

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Thursday, October 27, 2005
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Stanley W. Lyson, Chairman, called the meeting to order at 10:00 a.m.

Members present: Senators Stanley W. Lyson, Carolyn Nelson, John T. Traynor, Constance Triplett; Representatives Ron Carlisle, Dawn Marie Charging, Duane DeKrey, Lois Delmore, Kathy Hawken, Dennis Johnson, Kim Koppelman, William E. Kretschmar, Shirley Meyer

Members absent: Representatives Joyce Kingsbury, Lawrence R. Klemm

Others present: See attached appendix

It was moved by Representative DeKrey, seconded by Representative Carlisle, and carried on a voice vote that the minutes of the September 19, 2005, meeting be approved.

JUDICIAL ELECTIONS STUDY

Chairman Lyson called on Mr. William Neumann, Executive Director, State Bar Association of North Dakota, Bismarck, for testimony regarding the judicial elections study. Mr. Neumann said the State Bar Association has convened a special task force on judicial selection which is made up of lawyers, legislators, and judges. He said the task force will work with the Judicial Process Committee in its study of the judicial election process. He said the task force has identified three general areas of concern. The first, he said, involves the North Dakota Rules of Judicial Conduct. In the past, he said, these rules have limited what candidates for judicial office are allowed to say and do when campaigning. He said it is parts of these rules that were specifically addressed and declared unconstitutional by the United States Supreme Court and the Eighth Circuit Court of Appeals in *Minnesota Republican Party v. White* and the United States District Court in *North Dakota Family Alliance v. Bader*. He said setting ethical standards for the behavior of judges is the responsibility of the North Dakota Supreme Court. He said these rules are being addressed by the Judiciary Standards Committee, one of the Supreme Court's standing committees. He said that committee will be meeting in November and December to make recommendations to the Supreme Court for amendments to the rules.

Mr. Neumann said the second area of concern includes the North Dakota statutes, specifically North

Dakota Century Code Section 16.1-11-08. He said this section requires judicial candidates and others to run on a no-party ballot without reference to a party affiliation. He said opinions are divided on whether this statute is entirely unconstitutional or might be saved in some form of amendment. He said if Section 16.1-11-08 is to be repealed entirely, questions are raised about the application of some of the other election laws and whether judicial candidates would be forced to run under a party designation if the no-party portion of the ballot were abolished. He said the task force believes the identification of the statutes that may need to be amended or repealed and how judicial selection should fit with the state's other election laws is an area of responsibility that should be addressed by the Judicial Process Committee and the Legislative Assembly as soon as possible. He said the task force is starting work on these questions and is prepared to work with the committee on identifying the problems and possible legislative solutions.

Mr. Neumann said a third area includes long-term structural considerations of whether the method of selecting judges in North Dakota should be modified in some way in order to avoid full-scale political elections for judicial office. He said any effort in this area would require an indepth study and a long-term approach. He said the task force will meet again in December. He said the task force will serve as a resource to the committee.

In response to a question from Senator Nelson, Mr. Neumann said the task force members are Mr. Jack Marcil, Senator Stanley W. Lyson, Representative Duane DeKrey, Judge Steven McCullough, Ms. Karen Braaten, Mr. Kent Reiersen, Mr. Tag Anderson, Mr. James Hill, Mr. Paul Richard, Ms. Joanne Ottmar, Ms. Sheri Mills Moore, and Ms. Sandi Tabor.

In response to a question from Representative Delmore, Mr. Neumann said North Dakota citizens are comfortable with the no-party approach for judicial elections. He said he is not aware of a way to avoid making changes to the conduct of judicial elections as long as the state has judicial elections. He said North Dakota citizens like elections. He said he does not see much support for adopting the federal system of lifetime judicial appointments.

In response to a question from Representative Koppelman, Mr. Neumann said the *White* decision deals not only with the right of the candidate to speak but also deals with the right of people to endorse a candidate. He said a judicial candidate's refusal to accept an endorsement may only work for a limited time. He said because candidates may want funding from one party or another, the candidate may seek the endorsement of a party. He said it is a fact that money makes a difference in political campaigns.

In response to a question from Senator Lyson, Mr. Neumann said the task force hopes to provide the committee with ideas for any necessary statutory changes.

In response to a question from Senator Nelson, Mr. Neumann said the Rules of Judicial Conduct were amended several years ago to allow greater freedom of speech and association. He said the rules provide that a judge can be a member of a political party but cannot contribute money to that party. He said most citizens like the idea of an accountable judiciary.

In response to a question from Senator Traynor, Mr. Neumann said judicial candidates are subject to the same campaign statutes as are any other election candidates. He said the Rules of Judicial Conduct, however, add another layer of rules on top of the election laws. He said the law provides that a judicial candidate cannot solicit funds but rather must set up a committee for that purpose. He said the law also provides that the candidate is not permitted to know the identity of the contributors. He said the information is available to the public from the Secretary of State's office.

COMMISSION ON LEGAL COUNSEL FOR INDIGENTS

Chairman Lyson called on Representative DeKrey for an update of the status of the Commission on Legal Counsel for Indigents. Representative DeKrey said the commission hired Ms. Robin Huseby to serve as director of the commission. He said her office will be located in Valley City. He said Ms. Huseby will assume her duties on November 1, 2005. He said the commission's decision to hire Ms. Huseby was unanimous.

Representative DeKrey provided to the committee a list of the membership of the Commission on Legal Counsel for Indigents. He said the commission members are Mr. Joseph Maichel, Ms. Jonal Holt Uglem, Mr. Bruce D. Quick, Representative Duane DeKrey, Senator Thomas L. Trenbeath, and Mr. Thomas R. Ribb.

IDENTITY THEFT STUDY

Chairman Lyson called on Mr. Parrell Grossman, Consumer Protection and Antitrust Division, Attorney General's office, for a presentation of information regarding identity theft. Mr. Grossman presented a PowerPoint presentation on identity theft, a copy of

which is on file in the Legislative Council office. He said identity theft is the fastest growing white collar crime in the country. He said his staff of two assistant attorneys general, one field investigator, three investigators, and three administrative assistants receives 100 to 150 calls per day regarding incidents of or questions about identity theft. He said persons are not required to report identity theft to the Attorney General's office so this number may be just the tip of the iceberg. He said identity thieves use personal identifying information to go on spending sprees using credit card or debit card account numbers, open new credit card accounts, buy high-ticket items, gain employment, obtain duplicate driver's licenses, and use the victim's reputation without damage to their own. He said the victim's information can be obtained by discarded ATM receipts, stealing mail from mailboxes, illegally obtaining credit reports, and going through garbage cans. He said a common way of obtaining information using a computer is a method known as "phishing." He said there are a number of "phishing" scams that attempt to obtain personal identifying information by fraudulently attempting to represent reputable companies. He said people need to guard their personal information and be very careful about what information is revealed. He said the Attorney General offers an identity theft affidavit for victims to use to prove they have been a victim of identity theft. He said everyone should check their credit reports several times per year to check for errors and suspicious activity.

Mr. Grossman said in 2005 the Legislative Assembly passed a good security breach law. He said the Legislative Assembly also passed a bill that increased the penalty from a Class C felony to a Class B felony for certain types of identity theft with the offense elevated to a Class A felony for second and subsequent offenses. He said this change made North Dakota's penalty one of the toughest in the country. He said the legislation also allowed one jurisdiction to prosecute multiple offenses. He said the legislation made it easier to gain jurisdiction over the offender. He said House Bill No. 1500 (2005) requires fraud alerts on credit reports, makes police reports a mandatory item, allows for a judicial determination of factual innocence, and gives the Attorney General greater enforcement authority.

In response to a question from Representative Delmore, Mr. Grossman said the method for canceling credit cards varies from company to company. He said some require written cancellation while others allow the cancellation to be done by telephone. He said locked mailboxes is an effective way to prevent identity theft. He said the committee may want to encourage the post office to require locked mailboxes. He said the Attorney General's office would be willing to aid in the education efforts.

In response to a question from Senator Nelson, Ms. Marilyn Foss, North Dakota Bankers Association,

Bismarck, said notification that an address has been changed may be sent to both the accountholder's old address and new address. She said there is not a specific requirement that this be done; however, the federal government requires banks to maintain the security of the accountholder's data.

In response to a question from Representative Kretschmar, Mr. Grossman said there have been few prosecutions for identity theft in North Dakota. He said there have not been any prosecutions in the last year.

In response to a question from Representative Meyer, Mr. Grossman said the items on a credit report and the number of years an item stays on a report is based on the requirements of the Federal Credit Reporting Act.

Chairman Lyson called on Mr. David Feakes, Fessenden, for testimony regarding a personal experience with identity theft. Mr. Feakes said he is a victim of identity theft. He said his ordeal began in 1997 when an individual from Minnesota was able to obtain information regarding Mr. Feakes' bank accounts and a copy of his birth certificate. He said the individual who stole his identity opened accounts in his name and attempted to purchase a \$30,000 truck using those accounts. He said the individual was eventually caught. He said the individual spent 13 days in jail in North Dakota and 30 days in jail in South Dakota. He said that individual offended again and received a three-year sentence. He said the whole ordeal cost him attorney's fees, over \$2,000 in other costs, and many hours of his time. He said even though his credit record has been cleared, he is still unable to purchase a gun for hunting because there are still records that list him as a felon. He said as a citizen and consumer, he is the one being punished.

Senator Lyson said Mr. Feakes should be able to obtain a court order in Minnesota and South Dakota to purge the felonies from his record.

In response to a question from Representative Meyer, Mr. Feakes said he frequently checks his credit report. He said although it is clear, it took more than a year and many letters and affidavits to get it that way.

In response to a question from Representative Delmore, Mr. Feakes said if a similar situation would happen now, there would be more tools available to North Dakota law enforcement and stiffer penalties than were in place when the identity theft happened to him.

Chairman Lyson called on Mr. John Val Emter for testimony regarding the identity theft study. Mr. Emter said he had bad credit that caused his insurance rates to increase. He said the Attorney General's office did nothing to help him.

EMINENT DOMAIN STUDY

At the request of Chairman Lyson, committee counsel distributed a memorandum entitled [*Entities With Eminent Domain Authority*](#).

Chairman Lyson called on Ms. Connie Sprynczynatyk, North Dakota League of Cities, Bismarck, for testimony regarding the eminent domain study. Ms. Sprynczynatyk said eminent domain is used judiciously in this state. She said although eminent domain is used carefully and rarely, it is an important tool for governments. She said the question is whether North Dakota laws are properly balanced to protect private property rights while allowing for public use needs.

Chairman Lyson called on Mr. Howard Swanson, City Attorney, Grand Forks, for testimony regarding the eminent domain study. Mr. Swanson said eminent domain is an important tool for cities. He said Grand Forks used the authority in the late 1960s, in the late 1970s, and most recently after the 1997 flood. He said after the 1997 flood, the city needed over 1,000 parcels of land for the new levy system and flood wall. He said all but 22 landowners agreed to sell their property. He said 16 of the 22 landowners settled with the city before trial. He said of the six cases that went to trial, all six received jury verdicts that were less than the amount offered by the city. He said in one instance, the city offered \$250,000 and the jury award was \$25,000. He said the city's flood control project would not be as far along as it is without the use of eminent domain authority. He said North Dakota eminent domain law is more stringent than the Minnesota eminent domain law. He said in North Dakota, the law requires the governing body to adopt a resolution, obtain an appraisal, and to negotiate in good faith with the property owner. He said North Dakota law also allows the property owner to ask for attorney's fees. He said if the initiated measure regarding eminent domain passes, it would limit what Grand Forks is doing in terms of flood control. He said the measure would also impact the state's urban renewal law. He said if a city uses eminent domain to obtain property under the urban renewal law, the city could not permit commercial interests to relocate in that area. He said the property could only be used as city property and the city could not resell the property for private development.

In response to a question from Representative Koppelman, Mr. Swanson said the issue of eminent domain is in the forefront because of the media focus. He said the only instance in which the use of eminent domain was questionable was in the Jamestown case. He said he does not think there is an abuse of eminent domain in North Dakota. He said the *Kelo v. City of New London* case did not change any laws. He said the United States Supreme Court was relying on precedent. He said in the *City of Jamestown v. Leever's Supermarkets* case, the North Dakota Supreme Court found that the Legislative

Assembly had amended the state's eminent domain law to allow for the use of eminent domain for private purposes. He said the appropriate place to focus on this issue is in the Legislative Assembly. He said Grand Forks is trying not to overreach when purchasing property for flood control. He said in most instances, the property owners want to sell their entire lot, not just the needed portion.

In response to a question from Representative Kretschmar, Mr. Swanson said 38 states are considering either a constitutional amendment or statutes to address the *Kelo* decision.

In response to a question from Senator Triplett, Mr. Swanson said one way to address the issue may be to require a higher standard of review and more procedural safeguards.

Chairman Lyson called on Mr. Charlie Kourajian, Mayor, Jamestown, for testimony regarding the eminent domain study. Mr. Kourajian said the situation in Jamestown involved an old Red Owl store that had closed, was allowed to deteriorate, and had taken on an appearance of blight. He said there were complaints about the grocery monopoly of Leever's Supermarkets. He said when the Nash Finch Company was unable to purchase the property from Leever's, the company came to the Jamestown City Council for help. He said the city council encouraged the company to negotiate with Leever's. He said the city council received a petition that was signed by hundreds of Jamestown residents.

Chairman Lyson called on Mr. Ken Dalsted, Jamestown, for additional testimony regarding the Jamestown case. Mr. Dalsted said he served as the city attorney for Jamestown during the *Leever's* case. He said the situation involved a developer who planned to develop a 1 1/2-block area in downtown Jamestown. He said the developer was able to purchase all the property by negotiation with the exception of the crumbling parking lot owned by Leever's. He said holding on to the parking lot prevented development in that area.

Mr. Dalsted said the state's urban renewal law, which has been on the books for 50 years, allows for the use of eminent domain to obtain underused property not just blighted property. He said the proposed initiated measure goes too far in its effort to protect individual rights. He said those rights can be protected by making changes and modifications to the state's laws without destroying the intent of the Legislative Assembly for the past 50 years. He said one of the changes could be made in North Dakota Century Code Section 40-58-02. He said this section contains the findings and declarations of necessity for urban renewal. He said this section states why urban renewal is necessary and requires findings of unemployment, underemployment, and joblessness on a statewide basis. He said at the time of the Jamestown situation, Jamestown had a very high rate of unemployment and underemployment. He said

one way to address some of the concerns about eminent domain would be to require a finding of unemployment, underemployment, or joblessness in a specific community rather than on a statewide basis. Another section that could be amended is Section 40-58-05. He said this section requires a finding that the action is necessary in the interest of the public economy, health, safety, morals, or welfare of the residents of the city. He said this section could be amended to require the city to prove that the exercise of the urban renewal law powers could reasonably be expected to alleviate the conditions at issue. Another change that could be made, he said, would be to require that an underutilized or unutilized property must also be blighted. He said that it also may be helpful to more clearly define what a development plan is in Section 40-58-06. Finally, he said, Section 40-58-08(1) may need to be amended to clarify some inconsistencies with regard to how property is zoned.

In response to a question from Representative DeKrey, Mr. Dalsted said he is not sure if Jamestown would have used its eminent domain authority if the developer had not wanted the property. He said the citizens did petition the city to do something about the lack of competition and the high price of groceries in Jamestown. He said the situation not only involved the lack of competition but also the issue of blight.

In response to a question from Representative Koppelman, Mr. Dalsted said the initiated measure raises the question of whether a city can sell property that it acquires.

In response to a question from Senator Traynor, Mr. Dalsted said the initiated measure would "gut" the state's urban renewal law.

Chairman Lyson called on Mr. Bob Frantsvog, Minot, for testimony regarding the eminent domain study. Mr. Frantsvog distributed to the committee a copy of a resolution regarding the eminent domain issue which was approved by the North Dakota League of Cities on September 24, 2005. A copy of the resolution is on file in the Legislative Council office.

Mr. Frantsvog said he has been involved in the process of land acquisition for flood control in Minot. He said the only instance in which eminent domain was used in Minot was for some highway projects. He said the threat of eminent domain works well to speed up the process of acquiring land.

In response to a question from Senator Traynor, Mr. Frantsvog said he would provide to the committee a list of the projects in cities in which eminent domain has been used.

In response to a question from Senator Lyson, Mr. Jerry Hjelmstad, North Dakota League of Cities, Bismarck, said the purpose of the resolution was to express support for the legislative process.

Chairman Lyson called on Ms. Heidi Heitkamp for testimony regarding the eminent domain study.

Ms. Heitkamp distributed information regarding the proposed initiated measure and its intent. A copy of the information is on file in the Legislative Council office.

Ms. Heitkamp said the eminent domain issue is a battle between a private citizen's rights and the government's interest. Next to incarceration, she said, only the taking of property is as drastic. She said it has been mentioned frequently that eminent domain is used rarely. She said this is because the public knows eminent domain is a threat. She said under the language of the proposed initiated measure, incidental economic benefit from an eminent domain taking is allowable. She said the property can be taken only for traditional public use purposes. She said if the governing body takes more land than is needed, the governing body may not resell the extra property for private use. She said the United States Supreme Court decision in *Kelo* was not unpredictable. She said this holding has been building since the 1950s. She said if the proposed initiated measure passes, urban renewal law can still exist; however, the governing body will not be able to use eminent domain to condemn the property.

In response to a question from Senator Traynor, Ms. Heitkamp said if it is believed that the only thing of value in the urban renewal law is the authority of eminent domain, then yes, the measure would "gut" the urban renewal law.

In response to a question from Representative Hawken, Ms. Heitkamp said the citizens have a constitutional right to initiate a change to the state's constitution. She said this power allows citizens to directly change the constitution without using representative government.

Representative Koppelman said the legislative process allows for public input in the language of the legislation not just on the idea.

In response to a question from Representative Koppelman, Ms. Heitkamp said just like bills that go through the legislative process, the people will have to vote yes or no on the measure even if they like one part of the measure but not another. She said the language in the proposed initiated measure was sent to and reviewed by many people before the final language was agreed upon. She said in the Jamestown case, the city council's actions were done with a good purpose; however, she said, city government should not be in the business of promoting competition. She said true blight can be addressed by a city's police powers. She said in the *Kelo* decision, the Court used rational basis scrutiny--the lowest standard of review. She said the standard for a taking should be elevated.

Senator Triplett said the committee should receive an update on what other states are doing in regard to the *Kelo* decision.

Senator Lyson distributed a bill draft [\[70014.0100\]](#) relating to entities with eminent domain authority. He said the bill draft contains the changes that may need to be made to certain statutes if the proposed initiated measure passes. He said the bill draft will be discussed at the next meeting.

No further business appearing, Chairman Lyson adjourned the meeting at 2:45 p.m.

Vonette J. Richter
Committee Counsel

[ATTACH:1](#)