Economic Affairs Interim Committee

57th Montana Legislature

MINUTES

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

Third Meeting of Interim
Room 137, State Capitol
November 30, 2001

COMMITTEE MEMBERS PRESENT

Sen. Dale Mahlum, Chair
Rep. Kathleen Galvin-Halcro, Vice Chair
Sen. Jon Ellingson
Rep. Joe McKenney
Rep. Gary Matthews
Rep. Steve Vick

COMMITTEE MEMBERS EXCUSED

Sen. Glenn A. Roush
Sen. Dorothy Berry

STAFF PRESENT

Gordon Higgins, Research Analyst
Bart Campbell, Staff Attorney
Eddye McClure, Staff Attorney
Lois O'Connor, Secretary

VISITORS

Visitors' list (ATTACHMENT #1)
Agenda (ATTACHMENT #2)

COMMITTEE ACTION

- Approved the minutes from the September 7, 2001, meeting

CALL TO ORDER AND ROLL CALL

The meeting was called to order by Sen. Mahlum, Chair, at 10:05 a.m. Roll call was noted; Senators Berry and Roush were excused. (ATTACHMENT #3)

Rep. McKenney **moved** that the minutes from the September 7, 2001, meeting be approved. Motion passed unanimously.

INTERIM RULES, PROCEDURES, AND GUIDELINES ADOPTED BY THE LEGISLATIVE COUNCIL

Gordy Higgins, Research Analyst, Legislative Services Division, provided an overview of the interim rules, procedures, and guidelines adopted by the Legislative Council. (EXHIBIT #1)

Sen. Ellingson said that based upon the adopted interim rule that states that the Committee shall have submitted for LSD drafting purposes, he was unsure whether the rule gave the Committee the discretion to reject an agency bill draft request if it wanted to. He felt that the Committee was obligated to submit the bill drafts regardless. Mr. Higgins will discuss the issue with David Bohyer, Lois Menzies, and Greg Petesch and other interim committee staff to see if there has been any similar concerns raised. He will provide the Committee with clarification on the issue.

Rep. Vick said that it would be his intent that the Committee have some oversight on the bill drafting process and not submit every piece of legislation that is submitted by the agencies.

Claudia Clifford, State Auditor's Office, said that because the State Auditor's Office is not a part of the Executive Branch, it does not follow the same process as Executive Branch Agencies do regarding the executive planning process (EPP). She requested clarification on the issue and a time line on which the Committee would want the legislation submitted. Mr. Higgins said that the agencies that are outside of EPP process for legislation are just required to submit comparable information. It was his intention to have the EPP document available for Committee review at the February meeting and send formal letters from the Committee announcing what the Executive Branch Agencies that are required to submit EPP proposals are doing and hope that the same time frame can apply (late May of 2002) He added that the Committee could not review any new proposed legislation after September 15, 2002. Ms. Clifford said that the State Auditor's Office would try to comply with the rules but because of the SJR 22 Subcommittee work, there may be draft proposals requested in late August.

REPORT ON FINDINGS FROM STATEWIDE MEETINGS

David Gibson, Office of Economic Opportunity, Office of the Governor, presented an overview of A Vision for Economic Prosperity that outlined the Office of Economic Opportunity's strategic plan time lines, its guiding principles, and its general theme. (EXHIBIT #2)

Sen. Ellingson what the Office of Economic Opportunity was doing with respect to the layoffs and closures of the Jore Corporation, the Columbia Falls Aluminum Plant, and Montana Resources in Butte. Mr. Gibson said that it is very important to keep existing businesses in Montana functioning because it is easier to keep existing businesses than it is to recruit new ones. His Office is focusing heavily on businesses that need help and he has been working closely with people in the Flathead Valley to see what can be done at the Columbia Falls Aluminum Plant. The Jore Corporation is a tougher issue and everything that can be done is being done. Sen. Ellingson felt that the state should be involved in aggressive diplomacy to see what it would take to ensure that

the jobs from the three companies remain in Montana and that somebody in Mr. Gibson's Office or any Executive Branch Agency should be looking specifically at them. He requested an update at the Committee's February meeting.

PROGRESS REPORT OF WORKERS' COMPENSATION FEE SCHEDULES FOR PROVIDERS OF PHYSICAL MEDICINE

Jerry Keck, Administrator, Employment Relations Division, Department of Labor and Industry, said that the question raised at the Department is whether reimbursement rates paid to chiropractors were equitable in relation to the fees paid to physical and occupational therapists. The Department made a proposal through rule that would have put physical and occupational therapists and chiropractors on a single fee schedule. However, to ensure that the proposal was cost neutral, the Department had to reduce the rates paid to physical and occupational therapists and increase the rates paid to chiropractors. This was not a popular proposal to the physical and occupational therapists and the Department did not view it as a good solution to the problem. As a result, the rule was withdrawn. The Department has since met with the parties involved to try to reach an agreement to increase the fees paid to chiropractors with the understanding that it not trigger an increase in workers compensation premiums paid by employers while at the same time it not reduce the fees paid to occupational and physical therapist. He provided a list of the Workers' Compensation Advisory Council for Physical Medicine Fee Schedules. (EXHIBIT #3)

Mr. Keck said that all of the data collected by the Advisory Council will be available by mid-December. A second meeting of the full task force will be held in January. The Department will have prepared some proposed fee schedules and conversion factors that would address the problem and, hopefully, have agreement from all the parties, including the insurers. Mr. Keck will provide a full report and recommendations to the Committee at its February meeting.

Rep. Vick asked if the Department intended to freeze all of the rates paid so that chiropractors could catch up. Mr. Keck said that all rates paid to medical providers are based upon the current procedure terminology (CPT) codes that all states use. In 1993, the Department established a conversion factor--rates that are paid for each unit of service provided. Statute provides that every year, the Department increase that rate by the state's average weekly wage. As a result, it would not be a freezing of the physical and occupational therapist fees. In the broad statutory scheme for how all medical providers are paid, the Department feels that it could not freeze rates without a legal challenge. The solution would be an agreement that the insurers recognize that if the data shows that chiropractors have been underpaid that all parties agree to a certain level of increase, possibly $400,000, and review whether the system as a whole can absorb the increase of payments to chiropractors without triggering a rate increase. If a rate increase is triggered, it would come back to the Advisory Council for further negotiation on some lesser amount.

REPORT ON SJR 7 AND EMPLOYEE BREAK-TIME INQUIRIES

John Andrew, Department of Labor and Industry, said that SJR 7 asked the Department to review the travel regulations of both the U.S. Department of Labor and the Montana Wage An Hour Act and to establish a panel to discuss the rules. The group has had one meeting and he provided a list of people who attended or who expressed initial interest in the topic. (EXHIBIT #4) He also provided a summary of the Department's inquiries documented from employers and employees regarding breaks and meal periods. (EXHIBIT #5)

Sen. Mahlum asked how the information was gathered. Mr. Andrew said that the inquiries were received by telephone and as much information as someone was able or willing to divulge is what is contained in the summary. No calls were initiated by Department staff. Sen. Mahlum asked about state regulations regarding break and meal periods. Mr. Andrew said that neither state nor federal law mandate either break or meal periods. The rule the Department goes by is if an employer chooses to provide a meal period, in order for it to be non-compensated time, it has to be at least 30 minutes of uninterrupted time. If an employee is called back to work during that time period, they need to be compensated for the meal period. Mr. Andrew asked if the Committee wanted the Department to make as well as receive inquiries. Sen. Mahlum said yes, adding that the businesses throughout the state could be randomly selected.

Rep. Galvin-Halcro asked if was fair to assume that most calls came from employees. Mr. Andrew said that the vast majority of the calls were employee driven. Rep. Galvin-Halcro requested that the Department continue to track the inquiries in the future and requested an update at the Committee's May meeting.

Sen. Ellingson asked if there was a requirement that employers allow employees the opportunity to use restroom. Rep. Galvin-Halcro said that there is no statute that states that an employee needs to be allowed to use the rest room.

UPDATE ON ACTIVITIES RELATED TO SB 242 (DONUT AREAS)

Eddye McClure, Staff Attorney, Legislative Services Division, provided a copy of the recent Montana Supreme Court decision that challenges the constitutionality of SB 242 (donut bill). (EXHIBIT #6) She stated the following:

- Prior to the 2001 Session, state law authorized cities and towns to adopt their own building codes and to exercise jurisdiction over the codes within a 4 1/2 mile area outside the city limits (donut area).
- During the 2001 Session, the Legislature passed SB 242 that required cities and town to hold a mail-ballot vote as to whether the jurisdiction of the donut area would continue.
- Counties had to hold the elections no later than December 31, 2001.
- Upon adjournment, several questions were raised regarding the content of the bill, specifically from Yellowstone County.
- As a result, Dennis Pisonia, Yellowstone County Attorney, requested an Attorney General's opinion asking for clarification on first, if and when the counties decide the elections, who are the eligible voters; secondly, do the cities and towns that had and were operating under the city building codes, what happens in the interim until the elections are held.
- In his opinion, Attorney General Magrath stated that the eligible voters are the record owners of real property.
- Because of some of the questions raised, Attorney General Magrath could not make a ruling on the constitutionality of SB 242, it had to be decided in the Court.
- The concerned is that there may be people who live in the donut area but their names are not on the deed or title of the property and, therefore, they would not be allowed to participate in the vote.
- Attorney General Magrath said that the question of constitutionality of the franchise of the vote is a serious question.
- After the opinion, the Department of Labor and Industry sent a letter to city managers informing them that for cities, towns, or counties who did not hold election by December

31, 2001, or who held an election and the vote went down, that the Building Codes Bureau would be exercising jurisdiction in those areas.

- On October 19, 2001, a second Attorney General opinion was issued.
- Attorney General Magrath did not change his mind on the qualified electors who would be allowed to vote but he reversed his opinion on the jurisdictional question stating that the cities and towns lost jurisdiction over enforcing their city codes as of May 1, 2001 and could only be regained if the people approved the vote.
- A lawsuit was filed November 15 by three individuals who live in a donut area but are not record owners of real property and six cities and towns.
- The individuals are claiming that they are being disenfranchised from their right to vote in violation of the Montana and federal constitutions while the cities and towns are alleging that because of the inconsistencies in the language of SB 242, they are at jeopardy because they are unsure about what they are supposed to be doing.
- There were also ancillary questions about what the cities and towns were supposed to do in the meantime with the permits that they were issuing, the inspections they were conducting, and the fees that they collected.
- The plaintiffs are asking the Supreme Court to take original jurisdiction and issue a temporary injunction against the implementation of SB 242, the portion of the Attorney General's opinion regarding the cities and towns' loss of jurisdiction, and against the letter sent by the Department of Labor and Industry regarding the vote.
- On November 20, 2001, the Supreme Court issued a temporary injunction lining out their concerns about the vote, who gets to vote, and the liability of the cities and towns.
- The injunction prevents implementation of SB 242 and prevents any election, therefore, preventing the Department from taking over jurisdiction.
- A hearing date has been set for December 11, 2001, requiring the defendants to show cause why the temporary injunction should not be turned into a permanent injunctions.
- Currently, everything regarding SB 242 is on hold

Kevin Braun, Department of Labor and Industry, said that practical aspects of the lawsuit that are facing Department are that it is enjoined from exercising any jurisdiction in the extended jurisdictional areas. The reality is that the Department has had 206 construction permit applications filed subsequent to the second Attorney General's opinion and prior to the order that enjoined the Department. The individuals who have the permits pending before the Department and it cannot act them because of the order, the Department is turning the permits back to cities and towns to deal with. The Department is also working with the cities and towns regarding proration of the various fees due and so the inspections can continue. Mr. Braun said that the Attorney General's Office will be the lead defendant because of the constitutionality of statute has been challenged. It should be circulating a draft brief to the various defendants; and his inclination is that the issue would probably be decided through briefs rather than oral arguments. Mr. Braun added that he has also met with former Representative Bruce Simon who is interested in the issue.

Sen. Mahlum asked if the municipalities and the state had the same fee schedules. Mr. Braun said that there is not only a variance in fee schedules between the state and municipalities but that there was also variances in fees among the municipalities. The Department's and municipalities' program staffs are working together to establish where the fees should be set. The difficult fees are on those that the Department has performed certain inspections and they are at different stages of completion. These fees may have to be established on a pro rata basis

whereby the Department will retain a portion of its fees. Sen. Mahlum asked if of the 206 permits submitted to the Department that have been granted but are just getting started, can the municipalities penalize and fine the operators because they did not go to municipality first. Mr. Braun said that it would not be a wise thing for municipalities to do because at the time the permit applicants came to the Department, the current status of the law then was that the Department had jurisdiction.

Rep. Vick asked **Alec Hanson, MT League of Cities and Towns** why he believed that it was more constitutional for no individual to vote on the jurisdiction of the donut area than if just a few people get to vote. Mr. Hanson said that the League did not file the law suit but by individual cities and towns and private citizens. The amendment that the League offered to SB 242 authorized counties to establish building code districts in densely populated areas and every individual in the county got to vote for the county commissioner. This is the way that the League feels that it should be done. If the county commissioner makes the decision that people do not like, the people have the right of initiative and15% of voters in the county can suspend the law and refer it to the ballot at the next election. The question that surrounds this issue is whether the restricted franchise constitutional. He said that he could not answer the question. However, it was a legitimate question and the cities involved in the law suit became involved for one reason: if the election is held and is subsequently declared constitutional, the outcome is not good for anyone involved. Rep. Vick agreed that there could be a problem but he felt it hypocritical of cities that have fought the issue for year to suddenly say that they are concerned about people's constitutional rights when he felt that the cities have been violating them for a long time by requiring building permits of people who cannot vote. Mr. Hanson said that the cities were operating under a law passed by the Legislature. This law is a result of happenings from 1979 when building code system was torn apart and put back together. He argued that cities and towns have followed the law from the beginning.

Rep. Vick said that it was his opinion that the issue is strictly an issue of revenue for the cities rather than a safety issue. Anyone who deals with building code inspectors in many jurisdiction knows that the building codes enforcement is a joke.

Bruce Simon, Citizen and Former Legislator, Billings, said that the Supreme Court has thrown a "monkey wrench" into the issue because both current statute and SB 242 state that permits issued prior to the effective date shall be completed by the municipality that issued the permit. Now, the situation is that this is no longer true. The Department issued the permits he was uncomfortable with the idea that the Department passed the permits along to the municipalities. He felt that many people were going to be upset about being handed off to the cities when they bought their permits from the state. He was also concerned about the language of Supreme Court decision. He said that Miles City that has been exercising extended jurisdiction but is not a part of the law suit. The decision stops the cities and towns that are defendants in the lawsuit that they cannot exercise extended jurisdiction but it does not stop Miles City. Mr. Simon added that the Supreme Court decision also states that "the Department is temporarily enjoined from enforcing the code in the donut areas of the municipal defendants". He asked if the language should have been "municipal plaintiffs". His biggest concern was that if SB 242 in its entirety is declared void, it will disenfranchise many people. There are situations where cities have refused to ask permission from County Commissioners because they do not have to. He disagreed that SB 242 had been totally suspended, just portions of it, which leads to the question: since the

municipal jurisdiction is limited to its borders as the effective date of SB 242, how is it that municipalities can exercise extended jurisdiction by suspending other portions of SB 242.

Rep. Matthews clarified that the Miles City Council voted to join in the law suit. Ms. McClure added that all parties are thinking that the Supreme Court decision is probably statewide even though the Supreme Court mentioned defendant--counties and municipalities. If Miles City were to go forward with extended jurisdiction, she did not think that the Supreme Court would allow that.

CITY/STATE RESPONSIBILITY OF BUILDING CODES ENFORCEMENT, BOILER INSPECTIONS

Jim Brown, Administrator, Business Standards Division, Department of Labor and Industry, introduced **Bill Jellison, Building Codes Bureau, Department of Labor and Industry**. Mr. Brown said that Missoula enforces mechanical permits in its jurisdictional area. In a project involves a boiler in any building, under mechanical permitting procedure the city has, it requires a permit and various inspections. Title 50, chapter 74 requires a routine inspection of certain steam and hot water boilers annually. The 2001 Legislature provided a break to smaller boilers so that they did not have to be inspected annually. About two-thirds of the boilers are inspected by insurance companies. The particular case in Missoula involved an individual who owned a bed and breakfast installed a boiler and obtained a permit. The facility was inspected and approved. Later, the Department's boiler safety inspector inspected the facility and found several deficiencies in safety features. The inspector wrote a noncompliance notice and ordered the individual to upgrade the boilers in order to receive a certificate from the state. The individual felt the process was unfair because he had obtained the necessary installation permit Missoula and he thought that he was totally in compliance with the law.

Mr. Jellison said that there are two statutes involved in the issue--the Uniform Mechanical Code (construction) and the American Society of Mechanical Engineering (ASME) codes--safety inspection, installation, and maintenance. The Department, through administrate rule, has deleted the sections in the Mechanical Code that do not mesh the ASME boiler codes. This has been an isolated incident and it is very unfortunate and the Department continues to work with the individual on a reasonable solution and time frame.

Sen. Mahlum read a portion of a letter that he received from Mr. Jellison stating that the problems involving the individual was caused by a local building inspector who did not enforce the established boiler safety requirements as required by the Local Government Building Codes program. He felt that the individual was caught in catch 22 situation. He asked what the Department proposed to solve the situation. Mr. Jellison said that the Department can send its expert back to the individual to explain what is required. Its estimate of the individual's solution is $600 to $700 in retrofit. Sen. Mahlum said that the individual's plumber said that it would be approximately $2,500.

Sen. Ellingson asked if Missoula had done its job correctly in the first place, would the individual be looking at the additional expense. Mr. Jellison said to some extent. The individual has an older boiler and would only have had to added one component. The new boiler needs to meet certain standards and the boiler could have been ordered a boiler with appropriate controls from factory. Sen. Ellingson said that the problem is how much more expense is it to retrofit the new boiler. He said that the mistake was made by Missoula not the state and he felt that the individual should talk to his City Council person about relief.

Sen. Mahlum said that the individual has talked to the City Council who said that is was not their fault. He encouraged the Department to continue to work with the individual and he would continue to encourage him to speak with the City Council.

EFFECT OF HB 120 ON SUSPENSION OF FEES FOR PROFESSIONAL LICENSURE

Kevin Braun, Department of Labor and Industry, said that in the 2001 Session, the Department of Commerce's housekeeping bill contained a provision which struck a provision in Title 10 which allowed for the waiver of fees on person called into active military duty. Due to the happenings on September 11, 2001, many have been called into active service. The Department has analyzed the issue and has concluded that even though the provision was stripped away, Boards in their individual discretion do have the authority to suspend licensure fees and current licenses during the period of time that someone is serving in active military services for a reasonable period of time. Boards can do this on an ad hoc basis based upon the merits of case brought forward. He said that another issue relates to complete waiver of the requirements and a waiver of the fees. Since the authority was stripped, it becomes a more questionable legally.

Rep. McKenney said that he carried HB 120 at the request of the Department of Commerce. He said that the suspension of licenses and fees can continued through rulemaking to all licensees with the exception of medical personnel. He asked if any medical person challenged the issue. Mr. Braun said that he was only aware of one situation. Rep. McKenney asked if the Board knew that they had the right to waive licensure and fees. Mr. Braun said that the Department's legal staff is currently conveying this to the Boards.

Rep. Vick asked if each individual had to apply for the waiver or can it be done on a Board-by-Board basis for those on active duty. Mr. Braun said that if a particular Board finds that is the appropriate way to proceed, the Department will encourage them to adopt a rule that has uniform application regarding all the people and automatically granted once they send in a copy of their service orders.

REPORT ON RECENT SCOPE OF PRACTICE ISSUES BEFORE THE BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Bart Campbell, Staff Attorney, Legislative Services Division, stated the following:

- The Legislative Council received a number of inquiries from legislators requesting information about a meeting held by the Board of Professional Engineers and Land Surveyor that was not pursuant to a rule. As a result, he attended the hearing.
- The Board of Engineers was reviewing the possibility of interpreting the statutory definition of "scope of practice" in such a way that individuals who are not engineers who were installing sprinkler systems might be in violation of the definition.
- He commented to the Board that it was the opinion of the Legislative Services Division that, if in fact it had interpreted the statute in a certain way for 10 years, it would be very difficult to suddenly change the definition of "scope of practice" without legislative input and without a rule. The Board decided to take no action, appointed a subcommittee, and decided to review the issue further. To date, nothing is being done in the sense of adopting a new change and is basically on hold.
- Whatever position Committee would take on the issue would depend upon the Board's Subcommittee action.
- If the Subcommittee does not leave the status quo as it is, the Committee should urge them to make the change by rule because it allows the Committee some remedy.

Mr. Brown said that after meeting of the Board, he requested a summary memo from Todd Boucher, Program Administrator, Board of Professional Engineers and Land Surveyors to provide written documentation of the Board's action. He provided a copy and summary of the memo. (EXHIBIT #7)

Mr. Simon said that the Board did not have the authority under law to regulate individuals who are not engineers which he felt was outside of the Board's scope. The definition of "engineering" in statute is terrible, it is very difficult to determine whether an individual is conducting engineering or not, and it would be very difficult to prove in court. Sprinkler installers have been allowed to install sprinkler systems for years, and for the Board, without changes in legislation, to come forward now and say that it thinks that what the sprinkler installers are doing is engineering, when it has not thought that in the past, is not correct.

UPDATE ON GOVERNOR'S BLUE RIBBON TASK FORCE ON HEALTH CARE WORKFORCE SHORTAGE

Gail Gray, Director, Department of Public Health and Human Services, said that without economic growth, there are insufficient fiscal resources to pay for the services that DPHHS constituents need. Many of its clients need jobs and a robust economy. The health care workforce shortage is real, it is growing, and recruiting and training health care workers is very well documented. There is also a providers shortage, specifically in the dental field, and Montana hospitals desperate. The Governor appointed a Task Force that met for the first time and discussed the health care accessing problem, expanding the pipeline and educational strategies to meet needs, retention and retaining issues, and what could be done to make services more efficient. The people are Montana's number one asset and change must be on multiple levels because society has needs. The Task Force will meet several more times.

Rep. Vick asked how the state had intended to address the shortage of dentists. Ms. Gray said that the Task Force was not focused on the shortage of dentists only but on all aspects of the health care system. She said that the 2001 Legislature was courageous in funding the dental hygienist program at the Great Falls College of Technology. It could maximize the specialized time that dentists have to spend with a patient. More dental slot at the University of Washington or Minnesota may be needed. She said that the Department is short of money and the question always arises about what should be done with optional services. One thing that always comes up is dental. The Task Force is looking at ways to approach this in the Medicaid area. If dental is not taken care of it creates higher costs in other health services areas.

REPORT FROM SJR 22 SUBCOMMITTEE

Rep. McKenney said that the SJR 22 Subcommittee met three times for information gathering and public and stakeholder testimony. It hopes to offer some solutions to the 2003 Legislature. The Subcommittee has heard presentations on following:

- the history of the employer-based health care system and how Medicaid and Medicare was born;
- how new drugs were very expensive to bring to market and those costs are passed on to the consumer;
- the possibility of establishing a health care ombudsman;
- purchasing pools;
- prescription drugs;

- market incentives;
- expansion of health care programs; and
- tax credits.

The next question is the direction in which the Subcommittee wants to go. He said that it was time to discuss and choose items that were attainable in order to reach the goals that it has.

Representatives Matthews and Galvin-Halcro and Sen. Ellingson spoke about the challenges and the daunting tasks that the Subcommittee was faced with but were encouraged to find some beginning solutions established by other states that may be attainable even though the Subcommittee may not be able to find solutions to fix the overall fiscal problems that the issues of health care and health insurance raises.

PUBLIC COMMENT

Mr. Simon stated the following

- Rules adopted by state agencies must have two basics in fact--the statute and legislative intent; and when agencies go beyond legislative intent or fail to follow statute, they need to be called on the carpet.
- Under SB 11, interim committee were given the responsibility to review all rules from all agencies and were given the authority to suspend a rule until the next legislative session if they felt that a proposed rule did not follow statute or legislative intent.
- Mr. Simon provided a copy of the Building Codes Bureau's proposed rules of August 23, 2001, and a copy of the Bureau's November 21, 2001, adoption of the rules. (EXHIBITS #8 and #9 respectively)
- Page 1560 of the proposed rule and Page 2297 of the adopted rule.
  - The proposed rule was not needed because 50-60-201, MCA. already states the purpose of the Uniform Building Code. To write a rule defining the purpose of something which is currently in statute was inappropriate.
- Page1563(6) of the proposed rule and Page 2297, Comment and Response No. 9, of the adopted rule.
  - The Department has adopted a rule that requires that a Montana licensed architect or engineers be required on more complex structures to provide code compliant plans. His concern was, for example, that an individual in Billings bought a pre-packaged pole barn from UBC that was engineered in Minnesota. A Billings inspector told the individual that an engineer needed to be hired to check out the design to ensure that it would meet code in Montana. The building permit and the engineer cost the individual over $1,100 on a $7,000 building. He felt it inappropriate that a rule should state an individual must have an engineer's stamp from a Montana engineer. If the plans have been examined by a qualified engineer from another state, it should be good enough, otherwise Montana is getting into a situation where a Montana engineer's work will not be accepted in other states. The Department's response was that it does license architects and engineers in the same fashion as it does plumbers. They are not the same.
- Page 1564(9) of the proposed rules states "After the building official or his agent inspects a building and finds substantial compliance with the intent of the Uniform Building Code, the building official may issue a certificate of occupancy. . . "
- Page 1564(9)(6a) of the proposed rules states "Since the department has insufficient staff to conduct all of the key inspections identified in . . . the issued certificate of occupancy is

not a certification or guarantee of total compliance with the Uniform Building Code. These rules go against statute.

- 50-60-107, MCA, states that a certificate of occupancy for a building constructed in accordance with the provision of state and municipal code shall certify that the building conforms with the requirement of the building regulations applicable to it.
- He talked with Eric Fehlig, Chief Bureau Counsel, and asked for an example or form the Bureau had for issuing certificates of occupancy. Mr. Fehlig's answer was that the Department did not issue certificates of occupancy.
- 50-60-107, MCA, requires a certificate of occupancy in order for a structure to be occupied.
- Likewise, 50-60-106(2) states that each municipality or county certified under 50-60-302 shall, within its jurisdictional area,. . . .issue certificates of occupancy as provided in 50-60-107. He believed that the requirement exists in law for cities and counties for the issuance of certificate of occupancies.

- Page 1567(12) inserts the definition of a "private garage" in which only motor vehicles used by the tenants of the building on the premises are stored or kept. Subsection (12) also states that if a structure is commercial, it would not qualify as a "private" structure. It would not qualify as a "private" structure because if a building is being for commercial purposes, it is not a private storage structure. This rule is questionable.
- Page 1569(22) of the proposed rules defines a "farm and ranch building" as a building located on. . . .or in support of an agricultural use of a parcel of land, that either totals 160 or more contiguous acres under one ownership. . . .
- 50-60-102, MCA, states that the state building code, as defined in 50-0-203, does not apply to residential buildings containing less than five dwelling units or their attached structures, any farm or ranch building of any size, and any private garage or private storage structure of any size used only for the owner's use. . . .
  - If the two definitions that define a "private garage" or a "farm and ranch building" are allowed, an individual could build a $1 million house on a 40-acre site without a building permit but could not build a pole barn for two horses without a building permit.
  - The Legislature clearly had in mind that a pole barn was a "farm and ranch building", particularly if used to house livestock or used for the storage of agricultural implements. The rule on "farm and ranch buildings" should be stricken. Mr. Simon found Comment and Response #14 of the adopted rules insulting (Page 2299).
- Page 1569(18) of the proposed rules and Page 2299, Comment and Response13 of the adopted rules states that plan specification shall bear the seal of a licensed design professional. . . .the building professional may waive the requirement for design professional seal for minor projects such as storage sheds and minor renovations which do not have a direct bearing on public health and safety. . . .
  - An attorney has no expertise as to whether a structure has a bearing on public health and safety; therefore, the rule is inappropriate.
- Page 1572--New Rule #8--Reason of the proposed rules states that the Department proposes to repeal the Uniform Housing Code and the Uniform Code for the Abatement of Dangerous Buildings. . . .
  - 50-60-301(2), MCA, states that a municipality or county building code may only include those codes adopted by the department.

    - If the code is not adopted in the Department, it cannot grant local governments the authority to adopt the codes.
    - Page 2300--Response 16 of the adopted rules suggests that these are not really building codes. However, municipalities have been adopting these codes for years under the authority of 50-60-301(2).
    - If the Department is allowing municipalities to adopt these rule, the Department should have to adopt them.
- The statute should prevail and common sense should dictate that legislative intent has been violated. The Committee has the power to vote to suspend these rules until the next legislative session.

The Committee discussed the fact that concerns had been raised related to the rules but questioned the amount of time it had to decide on what it wanted to do. The Committee requested that staff review their concerns.

Mr. Braun said that he met with Mr. Simon and the Labor Commissioner in regard to Mr. Simon's concern with certificate of occupancy. He agreed that there was a problem with the language. The Department will also review Mr. Simon's other concerns.

Mr. Simon felt it appropriate that Committee staff review the entire body of rules adopted for building codes before the next meeting. He said that with the passage of SB 445--Department reorganization--the body of rules need scrutiny.

Mr. Campbell said that for the Committee to review a rule that has been in existence for 10 year, even if the rule is wrong, he was unsure whether the Committee could do anything about it. However, the Committees can call a hearing to make the Department explain the purpose of a rule and it can object to a rule which triggers a written response by the Department. If the Committees does not like the response, it can put a statement into the MAR that the Legislature disagrees with the rule or it can poll the Legislature by mail. If a majority of the Legislature believes that the rule does not follow legislative intent, it becomes an evidentiary burden in a lawsuit if someone sues the agency. He also did not see any power on the Committee's part to suspend a rule but it could go to court to challenge a rule. Mr. Campbell said that there are limits on the power of the Committee and limits on its ability to look at an entire body of existing rules.

Mr. Simon said that nothing precludes staff from reviewing the rules and bringing back the findings to the Committee to initiate rule changes.

The Committee instructed staff to work with the Department to review the body of building code rules, beginning with the rules brought up by Mr. Simon, and prepare a memo for the Committee and the interested person on what remedy the Committee may have under MAPA if it disagrees with a rule.

INSTRUCTIONS TO STAFF, ADJOURNMENT

The Committee's next meeting will be February 15, 2002. Agenda items are as follows:

- a response from the Board of Professional Engineers and Land Surveyors;
- the Department's report on the chiropractic fee schedule issue;
- an update from the SJR 22 Subcommittee; and

- an update on the resolution of the building codes rules.

There being no further business, the meeting adjourned at 3:15 p.m.

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