

MINUTES
of the
FIFTH MEETING
of the
REVENUE STABILIZATION AND TAX POLICY COMMITTEE

October 17-19, 2007
Room 322, State Capitol
Santa Fe

The fifth meeting of the Revenue Stabilization and Tax Policy Committee was called to order by Senator Timothy Z. Jennings, chair, at 9:14 a.m. in Room 322 of the State Capitol in Santa Fe.

Present

Sen. Timothy Z. Jennings, Chair
Rep. Edward C. Sandoval, Vice Chair
Sen. Carlos R. Cisneros
Rep. Anna M. Crook
Sen. Dianna J. Duran
Rep. Roberto "Bobby" J. Gonzales
Rep. William J. Gray
Rep. Ben Lujan, Speaker of the House
Sen. Bernadette M. Sanchez
Rep. Daniel P. Silva
Sen. John Arthur Smith
Sen. H. Diane Snyder
Sen. James G. Taylor
Rep. Thomas C. Taylor

Absent

Sen. Mark Boitano
Sen. Kent L. Cravens
Rep. Keith J. Gardner
Rep. George J. Hanosh

Advisory Members

Sen. Sue Wilson Beffort (10/17-18)
Sen. Phil A. Griego (10/18-19)
Sen. Cisco McSorley (10/18-19)
Rep. John Pena (10/19)
Rep. Debbie A. Rodella (10/19)
Rep. Henry Kiki Saavedra

Rep. Janice E. Arnold-Jones
Rep. Donald E. Bratton
Rep. Nathan P. Cote
Sen. John T.L. Grubestic
Sen. Gay G. Kernan
Sen. Steven P. Neville
Rep. Andy Nuñez
Sen. Leonard Lee Rawson
Sen. Nancy Rodriguez
Sen. John C. Ryan
Sen. William E. Sharer
Rep. Don L. Tripp
Rep. Luciano "Lucky" Varela

(Attendance dates are shown for those members not present for the entire meeting.)

Staff

Pam Ray
Doris Faust
Jeret Fleetwood
Doug Williams
Cleo Griffith

Guests

The guest list is in the meeting file.

Copies of all handouts and written testimony are in the meeting file.

Wednesday, October 17

Senator Jennings noted some changes to the agenda. Hil Davidson will not be appearing to make a presentation. Maurice Bonal will be moved to 11:35 a.m. Speakers in the afternoon will be moved up in the order that they appear on the agenda.

Introduction to Liquor Licensing Concerns

Joe Nestor Chavez, lobbyist, introduced the topics to be discussed and considered by the committee. He is mainly concerned about regulatory issues that extend the time for obtaining new licenses to six months or more, even for restaurant licenses to serve only beer and wine. In addition, some licensees are concerned that certain license holders are targeted for constant surveillance and that their patrons are harassed, while other licensees are virtually ignored and unregulated. Some people are concerned that the prices of licenses are again very high and that, as businesses expand in the metropolitan areas, the state has no rational procedure for providing dispenser's licenses except through quota and purchasing systems. Licensees also have some problems with the way that "picnic licenses" are administered, especially that liquor service is cut off before 2:00 a.m. There is also concern among licensees that licenses will be revoked for three violations of selling alcoholic beverages to an intoxicated person or a minor.

Liquor License Status and Regulation

Ed Lopez, superintendent of regulation and licensing, introduced the staff who would be making comments and responding to questions. Gary Tomada, director, Alcohol and Gaming Division (AGD), Regulation and Licensing Department (RLD), gave a presentation to the committee and discussed the handouts provided. Bob Schwartz, chief prosecutor, RLD, and Benina Armijo Cisneros, hearing clerk, responded to questions from the committee.

Mr. Tomada noted that, recently, two "quota licenses", those moved from one location to another with full dispenser and retailer capacity, sold for a combined cost of \$1.2 million. He noted that there are serious issues with dispensing liquor under "picnic licenses" and that, in most cases, no oversight is available to keep people who have consumed too much alcohol from

leaving a function driving a car. He noted that there is a high incidence of binge drinking in New Mexico and that the largest contributors to binge drinking are bars and lounges, where about 40% of binge drinking occurs. Only two percent of binge drinking occurs as a result of alcohol consumption in restaurants. The remainder may be from various other sources of alcoholic beverages, such as private or public parties. As yet, there has not been a license revocation for serving alcohol to an intoxicated person or a minor.

Mr. Tomada noted that the time it takes to issue a license is lengthy in New Mexico because of the hearing procedure that must occur prior to issuance. There is a possibility that some parts of issuing licenses can be expedited, but the AGD has had its staff drastically reduced and would need at least two additional staff members to move the procedure along. It was noted that small businesses are no longer the owners of licenses. In most cases, the businesses are large out-of-state concerns or businesses with locations in most states, such as grocery stores, hotels and restaurants.

There are approximately 600 inmates in New Mexico prisons as a result of alcohol-related crimes, according to Mr. Tomada. A comment from the committee posited that the enforcement and issuance of citations are based on some kind of profiling of licensees.

In his handout, Mr. Tomada:

1. described the division's duties and responsibilities as they apply to liquor licensing, oversight and regulation pursuant to the Liquor Control Act;
2. described the liquor licensing system in the state, the quota system, the types of licenses and how they are renewed and distributed throughout the state in incorporated areas and unincorporated areas, including:
 - a. license ownership: the AGD does not sort licenses by ownership structure so no information was provided on this question;
 - b. active and inactive licenses: there are 40 "expired" dispenser and retailer licenses; others are "inactive" due to tax holds, litigation or death and cessation of business; and
 - c. transferability of licenses: dispenser and retailer licenses can be transferred (Section 60-6A-19 NMSA 1978) or leased;
3. described how licensing procedures of surrounding states differ from New Mexico's, including:
 - a. Arizona has 17 types of licenses. The procedures to obtain a license are similar in that: background information on owners of 10% or more of the business is required; if the location is within 300 feet of a church or school, this information must be disclosed; premises are posted; and local governing bodies hold meetings for public comment. A difference is that

the state does not hold a hearing unless the license is disapproved at the local level. Arizona also has a quota system, which means that after the quote is reached, no new licenses of that type can be issued. These are called "quota licenses". Licenses can be transferred within a county and can be bought and sold. It takes 65 to 105 days to transfer a license.

b. Texas has approximately 31 types of licenses. All licenses are issued by the Texas Alcohol and Beverage Commission (ABC). No transfers are allowed except in the case of death, partnership dissolution, bankruptcy or receivership. Then, an application by a partner, receiver or successor in interest may be considered to operate the license until the end of the term of the license. At the end of the term, a new application would have to be submitted by the new operator. The entire process, including postings, hearings, etc., must be repeated;

4. provided information about types of infractions, including how many in what categories? (This information was provided as Exhibits 6, 7 and 8 of the handout);

5. described new regulations that have been implemented in the last 18 months:

a. effective 10/18/06:

(1) the definition of "sales to intoxicated persons" was changed to define more clearly a sale to an intoxicated person and to extend the time period in which a breath or blood test can be administered to a suspect. Employees are prohibited from imbibing while on duty; and

(2) penalties were revised for sales to intoxicated persons or minors from five permitted within a 12-month period to three citations within that period before the licensee would face a possibility of revocation of the licensee's license;

6. discussed whether the server training program works. Since 1994, over 200,000 servers have been trained and certified; 200,433 certificates have been issued; and 15,000 servers are trained annually. The program is staffed by 1.5 FTEs. The department has not asked for additional funds for those positions and has funded them out of existing department funds. (See the department handout for more information and backup for these questions.); and

7. discussed how much time does it take to issue a license. One hundred twenty days is the anticipated time to issue a license. The time depends on all parties adhering to the necessary time line and procedures, including:

a. application and background investigations;

b. posting notice of license application — requires 20-day period;

c. noting deficiencies in a license application and completions or correcting as required;

d. posting the license application which then goes to the local governing body for a hearing and public comment. There is a 45-day window in which the hearing must be scheduled; and

e. department review of application and public comments within 30 days.

Mr. Lopez noted that in other states, there is an expedited process for beer and wine licenses; in New Mexico, a beer and wine (restaurant) license goes through the same application time line as any other license. He suggested that an expedited process for approving beer and wine licenses be adopted. He noted that it is clear that there is no property right in a restaurant license. It cannot be sold. There are no package sales privileges with a restaurant license.

The committee noted that it wants to see more efficiency in the process, but does not want to ignore the need for local public input. A concern was noted that in the 1990s, specific brokers were recommended by the AGD to be used to "expedite" an application. Profiling of establishments and patrons also appears to be a problem in some legislators' districts. All patrons and licensees should be treated with respect. The division asked for recommendations to correct the problems seen.

In response to a question about local option districts that have more than their quota of licenses, Mr. Tomada noted that local option district transfers have occurred, and up to 10 local option district transfers into a district can occur in one year. The density of licensee locations is not an issue that is reviewed by the AGD. The quota system allows one license for 2,000 residents but allows licenses to be transferred into a local option district as long as the number of licenses in the district from which the license is transferred does not fall *below* the quota number. In 1997, a law was adopted that prevented the AGD from considering the quota as a maximum when transferring licenses into a local option district when the local option district is under quota to begin with. Mr. Lopez noted that the artificial limit on licenses is one cause of the price being so high. No new full dispenser's licenses have been issued since 1981, according to Mr. Tomada. Mr. Tomada responded to a committee member's question about how a local option district gets above quota by noting that licenses purchased from outside of a local option district and transferred in from a local option district that is losing population can cause the local option district to have more licenses than the quota indicates should be present. Some local option districts are already over quota due to population decreases. Mr. Lopez indicated that his data showed that the greater the number of licenses in a local option district, the higher the number of DWI-related car crashes, arrests and fatalities. Mr. Tomada suggested that the legislature could prohibit inter-local option district transfers. He also noted that the high price of licenses in 1980 was pushing families out of ownership of licenses and preventing them from purchasing licenses. The high costs moved the licenses to larger corporate owners. Various legislators related that it was taking nine months to get beer and wine licenses and that in 1981, the overhaul of the Liquor Control Act converted "canopy licenses" (multiple businesses using the same license on one premises location) into separate licenses, which caused an increase in the licenses available in a local option district.

A member of the audience, Peter Faye, owner of Ram's Grill, purchased his establishment on December 4, 2006, and, in August 2007, was informed by the AGD that he could not store beer and wine in a separate, unattached building on the premises and could not serve alcohol on the patio. The AGD was asked to follow up on this licensee's issue and to find

a means to resolve it. The prior owner was able to serve on the patio and store his product in the unattached building.

Mr. Tomada stated that there are 3,300 licenses in the state and that 1,400 of them are full service licenses. He discussed the issues brought up regarding picnic licenses or licenses that are temporarily issued for off-site or special events. It is now a regulation that picnic licenses stop serving alcohol at 11:00 p.m. Many times, these events begin early in the morning and continue all day into the evening. Weddings, dances and other events tend to have the same patrons consuming alcohol for long periods of time. This cut-off was to minimize the number of late night intoxicated people leaving events. There is little oversight of the service at these events.

Another comment by the committee dealt with the ability of the AGD to overturn denial of a license following a local hearing. The superintendent reviews the outcome of the local hearing and reviews the license for deficiencies and can overturn the finding of the local governing body if the superintendent finds its decision unsupported.

Mr. Tomada responded to questions about other state's practices by noting that Arizona has nontransferable beer and wine licenses; Texas licenses are issued by the county; and Colorado chains cannot amass liquor licenses and may only hold one full-service license, with other sites getting beer and wine licenses. Also, in Colorado, food must be served in a liquor business. Package sales are only permitted in grocery stores.

In response to another query about whether the forms for application and other services can be accessed online, Mr. Tomada stated that application forms can be downloaded from the web site and that RLD gives seminars on applying for appropriate business licenses. The email address is RLD@state.nm.us. It was noted that two counties, Curry and Roosevelt, are still dry, even though the municipalities within those counties are not. DWI arrests in Curry and Roosevelt counties are lower than most other counties proportionately. Mr. Lopez noted that although the Navajo Nation is dry, there is still considerable DWI activity in that area. He also noted that restaurant license applications have doubled in the last 12 months. Mr. Lopez also needs two additional hearing officers and administrative law judges. These positions have no staff, which results in an enormous paperwork burden. When Mr. Lopez began as superintendent in 2005, there were 272 applications for new or transferred licenses; in 2006, that increased to 502; and in 2007, through the end of September, 253 applications were submitted.

Mr. Tomada noted that population growth in New Mexico is about 2.5% annually. Full service liquor licenses are hard to get, but restaurant licenses are easier to obtain. It takes six to eight months to approve a winegrower's license. Mr. Lopez added that he thinks the Liquor Control Act needs to be simplified.

Committee members noted that off-premises sales and licensing with trained employees sounds like a good idea. It appears that the AGD does not like the picnic license system. The committee is still concerned that picnic licenses are cut off before 2:00 a.m. and do not allow service after midnight. The law permits fines to be assessed over a broad range, such as from

\$500 to \$5,000 per incident. The committee suggested that fines for liquor offenses should be reevaluated and possibly reduced due to excessiveness.

Mr. Lopez responded to the committee by noting that these licenses have turned into a way to increase profitability for licensees. What were originally anticipated as occasional events have turned into daily events. The statute limits picnic licenses to be used for a 12-hour period in a day; therefore, a picnic license cannot be issued for one day extending into the morning of the next day. A second permit would be required for the second day.

Enforcement

Herman Silva, director, Special Investigations Division (SID), Department of Public Safety (DPS), introduced Sergeant Lee Mullen and Sally Archuleta, who were available to the committee to respond to questions. Mr. Silva noted that he has 31 agents and currently has eight vacancies. In Albuquerque, each agent is assigned to 128 establishments. The most common infractions are sales to intoxicated persons and sales to minors. He noted that where substance abuse is high, DWIs are also more frequent. Server laws are enforced by the SID. The SID coordinates with the AGD by following up on investigation requests or complaints, posting liquor licensing notices and enforcing compliance with special dispenser's permits. Training on sales to intoxicated persons are given four to six times per year. The SID has implemented a prevention program that involves selective enforcement. Agents focus on six counties.

Lieutenant Ortiz described the selective enforcement parameters. First, agents analyze data from infractions at the premises of licensees. The agents of the SID then establish a rotation so that all licensees in the Bernalillo county area receive visits from the agents. They may return more frequently to those premises where more infractions have occurred. Rachel O'Connor, the governor's DWI czar, noted that there are few to no felony convictions for selling alcohol to minors. These are the basis of plea bargains and usually are pled to lesser offenses that are misdemeanors. Mark Rhodes, attorney, noted that his clients are unhappy with the manner in which the SID agents seem to target and intimidate licensees.

Liquor Licensing Issues

Mr. Bonal gave some background about the availability of licenses and the authority to sell licenses. He noted that in 1981, Tito Chavez and Les Houston sponsored the Liquor Control Act, a significant revision of the state alcohol laws. The thought was to have one license per 1,300 people, but the quota adopted required one license per 2,000 people. There has always been an argument that there are too many licenses or too few licenses and that licenses are not distributed evenly throughout the state. Right now, if a full-service license (one with dispenser and retailer capabilities) is involved in an inter-local option district transfer, the license loses its package sales (retailer) authorization. The highest value paid is for the ability to sell in unbroken packages. Mr. Bonal described Senate Bill 1028, which he promoted in the 2007 session. In that bill there would have been:

- no new licenses created;

- free movement of licenses throughout the state;
- a requirement that package sales provisions remain intact when a license is transferred across local option district lines; and
- a restoration of licenses that had their package component lost.

No licenses can be transferred into San Juan or San Miguel counties. Mr. Bonal claimed that in the last five years, tribal liquor control authorities have issued approximately 100 liquor licenses on tribal land. Another provision of Mr. Bonal's bill would have allowed beer and wine service under a restaurant license to be served only before, after and during a meal.

Rural liquor licenses were created to remain in rural areas. There were 26 to 30 of these licenses created. The license could not be operated within 10 miles of another operating liquor license. Also noted as a change made by the Liquor Control Act was that retailer licenses could not be changed into distributor's licenses.

A question from the committee queried what the role of a license broker is. Mr. Bonal stated that brokers facilitate liquor license applications and transfers. He further responded that liquor license brokers do not have to have a license and that there are really no qualifications required to become a liquor license broker. Another comment from the committee noted that the requirement for a restaurant license limits the amount of income that can be made from the beer and wine service on the premises. Restaurants that sell high-end wine find it difficult to keep below the 40% limit on gross receipts from wine and beer.

Mr. Lopez noted that the price of liquor licenses transferred will be posted on the RLD web site beginning the day before or the day of the current meeting, October 16 or 17. Mr. Chavez noted that, currently, package sales authority is in demand. Arizona revamped its liquor licensing to create more package licenses.

Mr. Bonal continued discussion of his proposal that would create package capability for 500 licenses that are currently just dispenser's licenses. Those licensees, according to Mr. Bonal, have lost their package sales capability. Mr. Lopez, although taking a neutral position on the bill, is concerned that the bill is very complex and would make the licensing procedures so complicated that only a very few people who have a long history with the industry would be able to interpret who should and should not have certain licenses.

Linda Aiken noted that Section 60-6A-19 NMSA 1978 explicitly states that there is no property interest derived from the state by obtaining a liquor license, but the license can be used for collateral for loan purposes. The licenses to which this provision pertains are dispenser, retailer, canopy and other transferable licenses.

Recent Liquor Regulation Changes — Impact on the Industry

Billy Baldwin and Ruben Baca presented information for this topic. Mr. Baca provided a handout. He stated that there are about 400 licenses at which package sales for off-premises consumption are authorized. Concerns about the ability of servers to recognize intoxicated

persons who purchase alcohol from these licensees arise often, especially because of the limited contact a clerk has with the person making the purchase. He noted that the clerk involved in the last point of sales is presumed to be responsible for the behavior and acts of an intoxicated person for up to 1.5 hours after the purchase of the alcohol. Mr. Baldwin thanked the executive for its willingness to meet and speak about the issues that arise from this presumption. Mr. Tomada noted that it is presumed that if a person has a blood or breath alcohol concentration (BAC) of .14 or higher 1.5 hours following the purchase of alcohol, that the person was intoxicated at the time that the alcohol was purchased and was most likely showing visible signs of intoxication. He reminded the committee that a person is considered intoxicated at a BAC of .08. At .08, there are generally few visible signs of intoxication.

Mr. Silva noted that most infractions the SID deal with are .2 or greater, much higher than the limit for DWI, and even though the presumption is that at 1.5 hours after purchase that the person was already intoxicated when purchasing alcohol, the SID must establish the time line of where the person was over the last three hours. Mr. Schwartz noted that the DWI standard is a "per se" standard, or, if the person is measured and has a BAC of .08 at the time that the person is driving, then by definition the person is intoxicated, whereas a BAC of .14 at 1.5 hours after a purchase is a presumptive standard that can be rebutted. The presumption may be rebutted by showing that during the intervening 1.5 hours, additional drinking did occur.

A question from the committee asked for a description of what .14 BAC looks like. Mr. Tomada said six drinks for a 150-pound man who has eaten no food would cause a .14 BAC. A BAC of .08 results from approximately four drinks. A drink is 12 ounces of beer, five ounces of wine or one ounce of spirits.

Mr. Schwartz suggested that it is fairly common for a person who has been stopped and has been drinking to tell an officer where the person was in the previous three hours, including where the person stopped to drink or purchase alcohol. The person also might tell the officer if the person was visibly intoxicated when that person last purchased the alcohol.

Mr. Baca suggested that all petroleum marketers that also sell alcohol post signs that they will not accept licenses that are for underage persons. This would mean that at 21, a person would have to obtain a new license to purchase alcohol. He also thinks that the cost of an underage license could be prorated so that a young person would have to get a new license at age 21.

A comment from the committee expressed concern that the offense is sales to an intoxicated person, but being visibly intoxicated is not illegal.

Owner-Manager Enforcement Concerns

Annette Lujan, manager, Fusion in Santa Fe, said that her club provides wristbands when a person enters so that the person can receive no more than two drinks in one hour. For some reason, the City of Santa Fe is fighting the free cab ride program. It appears that there are two problems; one is the expense, but the other is that at closing time a crowd develops in the parking lot while awaiting cabs. DWI funding provides the funds for "safe ride home" programs.

The city contracts with the transportation provider and receives money from the state for the service.

Ms. O'Connor noted that service from these free-ride services is many times not available when needed or on demand. So far, the programs have provided poor service.

Mr. Chavez spoke about the citations being issued to bartenders and customers with help from Mya Luna, a bartender that has received citations. Mr. Chavez noted that some criminal citations are dropped, but the costs to defend against an administrative citation are high: as much as \$2,500 per case and \$250 for administrative fees. The fines are very high both to the establishment and to the servers.

Nadine Milford noted the drop in DWIs since 1992. New Mexico used to be number 1 in alcohol-related incidents and now has fallen to eighth or tenth place in the nation. There still is a problem with irresponsible drivers, but things are improving.

The committee noted that people may make mistakes and get drunk, but the perpetrator should not be afraid to engage with regulators. Regulators should be concerned with making sure that the incident is not repeated rather than making an example of or humiliating the person. It was also noted, however, that people holding a commercial driver's license or pulling a trailer with animals for personal use need to take responsibility for their actions and not endanger others or their cargo. There was a suggestion that servers should be protected from fines if they report a person who is intoxicated or help get that person a cab, similar to the way the legislature provided immunity from fines or arrest if a person reports an overdose.

Posting of Notice of Hearings

Evelyn Feltner, president, Inez Neighborhood Association, and Donna Yetter from the Northeast Heights of Albuquerque brought concerns to the committee about the requirements for posting a notice prior to local and state hearings on liquor licenses. Ms. Yetter discussed the process of issuing a license. She said that the first part of the period after the application is devoted to reviewing the license for completeness and making certain that all documentation is accurate and complete. Background investigations are made during this period. Then, the hearings are supposed to be held on applications that are sufficiently completed. These applications would need a site plan of the location of the proposed premises and include in that plan should be identification of what businesses are adjacent to or in the immediate area of the proposed licensee. There should also be a map of the surrounding area so that the AGD can get an idea of whether the new license will be compatible with the surrounding area and assess the application for appropriate siting of the new business. Ms. Yetter suggested that the number of other bars in the immediate area should be assessed to determine if the density of liquor licenses is appropriate to the area. Ms. Yetter noted that the liquor license she is concerned about is a license going to an area where there are five other liquor licenses. She would like the state to have the ability to assess appropriateness and feel comfortable doing so. This would most likely require a change in law providing this authority to the AGD. The New Mexico Supreme Court is reviewing the issuance of a license for the establishment that Ms. Feltner and Ms. Yetter are

concerned about. Mr. Tomada noted that the state attempted to deny the license but a district court judge determined that the license should be issued. Ms. Yetter said that the state was asked to overturn the decision of the local government to allow the license. She noted that there is only one hearing officer in Albuquerque to determine whether to approve or disapprove applications for new license locations in the city. Mr. Lopez stated that his office is in the process of tightening up on applications and the hearing process.

Mr. Lopez was instructed to submit new rules and procedures adopted by the RLD for the AGD enforcement of the law to the staff person in charge of the Revenue Stabilization and Tax Policy Committee, Pam Ray, at the Legislative Council Service. The chair also stated he is considering sponsoring legislation to require review of regulations by the legislature. A question arose from the committee on when a new liquor licensee or a transferred license can begin to operate. It appears that a preliminary approval from the department comes prior to the local government approval or before the final approval.

The committee recessed at 4:39 p.m.

Thursday, October 18

The meeting was reconvened at 9:15 a.m. by Senator Jennings.

Taxation and Revenue Department Draft Legislative Proposal

Jan Goodwin, secretary of taxation and revenue, and Jim Nunns, tax policy director, Taxation and Revenue Department (TRD), presented five draft proposals for the committee's review and consideration.

Draft #1 revises Section 7-1-8 NMSA 1978, the section that restricts disclosure of taxpayer information to the agencies listed for the purposes listed. One of the suggested additions is to allow taxpayer information to be released to the RLD. This change elicited a great deal of discussion on what data would be released and how it would be used, stored and handled. There is concern about the way taxpayer information from liquor licensees would be used. There was also some concern on the sanctions that are meant in the draft (page 20). The RLD should be present if this bill is reviewed for endorsement.

Draft #2 would set a threshold for special payment methods. This would include electronic payment methods. The threshold for electronic payments would be decreased from the current \$25,000 in taxes owed to \$10,000. The reduction would be made in increments of \$5,000 over three years. The quarterly electronic filing threshold would be decreased, also. There is an appropriation located in the secretary's duties for fees that are designated to be used for administration of the electronic filing system.

Draft #3 pertains to other Tax Administration Act matters, such as lengthening of the protest filing period from 30 days to 90 days. No special request must be made by the taxpayer to access the longer period.

Draft #4 is a very rough proposal to simplify the exemptions, deductions and some low-income credits that can be claimed against a taxpayer's income tax. This will be drafted and brought back to the committee in November or December.

Hoyt Pattison, lobbyist, Dairy Farmers Association, wanted to know if there are changes in the provisions that farmers and ranchers do not have to pay estimated taxes. The response was that this exemption would still be available to be taken. Mr. Nunns also noted that, in the future, letters of reminder will be sent out to remind people that they are required to file estimated tax returns and pay the estimate. Mr. Pattison also wanted to know if the Withholding Tax Act would make estates and trusts pass-through entities. Mr. Nunns explained that New Mexico law does not track the federal law, and out-of-state taxpayers are able to meet their tax liabilities without filing. Mr. Pattison's final question was whether the number of employees would be decreased on information returns that must be filed by farmers and ranchers from a minimum of 50 employees.

It was noted by the committee that a farmer or rancher cannot include income other than ranch- or farm-generated income. If two-thirds of the person's income is from farming or ranching, the exemption would apply. Secretary Goodwin noted that there will be no penalty for 2007 for failure to pay estimated taxes. Estimated tax payments will begin after the notice is sent out for 2008 income. Another comment was about oil and gas withholding. It appears that oil and gas entities that are pass-through entities will have to make the estimated payment, and the recipient will have the amount withheld if the pass-through entity meets the threshold for paying estimated taxes. The film industry also may have to withhold and make estimated payments before it distributes money to film personnel from New Mexico-based productions.

Draft #5 would conform certain provisions of the Cigarette Tax Act with the Master Settlement Agreement that was adopted after litigation by the states against cigarette manufacturers in the 1990s.

A question from the committee sought more information on the issue of taxation of small wineries that was discussed at the September meeting. Mr. Nunns noted that it might be reasonable to phase out the state small winery tax at the same level as the federal small winery capacity, or 960,000 liters. Right now, a small winery in New Mexico must make 560,000 liters or less. Mr. Nunns also wants to consider allowing a credit for New Mexico wineries instead of the lower rate of tax, simply because so many out-of-state or foreign wineries that are difficult to monitor are also claiming the lower tax rate. He thinks that a production credit might possibly serve the same purpose. Small breweries also might need to be changed to a production credit, also.

Utility Franchise Fees

Tasia Young, lobbyist, New Mexico Association of Counties (NMAC), and Tito Chavez, lobbyist, NMAC, presented a draft bill that would specifically allow counties to charge utilities fees for use of the public rights of way in the unincorporated area of the county. Currently, a county is permitted to charge the "reasonable actual expenses" to obtain access for use of a right

of way. The bill would enable counties to negotiate fees for rights of way, according to Dan Bryant, county attorney from Lincoln County. Concern was expressed by committee members that municipal and county jurisdiction would not overlap so that the utility would have to pay twice for the same right of way. In addition, there were questions asked about whether pipelines would have to pay these additional fees. Mr. Bryant thinks that pipelines are included in the utilities to which fees could be charged. It was noted that one to three percent of a utility company's gross revenue comes from unincorporated areas of counties. Mr. Bryant provided a definition of a "franchise" as it pertains to utilities. A franchise is a utility that is granted authority by a government to operate in a specific territory. In response to another question, Mr. Bryant noted that an attorney general opinion limited counties to charging only the actual expenses directly associated with granting the easement to use a right of way. Another query was in regard to possible anti-donation issues resulting from providing use of the right of way without charge. Mr. Bryant stated that opinions from the attorney general are silent on potential anti-donation issues in regard to utility easements obtained from counties. When asked if the fees would be one-time payments at the beginning of the grant of the right of way, the panel stated that the fee would be assessed annually. Another question posed by the committee asked if it would be necessary to speak to the Public Regulation Commission (PRC) regarding this fee. Ms. Young stated that the fee would be included in the rate base of the utility by the PRC.

Local DWI Grant Fund and Program Update

Rob Mitchell, member, Board of County Commissioners, San Juan County, and chair, DWI Coordinators Committee, NMAC, told the committee that the fiscal year 2008 distribution of DWI grant and program money was reduced because of an excess distributed in 2007. There was an overprojection of Local DWI Grant Fund revenue by the TRD and the Department of Finance and Administration (DFA) of \$4.5 million. Distributions were made based on the projected revenue, but the money did not materialize. The money will be deducted from 2008 and 2009 allocations to the counties from the Local DWI Grant Fund. Grants are being reduced by \$1.6 million for two years to make up for the overdistribution.

Liza Lubach, Local Government Division, DFA, attempted to clarify the problem. She said that \$1.5 million will be reverted from the counties. The DFA calculated the amount of overpayment to each specific county and then subtracted that amount from the distribution to the county. Out of a distribution total of \$9.8 million, a total of \$1.5 million has to be reverted from all of the counties in each of the next two years. This amount includes other reversions also from the Local DWI Grant Fund and from detox funds distributed. It appears that a total of \$2.7 million will be withheld from future distributions to make up for the error in distribution.

Discussion among committee members returned to targeting and profiling of certain liquor establishments. Some members are concerned that this is malicious on the part of the SID rather than an attempt to provide prevention in the field. Others explained that the SID has targeted establishments that have a record of producing DWIs and so there is some merit to using limited resources where the need is greatest. Additional funding should be provided for Bernalillo County and other safe ride programs to help provide more assistance to liquor licensees when potentially intoxicated patrons are identified. Again, anti-donation problems

were cited as potentially interfering with the safe ride programs that transport people for free from a liquor establishment to the person's home. Ms. Lubach suggested that excess funding from the liquor excise tax could be used to fund safe ride programs.

A question from the committee asked how DWI programs would be able to reconcile their books with their budgets when this money is withheld from them. Does the excess money for the distribution reduce the amount of money flowing into the general fund? Also, questions arose about accountability and whether programs are effective. Mr. Mitchell noted that the DFA requires evidenced-based programs. He noted that the aggregate data for the year will be available by January 1, 2008 in fiscal year 2007.

The committee requested that the DFA distribute the report containing the DWI evidence-based program data on a routine basis to legislators. This is data that can be used to assess the benefit of programs funded by the Local DWI Grant Fund and other program funds. Other comments from the committee noted that more programs should be targeted to children to prevent them from growing up and becoming DWI perpetrators; not all of the money should be spent on adults who are already in the system and are causing the problems. Ms. Lubach stated that each county has a component to provide prevention and education programming for children. The committee asked to be informed about the programs that are working for children and in what schools the programs are offered. Ms. Lubach said that children's programming is part of the multipronged approach taken by counties, and the funding is not followed separately but as a part of the overall programming. The committee also requested the schools in which "all stars" programs are located. A concern was expressed that contract programs, such as all stars, are not long-term.

Locomotive Fuel Tax

Luis Heredia, Union Pacific Railroad (UP), presented information about the UP's request to amend the law that was adopted in the 2007 session. He requested that an extension of time be granted for beginning the community development project that the railroad has planned. First, Mr. Heredia presented background information on the size of the operation the UP is considering and the number of people that will eventually be employed in the Santa Teresa area. Right now, the UP has a network that crosses 23 states to move goods and provide services. More than 32,000 rail miles course those states, with 50,000 employees on a \$3.9 billion payroll. There are 125 UP employees currently in New Mexico, with track covering 644 miles and generating \$9.5 million in expenditures in the state. The plan is for terminal facilities to be housed at Santa Teresa. The rail line goes from Tucumcari to El Paso and on to Lordsburg then Arizona. The rail line also goes to Chihuahua (city), Mexico, and through Texas. Steve Sand, Real Estate Acquisitions Group, UP, described the location of the UP facility planned as beginning west of the Santa Teresa airport and allowing larger trains with intermodal cars to be accommodated. The project will relocate 285 jobs from El Paso and add about 60 more new jobs through 2010 at the end of the first phase. The project will involve approximately \$300 million in construction costs. Design of the facility is being handled by the Wilson architect firm in Albuquerque. Design and permitting should be completed by the summer of 2008. It should take two to 2.5 years to complete phase one. In 2014, the UP plans to begin the intermodal

facility. The state and the Bureau of Land Management (BLM) will be swapping land to allow for acquisition of the property needed from the state. There are three time-sensitive components to House Bill 839 (2007 session) to provide a fuel tax credit for the UP project. First, the UP was to obtain the permits by summer 2008; second, the UP was to begin construction of the facility by the fall or winter of 2008; and finally, the UP was to complete the land acquisition by the end of 2008. The land acquisition will probably not be completed until later than 2008, and this is the element that must be changed in the law. Ron Dutton noted that there are 10 sections of BLM land that must be exchanged for state land. This will take a great deal of time because federal land exchanges are slow and time-consuming. Not only does the BLM in Washington, DC, have to approve the exchange, but first an NEPA assessment must be completed. The BLM had suggested it could complete the land exchange by November 2008, but it may not be possible. If the exchange cannot be completed then a right of way can be granted so the project can move forward. An extension must be put in place in the 2008 session or it will be too late to accommodate any delays that may occur. There also will be rail line construction from Ensenada to Santa Teresa. This activity will all serve to expedite economic development in southern New Mexico. In response to a question from the committee, UP representatives stated they could not estimate the fuel costs that would be saved by this credit at this time. Tom Clifford, New Mexico Tax Research Institute, noted that when the bill was adopted the TRD estimated that \$3.5 million in fuel would be used or loaded in the state. Texas does not tax fuel loading, and this is one reason that New Mexico adopted the credit.

Tax Increment Financing

Bill Jordan, deputy director for policy, and Anne Stauffer, economist, New Mexico Voices for Children (Voices), presented to the committee some concerns about tax increment development districts (TIDDs). They raised questions about the costs to the state of continuing to approve TIDDs under the Tax Increment for Development Act (TIDA). They are not interested in changing the law as it applies to Mesa del Sol, the only existing TIDD in the state, but in reviewing the purposes of the TIDA before more TIDDs are approved. Ms. Stauffer spoke from a handout that was given to the committee. She noted that in most cases, TIDDs are not intended to develop "green-field" areas or areas where development would naturally occur without tax increment financing (TIF). Most states reserve TIF for "brown-field" areas that are areas of urban blight that are higher-risk areas to develop. They noted that state budgets rely on growth in the state to maintain and expand current programs and fund new programs. To give up that revenue from an area where services will have to be provided hampers the state's ability to expand services into the new areas and it reduces the money available to the state to provide for the needs of the people. It also may spur relocation of businesses and homeowners so that tax revenue from their current locations is lost and reduced new revenue will be realized. By the fifteenth year of a TIDD development, the state will have to provide more services than the increment it is receiving from the TIDD will pay for. The services are schools, law enforcement, fire protection and other basic needs of a community. For example, businesses moving into Mesa del Sol, such as Advent Solar, are not new businesses to the state, but are relocating. The film studio that will be locating in Mesa del Sol had intended to locate in the Barelillas area of Bernalillo County. There is limited-to-no oversight of a TIDD once it is established. The principles that should be incorporated into the TIDA are:

- oversight, transparency and enforcement;
- stakeholder input;
- no net expense to the state for providing governmental services;
- work force housing within the TIDD;
- small local businesses;
- a requirement that jobs created are high-paying and long-term;
- transit-oriented development;
- that schools must be constructed to accommodate the population;
- a sustainable business community; and
- plans for and development of open space.

The recommendations Ms. Stauffer made were:

- obtain a better understanding of the impact TIDDs will have on the general fund; and
- clarify questions and resolve uncertainties.

The TIDA should be amended to:

- exclude undeveloped greenfields from inclusion in TIDDs;
- include oversight and enforcement by specified state agencies;
- require that certain public policy goals be met, such as work force housing, transit-oriented development, high-value jobs, sustainable businesses, etc.;
- add a reporting requirement for counties and municipalities to inform the Legislative Finance Committee and DFA of TIDD proposal submission; and
- prohibit capital outlay funds from being appropriated to TIDDs, which are political subdivisions of the state.

Other questions to be answered:

1. Use and Oversight:

- What happens if every new development in New Mexico wants to be a TIDD?
- Which state agency has oversight over TIDDs?
- What state agency has done a complete, independent analysis of the fiscal impact of proposed TIDDs?
- If the state's analysis relies upon data from the developers, are the assumptions made by the developers adequate to ensure that the taxpayers are protected?

2. Fiscal Impact:

- What happens if the TIDD does not generate enough revenue to cover the state's operating costs within the TIDD?
- What is the total impact on state revenues given tax incentives provided to businesses that locate within the TIDDs?
- Is it realistic to assume that all of the economic development would not have occurred without a TIDD?
- Is it realistic to assume that the state's 25% of the gross receipts tax (GRT) from the TIDD will exceed the GRT revenue that the state would have received from that area in the absence of a TIDD?
- If TIDD revenue is greater than the costs of the public infrastructure, which entity gets the excess revenue and for what purpose? Does the developer keep the revenue?

3. Enforcement:

- What state agency has enforcement authority to ensure that TIDD revenue is used for public infrastructure and policy goals consistent with the TIDA, especially when the state is not a party to the master development agreements?
- What are the penalties if the infrastructure is substandard or not built?
- Since one of the goals of the TIDA is job creation, what happens if a TIDD does not meet its job creation targets?

- Which TIDD ordinance is controlling if a TIDD spans a city and a county?

The committee noted the concerns brought to it by Voices, but generally was positive and supportive of TIDD development, although it was agreed that the legislature must look carefully at each TIDD that seeks approval. The committee recognized that if adequate revenue does not come from within the TIDD to the state, the state general fund will have to make up the difference to pay for state services provided to residents and businesses within the TIDD. It was noted that TIDDs provide for planned, reasonable growth of an area and generally establish schools for children of new residents. Committee members did agree that strict oversight is needed and all plans should be reviewed at the state level carefully to ensure that the state general fund does not bear the costs of creating infrastructure in TIDDs. It was pointed out that the state or local governments already give up some of their revenue if industrial revenue bonds (IRBs) are issued for a new business and net deficits in revenue occur when schools are built in communities in which low-income parents generate limited or no income tax. There is also no indication of how additional increments of GRTs would be handled. Would the percent division apply to those increments, even if the TIDD expenditures were predicated on a lower amount? The committee agreed that planning is lacking in most developments and the preplanning required is one benefit of a TIDD.

The committee suggested that there is little information and tracking of IRBs. Tracking and information-gathering on IRBs need to be improved.

Mr. Jordan suggested that the state should assess the impact of Mesa del Sol on the general fund as soon as possible. SunCal is proposing a project that is at least four times as large as Mesa del Sol. The state should not rely on developers to provide the analysis of the impact of a TIDD. Counties and municipalities negotiate the development agreement with the developer and the State Board of Finance has authority to approve the agreement after it has been negotiated. Mesa del Sol keeps 75% of the GRTs generated within the boundaries of that TIDD.

The chair asked that the committee members be present to begin business on Friday, October 19, at 8:30 a.m., when Bill Fulginiti and Ms. Young will begin their presentation on compensatory time off and overtime issues resulting from the changes made to the minimum wage law in the 2007 session, and for Mr. Fulginiti to provide to the committee the New Mexico Municipal League (NMML) legislative priorities.

The committee recessed at 3:05 p.m.

Friday, October 19

The meeting reconvened at 8:30 a.m., with Senator Timothy Z. Jennings chairing.

Municipal League Legislative Proposals

Mr. Fulginiti, executive director, NMML, Ms. Young, lobbyist, NMAC, and Grace Philips, attorney, addressed the changes that the cities and counties have discovered that need to

be made in the minimum wage law changes adopted in the 2007 session that will become effective on January 1, 2008.

Municipalities and counties discovered that the new wording of the law would require that overtime be paid to personnel working on nontraditional work schedules, such as law enforcement, fire protection, hospital and other emergency services personnel. Many of these workers are assigned to work more than seven days in a row or more than 40 hours in a week and then get extended time off between shifts. To allow for compensatory time off rather than overtime, a change had to be made in the law. No additional money was included in budgets to pay overtime for these workers who previously did not get overtime when they worked the hours traditional to their positions. Overtime will have to be paid until the law is changed.

Mr. Fulginiti also discussed the need to allow municipalities access to taxpayer data generated from taxpayers within a municipality. Currently, local GRTs are collected by the state and returned to the municipality of origin. However, the municipality does not have access to the data supporting the distribution and cannot take action if a taxpayer has failed to pay all of the taxes due. Secretary Goodwin verified that:

1. local GRTs are inherently fluctuating sources of revenue and do not constitute a reliable and consistent source of revenue from month to month; and
2. the taxpayer confidentiality statutes prevent the data for auditing to be made available to municipalities.

Mr. Fulginiti presented the additional legislative priorities of the NMML adopted at its annual meeting a few days ago. They were as follows:

- exchange a distribution of municipal GRTs for a distribution of personal income tax that would be returned to the site of the residence of the taxpayer;
- add municipal judges to Section 34-10-1 NMSA 1978 to provide for a municipal judge to sit on the Judicial Standards Commission;
- support the 2008 general obligation bond issue for libraries;
- increase the Emergency Medical Services Fund Act distribution to municipalities and counties;
- increase the distribution to municipalities, counties and tribes from the Law Enforcement Protection Fund; and
- amend the Local DWI Grant Fund program to provide funding to municipalities.

House Memorial 35 — Transportation Infrastructure Futures Task Force

Rhonda Faught, secretary of transportation, presented the findings of the Transportation Infrastructure Futures Task Force (Task Force) created as a result of House Memorial 35 from the 2007 legislative session. The goal of the committee was to develop a concept of sustainable transportation with a sustainable revenue source. Taxes that are funding transportation infrastructure right now are remaining relatively flat while costs are rising rapidly. The gas tax is split, with 76% of the revenue deposited in the State Road Fund and the remaining 24% being distributed to local governments. In 2009, the federal highway fund is projected to have a \$2 billion deficit. The state is responsible for the maintenance of interstates, New Mexico highway routes, ramps, frontage roads, bus loops and relief routes. The conclusions of the Task Force were:

- transportation needs far outweigh available funding;
- federal revenue streams are decreasing with more emphasis being placed on states to pick up the slack;
- the current level of funding will not sustain New Mexico's transportation needs into the future; and
- options in transportation funding are needed.

The Task Force presented several funding options. Some revenue sources can be redirected to increase State Road Fund deposits.

1. Dedicate all of the motor vehicle excise tax to transportation. This would raise \$136 million, assuming the tax remains at three percent. The 19-year (2008 to 2026) revenue estimate is \$2,449 million.
2. Dedicate the GRTs on New Mexico Department of Transportation (DOT) contractors to transportation. This would raise \$14 million annually. The 19-year revenue estimate is \$760 million.
3. Improve compliance with the weight-distance tax and trip tax. This estimate assumes an increased collection of 25% over current collections. It would provide \$19 million annually. The 19-year revenue estimate is \$335 million.

Some new revenue sources can generate additional funds for the State Road Fund.

1. Impose a transportation-dedicated GRT. This could raise as much as \$121 million annually, with an increase of \$.2527 added to the current GRT.
2. Add a statewide GRT on gasoline of five percent on retail sales. This would generate about \$116 million per year.

3. Add a statewide GRT on special fuels. This would generate about \$78 million annually.
4. Increase the annual vehicle registration fees by \$69.00 per vehicle per year. This might be indexed to increase three percent to six percent per year. This would generate \$122 million annually and with the indexing could generate \$160 million to \$213 million per year.
5. Allow local governments to impose a dedicated local GRT of \$.25 or \$.50 at a regional level. This could generate as much as \$40 million to \$80 million per year.
6. Index the special fuels tax to allow for a three to six percent increase annually. This would generate \$25 million to \$60 million annually.
7. Index the gasoline tax to increase three to six percent annually. This would generate \$31 million to \$76 million annually.
8. Index the vehicle registration and transaction fees to increase three to six percent per year. This would generate from \$19 million to \$46 million annually.
9. Index the weight-distance tax and the trip tax to increase three to six percent annually. This would generate \$25 million to \$60 million annually.

The DOT believes that increased enforcement of the weight-distance tax might be the first, easiest and cheapest step to take to improve State Road Fund revenue. There are estimated to be, at a minimum, 704 noncompliant trucks in the state, and many are not paying the appropriate taxes. Secretary Faught suggested that motor vehicle excise taxes be reviewed during the interim to determine if these taxes should be raised.

The DOT is very close to a resolution of the rights of way issues on US 491. The department has been seeking some contribution from the Navajo Nation to help with the costs of that project.

In response to a question about the projects in GRIP I that have been initiated, Secretary Faught noted that all projects have at least received planning funding. It was suggested by the committee that, whatever source of revenue is chosen, the DOT should do a visible public information campaign to make tax or fee increases more acceptable to the public. Secretary Faught indicated that she would do a public awareness survey to determine the revenue generation methods most acceptable to the public. She also noted in response to a committee question that the weight-distance provisions of the law have not been enforced at night because the ports-of-entry stations are unmanned. Many violations are identified through these enforcement checks: driving without a commercial driver's license; truckers out of compliance with taxes; and motor vehicle issues such as nonfunctioning lights, tire problems and other safety

issues. She asked that the legislature invest in increased full-time-equivalent positions so that new staff could be hired to cover the ports of entry. Concern was expressed that agencies are unable to request the expansion funds that are needed because they are required to present a flat budget year after year. This causes government to be acting always in a crisis mode, when budgets are inadequate to cover the actual operating expenses of a department and necessary new staff positions cannot be filled. Concerns about expenditures on the Rail Runner and the Spaceport were voiced by committee members.

Commercial Driver's License Compliance Issues

Kenneth Ortiz, director, Motor Vehicle Division (MVD), TRD, and Javier Lopez, counsel, DOT, presented changes that need to be made to the commercial driver's license provisions. Three sections of the Motor Vehicle Code are amended in the draft. Sections 66-5-60 and 66-5-68 NMSA 1978 are amended to:

1. remove waiver language that allows the MVD to waive the requirement for testing to receive a commercial driver's license; and
2. include persons who require a commercial driver's license as persons whose motor vehicle offenses can cause the issuance of a commercial driver's license to be delayed for at least one year.

Section 66-8-102 NMSA 1978, describing the offense of driving while under the influence of intoxicating alcohol or drugs, was a section that was amended multiple times in 2007 and needs to be reconciled so that the federal government transportation and highway fund people can see that New Mexico's definition of "conviction" is uniform throughout the Motor Vehicle Code and complies with the requirements of the federal DOT.

Committee members questioned whether the definition of "drug" in Section 66-8-102 NMSA 1978 includes prescription drugs. The answer to this question was "yes, any drug that causes the impairment of a driver, whether the drug is prescribed or a street drug" can cause a violation under that section. Also, it was noted that there is still a lack of clarity regarding the provisions under which a mobile home is issued a title.

Adjournment

The committee adjourned at 10:50 a.m.

- 23 -