Education and Local Government Interim Committee

59th Montana Legislature

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MARK NOENNIG--Vice Chair
ELSIE ARNTZEN
KATHLEEN GALVIN-HALCRO
ROBIN HAMILTON
MIKE JOPEK
JON SONJU

COMMITTEE STAFF
LEANNE KURTZ, Lead Staff
EDDYE MCCLURE, Staff Attorney
FONG HOM, Secretary

MINUTES

Local Government Subcommittee

October 6, 2005

Room 137, State Capitol
Helena, Montana

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. RICK LAIBLE, Chair
REP. MIKE JOPEK, Vice Chair

SEN. JEFF ESSMANN
SEN. JEFF MANGAN
SEN. KIM GILLAN
REP. MARK NOENNIG
REP. JON SONJU

STAFF PRESENT

LEANNE KURTZ, Lead Staff
DAWN FIELD, Secretary

AGENDA & VISITORS LIST

Agenda, Attachment #1.
Visitors' list, Attachment #2.

COMMITTEE ACTION

The Local Government Subcommittee:
- adopted the proposed work plan; and
- authorized staff and the working group to present recommendations on the implementation of SB 116 at the December meeting;

CALL TO ORDER AND ROLL CALL

TAPE 1 - SIDE A

SEN. LAIBLE called the meeting to order at 9:30 a.m. SEN. MANGAN was excused, all other members were present (Attachment #3).

REVIEW DUTIES OF THE EDUCATION LOCAL GOVERNMENT INTERIM COMMITTEE / LOCAL GOVERNMENT SUBCOMMITTEE

Leanne Kurtz, Research Analyst, Legislative Services Division (LSD), reviewed the duties of the Local Government subcommittee and presented the proposed work plan for the 2005-2006 Local Government subcommittee of the Education Local Government Interim Committee - (EXHIBIT #1):
- SJR 11 - Study of the Subdivision and Platting Act;
- transportation-related problems being encountered by Montana cities and towns;
- the Attorney General opinions impacting local governments;
- the United States Supreme Court decision regarding eminent domain;
- business equipment tax;
- implementation of Senate Bills 185, 116, 290;
- the Main Street Program;
- uniform penalties for zoning violations;
- updates from other interim committees; and
- issues of concern to Local Government Subcommittee members and the public.

SEN. LAIBLE asked for subcommittee comments. SEN. GILLAN asked if additional issues could be addressed as they arise. SEN. LAIBLE said that the subcommittee would address any emerging issues of importance to the Local Government subcommittee. SEN. GILLAN said school funding would likely be a topic the subcommittee will have to deal with.

SEN. GILLAN asked if there are plans to reinstate the community technical assistance program. SEN. LAIBLE said he has also heard from small communities that this program was of great importance to them.

SEN. ESSMANN, referring to Page 3, EXHIBIT #1, Cities and Transportation, said that many states direct federal funds to a metropolitan planning organization, which then administers the funds and oversees the projects. He said there are three of these organizations in Montana. He asked that Ms. Kurtz check with other states that have these types of organizations and to research how they are set up and implemented.

PUBLIC COMMENT

Myra Shults, Joint Powers Insurance Authority, MACO, said she was happy to hear that the Subcommittee is taking a proactive role in this interim.

Linda Stoll, Missoula County, spoke to the reinstatement of the community technical assistance program, and said she was happy to hear that the subcommittee may be in support of this. She said it was a topic of great interest at the recent MACO convention.

SEN. ESSMANN **moved** to adopt the work plan. The **motion passed** on a unanimous voice vote.

UNITED STATES SUPREME COURT DECISION - EMINENT DOMAIN

Greg Petesch, Legal Director, Legislative Services Division (LSD), reviewed the background of the Kelo v. City of New London United States Supreme Court decision. A summary of the bench decision was distributed to the subcommittee members (EXHIBIT #2). Mr. Petesch explained the events and actions that resulted in the Kelo v. City of New London case:

- In 2000, the city of New London, Connecticut approved a development plan that in the words of the Connecticut Supreme Court, was "projected to create in excess of 1,000 jobs, to increase tax and other revenue, and to revitalize an economically distressed city, including its downtown and waterfront areas".
- New London had experienced decades of economic decline and in 1990, had been designated by state agencies as a distressed municipality. In 1996, the federal government closed a naval warfare center, causing even more economic distress. Unemployment rate was double the state's rate, the population was the lowest since 1920.
- The city activated a nonprofit entity to assist in its economic revitalization and adopted a plan to provide for economic development through development of its waterfront area in particular. As part of that plan, the Pfizer company announced that if the plan went through, it would build a research facility in the waterfront area.
- The city undertook purchasing the property to allow for the development plan. Certain individuals chose not to sell their property and the city undertook condemnation actions against those properties.
- The Connecticut Supreme Court upheld the ability to take those properties, ruling that economic development qualified as a public use and was in the public interest. It held that under both the Connecticut Constitution and the United States Constitution (Fifth Amendment).
- The crux of the issue revolves around the meaning of the phrase "public use". The Connecticut Supreme Court decision that the economic development was a public use and was in the public interest was appealed to the United States Supreme Court. The question presented to the United States Supreme Court was whether the taking of property by the State of Connecticut and having that property used by another private entity could qualify as a public use.
- The United States Supreme Court decided that property cannot be taken from one person and given to another person for private use but it deferred on the question of what is public use by a state government. Because the State of Connecticut has determined that economic development was a public use and in the public interest, Connecticut was not found to be in violation of the federal takings clause.

Mr. Petesch said this decision alarmed many people but said he views the decision as a reaffirmation of states' rights in this arena and that the United States Supreme Court showed deference to those decisions of the Connecticut Legislature and the Connecticut Supreme Court. He went on to say that:

- A specific provision in the Montana Constitution says that eminent domain can be exercised for taking private property for a public use so long as full market value is paid to the person whose property is taken.
- The Environmental Quality Council (EQC) studied eminent domain laws in Montana several years ago and clarified the laws to a great extent but did not make any substantive changes in the areas of what constitutes a public use.
- The actions taken by the EQC placed all of the public uses in one section of the Montana Code (70-30-102, MCA, - EXHIBIT #3).
- There are statutory requirements that must be met before eminent domain may be exercised under Montana law. 70-30-111, MCA, provides that before property can be taken by eminent domain under condemnation, the condemnor has to show by a preponderance of the evidence that the public interest requires the taking, based on these things:
  - that the use is authorized by law and must be able to be justified in the enumerated list of public uses in 70-30-102, MCA;
  - that the taking is necessary for that specified public use;
  - that an effort was made to buy the property through a written offer that was rejected by the property owner; and
  - if the property already devoted to public use is being condemned for a different public use, there is an additional step of showing that the proposed public use is more necessary than the existing public use.

Mr. Petesch also said that the Montana Supreme Court's position is that the determination of public use is a legislative determination. The Legislature gets to decide what are the public uses for which private property may be taken. It is the Court's function to determine whether the that specific taking of that specific property is necessary.

Mr. Petesch said, in his opinion, that this is not a pressing issue that needs to be addressed by the Montana Legislature. The only enumerated public use in Montana that could come close to being the type of economic development authorized in Kelo is the specific enumerated public use of urban development. Urban development is a specific identified public use and within 70-30-102 (12), MCA, it is specified that urban development has to be conducted as provided in Title 7, chapter 15, parts 42 and 43.

TAPE 1 - SIDE B

Mr. Petesch said In order to declare an area "blighted" by reason of economic liability, the cause of the economic liability must be identified in the enumerated list contained in the statute. It is a fairly involved process and the urban renewal has to be for either the purposes of redevelopment or rehabilitation, which are also defined. Redevelopment includes:

- the acquisition of the blighted area, the demolition and removal of buildings;
- the installation and construction of streets, utilities, parks, playgrounds, and other improvements necessary for carrying out the urban renewal and for making the land available for development or redevelopment by private enterprise; and
- the plan must meet redevelopment definition and/or rehabilitation requirements.

Rehabilitation requirements include:

- the restoration and renewal of the blighted area in accordance with the plan;
- carrying out a program of voluntary or compulsory repair and rehabilitation of buildings and improvements;
- the acquisition of real property and demolition of the buildings and improvements;
- installation and construction of streets utilities, parks, playgrounds, and the disposition of property acquired in the urban renewal at fair market value in accordance with the plan.

Mr. Petesch said that the process for condemning property is a very restrictive and that is why he thinks the Kelo decision does not present a pressing problem for the Montana Legislature. He pointed out that economic development in Montana is not an enumerated public use. Mr. Petesch said to the best of his knowledge, this statute has only been used once when the city of Helena put in the walking mall.

Mr. Petesch said another reason the Kelo decision did not alarm him is because in the redevelopment of downtown Helena under its urban renewal plan (the city commissioners designated it as a blighted area), one property owner on the edge of the development area declined to sell. The city of Helena instituted a condemnation action against the property. The Montana Supreme Court found that taking of that specific property was not necessary for that project. The Court said that passage of the city ordinance declaring the condemnation for urban renewal of the blighted area was not a conclusive presumption, so the action of the government wasn't a conclusive presumption in designating the area for purposes of public use and necessity. It was a condition precedent but it wasn't a conclusive presumption. The city argued that under this area concept, once it had established the boundaries, it didn't have to show necessity for the individual property. The Court said that wasn't true, that the city still had to show that taking that specific business, in this case, was necessary for the project. The city wanted to take the property for purposes of putting in a parking garage. The parking garage would have been designed to serve the businesses that the city intended to have locate in the area adjacent. The Court said there is no showing that the taking of that property was necessary to the clearance of the blighted area and the prevention of the reoccurrance of blight. The Montana Supreme Court requires that each case be considered on a property specific basis, if attempts to purchase the property have failed.

Mr. Petesch discussed what "that taking is necessary" means in this concept and said that it doesn't mean that it is absolutely necessary. He referenced a 1912 Supreme Court decision which ruled that necessary isn't absolute necessity. Necessary in the taking context means reasonable, requisite, and proper to the accomplishment of the end in view under the particular circumstances of the case. So, each showing of necessity is case specific.

Mr. Petesch said that the United States Supreme Court has ruled that a state legislature can abrogate the right to exercise the power of eminent domain, provided there is no interference with a vested right. State legislatures are free to add to or remove from statutorily determined public uses. That is the legislative function and the legislative prerogative. The Montana Legislature has determined that taking of private property for the benefit of another private entity is a public use in very specific instances. An example of this is a private road to a farm. If an existing farm's owner can't access the property, the owners may condemn a road right of way across adjacent property. No governmental entities are involved in that type of condemnation. The private citizen can condemn another's property if it is for a public use. Railroads rights of

way were condemned everywhere and every state has enacted a statute saying that construction of a railroad is a public use. Montana still has that statute on the books because adequate and reliable transportation serves the greater good.

Mr. Petesch discussed the enumeration of public uses and the concerns he has heard regarding them:

- that all public uses authorized by the government of the United States and concern that if Kelo decision will raise economic development to a public use authorized by the government of the United States. Mr. Petesch said, in his opinion, that this is not troublesome because there is no general condemnation law in the United State code. Wherever the federal government wants to give the power to condemn to a federal governmental entity, it specifically provides for it in statute. It is his opinion that the Kelo decision said that the determination by the State of Connecticut's Legislature that economic development is a public use did not mean that the federal government was authorizing taking for economic development, only that it deferred to the Connecticut legislature and the Connecticut Supreme Court decision on use of economic development as a public use.
- Another concern is with regard to local governments that condemn property for all other public uses authorized by the Legislature of Montana. Mr. Petesch said his interpretation of that is to mean those enumerated in section 70-30-102, MCA. He said this is a crucial point: the Legislature has determined that economic development is a public use for purposes of taxing and appropriating money. In order to have the authority to condemn property for a public use, it doesn't mean any public use for purposes for which taxes can be raised. The Legislature also gave local governments the authority to expend money for any public purpose. The Montana Supreme Court has said that public use and public purpose are synonymous. But the Legislature only authorized the taking of private property for the specifically enumerated public uses in 70-3- 102, MCA. Mr. Petesch said he believes that those public uses referred to means where condemnation is specifically allowed. In each of the statutes where the Legislature enumerates the ability to condemn, it now also says "may be taken for this purpose as provided in Title 70, chapter 30". Unless one can point to the specific public use that is enumerated, a claim to be raising taxes and appropriating money for this would be an attempt to amend this specific statute by implication and courts generally look disfavorably on amendment by implication, particularly where a taking of private property is involved. The Court has been very consistent in applying the condemnation laws and applying the same tests.

Mr. Petesch said it may be to the benefit of the Legislature, at some point, to review the public uses that it has enumerated. A number of them are outdated and are in need of revision, particularly relating to mining and logging practices. While there may or may not be an attempt to use these outdated definitions, they are still a qualified public use and the Courts would have to give deference to that legislative determination.

Mr. Petesch said the 2007 Legislature will have the opportunity to act on this issue because Senator Jerry O'Neil has requested LC 0004 to revise the use of condemnation for urban renewal.

SEN. ESSMANN asked if the differences between the Kelo decision and the Montana law is that the Connecticut does not require the private property to be a blighted area. Mr. Petesch

said none of the private property in Kelo was ever alleged to be blighted or nonproductive. It was well-maintained property and a mix of residential property and business property. There was no finding that it was in a rundown condition. The distinction is that in the Kelo case, property can be taken for the purpose of economic development. In Montana, property can only be taken if it meets the test of being blighted under the statute.

REP. NOENNIG said that he thought 70-3-102 (2), MCA,(EXHIBIT #3) to be redundant and that despite the Supreme Court's past interpretation of the statute, he was hesitant to rely on that. He asked Mr. Petesch to comment. Mr. Petesch said the reason for his conclusion is that it must be remembered that the intention of the EQC's revisions was to place all the provisions in one statute and to keep them intact. Provisions were located all through out the code. Virtually every title had condemnation for a purpose included.

ATTORNEY GENERAL OPINIONS

51 Op. Att'y General No. 5 (2005) -- Self-Governing Local Governments and Public Power

Mr. Petesch began his presentation by explaining that this issue first arose when the city of Butte began studying the feasibility of acquiring the electrical and natural gas distribution systems of the former Montana Power Company. In April of 2000, Sen. Shea requested a legal opinion from Mr. Petesch concerning whether Montana law would allow or prohibit a municipality or group of municipalities from acquiring a statewide natural gas and electrical energy distribution system (EXHIBIT #4). Mr. Petesch said he advised Sen. Shea that electrical energy utilities were legitimate for cities or towns to operate in Montana through the use of interlocal agreements. Butte also asked the Attorney General (AG) for a legal opinion. Attorney General Mazurek issued 48 Op. Att'y Gen. No. 14 (EXHIBIT #5) and was of much the same opinion as Mr. Petesch. The AG analyzed the statutes and the case law and determined that Butte-Silverbow, as a consolidated government, was self-governing and that it could have the authority to acquire and operate electrical and natural gas utilities within and outside the boundaries of the local government unit. Attorney General Mazurek also advised using interlocal agreements.

The most recent opinion, 51 Op. Att'y Gen. No. 5 (EXHIBIT #6), issued by Attorney General Mike McGrath, addresses the ability of the local governments that have entered into an interlocal agreement to create a private, nonprofit corporation for the purposes of acquiring a utility. AG McGrath held that the private, nonprofit corporation act in Montana allows an authority, created pursuant to an interlocal agreement among various municipalities, to incorporate as a public benefit nonprofit corporation to operate the utility. They can exercise any of the powers that the groups that formed it could exercise. Interlocal agreement created the Montana Public Power Authority and that authority, in turn, incorporated Montana Public Power, Inc., to serve as the legal entity to own and operate transmission and distribution assets. AG McGrath found that it is organized to pursue any lawful activity which nonprofit corporations may do and that all cooperatives which provide gas and electricity are basically nonprofit entities also.

A public benefit corporation, as enacted in the 2005 legislative session, deals with the conversion of public benefit corporations to different forms of either for profit or different types of entities. A utility owned by governmental entities almost has to be a public benefit corporation. That means that the asset is held in trust for the people and that is it is sold or converted to

some other form, the value of that public benefit has to be set aside to serve the purpose for which it was formed, so that the public still gets the benefit for which it was formed. The public power authority, the entity formed through the interlocal agreements entered into a written agreement that they would provide money for the incorporated entities use in pursuing the assets. AG McGrath found that to be a permissible public use under the taxation and appropriation laws. The Legislature specifically authorized local governments to provide natural gas and, under the analysis conducted by AG Mazurek, authorized them to provide electrical services.

The question was asked, if bonds are issued to acquire this, would that be incurring debt by the local government entity. Mr. Petesch said his opinion is that it does not incur debt, because the revenue to pay off the bonds would be from the operation of the utility itself and those types of private activity revenue bonds are authorized in Montana law. Mr. Petesch said this ruling is consistent with the previous AG ruling and, based upon Mr. Petesch's original analysis, he found nothing that led him to conclude that this couldn't be pursued.

SEN. LAIBLE asked if this plan goes through, would the power entity fall under the purview of the Public Service Commission (PSC). Mr. Petesch said in his opinion, it would, because it would be operating as a private non profit corporation and therefore, subject to rate regulation.

51 Op. Att'y Gen. No. 4 (2005) -- Spending Caps

Mr. Petesch said this opinion (EXHIBIT #7) holds that the expenditure limit the 2005 Legislature struggled with does not apply to any current legislature. The AG's analysis is based on the premise that one legislature can't bind another legislature. Mr. Petesch pointed out that the AG also discusses that while the legislature is free to enact legislation in any area, it may not conflict with a specific area of the Constitution. To set expenditure limits is recognized in the Constitution through the appropriation power, the taxing power, and the requirement for a balanced budget. He also pointed out that a legislature is free to condition appropriations and when it has properly conditioned an appropriation, that condition is binding on the agency accepting the money.

Mr. Petesch discussed the court cases referenced in the AG's opinion (pages 3-5, EXHIBIT #7). He said:

- The AG holds that action by a subsequent legislature in ignoring a restriction of a prior law is a clear indication of the legislature's intent not to be bound by a prior law.
- It is bad public policy for the legislature to ignore the laws it enacts. When the legislature does so, it creates conflict in the statutes, confusion in the public as to what the law is, and sets a poor example to public of following the law.
- He agrees with the portion of the AG opinion that says the statutory enactment of super majority votes to change a law are invalid. Article V, section 11 of the Montana Constitution says laws may be enacted by a majority vote. When the Legislature statutorily imposes a super majority requirement for the enactment of a subsequent law, it is in violation of that provision.
- This opinion does not place local government in any different position than it was before under the prior law.
- The Supreme Court does not favor repeals by implication. It will only find for a repeal by implication in cases where there is a clear conflict in the law and will, in the event of a

clear conflict, will find for a repeal by implication, whereas, the latter enactment controls the prior enactment.

- This opinion means that legislatures may disregard the expenditure limit because this opinion is binding on government. Mr. Petesch said he has repeatedly advised either repealing or amending the law because he believes that, although the AG opinion is binding on government, it can be overturned by the courts.

REP. NOENNIG asked if Mr. Petesch thought there could be circumstances in which it would be appropriate to decide that there is an implied repeal, rather than an expressed appeal. Mr. Petesch said yes.

REP. NOENNIG asked why the Legislature should amend the expenditure limit law if the end result would still be that it is an expenditure limit. Mr. Petesch said any legislature is free to impose any restriction it wants on itself but the AG's opinion says that while that particular legislature is obligated to follow those restrictions it imposed on itself, no succeeding legislature is bound to follow those restrictions. If the law was amended, the legislature that amended it would be bound to follow it. Under the AG's opinion, a successive legislature would not be required to follow it. He said if the legislature is going to operate in that piece meal function, he would suggest repealing it because it serves no purpose long-term. Mr. Petesch said another option is to enact a constitutional expenditure amendment and said that Representative Scott Mendenhall, as a private citizen, has submitted and initiative petition to do just that.

Mr. Petesch said most implied repealers occur where the legislature unwittingly creates an express conflict.

SEN. LAIBLE asked how this applies to all other statutory appropriations and said he is concerned about unintended consequences. Mr. Petesch provided an example from the 2003 Legislature that required that the legislature end each fiscal year end with a positive ending fund balance. Mr. Petesch said he viewed that as an attempt by the 2003 Legislature to bind future legislatures and that the AG opinion would be directly applicable to that provision. Mr. Petesch said, with regard to statutory appropriations, so long as they are on the books, they are not appropriated further in the budget. There is a statute that defines statutory appropriations as a valid appropriation within the meaning of the Constitution. Mr. Petesch said he believes those are valid until repealed.

REP. NOENNIG said a biennial appropriation is be effective from July 1 to June 30 of the next year. He asked, under the language of this AG opinion, if a legislator is seated on January 1 of that year, if there is there any appropriation under this analysis for the period between that January date and June 30. Mr. Petesch said SEN. LIABLE has specifically asked him about statutory appropriations and those are governed by 17-7-502, MCA. These are almost all special revenue accounts where the money in the account is appropriated pursuant to statute. The Legislature affects those existing budgets during that six-month period between when the Legislature convenes and when the fiscal year ends. The legislature may change the amount appropriated to an agency but may not require the agency to return funding it has already spent.

Michael Kakuk, Montana Association of Realtors, responded to Mr. Petesch's discussion on eminent domain and said there is a broad grant of legislative authority for finding of public use.

Sheri Heffelfinger, SJR 40 Update - Study of County Attorney Services provided copies of a status report containing the following information (EXHIBIT # 8):

- The Law and Justice Interim Committee's action taken to date on SJR 40;
- a copy of SJR 40; and
- staff background report on county attorney services in Montana.

Ms. Kurtz asked if the subcommittee would like future reports on this issue. REP. NOENNIG asked to be kept up to date on this study.

IMPLEMENTATION OF SB 290 - SANITATION IN SUBDIVISIONS

Jim Madden, Department of Environmental Quality (DEQ), gave a status report on implementation of SB 290. This is known as the preliminary sanitation information bill and provides for applicants for subdivision review to submit information to local governments about water and sewer and the suitability of the proposed subdivision site. Mr. Madden said the implementation of SB 290 is not done by DEQ but the role DEQ in this process is that of providing technical guidance. SB 290 requires that a preliminary informational process be submitted under the Subdivision and Platting Act and directed the DEQ to write rules which would provide technical guidance as to what types of information could be used to satisfy the preliminary information threshold. The DEQ has drafted preliminary rules for the types of information that local governments could require. Those rules will be run through a task force, which will include the stakeholders, as well as other interested parties. The DEQ intends to initiate stakeholders meetings in the next month to gather comments of the proposed draft rules. The formal rulemaking process will be completed early in 2006. Mr. Madden provided copies of the draft rules (EXHIBIT #9).

Steve Kilbreath, Subdivision Section Supervisor, DEQ, said this legislation is of great interest to all involved in the process, mainly the potential impact on the workload and on fee schedules.

SEN. LAIBLE asked, once the rulemaking is done and the process is in place, if Mr. Kilbreath anticipated that the workload would level out again. Mr. Gilbreath said that should be the case but that there is concern that this will require additional review time on water and sewer and that with the existing heavy workload, it will be difficult to find any additional time to do that.

SEN. LAIBLE asked if those issues will be discussed in the task force meeting. Mr. Kilbreath said they would be.

REP. SONJU asked who will determine the fees and what the basis for the fees will be. Mr. Kilbreath said the DEQ has standard fees for subdivision applications and those fees are based on time and experience. Counties also have standard fees for review of septic permits, soil and site work. If the local government is to do the initial review work, some type of a fee schedule will have to be designed. Mr. Kilbreath recommended an hourly fee.

TAPE 2 - SIDE B

Michael Kakuk, Montana Association of Realtors, said SB 290 does require more information from the developer when a subdivision application is submitted and requires more review time from the local government. The purpose of this is to allow the public to comment

more intelligently on water and sanitation issues and prevents the local government from denying or imposing conditions on a subdivision before it has reviewed these issues. Mr. Kakuk agreed that SB 290 will increase the workload and will justify increased fees, but that it fills a gap that will catch the subdivisions of between 20 and 160 acres that have previously gone without review.

Myra Shults said the reason for SB 290 was the AG's opinion from Granite County that said county commissioners have to address all water and septic at the preliminary plat stage. Counties were being sued because the perception was that the counties were not doing an adequate job of this. The counties had no guidelines or regulations for review at this stage. SB 290 established a procedure to follow and will provide information to counties that was previously not available. There may an initial increase in work but SB 290 will be to the benefit of developers.

Tim Davis, Montana Smart Growth Coalition, agreed with the statements made by Mr. Kakuk and Ms. Shults. He clarified that while fees may have to be adjusted, they are already authorized and are not a new fee. He also pointed out that fees required later in the review process would decrease because of the preliminary work now required.

LUNCH BREAK

SEN. LAIBLE reconvened the Local Government subcommittee meeting at 1:07 p.m. REP. JOPEK served as Chair for the afternoon portion of the meeting.

IMPLEMENTATION OF SB 255 - AIRPORT ZONING AND AIRPORT AFFECTED AREAS

Myra Shults, MACO, gave the background of SB 255, saying that unworkable and outdated laws and regulations resulted in the counties requesting the revision. Ms. Shults distributed a table of contents of the draft regulations for implementing SB 255 (EXHIBIT #10). She said that the comment period will end on October 15, 2005, and that the final version will be completed soon after. Ms. Shults said the table of contents gives an idea of the scope of the revised regulations. To date, airports have never had such comprehensive regulations. Ms. Shults explained how previous regulations had been drafted and reviewed several of the revised regulations. Each jurisdiction will be able to shape the regulations to fit the needs of that jurisdiction. Ms. Shults said that while she would have liked to have allowed more time for compliance, SB 255 provides a guide for local jurisdictions which should make SB 255 easier to implement. She said she is hoping that counties will adopt the regulations and that if there are problems, the law can be amended in 2007.

SEN. ESSMANN asked if the local airport boards will define the zones and if the counties will adopt the regulations. Ms. Shults said that the entity that owns the airport will adopt the rules.

REP. SONJU asked for more information regarding the threatened lawsuit against a local airport. Ms. Shults explained that a particular county attempted to adopt airport regulations and the people who owned land around airport threatened to sue the county if it approved the regulations. REP. SONJU asked for the name of the county. Ms. Shults said it was Madison County.

IMPLEMENTATION OF SB 116 - SUBDIVISION AND PLATTING ACT

Ms. Shults distributed a table of contents from the Park County Subdivision Regulations (EXHIBIT #11). She reviewed several instances of counties being overwhelmed by the work required by SB 116 and that after the Montana Association of Planners (MAP) seminar addressed questions and concerns of the counties, it has become obvious that there is a need to revise the advice given to MACO counties.

Ms. Shults said, in an attempt to assist already overworked planning offices, the Land Use Clinic at University of Montana Law School agreed to take on the task of developing model subdivision regulations. Until the Community Technical Assistance Program (CTAP) was discontinued in 2003, it was the duty of the Department of Commerce to revise the model subdivision regulations. The Law School has assigned two students and one professor to the project and after working all summer, the initial draft was released to planners for comment in September. She reported that two meetings have been held to discuss the regulations and that work on the third draft is underway. Ms. Shults suggested that the Land Use Committee send a draft copy to Jim Madden at the DEQ for input.

Ms. Shults noted that Carbon County asked for copy of the draft Park County regulations, held a public hearing in September, and adopted the new regulations on September 29, 2005. She said Carbon County is the only county to date to have adopted the new subdivision regulations.

SEN. LAIBLE asked if there a cost to communities to use the model subdivision regulations. Ms. Shults said the model is free to local governments and that the only cost will be to modify the model regulations to fit the needs of each particular jurisdiction.

TAPE 3 - SIDE A

PUBLIC COMMENT

Tim Davis, Montana Smart Growth Coalition, commented that the U of M students and their professor worked very hard on the draft regulations. He said the draft regulations have been sent out for comment and will be presented to the Montana Association of Planners in October. Mr. Davis noted that the draft regulations clarified a statute regarding environmental impact assessments on agricultural land that local governments, citizens, and developers found difficult to understand and implement. The model subdivision regulations have established a clear model for identifying those impacts and how subdivision regulations have to fit within those impacts on agricultural, natural resources, and wildlife. This will give both the local governments, the citizens, and the developers some predictable standards by which to operate.

Linda Stoll, Missoula County, said she was asked by Missoula County to coordinate its efforts on rewriting its subdivision regulations to comply with SB 116 and also to completely revise its road and street standards. Ms. Stoll said the first step taken was to make the regulations comply with SB 116 and SB 290. She said SB 116 did radically alter the process and procedures for reviewing subdivisions but that agreed that changes were necessary. She said she would keep the subcommittee apprised of the work being done in Missoula County and of the challenges encountered along the way. Ms. Stoll said the model regulations developed by the U of M caused a controversy, so Missoula County did not adopt them. She said that she hopes to eventually incorporate them into the regulations Missoula County is working on.

Patrick O'Herren, Planning Director, Ravalli County, thanked the subcommittee for its work on SB 116 and said while issues remain that must be worked out, the end result will be worth it. Mr. O'Herren suggested, due to difficulties experienced by Ravalli County, allowing counties more time to implement these subdivision changes. Many counties do not have the financial resources to contract work out or to hire consultants and coordinators. Mr. O'Herren said funding was not made available to the counties to help them implement these regulations and that the counties have been overwhelmed by their workloads. Staff is already overworked and manpower is not available to keep up with the existing workload and to rewrite these regulations. It would be very beneficial to have some type of one-time funding when substantial revisions are made.

SEN. LAIBLE agreed that the Legislature passed extensive legislation but did not give the counties the monetary tools to easily and quickly implement the legislation. He said he would like to discuss possible legislation to provide one-time funding to local governments to assist them with implementing new programs, such as the model subdivision regulations.

REP. NOENNIG said the first step would be to look at the fiscal note for SB 116 and then identify potential sources of funding.

SEN. LAIBLE said he didn't recall the fiscal note but thought that it would not impact to state government because the impact fell on the local governments. He suggested using general fund money as the funding source.

SEN. ESSMANN said he has served on the Yellowstone City and County Planning Board and that fees from developers pay for the Planning Board. SEN. ESSMANN said he didn't think there was a funding crisis. He said he would like to further investigate what fees are being charged in the counties and how they are being used before drafting legislation.

SEN. GILLAN said Yellowstone County has a high level of activity so there is always fee money coming in. Other counties may not be collecting fees from subdivisions, so are unable to fund much planning.

Ms. Kurtz said she would compile county-by-county information on the structure of their planning staffs, how they are funded, and what the fees are used for. She also noted the distinction between the suggested one-time funding and the reestablishment of the technical assistance program previously located in the Department of Commerce. She asked SEN. LAIBLE to clarify that his proposed legislation be used strictly for development and implementation of subdivision regulations. SEN. LAIBLE said his intent was not to create another office but rather to give one-time money to implement new legislation. He said the fees collected by local governments are not to do long range planning, but are for processing current projects. Long range capital improvement plans are difficult to pay for, when collecting the tax benefits and fee structures are years down the road. REP. JOPEK concurred with SEN. LAIBLE's statements and said the counties are focusing on the growth policy deadline in October 2006 and are struggling with how they are going to get that work done.

Mr. Davis suggested the Legislature consider creating an ongoing program that would include both technical assistance and funding. Current fees collected go to reviewing applications and not to long range planning. He said the SJR 11 working group will likely come up with suggestions on how to provide and fund technical assistance.

Gary Maclaren, HD 89, Ravalli County, said most of Montana's cities and counties find themselves in a "catch 22" situation with SB 185. The counties are not able to collect the fees they need to implement the infrastructure plan but until they can get the money to do the planning to start the process, they can't collect the fees. It is incumbent upon the Legislature to provide funding to provide the means with which to start this process. He supported the idea of a one-time appropriation into a special fund.

Ms. Stoll said SB 97, the Quality Growth Act, passed in1999 and was supposed to be funded but it never was. She discussed SEN. ESSMANN's concerns regarding fees and said that at one time, she thought the developer should bear cost of all fees. She said that she has learned that this does not work. She pointed out that there is a public benefit to the review process and that she is now of the opinion that the public should bear some of the cost. Ms. Stoll said she convinced Sen. Keenan to introduce a realty transfer tax bill. She explained that the realty transfer tax made sense because it would generate a dollar amount that was representative of the actual workload at the county level. The counties would keep most of that money to help fund land use issues. Ms. Stoll said, in her opinion, that one-time only money isn't a good solution, because there are always new costs coming up.

Alec Hansen, Montana League of Cities and Towns (MLCT), reported that the League recently held its annual conference and that impact fees were a topic of discussion. MLCT considers SB 185 as a triumph of cooperation and the solution to a biennial problem. He said the challenge now is to take what is a good and balanced law and put it to work. He said that the Department of Commerce's technical assistance program for communities was eliminated in 2003 but is now going to be rebuilt, and that the MLCT plans to assist with that. He reported that the MLCT is also planning to work on a model ordinance to try to help SB 185 work and work effectively. This issue is key to the future growth and development of Montana and must be done effectively.

REP. JOPEK asked if the subcommittee would be comfortable in allowing the working group to draft recommendations as well as staff, on how best to proceed on this issue. SEN. LAIBLE **moved** to allow staff to gather information and also allow the working group to present recommendations. SEN. GILLAN suggested that the information should be obtained on current capabilities and that it is important to know the magnitude of need. REP. SONJU asked to have fee information included. Ms. Kurtz said the she planned to include fee information in the December meeting. The motion **passed on a unanimous voice vote.**

SJR 11 - STUDY OF THE SUBDIVISION AND PLATTING ACT

Mr. Davis said this has been a difficult process and distributed the draft results of two working group meetings (8/16/05 meeting - EXHIBIT #12 and 9/19/05 meeting - EXHIBIT #13) **TAPE 3 - SIDE B** Mr. Davis discussed the highlights of each meeting and said the next meeting is scheduled for October 31, 2005. He said he is hopeful that a final draft version will be the result of the October meeting, that the group would have one more meeting in November to talk about specifics, and hopes to have framework for legislation by December meeting.

Mr. O'Herren said the good work done by the working group is a testament to the high quality of the people of the State of Montana.

Mr. Kakuk said the issues do not lend themselves to quick resolution and asked the subcommittee to be patient.

SEN. GILLAN raised two issues of concern:
- the absence of eastern Montana members on the working group; and
- whether the subcommittee is abdicating SJR 11 to the working group and asked for email updates of the work being done by the working group.

Mr. Davis said a number of jurisdictions are represented by organizations such as MACo and the League of Cities and Towns, so there is broad representation.

SEN. LAIBLE said the last Local Government subcommittee used a working group approach in the last interim with success. He suggested that the working group designate a spokesperson to write one email to all of the subcommittee members in order to keep them updated on the progress being made. Ms. Kurtz said she would serve in that role and would provide monthly updates to the subcommittee members.

SEN. LAIBLE said this is a difficult process because the meat of the subdivision and platting issue is being addressed. The consensus building that has occurred on almost every piece of legislation that has dealt with subdivisions is important and SJR 11 is a continuation of that. SEN. LAIBLE commented that he has sensed a level of frustration from the Subcommittee members. He recommended that the subcommittee step back and not force the process because the goal is legislation that all can find compromise and commonality in. He said the working group is a team and has to operate that way, and that he would find umbrage if anyone tries to run legislation around this model.

REP. NOENNIG strongly agreed with SEN. LAIBLE and emphasized that in past efforts, there were those who didn't attend the working group meetings and had a different attitude toward the product. He said he did not want that to happen and again and that he wanted to make sure that everyone who wants to participate has the opportunity to do so. He also said it is important that the subcommittee be involved, not because working group isn't capable, but to be in the position of being able to allay suspicions and keep things running smoothly.

Ms. Shults said the working group is not a closed group and that additional participation would be welcome, particularly from the agricultural community.

SEN. GILLAN suggested that the working group consider scheduling a meeting in Billings. Mr. Davis said members of the agricultural community have been invited to participate in the working group. He said meetings in other cities could be arranged.

PUBLIC COMMENT

No public comment was given.

DECEMBER MEETING ITEMS / INSTRUCTIONS TO STAFF

Ms. Kurtz gave an outline for a tentative agenda for the December meeting and said the agenda will include:
- an update on SJR 11;

- an update on the model subdivision regulations;
- responses to SEN. ESSMANN's requests for information on metropolitan planning organizations and county fees;
- SB 185 implementation of impact fees and the problems being encountered by local governments;
- implementation of SB 116 - information on the City-County Planning Offices' structure and fees and how fees are used; and
- an update on SJR 40.

Ms. Kurtz said she would like to see more local government representatives at the subcommittee meetings and will encourage more attendance. She asked the subcommittee members to contact her if they had a specific request for the agenda.

ADJOURN

With no further business before the Committee, REP. JOPEK adjourned the meeting at 2:45 p.m. The next meeting of the Local Government Subcommittee is scheduled for December 1, 2005, with the full Education and Local Government Committee meeting on December 2, 2005.

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