

SB 24 Testimony Info for House Comm. Hearing on 3/10/15

Part 1 - Stuart Owsley, ALA, NCARB Certified (1976), KS #2092 (1977), Pittsburg

- * Are any of the participants testifying in support of this Bill licensed architects?
- * Have any been involved in the drafting of the legislation regarding this Bill?
- * Are any of the participants aware of the true consequences of this Bill?
- * Has SB349 passed 2014, and SB24 been drafted by active market participants?
- * Do any of the individuals represent or come from a sole practitioner design firm?

With 38 years of experience and training of this speaker as a design professional, others of like or greater skill have asked, in the interests of time, that these spoken words be considered a repeat of their statements. While not an attorney or author of statutory law, not held any political office, and not held any position or office with any professional society, these remarks do represent many years of practical and diversified real world experience. Architect registration was acquired from the State of Kansas while my father, now not in this old Supreme Court Chamber, was a Supreme Court Justice in the 70's. He did represent and taught respect for the law. During the course of my 38 year practice, I have performed lawful design services under many boards and statutory editions of licensing law while being exposed to an alarming wanton disregard for the law during the past 15 years from the very agency governing our profession to establish and maintain a high standard of integrity, skills and practice in the technical professions. During the early years, more practical experience was acquired in the field of civil engineering but there was always a passion for architecture, and actually designed many architectural and engineering related systems under other architects and engineers before being registered. The scope of my practical experience spans over 50 years and actually had the title of assistant city engineer in the late 60's. Because of experience and necessity, the skills were acquired along the competence to design an entire building project with all of its integral features and systems as the statutory law permitted when first registered as an architect. My design work has never failed to perform, has received some minor recognition over the years, and actually have authored a few articles and booklets related to my profession. Have been licensed in five states and certified by the NCARB of which all have adopted an incidental practice position or provision except my home State of Kansas. Lawfully practiced my profession for 23 years without any problems, complaints, negligence, errors or mistakes until 2000 when the KSBTP filed the first complaint against me for doing what I had been lawfully doing for 23 years. Since that time have practiced in fear, not because of making a mistake or error but, because of the agency governing my profession erroneously censuring or restricting my lawful practice with additional complaints after another complaint which was dismissed and filed again with additional counts for an equipment mezzanine design that had stood the ultimate test of time for 5 years and site plan deviations from engineering standards for an architectural site plan not intended to be an engineering site plan.

To save time, we suggest that questions wait until end of this presentation.

Introduction: We are not opposed to SB 24 because of what it includes but are opposed because of what it does "NOT INCLUDE" or "LACKS" to address the technical corrections necessary for real world definitions of current practice and technology for all architects and in particular, the sole practitioner firms to restore over 50% of Court opinioned practice for architects historically possessed and now exclusive for other professions. Licensed professionals deserve and expect clarity with comprehensive and unbiased proposed legislation for up-dating for the statutory act governing the technical professions as well as the agency administering the professions. HB 2224 introduced by your committee accomplishes this expectation in addition to the two minor items included in SB 24.

Fiscal Note: The fiscal note prepared by the Division of Budget for this bill states there would be no fiscal effect on the Board's budget. We submit if the appropriate technical corrections regarding building and practice definitions were included in this bill there would be a dramatic and positive fiscal effect for:

- a) Reduction of the Board's legal services budget.
- b) Licensees' scope of practice opportunities and less potential legal expenses involved in defending and litigating for the practice rights and privileges possessed and saved.
- c) Public's opportunity for greater resources for competitive design services and skills.
- d) Insurance industry's professional liability coverage for licensees in line with similar scope of practice rights and privileges as has been adopted by 47 other states. We have been advised some insurance companies are dropping coverage in Kansas all together because of the new licensing laws.

Introductory statements included in a letter dated March 4, 2015 from registered architect Lawrence Goldblatt:

"Senate Bill 24 as proposed and scheduled for a hearing on March 10th, 2015 can be heard; it can be discussed; and it can be voted on by these bodies. However to do any of these acts violates the United States Supreme Court ruling in case No. 13-534, decided February 25th, 2015. That ruling is the law of the land. Any approved action by individual legislators on Senate Bill 24 as proposed, the KSBTP, or officials of the Executive Branch, is an act in defiance of the sworn oath to respect that law."

"Senate Bill 24 cannot be uttered in the public domain as it was originated or approved by an appointed executive branch regulatory board not supervised by the Government, whose members are also "market participants" while simultaneously regulating affected licensees. The acts of those board members, staff, and attorneys restrain trade and limit private value. They are anti-competitive, contrary to established law. Those acts were invalid when they occurred."

(Mr. Goldblatt's complete letter is included with testimony supporting documents. Mr. Goldblatt requests all questions regarding his letter should be directed to him personally for his response.

We also understand that the Legislature may change the definitions of professional practice and the associated rights and privileges of such practice but, those rights and privileges possessed by licensees at the time a new act takes effect are saved and protected by a statutory or regulatory clause that exempts such licensees from the purview of a new law. This clause would also save judges (Becker), attorneys (Hemsley, Pauls, Todd), realtors (Brunk, Scapa), accountants, physicians, dentists, cosmetologists, etc. from being not qualified to practice their profession if educational or examination requirements were changed and adopted for their profession and applied to all practitioners. The legislature did precisely this in 1993 when the adopted statutes included a provision which saved licensees rights and privileges as possessed at the time the new act took effect, and the language for this provision remained unchanged in the statutes for over 20 years until last July 1, 2014.

While the statements briefed and presented may vary, we do have an opinion and believe we can equivocally tell you, none of these statements will have anything to do with safeguarding the public's interest, welfare and safety.

- 1) Do you know the term "building" is no longer defined by its parts? "Building" in the practice of architecture has been revised to mean any permanent structure which is enclosed or partially enclosed that provides shelter for human habitation, occupancy or use and a) does not include structures that provide shelter not intended for human habitation such as for machines, utilities, processes, industrial products, work systems, or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, such as water and sewer treatment plants; and b) does not include in its definitions, integral part or parts of buildings as was included in previous statutes for the components, features, elements and systems logically and justifiably designed and/or engineered as expected and historically found in building projects which were included and defined in previous statutes.
- 2) Do you know the term "Professional architect" has been revised to mean a person who is licensed by the board to practice architecture as defined by statutory practice of such profession, and "not" the qualifications for licensure? Many architects were originally registered by the State Board of Architecture, or the State of Kansas, and/or licensed renewed by the board in addition to being initially licensed by the board; and for many years until July 1, 2014, the practice of architecture as defined was based on their qualifications of education, training and experience to engage in the practice of architecture and "not" the definitions of practice of such technical profession as "who is licensed by the board" has been not included since 1993 and before.
- 3) Do you know the "Professional architecture" or "practice of architecture" now does "not" include the application of knowledge of mathematics, applied physical science, principles of architecture and principles of engineering including architectural engineering as related to architecture? It did from 1949 to 1960, from 1961 to 1975, and from 1976 to 1992?

- 4) Do you know the definition for “practice of architecture” now does “not” include the language: “means those professional services of an architectural nature as well as basic structural, mechanical and electrical engineering services and incidental services that members of the architectural profession and those in their employ (engineering consultants) may logically and justifiably perform concerning state buildings and grounds”? It did in 1992?
- 5) Do you know the definition of “architect” now does “not” mean a person whose practice consists of that included in definition of “practice of architecture” which as defined, established a person’s qualifications of architectural education, training and experience for registration and/or licensure by the state to practice such profession? It did from 1/1/93 to 7/1/14? Now the term “architect” means a person who is qualified to engage in the “practice of architecture” and who is licensed (renewed or otherwise) by the board to practice architecture as provided in K.S.A. 74-7001 et seq., and amendments thereto?
- 6) Do you know the “practice of architecture” now does “not” include the language: “building projects or integral part or parts of buildings or other services and instruments of service related to architecture? It did from 1993 to 7/1/14?
- 7) Do you know the practice of architecture specifically and exclusively now identifies performing creative work as may be required in connection with the design and construction of public or private building items relating to building code requirements as such items pertain to architecture intended for human habitation, occupancy or use, and the spaces within and the site surrounding such buildings? All exclusive for the practice of architecture and therefore, excluded from the practice of engineering?
- 8) Do you know the definitions for the professions of engineering and architecture in Kansas do “not” include the incidental practice provision for each profession’s practice as has been adopted by 47 other states? An AIA Statutory Matrix on the Legal Relationships Between the Professions of Architecture and Engineering published this fact in 2012, and “incidental practice” was included in the National Council of Architectural Registration Boards (NCARB) 2014-2015 Model Law, used as a guideline for all Member Boards?
- 9) Do you know the definitions of “Professional engineer” and the “practice of engineering” now do not and never did include language for identifying and defining the fields or disciplines of practice for civil, architectural, structural, mechanical, plumbing and electrical engineering?
- 10) Do you know the definition of “practice of engineering” now “does not” and never did also include and define the scope of practice for the fields of civil, architectural, structural, mechanical, plumbing and electrical engineering which embrace such service or work for any structure or building intended for human habitation or not;

and not include the development of site surrounding such buildings; and not include the design of buildings with items relating to building code requirements which are as provided? Therefore, the exclusive province of architects?

Part 2 - Tom Pyle's Testimony is to be attached as a supplement if not included here.

Part 3 – Basic Truths and Facts:

The provisions of SB 24 for the repealing and amending of 2014 SB349 passed in the 2014 Legislative Session, attempt to include a "Bright line delineation or segregation of each the technical professions, in contradiction with the KS Supreme Court 2001 ruling concerning the overlap of the professions of engineering and architecture, by stipulating the practice of one profession shall not include those services specifically identified in the definitions of the other professions except for those services which are included in the term "common technical services" as defined. On the surface, this attempted delineation of design services might appear appropriate but, for the design and construction of buildings which are made up of an integrated equal balance of architectural and engineering related elements and systems, this is impossible and simply not feasible. Building design simply cannot be separated into architectural and engineering projects under separate technical professions. The definitions for professional practice services should be very careful with what is included exclusively and not included, excluded and restricted exclusively with such definitions of practice for each profession, and consider these basic truths:

- a) In 2001, the Kansas Supreme Court in *Michael Schmidt v. KSBTP (Case 84,934)* held that the professions of engineering and architecture are overlapping professions and are not mutually exclusive when chastising the KSBTP for failing to consider this overlap and for not following their own rules. (Board's incorrect actions for censure and restriction were reversed by the Court)
- b) Buildings are simply a collection of engineered and designed architectural and engineering related features and systems of which at least 50% of building features and systems integrated from the foundation to the roof are engineering related and of which the project architect has total responsibility and liability.
- c) To now say a project architect may not perform the design services for all of the building elements for which he or she is responsible and liable is unconscionable and ludicrous. The best example we can give you is the Hyatt Regency skywalk disaster in 1980. The project architect, as well as all architects and engineers with higher insurance costs, while not negligent and responsible for the mistakes and oversights, were still required to pay for the structural engineer consultant's errors and mistakes.

- d) In 2013, the Shawnee County District Court rendered in its Memorandum Opinion in *E. Tom Pyle, Jr. v. KSBTP (Case No. 12C97)* that provisions of the statutes saved the rights and privileges possessed by architects registered by the State Architectural Board or the State of Kansas prior to 1993: In 1992, included those services of an architectural nature as well as basic structural, mechanical and electrical engineering services and incidental services that members of the architectural profession may logically and justifiably perform concerning buildings; and rights and privileges possessed by licensees prior to July 1, 2014 without being required to obtain a new license when any educational requirements and/or practice definitions were changed. The profession and practice of architecture as defined from 1974 to 1992 and from 1993 to July 1, 2014 appeared to be based on a person's qualifications of education, experience and examination, and "not" the definitions of practice for such technical profession of a person who was registered or licensed, has license renewed or is licensed by the Board. (Board's Order was reversed and its Complaint was dismissed by the Court)
- e) SB 349 inappropriately added 13 words to K.S.A. 74-7040 in an attempt to circumvent the court opinion by applying the limits for the extent of such savings to the current definitions of the practice of such technical profession. Such a provision would fly in the face of the original intent of the statute for saving the rights and privileges possessed at the time the act takes effect; and only save the rights and privileges of all licensees regardless of when licensed, in accordance with the current definitions of the practice of such technical profession as possessed after the time the act took effect which are not in need of saving or being protected. In other words, the intent of this statute as adopted by the 1993 legislature, was and is to save a licensee's practice rights and privileges possessed at the time a new act takes effect which are affected by a change in the definitions of such technical profession for the new or current definitions which are to be applied to new licensees going forward, and not apply to existing licensees. In *State ex rel. v. Gillen*, 126 Kan. 368 (1928) the regulatory board had had denied an exemption to one individual, which the Court overturned because it added a provision or construction not present or intended by the Act's grandfather clause (like the 13 words referenced above)

Part 4- Presenter's Introduction and background information:

Truth and Consequences for 2014 SB 349 and 2015 SB 24:

- 1) Engineers and Landscape Architects licensed after July 1, 2014 are "not" permitted to prepare and provide designs, drawings, specifications and other technical submissions. (specifically & exclusively identified in Architecture) (This will be corrected with SB24)
- 2) The definition of "Building" is limited to mean any permanent structure which is enclosed or partially enclosed that provides shelter for human habitation and does not include those buildings not intended for human habitation, and does "not" define all of the architectural and engineering related parts, elements, integral parts, features and systems below the building and from the foundation to the roof which make a building,

building site and building project. (Incidentally, a similar definition of “building” was deleted from the prior statutes for the amended statutes in 2014 SB54 and SB349).

- 3) Architects licensed after July 1, 2014 are “not” permitted to provide or include in their professional architectural basic services for the design and construction of building projects with or without consultants, which requires application of special knowledge of the mathematical, physical and engineering sciences, design services for buildings and structures not intended for human habitation, planning and designing of engineering works and systems; preparing any engineering design features which embrace either public or private, for any utilities, structures, and buildings not intended for human habitation, occupancy or use. (specifically & exclusively identified in Engineering)
- 4) The profession of architecture as defined may be interpreted to restrict architects from providing and performing design services for at least 50% of the building’s parts or components which are engineering related, or engineered/designed features and systems, and assign such services exclusively to engineers. Such restrictions for architects are approaching such limitations placed on the vocations of interior architecture, interior designers and other employees and consultants exempted from licensure by the statutes.
- 5) Engineers and Landscape Architects are “not” permitted to provide any services for buildings intended for human habitation, occupancy or use, and the spaces within and the site surrounding such buildings. (specifically & exclusively identified in Architecture)
- 6) Engineers and landscape Architects are “not” permitted to provide any services for the design of items relating to building code requirements as such items pertain to architecture which includes buildings intended or not intended for human habitation, occupancy or use. (specifically & exclusively identified in Architecture)
- 7) Some then current licensees will “not” continue to practice their technical professions without restriction, **contrary to what was expressed to Mr. Owsley and the Legislature** last March 19, 2014 in a letter from KSBTP board member architect David Hoffman concerning a 2014 bill (SB54) amending the statutes.
- 8) The practice of some then current Kansas licensed architects **has been** changed or limited, some architects in Kansas will **not** be able to practice as was then currently allowed by statutes, some architects will **not** be allowed to prepare and seal drawings as was then currently allowed by statutes, and some architects **will have** their roles and responsibilities reduced from what was then currently described in the statutes, all **contrary to what was expressed to Mr. Owsley and the Legislature** last March 21, 2014 in a letter from then Chair, AIA Kansas Government Affairs Committee, architect Robert Fincham, AIA concerning a 2014 bill (SB54) amending the statutes.

- 9) The profession of architecture in Kansas is being subjected to such restriction for scope of practice services and lower standard of practice expectations, to the point of mediocrity in the profession by applying such practice to all practitioners which has or will create a state utopia where all architects are forced to agree to equalization of limited design service skills and fees. SB 349 passed in the 2014 Session and SB 24 as proposed before you now are a reflection of this conceivable state of affairs for architects in Kansas and some of the proponents of such legislation may be unaware of the consequences in regard to these bills.

Epilogue: Of course, none of these concerns will ever be a problem unless or until a building official needs to determine what the licensing law actually requires, or someone files a report of alleged violation, or someone challenges the provisions of the Act, or the KSBTP files its complaint against a licensee. Then at that time, what we do here becomes very important to all parties, their attorneys and the Courts. In 2001, the Kansas Supreme Court ruled an administrative agency such as the KSBTP, may not use its power to issue regulations which alter the legislative act which is being administered. It is assumed this also applies to Board actions and orders.

Part 5- Presenter's Introduction and background information:

Conclusion: Our opinion for a general answer to the question **Why?** The legislation as proposed in 2014 SB349 was an attempt to establish this “bright line” delineation or segregation of the professions of engineering and architecture in regard to building design and construction, by removing all language which suggested otherwise such as specific references to building integral part or parts of buildings, elements, features, components, works, systems which are architectural and/or engineering related for a building project and has always been the sum of its parts in architecture. In the definitions of practice for architects and architectural services, all language and terms have been removed which suggests the profession is knowable of mathematics, physical sciences, principles of architecture, architectural engineering and engineering as it relates to architecture. While overlapping professions, engineering and architecture have been restricted and/or prohibited from any performance of design services as defined in the practice of one another, to the point of absurdity and if not corrected, may create an unworkable literal interpretation of law.

THE MAJOR CULPRIT IN REGARD TO THE RECENT ANTI-TRUST LAW RULING IS SB 349 PASSED IN THE 2014 SESSION WHICH SB 24 IS REPEALING AND AMENDING ONE STATUTE WITH TWO MINOR CORRECTIONS. HB 2224 REPEALS AND AMENDS SIX SECTIONS OR STATUTES IN SB 349 AS WAS ADOPTED AND TOOK EFFECT ON JULY 1, 2014. SB 349 HAS BEEN REPORTED TO HAVE BEEN DRAFTED BY A TASK FORCE OF NON-SUPERVISED ACTIVE MARKET PARTICIPANTS REPRESENTING SIX PROFESSIONAL SOCIETIES AND THE KANSAS STATE BOARD OF TECHNICAL PROFESSIONS REGULATING AFFECTED PRACTITIONERS.

Solution Options:

- Reject SB 24 and introduce a bill to repeal the entire SB 349 passed in the 2014 Legislature and revert back to the Legislative Act in effect prior to July 1, 2014.

- Adopt an amended version of SB 24 as proposed and attached, with the appropriate corrections for repeal and amending of SB 349 passed in the 2014 Legislature, which will make the necessary technical corrections for all of the concerns as addressed herein, with clarified and comprehensive definitions of professional practice for the professions of engineering and architecture which incorporates applicable court case law, current practice expectations and technology for all architect's and engineer's standards of minimum qualifications of education, training and practical experience, and not limit licensees' practice to a minimum standard as required for competency in any such technical profession as licensed, renewed or otherwise, by the KSBTP.
- Reject SB 24 and pass HB 2224 as introduced by House Committee on Federal & State Affairs, for repealing and amending six statutes or sections of SB 349 passed in the 2014 Legislature, which would make the necessary technical corrections for all of the concerns as addressed herein including the two minor corrections in SB 24, with clarified and comprehensive definitions of professional practice for all of the technical professions which incorporates applicable court case law, current practice expectations and technology for all technical profession's standards of minimum qualifications of education, training and practical experience, and not limit licensees' practice to a minimum standard as required for competency in any such technical profession as licensed, renewed or otherwise, by the KSBTP.

Final Comment: The public and licensed professionals in Kansas rightfully deserve and expect clarity with comprehensive licensing laws governing the KSBTP as well as technical professionals, which reflect, establish and maintain a high standard of integrity, skills and practice in the technical professions and to safeguard the life, health, property and welfare of the public, and not the market share for any particular technical profession. Obliviously, any new law of the land which affects or negates this entire process while potential violation of law should be considered before any new legislation is adopted.

Applicable Statements and References:

"They (KSBTP) are dead wrong" - Architect Vernon Reed, FAIA

"We seem to be headed toward a Marxist utopia where all architects agree to the nanny state equalization of services and fees. Hard to believe it has come to Kansas" – Dr. Homer Williams, FAIA

It is my professional opinion "a bright line" delineation between the professions of architecture and engineering is not possible. Considering their history and the real world practice of these professions, such a clear distinction is simply not feasible or realistic." – Vernon Reed, FAIA (2006)

"Professional engineering and architecture are not mutually separate and can never be completely disassociated. They are overlapping vocations."- Maine Supreme Judicial Court Case, *State v. Beck* (1960)

"We conclude that, while all architects may be engineers, all engineers are not architects"- Maine Supreme Judicial Court Case, *State v. Beck* (1960)

"The professions of engineering and architecture are overlapping professions" - Kansas Supreme Court Case – *Schmidt v. KSBTP* (2001)

“An architect is basically an engineer with training in art” – Maine Supreme Judicial Court Case, State v. Beck (1960)

“Architecture is as much about the nature of engineering as it applies to building design, as it is architectural” The Attempted Engineering of Architecture, Safeguarding the Public? Or Expanding Market Share? – Stuart L. Owsley, AIA (2010)

“Yes, architects may design mechanical, electrical and structural systems incidental to the architect’s design”- Practice Requirements for NCARB Member Boards (2007), National Council of Architectural Registration Boards (NCARB Position adopted by 40 states in 2007 and 47 states in 2012 according to AIA Matrix on the Legal Relationships Between the Professions of Architecture and Engineering).

“Practice of architecture” shall not include the practice of engineering as defined in (Statute Reference), but a registered architect may perform such engineering work as is incidental to the practice of architecture” – NCARB 2014-2015 Model Law

“Only an architect has been educated, trained, and examined with respect to the skills and knowledge necessary to act as the coordinating professional. NCARB has concluded a registered architect is the only design professional prepared to coordinate all the other disciplines required for the project.”
Architecture as It Differs From Engineering – NCARB (2004)

Final Comment:

All of the comments presented by the other architects are fully supported and in a related issue, it appears if licensed and public members of the combined Board of Technical Professions representing the five technical professions of engineering, architecture, landscape architecture, surveying and geology do not ethically abstain from actions and/or decisions concerning the practice rights and privileges of another technical profession for which they are not licensed or associated then, the technical professions should be placed under separate administrative boards, one for architects and landscape architects, and one for engineers, surveyors and geologists as existed prior to 1976 for a “bright line” administrative delineation of the professions. Otherwise, it appears we will continue with this so called “Ship or Conspiracy of Fools” as architect Jim Sullivan mentioned in his letter.

Questions and/or Comments:

All testimony statements are endorsed by the following Kansas Licensees:

Architect Dr. Homer Williams, FAIA, 1995 NCARB President, Williams Spurgeon Kuhl & Freshnock Architects, KC

Architect E. Tom Pyle, Jr., NCARB Certified, E. Tom Pyle & Associates, PA, McPherson

Architect Jim Sullivan, Sullivan Palmer Architects, KC

Architect Max Christensen, Oakridge Construction Solutions, Wichita

Architect Lawrence Goldblatt, KC

Architect Barrie Scott, Association of Licensed Architects, NCARB Certified, Barrie Scott Associates, Illinois

Architect Stuart Owsley, ALA, NCARB Certified, SOA Architects dba Stuart Owsley & Associates, PA, Pittsburg