# Education and Local Government Interim Committee

## 58th Montana Legislature

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EDDYE MCCLURE, Staff Attorney
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# LOCAL GOVERNMENT SUBCOMMITTEE MINUTES

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

## COMMITTEE MEMBERS PRESENT

SEN. WILLIAM GLASER
SEN. RICK LAIBLE
SEN. JEFF MANGAN
REP. JOAN ANDERSEN

## STAFF PRESENT

LEANNE KURTZ, Research Analyst
EDDYE MCCLURE, Staff Attorney
CYNTHIA A. PETERSON, Secretary

## Visitors

Agenda, Attachment 1
Visitors' list, Attachment 2

## COMMITTEE ACTION

- Eddye McClure's work on governmental franchise was postponed.

## CALL TO ORDER AND ROLL CALL

The April 2, 2004, Education and Local Government Subcommittee (Subcommittee) meeting was called to order by acting Chairman Laible at 1:00 p.m., in Room 137, Montana State Capitol Building. The secretary noted the roll (Attachment 3) The minutes of the January meeting of the Subcommittee were approved.

## GOVERNMENT FRANCHISE

- **Eddye McClure, Legislative Services Division**

Eddye McClure, Attorney, Legislative Services Division, submitted written information and proposed options to the Subcommittee (EXHIBIT 1).

- **Geoff Feiss, Montana Telecommunications Association**

Geoff Feiss, General Manager, Montana Telecommunications Association, submitted a slide outline (EXHIBIT 2), a map of Montana Telecommunications Assets (EXHIBIT 3), and a list of Broadband Towns of Montana (EXHIBIT 4). Mr. Feiss suggested that governmental franchise could be as large an issue as one wanted to make it, and offered his assistance to the Subcommittee if it decided to pursue it.

- **Alec Hansen, Montana League of Cities and Towns**

Alec Hansen, representing the Montana League of Cities and Towns, agreed that governmental franchise is complicated. Mr. Hansen remembered numerous bills over the years that attempted to limit government competition with private enterprise. Mr. Hansen explained the laws have evolved and in most of the places where government provides services it is because private businesses have withdrawn or have been incapable of providing the services. Mr. Hansen said these services were mostly water, sewer, garbage, and recreation programs. Mr. Hansen urged the Subcommittee to carefully consider whether to get involved and suggested that the best way to deal with governmental franchise is on a case-by-case and service-by-service basis. Mr. Hansen said a general prohibition, complicated accounting procedures, or a law such as that proposed in HB 426 (2003) goes way too far and will cause more problems than it will ever correct. He said he is unaware of any plans or discussion about local governments getting into the telecommunications business, although he did note some Montana cities are interested in entering the power and gas utility business. Mr. Hansen explained if NorthWestern Energy does not emerge from bankruptcy, another company could purchase the transmission and distribution system, and operate it in a fashion contradictory to the interests of the people of Montana. Mr. Hansen said privatization is extremely complicated and has caused a significant amount of controversy during past sessions. Mr. Hansen reiterated the current laws have evolved over time and work well.

- **Harold Blattie, Montana Association of Counties**

Harold Blattie, Assistant Director, Montana Association of Counties, agreed with the testimony of Mr. Hansen. Mr. Blattie said Montana counties have always been solid supporters of the independent telecommunications industry.

- **Questions from the Subcommittee**

At the request of Senator Laible, Ms. McClure clarified the issue did not come to the Subcommittee from the telecommunications industry, but rather was the result of a 2002 Montana Supreme Court case. Greg Petesch, Legislative Services Division Legal Director, thought the Education and Local Government Interim Committee may want to look into it. Ms. McClure said the Montana Supreme Court held that Montana has failed to address governmental franchise in statute, which has caused it to be dealt with on a case-by-case basis

and in a manner that is reactive and not proactive. The Supreme Court suggested the Montana Legislature may wish to examine the issue.

Senator Laible said he did not believe the Subcommittee had the time or resources to address the problem in a full-blown manner, and wondered if there was a way to limit the scope of the problem. Ms. McClure cautioned that an attempt to develop guidelines could lead to discussions about the larger matter of privatization. Ms. McClure and Sen. Laible both agreed it would be difficult to limit the scope to certain areas.

Rep. Joan Andersen inquired whether any states currently operate under narrow guidelines. Ms. McClure clarified before guidelines can be developed, local governments have to decide whether they are in or out.

Sen. Jeff Mangan reminded the Subcommittee that there are only two meetings remaining and did not think there would be time to address the subject this interim. Sen. Mangan suggested Mr. Feiss try to get a bill drafted for the next legislative session. Sen. Mangan said he thought a lot of what Mr. Feiss had to say was relevant, but he did not see where the Subcommittee would have time to get involved.

Sen. William Glaser said every city and every county has a different idea of what it wants to do, so he did not think the Subcommittee should get involved. Sen. Glaser noted the makeup of the Subcommittee was mostly from metropolitan areas in Montana, and suggested Mr. Feiss would be better off having legislation drafted for the next legislative session.

Sen. Mangan moved Ms. McClure's work on governmental franchise be postponed. The motion carried unanimously.

## HJR 37 STUDY OF THE SUBDIVISION AND PLATTING ACT

***Title 76, Chapter 3 (Subdivision and Platting Act)***

- **Leanne Kurtz, Legislative Services Division**

Leanne Kurtz, Research Analyst, Legislative Services Division, provided the Subcommittee with a Progress Report on HJR 37 (EXHIBIT 5).

***(Tape 1; Side B)***

Ms. Kurtz reviewed Exhibit 5 with the Subcommittee and submitted a bill draft for discussion (EXHIBIT 6). Ms. Kurtz noted the italicized language in Exhibit 6 is language which has been discussed by the working group, but not agreed on.

- **Eddye McClure, Staff Attorney, Legislative Services Division**

Eddye McClure, Legislative Services Division, reviewed issues raised by the Brandborg decision (EXHIBIT 7).

***(Tape 2; Side A)***

- **Public or Working Group Comment**

Tammy McGill, Staff Planner for Stillwater County, began by thanking Ms. Kurtz and Ms. McClure for their hard work. Ms. McGill said the definition of "original tract of record" needed clarification. Ms. McGill mentioned the pre-application process needs to include clarification that the pre-application conference is not set in stone, and things may change. Ms. McGill noted the pre-application process would not be a formal review of the application, and when the actual review is conducted, there may be additional agencies or persons who need to be contacted for additional information. Ms. McGill said it was important to clarify the pre-application process is not part of the formal review process.

Ms. McGill said that "completeness review" means different things to different people. She suggested the working group clarify what "completeness review" means and whether it needs to be defined. To some planners, the term may mean running through the checklist, while to others it is more of a sufficiency review of the items on the checklist.

The 10 working days between the public hearing and the recommendation sent to the governing body is a statutory requirement and falls within the 60-working-day time line. Therefore, changing the requirement from 10 days to 10 working days will not affect the 60-day time frame. Ms. McGill said this change will give the planners three more days to complete work. Ms. McGill cited an example where the 10-working day requirement, in reality, only allowed a few more working days for staff, but does nothing to the 60-day review.

Ms. McGill spoke about Title 76, Chapter 4, change in the definition of "subdivision" from 20 to 160 acres, Ms. McGill said some counties are now complying with the Attorney General Opinion (40 Op. Att'y Gen. 7 2004) and some are not. Ms. McGill reiterated on behalf of the Stillwater County sanitarian that it is important to have consistency.

Peggy Trenk, Montana Association of Realtors, pointed out that the Montana Association of Realtors would like to see a process that is more predictable and consistent. Ms. Trenk testified that assuming some of the changes become law, it will statutorily authorize a review period beyond the 60-day review. Ms. Trenk identified the completeness review as important, and currently not as black-and-white as it should be. Ms. Trenk proposed public comment regarding sanitation should take place before the Department of Environmental Quality (DEQ) or the reviewing authority for sanitation and should not be before the County Commissioners or City Commissioners.

Myra Shults, representing the Joint Powers Insurance Authority, recently attended a Montana Association of Counties (MACO) land use committee meeting. Ms. Shults relayed that committee would like to be kept informed, and asked the Subcommittee to keep in mind that this is a work-in-progress.

Tim Davis, representing the Montana Smart Growth Coalition, said the toughest issue will be sanitation. Mr. Davis would like to ensure that sanitation and water availability are addressed during subdivision review, and that a new subdivision would not infringe upon the water of people already living in the area. Mr. Davis said it would be challenging to find a balance with DEQ that does not create unreasonable burdens on the developers ahead of time.

- **Questions from the Committee**

Sen. Mangan identified the biggest concern as the definition of "completeness review." Sen. Mangan said "sufficiency" would have a different meaning than "complete" and thought "sufficient" might be the better term. Ms. Kurtz explained the difference as the amount of time it takes to run through a checklist versus the amount of time it takes to ensure the information submitted is accurate and complete.

Sen. Mangan said one of the reasons a completeness review is being looked at is because of concern that different things get thrown into the middle of the game and rules get changed. Ms. Trenk explained the importance of having all the pieces of the application and that completeness be determined so the review process can begin. Sen. Mangan wondered if the working group was addressing this issue. Ms. Trenk hoped it was, but also recognized Ms. McGill's concern that the information is not only present, but also accurate. Ms. Trenk never envisioned taking from reviewers the ability to decide whether an application is sufficient. Ms. Trenk said it will be important to make a distinction between complete and sufficient.

Senator Laible said that within the definition of "completeness" they could allow applicants to have a check-off list and follow that up with a "sufficiency" review. Ms. McGill agreed and said one of the reasons she is hesitant to commit to a completeness review is that if, for instance, an Environmental Assessment is missing major components, the 60-day time period has already started to run. Ms. McGill sees this happening frequently right now. Ms. McGill agreed having a separate "completeness" review and "sufficiency" review could be the right direction. Sen. Laible identified one of the concerns as if the clock is running and someone notices at a late date that a document is not sufficient. Sen. Laible wanted to know how that scenario could be avoided. Ms. McGill suggested being able to toll the time may be one way to address the sufficiency problem. Ms. McGill was optimistic the parties would reach an agreement and it is just a matter of getting the parties on the same page.

***Title 76, Chapter 4 (Sanitation in Subdivisions Act)***

- **Eddye McClure, Staff Attorney, Legislative Services Division**

Eddye McClure provided an overview of 49 Op. Att'y Gen. No. 7 (2001), which came out of a case in Granite County. The first question asked by Granite County was whether a governing body was required to adopt subdivision regulations for water supply, sewage and solid waste disposal that are at least as stringent as the DEQ regulations required in the Sanitation Act. Granite County argued that because the Subdivision and Platting Act deals with lots less than

160 acres, and the Sanitation Act deals with lots less than 20 acres, Granite County argued there was no state law that applied to the area between 20 acres and than 160 acres; therefore, the local government should have authority to adopt more stringent rules than DEQ. The Attorney General did not accept the argument that there was no state law between the 20 acres and 160 acres and found no reason for the local government to adopt more stringent rules than the state rules. The Attorney General said it was irrelevant that there were different definitions for subdivision and that the Platting Act did not violate the Sanitation Act. The appropriate interpretation of Section 76-3-511, MCA, is that the local government shall adopt standards as stringent as the DEQ unless the local government can specifically show there is a public health reason to adopt more stringent regulations.

The second issue is whether the local government is required to incorporate by reference into their regulations the standards for water supply, sewage, and solid waste that are adopted by DEQ and sanitation. The Attorney General said the law does not mandate that and it is left to the discretion of local government as to the best method of adopting minimum subdivision regulations.

The third issue in the Attorney General's Opinion is when must a proposed subdivision undergo review to show compliance with local subdivision regulations. The Attorney General said the review must be done at the preliminary plat hearing. Ms. McClure noted this is problematic for some people dealing with sanitation and water, sewage, and solid waste disposal regulations. The Attorney General said that waiting until the final plat stage would be meaningless since the governing body could not impose any additional conditions at that stage.

Ms. McClure reminded the Subcommittee that the Attorney General's Opinion has the force of law until it is changed by the Legislature. Many times, the public is unaware since the Opinions are not incorporated into the statute.

- **Public Comment**

Myra Shults provided background information to the Subcommittee and said she had inquired about the difference the between 20-acre and 160-acre requirements and has learned one of the generally accepted ideas, prior to the case in Granite County, was that if a lot is 20 acres or larger, it should have water, and there should not be any sanitary problems. Therefore, there is no reason for DEQ to conduct a review. In Granite County, the court ruled that county commissioners are not qualified to make determinations regarding water and sewer. The question posed to the Attorney General was whether counties have to deal with lots that are 20 acres or greater given the fact that DEQ does not. The Attorney General's Opinion said the counties do have to deal with lots 20 acres or greater, and it must be done at the preliminary plat stage. Ms. Shults said that developers should be required to ascertain whether there is high groundwater before submitting a subdivision application. It has also been suggested that the well log for surrounding property be obtained to get an idea of

whether water will be available. Ms. Shults said most counties are not following the law and there seems to be confusion among the counties as to what they need to do to comply with the Attorney General's Opinion.

Sharon Haugen, Planning Director for Lewis and Clark County, explained that the issues underlying the Attorney General's Opinion had to do with the Lewis and Clark County Commissioners recently failing to approve a subdivision in the Helena valley. In Lewis and Clark County, people are asked to write well logs. People who opposed this subdivision argued that the county had a compelling interest and responsibility to make a determination that there was enough water quantity and water quality prior to approving the subdivision. Ms. Haugen explained that Lewis and Clark County will be watching to see what other counties are doing and everyone recognizes the Attorney General's Opinion must be addressed, but none of the other counties have figured out how to implement it.

Tammy McGill, Staff Planner for Stillwater County, talked about the consistency between 20 and 160 acres and explained that just prior to the Attorney General's Opinion, a 20-acre subdivision was approved, and they did not review for water quality, quantity, or dependability. A house was built, the septic was dug and hit water. This case is in litigation and the homeowner is claiming the county should have been aware of high groundwater. Conversely, they have lots that much larger that hit bedrock at three feet and cannot install septic systems. Ms. McGill admitted changing the threshold from 20 to 160 in the Sanitation Act would add to the workload of DEQ, but said subcontracting might be appropriate. Ms. McGill admitted Stillwater County is aware of the Attorney General's Opinion and its requirements, but is unsure how to go about complying with the Opinion.

As to a possible completeness and sufficiency review in the Sanitation Act, Ms. McGill has discussed the actual review with the sanitarians. DEQ does more of a sufficiency review, and if they find an application is lacking, the applicant will be notified, and the 60-day time period will begin to run again after the deficiency is corrected. Ms. McGill suggested the first time an application is received by DEQ, the applicant should receive the full 60 days. After the first insufficiency letter and the application is resubmitted, the time frame should be cut down to 20 or 30 days.

***(Tape 2; Side B)***

Peggy Trenk, representing the Montana Association of Realtors (MAR), said MAR is concerned about what local governments have to do to comply with the statutory requirements of the Platting Act and the level of information needed to be able to make a determination to approve, deny, or conditionally approve a subdivision. Ms. Trenk said it comes down to dollars and time and noted it is not unusual for surface or groundwater studies to cost $50,000 to $75,000. Ms. Trenk said it is not appropriate to ask someone to spend that amount money up front in the early stages before they have a sense of whether the subdivision will be approved. She said county commissioners and city commissioners may not be the appropriate individuals to evaluate these studies. Ms. Trenk would like to have public comment considered in these decisions and said sanitation should be discussed before the DEQ or the local board of health.

Michael Kakuk, an attorney representing MAR, said that taking the option of a clean split between Title 76, chapter 3, and Title 76, chapter 4 would require going into chapter 3 and removing those sections of law relied on by the Attorney General and which have thrown the local governments into this predicament. Mr. Kakuk said removing these sections would negate the Attorney General's opinion.

Tim Davis, representing the Montana Smart Growth Coalition, agreed with the comments made by Ms. McGill and would like to see all the approvals required before an application goes to the preliminary plat stage. Mr. Davis said the primary responsibility for public health and safety with subdivisions should be left with local government. Mr. Davis said DEQ and DNRC deal with site-specific conditions and not cumulative impacts that might occur to others. When a preliminary plat has a hearing, there is an opportunity for public comment. Mr. Davis suggested requiring a limited amount of sanitation information at the preliminary plat stage, with the understanding that more conditions would not be able to be added by the local government. Mr. Davis suggested one of the critical parts of the Attorney General's Opinion is that one of the reasons water and sanitation have to be addressed at the preliminary plat stage is because after the preliminary plat is approved, the local government cannot impose any more conditions. Mr. Davis commented he would like to see DEQ and DNRC deal with more cumulative impacts, but felt a compromise could be reached.

Jim Madden, an attorney for DEQ, provided an overview of DEQ's perspective of the Attorney General's Opinion. The DEQ does not believe the Opinion affects its authority or jurisdiction under the Sanitation Act. Mr. Madden said the question before the Subcommittee is how to deal with the Attorney General's Opinion. Mr. Madden said Sanitation Act jurisdiction is limited to under 20-acre parcels, and the Platting Act applies up to 160-acre tracts. There is language in the Platting Act that says the county commissions have to adopt rules for water and sewer that are not less stringent than DEQ's. Mr. Madden said that meant the DEQ review was required for parcels under 20 acres, and that would satisfy the language in the Platting Act. The Attorney General's Opinion ruled counties have to do the sanitary review for the larger parcels and requires the sanitary review be done before the preliminary plat. Mr. Madden did not recall that it has ever been the practice to have the sanitary review done before the preliminary plat. Mr. Madden noted the Platting Act review is a more general-type review while the Sanitation Act review is much more detailed. Mr. Madden said DEQ does not take a position on any of the issues, and the Sanitation Act states DEQ can review a Sanitation Act application any time after an application is submitted.

Ray Lazuk, Subdivision Program Manager, DEQ, identified problem areas that should be addressed in the early stages of subdivision review, such as drainfield site suitability, whether there will be degradation to state waters, appropriate lot size, and adequate water supply for on-site wells.

Byron Roberts, representing the Montana Building Industry Association, said he could not underestimate the value of minimal requirements and added that the nature of subdivision regulations is to develop prescriptive standards regarding water quality and quantity. Mr. Roberts said the process is scientific and not political. He said the only time the process should be political is at the time standards are developed.

- **Questions from the Committee**

Sen. Laible asked Mr. Lazuk about his suggestions for streamlining the process at an early stage and whether those suggestions would impact DEQ's staffing requirements. Mr. Lazuk said the kind of review he was suggestion would be done at the county level. Mr. Lazuk noted these are the types of issues DEQ would look at, and it would be in the applicant's best interest to gather that kind of information in advance during the preliminary plat stage. Sen. Laible commented this would, in some sense, streamline the way the DEQ operates and could be a benefit to DEQ. Mr. Lazuk replied it could streamline DEQ's review because some of the questions would have already been answered, but they may not have been answered adequately.

Sen. Laible wanted to know if all the information made available during the preliminary plat hearing would be provided to DEQ for consideration. Mr. Lazuk replied it would depend and added DEQ receives quite a few letters, telephone calls, and other information from concerned neighbors when a new subdivision is planned. Information submitted in the early stages, is not automatically seen by DEQ unless it is included in the Planning Board comments.

Sen. Laible asked Mr. Kakuk about the concern about developers having to put a lot of money up front before they know whether an application will get through the preliminary process. Sen. Laible wondered if it would be sufficient for local government to review well logs, perc tests for septic, and review other expert reports. The project would only go to DEQ once the local government is fairly certain the project will be going forward. Mr. Kakuk explained it could be done that way, and it would require changing the law to specify what is required up-front. Mr. Kakuk added MAR appreciates the role the public plays in the Subdivision and Platting Act review, and if the opportunity for public involvement is not present in Title 76, chapter 4, it should be added. Mr. Kakuk felt strongly that issues such as whether there is enough water, whether a test pit is good, and whether the soil is good, are all inappropriate for county commissioners to decide. He said that cumulative impacts should be considered by local governments, but not in the subdivision review process. Mr. Kakuk said the subdivision review process is quasi judicial and an adversarial process and suggested cumulative studies should be performed separately by experts and land should be zoned accordingly.

Sen. Laible asked about communications received from people opposing a subdivision and whether those communications would be considered ex parte. Mr. Kakuk agreed they would be ex parte if they were done under Title 76, chapter 3, but would not be ex parte under Title 76, chapter 4, since that process is not quasi judicial.

Upon question from Sen. Laible, Mr. Lazuk commented DEQ is receptive to all public comments and was not aware of any ex parte block. Mr. Lazuk said he does not think a public hearing would be appropriate, but he does ask the public to put comments in writing and substantiate claims with evidence.

Sen. Glaser said he is trying to figure out how everything done so far affects the ease or difficulty or reasonableness of what the ordinary citizen is trying to do in a small casual arrangement. Sen. Glaser was concerned that a couple out in the country can no longer provide a lot for their children. Sen. Glaser said county sanitarians can do whatever they want and that small "mom and pop" operations are being left out in the woods. Sen. Glaser was concerned about the lack of testimony from these individuals. He spoke of his own experience with the Yellowstone County Sanitarian in attempting to provide land for his children. Sen. Glaser commented it is getting to the point where it is almost impossible to provide land for your

children, and most people cannot afford to go through this lengthy expensive process.

Ms. McGill said she often works with small subdivisions and the people Sen. Glaser was referring to. She said a major subdivision in Stillwater County is not the same as a major subdivision in Missoula County. Ms. McGill suggested the proposed language in Title 76, chapter 3, allowing governing bodies to adopt subdivision regulations to establish minimum requirements for minor subdivision and allowing expedited processes will help address Sen. Glaser's concerns.

***(Tape 3; Side A)***

Ms. McGill said the Stillwater County Planning Board does not want to review one- and two-lot minor subdivisions because they should be cut and dried. Ms. McGill said this would help the "mom and pop" operations who are trying to help their children. Ms. McGill agreed that the focus tends to be on the big subdivisions and the others are overlooked.

- Subcommittee questions, discussion on direction of study and bill draft–next meeting–instructions to staff

Sen. Mangan said there is only one more Subcommittee meeting left and then a meeting of the full Committee in September. Sen. Mangan wondered if the Subcommittee could meet to finalize its recommendations to the full Education and Local Government Interim Committee sometime before September 13-14, 2004. Rep. Andersen agreed to request staff to give time prior to the meeting for the Subcommittee to finalize its recommendations.

Sen. Mangan said he would like to see the Title 76, chapter 3, issues resolved by the June meeting. This would allow the Subcommittee to focus on the Attorney General's Opinion on Title 76, chapter 4.

Sen. Laible referred back to Brandborg and the second public hearing for consideration of new information and expressed concern that it could start a revolving wheel. He said it should be very clear that if there is new information presented to the governing body, that is the only information allowed to be discussed at the second hearing. Ms. McClure clarified that was the intent and the second hearing would be on new information only.

**ADJOURNMENT**

There being no further business to come before the Subcommittee, the meeting was adjourned at 4:15 p.m.