

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

Wednesday, October 3, 2007
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Lee Kaldor, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Lee Kaldor, Dwight Wrangham; Senators Arden C. Anderson, Dwight Cook; Citizen Members Randy Bina, Linda Coates, Ron Krebsbach, Rodney Ness, Bev Nielson, Greg Sund, Ken Yantes; Governor's Designee Brian D. Bitner

Others present: Merle Boucher, State Representative, Rolette

See [Appendix A](#) for additional persons present.

It was moved by Ms. Bev Nielson, seconded by Mr. Randy Bina, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

STATE'S ATTORNEYS

Mr. Paul Murphy, Executive Director, North Dakota State's Attorneys Association and Foster County State's Attorney, provided written testimony on the provision of services by state's attorneys in rural counties ([Appendix B](#)). He said current law provides options for counties to share a state's attorney. He said state's attorneys are well-trained, whether part-time or full-time, and assistance may be received for complicated cases from the Attorney General's office and other state's attorneys. He said if any change in the law needs to be made, it would be minor and should be done upon the request of a certain county with a particular problem. He said state's attorneys should be elected and not appointed by the county commissioners so that state's attorneys remain independent and beholden to the electorate. He said there may be need for financial assistance to entice attorneys to be a state's attorney.

In response to a question from Representative Kaldor, Mr. Murphy said under current law the board of county commissioners can appoint a state's attorney. He said if there is a resident attorney that wants to be state's attorney and that attorney is the only person to run for that office, that person should be state's attorney. He said the board of county commissioners may open up the election for competition against a resident attorney, but the board should not have the power to appoint someone besides the resident attorney. He said a nonresident state's attorney may be elected as state's attorney if allowed by the board of county commissioners. He said in Griggs County the person acting as state's

attorney did not receive first place or second place in the election.

In response to a question from Representative Kaldor, Mr. Murphy said if one resident attorney runs for state's attorney, that person would be elected and could appoint an attorney from another county to be assistant state's attorney and do all the work of the state's attorney. He said in Grant County the person who was elected as state's attorney appointed a nonresident assistant state's attorney to do all the work of the state's attorney.

In response to a question from Mr. Sund, Mr. Murphy said the person who receives the most votes and is elected as state's attorney and who appoints an attorney from another county to do the work of the state's attorney may not defend individuals in a criminal action because of conflict of interest.

In response to a question from Representative Wrangham, Mr. Murphy said the nonresident assistant state's attorney who is appointed by a resident state's attorney would be compensated as approved by the board of county commissioners.

In response to a question from Ms. Nielson, Mr. Murphy said in Grant County the state's attorney is accountable to the voters for the nonresident state's attorney's work. He said this provides for an independence from the board of county commissioners and provides for unbiased legal work.

Mr. Sund said the board of county commissioners is accountable to the voters and if appointed the state's attorney, the state's attorney should follow an ethical standard and not be compromised in judgment because of that appointment.

In response to a question from Mr. Sund, Mr. Murphy said although attorneys follow an ethical standard, the independence provided by being elected removes any appearance of impropriety or to whom the loyalty of the state's attorney flows--the public.

In response to a question from Ms. Coates, Mr. Murphy said the board of county commissioners appoints many positions in the county government; however, positions relating to the criminal justice system should have more independence. He said the sheriffs are elected under the Constitution of North Dakota. He said state's attorneys and sheriffs need special protection because of the type of positions they hold.

Representative Kaldor said he is sympathetic to the need for the independence of state's attorneys; however, he does not like a state's attorney appointing

a nonresident state's attorney to do the job of state's attorney.

In response to a question from Representative Kaldor, Mr. Murphy said either the assistant state's attorney is accountable to the resident state's attorney or the board of county commissioners. In either case, there is secondary accountability.

FUNDING OF RURAL ROADS AND BRIDGES

Mr. Jon Mielke, Upper Great Plains Transportation Institute, provided written testimony on generating public involvement in the transportation policy and funding decisionmaking process ([Appendix C](#)). He said the Upper Great Plains Transportation Institute is developing a project to generate public involvement. He said the project will include the hosting of 8 to 12 local workshops around the state involving 50 to 100 participants representing all stakeholders in the transportation system. He said the goals of these workshops are to disseminate information on the existing transportation system, receive input concerning future transportation needs, and encourage future involvement in the decisionmaking process.

In response to a question from Representative Wrangham, Mr. Mielke said the Upper Great Plains Transportation Institute was created in 1967 and is housed at North Dakota State University. He said 95 percent of the budget comes from contracts and projects with governmental agencies. He said the focus of the institute is rural transportation issues.

In response to a question from Senator Cook, Mr. Mielke said the Upper Great Plains Transportation Institute does work in states other than North Dakota. He said the institute generally chooses projects that have transferability to North Dakota. He said the advisory council is made up of 18 entities provided for by state law.

In response to a question from Representative Kaldor, Mr. Mielke said the high costs of maintaining the transportation system are not generally known. He said the transportation system is generally taken for granted because of the good job that is done in maintaining the system. He said inflation has increased costs up to 30 percent and maintenance projects have been delayed because of these costs.

In response to a question from Senator Anderson, Mr. Mielke said the project resulted from frustration of members of the advisory council resulting from lack of people participating in the funding decisions for transportation. He said local stakeholders, like local transit systems, need to have a voice in the decisionmaking process.

In response to a question from Representative Kaldor, Mr. Mielke said the role of the Advisory Commission on Intergovernmental Relations in the Upper Great Plains Transportation Institute project would be for the commission members to inform local stakeholders. He said the commission could

encourage participation. He said he envisions that the institute will invite 2,000 to 3,000 people to participate.

In response to a question from Mr. Yantes, Mr. Mielke said information like township roads consisting of 56,000 miles of roads in this state is the type of information that will be shared at the meetings.

Mr. Francis Ziegler, Director, Department of Transportation, provided testimony on recent activities relating to federal highway funding. He said funding under the federal highway trust fund will be a negative \$5.3 billion in 2009. He said North Dakota stands to lose federal aid. He said the current federal funding bill expires on September 30, 2009. He said the department acts as a flowthrough for federal aid to cities and counties in the amount of \$46.1 million. He said Congress is making rule changes in apportionments for states. He said every year the appropriation is a little bit less than the apportionment, causing a rescission. He said the Department of Transportation used to absorb rescissions in categories that are not used that much. He said Congress may start to enforce these rescissions across the board, instead of allowing states to transfer them to unused categories. He said this will result in less federal aid flowthrough to cities and counties. He said the department is in preservation mode and needs the public to understand this and to participate in the process.

In response to a question from Representative Boucher, Mr. Ziegler said there will not be changes in the matching requirements; however, the state will see less money. He said these matching requirements are generally 90 percent federal and 10 percent state on the interstate system and 80 percent federal and 20 percent local on other roads.

In response to a question from Mr. Sund, Mr. Ziegler said North Dakota is a recipient state and receives more money than it pays for federal highway transportation funding. He said some states want a 92 percent minimum guarantee for the return of money paid for highway funding. He said energy efficiency will produce less revenue in gas tax.

In response to a question from Representative Kaldor, Mr. Ziegler said to his knowledge there has not been any federal aid left on the table for transit projects.

Mr. Sund said the federal government does not need to change the match, because the federal government requires local governments to pay more in related fees, e.g., engineering fees. He said the 20 percent match is more like 40 percent if the fees local governments have to pay are included.

STUDY OF EXTRATERRITORIAL ZONING

Ms. Connie Sprynczynatyk, North Dakota League of Cities, provided written testimony on annexation versus zoning authority and how zoning authority provides for orderly growth and process while protecting the interests of all parties ([Appendix D](#)).

Representative Wrangham said the intent of the study was to determine which entity should be planning around cities, not to review present zoning laws.

Representative Kaldor said it is helpful to understand what is being done at present so that changes may be made for the future. He said information on the present process for zoning is constructive information for the commission.

Mr. Dave Patience, Swenson, Hagen & Co., provided testimony on the consulting services he provides for property interests inside and outside cities. He said metropolitan planning organizations are needed to qualify for federal programs. He said there needs to be planning for physical obstructions so that infrastructure like railroad tracks, powerlines, and roadways may be developed in an orderly manner. He said there are many factors that limit what a person can do with property. He said storm water is treated as pollution and the State Department of Health has jurisdiction over storm water. He said development requires a plan filed with the state and may require approval of the Army Corps of Engineers. He said when a city has grown, the rural area next to the city becomes attractive to development. If there is a plan for this growth, the people know of these plans before the growth and know where the roads, sewer, and water will be located. He said this keeps costs of development low.

In response to a question from Representative Wrangham, Mr. Patience said North Dakota Century Code Chapter 11-35 provides for regional planning and zoning commissions and these commissions are capable of providing planning and zoning if the commissions have qualified people.

Mr. Larry Weil, West Fargo, provided written testimony on the growth of the city of West Fargo and examples of subdivisions and zoning coordination beyond city limits. In addition, he provided written testimony on how coordination had worked between the city, township, and county ([Appendix E](#)).

In response to a question from Representative Kaldor, Mr. Weil said West Fargo has a comprehensive plan in which townships had a role in creating. He said the townships in the area do not have the expertise and manpower for zoning issues.

In response to a question from Representative Wrangham, Mr. Weil said a regional planning and zoning commission uses a different framework from that used under other state law. He said planning and zoning has to take in the large picture of water, storm water, livable spaces, services, open spaces, and transportation.

Mr. Brad Gengler, Grand Forks, provided maps on annexations, rural subdivisions, and extraterritorial zoning in and around Grand Forks ([Appendix F](#)).

In response to a question from Senator Cook, Mr. Gengler said there are areas totally surrounded by annexed areas which have not been annexed because the areas are farmland or vacant land.

In response to a question from Ms. Nielson, Mr. Gengler said the population growth for Grand Forks has been around 1.2 percent annually. He said the current population is 53,000 and the expected population in 2010 is 55,000, in 2020 is 62,000, in 2030 is 70,000, and in 2040 is 78,000.

In response to a question from Representative Kaldor, Mr. Gengler said there are three members from the rural area on the 15-member planning and zoning commission. He said the city notifies the township of platting and exchanges agendas with the county.

In response to a question from Ms. Nielson, Mr. Gengler said the decision to be included within extraterritorial zoning authority of a city is made by someone that is not elected by people in the extraterritorial zoning area.

Mr. Jim Gilmour, Fargo, provided maps of annexation in Fargo and corridor problems resulting from lack of planning ([Appendix G](#)). He said the process for creating a subdivision requires an amenities plan for drainage, water, health, and roads. He said the burden is on the developer to show the development will work.

In response to a question from Representative Wrangham, Mr. Gilmour said Fargo has the circumstance of having a river as a border on the east side, the city of West Fargo on the west side, and the city of Horace on the south side. He said the city of Fargo needs a place to grow. He said Horace annexed property on the south side and annexed more property than it could use. He said Fargo was able to provide services for this area and was concerned with Horace choking off the development of Fargo.

In response to a question from Representative Wrangham, Mr. Gilmour said a regional planning and zoning commission would be a good approach if the parties could work together. He said the city of Horace was not willing to work with Fargo. He said the growing city is in the best position to make land use decisions.

Ms. Coates said Horace wanted to break an agreement on growth area with Fargo. She said Fargo wanted to avoid a court battle so Fargo and Horace worked out an agreement whereby Horace may grow unlimited to the west. She said Fargo needed to grow to the south.

In response to a question from Senator Cook, Mr. Gilmour said the extraterritorial zoning authority boundary is two miles south of 112th Avenue South. Ms. Coates said the city of Fargo could have gone farther but did not.

Ms. Donna Bye, Minot, provided written testimony on zoning issues in Minot ([Appendix H](#)). She said Minot is growing .5 percent to 1 percent per year. She said most industrial growth is to the east and south.

In response to a question from Mr. Bitner, Ms. Bye said Minot provides sewer and water services to an exterior subdivision.

In response to a question from Representative Wrangham, Ms. Bye said the city of Minot has three rural members on the planning commission. She said professional services are required for proper planning no matter which governmental entity provides the service.

Mr. Carl Hokenstad, Bismarck, presented testimony on planning and zoning in Bismarck. He said there are over 350 rural subdivisions within roughly four miles of Bismarck. He said the city requires a permit for rural developments. He said the city needs room for expansion and does not want to be hemmed in by rural subdivisions. He said subdivision design needs to be planned so that the subdivision may be incorporated into the city as the city grows. He said Bismarck works with organized townships. He said Bismarck requests written recommendations from the townships. He said three members from the extraterritorial zoning area are on the city planning commission. He said a member of the board of county commissioners is on the planning commission. He said if the planning relates to a subdivision within an organized township, one member of the board of township supervisors is a temporary member of the planning commission. He said Bismarck extended the extraterritorial zoning area to four miles in 2004 after completing a growth management plan.

Mr. Jerry Hjelmstad, North Dakota League of Cities, provided written testimony of sections of the North Dakota Century Code that provide protection to property owners in the city zoning and planning process ([Appendix I](#)).

In response to a question from Representative Boucher, Mr. Hjelmstad said city taxation only applies to property within the territorial limits of the city, not the limits of the extraterritorial zoning authority.

In response to a question from Representative Wrangham, Mr. Hjelmstad said the safeguard for people in the township in which extraterritorial zoning is to be extended is that there are public hearings. He said the law allows the city to extend extraterritorial zoning authority even if everyone in the area does not want the authority extended. He said sometimes the law provides for the requirement of a supermajority of the city board to extend zoning.

Mr. Gabe Brown, a landowner in the extraterritorial zoning authority of Bismarck, provided testimony on extraterritorial zoning. He said he owns a ranch four miles east of Bismarck and is on the board of township supervisors in Gibbs Township. He said the notification for extension of extraterritorial zoning authority comes too late to township officers. He said the township officers are asked for input, but the input does not matter. He said he received substantial offers for his property for residential use until the planning commission zoned it for industrial use. He said he cannot sell the land for rural residential use without changing the plan. He said he is being punished for keeping the land agricultural instead of selling it earlier for residential development. He said

after being given six days' notice he testified that he would not ever sell the land for industrial use; however, the plan was still adopted. He said the decision reduced his net worth by approximately 75 percent.

In response to a question from Ms. Coates, Mr. Brown said he had no intention of selling his land until the city made the industrial designation. He said last summer he learned that the state and local economic development people were looking at bringing a large business into Bismarck and placing it on his land. He said he was not notified of the plan.

In response to a question from Representative Kaldor, Mr. Brown said there is nearby property designated rural residential.

In response to a question from Ms. Coates, Mr. Brown said he has not approached the city with a zoning change request.

Mr. Melvin Fischer, Administrator, Environmental Health, City of Bismarck, presented written testimony on a summary of activities from the Environmental Health Division in the Apple Creek Township ([Appendix J](#)). He said the process is complaint-initiated.

In response to a question from Representative Wrangham, Mr. Fischer said the examples were a cross section of complaints the city receives.

In response to a question from Ms. Nielson, Mr. Fischer said the properties are within the city's jurisdiction and the environmental concerns relate to public health, nuisances, rodents, and concern with property values.

In response to a question from Ms. Nielson, Mr. Fischer said the degree of compliance with demands to clean up is good.

In response to a question from Mr. Bitner, Mr. Fischer said the information provided came as the result of a request and is of environmental concern in Apple Creek Township. He said similar concerns happen elsewhere. He said the purpose of the information is to provide examples of city jurisdiction over environmental concerns, not to single out Apple Creek Township.

Mr. Richard Hammond, Burleigh County resident, provided testimony in opposition to allowing cities to have extraterritorial zoning jurisdiction ([Appendix K](#)).

In response to a question from Senator Cook, Mr. Hammond said the city stopped the rural water cooperative from providing water. He said the city did it because the city said it would provide the water. He said 30 years have passed and there is no water. He said professional staff recommended that the planning commission zone an area industrial because of an airport sound study. He said airplanes rarely go over the property because the crosswind runway is hardly ever used for landing aircraft.

In response to a question from Senator Cook, Mr. Hammond said the city did not change the designation of the property to industrial, but the "experts" recommended the change.

In response to a question from Representative Kaldor, Mr. Hammond said zoning authority should be with the board of county commissioners for areas not within the territorial limits of a city.

Mr. Travis Anderson, Bismarck, provided testimony on problems with receiving a building permit because the house he purchased was on property that had not been platted. He said he has serious problems with his home that require immediate action and the platting will take four months to seven months at the cost of \$5,000. He said an emergency building permit was not allowed and the same problem has been experienced with others.

In response to a question from Representative Wrangham, Mr. Anderson said the reason the city requires platting is so that when the city annexes the property it knows where the ground water and roads and other things are located.

Ms. Kathy Mauch, Apple Creek Township, presented testimony on her small farm within Bismarck's extraterritorial zoning authority. She said the city does not allow them to use schoolbuses for calving shelters. She said she is not allowed to have parts vehicles on the land, unless they are in a building. She said this would be cost-prohibitive. She said when Bismarck exercised its extraterritorial zoning authority over Apple Creek Township, Apple Creek Township lost approximately \$71,000 in building permit fees. She said the township will have to increase mill levies to maintain roads. She said the school district was affected because the township bought a portable classroom from Bismarck to place on land owned by the township. She said the portable classroom was purchased on May 3 and was not placed until September due to bureaucratic delays.

Mr. Sund said building permit fees are to be tied to the cost of the program, not to be property tax relief.

In response to a question from Mr. Sund, Ms. Mauch said she understands that Bismarck Public Schools does not need a permit and can use a temporary foundation that is not allowed by the Apple Creek Township. She said the Bismarck temporary classroom was on cement blocks which were given to the township. She said it cost the township \$12,000 to put the building on a foundation because of requirements of the city, including having footings, a foundation, bracing, and engineering.

Mr. Ken Selzler, Apple Creek Township, answered questions for the commission.

In response to a question from Ms. Coates, Mr. Selzler said he is the Apple Creek Township supervisor and the township has building permits. He said he agreed with the people testifying, and the unintended consequence of the city enforcing its extraterritorial zoning jurisdiction is that people are building without permits. He said the township applies the same procedures as to public health as the city of Bismarck. He said the city has been especially tough on the township residents lately.

In response to a question from Representative Kaldor, Mr. Selzler said Apple Creek Township has issued building permits for years.

Senator Cook said he hoped that no matter where a person lived in this state there would be someone to call for a complaint about environmental health.

Mr. Doug Schonert, Burleigh County Commissioner, presented testimony to the commission. He said no one is against good zoning. He said the issue is who does the zoning. He said it has taken 50 years for Bismarck to grow three miles south and north and two miles east. He said when the Legislative Assembly allowed the increase from two to four miles for extraterritorial zoning, the increase was meant particularly for the city of Fargo. He said the extraterritorial zoning authority in Bismarck was done against the recommendation of the Burleigh County Board of Commissioners. He said the city planning staff is the same staff that is used by Burleigh County. The only difference is who has the final determination. He said the main issue is about the people who are having zoning restrictions placed on them without having representation and redress for creation or change of zoning rules. He said Burleigh County and the township only have representation in an advisory role. He said the city of Bismarck left no room for negotiation and increased the extraterritorial zoning to four miles because the city had the power.

In response to a question from Representative Kaldor, Mr. Schonert said only the board of county commissioners can approve plats. He said townships can only zone. He said generally the more local the government, the better the governing. He said there are 46 townships in Burleigh County and 6 are unorganized. He said in unorganized townships the board of county commissioners is the zoning board. He said there are 40 organized townships in Burleigh County. He said in Morton County there is only one organized township.

In response to a question from Senator Cook, Mr. Schonert said he recommends that the Legislative Assembly return the extraterritorial zoning authority to two miles. He said the boundary can always move as the city grows and, as such, the boundary continuously expands.

Mr. Curly Haugland, Landowners Association of North Dakota, presented testimony to the commission. He said the board of the Landowners Association of North Dakota does not think the Advisory Commission on Intergovernmental Relations is the correct or proper entity to be doing the study. However, since the Advisory Commission on Intergovernmental Relations is studying the matter, the association will participate at future meetings.

Mr. Bitner provided written testimony on the extraterritorial jurisdiction of Bismarck ([Appendix L](#)). He said the city will not pave the gravel road in the area. He said the township cannot afford to pave the road because of lost fees that go to the city because of extraterritorial zoning regulation. He said the permits in 2006 issued by the township were \$793.

He said the annual budget of the Apple Creek Township is \$32,000. He said he cannot build a garage on his property without being rezoned and having a new survey, subdivision platting, and a storm water management plan. He said he does not live within the city limits but is burdened by the city's extraterritorial jurisdiction. He said he cannot run for or vote in city elections. He suggested that property developed before the extension of extraterritorial zoning authority should be grandfathered so as not to be faced with huge financial burdens for compliance with city policies.

ZONING OF FEEDLOT OPERATIONS

Mr. Brian Kramer, North Dakota Farm Bureau, presented written testimony in opposition to having the Advisory Commission on Intergovernmental Relations study feedlot zoning. He said the study was not prioritized for a reason. He said the parties involved and the law as it is should be given time. He said if the issue relates to taxation, the issue should be before the Taxation Committee, and if the issue relates to health, the issue should be before the Agriculture Committee ([Appendix M](#)).

In response to a question from Mr. Krebsbach, Mr. Kramer said dealing with a small operator or an out-of-state corporation starting a feedlot operation requires issues to be addressed in the permitting process. He said these issues may be addressed on a case-by-case basis. He said there is not much expense to cleaning up a feedlot. He said the only additional concern over any other business would be to spread out the manure and fill up the waste ponds with dirt.

In response to a question from Ms. Coates, Mr. Kramer said more people are needed for a hog feedlot than for a cattle feedlot. He said if a farmer or rancher owns the feedlot, it is not taxed as commercial property.

CHARITABLE PROPERTY TAX EXEMPTIONS

At the request of Chairman Kaldor, commission counsel presented a memorandum entitled [Charitable Organizations' Property Tax Exemptions](#).

Ms. Marcy Dickerson, Tax Department, answered questions for the commission.

In response to a question from Mr. Sund, Ms. Dickerson said the dominant use determines the use of property as stated in the memorandum. She said "in part" is a term that needs to be interpreted.

In response to a question from Senator Cook, Ms. Dickerson said a large percentage of the property in cities is exempt because the property is used for charitable purposes.

MILLS TO DOLLARS

At the request of Chairman Kaldor, commission counsel presented a memorandum entitled [Alternatives to Expressing Property Tax Levies in Mills - Background Memorandum](#).

Senator Cook said in the last legislative session, the property tax relief bill requires three years of history in dollars on the property tax bill. He said this should lay to rest any issue relating to expressing property taxes in dollars instead of mills.

Mr. Sund said he was interested in taxing by dollars instead of mills.

Senator Cook said the Taxation Committee is discussing these issues.

STATE AID DISTRIBUTION FUND

At the request of Chairman Kaldor, commission counsel presented a memorandum entitled [State Aid Distribution Fund History](#).

Senator Cook said the state aid distribution fund is related to property tax. He said there are two issues in taxation. The first issue is the only way to reduce taxes is to reduce government. He said if that is not done, and a tax goes down, that tax has only been shifted. He said the second issue is to what degree should taxes be shifted.

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

Timothy J. Dawson
Commission Counsel

ATTACH:13