

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Tuesday, January 10, 2006
Viking Room, International Inn
Minot, North Dakota

Senator Stanley W. Lyson, Chairman, called the meeting to order at 1:00 p.m.

Members present: Senators Stanley W. Lyson, Carolyn Nelson, John T. Traynor, Constance Triplett; Representatives Ron Carlisle, Dawn Marie Charging, Duane DeKrey, Lois Delmore, Dennis Johnson, Joyce Kingsbury, Lawrence R. Klemin, William E. Kretschmar, Shirley Meyer

Members absent: Representatives Kathy Hawken, Kim Koppelman

Others present: See attached appendix

It was moved by Senator Nelson, seconded by Representative DeKrey, and carried on a voice vote that the minutes of the November 21, 2005, meeting be approved.

Chairman Lyson offered the committee's congratulations to Representative Charging for her appointment as vice chairman of the National Conference of State Legislatures Native American Legislative Caucus.

Chairman Lyson recognized Senator David O'Connell and Representative Matthew M. Klein, members of the Legislative Council, who were in attendance.

COMMISSION ON LEGAL COUNSEL FOR INDIGENTS UPDATE

Chairman Lyson called on Ms. Robin Huseby, Executive Director, Commission on Legal Counsel for Indigents, for testimony regarding the status of the commission. Ms. Huseby said the Commission on Legal Counsel for Indigents took over the indigent defense duties for the state on January 1, 2006. She said she has been working on the financial operation of the commission's budget with the Supreme Court and the Office of Management and Budget. She said because of the lack of attorneys who are willing to take an indigent defense contract in certain parts of the state, the commission made the decision to open three public defender offices. She said the offices will be located in Minot, Dickinson, and Williston. She said she is working on determining the costs of those offices and how those costs compare to using contract attorneys.

In response to a question from Representative Delmore, Ms. Huseby said the Minot office will have three attorneys, one paralegal, and one support staff person and the Dickinson and Williston offices will

each have two attorneys and one support staff person. She said all positions will be classified state employees. She said she is working on securing office space in each location. She said there is still one position to fill on the commission. She said the commission members are Mr. Joseph Maichel, Chairman, Ms. Jonal Holt Uglem, Mr. Bruce D. Quick, Representative Duane DeKrey, Senator Thomas L. Trenbeath, and Mr. Thomas R. Ribb.

In response to a question from Senator Traynor, Ms. Huseby said there is not a shortage of contract attorneys in the Devils Lake area.

In response to a question from Representative Carlisle, Ms. Huseby said the three cities selected for public defender offices represent a large geographical area.

In response to a question from Representative Meyer, Ms. Huseby said she would provide to the committee a copy of the American Bar Association's *Criminal Defense Standards*.

Representative DeKrey said the 2005 legislation gave authority to the commission to hire public defenders as it deemed necessary.

EMINENT DOMAIN STUDY

Chairman Lyson called on Mr. Francis G. Ziegler, Department of Transportation, for testimony regarding the department's use of eminent domain. Mr. Ziegler said the department acquired 1,791 parcels for highway purposes between October 15, 2000, and October 15, 2005. He said 75 of those parcels had to be condemned to be acquired. He said all of the other parcels were acquired through negotiation without the need to file condemnation paperwork with the courts. He said the condemned parcels represented 32 ownerships and an appraised value of \$940,220.32. He said the department did not go to trial to resolve any condemnations in the five-year period. He said only three cases are pending. He said these cases may or may not end up in trial. He said the department uses the eminent domain process as a last resort to keep projects on track.

Mr. Ziegler said the department does not know how far-reaching the interpretation of the economic development language in the initiated measure might be but the department does have some concern that the language may affect some future local economic development projects that also involve roadways.

He said the department has provided federal funding for local roadways leading to facilities that are created for the purpose of economic development. He said the department often uses the term "economic development" in the environmental document that defines the fundamental purpose and need of a project. He said the department's vision is "great ways, safe ways, promoting economic growth."

Mr. Ziegler said the department understands that the initiated measure is not intended to exclude condemnation for constructing roads and bridges or for conducting a common carrier or utility business but the department does have some concerns and questions regarding public activities, including transportation systems, which may be construed as relating to an economic development purpose. He submitted written testimony and a brochure on public information for highway and street projects, copies of which are on file in the Legislative Council office.

In response to a question from Representative Delmore, Mr. Ziegler said one of the pending cases involves land for the new Memorial Bridge in Bismarck. He said the department is currently in negotiations with the landowner. He said another pending case involves a landowner on a Highway 281 project.

In response to a question from Representative Klemin, Mr. Ziegler said the department uses the quick-take procedure to acquire land. He said the department deposits money with the clerk of district court and then proceeds with negotiations. He said the issue is not whether the department can take the property but rather what the property is worth. He said to obtain matching federal funds, each project must have an environmental document. He said "economic development" is a term used in the environmental document.

In response to a question from Senator O'Connell, Mr. Ziegler said of the parcels acquired since 2000, none have gone to trial. He said all cases have been resolved by negotiation. He said the department has gone as high as 25 percent above the appraised value to obtain a parcel of land.

In response to a question from Representative Kretschmar, Mr. Ziegler said economic development is a big part of most projects.

In response to a question from Senator Traynor, Mr. Ziegler said the money deposited with the clerk of district court remains with the court until the case is settled by trial or negotiations. He said the department has provided funding for roads that lead to the pasta and corn processing plants in the state. He said the department always offers just compensation in its negotiations with landowners.

In response to a question from Representative Johnson, Mr. Ziegler said the reason the three pending cases have not been settled is the amount of money, not the landowner's objection to the project.

In response to a question from Representative Klemin, Mr. Ziegler said the department is concerned

that if the initiated measure passes, a court may not allow eminent domain to be used if economic development issues are raised.

In response to a question from Senator Traynor, Mr. Ziegler said the department plans to replace wetlands acre for acre on the Highway 2 project. To date, he said, the department has found willing sellers. He said the department may have to buy land beyond the right of way in order to meet the requirements.

Chairman Lyson called on Mr. Robert L. Timm, Minot, for testimony regarding the eminent domain study. Mr. Timm said the current law needs clarification. He said he is concerned that after finding the perfect home for his family, he could lose it to eminent domain for economic development. He said he is against the taking of land for economic development purposes. He said the ability of government to take land for economic development may affect whether someone would decide to relocate to North Dakota. He said it may be necessary for real estate agents to disclose whether they are aware of an area that is going to be commercially developed.

In response to a question from Senator Lyson, Mr. Timm said he does not want homeowners to be forced to sell their homes and leave the area for economic development reasons.

Chairman Lyson called on Mr. Clair Watne, Minot, for testimony regarding the eminent domain study. Mr. Watne said the phrase at issue in the *Kelo* decision is "public use." He said the proposed initiated measure clarifies that land cannot be taken for economic development. He said the issue that has been raised is whether excess property taken by eminent domain can be resold for private use. He said it is the opinion of Mr. Casey Chapman, an attorney for the North Dakota Association of Realtors, that if the government takes property for public use and there is residual property, the government can resell the excess to the highest bidder. He said the Minot city attorney concurs with Mr. Chapman's conclusion. He said the initiated measure will not cause problems with reselling residual property. He said perhaps an Attorney General's opinion should be requested on the issue. Mr. Watne submitted a copy of the opinion written by Mr. Chapman, a copy of which is on file in the Legislative Council office.

Senator Lyson said he understands that city attorneys from Grand Forks and Fargo disagree that residual property can be resold for private use.

Chairman Lyson called on Mr. Emanuel Culman, New Town, for testimony regarding the eminent domain study. Mr. Culman said he went through an eminent domain proceeding in Los Angeles before moving to North Dakota. He said he received a letter of condemnation without any opportunity for a hearing. He said he and his neighbors held up the project for six months with demonstrations and a public relations campaign. He said the result was no trust in the government. He said it was a huge

letdown in civic responsibility on the part of the people involved. He said North Dakota's eminent domain laws seem to narrowly come down on the side of the landowner. He said North Dakota actually embraces the people whose land is to be taken and gives them a say in the process. He said he is impressed with the involvement of the community and the landowner.

COMMITTEE DISCUSSION

Chairman Lyson said the chairman of the Legislative Council denied the committee's request to form a subcommittee to meet with the members of the initiated measure's sponsoring committee to discuss certain issues with the measure. He said members of the Judicial Process Committee may meet with members of the sponsoring committee on their own. He said the Attorney General has told him that it would not be proper for the Attorney General to give an opinion on the pending measure.

Representative Kretschmar said if the initiated measure passes, the Legislative Assembly may want to consider defining the term "economic development." He said even the taking of property for a highway project involves some economic development. He said there is probably some element of economic development in every project.

Senator Lyson said the debate on the eminent domain issue seems to indicate there is a lack of trust in the Legislative Assembly and local government.

In response to a question from Representative Carlisle, committee counsel said the petition certification deadline for the initiated measure to appear on the ballot in the June 13, 2006, primary election is March 14, 2006. She said the petition certification deadline for the initiated measure to appear on the November 7, 2006, general election ballot is August 8, 2006.

In response to a question from Senator Nelson, Mr. John D. Olsrud, Director, Legislative Council, said the charge of the committee is to study and hold hearings on the eminent domain issues and to report to the Legislative Council. He said the next scheduled meeting of the Legislative Council will be in November. He said there is not a time or formal process for a report before then. He said the purpose of the hearings is to provide a forum for public comment since the initiated measure process does not have that mechanism.

In response to a question from Senator Nelson, Mr. Olsrud said the preparation of a facts and concerns sheet on the initiated measure for distribution to the public may need the Legislative Council chairman's approval under the rules of the Legislative Council.

In response to a question from Representative Charging, Mr. Olsrud said all committee members have the right to speak as individuals but as a body they are limited in authority.

In response to a question from Representative Klemin, Mr. Olsrud said the reporting requirement of this committee with respect to the eminent domain study is not any different from any other study. He said the Legislative Council could call a special meeting for the purpose of receiving a report on the eminent domain study but the next regularly scheduled meeting for receiving reports of committees is in November.

Representative Meyer said any document of facts and issues would be open to interpretation. She said at this point the information that has been received is only opinion.

Senator Triplett said the document could be just a summary of concerns. She said the document could make people aware of the concerns that were raised.

Representative Klemin said the report of the committee should reflect any recommendations or consensus that was reached by the committee.

Representative Carlisle said the committee should let the initiated process work. He said once the measure is officially on the ballot, all entities involved on all sides of the issue will make their opinions known to the public.

Representative DeKrey said the initiated measure process is the people's business. He said the process is guaranteed to the people by the Constitution of North Dakota. He said the Legislative Assembly should take a "hands off" approach with respect to the initiated measure process. He said the committee should be very careful about providing any kind of factsheet or opinions or even a committee vote regarding which way the committee is leaning. He said the public started the initiated measure process and it is the public's right to finish it.

Senator O'Connell said it is the responsibility of the sponsoring committee to promote the members of that committee's position and it is the responsibility of those who oppose the measure to organize and make their position known.

Representative Delmore said the Judicial Process Committee has done its part by holding public hearings. She said the minutes of these meetings are public records from which citizens may develop their own opinions. She said members of the media know their role in getting the information out.

Mr. Olsrud said the Constitution of North Dakota contains a provision that limits the Legislative Assembly from hampering, restricting, or impairing the initiated measure process. He said providing information would probably not be considered hampering, restricting, or impairing but if it appeared that the committee or the Legislative Assembly was actually a party to the process, an argument could be made that the Legislative Assembly was interfering in the process.

Representative Charging said if the measure does not pass, the hearing process will provide valuable information for the Legislative Assembly.

Representative Klemin said perhaps there needs to be a clarification of the committee's duties.

Chairman Lyson said he is considering the possibility of conducting another hearing in Dickinson on eminent domain issues.

No additional business pending, Chairman Lyson adjourned the meeting at 2:30 p.m.

Vonette J. Richter
Committee Counsel

John D. Olsrud
Director

[ATTACH:1](#)