

2009 SENATE TRANSPORTATION

SB 2151

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2151

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: January 16, 2009

Recorder Job Number: 7128

Committee Clerk Signature

Jody Hauge

Minutes:

Senator Lee opened the hearing on SB 2151 relating to liability of the state, the definition of discretionary acts relating to design of a public project, and claims arising from leased vehicles.

Tag Anderson, Director of the Risk Management Division of OMB appeared to provide information on SB 2151. Written testimony #1.

Senator Fiebiger asked that in section 1, if he would get a judgment of two hundred fifty thousand dollars, would get interest on it.

Anderson said there intent was all available recoveries prior to judgments. Post judgments would not apply as the cap applies to the judgment itself.

Senator Lee asked about the language they were taking out on page 2; what is the intent. "but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project."

Anderson said that it was not clear and that taking it out will leave it for case law if needed.

Senator Lee asked if by taking the wording out, is the state off the hook if there is some question of the draft plan unless someone brings a fine against it. Is the intent the state is off the hook and the contractor is on it.

Anderson said the intent is that the state is off the hook only in the aspect of the design of the public project involving discretionary function. If it did not involve a discretionary function the state would not be able to escape liability.

Senator Potter asked about Sovereignty Immunity.

A discussion followed with Mr. Anderson explaining the history of Sovereignty Immunity.

Senator Fiebiger asked why we need the language on line 7 on page one.

Anderson mentioned a case in Fargo. Discussion followed.

Testimony Opposed to SB 2151.

Bonnie Staiger appeared in opposition to SB 2151 representing both the AIA and ACEC but also in her role as Chair of the Construction Leaders Coalition. Written testimony #2.

Senator Potter said their testimony seemed to focus strictly on that line on page 2 that is being stricken. Is that correct?

Staiger said that was correct.

Jeffrey Volk, President and CEO of Moore Engineering, Inc, testified in opposition to SB 2151 on behalf of the American Council of Engineering Companies/ND.

Written testimony #3.

Discussion followed on liability and how Sovereignty Immunity has affected agencies liability and who should be liable.

Jeb Oehlke representing a business coalition which includes the North Dakota Chamber of Commerce as well as local chambers of commerce and their member businesses testified in opposition to SB 2151.

Tag Anderson stated again that they were not shifting liability and tried to clarify what they were trying to do.

Senator Potter asked then, it doesn't shift exposure it only limits the states.

Anderson said that was correct. In reality it is not limiting the state exposure at all; all we are doing is asking that the language be struck because it breeds uncertainty to what aspects of the design of a public project are truly discretionary and which are not.

Closed the hearing on SB2151.

The committee directed the intern to do some research on discretionary function and also on a bill from last session that Senator Potter referenced in discussion.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2151

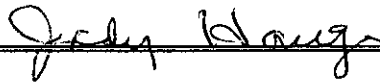
Senate Transportation Committee

Check here for Conference Committee

Hearing Date: January 30, 2009

Recorder Job Number: 8216

Committee Clerk Signature



Minutes:

Committee Work on SB 2151 #3.

Senator Fiebiger reported on his research on SB 2151. His thought on the bill based on the testimony and the information he received from the attorneys would be to not add the language on page 1, line 7. Also not adopt the language on page 2 relating to discretionary function specifically with respect to the engineering concerns the committee heard about. He doesn't really have problems with page 1, line 12 or page 4. He said he was nervous about changing page 2, lines 6-8.

Senator Nodland echoed Senator Fiebiger's concerns.

Senator Nething said he missed the hearing and just wondered why we should do this. What is the problem? This looks like it creates more problems.

Senator Potter said he believed only risk management testified for the bill.

Senator Potter moved a Do Not Pass.

Senator Marcellais seconded.

Roll call vote: 6-0-0

Senator Fiebiger will carry the bill.

Date:
Roll Call Vote #:

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2157

Senate Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass Other

Motion Made By Senator Potter Seconded By Senator Marcellais

Senator	Yes	No	Senator	Yes	No
Chairman Senator Gary Lee	✓		Senator Tom Fiebiger	✓	
Senator George Nodland	✓		Senator Richard Marcellais	✓	
Senator Dave Nething	✓		Senator Tracy Potter	✓	

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Fiebiger

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2151: Transportation Committee (Sen. G. Lee, Chairman) recommends DO NOT PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2151 was placed on the Eleventh order on the calendar.

2009 TESTIMONY

SB 2151

Testimony on SB 2151
Tag Anderson, Director
OMB Risk Management Division
January 16, 2009

Mr. Chairman, and members of the Senate Transportation Committee, my name is Tag Anderson. I am the Director of the Risk Management Division of OMB. I appear today to provide information on Senate Bill 2151.

Following the loss of sovereign immunity, the 1995 legislature established the North Dakota Tort claims Act, codified at N.D.C.C. Ch. 32-12.2. Statutory caps on liability are provided in N.D.C.C. § 32-12.2-1(2) in the amount of \$250,000 per person and \$1,000,000 per occurrence. The amendment on line 7 clarifies that the statutory caps are inclusive of all recoveries available regardless of how they are characterized. The uncertainty that arises from not having statutory caps that can always be relied upon impacts the actuarial analysis that goes into determining agency contribution rates as well as the cost of securing excess coverage for the Risk Management Fund. This amendment clarifies and reinforces what has been relied upon.

Because of the possibility of cases of catastrophic loss, where there are many injured parties resulting from one single occurrence, the current language provides that the legislature may adopt an appropriation to pay all or a portion of the total amount in judgments that exceed the \$1,000,000 per occurrence limitation. The amendment on line 12 extends the ability to allow a claimant to seek additional amounts above the \$250,000 per person limitation as well.

On page 2, the amendment would eliminate language that has lead to some confusion. The original intent was to specifically include the design of public projects within the concept of discretionary functions. The language we propose eliminating was apparently added to differentiate between those aspects of design that require human judgment and those aspects that do not. The language we propose eliminating can be seen as contradictory, as clearly certain aspects of drafting plans and specifications for public projects involve discretionary functions. Although we considered proposing alternative language, we determined that statutory language after this proposed amendment was clear and did not need further clarification.

Lastly, on page 4, the amendment would clarify that the Risk Management Fund may cover claims involving leased vehicles that are beyond 30 days. The language we propose removing was tied to and recognized that a state employee's personal insurance may provide coverage for short term vehicle rentals that are less than 30 days. However, this provision was never interpreted as impacting claims arising from the use vehicles that are leased by the State as opposed to acquired through direct purchase.

That concludes my prepared remarks. I would be happy to answer any questions you may have.

Thank you.

**Senate Transportation Committee
Testimony in Opposition
To SB 2151**

**Provided by Bonnie Staiger
Chair, Construction Leaders Coalition**

Chairman Lee and members of the committee

My name is Bonnie Staiger, Hon AIA, Executive Vice President of AIA North Dakota and Executive Director of ACEC | ND. Today I appear in opposition to SB 2151 representing both the AIA and ACEC but also in my role as Chair of the Construction Leaders Coalition. My testimony represents the combined opposition of each coalition partner—all of whom are here today.

The coalition is comprised of the following design and construction industry member organizations:

- AIA North Dakota (American Institute of Architects)
- ACEC | ND (American Council of Engineering Companies)
- Associated General Contractors of ND
- National Electrical Contractors Association
- ND Builders Association
- ND Plumbing, Heating, and Mechanical Contractors Association

I'm going to take just for a minute to clarify this coalition's role and the significance of our being here today. This group formed at the end of the 2005 legislative session agreeing to (finally!!) discuss issues which had plagued the industry and professions for a decade and which pitted many in this room against one another--not unlike the Hatfields and McCoys.

This group worked tirelessly to come together on a bill in 2007 which updated Chapter 48 dealing with public procurement methods and, thankfully, ended the roadside bombs in the halls of the legislature.

Our charter has been to

- Bring together diverse membership and opinions
- Find common ground
- Create a culture of collaboration and trust

- Move forward on issues only with unanimous consent of the member organizations

As for Chapter 48, the coalition continues to meet monthly to craft the remaining piece –a new section dealing with design/build procurement delivery. We are going slowly in an effort to get it right and to avoid as many implementation problems as possible.

In the past 4 years several issues have come to our attention and we have declined taking a position preferring to carefully abide by our narrow mission and focus.

When SB 2151 was introduced each member organization immediately had concerns and in one of those rare occasions, we come before you today to inform you of our unanimous opposition to this bill. Actually Mr. Chairman, we “Strongly Oppose” this bill and ask for a “Do Not Pass” recommendation.

This bill will inappropriately shift liability when agencies hire consultants. The contracts always require an insurance certificate to demonstrate the firm has professional liability insurance. If this proposed change is approved, it will place consultants in a situation where they will have considerable additional exposure with no possibility of securing insurance coverage for it.

In the words of Jeff Ubl, AIA, Principal, Tvenge & Associates, “I spoke with my Professional Liability insurance provider and our attorney. They both indicated this is far too much risk for us to assume and recommended avoiding public improvement work if this bill were passed.”

I will be happy to answer questions from the committee but I will refer those of a more technical nature to Jeffry Volk President & CEO of Moore Engineering and a coalition partner with us today.

Testimony opposing SB 2151

January 16, 2009

Senate Transportation Committee
Chairman Lee

My name is Jeffry Volk. I currently serve as a President and CEO of Moore Engineering, Inc and am a Professional Engineer and Registered Land Surveyor in North Dakota. My testimony today is on behalf of the American Council of Engineering Companies/North Dakota, Moore Engineering, Inc. and myself. I have spent my entire professional career as an engineering consultant in North Dakota.

My testimony is in opposition to SB 2151, specifically the changes proposed in Section 1 paragraph 3.b. The effect of the proposed change will be that neither the state nor state employees will be liable for the design of public projects that are completed as plans and specifications and are provided to a contractor to construct the public project.

Liability for design decisions, whether presented with plans and specifications or not, must always stay with the responsible design professional.

We oppose SB 2151 for the following reasons:

Engineering consultants retained by the state to assist with the design of public projects or provide construction contract administration services for the construction of public projects will see greater liability exposure as a result of this legislation.

When public projects are designed by engineering consultants for agencies, the agency can mandate the use of standard details and specifications for the preparation of the plans and specifications. These standard drawings and specifications are examples of agency design work product where SB 2151 would shift the liability exposure away from the agency and transfer additional liability to other parties involved with the public project.

Professional liability insurance purchased by an individual or company for its employees cannot cover the acts, errors, or omissions of another design professional or agency.

When agencies hire engineering consultants, the contracts normally require an insurance certificate be provided to demonstrate the firm has professional liability insurance. If SB 2151 is approved as introduced it will place engineering consultants in a situation where they will be exposed to considerable additional liability exposure with no possibility of providing insurance coverage for it.

Thank you for considering my testimony.

Jeffry J. Volk, PE & RLS
ND Registration # PE & LS 2524
President & CEO
Moore Engineering, Inc.
925 10th Ave East
West Fargo, ND 58078



4

**Testimony of Jeb Oehlke
North Dakota Chamber of Commerce
Presented to the
Senate Transportation Committee
January 16, 2009**

Senate Bill 2151

Mr. Chairman and members of the Senate Transportation Committee, my name is Jeb Oehlke. I am here today representing a business coalition which includes the North Dakota Chamber of Commerce as well as local chambers of commerce and their member businesses to ask you to **oppose** Senate Bill 2151.

The business community opposes this bill because the deletion of the language on lines six through eight on page two of the bill creates an unacceptable amount of risk for businesses in this state. Under this change a contractor may be held liable for damages resulting from the acts, errors, or omissions of a state employee who erred in drafting the plans and specifications for a public project.

In short this change will force North Dakota businesses to accept responsibility for the negligent acts, errors, or omissions of a state employee. A shifting of the risk to this degree is inequitable, unjustified and completely unacceptable.

North Dakota's business community urges this committee for a **DO NOT PASS** recommendation from this committee on Senate Bill 2151. Thank you Mr. Chairman and committee members. I am happy to answer any questions at this time.

THE VOICE OF NORTH DAKOTA BUSINESS

Fiebiger, Tom D.

From: Duane A. Lillehaug [dlillehaug@maringlaw.com]
Sent: Monday, January 19, 2009 10:28 AM
To: Fiebiger, Tom D.
Subject: SB 2151

Tom,

The bill I mentioned to you is SB 2151, which was heard last Friday morning in the Senate Transportation Committee.

The concern I have is the language being removed on p. 2, lines 6-8. The change would immunize the state from liability for errors or omissions in plans and specs that it approves or changes and then distributes to contractors on state construction projects, including roads, bridges, etc. For example, if the State furnished faulty plans to the contractor who built a bridge across the Missouri River that fell down (like the I-35W Bridge in Minneapolis), it would be immune for liability for its fault. That's not fair to ND bridge users, nor contractors and engineers who are required to follow the State's engineering decisions re: plans and specs for state projects.

I have a wrongful death case against the State (and others) pending right now in Benson County District Court in Minnewauken dealing with this precise issue. The State is claiming discretionary immunity for its decisions re: traffic safety during the course of construction. A summary judgment motion is pending before the Court of this very issue. The case name is Broden v. Riley Brothers Constr, Co., State of North Dakota, etc., Civil # 03-8-C-00160

In Broden, the contractor actually called the State engineer's attention to the dangerous intersection and signing and suggested corrective action about 10 weeks before Tanya Broden drowned as a result of leaving the roadway and entering Devils Lake at that intersection, which the State rejected with the specific instruction to "follow the plans." The contractor did, and now the state wants to be immune from that faulty decision-making. I have a brief I could share with you on this discretionary function immunity issue, but it is 40 pages long so didn't want to attach it to this e-mail without your permission.

Duane A. Lillehaug
Practicing in Minnesota & North Dakota
Maring Williams Law Office, P.C.
1220 Main Ave., Suite 105
P.O. Box 2103
Fargo, ND 58108-2103
701-241-4141
Fax: 701-235-2268
dlillehaug@maringlaw.com
Offices also in Detroit Lakes, MN
& Bismarck, ND

Notice: This e-mail is confidential and intended only for the individual(s) or entity(ies) named above. This e-mail may contain information that is privileged, exempt from disclosure under law, or may represent attorney work product. If you have received this communication in error, please contact the sender by telephone (800-492-5297), permanently delete this e-mail from your computer and refrain from disseminating or copying this communication. Thank you.

Fiebiger, Tom D.

From: Duane A. Lillehaug [dlillehaug@maringlaw.com]
Sent: Monday, January 19, 2009 11:45 AM
To: Fiebiger, Tom D.
Subject: FW: SB 2151

Tom,

An e-mail from Steve Plambeck which makes excellent points. I see AGC was at your hearing and opposed the bill.

Duane A. Lillehaug
Practicing in Minnesota & North Dakota
Maring Williams Law Office, P.C.
1220 Main Ave., Suite 105
P.O. Box 2103
Fargo, ND 58108-2103
701-241-4141
Fax: 701-235-2268
dlillehaug@maringlaw.com
Offices also in Detroit Lakes, MN
& Bismarck, ND

Notice: This e-mail is confidential and intended only for the individual(s) or entity(ies) named above. This e-mail may contain information that is privileged, exempt from disclosure under law, or may represent attorney work product. If you have received this communication in error, please contact the sender by telephone (800-492-5297), permanently delete this e-mail from your computer and refrain from disseminating or copying this communication. Thank you.

From: Plambeck, Stephen W. [mailto:SPlambeck@nilleslaw.com]
Sent: Monday, January 19, 2009 11:38 AM
To: Duane A. Lillehaug
Subject: SB 2151

AGC ND was present at the hearing and opposed the bill. In my personal opinion the proposed legislation represents a step "backwards" from the partial abolition of "governmental immunity" for political subdivisions and "sovereign immunity" for the State. Why shouldn't the State's engineers be as accountable as private consulting engineers if they fail to possess or use the degree of skill and learning ordinarily possessed and used by registered professional engineers acting in the same or similar circumstances, and such deviation from that professional standard of care is a proximate cause of an injury or loss? Especially, in light of the limits on the amount of money damages that can be recovered, the persons who can be named as defendants and the exclusion of punitive damages?