarding management of fish or game." [Before the committee was CSHB 24(RES).]

Number 0057

REPRESENTATIVE BRUCE WEYHRAUCH, Alaska State Legislature, joint sponsor of HB 24, referred to a map of the state of Alaska and pointed out the area to which HB 24 pertains - Glacier Bay. He noted that Glacier Bay is a huge body of water, and that the [National] Park Service claims that Glacier Bay National Park and Preserve includes the entire Glacier Bay plus "the line coming outside ... here, into what's called Icy Strait, down into Excursion Inlet, out this ... body of water, called Cross Sound, offshore three miles, up the coast and outside three miles to Lituya Bay, and then into Lituya Bay." That's the area that the National Park Service says is part of the national park, "into the state waters," he reiterated.

REPRESENTATIVE WEYHRAUCH explained that when Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), it called Glacier Bay Monument a park. He noted that dispute has arisen regarding whether commercial fishing is prohibited in wilderness areas, and that there is a wilderness area in Glacier Bay National Park and Preserve called the Beardslee Islands. He relayed that there has also been dispute over whether commercial fishing could continue in Glacier Bay. He mentioned that as he defines Glacier Bay, "it's more than 600,000 marine acres of state waters." Therefore, the area of concern is significant, he added. Glacier Bay "proper" and the marine waters outside of Glacier Bay proper are home to a huge, flourishing, sustained commercial fishery, as well as subsistence and sport fisheries. He remarked that halibut, salmon, Tanner/king crab, cod, shrimp, and significant troll fisheries occur in the waters that he'd defined as being outside of Glacier Bay proper.

REPRESENTATIVE WEYHRAUCH relayed that in the 1990s, the Alaska Wildlife Alliance sued the [National] Park Service, claiming that commercial fishing could not occur in Glacier Bay. The district court in Alaska ruled that commercial fishing could occur. This ruling was appealed to the 9th Circuit Court of Appeals, which affirmed the district court ruling but also said that the [National] Park Service could prohibit commercial fishing via regulation. Subsequently, the [National] Park Service engaged in the process of adopting regulations to prohibit commercial fishing in various areas inside Glacier Bay; this raised concerns that commercial fishing would also be prohibited outside of Glacier Bay proper - in the "disputed park waters."

Number 0312

REPRESENTATIVE WEYHRAUCH explained that U.S. Senator Ted Stevens passed legislation that closed Glacier Bay proper to commercial fishing, except in certain areas, and required "any fisherman who wanted to continue to fish there, in the halibut, salmon, and Tanner crab fisheries, prove they'd fished there and get a lifetime-access permit so they could continue to fish." Congress also authorized more than \$23 million for payment to fishermen harmed by the aforementioned closure, and "all kinds of businesses" and individuals have endeavored to obtain a portion of that money. As it stands now, he noted, some people have received compensation and some have not. In addition, some fishermen who have lifetime-access permits in the "halibut, troll salmon fishery, and Tanner crab fishery" can continue to fish in certain areas of Glacier Bay, but otherwise that area is

closed, and as soon as those lifetime-access permit holders pass away, there will be no more commercial fishing in Glacier Bay proper.

REPRESENTATIVE WEYHRAUCH mentioned that there is also an ongoing case in the U.S. Supreme Court - "a quiet-title action" - which has been referred to a "special master." He also mentioned that there is another issue involving areas called "donut holes," in Southeast [Alaska] and the waters of the Tongass National Forest, that are subject to the aforementioned U.S. Supreme Court case. The portion of that case which is still ongoing is "that portion of the case which claims that the waters of Glacier Bay ... belong to the state" as decided by another U.S. Supreme Court case involving Idaho, which says that the state came into the Union on equal footing with all other states and, thus, would have jurisdiction over its lands and waters.

REPRESENTATIVE WEYHRAUCH pointed out that HB 24 has nothing to do with "the buy-out program, the compensation program, the closure of Glacier Bay proper, or the quiet-title action." He said that he introduced HB 24 because then-U.S. Senator Frank Murkowski had introduced a bill - S. 501 - that required, under Section 3, subsection (b), for the Secretary of the Interior and the State of Alaska to cooperate in the development of a management plan for the regulation of commercial fisheries in the outer waters of the park in accordance with existing federal and state laws and any applicable international conservation and management treaties. He noted that the international conservation and management treaties that are not subject to this bill include "the International Pacific Halibut Commission, and the U.S./Canada salmon treaty."

Number 0540

REPRESENTATIVE WEYHRAUCH said that HB 24 is intended to ensure that any co-management agreement with "a sovereign" - meaning the U.S. government or a tribal entity - would be reviewed and approved by the State of Alaska, through the legislature. This review would ensure that before Alaska cedes any jurisdiction over its right to manage the fisheries and natural resources of the state, the legislature approves it. He rephrased the goal of the legislation as being, "We would not cede any jurisdiction over our resources, to another sovereign - or entity claiming sovereignty - by contract, which we did not do by constitution or state law." In response to a question, he remarked that the state has the basic right, under the U.S. Constitution and Alaska State Constitution, to manage its own "natural resources

and waters and lands" without interference from another "sovereign."

REPRESENTATIVE WEYHRAUCH noted that CSHB 24(RES) focuses specifically on the dispute involving Glacier Bay National Park and Preserve; it would add a provision that would ensure that the State of Alaska and the National Park Service would not enter into a co-management agreement of fish and game in the navigable waters within or adjoining Glacier Bay National Park and Preserve unless the legislature has approved that agreement by law before it takes place. By injecting the legislature into the process in this manner, he opined, it would be making a policy statement that the legislature wants the state to maintain its jurisdiction over commercial fisheries in that area. He added that he wanted to ensure that any co-management agreement does not cede the state's jurisdiction, because of the potential negative precedential effect it would have on other state waters, lands, fisheries, and natural resources. He offered that HB 24 is a very narrow bill pertaining to co-management agreements between the state and the National Park Service.

CHAIR McGUIRE asked whether HB 24 would violate the separation of powers [doctrine].

REPRESENTATIVE WEYHRAUCH relayed that legislation passed in 1997 - SB 178 - which pertained to the purchase of an office building in Anchorage by the Alaska Housing Finance Corporation, had within it a provision requiring that the legislature approve the agreement before it went into effect. Specifically, it said: "This section constitutes the review and approval required by AS 18.55.100(d)", which in turn read in part:

(d) Notwithstanding (a)(7) and (15) of this section, a proposed public building project shall be submitted by the corporation to the legislature for review. The corporation may proceed with the public building project only if it is approved by law.

REPRESENTATIVE WEYHRAUCH observed that via that past legislation, the legislature and the governor have allowed statutory language that entails the review of a contract. "That's a contract lease, this is a contract for co-management; it's the same thing, and there is precedent for this kind of an agreement," he opined.

CHAIR McGUIRE said that although she sees the analogy between contracts, she disagrees because an agreement to manage resources is different from an agreement to buy a building. She asked for comments from the drafter regarding separation of powers.

Number 0920

GEORGE UTERMOHLE, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, explained that separation of powers becomes an issue because, under the [Alaska State] Constitution, the legislature has been given the power to make law, and the governor has been given the responsibility of exercising those laws. Once the legislature has enacted a law, the issue then becomes to what extent can the legislature impair the executive branch's discretion to implement a law that has been assigned to it by the legislature. There are numerous incidents in statute wherein the legislature has given authority to an executive branch agency to perform a certain function, but withholds the agency's ability to implement "that agreement" without prior legislative approval.

MR. UTERMOHLE said that there has been litigation over such situations. In some cases, the courts have struck down legislative involvement in areas where executive branch discretion is at issue; in other cases, the courts have upheld the legislature's involvement. There are two examples of where the legislature has attempted to hold to itself certain authority to control executive branch discretion.

MR. UTERMOHLE said that the first was the 1976 [Alaska Supreme Court] case, Bradner v. Hammond, in which the legislature attempted to require the governor to submit to the legislature for confirmation certain names for sub-cabinet positions. The court looked at that case in terms of separation of powers, and described the case in separation of powers terms, but ultimately made its decision based on other provisions of the [Alaska State] Constitution which specifically provided that certain executive branch officials are subject to confirmation but only those officials. Thus the court found that the legislature had exceeded its authority in attempting to require that additional executive branch officers be subject to confirmation.

MR. UTERMOHLE said that the 1980 [Alaska Supreme Court] case, State v. A.L.I.V.E. Voluntary, arose because the legislature attempted to control the adoption of regulations by state

agencies. In that case, although the court acknowledged that the legislature can annul regulations if it so chooses, the court nonetheless struck down the actions of the legislature, not based on separation of powers, but because the legislature chose the wrong avenue in which to annul the regulations in question. Those regulations that the legislature attempted to annul are, in fact, law. The legislature has no authority to change law except by the enactment of laws itself; this did not happen in the A.L.I.V.E. Voluntary case.

Number 1115

MR. UTERMOHLE reiterated that there have been cases in which the legislature's attempt to require its approval of executive branch actions has been upheld. The 1998 Alaska Supreme Court case of Baxley v. State was one in which the legislature approved amendments to a contract for the Northstar oil leases; the legislature's action was upheld because it approved the contract amendments via legislation. "Another case, which is the other area where this occurs, is in regard to negotiating and the approval of contract bargaining agreements with ... state labor unions," he added. The executive branch has the authority to enter into collective bargaining agreements; however, those agreements do not take effect until the legislature has approved them by law, through the appropriation process. This provision has been upheld and enforced in numerous Alaska Supreme Court cases.

MR. UTERMOHLE said that there are no cases on point that actually say that "we can't do what's attempting to be done" via HB 24. The cases in which legislative approval of certain agreements has been upheld were [not] brought to the Alaska Supreme Court on a challenge to the separation of powers doctrine itself. He added:

So we don't know ... how much of a risk that is, if ... the issues in those cases were to be challenged on a separation of powers doctrine specifically, but given the available case law, there's nothing to suggest that this ... would exceed the ability of the legislature to require approval of these cooperative agreements [with] the National Park Service. Particularly in the legislature's favor is the requirement in the [Alaska State] Constitution that the legislature has the duty to provide for the conservation, development, and utilization of the resources of the state, by law.

CHAIR McGUIRE asked why there wasn't a fiscal note from the Department of Law.

REPRESENTATIVE WEYHRAUCH said he did not know.

REPRESENTATIVE GRUENBERG pondered whether the governor would have any concerns from a policy point of view about requiring an executive branch agreement to be approved by the legislature. He said he wants to know whether the governor intends to veto HB 24 if it passes the legislature.

Number 1353

REPRESENTATIVE HOLM asked: Did not Alaska reserve the right to be responsible for its own resources at the time of statehood?

REPRESENTATIVE WEYHRAUCH opined that it did.

REPRESENTATIVE HOLM asked why all navigable waters were not included in HB 24.

REPRESENTATIVE WEYHRAUCH offered, "Because this bill's easier for me to chew."

REPRESENTATIVE GARA posited that there might be times when the state will want to enter into an agreement with the federal government because that agreement would be beneficial for the state. Even in those instances, he surmised, under HB 24, the legislature would still have to approve the agreement. For example, what if there is the possibility of entering into an agreement that gives the state more authority to manage its resources. Why should there be a requirement that such a contract be brought before the legislature for approval?

REPRESENTATIVE WEYHRAUCH replied that HB 24 is designed to prevent the state from ceding, through contract, any of its authority without that contract first coming before the legislature for approval. That is his main concern, he reiterated, that the state not cede any of its authority to manage its resources.

REPRESENTATIVE GARA said he understood that point, but remarked that the opposite is true too: HB 24 would prevent the federal government from giving more authority to the state unless such a contract is approved by the legislature. He elaborated:

Wouldn't we now prevent the federal government ... from saying in, let's say, May, to the Board of Fisheries, "Here, we'll let the state manage fish and game; we'll let them do it today," but actually the fishermen then miss that whole summer season of fishing because the legislature doesn't meet 'til next January. ... Are we not preventing them from giving us things that we want, as well as taking things away?

Number 1562

REPRESENTATIVE WEYHRAUCH replied:

The only ... place I know that exists right now is in Glacier Bay proper, where the federal government has passed a law allowing the National Park Service to close commercial fisheries in Glacier Bay and manage the methods, means, ... areas, and fisheries that can be restricted. This does not have to do with those waters in Glacier Bay. This is simply on the outside, where no management regime like that exists at all. This is only in the outside waters of Glacier Bay proper - adjoining Glacier Bay.

REPRESENTATIVE GARA surmised, then, that HB 24 doesn't apply to the inside waters of Glacier Bay.

REPRESENTATIVE HOLM asked: "When did the state ... agree to give up its sovereignty and give up its rights over its own waters and its resources to the federal government? Was it through that federal law that was passed? Did we agree to that law, or was it just passed and now we succumb under that law?"

REPRESENTATIVE WEYHRAUCH replied: "The law was passed at the request of [U.S.] Senator Stevens, the ... state has not challenged the law, and the state did not intervene in ... the lawsuit that was filed by [the] Alaska Wildlife Alliance." In response to a further question, he confirmed that HB 24 will not have any effect on the ongoing litigation involving the "donut holes" waters.

REPRESENTATIVE GARA asked whether it is correct to say that currently, the federal government has asserted the authority to prevent the state from allowing fishing, under the state's fish and game rules, within the waters of Glacier Bay.

REPRESENTATIVE WEYHRAUCH said yes.

REPRESENTATIVE GARA then said:

So, if there were a chance for us to get that authority back by contract, I think we would certainly want to do that. And then -- so the last exchange we had was that, well, this only affects waters adjoining Glacier Bay, ... but the language that I have before me says within "the navigable waters within or adjoining Glacier Bay".

Number 1738

REPRESENTATIVE WEYHRAUCH said that [HB 24] is intended to be coincident with the S. 501 co-management requirement that then-U.S. Senator Frank Murkowski had adopted. If there is a contract that allows the state to again manage commercial fisheries in Glacier Bay and reopen those fisheries, it would be a violation of federal law, he remarked, because federal law has closed those waters and restricts the commercial fishing that can occur. Thus, he added, both the state and the federal government would be subject to an injunction.

REPRESENTATIVE GARA asked whether S. 501 strictly and completely prohibits the National Park Service from allowing any fishing, or does it give the National Park Service the discretion.

REPRESENTATIVE WEYHRAUCH said, "It prohibits it." The law that passed Congress, he added, restricts commercial fishing in Glacier Bay to certain areas. It only allows trollers, halibut fishermen, and Tanner crab fishermen who have obtained a lifetime-access permit to continue to fish inside Glacier Bay proper and only in those restricted waters.

REPRESENTATIVE GARA said his concern is this:

To the extent we can get the authority back to manage fish and game by contract - maybe that would require a statutory change on the federal government's part to allow us to do that and to allow the [National] Park Service to do that with us - but to the extent that opportunity becomes available, why would we not want to take advantage of it.

REPRESENTATIVE WEYHRAUCH replied:

We should; I believe we have it as a legislative priority of the executive branch. And we could put that in here, that it is the policy of the ... legislature to ask the administration to attempt to do everything possible to pass us a bill through Congress that reopens Glacier Bay to commercial fishing. ... I think that would be a great friendly amendment to this bill; that would be "a shot heard 'round Congress" too.

Number 1838

REPRESENTATIVE GRUENBERG said he'd never seen a bill drafted as this one is in the first sentence [starting on page 1, line 6]; it's drafted in the negative. Normally, he elaborated, a bill is drafted in the positive, for example, "The state must seek legislative approval before entering into such an agreement". He asked whether Representative Weyhrauch intended to have the bill drafted in the negative.

REPRESENTATIVE WEYHRAUCH explained that when he'd called Mr. Utermohle, he'd started his sentence with, "I don't want ...," and offered that perhaps that is why HB 24 was drafted as it was. He again reiterated that he did not want a co-management agreement with the federal government that allows the state to cede jurisdiction of its resources.

REPRESENTATIVE GRUENBERG suggested putting that sentiment in the positive. He asked Mr. Utermohle whether there is a reason why HB 24 shouldn't be written in the positive.

MR. UTERMOHLE explained that HB 24 is drafted in the manner it is in order to ensure that there is no question that there is no other authority under other provisions of statute whereby the state could enter into a cooperative agreement with the National Park Service.

REPRESENTATIVE GRUENBERG opined that if such is the case, then HB 24 must be drafted in the positive; otherwise, it's a negative of a negative.

REPRESENTATIVE HOLM offered the following analogy:

If I own my own house, and I lock it, and ... you present me with a contract for the use of my house, in order to unlock my house, ... then don't I admit that

you have the authority over my house if I accept your contract?

REPRESENTATIVE WEYHRAUCH said, "I guess for purposes of unlocking it, yes."

REPRESENTATIVE GRUENBERG said, "No, I don't think it follows, because you can't do it without your permission."

REPRESENTATIVE HOLM said, "Vis-a-vis, it's written in the contract that way."

Number 1962

STEPHEN WHITE, Assistant Attorney General, Natural Resources Section, Civil Division (Juneau), Department of Law (DOL), said that HB 24 presents two constitutional issues, the first of which has already been explored by the committee, that of separation of powers. He said that he agrees with Mr. Utermohle that this is an unsettled area, that there is no case law that would either say yes or no. But every time that the legislative branch gets involved with an executive branch power, or visa versa, the issue of separation of powers has to be raised. Even though the legislature has adopted statutes which allow the legislature to review contracts, those haven't been challenged; there's been no ruling on them.

MR. WHITE said that sometimes contracts involve the power to appropriate money; for example, in the collective bargaining agreements. That's a legislative power, so in those instances, he opined, the legislature is merely asserting its own power. He said that negotiating contracts regarding the management fish and game is typically considered an executive branch power; thus for the legislature to go in and review those contracts raises a separation of powers issue. He suggested that there may be a simple way to remove that constitutional issue while maintaining the sponsor's intent.

MR. WHITE explained that the second constitutional issue, which has not yet been addressed, is one called the "impairment of contracts" clause under the federal and state constitutions. Basically, he explained, it says that the legislature can't pass a law that impairs, or repeals, or in any way interferes with an existing contract. On that point, he referred to Section 2, subsection (b), of HB 24, and noted that it gives the legislature the ability, after the fact, to rescind a contract -

an agreement - entered into by the federal government and the state.

MR. WHITE acknowledged, however, that according to the Alaska Department of Fish and Game (ADF&G), there are no existing contracts of that nature. Therefore, he opined, that while that portion of HB 24 might raise the aforementioned constitutional issue, it may not actually even have any value. Removing that language, he predicted, would remove the constitutional issue. On the other hand, if the legislature is determined to keep that provision, he said, he thinks there is a way to strengthen it and make it more defensible from a constitutional challenge.

Number 2058

MR. WHITE added: "Do I think that either of these things are defective in terms of provoking a recommendation for veto by my department? The answer is no. The area of law is unclear. I'm here to suggest ways to remove those constitutional problems or maybe strengthen them from any attack."

REPRESENTATIVE GRUENBERG said he did not see how the aforementioned provision would impair an existing contract unless the contract was entered into before the effective date of the bill.

MR. WHITE said that is correct.

REPRESENTATIVE GRUENBERG surmised, then, that "we're only talking about a month or two here." He asked Mr. White whether he is anticipating any contract being agreed upon before the bill could go into effect.

MR. WHITE said no.

REPRESENTATIVE GRUENBERG asked Mr. White to elaborate on his suggestion that the separation of powers issue could be resolved.

MR. WHITE offered:

One way you could do it is, ... instead of having a legislature review for whether the department has ceded disciplinary power to manage ... fish and game, you could basically say the department may not enter (indisc.) a contract of this type which does that. So you put the standard up front; any contract that does

that could be voided by any court. So it sets your concern up front, it sets a standard by which the executive branch can act or not act, and it ... relieves you of the obligation - of the duty - to review and make that determination yourself as a legislature.

REPRESENTATIVE GRUENBERG said that they could certainly do that, and then the governor could simply introduce a bill in the following legislative session allowing him to sign the agreement.

Number 2180

MR. WHITE said that under his suggested language, he did not anticipate the governor having to undertake any procedure. His proposal would basically say that the department doesn't have the authority to enter into a contract that cedes authority, but if the department did so, that contract would be void.

REPRESENTATIVE GRUENBERG opined that if the language currently in HB 24 is unconstitutional, then Mr. White's suggestion is no more constitutional, because the governor would then have to submit a bill authorizing the contract, and such would be subject to the legislative process required to pass any legislation.

MR. WHITE argued that his suggestion does not entail any legislative action, it merely establishes a standard, up front, by which a contract could not be entered into by the department.

CHAIR McGUIRE asked Mr. White to provide to the committee, at the bill's next hearing, his suggested language and any documentation substantiating his assertions.

REPRESENTATIVE GRUENBERG asked Mr. White whether he is speaking on behalf of the administration.

MR. WHITE clarified that he is speaking on behalf of the Department of Law (DOL), and perhaps on behalf of the Department of Fish and Game (ADF&G).

CHAIR McGUIRE asked Mr. White to provide a fiscal note from the DOL, even if it is a zero fiscal note.

REPRESENTATIVE GARA asked whether the issue of separation of powers with regard to contracts pertaining to management of fish and game has been resolved in any other state's supreme court.

MR. WHITE indicated that he has not yet done that research, but is intending to.

REPRESENTATIVE GARA opined that such would be a prudent thing to do.

MR. UTERMOHLE indicated that he has not yet done that research either; his research has been confined to the Alaska State Constitution.

TAPE 03-36, SIDE B

Number 2360

REPRESENTATIVE GRUENBERG, referring to S. 501, noted that Section 3, subsection (c)(2), says: "Nothing in this Act shall enlarge or diminish Federal or State title, jurisdiction, or authority with respect to the waters of the State of Alaska, the waters within Glacier Bay Park and Preserve, or tidal or submerged lands." Does that not answer the question that that bill was not intended to affect state sovereignty, he asked.

MR. WHITE replied, "Well, the bill may not have intended to, but the parties could separately agree to give it away, ... and that's what Representative Weyhrauch's concern is."

CHAIR McGUIRE announced that HB 24 would be held over.

The committee took an at-ease from 2:05 p.m. to 2:06 p.m.

HB 151 - DWELLING DESIGN/CONSTRUCTION CLAIMS

Number 2327

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 151, "An Act relating to claims and court actions for defects in the design, construction, and remodeling of certain dwellings; limiting when certain court actions may be brought; and amending Rules 79 and 82, Alaska Rules of Civil Procedure." [Before the committee was CSHB 151(L&C); in packets was a proposed committee substitute (CS), Version V.]

Number 2314

REPRESENTATIVE KEVIN MEYER, Alaska State Legislature, sponsor of HB 151, explained that the bill provides a process for homeowners and builders to resolve construction defects without litigation, a process called "notice and opportunity to repair" in the Lower 48. He reported that 13 states are considering similar legislation; several have it in place, including Arizona, California, Nevada, and Washington, which perhaps have the biggest housing booms.

REPRESENTATIVE MEYER told members the bill requires homeowners to provide the builder or contractor with written notice of construction defects at least 90 days before taking civil action. During that period, the builder and owner must get together and set deadlines to make a reasonable attempt to resolve defects that are subject to claim; if the defects or complaints aren't resolved by repair or arranging for [monetary] settlement, then the homeowner may proceed to litigation. The homeowner has one year from the date a defect is discovered to begin this process [by providing notice, under Version V of the bill]; however, the ten-year limitation in statute cannot be exceeded.

REPRESENTATIVE MEYER offered reasons he believes this legislation is important. Alaska requires contractors and builders to have general liability insurance, which has become increasingly difficult to obtain - primarily, in his opinion, because of the ease of proceeding directly to litigation and suing for expenses. If they can get insurance, it often is very expensive, or they must get reduced coverage. Offering that these costs are often simply passed on to the homebuyer, and noting the rising prices of homes for first-time buyers in particular, Representative Meyer suggested the need to keep prices down. He added that a pending civil action can also affect the home's value to a potential buyer.

REPRESENTATIVE MEYER characterized this as a consumer-protection bill in the sense that it allows timely repair without the expense and loss of time due to a trial. Suggesting that most builders when notified of a defect would repair it immediately, he said there are times when a more formal process, such as provided in this bill, is necessary.

CHAIR McGUIRE drew attention to the memorandum from Representative Meyer to the committee describing the changes in Version V from CSHB 151(L&C). She asked him whether there are substantive changes.

REPRESENTATIVE MEYER described the changes as "primarily just minor," in some cases just grammatical changes. He noted that [Chair McGuire's] staff and his own had conferred on many of them, and said Version V doesn't change anything substantive.

[Representative Gara raised a concern that was negated later when it was clarified that Section 2 of Version V changes the wording such that a claimant has one year from discovery of a defect to begin the process outlined in AS 09.45.881-09.45.899, whereas CSHB 151(L&C) gave the claimant one year from the discovery to begin an action.]

Number 2085

REPRESENTATIVE ANDERSON moved to adopt the proposed CS, Version 23-LS0499\V, Bannister, 4/10/03, as a work draft. There being no objection, Version V was before the committee.

Number 2059

ROBIN WARD, Co-Chair, Legislative Affairs, Alaska State Home Builders Association (ASHBA), noting that this has been a mission of [ASHBA], told members the following:

Most of our homebuilders in this state today have been given notice that within this year we will all lose our current general liability carriers. Most of our carriers have left the state or are planning to leave the state, and all of us are struggling for liability insurance.

One of the things in the research that we found nationwide is that there are a few things that we can do, as homebuilders, to make ourselves more attractive to the insurance industry. This is one very key piece of legislation. Most of them are looking for some kind of a state legislative fix. ... They want to see something that the state is involved in, along with making ourselves attractive by better contracts, warranties, and so on - OSHA [Occupational Safety and Health Administration] programs, safety programs in our businesses.

But one of the main things that we need to do is something like this. They have looked at this and said, "This is something that we like." Therefore, the national ... homebuilders association has given us

national legislation, model legislation, to pattern after, and have been helping us work on this so that we can adopt it ... to bring forward to the Alaska legislature for adoption. So that's really the reason we're here, and we want to make sure you understand why we're doing this.

This is not a huge problem right now in our state, but it can be. And we want to try and not only prevent it, but make ourselves attractive [to insurance companies]. So the "driver" here really is our liability insurance.

Number 1992

REPRESENTATIVE GARA asked whether insurance companies have said that if the legislature passes a bill like this, they will reduce their rates or stay here. He also asked whether states that have similar legislation requiring notice and an effort to resolve problems also have cut the statute of limitations to one year.

MS. WARD replied:

No and no. No, they will not guarantee that if we do this ... they will come back in ... or anything else. They're just giving us a list of things that they feel would make us more attractive, without a guarantee that if we pass it, we're going to get liability insurance again. And no to the second because, respectfully, I'm not sure that that does that here, either. ... But no, ... not that I know of.

REPRESENTATIVE GARA asked whether the most important part to [ASHBA] is the general concept of requiring negotiation before suing.

MS. WARD affirmed that.

MS. WARD, in response to a question from Representative Holm, said:

We expect that we will lose 25 percent of our small homebuilders, because we know that even if we do get insurance, the cost of it will definitely go up. The new premiums that we're getting right now sometimes increase the cost of the house [\$2,000 to \$3,000].

Well, in an appraisal that will never be reflected. That's not ... an added value. So we find there's an awful lot of the small builders who have fairly low profit margins ... or whatever [that] we expect will go away. We do expect a certain percentage of our industry will go away this year because of that. You have to have liability insurance to be able to operate.

REPRESENTATIVE HOLM emphasized that builders cannot function in Alaska without liability insurance.

MS. WARD concurred, saying that is why it is [ASHBA's] main issue. "This is critical to us," she added.

Number 1901

REPRESENTATIVE GARA said he is always skeptical when the insurance industry suggests that someone do something with the incentive of possibly lowering rates later. He asked whether Alaska has a significant amount of homeowner litigation.

MS. WARD replied:

Not in this state. But ... all of our carriers are ... nationwide carriers. ... We are such a small pool that they don't even hardly use us in their actuarials. What we're being painted with is the brush of the Lower 48, and especially the larger states with large construction booms. Arizona, California, [and] ... Washington had huge ... construction defects. And one of the problems that we have is, ... the insurance industry, as they manage a claim, tend to settle. They're not necessarily practical about the ... technical side of it. ...

And I can give you an example of an Anchorage contractor that this did happen to, and basically the owner took them to court - with no notice to the builder - ... [over] a list of what normally [are] warranty items that our contractors would have fixed. ... The contractor turned it over to his insurance carrier, which is a normal situation. The insurance carrier looked at it and said, "Let's just pay it. ... It's going to be cheaper." ... And it was \$52,000 on normal warranty things that the contractor probably could have repaired for \$2,000 doing their own work.

... It doesn't take very many of those managed claims to put us out of business without ... notice. That contractor never even got notice.

REPRESENTATIVE GARA reiterated support for the concept of negotiating before suing, but indicated that if there is no problem in Alaska, he has a problem taking away Alaskans' rights, when there isn't abuse in the state, just to make the insurance companies happy on that score. Calling it a statute-of-limitations issue, he added, "If the insurance companies spent the time to do their actuarials in this state, where they should be doing them, they'd also confirm that." He indicated that this is a portion of his concern with the bill.

Number 1781

THOM ANTONOVICH, Custom Builder; President, Alaska State Home Builders Association, informed the committee that he would testify on behalf of himself and the 900 members of ASHBA across the state who make their livings building homes. He said Ms. Ward had summed up the feelings of ASHBA's members quite nicely, and noted that there would be testimony via teleconference from some of ASHBA's larger builders across the state, who could provide "dollar and cent figures" of what this is doing to his industry and the consumer. Speaking personally, he said he renewed his liability insurance last October and was surprised with an 85-percent increase over the previous year, in spite of the fact that he has been in the business about 25 years without a liability claim or workers' compensation claim.

MR. ANTONOVICH said Alaska is such a small market for the insurance carriers that they probably don't need much of an excuse to pull out of the market; he suggested this "right to repair" will create a better business climate for them. He surmised that the only reason some builders still have liability coverage is because they also insure their homes and automobiles, for example, with the same company; the company doesn't want to lose that business. He added, "I think a better business climate would help at least keep those operators in the market supplying us."

MR. ANTONOVICH also reported that until this year, his general liability insurance was a minor part of his overhead; this year, however, it is a major line item that must be passed on to the consumer. Characterizing himself as a "medium-sized builder," he said there are many small [companies] in the state, especially in outlying areas, that won't be able to operate if

they experience an 85-percent increase in liability [insurance costs]. He suggested that many would lose their businesses in the next year or two if something isn't done. He added, "I don't think we view HB 151 as a cure-all. These folks aren't going to flood back into the state and fall all over themselves to write insurance policies. But it'll certainly be one step in the right direction to get more competition in the insurance market in the state of Alaska." He closed by stating wholehearted support for HB 151.

Number 1636

MR. ANTONOVICH, in response to a question from Chair McGuire, reported that ASHBA is seriously looking at forming a self-insurance pool, which has been done successfully in four or five states. It would still require attracting an underwriter. He said having a bill in place would allow [ASHBA] to provide an underwriter with facts and figures, and show the underwriter that the builders in Alaska are a good risk and are protected somewhat from major litigation through this bill.

MR. ANTONOVICH, pointing out that it may not be true, also reported hearing that, yes, there will be [companies] willing to "write liability" in Alaska, but that it probably will cost a small builder a flat \$20,000 fee. It would be doable for someone building 20 houses a year. For someone building 3 or 4 houses a year, however, either it would cost the customer a lot of money or the builder would go under.

CHAIR MCGUIRE called it a critical point, noting that legislation this year would allow formation of some of these risk pools. She emphasized the importance of having the state get involved in some of these areas to set up the framework. Countering an argument she'd heard that companies could do it on their own, she said the problem is that insurance companies are charging \$20,000 as a flat fee, which is cost-prohibitive.

MR. ANTONOVICH concurred, saying that, ultimately, the consumer usually ends up paying the bill.

REPRESENTATIVE GARA, noting that many industries have said insurance rates are skyrocketing, emphasized the need for a bigger answer to either regulate insurance companies or find ways to help lower premiums. He suggested there must be a better way than just changing liability statutes. He asked Mr. Antonovich to share with the legislature any future findings that would assist in insurance reform.

MR. ANTONOVICH responded by offering to work with legislators to try to help come up with something that would assist all of Alaska's industries in this regard.

Number 1444

REPRESENTATIVE OGG asked about liability insurance costs - both before and after the 85-percent increase - for a home that costs \$160,000 to \$200,000.

MR. ANTONOVICH answered that it depends on how many houses the builder constructs a year. He said he used to pay about \$2,600 a year in general liability on about \$2.5 million in sales. This year, he'll probably pay \$26,000 on slightly higher sales; if he builds seven houses, it likely will cost \$3,000 per house. He reiterated that previously it wasn't a line item, but was just part of his percentage. Noting that the increase was over a three-year period and specifying that the 85-percent increase was just one year, he concurred with an observation by Representative Ogg that it had risen 1000 percent. Mr. Antonovich said he hadn't illuminated that, however, because his sales had risen too. He said his sales will be the same this year as last, so 85 percent is a hard-and-true number.

REPRESENTATIVE OGG asked whether this is putting Mr. Antonovich out of the market for some types of housing.

MR. ANTONOVICH clarified that the person it will hurt most is the first-time homebuyer who is stretching to make the deal work, because a thousand dollars can make or break a deal. For higher-end homes, it won't make the difference between building or not. He said, "It's not putting us out of the market."

CHAIR MCGUIRE called on Alan Wilson, noting that in addition to being past president of ASHBA, he was Home Builder of the Year in 2003.

Number 1327

ALAN WILSON, Alaska State Home Builders Association, characterized himself as a "small builder" who focuses primarily on remodeling work. Noting that his rates are going up as well, he pointed out that people who do remodeling tend to work with their clients differently than those who do new construction, since remodelers work directly in a person's dwelling and are there daily from 8 a.m. to 5 p.m.

MR. WILSON reported finding over the years that often clients don't know the process and are intimidated about seeking legal counsel to remedy issues. Hence one positive thing about the legislation is that this notice, which is required as part of the contract language, outlines a system or mechanism that a homeowner can look at and thus be less intimidated, since the process begins with writing a letter to the builder. He surmised that 90 percent of the time this communication will resolve the majority of the issues. Offering his belief that few construction-defect cases go to court in Alaska, he said that when they do, he doesn't believe either the builder or the homeowner wins because of the cost of a drawn-out legal case. This bill at least provides an opportunity to fix a problem without going to court.

MR. WILSON told members a presentation by the Alaska Housing Finance Corporation (AHFC) to the House Finance Committee on February 4, 2003, brought out some numbers that he believes emphasize [the reason for this bill]. He said the housing industry accounts for roughly 24 percent of the gross state product, which is equivalent to the [gross national product (GNP)]; in comparison, fishing accounts for about 19 percent. He called construction a big "economic engine" that affects a lot of people. He indicated AHFC also brought up that housing for the average Alaskan family costs approximately 28 percent of disposable income, and is probably the largest component of a family's expenses over the life of the mortgage. He suggested something like this bill is needed to protect people's assets.

CHAIR McGUIRE offered that it is also good for the consumer because usually a person has only a year to bring up items that might be fixed under warranty. She suggested this bill, in another small way, provides an additional avenue for a consumer who might discover something later that is severe enough to want to sue; prior to that, there would be an opportunity to have it fixed.

MR. WILSON agreed, indicating that he believes many builders try to limit the warranty by having homeowners sign one-year limited warranty agreements.

CHAIR McGUIRE called [the legislation], "win-win."

Number 1103

RICHARD TILLY, Builder and Contractor; Member, Alaska State Home Builders Association; and President, Interior Alaska Building Association, testified in support of HB 151. He said paying the cost of liability insurance is a major problem in the homebuilding industry. He reported that his business is currently seeking coverage for the 2003 building season; he has found two carriers for liability insurance, but only one is willing to provide a quote to his company. He said he still hasn't received a quote for the upcoming year, despite the fact that the anniversary date for his insurance is May 1 and he is right in the middle of the bidding season. In 22 years, he has never had a liability claim, he told members, and yet he still cannot get companies to offer him even a quote in order to know how to bid on projects for the coming season.

MR. TILLY said that last year his rates rose a minimum of 19 to 20 percent; at best, he anticipates 20 to 50 percent this year, but doesn't have a solid number. Concurring with earlier testifiers that the bill is intended to help builders as well as clients, he said the dispute-resolution format is intended to provide a simple and definitive method to resolve problems and get the home repaired. He urged passage of the bill.

Number 1005

MIKE MUSICK, Ester Construction, characterizing himself in terms of gross revenue as a "small builder," told members that this past year a large percentage of checks he has written are to his insurance companies. He suggested his situation is a little better than Mr. Tilly's because his anniversary date for liability insurance is August 8. Therefore, he has time to negotiate for the rest of the season and can go to work knowing his costs. He expressed hope that the legislature would pass this bill and provide certainty for all [builders].

Number 0931

CHUCK SPINELLI, Owner, Spinell Homes, Inc.; Immediate Past President, Anchorage Home Builders Association, testified in strong support of HB 151. He relayed that last year he built about 189 homes. It was his 17th consecutive year with State Farm Insurance Company ("State Farm"), which provided a policy for about \$85,000 a year, approximately \$450 per home, and the renewal date on the policy was December 2002. In October 2002 there were rumors State Farm might withdraw from the state. He obtained a quote of \$150,000 from another agent, but received assurance from State Farm of coverage through 2003. On the day

before his policy was to renew, however, he got a cancellation notice from State Farm giving him 60 days to renew [with another carrier].

MR. SPINELLI described the difficult timing because of vacations and getting together business information for other carriers. He indicated he'd expected the premium to be around the \$150,000 quoted in October. He had 80 or 90 houses under construction and was planning to be out of town March 1, the cancellation date. About a week before March 1, he called the "insurance guy," who told him he didn't even have a quote, although someone had said he'd insure Mr. Spinelli "for \$1 million on a \$2-million actual premium," which the insurance person hadn't taken seriously.

MR. SPINELLI expressed concern that carriers are "dropping like flies," with only two or three that will handle something in Alaska. He continued with his story, explaining that he'd finally received two quotes, one for \$435,000 and one for \$485,000, about \$2,000 per house just for general liability insurance. In his 17 years of building at Spinell Homes, Mr. Spinelli said he has built about 1,500 homes and has had \$71,000 worth of claims against him. He said \$35,000 of that was for a woman who fell down the stairs in an office building from which his business is run, and had nothing to do with construction.

MR. SPINELLI told members the insurance problem hasn't been brought on by the construction industry; it is a far deeper problem that insurance companies are having to deal with. He suggested the issue isn't just cost, but is availability of insurance at all. He concluded by saying HB 151 is just the first step towards bringing insurance underwriters back to Alaska, and that it would protect [builders] by giving them a chance to fix [defects] before someone sues.

CHAIR MCGUIRE asked that testifiers be brief in order to leave time to address amendments and move the bill out of committee.

Number 0540

HARLEY SUDSBURY, Sudsbury & Sons; Vice President, Anchorage Home Builders Association, noting that he is a builder in Eagle River, stated support for HB 151. He suggested it will protect both consumers and builders, and indicated it will lead to more availability with respect to the insurance that builders need.

Number 0515

STEVE ORR, Builder, noting that he has been a builder in the Matanuska-Susitna area for more than 20 years, told the committee that a year ago he spent a little under \$5,000 for general liability insurance. This year it will be \$80,000 - almost a 1,500-percent increase. Last year his combined insurance, including general liability, was slightly over \$1,300 per unit. This year it will be more than \$3,300. He explained, "My fear is that right now they've gotten us general contractors. They haven't started on our subcontractors yet." He expressed concern that in the near future he won't even know how to price a house if what has been occurring in other states occurs in Alaska. Remarking that he's fortunate to have obtained insurance, even though it took seven weeks to do so, he said someone may not even get insurance at all for attached dwellings in Anchorage.

Number 0415

JESS HALL, Builder; Area 15 National Vice President, National Association of Home Builders (NAHB), told members he has been building in Alaska for about 25 years. He concurred with previous testifiers about the bill's value with respect to rate increases for insurance. More valuable, he suggested, is the bill's role with regard to the relationship between the builder and homebuyer in opening communication and avenues to cure problems. He pointed out that his company uses a warranty put together by the Mat-Su Home Builders Association that is much more detailed than this legislation. Therefore, the bill won't affect how he does business, since buyers are required to notify the company of a problem so it can be taken care of.

MR. HALL told members that he once received a notice from the court of being sued for \$25 for a problem; he said it never got to the trial phase because once the [homeowner] discovered the company was willing to take care of the issue, the problem was resolved. Mr. Hall reported hearing last week that Idaho passed legislation similar to this, along with a tort-reform bill that places a seven-year statute of limitations and \$250,000 maximum liability on homes. He suggested perhaps taking that up in a future session.

CHAIR McGUIRE asked whether anyone else wished to testify. Hearing no response, she then closed public testimony.

REPRESENTATIVE GARA offered his belief that Version V is better than CSHB 151(L&C) and resolves one of his major worries about

the bill. Addressing what he called minor concerns, he asked to go through them and bring amendments to a future hearing or offer conceptual amendments at the current one.

REPRESENTATIVE GARA explained his first concern. A consumer who doesn't give written notice to the builder that he or she has noticed a problem with a house can lose the right to sue later on. However, if the warning to the consumer of the need to do so is in the middle of a thirty-page packet of contract language, it might not be noticed. Therefore, his concern would be resolved if the warning to the consumer were provided on a separate, one-page contract with a heading that says, "Notice that you must serve notice of your claim within a year," or words to that effect. He emphasized the need to let consumers know that the rules are changing.

Number 0040

SUZANNE CUNNINGHAM, Staff to Representative Kevin Meyer, Alaska State Legislature, pointed out subsection (b) [beginning on page 5, line 30] says, "The notice required by (a) of this section may be included as part of the contract, must be conspicuous, and must be in substantially the following form". She added that the language that follows, detailed on page 6, lines 1-19, is explicit, and that staff to some members had been contacted about this. She stated the intention of making it clear to everybody.

TAPE 03-37, SIDE A

Number 0001

MS. CUNNINGHAM read from the language beginning on page 6, line 1. She reported that one change made was adding the statutory reference to this contract language, to clarify that this is in law, and that there are deadlines for both the construction professional and the homebuyer. She concluded, "So we feel ... that's pretty adequately addressed, as it is, in this version."

REPRESENTATIVE MEYER added that the key phrase is "must be conspicuous". Whether it is a separate page or part of the contract, he said it has to be obvious to the homebuyer.

REPRESENTATIVE GARA emphasized that it should be a separate page signed by the homebuyer, in order to ensure that the homebuyer has seen it. Suggesting there may be disagreement over what "conspicuous" means, he offered his belief that it could be

missed otherwise. In addition, he reiterated his desire to have a heading for that one-page document that says something like "Notice of potential claim must be provided within one year", followed by the language [on page 6, lines 1-19, of Version V].

REPRESENTATIVE MEYER replied that the amendment seems harmless and is one he could live with. He added that he'd like time to discuss this, however, and suggested perhaps Representative Gara could bring these issues up on the House floor.

CHAIR McGUIRE responded that she'd rather have a clean CS from the committee than have new amendments debated on the floor.

REPRESENTATIVE GARA requested confirmation that the bill doesn't change the statute of limitations, but says [the consumer] must file a notice that he or she is "going to do something" within a certain amount of time.

REPRESENTATIVE MEYER said yes.

MS. CUNNINGHAM said that was her understanding as well.

Number 0230

REPRESENTATIVE GARA remarked that it is a very good change. He then brought attention to an amendment he'd previously decided not to offer, which read [original punctuation provided]:

At p. 1 line 13 change "one year" to "two years".

At p. 3 line 21. Insert

Sec. 09.45.884(d). Rules of equitable estoppel tolling the statute of limitations shall apply so that the statute of limitations shall not run between the time the claimant serves notice under AS 09.45, and the time the plaintiff should reasonably understand settlement under the procedures in AS 09.45 will not succeed.

REPRESENTATIVE GARA said that generally in law, statute of limitations specify certain times when it's unfair for the clock to tick against the consumer and thus the statute of limitations would be stopped in those cases. Those times are when the consumer is under the impression that he/she is working out something with the person being sued. [This legislation] includes a provision specifying that before bringing suit, an

individual must enter into a negotiation process. However, under this legislation the lawsuit must be filed while the negotiation process is going on, otherwise time runs out. Therefore, Representative Gara expressed his desire to have a provision similar to that [specified above], although he mentioned that it could be reviewed by Legislative Legal and Research Services.

REPRESENTATIVE GARA explained that the language would specify that the statute of limitations shouldn't run during the period of negotiations, otherwise one is forced to sue while negotiations continue or the consumer is lulled into thinking that [negotiations] are working well and doesn't think about a lawsuit. There could be many circumstances that could cause the consumer to miss the statute of limitations, he said. He pointed out that there is a concept in law called equitable tolling of the statute of limitations, which he emphasized he wanted to see happen during a fairly defined period during the negotiations.

REPRESENTATIVE GRUENBERG said he hoped [the committee] considered Representative Gara's suggestion favorably.

Number 0443

CHAIR McGUIRE announced that HB 151 would be held over.

ADJOURNMENT

Number 0460

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:00 p.m.