

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### JUDICIAL PROCESS COMMITTEE

Monday, November 21, 2005  
Birch Room, Best Western Doublewood Inn  
Fargo, 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, Duane DeKrey, Lois Delmore, Dennis Johnson, Joyce Kingsbury, Lawrence R. Klemin, Kim Koppelman, William E. Kretschmar, Shirley Meyer

**Members absent:** Representatives Dawn Marie Charging, Kathy Hawken

**Others present:** See attached appendix

**It was moved by Representative Carlisle, seconded by Representative Delmore, and carried on a voice vote to approve the minutes of the October 27, 2005, meeting of the committee.**

#### EMINENT DOMAIN STUDY

Chairman Lyson said the purpose of this study is to review the eminent domain issues raised in recent court decisions and to provide a forum for the public to discuss the issues. He said there is some misinformation circulating that eminent domain is being studied because either the committee or the Legislative Assembly is opposed to the proposed initiated measure.

Chairman Lyson called on Mr. Erik R. Johnson, Assistant City Attorney, Fargo, for testimony regarding the eminent domain study. Mr. Johnson said in a democratic form of government, there are innumerable opportunities for weighing the balance of power of government with the rights of citizens. He said the concept of eminent domain is one area of potential tension between the rights of individuals to own and control their property and the rights of the people as a whole, the government, to acquire the property for a public purpose. He said the inference behind any discussion of eminent domain is that because the government has the power to take private property away from property owners, that power somehow may be abused. He said the state's law on eminent domain requires that before property can be taken the government must be able to prove in a court of law that the use for the property serves a public purpose. He said the state's law also requires just compensation, a jury trial, and fair negotiations based upon an appraisal. In addition, he said, the property owner may be entitled to receive attorney's fees and the costs of relocation. He said the state's urban renewal laws contain additional elements and

protections. He said anytime the government gives itself power, there is a possibility of abuse. He said while the possibility of abuse by government should not be underestimated, it seems appropriate to work toward a goal of striking a balance between the good for the public as a whole and the rights of the individual. He said the current procedural and substantive elements in the state's eminent domain law provide a fair amount of protection for private property owners. He said the appraisal and negotiation process combined with the threat of having to pay both sides' legal costs have given the government considerable incentive to make generous offers to property owners. He said whether additional protections should be inserted into the law is a matter for the policymakers to debate.

In response to a question from Senator Lyson, Mr. Johnson said it is unclear whether the proposed constitutional amendment would prohibit a government from ever selling a parcel of property or a portion of that parcel if the parcel were obtained by eminent domain.

In response to a question from Representative Klemin, Mr. Johnson said the measure would prevent the condemning authority from taking private property for economic development purposes. He said the measure would prohibit returning property to private use once it has been taken for a public use. He said the measure does not address the issue of economic development that may be incidental to the public use.

In response to a question from Senator Nelson, Mr. Johnson said Fargo did not use the power of eminent domain in its post-1997 flood recovery efforts. He said negotiation was used to obtain all the needed property.

In response to a question from Representative Delmore, Mr. Johnson said he is not sure why there is a big concern about expected abuse. He said the *Kelo v. New London* decision has raised an awareness of the eminent domain issue.

In response to a question from Senator Traynor, Mr. Johnson said although city leaders do not include eminent domain in their strategy, it is known that if negotiation does not work, eminent domain is available.

In response to a question from Representative Kretschmar, Mr. Johnson said if the language in the proposed measure had been in the constitution in 1995, the *City of Jamestown v. Leever*s

*Supermarkets, Inc.*, case would have been decided differently.

Chairman Lyson called on Senator Judy Lee, Fargo, for testimony regarding the eminent domain study. Senator Lee said homes were taken when a water treatment plant was built in Fargo. She said the offers made to the homeowners were fair and people were pleased with the negotiations. She said paying a few more dollars in the negotiation process is a small price to pay for a smooth transition.

Chairman Lyson called on Mr. Gib Bromenschenkel, Fargo, for testimony regarding the eminent domain study. Mr. Bromenschenkel said he previously served on the Fargo City Commission for 30 years. He said eminent domain and economic development are complicated issues with no easy answers. He said economic development may be a new business or an underpass project that provides better access to a retail area. He said he would be concerned about finding economic development as a public purpose, even if it is not the primary purpose. He said the proposed initiated measure would affect urban renewal. He said there are situations in which property may be purchased just to prevent economic development. He said he is not aware of any major abuses of eminent domain. He said North Dakota's eminent domain law is fair. He said the public should be careful to not "throw out the baby with the bath water."

In response to a question from Representative Klemin, Mr. Bromenschenkel said a competitor may purchase property to prevent another competitor from moving ahead with a project. He said if the measure passes, it would invalidate portions of the state's urban renewal law.

Chairman Lyson called on Senator Tony Grindberg, Fargo, for testimony regarding the eminent domain study. Senator Grindberg said the definition of economic development may vary by city and by the city's needs. He said the United States Supreme Court does not want to stand in the way of the states taking action and that is what the states are doing. Senator Grindberg distributed to the committee a document entitled *Eminent Domain Resource Kit*. He said the information contained in this document will aid state and local economic development professionals understand eminent domain and the issues currently being raised. A copy of the document is on file in the Legislative Council office.

In response to a question from Representative Koppelman, Senator Grindberg said the concern is to provide the public with enough information to make an informed decision. He said the legislation being considered by Congress would limit the use of federal funds for taking land by eminent domain.

Chairman Lyson called on Mr. Brian Neugebauer, City Attorney, West Fargo, for testimony regarding the eminent domain study. Mr. Neugebauer said a water diversion project in Moorhead, Minnesota, would not have happened without the power of eminent domain. He said if one landowner had refused to sell, the

project would have been halted. He said eminent domain is a tax-saving tool for taxpayers. He said without eminent domain, the project would not have happened or it would have cost two or three times more. He said eminent domain is a valuable tool and it would be more difficult to negotiate without the power of eminent domain. He said he is not aware of a state that says the government cannot use blight as a reason to use eminent domain. He said if the initiated measure passes, North Dakota would be the only state that goes as far to restrict eminent domain. He said the proposed measure is a bad measure that will cost the taxpayers a lot of money. He said there are people who would buy property to stop a city project. He said the initiated measure would remove blight as a justification for a taking. He said local officials need to be trusted. He said it is clear that the measure would prevent a city from reselling remnants of property taken by eminent domain back to a private owner. He said if a city took property by eminent domain for a water tower and 30 years later no longer needed the water tower, it would not be able to sell that land for private use.

In response to a question from Representative Klemin, Mr. Neugebauer said the measure also would prevent a governmental entity from trading property if the property to be traded were acquired by eminent domain.

In response to a question from Representative Koppelman, Mr. Neugebauer said whether excess property taken by eminent domain could be resold to a private owner under the measure is open to interpretation.

Chairman Lyson called on Ms. Connie Sprynczynatyk, North Dakota League of Cities, Bismarck, for testimony regarding the eminent domain study. Ms. Sprynczynatyk said at the request of the committee, the North Dakota League of Cities surveyed cities with a population of over 2,500 regarding the use of eminent domain in municipalities. She said the survey indicated that eminent domain has not been used frequently by cities in the state. She said it is a tool of last resort. However, she said, the availability of eminent domain as a tool has helped cities to negotiate a fair price with property owners. She submitted a written summary of the survey, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Ms. Sprynczynatyk said the people in local government understand the importance of protecting private property.

Chairman Lyson called on Representative Chuck Damschen, Hampden, for testimony regarding the eminent domain study. Representative Damschen said he is a member of the initiated measure sponsoring committee. He said he is a part of the sponsoring committee because he is a property rights advocate. He said the purpose of the Landowners Association of North Dakota (LAND) is to protect

property rights. He said he previously served as director of the LAND Board.

Representative Damschen said regardless of the wording of the measure, someone will contest it. He said the measure does not eliminate the possibility of using eminent domain. Rather, he said, the measure only prohibits the use of eminent domain when done for economic development purposes. He said the measure does not prohibit incidental economic development.

In response to a question from Representative Klemin, Representative Damschen said eminent domain should be a tool of last resort. He said the taking of land should not be simple.

In response to a question from Representative Carlisle, Representative Damschen said this measure was proposed based upon a desire to protect private property rights.

Chairman Lyson called on Mr. Don Berge, Chairman, Citizens to Restrict Eminent Domain, Litchville, for testimony regarding the eminent domain study. Mr. Berge said the proposed measure would not prevent the taking of land for health or safety reasons. He said the citizenry of the state is concerned about the taking of private property for reasons other than public use or blight. He said as long as a landowner is law-abiding and pays taxes, the government should not be able to take the private property. He said the taking of land to build a road that is to be used by the public would not be affected by this measure. He said he was relieved to hear that the Legislative Assembly is not a competing interest on the measure. He said the sponsoring committee is a very bipartisan effort. He said he is a conservative and a Republican.

In response to a question from Senator Lyson, Mr. Berge said any portion of land taken by eminent domain which is not needed should be resold for private use.

In response to a question from Representative Klemin, Mr. Berge said whether there are additional changes that may need to be made upon the passage of the initiated measure is an issue for the Legislative Assembly to decide. He said the language of the measure was not done in a vacuum. He said the sponsoring committee contacted governmental entities and others for opinions on the wording of the measure.

In response to a question from Senator Triplett, Mr. Berge said those who received the proposed wording of the initiated measure were given two to three weeks to review. He said the measure does not affect the taking of land for a public use.

Chairman Lyson called on Mr. Bruce Furness, Mayor, Fargo, for testimony regarding the eminent domain study. Mr. Furness said eminent domain can be used for public health, safety, and improvement purposes. He said cities want to progress and grow. He said without eminent domain, the refusal of one property owner to sell may threaten a project. Following the 1997 flood, he said, the city needed 100

properties along the river. He said all but seven voluntarily agreed to sell to the city. He said the city needed those seven properties to protect 800 other homes.

In response to a question from Senator Nelson, Mr. Furness said he is concerned about the measure's very broad language.

Chairman Lyson called on Mr. Jim Lee for testimony regarding the eminent domain study. Mr. Lee said as long as the city relies on property taxes, the incentive will be there to use eminent domain to increase its tax base. He said the temptation will be there to replace low tax-producing property with higher-taxed property. He said without the safeguards of the measure, affordable housing will be affected. He said the Legislative Assembly should look at the reliance on property taxes.

### COMMITTEE DISCUSSION

Senator Traynor said there is a concern that there may be a problem with the wording of the initiated measure. He said there may be a need to have a dialogue with the sponsoring committee.

**It was moved by Senator Traynor, seconded by Representative Koppelman, and carried on a roll call vote that the committee request a meeting of the Judicial Process Committee with the sponsoring committee of the proposed initiated measure to discuss concerns about the wording of the measure and the possibility of withdrawing or amending the measure.** Senators Traynor and Triplett and Representatives DeKrey, Johnson, Klemin, Koppelman, and Kretschmar voted "aye." Senators Lyson and Nelson and Representatives Meyer, Carlisle, Delmore, and Kingsbury voted "nay."

Representative Klemin said he was concerned that working with the sponsoring committee may be seen as approval of the measure.

Representative Koppelman said the committee cannot speak for the entire Legislative Assembly. He said there has been testimony that the measure would not restrict a taking in a blighted area. He said the problem is not for the city to take the property for public use but to be able to return it for private use.

Representative Meyer said if the primary purpose of the taking is because the property is blighted, it does not matter if economic development is incidental to the taking.

Representative Klemin said a discussion with the sponsoring committee could include the possibility of amending the measure.

Senator Nelson said the Judicial Process Committee should not be telling the sponsoring committee how to write the language of an initiated measure.

Representative Carlisle said he agreed with Senator Nelson.

Representative Delmore said the language in the initiated measure was what the sponsoring committee intended. She said it is not the responsibility of the

Judicial Process Committee to question that language.

Representative Koppelman said based upon the charge of the committee, this would be within the duties of the committee.

Representative Delmore said there is no guarantee that any dialogue with the sponsoring committee would change the committee's or the voters' minds.

**It was moved by Senator Traynor, seconded by Representative Koppelman, and carried on a roll call vote that the Judicial Process Committee request the chairman of the Legislative Council to approve the formation of a three-member subcommittee to meet with several members of the initiated measure sponsoring committee to discuss concerns about the wording and scope of the initiated measure and the possibility of withdrawing and amending the initiated measure.** Senators Lyson, Nelson, Traynor, and Triplett and Representatives DeKrey, Johnson, Kingsbury, Klemin, Koppelman, and Kretschmar voted "aye." Representatives Carlisle, Delmore, and Meyer voted "nay."

### **COMMISSION ON LEGAL COUNSEL FOR INDIGENTS**

Chairman Lyson called on Ms. Robin Huseby, Director, Commission on Legal Counsel for Indigents, for an update of the status of the implementation of the new indigent defense system. Ms. Huseby said as the newly hired director of the Commission on Legal Counsel for Indigents, she assumed her duties on November 1, 2005. She said there is still one vacancy on the commission. She said the commission is awaiting an appointment by the Governor. She said indigent defense contractholders have been offered contracts for the remainder of the biennium. She said eligibility for indigent defense services will continue to be at 125 percent of the poverty level. As of January 1, 2006, she said, all indigent defense funding will move from the Supreme Court to the executive branch. She said she is looking at the recoupment from defendants of fees spent on providing indigent defense for that defendant. She said there may be a need for legislation to switch the burden to the commission for the recoupment of the indigent defense fees. She said she is at the very beginning of the process with much to do. She said she is in the process of analyzing and balancing caseloads.

In response to a question from Representative Delmore, Representative DeKrey said there have been two or three persons who have turned down the remaining commission position. He said the position requires a lot of time without any pay so it may not be easy to fill.

In response to a question from Representative Delmore, Ms. Huseby said there are national case standards that can be used to determine a normal caseload. She said when determining a normal

caseload, the amount of time and type of case are considered.

In response to a question from Senator Lyson, Ms. Huseby said the commission is working on finding contract attorneys in the northwest and southwest parts of the state. She said the commission is considering the hiring of public defenders in these areas.

In response to a question from Representative Klemin, Ms. Huseby said she has hired an administrative assistant. She said she is planning to hire an assistant director who will be an attorney. She said she plans to keep her office in Valley City but is willing to move if necessary. She said on January 1, 2006, the indigent defense funding in the judicial branch budget as well as the fees that are deposited in the indigent defense fund will be transferred to the commission.

In response to a question from Representative Koppelman, Ms. Huseby said she is aware of the caseloads of the contract attorneys in the state. She said caseload standards will be in writing.

In response to a question from Representative Carlisle, Ms. Huseby said she would keep the committee informed regarding any need for legislative changes.

In response to a question from Representative Kretschmar, Ms. Huseby said contract attorneys are working for \$65 per hour. She said the hourly rate is not as big a problem as the heavy caseloads.

In response to a question from Representative Meyer, Ms. Huseby said there are instances in which an unemployed person who is given indigent defense services later finds a job. She said it is in these instances in which it would be helpful for the judge to readdress the indigency issue.

Chairman Lyson said it would be permissible for Ms. Huseby to report to the committee at its next meeting by letter.

No further business pending, Chairman Lyson adjourned the meeting at 3:55 p.m.

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Vonette J. Richter  
Committee Counsel

[ATTACH:1](#)