Approved Ivan Sand 1/30/85
Date

MINUTES OF THE HOUSE COMMITTEE ON LOCAL GOVERNMENT.

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

1:30 ~~xxx~~a.m./p.m. on January 24, 1985 in room 521-S of the Capitol.

All members were present except:

Representative Rick Bowden, (Excused)

Committee staff present:

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

Conferees appearing before the committee:

Ms. Terri Zimmerman, Attorney General's Office
Mr. Jerry Palmer, Kansas Trial Lawyers' Association
Mr. Ron Smith, Kansas Bar Association
Ms. Janet Stubbs, Home Builders Association of KS

Chairman, Ivan Sand, called for testimony from opponents on HB 2016.

Ms. Terri Zimmerman, representing the Attorney General's Office, read a statement from the Attorney General supporting HB 2016 in part. (See Attachment I.)

Chairman Sand read letter from Rep. Nancy Brown which supports HB 2016 but would add to Section 1 (c) "providing road equipment and supervising road and bridge services." (See Attachment II.)

Mr. Jerry Palmer, representing the Kansas Trial Lawyers Association appeared in opposition to HB 2016 because municipalities are already exempt under the Kansas Tort Claims Act and general immunity is not desirable.

Mr. Mike Heim, Staff, discussed differences between antitrust action and tort action with Mr. Palmer.

Mr. Ron Smith, Legislative Counsel for the Kansas Bar Association with a membership of 4,000 lawyers, appeared in opposition of HB 2016. (See written testimony, Attachment III.) Mr. Smith concluded that the Association supports the intent of the bill to limit actual damages, punitive or treble damages and attorneys fees; that citizens should keep the ability to seek injunctive relief; that the plaintiff - who may be taxpayers - should not be entirely shut out of court.

Ms. Janet Stubbs, Home Builders Association of Kansas, presented written testimony. (See Attachment IV.) Ms. Stubbs requested that injunctive relief to individuals be retained and that the retroactive provisions of HB 2016 be removed. Ms. Stubbs noted that the Homebuilders Association has not been involved in litigation in Kansas but is afraid of what could happen; that other remedies aren't there; that the Association would agree with the Attorney General's statement presented earlier.

The question of the constitutionality of making the proposed legislation retroactive was raised.

Mr. Chris McKenzie pointed out that to date four antitrust cases have been filed in the Federal District Court; that two have been filed since the new federal law became effective.

Chairman Sand assured the Committee that further information will be forthcoming regarding antitrust legislation. The Chairman noted that meetings will be called for the week beginning January 28, as needed.

Meeting adjourned.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

DATE 1-24-85

NAME	ADDRESS	REPRESENTING
W Trapp	Russell	
Catherine Trapp	749 Sunset Russell Ks	
Jay Palmer	112 W 6th, Topeka	KTLA
Chris McKenzie	Topeka	League of Ks. Munn.
SCOTT LAMBERS	OP	OP
CHARLES BELT	WICHITA	WICHITA AREA CHAMBER OF COMMERCE
D. WAYNE ZIMMERMAN	TOPEKA	THE ELECTRIC CO's ASSOC. OF KS.
JANET STUBBS	"	HOME BUILDERS ASSOC. of KS
John Hanna	AP	Associated Press
Gerry Ray	Olathe	Jo Co Board of Commissioners
John Spurgeon		Budget
KC Dewey	WICHITA	SEDGWICK Co.
Bob BRADLEY	LAUREL, KS	KS Assoc Counties
Ed D. Shenkel	Shawnee	K.C.P. & L. Co.
Karen McClain	Topeka	Ks. Assoc. of Realtors
Tom Smith	Topeka	KS Bar Assn.
Terry Humphrey	Topeka	KS Manufactured Housing Inst.

(ATTACHMENT I)
1/24/85

RE: House Bill 2016

The Attorney General will support a bill which will exempt Municipalities from civil liability in the form of damages, treble damages, penalities and forfeitures so long as the other remedies available to the Attorney General remain in tact. This would include injunctive relief, attorney fees, costs, and criminal remedies.

Attachment 1

KANSAS ASSOCIATION of TOWNSHIPS

(ATTACHMENT II)
1/24/85

Nancy Brown, President
15429 Overbrook Lane
Stanley, Kansas 66224
(913) 897-3121

January 23, 1985

To: Mr. Ivan Sand

From: Nancy Brown

Re: House Bill 2016, Relating to Antitrust Liability

The Kansas Association of Townships would like to add its support to HB 2016 to the many others that testified before your committee today.

However, to benefit township governments, we would like to have the committee consider the addition of a clause dealing with road services, an area in which many townships in Kansas are involved.

Please consider adding the following to Section 1. (c)

- providing road equipment
  and supervising road and bridge services.

As you are aware this is one of the primary responsibilities of many township governments in the state of Kansas. As local government officials, they too are in a rather vulnerable position as they purchase equipment and deal with road and bridge problems.

Thank you for your consideration.

Nancy

Attachment 2

(ATTACHMENT III)

1/24/85

RON SMITH
Legislative Counsel

KANSAS BAR ASSOCIATION

HB 2016
House Local Government Committee
January 24, 1985

Mr. Chairman. Members of the Local Government committee. I am Ron Smith and I am Legislative Counsel for the Kansas Bar Association. The KBA is a professional association representing over 4,000 Kansas attorneys. Some are city attorneys. Some have filed anti-trust litigation.

I listened to Chris yesterday explain the problems the cities face regarding anti-trust litigation. I don't claim any expertise in this area.

But in the end, it boils down to a public policy decision whether to end the concept of judicial review of the major decisions that municipalities may make, and whether that decision is appropriate.

I also heard Chris indicate that plaintiffs pressing anti-trust matters against municipalities must prove two main things: (a) that the activity or the decisions of the city government "rises to the level of unreasonableness," and (b) the plaintiff's suffered damages.

But what does all this prove?

Let's review some major concepts. What the cities want and need from this legislation is relief from growing insurance

Attachment 3

premiums associated with anti-trust litigation. That is the goal of HB 2016.

What HB 2016 does, however, is end the concept of judicial review of the acts and decisions of municipal governments. That goes far beyond the reasonable goal of HB 2016.

The concept of judicial review is important. It is one of the checks and balances built in to our system by our founding fathers. It has an important purpose.

This bill destroys that concept in most of the major decision-making areas of city government. It reimposes the wornout and inappropriate public policy that government can do no wrong. Chris alluded to that yesterday when he said that cities have no constitutional rights. That's true. But what this bill does it elevate municipalities above the judicial scrutiny that you and I and corporations have to undergo in our daily business lives.

Let me illustrate. (By the way, my illustration should not be taken literally; I own IBM products and they are excellent.)

It was suggested yesterday by a conferee that purchasing powers of municipalities be exempt from anti-trust regulation. Let's assume that amendment is in this bill.

The city of Topeka has a large IBM computer shop. Let's assume that IBM Corporation worked out a deal with Computerland, and other computer retail operations that if Topeka wanted to purchase some IBM-PC terminals to emulate their large mainframe terminals, that these retailers all agree that -- among them-

selves and regardless who sells the PCs to the city -- they would charge 125% of the normal retail price. The vendor selling the PC would keep the regular markup, keep 1/5th of the extra 25% and turn the extra 20% markup back to the "consortium" to be distributed among all participating vendors. This is a classic example of price-fixing, and actionable under federal and state anti-trust laws.

The city of Topeka would go to federal district court and allege anti-trust activity by IBM. The city would seek actual damages, punitive damages, treble damages and attorneys fees.

HB 2016 would not affect the city's action.

But let's reverse the illustration.

The City of Topeka decides to bid out the purchase of several hundred IBM-PC computers. Computerland of Topeka offers to sell IBM-PC computers for 10% under retail costs. Crazy Dan's Computertrend in Olathe offers to sell the same machines to Topeka for 25% off retail. The city, however, decides to award the contract to Computerland. Crazy Dan raises a fuss, the newspaper prints several long stories, the citizens are angry, they form a taxpayer's organization, and they want something done.

What can be done?

Several times yesterday I heard allusions to "other remedies that were available" to disgruntled taxpayers without resorting to anti-trust litigation against municipalities.

Congress has provided relief from punitive damages and treble damages, Chris said. "Ouster" or "recall" is available to taxpayers if they're unhappy with their city government. I assume a partisan ambush at "reelection" time is also a taxpayer weapon. But they are not good alternatives. The number of city officials recalled or ousted in the last ten years could be counted on both of my hands. And the issues were far less complicated than an anti-trust violation.

These are political remedies, not judicial.

If these taxpayers are without a political remedy, the only remaining avenue is judicial. They can sue the city for an injunction prohibiting the city from entering into the contract with Computerland.

If HB 2016 is enacted with the purchasing power amendment discussed yesterday, these citizens of Topeka are powerless to seek judicial review. We're not just talking limitation of damages and attorneys fees; we're talking about exclusion from the court system these types of cases.

In your zeal to protect the taxpayer from liability, you've also shut the same taxpayer off from his only cause of action to regulate his own city government.

Taxpayers have no tort cause of action, because the city is not negligent. There is no contract case because the citizens did not make the contract with Computerland. There is no regular injunctive power available because Subsection 1(c) has been

amended to include purchasing decisions of cities being altogether free of judicial scrutiny.

The city of Topeka right now, I understand, is considering annexation of my subdivision into the city. We use private trash haulers out there. Under the provisions of Section 1(c)(5), even if the city's motives were all inappropriate and were costing us more money, the city could force us to use their trash system, and my neighbors would be powerless to stop that decision.

No longer is the city accountable.

That may solve the short-term problem of city officials. What about taxpayers? I don't think it is good public policy. I'm not sure taxpayers would approve.

Alternative

I am not without a positive alternative.

The Kansas Bar Association considered the interim committee's recommendation. The Executive Council drew a distinction between deep pocket corporate assets for anti-trust purposes, and the fact that a municipality's "deep pocket" is the taxpayer. Therefore, we support the intent of the bill to limit actual damages, punitive or treble damages, and attorneys fees.

Keep the ability of citizens to seek injunctive relief and thereby have judicial oversight of bad city decisions.

Federal anti-trust law now allows bond to be posted by plaintiffs seeking injunctive relief. If the action is filed to

delay, or frivolously, then the bond is forfeited to the defendant to pay for attorneys fees and costs. But don't shut the plaintiff--who may be taxpayers--entirely out of court.

That action is unnecessary to meet the goals of the legislation.

(ATTACHMENT IV)
1/24/85

TESTIMONY BEFORE
SPECIAL COMMITTEE ON LOCAL GOVERNMENT
JANUARY 24, 1985
BY
JANET STUBBS
HOME BUILDERS ASSOCIATION OF KANSAS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE ON LOCAL GOVERNMENT:

MY NAME IS JANET STUBBS, EXECUTIVE DIRECTOR OF THE HOME BUILDERS ASSOCIATION OF KANSAS. I APPEAR TODAY IN OPPOSITION TO HB 2016.

AS YOU ARE AWARE, CONGRESS PASSED THE "LOCAL GOVERNMENT ANTITRUST ACT OF 1984" IN THE FINAL HOURS OF ACTIVITY ON OCTOBER 11. THIS PROHIBITS RECOVERY OF MONETARY DAMAGES, BOTH TREBLE AND ACTUAL.

ALTHOUGH YOU HAVE ALREADY BEEN PRESENTED WITH MORE BACKGROUND INFORMATION ON THIS SUBJECT THAN YOU EVER WANTED TO HEAR, I URGE YOU TO BE REMINDED OF THE FACT THAT ALTHOUGH CONGRESS WAS THE OBJECT OF AN INTENSIVE LOBBYING EFFORT BY CITIES AND COUNTIES, THEY REFUSED TO REMOVE THE RIGHTS OF A PRIVATE PARTY TO INJUNCTIVE RELIEF. THEY ALSO REFUSED TO MAKE THE ACT RETROACTIVE IN THE MANNER YOU HAVE BEEN ASKED TO DO IN HB 2016.

I WANT TO STRESS THE FACT THAT THE NATIONAL ASSOCIATION OF HOME BUILDERS DID NOT SUPPORT THE TREBLE DAMAGE PROVISION WHICH CONGRESS HAS NOW REPEALED IN THE FEDERAL LAW. HOWEVER, NAHB AND HBAK SUPPORT THE AWARDING OF ACTUAL DAMAGES TO AN AGGRIEVED PARTY FOR THE DAMAGE CAUSED BY ANTICOMPETITIVE DECISIONS, INCLUDING THOSE WHICH ARE MADE UNDER THE CLOAK OF ZONING LAWS.

SOME 23 STATES' ATTORNEY GENERALS, INCLUDING THE KANSAS ATTORNEY GENERAL, FILED AMICUS BRIEFS ON THE SIDE OF COMMUNITY COMMUNICATION CO., INC. IN THE BOULDER CASE. THEIR SUPPORT REFLECTED A STRONG BELIEF IN THE EFFECTIVENESS AND IMPORTANCE OF ANTITRUST LAWS. MOEOVER, THEY SHARED CHIEF JUSTICE BURGER'S FEELING THAT LOCAL GOVERNMENTS SHOULD ENJOY NO SPECIAL SHIELD FROM THESE LAWS WHEN THEIR ACTIONS WARRANT SCRUTINY.

EXAMPLES GIVEN BY PROPONENTS OF HB 2016 MIGHT LEAVE THE IMPRESSION THAT SUITS FILED AGAINST GOVERNMENT UNITS ARE FRIVILOUS OR LACKING IN MERIT. IT HAS BEEN IMPLIED THAT LOCAL OFFICIALS ARE SUBJECT TO HARASSMENT SUITS BY DEVELOPERS AND OTHERS TO OBTAIN A DESIRED DECISION FROM GOVERNMENT

Attachment 4

UNDER THE THREAT OF COSTLY AND TIME CONSUMING ANTITRUST SUITS. I CANNOT PRESENT YOU WITH DOCUMENTATION OF FACTS THAT THIS HAS NOT OCCURRED, JUST AS I DO NOT BELIEVE THAT ACTUAL PROOF HAS BEEN PRESENTED THAT MORE THAN A POSSIBILITY OF SUCH AN OCCURRENCE MAY EXIST. HOWEVER, I WOULD SUBMIT THAT A DEVELOPER WHO MUST WORK WITH A GOVERNING BODY ON A REGULAR BASIS IS NOT GOING TO RUN THE RISK OF ALIENATING THOSE INDIVIDUALS WITH A FRIVILOUS LAWSUIT WHICH WILL AT THE SAME TIME COST HIM THOUSANDS OF DOLLARS TO INITIATE.

KEEP IN MIND THAT IN ORDER TO FILE A SUIT, THE PLAINTIFF IS ALSO SUBJECT TO THE EXPENSE OF AN ANTITRUST ATTORNEY AND THE TIME CONSUMING FACT FINDING TO OBTAIN THE HIGH DEGREE OF PROOF REQUIRED TO SHOW THE EXISTENCE OF AN ILLEGAL CONSPIRACY. THE BURDEN OF PROOF FALLS UPON THE PLAINTIFF.

PROVING AN ANTITRUST VIOLATION AGAINST A GOVERNMENTAL ENTITY IS LIKELY TO BE A MORE FORMIDABLE TASK THAN MAKING A CASE FOR A PRIVATE PERSON'S VIOLATION OF THE ANTITRUST LAWS. MOST LOCAL GOVERNMENT ACTIONS IN THE LAND USE CONTEXT WILL BE SUBJECTED TO A "RULE OF REASON" ANALYSIS, WHICH ALLOWS THE MUNICIPALITY TO ARGUE THAT ITS ACTION IS FAIRLY DEBATABLE, RATHER THAN TREATED AS A "PER SE" VIOLATION. GENERALLY, COURTS CONFINE THE ASSESSMENT OF PRIVATE PARTY CONDUCT UNDER THE RULE OF REASON STANDARD TO AN EXAMINATION OF CERTAIN ECONOMIC VARIABLES AND WILL NOT TAKE INTO CONSIDERATION THE SOCIAL GOOD THAT MIGHT BE DERIVED FROM THE CHALLENGED ACTIVITIES. BUT LANGUAGE IN LAFAYETTE AND BOULDER INTIMATES THAT, WHERE GOVERNMENT ACTIVITIES ARE INVOLVED, THE RULE OF REASON ANALYSIS MAY BE BROADENED TO ENCOMPASS NON-ECONOMIC CONSIDERATION, SUCH AS THE PUBLIC WELFARE.

CONSEQUENTLY, UNLESS A DEVELOPER CAN SHOW THAT AN ANTICOMPETITIVE PURPOSE WAS CENTRAL TO MUNICIPAL LAND USE ACTIVITY THAT BENEFITS THE DEVELOPER'S COMPETITORS, THE MUNICIPAL CONDUCT IS LIKELY TO SURVIVE AN ASSAULT UNDER STATE LAW. AT THE SAME TIME, IN ORDER TO HAVE "STANDING" TO CONTEST THE MUNICIPAL ACTION, THE DEVELOPER MUST SHOW MORE THAN THE MERE THREAT OF COMPETITIVE HARM TO HIS PROJECT; A CONCRETE INTEREST, SUCH AS PROXIMITY TO THE COMPETITOR'S PROPERTY, IS NECESSARY. SEE, E.G., WESTBOROUGH MALL V. CITY OF CAPE GIRARDEAU, 693 F.2D 733 (8TH CIR. 1982), CERT. DEN. 51 U.S.L.W. 3837 (MAY 24, 1983).

In Stauffer v. Town of Grand Lake, No. 80-A-752, (D. C. COLO. 1980) the Plaintiff brought suit over a decision of the Town Board and Planning Commission to re-zone his property (parcel "A") from multi-family to single-family use. Immediately prior to the time of this decision, according to the Complaint, the Town had been in the process of negotiating with the Plaintiff to acquire a separate parcel of his property (parcel "B") for use as a municipal theater and park. Again according to the Complaint, the Town proposed an even trade of property held by it for the holding of the Plaintiff, even though the Plaintiff's parcel was appraised at $228,276.00 and that of the Town at $77,640.00. At the June 12, 1980, meeting of the Planning Commission, held to consider the zoning of Parcel A, the Plaintiff was told that if he did not agree to the "even trade" offer with respect to parcel B, parcel A would be zoned single-family, low-density residential, thus destroying its intended use. This threat was ignored, and the zoning maps which had been available for public inspection were altered to reflect the single-family use and then approved by the Town Board.

In denying a Motion to Dismiss the Plaintiff's antitrust claim as having no legal basis, Judge Araj of the United States District Court for Colorado reasoned that the Colorado Zoning Statutes did set forth a state policy to displace competition with regulation, and that the State supervises this policy sufficiently to confer an exemption from antitrust liability for zoning decision made in line with State Law. However, in the view of Judge Araj, the automatic exemption from liability was not appropriate in this case, since the Complaint alleged that the Grand Lake zoning officials had acted "with the aim of obtaining the Plaintiff's property for municipal development and enhancing the competitive position of the trustees". As the Judge reasoned "the Colorado legislature did not forsee, contemplate, or intend that zoning officials would use their legislative authorization to promote their own interest and economic benefit".

In Whitworth v. Perkins, the court considered an allegation that the Defendants had engaged in exclusionary zoning with the intention of preventing the Plaintiffs from starting a retail liquor business that would have competed with the interest of certain members of the Town Board. The Court of Appeals held that this conduct should not be accorded automatic immunity simply because it was taken under the "cloak" of the State Zoning Statutes.

IN THESE CASES, ONLY THE MOST EGREGIOUS CONDUCT BY GOVERNMENTAL OFFICIALS HAVE BEEN HELD TO FORM THE BASIS OF ANTITRUST ACTIONS.

THE ARGUMENT IS ALSO MADE THAT THE COSTS OF SUCH SUITS WILL BE PASSED ON TO TAXPAYERS. THIS IS NO DIFFERENT, OF COURSE, THAN IN THE PRIVATE CONTEXT WHERE THE COSTS OF CORPORATE ANTITRUST LITIGATION ARE PASSED ON IN THE FORM OF HIGHER PRICES TO CONSUMERS. SIMILARLY, TAXPAYERS MUST ULTIMATELY PAY FOR OTHER TYPES OF LITIGATION AGAINST LOCAL GOVERNMENT, SUCH AS PERSONAL INJURY SUITS AND CONTRACT CLAIMS. THE IMPORTANT POLICY REASONS BEHIND THE ANTITRUST LAW SHOULD NOT BE NEGATED BY THE FACT THE COSTS WILL BE BORNE IN SMALL PART BY INDIVIDUAL MEMBERS OF THE PUBLIC.

AS AN EMPLOYER, I AM RESPONSIBLE FOR THE ACTIONS OF MY EMPLOYEE ACTING ON MY BEHALF. SHOULD WE TAXPAYERS NOT BE RESPONSIBLE FOR THE ACTIONS OF OUR EMPLOYEES, THE OFFICIALS WHICH WE ELECTED?

PROPONENTS OF AUTOMATIC AND BLANKET ANTITRUST IMMUNITY MAINTAIN THAT THE ACTIVITIES OF LOCAL GOVERNMENT WILL BE CHILLED BY THE PROSPECT OF ANTITRUST LIABILITY. HOWEVER, WE MUST REALIZE THAT ACTIVITIES OF LOCAL GOVERNMENTS HAVE CHANGED OVER THE YEARS. SOME ARE BEING MORE AGGRESSIVE IN THOSE ACTIVITIES IN COMPETITION WITH PRIVATE INDUSTRY.

AS THE DECISION IN WHITWORTH AND STAUFFER INDICATE, EFFECT OF THE ANTITRUST LAW WILL BE TO DETER THE USE OF PUBLIC OFFICE FOR PURELY PRIVATE GOALS OR TO EXTORT A UNIQUE ADVANTAGE FOR A LOCAL UNIT OF GOVERNMENT FUNCTIONING IN IT'S PROPRIETARY CAPACITY. THE CHILLING OF SUCH ACTIVITIES WOULD BE A SALUTARY RESULT OF PRESERVING THE ANTITRUST REMEDY.

ANTITRUST LIABILITY SHOULD CAUSE LOCAL GOVERNMENTS TO TAKE STEPS TO REDUCE THEIR LIABILITY, WHICH WE SEE AS A POSITIVE EFFECT.

FOR A CITY TO SCRUTINIZE ITS ACTIONS FOR RESTRICTION OR DISPLACEMENT OF COMPETITION BY IMPLEMENTING COMPLIANCE PROCEDURES SHOULD RESULT IN A FAIRER DECISION CREATED BY MORE RESPONSIBLE AND AWARE GOVERNMENT OFFICIALS.

THE ISSUE BEFORE THIS INTERIM COMMITTEE IS WHETHER ABSOLUTE IMMUNITY SHOULD BE GIVEN WHICH DENIES VICTIMS OF SUCH ACTIONS THE PROTECTION OF KANSAS ANTITRUST LAWS.

THE UNITED STATES SUPREME COURT POINTED OUT THAT THESE LAWS "ARE AS IMPORTANT TO THE PRESERVATION OF ECONOMIC FREEDOM IN OUR FREE ENTERPRISE ECONOMIC SYSTEM AS THE BILL OF RIGHTS IS TO THE PROTECTION OF OUR FUNDAMENTAL PERSONAL FREEDOMS". UNITED STATES VS. TOPCO ASSOCIATES, 402 U.S. 596 (1972)

PROPONENTS STRESSED THE PROBLEMS WITH LIABILITY INSURANCE FOR UNITS OF GOVERNMENT. DOES THIS PROBLEM STILL EXIST MINUS A PROVISION PERMITTING MONETARY DAMAGES?

AS A COMPROMISE, HBAK WOULD SUPPORT LEGISLATION SIMILAR TO THAT OF THE FEDERAL ACT, IF THE COMMITTEE DOES NOT BELIEVE THAT AN INDIVIDUAL IS ENTITLED TO RECOVER ACTUAL DAMAGES. WE URGE ACTION BY THIS COMMITTEE TO RETAIN INJUNCTIVE RELIEF TO INDIVIDUALS AND REMOVE THE RETROACTIVE PROVISIONS OF HB 2016.