Approved Ivan Sand
Date

MINUTES OF THE HOUSE COMMITTEE ON LOCAL GOVERNMENT.

The meeting was called to order by REPRESENTATIVE IVAN SAND at
Chairperson

1:30 ~~xxx~~./p.m. on FEBRUARY 21, 1984 in room 521-S of the Capitol.

All members were present except: Representative George R. Dean

Committee staff present:

Mike Heim, Legislative Research Department
Theresa Kiernan, Revisor of Statutes Office
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee:

Representative Arthur W. Douville, HB 2883
Mr. Chris McKenzie, League of Kansas Municipalities, HB 2883; HB 2892
Mr. Fred Allen, Kansas Assn. of Counties, HB 2883
Ms. Janet Stubbs, Homebuilders Assn. of Kansas, HB 2883
Ms. Margie Braden, Kansas Manufactured Housing Institute, HB 2883
Professor Merle Duncan, Washburn University, HB 2883
Mr. Bickley Foster, Planning Consultant and Legislative Intern, HB 2883

Chairman, Ivan Sand, called for hearings on the following House Bills:

HB 2883, concerning cities and counties; relating to planning and zoning; - Rep. Douville

Mike Heim, Staff, gave a brief overview of the bill. (See Attachment I.)

Representative Arthur W. Douville, sponsor of the bill, appeared to give background and intent of the bill. Douville stated that the problem addressed by the bill had been called to his attention by the League and the City of Overland Park; that the bill is not a limited bill but covers the entire State of Kansas; that the bill places the "burden of proof" on a plaintiff suing city or county officials for an "unreasonable" act in connection with planning and zoning.

Mr. Chris McKenzie, attorney, League of Kansas Municipalities, testified in support of the bill. (See Attachment II.) McKenzie stated that the League would like to see locally elected officials continue to make local decisions.

It was questioned whether this bill does away with "due process" and overrules the "Golden" case. McKenzie stated that it does not overrule "Golden." McKenzie stated he believes the bill codifies what the court has said.

Mr. Fred Allen, Kansas Association of Counties, testified that his Association concurs with the League in support of the bill.

Ms. Janet Stubbs, representing Homebuilders Assn. of Kansas, testified in opposition to HB 2883. Ms. Stubbs stated her Association feels that the language of the bill; e.g., "clear and convincing evidence" and "reasonableness", makes it almost impossible to question the decision of a governing body. Stubbs stated she would like to provide written testimony from an expert witness who had been unable to attend the hearing.

Ms. Margie Braden, Executive Director of Kansas Manufactured Housing Institute, testified in opposition to HB 2883. (See Attachment III.)

Professor Merle Duncan, Washburn University, appeared to share his observations regarding HB 2883. Duncan stated he would agree with most of McKenzie's testimony. He agreed that the provisions of the bill do not overturn "Golden" but codify what is there. He pointed out that he sees a problem with the "clear and convincing" language; that the bill may have the opposite effect than what the authors intended.

Mr. Bickley Foster, Planning Consultant and Legislative Intern described his testimony as "loyal opposition" to HB 2883. Foster stated he questions the problem of "burden of proof" as set out in the bill; that today an expert witness is very expensive to retain; that "clear and convincing" evidence may be financially prohibitive to produce; that boards' minutes are sometimes inconclusive.

Mr. Chris McKenzie suggested that the language, "clear and convincing" evidence might be better stated "preponderance of evidence."

Representative Arthur W. Douville stated that he sees the question to be, "Who sets social policy -- the courts or local officials?"

The hearing on HB 2883 was closed.

HB 2892, concerning fire districts; relating to property annexed by cities; - By Rep. D. Miller

Mike Heim, Staff, gave a brief overview of the bill. (See Attachment IV.)

Mr. Chris McKenzie, attorney, League of Kansas Municipalities, testified in support of the bill.

A question regarding responsibility for existing bonds when a rural fire district is annexed by a city was raised. Theresa Kiernan, Staff, verified that the property in such a case would still remain liable for the bonds; and the city would not have to pick it up.

The hearing on HB 2892 was closed.

Chairman Sand called for possible action on the following House Bills:

HB 2807, concerning county and township roads; relating to the duties of the county engineer and township board;-By Rep. Harder and Rep. Wunsch

Representative Robert S. Wunsch moved and Representative Clinton C. Acheson seconded that HB 2807 be passed.

Discussion followed. One suggestion was to add the title "Road Supervisor" to the bill. Staff pointed out that an AG Opinion has ruled that counties can appoint road supervisors.

Representative Elizabeth Baker made a substitute motion to amend HB 2807 by changing the $10,000 amount in Lines 43, 75, and 78 to $3,000. Representative Kenneth D. Francisco seconded the motion. Motion failed.

Representative Elizabeth Baker made a second substitute motion to amend HB 2807 by changing the $10,000 amount in Lines 43, 75 and 78 to $5,000. Representative Kenneth D. Francisco seconded the motion. Motion failed.

Chairman Sand called for a vote on the original motion. Motion carried.

HB 2847, concerning planning and zoning; relating to certain cities and counties; -By Rep. Eckert

Representative Steve Schweiker moved and Representative Dorothy Nichols seconded that HB 2847 be passed.

Discussion followed regarding the provision of the bill which enables cities or counties to join two or more commissions. One suggestion was to amend the bill and separate "metropolitan area" and "regional" commissions. Another suggestion was to localize the bill by limiting it to the MO-KAN Planning Commission.

Representative Robert S. Wunsch made a substitute motion to table the bill temporarily. Representative Clinton C. Acheson seconded the motion. Motion carried.

Meeting adjourned.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

DATE 2-21-84

NAME	ADDRESS	REPRESENTING
Janet Stubbs	Topeka	KBAK
Myrl Duncan	Topeka	Self
[illegible]	Topeka	W.U.
Ron Wegner	Onaga	
Fred Allen	Topeka	KAC
Gerry Ray	Olathe	Co. of Johnson
Scott Rambeck	Overland Park	Overland Park
C. Bickley Foster	Topeka - Wichita	Intern

MEMORANDUM

February 21, 1984

TO: House Local Government Chairman

FROM: Mike Heim, Kansas Legislative Research Department

RE: H.B. 2883

H.B. 2883 amends three planning and zoning statutes (the city, township, and county statutes) to provide that the district court, in reviewing actions of governing bodies, shall not substitute its judgment for that of the governing body. The district court may reverse such action only where unreasonableness is established by clear and convincing evidence. The burden of proof shall be on the party challenging the governing body's action.

(ATTACHMENT I)

League of Kansas Municipalities

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

TO: House Local Government Committee
FROM: League of Kansas Municipalities
DATE: February 21, 1984
SUBJECT: HB 2883; Scope of Judicial Review in Zoning Decisions

I. Introduction

The League of Kansas Municipalities wishes to register its support for HB 2883. HB 2883 would simply codify the rules governing the scope of judicial review of zoning decisions that have been recognized by the Kansas Supreme Court. These rules were stated by the Court in the 1978 case of Golden v. City of Overland Park and have been restated on a number of occasions since that time. Most recently the Court reiterated these rules in the 1980 case of Combined Investment Co. v. Board of Butler County Commissioners, and they include the simple rules stated in HB 2883.

1. The court may not substitute its judgement for that of the governing body.

2. The appellant bears the burden of challenging the reasonableness of the action; and

3. The zoning decision may be reversed only if the court is clearly compelled to do so by the evidence.

II. Why HB 2883 is Needed

If the standards of judicial review in HB 2883 have already been recognized by the Kansas Supreme Court, why is it needed? The reason is clear after examining the recent zoning decisions of the Court.

In the Golden case, mentioned earlier, the Court decided that when a local governing body is deciding whether to rezone a particular piece of property it acts in a quasi-judicial capacity, requiring the weighing of evidence, a balancing of the equities, an application of laws to facts, and a resolution of specific issues. In contrast, the Court characterized an initial zoning decision or the decision to adopt a comprehensive plan as a legislative or policy-making function which is not subject to the same procedural requirements.

As noted in a recent article in the Journal of the Kansas Bar Association (Winter, 1982, pp. 277-286), the real impact of the Golden decision was that in characterizing rezoning decisions as quasi-judicial the Court imposed significantly stricter procedural requirements on city and county governing bodies. These include: (1) Notice and an opportunity to be heard should be afforded all interested parties; (2) The parties should be allowed an opportunity to present relevant evidence and to rebut evidence offered by the opposition through cross-examination; (3) Governing body members should avoid contacts with the parties outside the formal hearing; (4) Maintenance of a record of findings to determine whether the applicable rules of law were observed; (5) The decision must be based solely on the evidence presented at the hearing and entered into the record; and (6) Complete impartiality toward the proposed zoning. In other words, local governing bodies

are required to act like judicial tribunals in making rezoning decisions.

The Golden decision was viewed by Kansas cities and counties as a significant setback since, in the words of Justice Fromme in his dissenting opinion, its effect was "to give to the district courts of this state complete and final control of the rezoning process." Although there can be little doubt that Golden seriously eroded the legislative discretion of city and county governing bodies, in subsequent cases the Court has clearly stated that the standards of judicial review of rezoning decisions were not changed by Golden; i.e., the standards in HB 2883.

HB 2883 is necessary in order to ensure that in some future opinion the Kansas Supreme Court is not persuaded to further erode the discretion of local governing bodies in making rezoning decisions. This has happened in the State of Washington where rezoning decisions are also viewed as quasi-judicial matters. Under current Washington law, a rezoning decision must be fair in fact and it must appear fair to a "fair-minded person in attendance at all meetings" on the rezoning issue. Under this approach, the bias of one member of a zoning body infects the action of the entire body regardless of the other members' lack of bias. Mere abstention from voting does not preserve the entire body's decision as it would under current Kansas law. In other words, the court is free to substitute its judgement for an otherwise qualified majority of the governing body.

One final comment in closing. Not only did Golden undermine the legislative power of local governing bodies and impose serious procedural limitations on its exercise, but it opens the door for potential liability for governing body members under the federal civil rights act. By characterizing rezoning as a quasi-judicial rather than legislative decision, the Court has effectively removed the absolute immunity from personal liability for alleged federal civil rights law violations traditionally available to legislators. This is the same immunity all state legislators enjoy. At least one federal district court has come to the conclusion that local officials only enjoy "qualified personal immunity" when making rezoning decisions due to its quasi-judicial character.

HB 2883 will not do anything to restore the legislative character of rezoning decisions and the absolute immunity that accompanies legislative acts. What it will do, however, is prevent any further undermining of the role of local elected officials in the zoning process. Whether characterized as legislative or quasi-judicial, rezoning decisions should be made by local elected officials and not by the courts. HB 2883 will help ensure that that remains the case.

Sincerely,

Chris McKenzie
Attorney/Director of Research

CM:gs

KANSAS MANUFACTURED HOUSING INSTITUTE
100 East Ninth Street • Suite 205 • Topeka, Kansas 66612 • (913) 357-5256

Testimony Before the House Local Government Committee on House Bill 2883
Margie Braden, Executive Director, Kansas Manufactured Housing Institute

Mr. Chairman and members of the committee, thank you for the opportunity to appear before you in opposition to House Bill 2883.

I am Margie Braden, Executive Director of the Kansas Manufactured Housing Institute. KMHI is a trade association representing all facets of the manufactured housing industry, i.e. manufacturers, retailers, park owners, suppliers, financial institutions, insurance companies, service companies and transport companies.

Our interest in House Bill 2883 stems from the experiences of both our association membership and our homebuying customers in overcoming local prejudices toward certain types of housing.

While I understand and sympathize with the view that the local governing body should have final jurisdiction in such matters, I ask that the committee give serious consideration to what this bill might do. Basically, as I understand it, the language being added in this statute, for the most part, simply spells out what Kansas case law already provides. The district court cannot substitute its judgment but can only reverse actions when unreasonableness is established. I question whether reasonableness and unreasonableness should not be defined at some point, but my real concern is with the statement clear and convincing evidence. This would appear to be the portion which would deviate from what current case law calls for. It is my understanding that clear and convincing evidence, as a legal art form, has a specific definition and that it places a much greater burden of proof--nearly to point of proving fraud. It concerns us that by adding this language, you may be placing a much

more substantial burden of proof on a citizen than does present law or case law.

It probably goes without saying that the Kansas Manufactured Housing Institute's interest in this bill is with regard to its possible effect on location of housing. It would seem contrary to the efforts of many groups, including President Reagan's 1982 Blue Ribbon Housing Commission, the National Conference of State Legislatures, through its recently published "State Policies for Affordable Housing," the National League of Savings Institutions, to name a few, who have made recommendations which should make housing more accessible and more affordable.

Some of these recommendations involve changing attitudes with regard to zoning and it would appear possible that legislation such as this could have the effect of placing too much of a burden on the party challenging local ordinances and could be used to enforce local prejudice and bias. Or, it could even have a reverse effect. If a governing body granted a variance to which numerous contiguous neighbors objected, they could be placed in a powerless position to defend their property or their rights.

The nature and evolution of the manufactured housing product has caused many in our industry to experience this prejudice and bias and we have reason to believe that it still exists in some localities. This may well be due to a lack of knowledge of the product and we do believe that this is gradually being overcome but because it does still exist and because in some communities planning and zoning ordinances are written by non-professionals--often well-meaning citizens who cannot seem to overlook their personal prejudices, we do not believe that enactment of this legislation would be in the best interests of the majority of middle and low income homebuyers.

I will cite for you one recent case in point.

About a year ago, I was contacted by one of our members in a small southeast Kansas community asking if I could assist their customer who was having a problem with local government officials. Briefly, the situation was this: An elderly widow owned approximately five acres of land near the edge of town, on which were located two homes--her old, rather run-down, energy inefficient site-built home and a mobile home in which her daughter lived. She had decided to replace her old home with a new, convenient, energy-efficient mobile/manufactured home. She purchased the home and then discovered when it was delivered and placed on the site that the city had recently passed new ordinances which would allow a single section mobile/manufactured home only in a rental park. Based on this, the city refused to connect her utilities. As is done in a number of municipalities, a single family dwelling was defined in this city's ordinances as not a mobile home.

The governing body of the city viewed this local legislation as an attempt to "upgrade" the appearance of their city. As is often the case, having had little in the way of planning in the past, they probably had some unsightly, older mobile homes in the community. However, I think there is a good chance that they had some older, unsightly site-built structures as well. I'm sure a lack of knowledge of the manufactured home product contributed to this decision. Nevertheless, after several months of conversations and correspondence between my office and the city government, after the widow and her attorney attended city council meetings and eventually had an appeal before an appeals board (which was finally appointed), after it was pointed out that the widow was in poor health, had poor eyesight and needed to live near the daughter who could care for her, after she had even written to the Governor regarding her plight, she gave up and returned her new manufactured home to the retailer. She is apparently still living in her old house.

Had she been younger, this lady may well have decided to challenge the city in Court--this will happen eventually in these cases--but, unfortunately, that takes a great deal of time, money and stamina and many people simply give up rather than fight city hall. Our concern is that well-meaning legislation such as H.B. 2883, requiring clear and convincing evidence, might make this remedy even more discouraging.

You may be aware that there is a statute in Kansas which states that county governments cannot write their zoning ordinances so as to arbitrarily exclude manufactured housing, but I'm sure most of you are also aware that it is being done and until challenged in Court, will probably continue to happen.

We recognize that local control is essential and we would not encourage dictation by outside parties as to what is best for a community. We don't even like to ask the courts to do that, but those of us in the manufactured housing industry have experienced a sufficient amount of prejudicial planning and zoning to make us extremely cautious with regard to extending that control and possibly eliminating that court intervention.

We believe the philosophy of the President's 1982 Housing Commission should be given serious consideration in this regard. That stated, in part, that the burden of proving a governmental need for a particular rule or regulation should rest with the governmental body making the regulation. And, further, that the obligation on the part of the governing body should be to provide for the needs of all its citizens, not to attempt to arbitrarily exclude, as local prejudice might dictate.

I do not mean to imply that I think H.B. 2883 will necessarily be detrimental, but I think there is enough of a possibility that you should seriously consider whether you want to place a more substantial burden of proof on the protesting citizen than now exists and, thereby, perhaps deprive him of "his day in court." Thank you.

MEMORANDUM

February 21, 1984

TO: House Local Government Chairman

FROM: Mike Heim, Kansas Legislative Research Department

RE: H.B. 2892

H.B. 2892 requires a city which annexes territory located within a fire district organized under K.S.A. 19-3601 et seq., to provide fire protection to the area on the same basis as the fire district. The city is required to pay for the costs of all facilities and equipment of the fire district which are located within the area annexed and such property shall become the property of the city. The city may also pay an amount equaling the outstanding indebtedness of the district which is attributable to that portion annexed. The city may issue general obligation bonds outside the debt limits of the city to pay costs incurred.

(ATTACHMENT IV)