

**ALASKA STATE LEGISLATURE
HOUSE TRANSPORTATION STANDING COMMITTEE**

March 18, 2008

2:40 p.m.

MEMBERS PRESENT

Representative Kyle Johansen, Chair
Representative Anna Fairclough
Representative Wes Keller
Representative Mike Doogan
Representative Woodie Salmon

MEMBERS ABSENT

Representative Mark Neuman, Vice Chair
Representative Craig Johnson

OTHER LEGISLATORS PRESENT

Representative Andrea Doll

COMMITTEE CALENDAR

HOUSE BILL NO. 415

"An Act relating to disclosures required for the sale of a used motor vehicle, including a trailer, by a motor vehicle dealer."

- MOVED CSHB 415(TRA) OUT OF COMMITTEE

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 294

"An Act establishing the division of marine transportation; establishing the Alaska Marine Transportation Authority Board and the position of director of the division of marine transportation, and assigning the powers and duties of each; making conforming amendments; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 372

"An Act relating to highway design flexibility and to the assumption by municipalities of certain duties related to highways."

- MOVED CSHB 372(TRA) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: HB 415

SHORT TITLE: USED MOTOR VEHICLE SALES

SPONSOR(s): TRANSPORTATION

02/25/08 (H) READ THE FIRST TIME - REFERRALS
02/25/08 (H) TRA, JUD
03/18/08 (H) TRA AT 1:00 PM CAPITOL 17

BILL: HB 294

SHORT TITLE: MARINE TRANSPORTATION ADVISORY BOARD

SPONSOR(s): REPRESENTATIVE(s) WILSON, LEDOUX, SEATON

01/04/08 (H) PREFILE RELEASED 1/4/08
01/15/08 (H) READ THE FIRST TIME - REFERRALS
01/15/08 (H) TRA, FIN
02/25/08 (H) SPONSOR SUBSTITUTE INTRODUCED
02/25/08 (H) READ THE FIRST TIME - REFERRALS
02/25/08 (H) TRA, FIN
03/11/08 (H) TRA AT 5:00 PM CAPITOL 17
03/11/08 (H) Heard & Held
03/11/08 (H) MINUTE(TRA)
03/18/08 (H) TRA AT 1:00 PM CAPITOL 17

BILL: HB 372

SHORT TITLE: HIGHWAY DESIGN FLEXIBILITY/MUNICIPALITIES

SPONSOR(s): REPRESENTATIVE(s) BUCH

02/19/08 (H) READ THE FIRST TIME - REFERRALS
02/19/08 (H) TRA, FIN
03/06/08 (H) TRA AT 1:00 PM CAPITOL 17
03/06/08 (H) Heard & Held
03/06/08 (H) MINUTE(TRA)
03/18/08 (H) TRA AT 1:00 PM CAPITOL 17

WITNESS REGISTER

DAVID SCOTT, Staff
to Representative Johansen
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 415 on behalf of the sponsor, Representative Johansen, chair of the House Transportation Standing Committee.

CLYDE "ED" SNIFFEN, Senior Assistant Attorney General
Commercial/Fair Business Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska

POSITION STATEMENT: During hearing of HB 415, provided background information.

JOHN COOK, Legislative Director
Alaska Auto Dealers Association
Fairbanks, Alaska

POSITION STATEMENT: Testified in support of HB 415.

CLIFF STONE, Staff
to Representative Peggy Wilson
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented CSSSHB 294, Version O, on behalf of one of the joint prime sponsors, Representative Wilson.

REPRESENTATIVE PAUL SEATON
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Spoke as one of the joint prime sponsors of SSHB 294.

DENNIS HARDY, Deputy Commissioner of Marine Operations
Alaska Marine Highway System
Department of Transportation & Public Facilities
Juneau, Alaska

POSITION STATEMENT: Expressed concerns with CSSSHB 294, Version O.

RICHARD WELSH, Assistant Attorney General
Transportation Section
Civil Division (Juneau)
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Expressed concerns with SSHB 294.

BRIAN KANE, Attorney
Legislative Legal and Research Services
Legislative Affairs Agency

Juneau, Alaska

POSITION STATEMENT: During hearing of SSHB 294, answered questions.

GINGER FORTIN

Homer, Alaska

POSITION STATEMENT: Testified that SSHB 249 will improve the existing ferry system.

REPRESENTATIVE BOB BUCH

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Spoke as the sponsor of HB 372.

DEBORAH BREVOORT, Staff
to Representative Bob Buch

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Presented HB 372, Version L, on behalf of the sponsor, Representative Buch.

JEFF OTTESEN, Director

Division of Program Development

Department of Transportation & Public Facilities (DOT&PF)

Juneau, Alaska

POSITION STATEMENT: During hearing of HB 327, expressed concerns.

PETER PUTZIER, Senior Assistant Attorney General

Transportation Section

Civil Division (Juneau)

Department of Law

Juneau, Alaska

POSITION STATEMENT: During hearing of HB 327, expressed concerns.

MARK NEIDHOLD, Chief Design & Construction Standards

Division of Design & Engineering Standards

Department of Transportation & Public Facilities

Juneau, Alaska

POSITION STATEMENT: During hearing of HB 327, expressed concerns.

ACTION NARRATIVE

CHAIR KYLE JOHANSEN called the House Transportation Standing Committee meeting to order at [2:40:17 PM](#). Representatives Doogan, Fairclough, Keller, and Johansen were present at the call to order. Representative Salmon arrived as the meeting was in progress. Also in attendance was Representative Doll.

HB 415-USED MOTOR VEHICLE SALES

[2:40:26 PM](#)

CHAIR JOHANSEN announced that the first order of business would be HOUSE BILL NO. 415, "An Act relating to disclosures required for the sale of a used motor vehicle, including a trailer, by a motor vehicle dealer."

[2:40:48 PM](#)

DAVID SCOTT, Staff to Representative Johansen, Alaska State Legislature, explained that HB 415 removes language governing the sale of used vehicles that is no longer of benefit to consumers, dealerships, or the state. This legislation repeals AS 45.25.465(c), which requires that all used vehicles for sale by a dealer are posted with a notice specifying that the vehicle isn't subject to Alaska's "lemon law;" isn't covered under a manufacturer's warranty; wasn't manufactured in a foreign country, including Canada. Mr. Scott pointed out that the consumer protection provided in AS 45.25.465(c) isn't applicable because used cars aren't subject to Alaska's lemon laws and aren't sold with a manufacturer's warranty. Furthermore, the dealer must also provide whether the vehicle was manufactured in a foreign country, as specified in AS 45.25.470. Mr. Scott opined that AS 45.25.465(c) leaves dealers subject to lawsuits and is a violation of unfair trade practices, which allows for lawsuits that demand treble damages and reimbursement of full legal costs, even when consumers haven't suffered any actual harm or damages. Although one may argue that there can never be too much consumer protection, when the state places undue burdens on Alaska's businesses while providing no additional consumer protection it's time to reevaluate. Mr. Scott then noted that the legislation includes retroactivity clauses on page 1, lines 11-14 and page 2, line 1, which allow any case to continue to its conclusion without affecting the rights of Alaskans that are now in court while precluding future court action.

[2:43:30 PM](#)

REPRESENTATIVE FAIRCLOUGH moved to adopt CSHB 415, Version 25-LS1546\C, Bannister, 3/17/08, as the working draft. There being no objection, Version C was before the committee.

[2:44:09 PM](#)

CLYDE "ED" SNIFFEN, Senior Assistant Attorney General, Commercial/Fair Business Section, Civil Division (Anchorage), Department of Law (DOL), referred to DOL's letter of support for SB 164, the companion to HB 415, dated February 19, 2008. The aforementioned letter indicates that when AS 45.25.465(c) was originally drafted it was intended to apply only to current model used vehicles and the expansion such that it was applied to all used vehicles was due to a drafting error. However, since that letter was drafted, DOL has learned that the expansion was an intentional act on behalf of U.S. Representative Gruenstein (ph). Even so, DOL supports this proposed change because it is fairly redundant. At the time the statute was passed, current model vehicles were particularly susceptible to misperceptions by consumers during the purchasing process because they looked new when in fact they were actually used vehicles. Furthermore, if those vehicles were manufactured for sale in Canada, the North American manufacturer's warranty and the lemon law didn't apply. Those were the main consumer harms that were originally trying to be addressed. The expansion of the statute to all used vehicles did impose other burdens on automobile dealers for the remaining inventory of used cars that were already protected under existing statutes. Because it's already required that dealers disclose to consumers, in writing, whether the vehicle is manufactured for sale in Canada and because the Federal Trade Commission (FTC) already requires a window sticker that clearly explains whether a vehicle is under warranty, those issues have been addressed for a number of years already. Therefore, expanding the requirements to the entire inventory of used cars of the dealer seems unnecessary. He noted that in 2006 there was an amendment to Title 8 that actually removes reference to current model vehicles from the Automobile Dealer Act. Furthermore, in the last couple of years most major auto manufacturers extended their warranties to vehicles sold in North America. Mr. Sniffen opined that there doesn't seem to be an issue of used current model vehicles coming into Alaska as was once the case. Taking all of the aforementioned into consideration, it seems that consumers are adequately protected, he said.

[2:48:15 PM](#)

REPRESENTATIVE DOOGAN related his understanding then that this [statute] was originally intended to require a sticker specifying that current model used vehicles brought over from Canada were used.

MR. SNIFFEN noted his agreement with that understanding.

REPRESENTATIVE DOOGAN then inquired as to how folks would be able to determine if a vehicle being sold as new is actually a used vehicle from Canada, if this [statute] is eliminated.

MR. SNIFFEN stated that a person will be able to tell because of the FTC's buyer's guide that's displayed in the window of the vehicle and the written disclosure in the paperwork that the vehicle was manufactured for sale in Canada. The latter should raise flags to the potential buyer that the vehicle is likely a used vehicle.

[2:49:46 PM](#)

REPRESENTATIVE DOOGAN directed attention to the retroactivity section of HB 415, which specifies that "it" wouldn't apply to any suit filed prior to January 1, 2008. He asked if the aforementioned would disadvantage those "who might be trying to beat us on the finish line."

MR. SNIFFEN acknowledged that there was concern in relation to SB 164, the companion to HB 415, regarding depriving the rights of those with existing cases. He noted that he, in fact, is involved in a couple of existing cases. He said there was no desire to have the retroactivity to unnecessarily interfere with the rights of people being represented to go forward and recover. The original retroactive language, to the extent allowed by law, makes this retroactive to 2004. Mr. Sniffen explained that the retroactivity language was changed such that those lawsuits pending prior to January 2008 could continue and the retroactivity would only apply to actions brought forward after January 1, 2008. Therefore, no lawsuits are being extinguished, he clarified.

[2:51:49 PM](#)

JOHN COOK, Legislative Director, Alaska Auto Dealers Association, opined that this comes down to an issue of fairness and Alaska jobs. As previously testified, these requirements for stickers are redundant and unnecessary. Because it's an unfair trade practice, there doesn't need to be actual harm or

damages suffered by the consumer. He recalled that in the 13 years he was in the automobile business he never received any comments related to the sticker that made a difference on someone's purchase. Mr. Cook remarked that it's troubling that since no actual harm or damages has to be proven, lawsuits could proceed which could close down what are largely family-owned small Alaska-based businesses. A class action lawsuit of the magnitude of one that's proceeding now would either bankrupt or close nearly any Alaska-based business. Mr. Cook related the Alaska Auto Dealers Association's support of HB 415 and strongly urged the committee to report it from committee today.

[2:54:51 PM](#)

CHAIR JOHANSEN closed public testimony.

[2:55:02 PM](#)

REPRESENTATIVE FAIRCLOUGH moved that the committee report CSHB 415, Version 25-LS1546\C, Bannister, 3/17/08, out of committee with individual recommendations and accompanying fiscal notes. There being no objection, CSHB 415(TRA) was reported from the House Transportation Standing Committee.

The committee took an at-ease from 2:55 p.m. to 2:59 p.m.

HB 294-MARINE TRANSPORTATION: BOARD & DIVISION

[2:59:11 PM](#)

CHAIR JOHANSEN announced that the next order of business would be SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 294, "An Act establishing the division of marine transportation; establishing the Alaska Marine Transportation Authority Board and the position of director of the division of marine transportation, and assigning the powers and duties of each; making conforming amendments; and providing for an effective date."

[2:59:23 PM](#)

REPRESENTATIVE FAIRCLOUGH moved to adopt CSSSHB 294, Version 25-LS1220\O, Kane, 3/18/08, as the working document. There being no objection, Version O was before the committee.

The committee took a brief at-ease at 2:59 p.m.

[3:00:13 PM](#)

CLIFF STONE, Staff to Representative Peggy Wilson, Alaska State Legislature, related that the joint prime sponsors took the committee's comments to heart. He then pointed out that beginning on page 1 of Version 0 the term "Authority" was changed to "Advisory" throughout the legislation. The language in the long title was changed such that it no longer refers to the establishment of the division of marine transportation and the position of director of the division of marine transportation and setting out the powers and duties of it. Version 0 no longer includes Article 3, formerly titled "**Alaska Marine Highway Organization and Operations**," which was located on page 1, line 14 through page 2, line 23, but rather now refers to "**Article 3. Alaska Marine Transportation Advisory Board.**" He explained that Article 3 is the Alaska Marine Highway System (AMHS) organization and operations, which involved a couple of new sections of statute. The section establishing the division of marine transportation was deleted as was the section regarding the Alaska marine transportation director. In response to Chair Johansen, Mr. Stone confirmed that the effect is that [AMHS] would remain part of the Department of Transportation & Public Facilities (DOT&PF) as is the case currently. Mr. Stone informed the committee that although the board composition remains, it's now located on page 2 and has been re-arranged a bit, such that all the communities, save the Ketchikan Gateway Borough, are listed in their [respective] district.

[3:05:34 PM](#)

REPRESENTATIVE DOOGAN related his understanding that in Version 0 only the Ketchikan Gateway Borough would continue to be specified singly as having a member on the board, while the other communities, originally listed separately in Version L, are now included with other communities in their district in Version 0.

MR. STONE noted his agreement with that understanding. In further response to Representative Doogan, Mr. Stone recalled that at a prior committee hearing there was discussion regarding the need to consolidate for simplicity. For example, there was to be one member position representing Haines and Skagway while in Version 0 Juneau is added to the district that includes Haines and Skagway.

[3:07:26 PM](#)

REPRESENTATIVE PAUL SEATON, Alaska State Legislature, explained that of the six nonregional members that were appointed, previously there was a designation that three of those had to come from particular cities or regions. Since Ketchikan didn't really fit into the regional representation, it's left as one of the six nonregional members. He noted that there are no restrictions on five of the other six at-large seats. In response to Representative Doogan, Representative Seaton confirmed that the reason for the arrangement is geography. He, too, recalled that at the last hearing, the committee expressed concern that there were too many designated regional seats. Therefore, Version O took two of those three [regional seats] of the six at-large seats from regional apportionment.

[3:08:58 PM](#)

MR. STONE, continuing his review of the changes encompassed in Version O, pointed out that the language of proposed AS 19.65.120(d) now specifies the following: "Board members serve at the pleasure of the governor." rather than the language "The governor may remove a member of the board only for cause." in Version L. In response to Representative Fairclough, Mr. Stone confirmed that the language in proposed AS 19.65.180(a) of Version O has been changed to say, "The board shall select not more than three nominees for the position of director or deputy commissioner of the department's division with responsibility for marine transportation," rather than "The board shall select not more than three nominees for the position of director of the department's division with responsibility for marine transportation". The aforementioned was the drafter's way of getting around the deletion of the section creating the division. He related that the prime sponsors felt the board should have a proactive role in selecting the three nominees that are forwarded to the commissioner for consideration.

[3:11:32 PM](#)

REPRESENTATIVE SALMON inquired as to why the Ketchikan Gateway Borough wasn't included in one of the regional districts.

MR. STONE answered that to some degree it was a matter of geography. However, he acknowledged that it could be argued that Kodiak is off by itself and thus should have regional representation. Ketchikan is one of the first hubs that is reached when traveling north from Bellingham, and thus the sponsors felt it could stand alone in regard to representation on the board. In further response to Representative Salmon, Mr.

Stone pointed out that page 2, line 31, specifies the following: "For members being appointed under (a)(2)-(6) of this section, there shall be at least one resident of the Ketchikan Gateway Borough."

[3:13:23 PM](#)

REPRESENTATIVE SALMON asked if there is any way in which the representation could only end up being from Southeast without any representation from the larger portions of Alaska.

MR. STONE explained that proposed AS 19.65.120(6), which refers to the two members of the public at large, was left so that a member of the public from the Railbelt or Fairbanks could be appointed to the board. Therefore, one of the board members from paragraphs (2)-(5) would have to be from Ketchikan. However, paragraph (6) could be filled by a member from Ketchikan. He specified that of the six seats, at least one must be from Ketchikan, which the sponsors felt provided the governor a fairly broad area from which to choose.

[3:15:20 PM](#)

REPRESENTATIVE DOOGAN related his understanding that the geographical necessity language applies to proposed AS 19.65.120(1)(a)-(e) and then there is a set of at-large members who could be from anywhere, except that one must be from the Ketchikan Gateway Borough. Therefore, in theory there would be six members of the board who had been defined geographically and the other five could be from anywhere, except that one has to be from Ketchikan.

MR. STONE noted his agreement.

[3:16:27 PM](#)

REPRESENTATIVE FAIRCLOUGH asked if the new composition of the board reflects the current Marine Transportation Advisory Board (MTAB).

MR. STONE replied no, adding that there are some subtle changes.

[3:17:10 PM](#)

MR. STONE, in response to Chair Johansen, explained that for the commissioner position the governor will take input and then select someone from a list of nominees that have applied.

Typically, for the position of deputy commissioner the governor confers with the commissioner; the commissioner has a great deal of input into who is selected [for those positions]. The decisions of who to [hire] for the deputy directors, legislative liaisons, and the partially exempt positions can be delegated to the commissioner by the governor.

[3:18:46 PM](#)

CHAIR JOHANSEN related his understanding then that the board will vet a pool of applicants, come up with three names, and submit them to the governor. He then inquired as to what happens if the governor doesn't like any of the names submitted.

MR. STONE clarified that the legislation specifies that those three names will be submitted to the commissioner who then can confer with the board, accept the names, and present the names to the governor. In further response to Chair Johansen, Mr. Stone opined that the governor has the prevue to go outside of the board's selection and select whomever she desires.

[3:19:59 PM](#)

REPRESENTATIVE DOOGAN surmised then that MTAB selects three names for the position of running the AMHS and those names are sent to the commissioner of DOT&PF, who then makes the choice.

MR. STONE stated his agreement.

[3:20:38 PM](#)

REPRESENTATIVE FAIRCLOUGH directed attention to the memorandum from Legislative Legal and Research Services dated March 18, 2008, which addresses the fact that statute doesn't include a deputy director position for AMHS. The last sentence of that memorandum says: "Otherwise, you could be left with the board nominating people for a position that no longer officially exists." She asked if Mr. Stone wanted to speak to that.

MR. STONE said the [lack of statute referencing a deputy director for AMHS] is why the language on page 3, lines 30-31, was kept fairly broad.

[3:22:30 PM](#)

CHAIR JOHANSEN, referring to the language on page 4, lines 3-4, said that although he understands the need for nominees to have

familiarity with marine engineering or maritime operations, he indicated he doesn't want to limit the options.

MR. STONE stated that Representative Wilson, one of the joint prime sponsors, probably wouldn't have problems deleting the language [on page 4, lines 3-4].

REPRESENTATIVE SEATON explained that the intent of proposed AS 19.65.180(a) is to [eliminate] the position being a strictly political appointee and instead have someone with marine highway experience and expertise. He acknowledged that since this is a recommendation to the commissioner and the governor actually does the appointing, it can always be ignored.

CHAIR JOHANSEN opined that he doesn't believe that the experience and expertise has to be spelled out in statute, as he said he believes the MTAB will take that into consideration. He reiterated that he would hate to exclude a brilliant individual who was interested in serving as the deputy director of AMHS.

[3:25:46 PM](#)

REPRESENTATIVE FAIRCLOUGH informed the committee that she became the executive director of Standing Together Against Rape (STAR) in Anchorage with no experience in sexual assault, but with a background in management. Although some would say that wasn't a good fit, she pointed out that her management experience resulted in the issue of domestic violence and sexual assault being discussed more than prior to her service for STAR. She further pointed out that under the new criteria STAR established after she left the position, she wouldn't qualify to run the organization. She noted that she will offer an amendment regarding the language on page 4, lines 3-4, which she characterized as prescriptive and restrictive. Representative Fairclough stressed, "I don't think that you have to have someone in the field of marine engineer and maritime operation to be able to do the job, but please note that I recognize the frustration that we have currently with how that has not been functional in the past." She then expressed the need to review an individual's entire package as well as the continually changing job market. Although the experience would be preferable, it shouldn't be required, she concluded.

[3:28:29 PM](#)

REPRESENTATIVE DOOGAN inquired as to how restrictive the term maritime operations is.

REPRESENTATIVE SEATON related his belief that there's a lot of difference between running a downtown business and a ferry system. The desire was to ensure that the position is filled with an individual who has experience with ferries and the various aspects of the field.

[3:29:57 PM](#)

REPRESENTATIVE DOOGAN then inquired as to what the limitation is if the term maritime operation isn't defined. He questioned whether running a tugboat is the same as running a fleet of tugboats, is the same as being the captain of a ferry, and is the same as having management experience in the ferry system.

REPRESENTATIVE SEATON remarked, "You're juggling trying to figure out how you make a fit so that we make sure we have the expertise to the run ferry system." He said he understood the position of some of the committee members. For instance, an individual who has experience running an airport, but no maritime experience may be [an acceptable nominee]. Representative Seaton then commented that if the committee decides to eliminate the language referring to experience, MTAB will be well aware that the intent is to have a nominee with experience in maritime operations.

CHAIR JOHANSEN commented that due to the Ocean Rangers program, it will be difficult to hire a marine engineer in Alaska.

[3:32:05 PM](#)

MR. STONE, continuing his review of Version O, pointed out that the language in Version L on page 5, lines 10-12, wasn't included in Version O. Furthermore, Version O no longer includes the route study, which was located on page 6, lines 1-7, of Version L. He then pointed out that under Version O, the legislation would become effective immediately since the existing transportation advisory board, per the administrative order, will sunset in May 2008.

[3:33:10 PM](#)

REPRESENTATIVE SEATON pointed out that the committee should have a conceptual amendment, which read [original punctuation provided]:

Page 4 after line 12 add "(d) The board has the express authority to offer a request for proposal to construct a 2 year ferry schedule."

3:33:57 PM

CHAIR JOHANSEN then turned to public testimony.

3:34:16 PM

DENNIS HARDY, Deputy Commissioner of Marine Operations, Alaska Marine Highway System, Department of Transportation & Public Facilities, speaking to Version 0, opined that the experience specified for the director or deputy commissioner of AMHS isn't necessarily the criteria that would lead to the selection of a good leader or a good communicator with the public or the legislature. He then said the department needs some clarification regarding what is meant by the language in proposed AS 19.65.195, which says: "The department shall provide staff for the board." Currently, the department provides some clerical assistance to the existing MTAB. This legislation may necessitate additional support for the board, for example, in developing a strategic plan. In response to Chair Johansen, Mr. Hardy confirmed that his testimony is the official position of the department.

3:36:12 PM

REPRESENTATIVE DOOGAN asked if Mr. Hardy is expressing the need for the legislation to include a definition of the staff work it would be expected to provide.

MR. HARDY answered that he wasn't sure it's necessary in the legislation, but some clarification is necessary for the fiscal note to be prepared.

3:37:14 PM

REPRESENTATIVE SEATON explained that the planning takes place in two locations in the legislation. On page 1 of Version 0, the legislation refers to the consultation with MTAB regarding the requirement of the comprehensive long-range plan. The aforementioned is an existing requirement. Page 4, lines 9-10, refers to the strategic plan of which he presumed AMHS is already doing the missions, core values, and initiatives. The board is re-involved with DOT&PF in construction of the strategic plan, which he also presumed the department must

already be doing. Therefore, he characterized it as a coordination effort such that MTAB is involved in the strategic plan. In response to Chair Johansen, Representative Seaton said that the staff support DOT&PF provides to MTAB currently provides is sufficient to carry out the duties encompassed in Version 0. The only difference is that MTAB would be involved in the planning conducted by the department, such as the strategic plan. However, there wouldn't be separate staff for MTAB. In further response to Chair Johansen, Representative Seaton confirmed that the next committee of referral for SSHB 294 is the House Finance Committee.

[3:39:35 PM](#)

REPRESENTATIVE FAIRCLOUGH inquired as to whether there is an updated fiscal note because besides board support, the legislation "is asking for the authority to request that the expressed authority to offer a proposal to construct a two-year ferry cycle." She opined that the aforementioned and updating the strategic plan will require time from the department that should be included in the fiscal note. Although Representative Fairclough said she wouldn't oppose the legislation from moving from committee, an updated fiscal note should be prepared.

[3:40:16 PM](#)

REPRESENTATIVE DOOGAN clarified, "The original question here was simply to establish that we weren't going to try and write a scope a work into this bill with the understanding that ... somewhere along the line here somebody's going to have to come up with a fiscal note."

[3:40:43 PM](#)

RICHARD WELSH, Assistant Attorney General, Transportation Section, Civil Division (Juneau), Department of Law (DOL), said that his principle concern relates to the legislation's effect on the governor's power of appointment as provided in Article III, Section 1 of the Alaska State Constitution. The aforementioned authority is qualified somewhat by Article 3, Sections 25-26, which provides the legislature confirmatory authority over heads of principle departments and members of boards. He related his view that the proposed AS 19.65.120(a) encroaches on the governor's power of appointment as the legislature's power of appointment only [exists] as far as granted in Article III, Sections 25-26 of the Alaska State Constitution. Since this board isn't going to serve as the head

of a principle department or a regulatory or quasi-judicial agency, he opined that proposed AS 19.65.120(a) would be unconstitutional. Mr. Welsh mentioned that he had concern about the nomination of the three candidates due to discussions at prior hearings. However, today's discussion seems to indicate the sponsors' recognition that if the commissioner deems the three nominees from MTAB as unacceptable, the commissioner can select whomever he/she deems appropriate.

[3:43:31 PM](#)

REPRESENTATIVE DOOGAN surmised then that Mr. Welsh doesn't believe the legislature has the authority to confirm the members of MTAB because MTAB doesn't fit the constitutional definition of what the legislature is allowed to confirm.

MR. WELSH replied yes, adding that the Alaska Supreme Court addressed this issue in the case of Bradner v. Hammond, which is found at 553 P.2d 1.

[3:44:26 PM](#)

MR. WELSH then turned to the language on page 3, line 30, which refers to the "director or deputy commissioner." He expressed the need to sort that out because it leaves a question in his mind.

[3:45:36 PM](#)

REPRESENTATIVE DOOGAN inquired as to the opinion of the legislative drafter with regard to the legislature's power to confirm the members of MTAB.

[3:46:11 PM](#)

BRIAN KANE, Attorney, Legislative Legal and Research Services, Legislative Affairs Agency, said that he would have to look into whether it falls within the legislature's purview to confirm members of MTAB as specified on page 2, lines 4-6, of Version 0.

[3:47:44 PM](#)

MR. STONE said that DOL may have a point as the language used for the Aviation Advisory Board says, "The Aviation Advisory Board consists of the following 11 members, who are appointed by and serve at the pleasure of the governor:". He said that he

wasn't sure how MTAB is different from the other boards and commissions that come before the legislature for confirmation.

[3:48:46 PM](#)

REPRESENTATIVE DOOGAN remarked that he is reluctant to concede the legislature's authority based on one attorney's opinion, an attorney who works for the governor. He expressed the need to hear from the legislature's attorneys before doing anything definitive regarding the legislature's ability to confirm members of MTAB.

[3:49:24 PM](#)

GINGER FORTIN, opined that SSHB 249 will improve the existing ferry system because some members of MTAB will have to be residents of ferry ports. She expressed hope that these members will have ridden the ferry and thus will have less of a chance of having the scheduling problems of 2008. Ms. Fortin said she hoped this legislation would be passed this session.

[3:50:17 PM](#)

CHAIR JOHANSEN announced that SSHB 294 would be held over to give sponsors time to research the question [regarding the legislature's ability to confirm members of MTAB]. He informed the committee that it would hear the legislation next week.

[3:50:46 PM](#)

REPRESENTATIVE SEATON asked if the committee has any questions regarding the amendment he mentioned earlier.

[3:51:02 PM](#)

REPRESENTATIVE FAIRCLOUGH commented that until the public hearing is closed, she didn't feel the committee can really discuss [amendments]. She noted that she has a couple of conceptual amendments that she may want to offer. She added that she doesn't support the amendment provided by Representative Seaton.

[3:51:45 PM](#)

CHAIR JOHANSEN closed public testimony.

[3:51:52 PM](#)

REPRESENTATIVE FAIRCLOUGH moved that the committee adopt Conceptual Amendment 1, as follows:

Page 1, line 9:

Delete "and improvement"

CHAIR JOHANSEN objected.

[3:52:11 PM](#)

REPRESENTATIVE FAIRCLOUGH explained that the language "and improvement" presupposes that the legislature will invest more funds and implies that there will be improvement to the [ferry] system, in some manner. Representative Fairclough said that although she supports improvement of the system, it would be clearer to state that a marine highway plan needs to be developed.

[3:52:51 PM](#)

CHAIR JOHANSEN related his preference to let the sponsors address the specific points brought up during the hearing prior to adding and/or deleting language.

[The committee treated Conceptual Amendment 1 as withdrawn.]

[3:53:09 PM](#)

REPRESENTATIVE FAIRCLOUGH then informed the committee that she plans to offer Conceptual Amendment 2, as follows:

Page 2, line 6-7:

Delete "The board shall be composed of the following members:"

Delete line 8 through page 3, line 1

Reletter accordingly.

REPRESENTATIVE FAIRCLOUGH said that she will probably oppose the legislation in its totality, although she won't oppose it from moving [out of this committee]. Speaking to the sponsors and those frustrated with poor ferry service, she pointed out that to some of the communities served by the ferry system other transportation modes are offered. She acknowledged that there are some communities that need to have improved ferry service schedules. Representative Fairclough opined, "If we expect to

improve our ferry system, we cannot just have marine highway people talking about it. The entire legislature needs vested in being able to support, propose amendments and changes, and fund those changes." She then highlighted that the legislature, as it tries to complete its business in 90 days, has created many advisory boards/committees to provide information in which she opined elected officials should be involved so that there is "buy-in" to promote the change desired in the system. The committees are doomed to fail otherwise, she remarked. Therefore, she further opined that it's the responsibility of the House and Senate Transportation Standing Committees to establish service levels and review how the funds are allocated as there are a limited amount of resources. She questioned how the legislature can discuss improving a system if it can't be maintained. Furthermore, the advisory board will only be able to submit three names while costing the state \$150,000, which the governor or the commissioner doesn't have to accept. She then emphasized that the legislature needs to provide a framework inside DOT&PF to guide the administration in regard to how the legislature believes funds should be invested.

REPRESENTATIVE FAIRCLOUGH inquired as to how much it costs for air transportation and ferry transportation into communities. She also requested information regarding which communities are on the road system and which aren't. She said that those communities that aren't on the road system need more subsidies inside the ferry system than other communities.

[3:57:55 PM](#)

CHAIR JOHANSEN related his view [Version 0] presents a decent balance for board members of MTAB. He then pointed out that Conceptual Amendment 2 would basically gut SSHB 294, which he said would be out of order. With regard to the references of a subsidy to AMHS, Chair Johansen said that the only reason the funds provided to AMHS can be referred to as a subsidy is because there is a fare box, which he likened to a toll. Chair Johansen opined that it is unfair to characterize it as a subsidy.

[3:59:40 PM](#)

REPRESENTATIVE FAIRCLOUGH pointed out that most roads in Alaska are subsidized. She clarified that when she refers to a subsidy she doesn't mean it negatively but rather as a realization in fiscal responsibility in planning.

4:00:14 PM

CHAIR JOHANSEN announced that SSHB 294 would be held over.

4:00:36 PM

The committee took an at-ease from 4:00 p.m. to 4:01 p.m.

HB 372-HIGHWAY DESIGN FLEXIBILITY/MUNICIPALITIES

[Due to technical difficulties there is no audio for the following five minutes. The minutes were reconstructed from the secretary's notes.]

4:01:55 PM

CHAIR JOHANSEN announced that the final order of business would be HOUSE BILL NO. 372, "An Act relating to highway design flexibility and to the assumption by municipalities of certain duties related to highways."

4:02:16 PM

REPRESENTATIVE FAIRCLOUGH moved that the committee adopt as the working document Version 25-LS0525\L, Kane, 3/13/08. There being no objection, Version L was before the committee.

4:02:35 PM

REPRESENTATIVE BOB BUCH, Alaska State Legislature, reminded the committee that context sensitive solutions (CSS) is a process for the design of new roads and redesign of old roads in which all of the stakeholders are involved from the beginning. Under CSS, community involvement is expanded when the road is being designed and also includes experts with different perspectives. Most importantly, these folks are brought in early in order to take into account all the different uses of the road. Representative Buch related that CSS is being used all over the nation with great success. In fact, the Federal Highway [Administration] (FHWA) has as one of its strategic goals to have CSS adopted in all 50 states by 2007. Representative Buch opined that CSS has reduced controversies in roads, the number of lawsuits, and has resulted in better roads. According to the FHWA, 43 states have implemented CSS.

REPRESENTATIVE BUCH acknowledged that last week the committee expressed concerns, which he subsequently discussed with the

Department of Transportation & Public Facilities (DOT&PF) and addressed in Version L. He mentioned that to this point there have been four committee substitutes (CS), every concern has been addressed, and Legislative Legal and Research Services has made it legally sound. Therefore, Representative Buch asked the committee to support [Version L].

4:05:16 PM

REPRESENTATIVE FAIRCLOUGH asked from who the facts Representative Buch related come.

REPRESENTATIVE BUCH related that he has worked with a community council on this matter for years and has received much information from a community councilman who has been involved with this issue for over a decade and who testified at a prior hearing. Furthermore, there is a web site that has all of the aforementioned information.

4:05:35 PM

[Recording starts.]

REPRESENTATIVE BUCH recalled giving staff a DVD that reviewed this and included web sites and information. Basically, this is something that the FHWA has been promoting for some time, and therefore most of the information came from FHWA.

4:06:24 PM

REPRESENTATIVE FAIRCLOUGH said she will check with the FHWA.

4:06:39 PM

DEBORAH BREVOORT, Staff to Representative Bob Buch, Alaska State Legislature, speaking on behalf of the sponsor, Representative Buch, noted that she will be referring to Version 25-LS0525\L. She recalled that last week the committee expressed the need for the legislation to contain language that allows DOT&PF to scale the CSS process to the complexity, size, and scope of a particular project. She further recalled that Representative Neuman and DOT&PF were concerned with the long list of stakeholders in the previous version because different folks would come forward and ask to be added to the list. To address those concerns, on page 2, lines 9-14, the following language was added:

(d) In carrying out the design process described in (c) of this section, the commissioner may

(1) consult with affected citizens, elected officials, interest groups, and other stakeholders appropriate for a particular project; and

(2) scale the process commensurate with the scope, complexity, and effect of the project.

MS. BREVOORT noted that the aforementioned language was provided by DOT&PF. Another key change in the above subsection is use of the word "may" rather than "shall." The belief, she related, was that the term "may" would provide the commissioner more flexibility and avoid lawsuits due to the discretion it provides. Ms. Brevoort then recalled that DOT&PF wanted to be sure that this legislation only applied to those projects beginning after the effective date of the legislation, which is now specified on page 2, lines 30-31. The other change embodied in Version L is on page 1, line 6, which uses the term "principles" rather than "standards."

[4:10:13 PM](#)

MS. BREVOORT, in response to Representative Buch, said that she can provide members a handout from the CSS web site, which is in partnership with FHWA. The web site relates that Alaska is not one of the 43 states employing CSS. The information also comes from the Anchorage Road Coalition and the American Association of State Highway and Transportation Officials (AASHTO).

[4:11:19 PM](#)

REPRESENTATIVE FAIRCLOUGH clarified that she is interested in specific studies with specific report dates in order to know who collected the specific data.

MS. BREVOORT offered to obtain that information.

[4:12:11 PM](#)

REPRESENTATIVE FAIRCLOUGH then inquired as to who testified for the Anchorage Road Coalition.

REPRESENTATIVE DOOGAN answered that it was a gentleman named, Frank McQueary.

REPRESENTATIVE BUCH, in further response to Representative Fairclough, specified that Mr. McQueary was with the Sand Lake

Community Council. Mr. McQueary has been involved with this process for 15 years, although he doesn't have an engineering degree. The research mainly came through highway engineers and their particular design process in the Lower 48.

REPRESENTATIVE FAIRCLOUGH informed the committee that she has been involved in multiple projects that used CSS, and thus she has a different perspective after serving on the Anchorage Metropolitan Area Transportation Solutions (AMATS).

4:13:40 PM

JEFF OTTESEN, Director, Division of Program Development, Department of Transportation & Public Facilities (DOT&PF), opined that Representative Buch and DOT&PF have worked hard to develop legislation that everyone can support, although it's not quite there. He expressed concern that the legislation is prescriptive rather than permissive, which is a risk. Forty-three states have implemented CSS. Alaska should be on the list, but Alaska isn't listed because the state's policy doesn't use the term CSS. Mr. Ottesen related that DOT&PF takes issue with the term CSS, which he characterized as a moving target. Mr. Ottesen said Alaska adopted flexible design standards and involved stakeholders in design much earlier than most states. Furthermore, [DOT&PF] has been training with a nationally prominent training center to involve nontraditional stakeholders since the early 1990s. Since CSS has become a term of art, the department has received training in CSS. Currently, CSS approaches are utilized in all relevant projects and all regions. For example, the highway-to-highway request for proposals (RFP) specifically speaks to the team being trained in CSS.

4:16:05 PM

MR. OTTESEN clarified that DOT&PF supports and already uses CSS. The department's concern is how it's put on paper. From experience, the department knows that prescriptive statutes can be used to stall or kill a project. Most states that adopt the CSS policy don't do so in statute. Of the four states that did adopt the CSS policy in statute, three states utilized very permissive language and the fourth state, without the permissive language, has an exemption of liability. Therefore, those states have allowed for the fact that the state shouldn't be sued for these issues should they proceed to use CSS. Mr. Ottesen related that the department's concern that CSS is a term of art. The legislation points to a policy of the FHWA, and

therefore the state is tying its future to the policy of a third party that can change its policies and can do so without any notification or involvement of the state. As an example, Mr. Ottesen informed the committee that the FHWA has a policy regarding how scenic byway grants are selected. In 2008, FHWA changed those criteria, didn't announce that to the states, or ask states for input. The department happened to learn about this after staff read about it on a web site.

[4:18:37 PM](#)

MR. OTTESEN then expressed concern that HB 372 doesn't allow any exemptions. There are frequently categories of projects that need exemption. For instance, an emergency response on a failing bridge or a wash out during a flood. Again, prescriptive language often gets interpreted in very specific ways before a judge and without exemption language there is no way out. In conclusion, Mr. Ottesen said that DOT&PF has implemented and already does CSS and the risk is that this legislation is prescriptive.

[4:19:57 PM](#)

REPRESENTATIVE DOOGAN asked if Mr. Ottesen considers the use of the term "shall" as prescriptive.

MR. OTTESEN replied yes, adding that he's also referring to [the way in which] it ties it to a list of things that the department has to do. He reiterated his earlier comments that there are other states with much more permissive language than that specified in HB 372.

[4:20:29 PM](#)

REPRESENTATIVE DOOGAN related his understanding that HB 372 is intended to get DOT&PF to design projects in a certain way, which he said he wasn't sure how that could be achieved with permissive language. Therefore, he surmised that at times the department doesn't want to follow these requirements.

MR. OTTESEN replied no, and added "We don't want to have ... someone be able to use this as a club against us if we have not talked to every single group because we didn't know about the new group that formed last week." Mr. Ottesen opined that the reference to all stakeholders is a fairly broad list. He then reiterated that DOT&PF already uses [CSS] in policy and design manuals and the department isn't being sued, and therefore [the

existing process] is working successfully. He highlighted that the department does flex its design standards and engage stakeholders in the process.

[4:22:33 PM](#)

CHAIR JOHANSEN suggested that Representative Doogan and Mr. Ottesen may be talking about two different "shalls."

REPRESENTATIVE DOOGAN inquired as to what Mr. Ottesen means when he refers to prescriptive language.

MR. OTTESEN deferred to other staff scheduled to testify. He then reiterated that only four states out of 42 or 43 have chosen to go the statutory route. If 90 percent of the states that have adopted CSS are doing so without statute, it can be done other ways, he opined.

[4:23:43 PM](#)

REPRESENTATIVE DOOGAN surmised that DOT&PF would prefer not to pass HB 372, but if it is passed the department wants it changed.

MR. OTTESEN, in response to Representative Doogan, confirmed that DOT&PF would prefer not to pass HB 372. However, if the legislation is passed, it would want to change it. In fact, the department did have a version of the legislation that doesn't use the CSS term of art, but it speaks to the principles of CSS.

[4:24:19 PM](#)

PETER PUTZIER, Senior Assistant Attorney General, Transportation Section, Civil Division (Juneau), Department of Law, echoed Mr. Ottesen's testimony that the principle of CSS by itself isn't problematic. The question is regarding how to get it on paper if it is decided to be placed in statute. Mr. Putzier said he will discuss the six legal issues with Version L. Firstly, Section 1 is a mandate, but it is unclear how to meet that mandate. For instance, he questioned how early is "early enough" and what does "ongoing" mean. Section 1 opens up an immediate problem of implementation, which he said he would discuss later. Secondly, Version L requires DOT&PF to use a design process that ensures consistency with federal CSS principles. However, to his knowledge, no one can point to where these principles are or exactly how these principles are defined. A vague and ambiguous term is being applied. He then

questioned how the standard can be met and compliance proven. He opined that CSS appears to be an "aspirational" goal, which really isn't a principle, to get the community involved in the design process. Thirdly, consideration of many specific factors must occur. The aforementioned is what Mr. Ottesen refers to as the prescriptive factors. Section 1 lists nine different factors. In so far as those factors are required, the question regarding whether each was adequately addressed is invited. Therefore, anyone who is disgruntled with any given project could challenge on the basis that the specific factors weren't adequately met. The best analogy is with the National Environmental Policy Act (NEPA), which is a procedural statute that was passed in 1970 by the federal government to consider environmental consequences. As everyone is aware, NEPA has engendered massive amounts of litigation charging that there was failure to adequately consider environmental consequences, the analysis was flawed in some manner, or all viable alternatives weren't considered. Therefore, even if the statute is merely procedural, it can engender a tremendous amount of litigation, he stated.

[4:28:46 PM](#)

MR. PUTZIER turned to the fourth issue, which is something that he said he would need to follow-up. He noted that AS 19.10.160(a) specifies that DOT&PF must conform its standards as closely as practicable to those adopted by AASHTO, while in proposed AS 19.10.160(c) the legislation mandates compliance with principles in the CSS system. Therefore, he expressed the need to ensure that those two subsections aren't in conflict. Mr. Putzier moved on to his fifth concern regarding the conflict between AS 19.10.160(c) and (d) in which it's unclear whether it's permissive or mandatory to consult with affected citizens. Therefore, AS 19.10.160(c) and (d) need to be harmonized. With regard to the sixth concern, Mr. Putzier opined that there is a tort and civil liability aspect to this legislation that needs to be explored. A spectrum of design choices can result in a situation in which community/citizen involvement would've resulted in one choice, while the process resulted in another choice. The aforementioned, he opined, invites plaintiffs' attorneys to challenge the design decisions made as a result of this process. This is a very real danger, which seemed to be recognized in Hawaii where waiver of liability provisions were included. Mr. Putzier concluded by clarifying that he isn't arguing against CSS as an idea, which he characterized as a worthy concept. However, this legislation in its current form

requires uncertain procedures and principles, and virtually guarantees litigation.

[4:31:04 PM](#)

REPRESENTATIVE FAIRCLOUGH requested that Mr. Putzier speak to his experience with litigation on transportation projects.

MR. PUTZIER informed the committee that he has been representing DOT&PF since December 1999 and represented DOT&PF, in a broad spectrum, regarding construction claims, administrative proceedings, and environmental litigation. He said that he has represented DOT&PF in numerous venues.

REPRESENTATIVE FAIRCLOUGH inquired as to Mr. Putzier's experience with challenges to the NEPA process and the impact in terms of cost of the project and time involved.

MR. PUTZIER acknowledged that once a project is disputed, it can take years and cost untold amounts of money in litigation fees and additional studies. In further response to Representative Fairclough, Mr. Putzier confirmed that DOL does bill DOT&PF, but he didn't know what it totals at the end of the year. He noted that he bills project by project, and thus could inform the committee of the legal fees by project.

REPRESENTATIVE FAIRCLOUGH related her understanding that legal fees can cut both ways, that is litigation can mean that the department is challenged a lot or it isn't doing its job appropriately.

[4:34:09 PM](#)

MR. PUTZIER, in response to Representative Doogan, confirmed that DOT&PF gets sued as it is. In further response to Representative Doogan, Mr. Putzier related his opinion that this legislation would result in more litigation. He echoed his earlier remarks that as consideration of these various factors are required, it invites the question regarding whether DOT&PF has done its job adequately. Therefore, an individual disgruntled with a project can result in a good faith argument that the department didn't adequately consider a specific matter or group. He further pointed out that the factors aren't very tangible and are factors on which reasonable people can differ. "In so far as reasonable can differ and we're requiring compliance, I see no other outcome but that there's probably going to be litigation engendered," he opined.

[4:36:09 PM](#)

REPRESENTATIVE DOOGAN surmised then that there would be litigation to define what is not defined or insufficiently defined for the legal profession. Therefore, he asked if the lawsuits would taper off or continue.

MR. PUTZIER reiterated his earlier analogy with NEPA litigation, for which there has been no clarity. In further response to Representative Doogan, Mr. Putzier confirmed that it's his opinion that this proposed legislation opens up a legal hole of undetermined depth for DOT&PF.

[4:37:38 PM](#)

REPRESENTATIVE FAIRCLOUGH outlined the steps in the process of project proposal, public notification, design, and public comment. She opined that the time when one can make the most difference is about 15 years before a project starts. When a project is first proposed and public notice goes out, few come forward to speak. However, by the time the project reaches its design phase, more community members come forward since the project seems more real. The litigation arises in the first phase, she noted. As the process continues, more people become aware of the projects. Representative Fairclough related that she supports CSS, but recalled when it was used on 15th Avenue in Anchorage and the project went from a \$1 million project to a \$15 million project. The more groups that are involved, different ideas come forward, she said. She relayed that she has watched projects languish for 10 years because various groups feel disenfranchised. She suggested that she would be supportive if there was a site on which notice [of projects] was posted versus the state having to reach out to all groups.

[4:42:50 PM](#)

REPRESENTATIVE DOOGAN clarified that he was trying to get a handle on the scope of the litigation on these projects. He said he is unwilling to open up more options to delay things, particularly when he believes there is already adequate opportunity to do so. Therefore, he said he will have trouble supporting HB 372 if it means that there will be more lawsuits, more delays, and higher cost projects.

[4:44:02 PM](#)

REPRESENTATIVE FAIRCLOUGH pointed out that the legislature establishes law at a "30,000-foot level" and allows the departments to interpret that law. If CSS or its principles are already being utilized by DOT&PF, then it would seem to solve some of the problems, she remarked.

[4:45:16 PM](#)

MARK NEIDHOLD, Chief Design & Construction Standards, Division of Design & Engineering Standards, Department of Transportation & Public Facilities, echoed earlier testimony that DOT&PF is already applying the principles of early and ongoing stakeholder involvement in the project development process. He specified that he chose not to use the term CSS because it's a moving target. As early as 1991 DOT&PF offered training classes to DOT&PF staff and consultants because it was the right thing to do to meet the needs of all the affected people. In 2003 and 2004 additional training regarding the flexibility that existed in the design standards was provided. Alaska is an AASHTO state and per the federal regulations, Alaska is required to use AASHTO's design standards on all highway projects that are part of the National Highway System. He noted that virtually all of those standards have been adopted for non-NHS projects and state-funded projects. Mr. Neidhold reiterated that the flexibility of CSS already exists in the [design] standards. There is a range of values/standards; AASHTO and FHWA have offered guidance with regard to applying flexibility in design issues. He informed the committee that the current environmental procedures manual and design procedures manual identify the department's expectation at a management level that the design project development staff use the early and ongoing stakeholder development and coordination process when the projects are developed. Currently, CSS isn't recognized by name. With regard to the comment that CSS is a moving target, Mr. Neidhold related that he has sat in on meetings of the AASHTO subcommittee on design at the federal level during which people have said that CSS stands for Consensus by all Stakeholders. The aforementioned is untenable and would be like trying to pass a bill unanimously. Furthermore, CSS includes language specifying involving all stakeholders, which Mr. Neidhold said is an impossible task. Mr. Neidhold informed the committee that his staff is updating the environmental procedures manual to include CSS, by name, while taking care to incorporate CSS, as practiced by Alaska DOT&PF. He echoed earlier testimony that since DOT&PF already uses CSS, it doesn't see the need to address it in statute due to the potential liability exposure.

4:50:56 PM

MR. NEIDHOLD recalled Representative Doogan's earlier comment that DOT&PF doesn't want to have to apply CSS all the time, to which Mr. Neidhold noted his agreement. He related that there are many classes of projects in which the response to the public's need warrants moving ahead without an involved public involvement process. For example, a highway safety improvement project in which the department has identified a guardrail end terminal that isn't safe. It would be unreasonable to say that DOT&PF has to go through an involved public process in order to address that particular safety issue. Therefore, there are projects on which DOT&PF doesn't want to be required to use CSS. Mr. Neidhold then turned to Representative Fairclough's statements regarding the process. He pointed out that DOT&PF is charged with balancing the public need for the transportation system with the impacts to the individual property owners and other interest groups. The department, he opined, works hard to address the balance in a manner that results in the greatest public good with the least private harm. If prescriptive statutory language that could potentially be construed as requiring steps that the department was judged to have not done or done inadequately is used, it could potentially impair DOT&PF's ability to deliver projects, he opined. In conclusion, Mr. Neidhold said, "And the bottom line is it's not DOT's transportation system; the department is responding to the public's need for their transportation system and we work very hard through the public process to deliver projects that do just that"

4:54:52 PM

MR. NEIDHOLD, in response to Representative Fairclough, confirmed that principles of early and ongoing public involvement are included. In further response to Representative Fairclough, Mr. Neidhold confirmed that as a matter of federal law, as part of Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), public involvement is required in the development of the initial plan. Under SAFETEA-LU, the federal funding for the highway transportation bill further required state transportation organizations to engage the public with amendments to that statewide transportation improvement plan (STIP). Therefore, there's a very prescriptive requirement for public involvement on the STIP.

[4:56:01 PM](#)

REPRESENTATIVE FAIRCLOUGH clarified that she is interested in whether the federal government is already requiring CSS or not and whether the state is applying it through principles in the department's regulations, or is the department meeting the federal requirements in a different method than outlined in CSS.

MR. NEIDHOLD responded that under the federal requirements for the development of the STIP for the development of highway system projects, early on in the development of the program/plan as well as in the development of individual projects, there are requirements for public involvement. Those requirements are being met under the department's current procedures. Under federal projects, the language in HB 372 wouldn't substantially change how the department does business with respect to those federal projects. With regard to state-funded projects, although there isn't law that requires that process, DOT&PF is already applying those.

[4:57:45 PM](#)

REPRESENTATIVE FAIRCLOUGH asked if all the factors specified in the proposed legislation are being taken into account now and the sponsor is seeking alignment with the federal requirements. She then inquired as to what isn't in the legislation, besides early and often public involvement, that the sponsor is trying to address.

MR. NEIDHOLD responded that he believes the answer to that is nothing. With regard to whether the department is addressing all those issues specified in every project, Mr. Neidhold reiterated that the department doesn't address all the issues for certain classes of projects whereas for the significant projects they are addressed. Version L, with the language which allows scaling the process commensurate with the complexity of the project, would change nothing short of any litigation regarding how effectively the department administered the process. The department's concern with HB 327 is in regard to the exposure to litigation because of the prescriptive list and the removal of the department's ability to apply principles that are appropriate for an individual project.

[5:01:18 PM](#)

CHAIR JOHANSEN surmised that this committee is in favor of the concept of CSS, while the department is saying that it's already

doing some of the things specified in the legislation. He related his understanding that the department's real concern is in regard to exposure to litigation. However, this committee's jurisdiction doesn't extend to legal matters. Therefore, he said he hesitated to have the drafter comment. Chair Johansen then said he would feel most comfortable requesting that HB 372 be sent to the House Judiciary Standing Committee.

[5:03:06 PM](#)

REPRESENTATIVE BUCH said that while he can understand the issues raised by DOT&PF, those concerns have been addressed in Version L. In fact, he opined that the legislation offers less litigious language than the department already faces. The reason for coming forth with this idea is because of the existing process that has been prolonged due to litigation. By having early involvement in the process, it removes the chances of litigation and shortens the length of projects, he opined. With regard to the proposal to refer HB 372 to the House Judiciary Standing Committee, Representative Buch deferred to the committee's experience and expertise.

[5:05:25 PM](#)

CHAIR JOHANSEN closed public testimony on HB 372.

[5:05:41 PM](#)

REPRESENTATIVE FAIRCLOUGH moved to report CSHB 372, Version 25-LS0525\L, Kane, 3/13/08, out of committee with individual recommendations and the accompanying fiscal notes.

REPRESENTATIVE DOOGAN objected.

[5:06:04 PM](#)

REPRESENTATIVE FAIRCLOUGH clarified that she isn't trying to stop the process with her questions, but she noted she hasn't had good experience with this in the past. Representative Fairclough informed the committee that she won't oppose moving Version L from committee, but will recommend Do Not Pass in the bill report. She opined that she has experienced so much litigation, in the form of delay tactics, along the lines of NEPA. She then related that she doesn't know how to appropriately allow community members who see something is wrong with the process to express that in an equitable manner without having the cost of the project increase.

5:07:44 PM

REPRESENTATIVE DOOGAN withdrew his objection.

5:07:54 PM

There being no further objection, CSHB 372(TRA) was reported from the House Transportation Standing Committee.

5:08:02 PM

ADJOURNMENT

There being no further business before the committee, the House Transportation Standing Committee meeting was adjourned at 5:08 p.m.