

MINUTES
of the
THIRD MEETING
of the
COURTS, CORRECTIONS AND JUSTICE COMMITTEE

August 4, 2010
Room 307, State Capitol
Santa Fe

August 5, 2010
Office of the Medical Investigator
1101 Camino de Salud
Albuquerque

The third meeting of the Courts, Corrections and Justice Committee was called to order at 9:40 a.m. by Senator Peter Wirth, co-chair, on Wednesday, August 4, 2010, in Room 307 of the State Capitol in Santa Fe, New Mexico.

Present

Sen. Peter Wirth, Co-Chair
Rep. Al Park, Co-Chair (Aug. 4)
Rep. Thomas A. Anderson
Rep. Joseph Cervantes
Rep. Gail Chasey (Aug. 4)
Rep. Zachary J. Cook (Aug. 4)
Sen. Mary Jane M. Garcia
Sen. Clinton D. Harden, Jr.
Sen. Linda M. Lopez
Sen. Richard C. Martinez
Sen. John C. Ryan (Aug. 5)
Rep. Mimi Stewart

Advisory Members

Rep. Eliseo Lee Alcon
Rep. Brian F. Egolf, Jr. (Aug. 4)
Sen. Gay G. Kernan (Aug. 4)
Sen. Carroll H. Leavell
Sen. Cisco McSorley
Rep. Bill B. O'Neill
Rep. Jack E. Thomas
Rep. Gloria C. Vaughn (Aug. 4)

Absent

Sen. Rod Adair
Rep. Antonio "Moe" Maestas
Rep. William "Bill" R. Rehm

Rep. Elias Barela
Rep. Dennis J. Kintigh
Rep. W. Ken Martinez
Sen. William H. Payne
Sen. Michael S. Sanchez
Rep. Sheryl Williams Stapleton
Sen. David Ulibarri

Guest Legislator

Sen. Timothy M. Keller (Aug. 4)

(Attendance dates are noted for members who did not attend the entire meeting.)

Staff

Maha Khoury, Staff Attorney, Legislative Council Service (LCS)

Kim Bannerman, Staff Attorney, LCS

Leslie Porter, Research Assistant, LCS

Guests

The guest list is in the meeting file.

Handouts

Copies of all handouts are in the meeting file.

Wednesday, August 4**Call to Order**

Senator Wirth asked Representative Stewart to give a little background on the Solar Rights Act. Representative Stewart stated that the purpose of HB 611 and SB 1031 in 2007 was to prohibit interference with solar rights, including interference by homeowners' associations (HOAs). Senator Wirth read Section 3-18-32 NMSA 1978 and asked the panelists to begin their presentation.

Solar Rights Issues

Katherine Mortimer, supervising planner, housing and community development, City of Santa Fe, explained the different types of solar collectors and described the prime issues with solar rights controversies as being between neighbors, namely, knowing whether one's neighbor has solar rights and is not violating those rights when one makes additions to one's home.

Faren Dancer, chair, Santa Fe Green Building Council; president, Sundancer Creations Custom Builders; and member, Architectural Advisory Committee, Eldorado Community Improvement Association, offered the additional concern of aesthetics, for individuals do not like solar installations in their view, and he noted that when building, he takes this visual impact into consideration. He mentioned the various regulations of solar modules on property, one being to camouflage or hide the modules. He offered two options of paint and trees, both of which are environmentally unfriendly: the former due to chemicals and the latter due to the lack of water in New Mexico.

Matthew O'Reilly, director, Land Use Department, City of Santa Fe, illuminated the conflicts of the Solar Rights Act with the escarpment ordinance for the City of Santa Fe. The act gives individuals the right to use solar power, while the ordinance protects the Santa Fe hills and ridgetops from development and has a limit on the height of structures built. He mentioned a

second hurdle with the Solar Rights Act and the historic districts and how there has been confusion on how Santa Fe may regulate the angles and size of the mechanisms on those buildings. He added that the City of Santa Fe would like to see as many solar mechanisms as possible.

Tom Willmott, president, Eldorado Community Improvement Association, discussed the number of homes in Eldorado and the layout of the community. He stated that the majority of the residents are cooperative with the screening process on solar collectors. The issues in Eldorado usually arise with ground-based solar arrays. He spoke about an instance where a committee of the association resigned *en masse* at a hearing on a solar tracker. He issued a strong word of caution with respect to not allowing any type of aesthetic regulation of energy-saving measures and gave the example of windmills.

Sharon Woods, chair, Historic Design Review Board, City of Santa Fe, explained that there are eight historic districts in New Mexico that get federal funds. In Santa Fe, there are 6,000 structures in the historic district, many of which are landmarks and significant buildings. She wondered how Santa Fe can keep the landmark-significant status of 25% of its structures while integrating solar collectors into the historic district. She discussed the Santa Fe-style ordinance and the preservation ordinance. She declared that the board is not against solar power, but it takes its responsibility to protect the buildings very seriously.

Members of the committee engaged in conversation with panel members, asked for points of clarification and discussed policy options and solutions concerning solar rights.

Senator Wirth asked Kathy Holian, Santa Fe County commissioner, to give an update on the Property Assessed Clean Energy Program and the Renewable Energy Financing District (REFD). Ms. Holian explained the programs and how a letter from the Federal Housing Finance Agency to Fannie Mae and Freddie Mac gave instructions that place restrictions on loans to any REFD area that would kill any lending in such a district. She believes the federal government misunderstands the program. Thus, the program is now on hold. She also discussed how Santa Fe County is rewriting its Land Development Code and may address some HOA issues in the new code. Committee members briefly discussed the programs and asked questions.

The Condominium Act and Zoning Issues

Mr. O'Reilly discussed the City of Santa Fe's Land Use Department's struggle with the "condominiumization" of the R1 zoning areas, or one private residence per parcel, in the city. He stated that guesthouses are being sold separately from main houses, which, in effect, turns an R1 parcel into an R2 parcel without approval from the city. He stated that this process of selling guesthouses or other structures violates the city's zoning authority and the problem lies with the Condominium Act. He stated that a city's zoning authority should be provided an opportunity to approve the proposed condominium. Frank D. Katz, former city attorney, City of Santa Fe, offered suggested language for changing a section of the act allowing for city approval. He stated that because such a requirement is not present, the city relies on voluntary compliance by landowners. He highlighted the fact that this is the only scenario where a division of land can be

accomplished without municipal approval.

Janice M. Ahern, Rubin Katz Law Firm PC, stated that the condominium form of ownership is similar to a cotenancy form of ownership. She noted that the City of Santa Fe is trying to regulate ownership; it only has the authority to regulate use and density pursuant to its zoning ordinances. Ms. Ahern pointed out that the use has not changed, whether it is a guesthouse or a condominium. She suggested that the problem is a local one that is caused by the city's guesthouse ordinance.

John N. Patterson, Scheuer, Yost and Patterson PC, discussed the guesthouse ordinance and suggested that the City of Santa Fe define the term "use" in it. He suggested other methods by which the city can control whether a guesthouse is sold as a condominium, for example, through utility and building permit controls. He stated that the city's proposed amendment to the statute goes beyond the zoning and density issue to require city approval for every condominium declaration.

Members of the committee asked questions of the panel and discussed policy options and examples of some of the issues involved in the creation of condominiums.

Issues with Homeowner and Condominium Associations

Scott Varner, president, Towne Park Neighborhood Association, and former board member, Towne Park HOA, described how he was forced to take legal action against his HOA with respect to xeriscaping his land. He stated that HOA boards are sometimes vindictive, arbitrary and abusive and that many times, a homeowner has to hire a lawyer simply to have access to the records. He briefly discussed how the use of proxies was manipulated in an election process at the Hillcrest HOA. He suggested the enactment of laws that allow for water conservation, full disclosure of records and alternative dispute resolutions and that there be a system in place to increase the accountability of board members. He noted the general low participation in HOAs and the lack of qualified individuals who are on the boards.

Meriam Jawhar, Village 5 councilmember, Zocalo Village Councils, Zocalo Condominiums, described the current status of Zocalo Condominiums, the numbers of units sold, units for sale and permits to build. She expressed the frustration of residents with laws that give the developer control over the condominium association board until 90% of the units are built and sold. She emphasized that the unit owners have no recourse to protect their investments, as their requests to the board are continually denied. She discussed the lack of transparency and lack of access to financial and other records of the association. She suggested that audits be required by law and that unit owners have a right to elect board members to the association instead of the developer appointing a unit owner to the board. She provided a handout that further detailed the issues and requested legislation to support condominium owner's rights.

Tom Simon, owner, Westgate Properties, LLC, discussed his business as a property manager who contracts with HOAs and condominium associations for management,

administration, governance and property maintenance. He stated that the management, structure and governance of these associations can be complex, and many choose to contract with a property manager. He expressed the importance for, and responsibility of, the owners to educate themselves on the functions of their associations.

Ms. Ahern discussed the current laws, such as resale certificates and financial disclosure provisions, with respect to the circumstances mentioned. Because HOAs and condominium associations are usually nonprofit corporations, she discussed provisions in the Nonprofit Corporation Act and the Condominium Act dealing with duties of the board and financial disclosure. She agreed that board members are volunteers and need to be educated on the issues. She added that the cost of an audit can be prohibitive and should be considered before requiring it by law.

Mr. Patterson stated that covenant disclosure should be made available to everyone before purchase. He stated that board members are immune unless they breach fiduciary duties. He briefly discussed proxy voting, legislative action on prohibition of extensive water use, dispute resolution and audits of the financial records. He emphasized the importance of educating board members and stated how many associations are running on a bare-bones budget with no reserves for big expenses or repairs.

Members of the committee asked questions of the panel and discussed possible legislation, changes and solutions to the expressed concerns. Representative Stewart announced the creation of a voluntary work group to look more closely at some of the issues. She asked Senators Keller and Ryan and Representative Anderson to join her in the group, as well as the members of the panel. Senator Wirth stated that individuals interested in attending any work group meeting should contact Ms. Khoury so they can be notified of the meeting.

Committee Business

The minutes of the last meeting were approved.

Public Comment

The committee heard comments from the public, including the following:

Max McCauley, a unit owner at Tres Caminos, discussed problems with his condominium association being controlled by a majority of absentee owners/investors who do not address quality-of-life issues and violate the laws and rules of the association.

Edyne Gordon of Zocalo discussed more issues with those condominiums, including how unit owners are ignored by the developer-controlled board; how it is too expensive to bring a legal action; and how the board is unresponsive and its attorney refuses to talk with the owners.

Christopher Johnson discussed oversight of associations, proxies, attorney fees and how HOAs violate their own bylaws or selectively enforce them and how they do not respond to owners' requests or complaints.

Recess

The committee recessed at 5:30 p.m.

Thursday, August 5

New Mexico DNA Identification System Administrative Center: Department of Public Safety (DPS) Audit and Proposed Relocation

Dr. Michael L. Mier, deputy secretary of administration, DPS, introduced the DPS members of the panel and stated that the DPS believes this move would be cost-effective and more efficient for the state.

Noreen Purcell, acting director, Forensic Laboratory, DPS, stated that New Mexico is one of the only states that does not have its DNA Identification System Administration Center (DNA Center) in a state agency. Instead, it is located at the Albuquerque Police Department (APD) Crime Laboratory in Albuquerque. She mentioned that the state database for the DNA Center has been compiled from felony offenders and that the DNA Center works separately from various crime laboratories. She emphasized that the DPS Forensic Laboratory has never lost accreditation and that, when its accreditation expired last year, casework was voluntarily ceased and international accreditation was granted six weeks later. She made it clear that the international accreditation given to the DPS crime laboratories is the highest accreditation given to any laboratory in the state. She stated that the decision to locate the crime laboratory in Albuquerque, made by Darren White as secretary of public safety, was made due to the DPS Forensic Laboratory having limited staff and space. She noted that the crime laboratory has expanded since that time and its forensic database laboratory is separate, which prevents cross-contamination of samples.

Louise Riebe, budget bureau chief, DPS, explained that the DNA Center is funded through fees and appropriations. She offered figures of those fees as well as general fund appropriations received since the inception of the DNA Center. She explained how the Federal Bureau of Investigation has to approve the transfer of the DNA Center and certify the DPS for this function. She expects it would be operational sometime in October.

Germaine R. Chappelle, general counsel, DPS, discussed the internal audit conducted and its findings, including cost savings with the relocation of the DPS to Santa Fe; an anticipated faster turnaround time for DNA results due to on-site analysis; and oversight concerns with the current administration of the DNA Center. She stated that the law designates the DNA Center as a unit of the DPS and gives the cabinet secretary the discretion to relocate it. She added that the DPS is the default location for the DNA Center. She stated that the current location of the DNA Center can be terminated with 90 days notice, and the DPS's decision to relocate the center had been discussed with APD staff.

Mr. White, public safety director, City of Albuquerque, expressed concern over the reasons given for moving the DNA Center and feels there is no legitimate reason to support the

relocation. He stated that he understands the current budget cuts and the claim of cost savings given by the DPS. He expressed concern over the known and unknown DNA samples being tested at the same site because currently, known samples are sent to a private laboratory to prevent cross-contamination and to sustain credibility of those positive identification samples in a court of law.

Paul Feist, commander, Scientific Evidence Division, APD, addressed his many concerns with the given testimony by the DPS representatives, including the cost-savings figures; fees collected; and the legitimacy of the audit. He declared that the DPS did not discuss this plan with the DNA Identification System Oversight Committee and that the DPS is requesting an action that is not legal and not done in the appropriate time frame.

Members of the committee and the panel engaged in rigorous conversation discussing the interpretations of the statute, asking for points of clarification and further information. Senator Ryan made a motion for the committee to send a letter to Governor Richardson expressing concern with the proposed relocation. Representative Anderson seconded the motion, and the motion passed with Representatives Anderson and Cervantes and Senators Harden, Lopez and Ryan voting yes; and Representative Stewart and Senators Garcia, Martinez and Wirth voting no. Members discussed putting the vote in the letter.

Uniform Law Commission: Proposed Legislation

Jack Burton, uniform law commissioner, explained bill draft #3, relating to genetic information in the employment context. The bill would enact the Uniform Protection of Genetic Information in Employment Act and amend the Genetic Information Privacy Act. Members of the committee asked brief questions on the draft bill.

Mr. Burton gave an overview of bill draft #5, updating and revising the Uniform Probate Code, the Uniform Trust Code and the Uniform Principal and Income Act, enacting the Uniform Guardianship and Protective Proceedings Jurisdiction Act and amending the Uniform Power of Attorney Act. The draft would also repeal the Uniform Fiduciaries Act. Fletcher Catron, a probate attorney, commented on the need to update the Uniform Probate Code. Committee members asked questions and discussed aspects of the bill draft.

Mr. Burton discussed bill draft #4 that would enact the Uniform Child Abduction Prevention Act and provide the courts with guidelines to follow in custodial disputes with respect to child abductions. He discussed how the majority of child abductions (over 75%) are conducted by family members. Members of the committee discussed familial abductions and asked for clarification on a couple of points.

Overview of the Office of the Medical Investigator (OMI)

Ross Reichard, M.D., assistant chief medical investigator, OMI, explained that the statewide office was established in 1973. He emphasized how New Mexico was on the forefront of medical investigation at the time of the establishment of the OMI. He noted important aspects and upgrades of the new facility, including increased biosafety for employees and visitors. He

discussed how all forensic pathologists at the OMI are also members of the Department of Pathology at the University of New Mexico (UNM). He noted that having the OMI in an academic setting has placed it in a nonpolitical environment and has led it to be held out as a model across the country. He discussed how the OMI pathologists are involved in resident training and specialty training with UNM annually and how this has influenced how forensic pathology is practiced around the country. Committee members inquired about various topics, such as upgrades in the new facility, autopsies, investigations, wrongful deaths, corpse transport and the examination of bodies.

Public Comment

The committee heard comments from members of the public against the proposed relocation of the DNA Center and against some of the provisions in the genetic information bill draft discussed earlier.

Tour of the New Facility of the OMI

Committee members, staff and members of the public toured the new facility of the OMI.

Adjournment

The committee adjourned after the tour, around 2:00 p.m.