

MINUTES OF THE HOUSE AGRICULTURE AND NATURAL RESOURCES COMMITTEE

The meeting was called to order by Chairman Larry Powell at 3:30 p.m. on March 16, 2009, in Room 783 of the Docking State Office Building.

All members were present except - Representatives Hayzlett and Moxley

Committee staff present:

Mike Corrigan, Office of the Revisor of Statutes
Corey Carnahan, Kansas Legislative Research Department
Pat Matzek, Committee Assistant

Conferees appearing before the Committee:

Woody Moses, Managing Director, Kansas Aggregate Producers Association
Dane Barclay, Owner, Alsop Sand Company
Ramon Gonzalez, Sales Manager, NR Hamm Quarry
Lou Allen, Attorney

Others attending:

See attached list.

Representative Powell opened the meeting requesting Mike Corrigan to explain **SB 253**. Mr. Corrigan advised the bill addresses the issue of modifying zoning regulations in all cities and counties and would exempt rezoning related to mining operations, subject to the Surface-Mining Land Conservation and Reclamation Act, from any super-majority vote requirement of the city or county governing body.

Hearing on:

SB 253 - Zoning amendments; protest petitions; mining operations; extraordinary vote not required.

Proponents:

Woody Moses, Managing Director, Kansas Aggregate Producers Association, (Attachment 1) spoke in favor of **SB 253**, stating the bill amends the requirement for zoning approval on mining operations pursuant to K.S.A. 49-601, to a simple majority. The bill is strictly limited to surface mining operations, does not apply to underground mining or coal, and unlike oil or feeding operations, does not exempt industry from zoning law.

Dane Barclay, Owner, Alsop Sand Company, (Attachment 2) appeared as a proponent of **SB 253**, documenting that of the more populated areas the Sand Company works in, like Salina, it is impossible to find a sand plant site where someone will not object to their presence. Mr. Barclay further stated in the Salina area, there are pockets of workable sand, but when all the areas without sand are eliminated; i.e., the areas that are no longer accessible because of flood control dikes, roads, houses, cities, sewer lines, oil and gas pipelines, railroads, drainage ditches, and the landowners that committed their land to other uses, there are very few areas left.

Ramon Gonzalez, Sales Manager, NR Hamm Quarry, (Attachment 3) testified in favor of **SB 253**, stating that with limestone being a limited resource, it is vital as a community to develop these resources in order to meet economic and social needs of the future, and that this bill would provide the local units of government the tools necessary to plan for their logical development. Mr. Gonzalez further advised the support of **SB 253** will help aid in the ability to successfully zone future quarry sites.

CONTINUATION SHEET

Minutes of the House Agriculture and Natural Resources Committee at 3:30 p.m. on March 16, 2009, in Room 783 of the Docking State Office Building.

Opponent:

Lou Allen, Attorney, (Attachment 4) provided testimony in opposition of **SB 253**, advising that although she opposes the current amendments, she proposes a change to the statute, K.S.A. 12-757, and because of the zoning issue in her neighborhood, she has become aware of some deficiencies in this statute, specifically the calculation of the protest area. Ms. Allen further stated the above issue is the reason for her submission of the proposed amendment which is attached to her testimony as "Exhibit B". It is not intended to change the current law, but attempts instead to clarify the law so there is uniformity in the calculation for protest petitions.

Questions were asked and comments were made.

The hearing was closed on **SB 253**.

The next meeting is scheduled for March 17, 2009.

The meeting was adjourned at 4:45 p.m.

AG. & NATURAL RESOURCES COMMITTEE GUEST LIST

DATE: 3-16-09

NAME	REPRESENTING
Lou Allen	Landowner
Ramon Gonzalez	N.R. HAMM, INC.
DANE BARCLAY	ALSOP SAND Co
Woody Moses	KAPPA
Eric Wisner	KDA
Brad Harrison	KFB
Mark Siskin	K65A

TESTIMONY

BEFORE
HOUSE AGRICULTURE & NATURAL RESOURCES COMMITTEE
REPRESENTATIVE LARRY POWELL, CHAIR

BY
EDWARD R. MOSES, MANAGING DIRECTOR
KANSAS AGGREGATE PRODUCERS ASSOCIATION
ON

SENATE BILLS 253 & 254 CONCERNING THE DEVELOPMENT OF NATURAL RESOURCES



March 16, 2009



WHAT DOES THE BILL DO?

- ⊙ Amends the requirement for zoning approval on mining operations pursuant to K.S.A. 49-601 to a simple majority.
- ⊙ Gives local units of government greater flexibility in planning for future needs,
- ⊙ By eliminating the requirement for a supermajority.
- ⊙ Provides greater resources to the citizens of the area.

WHAT IT DOES NOT DO

- ⊙ Bill is strictly limited to surface mining operations.
- ⊙ Does not apply to underground mining or coal
- ⊙ Unlike oil or feeding operations, does not exempt industry from zoning law.

ANSWERS GROWING SUSTAINABILITY CONCERNS

Report of the Special Committee on Transportation recommends adoption

While funding a future transportation plan is critical, keeping future costs at a reasonable level is important as well. During the course of its investigations, the Committee was concerned to learn that the cost of basic construction materials such as rock, sand and gravel has risen by an average of 154.6 percent from 1996 to 2006, while production has risen only 23.7 percent during the same period. More than 90 percent of asphalt and more than 75 percent of concrete produced contain these materials. This appears to be caused by a noticeable decline in the amount of permitted reserves in our state. The Committee urges both the Governor and the Legislature to review and recommend natural resource development policy designed to streamline access to permitted reserves. An updated policy providing for the safe and sustainable extraction of natural resources will save over \$480 million in construction costs over the next ten years.

IN THEORY RESOURCES ARE UNLIMITED



IN REALITY RESOURCES ARE DIMINISHING

- ⊙ Surface sources of quality aggregate have been used up over the last 80 years.
- ⊙ Access to Natural Resources is diminishing at an alarming rate.
- ⊙ Urbanization has prevented access to future resources.
- ⊙ NIMBY & BANANA syndromes inhibit further access
- ⊙ Scarcity of quality deposits. Natural Resources must be mined where they are found.

NIMBY OR BANANA SYNDROMES

- ⊙ Not In My Backyard (NIMBY)
- ⊙ Build Absolutely Nothing Anywhere Near Anyone (BANANA)
- ⊙ Attitude has made it virtually impossible to permit quality resources
 - ⊙ Saline County Douglas County
 - ⊙ Pawnee County Marshall County
 - ⊙ Shawnee County (2) **Kearney County**

DEMAND HOWEVER CONTINUES TO GROW

- ⊙ Demand for aggregates is demographically driven
- ⊙ Every Kansan uses approximately 11 tons per capita of aggregates each year, or
- ⊙ Approximately 30 million tons per year.
- ⊙ Wind farm construction takes a lot of sand
- ⊙ Sand & Gravel prices have gone up 154% over the last ten years.
- ⊙ Aggregate operations serve **everyone** within a 30 mile radius.

Demand

Crushed stone is a major component of the Kansas nonfuel mineral economy. Most of the product is made from limestone units of Pennsylvanian and Permian age that are located in the eastern one third of the state. To demonstrate the importance of crushed stone, Table 2.1 shows the tonnage, value and per capita consumption (tons per person) for the state. As with any construction-related commodity, year-to-year variations in the quantity of stone used are due to the economy of the state and, like cement and aggregates, particularly the magnitude of highway-department funding for major roads (see Table 2.1). Crushed-limestone aggregate sold/used in 1996 amounted to over \$100 million with a consumption of nearly 9.5 tons per person.

TABLE 2.1--Per capita usage of crushed stone in Kansas.

Year	Tonnage in Thousands	Population in Thousands	Value in Thousands	Per capita Use
1920	699	1,769	1,014	0.39
1930	1,249	1,881	1,245	0.66
1940	2,881	1,801	3,673	1.60
1950	7,630	1,905	8,920	4.01
1960	11,814	2,179	15,031	5.42
1970	15,161	2,249	22,406	6.74
1980	17,398	2,364	54,731	7.36
1990	20,800	2,478	79,200	8.39
1991	16,802	2,491	67,249	6.75
1992	17,084	2,515	69,600	6.79
1993	20,732	2,531	90,663	8.19
1994	23,624	2,554	103,416	9.25
1995	22,400	2,565	95,800	8.73
1996	24,420	2,572	106,000	9.49

USES

- Aggregates are construction materials of crushed stone, sand and gravel. About 10 tons of aggregates are required annually for each North Carolina citizen. A typical residential subdivision requires about 300 tons of aggregate per home.
- The single largest market for aggregates is road and street construction, including base and asphalt paving for highways, parking lots and other pavements. **One mile of typical 2-lane asphalt road with aggregate base requires about 25,000 tons.** Other large markets are portland cement concrete for bridges, pavements and building structures, riprap and erosion control stone, and railroad ballast.
- Approximately 50 percent (**70% in Kansas**) of all aggregate is used for publicly funded construction projects? i.e., highways, water and sewer systems, public buildings, airports and other county and municipal public works projects

Source: <http://www.geology.enr.state.nc.us/>



WHY IS IT GOOD PUBLIC POLICY?

- ⊙ Gives counties & cities more flexibility in making policy decisions on behalf of all voters. Expands the franchise.
- ⊙ Reduces displacement or dispersion
- ⊙ Reduces taxes
- ⊙ Reduces CO₂, NO_x, SO_x and other particulate emissions



WHY IS IT GOOD PUBLIC POLICY?

- ⊙ Promotes logical development
- ⊙ Promotes sustainable construction
- ⊙ Reduces costs on all construction
- ⊙ Balances extraction across county and state



SURELY THE NEEDS OF THE MANY OUTWEIGH THE NEEDS OF THE FEW!

- ⊙ Thank you for the opportunity to present these comments today.
- ⊙ ??????
- ⊙ Kansas Aggregate Producers Association
 - ⊙ 800 SW Jackson - #1408
 - ⊙ Topeka, Kansas
 - ⊙ 785-235-1188 Or 785-633-1188

Alsop Sand Co. Inc.
105 Industrial Road
Concordia, Kansas 66901
Voice 785-243-4249 Fax 785-243-4255

March 12, 2009

House Agriculture and Natural Resources Committee

Mr. Chairman,

My name is Dane Barclay; I am president of Alsop Sand Co. Inc... We operate sand plants in Abilene, Concordia, Salina and Scandia.

I would urge you to support Senate Bills 253 & 254.

Of the more populated areas that I work in, like Salina, it is impossible to find a sand plant site where some one, will not object to our being there.

I was able to find a workable site, to continue to supply Salina, and in March, 2005 we applied for a Conditional Use Permit (CUP).

Saline County counselor insisted that we had to work out a road agreement in which we would help the county with the cost of maintaining the road that our trucks would drive on the access the sand plant, before we went before the Planning and Zoning Board (P&Z).

Saline County Road and Bridge hired a consultant to analyze Water Well road between our proposed entrance and Ohio Street.

The consulting firm designed a road that could not fail.

It was grossly over designed and the resulting price tag was so high that Saline County and Alsop Sand Co. combined could not possibility stand the cost.

Talks with Road & Bridge Dept. about the road agreement stalled out.

At the April, 2007 P & Z meeting I requested that our application be tabled indefinitely. We could not reach a workable road agreement.

At this time we permitted the site in the Saline River Valley just north of I-70. It was my belief that even though this sight was generally considered too small, it would fill the gap between our original site and the site we were having trouble permitting.

The protest petition raised its ugly head during the permitting process on our Saline River Site.

On that site we only had one opponent. He lived far enough away, that he was not eligible to sign the petition. He coerced an elderly landowner to sign the petition. That one signature met the 20% land ownership requirement for the petition.

Ag & Natural Resources Committee
Date 3-16-09
Attachment 2

Fortunately our one opponent had delivered the petition to county staff and the elderly gentleman did not care enough to attend the P & Z meeting.

These facts were not missed by the County Commissioners and we received a 3-0 vote.

However had the elderly gentleman really been apposed, one landowner signature could have put us out of business in Salina.

How can anyone believe that is fair?

When county staff started questioning me about our competitor's problems producing the quality and quantity required, we renewed our discussion of the road issues and I restarted the process. I provided information how other entities, including KDOT had improved gravel roads with price tags that were affordable.

In late May I spoke with the County Road & Bridge staff and delivered copies of Dickinson Co. quarry road agreements for them to review.

We appeared before Planning & Zoning Board on June, 2007, our application was tabled.

July 31st I presented the Power Point presentation to the neighbors and gave a tour of the proposed site...

8-2-07 I met with the P&Z Director, County Engineer and the County Counselor to discuss a road agreement policy.

Rather than paying a per ton fee as was done in Dickinson Co, the county counselor insisted that we negotiate every detail of the road maintenance agreement with the County Commission.

On August 6th, 2007 we appeared at the P & Z hearing —our application was tabled over road concerns.

The same County Counselor that had required the road agreement earlier, reversed his position and declared that we could not work out a road agreement, until after the CUP had been approved.

October 9th, 2007 several P & Z Board members declared that they could not support the CUP until the road agreement was finalized, the application was tabled until the next meeting.

November 6th, 2007 at the P & Z meeting, the Chairman of the P&Z Board explained the county counselor's position on the road, 17 conditions were added to the CUP and they voted.

Eight of the nine Board members were present, a 4 to 4 vote was cast, which is a failure to move. This failure to move is treated the same as a unanimous NO vote.

In December we appealed to County commission, the County Commission voted 2-1, which fails to meet the 75% requirement and counts as a no vote?

One County Commissioner was engaged in a feud with the other two, we were collateral damage.

One of the 17 conditions of the CUP was that we would have to work out an acceptable road agreement with the county commission.

The county commissioner that voted NO stated that his reason for the NO vote was that the road in its present condition would not support truck traffic. He was one of the three Commissioners that we were to negotiate the future road agreement with.

He also mentioned concern about evaporative water loss, but we had testified repeatedly that we had acquired existing water rights to transfer to this use. NO MORE WATER USED, just used in a different place.

Zoning a Sand production site is very different than picking a site for another business, for example a truck stop.

For a truck stop you need good access to the highway and a steady flow of potential customers. You can locate a truck stop any where those two things occur. You can choose a site where you will have few objections.

You have to locate a sand plant where a quality natural sand deposit exists. There is no other option.

Keep in mind that there were only a finite number of workable sand deposits ever created. Man has been extracting sand from those sites in Kansas since the 1930's.

Of the remaining deposits many are not coarse enough to be workable, some are so intermingled with mud and clay that they are unworkable, some have had cities built on top of them or highways, flood control dikes, houses or in some other way are made inaccessible.

In 1995 I had acquired and permitted 100 acres of workable sand reserves in Dickinson County. Since that time the railroad built a second track between Solomon and Abilene and parks trains across our driveway for weeks at a time. The railroad cut off access to one of my two tracts and made 40 acres of my sand reserves inaccessible.

Sand deposits that are accessible now, may not be in the future.

The sand in the Solomon River Valley fails today's KDOT quality tests.

Sand along the Saline River occurs in small pockets and has 32 feet of dirt overlying 28 feet of sand. Half of that dirt is the consistency of pudding (to wet to use as fill dirt), which makes the deposits in the Saline River Valley economically unworkable.

In Salina area that leaves the Smoky Hill River Valley where pockets of workable sand occur, but when you eliminate all the area without sand, the areas that are no longer accessible because of flood control dikes, roads, houses, cities, sewer lines, oil and gas pipelines, railroads, drainage ditches, the landowners that committed their land to other uses, the depleted sand plant sites of the past, there are very few areas left.

In twelve years of looking for future sand reserves near Salina I have only found four properties.

The first is the site that we opened in 1997, from which all the accessible sand has been extracted.

The second is the site along the Saline River just north of I-70 where we are producing sand now. This deposit was made workable when the dirt contractor removed the top 20 feet of dirt to be used in the last major improvements on I-70. That deposit will be depleted in about 2 ½ years.

The third is the site that I spent 4 years and more money than I care to admit, in an attempt to get it permitted. All that investment went down the drain with a 2-1 vote.

The last site has some real access issues and will not be approved by a unanimous vote.

I did what others could not. I found workable sand deposits where past sand producers have given up. However I can not get them permitted.

We started the permitting process on the third site in March 2005, four years later we have no conditional use permit that enables us to stay in business and no chance of obtain one.

To give you some background information, this site is not even visible from the road; the nearest neighbors are depleted sand plants and agricultural fields. On the 5/8 of a mile road that is the source of the road issues; our trucks would drive by two lakes created by past sand operations, several agricultural fields, one feedlot, one livestock trucking firm and four houses.

We were caught in a feud that one County Commissioner, had with the other two.

Sand is a major component in all concrete and asphalt.

Only when you truly understand that sand is a building block in all infrastructures can you begin to see the economic impact of doubling and tripling the cost of that building block, by trucking sand in from a distance.

Recently I got acquainted with an engineer from McLanahan Corporation. He was delighted to show me pictures of a state of the art sand processing plant that he had designed. It was on the west coast of Canada and loaded all the concrete sand into ocean going ships.

When I asked where all that sand was going I was shocked to find, that it goes to San Diego and San Francisco.

There are reserves near both those cities, but they will not permit them.

Is it any wonder that California is on the verge of bankruptcy when their idea of how to permit sand reserves is to ship the sand in from Canada?

Senate Bills 253 & 254 are a much more reasonable solution?

If a unanimous vote was required to pass a new law, would any new laws be passed?

A unanimous vote is not even required to override a presidential veto.

We are not asking you to throw out the Planning and Zoning process. Or to eliminate all the frustration and contradiction we deal with.

We are asking for an appeals process that does not require a unanimous vote.

Thank you for your consideration. If you want to reach me during the day my cell phone number is 787-275-1793. It does not work inside my home, so in the evening 785-335-2569 is the best number.

Thank you for your consideration.

Sincerely,

Dane Q. Barclay



QUARRIES
CONSTRUCTION
ASPHALT
WASTE MANAGEMENT

609 Perry Place
PO Box 17
Perry, KS 66073-0017
Telephone 785-597-5111
FAX 785-597-5117

TESTIMONY

By the

Hamm, Inc.

Before the

Agriculture & Natural Resources Committee

Regarding SB 253 & SB 254
Concerning the Development of Natural Resources

March 16, 2009

Mr. Chairman and members of the committee my name is Ramon Gonzalez, I'm an employee of Hamm Inc. located in Perry, KS and a member of the Kansas Aggregate Producers Association. I would like to take this time to thank you for allowing me to appear before you today in support of SB 253 & SB 254. N.R. Hamm Quarry, Inc. and N.R. Hamm Contractor, Inc., the two major subsidiaries of Hamm, Inc. have been providing crushed limestone products and heavy-highway construction for the state of Kansas for over 55 years. Hamm, Inc. is an employee owned company employing 270 to 300 Kansas citizens in NE Kansas.

N.R. Hamm Quarry, Inc. operates numerous limestone producing quarries in over 14 counties in NE Kansas. The quarry operations are divided into two divisions. The Eastern Division has an office in Perry in Jefferson County, KS and the Western Division is based out of Herington in Dickinson County, KS. Many of our quarries are in operation primarily for state, county, and township projects. Some are even in operation exclusively for the production and sale of aggregate to the County the quarry is located.

Limestone is a limited natural resource. Many of the zoned quarry sites in use today have been in operation for 10 to 20 years. As these sites are depleted new sites are in high demand. The problem the quarry producer is running into is how to zone these new sites with the strict guidelines currently in place. This is not to say that quarries producers should be given special

Ag & Natural Resources Committee

Date 3-16-09

Attachment 3

treatment or that these sites do not need to go through the zoning process. Quarry producers are held to the standards set out by the Kansas Department of Health and Environment for storm water runoff, air emissions, noise emissions and pollution prevention. The ATF regulates any and all explosives that may be on site for blasting. The Mine Safety and Health Administration is in charge of the safety regulations quarry producers follow to ensure a safe working environment.

The support of SB 253 and SB 254 will help to aide in the ability to successfully zone future quarry sites. As the law is written today a quarry producer can go through the zoning process and receive a passing vote from the county commissioners. However, if a protest petition is filed by 20% of the adjoining landowners the quarry permitted is now re-evaluated and required to pass with a super-majority vote. In many counties the commission is comprised of only three board members, in these cases the super-majority becomes a unanimous vote. In addition, many quarry sites are located in rural areas. Many times because of the rural nature of the quarry site 20% of adjoining landowners can often be one person. This allows for one person to have a strong voice and influence over a permit that could benefit the county or state as a whole.

In closing, with Limestone being a limited resource it is vital that we as a community look to develop these resources in order to meet economic and social needs of the future. SB 253 & SB 254 will provide the local units of government the tools necessary to plan for their logical development. I urge this committee for their support of SB 253 and SB 254. I would like to thank you for allowing me to appear here today and would be willing to answer any questions you may have at the appropriate time. Thank you.

Lou Allen
Attorney at Law
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Topeka, KS 66615
(785) 233-4571
(785) 478-0991
louofg@aol.com

March 16, 2009

Honorable Representative Larry Powell
Chairman, House Committee on Agriculture and Natural Resources
300 SW 10th Street
Topeka KS 66612

Chairman & Committee Members:

Thank you for the opportunity to appear before you. My name is Lou Allen. I live in Shawnee County, Kansas. I am here to testify in opposition to SB 253 and 254.

Passing these bills may have far-reaching effects. The unintended consequences of which are unknown. The proposed amendments disrupt a policy to which Kansas has adhered since zoning regulations were first adopted in this state in the early 1920s.

Zoning has its beginning in common law nuisance. Zoning laws date back over 80 years to the early 1920s. After the World Trade Show there was a national push for planning under zoning rules. The federal government actively sponsored planning at the municipal level by establishing the Standard State Zoning Enabling Act through the Department of Commerce.

All zoning comes from government's inherent police powers to promote the health, safety, and/or the general welfare of the community. From the beginning of local land use regulation proponents agreed that those land owners most directly affected by zoning need a degree of protection from unwanted changes in the land use policies that they had relied upon. The protest petition was included in the nation's first comprehensive zoning ordinance. The legal architect is credited as characterizing the protest petition provision as a device for the protection of the property owners the purpose of which is to prevent easy or careless changes in the zoning regulations.

Kansas adopted zoning laws including the protest petition concept and procedures in the early 1920s. There are several states that recognize the protest petition procedure however, of these jurisdictions I am not aware of any that have excluded the applicability of the same to any one business or industry as is being proposed in this bill.

Protest petitions also lead to negotiation and settlement of controversial CUPs. I propose that the threat alone of the filing of a protest petition brings forth the parties with competing interests and compromises in terms of development and landowners' rights.

I assert it is currently the policy and has historically been the policy of this state to recognize the 20% land ownership rights for protest petitions in matters affecting the use and protection of one's real property.

Without a compelling reason this policy should not be disrupted. Or if it is disrupted, then it should be done only after a thorough study of the need for such an exemption. The aggregate community has failed to show under the current statutory structure a compelling reason for a change to state policy when it comes to zoning, protest petitions and the applicability to the mining industry. Shawnee County has at least 3 operating sand pits with another one coming on board this spring; Johnson County has a total of 9 mining operations, 6 in incorporated areas and 3 in unincorporated areas. In my research on this issue I came across testimony submitted in opposition to this bill from Dickinson County. I have attached a copy of those comments for your reference as Exhibit A. In summary Dickinson County points out that the mining industry is not the only industry subject to the protest petition process. Every zoning change and CUP must overcome the protest petition provision. The protest petition – just as every zoning decision by the county commission - is subject to the reasonableness standard. Further, the current statute gives property owners the tools necessary to require their local governing bodies be very careful and certain when making any zoning changes that a rational percentage of property owners deem to be of concern to them.

Therein the commissioners recognize that mining operations are inherently contentious stating that **“there are few actions that can have more potential impact upon adjacent or nearby property and property owners than when local governing bodies rule on zoning changes when mining operations are involved.”** (Emphasis original).

I also reviewed Mr. Barclay's written testimony to the Senate Committee considering SB 253 and SB 254. Therein, Mr. Barclay, the President of Alsop Sand Company admits that despite a valid protest petition, his sand company was able to secure the requisite super majority vote and establish a sand pit a couple of years ago in Saline County. However, in his present case he challenges one commissioner's vote.

In Combined Investment Co vs. Board of Butler Co Comm'rs, 227 Kan 17, 605 P2d 533 (1980) the Kansas Supreme Court considered this very issue. In that case a quarry wanted a conditional use permit to mine a certain aggregate needed by the State of Kansas in road construction. Also, this was the only site for this aggregate in the county. Some neighbors objected and filed a valid protest petition. Their county commissioner voted to not approve the CUP and the mining company appealed. The Supreme Court ruled that the commissioner's no vote was unreasonable. They stated that the company showed they could operate the facility safely and that the kind of aggregate mined was available in Butler County only at this site. Further, that this aggregate was needed for State Highway Construction. So, case law under the current statutory scheme and under current state policy as it relates to landowners' rights makes available mining operations when the decision to disallow the same is unreasonable. This is true even when a valid protest petition is filed and a super-majority vote is not met. A factor in this decision was clearly the availability of the aggregate.

In our case, the county commission determined 3-0 to allow a CUP for a sand pit operation. The conditions imposed included time and trip restrictions. Specifically, the trucks were limited to 60 truck trips a day and to a route that was from the sand pit

directly to the concrete plant. The limitation of the truck trips was to address safety concerns by area landowners and residents due to the introduction of truck traffic with that of residential and agricultural traffic. The route limit was to insure that this was not a retail operation and was to be used only by the owner of the pit for purposes of making concrete. Kansas Concrete and Gravel had argued that they needed this pit to make concrete at their plant and to deny the CUP would put them at the mercy of their competitors for sand. On appeal the district court and the court of appeals determined that the commissioners acted reasonably because they added conditions to the CUP as to the number of truck trips and the route. However, right after the court of Appeals decision, the sand company was back before the planning commission to increase the truck trips to 70 and get rid of the hauling route restrictions. A protest petition was filed. The commission voted 2-1 to approve both amendments. Exempting mining operations from the protest petition provisions jeopardizes the conditions put in place and recognized by two judicial authorities in our case. I am not here to argue our case before the legislature; I am trying instead to illustrate the unintended effects of the proposed amendments contained in SB 253 and 254.

I would submit that the removal of such a protection is akin to the removal of the 2/3 majority required to override the governor's veto as it relates to only one industry -- for example coal plants.

Although I oppose the current amendments I do propose a change to this statute, KSA 12-757. Because of the zoning issue in my neighborhood I have become aware of some deficiencies in this statute...specifically, the calculation of the protest area. That is why I have submitted the proposed amendment which is attached here as Exhibit B. It is not intended to change the current law -- but attempts instead to clarify the law so there is uniformity in the calculation for protest petitions.

In our case -- there was over 211.2 acres within the notification area that had no notification representing 26% of the overall subject area. One of those areas was the Kansas River. The Kansas River is navigable and therefore held in public trust by the State of Kansas for the use of its residents and visitors. See KSA 70a-106. See also www.nationalrivers.org. The Kansas River makes up 170.15 acres and the Railroad Right of Way makes up 41.05 acres.

The purpose behind the calculation is to take out of the equation that land that was subject to the zoning change and those parcels of land that had no notification -- generally because they belonged to the public. In our case the County attorney has determined that the Kansas River is not a public way and therefore the area is not excluded from the calculation and thus, more real property is needed for a valid protest petition. This is despite the fact that the Kansas River is a navigable waterway held in trust by the State of Kansas and open to use by all residents and visitors. The zoning statutes do not have a definition section wherein streets and public ways are defined. Therefore, I am proposing this clarification that specifically exempts rivers, highways, interstates, streets, roads, sidewalks, parks and right of ways from the calculation.

It is clear that even protest petitions alone cannot stop a mining operation from obtaining a CUP if the failure to do so was unreasonable. For that reason alone, the aggregate community has failed to give this body a compelling reason to exclude mining operations from protest petition protections.

Clarification is needed – as is shown in our case – as to what is excluded from the calculation to determine the validity of a protest petition.

Thus, in Mr. Barclay's case, the commissioner had to act reasonably or Mr. Barclay will be successful and he will have his sand pit. A valid protest petition alone cannot stop a CUP – the governing body still must act reasonably under Combined Investment.

In our case – the test of reasonableness has been met. Lifting the protest petition guarantees as they relate to sand pits jeopardizes the affected landowners from enforcing the conditions that two judicial authorities have agreed make the CUP reasonable.

In summary, changing the long established state policy of landowner's rights in zoning issues especially those expressed in protest petition provisions jeopardizes all Kansas landowners' rights. Further, alleviating those restrictions for only mining operations may have far reaching effects – the unintended consequences of which are unknown. It is for all these reasons that I urge this committee to vote no on SB 253 and 254. Since this statute is currently open for consideration to the legislature, I would urge you to adopt the amendments I propose so that there is consistency in calculating the protest petitions validity.

Thank you again for the opportunity to appear before your committee. If you have any questions or concerns, please feel free to contact me.

Very truly yours,



Lou Allen



DICKINSON COUNTY

109 East First Street, Suite 208, Abilene, KS 67410

Phone (785) 263-3120 Fax (785) 263-2081

www.dkcooks.org

COMMENTS RELATIVE TO SENATE BILL NO. 253 February 24, 2009

The Dickinson County Board of County Commissioners wishes to express its opposition to the proposed amendment to K.S.A 12-757.

There are numerous mining operations in Dickinson County. Our county governing body not only recognizes the importance of those mining operations, we depend upon them for materials critical to performing our own responsibilities in the public's interests. Our actions and interests speak for themselves - we are not anti-mining.

The single action proposed within Senate Bill No. 253 is to remove **only mining operations** from the existing zoning adoption requirements contained in K.S.A. 12-757 when owners of 20% or more of the represented property or 20% or more of the property owners of record within the prescribed notification area file a protest petition.

There are few actions that can have more potential impact upon adjacent or nearby property and property owners than when local governing bodies rule on zoning changes when mining operations are involved.

The current requirements of the base statute are not anti-mining. The current statute does not single out *mining* for special attention. Rather, the current statute gives property owners the tools necessary to require that their local governing bodies be very careful and very certain when making **any** zoning changes that a rational percentage of property owners deem to be of concern to them.

Leaving K.S.A. 12-757 stand as it now exists does not remove mining interests' ability to respond to what they may consider to be unreasonable action by a local governing body.

Exhibit A

KSA 12-757(f)(1) Proposed Amendment

Whether or not the planning commission approves or disapproves a zoning amendment, if a protest petition against such amendments is filed in the office of the city clerk or the county clerk within 14 days after the date of the conclusion of the public hearing pursuant to the publication notice, signed by the owners of record of 20% or more of any real property proposed to be rezoned or by the owners of record of 20% or more of the total real property within the area required to be notified by this act of the proposed rezoning of a specific property, excluding streets, **roads, highways, interstates, sidewalks, public parks, navigable rivers and waterways and public and railroad right-of-ways** and property excluded pursuant to paragraph (2) of this subsection, the ordinance or resolution adopting such amendment shall not be passed except by at least a $\frac{3}{4}$ vote of all the members of the governing body.

Exhibit B