



## **PUBLIC MEETING**

February 6, 2020  
MINUTES

The Lewis and Clark County Commissioners Public Meeting was held on Thursday, February 6, 2020, at 9:00 AM in Commission Chambers Room 330.

### **Roll Call**

Chair Susan Good Geise called the meeting to order at 9 a.m.

Commissioner Andy Hunthausen and Commissioner Jim McCormick were present. Others attending all or a portion of the meeting included Roger Baltz, Marni Bentley, Nicho Hash, Charles Lane, Christian Lehnert, Eric Bryson, Kevin Wright, Steven Burch, Tyler Manning, and Nadine McCarty, Recording Secretary.

### **Pledge of Allegiance**

Everyone recited the pledge.

### **Consent Action Items**

- a. Vendor Claims Report for Week Ending February 7, 2020. (Marni Bentley)

Roger Baltz reported on consent action item 2 a and recommended approval.

No public comment was received.

A motion to Approve was made by Commissioner Hunthausen and seconded by Commissioner McCormick. The motion Passed on a 3-0 vote.

### **Application for Modification of Funding to the Lost Horse Creek Resource Advisory Committee Agreement 17-PA-11011500-032. (Christian Lehnert)**

Christian Lehnert, Weed District Coordinator, presented the modification to the existing Lost Horse Creek Resource Advisory Committee (RAC) agreement in the amount of \$15,000 with matching funds of \$22,300 for a total of \$37,300. The modification funding will be in effect upon Forest Service approval in spring 2020 and will expire May 25, 2021. Mr. Lehnert gave a brief overview of the project. Staff recommends approval of the modification to the Lost Horse Creek RAC agreement.

Mr. Lehnert added through the Forest Service work is done on public land, funds are also given to private landowners for work on property that borders public land.

### **PUBLIC COMMENT -**

Steve Burch, resident, stated he knows noxious weed control is really important, but the only justification he heard for wanting more taxpayer money is the person in charge of it is really good at spending it.

Commissioner Good Geise noted the person that has been spoken of has been successful with the Forest Service and different funding programs in eradicating the noxious weeds in the area. When the grantor sees the grantee spent the money wisely they are willing to continue to fund that applicant.

Mr. Lehnert stated a lot of reporting occurs to show proof that funds are spent properly and wisely. He added most grants and/or agreements have to have more than two to three involved landowners.

Discussion was had on the very detailed and competitive grant applications where the completed work has proven to be highly effective with the taxpayer monies spent according to the grant award requirements. And through the working agreement with the Forest Service they can decide to not add money back to the agreement, allow it to run out, or add money back to continue good weed work. If duties are not fulfilled the agreement monies can be taken away and future grant applications denied.

Commissioner Good Geise noted over the years the Forest Service has realized they do not have the necessary staff to effectively manage the noxious weeds, thus they provide funds to local governments for these type of partnerships.

A motion to Approve was made by Commissioner Hunthausen and seconded by Commissioner McCormick. The motion Passed on a 3-0 vote.

### **Montana Public Employees' Retirement Board Litigation, Strategy, Discussion and Direction.** **(Roger Baltz)**

Charles Lane, Deputy County Attorney, gave a background stating procedurally the County began discussion of the separation from PureView close to one year ago with Montana Public Employees' Retirement Administration (MPERA) involved in those discussions. In August the County entered into a separation agreement where it was agreed to collaboratively separate the County away from the operations of PureView Health Center. This was a unilateral decision of PureView that could have been made at any time. This agreement included the termination of about 60 County employees to take place the end of February. After entering into the separation agreement for the first time in October without any notice and precedent, an informal letter was received from MPERA requesting \$5 million, derived from an accounting notation that was never intended to be a callable debt, of which MPERA has made such statements in the past and it is volatile. Statements have been made by MPERA that it is outside the control of a contracting entity, such as Lewis and Clark County to have any control over their unfunded liability and is the purview of MPERA and the legislature. When MPERA cited the back half of a statute that was inapplicable and when it was pointed out they no longer relied on the statute and noted it was a contractual obligation and they had authority under the constitution. An administrative process was initiated as it seems they felt they had an administrative power under the Montana Administrative Procedure Act (MAPA). That has since been abandoned and have now filed a declaratory judgment, a Writ of Supervisory Control from the Montana Supreme Court. Legal analysis has been a moving target the entire time and Mr. Lane views it as a policy decision where they are attempting to get the judicial branch to take legislative action and grant them authority that does not exist under statute.

The County received an order from the Supreme Court to respond to their declaratory judgment due in approximately 28 days. It is anticipated the Supreme Court will agree with the County Attorney's Office that this is inappropriately before them at this time, as there is an inadequate record, facts at issue and parties that are interested that are not a part of the current proceeding, and will end up in District Court.

Commissioner Good Geise stated there will not be a decision made today, it will be discussion on the County response to the Supreme Court.

Commissioner McCormick read parts of the MPERA October 15, 2019 letter and the Montana Public Employee's Retirement Board (MPERB) letter dated January 29, 2020 noting that recent testimony does not support the MPERB assertion that this is a constitutional emergency.



Commissioner McCormick cited the October 9, 2019 testimony to the State Administration and Veterans' Affairs Interim Committee presentation by Cavanaugh Macdonald Consulting regarding what is called Governmental Accounting Standards Board (GASB) statement No. 67 and read from the document of record that focused on the determination of the total pension liability utilizing the entry age normal actuarial funding method and determination of a discount rate in order to amortize the ultimate liability to pay out to retirees over a term time definite. He then noted the 30 years to fully amortize across the eight retirement system plans managed by MPERA, of which some are at the 30 years, some past, and some a little less, adding the PERS system that Lewis and Clark County participates is a few years beyond the 30 years or 100%. He then read when the discount rate is determined a small difference in the rate from actual can result in billions of dollars of difference, either over or under funded. He discussed the sensitivity analysis, the discount rate of 7.65% that MPERA assigned to the return, and what would occur if the rate was increased or decreased by 1%, noting a 2% swing can result in almost a \$2 billion difference in return.

Commissioner McCormick read public testimony from the January 15, 2020 combined hearing of the Legislative Finance Committee and the State Administration and Veterans' Affairs Interim Committee meeting regarding of over funding or under funding with a statement that read over funding may lead to beneficiaries to request more benefits. He added if that is the undesired result, then is under funding intentional. A question was also asked regarding the condition of the funds and if it was thought that the pension system was in trouble or to leave it as is, the Board of Investments Director response was there is no need to change anything.

Commissioner Good Geise stated when federally qualified health centers first began the model across the country was a co-applicant agreement that required a co-applicant for each health center to acquire grants for the healthcare services. The primary funder no longer looks favorably on co-applicant agreements as health centers have become viable, making the tie to local government no longer necessary. When the separation decision was made there was never a question that the employees at PureView worked for Lewis and Clark County. On March 1, 2020 PureView will become a private nonprofit organization. The contract the County signed with MPERA in 1947 states if the entity leaves there are certain actions that will have to follow. For the 63 employees that will leave, there is nothing that lists the number of employees that have come on. There has been no precedent, no indication, no process, and no procedure existing within MPERA itself and because they did not exist they did not communication any of that to their members, including Lewis and Clark County. Forty-seven percent of MPERA is local government. If the County followed MPERA's line of logic the County would never be able to do a reduction in force, never be able to privatize. A local government, no matter if a school district, city, or county has a fiduciary responsibility to their taxpayers.

Commissioner Good Geise discussed the pleading submitted to the Supreme Court from MPERA and several of the assertions that were made asking that a declaratory judgment be issued. She then read from the actual constitutional amendment that was cited in the MPERA pleading that read public retirement system assets including income and actuarially required contributions shall not be encumbered, diverted, reduced, or terminated because of concern about legislature and executive branches raiding pension plans to backfill other programs that they want to fund. The author of the constitutional amendment is the same individual that has moved forward a threat to MPERA that if they do not collect this money they are going to get sued. Commissioner Good Geise continued to read from the pleading that included: a citing as another aide to its constitution interpretation of Article 8, this Court should avoid absurd and unjust consequences. The seven states cited as a reason for MPERA to make this demand, their statutes talk about when an entire entity leaves the public employee retirement system. Lewis and Clark County are the employers and have not withdrawn. The consequences of this decision are enormous and there needs to be a robust record of the facts and assertions in order to find out what is really going on.

Commissioner Hunthausen stated the County is partners with MPERA and if there are going to be changes to the system you work with your members and reach out to them to solve the problems. In this

case, as pointed out there is no significant danger to the fund and a \$4 to \$5 billion asset rich fund, the \$5 million is nothing in terms of impact on the fund, leaving no emergency factor in any way.

Mr. Lane gave an overview of the separation of powers in state government that includes the executive branch, the legislative branch and the judicial branch. The state agencies reside under the executive branch and granted very limited powers in Montana. They come through the legislature and have to be very specific and enumerated powers. The agencies are allowed through the MAPA process to effectuate the statutory powers by establishing rules, the entire process protects the citizens and local governments from an overreach by a state agency. It allows public comment, input, and local government to address some of the questions that the county currently has, such as where MPERA is applying the rule as it is not a rule. MPERA has not gone through that process. All the citations addressed in their arguments to the Supreme Court they leave out that all of those are statutes and the states that they reference have gone through the process with the legislatures granting the agency the authority to take certain actions. However, there is not a citation that grants them this specific authority they are asking for in any other state. Other states legislatures have granted authority if an entire contracting entity were to separate and that statute does exist in Montana. Under the federal government there are provisions if you have a large termination of employees where it can be paid off over twenty plus years, but does not apply to state or local governments in the language of the federal act. There is no statute, no rule promulgated by MPERA that applies. They are attempting to take a broadly written constitutional mandate and invent authority out of that, sidestepping both the legislative and administrative rule making process in establishing authority without any parameters for the county to respond to. He added state agencies are supposed to operate under MAPA and MPERA is making their own rules. They are asking for the Supreme Court to step into the role of the legislature and grant MPERA that power. Montana legislature has established a process for addressing unfunded liabilities under Title 19, Chapter 3. That process is where MPERA would go to the legislature and increases the employer contributions to the system system-wide and the only mechanism statutorily allowed.

Mr. Lane commented on the history of the amendment where in 1994 the voters voted to prevent the stop-gap pension raiding and undercutting of pension systems that was occurring in other states. There is a legal argument that it is a self-enacting constitutional restriction on the legislature from going after those funds. Because of the broadly written constitutional amendment with no specifics there is no real legal argument that it gives unbridled authority to MPERA to take whatever action seen fit outside of their statutory powers.

Commissioner Hunthausen stated MPERB claimed after the \$5.1 million request that the County follow an administrative appeals process if not in agreement. In addition the County attended one of their board meetings made an in-person request to meet with their board to explain what is being discussed and to work with them as a partner if they believe there is a need to rectify a problem with the fund.

Mr. Lane noted given that there is no administrative rule the request to the County requiring the County step through an administrative process was without any authority and without this there was no framework for the County to respond to the request. The statement that the letter from the executive director was a final administrative decision under their powers under Title 19, it does not exist under Title 19. He added their appeal to Supreme Court fails to mention that they engaged in administrative process. Every step where the County has responded, including their administrative process, and pointed out the contradictory nature of the process, they have abandoned said process and have stuck with none of their authority.

Further discussion was had on other reductions in forces for numerous entities that have occurred across the state and now Lewis and Clark County is being singled out.

Mr. Lane stated fairness is not an argument of legal authority, but a policy argument placed before the legislature and discussed through the legislature. This hits at the lack of clarity by which MPERA is applying the made up rule. The legislature is the proper place for them to discuss how they would like to

apply the rule, how they would like the parameters of the made up rule to look, when it would be applied and to whom it would be applied.

Commissioner Hunthausen stated it seems it would be beneficial to engage all of the public entities involved in PERS to look at the last few years and review the number of layoffs, unfilled positions and put together a record to show there has been no consistency in their action, and coupled with no authority to do this in the first place.

Mr. Lane stated the County's response letter to MPERA's administrative process request pointed out that the state between 2015 and 2018 lost 148 employees while the county between 2015 and 2020, Mr. Lane did not have the state stats for the last two years, will have added approximately 20 employees and that includes the reduction having to do with PureView.

Eric Bryson, Montana Association of Counties (MACo) Executive Director, stated Lewis and Clark County is a member of the Property and Casualty Trust operated by MACo. MACo acts as the County's insurer both for physical damage and for liability. He added a claim was received from the County Attorney's Office on behalf of the County based on the notice received from MPERA that the County was going to be moving through an opportunity to appeal an agency determination on funding an unfunded actuarial liability. Property Casualty and Trust evaluated the submission and noted it does not fall under the traditional coverage that they would provide, but MACo would stay involved as it has statewide implications. Mr. Bryson noted he also attended the MPERB meeting, along with the Commission and County legal staff to make the request to the Board to have an opportunity to discuss in-person the demand letter received by the County. The request appears to have gone unanswered.

Because of the County's involvement in the Administrative Procedures Act as generic as presented by the County's counsel and the processes undefined both in policy and in practice and in statute Lewis and Clark County made a request to the Board of MACo to ask if they would be interested in initiating or joining in in potential litigation on this issue. MACo will join in, file an amicus if necessary, or find a way to address the issue for all Montana counties in particular the taxpayers in the state that based on the way GASB 67 & 68 were implemented in 2013 and 2014 allocates \$1 billion of pension liability on the balance sheets of local counties and cities across the state of Montana.

As previously pointed out from the actuary assessment and information obtainable from MPERA, local government is about 48% to 49% participants in PERS proper. That system in and of itself carries \$2 billion in liability according to the current actuary assessment as presented in December and in January to the interim committees that made this request. And of that \$2 billion, local government is roughly half.

Mr. Bryson stated the chart handout received at the MPERA interim committee and the additional testimony provided by the MPERA Executive Director is significant. The MPERA Executive Director testified that in approximately 33 years the pension liability goes to zero and the system as funded currently will be 100% funded, 100% solvent, and the unfunded actuarial liability, all things remaining equal goes to zero in that 33 to 35 year period.

The system itself says leave it alone and it will fund itself over time given current contribution rates and current estimates of income investment into the system going forward. This is strikingly different than what was filed in the Supreme Court in that they are asking for the Supreme Court to interject in an Administrative Procedure Act prior to a District Court determination to give the pension board system the ability to arbitrarily call a debt that is currently uncallable. In October 2014 when MPERA was promulgating rules about how they were going to allocate pension liability a handout was distributed, it is the MPERA fact sheet about what GASB 67 & 68 documentation of pension liability and local government entities was going to do to local governments. Mr. Bryson read from the document that included it is important to note that these new recording requirements will not necessarily reflect the financial condition of government entities because a pension liability cannot be made immediately due and payable. In 1994 was the constitutional amendment that said that those responsible for conferring benefits and establishing rates, in Montana that is the legislature, should not raid the pension funds.



In 2013 MACo, the League of Cities and Towns, pension participants, union representatives, and the legislature came together to find a way to infuse both additional cash contributions and ongoing rates of contributions in excess of what were in place at the time on a go forward basis for the PERS system. It was fully vetted in hearings with lots of testimony, support and opposition, and ultimately decided by the legislature and signed by the Governor to increase contribution rates for new hires going forward. In addition, they also diverted coal tax severance money that used to go to TSEP back to local governments for infrastructure investment into the pension system. Cash was put in for local government infrastructure to make the pension systems solvent on a go forward basis. The system today has been modified slightly in terms of the contribution rates, but the contract signed in 1947 defines the way the County interacts with the pension system. Local government cannot confer benefits, establish contribution rates, withhold higher contribution rates from employers than the statute authorizes and cannot fund an unfunded actuarial liability based on the information presented in the snapshot from the actuaries at MPERA.

There have been no rules promulgated by the agency to make this call and no history of this call being made. There are enumerable examples of local governments making decisions, both in terms of personnel and service delivery that change the way local governments provide services to constituents and of significance are county operated nursing homes. Decisions made every day the legislature and the government state agencies must make in terms of deciding personnel have never been made with a determination that there was an unfunded liability to be paid. If it is found by the Supreme Court, if they retain jurisdiction, and there is some ruling that determines the pension board can at will make an uncallable debt a callable debt, given the chart presented, the timeframe that these things work through court, if it is paid now the pension liability is about \$2 billion, if paid in 2035 the liability is \$2.5 billion, wait until 2051 to pay it is down to \$500 million, 2055 it is \$0.00. As reflected in the County balance sheets, in 2015 the unfunded actuarial liability as presented by the pension board was \$16.1 million, fiscal year 2016 it was \$20 million, fiscal year 2017 \$28 million, fiscal year 2018 \$26 million, and fiscal year 2019 \$22 million. Taking it from a snapshot of unfunded actuarial liability as an uncallable debt is not a true debt. The position of MACo is if you want to promulgate rules it is done through the agency process if they are granted the authority to do so because it provides for public input and participation. If it requires legislative change there would be the opportunity to talk in committee about the consequences of the legislative changes and it cannot be an edict from an agency without authority telling local governments the personnel decisions they are empowered to engage in come with a debt associated with their management of the pension system.

Mr. Bryson stated with the County, a public agency being sued by a public agency these discussions cannot occur in private, no litigation strategy. He added he has not found any notice provided by the pension board of the pension system to make a decision to move the County through an administrative process that was responded to when offered, to cancel the administrative process and to sue in Supreme Court no record of meetings, minutes or process that they have engaged in to have the deliberation done in an open forum.

#### **PUBLIC COMMENT -**

Steve Burch, Lewis and Clark County resident, thanked the Commission for fighting this, getting the taxpayers out of the health care business, and asked regarding the exit of PureView what happens to those employees 401K contributions.

Commissioner McCormick explained the pension system options for the employees and added employees also have the option to participate in a 457 deferred compensation plan with no employer contribution. He further explained the statutorily set contribution rates to PERS.

Commissioner Good Geise stated there were both vested and not vested employees. She explained those not vested to be employed by PureView will participate in that retirement. The employee/employer contribution will be terminated with the separation.

Mr. Burch stated the folks that will stay with PureView and were not vested will lose money even when it was not their choice to leave the County. Commissioner Good Geise noted that was a decision made by the PureView board after extensive conversation with their employees. They approached MPERA, to accommodate those employees, but they were not interested.

Charles Lane, Deputy County Attorney noted they are being treated similarly to any county employee whose position is being terminated.

**Public comment on any public matter within the jurisdiction of the Commission that is not on the agenda above.**

Steve Burch, Lewis and Clark County resident, stated he wanted to discuss and give his opinion on the proposed zoning. Beyond what is already covered by the subdivision process what is this fixing or doing. It seems to be another barrier to splitting property. It seems to be called citizen initiated.

Commissioner Good Geise stopped Mr. Burch and explained the difference between Part 1 Zoning - citizen initiated and Part 2 Zoning - county initiated. She noted the Commission receives updates on the zoning meetings that are occurring. She added it is the responsibility of the Commission to act in the public interest and a challenge of the Commission is to balance competing property rights. Part 2 zoning is an attempt to ensure property rights are honored.

Commissioner Hunthausen noted the previous meetings are introductory meetings. On February 18, 2020 there will be a zoning update to the Commission, it will then go to the Planning Board that will include public hearings and evaluations of the plan, and a public comment period before coming to the Commission for public hearings.

Commissioner McCormick noted in 2015 the County Growth Policy was adopted and this is a continuation of that.

Commissioner Good Geise stated the four public meetings held were going above and beyond the statutory requirements to get the views of the people. They have also heard from hundreds of people wanting Part 1 Zoning. The process is lengthy, staff is working on addressing concerns that have presented and there are certain statutory things that must be done.

Mr. Burch stated the last meeting he attended was 100% in opposition of the proposal.

**Adjourn**

There being no further business, the meeting adjourned at 10:48 am.

LEWIS AND CLARK COUNTY  
BOARD OF COMMISSIONERS

  
Susan Good Geise, Chair

  
Andy Hunthausen, Vice Chair

  
Jim McCormick, Member

ATTEST:

  
Paulette DeHart, Clerk of the Board