

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

May 13, 2003
8:07 a.m.

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Gene Therriault
Senator Johnny Ellis
Senator Hollis French

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CS FOR HOUSE BILL NO. 151(JUD) am

"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."

MOVED SCS CSHB 151(L&C) OUT OF COMMITTEE

SENATE JOINT RESOLUTION NO. 6

Proposing an amendment to the Constitution of the State of Alaska relating to the duration of a regular session.

HEARD AND HELD

SENATE JOINT RESOLUTION NO. 18

Proposing amendments to the Constitution of the State of Alaska relating to limiting appropriations from and inflation-proofing the Alaska permanent fund by establishing a percent of market value spending limit.

SCHEDULED BUT NOT HEARD

CS FOR HOUSE BILL NO. 102(STA)

"An Act relating to concealed deadly weapons."

MOVED CSHB 102(STA) OUT OF COMMITTEE

SENATE BILL NO. 198

"An Act relating to recovery of civil damages by a peace officer or firefighter; and providing for an effective date."

MOVED CSSB 198(STA) OUT OF COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86(JUD) am
"An Act relating to state permitted projects; and providing for
an effective date."

HEARD AND HELD

PREVIOUS ACTION

SB 198 - See State Affairs minutes dated 5/8/03 and Judiciary
minutes dated 5/12/03.

HB 151 - See Labor and Commerce minutes dated 5/8/03.

SJR 6 - See State Affairs minutes dated 2/11/03 and 5/8/03.

HB 102 - See Judiciary minutes dated 5/12/03.

HB 86 - See Judiciary minutes dated 5/7/03.

WITNESS REGISTER

Representative Kevin Meyer

Alaska State Capitol

Juneau, AK 99801-1182

POSITION STATEMENT: Sponsor of HB 151

Mr. Richard Tilly

Interior Alaska Builders Association

Fairbanks, AK

POSITION STATEMENT: Supports HB 151

Senator Gretchen Guess

Alaska State Capitol

Juneau, AK 99801-1182

POSITION STATEMENT: Sponsor of SJR 6

Representative Hugh Fate

Alaska State Capitol

Juneau, AK 99801-1182

POSITION STATEMENT: Sponsor of HB 86

Mr. Jim Pound

Staff to Representative Fate

Alaska State Capitol

Juneau, AK 99801-1182

POSITION STATEMENT: Answered questions about HB 86

ACTION NARRATIVE

TAPE 03-46, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 8:07 a.m. Senators Ogan, French and Seekins were present. He announced the committee would first take up SB 198, which the committee heard the previous day.

SB 198-DAMAGES RECOVERED BY POLICE/FIREFIGHTER

SENATOR OGAN moved CSSB 198(STA) from committee with individual recommendations and the zero fiscal note.

CHAIR SEEKINS announced that without objection, the motion carried. He then called a brief at-ease.

HB 151-DWELLING DESIGN/CONSTRUCTION CLAIMS

REPRESENTATIVE KEVIN MEYER, sponsor of HB 151, told members that the bill provides homeowners and construction professionals with a process to solve construction issues on new homes or major remodels. It requires homeowners to provide written notice to the construction professional at least 90 days prior to litigation. If a homeowner's complaints have not been resolved in a timely manner, the homeowner may proceed to litigation. He pointed out that most complaints are handled verbally, but, for those situations that are not easily resolved, this formal process is being created. Both parties will sign a contract that explains the process before any work begins.

REPRESENTATIVE MEYER said that under HB 151, the homeowner would have one year from the date of the discovery of a defect to proceed with a complaint. However, a homeowner cannot exceed the current 10-year statute of limitations. He said this legislation is important for several reasons. In Alaska, contractors and homebuilders are required to carry general liability insurance. Many insurance companies no longer provide general liability insurance and the insurance that is available is very expensive. The rising cost of insurance is often passed on in the price of new homes. This problem is not unique to Alaska. Six other states that are experiencing a housing boom have passed similar legislation. He said this bill creates a win-win situation for the homeowner and the homebuilder. He has heard no negative comments about the bill. He said three conforming amendments were made on the House floor. Because of those amendments, the Senate Labor and Commerce Committee adopted a committee substitute to make necessary changes. He recommended the Senate Labor and Commerce committee substitute be considered as the working document before the committee. He offered to answer questions.

CHAIR SEEKINS affirmed that committee members were considering the Senate Labor and Commerce committee substitute, labeled Version B.

SENATOR ELLIS asked how a consumer would receive notice of the one-year time limit in which to take action.

REPRESENTATIVE MEYER provided an example of a contract and an attached explanation that informs the homeowner of the process.

SENATOR ELLIS asked if the explanation is clear and obvious.

REPRESENTATIVE MEYER said it is and that one of the amendments made on the House floor required that the explanation of the process be put on a separate page.

SENATOR OGAN referred to the language on page 6, line 16, of SCS CSHB 151(L&C) that reads, "Within one year of the discovery of a design, construction, or remodeling defect,..." and asked if that essentially provides a one-year warranty on a house.

REPRESENTATIVE MEYER said the ten-year statute of limitation on a home would still be in effect. The language Senator Ogan referred to says that once a homeowner detects a problem, the homeowner has up to one year to notify the builder of the problem and then the process starts. He said more than likely, a homeowner will notify the builder right away and will not wait up to one year.

SENATOR OGAN said that proving a homeowner knew of a problem for less than a year would be difficult. He asked what this law does to change the current system.

REPRESENTATIVE MEYER said currently, if a homeowner detects a problem, the homeowner could go directly to litigation and, to avoid court costs, the parties often settle out of court.

SENATOR OGAN asked if the objective of this bill is to force the homeowner to try to remedy the situation before going to court.

REPRESENTATIVE MEYER said, "Exactly." He said he believes the homebuilder merely wants the opportunity to fix the problem. He said he would characterize SCS CSHB 151(L&C) as a consumer protection bill because it contains a formal process so that if a homeowner is forced to litigate, the homeowner can show what steps he or she took to address the problem. In addition, the

homebuilder will be highly motivated to correct the problem to avoid litigation.

SENATOR ELLIS said one of the driving concerns of homebuilders is the rising cost of insurance. He asked what representations the insurance carriers in the state have made about their future plans to reduce rates or maintain rates to justify the changes that SCS CSHB 151(L&C) will make.

REPRESENTATIVE MEYER said that homebuilders say this bill "will stop the bleeding." Their insurance rates are out of control. Insurance companies have indicated that if some process is put in place to try to control the costs, the rates will not continue to accelerate as they have. He said he does not know for sure whether it will stop any increase, but it will stop the accelerated increase.

SENATOR ELLIS said he plans to support the legislation and hopes for the best. He asked Representative Meyer to follow insurance rates over the next few years to see if the increases slow down.

REPRESENTATIVE MEYER said he would do so and that the homebuilders believe this bill will keep costs down.

VICE-CHAIR OGAN took public testimony.

MS. ROBIN WARD told members that nationwide insurance companies and not Alaska companies write insurance policies. Those companies have said that an indication of a stabilized market will be legislation in the majority of states across the nation. She just returned from Washington, D.C., where she worked with representatives of the other 49 states to achieve some legislation in each state.

VICE-CHAIR OGAN asked Ms. Ward whom she represents.

MS. WARD said she is the co-chair for legislative affairs for the Alaska State Homebuilders' Association (ASHA). She then told members that ASHA is trying to make itself more attractive to nationwide insurers. ASHA is also working on better warranties, better contracts, and safety programs. She said this legislation is one very important component and Alaska is one "cog in the wheel" in the nation. She said this legislation would help; there are examples in other states where builders and buyers have gone to court in which the buyer was more interested in money than having the repairs done. When a homeowner submits an insurance claim, the insurance company usually pays it without

managing it. She appreciated members' support of this legislation and offered to answer questions.

VICE-CHAIR OGAN asked Ms. Ward if the problem is due to an insurance crisis in general or if insurance carriers are pulling out of Alaska.

MS. WARD said the problem is a combination of both. In addition, the problem is partially due to timing. Insurance companies never realized the claims in this business because they were making a lot of money on investments. Now, they are going back to their actuarial [tables] to look at their business profit centers. Homebuilders' insurance policies are not one of those profit centers because of a lot of construction litigation. She said that only two carriers would write liability insurance policies for homebuilders. One of the major carriers, State Farm, is completely pulling out of homebuilder insurance in Alaska. She said for homebuilders who can find a carrier, a policy costs from two to ten times more.

VICE-CHAIR OGAN asked Ms. Ward if she believes this legislation would help mitigate the decline in the number of insurance carriers.

8:25 a.m.

MS. WARD said she does. She said ASHA is working with representatives in Montana, Idaho, Wyoming and Washington State to attract more carriers to the region. Those states have less litigation than California, Arizona and other areas.

VICE-CHAIR OGAN asked the average insurance cost for a general contractor.

MS. WARD said about \$500 per house. She said the latest quotes she received from two carriers in Alaska would increase that amount to \$3,000 per house.

VICE-CHAIR OGAN asked if an owner-builder would be required to have insurance.

MS. WARD stated, "This will be mandated by a licensed contractor. We're hoping that everyone will do it, including the owner-builder." She said the reality is that owner-builders often turn around and sell their homes to make extra money because they are allowed to build one per year without a license.

MR. RICHARD TILLY, representing the Interior Alaska Building Association, a group of 190 builders, vendors, and suppliers in Fairbanks, stated support for SCS CSHB 151(L&C). He said securing liability insurance for homebuilders has become a very expensive proposition. His company of 22 years requested quotes from seven nationwide companies and found only one that was willing to offer a quote. The insurance industry has claimed that homebuilders are a risk and has been pulling out of the state. He said this legislation creates a win-win situation for the consumer, builder and the insurance industry. He pointed out his insurance rates rose 20 percent last year and 22 percent this year and he has never filed a single claim in 22 years.

MR. ALAN WILSON, a Juneau builder and the second co-chair of ASHA's legislative affairs committee, told members that ASHA has been working on this bill for over one year. ASHA met with representatives of other states to hear their experiences with similar legislation. Early reports from builders in Arizona show the process is working well there. Homeowners are more comfortable using the process to resolve issues. Builders are responding to issues that are usually small but that could become major. He said he believes this approach will be a breath of fresh air from the consumers' perspective. He said that insurance companies are in the business to make money so it is not worthwhile to fight claims for up to \$60,000. Homebuilders have found that fraudulent individuals file claims for high amounts when the cost of repair might be \$5,000. They hope this legislation will bring those activities to an end.

With no further participants, VICE-CHAIR OGAN closed public testimony.

SENATOR FRENCH said his concern was addressed at the last hearing, that being that this legislation effectively places a roadblock between the consumer and the court. He said it appears as though the roadblock is minimal and he believes it is a reasonable compromise and should provide a better method to resolve disputes.

SENATOR FRENCH then moved SCS CSHB 151(L&C) from committee with individual recommendations and attached fiscal notes.

VICE-CHAIR OGAN announced without objection, the motion carried. He then announced a brief at-ease.

SJR 6-CONST AM: 90 DAY LEGISLATIVE SESSION

SENATOR GRETCHEN GUESS, sponsor of SJR 6, explained to members that SJR 6 proposes an amendment to the Alaska Constitution to limit the legislative session to 90 days. She believes the legislature can complete its work in 90 days, but doing so would require some structural and operational changes. She said after three-years in the legislature, she has seen a 60-day gestation period, and then the policy work is done during the second 60 days. She said shortening the gestation period to 30 days is reasonable. She said that prior to 1984, legislative session time period was unlimited. After that time, the sessions were limited to 120 days. The same number of laws has passed during the shorter sessions. She believes the public process can be accomplished and business completed in 90 days.

SENATOR FRENCH noted that this year, legislators were "hung up" waiting for the Governor's budget. He said that is when the real work begins. He said he believes 90 days is plenty of time to get the work done but he is interested in tying the beginning of the legislative session to receipt of the Governor's budget.

SENATOR GUESS said this year was an anomaly. Normally the budget is prepared by December 15. She said the question of tying the session to the budget dates is appropriate. She asked Ms. Neilsen to address whether the House has discussed that question.

MS. SARA NEILSEN, staff to Representative Samuels, told members that question did not come up in House committees but they have discussed starting the legislative session later, possibly in March.

SENATOR GUESS said a big trigger mechanism to the legislature's work is the budget forecast and it needs to be a driving force.

VICE-CHAIR OGAN announced that Senator Therriault had joined the committee.

VICE-CHAIR OGAN pointed out that he co-sponsored this legislation. He said the legislature has the ability, under existing constitutional language, to change the month and date of the beginning of the legislative session by law. He would object to starting as late as March but he would agree to begin at the end of January. He said he hopes that a shorter session will result in fewer laws being passed.

VICE-CHAIR OGAN noted that no one had signed up to testify. He then asked Senator Therriault, as a former Finance Committee chair, how he envisions a 90-day session working.

SENATOR THERRIAULT said a 90-day limit could be a problem. He asked members to keep in mind the balance of power between the legislative and executive branches. This legislature is working better with this Administration than it did with the previous administration but, even now, the legislature must often wait for information and legal opinions. He said that members of the House get elected every two years and new members have a steep learning curve. They need a certain amount of time to understand the budget process and play a meaningful role. He said he does not oppose a 90-day session but believes the consequences must be studied in depth. He pointed out that a piece of legislation on the floor today was introduced at the beginning of the session and people are saying it was rushed through the process. He asked what people will think if legislation gets passed in 90-day sessions.

SENATOR GUESS commented that Senator Therriault brought up some good points that need to be thought through. She said the legislature will have to think through when its organization and orientation will take place, as well as the budget and election year issues. She said she feels, as a public servant, she would have to do more preparation work prior to the start of the session. She said in her mind, shortening the session to 90 days is a policy call as to whether legislators believe they can do the work in 90 days and what kind of structure will be necessary to ensure a good public process.

8:49 a.m.

SENATOR THERRIAULT noted that he recently had a conversation with a freshman legislator who said it was difficult to start the first day of session with no staff. A discussion about swearing in newly elected legislators earlier has been taking place. Perhaps consideration should be given to swearing in legislators on the same day the Governor is sworn in. He said a shorter session would also require that more work be done during the interim. He said in his experience, half of the legislators have full-time jobs so committees with specific interim requirements would need members with flexible employment situations. In addition, that would drive up the cost during the interim.

SENATOR GUESS said the cost of work done during the interim is less than the cost of work done during session. She said from her personal experience as a citizen legislator with a full-time job, if there is predictability in the schedule, she could work around it.

VICE-CHAIR OGAN said he has spent a lot of time in the contracting business; his philosophy is that a job takes as long as one is given to do it. He felt that Senator Therriault's concerns are legitimate and the legislature might need to look at providing committees with authority to take action on legislation during the interim. He said his phone rang constantly when he was first elected. He had no staff and constant demands on him although he was not sworn in for two months. He said another consideration is that right before session begins, many people take vacations during the holidays.

CHAIR SEEKINS said his main concern was that after he was elected, he felt handcuffed by not having any staff. He said that problem should be addressed if the legislature wants to shorten the session. He said he would look favorably upon this legislation with a few modifications.

SENATOR GUESS stated that the concerns that have been raised are good ones. She agreed that orientation needs improvement, regardless of whether this legislation moves forward.

SENATOR ELLIS asked the date of the spring revenue forecast.

SENATOR SEEKINS said it is usually released in the first part of April.

SENATOR ELLIS asked if the Governor's budget was released on March 5.

SENATOR GUESS said she believes that is correct. She then asked that the committee hold this bill for further work on the structure of a 90-day session.

CHAIR SEEKINS announced he would hold the bill in committee.

TAPE 03-46, SIDE B

HB 102-CONCEALED DEADLY WEAPONS

OFFICER MIKE COUTURIER, representing the Anchorage Police Employees Association, stated support for the proposed changes

[in Version Q]. Peace officers support anything that provides them with a better tool to ensure everyone's safety through more detailed instruction about what to do when contacted by peace officers.

SENATOR FRENCH asked Officer Couturier who would be educating the public about the bill requirements regarding notification before entering a home with a concealed handgun or notifying police officers that one is carrying a concealed handgun.

OFFICER COUTURIER said the trainer would inform anyone obtaining a concealed carry permit if this bill passes. The majority of people handling concealed weapons receive their training [during the permit process]. He said he believes once a person has a concealed carry permit, that person would be on a mailing list for updates to any changes to the state law. He said:

As far as a person that owns a residence that happens to have a guest that happens to be carrying a weapon, and the homeowner, knowing that the person is supposed to provide them with that information, that's part of the onus that we all share in educating the public on current law and changes to the law. And partially as a responsible citizen of the state we all have a responsibility, of course, to know what the laws are and to obey them. Certainly some public forum of TV or municipal channels would assist in educating the public and those are the options that I see.

SENATOR FRENCH said it sounds like Officer Couturier is assuming the instructional courses under the current system would continue and it is through those courses that people would learn the provisions of the law. He said he is skeptical because he believes this bill will repeal the need for a permit and make it less likely that someone will spend the money to take a class.

CHAIR SEEKINS remarked that a person would still need a permit if he or she wants to carry a concealed weapon outside of the state because a person will not have reciprocity without a permit. In addition, a person with a permit can buy a handgun without the waiting period because the necessary background check has already been done. Therefore, it is still beneficial to take the training classes to get the actual carry permit. This bill will not make criminals out of people who wear a jacket over a weapon when they are carrying it legally. He said he would imagine that gun shops, the NRA, and outdoor organizations will do everything they can to educate the general

public. It will not be required by statute, but if this law is to work, those organizations know it is incumbent upon them to educate the public.

OFFICER COUTURIER said he needed to back up because when he read the bill he did not read anything that said permits would no longer be required.

CHAIR SEEKINS replied, "You can carry concealed now without a permit - if you do so in a lawful manner."

SENATOR FRENCH read, to clarify the nature of the bill for Officer Couturier, the following excerpt from the sponsor statement:

HB 102 repeals the concealed carry laws that require permits to carry deadly weapons, including handguns, knives and other legal-to-own deadly weapons. It does not repeal any of the restrictions on where a person can carry a concealed weapon, such as on school grounds, in courthouses or on private property, where the owner may prohibit such weapons.

CHAIR SEEKINS noted the third paragraph reads:

It does not eliminate the state's concealed carry permit program for two reasons.

OFFICER COUTURIER apologized and said he did not have the sponsor statement. He said the support of his organization might not be as strong because the Anchorage Police Department Employees Association certainly feels the need, prior to contacting someone - whether that be on a traffic stop or just contacting them on the street, to know ahead of time or upon recontact that the person has a concealed carry permit. He said if there were no system that allows the peace officer to know a person has a concealed carry permit, he would not know whether or not the carrier is violating. The Association feels the concealed carry program provides a valuable tool that the police department uses daily.

SENATOR FRENCH said he believes one valid reason for this bill is that it is difficult for people who live in the Bush to qualify for a concealed carry permit because the courses are only taught in metropolitan areas. He suggested it might be possible to offer the information that the peace officers want conveyed to people before they are allowed to carry a concealed

weapon through either an Internet session or a correspondence course.

OFFICER COUTURIER said his organization feels it is very important to have this tool as it makes contact safer; they would hate to lose this tool.

SENATOR FRENCH commented there may be some way to lower the level of qualification to get a concealed carry weapon permit, still convey the information, and allow law enforcement to have some knowledge of who has a concealed carry weapon permit.

CHAIR SEEKINS indicated the State of Vermont has this law; that state has one of the lowest crime rates in the nation.

SENATOR OGAN said the police officers he spoke with were supportive of the concealed carry law because they felt, "Well, the bad guys are all packing, we might as well let the good guys pack too." He noted when a person is stopped the police officer runs their identification through the APSIN system, which contains criminal records. He said it seems if a police officer runs a check on a person and finds they have a clean record, the police officer would feel there is some reasonable amount of certainty the person is not going to be a threat.

OFFICER COUTURIER said that is a reasonable assumption but we live in a world of exceptions. He said it is just a matter of having another tool in the peace officer's tool bag to approach each situation in the safest way possible.

CHAIR SEEKINS thanked Officer Couturier.

9:15 a.m.

SERGEANT DAVE PARKER, Anchorage Police Department, told members he was contacted the previous day about this legislation. One of his concerns is that this bill will put honorable gun owning citizens in a higher risk situation. He understands there will be an effort to provide education on the concealed carry laws, particularly about when a person can use lethal force. However, having trained concealed carry permit applicants for three years, he has found [the police department] is able to do a much more thorough job of teaching about when lethal force can be used and about the laws surrounding the use of force. If this concealed carry bill is enacted, he is concerned that people will be acting in ignorance. He would hate to see gun owners get into trouble because they do not know the law. He said the

police department has no problems with concealed carry permit gun owners because they have undergone the necessary education to get the permit. He likened the process to getting a driver's license.

MR. PARKER said carrying a concealed weapon in the Bush is not the problem; problems occur in the high-density urban areas. He said the current law is a good one. If the law is changed, the good citizens will be the ones who have problems.

CHAIR SEEKINS asked Mr. Judy to inform committee members about the State of Vermont's experience with this law.

MR. BRIAN JUDY, National Rifle Association, said the State of Vermont is the one state without a prohibition on concealed carry of weapons. According to FBI statistics, the State of Vermont consistently falls near the bottom of the list of states in terms of crime. Last year, Vermont ranked 49th out of the 50 states in violent crime. He said the law is working well; law-abiding citizens are not causing problems. He pointed out in Alaska, one does not need a permit to carry a firearm openly, nor is a permit required if a concealed firearm is being carried for a lawful outdoor activity. Therefore, a fairly wide segment of people are already carrying firearms without undergoing training. Under existing law, a person who is dressed in a manner that is not compatible with open carry is required to go through the government program, pay fees, be fingerprinted, and get on a government database merely to cover the firearm. Regarding the training issue, he told members in the large number of states with concealed carry permit laws, the required training runs the gamut; Vermont is one extreme. Washington has a concealed carry permit law with no training requirement for law-abiding citizens. Washington has approximately 250,000 licensed permit holders. Washington has no problems with those permit holders. The empirical evidence in all states shows that concealed weapons permit holders are not causing problems. He pointed out that Alaska experienced a significant reduction in violent crime after its concealed weapons permit law was enacted. He told members the NRA supports HB 102, as it believes it is good public policy.

CHAIR SEEKINS said as a young man, he was a resident of the State of Washington. At that time, he had a concealed carry weapon permit to carry a 22 rifle for hunting. He said all he needed was a good reason for the State of Washington to issue the permit. He asked if that is still the case.

MR. JUDY said a person does not have to provide a reason in the State of Washington, similar to the current law in Alaska. Issuance of a permit is mandatory for law-abiding citizens who can lawfully own a firearm.

CHAIR SEEKINS asked if he, as a permit holder, would be covered if he puts a revolver in the console of his truck but his wife would be breaking the law if she unknowingly borrowed his truck with the gun in it.

SENATOR OGAN said the officer who last testified said it is legal to carry a concealed weapon in one's automobile right now.

SENATOR FRENCH pointed out that in the April 4, 2003 letter Mr. Brady sent to Representative Croft about the 1995 changes to the concealed carry weapons law, he wrote, "Opponents screamed hysterically that blood would run in the streets." He asked whether that really happened or whether it was rhetorical flourish.

MR. JUDY said that was not rhetorical flourish. In 1993 or 1994, when HB 351 was initially introduced, people made hysterical claims and predictions. He still has the white paper done by certain members of the law enforcement community in which they predicted traffic stops turning into shoot-outs. He said those were the kinds of claims being made in other states in the 1980s that were making the same public policy change. In every single state, the empirical evidence showed that was not happening. He said that "bad" guys are going to continue to cause problems regardless of the level of training.

SENATOR OGAN said he believes Switzerland requires all citizens to be in the military. After they get out of the military, they take their weapons and uniforms with them and can be called back at any time. He said that Switzerland has virtually no crime.

CHAIR SEEKINS said when he visited Switzerland he was told that policy has kept Switzerland neutral for many years.

SENATOR OGAN moved CSHB 102(STA), \Q version, with individual recommendations and attached zero fiscal note.

SENATOR FRENCH objected.

The motion carried with Senators Ellis, Ogan, Therriault, and Seekins in favor, and Senator French opposed.

The committee took a brief at-ease.

HB 86-INJUNCTIONS AGAINST PERMITTED PROJECTS

REPRESENTATIVE HUGH FATE, prime sponsor of HB 86, told members that for too long, properly permitted projects have been delayed before ground is ever broken. Projects are often put on hold because our current [legal] system allows individuals or entities to stop projects without a legitimate reason and without any serious consequences. Adding the language in HB 86 to the code of civil procedure means that those who file malicious or bad faith claims in an attempt to stop a project must realize that the economic effects of their actions will be increased. This bill is written to give the defendant a cause of action and to provide guidance to the court when determining damages.

REPRESENTATIVE FATE said in most cases, when a project is permitted, the contractor begins the process of purchasing materials, hiring subcontractors and employees, and essentially commits to go to work. The economic damage of even a temporary forced work stoppage far exceeds attorney and court fees. This bill requires the responsible party or plaintiffs to assume economic responsibility for their actions if the court determines the action was improper. He said this legislation has been closely scrutinized and has been determined to be constitutional, legally clear, and it contains no provisions that will violate due process. He emphasized the court will determine whether the cause or action was improper.

SENATOR THERRIAULT asked if a court would have to dismiss a case and declare it to be malicious and ungrounded before the permittee could initiate the civil action.

MR. JIM POUND, staff to Representative Fate, said this would happen at the injunctive part of the process. If an injunction were granted, which is an extensive process, the cause of action would fall into place when the determination was made that the case was based on unfounded, bad faith, or malicious claims.

SENATOR THERRIAULT asked if he was granted a permit through the agency process and someone moved for an injunction, which the court denied, whether he would then make a claim in civil court that the filing for injunctive relief was a bad faith action or whether the court would have to make a proclamation on the request for injunctive relief before he could initiate a civil action.

REPRESENTATIVE FATE said his understanding is that a plaintiff's filing for injunctive relief will not be granted by the court if the court finds the cause of action was filed in bad faith. If injunctive relief is not granted, the project continues. However, that does not stop the court from determining the plaintiff had just cause in filing the cause of action for injunctive relief. In that event, it is likely the court would rule for injunctive relief, in which case there would either be a delay or the project would be stopped. The beauty of this piece of legislation is that it actually allows the court to determine whether the cause of action was filed in bad faith or was malicious.

CHAIR SEEKINS said under normal circumstances, if a court determines that the plaintiff is liable under this law, the court would initiate damages at a damages hearing. If not, it would be incumbent upon the defendant's attorney to file a motion for damages. He said he has observed that when lawsuits are determined by the court to be frivolous, damages are assessed at meetings with the clerk of the court.

REPRESENTATIVE FATE said this legislation should act as a deterrent because the liability for filing a lawsuit in bad faith will increase.

SENATOR FRENCH offered an amendment [Amendment 1] and told members the U.S. Supreme Court has provided some good direction in this area. His amendment is an attempt to comport with the U.S. Supreme Court's position on these lawsuits. Second, he believes the amendment will help shift the focus to the legal merit of a claim and away from the subjective intentions of the person filing it.

SENATOR FRENCH moved to adopt Amendment 1.

CHAIR SEEKINS objected.

SENATOR FRENCH said the amendment would make a small modification to page 2, line 8, by changing the language to read:

the person initiates or maintains an objectively baseless legal or administrative claim.

He said that he and Representative Fate discussed the difficulty of defining "objectively baseless" but the U.S. Supreme Court

has defined that term as a case in which no reasonable litigant could reasonably expect success on the merits. He said if a person brings a lawsuit on grounds with no legal merit, that person should be held accountable. His amendment would clarify that the court first looks at the legal merits of the case and then look at the intention of the person who filed the case. He noted that Amendment 1 comports with the U.S. Supreme Court decision written by Justices Scalia, Thomas, Rehnquist, White, Blackmun, Kennedy, and Souter.

CHAIR SEEKINS asked Senator French if he means that if Amendment 1 is not adopted, a person's rights would be violated under the U.S. Constitution.

SENATOR FRENCH said his intent is to get the bill as close as possible to what he sees as "the state of the law."

CHAIR SEEKINS continued, "The state of the law regarding that particular case that is cited, in other words."

SENATOR FRENCH replied, "Exactly. The case where you sue - where you assess damages against somebody who has gone to court under a [indisc.] citizen."

CHAIR SEEKINS asked if the state could maintain these conditions under paragraph (c) without running afoul of the U.S. Supreme Court.

SENATOR FRENCH said he is just trying to make the bill a little bit better.

SENATOR THERRIAULT questioned how the amendment would fit on page 2, line 8.

SENATOR FRENCH said he was referring to CS SSHB 86(JUD) am, version W.A.

CHAIR SEEKINS asked Representative Fate his opinion of the amendment.

REPRESENTATIVE FATE told members his only concern is that he is not aware of the U.S. Supreme Court case that Senator French referred to. He expressed concern that using two adjectives, "baseless" and "objectively," will add confusion.

CHAIR SEEKINS maintained his objection to adopting the amendment.

SENATOR THERRIAULT asked Senator French if it is necessary to include the word "objectively."

SENATOR FRENCH said he believes including the word "objectively" will force the court to look at the legal arguments and stay one step removed from the person filing the claim. He explained that he is concerned about separating the legal argument from the person who filed it. He said the person who files a lawsuit may have an irrational hatred of asphalt but if that person has a sound legal reason for his argument, that person should not be forced to pay damages.

CHAIR SEEKINS said that person would not have to pay damages according to paragraph (c)(4), because that person was not acting with malice.

SENATOR FRENCH said he believes a person could argue the contrary and wants to keep the focus on the strength of the legal argument.

CHAIR SEEKINS called for the question. The motion to adopt Amendment 1 failed with Senators French and Ellis voting in favor and Senators Ogan, Therriault, and Seekins voting against.

SENATOR FRENCH moved an amendment to add the word "baseless" to page 2, line 8, and said he believes that is a fair compromise.

SENATOR FRENCH explained the word "baseless" would be inserted in front of the word "legal" on page 2, line 8.

CHAIR SEEKINS objected to the motion to adopt Amendment 2.

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CHAIR SEEKINS noted that all claims are based on something so that if a lawsuit were based on, for example, a hatred of oil drill rigs, the claim would not be baseless.

SENATOR FRENCH replied:

I guess that is why the word 'objectively' was important, because it gets you back to the legal merits and not to the mind of the person who's bringing it. Once you step into the mind of the person who is bringing it, you're into a hall of mirrors and

I think you're somewhere where you just can't win. Any judge can look at the quality of a legal argument and say that's a joke. That's when it's objectively baseless.

CHAIR SEEKINS said a judge would have to determine that the plaintiff acted in bad faith.

REPRESENTATIVE FATE said he would prefer that "bad faith claim" be used.

CHAIR SEEKINS noted that language is already included in paragraph (c)(3).

SENATOR OGAN commented that determining malice is subjective; therefore he feels that including the word "baseless" will help to quantify the malice. He questioned how one would determine the legal standard for the culpability of "malice."

CHAIR SEEKINS pointed out that legal precedence has been set for "malice."

SENATOR THERRIAULT said he understands Senator French's argument in that a person might have a "legal hook" to hang the claim on but is filing the claim for the sole reason of delaying the project. Senator French is trying to focus the liability on cases in which there is no legal valid argument that is filed with bad intentions.

CHAIR SEEKINS stated:

I think that - what we're trying to get to there is that, Senator Therriault if I understand is, you could still bring the action on a legally valid point or it probably would be defeated in summary judgment right up front, but the question is was that legally valid complaint done in bad faith and I think that's what the sponsor is trying to get to is that - am I not correct?

REPRESENTATIVE FATE said that is correct.

CHAIR SEEKINS continued:

So, if it has no basis under the law, if it's baseless under the law, more than likely it would be disposed of in a very short period of time with summary

judgment because someone has not brought any basis to bring the action. And I think what he's trying to get to is the element of bad faith. He's not trying to keep someone from bringing an action that would otherwise be legally allowed.

SENATOR THERRIAULT said a person can bring an action to get an injunction against a project and the court can refuse to grant that injunction by saying if the project goes ahead, no one will be harmed. The injunction was not dismissed because the claim had no basis; it was dismissed because no one will suffer if the project goes ahead. He questioned whether under (2) on page 2, line 12, the claim would be considered to be the request for an injunction.

CHAIR SEEKINS said the claim to get injunctive relief would be rejected; he referred to the language on lines 6 and 7.

SENATOR FRENCH said he believes it could be either. A person could get an injunction and later fail on the merits, when the injunction would be lifted. That would be a far more expensive hurdle for a company to get over because the company could suffer a three-month project delay. He said the risk for the plaintiff is that the plaintiff gets the injunction and then loses the case three months later and is liable for \$3 million in damages. He said a person who may be considered an agitator could be on the hook for millions of dollars of damages even though that person had a valid legal reason for filing the claim. That is the reason he preferred including the words "objectively baseless."

CHAIR SEEKINS called for a roll call vote. The motion to adopt Amendment 2 carried with Senators French, Ogan, Therriault and Ellis in favor and Chair Seekins opposed.

CHAIR SEEKINS announced that he would hold CS SSHB 86(JUD) in committee until the next hearing.

SENATOR THERRIAULT informed members that he might propose an amendment to this legislation at the next meeting.

CHAIR SEEKINS adjourned the meeting at 10:02 a.m.