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TO: House Taxation Committee

FROM: Kansas Judicial Council – Prof. Richard Levy

DATE: February 9, 2016

RE: Testimony in support of HB 2472

The Kansas Judicial Council recommends HB 2472, a bill to clarify the jurisdictional rules regarding judicial review of appeals from the Board of Tax Appeals (BOTA). The need for this legislation was originally brought to the Council's attention by the Court of Appeals, and the legislation was drafted by the Council's Administrative Procedure Advisory Committee.

Background

In 2014, the legislature passed H.Sub. for S.B. 231, a bill that made a number of changes affecting BOTA. See L. 2014, ch. 141. Some of the changes affected the process for obtaining judicial review of a BOTA appeal. For example, under the prior law, BOTA had 120 days to render a written opinion in a property tax appeal. Under the bill, BOTA has 14 days to issue a "summary decision." Any aggrieved party, within 14 days of receiving the summary decision, may request a full and complete BOTA opinion, which must be issued within 90 days. An aggrieved party may appeal to either the Court of Appeals or the district court, rather than only to the Court of Appeals as under prior law. Any appeal to the district court will be a trial de novo. Also, a petition for reconsideration is no longer required to exhaust administrative remedies.

The 2014 bill did not make clear how these new provisions interact with the Kansas Judicial Review Act (KJRA), which governs judicial review of agency actions. For example, the new law does not

say whether a summary decision is a final, appealable order under the KJRA. Nor does it state whether a party may seek judicial review of a summary decision by BOTA without first requesting a full and complete opinion in order to exhaust administrative remedies. Finally, the new law was ambiguous as to the extent of de novo review in the district court.

As a preliminary matter, the Administrative Procedure Advisory Committee (Committee) considered whether there is any need for clarification of the statutory provisions regarding judicial review of BOTA appeals. Although the Committee agreed that both BOTA and the Court of Appeals have adopted logical, consistent interpretations of the new provisions, the Committee also found that the statutes are ambiguous and some clarifying amendments would be helpful.

Key Elements of HB 2472

The Committee drafted HB 2472 with the goal of preserving the original legislative intent and key elements of the new provisions, while clarifying uncertainties and resolving potential conflicts between provisions. The legislation reflects the following ideas:

- If an appeal is taken to the Court of Appeals, the appealing party should be required to first request a full and complete opinion. Because the Court of Appeals exercises limited review under the KJRA and must review the case on the record, it must have the full and complete opinion, which gives BOTA's findings of fact and conclusions of law.
- The taxpayer should control whether the appeal is to the district court or Court of Appeals; thus, while a taxpayer should be allowed to seek de novo review in the district court, a government entity should be allowed to appeal only to the Court of Appeals. If multiple taxpayers are parties to an appeal, any taxpayer should be able to seek de novo district court review. This approach is consistent with the perceived legislative intent to make the process fairer to, and more protective of, taxpayers.
- A party should be allowed to file a petition for reconsideration of a full and complete BOTA opinion but not a summary decision. If a party disagrees with a summary decision, the appropriate remedy is to request a full and complete opinion, not reconsideration.

De Novo District Court Review

In discussing the concept of de novo district court review, the Committee considered the Supreme Court's opinion in *Frick v. City of Salina*, 289 Kan. 1, 208 P.3d 739 (2009), which held that statutes allowing de novo review on appeal of an administrative action must be construed in light of the KJRA, which contemplates review on the basis of the agency record. According to *Frick*, in the context of appellate review of an administrative action, de novo review does not mean an entirely new

trial with new evidence being introduced unless the statute explicitly says so. Rather, a district court's review must be based on the administrative record, upon which the court is to make independent findings of fact and conclusions of law. See *Frick*, 289 Kan. at 18-23.

This issue of the extent of de novo review has been raised in several BOTA appeals pending in Johnson County. The Committee agreed that the legislature, in providing the option of a de novo trial upon appeal of a BOTA decision to the district court, most likely intended that the taxpayer receive an entirely new trial with the ability to introduce new evidence. The Committee believes that K.S.A. 74-2426 should be amended to clarify this intent, based upon *Frick*. The Committee also agreed that a cross-reference should be added in K.S.A. 77-618 of the KJRA to make clear that BOTA orders appealed to the district court are not subject to KJRA restrictions on the ability of the court to review disputed evidence on appeal.

Petitions for Reconsideration

The Committee also discussed whether a petition for reconsideration should extend the time for appeal or otherwise affect the finality of a BOTA order. The Committee reviewed the Kansas Court of Appeals opinion, *State Bank Comm'r v. Emery*, 19 Kan. App. 2d 1063, 880 P.2d 783 (1994), which held that the filing of a permissive motion to reconsider temporarily tolls the running of the time to file a petition for judicial review. Because petitions for reconsideration of BOTA orders are permissive under the 2014 amendments, the rule announced in *Emery* would apply. The Committee found this to be the appropriate outcome and recommended no change in this area.

Committee Membership

The members of the Judicial Council's Administrative Procedure Advisory Committee are:

Tracy T. Diel, Chair; Topeka
Athena Andaya; Topeka
Martha Coffman; Lawrence
Bob Corkins; Topeka
James G. Flaherty; Ottawa
Jack Graves; Wichita
Hon. Steve Leben; Fairway
Prof. Richard E. Levy; Lawrence
Steve Schwarm; Kansas City
Mark W. Stafford; Topeka