

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35 a.m. on Wednesday, January 28, 2004, in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Mike Heim, Kansas Legislative Research Department  
Lisa Montgomery, Office of the Revisor Statutes  
Dee Woodson, Committee Secretary

Conferees appearing before the committee:

Senator Derek Schmidt  
Bob Totten, Public Affairs Director for the Kansas Contractors Association  
Dale Glenn, Government Affairs Chair, American Institute of Architects (written)  
Larry Magill, Kansas Association of Insurance Agents  
John Cassidy, Office of Chief Council, Kansas Department of Transportation  
Tom Swenson, Kansas Consulting Engineers

Others attending:

See Attached List.

Chairman Vratil called for bill introductions. Roger Tarbutton, Assistant County Counselor, Johnson County, on behalf of the Kansas Association of Counties, the County Counselors Association of Kansas, and the Board of County Commissioners of Johnson County, requested two bills. The first bill would correct statutory defects relating to the collection of delinquent personal property taxes. The second bill would require notice to the County Treasurer prior to the conduct of a Uniform Commercial Code sale. (Attachment 1)

Senator O'Connor moved to introduce the two bills, seconded by Senator Umbarger, and the motion carried.

Kevin Fowler, Kansas Healthcare Association, asked that a bill be introduced to amend the Adult Care Home Licensing Act relating to the use of inspection reports and repealing the existing section. (Attachment 2) Senator Goodwin moved to introduce the bill, seconded by Senator O'Connor, and the motion carried.

Bill Yanek, Kansas Association of Realtors, requested introduction of legislation creating a "broker's lien" on commercial real estate defined generally as all real estate other than property containing one to four residential units. He said the lien would be effective only if the contract for services is in writing and signed by both the broker or the broker's agent and the owner or the owner's agent. (Attachment 3)

Senator O'Connor made a motion to have the bill drafted and introduced as a Committee bill, seconded by Senator Donovan, and the motion carried.

**SB 324 - Concerning appellate jurisdiction of the supreme court**

Chairman Vratil opened the hearing on **SB 324**. Senator Schmidt testified on **SB 324**, which he is co-sponsoring with Senator Vratil. He stated that the most important public policy issue facing the 2004 Legislature and the Governor is how to overhaul financing of Kansas' public schools. He stated that the broad sweep and direct language of the Shawnee County District Court's decision, coupled with the judge's refusal to allow an immediate appeal from his preliminary order, have impeded efforts to accomplish school finance reform. Senator Schmidt said he believed that the impediment would remain in place until the Kansas Supreme Court reviewed the District Court's ruling and provided a final ruling on what the Kansas Constitution requires of the Legislature.

Senator Schmidt stated **SB 324** would amend K.S.A. 60-2102 to create a new, temporary, narrowly targeted ground for immediate appeal to the Supreme Court from any preliminary or final decision of a District Court when that court holds any statute unconstitutional as a violation of Article 6 of the Kansas

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Constitution. He added the new provision would sunset July 1, 2006. He concluded that there was no reason to wait until July or August to commence the appeal. ([Attachment 4](#))

Senator O'Connor asked why a sunset date of 2006. Senator Schmidt explained the proposal contemplates an appeal being lodged within 30 days after the effective date of the act assuming both houses move swiftly and the Governor signs the bill into law.

Senator O'Connor inquired if the co-sponsors had visited with the Attorney General on this matter. Chairman Vratil stated that he visited with the Attorney General, and was assured that, if the law permitted the Attorney General to appeal the decision, he would appeal it as quickly as possible. The Chair said that he visited again with the Attorney General the day before this hearing, and he was anticipating a letter from the Attorney General giving the same assurance to the Committee members as he received. As of Committee time, the letter had not arrived.

Committee discussion continued with further clarifications about the appeal process, the preliminary order, and the burden the judge has placed on taxpayers of Kansas.

Chairman Vratil closed the hearing on **SB 324**.

### **HB 2154 -Construction contracts; indemnification agreements**

Chairman Vratil opened the hearing on **HB 2154**. Bob Totten, Kansas Contractors Association, Inc., testified in support of the proposed bill. He explained how he and Pat Hubbell, representing the railroads, worked out an agreement over concerns raised during a previous hearing held in the House Judiciary Committee. Mr. Totten explained the bill resulted from concerns over who was responsible for risk when a contractor was hired by Kansas Department of Transportation, and the project involved the railroad. He added that, in the agreement the two parties hammered out this summer, the railroads are assured their risk is mitigated as railroad liability insurance will be required before a contractor can do work on or adjacent to railroad property. ([Attachment 5](#))

Chairman Vratil distributed copies of the agreed to language between the contractors and railroads, and the proposal is to amend **HB 2154** with this language. The Chair explained the changes as set out in bold type on the proposed written amendment, and stated the amendment would be a stand alone provision on the legislation. ([Attachment 6](#))

Dale Glenn, American Institute of Architects, submitted written testimony in support of **HB 2154**. ([Attachment 7](#))

Larry Magill, submitted written testimony on behalf of the Kansas Association of Insurance Agents in support of **HB 2154**. ([Attachment 8](#))

John Cassidy, Office of Chief Counsel, Kansas Department of Transportation (KDOT), appeared before the Committee testifying in favor of **HB 2154**. He stated his written testimony was related primarily to the original bill and not to the amendment. He explained that KDOT spent numerous hours in recurring contract negotiations with railroad owners who wish to force KDOT into incorporating indemnification clauses into KDOT's contracts. He said it was KDOT's view that such indemnification provisions are neither a fair nor proper method of risk allocation, and KDOT has not acceded to the demand for such indemnification clauses in its contracts. He included with his written testimony a sample of an indemnification Clause. ([Attachment 9](#)) Mr. Cassidy told Committee members that Kansas contractors have expressed to KDOT their inability to assume the risk of the railroad owner's negligence. He added that KDOT understood the majority of Kansas contractors do not have sufficient assets to absorb the costs incurred by another party's negligence, especially another party over which the contractor has no control.

Mr. Cassidy testified that contractors, unable to assume the risk, would refrain from bidding on KDOT projects, thus reducing the bidding pool and the probability of obtaining the lowest responsible bid. He said there were some inconsistencies in the new language read by the Chairman relates to a deed, lease or easement, license or other instrument which is not part of a construction contract and that includes any

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instrument granting the right to enter upon the property. KDOT wants to make sure the Committee and the Legislature are aware the effect this will have on KDOT's agreement with the railroad. Mr. Cassidy stated that KDOT would be much more comfortable if there was some assurance that the amendment be broad enough to cover the agreement between KDOT and the railroad. (Attachment 9)

Brief questions and discussion followed clarifying Boeing's previous concerns about the bill, and the subject of insurance and indemnification. Chairman Vratil explained that the peanut of the bill was to declare as void against public policy any indemnity agreement where the indemnitee is indemnified against the indemnitee's own negligence. He communicated that in the past the railroad, in order to protect itself, insisted that KDOT and ultimately the general construction contractor indemnify the railroad for the railroad's own negligence. The Chairman clarified that **HB 2154** would indemnification practice.

Chairman Vratil asked Pat Hubbell, lobbyist for the railroads, if he had any added comments or clarifications. Mr. Hubbell briefly explained the railroads' side of the issue.

Tom Swenson, representing the Kansas Consulting Engineers, submitted written testimony in support of **HB 2154**. (Attachment 10)

Having no opponents present to testify on **HB 2154**, Chairman Vratil closed the hearing.

The Committee adjourned at 10:15 a.m. The next scheduled meeting is January 29, 2004.