Approved 3-19-90
Date

MINUTES OF THE HOUSE COMMITTEE ON PUBLIC HEALTH AND WELFARE.

The meeting was called to order by Marvin L. Littlejohn at
Chairperson

2:05 a.m./p.m. on March 15, 1990 in room 423-S of the Capitol.

All members were present except:

Rep. Foster, excused

Committee staff present:

Bill Wolff, Research
Norman Furse, Revisor
Sue Hill, Committee Secretary

Conferees appearing before the committee:

Steve Weir, Attorney for First Rule Properties
David Traster, Deputy Secretary, Department of Health/Environment

Chairman called meeting to order at 2:08 p.m.

Chair again apologized to conferees for the delay in committee meeting due to the long session in House of Representatives. He thanked them for their patience, and for their time.

Chair noted (Attachment No. 1) a copy of decision from Judge Jackson of District Court of Kansas, Shawnee County had been provided to all members. This decision relates to HB 2802.

HEARINGS CONTINUED ON HB 2802 for the third day.

Steve Weir, Attorney representing First Rule Properties (Attachment No. 2) noted his comments would be a follow-up of the testimony he had given previously. He drew attention to explanation given by Mr. Furse yesterday and noted, clearly these three statutes involving HB 2802 were enacted at three different times, but it appears they are being interpreted by State Agencies as one, all enacted at the same time for one purpose. He drew attention to an affidavit that indicates a disclosure part of license application was signed by First Rule Properties indicating they had absolutely no connection to the operation of the business and this was only put on the license for disclosure purposes. He noted ambiguity in present law that Attorney General (AG) and Courts have found in present law regarding receiverships for adult care homes. HB 2802 is aimed at clarifying those ambiguities and would carry out the legislatures' intent in statutes, i.e., license all who actually managed, controlled the adult care home operation; make those who controlled, operated/managed the business causing it to go into receivership, pay receiverships costs; to disclose to consumers all persons who had any connection to the facility in any form to uncover "shell" corporations being set up to avoid liability. He noted the only common sense method of interpreting these particular statutes is to comply with constitutional requirements, to require licensure of all persons who would actually have control in operating the business and all other persons, including landlords, should merely be required to be reported to the public for financial purposes. He noted, the AG and Courts pointed out there is no constitutional method availabale to require a mere landlord to pay receiverships caused by someone else. His client offered to Department of Health/Environment (KDHE), to provide someone to take over the business at less cost than was being charged by the

HEARINGS CONTINUED ON HB 2802. (Steve Weir continued--)

receiver, but both Department of H&E and SRS refused, and at thethe same time claimed landlord (First Properties) was an "owner or licensee", and required them to repay the costs of receivership. They feel, he stated, the statutes are clear in interpretation that the individual officers, directors of the corporation operating the business whose management may have caused receivership are liable for the costs. A final point he stressed, was that his client resents the insinuation that Representative Bunten had done anything unethical as relates to this question. His efforts have been totally ethical and legal. If Rep. Bunten had not interceded on behalf of the State of Kansas, legal action would have been taken against the State Agencies, i.e., SRS, KDHE, for their unconstitutional application of the statutes. Both Representative Bunten and the AG recognize the potential liability of the State for its continuing unconstitutional interpretation of these ambiguous statutes, and if anything, have worked against us and thus far have kept my client from actively pursuing claims against the state in regard to this receivership situation. He answered numerous questions, i.e., HB 2802 is not necessary for his client any longer, but it would have an impact on how State Agencies perceive these particular Statutes in the future; he was cautious about proposed amendments and the effect it would have on his client until this particular litigation has been completed. He answered questions in regard to how much rent was owed at the time Receivership was filed.

David Traster, Deputy Director Department of Health/Environment drew attention to Attachment he had distributed on February 27th, and he offered no additional printed testimony. (Attachment No. 3)recorded this date is the same as was given to members on February 27, 1990. He noted there are implications with the passage of HB 2802. He noted however, detailed explanation by Mr. Furse of legislative history on statutes in question were very enlightening. At this time the Department of Health/Environment views this matter for the Legislature to decide and they will defer to the judgement of the legislature on it. From the beginning we have interpreted the Statutes literally, i.e., that "owner" meant "owner", "licensee" meant "licensee" , not only in this receivership, but in other receiverships as well. We have sought and received recovery of receivership costs from one other owner who was not involved in the business. The matter at hand is the first time it has been challanged. He noted further, their Department has not filed litigation seeking recovery costs from the matter we discuss here today. The only litigation filed is the receivership action. He wished to make it clear this issue is not right. There may be other entities who are/may be at fault here. The State is not singling out First Rule Properties and he would like that made clear to members.

HEARINGS CONTINUED ON HB 2802.

Mr. Traster answered questions, i.e., he means voluntarily becoming involved in the operation of a nursing home, is only that no person is forced into buying a nursing home. There was a lengthy discussion in regard to the form (PRS-102); no, the Department not requiring any I.D. number has no special significance to their Department. Yes, it costs KDHE $140 a day to operate the facility (Pioneer Village); if they have interpreted these statutes wrongly, then tell them by passing HB 2802, and they will abide by the wishes of legislature; yes there were some deficiencies with the physical plant of Pioneer Village; yes, the State did have to make some repairs/renovations, however the problems with this facility had very little to do with the facility, but were problems related to treatment. He noted he did not wish to try this case before the committee, if it is to be tried, it needs to be done in the Courts. No, he is not aware of any other receiverships going to be filed this year, but noted they often occur at holiday (Christmas) time, or week-ends when State Agencies offices are closed, so there is always a possibility there could be filing of receiverships. Yes, this receivership will terminate sometime this summer, whether or not the State files for recovery costs depends on large measure the outcome of this bill. He said again, they would defer to the decisions made by committee on HB 2802.

HEARINGS CLOSED ON HB 2802.

Chair noted no action will be taken on HB 2802 today. It is the policy of this committee to defer disc
ussion and action for a day or so after hearings have been closed on a bill.

Chair noted action would be taken on HB 2802 and HB 3003 the next time committee meets, hopefully that will be Monday March 19, 1990.

Meeting adjourned 3:06 p.m.

GUEST REGISTER

HOUSE PUBLIC HEALTH AND WELFARE COMMITTEE

Date March 15, 1990

Name	Organization	Address
DAVID M. PRASTER	KDHE	Topeka
Steve Weir	Corporate, Weir & Myers	Topeka

District Court of Kansas
Third Judicial District
Shawnee County, Kansas

Chambers of
Fred S. Jackson
Judge of the District Court
Division No. Two
Shawnee County Courthouse
Topeka, Kansas 66603-3922

February 6, 1990

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Marvin G. Stottlemire, Esq.
Kansas Department of Health and Environment
Landon State Office Building
Topeka, KS 66612-1290

Re: Pioneer Village, Inc., et al. v.
Kansas Department of Health and Environment
Case No. 89 CV 318

MEMORANDUM DECISION AND ORDER

Gentlemen:

The Motion of the defendant, First Rule Properties, for summary judgment was argued November 22, 1989 and taken under advisement. The briefs of counsel, together with the record in the action, have been reviewed and the Motion is now ready for decision.

After reviewing the record and briefs of counsel, it appears that a genuine issue of material fact exists concerning the pivotal issue as to whether or not First Rule Properties, Inc., was a licensee or co-licensee of the nursing home operation conducted by Pioneer Village, Inc., or simply a lessor of the real estate upon which the nursing home operation was conducted. First Rule Properties contends that it was simply a lessor and the Department of Health and Environment contends that it was a co-licensee. It appears that this fact should be readily ascertainable, however, from the state of the record at this point, the Court has been unable

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3-15-90
Attn #1

to ascertain which contention is factually correct. Because an issue as to a genuine material fact exists, the Motion of the defendant, First Rule Properties, for summary judgment must be overruled.

Counsel should be advised that it is the opinion of the Court that in the event First Rule Properties is determined to be merely a lessor, the receiver would be bound by the terms of the existing lease between First Rule Properties, Inc., and Pioneer Village, Inc., in accordance with the provisions of K.S.A. 39-959(g). The Court is in agreement with the rationale expressed in the Attorney General's Opinion No. 89-96 attached to the movant's brief. If First Rule Properties is determined to be a co-licensee, the receiver would not be bound by the terms of the existing lease in accordance with the statutory authority relied upon by receiver.

If counsel cannot reach an agreement as to the factual issue set out above, they should advise the Court so that an evidentiary hearing may be scheduled to resolve this issue.

The original of this Memorandum Decision and Order is being filed with the Clerk and shall constitute the entry of the Court's ruling upon the Motion. No further Journal Entry is necessary.

Very truly yours,

Fred S. Jackson
District Judge

FSJ:vs

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3-15-90
Attn #1
pg. 2.

TESTIMONY TO THE
HOUSE PUBLIC HEALTH AND WELFARE COMMITTEE
by Stephen P. Weir
ON
Wednesday, March 14, 1990
House Bill 2802

Mr. Chairman and members of the Committee:

My name is Steve Weir and I appear before you today on behalf of First Rule Properties, a general partnership consisting of Randolph Adams and Howard Paul located in Topeka, Shawnee County, Kansas. I appreciate the opportunity to speak to you today regarding House Bill 2802, which deals with State receiverships for adult care homes.

Pioneer Village, Inc., a non-profit corporation, had been running an adult care home in East Topeka for several years when it decided to move its business. It then leased a building and property in August, 1985 from my client, First Rule Properties. The lease is a true lease requiring the tenant, Pioneer Village, Inc., to make all changes or alterations in the building necessary to carry on its business.

When Pioneer Village, Inc. changed location, it had to apply for a new license to operate its adult care home. At that time, because of a new statute requiring license applicants to disclose any and all persons or entities who have any connection to the business or the property, the Kansas Department of Health and Environment ("KDHE") required that my client, as the landlord leasing the property to the business, sign the disclosure part of the license application.

I have attached a copy of an affidavit of the administrator of the adult care home, at the time of the license application, wherein she testifies that my client, the landlord here, had absolutely no connection to the operation of the business and was only put on the license for disclosure purposes.

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attm. # 2

Pioneer Village, Inc. carried on the business of the adult care home from 1985 to 1989 (without any involvement by my client the landlord) and then it declared bankruptcy because SRS refused to pay more than $60 to $70 per patient/per day to operate the business and take care of the residents.

Pioneer Village then filed a lawsuit to have a Receiver appointed, under the statutes we are discussing today, to run the business.

KDHE then took the position in that receivership lawsuit, that since my client, First Rule Properties, was named on the license for disclosure purposes and was an "owner" of the building and ground, it should pay for the costs of the receivership under these statutes requiring an "owner or licensee" to pay the costs of the receivership.

There is an ambiguity in the present law that both the Attorney General and the courts have found regarding receiverships for adult care homes. The ambiguity concerns who may, legally, be included in the undefined term "owner or licensee". Is it the owner of the business actually operating the facility? Is it the mortgage holder of the facility? Is it the landlord who leases the property to the operator of the business? Is it the directors, officers or stockholders of a corporation owning the business? Is a licensee, the actual operator of the business or is it the mortgage holder or landlord placed on a license with the operator's name for disclosure purposes, who otherwise have no connection to the operation of the facility?

The Congress of the United States had a similar problem when it enacted statutes regarding liability of "owners" for environmental cleanup, commonly referred to a CERCLA. Those statutes also failed to define owner until there were so many cases won by banks who had foreclosed on property and landlords both of which could be defined as an "owner" under the statute that Congress changed the law to include only those who actually had control of the business when the pollution occurred.

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Attm. #1. pg. 2

House Bill 2802 is aimed at similarily clarifying those ambiguities and carrying out the legislatures' intent as determined by the Attorney General and the Shawnee County District Court. Until that Court's recent decision, KDHE had been using the ambiguity as to who could possibly be considered to be an "owner or licensee" of an adult care home to claim that people wholly unrelated to the nursing home business and/or to the cause of the receivership should have to pay the costs of the receivership.

This was not the intent of the legislature and I have prepared a memorandum which I handed out at the last hearing wherein all of the legislative history is copied and discussed in detail. One parenthetical note - The revisor of statutes who staffed the original committees who discussed this statute prepared the language of this bill and has also stated that he does not believe the legislature ever intended to include mere landlords in this statute.

As the Attorney General and the court in our case pointed out, the legal test to determine the constitutionality or validity of a statute, is whether, as applied to the facts of each case, there is a logical or rational connection between the goals sought to be achieved by the legislature and the actual application or impact of the law. The best method to determine what goals were intended to be achieved when the statutes are ambiguous is to look at the legislative history. (Please note: KDHE stated at the last hearing; to the Attorney General and to the Court that the legislative intent is not what we have suggested to you, but notice that KDHE did not cite any legislative history and did not copy any of that history for your review.)

The legislative history of these statutes (which I have quoted and copied for the committee) clearly indicates that the reason for these statutes was to:

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3-15-90

Attach. #2
pg. 3

1. license all those who actually managed or controlled the adult care home operation;

2. make those persons who controlled, operated or managed the business, causing it to go into receivership, pay the costs of the receivership; and

3. to disclose to consumers all those persons who had any connection to the facility in any form to uncover "shell" corporations being set up to avoid liability.

Returning to the legal requirement that legislative action be based upon reasonableness and that there be a clear connection between the action and the ends sought to be achieved, the statutes only appear to be reasonable if they are applied to actual operators and owners who have control of the business.

There is no logical or rational nexus between the goals sought to be achieved [1) licensure of persons who control the business, 2) penalties for persons who control the business and cause it to be put into receivership, and 3) disclosure of ownership and related parties for financial purposes] with the application of the statutes as suggested by the KDHE (Requiring persons who have no control, possession or ownership interest to be a co-licensee and pay for the errors and omissions caused by the wholly unrelated business operator).

The only common sense method of interpreting these statutes to comply with constitutional requirements would be that they require licensure of all persons who would actually have control in operating the business and all other persons, including landlords, should merely be required to be reported to the public for financial purposes.

Not being a proper "owner" or "licensee" as intended by the legislature, the landlord would not be liable for the costs of the receivership pursuant to K.S.A. 39-960. To find otherwise would deprive the landlord of his property without any causal relationship, justification or basis to support the reason for the statute - i.e. to make those who caused the problems, pay for them.

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Attorney General Robert Stephan has issued an Attorney General's Opinion regarding the definition of owner or licensee. His opinion states that the legislature intended to require those who controlled the operations of the facility and caused the need for the appointment of the receivership, to be included in the term "owner or licensee" and not mere landlords who are required by KDHE to be placed on the license for disclosure purposes.

In the pending receivership action, Shawnee County District Court Case No. 89-CV-318, Judge Jackson in his Memorandum Decision and Order of February 6, 1990 ruled that "The Court is in agreement with the rationale expressed in the Attorney General's Opinion No. 89-96."

I was asked at the last hearing who would pay the costs if the actual business operator was in bankruptcy and the landlord did not pay the costs. My first response is that as the Attorney General and Court pointed out there is no constitutional method available to require a mere landlord to pay the costs caused by someone else.

Secondly, in our case after KDHE threatened to require the landlord to pay the costs of the receiverships, the landlord made an offer to KDHE to provide someone to take over the business at a cost significantly less than what was charged by the Receiver but KDHE and SRS refused to allow the landlord to provide someone to run the business at the same time it claimed the landlord was an "owner or licensee" of the business under the statutes requiring them to repay the costs of the receivership.

SRS then paid the management company installed by the Receiver an increase over what it was paying to Pioneer Village of up to $120.00 per day/per patient. There would be little or no significant costs if SRS and KDHE would have allowed the landlord to provide someone to take over the business instead of installing the Receiver. Now KDHE and SRS are trying to make my client pay for the extra costs of the Receiver after they refused to allow my clients an opportunity to provide someone to come in and take over the business and avoid those costs.

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pg. 5

Thirdly, the statute is clear that the individual officers and directors of the corporation operating the business whose management may have caused the receivership are liable for the costs. In our case Pioneer Village, Inc. has two officers and directors insurance policies (which have recently paid over $75,000.00 in other claims by other parties against the same officers and directors) but KDHE has not even attempted to claim the costs from those persons or the insurance companies. Nor has KDHE made a claim against the Bank who holds the mortgage on the property which according to KDHE's argument would also be an "owner" of the property under these ambiguous statutes.

The final point that I would like to make is that my client's resent the insinuation that Representative Bunten has done anything unethical as relates to this question. His efforts have been totally ethical and legal as he sought to help us meet with government officials and seek resolution of our differences, and when that failed, to request an attorney general's opinion.

In fact, if Representative Bunten had not interceded on behalf of the State, my clients would have actively pursued an action against SRS, KDHE and the State for their unconstitutional application of the statutes in the same line as all the banks and landlords challenged the Federal CERCLA laws, and a class action representing all adult care homes similarly situated who were refused reimbursement from SRS for anything less than the $180 to $190 per day/per patient which the Receiver now claims it costs to properly run the facility, as compared to the $60 to $70 per day/per patient SRS told Pioneer Village was appropriate, thereby driving the operator of this business into bankruptcy.

Representative Bunten and the Attorney General recognized the potential liability of the State for its continuing unconstitutional interpretation of these ambiguous statutes and if they did anything, they worked against us, and thus far have kept my client from actively pursuing claims against the State in the receivership lawsuit and future class actions.

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pg. 6

I would therefore respectfully request that this Committee approve of the proposed amendment in House Bill 2802 which clarifies the language of the statute to include only those persons with whom the legislation was originally concerned.

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Attm. #2
Pg. 7

AFFIDAVIT

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Lynda Crowl, after being duly sworn upon my oath state:

1. I was the Administrator of Pioneer Village, Inc. (a non-profit corporation) at the time it was first licensed to operate the adult care homes located on S.E. 25th Street commonly referred to as Pioneer Village in Topeka, Kansas.

2. It is my belief based upon my personal knowledge, experience and observations at the time that the only reason that First Rule Properties was placed upon the license as co-licensee was because Kansas Department of Health & Environment required that First Rule Properties sign part of the license application to disclose to the public that First Rule Properties was the landlord of the property.

3. I informed the Kansas Department of Health & Environment, at the time, and the Kansas Department of Health & Environment employees I dealt with at the time, regarding the license, knew that First Rule Properties was put on the license for disclosure purposes but was not the licensee and that First Rule Properties had no connection to, or actual or indirect interest in, the ownership, operation or management of the actual adult care business.

4. Throughout the entire period I was Administrator of the facility, First Rule Properties never played any role in the ownership, operation or management of the adult care business and

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3-19-90
Attm. #2
Pg. 8

as far as I know Kansas Department of Health & Environment never treated First Rule Properties as an actual licensee or operator of the business.

FURTHER AFFIANT SAYETH NAUGHT.

Lynda Crowl
Lynda Crowl

SUBSCRIBED AND SWORN TO before me this 12th day of March, 1990.

Tammy L. Milner
NOTARY PUBLIC
State of Kansas
My Appt. Expires 7-14-91

Tammy L. Milner
Notary Public

My Appointment Expires:

July 14, 1991

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3-15-90
Attm. #2.
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State of Kansas
Mike Hayden, Governor

Department of Health and Environment
Office of the Secretary

Stanley C. Grant, Ph.D., Secretary

Landon State Office Bldg., Topeka, KS 66612-1290

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Testimony Presented to

The House Public Health and Welfare Committee

by

The Kansas Department of Health and Environment

House Bill 2802

Background

House Bill 2802 would amend adult care home receivership law by exempting owners of property who lease such property for purposes of operating an adult care home from any obligation to repay the State of Kansas for costs incurred or payments made for the operation of a receivership.

In 1984, receivership statutes were amended to allow the State to recover from the owner or licensee the costs of operating and funding a facility in receivership.

Since 1984, two receivership actions have been filed. Upon termination of the first, the costs of the receivership were recovered from the owner. The owner was not involved in the day to day operation of the facility. The second receivership is still in effect. The cost recovery action will not be ripe until the receivership is closed.

Problems

Exempting the owner of property, acting as lessor, from responsibility to reimburse the state for costs associated with receiverships has several implications. Perhaps the most obvious is that taxpayers could ultimately bear the costs of receiverships. This is not appropriate given the fact that the lessor voluntarily agrees to become involved in the nursing home industry. The lessor gains benefit from the operation of the adult care home yet would be relieved of all responsibility when the operation of the adult care home sours.

It is not unusual for the receiver to expend considerable funds to renovate, clean and repair the physical plant when a receivership is commenced. The lessor thus ends up with a much improved physical plant funded by the taxpayers without cost recovery.

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attm #3

Charles Konigsberg, Jr., M.D., M.P.H., Director of Health (913) 296-1343

James Power, P.E., Director of Environment (913) 296-1535

Lorne Phillips, Ph.D., Director of Information Systems (913) 296-1415

Roger Carlson, Ph.D., Director of the Kansas Health and Environmental Laboratory (913) 296-1619

The Legislature determined in 1984 that it was appropriate for lessors to be accountable in the operation of adult care homes. This, in part, was in recognition that the residents of adult care homes are dependent not only on the operator but on the physical plant owner for their well-being.

Department Position

The Department believes this proposal compromises the accountability of an adult care home provider. Lessors have every opportunity to protect themselves from inadequate operators when they enter into lease arrangements. Accordingly, the Department of Health and Environment respectfully requests that House Bill 2802 not be favorably passed.

Testimony Presented By

David M. Traster
Assistant Secretary and General Counsel
Kansas Department of Health and Environment
February 27, 1990

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Attm. #3
pg. 2.