Approved: April 30, 2004
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 a.m. on Tuesday, March 9, 2004, in Room 123-S of the Capitol.

All members were present except:
Senator David Haley - Arrived 9:40 a.m.
Senator Greta Goodwin (E)

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of the Revisor Statutes
Helen Pedigo, Office of the Revisor Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Chris Schneider, Asst. District Attorney, Wyandotte County
Chief Judge Larry Solomon, 30th Judicial District (written testimony)
Kevin Graham, Assistant Attorney General (written testimony)
Senator Robert Tyson
Robert D. Tolbert, General Building Contractors
Professor Geo. Bittlingmayer, KU School of Business
Terry Holdren, Kansas Farm Bureau
Allie Devine, Kansas Livestock Association
Charles Benjamin, Kansas Chapter of the Sierra Club
Bob Vancrum, Blue Valley School District
Sally Howard, Kansas Department of Transportation
Sandy Jacquot, Kansas League of Municipalities
Randall Allen, Kansas Association of Counties
Rich Eckert, Shawnee County Counselor
Mike Taylor, Unified Government of Wyandotte County/Kansas City, KS (written testimony)
Herbert Graves, Jr., State Association of Kansas Watersheds (written testimony)
Ashley Sherard, Lenexa Chamber of Commerce (written testimony)
Dr.Gary George, Olathe School District (written testimony)
Jane Neff-Brain, Sr. Assistant City Attorney, City of Overland Park (written testimony)
Matt Jordan, Director of Community Development for the Kansas Department of Commerce (written testimony)
Wes Ashton, Director of Government Relations, Overland Park Chamber of Commerce (written testimony)
Whitney Dameron, City of Topeka (written testimony)
Allen Bell, Economic Development Director, City of Wichita (written testimony)
Galen Biery, Sr. Attorney, ONEOK Services Co. (written testimony)

Others attending: See attached list.

HB 2312 - Time limitations for defendant to be brought promptly to trial

Chairman Vratil opened the hearing on **HB 2312**. Chris Schneider, Assistant District Attorney, Wyandotte County, testified in support of the proposed bill. He explained that the current version of KSA 22-3402 sets specific time limits in which a defendant must be brought to trial, but leaves in confusion the question of what time limits apply when a defendant causes a delay in the trial. The present situation is a problem for the courts in large jurisdictions and in small, multi-county judicial districts. He asked for an amendment which would strike changes made by the House. To address the concerns of the House, Mr. Schneider would support shortening the extension of time from 90 to 60 days in cases where the competency of the defendant is at issue. (Attachment 1)

Chief Judge Larry Solomon, 30th Judicial District and President of the Kansas District Judges Association, submitted written testimony in support of **HB 2312**. (Attachment 2)

Kevin Graham, Assistant Attorney General, submitted written testimony in support of **HB 2312**. (Attachment 3)

There being no other conferees to testify before the Committee, the Chairman closed the hearing on **HB 2312**.

SB 547 - Limitation on exercise of eminent domain

Chairman Vratil opened the hearing on **SB 547**. Senator Robert Tyson testified in support of the proposed bill which addresses the problem of misuse of eminent domain. He explained that the State Legislature's authority has been delegated so much in recent years that the Legislature has lost oversight of that process. Local units of government in Kansas may exercise eminent domain only where the Legislature has delegated this authority to such units. Individual property rights need to be protected, and **SB 547** would restore a little bit of that individual freedom for Kansans. (Attachment 4)

Robert Tolbert, General Building Contractors, Inc., spoke in favor of **SB 547**, and described his concerns about the blatant misuse of the power of eminent domain in Kansas for economic development. He shared his story of having a successful business uprooted and private ownership rights taken away by the power of big business and political pressures in Shawnee County. (Attachment 5)

Professor George Bittlingmayer, University of Kansas, testified in support of the proposed bill. He stated that "public use" as interpreted by the courts has extended beyond circumstances justified by economic analysis. In conclusion, he stated that eminent domain has legitimate uses but these arise primarily when the government faces a holdout problem in executing transportation or other projects involving rights of way. Professor Bittlingmayer added that eminent domain has been abused when government acts on behalf of private interests forcing the sale of properties from one private entity to another. (Attachment 6)

Terry Holdren, Kansas Farm Bureau (KFB), spoke in favor the **SB 547**. He stated that KFB's policy clearly states that eminent domain procedures should be used only for legitimate governmental purposes, and **SB 547** would not prohibit such use. (Attachment 7)

Allie Devine, Kansas Livestock Association (KLA), testified in support of **SB 547**. Ms. Devine suggested the Kansas Legislature look at recent court decisions and consider the public policy implications the current eminent domain practices. Ms. Devine suggested the following modified language be added to the bill: "No property, land, or site, shall be taken through the exercise of the right of eminent domain prior to a showing that all required state and federal permits to use or develop any such land or site have been obtained." KLA also asked that property revert to the landowner if the "public purpose" project does not take place. (Attachment 8)

Charles Benjamin, Kansas Chapter of the Sierra Club, spoke in favor of **SB 547**, and expressed concern about urban sprawl. The Sierra Club does not object to county commissions improving infrastructure to accommodate retail or industrial development in a county or giving property tax breaks to encourage development. He said his organization objected to a county condemning someone's land when that landowner does not want to sell it to a private developer. (Attachment 9)

Brief Committee comments and discussion followed the proponents' testimony.

Chairman Vratil called upon Robert Vancrum, Blue Valley Unified School District No. 229, to testify as the first opponent. Mr. Vancrum stated that Blue Valley objected to the bill because the language is over-broad. It bars leases of school facilities. It effectively puts an end to the use of school facilities during nights, weekends and other hours by groups. ` Mr. Vancrum stated that Blue Valley opposes the 30 year period set forth in the bill even with regard to sale or transfer. (Attachment 10)

Sally Howard, Kansas Department of Transportation (KDOT), testified in opposition to **SB 547**. She explained KDOT's opposing position regarding the prohibition period of 30 years for the sale, lease, or transfer of property acquired by a condemning authority. The 30 year prohibition would adversely impact

MINUTES OF THE SENATE JUDICIARY COMMITTEE at 9:30 a.m. on Tuesday, March 9, 2004, in Room 123-S of the Capitol.

KDOT's ability to manage its right-of-way, and will have a negative impact on revenues generated from KDOT right-of-way. (Attachment 11)

Sandy Jacquot, League of Kansas Municipalities (LKM), spoke in opposition to **SB 547**. She said that LKM has a specific policy statement in support of continued eminent domain authority which ensures a timely process. Ms. Jacquot stated that this bill has the potential to either eliminate or greatly reduce economic development in the State of Kansas. (Attachment 12)

Randall Allen, Kansas Association of Counties, testified in opposition to **SB 547**. He stated that the bill would forestall any ability of a city or county to acquire land for purposes of economic development. He asked that the Committee exercise caution in interfering with cities' and counties' powers affecting economic development. (Attachment 13)

Rich Eckert, Shawnee County Counselor, spoke against **SB 547**. Under Item 7 of his testimony, the bill would affect KSA 19-4101 which explicitly allows counties to create industrial parks and use eminent domain for economic development purposes. (Attachment 14)

The following submitted written testimony in opposition of **SB 547**:

Mike Taylor, Unified Government of Wyandotte County/Kansas City, Kansas (Attachment 15)
Herbert R. Graves, Jr., State Association of Kansas Watersheds (Attachment 16)
Ashley Sherard, Lenexa Chamber of Commerce (Attachment 17)
Dr. Gary George, Olathe School District (Attachment 18)
Jane Neff-Brain, City of Overland Park (Attachment 19)
Matt Jordan, Kansas Department of Commerce (Attachment 20)
West Ashton, Overland Park Chamber of Commerce (Attachment 21)
Whitney Damron, City of Topeka (Attachment 22)
Allen Bell, City of Wichita (Attachment 23)
Galen Biery, ONEOK Services Company (Attachment 24)

Chairman Vratil directed the Committee members to read all of the testimony carefully, and be prepared to work **SB 547** within the next week.

Minutes for the February 3, 2004, meeting were presented for approval. Senator Donovan moved to approve the minutes as written, seconded by Senator Umbarger, and the motion carried.

The Chair adjourned the meeting at 10:30 a.m. The next scheduled meeting is March 10, 2004.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Tues, March 9, 2004

NAME	REPRESENTING
Robert Tyson	Senator
John D'Aloia Jr.	Senator Pugh Staff
DAVID PFLUM	Sen. Pugh
Mike Taylor	Unified Government/Wyandotte County
Jim Clark	KBA
Michael White	KCDAA
Randall Allen	Ks. Assn. of Counties
Mike Pepoon	Sedgwick County
Ray Hallauer	Sen. Pugh
Ed Martin	Private Bus.
John Deahl	Individual
Joan Deahl	Individual
BRAD HARRELSON	KFB
KEN RANJES	KANSAS Building Industry Assn.
Ashley Sherard	Lenexa Chamber
DICK CARTER	MANHATTAN AREA CHAMBER
Tom Burgess	City of Wichita
Natalie Bright	REAP
Bob Vancrum	Blue Valley USD 229

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Tues., March 9, 2004

NAME	REPRESENTING
Bill Vicory	KDOT
James M. Crowl	Shawnee County
Rich Eckert	KAC
Allen Bell	City of Wichita
Bob Tolbert	General Building Contractors
Joan Baskett	Individual

Remarks of Christopher L. Schneider, Assistant Wyandotte County District Attorney, regarding H.B. 2312

Before the Judiciary committee of the Kansas Senate

March 9, 2004

Mr. Chairman and members of the committee:

The current version of K.S.A. 22-3402 sets specific time limits in which a defendant must be brought to trial (i.e., ninety days after arraignment if defendant is held in custody solely because of that case, and one hundred eighty days otherwise), but leaves in confusion the question of what time limits apply when a defendant causes a delay in the trial.

Current case law does not do much to help. In *State v. Dreher*, 239 Kan. 259, 261, 717 P.2d 1053 (1986) the Kansas Supreme Court said: "any additional period of time assessed against a defendant due to the necessity of rescheduling a trial because of his fault should be limited to a reasonable time measured by the particular circumstances of the case." Unfortunately, what should be considered a "reasonable" time period is subject to conflicting interpretations, making it difficult to foresee what would be a reasonable period of time in a particular case.

The problem arises in a couple of different ways. First, when a defendant fails to appear for trial or a pretrial hearing set after arraignment. The time limit is tolled when a bench warrant is issued for the defendant. However, once the defendant is picked up on the bench warrant, a literal interpretation of the statute indicates that the state only has the number of days that remained in the speedy trial time at the time of the defendant's failure to appear to get him or her to trial. For instance, if a case has a speedy trial deadline of March 12, 2004, and is set for trial today (March 9, 2004), and the defendant fails to appear, a bench warrant is issued and speedy trial time is tolled. However, once the defendant is picked up on the warrant, there would only be three days in which a trial could be commenced.

The same situation arises when the issue of a defendant's competency arises as his or her case is approaching trial. Speedy trial time is tolled while the defendant's competency is determined and, if necessary, treated. However, the state can still be in a position of only having a few days to get a defendant to trial, just as when the defendant fails to appear for trial of his own volition.

The present situation is a problem for the courts, which have their dockets set in advance with other cases having speedy trial deadlines. In order to resolve a case with the problem addressed here, another case has to be continued. For instance, in Wyandotte County, criminal trials are set five to eight weeks in advance. The statement of Chief Judge Larry T. Solomon of the 30th Judicial District, given before this committee on March 24, 2003, on this bill, indicates that the same problem is faced by small, multi-county judicial districts.

Senate Judiciary
3-9-04
Attachment 1

The situation is a problem for prosecutors because we need a reasonable amount of time to contact witnesses so that they can be made available to testify. In a complicated case with numerous witnesses, this is not something that can be done on short notice. Expert witnesses, such as lab personnel or doctors, are often unavailable on short notice, and the average person needs to make arrangements with his or her employer to be off work to testify. In addition, in a society as mobile as ours in this day and age, it is often necessary to work around travel arrangements of people whose testimony is necessary to prove a case. In order to be fair to victims and witnesses, it is only right to have a reasonable period of time to schedule a case for trial. When a defendant fails to appear on the day of trial, or when competency is raised at such a late date, the state has already met with witnesses, obtained service upon reluctant witnesses, and perhaps secured the attendance of witnesses from outside the state, all of which cannot be done again in a few days.

The legislation, as originally proposed, would give the state 90 days after a defendant was arrested on a bench warrant or after competency had been ascertained to get the defendant brought to trial. The other body amended the legislation. It did not change the proposed language addressing the situation where a defendant simply fails to appear for trial.

The House amendments address the situation where a question as to the defendant's competency arises shortly before a trial date that is set near the end of the statutory speedy trial time. The amendments subtract the number of days the defendant was held in jail prior to the determination of his or her competency to stand trial.

If the amendments were interpreted as I understand they were intended, the *status quo* would not change. The law would be the same as it is now, only expressed in more verbiage. However, giving the amendments a literal interpretation (and remember that criminal statutes are interpreted strictly against the state), even the time spent by a defendant in jail prior to arraignment (the trigger event for statutory speedy trial) would count against speedy trial. Thus a defendant sent for a competency evaluation within days of his or her speedy trial running, could, if found competent, be subject to being discharged immediately upon being returned from the State Security Hospital.

The motivation behind the House amendments seems to be that ninety days was too long of a time to make someone wait for trial on account of a mental illness. Indeed, this is a valid concern. A better means of addressing the issue would be to shorten the speedy trial extension to sixty days. This would address the needs of the courts, prosecution, victims, and witnesses while still protecting a defendant's interest in obtaining a speedy trial.

We would sincerely request passage of this legislation, with an amendment striking the changes made by the House. To address the concerns of the House, we would not oppose shortening the extension of time from ninety to sixty days in those cases where the competancy of the defendant is at issue. If the House amendments are not stricken, we would ask that the bill die in committee.

March 9, 2004

Senator John Vratil
Senate Judiciary Chairperson
Room 123-S, Statehouse
Topeka, KS 66612

Dear Senator Vratil and Senate Judiciary Committee Members:

As President of the Kansas District Judges Association (KDJA), I am writing to express the concerns of the KDJA Executive Board regarding the House Committee amendments to HB 2312.

The House Committee amendments provide that, upon a finding that a defendant is competent to stand trial, the trial is to be scheduled within 90 days of that finding, **"minus the number of days the defendant is held in jail prior to such finding."** The House Committee amendment, while well-intentioned, could create situations in which a defendant is found to be competent, and the trial must be held immediately because the defendant was held in jail for almost 90 days prior to the finding of competence. The bill is silent as to what might happen if the defendant was held in jail for more than 90 days prior to the finding of competence.

I cannot venture an opinion at this point as to whether the 30-day extension found in Section 1(5)(d) would apply in those situations. However, even if the 30-day extension applies, most courts would have difficulty scheduling a trial in less time given current caseloads and staffing patterns. In small judicial districts, such as mine (the 30th Judicial District), we do not have a regular jury trial docket. Juries are specially summoned for each jury trial. It is difficult to specially summon a jury, get the questionnaires back, and go to jury trial in less than 30 days.

It has also been my experience over the last 14 years on the bench that defendants and defense counsel frequently file motions to determine competency shortly before the scheduled jury trial. Because most dockets are fairly "backed up," criminal jury trials tend to be set toward the end of the 90-day window anyway. The proposed language sets the stage for manipulation by the defendant and harm to the public. While the defendant should not be prejudiced by seeking a determination of competency, they should not be rewarded either.

I urge that the House Committee amendments to HB 2312 be deleted from the bill. Thank you for your consideration of this issue.

Sincerely,

Larry T. Solomon
Chief Judge, 30th [illegible]

Senate Judiciary
3-9-04
Attachment 2

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

PHILL KLINE
ATTORNEY GENERAL

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TESTIMONY OF
ASSISTANT ATTORNEY GENERAL KEVIN GRAHAM
BEFORE THE SENATE JUDICIARY COMMITTEE

RE: HOUSE BILL 2312 AS AMENDED BY HOUSE COMMITTEE
March 9, 2004

Chairperson Vratil and Members of the Committee:

Thank you for the opportunity to submit this written testimony on behalf of Attorney General Phill Kline concerning H.B. 2312, as amended by House Committee.

When H.B. 2312 was originally introduced the bill amended and clarified provisions of K.S.A. 22-3402 (the "speedy trial" statute.) The amendments and clarifications included in the original bill were requested by the Kansas County and District Attorneys Association, and were supported by the Attorney General. The original bill language was designed to provide greater specificity to the courts and attorneys regarding when a criminal trial must take place in cases where certain types of delays occur. For example, in a case where a defendant fails to appear for a hearing and a bench warrant was issued for the arrest of the defendant the original bill set a clear, fixed maximum time limit for bringing that individual to trial. Another example would be a case where the defendant was originally found to be incompetent to stand trial then later was determined to be competent; the original bill would have imposed a clear, maximum time limit for bringing the defendant to trial. The intent of H.B. 2312 was to prevent ambiguity, to help insure defendants are brought to trial in a timely fashion and to protect the rights of defendants.

However, H.B. 2312 was amended in House Committee in such a way that may create substantial confusion for criminal justice practitioners and could actually result in certain criminal defendants being set free without ever being required to stand trial. The House Committee added the words "**minus the number of days the defendant was held in jail prior to such finding**" to lines 2 and 3 and lines 8 and 9 of page two of the bill. The effect of these seemingly simple amendments could be great. Consider a hypothetical example: A defendant is arrested and charged with a crime. For a period of time the defendant is incarcerated in jail prior to trial and during that period of time is provided a mental evaluation. The result of the mental evaluation is a finding that

Senate Judiciary
3-09-04
Attachment 3

the defendant is incompetent to stand trial. Some period of time later the defendant is re-evaluated and determined to have regained competency to stand trial for his/her crimes. Under the language amended into H.B. 2312 by the House Committee, if that defendant had been held in jail on the charged crime for an aggregate period of 90 or more days the state would be barred from taking the defendant to trial. Another example could be a similar case where a defendant has been held in jail for a total period of 85 days, then a report is received from the doctors and it is determined that the defendant is competent to stand trial. The state would then be required to bring that defendant to trial within just five days, meaning the state would be forced into a position of having to completely prepare for trial (locate and subpoena witnesses, prepare exhibits and arguments, clear other matters from their calendars, etc) within five days or watch the defendant go free. Similarly, the court would be forced to immediately make room on the court's docket for the defendant's trial, or run the risk the defendant would go free.

The Attorney General believed H.B. 2312, as originally worded, to be productive legislation designed to clarify Kansas criminal procedure and prevent errors. If passed into law as amended H.B. 2312 would create misunderstandings and confusion for criminal justice professionals and may have the unintended result of prohibiting the prosecution of certain defendants. Attorney General Kline would like to see the House Committee amendments to H.B. 2312 removed so that he can once again support the bill.

On behalf of Attorney General Kline I would like to thank you again for the opportunity to appear before the committee concerning H.B. 2312, as amended by House Committee.

STATE OF KANSAS

ROBERT TYSON
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TOPEKA

SENATE CHAMBER

COUNTIES
ANDERSON, BOURBON
FRANKLIN, LINN & MIAMI

COMMITTEE ASSIGNMENTS
CHAIRMAN: NATURAL RESOURCES
MEMBER: AGRICULTURE
UTILITIES
JOINT COMMITTEE ON
SPECIAL CLAIMS AGAINST
THE STATE
http://skyways.lib.ks.us/kansas/government/tyson/
email:rtyson@ink.org

Testimony SB 547
Senate Judiciary Committee
March 9, 2004

Thank you Chairman Vratil and members of the Senate Judiciary Committee for allowing me time today to speak in favor of SB 547. This bill addresses the problem of misuse of eminent domain that we are experiencing today. This is a problem that we need to address, as eminent domain is the responsibility of the legislature. It is used by other entities only as the legislature directs. We have delegated our authority so much in recent years that we have lost any oversight in the process of eminent domain.

As I previously indicated, local units of government in Kansas may exercise the power of eminent domain only where the legislature has delegated this authority to such units. The rule often stated by Kansas courts is that:

"The power of eminent domain can only be exercised by virtue of a legislative enactment. The right to appropriate private property to public use lies dormant in the state until legislative action is had pointing out the occasions, mode, conditions and agencies for its appropriation."

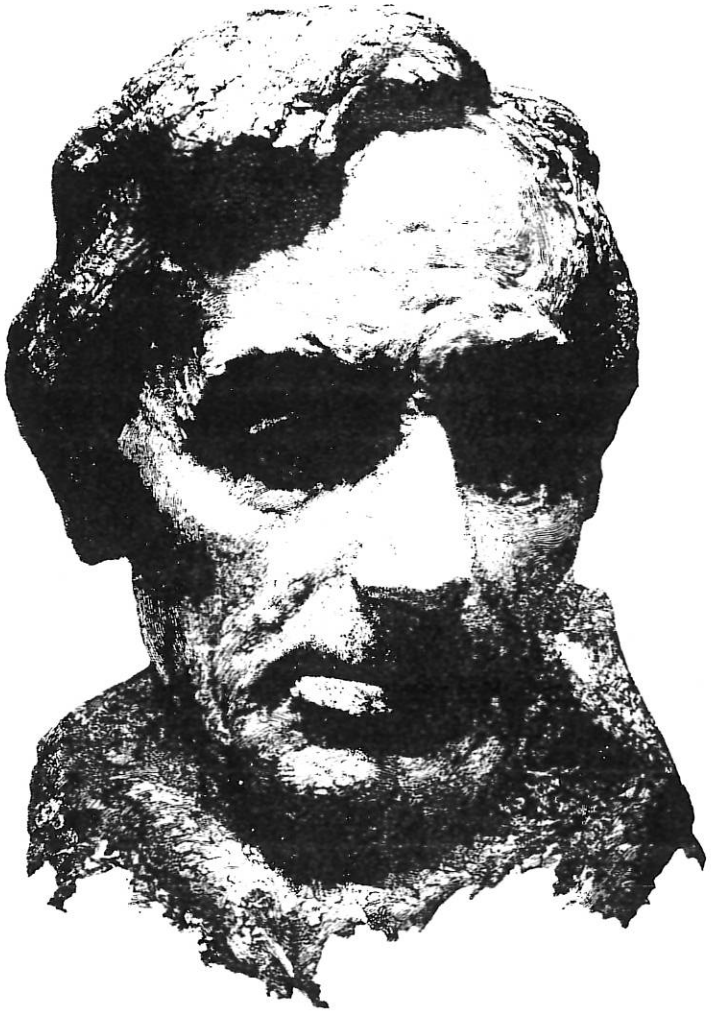
Strain v. Cities Service Gas Co., 148 Kan. 393, 83 P. 2d 124 (1938)

Our constitutional rights are to protect the weak from the strong. Our founding fathers often stated that the basic natural rights of the colonists were Life, Liberty and Property. The right to own property and have it protected guarantees freedom. This bill restores a little bit of that individual freedom for Kansans.

I ask for your vote in favor of individual property rights. Please pass SB 547.

"The moment the idea is admitted into society that property is not as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." John Adams

Senate Judiciary
3-9-04
Attachment 4



Property is the fruit of labor; property is desirable; it is a positive good in the world; that some should be rich shows that others may become rich, and hence is just encouragement to industry and enterprise.

Let not him who is houseless pull down the house of another, but let him work diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built.

A. Lincoln

MARCH 21, 1864

Compliments of

BOB DOLE

U.S. Senator–Elect
KANSAS

4-2

Testimony on SB 547
Senate Judiciary Committee
March 9, 2004

Submitted by:
Robert D. Tolbert
General Building Contractors, Inc.
5602 S.W. Topeka Blvd. - Suite C
Topeka, KS 66609-1005
862-1323

Thank you Chairman Vratil and members of the Senate Judiciary Committee for hearing SB 547 and allowing me to testify in its favor today. I present my testimony to express my concerns over the blatant misuse of the power of eminent domain in this state to wrongfully take privately held land and convey it to other private enterprises for economic development.

As a small business owner, I was able to realize my dream to not only have a successful business but to be able to own our building and warehouse in lieu of leasing space from others. It gave us room to expand our business and pursue other avenues to grow our business.

My dreams quickly became a nightmare due to the lack of private ownership rights, the power of big business, and political pressures. On November 16, 2000, we purchased approximately 8 lots totaling approximately 3 acres in a platted 84-acre Industrial Park in South Topeka. Our property fronted a newly constructed street with all utility infrastructure in place.

We developed plans and started construction in May 2001, on a new owner occupied office and warehouse on one of the 8 lots we owned. We moved into our new facility October 29, 2001.

Then in January 2002, the harassment began and the nightmare started! We were contacted by a local real estate firm about selling our property. We were told that GO TOPEKA was in the process of acquiring land for an Industrial Park, which was fine with us because it would only help in the development of our area. We were not interested in selling because our business was established in the new building and we had inquiries from other small businesses wanting to build new facilities and expand, which would have been beneficial for our company.

What finally came out in the negotiations with GO TOPEKA was that they didn't have the funds available to purchase our property but, rather, wanted us to agree to a 4-year option with them. This was not an acceptable agreement for us and we declined.

What I found out later was that the realtor and GO TOPEKA had threatened all the small landowners with eminent domain proceedings unless they signed the option agreements.

Shawnee County used the power of eminent domain filed on March 19, 2002, to gain control of our property.

Senate Judiciary
4-9-04
Attachment 5

We filed an injunction on April 17, 2002, to halt the condemnation proceedings; however, the District Court ruled against us. The case was appealed, and the Kansas Supreme Court upheld the lower court ruling.

GO TOPEKA had under its control nearly 400 acres adjacent to our property. The 3 acres that we owned had no bearing on the success of the new Industrial Park or the possibility of bringing the Target Distribution Center to town.

One property and many more acres were conveyed to Target at no cost to them. They also received tax abatements on their property and improvements.

My lawsuit against the Shawnee County Commission started out as an attempt to retain my property on 57th Street, but it soon became evident to me that the issue was much bigger than 3 acres in Shawnee County. The outcome would affect all landowners and citizens in the state.

You now have the opportunity to save others in Kansas from my fate, and I urge you to curtail the indiscriminate use of the eminent domain power for economic development within the state by passing Senate Bill No. 547.

I have suffered from lost time, have been burdened with extra expenses to my business, have developed hard feelings, and have lost profits because of this.

Robert D Talbert

3-8-04

Testimony of
George Bittlingmayer
Before the Senate Judiciary Committee
Kansas Senate
Tuesday, March 9, 2004

My name is George Bittlingmayer. I am the Wagnon Distinguished Professor of Finance at the University of Kansas. I have a background in economics and finance, and much of my teaching and research has focused on the economic and financial effects of regulation.

I am here to offer my support for Senate Bill No. 547, An Act Concerning Eminent Domain.

Eminent domain allows the state to take property against the will of the owner, providing only arbitrated "just" compensation in situations involving a "public use." From an economic standpoint, the exercise of this power is often justified. However, this power is easily abused and extended to circumstances where the benefits essentially go to private interests. In my view, "public use" as interpreted by the courts has been extended beyond circumstances justified by economic analysis.

Voluntary exchange generally offers the best mechanism for allocating resources to their best uses. This is a conclusion based on actual experience in a wide variety of experiences. It is not a matter of belief or ideology.

For example, the military draft is a type of "eminent domain." It forces young people to provide their labor services on dictated terms. The U.S. abandoned conscription for its armed services and allowed young people to choose careers in the military and elsewhere based on their abilities and interests, and the willingness of taxpayers to offer enticing financial terms to those who do serve.

A second example stems from wage and price controls – in particular for gasoline - during the 1970s. Wage and price controls generated distortions and poor incentives.

Senate Judiciary
3-9-04
Attachment 6

Again, our woeful experience with wage and price controls confirms that voluntary transactions are better than dictated transactions.

Eminent domain is justified when the government faces a "holdout problem." A leading example involves highway construction. If changing circumstances require the construction of a new highway between Lawrence and Ottawa, for example, the state will have to assemble a right of way based on hundreds if not thousands of individual landholdings. Without the power to condemn land, any individual could block construction of the road or demand a payment that would render the road uneconomical. Similarly, widening of I-70 as traffic grows involves a legitimate use of eminent domain.

Eminent domain is not justified, however -- even if the government is the ultimate buyer -- when there is no holdout problem. If the U.S. Postal Service wants to open up a new branch, it can and should seek out a willing seller of property without resort to eminent domain. This confronts the Postal Service with the right incentive. The true measure of value to the current owners is what that owner will accept to part with his or her property. Eminent domain departs from this principle. As a result, allowing the government to condemn land for "public use" for a post office makes it easier for the government to acquire land more cheaply than a similarly situated private buyer -- a result that has no economic justification.

Eminent domain is easily abused, especially by the politically well connected or for questionable purposes. Some recent questionable uses of eminent domain in Kansas are well known. They include the condemnation of 150 homes to build the NASCAR's International Speedway in Wyandotte County; the forceful taking of an independent used car dealership in Merriam to allow the expansion of a neighboring BMW dealership; and the use of eminent domain for the benefit of the Target Corporation's Topeka distribution center.[1]

In practice in the fifty states, local governments have condemned land for "shopping centers, industrial parks, factories, hotels, health clubs, marinas, office buildings, golf

[1] Dana Berliner, Private Power, Private Gain, Institute for Justice (2003), pp. 78-80; and "Eminent Domain Abuses in Kansas," Manahattan Free Press, January 29, 2004.

6-2

courses, and casinos."[2] In these examples, the power of the state and ultimately physical force are used to transfer land from one politically disfavored use or one politically disfavored owner to a more politically favored use or owner. Sometimes the "public use" justification is merely that the local government would receive greater tax revenues.

Private developers have alternatives to eminent domain. It is true that the assembly of a number of parcels for large-scale projects often presents a challenges, but developers have other tools at their disposal that do not require a forced transfer. First, they can negotiate openly with the holders and sign options to purchase with each owner that are conditional on reaching similar agreements with the other owners. Second, private developers can assemble land by using third parties as agents who do not disclose the developers' ultimate intent.

Eminent domain often fails to provide just compensation. A classic study by an economist at the RAND think tank found that the use of eminent domain in urban renewal results in overpayment for highly valued parcels and underpayment for low-valued properties.[3] This result is not surprising. Wealthy individuals and larger corporations will have the sophistication and resources to secure high values for their condemned property; while the less affluent and small businesses will be relatively powerless.

In conclusion, eminent domain has legitimate uses but these arise primarily when the government faces a holdout problem in executing transportation or other projects involving rights of way. Eminent domain has also been abused, particularly when government acts on behalf of private interests in forcing the sale of properties from one private entity to another. Senate Bill No. 547 would put an end this practice.

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[2] Steven M. Simpson, "Judicial Abdication and the Rise of Special Interests," 6 Chapman Law Review 173, 199 (2003).
[3] Patricia Munch, An Economic Analysis of Eminent Domain, 84 Journal of Political Economy 473 (1976).

Kansas Farm Bureau
Helping Feed the World

Kansas Farm Bureau

2627 KFB Plaza, Manhattan, Kansas 66503-8155 • 785.587.6000 • Fax 785.587.6914 • www.kfb.org
800 SW Jackson St., Ste. #1008, Topeka, Kansas 66612 • 785.234.4535 • 785.234.0278

PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON JUDICIARY

RE: SB 547—Relating to limitations on the use of eminent domain.

March 9, 2004
Topeka, Kansas

Presented by:
Terry D. Holdren
Associate State Director—KFB Governmental Relations

Chairman Vratil and members of the Senate Judiciary Committee thank you for the opportunity to appear today in support of this measure which places restrictions on the ability of entities to use eminent domain to acquire property for economic benefit. We are pleased to offer our support for SB 547.

I am Terry Holdren and I serve as Associate State Director for Governmental Relations at Kansas Farm Bureau (KFB). As you know KFB is the state's largest general farm organization representing more than 40,000 farm and ranch families through our 105 county Farm Bureau Associations.

Our members have long been outspoken about unnecessary intrusion and interference with private property rights by governments or private companies seeking to extend or expand utility or other services to their customers. KFB policy, developed at the grassroots level, clearly states that eminent domain procedures should be used only for legitimate governmental purposes.

Senate Judiciary
3-09-04
Attachment 7

Development of eminent domain as a legal theory, especially, the taking of property for public use, has roots in the colonial period before our independence from the British. While that history is varied and at times not well recorded, it would appear that largely eminent domain was employed to acquire land for the development of roads and mill dams. Eventually, use was expanded, after the Revolutionary War, to include lands to be developed for schools, courthouses, capitals, etc. Finally, a provision in the Bill of Rights codified the requirement that private property not be taken for public use without just compensation. Kansas has adopted that provision in its statutes at 26-513(a), the section before you today.

Despite the lengthy history associated with eminent domain, little evidence of legislative intent exists to guide policy makers or the courts in their struggle to define the "public use" component of lands taken by eminent domain. Our own history includes broad uses of the power by railroads and utility companies during the settling of the state and since. It is this use, and the potential for expansion of the power, that causes much concern among our members. (*See generally*, Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 Buffalo Law Review 1 (1980)).

SB 547 would not prohibit the use of eminent domain for legitimate purposes. It would prevent misuse of the power by private entities seeking to change the use of land with the goal of economic benefit for private investors or companies.

Thank you for the opportunity to appear today.

KANSAS LIVESTOCK ASSOCIATION

Since 1894

TESTIMONY

To: Senate Judiciary Committee
Senator John Vratil, Chair

From: Allie Devine, Vice President and General Counsel

Subject: **Support for SB 547**

Date: March 9, 2004

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 6,000 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, grazing land management and diversified farming operations.

Good morning Mr. Chairman and members of the Committee, my name is Allie Devine and I am here today representing the Kansas Livestock Association.

KLA has a long-standing history of preserving the private property rights of individuals. The strong feelings our members have for preservation of private property rights was best illustrated in the testimony of Bill House, Roger Black, and Donna Martin on SB 641. While their testimony was directed to a particular project it was a good example of the passion our members exhibit when their property interests are being challenged.

The Cowley County lake project has caused us to really consider and research eminent domain provisions in Kansas. We have learned some very key points that we believe need the legislature's attention.

1. Only the legislature can limit the use of eminent domain.
2. Establishment of conditions precedent to use of eminent domain is completely within the authority of the legislature and has been done.
3. The courts will interpret what constitutes a public purpose very broadly.

We are asking the legislature to:

1. Place restrictions on the use of land taken by eminent domain as proposed in SB 547.
2. Place a condition precedent on the use of eminent domain that requires condemnors to assure compliance with federal and state permits prior to the use of

Senate Judiciary
3-9-04
Attachment 8

6031 SW 37th Street ◆ Topeka, KS 66614-5129 ◆ (785) 273-5115 ◆ Fax (785) 273-3399

eminent domain powers. If eminent domain powers are used and land cannot be developed because of a failure for permitting the land or any part thereof the law should require it to revert to the landowner.

3. Narrow the definition of what constitutes a "public purpose" for which land can be taken.

Background: The background of eminent domain can be found in McCurdy and Thompson, "*What is Eminent Domain and How Do You Do It*?" 61 Dec. J. Kan. B.A. 24 (1992). (Hereinafter McCurdy) This article describes the United States and Kansas Constitutional provisions that "no person be deprived of property without due process of law; nor shall private property be taken for public us, without just compensation." Eminent domain powers may be used for a public purpose when reasonably necessary. If the condemning authority and the landowner cannot agree on a price, the condemning authority will exercise its power of eminent domain to "taking" the property.

In 1963 the legislature passed the Eminent Domain Procedure Act, which outlines the provisions for use of eminent domain by public entities. As a practical matter, the Eminent Domain Procedure Act addresses the "how" of eminent domain. It does not specifically address the "why" or the "what is the public purpose of the use of eminent domain".

We suggest that the Kansas Legislature look at recent court decisions and consider the public policy implications of the current eminent domain practices. It is our understanding that there is little judicial or legislative review of the "public purposes for a public good" provisions of the Constitution. The McCurdy article describes the process this way:

> *While due process mandates that the government act with a public purpose and for a public good before depriving a citizen of individually owned property, judicial latitude in interpreting the due process clause and the taking clause allows the condemning authority to make the initial determination of the necessity of the taking. In this manner the condemning authority itself determines whether a lawful corporate purpose exists which warrants its own condemnation of the landowner's property. In making this decision, the condemnor must exercise reasonable discretion. The judiciary will only countermand the propriety of the taking if the landowner can show fraud, bad faith, or an abuse of discretion.*

The article continues to describe that a landowner challenging the necessity of the taking must use the bifurcated system established in Kansas and challenge the authority in a civil suit separate from the condemnation proceeding. Under K.S.A. 26-501 et seq. and specifically in K.S.A. 26-504 the judge is limited to the petitions to make a determination of "why" the taking is necessary.

Recent court cases outlined in the Attorney General's report in the 2003 Update to Guidelines for Takings of Private Property, Vol. 23, No. 1, January 1, 2004 illustrate the broad interpretation the Kansas Supreme Court has given the public purpose provisions:

We have endorsed the view that the development of recreational facilities and the facilitation of economic development in partnership with private enterprise have been considered legitimate public purposes for the exercise of eminent domain and the expenditure of public money. (Cites omitted).

It is elementary that the legislature possess no power to authorize the appropriation of one's property for a private use or purpose, but it is equally well-settled that the right to take private property for a public use is inherent in the state, and that the legislature may authorize the acquisition and appropriation of private property for a public use provided the owner is compensated therefore. (Cites omitted) The difficulty often encountered lies in the inability of courts comprehensively to define the concept of a public use or purpose, due, no doubt, to the exigencies shown by the facts and the diversity of local conditions and circumstances in an ever-changing world. (Cites omitted)

In our opinion the concept of the terms public purpose, public use, and public welfare as applied to matters of this kind, must be broad and inclusive...The mere fact that through the ultimate operation of law the possibility exists that some individual or private corporation might make a profit does not, in and of itself, divest the act of its public use and purpose." See General Building Contractors, LLC. v. Board of Shawnee County Commissioners of Shawnee County, 275 Kan. 525, 66 P.3d. 873 (2003).

In preparation for the hearings on SB 461, we noted the Kansas Supreme Courts comments regarding the use of eminent domain in Concerned Citizens, United, Inc. v. Kansas Power and Light Company 215 Kan. 218, 523 P.2d. 755. The Court noted that the legislature "has the inherent power of eminent domain limited only by constitutional restrictions. Such power may be delegated by the legislature to any public authority to be exercised as directed."

In summary only the legislature can limit the use of eminent domain. Without clear direction from the legislature, the courts will interpret the "public use" provisions very broadly. We support the restrictions of SB 547. In our opinion, this bill precludes greed from becoming the "public" purpose for which the land is taken.

We ask that the legislature, at a minimum, establish the condition precedent for all land considered for taking through eminent domain, that the project meet state and federal permitting requirements PRIOR to the condemnation proceeding. We can think of no greater injustice than to have a person's property taken, and then the "public purpose" project not proceed because of a state or federal permitting issue. We would ask that if those circumstances occur, that the legislature pass provisions that require the land to revert to the landowner. Modification of the language in SB 461, as outlined below, could be applied to entities that use eminent domain powers:

No property, land, or site, shall be taken through the exercise of the right of eminent domain prior to a showing that all required state and federal permits to use or develop any such land or site have been obtained.

We believe these are first steps to addressing the overall public policy question of "what does the Legislature intend for the use of eminent domain". Thank you for your time and consideration.

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Testimony in Support of SB 547
An Act concerning eminent domain; relating to limitations on taking of private property
On Behalf of the Kansas Chapter of the Sierra Club
Before the Kansas Senate Judiciary Committee
March 10, 2004

Mr. Chairman, members of the Committee, thank you for the opportunity to appear before you this morning on behalf of the Kansas Chapter of the Sierra Club in support of SB 547. The Sierra Club is the largest grass-roots environmental organization in the world with over 800,000 members, including 4,000 in Kansas. One of the issues that Sierra Club is concerned about is urban sprawl. Urban sprawl destroys open space and valuable farmland and leads to urban blight.

The Kansas Supreme Court made a decision last year that we think will facilitate urban sprawl. In *General Building Contractors, L.L.C. v. Board of Shawnee County Commissioners*, 275 Kan. 525, the Court ruled that "the taking of private property for industrial or economic development is a valid public purpose" for counties in their exercise of eminent domain. The court legitimizes the scenario whereby a rural landowner on the edge of town is approached by a shopping center or "big box" developer who offers to purchase the landowners property. The property owner refuses to sell her land to the developer. The developer then goes to the county commission and gets the commission to condemn the land for "industrial or economic development."

I served as a county commissioner for 16 years in Harvey County. I know very well the pressures on county commissioners to find sources of revenue other than from property taxes to meet the legitimate needs of the county. Putting a shopping center or big box development on a piece of ground that is currently zoned agricultural is almost irresistible to a county commission. Agricultural land brings very little in property tax revenues. However, a shopping center or big box development changes the land value from agriculture to retail, bringing in more real property taxes, plus the personal property taxes from the fixtures in the stores, as well as the sales taxes.

We do not object to county commissions improving infrastructure to accommodate retail or industrial development in the county or giving property tax breaks to encourage this sort of development. I voted to spend Harvey County

taxpayer dollars on those kinds of improvements and to give property tax breaks to encourage economic development in Harvey County many times as a county commissioner. What we do object to is a county stepping in to condemn someone's land when that landowner does not want to sell his or her land to a private developer.

Thank you for your time and attention. I would be pleased to stand for questions.

Testimony to the
Senate Judiciary Committee
Robert J. Vancrum, Government Affairs Specialists
Blue Valley Unified School District No. 229

Senate Bill 547. Exercise of Eminent Domain.

Chairman Vratil and Honorary Committee Members:

Blue Valley Unified School District is here to express in part opposition to Senate Bill 547. This Bill would appear to prohibit any sale, lease or transfer to a private entity by any public entity having eminent domain powers for a period of 30 years and after an appropriation by eminent domain. We understand that this Bill is well intentioned and is aimed at some claimed abuses in using eminent domain to take property from one private owner only to turn it back over to another private owner for commercial or economic benefit. Our objection is that the language used to achieve this legislative purpose appears to be overbroad.

In the first place, its complete bar for leases of school facilities would effectively put an end to usages of school facilities during nights, weekends and other hours to such groups as the YMCA/YWCA which runs a very popular after-school care program in many of our schools, and little league baseball, basketball, football and soccer programs which utilize our facilities on a large number of nights and weekends. Facilities are also made available to a wide variety of charitable, religious, community, non-profit and neighborhood organizations. Most everyone of these arrangements is a lease for one year or shorter period, but all would be prohibited in facilities that have been acquired by eminent domain under this Bill. . Surely it is not the intent of any of the proponents to take away the ability to utilize these facilities for these purposes.

Obviously the Blue Valley School District prefers to negotiate for and purchase land needed for new schools. But in a school district that grows by more students that an average entire school district in the State of Kansas each year, it is sometimes not possible to find suitable land anywhere near large new housing developments. Blue Valley West, a middle school and an elementary school are all built on sites that had to be taken by eminent domain.

We would also oppose the 30 year period set forth in the Bill even with regard to sale or transfer. In the life of a school district a 30 year period is a very long period of time indeed. Thirty years ago the Shawnee Mission School District just north of us was rapidly growing just as Blue Valley is today and would have had many brand new schools. Today many of those schools are in areas that are populated nearly entirely by senior citizens. That school district has on a number of occasions transferred facilities which have appeared to outlived any foreseeable future as a school building to non-profit and even commercial buyers.

Although our principal concern with this Bill is its prohibition of leasing, we also would suggest that a 30 year time frame on sales or transfers will create serious management problems in some districts at some time in the not too distant future. We would urge you to consider a shorter period such as 5 or 10 years, which would certainly seem to achieve the end of eliminating the worse abuses.

I would be happy to answer questions now or any time at your convenience.

Senate Judiciary
3-9-04
Attachment 10

Blue Valley School District - YMCA Day Care Programs

- Before & After Care in all elementary Schools
- Central Site Day Care in four elementary schools for day care on days when school is not in session due to parent teacher conferences, early dismissals, closings due to inclement weather, winter break or spring break.
- Kindergarten Program – in seven elementary schools for half-day kindergarten programs
- Summer Camp – for the summer of 2004 will be in five elementary schools for a summer day care program

BVUSD #229
Church Patrons, 2004

Grace Church – BVMS
16225 Juniper
Overland Park, Ks 66085

Cambridge Church – LMS
12904 State Line
Leawood, Ks 66209

LifePointe Church – OTMS
P.O. Box 26767
Overland Park, Ks 66225

Ethiopian Christian Fellowship Church – OMS
14301 W. 119th St
Olathe, Ks 66062

Southern Hill Freewill Baptist Church – PRMS
P.O. Box 23808
Overland Park, Ks 66283

South Leawood Baptist Church – LES
8745 Ballentine #A
Overland Park, Ks 66214

Bethany Lutheran Church – HMS
9101 Lamar
Overland Park, Ks 66207

Center Point Community Church – LKM
14860 Robinson
Overland Park, Ks 66223

These churches hold weekly services and conduct various church related activities on a year round basis.

KANSAS

DEPARTMENT OF TRANSPORTATION
DEB MILLER, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

TESTIMONY BEFORE THE
SENATE JUDICIARY COMMITTEE

REGARDING SENATE BILL 547
RELATING TO EMINENT DOMAIN

MARCH 9, 2004

Mr. Chairman and Committee Members:

I am Sally Howard, Chief Counsel for the Kansas Department of Transportation (KDOT). On behalf of KDOT, I am here to oppose Senate Bill 547, an act concerning eminent domain.

This legislation would amend K.S.A. 26-513 by prohibiting, for a period of 30 years, the sale, lease, or transfer of property that has been acquired by a condemning authority. As we read the bill, it would apply to property that KDOT acquires through condemnation, purchase, or dedication.

Senate Bill 547 will adversely impact KDOT's ability to manage its right-of-way and will have a negative impact on revenues generated from KDOT right-of-way. While KDOT typically does not purchase right-of-way until it has final plans for a project, there are occasions when KDOT purchases or condemns property it anticipates will be needed for a project in the future. This advance acquisition of right-of-way generally occurs where we anticipate a project will be constructed in an area that is already experiencing development pressures. If KDOT waited to purchase right-of-way in these areas, there is significant risk that development would occur, thus increasing the cost of right-of-way to such an extent that we could no longer afford to construct the project. Unfortunately, there are occasions where KDOT purchases or condemns right-of-way that it later determines will not be needed for the State Highway System. Senate Bill 547 would prohibit KDOT from selling this right-of-way to a private party for a period of 30 years from the date the land was originally acquired.

The legislature has encouraged KDOT to take a more active approach in marketing right-of-way that it has determined will not be needed for the State Highway System. KDOT has already taken steps to respond to the legislature's direction by creating a section within its Bureau of Right of way that will focus on identifying and disposing of excess right-of-way. Senate Bill 547 runs contrary to the legislature's prior direction by

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DOCKING STATE OFFICE BUILDING, 915 SW HARRISON ST., ROOM 730
VOICE 785-296-3461 TTY 785-296-3585 FAX 785-296-1095 h

Senate Judiciary
3-9-04
Attachment 11

prohibiting KDOT from disposing of excess right-of-way for a period of 30 years after the date of acquisition.

Senate Bill 547 also prohibits KDOT from leasing property it has purchased or acquired. Again, in those instances where KDOT has purchased right-of-way in advance of the construction of a project, it attempts to make the best use of the acquired property. KDOT frequently enters into leases with private parties who want to use right-of-way that has been purchased in advance of the construction of a project. KDOT typically charges rent to a party wanting to use the property. This arrangement allows KDOT to generate revenue from its property and yet maintain control over the property. Currently, we have lease agreements with private individuals, businesses, and farmers. Under these lease agreements, we have allowed businesses to use right-of-way for parking and have given farmers the ability to cultivate our right-of-way. Our lease agreements allow us to partner with private citizens to make the best use out of right-of-way that is not yet needed for a project.

KDOT opposes passage of Senate Bill 547. We are opposed to legislation that would impose a 30 year waiting period before KDOT could sell, lease, or transfer real property that it has acquired. This legislation would negatively impact KDOT's ability to manage its right-of-way and would also impede KDOT's ability to allow the reasonable use of its right-of-way by citizens of this State.

LKM
League of Kansas Municipalities

300 SW 8th Avenue
Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

To: Senate Judiciary Committee

From: Sandy Jacquot, General Counsel

Re: Opposition to SB 547

Date: March 9, 2004

Thank you for the opportunity to appear before you today on behalf of the 555 member cities of the League of Kansas Municipalities (LKM). LKM and our member cities stand in opposition to SB 547. LKM has a specific policy statement in support of continued eminent domain authority of Kansas cities. This bill would bar the transfer of any property, whether by sale, lease or transfer, to any private entity if the property was acquired through the use of eminent domain. There is an option for approval by the Legislature, but given the expediency of many development projects, by the time Legislative approval is obtained, if it is, the developer has likely chosen another location, perhaps out of state.

This bill has the potential to either eliminate or greatly reduce economic development in the State of Kansas. As recently as about 20 years ago, the use of eminent domain for economic development purposes was unheard of and, in fact, not considered to be a public purpose. The changing economic climate and competition for business growth between states and municipalities soon brought about a change in the role of government. There are numerous examples in Kansas where economic development occurred because of the use of eminent domain. Some of those have been litigated and found to be a valid use of eminent domain. One example is the Target distribution center in Shawnee County, which required the condemnation of several parcels to acquire the amount of land needed for such an expansive project. This bill would have made the Target distribution center locate elsewhere, probably not in Kansas since other states were competing for the project. The Target capital investment is huge and will initially provide 650 jobs, which is to increase in the future. This project benefits the area and the State of Kansas. This is but one example.

The Legislature has provided economic development tools to local governments, such as tax increment financing, sales tax revenue bonding authority and others to encourage such development in the state. These statutes seem to recognize the importance of competing for economic development projects in a climate where incentives for development are common. On the one hand, the state is encouraging economic development and on the other hand proposing to take away one of the necessary tools to accomplish such growth. Clearly this is a policy decision and one that the state should not make lightly. There is a need to carefully balance the property interest of individual landowners against the public purpose served by encouraging and fostering economic development in the state. An outright ban on the transfer of property from one private entity to another is much too broad and is likely to have dire consequences on the economic growth of the State of Kansas.

Thank you for the opportunity to appear in opposition to SB 547. For all of the above-stated reasons, we respectfully request that you do not report SB 547 favorably for passage.

Senate Judiciary
3-9-04
Attachment 12

KANSAS
ASSOCIATION OF
COUNTIES

TESTIMONY
concerning Senate Bill No. 547
Eminent Domain Powers of Cities and Counties
Presented by Randall Allen
Senate Judiciary Committee
March 9, 2004

Mr. Chairman and members of the committee, I appreciate the opportunity to testify in opposition to SB 547, prohibiting the taking of private property via eminent domain in which the property is sold, leased, or otherwise transferred to a private property for a period of thirty years after the taking of the land; and the use of such property by a private entity for commercial or economic benefit to the private entity for a period of thirty years after the property is acquired, except upon specific legislative approval.

Certainly, cities and counties exercise their eminent domain powers cautiously. Situations in which it is anticipated that a city or county will sell or transfer property to a private property after going through eminent domain procedures are even rarer. Obviously, it is not in the public interest for private property to be taken for public use without just compensation.

However, the impact of SB 547 would seem to forestall any ability of a city or county to acquire land for purposes of economic development on a large project with benefit accruing to a wide area, with a large number of jobs attached, such as the Kansas Speedway project in Wyandotte County or the Target Distribution Center project in Shawnee County. It would be unfortunate if this bill were to pass and effectively limit the ability of communities to do what is necessary to land large projects with large numbers of related jobs. Please exercise caution in interfering with cities' and counties' powers affecting economic development, and table SB 547.

Thank you for hearing our testimony.

The Kansas Association of Counties, an instrumentality of member counties under K.S.A. 19-2690, provides legislative representation, educational and technical services and a wide range of informational services to its members. Inquiries concerning this testimony can be directed to Randall Allen or Judy Moler at the KAC by calling (785) 272-2585.

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Topeka, KS 66615
785•272•2585
Fax 785•272•3585

Senate Judiciary
3-09-04
Attachment 13

Shawnee County
Office of County Counselor

RICHARD V. ECKERT
County Counselor

Shawnee County Courthouse
200 SE 7th St., Ste. 100
Topeka, Kansas 66603-3932
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SB 547 would essentially overturn the Supreme Court's decision in *General Building Contractors, LLC v. Board of Commissioners of Shawnee County,* 275 Kan. 525 (2003). This case blessed the actions of Shawnee County in using eminent domain to acquire a small amount of land needed to complete a major industrial park. This land was transferred to Growth Organization of Topeka which in turn dedicated the land to the Target Corporation. This land transaction resulted in a building worth approximately 45 million dollars filled with personal property worth 40 million dollars. Approximately 550 new jobs will be added to Topeka and Shawnee County this year with approximately another 300 jobs added within the next few years. There is little doubt this successful job creation venture would have been hopeless without Shawnee County's use of its eminent domain power.

Additionally, other states will not restrict themselves in the global marketplace. Only recently the states of Kentucky and Connecticut gave their local municipalities the power to enhance economic development through the power of eminent domain. The rationale for this use is simple: creating good quality jobs and the enhancement of the tax base. These are exactly the two governmental actions most citizens desire of their public officials.

Here are the main arguments against SB 547:

ARGUMENTS.

1. The legislation would severely disadvantage the State of Kansas and its local governments when competing with surrounding states for vital economic development projects.

2. The legislation would allow land speculators to acquire property in areas likely to be developed in the future and then hold the public hostage when desirable development opportunities arise.

3. The legislation would radically alter a fundamental pillar of western civilization. The sovereign's right of eminent domain for public purposes dates back to Roman law and was specifically adopted by our founding fathers. When recognizing the desirability of the public's right of eminent domain, the founding fathers struck the balance between the rights of the public versus the right of the individual by requiring that "just compensation" be paid and by requiring that private property could only be taken for "public purposes."

4. The legislation would cause needless additional litigation concerning proper versus improper public purposes. Over the last two hundred years, our courts have

Senate Judiciary
3-09-04
Attachment 14

addressed and defined what is a proper "public purpose" with regard to eminent domain.

5. The legislation is unnecessary because in any eminent domain proceeding, the property owner has the ability to challenge 1) whether the condemnor can lawfully exercise the right of eminent domain, and 2) whether the right of eminent domain is being used for a lawful public purpose. Based upon well developed caselaw, the courts possess and regularly exercise the authority to deny unlawful or improper uses of eminent domain.

6. The legislation would have numerous unintended and undesirable ramifications for the public. For example, utility companies currently possess a limited right of eminent domain. If the company is private, would it be prevented from exercising the right? Must a public utility that has acquired property by eminent domain be prevented from merger or purchase by a private company? If so, this could have severe consequences for the public.

7. Additionally, how would this SB affect K.S.A. 19-4101 that allows counties to create industrial parks. This statute explicitly allows such parks to use eminent domain for economic development purposes.

In *General Building Contractors*, here are the main facts that required eminent domain action:

1. Center Point Commerce Park: Total Acres 432; Acres owned by General Building Contractors and Tolbert: 3.8 acres.

2. General Building Contractors and Tolbert bought property in an auction in December, 2000 for $12,000. They then constructed a building appraised at $180,000 in October, 2001.

3. Intermediary for Target approached Go Topeka in late 2001, early 2002. All properties (excluding GBC and Tolbert) were optioned by Go Topeka by February, 2002. At this point, GBC wanted $540,000 plus an alternative sight near present site in the Commerce Park with all infrastructure in place and paid for by Go Topeka [approximately another $100,000 in value]. Eminent domain action filed in March, 2002, and appraisers awarded $329,000, a return of $137,000 or an incredible 71% return on GBC's investment of $192,000 in approximately 1 year.

4. As a final statistic to show that this was just about the money for the landowner, the landowner's final settlement offer after the oral arguments at the Supreme Court was 1.2 million dollars.

14-2

Testimony

Unified Government Public Relations
701 N. 7th Street, Room 620
Kansas City, Kansas 66101

Mike Taylor, Public Relations Director 913.573.5565
Don Denney, Media Relations Specialist 913.573.5544

Senate Bill 547
Limitation on Use of Eminent Domain

Delivered March 9, 2004
Senate Judiciary Committee

The Unified Government of Wyandotte County/Kansas City Kansas opposes Senate Bill 547. The bill proposes unreasonable limitations on economic development opportunities which can improve communities, create jobs and bring enormous benefits to the entire state.

The bill also tries to impose irrational limitations on a governmental power which is carefully used, strictly regulated and offers involved parties full benefit of the judicial system for redress of their grievances.

SB 547 would prevent governmental entities from transferring land obtained through the eminent domain procedure to a private entity for 30 years. The land could not be used by a private entity if it creates economic benefit for the entity. What determines economic benefit under the bill is confusing and opens the door to all kinds of hypothetical challenges which could stymie all kinds of projects in the public interest.

Of course, the bill allows the Legislature to override these restrictions in cases it deems warranted. This provision once again places the Legislature in the position of "parent" over local government. The Legislature would prohibit the "untrustworthy child" of local government from using eminent domain for economic development purposes, but allows itself, "the wise parent with believed superior judgment" to make such decisions. Such displays of disrespect and distrust of local officials and the citizens they represent are becoming typical of many Kansas legislators.

Wyandotte County has used eminent domain authority to create the most popular, most attended tourist attractions in the State of Kansas. The benefits created by the Kansas Speedway and Village West stores, including Cabela's, serve greater public interest than the individual homes that were located on the sites. By 2005, Village West will create nearly 3,800 new jobs and generate more than $5-million in property taxes. Prior to this economic rebirth, the 400-acre site known as Village West produced only $15,000 a year in property taxes. That development is benefiting every citizen of Wyandotte County and is creating prosperity for the entire State of Kansas. None of that would have been possible if Senate Bill 547 had been law. And nothing like it will ever be possible again in Kansas if Senate Bill 547 becomes law.

There is a sense by some misinformed critics that citizens affected by eminent domain have their land taken from them without fair or adequate compensation. The fact is, in the case of the Kansas Speedway and most other eminent domain projects, the landowners make more money by having their property purchased by the taxpayers than they ever would selling it on the open market.

Senate Bill 547 is a drastic over reaction to perceived injustices and would be devastating to growth and progress in Kansas.

Senate Judiciary
3-09-04
Attachment 15

STATE ASSOCIATION OF KANSAS WATERSHEDS

Herbert (Herb) R. Graves, Jr., Exec. Dir.
2830 Rain Road, Chapman, KS 67431
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Fax # (785) 922-6080 **email:** sakw@tctelco.net

State Association of Kansas Watersheds (SAKW) Testimony

Senate Judiciary Committee

RE: SB 547 / Limited Use of Eminent Domain

March 9, 2004

Presented by:

Herbert R. Graves Jr., SAKW Executive Director

Senate Judiciary
3-09-04
Attachment 16

Chairman Vratil and members of the committee, thank you for the opportunity to provide comments on SB547 that relates to setting limitations on the use of eminent domain. My name is Herbert R. Graves Jr., Executive Director of the State Association of Kansas Watersheds, referred to as SAKW for the remainder of this testimony.

For fifty years watershed districts under the authority of KSA 24-1209 of the Watershed District Act have had the authority to use eminent domain as provided by KSA 26-501 to 26-516.

Watershed districts have used eminent domain very sparingly and only as the last resort to insure the protection and improvement of life and to sustain the natural resources of Kansas. On occasion the taking of land by fee title has occurred because it was felt to be the most efficient use of taxpayers dollars.

Watershed districts do not want to be landowners. In nearly every case, watershed districts try to resale the land obtained through eminent domain. Most land obtained through eminent domain is in agriculture use and generally stays in agriculture use after it is resold.

There are several multi-purpose dams in Kansas that provide recreation and water supply to communities in addition to the flood control benefits of the project. These communities want and need full control over the use of those structures. Eminent domain has been used to obtain title of some of the land for those type projects.

Watershed districts do not want to lose the option of being able to resale land obtained by eminent domain as soon as possible. Until the land is resold, watershed districts do not want to deprive the user of the land from making a fair profit.

SAKW and our partnering watershed districts therefore stand before you today in opposition of the changes suggested by SB 547.

We thank you again for allowing us this time to voice our opinions on SB547.

Herbert R. Graves Jr.
SAKW Executive Director

Lenexa Chamber of Commerce

The Historic Lackman-Thompson Estate
11180 Lackman Road
Lenexa, KS 66219-1236
913.888.1414
Fax 913.888.3770

TO: Senator John Vratil, Chairman
Members, Senate Judiciary Committee

FROM: Ashley Sherard, Vice-President
Lenexa Chamber of Commerce

DATE: March 9, 2004

RE: **Opposition to SB 547—Limitations on Exercise of Eminent Domain**

The Lenexa Chamber of Commerce would like to express its opposition to the concepts embodied in Senate Bill (SB) 547, which would create new limitations on the exercise of eminent domain.

Redevelopment projects can be crucial to maintaining the economic viability of a community, particularly in areas that are aging or blighted, and key to many of these projects is the ability to assemble the necessary land. While most land acquisition is successfully negotiated, in some instances cities have used eminent domain to acquire property for private development that serves the greater public good.

Eminent domain cannot and should not be taken lightly when used as a tool to assist in acquiring private property for private development. **The limitations on exercise of eminent domain as put forth in SB 547, however, would remove a primary incentive for property owners to negotiate, leading to exorbitant land prices or, more likely, either cancellation of the project or relocation to a state that does not have such limitations.** Either way, ultimately the greater public pays the price.

Accordingly, we strongly believe it is critical to preserve the existing powers of eminent domain as an option to facilitate appropriate development and redevelopment, continuing to leave decisions as to the exercise of those powers primarily with locally-elected officials. We believe local officials continue to be in the best position to make decisions regarding the use of eminent domain in their communities, based on the unique circumstances and needs surrounding each case.

For all of these reasons, the Lenexa Chamber of Commerce urges the committee *not* to pass out SB 547 favorably. Thank you for your time and attention to this issue.

Senate Judiciary
3-09-04
Attachment 17

Olathe School District
Testimony provided by Dr. Gary George
March 9, 2004

Regarding Senate Bill 547

Chairman Vratil and Committee Members:

Today we are writing in opposition to Senate Bill 547 as it is currently written. Senate Bill 547 places very restrictive conditions on the property rights of a public entity that acquires property through eminent domain proceedings.

Let me state at the outset that the Olathe School District has not acquired property in this manner nor are we planning to do so. We do, however, believe that the restrictions proposed in Senate Bill 547 are too restrictive.

A 30-year restriction is too long. Because of rapidly changing demographics, it is conceivable that a school property acquired under eminent domain may not be needed in less than 30 years. Under current law, this property could be sold. Additionally, the restriction on private economic and commercial use on the land is also very restrictive and unclear. Does this mean that a school district could not enter into an exclusive relationship with a soft drink vendor for a vending machine in the designated building – or that a leased school bus could not come on the school property – or that we cannot lease a copy machine for that building? Does it mean that a school district could not rent out the gym or the pool for a private company's recreation program?

Finally, we believe that this proposed law could ultimately work against the state and its divisions in the same manner.

We believe that Senate Bill 547 needs further work to clarify the issues we have raised in this testimony before it is reported out of committee.

Senate Judiciary
3-09-04
Attachment 18

The City of Overland Park KANSAS
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Law Department
Robert J. Watson, City Attorney

TESTIMONY IN OPPOSITION TO SENATE BILL NO. 547

TO: The Honorable John Vratil, Chairperson
Members of the Senate Judiciary Committee

DATE: March 9, 2004

RE: Senate Bill No. 547--Proposed legislation concerning eminent domain; relating to certain limitations on the taking of private property.

Ladies and Gentlemen:

This testimony is offered by the City of Overland Park in opposition to Senate Bill No. 547. Proposed additions to K.S.A. 26-513(a) would forbid the sale, lease or transfer of property obtained through eminent domain for 30 years after a justly compensated taking. These proposed additions also would prohibit even the use of such property by a private entity for 30 years, if that use economically benefits that entity, except upon special approval of the legislature via legislative enactment. These proposed additions to the eminent domain statute would tie the hands of municipalities to the economic disadvantage of its citizens.

Specifically, on more than one occasion, Overland Park has obtained property and built a facility that, though large for its use at the time, was constructed to accommodate future growth, which has occurred. During the interim, the extra space has been utilized by private entities which have compensated the City for that use. Thus the City receives cost savings by constructing in one phase, then receives rent for that extra space until such time as that space is needed solely for City functions. It's a win/win situation that would be abrogated by the proposed legislation.

Additionally, at times the City condemns property for roadways that, because of the nature of the taking (such as, the roadway bisects the tract), is considered a total taking for which the City pays full value. But the City has no need of the entire tract, just that

Senate Judiciary
3-09-04
Attachment 19

portion upon which the road must be built. If this proposed legislation is approved, the City, having been forced to pay for the entire tract, will now have to continue for 30 years to maintain the parcels that are unnecessary for the street construction and which, absent this legislation, could be sold, thereby reimbursing the City for a portion of its outlay and putting those parcels back into private, property tax paying use.

There are more examples than these, but hopefully, these two concrete situations demonstrate the damage that will be caused if Senate Bill No. 547 is approved. The financial stability of cities is being continually threatened. It is imperative that they retain the flexibility to interact with the private community to lease, sell or allow the use of city property obtained by the payment of just compensation through eminent domain.

Thank you for your consideration.

Jane Neff-Brain

Jane Neff-Brain
Senior Assistant City Attorney

KANSAS

DEPARTMENT OF COMMERCE
JOHN MOORE, LT. GOVERNOR/SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

March 9, 2004

TO: The Honorable John Vratil, Chairperson
Members of the Senate Committee on Judiciary

RE: Senate Bill 547

The Department of Commerce wishes to share its concerns about Senate Bill 547 and how this bill could negatively impact economic and community development efforts in Kansas. As currently written, SB 547 would place significant restrictions on the use of property secured through eminent domain. Commerce understands that use of this authority by governmental entities should be handled judiciously and that important private property rights must be protected. However, Commerce firmly believes it is in the best interest of the State of Kansas, and its units of local government, that the current system be maintained. The ability to acquire private property for the purposes of economic and community development is a fundamentally important tool that needs to be preserved in its current form.

The changes contained in SB 547 offer the following harmful implications to efforts to grow the Kansas economy and conduct community betterment projects:

- Kansas needs to maintain the ability to acquire property for economic and community development in a manner that is competitive with others states. Restrictions placed on the state's ability to make improvements for economic and community development purposes would make Kansas less competitive and less desirable as a place to do business.

- Provisions in this bill that require governments maintain ownership and control of property for 30 years constitutes a significant limitation to the ability to make improvements through the use of eminent domain. Thus, projects that might otherwise be able to create and retain jobs as a result of the use of this mechanism would become far less likely if this bill would be enacted.

- Commerce views the ownership of property by private interests as a desirable outcome of economic development activities. This bill would require government ownership of property to a greater extent than current law. Thus, this bill would increase ownership of land by government at the expense of the private sector.

- In many instances, the ability to acquire property through eminent domain is a key provision in making economic and community development projects possible. However, the requirement that no property acquired through eminent domain would be used for commercial or economic benefit of private entities eliminates an important tool to develop the Kansas economy.

Thank you for your consideration of these important issues. Please contact me at 296-2151 or mjordan@kansascommerce.com should you desire additional information.

Sincerely,

Matt Jordan
Director of Community Development

Senate Judiciary
3-09-04
Attachment 20

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OVERLAND PARK
CHAMBER OF COMMERCE

TO: Senator John Vratil, Chairman
Members, Senate Judiciary Committee

FROM: Wes Ashton, Director of Government Relations
Overland Park Chamber of Commerce

DATE: March 9, 2004

RE: **SB 547- Limitations of eminent domain.**

The Overland Park Chamber of Commerce would like to express its opposition to SB 547, which seeks to restrict and limit eminent domain for local governments in Kansas. The chamber has recognized the necessity of government entities to occasionally need to use the power of eminent domain. This power was granted to government for a number of reasons, and continues to be a tool for economic growth and expansion.

The chamber believes that the proposed legislation creates burdensome, substantial and long-term negative economic consequences to governments throughout Kansas by restricting legislative resources, which are needed to promote strong and vibrant local economies and to fulfill the goal of securing new private sector investment.

This legislation will restrict the ability of local governments to strategically use eminent domain to advance local economic growth and development efforts by keeping property out of use by the private sector, which has the ability to generate needed taxes and new or retained jobs.

Projects that would be negatively impacted by this legislation include redevelopment projects in downtowns across Kansas, where dilapidated and unsafe or economically unviable buildings or property need razing or redevelopment. These types of environments occasionally require eminent domain in order to either preserve or initiate reinvestment in localized areas of existing development. Projects very likely would be lost to such locations without the ability of local governments to utilize eminent domain to condemn, acquire, sell and or redevelop properties for such alternative uses as town homes; condominiums and related residential developments, or for public/private use facilities such as arenas.

In summary, SB 547 is detrimental to communities across the state because it creates economic hardships and a significant hindrance in the ability of communities to foster local economic development. This would restrict private sector development from the

Senate Judiciary
3-09-04
Attachment 21

very properties needing the use of eminent domain assistance. This legislation would also result in a long-term loss of taxes, job opportunities, and promote creeping blight, which could heighten the concerns of existing private investment in properties surrounding the area subject to eminent domain.

For all the foregoing reasons, the Overland Park Chamber of Commerce opposes the passage of SB 547. Thank you for your time and attention to this issue.

WHITNEY B. DAMRON, P.A.
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E-MAIL: WBDAMRON@aol.com

SUBMITTED TESTIMONY

TO: The Honorable John Vratil, Chairman
And Members Of The
Senate Committee on Judiciary

FROM: Whitney Damron
On Behalf Of
The City of Topeka

RE: SB 547 – An Act Concerning Eminent Domain

DATE: March 9, 2004

Mr. Chairman and Members of the Senate Committee on Judiciary:

On behalf of the City of Topeka, we must respectfully express our strong objections to the proposed changes in the laws relating to eminent domain contained in SB 547.

We understand the concerns with the taking of land by a political subdivision for private interests. However, we also must balance the needs of our community with the purpose of eminent domain. For example, the City of Topeka successfully attracted nearly 1,000 jobs to our City by successfully luring a Target Distribution Center to a location in southern Shawnee County nearly two years ago. Most of the land assembled for this project was obtained through fee simple purchase. However, a small portion had to be obtained through condemnation proceedings. That was unfortunate, but nevertheless, Target would not be opening a distribution center in Topeka this year absent this authority.

Similar successful and appropriate uses of eminent domain powers can be cited with the Kansas Speedway and Village West redevelopment project in western Wyandotte County. This area is one of the most vibrant and successful commercial real estate developments in the United States, but could not have occurred absent eminent domain authority by the Unified Government of Wyandotte County and Kansas City, Kansas.

Cities, counties and other political subdivisions hesitate to utilize eminent domain. It is an adversarial process, but one that does provide significant protections to those whose land and property is affected. If Kansas is to be in position to solicit major developments to our state, we must retain this ability in statute.

On behalf of the City of Topeka, we ask for your rejection of SB 547. Thank you.

Senate Judiciary
3-9-04
Attachment 22

CITY OF WICHITA

LEGISLATIVE TESTIMONY

TO: Chairperson Vratil and Members of the Senate Judiciary Committee

SUBJECT: Testimony in Opposition to Senate Bill 547

SUBMITTED BY: Allen Bell, Economic Development Director

DATE: March 9, 2004

Thank you for the opportunity to testify in opposition of Senate Bill 547. The City of Wichita opposes SB 547. This proposed legislation could be a serious impediment to economic development in the City of Wichita and Statewide. The bill would limit the use of eminent domain when the property to be acquired was to be sold or leased to a private entity within 30 years of acquisition.

While there are legitimate policy discussions on the whole scope of the taking of private property by government at any level, the U.S. Constitution and the Court decisions have refined that scope and ensured procedural protections and adequate compensation for owners of property affected by takings. While trying to protect certain property owners from government, this bill goes too far and would result in stifling and unnecessary limitations on the powers of all levels of government in Kansas.

Generally, the government may take private property only for a "public purpose." There are grants of eminent domain authority to local governments through the State statutes. Some of these specifically contemplate that the public purpose of the taking includes the redevelopment and reuse of the property by private entities. For example the Urban Renewal Law (KSA 17-4742 et. seq.), and the Redevelopment of Central Business Districts Act (KSA 12-1771 et seq.) are premised on the concept of acquiring properties for use by private entities. Such projects occasionally could not be accomplished without eminent domain authority

While there is language in the bill that *may* be interpreted to continue to allow eminent domain under specific statues, that language is not clear. It certainly muddies the waters of existing authority and will lead to unnecessary challenges and delays.

This amendment is bad for other reason that may have nothing to do with what the proponents may be trying to address: Most specifically, the City is almost always required, in connection with acquisition of right-of-way for major projects such as highways, to acquire the entire tract even though it only needs a portion of the tract for the project. This is an economic decision. Partial takings are very often so damaging to the remaining property that the City pays what amounts to the full value of the land for taking a strip of right-of-way. Law allows and economic sense dictates that the City can condemn the entire tract--often for not a lot more money than what it would have paid for the right-of-way it needs, utilize the right-of-way and dispose of the surplus to minimize the cost to the taxpayers of the right-of-way acquisition. Under this bill, the remainder of the tract would have to sit vacant and off of the tax rolls for 30 years before it could be put back into productive use by the private sector.

Senate Judiciary
3-09-04
Attachment 23

Testimony on Senate Bill 547
Senate Judiciary Committee
March 9, 2004

As a matter of informal policy, the Wichita City Council tries its utmost to avoid using its power of eminent domain in connection with economic development projects. The benefit of the doubt always goes to the property owner when faced with an impasse between a developer and a property owner. But there are times when property owners' interest should not be allowed to stand in the way of progress for the entire community.

Public-private partnerships are a fact of life in urban redevelopment and most often, the public's role includes land assemblage and providing the site for the redevelopment project. In urban areas, one of the biggest challenges to significant redevelopment efforts is the diversity of ownership in the older, more distressed parts of the inner city. In some cases, an individual property may have dozens of owners who are only distantly related, who live all over the U.S. and many of whom are not even aware they own land in Kansas. In those kinds of exceptional cases, redevelopment of blighted areas may not be possible without the use of condemnation.

Economic Development is all about competition between states and communities. Quality of life amenities are part of this competition. Redevelopment of older cities is one of the important factors that identify whether a state or community is progressive and forward-thinking in this regard. If S.B. 547 becomes law, Kansas will be moving in the wrong direction.

In conclusion, this proposed legislation, in addition to being overly broad and restrictive, will serve to hamper economic development in our communities. We oppose the bill in concept as well as its specific language.

TESTIMONY

TO: The Honorable John L. Vratil, Chairman
And Members of the
Senate Judiciary Committee

FROM: Galen E. Biery
Senior Attorney
ONEOK Services Company

RE: SB 547 An Act concerning eminent domain; relating to certain limitations on taking of private property; amending K.S.A. 26-513 and repealing the existing section.

DATE: March 9, 2004

I am Galen Biery, Senior Attorney for ONEOK Services Company. Among my responsibilities is advising ONEOK, Inc., and its affiliates concerning eminent domain matters. My testimony today will be in opposition to proposed Senate Bill 547.

There are times in the operation of a utility that certain assets become a burden to continue to operate and maintain. The expense of operating and maintaining such assets is borne by the ratepayers. It is in the best interest of the utility and the ratepayers to sell such assets to third parties whenever possible. Most of these assets are pipelines with associated easements and rights of way, a portion of which may have been acquired by condemnation.

Senate Bill 547, as presented, would prevent the sale or transfer of pipelines and facilities which are located on condemned right of way until thirty years after the public utility acquired the right of way. The ratepayers could be required to bear the cost of maintaining the asset until it could legally be sold.

I do not believe the intent of this bill was to negatively impact public utilities, but its passage would have that effect. Therefore I respectfully request that the Judiciary Committee vote to cease further action on SB547.

Senate Judiciary
3.09.04
Attachment 24