2009 HOUSE NATURAL RESOURCES

HB 1320

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1320

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 1-23-09

Recorder Job Number: 7666

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

Chairman Porter – Open the hearing on HB 1320.

Rep. James Kerzman – I'm here to introduce Dave Schweigert will give you the technical details of this bill. I signed on to address the liability issues on recreational lands.

Chairman Porter – The only question I have is we had HB 1189 before us a couple seconds ago are you aware they both deal with the same part of the code on the back page? You have different ideas on which way you think you are going. Do you have any comment or are you going to leave it up to the association to work out the details?

Rep. Kerzman – I would leave it up to the association. I think we are both looking for the same answers.

David Schweigert – See **Attachment # 1**. In 53-08-01 we are adding a definition of what business purpose is. It is basically defining it to include situations where you look to the reason the landowner is opening up this land. Presently you don't look at why the landowner is doing this. You only look at why the person is on the land. I would suggest a lot of times these sort of carnivals and free events a business may be opening up like a mall or something, they may not be looking to get that customer, or that customer may not be coming in at that

time to purchase something, but the purpose is to get them there, have something to eventually lead them into the business, such as a carnival or some activity on their land.

Chairman Porter – As you are going through your definitions the scenario that comes to my mind is you have a rancher with a couple hundred head of cattle on his pasture, has 10 horses in a stable, and has a sign up – trail rides $20.00. Currently, that individual is immune under the recreational activities for those trail rides.

Mr. Schweigert – Actually he's not. He's charging a fee for those trail rides. Currently he is not immune. He would be immune, for instance, if the individual would say to him, Sir I see you have some horses there, would you mind if I rode those horses? And he said "sure". He would be immune. This bill has absolutely no effect on that situation.

Rep. Keiser – Would be exempting non-profits from liability?

Mr. Schweigert – If it is a non-profit then the non-profit really doesn't have a business purpose.

Rep. Keiser – They are included in your definition.

Mr. Schweigert – Oh are they?

Rep. Keiser – So you would exempt non-profits from liability?

Mr. Schweigert – If it was a true non-profit I don't believe it would fit under the business purpose statute definition.

Rep. Keiser – I don't care what you think it's what our code says.

Mr. Schweigert – Sure, I understand.

Rep. Keiser – A hospital is a non-profit.

Mr. Schweigert – Actually it is what a court says.

Rep. Keiser – A hospital is a non-profit, so the hospital has a violation and you know about it, and you know about it, you will be able to sue them.

Mr. Schweigert – By my definition, what I'm looking at, is whether the hospital is attracting business to the hospital using that. I'm not so sure that I would consider the hospital non-profit in that instance. If that's what it is, and I'm not aware of that and I apologize, there may be some arguments there.

Rep. Keiser – We had a bill yesterday with some interest?????? They are not excluded here.

Mr. Schweigert – If it is a true non-profit – if a non-profit has a business purpose behind it they would not be excluded. May I suggest to you the other issues that come up with this immunity, if a situation where you would have someone who would be walking to the hospital right next to someone who would be walking to where the carnival is going on, presently the one walking to the hospital would be able to ?????. The person walking to the carnival would not, because he would be subject to recreational use immunity. There is insurance that covers this already. Basically this is treating people similar, when they are using commercial type property that is not really the type of property that was intended for recreation.

Rep. Hofstad – Won't this discourage businesses from using their facilities from using their facilities or parking lots for car washes and those types of things? Often time's classes will use a business and it could serve a connection. It seems to me like we are going to discourage that kind of activity.

Mr. Schweigert – I would suggest they are already subject liability in those types of situations. They are charging a fee to use that property. The car wash – if it was a non fee type car wash, would they be subject to liability – under the present laws – that is a good question.

Chairman Porter – If it is a high school cheerleader group that has no business relationship with that business, other than they said you could have your car wash here, then that business is not charging a fee. It is the nonprofit or the other volunteer group that is charging the fee. Technically they wouldn't carry the liability.

Mr. Schweigert – Technically, but from a legal perspective, and really what you are talking about here is insurance perspectives, the insurance of the business would cover that situation. I would suggest to you, what happens in those situations, is in those situations where you ask the owner of the store, "Sir were you allowing this strictly because of good will, or were you hoping to attract business"?

Rep. Keiser – Look carefully at the car washes in your community. In ours it's a voluntary contribution to get your car washed.

Mr. Schweigert – Actually if it is a contribution – voluntary or not – you would still take yourself outside. If you accept a contribution from me and the next person comes through and doesn't make a contribution, the person gave a contribution could bring a claim, the person who didn't give a contribution could be barred against bringing a claim. That would be a question for the court to decide.

Rep. Drovdal – A business that would allow a cheerleading group to come onto their property and do a car wash and didn't charge them, they're not getting a direct benefit from it, wouldn't an attorney argue they are getting good will and therefore it is a business purpose and therefore this would apply?

Mr. Schweigert – Basically saying is if a mall or that business says "Look, we are not doing this to attract business, we are doing this to benefit this cheerleading organization" the statute doesn't apply. But if the business said "Yes, we are opening up this land and one of the purposes we are doing this is because we want to attract people to our business." Then it takes them outside of amenity by our amendment.

Chairman Porter – Under the existing law they would be immune.

Mr. Schweigert – Under the existing law they would be immune, that is correct.

Chairman Porter – Further questions for Mr. Schweigert? I have one more comment. Adding subsection 3, we have subsection 1 already describing willful or malicious failure. Isn't subsection 3 redundant language?

Mr. Schweigert – No it actually isn't because you can, for instance, willful and malicious essentially mean it is just shy of being intended. In 3 we are basically saying if you dig a trench or something along those lines and you forget to put up the barriers, you don't intend that injury, you just negligently forgot to put up the barriers or forgot to notify people about that, and you knew it was there.

Chairman Porter – So if I'm out digging a water line in and someone stops and says I want to ride a 4 wheeler across your land and I've got a 20' open trench that I am actively working on, if I don't stop my work and put up a barrier around there and then go back to work, then I fall out of the immunity category because I let them ride their 4 wheeler on my land.

Mr. Schweigert – That is correct.

Chairman Porter – Further testimony in support of HB 1320?

David Bliss – I practice law here in Bismarck – I support this bill. I want the committee to look at the – willful and vs. the willful or – malicious. This is on the last page of the bill. What this says here is that the new amendment would read willful or malicious failure to guard. That is pretty important now you have to show, not only was it a deliberate act, it was a malicious act. Evil intent. This is actually a criminal standard which in my opinion doesn't belong in the civil end. The standard here is actually an impossible standard to ????. What do you have to prove under the recreationally use? You have to prove that you maliciously did it. That means he had evil intent. Not only did I deliberately do it, I'm going to do it to screw that guy. If there is a stable of horses, I'm going to deliberately a nuisance here, I'm going to put some 2x6's over a hole, and I'm going to make sure those guys are going to fall into it. That is how this

standard applies to recreational use. It is just simply an impossible standard. This applies to landowners to. I have a case now where a young boy was out in a hay field, his dad told him to come home if the tractor quits. The tractor did quit so the kid gets on a 4 wheeler and he comes home by a section line road. A road he hadn't come on before. It turns out there's a trench that is dug. You couldn't see. He literally fell into the trench and was killed. The landowner owns both sides of that section line. The question is, does recreational use immunity apply? The kid was coming home because the tractor quit. How does that work? Secondly, what standard does that apply? Do you have to apply willful and malicious? Did that landowner know about that trench? In this case he did, it was so dangerous he told the township, the township didn't do anything, but what is the overall stand here? The standard is that we have to show evil intent. That is the reason for the willful or. This way if Chairman Porter did it maliciously and we can show it then he can be liable.

Chairman Porter – Further testimony in support of HB 1320? Opposition to HB 1320? Then we will close the hearing on HB 1320.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1320

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 2-12-09

Recorder Job Number: 9375

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

Chairman Porter – HB 1320

Rep. DeKrey – Rep. Keiser and I have talked about this bill and we can't come up with an amendment we think will improve the present law.

Chairman Porter – Is that a motion?

Rep. DeKrey – I move a Do Not Pass.

Chairman Porter – I have a motion from Rep. DeKrey for a Do Not Pass 2nd from Rep. Drovdal.

Discussion? Seeing none the clerk will call the roll on HB 1320.

Yes 12 No 0 Absent 1 Carrier Rep. DeKrey

Date: 2-12-09
Roll Call Vote #:

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1320

House Natural Resources Committee

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Legislative Council Amendment Number

Action Taken ☐ Do Pass ☑ Do Not Pass ☐ As Amended

Motion Made By DeKrey Seconded By Drovdal

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep Hanson	✓	
Vice Chairman Damschen			Rep Hunskor	✓	
Rep Clark	✓		Rep Kelsh	✓	
Rep DeKrey	✓		Rep Myxter	✓	
Rep Drovdal	✓		Rep Pinkerton	✓	
Rep Hofstad	✓				
Rep Keiser	✓				
Rep Nottestad	✓				

Total (Yes) 12 No 0

Absent 1

Floor Assignment DeKrey

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

REPORT OF STANDING COMMITTEE

HB 1320: Natural Resources Committee (Rep. Porter, Chairman) recommends **DO NOT PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1320 was placed on the Eleventh order on the calendar.

2009 TESTIMONY

HB 1320

Attachment #1

HOUSE BILL 1320

Mr. Chairman, ladies and gentlemen of the committee, my name is David Schweigert and I am an attorney at the Bucklin, Klemin, McBride & Schweigert law firm in Bismarck. I am here today in support of House Bill 1320.

I. Purpose or HB 1320

The purpose of HB 1320 is to insure that recreational use immunity cannot be used beyond its original purpose to open up land which would otherwise unlikely be open for use to the public and applied to situations where the land is being used for a business purpose by the owner. HB 1320 addresses these shortcomings by narrowly amending Ch. 53-08.

II. History and purpose of Ch. 53-08

The underlying purpose of the Recreational Use Statute is the furtherance of the public policy of opening land and water areas to recreational uses. *1965 N.D. Laws ch. 337, preamble*. It was enacted in the 1960's amid concerns that farmers, ranchers, and other land owners were closing their property to recreational uses, in a state where outdoors recreation is a critical part of the culture and economy. The thought was, that by providing recreational use immunity more land would be open to recreational activity, such as hunting, snowmobiling, hiking and other outdoor activities. In fact, the original language provided an exemplary list of contemplated activities this list included: "hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and visiting, viewing, or enjoying historical, archeological, geological, scenic, or scientific sites, or otherwise using land for purposes of the user." *1965 N.D. Laws ch. 337, § 1(3)*.

In 1995, in response to North Dakota abolishing sovereign immunity, the legislature amended the Recreational Use Statute to ensure that it would apply to public lands. There was a fear that the state would be inundated with lawsuits brought by recreational users of state lands. *House Standing Committee Minutes, House Agriculture Committee*, February 9, 1995, p. 1, *Statement of Linda Kahl, North Dakota State Land Department. See also id., Testimony of Robert Olheiser, State Land Commissioner*, January 6, 1995 (concerning a period of state liability "exposure during the summer, when [the state] would be subject to [its] greatest potential for recreational use," which formed the justification for the legislature passing the amendment to Ch. 53-08 as an emergency measure to take effect more immediately).

In the process of the 1995 amendments to the Recreational Use Statute, the House of Representatives changed the list of activities to which it would apply. *Id., Tesetimony of Robert Olheiser, State Land Commissioner*, February 22, 1995. The purpose of the change was to avoid the potential interpretation that the prior list of activities was exhaustive and not exemplary in nature. There is no record of any debate being held on this change, but the testimony before the legislature was explicit that the change would not affect the meaning of the Recreational Use Statute, but instead simply clarify it.

The House Agriculture Committee minutes from 1995 go even further to solidify that the purpose was not to change the Statute so as to apply to anything other than outdoors-type recreation. Ms. Kahl testified, in support of S.B. 2127, that the state "[has] no control over what happens on a trailride." *House Standing Committee Minutes,*

House Agriculture Committee, February 9, 1995, p. 1, *Statement of Linda Kahl, North Dakota State Land Department*. Mike Brand testified that the Statute "[had] been relied on by ... agencies such as Game and Fish Department" and that "[p]rivate landowners rely on this law very heavily for protection from liability people crossing their lands [sic]." *Id.*, p. 1, *Statement of Mike Brand, North Dakota State Land Department*. The understanding of the law by the legislature enacting it in 1995 was that it was intended to apply to outdoors-type recreational land uses.

III. Effect of the proposed amendments

As currently enacted, Ch. 53-08 immunizes land owners from premises liability if they "either directly or indirectly invite[] or permit[] without charge any person to use [their land] for recreational purposes." N.D.C.C. § 53-08-03. The statute defines "recreational purposes" to "include any activity engaged in for the purpose of exercise, relaxation, pleasure, or education." N.D.C.C. § 53-08-01(4). The statute does not look to the reason why the landowner may be opening up their land. If the user is engaged in these activities and has not paid a charge, recreational use immunity applies.

For instance, a car dealership who holds a customer appreciation day and displays the new line of vehicles being offered could rely on recreational use immunity if someone is hurt by a condition of the property if that person is there for recreational purposes. A mall parking lot who is using a free carnival to attract individuals to the mall could rely on recreational use immunity if someone is hurt by a condition of the property if that person is there for recreational purposes. The proposed amendment would not make the businesses cited above automatically responsible for those injuries, it would merely take them outside of the immunity statute if there was a business

purpose involved in opening the land and normal premises liability standards would apply.

The proposed amendments also help clarify that it is not necessary for the injured individual to pay the fee to use the land. It can be paid by anyone on their behalf, such as a sponsor. Presently, if for instance my business would sponsor or underwrite and make it possible for a bunch of children to attend a carnival and something happened, it is very possible the carnival could rely on recreational use immunity as the statute requires "the person" to pay the charge. The proposed amendments make it clear that the charge can be paid by anyone.

The remaining changes to the statute remove immunity when the land owner acts in certain culpable ways, above mere negligence. One change is from "willful and malicious" to "willful or malicious" in N.D.C.C. § 53-08-05(1). The terms "willful" and "malicious" represent distinct legal concepts. Specifically, a "malicious" act is one that is already "willful," and is also performed without legal justification or excuse. BLACK'S LAW DICTIONARY (8TH ED.) at 977. The proposed amendment would help to clarify that the conduct can be either willful or malicious.

The final substantive change would deny immunity when the injury was caused by a man-made defect in the land that the owner knew was there. For instance, if a county dug a trench across a road and left it open, without any warnings and a four wheeler subsequently drove into it, the county couldn't rely on recreational use immunity for its failure to close the trench or warn of its existence if the four wheeler driver was engaged in a recreational activity. Again, the county would not be automatically liable, and the injured person would still have to prove responsibility under

normal premises liability circumstances.

Taken together, the changes proposed by H.B. 1320 resolve the problems in the current version of Ch. 53-08, N.D.C.C., as described above, by ensuring that the Recreational Use Statute is drafted to advance its purpose in opening land and other property in North Dakota to free, recreational use, not situations in which the landowner is holding a recreational event for free to further a business purpose.