

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 A.M. on February 13, 2006 in Room 241-N of the Capitol.

All members were present except:
Broderick Henderson- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research Department
Norm Furse, Office of Revisor of Statutes
Renae Jefferies, Office of Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee:
Sherry C. Diel, Executive Director, Kansas Real Estate Commission
Representative John Grange

Others attending:
See attached list.

The Chairman opened the hearing on **HB 2788 - Concerning expiration, suspension or revocation of real estate brokers and salespersons licenses and civil fines.**

Staff gave a briefing on **HB 2788**. When the license of a supervising broker or branch broker expires, the licenses of all licensees associated with or employed by the supervising broker or branch broker shall automatically be placed on inactive status within five calendar days after written notice is issued. When the license of a supervising broker or branch broker is suspended or revoked, the licenses of all licensees associated with or employed by the supervising broker or branch broker shall automatically be placed on inactive status within five calendar days after written notice is issued by the commission to the associated or employed licensee for the duration of the suspension or revocation.

Sherry C. Diel, Executive Director, Kansas Real Estate Commission, testified as a proponent to **HB 2788**. Sections 1 through 6 addresses the issues of what happens to the licenses of salespersons or associate brokers who are employed by or associated with a supervising broker or branch broker whose license expires or is suspended or revoked and how pending transactions must be handled. Section 7 would increase the maximum statutory fine set forth in K.S.A. 58-3050(b) from \$500 to \$1,000 per violation and up to \$10,000 per violation if the Commission makes specific findings that egregious circumstances exist and that the licensee committed one or more violations (Attachment 1).

There was no opposition to **HB 2788**.

The Chairman closed the hearing on **HB 2788**.

The Chairman stated **HB 2655 - Kansas fairness in private construction contract act** had a hearing on February 7 and Representative Grange would review the bill.

Representative Grange stated he agreed with the Associated General Contractors (AGC) position as to retaining the definition of Substantial Completion, page 1, line 39, Section 1 (h). He disagreed with the American Subcontractors Association (ASA) position to delete the same and concurred with both parties on changing from 60 to 30 days, on page 3, line 18, Section 3, (b). He disagreed with the AGC position to delete the language on page 2 line 4 that begins with "*but in any case*" and continues on page 3, lines 1-4 that ends "*under the contract*" and also disagreed with any language that would provide for "line item" substantial completion as proposed by ASA (Attachment 2).

After discussion Representative Grange moved and Representative Grant seconded to change "60" days to "30" days on page 3, lines 3 and 18. The motion carried.

Representative Sharp moved and Representative Pauls seconded on page 2, line 43 and page 3, lines 1 through

CONTINUATION SHEET

MINUTES OF THE House Commerce and Labor Committee at 9:00 A.M. on February 13, 2006 in Room 241-N of the Capitol.

4 to strike all in italics. A Division was called - Yeas - 9 and Nays - 7. The motion carried.

Representative Grange stated this was the meat of the bill that had been gutted.

Representative Grant moved and Representative Grange seconded to change 10% to 5% on page 3, line 15. There was a Division called - Yeas - 6 and 11 Nays. The motion failed.

Representative Sharp moved and Representative Masterson seconded to move **HB 2655** out as amended. A Division was called - Yeas - 6 and 11 Nays. The motion failed.

The meeting adjourned at 10:40 a.m. The next meeting will be February 14, 2006.

COMMERCE AND LABOR COMMITTEE

DATE February 13, 2006

NAME	REPRESENTING
D. Chamy 2020	Federico Conzalez
BRIAN M. Jone	KTLA
Jim Bluff	KSAFL-CTO
James P. Wang	Foulston Siefkin LLP
Kathleen Olsen	KS Bankers Assn
Tom Burgess	ASA - WACM
BILL YANEK	KS Assn of REALTORS
Lindsey Douglas	Hein Law Firm
Corey Peterson	Acc of Kansans
Trudy Aeon	Am Inst of Architects
Mark Schweber	Westar Energy



KANSAS

KANSAS REAL ESTATE COMMISSION
SHERRY C. DIEL, EXECUTIVE DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

Memo To: Chairperson Dahl and Members of the House Commerce and Labor
Committee
From: Sherry C. Diel, Executive Director
RE: HB 2788
Date: February 13, 2006

Sections 1 through 6 of the proposed legislation addresses the issues of what happens to the licenses of salespersons or associate brokers who are employed by or associated with a supervising broker or branch broker whose license expires or is suspended or revoked and how pending transactions must be handled. Section 1 and 2 would provide that when the license of a supervising broker or branch broker expires or is suspended or revoked, the Commission would have authority to automatically deactivate the licenses of any salespersons or associate brokers associated with or employed by that supervising broker or branch broker within five days after the Commission issues written notice to the associated or employed licensee of the expiration, suspension or revocation of the supervising broker's or branch broker's license.

In the case of expiration of a supervising broker or branch broker's license, another supervising broker or branch broker may assume the role as the supervising broker or branch broker to avoid deactivation of the affiliated licensees' licenses if notification is provided to the Commission prior to the expiration date of the change in supervising brokers or branch brokers. In the case of a suspension or revocation of a supervising broker or branch broker, the Commission may, if it deems it is in the public interest until pending transactions are closed, authorize another broker to act as the supervising broker or branch broker during the period of suspension or revocation.

Section 3 is intended to clarify that a supervising broker or branch broker whose license is suspended or revoked can be paid personally earned commission only if the commission was earned while the license was on active status and prior to the effective date of the suspension or revocation. Nothing would prohibit a supervising broker or branch broker whose license is suspended or revoked from receiving compensation from his ownership interest in the brokerage.

Section 4 would provide that unless another broker assumes the role of supervising broker or branch broker prior to the expiration date of the supervising broker's or branch broker's license, all listings and brokerage agreements must be canceled by the supervising broker or branch broker on or before the expiration date of the license. When the supervising broker's or branch broker's license is suspended or revoked, all

listings and brokerage agreements must be canceled by the supervising broker or branch broker whose license is suspended or revoked within five days after the effective date of the order of suspension or revocation, unless another broker is appointed by the Commission to serve as the supervising broker or branch broker.

Section 5 would prohibit a supervising broker or branch broker whose license is expired or is suspended or revoked from personally finalizing any pending closings. The legislation would require that the responsibility for finalizing pending closings be transferred to another broker, an attorney, a financial institution or an escrow company.

Section 6 would provide that if another supervising broker or branch broker has not been authorized by the Commission to act as the supervising broker, all advertising under the supervising broker's name or trade name, including signage, must be removed or covered within five days after the expiration date of the supervising broker's or branch broker's license or the effective date of the suspension or revocation.

Section 7 would increase the maximum statutory fine set forth in K.S.A. 58-3050(b) from \$500 to \$1,000 per violation and up to \$10,000 per violation, if the Commission makes specific findings that egregious circumstances exist and that the licensee committed one or more of the following violations:

- (1) Misappropriated funds belonging to another person;
- (2) Engaged in fraud or made any substantial misrepresentation;
- (3) Represented to a lender, guaranteeing agency or any other interested party, either verbally or through the preparation of false documents, an amount in excess of the true and actual sale price of the real estate or terms differing from those actually agreed upon;
- (4) Committed forgery or signed or initialed a contractual agreement on behalf of another person in a real estate transaction unless authorized to do so by a duly executed power of attorney;
- (5) Failed to promote the interests of the client with the utmost good faith, loyalty and fidelity; or
- (6) Failed to disclose to a customer all adverse material facts actually known by the licensee regarding environmental hazards affecting the property that are required by law to be disclosed, the physical condition of the property, material defects in the property, defects in the title to the real property or the client's ability to perform under the terms of the agreement.

The Commission has found that the \$500 fine is too low to discourage violations of the law in comparison to the commission that can be earned on the transaction. In a few

HB 2788
February 13, 2006
Page 3

cases, the Commission has felt that that the only viable alternative is to suspend or revoke a license due to the lack of authority to impose a meaningful fine. In an average year, the Commission sees about one or two egregious cases that would warrant revocation or consideration of a fine in the \$1,001-10,000 range per violation.

Any fines received by the Commission are transferred to the State General Fund.

Finally, the proposed legislation would provide the Commission with the authority to revoke the license of any licensee who voluntarily surrenders their license during a pending investigation of misconduct or while charges of misconduct against the licensee is pending or anticipated.

I appreciate your consideration and would be happy to answer any questions that you have.

Testimony on HB ²⁶⁵⁵ ~~2787~~ Commerce and Labor Committee
by Committee Member Representative John C. Grange
Room 531-N, 296-7663
February 13th 2006

“The greatest and most turbulence today results from the collision between the delusions of the decision makers- whether they are in governments, in the top management of business, or in union leadership,- and the realities of the world”. *Peter Drucker*

We have been exposed to testimony from large and small companies, owner representatives, architects, General Contractors (GC), and subcontractors (SC). This testimony is vital in helping us decide this issue of retainage and the effect it may have on the way we conduct business within the private sector. Make no mistake; this proposed legislation may have a huge impact.

We have heard horror stories from both sides of this issue; contractors that do not pay, subcontractors that do not perform, suppliers who are not paid, paying twice for materials, bankruptcies, and long delays in receiving payment. Hopefully these stories reflect the exception and not the norm.

We heard that total removal of retainage is out of the question and I agree. Some element to insure satisfactory job performance is essential. What I propose; will insure that payment is received within a reasonable time following completion of contracted work. Testimony revealed that a performance bond may be hard to obtain by some subcontractors and if required, will raise the cost of a completed project. Remember the bond is an insurance policy that guarantees to the owner that a project or portion thereof will be satisfactorily completed or funds are provided to allow the contractor to hire another subcontractor to complete the work.

The cost may increase and this is a consideration for the builder or owner. As the law now stands an owner/developer can withhold funds until well after total completion of the project. We were provided with results of a nationwide study conducted in 2004 by Clemson University that shows an average time to receive a final retainage payment to be 167 days for subcontractors and 99 days for contractors. The study revealed the total retainage was often not paid in full (GC 93.8%, SC 89.6%). We heard the owner held release of this money for various reasons.

I would offer an example that on a \$10 million project the retainage amount can be \$1 million and remember this money has already been spent by the subcontractor. Taking into account the possible 167 day delay for receipt of payments, a subcontractor could wait a year to get his money. The owner could be using these funds to help finance the total project. An owners construction loan need not be drawn upon until the latest possible date and in a worse case this obligation may never be fully satisfied. This does not seem fair to me.

Testimony indicated some subcontractors may be struggling and the general contractor will not know of these problems until it is too late. Remember the story of having to pay for materials twice although lien release had been provided? False documents could be a problem, perhaps retainage could help mitigate the damage but certainly retainage alone would not be enough to

Comme Labor
2-13-06
Atch # 2

satisfy a claim for material costs. There enters the bond requirements or insurance possibilities.

If all contractors performed due diligence prior to signing contracts, in selection of projects, and enjoyed a positive working relationship with each other this issue would never had been noticed. Normally a subcontractor provides his quote to numerous GCs. Providing different values to each GC will extend the time requirement necessary to produce such documents.

Remember the example where the concrete contractor did not provide the proper “block outs” in the roof for the project and that were not noticed until months later when the mechanical contractor needed to install piping or ductwork? Without retainage what incentive would the “at fault contractor” have to return to complete his required task or pay for someone else to cut the concrete? . Without assigning blame on poor progress inspections to the builder or architect; there would remain the adherence to conditions of the contract and warranty provision. Unintentional omissions are practically unavoidable.

The basic contract documents and blueprints both state that all bidders are to familiarize themselves with all documents, drawings, and visit the site locations. Any omissions or conditions discovered are the responsibility of the subcontractor and are to be reported to the architect immediately. This caveat is to protect the designers and uses the professional expertise and experience of the contractors to report any shortfalls in the design documents.

We heard the GC and SC are personally responsible and should consider all the consequences prior to entering into a contract. They have all the options of not bidding if they can not meet the conditions of the contract. The proposed changes of this statute puts the same responsibility on the owners or developers. Due diligence is required of all parties.

To what extent should the government get involved with the minute details of a contract? This is a valid argument and deserves our discussion. The changes I have proposed address the power normally reserved to the contractor and owner over the smaller contractors. These proposals will level the field and gives all parties to a private construction contract equal opportunities for negotiating their conditions.

I agree with the AGC position as to retaining the definition of **Substantial Completion**, page 1, line 39, Section 1 (h). I disagree with the ASA position to delete the same. I concur with both parties on changing from **60** to **30** days, page 3, line 18, Section 3, (b). I disagree with the AGC position to delete the language on page 2 line 4 that begins with “*but in any case*” and continues on page 3 lines 1-4 that ends “*under the contract*”. I disagree with any language that will provide for “**line item**” substantial completion as proposed by ASA.

There has been many hours spent by all parties involved with HB 2655 and I appreciate the efforts of both the opponents and proponents. Since there is something for each and neither party gets their full request I assume we will have some additional balloon changes or amendments.

I appreciate your consideration and will stand for questions.