

Approved: _____ 3/13/97
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Carmody at 3:30 p.m.. on February 17, 1997 in Room 313--S of the Capitol.

All members were present except: Representative Carmody (excused)
Representative Kline (excused)
Representative Mayans (excused)
Representative Ruff (excused)
Representative Shriver (excused)
Representative Shultz (excused)

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Jill Wolters, Revisor of Statutes
Jan Brasher, Committee Secretary

Conferees appearing before the committee: Bob Vancrum, Task Force on the Regulation of Residential Building Contractors
Representative Ballou
Chris McKenzie, League of Kansas Municipalities
Janet Stubbs, Kansas Building Industry Association
Art Brown, Mid-America Lumbermens Association
Bob Bartunek, Home Builders Association-written only
Steve Dickerson, Kansas Trial Lawyers Association
Brad Smoot, Home Builders Association
Carolyn Hall, Consumer Appointee to the Task Force

Others attending: See attached list

Vice Chairperson Representative Pugh called the meeting to order at 3:55 p.m.

HB 2161: **Civil procedure; notice of intent to perform, oral contracts; amounts in excess of written contracts.**

HB 2162: **Implied warranties of workmanlike construction and habitability.**

Bob Vancrum, Chair, Task Force on the Regulation of Residential Building Contractors testified in support of both **HB 2161** and **HB 2162**. The conferee referred to the task's force's report. (Attachment 1) The conferee stated that one of the most significant recommendations would establish in statute the right of an aggrieved homeowner to recover if they show a breach of an implied warranty of habitability or workmanlike construction which **HB 2162** addresses. The conferee stated that this bill will allow the recovery of attorney fees to the prevailing party.

The conferee stated that **HB 2161** was recommended by the task force to remedy the possibility of a homeowner being sued on a oral contract by a subcontractor who had not filed a notice of intent and claimed not to be paid by the contractor. (Attachment 2)

Committee members discussed with the conferee issues concerning local licensure, and the term "workmanlike construction."

Chris McKenzie, League of Kansas Municipalities spoke in support of **HB 2161** and **HB 2162**. The conferee stated passage of these bills will be a good start in balancing the interest of the construction and consumer communities in resolving conflicts over these issues. (Attachment 3)

In response to a Committee member's question regarding whether **HB 2162** would affect neighborhood remodeling projects, habitat for humanity or Mennonite housing projects, the conferee stated that the bill would probably apply.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON Judiciary, Room 313-S Statehouse, at 3:30 p.m. on February 17, 1997.

Steve Dickerson testified on behalf of the Kansas Trial Lawyers Association to recommend changes to **HB 2162**. One recommended change would make the statute of limitations the same time period provided in K.S.A. 60-512. A second change would substitute attorney fee language contained in the Kansas Consumer Protection Act for language contained in subsection (g). The third recommended change would allow the consumer to hire another contractor to cure a defect problem. The fourth recommendation would clarify the definition of "contractor." (Attachment 4)

Carolyn Hall, Consumer Appointee to the Task Force, testified in support of **HB 2161** and **HB 2162**. Ms Hall stated that she agreed in concept with **HB 2162** but recommended "taking out prevailing party" and insert "if the consumer prevails." The conferee also recommended extending the life of the warranty. The conferee related her own personal experience with a building contractor and defective workmanship. The conferee stated that the attorney fees are often more than individuals can afford.

Janet Stubbs, Kansas Building Industry Association testified in opposition to both **HB 2161** and **HB 2162**. The conferee related examples where oral contracts are relied on by both the contractor and the customer. The conferee stated that her association supports enforcement of construction codes which will assure customer satisfaction. The conferee stated that the majority of problems in particular areas of the state could be resolved with good inspections. The conferee stated that KBIA does not support **HB 2161** which would create an environment which encourages litigation or removes the ability of a contractor to collect what is rightfully owed him for his labor. (Attachment 5)

Art Brown, Mid-America Lumbermens Association testified in opposition to **HB 2161** and stated that his association had no position on **HB 2162**. The conferee stated that his testimony related the opinion of the association's attorney and his interpretation of **HB 2161**. The conferee related a scenario of the many times that changes in orders occur in his business. The conferee stated that in the attorney's opinion there are problems with technical legal aspects of this bill. (Attachment 6)

Brad Smoot, Home Builders Association testified in opposition to **HB 2161** and **HB 2162**. The conferee referred to Bob Bartunek's written testimony. (Attachment 7) The conferee addressed the issues of attorney fees in **HB 2162**. The conferee stated that the language was taken from the consumer protection act. The conferee stated that the consumer protection act deals with flagrant or deceptive acts or practices, whereas construction situations deal with disagreement concerning implementation of implied warranties.

The Vice Chairperson adjourned the meeting at 4:50 p.m.

The next meeting is scheduled for February 18, 1997.

HOUSE JUDICIARY COMMITTEE COMMITTEE GUEST LIST

DATE: 2-17-97

NAME	REPRESENTING
<i>Paula Hall</i>	<i>Task Force Member</i> <i>at Judiciary</i>
<i>Kelly Koutalas</i>	<i>City of Overland Park</i>
<i>Walter Smith</i>	<i>KMHA</i>
<i>Bob Bram</i>	<i>Mid-America Lumber</i>
<i>Paul Shelby</i>	<i>AJA</i>
<i>Wendy Harms</i>	<i>Kansas Ready Mixed Concrete Assoc.</i>
<i>Kathy Taylor</i>	<i>KBA</i>
<i>DAVID B. SCHLOSSER</i>	<i>Pete McGill & Assoc</i>
<i>James Stubbs</i>	<i>Ks. Bldg. Ind. Assn.</i>
<i>Sob Vancouver</i>	<i>Task Force on Residential Construction</i>
<i>Chris McKernin</i>	<i>League of Ks. Municipalities</i>
<i>Tom Kungles</i>	<i>KTLA</i>
<i>Steve Dickerson</i>	<i>"</i>
<i>Lucy Ann</i>	<i>Amer Inst of Architects</i>
<i>George Barber</i>	<i>Barber & Assoc's</i>

100
1

REPORT ON

RESIDENTIAL BUILDING CONTRACTORS

Presented to the

KANSAS LEGISLATURE

by the

TASK FORCE ON THE REGULATION OF RESIDENTIAL BUILDING CONTRACTORS

January 1997

House Judiciary
Attachment 1
2/17/97

MEMBERS OF THE RESIDENTIAL BUILDING CONTRACTORS TASK FORCE

Robert Vancrum, Chairperson
Legislative Appointee

Senator U. L. "Rip" Gooch
Legislative Appointee

Representative John Ballou
Legislative Appointee

Representative Daniel J. Thimesch
Legislative Appointee

Kurt von Achen
Architect Appointee

Robert Hiatt
Consumer Appointee

Gail Bright
Assistant Attorney General Appointee

Wes Galyon
Builder Appointee

Chris McKenzie, Vice-Chairperson
League of Kansas Municipalities Appointee

Tim Ryan
Building Code Enforcement Appointee

Carolyn Hall
Consumer Appointee

Darol Rodrock
Home Builder Appointee

Mike Perry
Builder Appointee

Ron Worley
City Building Code Enforcement Appointee

Robin Lehman
Home Builders Appointee

REPORT ON THE TASK FORCE ON REGULATION OF RESIDENTIAL BUILDING CONTRACTORS

Summary

During the 1996 Session, the Legislature passed H.C.R. 5053 which established a 15-member Task Force on the Regulation of Residential Building Contractors and directed a study of the residential building industry.

H.C.R. 5053

H.C.R. 5053 states the following:

the residential building industry is a major Kansas industry and is vital to the economic health of the state;

residential building contractors are not required to be licensed or regulated by the state;

all cities and counties have not exercised the authority to license or regulate residential building contractors;

problems resulting from violations of city and county building codes continue to occur;

existing city and county building codes are not always adequately enforced;

lack of consumer knowledge prevents home buyers from adequately protecting themselves from dishonest or unqualified residential building contractors; and

losses incurred by homeowners as a result of improper construction practices are of concern to the Legislature.

H.C.R. 5053 gave the Task Force the specific charge to conduct a study and review of the issues surrounding the need for regulation or licensure of residential building contractors and to provide comprehensive solutions to the problems that exist in purchasing and constructing safe and structurally sound residences.

The Task Force was comprised of 15 members as follows:

- one member to be appointed by the Kansas Building Industry Association;
- one member to be appointed by the Lawrence Home Builders Association;
- one member to be appointed by the Wichita Area Builders Association;

- one member to be appointed by the Home Builders Association of Greater Kansas City;
- two city or county building code enforcement officers, one to be appointed by the President of the Senate and one to be appointed by the Speaker of the House of Representatives;
- two members of the general public representing consumers, one to be appointed by the President of the Senate and one to be appointed by the Speaker of the House of Representatives;
- four legislators, of which one shall be appointed by the President of the Senate, one shall be appointed by the minority leader of the Senate, one shall be appointed by the Speaker of the House of Representatives and one shall be appointed by the minority leader of the House of Representatives;
- an Assistant Attorney General from the Consumer Protection Division to be appointed by the Attorney General;
- one member who is an architect to be appointed jointly by the President of the Senate and the Speaker of the House of Representatives; and
- one member appointed by the League of Kansas Municipalities.

A written report, including any recommendation of proposed legislative alternatives was to be presented by the Task Force to the Governor and the Legislature no later than January 31, 1997.

Background

There has been legislative interest in problems associated with the residential home building industry for some time. Several bills directed at regulating various facets of the home building industry have been introduced in recent legislative sessions as follows:

1995 S.B. 212 would have amended the Consumer Protection Act to allow for the award of attorney fees to the Attorney General and local prosecutors for enforcement of the Act.

1995 S.B. 224 would have prohibited cities from issuing certificates of occupancy for newly constructed dwellings prior to the dwelling meeting structural, electrical, plumbing, heating, air conditioning, and mechanical standards under all applicable building codes.

1995 S.B. 331 would have provided for the establishment of homeowners recovery fund and for the recovery of certain losses by homeowners caused by contractors for single-family residences.

1996 S.B. 629 would have required statewide licensure of residential building contractors under the State Board of Technical Professions.

None of the above-mentioned measures were passed by the Legislature, although S.B. 212 passed the Senate and the House Judiciary Committee. The bill was defeated on the House Floor and was stricken from the House Calendar.

Task Force Activity

The Task Force met for a total of seven days. The Task Force heard from over 40 conferees, and reviewed letters received from others who did not appear; conducted a field tour of seven homes where owners had complained of substandard contractor work; conducted a survey of selected Kansas communities; reviewed other states' laws; and reviewed considerable other research in this area.

Conferees included a number of aggrieved homeowners, a home builder, and representatives of several local homebuilder associations, representatives of the Attorney General's Consumer Protection Division, the Kansas Insurance Department, the Kansas Real Estate Commission, the Kansas Board of Technical Professions, a number of city and county building and planning and zoning officials, a mortgage broker, a representative of a mediation and arbitration service, a representative of the Kansas Trial Lawyers Association, an Arizona consumer attorney by teleconference call, and others.

Aggrieved Homeowners

Initially, the Task Force heard from a number of aggrieved homeowners who related their individual problems encountered in the construction of a new home. Examples of construction problems cited ranged from minor to severe and included misplacement of interior walls, inadequate or lack of support beams, faulty roofs, cracked concrete in basements, and driveways, major water leaks, cracks in sheet rock and walls, use of substandard construction materials, failure to follow architectural designs, faulty installation of windows, and various other problems. Several testified they had been involved with protracted litigation and had incurred large legal fees, had inadequate remedies available to them under current law, and had suffered major family disruptions. Some conferees expressed frustration with their attorneys as well as the judicial system. These conferees offered suggestions about how the law or the process might be changed to deal with inadequate home construction which included the following:

1. improve information availability regarding home construction warranties;
2. provide for more adequate inspection and enforcement of building codes;
3. provide for more and better-trained building inspectors;
4. provide for better monitoring of the issuance of home occupancy permits;
5. establish increased accountability on the part of home builders;
6. establish a system of statewide licensure, bonding, and certification for contractors and subcontractors in the home building industry;

7. require those involved in the home building business to have the company name clearly indicated on work vehicles for identification purposes;
8. enact specific home buyer protection measures within the Consumer Protection Act;
9. require lender and real estate seller accountability in regard to home construction;
10. strengthen measures to ensure that home construction is finished on schedule;
11. provide better methods for checking on home builders, especially their financial condition;
12. allow the recover attorney fees by homeowners against builders;
13. provide better consumer education;
14. establish lemon laws similar to those used in the automobile industry;
15. require registration of contractors; and
16. provide for specific disclosure of home buyer remedies and other requirements at closing.

Home Building Industry

The Task Force received testimony describing the home building industry practices in Wichita and Sedgwick County where licensing of building contractors and subcontractors is required. According to a Wichita building code inspector, the municipality has a strong licensure and regulation program with enforcement authority through the municipal court. Some transgressor builders have done jail time for their repeated failure to comply with local building codes. A Task Force member who represents the Wichita Area Builders Association (WABA) reviewed the WABA efforts to safeguard the integrity of the building industry. Approximately 50 or 60 complaints are received each year against builders and most of these are resolved by telephone.

Zoning Administration—County Planning

Two zoning administrators, one from Hays and one from El Dorado, testified before the Task Force. The administrator from Hays described the growth of building codes in his area. He expressed a belief that national codes will be in place by the year 2000. The administrator from Hays indicated that currently there is a lack of building codes in most of the rural areas of Kansas and that rural homes are not inspected at all. According to the conferee a prior attempt to adapt building codes in 1994 was abandoned due to the opposition of builders who stated that adherence to codes would price them out of business, that government intrusion in their lives was unwelcome, and that local builders were fearful they would not be allowed to do their own work.

A county planning task force member from Andover urged the adoption of a statewide contractor provision for licensing and bonding. He expressed a concern that local officials are reluctant to enforce local licensure provisions. The suggestions offered by these conferees are not necessarily the positions taken by their elected city or county officials.

Building Code Enforcement

A Task Force member, involved in building code enforcement, presented statistical information regarding the building code compliance inspection and certification in Overland Park. He indicated less than ten complaints are received each year, whereas approximately 934 single family permits were issued in 1995 and approximately 983 single family permits were issued through October 1996.

Home Buyers Warranty—Insurance

A marketing representative for Home Buyers Warranty presented information on the 2-10 Home Buyers Warranty which stands for ten years of structural coverage, starting with the closing date, one year of workmanship coverage, and two years of mechanical systems coverage. The builder application process for membership with the company was outlined. Arbitration of claims is required and the homeowner must waive their right to sue the builder.

An official with the Kansas Insurance Department described how a homeowner's insurance policy is designed to cover acts of God, negligence and liability of homeowners, but does not cover faulty workmanship of builders. He also addressed bonding systems for contractors and added that such a system could be costly. He explained that home buyers' warranty programs are formed under federal law. States cannot review their rates, investigate how claims are settled, or review their financial status.

Kansas Real Estate Commission

A member of the Real Estate Commission addressed the Task Force noting that the agency is fee funded. He stated there are five investigators for complaints and approximately 10,000 licensed real estate agents. He indicated that most complaints are worked out through the realtor, builder, and buyer and do not require litigation. The conferee said it would be extremely difficult, if not impossible, to develop a statewide real estate contract for all home purchases.

Conference Call on Implied Warranties

An attorney from Arizona with long standing experience in home construction litigation, testified by a telephone conference call. He spoke on the legal concept of implied warranty and compared this theory to negligence and breach of express warranty laws. As a court generated theory, and not a statutorily created one, the implied warranty in the State of Arizona requires that a new home is built in a workmanlike manner or in an ordinarily skilled manner, or to the mean standard of competence. According to the conferee, the national trend is to follow the implied warranty theory. States such as Florida, Arizona, New Mexico, and California, which

are experiencing high growth are developing case law on the theory of implied warranty. The Arizona law regarding licensure requirements for all contractors was described in detail.

Consumer Protection Act

An Assistant Attorney General addressed the Consumer Protection Act (CPA) as it applies to issues involved in home building cases. According to the conferee there were 40 complaints with 28 from Johnson County in 1995 and 18 complaints filed through September of 1996. He described the difficulties in pursuing a case under the CPA. In order to show a lack of merchantability a plaintiff must prove many defects. The workmanship would have to be unconscionable in the court's opinion. Negligence or breach of contract would not be enough without showing pattern of conduct by a builder. Attorney fees are allowed but overall, cases in the building construction area are difficult to prove. The conferee later advised the Task Force that the Attorney General's office is short on staff to pursue implied warranty actions under the CPA. He suggested that a better approach would be to create an independent implied warranty statute and to allow the recovery of attorney fees in a private cause of action against a builder.

Kansas Trial Lawyers

An attorney from the Kansas Trial Lawyers Association spoke to the Task Force about the difficulty representing clients in actions against builders in both new construction as well as renovation cases. He indicated that attorney fees, expenses of litigation, study reports, professional opinions, and expert witness fees are costs that are not covered in awards which are all part of the actual cost of restoring a home to the condition it should have been in the first place. The conferee said the CPA was changed recently from intentional to willful wrongdoing. He said that there are problems with the definition of willful.

Other Attorney's Comments

One attorney from Kansas City suggested the creation of an implied warranty of merchantability with damages available in addition to costs. He further recommended that consumers should have a right of action under product liability theories.

An attorney from Independence, Missouri, addressed the Task Force with complaints of the inferior quality of homes built in the \$300,000 to \$700,000 range. He suggested the state allow treble damages to cover residential consumer fraud.

An Olathe attorney who was also an aggrieved homeowner suggested the adoption of statewide safety codes to supplement local safety codes. He further suggested a limit on a construction lender's ability to secure a lien interest beyond the contract price of a home; a prohibition under which subcontractors cannot sue homeowners without a written contract; and a measure to address the problem of developers selling lots to builders rather than homeowners.

The attorney for the builder who constructed the residence of one of the complaining homeowners presented testimony on behalf of the builder and generally addressed the ongoing lawsuit and problems surrounding the situation.

Arbitration and Mediation

A representative of a mediation and arbitration service made a number of suggestions which included, among others, the following:

1. State law should be changed to put both parties on a level playing field and to encourage both parties to enter into arbitration contracts. The consumer should receive informational materials explaining the procedure at the time of signing the building contract.
2. Predispute resolution clauses in contractual agreements should be made illegal unless both parties agree on dispute resolution. These contractual agreements should meet certain levels of fairness, full disclosure, and procedural fairness.
3. An equal exchange of information needs to be mandated. There is no right to discovery in arbitration in Kansas at this time.
4. Procedures need to be established that require promptness of settling disputes, thus lowering costs.
5. The selection process of the mediator or arbitrator which is fair to both parties needs to be outlined. The builder's liability insurance company would have to be notified of upcoming arbitration.
6. Costs and how they are to be paid need to be described.
7. A consumer should be able to contact a designated state office for additional information about other dispute resolution programs or to report the results of the arbitration experience. This would require that the state establish an office to act as a clearing house and monitoring agency for information about dispute resolution programs.
8. The law needs to be changed to allow the parties to sue if arbitration is not satisfactory. All causes of action should be tried in one procedure. Property owners should be allowed to back out if arbitration is unsuccessful. This would allow arbitration of a tort as well as a contractual disagreement.
9. The law should be changed to provide that any application to enforce or challenge an arbitration award should be made directly to the Court of Appeals rather than going through District Court first.

Other State's Contractor Licensing and Bonding Laws

Many states around the country have some form of contractor licensing. There are basically two types of licensing. The first is registration which usually requires a contractor to show proof of workers' compensation and liability insurance and sometimes post a bond. The second type is a certification process which, in addition to the requirements of registration, also requires the applicant to be tested on trade and business management knowledge. Some of the most stringent laws require the contractor to show proof of practical trade experience, proof

of financial responsibility, and contribute money to a Consumer Recovery Fund. The majority of states that license contractors regulate general, residential, and home improvement contractors. A few states only regulate home improvement contractors. Certain states only have requirements for nonresident (out-of-state) contractors. Currently, 36 states require some sort of contractor licensing or registration; 27 of which include home builders.

Information was requested by the Task Force on the budget and the number of inspectors from Arizona and Utah. The response from these states revealed that Arizona has a budget of approximately \$4,786,000 for the entire state agency (Arizona Registrar of Contractors) and employs 22 inspectors located throughout the state in 12 different sites. Utah's Department of Commerce operates with a budget of approximately \$257,820 and employs 28 inspectors who work out of Salt Lake City with one inspector located elsewhere in the state. Copies of state statutes from Utah, Virginia, and Oklahoma governing the building industry were distributed to the Task Force for their review.

A number of states have some type of bonding requirement for home builder contractors. The purpose of the bonding requirement varies. For example, in Arizona, bond requirements for general contractors are between \$5,000 and \$90,000; for residential contractors between \$5,000 and \$15,000; and speciality residential contractors between \$1,000 and \$7,000. Contractors may file a \$100,000 bond in lieu of contributing to the Residential Contractors Recovery Fund. The latter bonds and the Recovery Fund are for claims for persons injured by a contractor's failure to adequately build or improve a residential structure. By contrast, in Montana, all contractors and subcontractors must be licensed and must post a bond in an amount equal to the contractor's monthly payroll not to exceed \$25,000. The minimum amount is \$6,000 for a general contractor and \$4,000 for a speciality contractor. The bond is surety for taxes due to the state, wages and fringe benefit, and other payments to persons furnishing labor.

Field Tour

The Task Force spent one day in the field touring homes of several consumers who voiced complaints. Of the six residences on the tour one was in Eudora, one was in Overland Park, three were in Olathe, one was in Lenexa and one in Basehor. As a result of the field trip, certain members of the Task Force expressed a belief that some of the complaints were of dubious merit and further, that some of the homeowners may have contributed to their problem by the unauthorized use of plans or designs.

Survey of Local Officials

A survey regarding residential home building issues was sent out to various local government building officials. Responses were received from 12 entities including the cities of Augusta, El Dorado, Leawood, Lenexa, McPherson, Olathe, Overland Park, Prairie Village, Shawnee, and Salina, and Butler and Johnson counties. The following is a brief summary of the survey questions and responses received:

1. What are the number of building permits issued in your area for calendar year 1995 and to date (October 24, 1996) in 1996? How many of the building permits are for new home contractors?

The City of Augusta reported the fewest building permits issued in 1995 with a total of 188, 40 of which were for new residences. The City of El Dorado reported the fewest building permits through September of 1996 with 148 and 20 of which were for new residences. The City of Overland Park reported the largest number of building permits for 1995 and 1996 with 4,205 of which 934 were new residences in 1995 and 3,641 of which 983 were for new residences through reporting period for 1996.

2. What problems have been encountered with residential home builders in your locality? Does your locality have some type of complaint procedure?

Problems reported varied. . Examples of responses included: inability to get subcontractors licensed (Augusta); refusals to respond to call backs (Overland Park); failure to get a final inspection or certificate of occupancy (Shawnee); and inexperienced builders (Salina). Several local units of government responded there were few problems or the problems were solved at the time they arose (Johnson County, Leawood, and McPherson). No local unit reported that a formalized complaint procedure existed.

3. Do you have a local licensure requirement for residential contractors? What is the annual fee for licensure?

Seven local units responded that a license was required. Two of these responses said that only a business license was required.

4. Do you have any recommendation or solutions for problems that you have raised?

Responses included: require state licensure (Augusta and Shawnee); continued education for contractors (Augusta); require mortgage companies to have a city-issued certificate of occupancy before real estate closing and require realtors to inform buyers whether the home has been approved by the local jurisdiction (Olathe); and suspend contractor licenses for three building code violations in one year (Shawnee).

5. Should the state license residential contractors?

Five local units favored state licensure. The other seven responses either opposed state licensure or expressed reservations.

6. Should the state adopt a statewide building code?

Five local units favored the adoption of a statewide building code; four opposed such action; and the other three local units did not respond to this question.

7. Should the state require residential contractors to secure performance bonds?

Six favored and six opposed this idea.

Conclusions and Recommendations

The Task Force on the Regulation of Residential Building Contractors recognizes the fact that the issues and problems involved in residential home building are vast and complex. In an attempt to sort out the various complexities that surfaced during the hearings on the topics during the interim, the Task Force elected to focus on the following topics.

Implied Warranty. The Task Force considered a bill that would have expanded the Consumer Protection Act to include a theory of implied warranty of habitability and implied warranty of workmanlike construction as it applies to a new single family dwelling sales or construction or remodeling or renovation of an existing residence. The Task Force rejected the idea of amending the Consumer Protection Act in part because the Attorney General's Office said it did not have adequate staff to take on expanded responsibilities under this law.

The Task Force believes, however, that Kansas law should recognize implied warranties of habitability and workmanlike construction. The Task Force therefore recommends the introduction of legislation apart from the Kansas CPA as a bill which establishes a private civil cause of action and creates implied warranties of habitability and workmanlike construction. The warranties would attach to every contract or agreement for the sale or construction of a new residence or the alteration, repair, remodeling, or renovation of an existing residence. Items to be warranted under the implied warranty of habitability include the following:

1. work performed and materials used must comply with any plans and specifications contained in the contract or agreement;
2. work performed and materials used must comply in all material respects with applicable building codes and other public requirements establishing standards of quality and safety which have been adopted by statute, city ordinance, or county resolution or by rules and regulation;
3. the roof, supporting walls, floors, windows, doors, insulation, and foundation of the residence must be in safe working order and structurally sound;
4. the electrical, plumbing, or mechanical systems must be in safe working order and condition; and
5. the residence, or affected part in the case of a renovation, repair, remodeling, or alteration must be reasonably suited for its intended use.

Under an implied warranty of workmanlike construction, the contractor also would warranty that the work was done using due care and skill according to generally accepted industry practices.

The bill provides that the cause of action cannot be initiated until the contractor has been reasonably notified in writing of a defect and the contractor either: (1) denies the claim or (2)

fails to cure or remedy the defect in a timely manner. The contractor has 30 days, after notice, to cure a defect that renders the residence unsafe to occupy and 90 days to cure any other defect. A three-year statute of limitation is established, from the date of closing for a new residence and from the date of final payment for a remodeling, repair, renovation, or alteration project regarding items 1 to 3 outlined in the paragraph above. A one-year statute of limitations is provided to bring an action under items 4 and 5 above as well as for enforcement of the implied warranty of workmanlike construction.

Reasonable attorney fees and costs can be awarded to the prevailing party at the discretion of the court. Any warranty created by the bill will not supersede any express manufacturer's warranty and shall be in addition to any express or other implied warranty provided by law.

Oral Contracts. The Task Force considered a recommendation that legislation be recommended which imposes a statutory limitation on the right of subcontractors to file suit against homeowners absent a written contract by amending the Statute of Frauds. The Task Force rejected this recommendation being unwilling to tamper with the Statute of Frauds.

The Task Force, however, recommends a bill to limit the enforcement of oral contracts by amending the mechanics' lien law notice of intent to perform provision regarding new residential property. The bill provides that a person may not enforce an oral contract in law or in equity unless a notice of intent has been filed. The bill also provides that a written contract may not be enforced in excess of the amount expressed in such a contract in law or equity.

Licensure. The Task Force considered a bill draft on licensure of residential building contractors but rejected this concept as unwarranted at this time. The bill under consideration contained a definition of a residential contractor as one who offers or submits a bid to construct any new one or two-family dwelling that would require a building permit. The bill would have exempted various professionals such as architects, engineers, plumbers, electricians, subcontractors working under the supervision of a licensed residential contractor, and wage earning employees.

The bill contained many similarities to 1996 S.B. 629.

Plans. The Task Force also considered but rejected the idea of endorsing legislation that would have required building plans, either certified or sealed, to be filed in order for a building permit to be issued. City or county units of government could have opted-out of the provisions of the bill.

Mediation or Arbitration. The Task Force also considered but rejected a bill which would have prohibited the use of predispute alternative dispute resolution provisions in homebuilder contracts.

Other Issues. Other issues were considered by the Task Force during the interim study, including the following:

1. temporary occupancy certificates;
2. lemon laws for single family residential;
3. homeowner recovery fund;

4. adoption of a statewide building code;
5. contractor performance bonds;
6. contract requirements insurance;
7. lender liability issues when moneys are released inappropriately to a builder;
and
8. statewide certification for building inspectors.

Members of the Task Force recognize that the lack of trained workers in the home construction area can be problematic. One approach to help alleviate this situation is to enlist the assistance and cooperation of secondary and vocational educators in an effort to fill the void caused by the shortage of trained, experienced home building craftsmen. Individuals within the home building industry are encouraged to become active partners with the schools to achieve this goal.

As a final concern, the Task Force is aware that the Insurance Service Organization (ISO) is in the process of rerating homeowners' insurance policies on a nationwide basis. Some informed persons believe ISO rerating will result in an emphasis on tougher building inspection programs and building code requirements. These changes are expected to be ready for implementation in 1998 and could result in substantially higher homeowner insurance rates for those persons living in areas that do not have building codes and building inspections. The Task Force is further aware that many cities and counties in Kansas do not have building codes or building inspectors.

When the ISO rerating procedure is completed, a further review of the need for a statewide building code and inspection process may be necessary. The Task Force realizes that consumers are often confused by the complex nature of various building codes as well as a total lack of building codes in some areas. In addition, the Task Force is concerned that tracking building code provisions as well as other complicated measures involved in a residential construction project can prove to be a daunting task for many homeowners. Certain members of the Task Force believe that a method should be developed by the Legislature to continue to monitor the status of the home building industry since the potential for problems that affect consumers within the home building industry will continue. Other members of the Task Force believe that, since in Kansas cities and counties have home rule power, the local level is the appropriate level to deal with these problems.

#2
TESTIMONY OF BOB VANCURUM, CHAIR,
TASK FORCE ON THE REGULATION OF RESIDENTIAL BUILDING CONTRACTORS

Thanks for the opportunity to appear before the committee and present the report and recommendations of the above task force. You have all received a copy of our 12 page report, so I won't repeat what's in it. Most of you will remember that the task force was created by the 1996 legislature to investigate continuing complaints about shoddy workmanship and even violations of city and county building codes and the extreme difficulty some consumers have had in recovering enough to avoid bankruptcy when faced with a builder who chooses to litigate rather than make the necessary repairs or corrections.

The task force had 15 members, with 4 from the building industry, 2 from city building code departments, 2 consumers, the attorney general, an architect, a League of Municipalities rep and four legislators. We met a number of times, took one field trip, took testimony from 40 conferees, and considered a wide variety of measures, including licensing of homebuilders, bonding, statewide building codes and consumer protection amendments. Eventually the Task force agreed without dissent on the two bills before you today. I want to publicly express my appreciation to the members of this task force who took time to seriously attempt to address some real problems facing the homebuilding industry. I was especially pleased that the several representatives of the homebuilding trade on the committee were willing to compromise and support the bills you see before you.

The most significant of the bills would establish in statute the right of an aggrieved homeowner to recover if they show a breach of an implied warranty of habitability or workmanlike construction. In addition to defining the warranty of habitability in some detail (bottom of page 1 and top of page 2), the bill in Section 1(g) would permit the award of attorney's fees to the prevailing party. One of the common threads running through the complaints of the victims of poor construction and in some cases homes that were structurally unsound that I've heard is that they have no ability to take the contractor to court and recover enough damages to correct the problems because most of what they needed to do so would be consumed in litigation costs. These are costly cases to bring with lots of expensive witnesses and there is often a disequal ability to bear the expenses, because builder's insurance often pays defense costs.

It is true that Kansas law already assumes an implied warranty of performing construction in a workmanlike manner. Scott v. Strickland 10 Kan App 14,18 (1984). But it is not clear what that warranty covers, and it is probable that a court would not allow

House Judiciary
Attachment 2
2/17/97

the award of attorneys fees, which this statute would permit. The bill also sets forth a statute of limitations, that certain of these actions must be brought within one year, and certain may be brought for three years from the date of closing. These are essential changes in the law if we are to give consumers even a fighting chance of recovering their damages from negligent, sloppy and sometimes unscrupulous homebuilders and remodelers.

Our Task Force did find that the overwhelming number of these complaints are coming from the rapidly developing urban areas of the state. This shouldn't be surprising, because that's where the majority of construction is occurring. Furthermore, it's the area where many new and inexperienced builders flock. I would suggest that you are going to have a lot fewer complaints about substandard and negligent construction in communities where everyone knows most everybody than in an area where there are over 1,000 so-called homebuilders (KC area). The task force also noted that complaints seemed to be much reduced in the areas like Wichita where there has been local licensing of homebuilders. There also is such licensing in Hays. There are no building codes in most of the rural areas of the state however and some of the biggest abuses seem to be occurring in rural areas like Butler county and Leavenworth county that are beginning to see new housing construction spill over from nearby urban areas.

I need to say a few words about the other bill our Task Force recommended. This bill would bar recovery by a subcontractor on an oral contract theory if they had failed to file a notice of intent to perform. We had at least one conferee testify before us who said he was sued on a supposed oral contract by a subcontractor who hadn't filed a notice of intent and claimed he wasn't paid by the general contractor. I recognize this bill presents some difficult issues, but it was approved on a majority vote of our Task Force.

I would be happy to try to answer any other questions.



#3
**League
of Kansas
Municipalities**

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL 300 S.W. 8TH TOPEKA, KS 66603-3896 (913) 354-9565 FAX (913) 354-4186

TO: House Judiciary Committee
FROM: Chris McKenzie, Executive Director
DATE: February 17, 1997
RE: HB 2161 and HB 2162

Thank you for the opportunity to appear today on behalf of the League of Kansas Municipalities in support of HB 2161 and HB 2162. I served as Vice-Chairperson of the Residential Building Contractors Task Force. The two pieces of legislation that were finally recommended reflect the difficult negotiations that went on among Task Force members. I want to express my appreciation to Bob Vancrumm for his leadership as Chairperson and to my fellow Task Force members.

These two measures, HB 2161 and HB 2162 are by no means perfect. They do reflect a sincere effort, however, to address what I was convinced is a problem in some of our highly developed parts of our state. Will these measures "solve" the problem? Absolutely not. I would respectfully suggest, however, that they will start of the process of balancing the interests of the construction and consumer communities which clash on this issue.

RECOMMENDATION: Inasmuch as HB 2161 and HB 2162 represent the work products of negotiation and compromise on the Residential Building Contractors Task Force, the League recommends your favorable consideration of these measures.

About the League of Kansas Municipalities

Established by municipal officials in 1910, the League of Kansas Municipalities is a voluntary, nonpartisan federation of over 500 Kansas cities. It operates as a public agency and is defined by state laws as an instrumentality of its member cities. The powers and duties of the League are prescribed by state law and in bylaws adopted by the voting delegates of its member cities. The primary mission of the League is to assist its member cities in strengthening local government in order to advance the general welfare and promote the quality of life of the people who live within our cities.

House Judiciary
Attachment 3
2/17/97

HOUSE COMMITTEE ON JUDICIARY
Monday, February 17, 1997

My name is Steve Dickerson and I am legislative chair for the Kansas Trial Lawyers Association (KTLA) for the 1997 legislative session. KTLA always welcomes the opportunity to appear before this committee as it considers and works legislation affecting consumers' legal interests.

The Task Force on Regulation of Residential Building Contractors met extensively last year and earnestly explored a host of measures to improve the integrity of residential building construction in this state. The Task Force gave KTLA and others the opportunity to be heard and KTLA voiced its perspective at several Task Force meetings.

Most consumers dream of building a new home and many are able to make their dream come true. When a family builds a new home it is usually the family's biggest financial undertaking. HB 2162 is intended to provide consumers with increased legal protection when their dream home turns sour.

Although KTLA believes the language of the bill is a good starting point, the bill could be significantly improved with a few key adjustments. Attached is a copy of the bill with these key changes noted thereon as follows:

Statute of Limitations
Subsection (e), page 2, lines 28 to 32

Implied warranty breaches are subject to a ^{two} ~~three~~-year statute of limitations under longstanding Kansas law. Shortening this period of limitations to one year for certain claims clearly does not advance the objectives of the bill.

House Judiciary
Attachment 4
2/17/97

Fees**Subsection (g), page 2, lines 38 to 40**

The attorney fee language contained in the Kansas Consumer Protection Act, which is specifically designed for consumer transactions, should be substituted for the language contained in subsection (g).

Cost of Curing**Subsection (j), page 3, line 4**

After giving the contractor a fair chance to cure any broken promises or defects, the consumer needs to be able to hire another contractor to cure the problem and have the original contractor pay the substitute contractor's bill. Damages based on value of the home with and without the defect are hard to figure, although that is a common standard for determining damages.

Definition of Contractor**Subsection (a)(2), page 1, lines 24 to 26**

Although it is remote, the existing definition of "contractor" could be construed to mean that a contractor is only one who undertakes to build a new home "with or for another." Adding "alone or" would clarify that a contractor doesn't have to undertake the project with or for another.

HOUSE BILL No. 2162

By Committee on Judiciary

1-31

9 AN ACT concerning residential building contractors; creating implied
10 warranties of habitability and workmanlike construction.
11

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

13 Section 1. (a) When used in this act:

14 (1) "Residence" means any: (A) Single family house; or (B) unit in a
15 building containing living quarters occupied or intended to be occupied
16 by not more than four families living independently of each other; or (C)
17 unit in a multiunit residential structure of five stories or less in which title
18 to the individual units is transferred to owners under a condominium or
19 cooperative agreement. Such term shall not include mobile or manufac-
20 tured homes, appurtenant recreational facilities, detached garages, drive-
21 ways, walkways, patios, boundary walls, retaining walls not necessary for
22 the structural stability of the residence, landscaping, fences, nonperma-
23 nent construction materials, off-site improvements and all similar items.

alone or

24 (2) "Contractor" means any person who undertakes, with or for an-
25 other, to build or construct a new residence or alter, repair, remodel or
26 renovate an existing residence.

joint venture,

27 (3) "Person" means any individual, corporation, partnership, associ-
28 ation or other legal entity.

29 (b) (1) An implied warranty of habitability and an implied warranty
30 of workmanlike construction shall attach to every contract or agreement
31 for the sale or construction of a new residence or the alteration, repair,
32 remodeling or renovation of an existing residence in this state.

33 (c) Under the implied warranty of habitability, the contractor repre-
34 sents and warrants each of the following:

35 (1) The work performed and materials used comply with any archi-
36 tectural or other plans and specifications contained in or incorporated
37 into the contract or agreement;

38 (2) the work performed and materials used comply in all material
39 respects with applicable building codes and other public requirements or
40 regulations establishing standards of quality and safety which have been
41 adopted by statute, city ordinance or county resolution or by rule or reg-
42 ulation adopted to implement such statute, ordinance or resolution;

43 (3) the roof, supporting walls, floors, windows, doors, insulation and

and free from leaks

1 foundation of the residence shall be in good and and condition,
2 sound; and structurally

3 (4) the electrical, plumbing or mechanical systems shall be in safe
4 working order and condition; and

5 (5) the residence, or the affected part of the residence in the event
6 of alteration, repair, remodeling or renovation, shall be reasonably suited
7 for its intended use.

8 (d) Under the implied warranty of workmanlike construction, the
9 contractor represents and warrants that the work performed was done
10 using due care and skill according to generally accepted industry prac-
11 tices.

12 (e) No civil action directed to a breach of any warranty contained in
13 this section shall be commenced until after the contractor has been rea-
14 sonably notified in writing of the breach or defect and the contractor (1)
15 denies the claim or (2) fails to cure, correct or remedy the breach or
16 defect in a timely manner. The contractor shall have 30 days after receipt
17 of the notice to cure, correct or remedy any breach of warranty or defect
18 that has made the residence unsafe to occupy, and 90 days after receipt
19 of the notice to cure, correct or remedy any other breach of warranty or
20 defect. If the contractor is not reasonably available to notify as required
21 by this subsection, a civil action directed to a breach of any warranty
22 contained in this section may be commenced at any time. Any action
23 brought pursuant to paragraph (1), (2) or (3) of subsection (c) shall be
24 commenced within three years of the date of closing in the case of a new
25 residence or three years from the date of final payment to the contractor
26 in the case of alteration, repair, remodeling or renovation of an existing
27 residence or it shall be forever barred. Any action brought pursuant to

this section shall be commenced with the time period provided in K.S.A. 60-512, and amendments thereto,

28 paragraph (4) or (5) of subsection (c) or pursuant to subsection (d) shall
29 be commenced within one year of the date of closing in the case of a new
30 residence or one year from the date of final payment to the contractor in
31 the case of alteration, repair, remodeling or renovation of an existing
32 residence or it shall be forever barred. If compliance with the notice
33 provisions of this subsection would result in the barring of an action, such
34 time shall be extended by the time period required for compliance with
35 the provisions of this subsection.

36 (f) Any disclaimer or limitation of any warranty contained in this sec-
37 tion shall be void.

38 (g) In any action brought under this section, the court may award to
39 the prevailing party costs and reasonable attorney fees, including those
40 on appeal →

41 (h) The remedies provided in this section shall not be construed to
42 limit, impair or exclude any other common law or statutory remedies or
43 claims for relief.

, limited to the work reasonably performed if:
(1) The consumer has brought or maintained an action the consumer knew to be groundless and the prevailing party is the contractor; or a contractor has breached a warranty contained in this section and the prevailing party is the consumer; and
(2) An action under this section has been terminated by a judgment, or settled.

1 (i) Any warranty created by this section shall not supersede any ex-
2 press warranty and shall be in addition to any express or other implied
3 warranty provided by law.

4 Sec. 2. This act shall take effect and be in force from and after its
5 publication in the statute book.

(j) In any action to enforce a breach of any warranty contained in this section an aggrieved consumer may claim as damages and recover the cost of curing, correcting or remedying the breach of warranty or defect.

#45

HOUSE JUDICIARY COMMITTEE
HB 2161 & HB 2162

February 17, 1997

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Janet Stubbs appearing today on behalf of the members of the Kansas Building Industry Association.

Appearing before the Judiciary Committee on the issue of warranty of habitability causes me some discomfort since I do not possess a law degree. However, I will attempt to express some of the concerns which have been expressed by our members--not because they possess the qualities which have been described by some conferees appearing on issues of interest to the industry, but rather because we feel there hasn't been consideration given to some conditions which affect warranty work.

An example of such a situation would be if the item of concern in question was a window which was warranted by the manufacturer. The builder would be required to notify the manufacturer representative who travels a set territory and wait for his inspection. To tamper with the product is often a reason given by the manufacturer as a cause to void the warranty. The rep might be unable to inspect the window within the 30 days I understand is provided in the bill. How would this be handled?

Throughout this bill, it would seem that the builder could be made liable for decisions which may be made by the homeowner and later decided it is not what the owner wants. What does Section 1 c (5) mean? If the owner of a home wants to remodel in some way and hires a contractor to do the job, it is later determined that the addition or repair was not a good selection of type of material, etc., will the builder be subject to liability?

Most builders provide a 1 year warranty and there are companies which provide warranties which some builders buy on their product. Although I will not take the committee's time to go into details on this warranty, I would be glad to provide information or obtain answers to questions if I do not know the answer.

I recognize that the Kansas City area has received publicity on poor quality construction which created the task force from which this bill came. I also believe that there are other ways of handling the issues which were revealed during the meetings of the task force than to create more opportunity for litigation.

On SB 191 and the subject of the Intent to Perform and oral contract, I will tell you that I was involved in the revision to the statute and the insertion of the intent to perform provision. It was intended, and I believe the statute provides as written, that the intent to perform was required to

House Judiciary
Attachment 5
2/17/97

be filed prior to closing on a new structure. Without such, a mechanics lien could not be filed by a subcontractor. I can assure you that was the intent of the group of individuals who worked on the legislation at the time and I believe that is the way it should be enforced. I am told some courts are permitting mechanics liens to be filed without first having filed an intent to perform. We are all subject to the abilities and actions of the Court.

Not permitting assurance of collection of a debt in the construction industry, when there is no written contract, would assuredly change the way the industry operates. The consumer group involved in this issue may believe this would be good for the home buyer, but what happens when the custom homeowner wants to add insulation to some of the interior walls, for example, while the insulation job is in progress? This would increase the cost of the job and, would, under the provisions of this bill, be a problem for collection by the sub, if it came to payment problems.

Most subcontractors develop a relationship of trust with the general contractors with whom they work. They know the price per square foot, running foot, etc. and call the sub and advise when the portion of the work he is to perform will be needed. The homeowner should determine the integrity and ability of the general contractor and have a clear communication with him on what he expects and how it is to be done.

The KBIA cannot support either bill and urges the Committee to give further consideration to this issue before taking action. We strongly support enforcement of construction codes which will assure customer satisfaction with the "American Dream" and prevention of a "nightmare" for the consumer. I believe the area of the State with the most complaints should be able to solve the majority of their problems with good inspections and without increasing the cost of the house. We do not support creating an environment which encourages litigation or removes the ability of a contractor to collect what is rightfully owed him for his labor. We believe the number of complaints should be put in perspective by considering the number of houses which have been built to produce the complaints about which you are hearing.

#6



MID-AMERICA LUMBERMENS ASSOCIATION

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE

House Bill # 2161

February 17, 1997

Mister Chairman, members of the House Judiciary Committee. My name is Art Brown. I represent the retail lumber and building material dealers in Kansas through the Mid-America Lumbermens Association. I appear before you today representing these dealers to state our opposition to House Bill # 2161.

I will start my testimony with the statement that the contents of this testimony is the opinion of our attorney and as such, is his view and interpretation of the bill. I am not an attorney and have no expertise in being able to debate any technical legal aspects of this bill.

He has a concern with item "g" in the bill, page 2 line 37. It is his feeling that "g" does not totally relate to item "b" on page 1 line 22. Because, in his opinion, he does not see a solid correlation, he feels that a judge could apply this particular part of the bill to cover all oral contracts whether they relate to construction or not. Language that would state that the claimant is filing a mechanics lien under K.S.A. 60-1103 he feels would codify the intent of the author(s) of the bill. In this matter, I would totally leave such

*House Judiciary
Attachment 6
2/17/97*



a policy decision to the will of the Committee.

What really makes the bill onerous to us, and the reason we have to oppose this bill is item 1 under "g" on line 38 pg 2 of the bill.

Again, under attorney opinion, this language can be interpreted to nullify any oral agreements between materialmen, sub-contractors, contractors and contractor/owners unless an intent to perform has been filed as stated in K.S.A. 60-1103. In our business, it is a common occurrence for a contractor to contact us on the telephone to ask that we send out additional material to a job site, without physically having to come to our place of business to do so. In almost every case, personnel taking such a request are told to take the order and write on the invoice " per phone conversation with_____ " and the date. I can assure you, this can take place 4 to 5 times a day and on the same job site. It is our attorneys opinion that because this is a transaction that is an oral agreement between the contractor and us, that as this bill is written, if a lien were filed on this particular job, all of the material that was ordered over the telephone would not be subject to our lien rights. That is why this bill as it is currently written is totally unacceptable to our membership.

A scenario if you were to pass this bill into law, would have our contractor customers having to physically come to our place of business every time they wanted to add material to their order and sign the invoice

so we could protect our lien rights. I cannot speak for the other construction trade groups who have knowledge of this bill. I feel it very safe to say that putting such a devastating inconvenience both in costs and time upon their members would be met with as much reluctance and opposition as it would be with our members.

Also, we are not totally clear on what the intent of this bill is. It would seem that the object is to eliminate all oral contracts in the arena of construction activity. With the exception of the aforementioned example, there are no oral agreements we have with our customers. The amount of money involved in the materials used in construction, at least from our part of the construction component, makes us implement the upmost in oversight to protect our financial interest in the conduct of our daily business. If in the area of the contractor, sub-contractor and owner part of the construction component, if the author(s) of this bill feel that the elimination of oral contracts is necessary to improve communications and eliminate confrontations, we would ask that language be implemented that would not impact our current ability to do business in the way I have described in this testimony.

I would conclude by stating that we are not enamored by the concept of this bill, and certainly not this bill as it is written and ask that this committee not adopt HB 2161 for passage out of this Committee.



4 A
**Home Builders
Association**
of Greater Kansas City



600 EAST 103rd STREET • KANSAS CITY, MO 64131-4300 • PHONE (816) 942-8800 • FAX (816) 942-8367

Home Builders Association of Greater Kansas City
Testimony in Opposition to HB 2161 and HB 2162
(Implied Warranties of Workmanlike Construction & Habitability and Oral Contracts)
House Judiciary Committee
February 17, 1997
Topeka, Kansas

Chairman Harris and members of the committee, my name is Bob Bartunek, and I am an attorney representing the Home Builders Association of Greater Kansas City (HBA). I wanted to make you aware of our **opposition to HB 2161 and HB 2162.**

Briefly, we are opposed to these bills for the following reasons:

HB 2161: Bill Concerning Civil Procedure, Relating to Subcontractors' Liens, Amending K.S.A. 60-1103b

Oral Contracts: Subsection (g) is unrelated to the subcontractor mechanics lien provisions of this section. It provides that an oral contract may not be enforced unless the Notice of Intent to Perform has been filed. These are unrelated concepts. The Notice of Intent relates to mechanics liens, not oral contracts. There is a large body of law, totally unrelated to mechanics liens, regarding the enforceability of oral contracts. This subsection confuses the issue. Oral changes are often made in good faith regarding house plans, appliances, light fixtures, etc.

Also, the last sentence of the bill provides that a written contract may not be enforced in excess of the amount expressed in the contract. Theoretically, this has always been the case. It is only through change orders, whether written or oral, that the contract amount changes.

HB 2162: Bill Concerning Residential Building Contractors, Creating Implied Warranties

Ambiguous Standards: The legislation would set an ambiguous standard in the implied warranty of workmanlike construction, i.e., work must be performed according to accepted industry practices. This standard would lead to more litigation in the home buying process, which would only create problems rather than solve them.

Procedure/Enforcement of Homeowner Rights: Subsection (e) creates a procedure for homeowners to enforce their rights. Some lawsuits must be brought within one year. Under most current warranties, a claim must be made within one year, but there is a significantly longer period to file a lawsuit. The bill's one year deadline could encourage homeowners to quickly sue for fear of losing their rights.

House Judiciary
Attachment 7
2/17/97

Deadlines: Additionally, the deadlines run from either "closing" or "final payment." If there is no formal closing, or if the contractor does not receive final payment, there would be confusion as to when the deadline starts to run.

Attorney fees: Under subsection (g), the prevailing party in a lawsuit brought under the bill could recover costs and reasonable attorney fees. This provision is a major change in current law and in a long-standing policy regarding the recovery of attorney fees in contract disputes. Recovery of attorney fees is more typically applied in cases of fraud and deceit and is inappropriate in cases of warranty disputes. Once again, this would encourage litigation rather than encourage parties to solve their problems.

Warranties attempt to address situations and defects that occur after construction. We're not aware of problems that have resulted from inadequacies in current warranty law or from a lack of warranties. What would be gained by making these revisions?

We urge you to oppose HB 2161 and HB 2162.

Thank you for your consideration. I am happy to answer any questions you have.