

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative Bob Frey at  
Chairperson

3:30 ~~xxx~~ a.m./p.m. on January 25, 1984 in room 526-S of the Capitol.

All members were present except:

Representative Blumenthal was excused. Representative Erne was absent.

Committee staff present:

Terry Donaldson, Legislative Research Department  
Mike Heim, Legislative Research Department  
Mary Ann Torrence, Revisor of Statutes' Office  
Nedra Spingler, Secretary

Conferees appearing before the committee:

Justice David Prager, Kansas Supreme Court  
John Brookens, Kansas Bar Association  
Jim Kaup, League of Kansas Municipalities  
Pat Baker, Kansas Association of School Boards  
Ed Johnson, City Attorney, Topeka  
David Tittsworth, Chief Attorney, Department of Transportation  
Brian Moline, State Corporation Commission  
Professor David Ryan, Washburn Law School, Member, Administrative Procedures Advisory Committee  
Arnold Berman, Chief Attorney, Department of Human Resources  
Art Griggs, Chief Attorney, Department of Administration

A hearing was held on HB 2688, administrative procedures act, and HB 2689, judicial review and civil enforcement of agency actions.

Justice David Prager, Chairman of the Judicial Council, spoke to the importance of the bills, especially noting the need for HB 2689 and its clarity and uniformity outlining people's rights. He noted a standard APA had been a legislative issue since 1954 and may not have been successful because no input had been received from the state agencies. He gave the makeup of the 1983 Judicial Council Administrative Procedures Advisory Committee, noting that representatives of the Department of Health and Environment, the State Corporation Commission, Department of Revenue, and SRS were members as well as attorneys who specialize in appearances before administrative agencies, a law professor, and legislators. He pointed out the Judicial Council is a joint venture of the Supreme Court and the legislature. The Council was requested by the legislature to examine the entire subject of administrative procedures to clear up the many procedures used by agencies and to develop a uniform APA which would cut costs and speed up litigation. Justice Prager urged the Committee to recognize and realize that the state's problems in this regard need immediate attention. Although House Bills 2688 and 2689 may not be perfect, he believed they should be tried and improved upon as needed.

In regard to making the acts apply to every agency without exemptions, Justice Prager said this was left open because if the mass of special statutes in existence was not repealed, people would rely on those statutes and not on the APA. He believed new Section 3, HB 2689, regarding the effective date which gives agencies the opportunity to show a good reason why it would need another procedure, would provide a grace period for implementation of the new procedures. A member questioned what would happen in 1985 to Workers' Compensation and Employment Security which have their own procedures that work well. Justice Prager said these would be considered. Workers' Compensation had worked well because everybody knows what its rules are.

A member expressed concern that local units of government and boards that come under the act had not been represented on the Advisory Committee or been consulted. He knew of no complaints from locals and questioned if only lawyers and courts wanted the bill.

John Brookens said the Kansas Bar Association supports both bills. He believed the membership of the Advisory Committee was the best available, and the bills represent a consensus of this group.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,  
 room 526-S, Statehouse, at 3:30 ~~am~~/p.m. on January 25, 1984.

Jim Kaup, League of Kansas Municipalities, said the League had no formal position on HB 2689, but he gave concerns of that group. He believed it was significant that no representatives of local government had been a member of the study committee. The League did not ask for this bill. It would require locals who do not have administrative procedures to adopt them. He was not convinced a problem existed as there had been no complaints. Passage of the bill would increase litigation, cause turmoil, and create financial burdens on locals that do not have full-time administrators. He was concerned as to what agencies the "trailer" bill would exempt. He believed administrative procedures should be developed and in place locally before HB 2689 is passed as it was not fair to require judicial review where there are no administrative records. Mr. Kaup suggested the bill be amended to strike all reference to political subdivisions and the language in HB 2688, lines 22-27, be substituted. This would give locals time to develop a procedure. A statement from Mr. Kaup is Attachment No.1.

In discussion, Mr. Kaup said the League would not object if the bill was permissive to locals and a city wanted to use its provisions. The League needed more time to find out if its members favor the bill. He estimated it would take two years for locals to adopt procedures.

Pat Baker, Kansas Association of School Boards, neither supported or opposed HB 2689 but expressed concerns regarding its effect on local school boards. Although school boards are not affected by HB 2688, they would be affected in their dealings with state agencies. She said, under K.S.A. 60-2101d, the Association has developed over the years, through case law, what the local school board's scope of review is, and there are now few complaints. She was concerned that a new review process would start another 15 years of litigation. She also expressed concern that the "trailer" bill was not available. Ms. Baker suggested that local school boards be exempt from HB 2689 and that they continue to be subject to 60-2101d. More time was needed to get opinions from members of her group and to research how many different areas of the bill would affect local boards of education. It should be clarified who has the final decision regarding special education cases.

A member said the "trailer" bill could not be written until House Bills 2688 and 2689 were finalized as to the agencies to whom they would apply. Ms. Baker was requested to give the Committee a list of school board decision items she thought should be exempt.

Ed Johnson, City Attorney for Topeka, opposed HB 2689 in its present form. He believed it would afford one more avenue of approach for litigation, result in extra costs to the city, and broaden the scope of relief. The city is already dealing with exceptions to the tort claims act, and another layer of access to litigation is not needed.

A member said HB 2689 did not open any doors to litigation that are not presently available and questioned if it would not be better to eliminate confusion by organizing and writing down a set of rules. Mr. Johnson believed organization would be all right, but the bill would bring more litigation.

David Tittsworth, Chief Counsel for the Department of Transportation, expressed that agency's concerns regarding the two bills. In 2688, Section 3, he questioned what the agency's scope was and what constituted an order. He believed all decisions of the DOT regarding highways, right-of-way, etc., could be challenged, and the agency would fall under the formal adjudicative procedure. DOT does not have hearing officers. Decisions are made by its eight attorneys. Easy access to court review would increase litigation and the administrative burden, and increase costs. He had no definite cost figures but noted it had been very expensive to implement the tort claims act. He believed someone would be aggrieved with every decision regarding DOT projects.

A member noted the DOT seemed to be saying it does not want a third party making decisions, that it likes its own decisions. DOT should furnish more specifics and examples substantiating its concerns. He pointed out that the tort claims act was not passed without knowing it would create litigation.

Brian Moline said the State Corporation Commission had two types of appeals, non-rate and rate. Non-rate appeals would not be affected by the bills, but statutes permit rate appeals to be taken directly to the court of appeals. He said this should be retained, but non-rate cases could be treated the same as other agencies.

CONTINUATION SHEET

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room 526-S, Statehouse, at 3:30 ~~xxx~~/p.m. on January 25, 1984.

Professor David Ryan, member of the Advisory Committee, said all the negative testimony was foundless. He objected to putting off action as this has been done repeatedly over the years. HB 2689 codifies existing law, and the truth is the opposite of the fears expressed. It is needed because of the people who were not present at this hearing - the citizens that Committee members represent whose current access to the court is difficult. He believed 60-210ld makes it hard to get to court. No opponents had given examples of any decisions that cannot be appealed at present. The only change in HB 2689 from present statutes is in getting to court, and the court's scope of review is very limited.

Arnold Berman, Chief Counsel, Department of Human Resources, said the Department does not oppose the bills but did not believe possible additional appeals could be handled with current manpower. Ninety to 100 Employment Security decisions are currently appealed annually to the district court which, presently, are mostly handled by the Shawnee County district court. Venure is not spelled out in the bill. He believed HB 2689 would require the Department to go to all 105 counties where petitioners can file appeals locally.

In regard to HB 2688, Mr. Berman said, if the Department of Human Resources is not an excepted agency, decisions on some 100 orders a year in the Employment Security, Workers' Compensation, and wage payments, could be appealed to the Secretary and end up on his desk. He suggested consideration be given to spelling out the venure for enforcement of agency orders and judgments.

The Chairman requested Mr. Berman to submit his remarks in writing as he had made significant points.

Art Griggs, Chief Attorney, Department of Administration, said he had not discussed HB 2688 and HB 2689 with the Secretary of Administration but he shared the concerns of the agencies in not knowing what applies to them and which agencies are exempt. Present statutes would have to be flagged to reference the APA. Under HB 2689, he questioned if employees could appeal all decisions including performance evaluations, vacation days, or insurance coverage. He did not believe the court should be involved in these types of decisions or in decisions made by licensing boards that affect a person's occupation.

The meeting was adjourned at 5:30 p.m.



**League  
of Kansas  
Municipalities**

*Attachment 20.1  
1-25-84*

Attachment # 1

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

To:  
FROM: Jim Kaup, Staff Attorney  
DATE: January 31, 1984  
RE: HB 2689, Judicial Review and Civil Enforcement of Agency Action

**SUMMARY**

At the time of the House Judiciary Committee hearing of January 25 on HB 2689 the League had not taken a formal position on the bill. A position was taken on Friday, January 27 and the following sets out that position:

For the reasons stated before this Committee at the January 25 hearing, and detailed in the attached pages, the League of Kansas Municipalities requests consideration of the following amendment to HB 2689:

**LEAGUE'S PREFERRED AMENDMENT---**

Remove political subdivisions from the scope of HB 2689.

1. Strike references to "political subdivisions" from lines 25, 56:60 and 136:139. Also amend definition of "state agency" at lines 69:73 by inserting the same language used in HB 2688 at lines 22:27.

2. In order to continue to permit appeals to the courts from local government actions, the repealer of K.S.A. 60-2101(d) in the title and at lines 441:456 should be struck.

If the committee declines to adopt the above proposed amendment, the League suggests the following alternative:

**LEAGUE'S ALTERNATIVE AMENDMENT---**

Amend HB 2689 so as to delay its date of application to local governments by two years. This would benefit local governments in two ways:

1. Local governments would have a period of time to observe how the Kansas Administrative Procedure Act (HB 2688) and the Act for Judicial Review and Civil Enforcement of Agency Actions work for state agencies. During this period of time we could identify shortcomings and possible improvements to these laws which could be dealt with at future legislative sessions.

2. The League would have adequate time in which to prepare a "model administrative procedure act for local governments", and to undertake an education program geared to encouraging local governments to adopt and follow administrative procedures consistent with those set out in HB 2688.

The League suggests that New Section 3 of HB 2689 be amended by the committee to have application dates of July 1, 1986 and July 1, 1987 inserted with reference to local units of government.

Insert within the definition of "political subdivision" (lines 56:60) an exemption for local government legislative and judicial bodies. Such an amendment would extend the same exemption that HB 2689, as presently drafted, gives to the state government's legislative and judicial branches (see line 71).

*Attch. 1*

## .. INTRODUCTION

A. The League appears today only with respect to HB 2689, and will request this committee amend that bill. Although HB 2688 is by its express terms not applicable to political subdivisions, I will find it necessary to make occasional references to that bill due to its close relationship to HB 2689.

While the League recognizes a number of positive features in this legislation (for example -- limited scope of judicial review; uniformity and certainty regarding court appeals; and the provision for civil enforcement of local agency action) our primary concern at this time is the uncertainty that we believe will result from passage of this bill at this time. Due to a lack of hard information pertaining to local administrative procedures, we cannot say for certain whether the bill would increase the number of legal challenges to local governmental actions; whether it would require a complete reworking of local administrative procedures which are already in place; or whether it would force those local governmental units which do not have administrative procedures in place to choose between the adoption of such procedures or ceasing their involvement with certain programs, services or functions.

## B. SCOPE

This committee must appreciate certain realities. By maintaining its present language you would be bringing within the scope of this act not merely several dozen state agencies which already have in place administrative procedures. You would be dealing with over 4,000 local governmental units--many of which have no formal administrative procedures in place. We believe that this absence of existing administrative procedure is very significant when dealing with the question of whether or not to impose a uniform procedure for judicial review of local government actions.

### **Summary of Kansas Local Units**

A recent analysis by the League of Kansas Municipalities identifies the following 4,073 governmental units in Kansas:

105	County Governments
627	City Governments
1,416	Township Governments
306	School Districts (USDs)
19	Community Colleges
7	Regional Library Districts
747	Cemetery Districts
350	Fire Districts
29	Hospital Districts
78	Drainage Districts
93	Sewer Districts
105	Conservation Districts
83	Watershed Districts
22	Special Improvement Districts
2	Airport Authorities
6	Ambulance Districts
2	Community Building Districts
1	County Rural Road System
2	Industrial Districts
7	Irrigation Districts
32	Library Districts
9	Lighting Districts
1	Municipal University District
3	Park and/or Recreation Districts
13	Township Zoning Districts
1	Transit Authority
1	Vocational-Technical School District
6	Water and/or Sewerage Districts

## C. LEAGUE PROPOSED AMENDMENT

We wish to ask this committee to delete all references to political subdivisions from HB 2689, to insert the identical language found in lines 22:27 of HB 2688 and by so doing to expressly exclude from the scope of HB 2689 the actions of local units of government.

## II. CRITICISMS OF THE BILL

A. HB 2689 assumes that a problem exists with the manner by which the courts of this state are reviewing actions of local governments. We are not convinced at this time that problems do exist which are not being adequately, fairly and timely resolved--for both parties--by de novo review by the courts pursuant to K.S.A. 60-2101(d).

As mentioned by Professor Ryan, K.S.A. 60-2101(d) provides a means for judicial review of actions taken by local governments. There has developed a body of case law on



the scope of judicial review of local government actions in Kansas. While admittedly some of this case law is not what we would like it to be, the League has not heard any groundswell of criticism from city attorneys, or from municipal law practitioners, against de novo review.

B. The League believes it is inconsistent, unrealistic and poor public policy for the Legislature to establish a uniform standard for judicial review of local governmental decisions unless there is some assurance that local governments already have in place an administrative procedure that will produce a record upon which a district court can base its review. Application of HB 2689, which calls for judicial review on the administrative record, to local units presupposes a level of administrative expertise that we do not believe exists in many of the political subdivisions that would be subject to this bill as presently worded.

We must emphasize that we do not know for certain what administrative procedures are in place in which municipalities nor can we attest to how good those procedures are which are already in place. However, we do not think it unreasonable to believe that many local units do not have formal administrative procedures in place. We also do not think it unreasonable to predict that passage of HB 2689 in its present form will cause increased litigation, expense and administrative turmoil (at least in the short-run) for local governments and ultimately and indirectly its passage will require local governments to adopt administrative procedures which are substantially equivalent to those set out for state agencies in HB 2688.

Consequently, the League believes that this bill will create a considerable a financial burden upon that great majority of local units of government which does not have full-time legal counsel or professional administrators.

C. It is also a matter of concern to the League that the trailer bill has not been drafted. The League is uncomfortable in reviewing and commenting upon this bill without having prior knowledge as to which statutory procedures would continue to operate and which would be struck by this new law.

### III. THE LEAGUES' PROPOSAL

Because we have not yet been able to measure the likely impact of HB 2689 upon local units of government, and because we do see merit in the development at the local governmental level of administrative procedures which properly protect the rights of citizens and which are also relevant to the needs of the locality, and because we believe such administrative procedures must be in place at the local government level prior to the state passing a uniform judicial review act---

We would ask this committee to amend HB 2689 by either removing local governments from the scope of the Act, or in the alternative to delay the Act's applicability to local governments by several years. We would like several years in which to observe how well the KAPA and the Judicial Review Procedure Act work with respect to state agencies. If local governments are to be made subject to this law, such a delay in application would enable the League to produce and distribute to our member municipalities a "model administrative procedure act for local governments".

### IV. SUMMARY

Once again, the League is not opposed to any possible improvement in the administrative procedures adopted and applied at the local government level.

If these two bills, HB 2689 and 2689 are passed, but only made applicable at this time to state agencies, we assume it will only be a matter of time before local governments would also be required to have administrative procedures comparable to those set out in HB 2688. At such a time, under our plan, local governments would be better prepared for such a state-mandated requirement.

APPENDIX

LEAGUE'S PREFERRED AMENDMENT:

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Session of 1984

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HOUSE BILL No. 2689

By Joint Committee on Administrative Rules and Regulations

1-13

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0016 AN ACT concerning governmental agency procedures; relating  
0017 to judicial review and civil enforcement of agency actions;  
0018 amending K.S.A. 60-2101 and K.S.A. 1983 Supp. 75-6207 and  
0019 82a-1038 and repealing the existing sections.

0020 *Be it enacted by the Legislature of the State of Kansas:*

0021 New Section 1. This act shall be known and may be cited as  
0022 the act for judicial review and civil enforcement of agency  
0023 actions.

0024 New Sec. 2. As used in this act:

0025 (a) "Agency" means ~~a state agency or a political subdivision.~~

~~0056 (i) "Political subdivision" means political or taxing subdivi-~~  
~~0057 sions of the state, including boards, commissions, authorities,~~  
~~0058 councils, committees, subcommittees and other subordinate~~  
~~0059 groups or administrative units thereof, receiving or expending~~  
~~0060 and supported in whole or in part by public funds.~~

0061 (i)(j) "Rule and regulation" means a standard, statement of  
0062 policy or general order, including amendments or revocations  
0063 thereof, of general application and having the effect of law,  
0064 issued or adopted by an agency to implement or interpret legis-  
0065 lation enforced or administered by such agency or to govern the  
0066 organization of procedure of such agency.

0067 (j)(k) "Rulemaking" means the process for formulation and  
0068 adoption of a rule and regulation.

~~0069 (l) "State agency" means any officer, department, bureau,~~  
~~0070 division, board, authority, agency, commission or institution of~~  
~~0071 this state, except the judicial and legislative branches, which is~~  
~~0072 authorized by law to administer, enforce or interpret any law of~~  
~~0073 this state.~~

any officer, depart-  
ment, bureau, divi-  
sion, board, authority,  
agency, commission  
or institution of this  
state, except the  
judicial and legislative  
branches of state gov-  
ernment and political  
subdivisions of the  
state, which is author-  
ized by law to ad-  
minister, enforce or  
interpret any law of  
this state.

0124 New Sec. 9. (a) Unless otherwise provided by law, the dis-  
0125 trict court shall conduct judicial review.

0126 (b) Except as otherwise specifically prescribed by law or as  
0127 prescribed in subsection (c), venue is in the county:

0128 (1) In which the order is entered or the rule and regulation is  
0129 promulgated; or

0130 (2) in which the petitioner resides; or

0131 (3) in which the petitioner's principal place of business is  
0132 located; or

0133 (4) in which any part of the orders may be effective; or

0134 (5) in which any part of the subject matter involved in the  
0135 order is situated.

~~0136 (c) In case of agency action by a political subdivision, venue~~  
~~0137 shall be in the county in which the political subdivision is~~  
~~0138 located, or if the political subdivision is located in more than one~~  
~~0139 county, venue shall be in any such county.~~

0399 Sec. 28. K.S.A. 60-2101 is hereby amended to read as fol-  
0400 lows: 60-2101.

, of a poli-  
tical subdi-  
vision,

0441 (d) A judgment rendered or final order made by an adminis-  
0442 trative board or officer exercising judicial or quasi judicial func-  
0443 tions may be reversed, vacated or modified by the district court  
0444 on appeal. If no other means for perfecting such appeal is  
0445 provided by law, it shall be sufficient for an aggrieved party to  
0446 file a notice that such party is appealing from such judgment or  
0447 order with such board or officer within thirty (30) days of its  
0448 entry, and then causing true copies of all pertinent proceedings  
0449 before such board or officer to be prepared and filed with the  
0450 clerk of the district court in the county in which such judgment  
0451 or order was entered. The clerk shall thereupon docket the same  
0452 as an action in the district court, which court shall then proceed  
0453 to review the same, either with or without additional pleadings  
0454 and evidence, and enter such order or judgement as justice shall  
0455 require. A docket fee shall be required by the clerk of the district  
0456 court as in the filing of an original action.



HOUSE BILL No. 2689

By Joint Committee on Administrative Rules and Regulations

1-13

0024 New Sec. 2. As used in this act:

except the  
judicial and  
legislative  
branches  
thereof,

0056 (i) "Political subdivision" means political or taxing subdivi-  
0057 sions of the state, including boards, commissions, authorities,  
0058 councils, committees, subcommittees and other subordinate  
0059 groups or administrative units thereof, receiving or expending  
0060 and supported in whole or in part by public funds.

0074 New Sec. 3. (a) On and after July 1, 1985, this act shall apply  
state] 0075 to all agencies and all proceedings for judicial review and civil  
state] 0076 enforcement of agency actions not specifically exempted by  
0077 statute from the provisions of this act. On and after July 1, 1984,  
state] 0078 and prior to July 1, 1985, this act shall apply to all agencies and  
0079 all proceedings for judicial review and civil enforcement of  
state] 0080 agency actions except to the extent that other statutes provide  
0081 such procedures for such agency.

(b) On and after July 1, 1987, this act shall apply to all political subdivisions and all proceedings for judicial review and civil enforcement of actions of political subdivisions not specifically exempted by statute from the provisions of this act. On and after July 1, 1986, and prior to July 1, 1987, this act shall apply to all political subdivisions and all proceedings for judicial review and civil enforcement of actions of political subdivisions except to the extent that other statutes provide such procedures for such political subdivisions.

0082 ~~(c)~~ (b) This act creates only procedural rights and imposes only  
0083 procedural duties. They are in addition to those created and  
0084 imposed by other statutes.

Subject to the  
provisions of  
Section 3 of  
this act,

0441 (d) A judgment rendered or final order made by an adminis-  
0442 trative board or officer exercising judicial or quasi judicial func-  
0443 tions may be reversed, vacated or modified by the district court  
0444 on appeal. If no other means for perfecting such appeal is  
0445 provided by law, it shall be sufficient for an aggrieved party to  
0446 file a notice that such party is appealing from such judgment or  
0447 order with such board or officer within thirty (30) days of its  
0448 entry, and then causing true copies of all pertinent proceedings

0499 before such board or officer to be prepared and filed with the  
0450 clerk of the district court in the county in which such judgment  
0451 or order was entered. The clerk shall thereupon docket the same  
0452 as an action in the district court, which court shall then proceed  
0453 to review the same, either with or without additional pleadings  
0454 and evidence, and enter such order or judgment as justice shall  
0455 require. A docket fee shall be required by the clerk of the district  
0456 court as in the filing of an original action.