

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

Thursday, August 16, 2012
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, Thomas R. Beadle, Ron Guggisberg, Brenda Heller; Citizen Members Don Frye, Shawn Kessel, Jon Martinson, Richard Riha, Mike Schwartz, Kenneth Yantes; Governor's Designee Brandi Pelham

Member absent: Citizen Member Scott Ouradnik

Others present: Representative Jerry Kelsh, member of the Legislative Management, also was in attendance.

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

Chairman Klemin welcomed Mr. Schwartz to the commission. He said Mr. Schwartz was appointed by the North Dakota Recreation and Park Association to replace Mr. Ron Bieri who is no longer a member of a board of park commissioners.

It was moved by Mr. Frye, seconded by Representative Beadle, and carried on a voice vote that the minutes of the February 21, 2012, meeting be approved as distributed.

OVERSIZE VEHICLE PERMIT FEES AND PENALTIES

At the request of Chairman Klemin, Colonel James Prochniak, North Dakota Highway Patrol, distributed information ([Appendix B](#)) regarding extraordinary road use fees collected by the Highway Patrol and by counties.

Colonel Prochniak said the difference between the summary provided today and the summary provided at the last meeting of the commission is that today's summary is based on the fiscal year rather than the last calendar year. In addition, he said, several counties have submitted funds since the last report. He said he was not sure if the funds submitted by the counties are a result of increased enforcement or other factors. He said collection of extraordinary road use fees continues to grow in all respects, and the approximately \$3 million collected this year is the highest total amount ever collected. He said last year's total collections already have been surpassed this year. He said the added enforcement with Highway Patrol officers having portable scales is paying for itself rather quickly while keeping the state's infrastructure safe.

In response to a question from Representative Klemin, Colonel Prochniak said approximately \$1.7 million in oversized vehicle permit fees were

collected as of July 1, 2012. He said the amount collected through permit fees is likely to continue to increase. He said the permits allow the movement of certain excess loads. He said the Highway Patrol is working on a major project that will allow 24-hour access through a vendor under which permits may be issued. He said the project should go live in about a year, and he expects the Highway Patrol will demonstrate the project for legislators during the 2013 legislative session.

In response to a question from Mr. Kessel, Colonel Prochniak said the Highway Patrol did not seek information from cities that are collecting extraordinary road use fees. He said there likely are a couple of cities, including Fargo, that collect extraordinary road use fees.

At the request of Chairman Klemin, Commission Counsel reviewed a bill draft [[13.0036.01000](#)] that would allow counties to retain extraordinary road use fees collected in the county for the support of the county road system.

At the request of Chairman Klemin, Mr. Grant Levi, Department of Transportation, provided comments ([Appendix C](#)) regarding the bill draft.

In response to a question from Representative Guggisberg, Mr. Levi said he has not discussed the provisions of Section 3 of the bill draft with Colonel Prochniak. He said if the provisions of Section 3 were based on South Dakota law, it may make sense in South Dakota to have the oversight of enforcement under the Department of Transportation because the Department of Transportation and the Highway Patrol in South Dakota are under the same department.

In response to a question from Mr. Riha, Mr. Levi said the definition of deficient enforcement is subjective. He said any oversight of enforcement probably should be based on the federal model the Highway Patrol follows with respect to state certification of vehicle size and weight enforcement. He said the Highway Patrol certifies to the federal government that the state is appropriately enforcing size and weight restrictions. He said Section 3 of the bill draft is probably unnecessary, particularly if the intent of the bill draft is to encourage enforcement.

Chairman Klemin said there had been some concerns raised at the previous meeting with respect to overzealous local enforcement being used as a revenue-producing mechanism.

Mr. Levi said an appropriate balance of enforcement is likely to occur and overzealous

enforcement is not likely to be a problem. He said Department of Transportation officials have long believed that sanctions are not the way to do business as a means to encourage enforcement.

In response to a question from Mr. Martinson, Mr. Levi said he supports the concept that local jurisdictions receive the funds collected as a result of local enforcement on local roads. He said an appropriate level of enforcement is important to protect the infrastructure.

In response to a question from Representative Klemin, Mr. Levi said although Section 3 of the bill draft probably is not necessary, the section could be replaced with a requirement that reports of enforcement be provided to the Legislative Assembly.

In response to a question from Representative Klemin, Colonel Prochniak said he agrees with the Department of Transportation's philosophy regarding oversight. He said enforcement certification already is provided to the federal government, and he has concerns with the subjective nature of the oversight provisions. In addition, he said, he is concerned about the concept of trying to determine fairness with respect to allowing law enforcement officer discretion. He said the Highway Patrol has a great working relationship with local law enforcement and would prefer not to be in a position of reviewing their work. He said overzealous enforcement is not likely to be a problem, and law enforcement responds to the public demand in enforcing laws in that additional concentration is placed on problem areas so that law enforcement can better protect the safety of the public.

Mr. Terry Traynor, North Dakota Association of Counties, submitted written testimony ([Appendix D](#)) regarding the bill draft. Mr. Traynor said if policymakers believe a reporting requirement is necessary, the bill draft could be revised to require enforcement reports to be submitted so that the Legislative Assembly can determine if the bill draft should be continued beyond June 30, 2017.

In response to a question from Representative Klemin, Mr. Traynor said he believes the city of Bismarck conducts local weight enforcement. If any townships were to have local enforcement on township roads, he said, townships should share in the revenue if township roads are being damaged.

Mr. Scott Rising, North Dakota Soybean Growers, said soybean growers are concerned with local infrastructure and enforcement of laws. He said he believes it is critical to not interfere with the relationship between the Highway Patrol and local law enforcement by requiring the Highway Patrol to serve in an oversight capacity with respect to enforcement. He said there may be a greater likelihood of overzealous enforcement if additional costs are imposed as a result of oversight functions.

In response to a question from Representative Klemin, Mr. Rising said he does not see the need for Sections 3 and 4 in the bill draft.

Mr. Yantes said township officers support the concept of the money following the damages for the affected jurisdictions.

Mr. Riha said he agrees that the money being distributed to the affected jurisdiction is a matter of fairness. He said Sections 3 and 4 of the bill draft are not necessary. With respect to concerns regarding overzealous enforcement, he said, he is mystified by the concerns.

Representative Beadle said the reports that have been presented by the Highway Patrol at the last two meetings should be sufficient to provide information in the future as well.

Representative Guggisberg said he agrees the reports are not necessary. He said local law enforcement can handle enforcement without oversight from the state.

It was moved by Mr. Martinson, seconded by Representative Beadle, and carried on a roll call vote that the bill draft relating to extraordinary road use fees be revised to incorporate the suggestions provided by Mr. Traynor. Representatives Klemin, Beadle, Guggisberg, and Heller; Citizen Members Frye, Kessel, Martinson, Riha, Schwartz, and Yantes; and Governor's Designee Pelham voted "aye." No negative votes were cast.

It was moved by Mr. Yantes, seconded by Representative Beadle, and carried on a roll call vote that the bill draft, as amended, relating to extraordinary road use fees be approved and be recommended to the Legislative Management. Representatives Klemin, Beadle, Guggisberg, and Heller; Citizen Members Frye, Kessel, Martinson, Riha, Schwartz, and Yantes; and Governor's Designee Pelham voted "aye." No negative votes were cast.

DISASTER RESPONSE AND MITIGATION

At the request of Chairman Klemin, Commission Counsel reviewed a second draft of a bill draft [[13.0037.02000](#)] relating to liability and immunity during disaster responses.

In response to a question from Representative Kelsh, Chairman Klemin said the term "gross negligence" is defined statutorily and through case law as the failure to use even the slightest care.

At the request of Chairman Klemin, Mr. Greg Wilz, Department of Emergency Services, provided testimony ([Appendix E](#)) regarding the bill draft.

In response to a question from Representative Klemin, Mr. Wilz said the state has taken responsibility recently for damages caused as a result of a disaster response action. However, he said, there have been cases where some local governments have not taken responsibility for damages. Although the state generally has overarching authority in emergency response, he said, each entity of government that is responsible for damage should assume its responsibility. He said a written agreement with a property owner regarding the

use of a property would take precedence with respect to the determination of the extent of liability under the proposed revision he submitted.

In response to a question from Representative Kelsh, Mr. Wilz said there are many factors involved in emergency situations, but generally local leadership should be in charge at the local level when decisions are made. He said reimbursement from the federal Emergency Management Agency (FEMA) is not always clear. He said the proposed revision to the bill draft would provide that all entities are held accountable for damages caused due to decisions made in emergency response.

Representative Kelsh said some small governmental entities often do not have funding available to assume responsibility in emergency response.

In response to a question from Representative Klemin, Mr. Wilz said FEMA would never tell a local government where to locate a levy nor would the Corps of Engineers ever likely order the destruction of property. Although there may be a remedy under state law for damages sustained by property owners due to emergency response, he said, there is not always the political will to do the right thing at the local level. In the case of the backhoe falling into a basement in Minot, he said, the contractor likely has some liability, and the corps and the city likely would have some liability. He said his proposed amendment would put local officials on notice that there is liability for those instances.

Representative Klemin distributed photographs ([Appendix F](#)) of a home damaged by the placement of a levy in a response to a flood protection action. He said the photographs show damage to a house in which the homeowner had no recourse. He said the private insurance coverage would not cover damages due to flooding or done by governmental entities.

Mr. Wilz said the city should have assumed liability for that damage because the levy was put in place to protect the common good.

In response to a question from Representative Klemin, Mr. Wilz said Section 4 of the bill draft would allow for the payment of expenses incurred by the state, but the language could use some clarification.

Representative Kelsh said he agrees with Mr. Wilz that the damages caused by a local government should be paid by the local government. However, he said, some smaller local governments do not have funds to pay expenses.

Representative Klemin said it is better for the community to bear the burden than the property owner when the work is done for the good of the community.

It was moved by Mr. Martinson, seconded by Ms. Pelham, and carried on a roll call vote that the bill draft be revised to incorporate the proposed revision submitted by Mr. Wilz and to clarify in Section 4 that the payment of expenses be limited to expenses incurred by the state. Representatives Klemin, Beadle, Guggisberg, and Heller; Citizen

Members Frye, Kessel, Martinson, Riha, Schwartz, and Yantes; and Governor's Designee Pelham voted "aye." No negative votes were cast.

In response to a question from Representative Heller, Mr. Wilz said the state becomes involved only in situations in which the Governor declares a state of emergency. He said there are emergency responses that are only declared at the local level.

It was moved by Mr. Kessel, seconded by Mr. Frye, and carried on a roll call vote that the bill draft, as amended, relating to liability and immunity during disaster responses be approved and recommended to the Legislative Management. Representatives Klemin, Beadle, Guggisberg, and Heller; Citizen Members Frye, Kessel, Martinson, Riha, Schwartz, and Yantes; and Governor's Designee Pelham voted "aye." No negative votes were cast.

GROUP HOUSING REGULATION

At the request of Chairman Klemin, Commission Counsel presented a draft of a resolution [[13.3011.01000](#)] that would direct a Legislative Management study of issues related to development of group housing and crew camps, including infrastructure demands, health and safety requirements, regulation, and enforcement of regulatory violations.

Mr. Brady Pelton, North Dakota Association of Oil and Gas Producing Counties, said his association is supportive of looking at methods through which the state can assist local governments in addressing issues. He said the association is working on best practices to address crew camps, but additional resources may help in establishing better local policies.

Mr. Kessel said one area that may need to be examined is the definition of crew camps.

It was moved by Mr. Kessel, seconded by Representative Beadle, and carried on a roll call vote that the resolution draft related to development of group housing and crew camps be approved and recommended to the Legislative Management. Representatives Klemin, Beadle, Guggisberg, and Heller; Citizen Members Frye, Kessel, Martinson, Riha, Schwartz, and Yantes; and Governor's Designee Pelham voted "aye." No negative votes were cast.

Chairman Klemin thanked the members of the commission for their service. He said the commission serves as a useful forum for ideas and debate from the various groups represented. He said the commission addressed its assigned study and recommended a bill draft to address the concerns. In addition, he said, the commission addressed a number of other issues affecting local governments and provided interested parties an opportunity to make their issues known. He said North Dakota Century Code Section 54-35.2-01 provides that the commission shall meet at least semiannually. Thus, he said, although the commission has completed its

study and will make a report to the Legislative Management in November, the commission may need to meet during the first six months of the next calendar year to satisfy the statutory requirement of semiannual meetings. He said the members of the commission are appointed to serve two-year terms beginning July 1 of each odd-numbered year. Therefore, he said, the members of the commission continue to serve for the remainder of the biennium.

It was moved by Representative Heller, seconded by Representative Beadle, and carried on a voice vote that the Chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the commission and to present the report and the recommended bill drafts to the Legislative Management. Representatives Klemin, Beadle, Guggisberg, and Heller; Citizen Members Frye, Kessel, Martinson, Riha, Schwartz, and Yantes; and Governor's Designee Pelham voted "aye." No negative votes were cast.

No further business appearing, Chairman Klemin adjourned the meeting at 11:00 a.m.

John Bjornson
Commission Counsel

ATTACH:6