

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairman David Wysong at 8:30 a.m. on March 11, 2009, in Room 545-N of the Capitol.

All members were present.

Committee staff present:

Ms. Margaret Cianciarulo, Committee Assistant
Mr. Norm Furse, Office of the Revisor of Statutes
Mr. Ken Wilke, Office of the Revisor of Statutes
Mr. Reed Holwegner, Kansas Legislative Research Department
Mr. Julian Efird, Kansas Legislative Research Department

Conferees appearing before the Committee:

Mr. Don Bowers, Building Consultant, Holmes Inspection Co.
Mr. John Lyle, Professional Engineering Inspections, Inc.

Others attending:

Please see attached list.

Continued hearing and possible action on HB2260 - an act concerning the Kansas home inspectors professional competence and financial responsibility act

Upon calling the meeting to order, Chairman Wysong announced the hearing on **HB2260** would continue and again called upon Mr. Don Bowers, Building Consultant, Holmes Inspection Co., who again offered a list of changes to the bill from an opponent's side and answering some of the testimony from yesterday's hearing including:

- if a home inspector uses an inspection agreement that includes a clause with a limit of liability clause and there is ever a problem, the buyer has no recourse.

Answer: the Kansas "Small Claims Process" allows an aggrieved consumer to file a claim against another party or business (including home inspectors) through the Kansas Court System for an amount up to \$4,000 without going to the expense of hiring an attorney.

- The Realtors (their lobbyist & President of KAREI) stated they have been working with all home inspectors groups and they are representing all home inspectors in Kansas.

Answer - of the five Home Inspector Associations (two State and three National) two groups had no input into the bill or contact with the Realtors. Mr. Bowers offered a breakdown of the 98 members on KAREI's web site including 14 who were out of business, one was deceased, and delete termite inspectors, etc. and why they are not representing all home inspectors in Kansas.

- Regarding professional engineers, of which there are over 50 degrees, they are not required to carry E&O insurance and would be exempt from the bill.

Answer - according to letters he received from the State Engineering Board, they state that 1&2 family houses are excluded from Kansas engineering laws and therefore the Board of Technical Registration has no jurisdiction over an engineer doing home inspections.

- Regarding the KAREI lobbyist's testimony concerning complaints against home inspectors.

Answer - Mr. Bower's group contacted consumer complaint resources like the Better Business Bureau, the Kansas Attorney General's office, etc. and found there were less than 13 complaints against home inspectors over the last three years.

He cited that this bill has no financial impact on the State.

CONTINUATION SHEET

Minutes of the Senate Commerce Committee at 8:30 a.m. on March 11, 2009, in Room 545-N of the Capitol.

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Mr. Bowers then offered a sheet listing Professional Engineering Degrees and also, written testimony from:

1. Ms. Nancy Seats, National President of Homeowners Against Deficient Dwellings Inc.(HADD) also offering correspondence stating non complaints from the national level.
2. Mr. Mike Pritchett, President, National Association of Home Inspectors, offering their concerns with the way the bill is written regarding:
 - A. The 105 Kansas counties - only eight were showing over 60,000 population or that 97 counties would not go to licensure until 2011;
 - B. The minimum liability issue, home inspectors could be held liable for up to \$10,000 minimum liability issue.
3. Ms. Betty Rose, Executive Director, Kansas State Board of Technical Professions' regarding the Board's opinion of PE's performing home inspections. (Enclosures were not included with her letter as mentioned)

A copy of Mr. Bowers' testimony, his list and attachments are (Attachment 1) attached and incorporated into the Minutes as referenced.

The Chair then called on Mr. John Lyle, Professional Engineering Inspections, Inc., who referred the Committee to a letter from the Kansas State Board of Technical Professions answering his question to them, "Is an engineer permitted to violate their professional conduct...." A copy of this letter is (Attachment2) attached hereto and incorporated into the Minutes as referenced.

The Chair asked Mr. Lyle, "basically you are asking to be taken out of this" to which Mr. Lyle agreed.

The Chair then called on Senator Schodorf who recalled from last year, that home inspectors would be required to have continuing education and so no one wanted them in their professions. The Chair stated that the Realtors were concerned that they may be liable for the home inspectors if there is a problem and so they are passing them onto this organization. Questions and comments then came from Senators Wagle, Holland and Schodorf including:

1. For Mr. Lyle, isn't there an easier way to do this?
2. And for Mr. Bowers regarding page 11, can you clarify "cannot limit his liability to anything less than \$10,000?" Are there products where you can readily turn to go buy this \$10,000 error omission policy for your type of business or where would you turn to find this type of coverage? Do you have to theoretically carry this \$10,000 for each home or leave it out there ad nauseam? Since the passage of this bill, has litigation decreased for Realtors and increased for home inspectors? And, is this \$10,000 error omission really the crux of the bill?

The Chair then called on Mr. Wilke who offered four handouts including:

1. His spread sheets of the bill from yesterday's meeting of Tuesday, March 10, 2009.
2. The Attorney General's opinion No. 2009-05, dated February 11, 2009.
3. The memorandum from Mr. Wilke dated March 11, 2009 regarding 12 potential issues and changes for this bill as amended by the House Committee.
4. A 2-page copy of the statute of the real estate commission.

CONTINUATION SHEET

Minutes of the Senate Commerce Committee at 8:30 a.m. on March 11, 2009, in Room 545-N of the Capitol.

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He went on to explain his Memorandum, a copy which is included with the other three handouts is (Attachment 3) attached hereto and incorporated into the Minutes as referenced.

Questions came from Senators Holland, Emler, Wysong of Mr. Wilke's memorandum including:

- Item 2 - a discussion and vote among Committee members regarding who on the board should be a home inspector, do we need to worry about a chain of succession, do we want to specify, or is it a board responsibility? Do you want to write in the bill a line of succession?

- Item 4, the Chair called on Mr. Barnes who suggested the following language be placed on page 9 under line 15, "all registered inspectors must retain all records relating to all individual inspections for 24 months following the inspection," putting back into a section where the heading is "all registered inspectors must do..." (What is the statute of limitations on this and is this the correct place to put this language?)

- Item 5, deals with inconsistency as shown on page 6, lines 9 through 17 that states the board may deny, suspend, or revoke a registration but on line 15 there is a mandatory revocation following conviction of a felony. However if you follow that language, originally you could suspend, revoke or deny a registration for conviction if a misdemeanor involving dishonesty or a felony occurs, now you turn around and revoke it. (Referred the Committee to his fourth handout, specifically K.S.A.58-3043, part 2 subsection E as an example and possible way to fix.) Senator Emler asked about Mr. Bowers' list earlier where he referenced page 6. Mr. Wilke said they could use but would still like to separate for clarity purposes.

The Chair asked Mr. Wilke if he made the change that was discussed in yesterday's hearing regarding "standard of practice" found on page 5, line 22?

The Chair then recognized Senator Emler who asked if Mr. Wilke could develop a balloon as though the Committee had adopted the changes shown in his memo?

Adjournment

As it was going on 9:30 a.m., the Chair adjourned the meeting after discussing upcoming Committee meetings.

The next meeting is scheduled for March 12, 2009.



HOLMES INSPECTION CO.

P.O. Box 12787 – Shawnee Mission, KS 66282 – (913) 649-8878

Certified Moisture Analysis & EIFS / Stucco Inspections
FHA – 203(k) Inspector, Plan Reviewer & Consultant
FHA – Approved Compliance Inspector
Certified Construction Inspector

www.holmesinspection.com



March 10, 2009

Re: HB-2260

Honorable Senator Wysong & Members of the Kansas Senate Commerce Committee:

I want to thank the committee members for allowing me the opportunity to testify before the Senate Commerce Committee on HB-2260. This year and last year I have been in Topeka listening to and testifying about 1st HB-2315, and now HB-2260. There have been many people testifying about this bill, and if memory serves me correctly each person speaking AGAINST the Bills had less than 2 minutes to speak. To members of the legislature this may be quite common but to us small 1 man mom and pop businesses, this is scary. It is like you're being put on trial for your life and trying to defend yourself in under 2 minutes AGAINST many special interest groups that have spent weeks or months behind the scenes promoting their agendas to the jury. It is overwhelming.

At various times last year both Senators Karin Brownlee and Susan Wagle each brought up a very astute and intuitive thought that I have not heard asked in previous Committee hearings on this bill OR by the proponents of the bill. Paraphrased the thought is basically: what is the need – where is the beef. Is there really a significant overwhelming need OR could we looking at a lot of special interests that are trying to use the state government to manipulate another profession? I'd like to try and address that question.

My name is Dan Bowers and I am a Building Consultant. I do residential, commercial, environmental and specialty inspections (stucco, mold, expert witness, construction, etc). **We are Affiliates of the Lawrence & KCRAR Board of Realtors.** My sister-in-law Susan Bowers, has been President of the largest Board-of-Realtors in Kansas, my brother Rick Bowers, has been President of the Kansas City MLS; and they are both long-time agents with Prudential Kansas City. In 1984 I became the 1st ASHI Inspector in the Midwest and have been President of both the Kansas and Missouri ASHI Chapters, and served on their National Board of Directors 3 times in the past 15 years.

I've been actively performing home inspections full time since 1984, and part time since 1976. Before that I was a Real Broker and Home Builder for 8 years. I have written over 68 articles for local newspapers or magazines, appeared on several TV or radio shows on housing defects, and we've have been featured on both Stan Kramers investigative TV news show and the KC Star's home video series on home ownership. I am also an approved CE Trainer for FHA, both the Kansas & Missouri Real Estate Appraisal Boards, MAR, ASHI, NAHI, NACHI and we teach 3 adult education classes on building and construction defects at Johnson County Community College each semester. **On top of that we are the highest rated home inspection company in this area on the national consumer group - Angie's List.**

During the 30 plus years I've been involved in home building, real estate and home inspections 1 thing has never changed. The realtors have constantly tried to control or manipulate the home inspection industry. In years past it was by "Blackballing" the more thorough inspectors OR by feeding names of inspectors that "don't make waves" to the home buying clients. Nothing has changed, except now Agents are trying to use the legislature to do it for them.

Home Inspectors are not perfect, BUT the majority of complaints against them are from Realtors or sellers (he was too picky, he killed my deal), OR from buyers that have a problem and want someone to take care of it AND really don't care who pays as long as its not themselves. 93% of inspector lawsuits end up being frivolous.



National Association of Certified Home Inspectors



Senate Commerce Committee
date: March 11, 2009

Attachment 1

1) Several people including the **KAR lobbyist (Luke Bell)** and a **Jeff Barnes** have testified to these Committee's that if a home inspector uses an inspection agreement that includes a clause with a limit of liability clause and there's **EVER** a problem the buyer has no recourse. **This is INCORRECT.**

To start with, the **Kansas "Small Claims Process"** allows an aggrieved consumer to file a claim against another party OR business (including Home Inspectors) through the **Kansas Court System for an amount up to \$4,000 without going to the expense of hiring an attorney.** The special interest groups or proponents of this Bill have failed to mention that fact to the committee.

2) As an expert witness I'm often hired to support or dispute another home inspector OR engineers report - all of whom had limit of liability clauses in their contracts. Many professions use these types of clauses in their service contracts with their clients. When my grandsons school sends students on an outing, they have the parents sign a release of liability statement saying we won't hold the school responsible if the student is hurt; when I got lasik surgery the doctor gave me a 16 page limit of liability form to sign, saying they'd do the best job they could - but it might not work and in some instances people have ended up with worse vision than before the surgery OR have even gone blind; the Real Estate Contract used by the Kansas City Board of Realtors has over 5 clauses STATING they have NO LIABILITY to anyone if this or that happens. If what the KAR lobbyist told the committee is true, then neither the school, the doctor or a Realtor could **EVER** be sued in our state - Kansas consumers have no recourse if these folks botch something up - Right or Wrong. Its **VERY** wrong, and the KAR lobbyist or Trial Attorneys lobbyist both know it (OR they **LACK** a lot of knowledge about their own profession and our states legal system). If the bus driver is on drugs and rolls the bus and hurts a child; if the doctor shows up drunk and nicks your cornea; if the Realtor tells a seller to not disclose things that later become problems for the homebuyer - there is recourse. Its called our legal system (arbitration, mediation or in some cases a lawsuit). It's the SAME with home inspectors.

3) The KAR lobbyist (Luke Bell) talked of untold numbers of complaints against home inspectors in our state. This past year Mr. Bell has sent emails (of which we have copies) to Realtors in Kansas indicating the Real Estate Industry WANTS to PUSH regulation onto another PROFESSION (home inspectors) and asking Realtors to provide them with NEGATIVE EXERIENCES with inspectors to support their push. In Kansas there are approximately 175 to 225 home inspectors and around 15,000 real estate licensees. The metropolitan Kansas City area is the largest city in Kansas, and the 2 largest home inspection businesses there only have 4 home inspectors each working for them. About 95% of Kansas home inspectors are small 1 man - mom and pop businesses in Kansas, Having a **GIANT** industry like Realtors (with 15,000 licensee's in Kansas) trying to use the Kansas legislative system to manipulate or control a very **SMALL** industry (under 225 members) seems like Restraint of Trade OR almost criminal.

Home Inspectors are not perfect but after seeing these emails we wondered about this ourselves and contacted consumer complaint resources like the BBB (Better Business Bureau), the Kansas Attorney Generals office for consumer complaints, and HADD (Homeowners Against Deficient Dwellings). Mike Greenwalt, the President of KARCI (Kansas Association of Residential and Commercial Inspectors) has provided written correspondence from these groups indicated less than 13 complaints against home inspectors over the past 3 years. Nancy Seats (the National President of HADD and a past Kansas City resident) wrote a letter this month to the Senate stating that she has not received ANY complaints against Kansas home inspectors BUT has received hundreds of complaints against builders, contractors and other related professions in Kansas. She has reviewed HB-2260 and thinks it is not only uncalled for but harmful to consumers - especially in a state like Kansas where 3/4th of the state is without mandatory building codes, mandatory code inspections and mandatory licensing of contractors.

4) The Realtors lobbyist and the President of KAREI (Jeff Barnes) told the Senate Committee that they have been working with ALL home inspectors groups on this Bill. This is NOT EXACTLY CORRECT. There are 2 State Home Inspector Associations (KARCI & KAREI); and 3 National Home Inspector Associations: ASHI (American Society of Home Inspectors), NAHI (National Association of Home Inspectors) and NACHI (InterNational Association of Home Inspectors). I believe 2 of the other inspectors (the Pres of the State NAHI Chapter, the Secretary of the 2nd State Association - KARCI, and an officer from the State NACHI Chapter stated their groups had no input into the Bill or contact with KAREI, the KAR or the Trial Attorneys Association - NONE at all). It was also pointed out that while KAREI says they represent all Home Inspectors in Kansas, etc - of the 98 members on their web site earlier this week - 14 were out of business, 1 was deceased, and 2 were retired. Of the remaining 81 home inspectors, 3 were NACHI members, 4 were NAHI members and the other 74 inspectors were ASHI members - KAREI is NOT a FULL cross section of the state home inspector population; If you take out NON-Home Inspectors (termite inspectors, chimney sweeps, etc) it's more a state ASHI group.

In short HB-2315 and now HB-2260 was put together, written and pushed on the home inspectors in Kansas by ONLY the Kansas Realtors Association, maybe trial attorneys AND a group of ASHI home inspectors purporting to be THE state association (KAREI). The other 2/3rd of the home inspectors in Kansas had no input whatsoever in this Bill. That meant that 1 state association (KARCI) , 2 National Associations (NAHI & NACHI) and all unaffiliated home inspectors in Kansas were left out in the cold. This is like enacting regulation that affects all 3 major car manufacturers (Ford, Chrysler and General Motors), but only working with Ford to put the rules in place. One association AND one association ONLY has had any input or contact with the KAR

5) Several times in last years session a licensed and married couple of PE's testified before the House of Rep's or Senate) that they both perform HOME INSPECTIONS and told how with their knowledge, training and stringent COE that they didn't need extra training, or added regulation upon themselves, etc AND since the state engineering laws already governed them THAT it was only right that ENGINEERS be exempted from the Home Inspectors Bill.

Besides doing home inspections, I periodically train people getting into home inspections. I've never met either her or her husband in person - however, when they decided to get into the home inspection business about 4-5 years ago they hired an instructor that worked with me to train them in home inspections. They hired one of our Instructors to train them on weekends for about a month and a half. Over the past 8 years I've been hired to go against an ENGINEER in expert witness testimony probably 20-23 times because of a shoddy home inspection by the engineer (to date we've not lost one time).

In KANSAS an engineer is not required to carry E&O insurance and in KC we have 21-22 licensed PE's active in home inspection. This group would be exempted from the law. I have received letters from the State Engineering Board to me - stating that 1&2 family houses are EXCLUDED from KANSAS engineering laws and therefore the Board of Technical Registration has no jurisdiction over an ENGINEER doing home inspections.

There are over 50 engineering degrees, including: optical science, waste water management, petroleum, farm agricultural, computer software design, marine biology and others. ANYONE with a PE designation in these degrees can be a home inspector AND would be exempted from HB-2260. An engineer may be highly skilled in whatever field their engineering degree is in, but Home Inspection Training is not part of that training. Most engineering training does not qualify one of them to be a Home Inspector.

Thank You,

Dan Bowers, CRI, CMI

Page 3 –

Lines / 21 thru 28 (these words were struck)

~~(g) “Dismantling” means to take apart or remove any component, device or piece of equipment that is bolted, screwed or fastened by any other means and that would not be taken apart or removed by a homeowner in the course of normal and routine household maintenance.~~

(h) **“Material Defect”** means a condition that significantly affects the value, habitability or safety of the dwelling and is equal to 1% of the sales price OR \$2,000 (whichever is more). Style, cosmetic defects or aesthetics shall not be considered in determining whether a system, structure or component is materially defective.

We feel MATERIAL DEFECT needs to be left in and SOMEHOW defined

Page 4 –

Line / 29

The **chairperson** must be a registered home inspector.
So should at Least the Vice-Chair (??? Secretary / Treasurer)

Page 5 –

Lines / 22 thru 24

~~(b) approve and adopt the a standards of practice of nationally-recognized home inspection associations which meet the requirements of this act and a code of ethics;~~

Page 6 –

Lines / 6 thru 7

~~(i) contract with agencies or consultants as necessary to assist the board in obtaining information about educational providers.~~

Lines / 14 thru 25

(2) been convicted of or plead guilty or nolo contendere in a court of competent jurisdiction to forgery, fraud, conspiracy to defraud or any similar offense or offenses any violent crime or sexual offense the Home Inspection Board may prohibit this person from registration as a Home Inspector UNTIL 10 years has elapsed since the applicant was discharged from post-release supervision and the Board determines the registrant does not pose a threat to the public as a home inspector. ~~The board shall revoke a registration following the conviction of a felony unless the board determines the registrant will not pose a threat to the public in the capacity as a home inspector and that such registrant has been sufficiently rehabilitated to warrant public trust. In the case of a person who has been convicted, plead guilty or nolo contendere in a court of competent jurisdiction to any misdemeanor involving dishonesty or to any other type of felony (other than in #2 above), and who applies for an~~

original registration, or to reinstate a revoked registration, the Home Inspection Board may prohibit this person from registration as a Home Inspector UNTIL 5 years has elapsed since the applicant was discharged from post-release supervision and the Board determines the registrant is not a threat to the public as a home inspector.

Page 7 –

Lines / 1 thru 8

(6) **(5)** including as a term or condition in an agreement to conduct a home inspection any provision that disclaims the liability of the home inspector for any errors and omissions which may arise during a home inspection or to limit the amount of damage for liability for any errors and omissions which may arise during a home inspection to less than ~~\$10,000~~ \$1,500 in the aggregate for each home inspection;
(7) **(6)** failing to provide a client with a pre-inspection notice prior to the home inspection;

Lines / 35 thru 38

(b) The board may charge a fee not to exceed ~~\$500~~ \$150 to review an application packet submitted for approval by an education provider for pre-registration courses or a fee not to exceed \$50 to review an application packet for an education provider for continuing education classes.

Page 8

Lines / 1 thru 4

(b) On and after January 1, 2011, all individuals performing home inspections as defined in K.S.A. 2008 Supp. 58-4502, and amendments thereto, shall be required to file a written registration and *be registered* by the board.

Page 9

Lines / 6 thru 10

(B) (i) if the individual performs home inspections in counties with a population of 60,000 or more, have been actively engaged in the practice of conducting home inspections for not fewer than two years prior to the effective date of this act and have completed not less than **100 fee-paid home inspections**; or
(ii) if the individual does not perform home inspections in counties with a population of 60,000 or more, have been actively engaged in the practice of conducting home inspections for not fewer than two years prior to the effective date of this act and have completed not less than **35 100 fee-paid home inspections**.

Lines / 41 thru 43

1-5

(a) A tradesman or contractor performing a single component or system evaluation or a combination of **any two three systems** or components listed in K.S.A. 2008 Supp. 58-4502 (a)(1)(A)-(I) while acting within the scope of that occupation;

Page 10 –

Lines / 8 and 9

~~(d) an individual licensed by the state as a professional engineer while acting within the scope of that license; ??????????~~

Page 11 -

Lines / 17 thru 40

(c) No home inspector may include, as a term or condition in an agreement to conduct a home inspection, any provision that disclaims the liability for any errors and omissions which may arise during a home inspection, or limit the amount of damages for liability for any errors and omissions which may arise during a home inspection to less than \$10,000 \$1,500 in the aggregate for each home inspection and such term or condition or limitation setting the liability at an amount greater than \$10,000 \$1,500 must be provided to the customer in writing to be in effect.

(d) An action to recover damages for any act or omission of a home inspector relating to a home inspection or home inspection report must be brought not more than 12 months from the date the home inspection was performed and may be initiated only by a party to the real estate transaction *the client* for which the home inspection was conducted.

~~(e) In any action to recover damages for any error or omission of a home inspector relating to a home inspection or home inspection report, a home inspector is liable for any errors and omissions which may arise during a home inspection in an amount of not to exceed \$10,000 in the aggregate for each home inspection, or to the amount in the pre-inspection agreement to conduct a home inspection, if greater than \$10,000 in the aggregate for each home inspection, provided that a home inspector provides the customer with a clear written description in the pre-inspection agreement of any greater limitations on the liability of the home inspector for any errors and omissions which may arise during the home inspection.~~

By removing (e) above - a client may recover whatever amount a court determines.

PROFESSIONAL ENGINEERING DEGREE'S (PE's)

1. Acoustical
2. Aerospace
3. Air Conditioning, Heating & Ventilation (HVAC)
4. Architectural
5. Automation & Control Systems
6. CAD Design & Drafting
7. Chemical
8. Civil
9. Clean Rooms
10. Computer Software
11. Consulting
12. Corrosion Prevention
13. Electrical
14. Electronics
15. Energy Management
16. Engineering Management
17. Environmental
18. Farm Agricultural
19. Fire Protection
20. Forensic
21. Geological (Soils)
22. Geo-Technical
23. Hydraulic
24. Industrial
25. Land Development & Design
26. Manufacturing
27. Marine
28. Mechanical
29. Metallurgical
30. Mining
31. Nuclear
32. Occupational (Safety & Health)
33. Optical Science
34. Petroleum
35. Pharmaceutical
36. Plant Maintenance
37. Pollution
38. Power Plant Management & Design
39. Product Development
40. Process
41. Public Utilities
42. Railroad
43. Robotics
44. Sanitation
45. Soils
46. Storm Water Management
47. Structural
48. Systems
49. Telecommunication
50. Tool Design
51. Traffic & Transportation
52. Waste Water Management & Treatment

Under The Laws & Regulations That Govern Engineers In The State Of Kansas, Every One Of The People On This List Of Engineering Specialties Could Perform A Home Inspection For A Homebuyer And Yet They Could Be **Excluded** From The Rules As Set Forth In **HB-2260, If Engineers Are Exempted.**

As You Can See, The Majority Of These People Are Possibly Highly Skilled And Trained In Whatever Field & Discipline Their Engineering Degree Is In, But Home Inspection Training Is Not Part Of The Knowledge Or Training That Is Required For All Of These Degree's.
Vote No To HB-2260

Sent: Thursday, March 05, 2009 11:47 AM
Subject: HADD

To: Commerce Committee Members

I am President of Homeowners Against Deficient Dwellings, a national grass roots not for profit (501c3) advocating for the safe and sound construction of new homes. A home is often the largest purchase a family will ever make. At this time, in the state of Kansas, there is no consumer protection for that purchase. Our organization would find it far more important to pass legislation that would hold a home builder accountable and responsible for shoddy construction than to license Home Inspectors who are the only neutral party working for the buyer in the purchase of a new or resale home. Every other person involved in the transaction has a vested interest in the sale.

In the 15 years that I have been dealing with homeowners in Kansas, and across the nation, I have never had a complaint against a Home Inspector. At the same time there have been tens of thousands of complaints about home builders cutting corners to add to the bottom line. The lack of window flashing, roofing felt, and improper grading, all of which allow water intrusion, and are issues that buyers count on Home Inspectors to find.

I might add that I have heard numerous complaints from Home Inspectors that some Realtors refuse to add their names to lists they give to prospective buyers if the Home Inspector has ever found issues that killed a deal. Honest Home Inspectors and honest Appraisers need protection from Realtors and Mortgage Brokers who only list professionals who do their bidding.

I am certain that the Attorney General's consumer protection division would tell you that complaints against Home Inspectors are minimal as compared to other issues regarding home ownership like fraudulent appraisals, fraudulent lending, and shoddy construction.

Please do not pass HB 2260. At this time Home Inspections are affordable for purchasers. **This legislation will certainly raise the cost and in my opinion will do nothing to protect the public since it seems to me that on this issue there is nothing to protect the public from.**

Because Builders Owe a Duty Beyond Cashing Your Checks. Request for a Congressional hearing concerning accountability of the home builders in Kansas

Nancy Seats, President
Homeowners Against Deficient Dwellings INC. (HADD INC)
Member: National Alliance Against Construction Defects

Home: 314-909-1667
Cell: 816-560-0030

From: mike pritchett
To: Oletha29th@aol.com
Sent: Thursday, March 05, 2009 11:44 AM
Subject: hb 2260

To: Commerce Committee Members

My name is Mike Pritchett I am the President of the National Association of Home Inspectors, Heartland Chapter which represents home inspectors that live and work in the states of Kansas and Missouri.

Our members have expressed great concern with HB 2260. One of the many areas of concern is the fact that of the **105 Kansas Counties / ONLY 8** were showing **OVER 60,000** population as of the last US Census. That basically means that out of 105 Counties / 97 would NOT go to licensure until 2011. This means that only 8 counties and their dwindling (more are leaving the business every day) inspectors will be carrying the weight for the remaining 97 counties for two years. This is not enough money to keep the burden of licensing inspectors off of the **Kansas taxpayers**. At a time when budget cuts are being made this makes no sense for the Kansas budget. I know everyone has been told this bill will be self funding, however I don't see how it is possible to pay board members expenses and hire a secretary to work for the board without the state throwing taxpayer dollars into this unneeded and unnecessary bill. We believe a financial study needs to be done to verify that the funds will be adequate to maintain this legislation before any bill is passed that will further drain the Kansas budget. The board estimates that there are only 100-150 home inspectors in the state / how can .08% of the counties fund this legislation for the rest of the state?

Another concern is the \$10,000.00 minimum liability issue. As most of you are aware a house has many systems from plumbing, electrical, structural , heating ventilation and air conditioning that must all come together to make a home safe and comfortable.

I am sure many of you also know from calls to service providers that some of systems can work fine today and not tomorrow. A heating and air conditioning system for example has many moving parts that often break or stop functioning without any prior warning.

The way HB2260 is written the home inspector could be held liable for up to \$10,000.00 for 12 months after the date of inspection. So if the client moves into a home in February 2009 and the furnace stops working in January 2010 the home inspector could be held liable for costly repairs or replacement of the unit. Regardless of whether or not the home owner had preformed the minimum manufacturers recommended maintenance on that furnace. The home inspector has to pay for a new furnace because the home owner did not change a dirty filter or have the unit cleaned and serviced as recommended.

A precedent has already been established in the state of Kansas that allows service providers to negotiate the amount of liability they will assume for the fee paid for their service.

Doctors, hospitals, schools and realtors among many other professions do limit the amount of liability that they assume for the fee charged for service. The home inspector deserves the same right.

HB2260 could unfairly open the flood gates and make home inspectors the new insurance policy for home buyers in the state of Kansas.

Thank you

Mike Pritchett

President, National Association of Home Inspectors

Heartland Chapter



KANSAS STATE BOARD OF TECHNICAL PROFESSIONS

(913) 296-3053

Suite 507, Landon State Office Building 900 Jackson Street Topeka, Kansas 66612-1214

January 28, 1993

D.L. Bowers

RE: Professional Engineers Performing Home Inspections

Dear Mr. Bowers:

The Board of Technical Professions met on January 12, 1993, to review inquiries, complaints, and correspondence. The Board directed me to write you regarding the above-captioned matter.

It is the opinion of the Board of Technical Professions that a licensed architect or professional engineer is not required on the average home inspection.

Pursuant to K.S.A. 74-7031(b) and K.S.A. 74-7033(b), "Persons preparing plans, drawings or specifications for one and two family dwellings or for agricultural buildings", are exempt from the practice of architecture and engineering. (See enclosed copy of the statutes and rules and regulations of the Board of Technical Professions.)

Therefore, the types of services described in your letter do not fall under the jurisdiction of the Kansas State Board of Technical Professions.

Sincerely,

A handwritten signature in cursive script that reads "Betty L. Rose".

Betty L. Rose
Executive Director

BLR:pa
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KANSAS STATE BOARD OF TECHNICAL PROFESSIONS

(785) 296-3053

<http://www.kansas.gov/ksbtp/>

Landon State Office Building 900 SW Jackson Street Suite 507 Topeka, Kansas 66612-1257

June 6, 2008

Julie Lyle, P.E and John Lyle, P.E.
Professional Engineering Inspections, Inc.
1161 SW Mulvane St
Topeka, KS 66604

Dear Mr. & Mrs. Lyle:

During its meeting on May 29, 2008 the Board discussed your letter of March 25, 2008 and the issues which you raised. The issues with House Bill 2315 appear to be dead at this time. The Board will continue to monitor any legislation dealing with home inspectors as the issues may resurface.

The Board also discussed your specific question on page 2 of your letter "is an engineer permitted to violate their professional conduct..." The Board's answer is "no, a professional engineer can never violate generally accepted engineering practices."

We appreciate your communication with the Board. Please do not hesitate to contact the Board office if you become aware of legislative issues related to home inspectors that we should follow.

Sincerely,

Jean Boline
Executive Director

Senate Commerce Committee
Date: March 11, 2009

Attachment 2

Senate Committee on Commerce
House Bill 2260

Section	Original Bill Provision	Provision as Amended	Additional Information
1 New Section	<p>Subsection (a) of this section included in the application process a requirement for fingerprinting and a criminal background check.</p> <p>Subsection (b) prohibits disclosure by the Board of any information received as a result of the information required by subsection(a). However, such information may be used by the Board at a hearing pursuant to the act. Penalties for disclosure are included. include Class A nonperson misdemeanor, removal from office and denial, suspension or revocation of registration issued under the act.</p> <p>Subsection (c) makes the costs of the fingerprinting and criminal background check the responsibility of the applicant for registration</p>	<p>This section was stricken in its entirety by the House Committee.</p>	
2 Amends K.S.A. 2008 Supp. 58-4502	<p>This section removed the definitions of the terms “dismantling” and “material defect”</p>	<p>1 The original language remained intact, but the amendment also includes, on page 2, lines 12-14, removal of the language requiring the home inspector to belong to a national organization of home inspectors approved by the Board.</p>	<p>The amendment appears to have been done to comply with Attorney General Opinion 2009-5, Dated February 11, 2009.</p>

Senate Commerce Committee
Date: March 11, 2009

<p>3 Amends K.S.A. 2008 Supp. 58-4503</p>	<p>This section establishes the Kansas Home Inspectors Registration Board and provides for the organization thereof. This section removes:</p> <p>(1) the requirement that the secretary of state be the custodian of all permanent records of the Board;</p> <p>(2) makes the salary of the executive secretary of the Board approved by the Governor instead of the state finance council; and</p> <p>(3) places all other employees of the agency in the Classified Service. changes to the Governor corrects a reference to who approves the salary of the</p>	<p>2 No change from the original bill.</p>	
<p>4 Amends K.S.A. 2008 Supp. 58-4504</p>	<p>This section provides of the powers and duties of the Board. This section:</p> <p>(1) authorizes the Board to adopt a standards of practice and a code of ethics for home inspectors. It also removes the requirement that the standards of practice be those of a nationally recognized home inspection association;</p> <p>(2) strikes the ability to suspend revoke or fail to renew registrations and move this to another section;</p> <p>(3) authorizes investigations into allegations of misconduct against an applicant or registrant. Also grant s right to inspect records kept and maintained by a registrant;</p> <p>(4) requires attendance or production for examination of documents or physical evidence in possession of registered home inspector;</p> <p>(5) authorizes approval of educational materials and and providers of continuing education in accordance with rules and regulations; and</p> <p>(6) authorizes contracts with other agencies or consultants to obtain information with education providers.</p>	<p>3 No change from the original bill.</p>	

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<p>5 Amends K.S.A. 2008 Supp. 58-4505</p>	<p>This section lists grounds for suspension, revocation or denial of a registration or the imposition of probationary conditions on a registrant or applicant.</p> <p>(1) This section removes the reference to pleading guilty, nolo contendere or being convicted of forgery, fraud, conspiracy to defraud or similar offenses and replaces these with an expanded list of any misdemeanor involving dishonesty or any felony.</p> <p>(2) This section mandates the revocation of a registration involving conviction of a felony unless the Board determines that:</p> <ul style="list-style-type: none">(A) the registrant poses no threat to the public; and(B) the registrant has been rehabilitated sufficiently to warrant the public trust. <p>(3) This section includes the ground that the home inspector failed to perform the inspection with the standard of care which would be exercised by the reasonably prudent home inspector.</p> <p>(4) This section includes certain conflict of interest types of acts as grounds for action against the registration. These include inspecting for a fee any property in which the home inspector has a personal or financial interest without proper disclosure; offering or delivering commissions or referral fees for business referrals; and performing or agreeing to perform home inspections where employment or fee is contingent on the outcome of the home inspection.</p>	<p>4</p> <p>This provision was removed by the House Committee amendments. (See page 6, lines 27-30)</p> <p>(This language is found on page 6, lines 33-43 and also transfers existing language from K.S.A. 2008 Supp. 58-4513(a), (b) and (c) which have been repealed.)</p>	<p>This language in (3) effectively duplicates K.S.A. 2008 Supp. 58-4512(a). (See HB 2260 as amended on page 11, lines 12-14.</p>
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	<p>from K.S.A.2008 Supp. 58-4513 and repeals that section.</p> <p>(5) This section includes as a ground for action :</p> <p>(A) the inclusion in an agreement for a home inspection any provision which disclaims liability of the home inspector for errors or omissions in the inspection or limits the amount of damage for such liability to less than \$10,000.</p> <p>(B) failing to provide a client with a pre-inspection notice.</p> <p>(C) Failing to respond to the Board to appear or provide documents or evidence during an investigation.</p> <p>(6) The section adds a provision requiring proceedings comply with the Kansas Administrative procedures Act (KAPA).</p>		<p>This language in(5) (A) and (B) effectively duplicates K.S.A. 2008 Supp. 58-4512(c) and (f). (See HB 2260 as amended on page 11, lines 17-24 and 41-43.</p>
<p>6 Amends K.S.A. 2008 Supp. 58-4506</p>	<p>This section authorizes additional fees for:</p> <p>(1) late renewal (not to exceed \$50)</p> <p>(2) reinstatement of an expired or revoked registration (not to exceed \$300)</p> <p>(3) duplicate copy of registration (not to exceed \$25)</p> <p>(4) review of application packet for a preregistration course from educational provider for approval (not to exceed \$500)</p> <p>(5) review of application packet for a continuing education course from educational provider for approval (not to exceed \$50)</p>	<p>5 No change from the original bill.</p>	

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<p>7 Amends K.S.A. 2008 Supp. 58-4509</p>	<p>This section establishes registration time lines and requirements. The section removes the requirement that any person performing home inspections file a written application for registration with the Board with the requirement that such person be registered with the Board. (Corrective language) Subsection (a) requires registration by July 1, 2009 for persons performing home inspections in counties having a population of 60,000 or more. Subsection (b) requires registration by July 1, 2011 for all persons performing home inspections. Subsection (c)(5) requirement for proof of membership in one or more nationally recognized organizations of home inspectors has been removed. Subsection (c)(6) removes the requirement for exams to be proctored by a national organization requirement approved by the Board. Subsection (c)(7) removes the requirement that continuing education courses be approved by the Board. Subsection(d) authorizes renewal of registrations annual or biennial basis through rules and regulations. Subsection(e) authorizes granting if inactive status to a registrant who completes all requirements for registration except continuing education. Subsection (f) authorizes a reinstatement process for registrations which have been expired or revoked for at least 30 but not more than 90 days.</p>	<p>6 This provision was amended by the House committee to allow for grand-fathering of persons who have been performing home inspections for at least two years prior to the effective date of this act and who have met certain other conditions.</p>	<p>The amendments in (c) (5) and (c)(6) appears to have been done to comply with Attorney General Opinion 2009-5, Dated February 11, 2009.</p>
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<p>8 Amends K.S.A. 2008 Supp. 58-4510</p>	<p>This section establishes to whom the act applies and provides a list of exemptions.</p> <p>The exemption for pest exterminator or chemical applicator has been changed from an person employed in that capacity to one providing those services within the scope of such occupation and not as a home inspector.</p> <p>Subsection (p) creates a new exemption for any person assisting a registrant providing such person renders no opinion evaluation or report to a client regarding the items inspected.</p>	<p>7 The House committee rewrote this provision so that the person is supervised by a registered home inspector who also is responsible for any home inspection report issued.</p>	
<p>9 Amends K.S.A. 2008 Supp. 58-4511</p>	<p>This section declares that any home inspection by an individual who is not registered as a home inspector is unlawful.</p> <p>This section also makes it unlawful for any person to knowingly hire an unregistered home inspector. Violation of this section is a Class A nonperson misdemeanor.</p>	<p>8 The House Committee removed this second provision.</p>	

<p>10 Amends K.S.A. 2008 Supp. 58-4512</p>	<p>Subsection (a) requires registered home inspectors to conduct home inspection under the degree of care that a reasonably prudent home inspector would exercise under the circumstances.</p> <p>Subsection (b) requires home inspections to be conducted under standards approved by the Board.</p> <p>Subsection (c) prohibits the inclusion in an agreement for a home inspection any provision which disclaims liability of the home inspector for errors or omissions in the inspection or limits the amount of damage for such liability to less than \$10,000.</p> <p>Subsection (d) imposes a 12 month statute of limitation for recovery of damages from the date of the home inspection. This provision limits the right of recovery to the client instead of any party to the real estate transaction.</p> <p>Subsection (e) limits the amount of damage recovery for errors and omissions in the home inspection to \$10,000 or less unless the home inspection contract provides for a greater amount and the written pre-inspection agreement clearly discloses the greater amount.</p> <p>Subsection (f) requires all registered home inspectors to customers and clients with a completed pre-inspection notice prior to the actual home inspection. The terms "customers and" are deleted. Also "completed" is replaced by the term "written".</p>	<p>9 No change from the original bill.</p>	
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February 11, 2009

ATTORNEY GENERAL OPINION NO. **2009-5**

Jeff Barnes, Chair
Kansas Home Inspectors Registration Board
610 Rivera
Mulvane, Kansas 67110

Re:

Constitution of the State of Kansas--Legislative; Kansas Home Inspectors Professional Competence and Financial Responsibility Act; Registration Requirement of Membership in Nationally Recognized Organization; Unlawful Delegation of Legislative Authority to Private Organization

Personal and Real Property--Kansas Home Inspectors Professional Competence and Financial Responsibility Act; Effective Date of Liability Disclaimer and Limitation of Liability for Damages

Synopsis:

The Kansas Home Inspectors Professional Competence and Financial Responsibility Act (the Act) became effective on July 1, 2008. However, registration of home inspectors cannot occur before July 1, 2009. Therefore, requirements that registered home inspectors conduct inspections in accordance with the "reasonably prudent home inspector" standard of care and provide completed pre-inspection notification do not apply until the individual is registered. However, the Act's provisions relating to liability disclaimers and limitations apply to all home inspectors regardless of registration status. The 12-month statute of limitation also applies to all home inspections regardless of registration status.

K.S.A. 2008 Supp. 58-4511 makes performance of home inspections without being registered or exempt from registration a class A nonperson misdemeanor. The county or district attorney in the county or district where an offense occurred would have jurisdiction to file such a misdemeanor charge, a decision that is within the discretion of the appropriate county or district attorney.

The registration requirement of membership in a nationally recognized home inspection society, association or organization impermissibly delegates legislative authority to a nongovernmental entity in violation of Article 2, § 1 of the Kansas Constitution. Cited herein: K.S.A. 45-310; 45-311; K.S.A. 2008 Supp. 58-4501; 58-4502; 58-4509; 58-4510; 58-4512; L. 2008, ch. 171, § 15; Kan. Const., Art. 2, § 1.

* * *

Dear Mr. Barnes:

As chair of the Kansas Home Inspectors Registration Board (the Board), you pose several questions that pertain to the recently enacted Kansas Home Inspectors Professional Competence and Financial Responsibility Act.⁽¹⁾

Effective date of K.S.A. 2008 Supp. 58-4512

With some exceptions,⁽²⁾ the Act requires that on and after July 1, 2009, all individuals performing home inspections in counties with a population of 60,000 or more be registered with the board; all other individuals performing home inspections are required to be registered on and after January 1, 2011.⁽³⁾ The Act, by its own terms, provides that it "shall take effect and be in force from and after its publication in the statute book."⁽⁴⁾ "Publication in the statute book" refers to the publication date of the 2008 Session Laws, which was July 1, 2008.⁽⁵⁾

Your question, however, relates to when K.S.A. 2008 Supp. 58-4512 "went into force." Two subsections in this statute require *registered* home inspectors to conduct home inspections with the degree of care a "reasonably prudent" home inspector would exercise and to provide customers with a completed pre-inspection notification.⁽⁶⁾ Two subsections prohibit home inspectors - registered or not - from disclaiming liability or limiting liability for damages to less than \$10,000.⁽⁷⁾ The last two subsections of this statute establish a 12-month statute of limitations for damage actions and require home inspections to be conducted pursuant to standards set by the board."⁽⁸⁾

The Act was effective on July 1, 2008. However, there will be no registered home inspectors until July 1, 2009. Therefore, the subsections requiring registered home inspectors to conduct inspections in accordance with the "reasonably prudent home inspector" standard of care and providing pre-inspection notification do not apply until the individual is registered. However, the provisions relating to liability disclaimers and limitations became effective on July 1, 2008 and, thus, apply to all home inspectors regardless of registration status. The 12-month statute of limitation also applies to all home inspections regardless of registration status.

Board not meeting effective date for implementation of Act

You also pose the following question:

"The process of receiving state approval for rules and regulation and the many other endeavors of the Board is very lengthy. The Board is trying very hard to insure that this process is finalized prior to the July 1, 2009 deadline, however if we are not able to meet this date, what are the consequences for inspectors and the industry if we fail to finish in time?"

K.S.A. 2008 Supp. 58-4511 makes performance of home inspections without being registered or exempt from registration a class A nonperson misdemeanor. The county

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or district attorney in the county or district where an offense occurred would have jurisdiction to file such a misdemeanor charge. Whether a charge would be brought under the circumstances you present is within the discretion of the appropriate county or district attorney. However, the board's continuous good faith efforts to implement the act in as timely a manner as possible may be a consideration in any potential charging decision.

Membership in a home inspectors society, association or organization

In addition to passing an examination and meeting specified education or experience requirements, in order to become registered the Act requires a person to:

"Submit proof of membership in good standing in one or more nationally recognized society, association or organization that provides for membership of individuals engaged in home inspections as recognized by the board."⁽⁹⁾

Your inquiry regarding the constitutionality of this requirement triggers an analysis under Article 2, Section 1 of the Kansas Constitution which provides:

"The legislative power of this state shall be vested in a house of representatives and senate."

"Article 2, § 1 expresses the fundamental concept that we are to be governed by our duly elected representatives. It is the foundation upon which our democratic form of government is built."⁽¹⁰⁾ This concept has given rise to the nondelegation doctrine.

As one law journal author explained:

"Thus, reasoning in support of the nondelegation doctrine is straightforward. Our democratic form of government permits us to elect our representatives. If we do not approve of the decisions they make, we can vote for someone else at the next election who more closely represents our views. Private groups, on the other hand, are insulated from the democratic process because they are neither elected nor appointed by someone who is elected."⁽¹¹⁾

As early as 1919, the Kansas Supreme Court expressed the nondelegation doctrine thus:

"[I]t is only necessary to recur to the most simple and elementary principles of civil government. In our commonwealth the power to make, amend, alter, and repeal the laws is vested in the Legislature. That body may not abdicate its functions nor delegate its powers to any other body, however learned, wise, and far-sighted the latter may be. This principle of our Constitution and of our public policy is fundamental."⁽¹²⁾

In *State v. Crawford*,⁽¹³⁾ the issue concerned a statute that required the installation of electric wiring be in accordance with the National Electrical Code promulgated by the

National Fire Protective Association, which the Court referred to as an "unofficial organization of private persons."⁽¹⁴⁾ The Court found the statute to be an unlawful delegation of legislative power and therefore unconstitutional in violation of Article 2, § 1.

In a more recent case, the Court again addressed the principles of unlawful delegation, this time in the context of a pharmacy statute that required every applicant to be a graduate of a college accredited by the American Council on Pharmaceutical Education [ACOPE], saying Article 2, § 1 prevented "usurpation of legislative authority by other departments of government as well as by a nongovernmental agency of a private individual."⁽¹⁵⁾ Further, the Court said:

"[A] strict rule is applied when the delegation of authority to some outside, nongovernmental agency is attempted. The legislative power of this state is vested in the legislature and the legislature is prohibited from delegating legislative powers to nongovernmental associations or groups."⁽¹⁶⁾

The court found that the statute had the effect of delegating to ACOPE through its accreditation process the standards of education required before registration was permitted. The statute thus gave full control and ultimate authority to a private, nonprofit association regarding a qualification to become a registered pharmacist and was therefore "constitutionally impermissible."⁽¹⁷⁾

With these constitutional holdings in mind, the issue is whether the registration requirement of being a member of a home inspectors professional association, society or organization impermissibly delegates ultimate authority to a nongovernmental entity? Under this provision of the statute, a person cannot become registered unless the person is a member, and membership criteria is entirely within the authority of such association, society or organization. Further, membership criteria may be changed sporadically at will by an association, society or organization, even causing the criteria to be much more rigorous than otherwise required by law; thus a registration applicant could be precluded from becoming a member and consequently from becoming registered. In such event, ultimate authority would rest with a nongovernmental entity rather than with the Board. Even though the statute gives the Board authority to "recognize" an association, society

or organization, the Board has no authority over membership criteria. Accordingly, K.S.A. 2008 Supp. 58-4509(c)(5) impermissibly delegates legislative power to nongovernmental associations, societies and organizations in violation of Article 2, § 1 of the Kansas Constitution.⁽¹⁸⁾

Sincerely,

Steve Six
Attorney General

Camille Nohe
Assistant Attorney General

SS:MF:CN:jm

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FOOTNOTES

Click footnote number to return to corresponding location in the text.

¹ K.S.A. 2008 Supp. 58-4501 *et seq.* (formerly L. 2008, ch. 171).

² K.S.A. 2008 Supp. 58-4510.

³ K.S.A. 2008 Supp. 58-4509(a) and (b).

⁴ L. 2008, ch. 171, § 15.

⁵ K.S.A. 45-310; 45-311.

⁶ K.S.A. 2008 Supp. 58-4512(a)(f).

⁷ K.S.A. 2008 58-4512(c)(e).

⁸ K.S.A. 2008 Supp. 58-4512(b)(d).

⁹ K.S.A. 2008 Supp. 58-4509(c)(5). While your query did not include a reference to K.S.A. 2008 Supp. 58-4502(e) ("The pre-inspection notice shall contain, at a minimum, the following information: . . . (3) an identification of the national home inspection organizations approved by the board which the home inspector is a member of at the time of the home inspection . . ."), the analysis provided herein applies equally to that provision.

¹⁰ *Sedlak v. Dick*, 256 Kan. 779, 802 (1995).

¹¹ Theroff, *The Private Nondelegation Doctrine in Kansas and the Kansas State High School Activities Association.*, 44 U.Kan. L. Rev. 633, 635 (1996).

¹² *State v. Crawford*, 104 Kan. 141, 143 (1919).

¹³ *Id.*

¹⁴ *Id.* at 143.

¹⁵ *Gumbhir v. Kansas State Board of Pharmacy*, 228 Kan. 579, 582 (1980).

¹⁶ *Id.* at 584-85.

¹⁷ *Id.* at 587.

¹⁸ The research and drafting of this opinion took into consideration *State Board of Healing Arts v. Beyrle*, 269 Kan. 616 (2000), but found it distinguishable from the issue presented herein. In that case, a statute provided that any naturopath who had graduated from a nationally recognized naturopathic college as approved by the state naturopathic association and practicing in the state of Kansas as of January 1, 1982 be permitted to practice in Kansas without approval

of the Kansas Board of Healing Arts. The Court found this statute to be a kind of grandfathering clause, as opposed to a prospective licensing requirement. "The legislature did not hand over to a private organization the right to set future standards; it merely determined that a certain class of individuals already meeting particular standards and practicing as of a particular date may continue to practice naturopathy. . . . Those standards were adopted in K.S.A. 65-2872a and are not subject to change by a nongovernmental agency because of the time limitation of the statute." *Beyrle* at 630-31.



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MEMORANDUM

To: Senate Commerce Committee

From: Kenneth M. Wilke, Senior Assistant Revisor of Statutes

Date: March 11, 2009

Subject: Potential Issues and Changes for House Bill 2260 as amended by House Committee.

In my examination of the bill, the following issues may require consideration and possible amendments by the Committee.

As a preliminary for the following discussion, consider the definition of "home inspection" on page 1 in lines 3-18. The home inspection involves examination of three or more of the systems listed in lines 8 -18. If only one or two systems are examined, no home inspection occurs.

1. On page 2, in lines 25-29, retain the definition of "material defect"
2. On page 4, in line 29 change "must" to "shall". Also consider requiring the Board's Vice Chair and other officers to be registered home inspectors.
3. On page 4, in line 40 delete "permanent". This conflicts with the Kansas Open Records Act.
4. On page 5, in lines 29-41, the language creates a power to examine and copy records of the registrant. It also effectively grants the Board the right to subpoena the registrant and compel production of documents and physical evidence pertaining to home inspections. But there is no provision in the bill requiring the registrant to keep or maintain any records or physical evidence.
5. On page 6, lines 9 and 17 are inconsistent.

Line 9 provides the Board may deny, suspend or revoke a registration for various listed grounds, including conviction of any misdemeanor involving dishonesty or any felony.

Line 17 requires the Board to revoke the registration following conviction of any felony unless the board determines that the person will not pose a threat to the public and has been sufficiently rehabilitated to warrant the public trust.

These two provisions are inconsistent. Also does the type of felony matter?

6. On page 6, the language in lines 33-37 was transferred from K.S.A. 2008 Supp. 58-4513 which has been repealed. However the language on page 7 in lines 1-8 essentially duplicates the provisions of K.S.A. 2008 Supp. 58-4512(d) and (f) which may be found on page 11 in lines 25-29 and 41-43.

7. On page 7 in lines 17-22, consider changing the language making the civil fine subject to notice and an opportunity for a hearing . The present provision actually requires a hearing.

8. On page 8, insert the “bond “language requested by Mr. Barnes.

9. On page 9, in line 41 the term “tradesman” is not defined.

10. On page 10, in lines 32 and 33, the terms “pest exterminator” and “chemical applicator” are not defined.

11. On page 11 in section 8, subsection (a) makes it unlawful for an individual to perform a home inspection without being registered. Subsection(b) makes the penalty for violation a Class A nonperson misdemeanor. (Fine not to exceed \$2500 or jail time not to exceed one year or both.) This creates a potential problem since there are two different registration dates depending upon the population of the county in which a person performs home inspections. (See Section 6 subsection (a) on page 7, lines 40-43 and subsection (b) on page 8, lines 1-4.

12. On page 11, in lines 24,29, 37 and 42 the terms “customer” and “client” appear to be used interchangeably. Is this intended? See also other portions of the bill.

58-3043. Granting or renewal of license; considerations of the commission; conviction of crime; effect of. (a) In determining whether to grant or renew a license the commission shall consider:

(1) Any revocation or suspension of a prior real estate license;

(2) (A) Whether an applicant has committed any of the following during the term of any prior real estate license:

(i) A violation of any of the practices enumerated in K.S.A. 58-3062, and amendments thereto;

(ii) a violation of this act or rules and regulations adopted hereunder; or

(iii) a violation of the brokerage relationships in real estate transactions act, K.S.A. 58-30,101 et seq., and amendments thereto;

(B) whether an applicant has been finally adjudicated and a determination was made by a federal, state or other appropriate licensing body that the applicant committed any violation that is comparable to a violation in subparagraph (A) during the term of any real estate license issued to the applicant by another jurisdiction;

(3) any plea of guilty or *nolo contendere* to, or any conviction of any misdemeanor which reflects on the applicant's honesty, trustworthiness, integrity or competence to transact the business of real estate;

(4) any conduct of the applicant which reflects on the applicant's honesty, trustworthiness, integrity or competence to transact the business of real estate; and

(5) such other matters as the commission deems pertinent.

(b) In its consideration of any prior revocation, conduct or plea of guilty or *nolo contendere* to or conviction of a misdemeanor as specified in subsection (a), the commission shall consider the following factors:

(1) The nature of the offense;

(2) any aggravating or extenuating circumstances;

(3) the time elapsed since such revocation, conduct or plea of guilty or *nolo contendere* to or conviction of a misdemeanor;

(4) the rehabilitation or restitution performed by the applicant; and

(5) any other factors that the commission deems relevant.

(c) The commission may deny a license to any person who, without a license, has engaged in a

real estate activity for which a license was required.

(d) When an applicant has made a false statement of material fact on the application, such false statement may be sufficient reason for refusal of a license.

(e) (1) Except as provided in paragraph (2), the commission shall refuse to grant a license to an applicant if the applicant has entered a plea of guilty or *nolo contendere* to, or has been convicted of:

(A) (i) Any offense that is comparable to any crime which would require the applicant to register as provided in the Kansas offender registration act; or

(ii) any federal, military or other state conviction for an offense that is comparable to any crime under the laws of this state which would require the applicant to register as provided in the Kansas offender registration act; or

(B) (i) Any felony other than a felony under subparagraph (A); or

(ii) any federal, military or other state conviction for an offense that is comparable to any under the laws of this state other than a felony under subparagraph (A).

(2) The commission may grant an original license pursuant to subsection (f) if the applicant's application is received at least:

(A) Fifteen years after the date of the applicant's discharge from postrelease supervision, completion of any nonprison sanction or suspension of the imposition of the sentence resulting from any plea of guilty or *nolo contendere* to or conviction of any offense specified in subparagraph (A) of paragraph (1); or

(B) five years after the date of the applicant's discharge from postrelease supervision, completion of any nonprison sanction or suspension of the imposition of the sentence resulting from any plea of guilty or *nolo contendere* to or conviction of any offense specified in subparagraph (B) of paragraph (1), whichever is applicable.

(3) For the purposes of this subsection, "post-release supervision" shall have the meaning ascribed to it in K.S.A. 21-4703 and amendments thereto.

(4) For the purposes of this subsection, "non-prison sanction" shall have the meaning ascribed to it in K.S.A. 21-4703, and amendments thereto.

(f) (1) The commission may renew or grant an original license to an applicant who has entered a plea of guilty or *nolo contendere* to, or has been

convicted of any crime listed in paragraph (1) of subsection (e) if the applicant presents to the commission satisfactory proof that the applicant now bears a good reputation for honesty, trustworthiness, integrity and competence to transact the business of real estate in such a manner as to safeguard the interest of the public. The burden of proof shall be on the applicant to present such evidence to the commission.

(2) In addition to the factors listed in subsections (a) and (b), in determining whether or not the applicant presently has a good reputation as required in subsection (f), the commission shall consider the following additional factors:

(A) The extent and nature of the applicant's past criminal activity;

(B) the age of the applicant at the time of the commission of the crime or crimes;

(C) the amount of time elapsed since the applicant's last criminal activity;

(D) the conduct and work activity of the applicant prior to and following the criminal activity; and

(E) evidence of the applicant's rehabilitation or rehabilitative effort; and

(F) all other evidence of the applicant's present fitness for a license.

History: L. 1980, ch. 164, § 10; L. 1984, ch. 313, § 85; L. 1986, ch. 209, § 5; L. 2002, ch. 82, § 5; L. 2004, ch. 82, § 1; L. 2007, ch. 88, § 2; L. 2008, ch. 155, § 2; July 1.

Cross References to Related Sections:

Prohibited acts, see 58-3062.

58-3045. Expiration of license; renewal; reinstatement and renewal of license. (a) Except for a temporary salesperson's license issued pursuant to subsection (i) of K.S.A. 58-3039, and amendments thereto, each license issued or renewed by the commission shall expire on a date determined in accordance with a schedule established by rules and regulations of the commission, which date shall be not more than two years from the date of issuance or renewal. Except as otherwise provided by this act, applicants for issuance or renewal of a license must satisfy all applicable requirements prior to issuance or renewal of the license.

(b) (1) Except for a temporary salesperson's license issued pursuant to subsection (i) of K.S.A. 58-3039, and amendments thereto, each license shall be renewable upon the filing of a renewal application on or before the renewal date, which

is the last calendar day of the month preceding the license expiration date. Such application shall be made on a form provided by the commission and accompanied by (A) the renewal fee prescribed by K.S.A. 58-3063, and amendments thereto, and (B) evidence of compliance with the requirements of K.S.A. 58-3046a and amendments thereto or the licensee's license with the licensee's request that the license be deactivated on the renewal date pursuant to K.S.A. 58-3049, and amendments thereto.

(2) Failure to comply with paragraph (1) on or before the renewal date will automatically cancel the license on the license expiration date unless the license is renewed pursuant to subsection (c) prior to the expiration date.

(c) The commission may reinstate and renew the license of a licensee who has failed to comply with the requirements of subsection (b)(1) if within six months following the date of the expiration of the license, the licensee submits to the commission an application for late renewal. Such application shall be made on a form provided by the commission and shall be signed by the licensee. Except for late renewal of a license on deactivated status pursuant to K.S.A. 58-3049, and amendments thereto, such application also shall be signed by the licensee's supervising broker or branch broker, if applicable. Such application shall be accompanied by (1) evidence of compliance with K.S.A. 58-3046a, and amendments thereto, or a written request that such license be renewed on deactivated status pursuant to K.S.A. 58-3049, and amendments thereto, and (2) payment of the renewal fee prescribed by K.S.A. 58-3063, and amendments thereto, plus a late fee of \$50.

(d) An application for renewal filed in compliance with the requirements of subsection (b) shall entitle the applicant to continue operating under the applicant's existing license after its specified expiration date, unless such license has been suspended or revoked and has not been reinstated or unless such license is restricted, until such time as the commission determines whether the application fulfills such requirements.

History: L. 1980, ch. 164, § 12; L. 1984, ch. 313, § 87; L. 1986, ch. 209, § 7; L. 1997, ch. 65, § 9; L. 2002, ch. 82, § 8; L. 2007, ch. 88, § 7; July 1.

58-3046a. Licensure; educational requirements. (a) Except as provided in K.S.A. 58-