

Approved: 1-27-98
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Emert at 10:15 a.m. on January 21, 1998 in Room 514-S of the Capitol.

All members were present except: Senator Oleen (excused)
Senator Pugh (excused)

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson Legislative Research Department
Gordon Self, Revisor of Statutes
Mary Blair, Committee Secretary

Conferees appearing before the committee: Randy Hearrell, Kansas Judicial Council
John Hamilton, Attorney, The Civil Code Advisory Committee,
Eminent Domain Committee Member
Joe Lawhon, Legislative Post Audit
Kim Gulley, Assistant Legal Counsel, League of Kansas
Municipalities

Others attending: See attached list

The minutes of the January 20 meeting were approved on a motion by Senator Bond and seconded by Senator Goodwin. Carried.

SB 448 - An act concerning the eminent domain procedure act.

The Chair recognized the receipt of numerous requests for bill introductions and stated that the Committee would begin looking at these introductions next week. He then recapped **SB 448** and **SB 413**.

Conferee Hearrell briefly summarized the Judicial Council's participation in the review of **SB 448** and acknowledged the members who made up the committee to study the issue of eminent domain. (attachment 1)

Conferee Hamilton testified in support of **SB 448**. He reviewed his committee's provisions to the bill detailing: appointment of appraisers; hearing date extensions; appeal process; and several other additions and/or language changes. Discussion and clarification from the conferee on various aspects of the bill, followed. (attachment 2)

SB 413 - An act amending the eminent domain procedure act; relating to the appointment of appraisers; concerning the appraisers' report.

At the request of the Chair, Conferee Hamilton presented his personal thoughts on **SB 413** pointing out areas of change which he felt were unnecessary and explaining why.

Conferee Lawhon appeared on behalf of the Legislative Post Audit Committee (LPAC) to explain the origin of **SB 413** and to express LPAC's support of the bill. He pointed out several weaknesses LPAC found in the bill and made recommendations to address these weaknesses. (attachment 3) Discussion followed with specific emphasis on the recommendation to require court-appointed appraisers have some experience in real estate valuation and be able to justify and document their appraised value of the property.

The Chair presented a suggestion from Professor Kuether, Kansas Bar Association Committee, that certain language in **SB 413** be changed, specifically beginning at line 18, page one, to insert "or contiguous county" following residents of the county.....(no attachment)

Conferee Gulley testified as neutral on **SB 448** and **SB 413**. She did, however, share several concerns regarding both of the bills explaining how some of the changes would have a negative effect on a city both practically as well as monetarily. (attachment 4)

Written testimony opposing **SB 448** and **SB 413** was received from The City of Overland Park, Kansas. (attachment 5 & 6)

The meeting adjourned at 11:00 a.m. The next scheduled meeting is Tuesday, January 27, 1998.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-21-98

NAME	REPRESENTING
James Clark	KCDAA
Mike Beam	Ks LUSTK ASSN.
Doug Wareham	Ks. Grain & Feed Assn. Ks. Fertilizer & Chemical Assn.
Katrina Porter	OJA
Rusk Dole	Goodwin Aide
Dr. Thomas	Judicial Council
Steve M. Israel	KTLA
Kym Gulley	League of KS Municipalities
James H. Williams	Riley County
Kelly Kuitala	City of Overland Park
Eula Unglauer	Seven C. Montgomery
Janis Shank	Sen. Min. Agenda Clerk
Joe Lawho	Postaudit
Matthew Goddard	Heartland Community Bankers Assoc
Carrie Beecht	Smoot
Larry Kleeman	League of KS Municipalities
Kevin A. Smith	Kan. Sentencing Comm.
Vicki Lynn Hessel	Budget

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(06/97)

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SENATE BILL No. 448

By Committee on Judiciary

1-15

9 AN ACT concerning the eminent domain procedure act; amending K.S.A.
10 26-504, 26-505, 26-508 and 26-513 and repealing the existing sections.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. K.S.A. 26-504 is hereby amended to read as follows: 26-
14 504. If the judge to whom the proceeding has been assigned finds from
15 the petition: (1) The plaintiff has the power of eminent domain; and (2)
16 the taking is necessary to the lawful corporate purposes of the plaintiff,
17 ~~he the judge,~~ after hearing any suggestions and objections of any party
18 appearing at the hearing shall enter an order appointing three (3) disin-
19 terested householders of the county judicial district in which the petition
20 is filed to view and appraise the value of the lots and parcels of land found
21 to be necessary, and to determine the damages to the interested parties
22 resulting from the taking. Such order shall also ~~fix~~ determine the time for
23 the filing of the appraisers' report, and such time for filing shall not be
24 later than twenty (20) days after the entry of such order. *Provided, except*
25 *that the time for filing of such report shall not, in any event, be earlier*
26 *than 20 days nor later than 60 days after the entry of such order.* For
27 good cause shown, the court may extend the time for filing by a subse-
28 quent order. The granting of an order determining that the plaintiff has
29 the power of eminent domain and that the taking is necessary to the lawful
30 corporate purposes of the plaintiff shall not be considered a final order
31 for the purpose of appeal to the supreme court, but an order denying the
32 petition shall be considered such a final order.

33 Appeals to the supreme court may be taken from any final order under
34 the provisions of this act. Such appeals shall be prosecuted in like manner
35 as other appeals and shall take precedence over other cases, except cases
36 of a like character and other cases in which preference is granted by
37 statute.

38 Sec. 2. K.S.A. 26-505 is hereby amended to read as follows: 26-505.
39 After the appraisers are appointed they shall take an oath to faithfully
40 discharge their duties as appraisers. The judge shall instruct ~~them the~~
41 *appraisers* to the effect that they are officers of the court and not rep-
42 *representatives of the plaintiff or any other party, that they are to receive*
43 *their instructions only from the judge, and he the judge shall instruct them*

Comment

- a. Section 1 deletes "he" and substitutes "judge" and requires that the judge hear the suggestions and objections of the parties, if any, prior to appointing appraisers.
- b. Section 1 will allow the judge to appoint three disinterested householders as appraisers who reside in the judicial district rather than the county where the courthouse is located. This expands the possible list of appraisers available for appointment.
- c. Section 1 allows the judge at the initial hearing on the petition to fix a realistic date to complete the appraisal. The date must be not earlier than 20 days and not more than 60 days after the hearing on the petition. Current law mandates 20 days which often is not a reasonable time.
- d. The judge can further extend the date beyond 60 days for good cause shown if the appraisers need more time to complete their work.

Comment

- a. Section 1 deletes "he" and substitutes "judge."
- b. Section 2 requires the judge to instruct the appraisers not to allow ex parte communications by representatives of the plaintiff or the defendant. Both parties must be given the right to be present and to inspect and receive all written material given to the appraisers by either party.

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1 as to the nature of their duties and authority, and as to the basis, manner
 2 and measure of ascertaining the value of the land taken and damages
 3 resulting ~~therefrom~~ from such taking. The instructions shall be in writing.
 4 *The instructions shall prohibit the appraisers from any meetings or dis-*
 5 *ussions with representatives of the plaintiff or the property owner with-*
 6 *out allowing both parties an opportunity to be present and to inspect and*
 7 *receive copies of all written material furnished to the appraisers. In ad-*
 8 *dition, the judge may instruct the appraisers regarding any other matters*
 9 *relevant to the appraisers' performance of their duties, including, but not*
 10 *limited to, the authorization of special studies relating to the land taken*
 11 *and the land remaining after the taking. Additional instructions may be*
 12 *initiated by the court or upon written motion by the plaintiff or any*
 13 *defendant at any time prior to the filing of the appraisers' report. Upon*
 14 the completion of their work the appraisers shall file their report in the
 15 office of the clerk of the district court and the appraisers shall ~~thereupon~~
 16 notify the ~~condemner~~ plaintiff of such filing. The ~~condemner~~ shall plain-
 17 tiff, within three (3) days after receiving such notice, shall mail a written
 18 notice of the filing of such report to every person who owns any interest
 19 in any of the property being taken, if the address of such person is known,
 20 and shall file in the office of the clerk of the district court an affidavit
 21 showing proof of the mailing of such notice. The fees and expenses of
 22 the appraisers shall be determined and allowed by the court, including
 23 any additional costs relating to special studies.

24 Sec. 3. K.S.A. 26-508 is hereby amended to read as follows: 26-508.
 25 ~~If the~~ The plaintiff, or any defendant, who is dissatisfied with the award
 26 of the appraisers, he may, within thirty (30) days after the filing of the
 27 appraisers' report, appeal from the award by filing a written notice of
 28 appeal with the clerk of the district court. *Except as otherwise provided,*
 29 *such appeal shall be filed within 30 days of the following, whichever oc-*
 30 *currs later: (1) The filing of the appraisers' report; or (2) the mailing of the*
 31 *written notice of the filing of such report in accordance with the provisions*
 32 *of K.S.A. 26-505 and amendments thereto. In the event any parties shall*
 33 *perfect an appeal, copies of such notice of appeal shall be mailed to all*
 34 *parties affected by such appeal, within three (3) days after the date of the*
 35 *perfection thereof. An appeal by the plaintiff or any defendant shall bring*
 36 *the issue of damages to all interest interests in the tract before the court*
 37 *for trial de novo. The appeal shall be docketed as a civil action and tried*
 38 *as any other civil action: Provided, however, The , except that the only*
 39 *issue to be determined therein at such trial shall be that of just compen-*
 40 *sation to be paid for the land or right therein taken at the time of the*
 41 *taking and for any other damages allowable by law. The time for appeal*
 42 *taken pursuant to this section may be extended by the court not to exceed*
 43 *an additional 30 days upon a showing of excusable neglect.*

c. Section 2 also allows the instructions to permit special studies relating to the land taken and the remainder if appropriate.

d. Section 2 also adds the word "plaintiff" in lieu of "condemnor" at two places to make the act consistent.

Comment

a. Allows the plaintiff or a defendant to appeal the court award within 30 days after both the following occur:

1. Filing of the award;
2. Mailing by plaintiff to the defendant notices the award has been filed by the appraisers.

This improves the current law and allows the court to further extend the appeal time an additional 30 days upon a showing of "good cause."

1 Sec. 4. K.S.A. 26-513 is hereby amended to read as follows: 26-513.
 2 (a) *Necessity*. Private property shall not be taken or damaged for public
 3 use without just compensation.
 4 (b) *Taking entire tract*. If the entire tract of land or interest ~~therein~~
 5 *in such tract of land* is taken, the measure of compensation is the *fair*
 6 *market* value of the property or interest at the time of the taking.
 7 (c) *Partial taking*. If only a part of a tract of land or interest is taken,
 8 the compensation and measure of damages are the difference between
 9 the *fair market* value of the entire property or interest immediately before
 10 the taking, and the *fair market* value of that portion of the tract or interest
 11 remaining immediately after the taking.
 12 (d) *Factors to be considered*. In ascertaining the amount of compen-
 13 sation and damages as ~~above defined, the following factors, without re-~~
 14 ~~striction because of enumeration, provided in this section, any existing~~
 15 *factors that affect fair market value* shall be given consideration ~~if shown~~
 16 ~~to exist but they~~. *Such factors* are not to be considered as separate items
 17 of damages, but are to be considered only as they affect the total com-
 18 pensation and damage ~~under the provisions of as provided by~~ subsections
 19 (b) and (c) ~~of this section~~. *Factors that may be considered include, but*
 20 *shall not be limited to, the following:*
 21 1. (1) The most advantageous use to which the property is reasonably
 22 adaptable;
 23 2. (2) access to the property remaining;
 24 3. (3) appearance of the property remaining, if appearance is an el-
 25 ement of value in connection with any use for which the property is
 26 reasonably adaptable;
 27 4. (4) productivity, convenience, use to be made of the property
 28 taken; or use of the property remaining;
 29 5. (5) view, ventilation and light, to the extent that they are beneficial
 30 attributes to the use of which the remaining property is devoted or to
 31 which it is reasonably adaptable;
 32 6. (6) severance or division of a tract, whether the severance is initial
 33 or is in aggravation of a previous severance; changes of grade and loss or
 34 impairment of access by means of underpass or overpass incidental to
 35 changing the character or design of an existing improvement being con-
 36 sidered as in aggravation of a previous severance, if in connection with
 37 the taking of additional land and needed to make the change in the im-
 38 provement;
 39 7. (7) loss of trees and shrubbery to the extent that they affect the
 40 value of the land taken, and to the extent that their loss impairs the value
 41 of the land remaining;
 42 8. (8) cost of new fences or loss of fences and the cost of replacing
 43 them with fences of like quality, to the extent that such loss affects the

Comment

- a. Inserts the words "fair market" before "value" to make it consistent with case law and PIK instructions.
- b. Strikes "the following factors without restriction because of enumeration" and adds "any existing factors that affect market value." This makes the statute consistent with case law. Strikes "if shown to exist but they" and adds "Such factors" and adds the phrase "Factors that may be considered include but shall not be limited to:"
- c. Adds a definition of "fair market value" taken from K.S.A. 79-503(a) and case law.

- 1 value of the property remaining;
- 2 ~~9.~~ (9) destruction of a legal nonconforming use;
- 3 ~~10.~~ (10) damage to property abutting on a right-of-way due to change
- 4 of grade where accompanied by a taking of land;
- 5 ~~11.~~ (11) proximity of new improvement to improvements remaining
- 6 on condemnee's land;
- 7 ~~12.~~ (12) loss of or damage to growing crops;
- 8 ~~13.~~ (13) that the property could be or had been adapted to a use
- 9 which was profitably carried on.
- 10 ~~14.~~ (14) cost of new drains or loss of drains and the cost of replacing
- 11 them with drains of like quality, to the extent that such loss affects the
- 12 value of the property remaining; and
- 13 ~~15.~~ (15) cost of new private roads or passageways or loss of private
- 14 roads or passageways and the cost of replacing them with private roads
- 15 or passageways of like quality, to the extent that such loss affects the value
- 16 of the property remaining.
- 17 (e) *Fair Market Value.* "Fair market value" means the amount in
- 18 terms of money that a well informed buyer is justified in paying and a
- 19 well informed seller is justified in accepting for property in an open and
- 20 competitive market, assuming that the parties are acting without com-
- 21 pulsion. The fair market value shall be determined by use of the compa-
- 22 rable sales, cost or capitalization of income or any other generally ac-
- 23 cepted appraisal method.
- 24 Sec. 5. K.S.A. 26-504, 26-505, 26-508 and 26-513 are hereby re-
- 25 pealed.
- 26 Sec. 6. This act shall take effect and be in force from and after its
- 27 publication in the statute book.

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**TESTIMONY BEFORE THE
SENATE JUDICIARY COMMITTEE
SENATE BILL No. 413
Joseph Lawhon, Senior Auditor
Legislative Division of Post Audit
February 21, 1998, 10:00 a. m., Room 514-S**

Mr. Chairman and Members of the Committee,

Thank you for allowing me the opportunity to speak before you on Senate Bill 413. I am appearing on behalf of the Legislative Post Audit Committee to explain the origin of the bill and to express Legislative Post Audit's support of this bill.

Senate Bill 413 proposes two changes to Kansas' eminent domain procedures act. The Post Audit Committee requested this legislation be introduced to address recommendations made in our performance audit report, *Reviewing the Department of Transportation's Acquisition of Right-of-Way for Highway Projects*. This report was issued in March 1997. I was the audit supervisor.

In this audit, we found that the Department of Transportation didn't always pay consistent prices to landowners, and it often paid significantly more than the appraised amounts. When landowners received significantly more than the appraised amounts, it was because of condemnation awards, or because the Department agreed the property was worth more.

When reviewing a sample of properties the Department acquired through the condemnation process, we identified two weaknesses that create a risk that the price paid for land may not be fair to the landowner or to the State.

First weakness -- Kansas law doesn't require the three individuals appointed by the court to appraise property and establish fair market value (for condemnation proceedings) to have any specific qualifications. The law currently requires that when property is being acquired through condemnation, a judge will appoint three disinterested "householders" from the county in which the land is being condemned to appraise the property and make a determination of just compensation. The law doesn't require these three people to have any other specific qualifications. During our audit, Department of Transportation officials told us that the courts generally appoint people who have some sense about property values, but the Department rarely objects to whomever is appointed because the judge could still appoint that person, and then he or she might be prejudiced against the Department.

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Second weakness -- Kansas law doesn't require the court-appointed appraisers to justify their valuation, or document how they reached their figure of fair market value. The report that the court-appointed appraisers submit to the court simply shows a total dollar value for the property being acquired, without any descriptive comments about the factors they considered to come up with their value.

To address these two situations, we recommended the following:

To ensure that valuations of property acquired through the condemnation process are realistic and supportable, the Legislative Post Audit Committee should consider introducing legislation to amend K.S.A. 26-501 *et. seq.* to require court-appointed appraisers to :

- a. Have some experience in real estate valuation.
- b. Justify and document their appraised value of the property.

The Department of Transportation concurred with this recommendation.

This concludes my presentation, and I'd be happy to answer any questions at this time.



League of
Kansas
Municipalities

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To: Senate Judiciary Committee
From: Kim Gulley, Assistant General Counsel
Date: January 21, 1998
Re: Comments on SB 413 and SB 448

Thank you for allowing us the opportunity to appear before you today to comment on SB 413 and SB 448 concerning the Eminent Domain Procedure Act. While the League does not specifically support or oppose either of these bills, we appreciate the opportunity to share with you some of our concerns.

SB 413

Section 1. This section provides that anyone who is a *resident* of the county in which a petition is filed *who has experience in the valuation of real estate* would be eligible to serve as an appraiser in eminent domain proceedings. This appears to be an innocuous clarification and we would not oppose this change.

Section 2. This section adds a requirement that the appraisers include in their report the factors considered in determining the value of the property and *copies* of any documentation in support of such value. It has been brought to our attention that this requirement would inevitably involve a significant amount of paperwork and reproduction of numerous documents and could, in turn, add a significant expense to the project. We are unsure of the necessity of this change at this time.

SB 448

Section 1. This section would expand the time for filing of the appraisers' report to a period of up to 60 days. Anything which expands the time required to complete the process inherently adds to the cost of the project. We believe that the current statutory time limit of 20 days provides ample time for completion of the appraisal and further provides certainty with respect to the process.

Section 2. This section gives rise to the most concern by the League. This section would prohibit communications among the parties and their representatives during eminent domain proceedings. Practically, this provision could prove to be unworkable. Very often a representative of the city (e.g., the city attorney) will serve as a coordinator to set up meeting times and inspections. The requirements in this section of the bill would prove particularly onerous when the eminent domain proceedings involve a large number of land owners. We also are concerned with the "special study" language in that it appears to grant to the appraisers the ability to conduct special studies at an additional cost to be borne by the governmental entity.

Section 3. This section expands the time period for filing an appeal of the appraisers' report and we would again note that anything which expands the time period of the eminent domain procedure, tends to increase the total cost of the project to the city and, in turn, the local taxpayer.

Thank you for allowing me to appear today on behalf of the League and our 527 member cities.

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Law Department

Robert J. Watson, City Attorney

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TESTIMONY IN OPPOSITION TO SENATE BILL NO. 448

TO: The Honorable Tim Emert, Chairperson
Members of the Senate Committee on Judiciary
Room 514-S

DATE: January 20, 1998

RE: Senate Bill No. 448 -- Proposed Amendments to K.S.A. 26-504, 26-505,
26-508 and 26-513 pertaining to condemnation of easements by
Kansas cities

Ladies and Gentlemen:

The City of Overland Park strongly opposes Senate Bill No. 448, for the following reasons:

1. Amended Sec. 2. of K.S.A. 26-505 states, *"The (judge's) instructions shall prohibit the appraisers from any meeting or discussions with representatives of the plaintiff or the property owners without allowing both parties an opportunity to be present and to inspect and receive copies of all written material furnished to the appraisers."* Although the City would not object to a requirement that the appraisers disclose any substantive information received from either party to the other, it strongly opposes the above-quoted language which would force the appraisers into an elaborate scheme of notification for the most trivial of exchanges. For example, many Overland Park condemnations encompass 50+ tracts. If an appraiser needed to call the City to inquire about the zoning designation on a particular tract or to obtain a telephone number of a party in possession of a tract, the appraiser would first be required to contact all 50 property owners and allow them the opportunity to be present at the delivery of such information. Even when the City called the appraisers to notify them that they had been appointed by the judge to serve as appraisers, such a time-consuming process would be required. It is doubtful in most eminent domain actions, if such a requirement could even be fulfilled.

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2. Amended Sec. 2 of K.S.A. 26-505 states, "*In addition, the judge may instruct the appraisers regarding any other matters relevant to the appraiser's performance of their duties, including, but not limited to, the authorization of special studies relating to the land taken and the land remaining after the taking.*" The Section goes on to allow the court to determine and allow costs of those special studies. All costs and expenses of condemnation are presently assessed against the plaintiff City, and we see no reason to believe that the cost of special studies would not be so assessed. The City does not anticipate a need for additional studies, but does foresee potentially huge costs and long delays in the time necessary to acquire easements, if such studies are allowed.

3. Amended Sec. 3 of K.S.A. 26-508 states, "*The time for appeal taken pursuant to this section may be extended by the court not to exceed an additional 30 days upon a showing of excusable neglect.*" The City feels that 30 days, as presently allowed, is ample time to perfect an appeal. City construction projects are seasonally dependant and adding 30 more days of uncertainty to a projects timetable would create a hardship for the City.

The cities of Kansas have functioned well for many years under the presently-configured eminent domain statutes and Overland Park has received few appeals or complaints from property owners regarding the process of obtaining easements. Therefore, Overland Park requests that you reject Senate Bill No. 448.

Thank you for your consideration.

The City of Overland Park



Robert J. Watson
City Attorney



Jane Neff-Brain
Senior Assistant City Attorney



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TESTIMONY IN OPPOSITION TO SENATE BILL NO. 413

TO: The Honorable Tim Emert, Chairperson
Members of the Senate Committee on Judiciary
Room 514-S

DATE: January 20, 1998

RE: Senate Bill No. 413 -- Proposed Amendments to K.S.A. 26-504 and 26-505 pertaining to condemnation of easements by Kansas cities

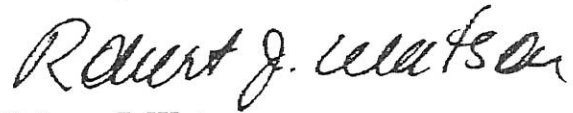
Ladies and Gentlemen:

The City of Overland Park opposes that portion of Amended Sec. 2 of K.S.A. 26-505 in Senate Bill No. 413 which requires appraisers to include in their report the factors considered in ascertaining the value of the property and copies of any documents supporting such value. It has been the experience of the City of Overland Park, that if a request for such information is forthcoming from any interested party, the appraisers are agreeable to providing what information they have maintained. Making such a requirement statutory, will only add considerable cost to the condemnation effort. Appraisers will tend to write more detailed reports and must attach all documentation to their report. The City is responsible for paying the appraisers' fees, which at the present cost of \$140\hour times three appraisers or \$420\hour, will be substantially increased if appraisers feel that they must more greatly detail and document each appraisal for filing purposes. Seldom, in our experience, is this kind of information requested, yet these additional costs will be passed along to the citizens of the city commencing the eminent domain in all cases, should this provision of the above-cited legislation become law.

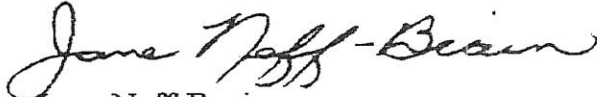
Therefore, we ask your consideration in rejecting such amendment to K.S.A. 26-505.

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The City of Overland Park, Kansas



Robert J. Watson
City Attorney



Jane Neff-Brain
Senior Assistant City Attorney