

Legislative Analysis



RECOUNT PROCEDURES

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

Senate Bill 603 (S-1) as passed by the Senate
Sponsor: Sen. Stephanie Chang

Analysis available at
<http://www.legislature.mi.gov>

Senate Bill 604 (S-1) as passed by the Senate
Sponsor: Sen. Jeremy Moss

House Committee: Elections
Senate Committee: Elections and Ethics
Complete to 5-14-24

SUMMARY:

Senate Bill 603 would make several changes to the recount process at both the county and statewide level and would increase the per-precinct deposit fee to be paid by a petitioner. Senate Bill 604 would make complementary changes to the Code of Criminal Procedure.

Senate Bill 603 would amend the Michigan Election Law to modify the requirements for requesting and conducting a recount. Among other changes, the bill would specify that a recount is an administrative process; modify the threshold for an automatic recount; allow ballot question committees to petition for a recount; provide a standard form to be used when filing a recount petition or counter petition; require a petitioner to allege an error, rather than fraud or mistake, in the election results and require enough votes to be recounted to change the results; amend the requirements for whether votes in a precinct can be recounted; and increase the deposit for filing a recount petition.

Certification deadlines

County canvass boards are currently required to complete their canvass as soon as possible and no later than the fourteenth day after the election; otherwise, the county canvass board must deliver all records and other information pertaining to the election to the Board of State Canvassers (BSC), which must certify the results by the twentieth day after the election. Senate Bill 603 would specify that these provisions are subject to the deadlines that apply for an expedited canvass for a presidential election, which occurs when there are fewer than 25,000 votes differentiating between the top two slates of presidential electors.

For an expedited canvass for a presidential election, the secretary of state (SOS) can require county canvass boards to certify the results by the *seventh* day after the election (or by an alternative date before the fourteenth day after the election), and the BSC must complete its expedited canvass and announce its determination no later than the *twentieth* day after the election. Senate Bill 603 would instead provide that the SOS could require county canvass boards to certify the results on or before the *tenth* day after the election, and the BSC would have to determine the results on or before the *thirteenth* day after the election.

The bill would also require the BSC to conduct an expedited canvass, on a date appointed by the SOS, for any statewide primary with an unofficial vote differential of 1,500 or fewer votes.

The BSC's certification of any election result would be final and subject to only a post-certification court order or a post-certification BSC-supervised recount.

Documentation

After the completion of a county canvass, clerks of county boards of canvassers currently must provide the SOS with certified copies of all statements of votes related to an election on any proposed constitutional amendment or ballot question and an election for state office, presidential elector, United States senator or representative, circuit court judge, and state legislator. Senate Bill 603 would extend this requirement to statements related to an election for supreme court justice, court of appeals judge, probate judge, district court judge, member of the State Board of Education, member of the Board of Regents of the University of Michigan, member of the Michigan State University Board of Trustees, and member of the Wayne State University Board of Governors.

Currently, the clerk of a county that alone constitutes one or more senatorial or representative districts must mail the SOS a copy of the certificate of determination of election results, along with the SOS the address of each individual elected to a county office or to the state legislature. The bill would instead require the SOS to inform county clerks of whether they must transmit the certificate electronically or by mail.

Automatic recounts

Senate Bill 603 would require an automatic recount of all precincts in the state if the BSC certifies a statewide election as having been determined by a vote differential of 0.1% or less of the total number of votes cast, rather than 2,000 or fewer votes as is current law.¹ The bill would also require an automatic recount of all precincts in a special or general election for a state senate district that is certified as having been determined by 75 or fewer votes and for a state representative district that was determined by 25 or fewer votes.

To determine the procedures for an automatic recount of a ballot question, the BSC would have to meet as soon as practicable after certification, rather than on the seventh day following certification. The bill would also specify that the BSC must notify each participating ballot question committee of the time and place of the meeting.

If a losing candidate or ballot question committee files a written statement with the SOS within 48 hours after the election is certified that requests for the recount not to be conducted, the automatic recount would not occur.

Recount administration

Under the bill, the BSC would be authorized to promulgate rules pursuant to the Administrative Procedures Act for conducting recounts. Senate Bill 603 would also specify that a county board of canvassers is authorized to conduct post-certification recounts of local election results and that all local recounts must be conducted under the procedures described in Chapter XXXIII (Recounts; County, City, Township, and Village Boards of Canvassers) of the Michigan Election Law. The bill would state that Chapter XXXIII is to be liberally construed to achieve the purpose of fair, impartial, uniform, and expeditious recounts.

¹ As is current law, this provision would not apply to partisan offices to which more than one individual is elected.

Senate Bill 603 would remove a provision requiring county canvass boards to investigate the facts set forth in a recount petition, in addition to a provision stating that remedy by quo warranto (a legal challenge to an individual's right to hold an office) remains in full force alongside other existing remedies for illegal or fraudulent voting or for tampering with election materials prior to a recount. It would also remove a provision requiring the BSC to investigate the facts and allegations set forth in a recount petition and conduct a recount as early as possible after receiving a petition and accompanying deposit.

The bill would provide that a county canvass board recount is an administrative process that is limited to determining the number of votes cast for each candidate or for or against a ballot question and not an investigation, audit, or assessment of the qualifications of participating voters or the manner in which ballots are applied for or issued. A board would have to deny a petition to investigate or audit an election, a petition to assess the qualifications of voters participating in an election or the manner in which ballots are applied for or issued, or a petition to do anything other than an administrative recount.

The bill would also add a new section stating that any proceeding intended to restrain, enjoin, modify, control, reverse, or otherwise interfere with the action of a board of county canvassers or a representative operating under the board's supervision could be instituted only against the board of county canvassers and only by mandamus (a court order issued to a public official to fulfill their duties).

If an individual in charge of ballots, ballot containers, or other election materials fails to deliver those materials to a board of county canvassers upon the board's request, the board could issue a subpoena to compel delivery. (Currently, the law grants county canvass boards the power to subpoena an individual to compel them to bring the ballot boxes used in each precinct, in addition to other election documents and reports, for the purposes of a recount investigation.) An individual who is subpoenaed and fails to produce the requested materials would be guilty of a misdemeanor.²

Any individual who willfully interferes with a recount or related activities would be guilty of a felony. (Currently, this penalty only applies to an officer, assistant, clerk, or employee engaged in the conduct of a recount that willfully interferes with a fair and impartial recount.)

Recount petition forms

Senate Bill 603 would provide the content of the forms to be used for a petition or a counter petition by a candidate or a ballot question committee.³ A candidate petition and counter petition for a recount would list the petitioner's name and address, the body being petitioned, the office and precincts the recount is requested for, the error in the canvass or returns of votes, and the required deposit. A candidate petition for a recount would also include a statement that the petitioner has a good-faith belief that, if not for the error, they would have had a reasonable chance of winning election and a statement that the petitioner is requesting a recount of enough votes to change the result of the election. The form would have to be signed and dated by the candidate and notarized. An authorized representative of a ballot question committee would

² This provision currently only applies to a subpoenaed individual who fails to appear and produce a ballot box.

³ Currently, recount petitions must swear to and describe the alleged mistake or fraud, list the city, ward, township, village, and precinct in which the mistake or fraud is alleged to have occurred, and ask for a correction, but the Michigan Election Law does not provide the form for the petition.

have to provide the same information for a petition or counter petition for a recount on a ballot measure, except that they would specify the ballot question that a recount is requested for rather than an elected office.

The SOS would have to modify the forms for a ballot question committee petition for a recount or counter petition in order to allow a voter to file either petition in the absence of a ballot question committee.

Senate Bill 603 would add a provision stating that a candidate, ballot question committee, or elector may withdraw a recount petition or counter recount petition at any time.

Candidate recount petitions

Currently, a losing candidate who believes that they are aggrieved on account of fraud or mistake in the canvass or returns of the votes can petition for a recount of the votes cast for that office in any precinct. The candidate must be able to allege a good-faith belief that they would have had a reasonable chance of winning if not for the fraud or mistake. A candidate filing a petition for a BSC-conducted recount additionally must provide specific allegations of wrongdoing with any available evidence, set forth the nature and character of the fraud or mistake, and specify the counties, townships, and precincts in which the recount is requested.⁴ Candidates filing for a state-level recount must generally file a signed and sworn petition with the SOS within 48 hours following the completion of the canvass, and if the candidate ran for a state legislative office, they must also file a copy of the petition with the clerk of the House of Representatives or the secretary of the Senate, as applicable.

Senate Bill 603 would instead provide that a candidate who alleges a good-faith belief that they would have had a reasonable chance of winning the election if not for an error in the canvass or returns of the votes may petition for a recount. A candidate would have to use the required form, described above, and the number of votes requested to be recounted would have to be greater than the difference in votes between the petitioner and the winning candidate. Petitions for a state-level recount would have to be filed by 5:00 p.m. on the second day after the BSC certifies the election results.

Ballot question recount petitions

Currently, a voter who participated in a local election and believes that fraud or error occurred in relation to a proposed ballot question can petition the county canvass board for a recount of the votes cast on that ballot question in any precincts. For a proposed constitutional amendment or statewide ballot proposal, a Michigan voter who believes there has been fraud or error can file a recount petition with the SOS within two days after the BSC's final certification. The petition must clearly set forth the nature and character of the alleged fraud or error and the counties, cities, townships, or precincts in which it is believed that error or fraud occurred.

Senate Bill 603 would instead allow a ballot question committee to file a recount petition for the votes cast on that ballot question in any precincts if the committee believes that an error occurred which led to the opposite result in the election. Recount petitions would have to be filed in good faith and using the required form, and the number of votes requested to be recounted would have to be greater than the difference between the "yes" and "no" votes on

⁴ Candidates file a state-level recount petition for an office canvassed by the BSC and offices for congressional representative or state legislator for a district located wholly within one county.

that ballot question. A ballot committee that participates in a statewide ballot question would have to file the recount petition by 5:00 p.m. on the second day after the BSC certifies the election results. If a ballot question committee did not participate in an election in which there was a ballot question on the ballot, any individual who voted in that election could file a recount petition concerning the ballot question under these same provisions.

Petition deposit fees

Current law requires a petitioner to deposit \$25 with the appropriate board of county canvassers clerk (for local elections) or State Bureau of Elections (for state elections) for each precinct for which a recount is requested. If, however, the number of votes separating the presumptive winner and the petitioner is more than 50 votes or 0.5% of the total number of votes cast in the race, whichever is greater, the petitioner must deposit \$125 for each precinct. If the number of votes separating the presumptive winner and the petitioner is more than 75 votes or 5.0% of the total number of votes cast, the petitioner must deposit \$250 per precinct. (For races where more than one candidate is to be elected, the vote differential is determined based on the number of votes cast for the presumptive winner with the fewest votes, the number of votes cast for the petitioner, and the sum of the number of votes cast by the two candidates.) A petitioner must deposit \$125 for each precinct for a recount of a ballot question if the number of votes separating “yes” and “no” is more than 50 votes or 0.5 of the total number of votes cast on the proposal, whichever is greater.

Senate Bill 603 would double the deposit fee for filing a recount petition to \$50, \$250, or \$500 per precinct, according to the schedule described above. (The vote differential and percentage thresholds would not be amended.) It would also require a deposit of \$500 per precinct for a recount under the following circumstances:

- A recount petition is filed for a statewide office and there are more than 4,000 votes separating the presumptive winner and the petitioner.
- A recount petition is filed for a statewide primary election and there are more than 1,400 votes separating the presumptive nominee and the petitioner.
- A recount petition is filed for a special or general election for state senate and there are more than 150 votes separating the presumptive winner and the petitioner.
- A recount petition is filed for a special or general election for state representative and there are more than 50 votes separating the presumptive winner and the petitioner.
- A recount petition is filed for a ballot proposal and the number of votes separating the “yes” and “no” votes is more than 75 votes or 5.0% of the total number of votes cast, whichever is greater.

A deposit of \$250 per precinct would apply under the following circumstances:

- A recount petition is filed for a statewide office and the number of votes separating the presumptive winner and the petitioner is more than 2,000 and less than 4,001.
- A recount petition is filed for a statewide primary election and the number of votes separating the presumptive nominee and the petitioner is more than 700 and less than 1,401.
- A recount petition is filed for a special or general election for state senate and the number of votes separating the presumptive winner and the petitioner is more than 75 and less than 151.

- A recount petition is filed for a special or general election for state representative and the number of votes separating the presumptive winner and the petitioner is more than 25 and less than 51.

The bill would also require the SOS to adjust the fees every four years, beginning January 1, 2027, based on the percentage change in the Consumer Price Index for the preceding August and rounded to the nearest \$10. The SOS would have to announce the adjustment by December 15 for each year an adjustment is made.

Senate Bill 603 would provide that the deposit fees are refunded to the petitioner if the recount establishes sufficient error, rather than fraud or mistake, to change the result of the election.

Counter petitions and objections

Currently, for local elections, the clerk of a board of county canvassers must deliver a copy of a recount petition to certain opposing candidates within 24 hours after receiving the petition and the accompanying deposit, and for state-level elections, the SOS must mail a copy of a recount petition to each opposing candidate within 48 hours after receiving the petition and deposit. If a candidate cannot be found, a copy of the petition must be left with an immediate family member at the candidate's last known place of residence or posted in a conspicuous location at that residence if a family member cannot be found.

Senate Bill 603 would require ballot question committees to be notified under these provisions and would require copies of the petition to be provided by email within 24 hours. A petition would no longer have to be left with a family member or at the candidate's residence if a candidate cannot be found.⁵

The bill would also allow ballot question committees to file a counter petition in the same manner as a candidate, and if a ballot question committee did not participate in an election in which a ballot question is on the ballot, any individual who voted in that election could file a recount counter petition in the same manner as a ballot question committee. A clerk would have to refund the counter petitioner's deposit if the recount does not change the result of the election (rather than if the original petitioner does not establish fraud or receive a certificate of election as is currently required).

An opposing ballot question committee could file objections to a recount petition with the BSC or a county canvass board. Any objections submitted by a candidate or ballot question committee would have to be submitted in writing to the BSC or board of county canvassers, as applicable, beforehand in order to be presented at a meeting to consider the objections.

For local recounts, an opposing candidate or ballot question committee would have to file any objections no later than 48 hours after a recount petition has been filed, and a ruling would have to be made within four calendar days after the county canvass board meeting. (Currently, objections must be filed by 4:00 p.m. on the seventh day after a recount is filed, and a ruling must be made within five business days after the meeting.) The bill would also remove a provision requiring a county canvass board to wait at least two business days after ruling on any objections before beginning a recount.

⁵ The SOS could provide the notice either by mail or by email, and the SOS's failure to notify an opposing candidate or ballot committee would not affect the results of the recount.

Recount eligibility and procedures

A recount petition for a local election must be filed with the clerk of the board of county canvassers within *six days* after a county canvass board has completed its original canvass, and a copy must be filed with the SOS within two days after the original petition is filed. SB 603 would instead require recount petitions to be filed within *48 hours* after a county canvass board has certified the canvass and would no longer require a copy to be filed with the SOS.

The SOS would be responsible for establishing the form and manner of communication with a county canvass board to verify if a petition has been filed with the BSC to request a recount of ballots in the same district as a recount petition for a county or district office or proposition.⁶

Currently, a board of county canvassers cannot recount a precinct if any of the following occur:

- The seal on the transfer case or other ballot container is broken or does not match the number on the poll book, if the breaking or discrepancy is not satisfactorily explained to the board and the security of the ballots has not otherwise been preserved.
- The number of ballots to be recounted and the number of ballots issued on election day do not match, and the difference is not satisfactorily explained to the board.
- The seal used to seal the ballot label assembly to a voting device is broken or does not match the poll records, and the ballot labels or rotation of candidates' names is different than what is shown by other devices in the precinct and election commissioner records.

Absentee ballots tallied in a precinct using an absent voter counting board or in a precinct where one or more voting machines are determined to be recountable can be recounted if those ballots are securely packaged and sealed.

The bill would remove these provisions and instead provide that the board of canvassers must recount all ballots in a precinct if both of the following apply:

- The ballots are properly sealed in a ballot container in a manner that does not allow a ballot to be added or removed, and the seal number on the seal is accurately recorded in or on the poll book, ballot container certificate, or statement of results.
- Either the precinct is in balance by matching the number of ballots to be recounted and the number of ballots issued in the precinct as shown in the election records, or the precinct was certified as out of balance during the county canvass and remains out of balance by an identical or fewer number of ballots after review during the recount.

The only documents that a board of canvassers could use to determine whether a precinct can be recounted would be poll books, poll lists, statements of results, ballot container certificates, ballot totals counted by a tabulator, and county canvass notations on the number of ballots and voters in the poll book, affidavits, and tabulator tapes.

If a board of canvassers determines that the ballots of a precinct are not eligible for a recount under those provisions, the board could still conduct the recount if a satisfactory explanation is provided by an election inspector, clerk, or member of the clerk's staff in an affidavit.⁷ An

⁶ The Michigan Election Law provides that a local recount cannot begin until the board of county canvassers determines that an overlapping recount petition has not been filed with the SOS. If such a petition has been filed, the county board must wait for instructions from the BSC before taking further action.

⁷ The SOS would have to prescribe the affidavit form and prepare and issue instructions for a board of canvassers to follow when determining if an explanation is satisfactory.

explanation could not be accepted as satisfactory unless it documents that the security of the ballots is otherwise preserved.

Current law requires ballots from a precinct to be counted and compared with the number of ballots issued on election day during a local recount. If the count does not match, the ballots must be counted and compared a second time, and the ballots cannot be recounted if the totals still do not match. If the second count matches, the ballots are counted and compared a third time, and the ballots cannot be recounted if both the first and third count do not match.

Senate Bill 603 would remove these provisions and provide that a recount is conducted by having one recount clerk call the votes for each candidate or ballot question and two tally clerks record the votes (as is the current required procedure for when the first count or second and third count of the ballots matches the total number of ballots issued on election day), although a recount could be conducted in an alternative manner upon BSC approval.⁸

Local recounts currently must be completed by the thirtieth day (or the twentieth day, if the recount is for a primary election) following either the last day for filing counter petitions or the first day that recounts may lawfully begin. Senate Bill 603 would remove the latter option and generally base the deadline for completing recounts only on the last day for filing counter petitions. However, a recount involving the result of a presidential election would have to be completed and verified before 3:00 p.m. on the sixth day before the presidential electors convene, and if it is not possible to complete and certify the recount before that deadline because of a government-declared emergency or court order, the recount must be completed as soon as possible and no later than 11:59 p.m. on the second day before the electors convene.⁹

Recount vote challenges

The bill would add a new section, 883a, to the Michigan Election Law to allow a candidate or ballot question committee to challenge a county canvass board's determination of whether to count a specific vote for a candidate or ballot question subject to a recount.¹⁰ Before the recount is completed, the board of county canvassers would have to hear arguments on the challenges and decide whether to accept or reject a challenge using the same criteria as for the original counting of the votes.

An aggrieved candidate or committee could appeal the decision to the BSC's designated supervisor, who could confirm, reject, or modify the county canvass board's decision. A candidate or ballot question committee that disagrees with the representative's resolution could petition the BSC for a de novo review (a review without consideration of a previous decision) of the challenge by filing a petition disagreeing with the resolution and specifying the substance of the challenge before the county canvass board completes its recount. The BSC could only accept petitions for a de novo review of challenges concerning the determination of how a specific vote is counted.

⁸ Currently, one watcher and one tallier can be present at each table to check the work of the recount clerks. SB 602 would still allow two individuals at the table but would not specify their duties.

⁹ Federal law requires Electoral College electors to meet on the first Tuesday after the second Wednesday in December.

¹⁰ This section would replace section 871a, which provides the current procedures for challenges during a recount. Another provision of the bill would specify that authorized recount observers and a candidate or ballot question committee's counsel may also challenge a vote during a recount.

Upon receiving the petition, the designated supervisor would have to make an exhibit that details the resolution and includes the ballot, which would have to be securely sealed in an exhibit envelope maintained by the supervisor. The supervisor would also have to provide the county clerk with a receipt for the challenged ballot. The BSC would have to notify all involved candidates and ballot question committees of the date the BSC will meet to consider the petition in the same manner that notice of the recount was given. The BSC would have to allow the candidates and ballot question committees to present oral and written arguments on the challenges at the meeting, and the board could rule on the challenge at the meeting only if the total number of challenges submitted could change the result of the election.

Additional provisions

The bill would specify that for the purposes of Chapter XXXIII, “precinct” would mean an election day precinct, absent voter counting board, or a precinct at an early voting site. It would also amend other provisions of the Michigan Election Law to reference “election materials” rather than specific items such as ballot boxes and poll books.

Currently, when conducting a recount for a legislative office, the BSC must preserve the ballots until the contest is disposed of under the rules of the legislative body that takes office immediately following the contested general election. For a special legislative general election, ballots must be preserved until the contest is disposed of under the rules of the legislative body serving at the time the recount is concluded and filed with the legislative body. SB 603 would remove these provisions.

Finally, the bill would repeal the following sections of the Michigan Election Law:

- Section 871a, which pertains to procedures for challenging a vote during a recount.
- Section 872, which empowers county canvass boards to investigate fraud for recounts over which they have jurisdiction and to refer any findings to the relevant prosecutor and judge.
- Section 877, which allows for a review and correction of an apparent error in the election returns by a circuit court.
- Section 885, which authorizes the BSC and county canvass boards to subpoena individuals for any purpose in connection with a recount.¹¹
- Section 886, which requires individuals to receive the same compensation and mileage as witnesses in circuit courts.¹²
- Section 891, which requires recounts conducted by the BSC to be conducted in the same manner as those conducted by county canvass boards.

MCL 168.2 et seq.

Senate Bill 604 would amend the sentencing guidelines chapter of the Code of Criminal Procedure to reflect the changes to the Michigan Election Law proposed by Senate Bill 603.

Currently, misconduct of an election employee in a county or local recount is a Class E felony against the public trust punishable by a statutory maximum of five years.

¹¹ SB 603 would retain a county canvass board’s power to subpoena an individual if they do not fulfill the board’s request to provide election materials.

¹² This provision would be included elsewhere in the bill.

Under the bill, this penalty would instead apply for interfering with a recount or activities relating to a recount.

The bill cannot take effect unless Senate Bill 603 is also enacted.

MCL 777.11d

BACKGROUND:

The fee schedule for recounts was last amended by 2018 PA 130, which created a tier of recount fees at \$250 per precinct if the winner and loser were separated by more than 75 votes or 5.0% of the total number of votes cast, whichever was greater.¹³

FISCAL IMPACT:

Senate Bill 603 would potentially reduce election recount requests and provide additional deposit revenue for conducting election recounts. The bill would double existing petition deposits and allow the deposit in subsequent years to increase according to the Consumer Price Index. In cases where recounts do not change the result of the election, the deposit increases would offset part, but in some cases not all, of the costs to the state and local units of government of conducting the recount. Fiscal impacts to the state and local units of government would vary and depend on the number of recount petitions filed, the vote differential in the election being recounted, whether the recount is conducted by hand or machine, the number of precincts recounted, and finally the outcome of the recount.

There are 4,672 precincts in Michigan, not including absentee precincts, as of the 2022 Biennial Precinct Report. The average number of precincts per city in Michigan is eight. An analysis of the 2016 presidential election found that the average per-precinct cost would have been \$465 if conducted by hand.

In addition to increased revenue from filing deposits, the bill could reduce the number of election recounts, and associated costs, due to the increased cost of filing deposits as well as the bill's exclusion of fraud as a basis for requesting a recount.

The number of criminal convictions that would result under provisions of Senate Bill 603 is not known. New felony convictions for individuals interfering with a recount or activities related to a recount would result in increased costs related to state prisons and state probation supervision. In fiscal year 2023, the average cost of prison incarceration in a state facility was roughly \$48,700 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$5,400 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. The fiscal impact on local court systems would depend on how provisions of the bill affect court caseloads and related administrative costs. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

¹³ See: <https://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/pdf/2017-HLA-0290-90F7A587.pdf>.

Senate Bill 604 is a companion bill to Senate Bill 603 and would amend the sentencing guidelines chapter of the Code of Criminal Procedure to include the proposed new felony of interfering with a recount or activities relating to a recount, as a Class E felony punishable by a statutory maximum of five years. The bill would not have a direct fiscal impact on the state or on local units of government.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.