Approved February 7, 1984
Date

MINUTES OF THE SENATE COMMITTEE ON TRANSPORTATION AND UTILITIES.

The meeting was called to order by SENATOR ROBERT V. TALKINGTON Chairperson at

9:00 a.m./p.m. on Tuesday, February 7, 1984 in room 254-E of the Capitol.

All members were present except:

Senators Hein and Rehorn.

Committee staff present:

Fred Carman, Hank Avila, Rosalie Black

Conferees appearing before the committee:

SB 478 - Senator Ben Vidricksen; David Tittsworth, Chief Counsel, DOT;
Jim Kaup, KS League of Municipalities;
Kathleen Sebelius, KS Trial Lawyers Association;
Jerry Palmer, Attorney

The meeting was called to order by Senator Talkington, Chairman, to discuss Senate Bill No. 478 which, if passed, would allow less stringent standards for road and bridge construction.

Senator Morris moved to approve minutes to date; seconded by Senator Hayden. The motion carried.

The Chairman indicated that the proposal is from the interim committee on Efficiency in State Government and introduced Senator Ben Vidricksen to discuss SB 478.

SENATE BILL NO. 478 - HEARING

Senator Vidricksen explained that the concept for SB 478 originated when contractors who believed that DOT state highway design requirements were excessive contacted him. He added that the reduction of highway construction standards would be done on a case by case basis according to the discretion of the Secretary of Transportation with conformity to "generally recognized and prevailing standards" developed by AASHTO and adopted by the federal Department of Transportation. Senator Vidricksen's interest is to reduce the cost of highway construction.

Ed Johnson, City Attorney for Topeka, indicated by telephone

MINUTES OF THE SENATE COMMITTEE ON TRANSPORTATION AND UTILITIES,
room 254-E, Statehouse, at 9:00 a.m./p.m. on February 7, 1984

SENATE BILL NO. 478 - HEARING (con't)

that city officials support SB 478.

David Tittsworth recommended adding an amendment that design for construction or improvement of public property equate to AASHTO minimum guidelines which would not dilute the intended effect of design exception but merely clarifies which design standards are to be used. If it is shown that such standards were not met, the governmental entity must be prepared to defend its decision under usual negligence rules.

A second amendment involving whether design exception is met which would be a function of the court, rather than a jury, was also suggested by Mr. Tittsworth. (See Attachment 1.)

Jim Kaup said that the League agrees with both DOT amendments since it supported HB 3092 (1982 Session) which contained identical language to SB 478. However, he added, the League is concerned about tying directly into AASHTO.

Noting his experience in assisting with the drafting of the Kansas Tort Claims Act, Kathleen Sebelius introduced Jerry Palmer.

Mr. Palmer in opposing SB 478 indicated that definite standards for design are needed for highway construction. He suggested making no amendments to the Tort Claims Act until it is determined that a change is necessary.

The Chairman asked Jerry Palmer and David Tittsworth to meet to discuss their views of SB 478 and then make recommendations to the Committee.

The meeting adjourned at 9:45 a.m.

Robert V. Talkington

Please PRINT Name, Address, the organization you represent, and the Number of the Bill in which you are interested. Thank you.

Feb. 7, 1984

NAME	ADDRESS	ORGANIZATION	BILL NO.
Glenn Sewell	Lawrence	Sen. Richard	
Jim Kaup	Topeka	League of Ks. Munic.	
David Titsworth	Topeka	KDOT	478
Edward R. DeSoignie	"	"	"

Attachment 1

Kansas Department of Transportation

February 7, 1984

MEMORANDUM TO: Senate Transportation Committee

FROM: David G. Tittsworth
Chief Counsel

REGARDING: Senate Bill 478

Senate Bill 478 amends the Kansas Tort Claims Act, K.S.A. 1983 Supp. 75-6101, et seq. Specifically, the bill amends the current exception contained in the act which provides that a governmental entity shall not be liable for damages resulting from:

> "...the plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval and if the plan or design was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared..." K.S.A. 1983 Supp. 75-6104(l)

The proposed legislation contains language which elaborates upon the current design exception in two ways:

1. Senate Bill 478 states that the governmental entity shall not be required to comply with "every generally recognized and prevailing standard in existence at the time of approval of any plan or design..." and,

2. Senate Bill 478 allows the governmental entity to consider "factors of cost and available resources...in developing designs and plans, so long as the designs and plans approved are reasonable in light of all factors considered and documented..."

The basic effect of the current design exception contained in K.S.A. 1983 Supp. 75-6104(l) is to focus all issues regarding design liability to a consideration of whether design standards were followed at the time the highway design was prepared. The reason for the exception is clear. The following excerpt from the attached article, "State Liability for Highway Defects", gives a basic overview of the design exception:

Att. 1

"The design of a state highway necessarily reflects the discretion of the planning board. Such discretionary functions are generally immune from tort liability. The immunity rests upon a different rationale than sovereign immunity; it is not grounded upon the status of the state as sovereign, but instead it is a component of the proper relationship between administrators and the courts. The doctrine of immunity for discretionary actions is founded upon the notion that the administration of state affairs and the discretionary actions that are necessarily involved are the proper province of the state, not of the courts and juries. To allow tort liability for such actions would involve a violation of the separation of powers and would be debilitating to the efficient functioning of the governmental process." Emory Law Journal, Vol. 27, p. 382 (1978).

Design standards are continually being changed and upgraded. Minimum standards published by the American Association of State Highway and Transportation Officials (AASHTO) are generally utilized by the Kansas Department of Transportation for highway projects. Since 1940, however, such standards have dramatically changed. If a governmental entity were to be held to present design standards for highway plans prepared forty or more years ago, it is clear that exposure to liability would be significantly increased. Under such a scenario, the governmental entity would be required to upgrade all highways to current standards. Obviously the cost of such upgrading would be prohibitive.

The Department maintains that AASHTO minimum guidelines should equate to "generally recognized and prevailing standards" and suggests that Senate Bill 478 could best be implemented by making it clear that such guidelines apply by the following amendment to K.S.A. 1983 Supp. 75-6104(l):

"...the plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval and if the plan or design was prepared in conformity with ~~the generally recognized and prevailing standards~~ AASHTO minimum guidelines in existence at the time such plan or design was prepared..."

The proposed amendment does not dilute the intended effect of the design exception but merely clarifies which design standards are to be used. If it can be successfully shown that such design

standards were met, the exception has been established and no liability will attach. If it is shown that such standards were not met, the governmental entity must be prepared to defend its decision under usual negligence rules.

The Department also believes that the issue of whether the design exception is met, as well as all other exceptions contained in K.S.A. 1983 Supp. 75-6104, should properly be a function of the court, not the jury. The Department recommends that the following provision be added to K.S.A. 1983 Supp. 75-6104:

> "In any action commenced under this act, at the close of discovery, or at any earlier time as may be appropriate under the circumstances existing, the Court shall, upon application of the government entity or employee, make a finding based on the record in the action as to whether an exception enumerated above has been established in regard to all or part of the claim against the governmental entity as a matter of law. A finding that an exception has been established shall be conclusive, subject to the right to appeal, as to the Court's jurisdiction to further hear or consider the matter."

The proposed amendment is necessary for two primary reasons. First, it has been held by the Kansas Supreme Court that an exception written into a tort claims act constitutes a jurisdictional bar if established. Carpenter v. Johnson, 231 Kan. 783, 786, 649 P.2d 400 (1982). As such, the court should determine whether exceptions contained in the Tort Claims Act have been established. If the court determines that an exception has been met, the court is without jurisdiction to hear the matter. Clearly, a jury should not determine the scope of a court's jurisdiction.

Second, this proposed amendment to K.S.A. 1983 Supp. 75-6104 is necessary to clarify the legislature's intent regarding the many exceptions contained in the Kansas Tort Claims Act. The amendment does not substantively change any of the exceptions enumerated in the act. It does not broaden or lessen the qualified immunity of any governmental entity nor does it broaden or lessen the rights of an injured party seeking damages. The amendment will merely insure that courts will interpret the enumerated exceptions in the act and will rule on them as a matter of law. In this manner, the effect of the act will better be realized and the scope of the exceptions to liability will be better defined and clarified. Such rulings should help to give direction to governmental entities wishing to avoid liability, as well as helping to establish the rights of injured parties.

Since the passage of the Kansas Tort Claims Act, the Department has sensed the onslaught of litigation which the act will surely spawn. The experience of other states points to this inevitable conclusion. In October, 1983, the Pennsylvania Department of Transportation reported that it had paid in excess of $22 million for judgments and claims settlements arising after the passage of an act in 1978 which established a limited waiver of sovereign immunity. The number of staff attorneys working for the California Transportation Department has escalated from a dozen in the early 1960's to over 100, after passage of a tort claims act. A similar trend has been noted in other states.

47 tort claim lawsuits have been filed against the Department since the July, 1978 effective date of the Kansas Tort Claims Act. The Department has paid settlements and judgments arising out of such cases in excess of $350,000 over the past five years. Currently there are 15 tort claim cases pending against the Department in which claims approaching a total of $20 million are being made. Based on the number of cases which have been filed, it is clear that at least 15-20 more lawsuits will be filed against the Department this year.

The Department is not advocating a return to sovereign immunity, but merely wishes to clarify its responsibilities and to identify potential liability and to take reasonable steps to minimize such liability. The proposed amendments to the act will help to encourage this result and will aid the courts, the legislature, governmental agencies and injured parties in pursuing the duties and rights established under the act.