

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

Thursday, December 8, 2011
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Lawrence R. Klemin, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Lawrence R. Klemin, Ron Guggisberg, Brenda Heller; Citizen Members Ron Bieri, Don Frye, Shawn Kessel, Jon Martinson, Scott Ouradnik, Richard Riha, Kenneth Yantes

Members absent: Representative Kathy Hawken; Governor's Designee Brandi Pelham

Others present: See [Appendix A](#)

It was moved by Mr. Yantes, seconded by Mr. Frye, and carried on a voice vote that the minutes of the September 7, 2011, meeting be approved as distributed.

DISASTER MITIGATION RESPONSE

At the request of Chairman Klemin, Mr. Greg Wilz, Director, Division of Homeland Security, Department of Emergency Services, presented information ([Appendix B](#)) entitled *Disaster Response and Recovery Potential Gaps and Issues*. Mr. Wilz said Senate Bill No. 2371, which was adopted during the special legislative session in November 2011, was viewed as a bridge to the 2013 legislative session with respect to addressing disaster relief in the state. He said there will not be enough money available to accomplish what should be accomplished for businesses and home acquisitions in the Minot area. He said local governments need staff and expertise to address recovery issues. He said it was his understanding that the Department of Transportation incurred at least \$500,000 in payroll costs in responding to disasters during the spring and summer of 2011, which costs are not reimbursed by the Federal Emergency Management Agency. In addition, he said, the State Board of Animal Health incurred significant costs, particularly considering the relatively small size of the agency. He said using the approach of spending federal funds before state disaster recovery or relief funds often results in delays in getting funding to local governments.

Mr. Wilz said a review of the response and recovery operations during the last year has shown that there are a number of areas that should be addressed. He said evacuations in some areas did not go smoothly, and there will need to be a review of evacuation procedures and requirements. Another area for consideration, he said, is the possibility of providing a state individual assistance program.

Although a state individual assistance program could be viewed as a duplication of a federal service, he said, there are unmet needs that should be studied. He said an unmet needs committee exists to attempt to find programs to help, but the issue needs further study and analysis. Another area to address, he said, is consideration of the use of the state disaster relief fund. He said the fund generally is limited to use for presidentially declared disasters, which limits its use. Another area that merits review, he said, is the liability of the state for property damage in responding to disasters. He said there was a significant amount of personal property damage done by contractors in responding to the flood in Minot for which the state is not liable. He said under state law, there is no state liability unless the Governor directs a taking of property for responding to a disaster.

Mr. Wilz said because there are gaps in federal flood insurance coverage, it is important that insurance agents be educated with respect to the program. He said Section 29 of Senate Bill No. 2371 directs the Department of Emergency Services to coordinate an executive branch study of flood response measures and coordination of state, local, and federal resources to mitigate future flooding in the state. He said the political will and desire to follow through on the recommendations of the study is needed, and there are many things that can be done to mitigate damage. He said it is important to adopt reasonable rules and regulations to address the changing environment. He said flexibility in the use of disaster relief funds is needed.

In response to a question from Mr. Frye, Mr. Wilz said outbuildings are not covered by federal flood insurance because the purpose of the program is to get people back into their homes. However, he said, there are some questions about whether the lack of coverage for outbuildings should be addressed. He said there are many nice shop buildings that are not covered by flood insurance.

In response to a question from Representative Klemin, Mr. Wilz said the Department of Emergency Services has examined the issue of state individual assistance. He said the state could look at adopting a plan similar to the federal individual assistance program and use similar coverage thresholds. He said the intent of the study directed in Senate Bill No. 2371 seems to be a broad directive to study efforts to mitigate future damages. However, he said, the study also will likely examine issues such as

individual assistance and emergency response. He said he is unaware of any private flood insurance that will cover the gaps in the federal flood insurance program. However, he said, there could be secondary programs that would be like insurance but would not affect the federal assistance. He said it is important for local governments to address the problem of people building million dollar homes in areas in which homes should not be located.

Chairman Klemin requested commission counsel to invite a representative of a private insurance company to discuss the availability of private insurance that would supplement the federal flood insurance.

In response to a question from Representative Klemin, Mr. Wilz said most of the individuals in Minot who received federal individual assistance grants received the maximum available. He said similar programs for businesses do not exist, but Small Business Administration loans may be available and certain Bank of North Dakota programs may be accessible to businesses.

Mr. Wilz said no claims have been paid under North Dakota Century Code Section 37-17.1-12. Although inquiries have been made regarding compensation, he said, no claims have been filed and no money has been appropriated to pay any claims.

Representative Klemin said the restrictions upon payment of claims probably should be reduced so that the compensation provisions have some meaning. Combined with the immunity provided under Section 37-17.1-16, he said, the compensation provisions are meaningless.

Mr. Wilz said local governments are the foundation of disaster response, and the state generally would not direct a response action that would have some liability attached to the action.

Representative Klemin said the commission should take a closer look at the liability of the state and local governments with respect to disaster response. He said Section 37-17.1-07 seems extreme in that there are no standards.

Mr. Wilz said the immunity provisions allow the state to get the use of properties by limiting the property owners' liability concerns, except in the case of gross negligence. He said immunity provisions also are necessary to get federal involvement in disaster response. He said federal employees may not be held responsible for liability and should have the same protection as state employees. He said the state is responsible for damages if there is gross negligence.

In response to a question from Mr. Riha, Mr. Wilz said some other states provide individual assistance programs. He said most of those programs are patterned after the federal program but apply in nonpresidentially declared disasters. He said the individual assistance programs are used frequently in some states.

In response to a question from Mr. Bieri, Mr. Wilz said the study being conducted by the department will

examine issues related to evacuation authority for local governments.

Representative Klemin said the Legislative Assembly killed a proposal in 2011 which would have provided incident command authority.

Mr. Wilz said the study may recommend that evacuation authority be given to a local political leader.

OVERSIZED VEHICLE PERMIT FEES AND PENALTIES

Chairman Klemin called on Ms. Linda Svihovec, McKenzie County Auditor, for comments regarding the North Dakota Uniform County Permit System. Ms. Svihovec submitted written information ([Appendix C](#)) regarding the Uniform County Permit System. She said the Uniform County Permit System has been in place for a number of years and has become a revenue source for counties to address the damage done by truck traffic. She said the number of permits issued has increased substantially due to energy development in the western portion of the state. Because of an Attorney General's opinion issued in December 2009, she said, legislation was introduced during the 2011 legislative session which would have allowed counties to retain fees generated as a result of enforcement of oversized vehicle violations. However, she said, the Legislative Assembly did not adopt the proposed change.

Ms. Janet Sanford, North Dakota Uniform County Permit System, said the Uniform County Permit System allows trucking companies to self-issue permits or order online permits for overweight or oversized trucks traveling on county roads. She said electronic permits can be purchased in advance, and the funds generated are distributed to the counties on a monthly basis. When a company uses self-issuing permits, she said, the company is billed at the end of each month, and the bills are paid directly to the affected counties. She said each county has the responsibility to collect the funds due.

In response to a question from Representative Klemin, Ms. Sanford said if payments are not being submitted, the counties may seek help in the collection process.

Ms. Svihovec said collection of the fees is a responsibility of each county. She said a county may stop issuing permits to an operator that has not paid fees. However, she said, most companies have been good at paying the amounts due.

In response to a question from Representative Klemin, Ms. Svihovec said the original intent of establishing the uniform system was to track who was responsible for road damage. She said she never anticipated how the system would grow. She said the system is a method through which to see where traffic is increasing and where the impacts are. She said the funds collected are helpful in mitigating some of the road damage.

In response to a question from Mr. Riha, Ms. Svihovec said enforcement of oversized and overweight laws vary by county, depending upon the resources available for enforcement. Because the fine for being overweight is only \$100, she said, it can be cheaper at times to operate overweight and pay the fine. She said the fine is transferred to the state even if the county is responsible for the enforcement and the county roads are sustaining damage.

At the request of Chairman Klemin, commission counsel distributed a copy ([Appendix D](#)) of the December 2009 Attorney General's opinion; Article IX, Section 2, of the Constitution of North Dakota; Section 29-27-02.1; and 2011 House Bill No. 1042, as introduced.

Representative Klemin said the commission should not duplicate the work done during the last interim but should focus on questions that need to be answered. He said one question is whether the \$100 fine for operating an overweight vehicle is sufficient.

Ms. Svihovec said the significant question is whether extraordinary road fees should be kept by the county or go to the state.

In response to a question from Representative Heller, Ms. Sanford said the permit fees are established by the counties, and the uniform system has established an advisory committee to review the fee structure.

In response to a question from Representative Klemin, Ms. Svihovec said counties have continued to enforce overweight violations despite not being able to retain the proceeds of the enforcement and receive nothing for the impact on the county roads.

Ms. Sanford said the impact on county roads is significant because the roads were not built to handle the heavy loads, and county roads must be used to travel to most of the sites impacted by energy development.

In response to a question from Representative Klemin, Ms. Sanford said there appear to have been circumstances in which the state has not allowed overweight loads on state highways for extremely large loads and has redirected that traffic to county roads.

Mr. Ouradnik said he sees no reason to not try to change the law again to allow counties to retain the extraordinary road use fees, especially in light of the state not allowing certain heavy loads on state roads.

Mr. Yantes said there are over 56,000 miles of township roads that are also being used to transport large loads. Because of the damage being done to the roads is far beyond the ability of townships to handle, he said, it is important that the issue of allocation of fees collected be reconsidered.

Chairman Klemin called on Ms. Leanna Emmer, Highway Patrol, for comments regarding permitting of overweight and oversized vehicles. Ms. Emmer submitted written information ([Appendix E](#)).

In response to a question from Mr. Kessel, Ms. Emmer said if an overweight or oversized vehicle is stopped on a state road within the limits of a city

and on which road the city performs the maintenance, any extraordinary road fees collected go to the state.

In response to a question from Representative Klemin, Ms. Emmer said the permit fees for oversized and overweight vehicles on state roads range from \$20 to \$70. She said if the vehicle is also driven on county roads, a county permit is also required. She said the state has the discretion to deny a permit, but every effort is made to help get the oversized vehicles to the final destination. She said if a load is going to be significantly overweight, the permit may not be issued until the roadbed freezes. She said she is unaware of any initiatives to change the state permit fee charges.

In response to a question from Mr. Frye, Ms. Emmer said the Highway Patrol does not regularly deny permits so that the loads are diverted to county roads. However, she said, the state will deny permits if necessary to protect infrastructure.

Chairman Klemin called on Mr. Terry Traynor, Assistant Director of Policy and Programs, North Dakota Association of Counties, Bismarck, who provided an illustration ([Appendix F](#)) of the revenue flow for overweight and oversized permits and penalties. Mr. Traynor said the commission may want to consider inviting representatives of the North Dakota Insurance Reserve Fund to discuss issues regarding the liability and responsibility for property damage resulting from overweight and oversized vehicles. He said extraordinary road fees are intended to pay for damage done to the road, but all the funds collected go to the state highway fund. He said extraordinary road fees are generally settled for less than the total fee that is allowed. Until the 2009 Attorney General's opinion, he said, the settlement received was retained for county road maintenance when the violation was on a county road. He said it makes sense to allow the governmental entity having the damaged road to retain the fee. During the 2011 legislative session, he said, there was discussion on the House floor which suggested that allowing counties to retain the fee would encourage aggressive enforcement. He requested the commission to consider adjusting the distribution of the extraordinary road fees. In addition to the Uniform County Permit System in the western portion of the state, he said, five southeastern counties have established a single permit schedule, and a robust system exists in the Red River Valley.

In response to a question from Representative Klemin, Mr. Traynor said distributions from the state highway distribution fund to counties are based on a formula relating to the number of motor vehicles registered in the counties. He said counties receive 22 percent of the funds from the state highway fund, cities receive 14 percent, townships receive 2.7 percent, and 1 percent is allocated to transit programs. He said if the extraordinary road fees were to go into the state highway distribution fund, 63 percent of the funds would still go to the state highway fund, and most of the money would go to

areas other than where the majority of the road damage is done. He said he would support introduction of the changes proposed in House Bill No. 1042.

Mr. Ouradnik said if a bill similar to House Bill No. 1042 were introduced, but required that the county money be dedicated for the local road systems, the opposition that was expressed in the House of Representatives may be reduced.

Ms. Sandy Clark, Director of Public Policy, North Dakota Farm Bureau, said the Farm Bureau was involved in the discussion on House Bill No. 1042. She said the Farm Bureau does not oppose the permitting process and has no objection to the permit fees being retained by the counties issuing the permits. However, she said, the Farm Bureau objects to the fines and extraordinary road fees being used as a revenue source for counties and has concerns that allowing the retention of the funds would lead to aggressive enforcement and harassment of farmers and ranchers. She said the oil industry and agriculture have large oversized vehicles and some farmers will occasionally operate overweight vehicles as a matter of necessity. She said she has seen harassment of beet-hauling trucks in some areas of the state and heard representatives of one county suggest during the legislative session that enforcement will increase because of the need for funding by local governments.

Mr. Larry Syverson, President, North Dakota Township Officers Association, Mayville, said the North Dakota Township Officers Association supported House Bill No. 1042 and would like to see a similar bill introduced again.

In response to a question from Representative Klemin, Mr. Syverson said he does not have significant concerns with enforcement of overweight regulations. He said he has seen an instance of a farmer that hauled large loads all through the night and the damage to the road was quite evident in the morning.

Representative Klemin requested the Legislative Council staff provide the commission additional financial data regarding extraordinary road fees, permit fees, and fines. He also requested the Legislative Council staff to prepare a bill draft similar to House Bill No. 1042 but require that the county collections be used for support of local road systems. In addition, he said, the bill draft should include a provision requiring periodic reports on enforcement of overweight and oversized violations and a study to monitor the effect of the bill. He said the bill draft should include a provision to sunset the bill after four years.

POTENTIAL STUDY TOPICS

At the request of Chairman Klemin, commission counsel distributed a list ([Appendix G](#)) of potential study topics submitted by members of the commission.

Chairman Klemin said the commission will likely hold three more meetings and should take on only potential topics for study that can be reasonably accomplished in that time.

Representative Guggisberg distributed "Fact Sheet North Dakota Fire Service Needs Assessment" ([Appendix H](#)) which reviews the preparedness of fire service agencies in the state. He said the updated study of readiness indicated that the state of readiness of fire service agencies in the state is even worse than previously indicated in studies. He said there is no central governmental agency that oversees fire service, and fire service officials need to go to the Legislative Assembly directly to address regulation and funding issues. He requested that fire officials be allowed to bring recommendations to the commission. During the special legislative session, he said, he proposed an amendment to provide funding for fire services. However, he said, the amendment was not accepted. He said the commission can work with fire service leaders to look for solutions to the problems identified in the needs assessment.

In response to a question from Mr. Riha, Representative Guggisberg said fire service officials need to know what the state wants from them in response to the assessment. He said the officials need some guidance from the state level as well as funding.

Representative Klemin said temporary housing developments in the western portion of the state have posed problems for emergency response and 911 services. He said there are problems with finding locations that are not identified on maps and other concerns that emergency responders are not prepared to handle. He said the commission may consider looking at developing a model ordinance regarding temporary housing and may examine the equivalent of including identifying addresses for emergency services. He requested the Legislative Council staff work to obtain copies of temporary housing ordinances and regulations that have been developed in cities and counties.

Mr. Frye said the discussion regarding temporary housing could include issues related to reverse 911 services.

Mr. Kessel said several cities have enacted ordinances regarding man camps. Another issue that has arisen, he said, is sexual offender registration with respect to temporary housing.

Representative Klemin requested the Legislative Council staff prepare a bill draft to address compensation to damages under Section 37-17.1-12 and immunity under Sections 37-17.1-16 and 37-17.1-17. In addition, he said, the uses of the state disaster relief fund under Section 37-17.1-27 should be expanded to allow for the payment of expenses incurred under Chapter 37-17.1. He said Section 37-17.1-12 should be amended to remove the requirement that the use or destruction was ordered by the Governor to provide an opportunity to have compensation paid under additional circumstances.

He said immunity under Section 37-17.1-16 should be limited to individuals. He said Section 37-17.1-17 should be amended to include gross negligence.

Mr. Ouradnik said he is concerned with subjecting a building owner to liability when the property has been taken for use in a disaster situation.

Representative Klemin said he understands that concern, but it seems unreasonable to provide total immunity.

Mr. Bieri said extraterritorial zoning authority may be an issue to consider again due to the growth in the western portion of the state.

Mr. Kessel said cities like Dickinson need to be able to respond quickly due to rapid growth, and consideration may be given to allow cities to go further with extraterritorial zoning if the cities have an approved plan.

Representative Klemin said extraterritorial zoning has been an issue of hot debate in previous legislative sessions. He said he is not sure if the commission has the ability to address the issue at this point. He said cities and counties may be able to work under joint powers agreement to work through zoning issues in areas of rapid growth.

Mr. Kessel said the city attorney in Dickinson has indicated that the city may not have the authority to use a joint powers agreement to address zoning issues.

Chairman Klemin said he would like to limit the scope of the commission's review of the zoning issues. However, he said, the city attorney from Dickinson may be interested in providing information to the committee at a future meeting.

Mr. Yantes said zoning laws should be flexible so that cities and counties can negotiate agreements. He said an issue he would like to further study is related to snow and flood recovery programs. He said the programs have not worked well for townships because of the restrictive nature of the programs.

Representative Klemin said representatives of the townships should work with the Department of Emergency Services to see if the study of the department will address their concerns and come back to the commission if the study does not address their concerns.

Representative Heller said she received information at a recent meeting regarding mitigation and disaster management. She said the Institute for Building Technology and Safety assesses disaster mitigation and response and works to examine local codes to help with mitigation issues.

Representative Klemin requested the Legislative Council staff obtain further information regarding the Institute for Building Technology and Safety and see if a representative of the institute would be interested in providing the committee additional information at a future meeting.

No further business appearing, Chairman Klemin adjourned the meeting at 12:45 p.m.

John Bjornson
Commission Counsel

ATTACH:8