

MINUTES
SENATE STATE AFFAIRS COMMITTEE

DATE: Wednesday, March 28, 2012
TIME: 4:00 P.M.
PLACE: Room WW02
MEMBERS PRESENT: Chairman McKenzie, Senators Darrington, Davis, Hill, Fulcher, Winder, Lodge, Malepeai, and Stennett
ABSENT/ EXCUSED:

NOTE: The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

Chairman McKenzie called the meeting to order at 4:22 p.m. with a quorum present and thanked the audience for their patience.

H 693 RELATING TO THE DEPARTMENT OF ADMINISTRATION to provide for rules governing the Capitol Mall and to provide for enforcement of such rules.

Teresa Luna, Director, Department of Administration, introduced **H 693** explaining that the legislation is designed to clarify and formalize the authority of the Director of the Department of Administration to put in place rules governing public conduct in the capitol mall, to better define the capitol mall properties and to allow other agencies to apply the rules governing the capitol mall to their agency's property upon approval of the Legislature.

The need for these clarifications became clear during the litigation concerning the use of the Capitol Annex. The legislation is designed to clarify that the Department can create uniform neutral standards through the rulemaking process. Interested parties, including the public and state agencies, may comment on the rules and request revisions.

Ms. Luna proceeded to go through the history of the bill and explained each of the provisions of the bill. Page one, lines 16-19, authorizes the Director of the Department of Administration (Director) to have exclusive control of the capitol mall properties identified in subsection (2) of Section 1 and shall have the authority to promulgate rules relating to the use of those properties including the requirement of permits for the use of such properties.

Subsection (2) defines the types of properties and the systems that are included under the authority of the Director. See page one, lines 24-42 and page two, lines 1-14. Subsection (c) excludes the interior of the capitol building itself.

Subsection (3) permits other State of Idaho entities to use the promulgated rules upon a request to the Director. Those entities can "opt in" with the consent of the legislature during the rulemaking process.

Subsection (4) gives the responsibility for law enforcement for the capitol mall properties to the Idaho State Police and Subsection (5) is the original language of the statute. Subsection (6) outlines who has control of the interior of the capitol building.

Section 2 is a requirement that the Department of Administration promulgate rules within thirty days of the signing of this bill.

Section 3 is an emergency clause.

Senator Stennett asked how far out will this jurisdiction be extended. **Ms. Luna** responded that it would be the blocks immediately surrounding the capitol and what is traditionally referred to as the capitol mall. **Ms. Luna** listed the names of the buildings that would be included. There are also buildings owned by various departments that are two blocks away that would be covered by the "opt in" clause if they decided to use it.

Senator Stennett inquired about who would be in charge if this bill passed. Is it correct that the power is granted solely to the Director? **Ms. Luna** answered that the legislation gives the power to the Director to promulgate the rules, then it must go through the rulemaking process with final approval by the legislature. **Senator Stennett** asked if there was adequate staff to manage all these additional properties with the added responsibilities. **Ms. Luna** said that they are currently managing these properties, they just don't have the authority to promulgate any rules that allows them to manage with any authority. **Senator Stennett** pointed to Judge Winmill's decision, how would this bill allow similar activities without being in conflict with the Judge's decision? **Ms. Luna** stated that the rules would reflect the Judge's orders. **Senator Stennett** noted that there was nothing in the bill to direct what would or wouldn't be allowed on the capitol mall. Would the mall still be open to a reasonable public display, or speech, or rights to assemble after this bill is passed? **Ms. Luna** answered yes.

**PUBLIC
TESTIMONY:**

Chairman McKenzie provided an outline of the procedures to follow during the public testimony portion of the meeting.

NOTE: Most of those who testified also submitted their written comments and those will be included as part of the minutes.

Shavone Hasse, testified in opposition.

Senator Davis explained that the administrative rules come back to the legislature for approval. But, before that can happen, the legislature must give an entity the authority to promulgate the rules. That process is outlined in the Idaho Administrative Procedure Act and is confirmed by *Knee versus Ardell* which states that the rules must be reviewed and if they are not content neutral, they will be rejected. Rules that disadvantages any organization and gives an advantage to others would not be acceptable. The legislature will be looking for content neutral rules when they come back next year for review and approval. **Ms. Hasse** stated it was her understanding the authority already exists to promulgate rules to maintain property. In addition, this bill has an emergency clause that says it goes into effect as soon as it passes which means the rules they are planning to pass will be in effect immediately and will not go before the legislature until next year. **Senator Davis** noted that they use a negotiated rulemaking process, and the emergency clause is to allow the process to begin immediately. Public comment input will be considered throughout the process so the rules will be content neutral. Although the Senator cannot speak for the Director, experience says that is the intent.

Senator Winder requested that **Dennis Stevenson** give an overview of the rulemaking process after the public testimony segment is finished.

Gene Bray testified in opposition.

Senator Stennett asked for **Mr. Bray's** opinion about the overlap of this bill with other Idaho codes. **Mr. Bray** provided an example, i.e., the capitol properties are enumerated in other code and it would be sufficient for this bill to refer back to that part of code. The same would be true with parking rules and fees.

Cyndi Tiferet testified in opposition (no written testimony).

Edward Waters testified that the bill is flawed and should be sent to "general orders" (no written testimony).

Anne Hausrath testified in opposition.

Senator Davis appreciated the comments and went on to explain the difference between a pending rule and a temporary rule and how each of those are processed. **Ms. Hausrath** pursued her concern that one nonelected person has the authority to promulgate rules in thirty days – it can't be done.

Mary Reali, District 21, testified in opposition.

Katie Fite testified in opposition.

Fairy Hitchcock testified in support.

Roger Brown, Governor's Office, testified in support.

Senator Davis asked for assurance that the promulgated rules would be content neutral and that input will be considered before the temporary rules are adopted.

Mr. Brown explained that the Governor's position is to make this process conducive to allow proper maintenance, safety, and for equal access to the capitol mall.

Barbara Kemp, Boise, testified in opposition.

Angel Glen Garity, Nampa, ID, testified in opposition.

Dean Gunderson, District 19, supports this bill because he is involved with the group in the current lawsuit and even though they have a strong case, a set of promulgated rules will prove a pattern of behavior on the part of the State to overstep the court. He would like to have "this last nail in the coffin of the State's case in his tool kit."

Rachael Raue Namp, ID, testified in opposition.

Chairman McKenzie called for more testimony. Being none, **Ms. Luna** was asked for closing statements.

Senator Stennett quoted from *Idaho Code, Section 16-6704* that discusses the Director's authority to promulgate rules pursuant to Idaho Code governing access and use by the public, of the capital building and its grounds. You are moving forward independently to develop temporary rules, is that correct? **Ms. Luna** responded that *Section 16-6704* applies only to the capitol building and its grounds which are governed by the Executive Branch and Legislature. The Department of Administration is the landlord to all other properties defined as the capitol mall. If the question is, "does the Director have the authority to do that unilaterally," the answer is yes. But, it must be done through the promulgated rule process and that will require public input and final approval by the legislature before they become permanent.

Senator Stennett referred to the "exclusive control" language of the bill. What is the code that gives the Department the authority to operate other properties besides the capitol? **Ms. Luna** said that *Idaho Code, Section 67-5709*, allows the Director to maintain personnel and operating expenditures incurred in the operation and management of the State Capitol Mall and its multi agency facility.

Senator Hill requested the legal definition of "threatened" as in threatened violation. Why would someone be sued because of threatened violations? **Ms. Luna** deferred to **Michael Gillmore** from the Attorney General's Office. **Mr. Gillmore** stated that the normal standard for injunctive relief against threatened or continued violations, for example, the injunction from Judge Winmill in this case, was against a threatened violation of first amendment rights because there had been no removal of camping equipment at that time. To his knowledge, **Mr. Gillmore** said there are no threatened violations in that sense. A group that tries to displace another group that had a permit to occupy a space might be a threatened violation. **Senator Hill** asked if this is a common term in legal jargon?

Mr. Gillmore answered that when one goes to court for injunctive relief, the standards are against threatened or continued or existing violations of the law.

Senator Malepeai asked **Ms. Luna** about the emergency clause. What is the emergency in implementing the contents of this legislation instead of waiting until July 1st? **Ms. Luna** responded that it is really about the upcoming spring and summer maintenance schedule. In order to maintain the properties, they need the authority to do so.

Senator Stennett continued on that note; with Judge Winmill's decision, those tents are allowed to be there, how will that change by passing this bill? **Ms. Luna** said they don't intend to violate the judges ruling. There are several parcels of property on capitol mall that they need the assurance they would be able to maintain them through the upcoming spring and summer. **Senator Stennett** asked if the existing tents will remain even if this bill is passed. **Ms. Luna** answered that they will comply with the Judge's orders.

Senator Winder requested that **Mr. Stevenson** explain the rulemaking process. **Mr. Stevenson** explained how the process works from promulgating the rules, publishing them, receiving input, issuing temporary rules and then presenting them to the legislature for approval or rejection. It is a complicated process.

Senator Fulcher submitted that it was interesting to listen to the testimonies and read the messages that have come forward with this issue. There seems to be widespread agreement on the need to appropriately manage property. The disagreement occurs when deciding who will do it and how it will be done. There is a strong belief that liberty is being threatened from both sides of the question. The Department is in place with the mechanism to deal with the management of these properties and it seems they don't have the tools to do what is needed.

MOTION:

Senator Fulcher moved, seconded by **Senator Hill**, to send **H 693** to the Senate floor with a do pass recommendation.

Senator Davis commented that this bill is really the management of the assets of the State of Idaho. If this is carried out responsibly, in a way that is content neutral, and they pledge to comply with the orders of the court, then the Senator will support the legislation as written. However, if rules come back that are not content neutral, he will have a difficult time supporting the legislation.

Senator Winder stated that this really deals with equal public access to property. There is a good history of the State managing equal access to the steps of the capitol as shown this past week. Others should have access to the property and there shouldn't be a permanent display. There can be opportunities for free expression which is one of the greatest rights we have in this country and no one on the Committee wants to lose that.

VOTE:

The motion carried by voice vote. **Senator McKenzie** will be the floor sponsor.

MINUTES:

March 23, 2012

MOTION:

Senator Hill moved, seconded by **Senator Lodge**, to accept the minutes of March 23, 2012.

VOTE:

The motion carried by voice vote.

ADJOURNMENT:

Being no further business, **Chairman McKenzie** adjourned the meeting at 5:50 p.m.

Senator McKenzie
Chairman

Twyla Melton
Secretary