Approved
Date: 3-25-02

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Senator Vratil at 10:15 a.m. on March 22, 2002 in Room 423-S of the Capitol.

All members were present except: Senator Umbarger (excused)

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

Conferees appearing before the committee:
Chuck Simmons, Secretary, Department of Corrections (DOC)
Reid F. Holbrook, Attorney, Community Solutions, Inc. (CSI)
Senator David Haley
Senator Chris Steineger
Diane Lloyd, Chairperson, Strawberry Hill Revitalization & Restoration Committee
Phil Sanders, Unified Government, Wyandotte County, Kansas City, Kansas
Larry Baer, League of Kansas Municipalities
Tom Overby, Avenue Area, Inc.

Others attending: see attached list

The minutes of the March 21st meeting were approved on a motion by Senator Donovan, seconded by Senator Goodwin, Carried.

HB 2752–theft; defining certain crimes related to certain pipelines

Following a review of **HB 2752** by the Chair and discussion by Committee, Senator Schmidt moved to amend the bill by striking "5" and replacing it with "7" on pg.1 line 35, Senator Adkins seconded. Carried. Following further discussion, Senator Schmidt moved to pass the bill out favorably as amended, Senator Adkins seconded. Carried with Senator Pugh requesting his nay vote be recorded. Senator Schmidt made a motion to grant staff leeway to make necessary technical amendments to the **HB 2752**, Senator Goodwin seconded. Carried.

HB 2735–aggravated battery

The Chair reviewed the **HB 2735** and briefly discussed the projected prison bed impact as well as sentencing alternatives done by the Sentencing Commission.(attachments 1 and 2) Following discussion Senator Adkins moved to pass the bill out favorably, Senator Schmidt seconded. Following further discussion, Senator Goodwin made a substitute motion to table the bill indefinitely, seconded by Senator Haley. Carried with Senators Adkins and Schmidt requesting their nay votes be recorded. The Chair stated that he would request the bill be blessed.

SB 648–corrections: relating to day reporting center in Wyandotte County

Conferee Simmons testified in support of **SB 648**, a bill which would require the DOC to establish a day reporting center in Wyandotte County for the purpose of supervising, counseling and monitoring offenders on parole or postrelease supervision. The Conferee presented historical background on the establishment of day reporting centers (DRC) in Kansas as mandated by **SB 323** in 2000. He discussed the request for proposal (RFP) process, the role and responsibility of the contractor, CSI, and the efforts of the DOC and CSI to work with the Unified Government in Wyandotte County, to establish a DRC in Kansas City. He further discussed a requirement by the city that a special use permit for certain property be applied for which set out five conditions to be met in order for it to be approved.(attachment 3)

Conferee Holbrook testified in support of **SB 648**. He presented a brief background on CSI, whom he represents, discussed the establishment of the Topeka and Wichita DRC's, reviewed the criteria for DRC, and discussed, in detail, the problems encountered with local government and the community in attempting to establish a Kansas City DRC. He provided a list of approximately thirty potential DRC sites which have been considered.(attachment 4)

Senator Haley testified "not in opposition to the context of **SB 648** but to the legality of whether or not the state, through the enactment of this bill, can rightfully supercede the Unified Government's right to apply their

zoning and planning policies. He cited case law to support his statements.(attachment 5)

Conferee Steineger testified as an opponent on **SB 648** but stated it was "a good bill which has the Uniformed Government and the Wyandotte County Delegation working together." He discussed what he felt were the apparent inadequacies of CSI.(attachment 6)

Conferee Lloyd testified in opposition to **SB 648**. She presented background on her community's development, discussed the efforts of the community and city government to work with CSI, and provided alternatives for the placement of the DRC.(attachment 7)

Conferee Sanders testified in opposition to **SB 648** stating that despite the UG's opposition it has attempted to work with the State and it's contractor, SCI. He discussed problems the UG has had with CSI especially in the area of communications, and provided a timeline of events and facts beginning with the adoption of **SB 323** , to support his statements.(attachment 8)

Conferee Baer testified in opposition to **SB 648** "because it allows the placement of a DRC without it being subject to existing zoning, permitting, licensure or other local requirements." He elaborated on this.(attachment 9)

Conferee Overby testified in opposition to **SB 648.** He briefly discussed redevelopment in his area.(no attachment)

Written testimony supporting **SB 648** was submitted by Representative Kathe Lloyd.(attachment 10).

The meeting adjourned at 11:32 a.m. The next scheduled meeting is March 25, 2002.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-22-02

NAME	REPRESENTING
Jeff Bottenberg	Kansas Sheriff Assn
Tom Bruno	Williams Co.
Lonnie Hardy	Strawberry Hill K.C.K.
Nate Lloyd	Strawberry Hill K.C.K
Wm R Williamson	Strawberry Hill KCK
Larry R Baer	LKM
Charles Simmons	Dept. of Corrections
Phil Sanders	Unified Govt. WYCO/KCK
Don Denney	UNified Govt. Wyco/KCK
Diane Lloyd	Strawberry Hill, KCK
TOM OVERBY	AVENUE AREA CDC
Connie Burns	Whitney B Damron, PA
Vincent Persley	Vincent Persley
Joe Decke	KCKBPU

Kansas Sentencing Commission

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Topeka, Kansas 66603

Telephone: (785) 296-0923
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Date: March 18, 2002

To: Representative Mike O'Neal, Chairman House Judiciary

From: Barbara Tombs, Executive Director

Re: Requested Information

Recently you requested information regarding the combined prison bed impact projected for SB 487 and HB 2735. In addition you requested the Sentencing Commission to provide sentencing alternatives related to these two proposed bills. Listed below is a summary of the projected prison bed impact and various sentencing alternatives that may be considered.

Prison Bed Impact:

SB 487 creates a new sentencing rule of presumptive prison applicable to non-residential (SL7) /automobile burglary (SL9), nonperson felonies. The projected impact on prison beds would result in the need for 12 to 51 additional prison beds over the 10-year projection period – a conservative projection.

HB 2735 creates two new category of aggravated battery while DUI to include (1) unintentionally causing great bodily harm to another person –SL5 and (2) unintentionally causing bodily harm to another person-SL8. The projected impact on prison beds would result in the need for 12 to 376 additional prison beds over the 10-year projection period.

Total projected prison bed impact for the two bills combined would be **24 to 427 additional prison beds** over the 10-year projection period.

Sentencing Alternatives:

SB 487 – Special rule for nonresidential and auto burglary.

(1) Concern has been raised by the bill's authors that under the current Sentencing Guidelines Act, convictions for residential and auto burglary will never result in a presumptive prison sentence being imposed due to the non-person felony classification, which is the reason for the proposed legislation. However, established case law dealing with non-statutory reasons

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for departures specifically address this issue. In both State v. Trimble and State v. Meyer, the Court ruled that **an offender's lack of amenability to probation**, if supported by evidence, **is grounds for an upward departure** – either dispositional or durational. Evidence to be considered in granting a departure include an offender's history of committing offenses while on probation or parole, or an offender's incredible record of prior convictions for nonperson felonies. The court cited in reviewing the offender's prior record of 12 nonperson convictions, including 9 burglary convictions as support for the court's decision to depart. Thus, under the current sentencing guidelines there is the option, at the court's discretion, to impose a prison sentence through a departure option when a offender has a criminal history of prior burglary convictions.

The current procedure permits the court to make the decision when warranted through an established departure factor. It would appear that implementing a new sentencing rule preempts judicial discretion and ignores the current remedy set forth under sentencing guidelines to address the habitual non-residential/auto burglar.

(2) Another option to consider would be using the approach taken last year with the offense of forgery. For repeated convictions of forgery, mandatory county jail time was imposed as part of the sentencing structure. For a second forgery conviction, a mandatory 30 day jail term was required and for a third and subsequent forgery conviction, a 45 day jail term was imposed as part of the nonprison sentence. Since nonresidential burglary and forgery share many similar characteristics, primarily being common repeat offenses and classified below the incarceration line on the sentencing grid, a graduated mandatory jail term may be applied in the same manner. The offender is held accountable, has his/her freedom curbed and there no impact on state prison facilities. Given the relatively short underlying prison sentences, especially auto burglary, the cost-effectiveness of incarceration in a state correctional facility is questionable.

(3) If the intent is to target the habitual burglar, then perhaps increasing the number of prior burglaries to be considered prior to the imposition of an presumptive prison sentence should be increased from 3 prior nonresidential/auto burglaries to maybe 5, 10, 15 or another appropriate number that more clearly designates the "habitual burglar". It would appear that three prior convictions may not adequately define the true habitual burglar and the person that the state wants to spend $21,000 a year incarcerating in a state prison.

(4) Finally, it should be noted that admissions to prison in FY 2001 that were the result of special sentencing rules totaled 261 new court admissions or 16.5% of the total new court admissions. This figure does not include probation/parole violators, only those offenders sentenced directly by the court. The issue raised by these figures is that as we add more and more special sentencing rules, we designate more prison beds for offenses falling below the incarceration line and decreasing the number of prison beds available for the serious and violent offenders whose offenses are designated above the incarceration line and indicate a presumptive prison sentence. This is a policy decision that has long term implications both in the use of state resources and sentencing philosophy, especially in light of the nonperson felony classification assigned to these specific offenses.

HB 2735 – Aggravated Battery while DUI

(1) It appears that the one of the elements of the crime of aggravated battery while DUI is the "unintentional" causing of great bodily harm or bodily harm, which separates this offense from the elements of the current intentional aggravated battery statute(s). The current penalty proposed under this bill for the unintentional aggravated battery while DUI causing great bodily harm to a person is a severity level 5 person felony, which makes it comparative to the current aggravated battery, reckless with great bodily harm (SL5). It would make more sense to designate unintentional aggravated battery while DUI as a severity level 6 person felony, ranking below all levels of intentional or reckless aggravated battery, since the key element is the "unintentional" nature of the crime due to the fact the offender was intoxicated when the offense was committed. In addition, a severity level 6 classification would allow for two presumptive nonprison grid cells and a border box, providing the option for a nonprison sentence to the offender with a limited or no criminal history, while still designating a felony conviction and appropriate nonprison sanctions, including treatment and offender accountability to both society and the victim. If incarceration is a desired penalty, under the current sentencing guidelines the offender would be subject up to 60 days in county jail as a condition of probation.

(2) A second reason to consider the imposition of a severity level 6 felony classification is one of proportionality of the seriousness of the offense to other severity level 5 person felonies including: involuntary manslaughter, aggravated burglary, aggravated sexual battery, robbery and sexual exploitation of a child. It would appear that unintentional aggravated battery causing great bodily harm is given the same consideration in the amount of harm done as involuntary manslaughter, which results in the loss of a human life. It does not seem to make sense that the unintentional taking of a human life should be ranked on the same level as an unintentional aggravated battery that results in great bodily harm.

(3) The bill also sets the penalty for unintentional aggravated battery causing bodily harm to another person while DUI as a severity level 8 person felony, which is the same as the current penalty for aggravated battery and recklessly causing bodily harm to another person with a deadly weapon or in any manner in which great bodily harm can be inflicted. Again the proportionality issue is raised by designating the two types of aggravated battery – one intentional and one unintentional- on the same severity level. It may be more appropriate to designate the unintentional aggravated battery causing bodily harm while DUI as a severity level 9 person felony. Although both severity levels designate presumptive nonprison sentences, it makes more sense and it is more logical to rank the "unintentional" offense lower than the intentional or standard aggravated battery, especially in light of the current severity level 8 classification including the causing of bodily harm **with the use of a deadly weapon.** There would also be a lesser impact on additional prison beds since a level 9 offense has shorter underlying prison sentences than severity level 8, thus probation violators would still be required to serve a prison sentence if revoked, but it just wouldn't be as long.

Bedspace Impact Assessment
House Bill 2735
Aggravated Battery while Committing a Violation of K.S.A. 8-1567

SECOND AMENDMENT - SL 6 & SL 9

KEY ASSUMPTIONS

- The target inmates in this bill include any persons who are convicted of "aggravated battery of **unintentionally causing great bodily harm to another person** and **unintentionally causing bodily harm to another person** while committing a violation of K.S.A. 8-1567".

- "**Unintentionally causing great bodily harm to another person**" is designated as a severity level 6, person felony and "**unintentionally causing bodily harm to another person**" is designated as a severity level 9, person felony.

- Projected admission to prison is assumed to increase by an annual average of half percent. Bed space impacts are in relation to the baseline forecast produced in September 2001 by the Kansas Sentencing Commission.

- Percentage of target inmate sentences served in prison is assumed to be 85 percent, which is consistent with the official projections released in September 2001.

- The average length of stay in prison for the new N6 inmates is assumed to be 30 months and the average length of stay in prison for N9 inmates is assumed to be 10 months.

Unintentionally Causing Great Bodily Harm To Another Person-N6

- **Scenario One**: It is assumed that 2% (12 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001will be convicted of the crime of "aggravated battery of **unintentionally causing great bodily harm to another person** " with 25% of them being sentenced to prison and 75% to probation. Of the probation sentences, 25% of the probationers will violate their probation terms in 20 months and be ordered to serve their underlying prison sentences.

- **Scenario Two**: It is assumed that 5% (30 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001will be convicted of the crime of "aggravated battery of **unintentionally causing great bodily harm to another person** " with 25% of them being sentenced to prison and 75% to probation. Of the probation sentences, 25% of the probationers will violate their probation terms in 20 months and be ordered to serve their underlying prison sentences.

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- **Scenario Three**: It is assumed that 10% (60 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001will be convicted of the crime of "aggravated battery of **unintentionally causing great bodily harm to another person** " with 25% of them being sentenced to prison and 75% to probation. Of the probation sentences, 25% of the probationers will violate their probation terms in 20 months and be ordered to serve their underlying prison sentences.

Unintentionally Causing Bodily Harm To Another Person-N9

- **Scenario One**: It is assumed that 5% (30 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001will be convicted of the crime of "aggravated battery of **unintentionally causing bodily harm to another person** " and be sentenced to probation. In 20 months of their probation period, they will violate their probation terms and be ordered to serve their underlying prison sentences.

- **Scenario Two**: It is assumed that 10% (60 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001will be convicted of the crime of "aggravated battery of **unintentionally causing bodily harm to another person** " and be sentenced to probation. In 20 months of their probation period, they will violate their probation terms and be ordered to serve their underlying prison sentences.

- Scenario Three: It is assumed that 25% (151 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001will be convicted of the crime of "aggravated battery of **unintentionally causing bodily harm to another person** " and be sentenced to probation. In 20 months of their probation period, they will violate their probation terms and be ordered to serve their underlying prison sentences.

FINDINGS

- There was no offender sentenced to prison under the crime of aggravated battery of **unintentionally causing great bodily harm to another person** or **unintentionally causing bodily harm to another person** while committing a violation of K.S.A. 8-1567", during FY 2001.

- There were 602 offenders sentenced to probation under K.S.A. 8-1567 during FY 2001.

Unintentionally Causing Great Bodily Harm To Another Person-N6

- **Scenario One**: If 2% (12 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001 are convicted of the crime of "aggravated battery of **unintentionally causing great bodily harm to another person** " with 25% of them being sentenced to prison and 75% to probation and then 25% of the probationers will violate their probation terms in 20 months and subsequently be ordered to serve their underlying prison sentences, by the year 2003 there will be 3 bed needed and by the year 2012 there will be 11 beds needed.

- **Scenario Two:** If 5% (30 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001are convicted of the crime of "aggravated battery of **unintentionally causing great bodily harm to another person** " with 25% of them being sentenced to prison and 75% to probation and then 25% of the probationers will violate their probation terms in 20 months and subsequently be ordered to serve their underlying prison sentences, by the year 2003 there will be 8 beds needed and by the year 2012 there will be 30 beds needed.

- **Scenario Three:** If 10% (60 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001are convicted of the crime of "aggravated battery of **unintentionally causing great bodily harm to another person** " with 25% of them being sentenced to prison and 75% to probation and then 25% of the probationers will violate their probation terms in 20 months and subsequently be ordered to serve their underlying prison sentences, by the year 2003 there will be 15 beds needed and by the year 2012 there will be 57 beds needed.

Unintentionally Causing Bodily Harm To Another Person-N9

- **Scenario One:** If 5% (30 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001are convicted of the crime of "aggravated battery of **unintentionally causing bodily harm to another person** " and are sentenced to probation and subsequently violate their probation terms in 20 months, resulting in revocation to prison, by the year 2003 no additional beds would be needed and by the year 2012, 22 additional beds would be required.

- **Scenario Two:** If 10% (60 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001will be convicted of the crime of "aggravated battery of **unintentionally causing bodily harm to another person** " and are sentenced to probation and subsequently violate their probation terms in 20 months, resulting in revocation to prison, by the year 2003 no additional beds would be needed and by the year 2012, 46 additional beds would be required.

- **Scenario Three:** If 25% (151 offenders) each year of the 602 offenders sentenced under K.S.A. 8-1567 during FY 2001are convicted of the crime of "aggravated battery of **unintentionally causing bodily harm to another person** " and are sentenced to probation and subsequently violate their probation terms in 20 months, resulting in revocation to prison, by the year 2003 no additional beds would be needed and by the year 2012, 115 additional beds would be required.

- The impact of this bill will result in a total of 33, 76 and 172 additional beds respectively by the year 2012.

Unintentionally Causing Great Bodily Harm To Another Person-N6
Bed Space Impact Assessment - Amendment

June of Each Year	Scenario #1 2%		Scenario #2 5%		Scenario #3 10%	
	Admissions	Beds Needed	Admissions	Beds Needed	Admissions	Beds Needed
2003	3	3	8	8	15	15
2004	4	7	10	18	19	34
2005	5	10	14	25	26	46
2006	5	11	14	30	26	54
2007	5	11	14	30	26	54
2008	5	11	14	29	27	57
2009	5	11	14	30	27	57
2010	5	11	14	29	27	57
2011	5	10	14	30	27	59
2012	5	11	15	30	27	57

Unintentionally Causing Bodily Harm To Another Person-N9
Bed Space Impact Assessment - Amendment

June of Each Year	Scenario #1 5%		Scenario #2 10%		Scenario #3 25%	
	Admissions	Beds Needed	Admissions	Beds Needed	Admissions	Beds Needed
2003	0	0	0	0	0	0
2004	10	10	20	20	51	51
2005	30	21	61	44	153	106
2006	31	23	61	42	154	108
2007	31	22	62	44	155	112
2008	31	21	62	45	156	109
2009	31	21	62	44	156	112
2010	31	21	62	43	157	112
2011	31	21	63	46	158	108
2012	32	22	63	46	159	115

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House Bill 2735 Total Bed Space Impact Assessment -Amendment

June of Each Year	Scenario #1		Scenario #2		Scenario #3	
	Admissions	Beds Needed	Admissions	Beds Needed	Admissions	Beds Needed
2003	3	3	8	8	15	15
2004	14	17	30	38	70	85
2005	35	31	75	69	179	152
2006	36	34	75	72	180	162
2007	36	33	76	74	181	166
2008	36	32	76	74	183	166
2009	36	32	76	74	183	169
2010	36	32	76	72	184	169
2011	36	31	77	76	185	167
2012	37	33	78	76	186	172

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STATE OF KANSAS

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Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

TO: Senate Judiciary Committee

FROM: Charles E. Simmons

DATE: March 22, 2002

SUBJECT: Senate Bill No. 648

The 2000 legislature in SB 323 authorized the Department of Corrections to establish day reporting centers for offenders on parole or postrelease supervision. The centers were intended to be an alternative to the reincarceration of offenders who violated conditions of their supervision but who did not represent a public safety risk.

The Department of Corrections issued a request for proposals for operation of the centers in June, 2000. The RFP specified that the centers would be located in Topeka, Wichita, and the Kansas City area.[1] The RFP also included the following criteria regarding the location of the DRC:

> ***Site:*** *Each DRC facility shall be on a site selected by the contractor. Multiple sites or proposals for each DRC facility from a single contractor will not be accepted. Sites should not be near or adjacent to day care centers, public parks and recreation areas, taverns or private clubs, adult entertainment facilities, public schools or residences for individuals suffering from developmental physical or mental disabilities. Any site(s) selected by the contractor is subject to final approval by KDOC.*
>
> ***Site Criteria****: Each site shall be of adequate size to accommodate the stated population levels, including necessary support services and utilities. Site locations should provide private counseling space with adequate furnishings, including a desk, chair, adequate lighting and telephone, space and furnishings for group meetings, classrooms, rest room facilities, multipurpose space, reception area, office space, conference room, and respite areas where offenders can eat and/or relax.*

[1] The question has been asked about why Wyandotte county was selected as the location for the day reporting center. Attached is a copy of a memorandum I distributed on January 4, 2002 explaining the rationale for this decision.

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Each site shall conform to all applicable zoning and building codes, including Americans with Disabilities Act requirements.

Each site shall have a primary and secondary entrance providing all weather ingress/egress from two directions to publicly maintained roads.

Because of requirements relating to VOI/TIS funds, the site(s) cannot be new construction.

***Site Location Factors**: Among factors to be considered in determining the suitability of a proposed site are the following: Availability of fire protection and law enforcement assistance; access to adequate medical care; access to interstate highways; access to employment opportunities; and, close proximity to public transportation.*

The contract for operation of the day reporting centers was awarded to Community Solutions, Inc., a not for profit company based in Connecticut. The contract specified that CSI had the responsibility to select a site for the DRC in each of the three communities.

A day reporting center in Topeka was opened in May 2001 without any issues regarding its location.

In Wichita the site selection process was difficult. The process began in the fall of 2000 and is only now being finalized. Over 40 locations in Wichita were considered and were rejected by the contractor or the Department as not meeting RFP specifications, or drew opposition from area neighborhood associations or citizens.

As a result of the difficulty of selecting a location generally acceptable to the community, I requested that Wichita city officials identify an acceptable site. City officials then took an active role in this process. A number of potential sites identified by the city were withdrawn after drawing community opposition. Finally, a site was identified which appears to be generally acceptable and details on an agreement to develop the site are being finalized. It is possible that the DRC in Wichita could be operational later this summer.

In Kansas City the process of identifying a generally acceptable site for operation of the DRC has also been very difficult. The process there began in the fall of 2000 as well. Numerous sites have been considered. CSI has prepared a summary of its efforts to place the DRC in Kansas City, which it will present to the Committee.

Several notifications to local officials in Kansas City were made, the first being September 25, 2000. Frequent contacts on an ongoing basis were had with a representative of the Unified Government. A letter dated May 8, 2001 to local officials was sent, specifically regarding the proviso adopted by the 2001 legislature in SB 57. Public meetings were held on two occasions, March 2001 and January 2002, regarding specific locations. These meetings drew considerable opposition from local citizens.

Following the meeting in January, 2002 efforts were made to negotiate a lease for space to operate the day reporting center in the same building that houses the state parole office. Approximately 440 offenders are supervised by the Kansas City parole office. Many of them report to the parole office for meetings with their supervising parole officer. The parole office has been located at 1123 N. 5th Street in Kansas City since 1988. The proposed location of the DRC is at 1111 N. 5th Street.

An application for a special use permit to operate the DRC at 1111 N. 5th Street was filed in February 2002. In considering the application city staff recommended five conditions which would have to be met in order for a special use permit to be approved. The five conditions are:

1) *Four (4) year approval period for a maximum of 60 clients.*
2) *Hours of operation limited to 8:00 a.m. to 8:00 p.m., Monday through Saturday.*
3) *A Kansas Department of Corrections official should be on-site during office hours.*
4) *Day reporting center serving only non-violent offenders.*
5) *The day reporting center being closed if the GPS is not operational.*

Conditions 1, 2, and 3 pose no problem to the operation of the day reporting center. Condition 5 requires clarification as to its potential impact. The other condition, #4, however, could so limit the use and value of the day reporting center that it would not be a prudent use of resources to proceed with development of the DRC. My response to the five conditions is set forth in the attached letter to CSI's attorney, Reid Holbook, dated March 11, 2002.

Placing the DRC at 1111 N. 5th Street drew considerable local opposition, despite the fact that the parole office has been in operation since 1988, virtually next door to the proposed DRC site. If the DRC were to operate at this proposed location, offenders would be going to essentially the same place as they now go, but for a different purpose.

The application for a special use permit was deferred for 30 days. It is now scheduled to be taken up again in April. If approved by the Planning and Zoning Board it will then be considered by the Unified Government Commission. This would not likely occur until late April, at the earliest.

I believe the Department of Corrections and Community Solutions, Inc. have made a reasonable, good faith effort to locate a day reporting center in Kansas City, and to do so with respect and consideration for the wishes of the community. I have not tried to force the DRC into a specific location in the community. Rather, I have requested assistance from local officials in identifying an acceptable site. I have met with city officials regarding the DRC. I have provided information about the DRC to the media and public officials. I have participated in two community meetings. An invitation to visit the Topeka DRC has been extended. Still, after a year and a half there has not been an acceptable site identified. There are no assurances that the pending special use permit application will be approved, or that if approved, the conditions of the permit will allow for the operation of the DRC in the manner intended.

The department, the contractor, and the community have expended considerable time, energy, and resources on this issue. It is time to bring the matter to a conclusion, one way or the other. At this point it is my feeling that if a DRC is to be located in Kansas City, SB 648 is necessary.

Day Reporting Centers – Information Sheet

■ What is the Day Reporting Center (DRC) program?

The DRC program is a highly structured, non-residential program that provides intervention, supervision and program services to KDOC post-incarceration supervision offenders who have violated conditions of release but who are not considered a public safety risk and do not require immediate re-incarceration.

■ Basic Program Features

- DRC offenders sleep at home, but they are required to be at the center during normal hours of operation unless they are at work or another authorized activity.
- Each DRC participant is monitored 24 hours per day, 7 days per week using Global Positioning Satellite (GPS) technology, whereby the offender wears an electronic device for satellite tracking of the offender's location and movements.
- The length of DRC programming is up to 90 days, with the exact duration depending on the progress of the individual offender.
- Offenders assigned to a DRC are expected to be employed. If an offender is not employed, the DRC will assist in job development and placement activities.
- All participants are expected to perform 50 hours of community service work.
- Other DRC program components are tailored to the needs of each offender, including:

Substance abuse treatment	Cognitive structuring skills	Mental health counseling
Drug testing	Breath testing	Anger management
Community service work	Life skills	Family counseling

- Program services are delivered by Community Solutions, Inc. (CSI) pursuant to a contract with the Department of Corrections. Authorized program capacities are: Wichita – 120; Kansas City – 60; and Topeka – 40.

■ Target Population

Primary target: offenders on KDOC post-incarceration supervision who have violated conditions of release but who can, with the highly structured supervision provided by the DRC, remain in the community as an alternative to revocation and return to prison.

If program capacity is available: probation condition violators, including those assigned to community corrections, will be accepted if they would otherwise be revoked and admitted to KDOC custody. Local officials will determine if these offenders are placed at the DRC.

■ Status

Of the three DRCs authorized by the 2000 Legislature, Topeka is the only one which is currently operational. The Topeka DRC:

- *opened in May 2001.*
- *has received 74 placements to date, 24 of whom have completed successfully. Twenty-two offenders have been discharged unsuccessfully.*
- *has 25 offenders currently assigned to the program (as of December 18, 2001). Most of these offenders are employed.*
- *is open 8:00 am – 8:00 pm Monday through Friday, and 8:00 am – 4:00 pm on Saturday. All offenders are monitored continuously through GPS tracking devices.*
- *has assigned offenders to approximately 2275 hours of community service work through community agencies.*

Wichita officials have approved a location for the DRC and it is anticipated that the DRC will be operational in that community in the spring of 2002.

STATE OF KANSAS

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Topeka, Kansas 66612-1284
(785) 296-3317

Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

TO: Wyandotte Legislative Delegation

FROM: Charles E. Simmons

cc: Phil Sanders
Terri Saiya, Community Solutions, Inc.

DATE: January 4, 2002

SUBJECT: Day Reporting Center

The question has been posed a number of times regarding why the decision was made to locate the day reporting center in Wyandotte County.

When the day reporting center concept was discussed during the 2000 session, the department indicated that centers should be located in Topeka, Wichita, and the "Kansas City area." These locations were obvious choices due to the number of offenders under supervision in each community.

When the department issued the Request for Proposals to contract for operation of the day reporting centers we did not specify that the center should be located in Wyandotte or Johnson County, but indicated that it was to be located in the Kansas City area. Data concerning the number of offenders under supervision indicates that the majority are in Wyandotte County.

Kansas Offenders Released to Post-incarceration Supervision
During Fiscal Years 1999-2001, by County to Which Released

	Wyandotte	Johnson
FY 99	740	310
FY 00	839	465
FY 01	439	395

KDOC Supervision Caseloads, as of June 30th each year, 1999-2001.

	Wyandotte	Johnson
1999	779	520
2000	772	538
2001	493	396

KOC Admissions of Post-Incarceration Violators from Johnson and Wyandotte Counties by Fiscal Year

	Wyandotte	Johnson
FY 1999	350	89
FY 2000	446	153
FY 2001	284	140

Note: Numbers reflect the offenders on parole, post-release supervision, and conditional release returned to prison for violating the conditions of their release, excluding those returned by virtue of conviction on a new offense.

It should be noted that the numbers in all categories are lower in FY 2001 than in previous years. This is due to provisions of Senate Bill 323, enacted during the 2000 legislative session, which reduced periods of post-release supervision for certain categories of offenders. This reduced the total number of offenders under supervision statewide by approximately one-third and also reduced the number of condition violators returned to prison. In FY 2000 the monthly average of condition violators returned to prison was 265, while in FY 2001 the number was 221. For the first six months of FY 2002 the monthly average is 192.

It seems more efficient to locate the day reporting center in the area where it will serve the most offenders. The purpose of the DRC is to provide an alternative to revocation for offenders who violate the conditions of their supervision but who do not pose a public safety risk. Wyandotte County not only had the most offenders under supervision but also the most offenders returned to prison for violating conditions of supervision.

Available community resources in the Kansas City area at the current time are:

- Contract with Salvation Army Shield of Service, Kansas City, Kansas – 20 placements;
- Contract with Mirror, Inc. for community residential beds, Shawnee, Kansas – 42 placements.

Although the DRC is not a residential facility, balancing the availability of community resources weighs in favor of placing the day reporting center in Wyandotte County.

I hope this information is helpful regarding some of the considerations involved in placement of the day reporting center. Please let me know if you have any questions regarding this matter.

STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
Landon State Office Building
900 S.W. Jackson — Suite 400-N
Topeka, Kansas 66612-1284
(785) 296-3317

Bill Graves
Governor

Charles E. Simmons
Secretary

March 11, 2002

Reid Holbrook
Holbrook, Heaven & Osborn, P.A.
P. O. Box 171927
Kansas City, KS 66117-0924

Dear Mr. Holbrook:

I have reviewed the staff review summary regarding the application for a special use permit at 1111 North 5th Street in Kansas City, Kansas.

The report recommends five conditions regarding operation of the DRC at this location. The following conditions pose no concerns with respect to the goals of the DRC:

A. Four (4) year approval period for a maximum of 60 clients.

Response: The DOC established the capacity of 60 in the Request for Proposal it issued for this project. We have no intent to propose an increase in capacity beyond that level.

C. Hours of operation limited to 8:00 a.m. to 8:00 p.m., Monday through Saturday.

Response: These hours are very similar to those in effect for the Topeka DRC and are consistent with the goals of the DRC.

D. A Kansas Department of Corrections official should be on-site during office hours.

Response: There will be a parole officer position assigned to the DRC. It has always been our intent to establish a liaison/monitoring presence at each DRC and we have a position authorized for this purpose. A DRC operating at 1111 N. 5th Street will have the added benefit of being virtually next door to the existing parole office and the staff assigned there.

The other two comments require further clarification before we can fully evaluate their impact on the DRC operations.

B. Day reporting center serving only non-violent offenders.

Response: The department's intent is that the DRCs be an option for all offenders under DOC supervision in the Kansas City area, irrespective of the crime of conviction. Most offenders under DOC supervision have a criminal history which includes what are classified as "person crimes." Excluding all of these offenders from placement in the DRC would significantly diminish the usefulness and bring into question the feasibility of having a DRC at all.

If the intent of the proposed condition is that offenders referred to the DRC not have been involved in acts of violence during the supervision period, such a condition poses no hindrance to the DRC operation, as the DOC response to such conduct in most all cases is revocation of release status and a return to prison.

We will need clarification regarding this condition before we can respond further as to its impact on the DRC.

E. The day reporting center being closed if the GPS is not operational.

Response: From the outset, GPS has been an integral part of the DRC concept. However, this proposed condition also requires clarification regarding its intent. Does the condition apply to any temporary non-operational status of the GPS, or is the intent that the DRC be closed if GPS is not available on a long-term basis?

From our perspective, it does not make sense to close the DRC if the GPS is unavailable for only a few hours or a few days. The DRCs provide more supervision and structure than other non-residential community supervision. Closing the DRC for a few hours or a few days will not remove the offenders from the community. However, it will actually lessen the level of supervision they will be receiving. Closing the DRC during such temporary outages of the GPS is the opposite of what should occur. The DRC should remain open so that as much supervision as possible can still be provided.

If the intent is the DRC be closed if GPS becomes unavailable on a long-term basis or permanently, we have less concern about such a condition, provided the DOC have the ability to substitute other available and effective technology which will serve the same purpose as GPS.

Please request clarification regarding the intended purpose of this proposed condition.

Please advise when you have additional information regarding these matters.

Sincerely,

Charles E. Simmons
Secretary

cc : Terri Saiya
Robert Sanders

BEFORE THE KANSAS SENATE JUDICIARY COMMITTEE

TESTIMONY OF REID F. HOLBROOK IN SUPPORT OF SENATE BILL 648

FRIDAY, MARCH 22, 2002

Chairman Vratil, Members of the Committee, Good Morning

My name is Reid Holbrook[1] and I am a lawyer who practices in Kansas City, Kansas. I have had the privilege to represent Community Solutions Inc. (CSI) in its efforts to establish and operate a Day Reporting Center (DRC) in Kansas City, Kansas. I would like to offer a few remarks in support of Senate Bill 648 and respond to any questions you may have.

Highly summarized, CSI is a Not For Profit Corporation that is a tax exempt organization withing the meaning of IRC §501(C)(3). It does business in approximately seven states, mostly in the northeast part of the United States and was the first organization with a DRC accredited by the American Correctional Association. CSI has operated DRC's since 1989 and has continued to establish and operate DRC's in other states, usually through a contractual relationship with state correctional authorities.

In December 2000, following a public bidding process, CSI was awarded a 53 month contract by the Kansas Department of Corrections (DOC) to establish and operate DRC's in Wichita, Topeka and Kansas City. The Topeka DRC was opened and commenced operations at 400 S.W. Croix in early May of 2001. There was never any opposition to this facility. The City of Topeka did not require CSI to obtain a special use permit for the Topeka facility that is located in a retail business district. The Wichita facility initially encountered opposition, probably due to an unwise choice of locations by CSI. Fortunately, the City of Wichita took a leadership role and developed a site that was satisfactory to CSI and its citizens and has agreed to construct a facility where CSI will be a tenant. CSI is about ready to sign a lease in Wichita and the Wichita facility should be online by early fall. The City of Wichita is to be complimented for the leadership role it has taken.

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[1]Mr. Holbrook is a member of the Wyandotte County Bar Association, Kansas Bar Association and the American Bar Association. He serves on the Kansas Bar Association's Bench Bar Committee and is Chairman of the KBA Task Force on Mandatory Professional Liability Insurance. He is the immediate past National Chairman of the University of Kansas Alumni Association and is a member of its Executive Committee. He is also a partner in the firm of Holbrook, Heaven & Osborn, P.A..

SJud 3-22-02 Att 4

In the thirteen years that CSI has operated DRC's it has never had the experience that it has had in Wyandotte County. As you may know the three DRC's proposed for Kansas are all non residential facilities, operate from approximately 8:00 a.m. to 8:00 p.m., and through a GPS monitoring system provide intensive control and supervision over clients who are referred to the program by DOC. The Kansas City, Kansas proposed DRC is authorized to accept up to 60 clients which requires approximately 7000 square feet for its operations. A DRC requires office space, conference rooms and a small reception area. None of the DRC's established by CSI have ever had inside or in house security and indeed when you walk into the Topeka facility, the first individual that you will greet is a female receptionist. The contract between CSI and DOC does contain very specific criteria which CSI must comply with in so far as siting and operating a DRC. It is the stringency of the criteria that makes locating a suitable site sometimes difficult.

CSI, shortly following the signing of the December 2000 contract, engaged a real estate firm in Kansas City, Kansas (Fishman & Co.) to assist them in locating a suitable site. Initially, the most logical site for the DRC was the Indian Springs Shopping Center, which at that time was nearly vacant but is a very large enclosed mall that meets all of the contractual criteria established by DOC. Two separate locations within the mall were considered and proposed and eventually the mall ownership advised Fishman that the Unified Government objected to the DRC being located at Indian Springs. No specifics or reasons were provided .

Fishman then next reviewed a number of sites including another shopping center site located at approximately 38th and State Avenue in Kansas City, Kansas. The zoning for the site was appropriate, the shopping center was only approximately 50% occupied and modification of an old Sears store was agreed to as the site most suitable for the DRC. CSI entered into a lease and agreed to $150,000.00 worth of lease hold improvements in order to get the space properly configured. The total rental cost to CSI over a 53 month lease hold period would have been approximately $7.25 per square foot. Just before the facility was ready to open, CSI and Fishman were notified by Unified Government city Planning and Zoning officials that a special use permit was required. It being the contention of the Unified Government that a DRC was the same thing as a prison or custodial facility thus a requirement for a special use permit. CSI and Fishman disagreed but the city has refused to issue any sort of an occupancy permit or allowed use of the facility.

On March 26, 2001 a "community meeting" was arranged for at the Kensington Park Recreation Center and approximately 80 citizens appeared to receive information about the DRC and what it would do. CSI representatives and DOC representatives attended this meeting to offer information about a DRC. The meeting was just before the mayoral election, it was raucous and significant opposition to 38th and State was expressed by a number of individuals including elected public officials of the Unified Government.

Following the March meeting there were a series of efforts between CSI and the Unified Government to see if other viable alternatives existed. Since the Unified Government operates a "community corrections" facility in the old federal courthouse next door to the Wyandotte County Courthouse, CSI offered to rent space and or swap space in the old federal courthouse and allow another agency of the UG to occupy the space at 38th and State. The Wyandotte County treasurers office was one agency that was discussed. Eventually, the Unified Government stated that this was not a viable concept and rejected the CSI proposals.

CSI continued to consider other alternatives and requested the Unified Government to review its land bank to see if it owned any property that could be utilized. The response of the Unified Government was there was none but did suggest the public levee in Kansas City, Kansas be considered. The Levee was considered and evaluated and though not a desirable site the initial belief was that the site could be "made to work." The dispute continued between the Unified Government and CSI regarding the necessity of a special use permit but as a concession to the Secretary of Corrections, CSI agreed to submit an application for a special use permit. This permit was considered and approved by the Planning and Zoning Commission in July of 2001. During this process, CSI employed an architect and an engineer to evaluate the public levee space in order to attempt to determine what the tenant improvement cost could amount to. As a result of their investigation, the engineer and the architect provided reports that asbestos and the removal cost and the tenant finish cost. Amortizing these costs over the term of the lease together with the lease cost made the levee site economically unfeasible and CSI withdrew its application for the special use permit. CSI again requested Fishman & Co. to see what other alternatives and sites could be available and a site was identified at 8th and Armstrong in Kansas City, Kansas which was formerly the old Gas Service Company. This is a building that has two floors with 7000 square feet each floor. Fishman & Co. arranged to have investors buy the building and CSI was willing to sign a lease to operate the DRC from the lower level. Extensive discussions again took place with the Unified Government's community corrections officials to see if they would lease the upper floor. Occupancy and use of this building was not economically feasible unless both floors could be rented. Also, there would be some advantages to both CSI and Community Corrections to be in the same building. Eventually, the Unified Government notified CSI that for financial reasons the proposal to relocate Community Corrections to 8th and Armstrong was not viable.

In late fall and early winter 2001, CSI considered space in a shopping center at 5th and State Avenue in Kansas City, Kansas. The space was located immediately next door to the existing Department of Corrections offices that has been there thirteen years and the 6900 square feet was the right size. Although the space was significantly more expensive ($12.00 per square foot) than the 38th and State location, it was the belief of CSI that in order to get the DRC open it would pay the increased cost. Also at this time there was increased interest about this issue from an Interim Committee of the Legislature as well as Kansas City, Kansas residents. Accordingly, CSI arranged for a briefing and tour of the Topeka facility on December 12, 2001. All members of the Wyandotte County delegation as well as commissioners of the Unified Government and the Mayor/CEO were

invited together with the members of the Oversight Committee on Correction and Juvenile Justice chaired by Representative Kathe Lloyd. Neither the Mayor nor any commissioners of the Unified Government showed up for the meeting. The Oversight Committee showed up in its entirety and in my judgment appreciated the briefing of how the Topeka facility was functioning. Senator David Haley was the only representative of the Wyandotte County delegation who appeared. In part due to the lack of attendance and at the suggestion of members of the Special Oversight Committee, CSI agreed to hold a public forum on January 9, 2002 in the offices of the Department of Corrections in Kansas City, Kansas. All commissioners and the Mayor of the Unified Government were invited and the County Delegation was invited. Civic and business leaders were invited to include the entire board of the Kansas City, Kansas area Chamber of Commerce and leaders of neighborhood groups were also invited. Following the briefing by the director of the DRC in Topeka, there was a brief question and answer period which amounted to little more than various local public officials and local citizens expressing their opposition to a DRC in Wyandotte County. Please keep in mind the purpose of the meeting was to provide information and it was not intended to be a public debate.

In late January 2002, CSI developed what it considered to be a less than satisfactory proposed lease arrangement with the ownership of the 5th and State Avenue property and in February applied for a Special Use Permit for the space next door to DOC. CSI continues to believe that a special use permit is not necessary and is merely a contrived hurdle for CSI to have to clear in order establish a DRC. Nevertheless, and again as a concession to the Secretary of Corrections, CSI did seek a special use permit. The hearing on the permit was conducted on March 11, 2002 before the Unified Government's Planning and Zoning Commission. Many of the people who appeared at the January 9 meeting appeared on March 11 and expressed their opposition to the application. The Planning and Zoning Commission chose to table the application for thirty days and the matter remains pending.

Not only has the Unified Government arbitrarily established a hurdle for CSI to clear, now that the application for a special use permit has been submitted, it has added additional conditions in order for CSI to receive the permit. One condition is that CSI have only non-violent offenders in the DRC. Since most parolees have a history of violence in their background this is a criteria that is simply unacceptable (as well as unbelievable) because it effectively eliminates CSI from accepting any referral unless he or she was a counterfeiter or an embezzler. Another condition is that if the GPS system for some reason becomes inoperable, albeit temporary, then the DRC must shut down operations. If during the course of the business day if for some reason the system malfunctions (and it never has in CSI's experience) then apparently all of the individuals over whom close supervision is being monitored should be released to go to their homes and be returned into the community. During the March 11 meeting one opponent stated that there was another location that was suitable and of course the Planning and Zoning Commissioners think this site should be explored. Actually, it has been considered and is unsuitable for a wide variety of reasons, which have been detailed to the Planning and Zoning Commission.

CONCLUSION

From my experience in dealing with the foregoing issue, two things are clear. One is the Unified Government is carefully manipulating the process to defeat the ability of CSI to carry out the intent of the Legislature e.g. the rehabilitation and supervision of parolees on a less costly basis than returning them to incarceration. Second, the UG and its leadership have adopted the same belief of the neighborhood groups that is "...send them somewhere else...". At nearly every meeting there is the "...send them to Johnson County..." argument that is advanced. Some people are in denial about the fact that these parolees (during the month of February, approximately 452) actually live in Wyandotte County and further believe that the presence of the DRC will stimulate lawlessness and violence. When people are informed there has never been any incident at the Topeka DRC and that the experience of "violent incidents" within DRC's operated by CSI across the country is virtually nil, there is simply a blind refusal to accept any factual data that is contrary to beliefs that are held.

CSI, together with the Secretary of Corrections and the Department of Corrections has considered nearly thirty sites in Wyandotte County and they are identified on Exhibit A that is attached hereto. CSI and the Department of Corrections has gone to unusual lengths to either conduct public forum's, offer tours of the existing DRC in Topeka or otherwise attempt to cooperate with the Unified Government in connection with establishing a DRC. There will never be a DRC in Kansas City, Kansas unless Senate Bill 648 is adopted and enacted and would provide for the Secretary of Corrections to accomplish the legislative goals of the State of Kansas.

Thank you for considering my comments and I will be pleased to respond to any questions.

EXHIBIT A

TESTIMONY OF REID F. HOLBROOK-SENATE BILL 648

MARCH 22, 2002

1. Indian Springs Mall, Suite 72-Letter of intent was approved by landlord and later rejected because of opposition by the Unified Government.

2. Indian Springs Mall, Suite 49-Rejected due to opposition of Unified Government.

3. Indian Springs TBA Building-Too much tenant finish required and opposed by Unified Government.

4. Old Shoney's Restaurant Building, 49th and State Avenue-Too Close to a Bar and Liquor Store.

5. Advantage Auto Sales Site, 50th and State Avenue-Not enough square footage(only 3000 square feet)

6. 3748a State Avenue-Lease signed and tenant finish completed. Opposed by Unified Government.

7. 5th and State Avenue (Old VA Clinic Site)- approved by CSI-landlord didn't want to lease.

8. 1111 N. 5th (Old Census Site)-approved by CSI-landlord didn't want to lease (Now is willing to lease).

9. 47th and State Avenue, Douglas Bank Building-approved by CSI, opposed by Unified Government (part of Indian Springs Mall)

4-6

10. 13th and Minnesota (church)-Too close to Kansas School for the Blind.

11. 7th and Armstrong-Arrowhead Building-too costly to renovate and no parking.

12. 728 Minnesota Avenue-Not ADA Compliant

13. Public Levee Site-Tenant finish too costly.

14. 7th and Armstrong-Old Federal Courthouse-UG staff proposed to swap space used by Community Corrections for the space at 3748a State Avenue. They later indicated they wouldn't do this.

15. 820 Kansas Avenue-Not ADA compliant.

16. 9th and Osage-Building had structural problems and was too costly to renovate.

17. Former "Mrs. Peters Restaurant"-in Bankruptcy Court and not available.

18. Strip Center at 49th and State Avenue-Smallest space available was 10,000 square feet. Building was being sold and would not divide or renovate.

19. Old Medical Building at 18th Street, just north of I-70-cost prohibitive to renovate and poor bus service.

20. Kansas Avenue and Mill Street-NE Corner-across the street from liquor store.

21. 8th and Armstrong-Former Gas Service Center-14,000 square foot building-Originally going to cohabitate with UG-Community Corrections, but they later indicated they wouldn't do this. Then explored possibility of sharing with Kansas Department of Corrections, Parole Services when the site at 5th and State became available.

22. 555 Stanley Road-Not ADA Compliant

Zoning And Planning: The Economics of State Land Use and the Balancing of Interests Test [*Herrmann v. Board of County Commissioners of Butler County*, 246 Kan. 152, 785 P.2d 1003 (1990)]

I. Introduction

The power to regulate and restrict land use is a general police power residing in the states.[1] This police power is typically delegated to city and county authorities by statute. However, the statutes do not address the question of whether authorized local land use restrictions apply to state government land use.[2] The Kansas Supreme Court confronts the issue of state immunity from local zoning restrictions in *Herrmann v. Board of County Commissioners of Butler County*.[3] In finding the state immune from local zoning regulations, the Supreme Court of Kansas accepts the balancing of interests test previously applied by the Kansas Court of Appeals.[4]

II. Case Description

Following a public hearing, the Board of County Commissioners of Butler County, Kansas (Board) granted a special land use permit to a local landowner. The permit allowed the construction of a state prison in Butler County. Two area landowners brought suit against the Board, alleging that a prison was not a

1. *See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The United States Supreme Court stated the power to regulate land use is found in the state's police power and may be asserted for the public welfare. *Id.* at 387. For a comprehensive discussion of the constitutionality of zoning regulations, *see generally* MANDELKER, LAND USE LAW §§ 2.01 to 2.46 (2d ed. 1988)[hereinafter MANDELKER].

2. *See* Note, *Municipal Power To Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284 (1964). A number of jurisdictions exempt the state and agencies thereof from local building restrictions on the basis of the sovereign immunity doctrine. Still others hold that unless local authority to regulate building construction is expressly withdrawn by the legislature or abused by local authorities, the state must comply with the local regulations. *Id.* at 291-92; *cf.* State v. City of Kansas City, 228 Kan. 25, 612 P.2d 578 (1980). The city of Kansas City sought to have city building codes enforced on the construction of a University of Kansas Medical Center facility. The Supreme Court of Kansas recognized the balancing of interests test but found the test would not be "feasible or practical as applied to local building codes and proposed construction by the Board of Regents." *Id.* at 38, 612 P.2d at 587. The large number of projects undertaken by the board of regents and the potential delays resulting from litigating each project under the balancing of interests test could doom the projects. The Kansas Supreme Court held for the board of regents on the basis of the vital educational responsibilities entrusted to the board. *Id.*, 612 P.2d at 587. For a discussion of the issue of increased litigation resulting from the balancing of interests test, see *infra* notes 74-76 and accompanying text.

3. 246 Kan. 152, 785 P.2d 1003 (1990).

4. *Id.* at 158, 785 P.2d at 1008; *see* Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 576 P.2d 230 (1978). The Kansas Court of Appeals found the balancing of interests test superior to the traditional tests for state immunity from local zoning regulations because the public interest is better served by a test which weighs and considers all factors. *Id.* at 112, 576 P.2d at 238.

permissible use for land zoned A-2, agricultural transition.[5] The state of Kansas intervened pursuant to Kansas Statutes Annotated (K.S.A.) § 60-224(a)(2).[6]

In reaching a decision, the district court relied exclusively upon the balancing of interests test applied in *Brown v. Kansas Forestry, Fish & Game Commission*.[7] In *Brown*, the Kansas Forestry, Fish and Game Commission (Commission) purchased two lots in a residential neighborhood adjacent to a state-owned recreational facility. The Commission intended to develop the lots as parking space and washrooms for use by patrons of the state facility.[8] In a case of first impression, the Kansas Court of Appeals rejected the traditional tests and adopted a balancing of interest test for resolving the issue of local zoning regulation applicability to state government land use.[9]

The district court in *Herrmann* applied the balancing of interests test and found that the compelling state interest in the prison weighed in favor of state immunity from local zoning regulations.[10] Hence, the trial court granted summary judgment in favor of the state.[11] However, the summary judgment granted was partial in that immunity was qualified upon the state acting reasonably in choosing the site for the prison. Whether the state had acted reasonably in choosing the Butler County site was a factual question to be determined at trial. The plaintiffs, however, conceded that the state had acted reasonably in choosing the proposed site for the prison. By conceding that the state had acted reasonably, the plaintiffs had the right of appeal from a final judgment rather than the right of an interlocutory appeal from a partial summary judgment.[12] The limited issue before the Supreme Court of Kansas[13] was whether the dis-

5. *Herrmann*, 246 Kan. at 154, 785 P.2d at 1005. The Butler County Planning Commission held a public hearing March 9, 1989, at which time local residents expressed views concerning construction of the prison. Following issuance of the special use permit, suit was filed April 26, 1989. The plaintiffs alleged the Board's decision to grant the permit was arbitrary, unreasonable, capricious, and predetermined. *Id.* at 153-54, 785 P.2d at 1005; *see also* Butler County, Kan., Ordinance 102, A-2 Agricultural Transition District (1989). "This district is established to retain many of its agricultural characteristics, but to also serve as a transition area to accommodate many of the nonagricultural uses normally located in a rural area while anticipating an increasing amount of urbanization." *Id.*

6. *Herrmann*, 246 Kan. at 154-55, 785 P.2d at 1006. *See* KAN. STAT. ANN. § 60-224 (1983). The statute provides:

> (a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter substantially impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id.

7. *Herrmann*, 246 Kan. at 156, 785 P.2d at 1007; *see* Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 112, 576 P.2d 230, 238 (1978)(first Kansas case to apply the balancing of interests test).

8. *Brown*, 2 Kan. App. 2d at 103, 576 P.2d at 231.

9. *Id.* at 112, 576 P.2d at 238. For a discussion of the rationale underlying the rejection of the eminent domain test, the superior sovereign test, and the governmental proprietary distinction, see *infra* notes 20-39 and accompanying text.

10. *Herrmann*, 246 Kan. at 156, 785 P.2d at 1006.

11. *Id.* at 158-59, 785 P.2d at 1008-09.

12. *Id.* at 156, 785 P.2d at 1006.

13. In *Herrmann*, the Kansas Supreme Court makes no reference to a Kansas Court of Appeals ruling on the case. Perhaps the Kansas Supreme Court ordered the case from the court of appeals pursuant to K.S.A. § 20-3018(c). The statute provides that "[a]t any time on its own motion, the supreme court may order the court of appeals to transfer any case before the court of appeals to the supreme court for review and final determination." KAN. STAT. ANN. § 20-3018(c) (1988). In the

trict court erred in granting the state qualified immunity from local zoning regulations.[14]

In *Herrmann*, the Kansas Supreme Court recognizes the court of appeals ruling in *Brown* and declares the balancing of interests test as the "appropriate" test for resolution of whether local zoning restrictions apply to state government land use.[15] The purpose of the test is to derive legislative intent with respect to state immunity when it is not clearly ascertainable. The legislative intent may be drawn from a variety of factors including, but not limited to: the nature of the state agency seeking immunity, the intended land use, the public interest to be served, the effect of local zoning restrictions upon the intended use, and the impact of the intended use upon legitimate local interests. Using these factors, an overall value judgment is made concerning the proposed land use. Further, when a state project is granted immunity, it is conditioned on nonarbitrary use by the state agency in locating the site for the project.[16]

III. ANALYSIS

Kansas counties and cities have been delegated the authority to regulate and restrict land use. The governing bodies of incorporated cities may zone land within city limits while county officials are authorized to zone lands within county borders except for land within an incorporated city.[17] To the credit of

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alternative, the Kansas Court of Appeals may have requested the Kansas Supreme Court hear the case pursuant to K.S.A. § 20-3016. The statute allows the court of appeals to request supreme court review and final determination when "the case is within the jurisdiction of the supreme court." KAN. STAT. ANN. § 20-3016 (1988). In addition, the court of appeals must find one of the following:

(1) One or more issues in such case are not within the jurisdiction of the court of appeals;
(2) the subject matter of the case has significant public interest;
(3) the case involves legal questions of major public significance; or
(4) the caseload of the court of appeals is such that the expeditious administration of justice requires such transfer.

Id.

14. *Herrmann*, 246 Kan. at 156, 785 P.2d at 1007. The plaintiffs asserted the district court erred in granting the State the right of intervention pursuant to K.S.A. § 60-224(a)(2). *Id.* at 155, 785 P.2d at 1006. The Kansas Supreme Court finds that all factors authorizing intervention had been met. The State filed a timely application, showed a strong interest in the subject matter, and faced inadequate representation without the right of intervention. *Id.*, 785 P.2d at 1006. Further, the plaintiffs contended the district court erred in awarding the State a partial summary judgment because the State did not come forward with evidence to show why the particular Butler County site was chosen. The Supreme Court of Kansas notes that the plaintiffs' argument represents a misinterpretation of the district court decision. The district court did not grant summary judgment on the question of whether the State's actions were reasonable. The plaintiffs conceded the reasonableness of the State's actions to give rise to an appeal from a final judgment. Thus, the plaintiffs removed the issue from appellate review. *Id.* at 155-56, 785 P.2d at 1006.

15. *Id.* at 157-58, 785 P.2d at 1007-08.

16. *Id.*, 785 P.2d at 1007-08; *see also* Rutgers v. Piluso, 60 N.J. 142, 152-53, 286 A.2d 697, 702-03 (1972)(the Supreme Court of New Jersey fashioned the balancing of interests test). Factors to consider whether the state has acted arbitrarily are the consideration given to the effect of the project on local interests and the extent to which alternative sites were considered. Long Branch Div. of United Civic & Taxpayers Org. v. Cowan, 119 N.J. Super. 306, 310, 291 A.2d 381, 383 (1972).

17. *See* KAN. STAT. ANN. § 12-707 (1989). "The governing body of any city is hereby authorized by ordinance to divide such city into zones or districts, and regulate and restrict the location and use of buildings and the uses of the land within each district or zone." *Id.*; KAN. STAT. ANN. § 19-2919 (1989). The statute provides:

> For the purposes of promoting health, safety, morals, comfort, or the general welfare, and conserving and protecting property values throughout the county or portions thereof, the board of county commissioners of any county, by resolution at a regular meeting of the

Kansas legislators, the zoning acts were well drafted, which may explain the minimal number of zoning disputes between county and city authorities in Kansas case law.[18] However, the statutes do not indicate their applicability to state government land use.[19] Historically, the courts have used one of three tests to resolve the issue of whether local zoning restrictions apply to state government land use.

A. *Traditional Tests For Immunity*

Under the eminent domain test, if a state agency has the power of eminent domain,[20] the state agency is immune from local zoning regulations.[21] The eminent domain test has been applied whether the land is actually condemned or purchased.[22] The underlying rationale of the test is a presumption of legislative intent that the state, or agency thereof, be immune from local zoning regulations if the power of eminent domain is available to the state agency.[23] Critics of this approach note that absolute immunity based on the power of eminent domain is an invitation for irresponsible government. Absolute immunity provides no incentive for the state to consider local interests or to negotiate with local authori-

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board, may provide for the adoption, or amendment, of zoning regulations in the manner provided by this act.

Id.; *see also* State *ex rel.* Burton v. Vandyne, 159 Kan. 378, 383, 155 P.2d 458, 462 (1945)(Kansas Legislature has delegated the authority to regulate land to local authorities since 1921).

18. *But see* City of Salina v. Jaggers, 228 Kan. 155, 612 P.2d 618 (1980). The case provides a comprehensive statutory history and analysis of Kansas zoning regulations. The incorporated city of Salina sought to regulate unincorporated land outside of its limits within Saline County. The Kansas Supreme Court held for the county on the grounds that the city had not availed itself of K.S.A. § 12-705 which would have allowed for joint city and county regulation of the land. *Id.* at 170, 612 P.2d at 630. Specifically, K.S.A. §§ 12-705 to 705a provides an incorporated city with the opportunity to regulate land not within its borders in conjunction with county authorities. The land must be within three miles of the city limits, the city must give public notice, and a joint committee of city and county officials must pass a resolution putting the new zoning regulations in effect. *Id.*; *see also* KAN. STAT. ANN. § 19-2918 (1989)(county authorities are given the same opportunity to regulate land within incorporated city limits).

19. *See* MANDELKER, *supra* note 1, at § 4.43 (lack of legislative guidance is surprising). *But see* OR. REV. STAT. § 227.286 (1989)(all public property is subject to local land use restrictions).

20. *See* NICHOLS, THE LAW OF EMINENT DOMAIN § 1.11 (3d ed. 1989). Eminent domain is the power of the sovereign to take property for "public use" without the owner's consent. *Id.*

21. *See, e.g.*, State *ex rel.* Askew v. Kopp, 330 S.W.2d 882, 889 (Mo. 1960) (Missouri Supreme Court found property rights are secondary to the state's power of eminent domain). *But see* City of St. Louis v. City of Bridgeton, 705 S.W.2d 524 (Mo. Ct. App. 1985). The Missouri Court of Appeals noted that the Missouri Supreme Court has abandoned the eminent domain test in favor of a variation of the pure balance of interests test. *Id.* at 529 (citing St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo. 1962)).

22. *See* State *ex rel.* Askew, 330 S.W.2d at 889 (court found controlling factor to be the right to condemn the property and not actual condemnation).

23. Aviation Serv. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761 (1956). Hanover Township attempted to preclude the improvement of Morristown Municipal Airport, located within Hanover Township. The operators of the airport were given the power of eminent domain by statute; however, the proposed improvement did not require acquisition of new land. The New Jersey Supreme Court held the power of eminent domain to "reflect legislative intent to immunize the acquisition and maintenance [of the airport] from the zoning power." *Id.* at 283, 119 A.2d at 766; *see* Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971)[hereinafter Note]. Another justification for the test is that once brought within the public domain, either by purchase or condemnation, the land becomes part of the public domain and immune from local zoning regulations. *Id.* at 875; *see also* Reynolds, *The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing*, 71 MINN. L. REV. 611 (1987)[hereinafter Reynolds]. When land is acquired for a public purpose, the public purpose and not the method by which the land was acquired controls. *Id.* at 616-17.

ties.[24] Others see the test as an unreasonable extension of the power of eminent domain. The power of eminent domain allows the state to acquire property that has "nothing to do with the use of property."[25]

A related approach, the superior sovereign test, concentrates on the relationship between the competing political bodies. If the state agency is deemed superior to the competing local authority, the state agency will be held immune from local zoning regulations.[26] The superior sovereign test assumes that all political bodies may be ranked in a state governmental hierarchy. If the political body seeking immunity holds a superior position in that hierarchy, it is presumed that the legislature intended that the superior body be immune from local zoning regulations.[27] The obvious problem in applying the superior sovereign test is that of ranking sovereigns.[28] The superior sovereign test also ignores the delegation of authority to local government and invites arbitrary, irresponsible decision making by superior state agencies.[29]

Finally, under the governmental proprietary distinction, the intended land use is determinative. If the intended use is governmental, mandated by legislation to confer a benefit to the general public, the state is immune from local zoning regulations.[30] A proprietary land use, one "conferring private advantage

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24. *See* Reynolds, *supra* note 23, at 618. Absolute immunity under the eminent domain test provides no check on arbitrary or unilateral decision making on the part of the state. *Id.*; *see also* Johnston, *Recent Cases in the Law on Intergovernmental Zoning Immunity: New Standards Designed to Maximize the Public Interests*, 8 URB. LAW. 327 (1976)[hereinafter Johnston]. The power of condemnation allows state government to "side-step volatile political issues" by providing needed yet unpleasant facilities in locations where the political ramifications may be minimized. *Id.* at 331.

25. City of Temple Terrace v. Hillsborough Ass'n, 322 So. 2d 571, 578 (Fla. Dist. Ct. App.), *aff'd*, Hillsborough Ass'n v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976). The court of appeals reasoned the power to condemn and the power to use property represent two distinct issues. *Id.*; *see also* Note, *supra* note 2, at 300 (the inference of immunity for land use from the power of eminent domain is "unwarranted").

26. *See Aviation Serv.*, 20 N.J. at 282, 119 A.2d at 765. The court recognized a line of cases in which immunity was granted when the political body seeking immunity "occupies a superior position in the governmental hierarchy. . . ." *Id.*, 119 A.2d at 765. The superior sovereign test was not applied because the status of both litigants was that of a Township. *Id.*, 119 A.2d at 765.

27. *See id.*, 119 A.2d at 761. The court stated that the rationale behind granting immunity was a presumption of legislative intent derived from the superior position held by the political body seeking immunity. *Id.* at 282, 119 A.2d at 765 (citing Town of Bloomfield v. New Jersey Hwy. Auth., 18 N.J. 237, 247, 113 A.2d 658, 663 (1955), Hill v. Borough of Collingswood, 9 N.J. 369, 375, 88 A.2d 506, 510 (1952)). In *Rutgers v. Piluso*, the Supreme Court of New Jersey rejected the superior sovereign test in favor of a balancing of interests test. Rutgers v. Piluso, 60 N.J. 142, 153, 286 A.2d 697, 703 (1972); *see also* Note, *supra* note 23, at 878-79. The presumption arises from the statewide duties and jurisdiction given to the state and agencies thereof which must not be obstructed by local zoning regulations. *Id.*

28. *See Aviation Serv.*, 20 N.J. at 282, 119 A.2d at 703 (superior sovereign test could not be applied because both governmental bodies occupied the same rank); Johnston, *supra* note 24, at 330. The test has been applied in disputes between "specialized" and "general" jurisdiction political bodies. Usually, the specific jurisdiction body, a school district or highway authority, will be granted immunity from the general jurisdiction such as a county or city. *Id.* The classification as specific or general may be the result of the difficulties found in ranking political bodies within the state government hierarchy.

29. *See* Note, *supra* note 23, at 877. Given the statutory authority to restrict and regulate land use, counties, municipalities, and cities become equal "agents of the state". As equal agents, any attempt to rank such governmental bodies will necessarily ignore the delegation of authority to regulate land use. *Id.* The possibility of arbitrary decision making resulting from absolute immunity is seen as one of the major flaws of the superior sovereign test. Johnston, *supra* note 24, at 333; Reynolds, *supra* note 23, at 624.

30. *See* City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962). Because the city of Scottsdale was performing a governmental function in constructing and operating a sewage

pursuant to permissive legislation," will be subject to local land use regulations.[31] The governmental proprietary distinction evolved in the context of governmental immunity from tort claims.[32] The distinction has been extended to land use disputes as a means of deriving legislative intent.[33] Further, the test has been defended on the ground that it allows all relevant factors to enter into the analysis.[34] The major criticism of this test parallels that of the superior sovereign test. The difficulties in distinguishing between governmental and proprietary land uses are no less problematic than ranking sovereigns.[35]

These three traditional tests have received considerable criticism from commentators and courts.[36] "All have been subject to scholarly criticism as too simplistic, avoiding the kind of analysis needed for rational resolution of the complex issues posed by land use problems in a modern, urban orientated society."[37] While each test has unique problems, the common flaw is the mechanical application of labels and the absence of legitimate local concerns in the

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facility, the Tempe city zoning restrictions prohibiting such a land use were inapplicable. *Id.* at 397-98, 386 P.2d at 639.

31. Note, *supra* note 2, at 295-96.

32. MANDELKER, *supra* note 1, at § 4.48. A political body performing a governmental function is immune from tort claims arising out of that governmental function. *Id.*; *see* Dalehite v. United States, 346 U.S. 15, 42 (1953)(one injured carrying out government operations has no cause of action against government). *But see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). The Supreme Court found the governmental proprietary distinction to be "unworkable" in the context of state immunity from federal regulation. The distinction has been made unworkable by the expanding role of government. *Id.* at 543.

33. *See* Johnston, *supra* note 24, at 329. Immunity for governmental functions is predicated on the assumption that subjecting governmental land use to local zoning regulations may adversely effect the public interest. The legislature is entrusted with protecting and furthering the public welfare. Accordingly, when the public welfare may be adversely effected through enforcement of local land use regulations, the presumption is that the legislature would grant immunity to protect and further the public welfare. *Id.*

34. *See* Note, *supra* note 23, at 872. Inherent in the governmental proprietary distinction is a balancing of local interests against those of the state. *Id.*; *see also* Reynolds, *supra* note 23, at 623. The test allows the court to consider the potential negative impact the intended land use may have upon the interests of local landowners and authorities. *Id.* For a discussion of the relationship between the governmental proprietary distinction and the balancing of interests test, see *infra* notes 79-93 and accompanying text.

35. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 543 (1985) (Supreme Court found the governmental proprietary distinction "unworkable"); *see also* Township of Washington v. Village of Ridgewood, 26 N.J. 578, 141 A.2d 308 (1958). The Supreme Court of New Jersey found the distinction "illusory" on the grounds that all authorized functions of government, state or local, are governmental. *Id.* at 584, 141 A.2d at 311; Reynolds, *supra* note 23, at 622 (inconsistent results have also plagued the governmental proprietary distinction).

36. *See* Reynolds *supra* note 23, at 616-24 (comprehensive discussion and criticism of traditional tests); Johnston, *supra* note 24, at 331-35 (thorough discussion of traditional tests and their faults); Note, *supra* note 23, at 883 (traditional tests described and criticized); Note, *supra* note 2, at 300-01 (brief treatment of the traditional tests); Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEX. L. REV. 316, 325-29 (1961)(traditional tests analyzed). For cases providing a comprehensive analysis of the traditional tests and their faults, all of which applied the balancing of interests test, see City of Temple Terrace v. Hillsborough Ass'n, 322 So. 2d 571 (Fla. Dist. Ct. App.), *aff'd*, Hillsborough Ass'n v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976); Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 576 P.2d 230 (1978); Rutgers v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972); Blackstone Park v. State, 448 A.2d 1233 (R.I. 1982).

37. *Brown*, 2 Kan. App. 2d at 104, 576 P.2d at 232.

analysis.[38] The balancing of interests test is the rational analytical tool required for resolution of land use disputes involving the state.[39]

B. *Balancing of Interests Test*

Kansas courts did not directly address the limited issue of state governmental immunity from local zoning regulations until 1978 in *Brown v. Kansas Forestry, Fish & Game Commission*.[40] Faced with a case of first impression, the Kansas Court of Appeals noted the criticism surrounding the traditional tests and then considered a balancing of interests test.[41]

The Kansas Court of Appeals joined a number of courts in adopting the analysis of *Rutgers v. Piluso*,[42] a leading case rejecting the traditional tests for state governmental immunity in favor of a balancing of interests test.[43] The question posed in *Rutgers* was whether Rutgers State University could circumvent local regulations limiting the number of student housing units within city limits. In rejecting the traditional tests, the *Rutgers* court reasoned that legislative intent, with respect to the intended land use and state agency, ought to be the basis for granting immunity. While not exclusive, the factors considered in the analysis were: the nature of the state agency seeking immunity, the intended land use, the public interests to be served, the effect of local zoning restrictions upon the intended use, and the impact of the intended use upon legitimate local interests. Using these factors, an overall value judgment was made concerning the proposed land use. Further, if immunity was found, it was conditioned on

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38. *See* Reynolds, *supra* note 23, at 624. The use of conclusory labels does not allow for the relevant factors, including local interests, to enter into the analysis. The critical flaw common to all of the traditional tests is they fail to bring about compromise and negotiation between the competing governmental bodies. *Id.*; *see also* Note, *supra* note 23, at 883 (application of "artificial abstracts" does not provide a reasonable analysis of the specific factual situation).

39. *See* Note, *supra* note 23 at 883-84. A balancing analysis was proposed to provide some "fundamental considerations" in determining whether immunity should be granted:

1. Is there any statutory guidance as to which interest should prevail? . . .
2. Do the zoning ordinance and any other manifestation of the local planning process comprehend alternative locations for the particular facility?
3. Did the governmental unit consider alternative locations for the facility?
4. What is the scope of the political authority of the governmental unit performing the function relative to the body instituting the zoning ordinance?
5. Has there been any independent supervisory review of the proposed facility by a governmental unit of "higher" authority such as a state-wide planning commission? . . .
6. How essential is the facility to the local community? To the broader community?
7. How detrimental is the proposed facility to the surrounding property?
8. Has the governmental unit made reasonable attempts to minimize the detriment to the adjacent landowners' use and enjoyment of their property?
9. Has there been any attempt to comply with the zoning procedure for obtaining an amendment or variance? Have the adversely affected landowners been given an opportunity to present their objections to the proper nonjudicial authorities?

Id. The article has received favorable treatment which is reflected in the contemporary balancing of interests approach to state immunity from local zoning regulations. *See* Rutgers v. Piluso, 60 N.J. 142, 152-53, 286 A.2d 697, 702 (1972)(*Rutgers* test shows remarkable similarities to considerations proposed in Note, *supra* note 23).

40. 2 Kan. App. 2d 102, 102, 576 P.2d 230, 231 (1978).

41. *Id.* at 104, 576 P.2d at 232. The Kansas Court of Appeals found the traditional tests to be "too simplistic". *Id.*, 576 P.2d at 232.

42. 60 N.J. 142, 286 A.2d 697 (1972).

43. *Brown*, 2 Kan. App. 2d at 113, 576 P.2d at 238; *see* Blackstone Park v. State, 448 A.2d 1233, 1239 (R.I. 1982)(lists jurisdictions adopting balancing of interests approach in issue of state immunity from local zoning regulations).

nonarbitrary use by the state agency. The *Rutgers* court noted that in some situations, one factor may be paramount in the analysis to the extent of overriding all other factors.[44]

In applying the *Rutgers* balancing of interests test in *Herrmann*, the Kansas Supreme Court finds the facts of the case weigh heavily in favor of immunity.[45] First, the state itself was seeking immunity. Moreover, the proposed prison was necessitated by prison overcrowding and a federal mandate to reduce that overcrowding.[46] Failure to comply with the mandate could have resulted in the state of Kansas losing exclusive control of its correctional system, and a "court-ordered release of a large number of felons many of whom would pose a significant threat to Kansas citizens."[47] The Kansas Supreme Court then reaffirms the district court opinion which proceeded through the final two factors of the balancing test. The district court found the local zoning regulations would have severely frustrated the construction of the prison, causing considerable delay and additional cost. Finally, the district court noted the project would confer a general economic benefit to citizens of Butler County.[48]

Immunity granted by the balancing of interests test is not, however, absolute immunity. When a state agency undertakes a governmental land use weighing in favor of immunity under the balancing of interests test, the decision is subject to judicial review. If a court finds the decision to locate the proposed state facility arbitrary, then immunity will be denied.[49] For example, in *Long Branch Division of United Civic & Taxpayers Organization v. Cowan*,[50] the New Jersey Department of Health sought to establish a drug rehabilitation center in violation of city zoning regulations.[51] The balancing of interests test weighed in favor of granting the New Jersey Department of Health immunity. However, on appeal, the Appellate Division remanded the case back to the trial court "on the sole issue of whether the Department acted unreasonably or arbitrarily."[52] Judicial review of the reasonableness of the state in locating a facility reduces the probability of irresponsible decision making, a critical flaw of the traditional tests for immunity.[53]

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44. *Rutgers*, 60 N.J. at 152-53, 286 A.2d at 702-03.

45. Herrmann v. Board of County Comm'rs of Butler County, 246 Kan. 152, 159, 785 P.2d 1003, 1008 (1990).

46. *Id.* at 158, 785 P.2d at 1008.

47. *Id.* at 159, 785 P.2d at 1009.

48. *Id.*, 785 P.2d at 1008-09.

49. Rutgers v. Piluso, 60 N.J. 142, 153, 286 A.2d 697, 703 (1972). Immunity when granted, must not "be exercised in an unreasonable fashion so as to arbitrarily override all important legitimate local interests." *Id.*, 286 A.2d at 703. Legitimate local concerns include the effects the proposed project would have upon the underlying justifications for allowing cities and counties to enact zoning regulations. *See* KAN. STAT. ANN. § 19-2919 (1988)(zoning promotes health, safety, morals, and general welfare, in addition to conserving property values).

50. 119 N.J. Super. 306, 291 A.2d 281 (N.J. Super. Ct. App. Div.), *cert. denied*, 62 N.J. 86, 299 A.2d 84 (1972).

51. *Id.* at 309, 291 A.2d at 382.

52. *Id.* at 309-10, 291 A.2d at 383.

53. *See* Reynolds, *supra* note 23, at 624. The traditional tests for immunity were based upon the mechanical application of labels and did not address local concerns. *Id.* The only judicial review of the traditional tests was a determination of whether the state agency or project could be labeled such that immunity would be granted.

C. *Evaluation of The Balancing of Interests Test*

1. The Economics of Balancing

The balancing of interests test recognizes that increasing population and urbanization have made land use planning, accomplished through zoning, an issue of great importance to local government.[54] Land use planning allows local authorities to control population density, preserve resources, and protect the aesthetics of neighborhoods, thereby conserving the value of property.[55] At the same time, the balancing of interests test acknowledges that the state must serve considerably more citizens than local government.[56] The balancing of these state and local objectives represents a cost-benefit approach to immunity that balances the specific benefits of the proposed land use against the specific costs local communities will incur.[57]

The only Kansas cases applying the balancing of interests test are *Brown v. Kansas Forestry, Fish & Game Commission* and *Herrmann v. Board of County Commissioners of Butler County*. In both cases, a state agency sought to use land contrary to local zoning regulations.[58] The application of the balancing of interests test illustrates the underlying cost-benefit analysis.

In *Herrmann*, legislation mandated the construction of a state prison to benefit and protect the entire citizenry of Kansas from the early release of convicted felons.[59] Further, evidence indicated that residents of Butler County

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54. *See* City of Temple Terrace v. Hillsborough Ass'n, 322 So. 2d 571 (Fla. Dist. Ct. App.), *aff'd*, Hillsborough Ass'n v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976). In applying the balancing of interests test, the court of appeals found growing populations and decreasing land availability make control of land an integral part of local government. *Id.* at 579; *see also* Town of Oronco v. City of Rochester, 293 Minn. 468, 471, 197 N.W.2d 426, 429 (1972)(urban sprawl and overpopulation necessitate effective land use planning accomplished through zoning).

55. *See generally* MANDELKER, *supra* note 1, at §§ 1.02 to 1.10. Zoning restrictions arose out of allowing one to bring suit under nuisance law to have another's offensive land use prohibited. *Id.* at § 1.03; HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 99-127 (2d ed. 1988). The prevention of offensive land use is one of the major justifications and goals of zoning regulations. *Id.* at 100. *But see* HIRSCH, *supra*, at 108. Empirical econometric studies have found that offensive land use, which zoning regulations are to prevent, are not significant factors effecting property values. However, the studies did show that major projects such as airports, a governmental project, could be detected in the data and had an adverse effect upon property values. *Id.*; *see also* KAN. STAT. ANN. § 19-2919(a) (1988). County authorities are authorized to enact zoning regulations to conserve the value of property within the county. *Id.*

56. *See, e.g.*, Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 576 P.2d 230 (1978). The court noted the overall public purpose served by the Commission in providing recreational facilities for all citizens of Kansas. *Id.* at 112, 576 P.2d at 238.

57. All but one of the five factors proposed by the *Rutgers* balancing of interests test may be classified as either a cost or a benefit. Although not express the first factor, the nature of the state agency seeking immunity, may supply an indication of the benefit to be generated by the project. Factors two and three, the intended use and public interest to be served, combine to provide the benefit of the project. In considering the impact of local zoning regulations upon the project, the fourth factor, the test considers the costs which the zoning regulations might impose upon the project. In *Brown*, the court stated that local zoning regulations, if applicable, would not impair the operations of the state recreational facility. That is, the cost of enforcing local regulations was marginal. *Brown*, 2 Kan. App. 2d at 113, 576 P.2d at 238; *see also* Herrmann v. Board of County Comm'rs of Butler County, 246 Kan. 152, 785 P.2d 1003. Had local zoning restrictions been enforced, delays in construction could have been "costly to the state." *Id.* at 159, 785 P.2d at 1008. The fifth factor of the test, the impact of the project upon local interests, is a clear consideration of the costs to be incurred by local residents as a result of the project.

58. *See Herrmann*, 264 Kan. at 154, 785 P.2d at 1005 (a prison was not a permissible use for property zoned A-2, agricultural transition); *Brown*, 2 Kan. App. 2d at 103, 576 P.2d at 231 (Commission's proposed project was in violation of single family housing zoning restrictions).

59. *Herrmann*, 246 Kan. at 159, 785 P.2d at 1009.

would enjoy an economic benefit from construction of the prison.[60] The plaintiffs' arguments were directed to the process by which the state was given immunity and not to the costs incurred from the project.[61] One possible explanation for not arguing the costs incurred was the plaintiffs' recognition that their individual costs could not compare to the statewide benefits provided by the project. Therefore, a suit based on procedural concerns provided the only viable alternative.

In *Brown*, the Kansas Forestry, Fish & Game Commission (Commission) sought to construct parking and washroom facilities for the convenience of those using the state-owned recreational site.[62] The Kansas Court of Appeals applied the balancing of interests test and found the benefit created by the intended land use marginal. Only patrons of the state-owned recreational park, a limited segment of the population, would benefit from the convenient parking and washroom facilities. On the other side of the analysis, the intended land use would have had a detrimental effect upon the interests of local landowners and the general land use plan of the community. Accordingly, the *Brown* court held that the Commission was subject to local zoning restrictions under the *Rutgers* balancing of interests test.[63]

Three months after the New Jersey landmark case of *Rutgers v. Piluso*,[64] the Supreme Court of Minnesota fashioned its own balancing of public interests test in *Town of Oronco v. City of Rochester*.[65] The case centered on a dispute concerning the placement of a landfill by the city of Rochester within the township of Oronco.[66] The *Oronco* balancing of public interests test appears, on its face, to differ from the *Rutgers* balancing of interests test. First, the *Oronco* test does not endeavor to ascertain legislative intent. Instead, the *Oronco* balancing of public interests test is a simple cost-benefit analysis.[67] The second facial difference between the *Oronco* and *Rutgers* balancing tests is that the *Oronco* test provides no structured or patterned application similar to that of the five factors found in the *Rutgers* test.[68]

60. *Id.*, 785 P.2d at 1008. Presumably, the economic benefit would come from increased employment in terms of the construction, maintenance, and continued operation of the prison facility.

61. Brief for Appellants at 4, Herrmann v. Board of County Comm'rs of Butler County, 246 Kan. 152, 785 P.2d 1003 (No. 64181). The plaintiffs' main argument was that the state did not have standing to raise the issue of immunity because the state had not participated in the Butler County zoning procedure. *Id.* The Kansas Supreme Court, however, found the state to have properly exercised the right of intervention provided pursuant to K.S.A. § 60-224(a). *Herrmann*, 246 Kan. at 155, 785 P.2d at 1006. See *supra* note 6 for the text of K.S.A. § 60-224.

62. *Brown*, 2 Kan. App. 2d at 103, 576 P.2d at 231.

63. *Id.* at 113, 576 P.2d at 238.

64. 60 N.J. 142, 286 A.2d 697 (1972).

65. 293 Minn. 468, 197 N.W.2d 426 (1972).

66. *Id.*, 197 N.W.2d at 426. The Minnesota Supreme Court held the city of Rochester immune from the zoning restrictions of Oronco Township. The existing landfill was at capacity and posed a pollution threat. The township of Oronco alleged that the new site for the landfill would also pose a pollution threat. The court noted that pollution was both a state and local concern of the "highest order." However, the state agency given the authority over the development of landfills had previously given consent and would continue to oversee the operation. *Id.* at 472, 197 N.W.2d at 429.

67. *See id.* at 471, 197 N.W.2d at 429 (Minnesota Supreme Court makes no express or implicit reference to legislative intent); *cf.* Rutgers v. Piluso, 60 N.J. 142, 152, 286 A.2d 697, 702 (1972)(legislative intent is the express purpose of applying the balancing of interests test).

68. *See Oronco*, 293 Minn. at 471, 197 N.W.2d at 429. The Minnesota Supreme Court simply states that a balancing test is preferable to a general rule of immunity based upon the power of eminent domain. *Id.*, 197 N.W.2d at 429.

The differences between the *Oronco* and *Rutgers* tests are, however, superficial. The underlying focus of both is to weigh the benefits derived from the intended land use against the adverse impact of the land use on local interests. The *Rutgers* balancing of interests test has the express purpose of deriving legislative intent. However, the test is only applied when legislative intent is not ascertainable.[69] Assuming legislators endorse projects producing a net benefit to society, the *Rutgers* test satisfies its express purpose. The five factor analysis proposed by the *Rutgers* balancing of interests test is not exclusive. The Supreme Court of New Jersey emphasized that there is no precise analytical procedure from which all cases could be decided. It merely provided the most obvious factors which might routinely be considered.[70]

A cost-benefit approach to state government immunity from local zoning regulations is endorsed by the drafters of the American Law Institute Land-Development Code.[71] If local zoning restrictions would prevent a state land development, the project may go forward only when the net benefits generated exceed the net detriments resulting from the proposed project.[72] No court has explicitly addressed the balancing of interests test as a cost-benefit approach; however, the Rhode Island Supreme Court noted the "similar balancing methodology" proposed by the American Law Institute when it adopted the *Rutgers* balancing of interests test.[73]

2. *Legislative Intent And The Benefits of Governmental Land Use*

The balancing of interests approach to resolution of land use disputes involving the state has not escaped criticism. Most notably, it has been argued that the balancing of interests test creates uncertainty resulting in increased litigation.[74] The basis of the uncertainty lies in a subjective evaluation of facts that

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69. *Rutgers*, 60 N.J. at 152, 286 A.2d at 702.

70. *Id.* at 153, 286 A.2d at 702.

71. MODEL LAND DEV. CODE § 7-304 (1975). The code emphasizes that state governments ought to be subject to local zoning restrictions in the absence of "supralocal" concerns. *Id.* § 12-201, official note. The existence of "supralocal" concerns is an indication the intended state land use provides a net benefit to the citizens of the state. Although not defined by the code, *Herrmann v. Board of County Comm'rs of Butler County* provides a good example of a supralocal concern. The state need to build a prison was heightened by a federal court order to reduce prison overcrowding. Failure to satisfy the court order could have resulted in the release of convicted felons whom would pose a supralocal threat to Kansas citizens. *See Herrmann*, 246 Kan. at 159, 785 P.2d at 1009.

72. MODEL LAND DEV. CODE § 7-304(2) (1975).

> If the Development of Regional Impact would not otherwise be entitled to a development permit under the development ordinance the agency shall nevertheless grant the permit if it finds that (a) the probable net benefit from the development exceeds the probable net detriment measured under the standards of § 7-402; and (b) the development does not substantially or unreasonably interfere with the ability to achieve the objectives of an applicable Local or State Land Development Plan; and (c) the development departs from the ordinance no more than reasonably necessary to enable a substantial segment of the population of the state to obtain reasonable access to housing, employment, education, or recreational opportunities.

Id. Section 7-402 of the Model Land Development Code provides ten factors which may be considered in evaluating the benefits and detriments of the development. "In reaching its decision, the Agency shall not restrict its consideration to benefit and detriment within the local jurisdiction, but shall consider all relevant and material evidence offered to show the impact of the development on surrounding areas." *Id.* § 7-402 (1975).

73. Blackstone Park v. State, 448 A.2d 1233, 1239 (R.I. 1982).

74. *See* Pennsylvania Dept. of Gen. Serv. v. Ogontz, 505 Pa. 614, 483 A.2d 448 (1984). The Supreme Court of Pennsylvania rejected the balancing of interests test in deciding whether local

produces case by case adjudication. The result of weighing and balancing the costs and benefits of specific state projects will necessarily create some level of uncertainty.[75] However, when compared to the alternatives, the balancing of interests test presents the most enlightened approach to the issue because all relevant factors enter into the analysis.[76] A supplemental analytical tool to reduce the inherent uncertainty accompanying the test would, however, enhance the balancing of interests test.

In the context of state government land use, this writer believes the distinction between governmental and proprietary land use may be an appropriate supplemental tool. For the purposes of this analysis, a governmental land use shall be one mandated by legislation to confer a benefit for the entire citizenry of the state.[77] All other state land use will be, by definition, proprietary.

A governmental land use will favor immunity under the balancing of interests test. First, the judgment of the state is to be given considerable weight using the *Rutgers* balancing of interests test.[78] Factors two and three, the intended land use and public interest of interest to be served by that use, will be substantial when the legislature mandates the land use to benefit the entire state.[79] Moreover, a legislative mandate is an expression of legislative intent that the balancing of interests test is designed to ascertain.[80] In *Herrmann*, construction of a state prison was mandated by legislation to protect and benefit every citizen

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regulations were applicable to a state facility for the mentally handicapped. The balancing of interests test was rejected because "it has the disability of leading to uncertain results at every level." *Id.* at 626, 483 A.2d at 454. The Pennsylvania Supreme Court reasoned that the Pennsylvania Statutory Construction Act provided the most reliable method of deriving legislative intent. *Id.* at 627, 483 A.2d at 455; *see also* Reynolds, *supra* note 23, at 638-39. In addition to uncertain results, four additional flaws in the balancing of interests test are suggested. Rather than foster negotiation, the test provides a disincentive for negotiation because of the possibility that the state may be found immune: the state may take an "uncompromising stance." *Id.* at 637. Moreover, the balancing of interests test unnecessarily places the judiciary in the middle of a land use decision which is better left to local authorities. *Id.* at 639. Further, because many state projects present a compelling state interest, the test "does not guard against irresponsible decision making by the intruder." *Id.* Finally, the test is "inadequate" for deciding the issue of state immunity because both the state and local authorities are actively attempting to further state policy. "It is not for courts . . . to pick and choose between valid public purposes." *Id.* at 641.

75. *See* Rutgers v. Piluso, 60 N.J. 142, 152-53, 286 A.2d 697, 702 (1972). The uncertainty is created from "a value judgment reached on an overall evaluation" of each factual situation as proposed by the *Rutgers* balancing of interests test. *Id.*, 286 A.2d at 702; *see also Pennsylvania Dept. of Gen. Serv.*, 505 Pa. 614, 483 A.2d 448. Uncertainty necessarily results from deciding the issue of immunity on the equities of each case. *Id.* at 626, 483 A.2d at 454.

76. *See* City of Temple Terrace v. Hillsborough Ass'n, 322 So. 2d 571 (Fla. Dist. Ct. App.), *aff'd*, Hillsborough Ass'n v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976). The Florida Court of Appeals describes the test as not only the fairest test, but also the only test which takes into consideration all relevant factors. *Id.* at 578; Blackstone Park v. State, 448 A.2d 1233, 1240 (R.I. 1982)(balancing of interests test has also been described as the "fairest method").

77. The distinction between governmental and proprietary functions has been made difficult by the growing size and functions performed by both state and local government. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 543 (1985). However, in the context of land use mandated by legislation which provides a benefit to the entire state, the critical consideration goes to the benefit to be generated by the land use. Whether the use is proprietary or governmental is secondary, providing some level of guidance in evaluating the competing interests.

78. Herrmann v. Board of County Comm'rs of Butler County, 246 Kan. 152, 158, 785 P.2d 1003, 1008 (1990). The judgment of the state in choosing a location is to be given substantial consideration. *Id.*, 785 P.2d at 1008.

79. The intended land use and public interests served thereby comprise the benefit side of the economic analysis. In the case of a governmental land use mandated by legislation, these factors are substantial because the project will provide a statewide benefit.

80. Rutgers v. Piluso, 60 N.J. 142, 152, 286 A.2d 697, 702 (1972).

of Kansas. Consequently, the state was held immune from local zoning regulations.[81] In short, a governmental land use will present an overriding public interest that, under the balancing of interests test, will result in immunity.

A proprietary land use may or may not present the same overriding public interest. The specific benefits and costs generated from a proprietary use will be fact-specific, resulting in case by case adjudication and some level of uncertainty. The intended land use found in *Brown*, parking space and washroom facilities to enhance a state recreational facility, did not present the same overriding public benefit as in *Herrmann*. The Commission had a legislative mandate to serve the general public interest; however, the intended land use did not further that mandate.[82] Hence, with no overriding public interest to be served by the intended land use or ascertainable legislative intent with respect to the particular project, the result in *Brown* turned on the specific costs and benefits of the proposed project.

In *Herrmann*, the Kansas Supreme Court affirms the district court's application of the balancing of interests test notwithstanding ascertainable legislative intent. House Bill 2548 was passed by the Kansas Legislature and signed by the Governor four days prior to the state intervening in the suit.[83] The bill provided funding for the proposed prison and pronounced the construction of the prison an urgent public necessity.[84] Further, an amendment to House Bill 2548 calling for local authorization of any proposed prison was defeated in the Kansas Legislature.[85] Perhaps the Kansas Supreme Court was searching for an express legislative exemption from local zoning regulations. The court does note that the defeated amendment to House Bill 2548 "could" reflect the legislature's intention that construction of the prison not be prevented by local opposition.[86]

The absence of any express legislative intent was the reason for the *Brown* court's adoption of the balancing of interests test.[87] For this reason, some have

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81. *Herrmann*, 246 Kan. at 158, 785 P.2d at 1009.

82. *See* Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 112, 576 P.2d 230, 238 (1978). The Commission was vested with the responsibility of providing recreational facilities for all citizens of Kansas. *Id.*, 576 P.2d at 238. Had the Commission proposed the establishment of a new recreational facility on land zoned for agricultural use, the court of appeals states that "[t]he merits of such a case appear clear, at least on the surface" implying that the state would be immune from the local restrictions. *Id.* at 113, 576 P.2d at 238. However, the caveat "at least on the surface" recognizes that the costs to local authorities and landowners may exceed the benefits to be derived from the land use. The court of appeals statement has two important implications. Because the Commission has a legislative mandate to provide facilities to benefit the general public, such governmental projects will generally be immune from local regulations. However, a governmental land use will not by itself grant the state immunity. The controlling factor found below the surface is the cost-benefit analysis of the project.

83. *Herrmann*, 246 Kan. at 154, 785 P.2d at 1006; *see* 1989 Kan. Sess. Laws ch. 31, § 1-11 (codification of House Bill 2548).

84. *Herrmann*, 246 Kan. at 154, 785 P.2d at 1005.

85. *Id.* at 159-60, 785 P.2d at 1008.

86. *Id.* at 160, 785 P.2d at 1009. The defeated amendment called for the state to give public notice of all pertinent information concerning the proposed prison. Further, if local residents produced a petition in opposition to the facility, signed by no less than ten percent of the voting public within the county, the question of whether to locate the prison within that county was to be decided by an election. If the election results showed a majority of voters were not in favor of the proposed prison, the prison would not be constructed in the county. *Id.* at 159-60, 785 P.2d at 1008-09; *see also* Rutgers v. Piluso, 60 N.J. 142, 152, 286 A.2d 697, 702 (1972). The Supreme Court of New Jersey noted that such legislative intent is "rarely specifically expressed." *Id.*, 286 A.2d at 702.

87. *See* Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 576 P.2d 230 (1978). The court began the balancing of interests analysis on "the premise that the legislature has

argued that the *Rutgers* balancing of interests simply weighs and balances the equities of the situation without attempting to ascertain legislative intent.[88] However, if a state agency initiates a project to promote and comply with its legislative mandate, the intent of the legislators is more readily ascertainable.[89]

For example, the establishment, operation, and maintenance of state universities and corrections facilities are inherently governmental land uses.[90] In cases involving state universities and corrections facilities, in which the balancing of interests test has been applied, the legislative mandates have been controlling factors.[91] Where a legislature has delegated the responsibility of providing statewide benefits to a state agency, the legislative mandate provides the strongest and most reliable indication of legislative intent. The balancing of interests test recognizes and gives effect to legislative intent by weighing in favor of immunity for governmental land uses mandated by legislation to provide a benefit to the citizens of the state.

IV. CONCLUSION

The Kansas Supreme Court applies the balancing of interests test to the facts of *Herrmann v. Board of County Commissioners of Butler County* and grants the state immunity from local zoning regulations.[92] The fact that a governmental land use, such as a state prison, weighs heavily in favor of state immunity from local zoning regulations does not detract from the validity of the balancing of interests test. In fact, the architect of the balancing of interests test, the New Jersey Supreme Court, noted that state agencies will generally be immune from local zoning restrictions.[93] The underlying cost-benefit analysis will usually produce a net benefit when the state undertakes a project having a statewide impact. Further, the express purpose of the test is to derive legislative intent. State land

not spoken directly on the subject" of the Commission's immunity from local zoning regulations. *Id.* at 112, 576 P.2d at 237.

88. *See* Pennsylvania Dept. of Gen. Serv. v. Ogontz, 505 Pa. 614, 627, 483 A.2d 448, 455 (1984)(the balancing test "has nothing to do with legislative intent"); *see also* Reynolds, *supra* note 23, at 627 (the *Rutgers* test is a "pure balancing test").

89. *See supra* notes 83-86 and accompanying text for an example of a state agency furthering its legislative mandate.

90. *See* State v. City of Kansas City, 228 Kan. 25, 612 P.2d 578 (1980). The Kansas Supreme Court, in a dispute between the University of Kansas and city officials concerning the applicability of local building codes, found the board of regents to have a legislative mandate to provide higher education for all citizens of the state. *Id.* at 38, 612 P.2d at 587; *see also* KAN. STAT. ANN. § 75-5201 (1989). The Department of Corrections enabling legislation is to be construed "consistent with the interests and safety of the public". *Id.*

91. *See* Herrmann v. Board of County Comm'rs of Butler County, 246 Kan. 152, 785 P.2d 1003 (1990). The "legislative enactment declaring the construction of the prison to be a matter of compelling public interest" weighed heavily in the Kansas Supreme Court's decision. *Id.* at 159-60, 785 P.2d at 1009; *see also* City of Newark v. University of Deleware, 304 A.2d 347 (Del. Ch. 1973). The brief opinion provides very few facts. The court merely stated the issue of whether the university was immune from local zoning regulations and, under the *Rutgers* balancing of interests test, found the university immune. *Id.* at 348-49. The controlling factor in the decision appears to be the vital governmental function played by the university. Rutgers v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972). Rutgers State University was found immune from local zoning regulations under the balancing of interests test. Local regulations would have frustrated the expansion and development of the university which was established to confer a benefit to the whole of New Jersey. *Id.* at 153, 286 A.2d at 701.

92. *Herrmann*, 246 Kan. at 160, 785 P.2d at 1009.

93. *Rutgers*, 60 N.J. at 153, 286 A.2d at 703.

use mandated by legislation to confer a benefit to the public at large is a strong indication of legislative intent that the state be immune from local zoning regulations. The inherent uncertainty found in the balancing of interest test can be reduced when it is recognized that governmental land use will generally provide a net benefit. However, the critical and determinative factor underlying the governmental guidepost remains the implicit cost-benefit analysis found in the balancing of interests test.

J. Scott MacBeth

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INFORMATION AND TECHNOLOGY
SRS TRANSITION OVERSIGHT

Testimony on Senate Bill 648

Presented by

Senator Chris Steineger
March 22, 2002

1. The Department of Correction's contractor, C.S.I., has been a **poor communicator.**

2. The Department of Corrections **bid specifications stipulate compliance** with all local codes and ordinances. C.S.I. initially attempted to evade the planning and zoning process. C.S.I. also evaded obtaining building permits for a remodeling project, which included electrical work.

3. The Unified Government **offered** numerous **sites**, including the U.G. owned public levy, which is appropriately located away from homes and neighborhoods.

4. SB 648 blatantly over rides **local control**.

Sen Jud
3-22-02
att 6

INTRODUCTION DIANE LLOYD - CHAIRPERSON FOR STRAWBERRY HILL REVITALIZATION & RESTORATION COMMITTE

I DON'T REALLY LIKE BEING HERE TODAY. BUT I FEEL IT MY CIVIC DUTY TO DEFEND OUR NEIGHBORHOODS. I AM EXHAUSTED AND FRUSTRATED BY THIS WHOLE DRC SITUATION. WE COME BEFORE YOU ALL TO SHOW YOU HOW COMMITTED WE ARE TO OUR COMMUNITY AT LARGE. I WOULD ALSO LIKE TO EXPLAIN TO THE BEST OF OUR KNOWLEDGE OF WHAT IS GOING ON HERE. AND THAT IS A MAJOR LACK OF COMMUNICATION AND HALF TRUTHS. I SAY THIS BECAUSE NOT ALL OF THE PUZZLE PIECES ARE IN PLACE. I'M NOT SURE IF THESE PIECES WILL EVER BE FOUND.

I'LL START THIS OUT WITH A SHORT HISTORY ABOUT THE COMMITMENT OF THE RESIDENTS OF STRAWBERRY HILL. I KNOW THIS TO BE THE SAME IF NOT MORE SO FOR THE TURTLE HILL COMMUNITY. WHEN I FIRST BOUGHT A HOUSE ON STRAWBERRY HILL, TURTLE HILL WAS A DISASTER. THE INNER CITY WAS SUFFERING FROM AN INCURABLE DISEASE, CANCER. IT WAS HARD TO TELL WHERE IT FIRST STARTED. THE CITY LOOKED LIKE IT WAS DYING A SLOW AND TERRIBLE DEATH. TRASH EVERYWHERE, WEEDS COVERED EMPTY LOTS, HOMES THAT WERE ONCE LOVINGLY TAKEN CARE OF- LEFT ABANDONED WITH BROKEN WINDOWS, SMASHED IN DOORS, ROOFS FALLING IN, BROKEN CURBS, STREETS WITH POT HOLES, RESIDENTS AFRAID TO COME OUT OF THEIR HOMES. STRAWBERRY HILL ONCE AN SLAVIC ETHNIC STRONGHOLD WAS SHOWING ITS AGE. YOU COULD SEE WEARING AT THE EDGES. 14 YEARS AGO, I FELL IN LOVE; IN LOVE WITH A HOUSE AND AN ETHNIC NEIGHBORHOOD AND ESPECIALLY

ORSH

SJud 3-22-02 att7

THE PEOPLE. FOR THE LAST 13 YEARS, I SEE A CHANGE. LIKE THE SEASON CHANGE FROM WINTER TO SPRING. THERE IS NEW LIFE IN THE INNER CITY. IT'S LIKE SEEING THE FIRST SPRING FLOWERS BLOOMING AND THE TREES COMING ALIVE AGAIN. GONE IS THE DARKNESS OF WINTER. YOU CAN SMELL IN THE AIR A NEW FRESHNESS AND SENSE A TIME OF HOPE.

STRAWBERRY HILL RESIDENTS HAVE VOLUNTEERED HOURS OF MANPOWER: HELPING THE ELDERLY OR HANDICAPPED WITH EITHER PAINTING OR LAYING OUT CONCRETE SIDEWALKS, BUILDING CURBS, FIXING BROKEN SIDEWALKS, CLEANING STREETS AN D CUTTING GRASS IN VACANT LOTS, SPRAYING THE WEEDS IN THE SIDEWALKS, BUILDING A GAZEBO, PUTTING IN BENCHES, PLANTING FLOWERS IN THE TWO PARKS, PAINTING ALL THE FIRE HYDRANTS WHITE WITH STRAWBERRIES ON THEM. THESE ARE JUST SOME OF THE PROJECTS WHICH OUR NEIGHBORHOOD HAS DONE. WE HAVE A BUSINESS PLAN FOR THE FUTURE OF THE HILL. WE ARE WORKING ON DESIGNATING STRAWBERRY HILL TO A CULTURAL HISTORIC DISTRICT.

WE HAVE BEEN COLLABORATING WITH CATHOLIC HOUSING OF WYANDOTTE COUNTY TO BUILD INFILL HOUSES ON THE EMPTY LOTS TO CONFORM TO EXISTING ARCHITECTURE AND THEY ARE REHABBING SOME OF THE OLDER HOMES. THEY HAVE ALSO BEEN AWARDED A 1.7 MILLION DOLLAR NPI GRANT FROM LISC TO FUND THOSE PROJECTS. THE OLD HISTORIC CITY HALL WILL BE RESTORED AND RENOVATED INTO LOFT APARTMENTS BY BANK OF AMERICA AND CITY VISION.

THERE ARE ALSO BI-STATE PROJECTS WHICH INVOLVE OUR NEIGHBORHOOD. THE KC RIVERFRONT HERITAGE TRAIL AND THE SCENIC BYWAYS WHICH WILL GO ALONG ARMSTRONG AVENUE.

OF COURSE YOU ARE ALL AWARE OF THE MULTI-MILLION DOLLAR HILTON HOTEL ON THE NORTH SIDE OF MINNESOTA AVENUE. THE NEW BPU BUILDING JUST TO THE WEST AND THE RENOVATION OF THE REARDON CENTER. WE HAVE ALSO WITHIN OUR BOUNDARIES THE NEW EPA BUILDING. JUST ONE BLOCK AWAY ON NEBRASKA & 6TH STREET, TOWNHOMES ARE UNDERCONSTRUCTION.

TURTLE HILL HAS COME BACK FROM THE DEAD. THERE ARE BRAND NEW HOMES BEING BUILT AND REHABS OF THE OLDER ONES. NOT TO MENTION MOUNT ZION ESTATES AND THERE ARE OTHER NEW HOMES SPRINGING UP LIKE FLOWERS ALL OVER. THESE HOMES ARE NOT LOW INCOME HOUSING. THIS IS JUST AN OVERVIEW FOR THE MEMBERS HERE TODAY THAT ARE NOT AWARE OF THE NEW REDEVELOPMENT OF THE DOWNTOWN KANSAS CITY KANSAS.

I'D LIKE TO TAKE TIME NOW TO BRING YOU UP TO DATE AS TO THE LACK OF COMMUNICATION THAT'S BEEN GOING ON. THIS IS BETWEEN US AND COMMUNITY SOLUTIONS, THEIR LAWYER, THEIR REALTOR, THE DEPARTMENT OF CORRECTIONS. AND I BELIEVE HERE TOO. OUR MAJOR SOURCE OF INFORMATION HAS COME FROM THE LOCAL NEWSPAPERS. BECAUSE OF THE COVERAGE IN THE KANSAN, I LEARNED OF THE SITUATION AT 49TH & STATE AND HAVE FOUND OUT A LITTLE MORE

WHILE DOING A LITTLE DIGGING. NOW YOU ARE PROBABLY FULLY AWARE IT WAS AROUND JANUARY 2001, THAT COMMUNITY SOLUTIONS SIGNED A LEASE FOR TOWER PLAZA AND BEGAN RENOVATIONS. WHEN A NEARBY BUSINESS OWNER QUESTIONED THE REALTOR ON WHAT KIND OF BUSINESS WAS GOING TO MOVE INTO THE SPACE, HE WAS TOLD IT WAS A SATELLITE COMMUNICATION COMPANY. CUTE, I BELIEVE THAT WAS A MAJOR HALF TRUTH! FROM MY SOURCES THE UG WAS NOT NOTIFIED BY CSI. IN FEBRUARY SOMEONE IN THE UG STAFF READ ABOUT THE SITE IN THE DOC NEWSLETTER. ALSO I'D LIKE TO BRING UP THE FACT THAT THE REALTOR WOULD KNOW THAT BEFORE ANY RENOVATIONS CAN BE DONE, YOU MUST ACQUIRE A BUILDING PERMIT. THIS REALTOR WAS A FORMER COMMISSIONER. THAT SAME MONTH THE CITY INFORMED CSI THAT THEY WOULD NEED A SPECIAL USE PERMIT. BUILDING INSPECTORS ALSO ISSUED A STOP ORDER. THE REALTOR REQUESTED THIS BE LIFTED BECAUSE THE RENOVATIONS WERE NON-SPECIFIC TO THE DRC. SO IT WAS LIFTED. IN MARCH, CSI WAS FORMALLY NOTIFIED THAT THEY WOULD REQUIRE A SPECIAL USE PERMIT. THIS IS WHEN THE LAWYER BECOMES INVOLVED AND CAME TO THE APPEALS HEARING TO CHALLENGE THE RULING THAT CSI WAS NOT A CORRECTIONAL INSTITUTION. ?

(IN LATER CORRESPONDENCE DATED 12/21/01 FROM TERRI SAIYA, REGIONAL DIRECTOR FOR CSI SHE STATES THAT CSI IS A NON-PROFIT CORRECTIONAL FACILITY)

WAS THIS DUE TO A LACK OF COMMUNICATION BETWEEN CSI AND THEIR LAWYER? WAS THE LAWYER EVEN AWARE OF WHAT A DRC OPERATION WAS? OR DID HE EVEN KNOW ANYTHING ABOUT HIS CLIENT – CSI? NOW PLEASE REMEMBER THIS SITE DID NOT GO THROUGH THE PLANNING & ZONING PROCESS. THIS WAS AN APPEALS HEARING ~~WAS~~ TO VERIFY WHETHER OR NOT COMMUNITY SOLUTIONS REQUIRED A SPECIAL USE PERMIT. I WOULD ALSO LIKE TO ADD THAT I INQUIRED AS TO WHEN ~~DID~~ WAS THE PENAL & CORRECTION AL INSTITUTION ADDED TO THE SPECIAL USE PERMIT LIST – IT WAS IN 1984. IT'S NOT NEW ON THE BOOKS. I WAS CURIOUS. ~~NOW FROM THE NEWS COVERAGE~~, WE THE COMMUNITY DID NOT KNOW ANYTHING ABOUT CSI CONSIDERING 8TH & ARMSTRONG UNTIL OUR PRES RECD CALL FROM KANSAN WE WERE INVITED BY TERRI SAIYA OF COMMUNITY SOLUTIONS ON 12/21/01 TO COME TO A BRIEFING SESSION BEING HELD ON JANUARY 9TH 2002 AT THE PAROLE OFFICE AT 5TH & STATE. THE MEETING NOTICE WAS LISTED IN THE KANSAN AND MANY CAME. MORE THAN I BELIEVE WERE EXPECTED. WE WERE INFORMED ABOUT BOTH SITES BEING CONSIDERED. MANY OF US LEFT THAT MEETING FEELING, WE HADN'T ACCOMPOLISHED ANYTHING. WE FELT THAT MANY OF OUR QUESTIONS WENT UNANSWERED. IT WAS AT THAT MEETING THAT THE LEVY LOCATION WAS DISCUSSED. COMMUNITY SOLUTIONS DECLINED THIS SITE STATING THAT THERE WAS ~~TOO MUCH~~ ASBESTOS AND IT WOULD BE TOO COSTLY TO REMOVE. THIS SITE WAS NEVER BROUGHT UP TO THE PLANNING & ZONING COMMITTEE.

AAI RESPONDED WITH AN OPPOSITION LETTER DATED JANUARY 10, 2002 BUT ASKED IF THEY NEEDED ASSISTANCE IN FINDING A MORE SUITABLE SITE. THIS LETTER WAS ADDRESSED TO KATHE LLOYD WITH CC'S TO Governor, Wyan Cty Delegation, chair JT commitee, Mayor, Wy County Commission. AAI NEVER RECEIVED A RESPONSE. STRAWBERRY HILL ALSO SENT A LETTER IN OPPOSITION TO COMMUNITY SOLUTIONS WITH CC'S

TO: Kathe Lloyd, Charles Simmons, Mayor, City Commission

ALL WAS QUIET FOR AWHILE UNTIL I WAS GIVEN A COPY OF THE ARTICLE IN THE KC STAR'S WYANDOTTE AND LEAVENWORTH COUNTY SECTION DATED 2/20/02 IN WHICH IT STATED THAT COMMUNITY SOLUTIONS WOULD PURSUE THE 5TH & STATE LOCATION. THIS LOCATION WAS DISCUSSED AT THE JANUARY 9TH MEETING BUT WE WERE TOLD BY CHUCK SIMMONS THAT THE OWNERS WANTED TOO MUCH MONEY FOR THE SPACE SO ~~WOULD NOT BE~~ IT WASN'T CONSIDERED.

AT THE PLANNING & ZONING MEETING HELD ON MARCH 11TH AND I MUST REMIND YOU THIS WAS THE VERY FIRST TIME COMMUNITY SOLUTIONS BROUGHT BEFORE THE BOARD ANY SITE FOR A DRC! AT THE MEETING THE LAWYER DISCLOSED CSI HAD LOOKED AT BETWEEN 30 AND 40 SITES. NEIGHBORHOOD OPPOSITION ALONG WITH HOUSE REP VALDENIA WINN STATED THAT WE WISHED TO FORM A CITIZEN COMMITTEE TO FIND AN ALTERNATIVE SITE. I STATED THAT WE HAD ALREADY FOUND ONE LOCATION WHICH WOULD FIT THE DEPT OF CORRECTIONS CRITERIA PER RFP #01742 PG 18 SITE CRITERIA. I HAD ALL INFORMATION WITH ME. WE

WERE NOT APPROACHED AFTER THE BOARD HAD DECIDED TO GIVE THE CITIZEN COMMITTEE 30 DAYS TO FIND AN ALTERNATIVE SITE BY EITHER CSI'S LAWYER NOR THEIR REALTOR.

ON MARCH 14TH, I RECD A CALL FROM THEIR REALTOR REQUESTING THE INFORMATION. I GAVE HIM THE LOCATION ADDRESS, THE LEASING AGENT'S NAME, THE SQ FOOTAGE, THE ANNUAL COST PER SQ FOOT AND ALSO TOLD HIM THAT THE 103 BUS STOPPED NEARBY WITHIN WALKING DISTANCE TO THE SITE.

I THEN SUBMITTED A FORMAL REQUEST FOR THE CONTRACT BETWEEN CSI AND THE DEPT OF CORRECTIONS ON FRIDAY MARCH 15TH TO BILL MISKELL, THE PUBLIC INFO OFFICER OF THE DEPT OF CORRECTIONS AND STATED I WAS INTERESTED IN PICKING UP THE INFORMATION IN TOPEKA ALONG WITH TOURING THE TOPEKA DRC. THIS WAS SET UP FOR TUESDAY MARCH 19TH. I WAS TO MEET BILL MISKELL THERE AT 10 AM. I ARRIVED AND WAS GIVEN A TOUR OF THE FACILITY BY SHELLY GHIO AND BILL MISKELL. THEY EXPLAINED THE MONITORING SYSTEMS AND ANWSERED MY QUESTIONS. WHAT DISTURBS ME IS THE FACT THAT THEY MAY HAVE BEEN FULLY AWARE OF THE FACT THAT SB 648 HAD BEEN PREVISOULY SUBMITTED THE DAY BEFORE TO ALLOW THE LEGISLATURE TO MANDATE A SITE REGARDLESS TO CONFORMING TO THE LOCAL GOVERNMENT ORDINANCES. I NOW FEEL MISLEAD. WAS MY TIME WASTED WHEN THEY READILY KNEW THAT OUR CITIZEN COMMITTEE WOULD HAVE NO FURTHER SAY IN THE MATTER?

SO YOU MUST QUESTION YOURSELVES WITH THESE FACTS. WE FEEL MISJUDGED BY THIS LEGISLATURE. WE THE COMMUNITY ARE NOT AT FAULT NOR SHOULD WE SUFFER THE CONSEQUENCES. WE DO NOT FEEL OUR NEIGHBORHOODS TO BE LOW INCOME HOUSING. IN FACT CENSUS DATA STATED THE MEDIUM INCOME FOR OUR AREA TO BE 42,000. THE METRO AREA – 48,000. SO WE ARE NOT VERY FAR. WE HAVE MUCH REDEVELOPMENT. WE ARE TRYING TO IMPROVE THE NEGATIVE IMAGE OUR COMMUNITY HAS. HOW WILL THIS NEGATIVE INFLUENCE EFFECT US? WHEN I ASKED SHELLY GHIO ON TUESDAY ABOUT WHERE ARE THE OTHER COMMUNITY SOLUTIONS DRC SITES IN THE OTHER STATES LOCATED? SHE SAID IN THE DOWNTOWN WHICH IN CONNECTICUT AND IN NEW JERSEY ARE OLDER LARGER CITIES WITH HUGE DOWNTOWNS. THESE ARE MIXED AREAS. BY THIS I MEAN BUILDINGS ARE 5 – 6 STORIES HIGH, RETAIL BUSINESSES ARE MIXED WITH APARTMENT RENTALS. THESE ARE NOT A RESIDENTIAL NEIGHBORHOODS WITH HOME OWNERSHIP. THE OTHER LOCATION IS IN LOW INCOME HOUSING AREAS. THERE AGAIN, NO COMPARISON, THE SURROUNDING NEIGHBORHOOD HOUSES HAVE GONE UP IN VALUE DUE TO THE REDEVELOPMENT IN THE AREA.

SO YOU MUST QUESTION YOURSELVES WITH THESE FACTS. WE FEEL MISJUDGED BY THIS LEGISLATURE. WE THE COMMUNITY ARE NOT AT FAULT NOR SHOULD WE SUFFER THE CONSEQUENCES. WE DO NOT FEEL OUR NEIGHBORHOODS TO BE LOW INCOME HOUSING. IN FACT CENSUS DATA STATED THE MEDIUM INCOME FOR OUR AREA TO BE 42,000. THE METRO AREA – 48,000. SO WE ARE NOT VERY FAR. WE HAVE MUCH REDEVELOPMENT. WE ARE TRYING TO IMPROVE THE NEGATIVE IMAGE OUR COMMUNITY HAS. HOW WILL THIS NEGATIVE INFLUENCE EFFECT US? WHEN I ASKED SHELLY GHIO ON TUESDAY ABOUT WHERE ARE THE OTHER COMMUNITY SOLUTIONS DRC SITES IN THE OTHER STATES LOCATED? SHE SAID IN THE DOWNTOWN WHICH IN CONNECTICUT AND IN NEW JERSEY ARE OLDER LARGER CITIES WITH HUGE DOWNTOWNS. THESE ARE MIXED AREAS. BY THIS I MEAN BUILDINGS ARE 5 – 6 STORIES HIGH, RETAIL BUSINESSES ARE MIXED WITH APARTMENT RENTALS. THESE ARE NOT A RESIDENTIAL NEIGHBORHOODS WITH HOME OWNERSHIP. THE OTHER LOCATIONS IS IN LOW INCOME HOUSING AREAS. THERE AGAIN, NO THESE SURROUNDING NEIGHBORHOOD HOUSES HAVE GONE UP IN VALUE DUE TO THE REDEVELOPMENT IN THE AREA.

ARE LOCATED

IN DOWNTOWN KCK

COMPARISON,

County Administrator's Office

Dennis M. Hays, County Administrator

Municipal Office Building
701 North 7th Street, 6th Floor
Kansas City, Kansas 66101-3064

Phone: (913) 573-5030
Fax: (913) 573-5540

March 22, 2002

Senator John Vratil, Chairman
Senate Judiciary Committee

Dear Senator Vratil and Members of the Committee:

The Unified Government has a vested interest in the location of a Day Reporting Center (DRC) in Kansas City. Although the Unified Government strongly opposed Senate Bill 323, once adopted, the Unified Government has not resisted the placement of a DRC in Kansas City. The State's ability to locate the center regardless of the Unified Government's support or approval has been understood since the passing of the DRC legislation. It is for this reason that the Unified Government has continually cooperated with the State and its contractor, CSI, throughout this project. The Unified Government's only insistence has been that the State and/or CSI communicate directly with KCK residents, seeking input from those directly impacted by the proposed location of the DRC. The most advantageous method for accomplishing this goal is found in Unified Government local codes and ordinances that require the State's contractor to acquire a special use permit through the planning and zoning process. This process would allow for ongoing dialogue between the UG and contractor as well as offer opportunity for citizen input at numerous public venues required by the ordinance. This represents our primary concern regarding the placement of a day reporting center in our community and why the Unified Government must strongly oppose SB 648.

The State's 2001 RFP for the day reporting center project as well as the contractual agreement between the State and CSI contain language mandating conformance with "applicable zoning and building codes". At no point in the process (RFP to contract award) was the Unified Government contacted by CSI regarding local requirements necessary for the operation of a DRC in our community. Once notified of local requirements and the importance of contact with the community, CSI chose to ignore the concerns of the community with whom they proposed to be a partner and legally challenge local zoning requirements in costly and time consuming litigation. From the Unified Government's perspective, any delay in the opening of a DRC in the KCK area is the direct result of the absence of communication by CSI at the local level.

On October 29, 2001 The Joint Committee on Corrections and Juvenile Justice Oversight directed a letter to the Unified Government addressing "frustration" regarding the failure to site a DRC in the Kansas City Area. The Unified Government shared in this frustration not only in the

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way the Committee had assumed similarities in the Wichita and KCK DRC projects but also that the blame for the inability of the private contractor to establish a DRC site in accordance with the State contract and local requirements appeared to have now been shifted to the Unified Government. Unlike the incredibly public process followed in the City of Wichita, CSI has presented only two sites before the UG Planning and Zoning Board for consideration. The first proposed site was passed unanimously by the Zoning Board only to be removed by CSI prior to consideration by the UG Commissioners. The second and most recent site is currently being considered by the Zoning Board. If SB 648 is passed, not one proposed DRC location will have been brought before the Unified Government Board of Commissioners.

To better describe the events and facts in this matter I have attached a timeline beginning with the adoption of SB323. When reviewing the attached timeline, key points to keep in mind are:

- Although contacted by other bidders, CSI never contacted the Unified Government regarding local codes or ordinances prior to the contract award by the State.
- Once notified of the local requirements, CSI never attempted to comply but instead engaged in lengthy disputes and litigation over zoning ordinances.
- The Tower Plaza location was initially revealed to the UG as a result of an employee reading an announcement in the DOC newsletter. The contractor had already signed a lease agreement and begun renovations of the property without the proper permits by the time the UG received written notification from the Department of Corrections.
- Had CSI engaged the Unified Government from the beginning of the process, as required by the State's RFP and contract, and proposed potential sites through the zoning process, threatened intervention by the Legislature might never have been necessary

Respectfully,

Phillip M. Sanders
County Administrator's Office

DRC TIMELINE

July 1, 2000	SB 323 enacted
September 25, 2000	Letter from Simmons to U.G. re: CSI contract award and proposed Indian Springs site. Simmons request feedback.
October 2, 2000	U.G. phones Simmons, expresses concern with Indian Springs site. Simmons requests assistance in identifying alternative locations. Sanders requests site specs.
October 6, 2000	Letter from Simmons with attached RFP excerpt re: DRC site specifications.
October 17, 2000	Simmons, Mayor Marinovich, County Administrator, Phil Sanders meet. Discuss alternatives to Indian Springs & necessity of community input on future proposed sites.
October 30, 2000	Per Simmons request, Sanders faxes list of potentially viable sites to forward to CSI for consideration.
November 2000	Simmons notifies Sanders by phone that CSI will pursue 49th & State location. Sanders expresses concern that CSI has not contacted U.G. Simmons sends e-mail directing CEO to call but never does.
January 2001	CSI signs lease for Tower Plaza site and begins renovations.
February 2001	U.G. receives notification of DRC at Tower Plaza via staff reading DOC monthly newsletter.
February 27, 2001	Sanders informs Simmons that Special Use Permit may be required and that CSI should contact Planning & Zoning for details.
February 28, 2001	U.G. Building Inspection issues stop work order on Tower Plaza renovations due to lack of necessary permits.
February 28, 2001	CSI realtor issues letter to U.G. requesting stop order to be lifted, stating in writing that renovations are non-specific to DRC. Stop order is lifted, and renovations are completed.
March 13, 2001	U.G. Planning formally notifies CSI that Special Use Permit is required.

March 26, 2001	Letter from Holbrook announcing legal counsel for CSI, opposition to Special Use Permit requirement, and intent to seek reimbursement from U.G. for renovations to Tower Plaza.
March 26, 2001	Community meeting organized by Rep. Valdenia Winn - Kensington Park Rec. Hall. Simmons, Sanders attend, field questions from 100 citizens opposed to Tower Plaza site.
March 27, 2001	Sanders, Simmons report to WyCo delegation in Topeka on status of DRC project. Simmons states Tower Plaza is not a "viable" location.
March 28, 2001	Sanders, CSI representative, CSI attorney tour U.G. Court Services building as potential DRC location.
April 20, 2001	CSI files Federal action requesting temporary restraining order on U.G. to allow Tower Plaza opening. TRO denied.
May 7, 2001	U.G. notified of permanent injunction hearing filed by CSI vs. U.G.
May 2001	U.G. staff forwards list of potential DRC sites to CSI attorney.
June 1, 2001	Stipulation for Dismissal of permanent injunction. U.G. and CSI agree to settle issue outside of court.
June 5, 2001	Simmons calls meeting with CSI, Sanders, and attorneys to determine how project can move forward. All tour vacant space adjacent to State parole location and Public Levee as potential sites.
June 2001	CSI files application for Special Use Permit on Public Levee site.
July 25, 2001	CSI attorney requests Special Use Permit application to be pulled from UG Commission agenda.
August 6, 2001	8th & Armstrong reviewed as potential site. U.G. letter to CSI attorney Holbrook identifying community representatives to contact impacted by the new site.
August 9, 2001	U.G. staff & CSI tour 8th & Armstrong site. U.G. staff requests site drawings; CSI never replies.

October 18, 2001	UG requests update from CSI's regarding their progress with community input re: 8th & Armstrong.
October 29, 2001	Sanders meets with CSI & realtor to discuss costs of potentially moving Community Corrections to 8th & Armstrong.
October 29, 2001	Deadline ultimatum letter from CSI attorney to UG. States that if Community Corrections does not move into 8th & Armstrong, CSI will refocus on Tower Plaza location.
October 31, 2001	Letter from Holbrook to Sanders stating CSI will seek community input once U.G. confirms Community Corrections move to 8th & Armstrong.
November 1, 2001	Letter received from Joint Committee.
December 12, 2001	UG representatives tour the Topeka DRC; discuss issues with Joint Committee on Corrections.
January 9, 2002	CSI – KCK community meeting regarding 5th & State location for DRC
February 8, 2002	CSI files for special use permit for 400 State Avenue
March 11, 2002	Planning & Zoning Commission postpones decision on SUP for 30 days pending review of alternative sites.

LKM
League of Kansas Municipalities

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Phone: (785) 354-9565
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TO: Senate Judiciary Committee

FROM: Larry Baer, Assistant Legal Counsel

DATE: March 22, 2002

RE: Opposition to SB 648

Thank you for allowing the League to testify today in opposition to SB 648. The League is not opposing this bill on the basis that it involves a day reporting center. Rather, our concern is that it allows the placement of a day reporting center without it being subject to existing zoning, permitting, licensure or other local requirements.

Zoning regulations exist in cities to provide for the orderly and compatible existence of land uses. That is strictly a local issue and one that should be left to the discretion of the locally elected officials. While it is true that a state agency may be inconvenienced by not being able to locate a facility where it may choose, the state agency is not in the best position to evaluate the factors that local governments balance when granting or denying zoning changes or conditional use permits. It is bad public policy to take away local control in such an important area as land use and grant it to an agency that does not have to consider the best interest of the community in its decision.

For the above reasons, the League urges this Committee not to report SB 648 favorable for passage.

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STATE OF KANSAS

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TOPEKA

HOUSE OF
REPRESENTATIVES

REPRESENTATIVE, SIXTY-FOURTH DISTRICT
CLAY, DICKINSON, GEARY,
RILEY COUNTIES

STATE CAPITOL
ROOM 182-W
TOPEKA 66614-1504
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COMMITTEE ASSIGNMENTS
VICE-CHAIR: K-12 EDUCATION
MEMBER: CORRECTIONS & JUVENILE
JUSTICE
JUDICIARY
PUBLIC SAFETY BUDGET

SB648

Thank you Mr. Chairman and committee members for hearing SB648. This past year I served as the chairman of the corrections oversight committee. Monthly we ask for a report from Secretary Simmons in regards to his department and the charges which the legislature has given him to carry out. The three day reporting centers are very much in that category. Frustration built over the months as we continually heard how the Sedgwick and Wyandotte centers were hitting numerous roadblocks. The oversight committee made the decision to write a letter giving a deadline to the counties and CSI to work out their difficulties or we would ask the legislature to step in. In the same letter we invited both county governments as well as anyone else interested to Topeka to tour the day reporting center. Before the set date we recieved confirmation from Secretary Simmons that an agreement had been reached with Sedgwick county. The day before the tour a call was received from the Unified Government of Wyandotte county to say no one would be present, not only were the county leaders invited but the legislators as well. The Unified Government wanted us to cancel the meeting but at the late date it was felt that was impossible. Two representatives that work for the Unified Government showed for the tour. No legislators were present. (Senator Haley did make it after all of the rest of us had left.)

At the meeting and tour that day the committee visited with CSI as well as the Unified Government representatives and strongly encouraged them to get this situation worked out. Both sides had their stories and we suggested a compromise. The Unified Government stated there needed to be a public meeting and CSI agreed to hold one. AUg myself, Secretary Simmons and Maority Leader Weber went to the parole office in Wyandotte county to meet with citizens and government representatives. At that time a sight had been chosen which was receiving crticism from the locals. At that meeting it was suggested to locate the day reporting center next to the parole office since the people served would be the same in both places. That is what the DOC and CSI have negotiated. Citizens are still complianing and the planning and zoning board are postponing making a decision.

One of the conclusions and recomendations from the joint committee was to "Support legislative action necessary to locate a Day Reporting Centers in Sedgwick and Wyandotte counties"

I urge you to support SB648

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Joint Committee on Corrections and Juvenile Justice Oversight

CONCLUSIONS AND RECOMMENDATIONS

The Joint Committee reviewed topics included in the statutory charge as well as the topic of treatment programs and services for sexually aggressive youth which was assigned by the Legislative Coordinating Council. The Committee will introduce one bill related to the sentencing of persons convicted of forgery.

Non-legislation recommendations made by the Committee include the following:

- Recommend the budget committees review means to eliminate the backlog of methamphetamine laboratory work by the Kansas Bureau of Investigation;
- Instruct the Kansas Bureau of Investigation to report back to the Committee on the status of federal funding for methamphetamine enforcement;
- Support legislative action necessary to locate Day Reporting Centers in Sedgwick and Wyandotte counties;
- Encourage the appropriations committees to study the issue of increasing the reimbursement rate for level IV and level V juvenile residential facilities;
- Instruct the Juvenile Justice Authority and the Department of Social and Rehabilitation Services to further research the issue of the treatment of sexually aggressive youth, and to develop a joint plan to address the issue including potential treatment and funding options;
- Support the passage of 2001 SB 95, which revises the compact agreement between states governing the supervision of adult offenders on probation, parole, or postrelease supervision and who move between states;
- Encourage the appropriate standing committees to carefully consider 2001 HB 2587 and 2001 HB 2588 or other legislation related to inmate reintegration into society; and
- Support the movement toward the consolidation of field services and encourage the Kansas Sentencing Commission to continue its efforts in this area.

Proposed Legislation: The Committee recommends one bill.

BACKGROUND

The 1997 Legislature created the Committee on Corrections and Juvenile Justice Oversight which is comprised of seven members each from the House and Senate. The duties of the Committee include:

- Monitor the inmate population and review the programs, activities, and plans of the Department of Corrections;
- Monitor the establishment and review the programs, activities, and plans of the Juvenile Justice Authority;

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