

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

LEGISLATIVE COUNCIL

Monday, September 11, 2006
Brynhild Haugland Room, State Capitol
Bismarck, North Dakota

Senator Bob Stenehjem, Chairman, called the meeting to order at 1:15 p.m.

Members present: Senators Bob Stenehjem, Dick Dever, Ray Holmberg, Aaron Krauter, Karen K. Krebsbach, Stanley W. Lyson, David O'Connell, Larry J. Robinson; Representatives Rick Berg, Al Carlson, Lois Delmore, William R. Devlin, Scot Kelsh, Matthew M. Klein, Joe Kroeber, Chet Pollert

Member absent: Representative Merle Boucher

Others present: [See Appendix A](#)

It was moved by Senator O'Connell, seconded by Senator Robinson, and carried on a voice vote that the minutes of the September 8, 2005, meeting be approved.

OPENING REMARKS

Chairman Stenehjem said the purpose of the meeting is to fulfill the Legislative Council's statutory responsibility to coordinate the determination of the estimated fiscal impact of initiated measures. He said in 2005 the Legislative Assembly enacted North Dakota Century Code (NDCC) Section 16.1-01-17, which requires the Legislative Council to hold hearings, receive public testimony, and gather information on the estimated fiscal impact of initiated measures. He said this law resulted from the passage of an amendment to the state constitution in 2004 which permits the Legislative Assembly to provide by law a procedure through which the Legislative Council may establish an appropriate method for determining the fiscal impact of an initiative measure and for making the information regarding the fiscal impact of the measure available to the public.

Chairman Stenehjem said the Secretary of State has notified the Legislative Council office that two initiated measures qualify for the general election ballot--an initiated constitutional measure relating to the taking of private property and an initiated statutory measure relating to child custody and support. He said the procedure for obtaining fiscal impact information basically will be the same as that followed during legislative sessions--those state agencies determined to have either the best information on the impact of a measure or the primary responsibility for compiling and maintaining the information that is needed have been invited to present their findings at this meeting. He emphasized that the only purpose for holding this meeting is to meet the Legislative Council's statutory responsibility to obtain fiscal

information on each measure and the Council is not holding this meeting to hear testimony on the merits of either measure. He said the Council will first hear from the Department of Transportation on the estimated fiscal impact of the measure that would place additional limitations on the taking of private property.

INITIATED MEASURE REGARDING TAKING OF PRIVATE PROPERTY

This initiated measure amends Article I, Section 16, of the Constitution of North Dakota which relates to the taking of private property for public use. This language is added to the section:

For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.

Mr. Grant Levi, Interim Director, Department of Transportation, presented information on the estimated fiscal impact of this measure. He distributed copies of the fiscal note requested of the department, a copy of which is attached as [Appendix B](#).

Mr. Levi said the Department of Transportation purchases property following state and federal laws that require the department to pay just compensation for the property. As transportation projects are built, he said, it may be possible that someone may challenge the project as being exclusively for economic development in which case there may be some administrative costs. He said the department has no way to determine what those costs may be before they are incurred.

Representative Carlson asked about the impact of the measure on the taking of property for extension of a street project that recognizes increased traffic flow to an economic development project, such as a large retail center, but plans change and the retail center is not built. Mr. Levi said the department would proceed with the project if there is a transportation need. If a project provides transportation infrastructure that is primarily related to economic development, he said,

the department would work with the landowner and if the landowner would not agree to sell the land, the department would not proceed with the project if other transportation needs are not present.

Mr. Shane C. Goettle, Commissioner, Department of Commerce, presented information on the estimated fiscal impact of this measure. He distributed copies of the fiscal note requested of the department, a copy of which is attached as [Appendix C](#).

Mr. Goettle said it is not possible to estimate the fiscal impact of this measure because it is unknown how many potential economic development projects could be affected. He said the department does have a fair degree of certainty that the state fiscal impact with respect to expenditures and appropriations is zero.

Mr. Jerry Hjelmstad, North Dakota League of Cities legal counsel, distributed a prepared statement, a copy of which is on file in the Legislative Council office.

Mr. Hjelmstad said the possible fiscal impacts on cities of the language, excluding public benefits of economic development from an allowed public use, are (1) there could be an increase in the cost of acquiring property for economic development (if the property could be acquired at all); and (2) there could be a loss of benefits associated with an economic development project.

Mr. Hjelmstad said the possible fiscal impacts on cities of the language prohibiting the taking of private property for the use of or ownership by any private entity, except for property necessary for conducting a common carrier or utility business, are:

- Property acquired by a city through eminent domain could never go back into private ownership, which would mean more tax-exempt public property.
- Property acquired by a city through eminent domain would remain city property even when no longer needed for the original purpose, which would result in perpetual costs for the city.
- Cities would not be able to use eminent domain for most urban renewal projects because such development is done primarily by private enterprise, which could result in a declining tax base.
- There could be an increase in the cost of acquiring property for urban renewal (if the property could be acquired at all).

Ms. Heidi Heitkamp, representing C-RED, spoke on the merits of this measure. She said she agrees with the Department of Transportation that there could be additional costs if a person challenged a project as being primarily for economic development. She said she disagrees with the interpretation of the League of Cities that a portion of land taken by eminent domain which is not used for a project must be kept in perpetuity. She said there is no language that requires land not required for a legitimate project to be kept by the public entity.

In response to a question from Representative Klein about the delays that could be caused to project construction, Ms. Heitkamp said whenever a person challenges the taking of property, a project will be delayed.

INITIATED MEASURE ON PARENTING PLANS AND CHILD CUSTODY AND SUPPORT

This initiated measure enacts North Dakota Century Code Section 14-09-06.7 to provide that parents retain joint legal and physical custody of their children unless a parent has been denied custody by being declared unfit by clear and convincing evidence, to require parents to develop a joint parenting plan, to require the court to facilitate production of a parenting plan if the parents cannot agree, to provide that parents who previously have not had a fitness hearing may petition the court for a fitness hearing at any time, and to provide that child support payments may not be greater than the actual cost of providing for the basic needs of the child.

Ms. Sally Holewa, Supreme Court Administrator, presented information on the estimated fiscal impact of this measure. She distributed copies of the fiscal note requested of the Supreme Court, a copy of which is attached as [Appendix D](#).

Ms. Holewa said three provisions of this measure could have a significant impact on the judiciary--court involvement in developing a joint parenting plan, court involvement in making findings that parents are unfit, and court involvement in determining actual costs of providing basic needs of children.

Ms. Holewa said court-facilitated mediation is a requirement of the initiative. She said it would not be appropriate for judges to assume the role of mediator as well as adjudicator. She said the estimated cost of \$2,057,000 for the 2007-09 biennium is to recruit and train 11 mediator units (1 mediator and 2 support staff per mediator), with 1 mediator in each of the seven judicial districts and an additional mediator in Williston, Bismarck, Grand Forks, and Fargo. She said the addition of court-sponsored mediator units will have an impact on the counties, as counties are required to provide adequate facilities for the courts.

Ms. Holewa said the courts will be involved in determining fitness to parent if parents are unable to reach agreement. She said 85 percent of parties currently reach agreement without requiring trials but to some degree this is because child support levels are known. She said this measure leaves this issue open to argument. She said there could be confusion as to joint parenting and how parenting time issues are resolved which may result in increased court intervention when disputes arise. She said cases currently can be reopened if the parties can show substantial change in circumstances or danger to the child. She said the initiated measure removes these basic thresholds and grants a hearing by right and it is

unknown how many litigants will seek a hearing on change of custody as a matter of right.

Ms. Holewa said weighted caseload studies show a current statewide judge shortage of five judges but the judicial system is not prepared to ask for additional judgeships until the trends in locations where additional judges are necessary are discerned. She said it would be premature to add additional judges now because there is not a sense of how many more hearings will result under this measure or the average length of the hearings. She said weighted staffing studies show a deputy clerk shortage of seven clerks statewide. She said additional deputy clerk staff has not been requested this biennium because it is hoped some of the shortage can be alleviated by sharing staff between counties.

Ms. Holewa said if this measure passes, the judicial system may need to request additional judge units and deputy clerks in the 2009-11 biennium--how many and where they will be located will depend upon the actual impact of this measure. She said the estimated costs in the 2009-11 biennium of \$2,497,000 to \$5,741,000 and in the 2011-13 biennium of \$2,622,000 to \$6,028,000 reflect additional judgeships and court clerks and involve ranges due to uncertainties as to the impact of the measure on judicial workload.

Ms. Brenda Weisz, Chief Fiscal Officer, Department of Human Services, presented information on the estimated fiscal impact of this measure. She distributed copies of the fiscal note requested of the department, a copy of which is attached as [Appendix E](#). She also distributed copies of letters from Mr. Thomas F. Sullivan, Regional Administrator, United States Department of Health and Human Services, to Senator Tom Fischer and to Ms. Carol K. Olson, Executive Director, North Dakota Department of Human Services, copies of which are on file in the Legislative Council office.

Ms. Weisz said based on the language of the initiated measure, the state's compliance with federal regulations could be compromised. She referred to the letters from Mr. Sullivan which point out that North Dakota must have an approved state IV-D plan to receive federal funding for operation of its child support enforcement program. Mr. Sullivan's letters specifically refer to the federal regulation that child support guidelines must at a minimum take into consideration all earnings and income of the noncustodial parent. The letters also note that an approved state IV-D plan is a requirement for block grants under the temporary assistance for needy families (TANF) program.

Ms. Weisz said the fiscal note identifies the total amount of federal funds that could be withheld for the child support enforcement program, including the funds matched by state and county expenditures and state and county child support incentives, and the loss of TANF money--\$71,106,009 for the 2007-09 biennium, \$71,938,036 for the 2009-11 biennium, and \$73,103,567 for the 2011-13 biennium. She said the

fiscal note reflects a worst-case scenario, i.e., loss of all federal funds. Ms. Weisz said the estimated figures for the 2009-11 and 2011-13 bienniums are based on 3 percent inflation each year. She said the final determination as to the effect of the measure on federal program requirements is a federal determination.

Ms. Weisz said there also would be an impact on counties due to increased staffing needs at the regional child support enforcement units and the county social services offices. She said the increased staffing needs are due to additional staff time needed on future cases, home studies related to fitness hearings, and reprocessing existing cases to include parenting plans.

Mr. Terry Traynor, Assistant Director, North Dakota Association of Counties, distributed prepared testimony, a copy of which is on file in the Legislative Council office. He said this measure potentially opens all 50,000 current child support cases for reprocessing. He said anecdotal evidence suggests 30 percent of child custody cases are contentious. He said the current county cost of child support enforcement administration is \$4 million per year. He said if only 30 percent of existing support cases would need to be reprocessed in the first year, the added caseload could cause an increase in the county cost of child support enforcement administration of \$1 million per year. He said the regional child support enforcement agencies would need to increase their current staffing.

Mr. Traynor said this measure affords every parent the opportunity to request a hearing regarding the fitness of the other parent. He said it is anticipated that numerous hearings will need to be scheduled and staffed by court workers in each county. He said 68 clerks of court staff members in 41 counties are county employees. He said applying the 30 percent ratio to fitness hearings would result in hearings that could require an additional 10 full-time equivalent employees at a cost of \$400,000. He said increased numbers of staff also will add pressure for courtroom expansion.

Mr. Traynor said the fitness hearings raise another funding concern for counties. He said if fitness is questioned, the county will be required to complete a home study for the court and if only half of the 30 percent of the 8,000 new cases per year require a home study, the cost to counties could exceed \$500,000 per year. He said a means to influence the determination of parental fitness is allegations of child abuse and neglect. He said counties are responsible to conduct child abuse and neglect assessments and each assessment costs county taxpayers about \$500. Assuming 2 of 10 fitness hearings will include an allegation of child abuse or neglect, he said, would increase costs to counties by \$300,000.

Mr. Traynor said there also could be increased county expense for economic assistance administration and programs for foster care of children. Summarizing his testimony, he said, the

total of all costs to counties could be in excess of \$3 million per year.

In response to a question from Representative Devlin, Mr. Traynor said even if the federal funds for the state's child support enforcement program are not at risk, the \$3 million increased annual cost to counties would still be valid.

Mr. Tom Tupa, Executive Director, North Dakota Association of Social Workers, distributed prepared testimony, a copy of which is on file in the Legislative Council office. Mr. Tupa said at least eight systems would be impacted fiscally by this initiated measure:

1. Child care system.
2. Criminal justice system.
3. Educational system.
4. Family system.
5. Judicial system.
6. Legal system.
7. Medical system.
8. Private social services delivery system.

Mr. Tupa said much of the impact will result from more high-conflict divorces, more problem-behavior children, and more parties under stress. He said this measure shifts the factors in child custody determinations from "in the best interest of the child" to "the rights of the parents."

Mr. Mitchell Sanderson, chairman of the sponsoring committee of the measure, distributed a report entitled *Individual and Social Costs of Divorce in Utah* authored by Mr. David G. Schramm, Auburn University; written testimony of Mr. Sean E. Brotherson, submitted to the interim Judiciary Committee at its March 20, 2006, meeting; and a paper entitled *General Comments on Initiative for 14-19-06.7* by R. Mark Rodgers dated June 6, 2006. Copies of these documents are on file in the Legislative Council office.

Mr. Sanderson said members of the sponsoring committee believe there will be a reduction in court costs because there will be less conflict in child custody cases, fewer cases, and reduced security requirements. He said there is no way anyone can quantify the caseload resulting from this measure. He said the intent of the committee is to get the courts out of the family law arena.

Mr. Sanderson said it is not definite that the state is in jeopardy of losing federal funds. He said the letter from Mr. Sullivan, a federal official, is out of bounds, trying to scare legislators and others. He said the testimony of others is based on a worst-case scenario but people should look at the best-case scenario. He said studies show that shared parenting reduces costs.

In response to a question from Representative Devlin, Mr. Sanderson said other states allow shared parenting but the shared parenting concept is new in those states and studies have not been done as to the cost-savings.

In response to a question from Representative Devlin, Mr. Sanderson said the court would not be involved in developing the parenting plan. He said the

plan would be worked out between the parties and their attorneys and the judge would merely sign the agreement. He said courts are currently involved when there is no agreement so any failure to reach agreement should not increase court workload.

In response to a question from Representative Devlin, Mr. Sanderson said basic needs are food, clothing, and shelter. He said the courts do not need to get involved in personal financial matters.

In response to a question from Senator Dever, Mr. Sanderson said he has not quantified the savings to North Dakota. He said it is difficult to come up with numbers because everything is so speculative.

Mr. Lawrence King, President, State Bar Association of North Dakota, distributed prepared testimony, a copy of which is on file in the Legislative Council office. He said this measure would have a direct impact on family law and the delivery of legal services in North Dakota. He said 80 to 95 percent of divorce cases settle without the necessity of a trial, primarily because current child support guidelines are well-defined, leaving little room left for dispute, and child custody is determined based on the best interests of the child, which is well-defined through statute and case law. He said this measure dramatically alters these two areas--by changing child support to actual costs of providing basic needs and by requiring joint physical custody of children by equal time-sharing by the parents. He said substantial litigation will result as to what is "basic" and what is a "need." He said significant litigation also will occur when one parent tries to avoid equal sharing by having the other parent declared unfit. He said lawyers who work in the family law area believe this measure will result in a significant increase in family law business.

COMMITTEE DISCUSSION

Chairman Stenehjem reviewed that portion of NDCC Section 16.1-01-17 which requires the agencies that provided fiscal notes to submit a report to the Legislative Council within 30 days after the close of the first complete fiscal year (June 30, 2008) after the effective date of an initiated measure on the actual fiscal impact for the first complete fiscal year and a comparison to the estimates provided to the Legislative Council.

Chairman Stenehjem called on the director who said this was the first use of NDCC Section 16.1-01-17. He said the information provided by the state agencies will be compiled by the Legislative Council staff and the staff will not revise figures but will follow the law. Under the law, by October 8, the Legislative Council is to submit to the Secretary of State the fiscal information presented to the Legislative Council.

In response to a question from Representative Carlson, Senator Stenehjem said the numbers used in the report will be the numbers submitted by state agencies. He said NDCC Section 16.1-01-17 provides that the Legislative Council is to receive

fiscal impact information from agencies, institutions, or departments and to submit a statement of the estimated fiscal impact of the measure to the Secretary of State. He said if additional information is desired from the Supreme Court as to the effect of the initiated measure on child custody and support on counties, the court can be requested to revisit the fiscal note. He said that information should be provided by the court rather than the counties.

The director explained the fiscal note process used during a legislative session relies on information from state agencies. With respect to fiscal impact on political subdivisions, he said, the state agency primarily responsible for information that can be used to provide information on impact on political subdivisions is the entity that prepares the fiscal note. He said an example is the impact of education funding on school districts which is prepared by the Superintendent of Public Instruction.

Representative Carlson said the need is for a number as accurate as possible. He inquired as to whether the Legislative Council could send a note back to an agency for reconsideration. The director said the Legislative Council is within its authority to ask an agency to reconsider its fiscal note but the statute does not provide for the Legislative Council to determine its own figures.

Senator Krauter said his concern is that fiscal information should be complete and whether the fiscal note presented by the Supreme Court included impact on counties. Ms. Holewa said there was no discussion with counties with respect to added costs for anything other than facilities for additional judgeships and court reporters but not added health care and other costs. She said the \$3 million figure by counties is not included in the court's fiscal note.

Representative Berg said this process was valuable for one reason--a public forum was available to have the information on fiscal impact provided. He said the next legislative session may need to revisit this issue. He said the initiative process sometimes results in innovative ideas. He said if the objective is to put the best figures out, this process may need to be revised.

Senator Holmberg said the Legislative Council is put in the position of accepting information presented by agencies but the initiative process is used to give a voice to the people.

Representative Carlson said the statute requires use of fiscal information provided by state agencies and that information is the information that should be included in the report to the Secretary of State.

Representative Devlin said he thought the report should identify the estimated loss of federal funds but should also refer to the sponsoring committee's position that the measure would not result in the loss of federal funds and should save the state funds.

Representative Berg said the choices appear to be to accept the fiscal notes presented by agencies or to delve into the substance of the measures to develop alternative fiscal information.

Senator Krauter said his concern is that people have used the initiative to place an issue on the ballot and the Legislative Council needs to be careful on issuing statements on fiscal impact of the issue.

Senator Stenehjem said NDCC Section 16.1-01-17 basically provides for gathering the fiscal note information and submitting that information to the Secretary of State. He said this does not require the Legislative Council to take a position either way in favoring or questioning the information presented.

It was moved by Representative Carlson, seconded by Representative Klein, and carried on a roll call vote that the Legislative Council accept the fiscal notes prepared on both initiative measures and forward the information to the Secretary of State as provided by NDCC Section 16.1-01-17. Senators Stenehjem, Dever, Holmberg, Krauter, Krebsbach, Lyson, and Robinson and Representatives Berg, Carlson, Delmore, Kelsh, Klein, Kroeber, and Pollert voted "aye." Senator O'Connell and Representative Devlin voted "nay."

No further business appearing, Chairman Stenehjem adjourned the meeting at 3:10 p.m.

Jay E. Buringrud
Assistant Director

John D. Olsrud
Director

[ATTACH:5](#)