

MINUTES

SPECIAL COMMITTEE ON JUDICIARY

October 6-7, 2004
Room 313-S—Statehouse

Members Present

Representative Michael O'Neal, Chairperson
Senator Greta Goodwin
Senator Phil Journey
Senator Derrick Schmidt
Senator John Vratil
Representative Sydney Carlin
Representative Eric Carter
Representative Paul Davis
Representative Jeff Jack
Representative Judy Morrison
Representative Tim Owens
Representative Jan Pauls

Staff Present

Jerry Ann Donaldson, Kansas Legislative Research Department
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Kansas Revisors of Statutes Office
Diana Lee, Kansas Revisors of Statutes Office

Conferees

October 6

Robert Tolbert, Topeka
Bill House, Arkansas City
Charles Benjamin, Sierra Club
Allie Devine, Kansas Livestock Association
Terry Holdren, Kansas Farm Bureau
Sandy Jacquot, League of Kansas Municipalities
Randall Allen, Kansas Association of Counties
Jim Crawl, Shawnee County Counselor
Carolyn Patterson, City Attorney, Hutchinson
Christy Caldwell, Greater Topeka Chamber of Commerce
John Waltner, Mayor of Hesston

October 7

Larry Magill, Kansas Association of Insurance Agents
Kevin Fowler, Kansas Health Care Association
Rodney Whittington, Kansas Health Care Association
D.J. Sims, Conrad and Sims, Newton
John Federico, Kansas Health Care Association
Becca Vaughn, Topeka Independent Living Resource Center
Margaret Farley, Kansas Trial Lawyers Association
Jo Scott, Citizen
Ernie Kutzley, American Association of Retired Persons
Deanne Bacco, Kansas Advocates for Better Care
Mike Donnelly, Kansas Advocacy and Protective Services

**October 6
Morning Session**

Topic Nos. 1 and 2—Eminent Domain

Mike Heim reviewed Eminent Domain Law in Kansas and 2004 legislative activity relating to the issue ([Attachment 1](#)).

The bills from the 2004 Legislative Session were as follows:

SB 461—amends the port authority law operating in Cowley County which can modify, amend, or extend the port authority’s original plan from the purpose for which it was created. It also amends the eminent domain law dealing with relocation assistance payments to provide advance payments and to extend the filing time the appraiser’s reports in condemnation proceedings. It provides that neither Cowley County nor a port authority shall have the right of eminent domain to acquire land in Cowley County for which at least one of the purposes is a recreational-use purpose. This bill was enacted.

SB 395—the important provision in this bill is that a city that exercises eminent domain to acquire property must compensate the property owner at least 125 percent of the highest appraised valuation based on the prior three years valuation. This bill was enacted.

SB 547—this bill would have amended the Eminent Domain Procedure Act to provide that the taking of private property for the purpose of selling, leasing or transferring the property to any private entity to be used by the private entity for industrial or economic development shall not constitute public use. This bill was killed in the Senate on Final Action.

The United States Supreme Court will be hearing an eminent domain, economic development and private property rights case, *Kelo v. City of New London*, 843 A 2d 500 (Conn. 2004). The question the Court will answer is whether a private development amounts to the kind of public use for which eminent domain is authorized by the United States Constitution. The takings clause of the Fifth Amendment provides: “nor shall private property be taken for public use without just compensation.”

In the cases *State ex rel. Tomasic v Unified Government of Wyandotte County/Kansas City* 265 Kan. 779, 790 (1998) ([Attachment 2](#)) and *General Building Contractors, LLC v Board of Shawnee County Commissioners* 275 Kan 525 (2003) ([Attachment 3](#)) the Kansas Supreme Court has upheld the use of eminent domain to take private property for economic development purposes.

Staff provided a portion of a study entitled Public Power, Private Gain, by Dana Berliner, as it relates to Kansas. It suggests that Kansas is one of the worst abusers of eminent domain and is more willing than other states to use eminent domain on developers behalf ([Attachment 4](#)).

Robert Tolbert, Topeka, stated that it is a constitutional right to own property without the threat of having it taken away by the government. Development is best handled by private enterprise not through eminent domain. He believes that Kansas should act now in protecting citizens rights and not wait for the U.S. Supreme Court's decision ([Attachment 5](#)). He relayed his story of how the City of Topeka used eminent domain to take away his land for development of a Target Distribution Center.

Bill House, Arkansas City, commented that eminent domain is one of the biggest fights that has continued throughout history. There are reasonable uses for eminent domain but the downside of using it is what it does to the victims. The government has made the taking of land easier and cheaper for companies to acquire land ([Attachment 6](#)).

Charles Benjamin, Sierra Club, is opposed to eminent domain when it causes the loss of wildlife areas and farmland. He does not oppose businesses receiving property tax breaks to encourage economic development ([Attachment 7](#)).

Allie Devine, Kansas Livestock Association, supports the preservation of land and encouraged the Legislature to define what "public purpose" is instead of waiting for the U.S. Supreme Court to rule because it could be a year from now before they hand down their decision. Kansas is the last state that has wide open spaces and they are worried that the use of eminent domain will eventually take over the farmland. Kansas Livestock Association knows that there is some public good that will come out of eminent domain, like roads, water supply and they usually have not disagreed with those, but eminent domain is for the public good and not for a business to make money ([Attachment 8](#)).

Terry Holdren, Kansas Farm Bureau, commented that their organization's policy is that eminent domain procedures should be used only for legitimate governmental purposes. He requested that the Legislature restrict the use of eminent domain for economic development where property is seized and transferred to a private entity ([Attachment 9](#)).

Afternoon Session

Sandy Jacquot, League of Kansas Municipalities, opposed any more restrictions on eminent domain because limitations would pose dire threats to the continued economic growth of the state. She stated current eminent domain statutes adequately balance private property rights with the need of the government to acquire property. In all actuality, she stated, a small number of landowners do not want to sell. Most contest the amount of money they are going to receive for compensation ([Attachment 10](#)).

Ms. Jacquot urged the Committee to wait and see what the U.S. Supreme Court does and then enact state guidelines to go along with the ruling. She suggested the definition of "public use" needs to be flexible so it can change with the times, and she noted that she would be willing to work with others to determine a middle ground.

Randall Allen, Kansas Association of Counties, stated that his organization uses eminent domain as a last resort to acquire property. He could only think of two instances where land was acquired through eminent domain and used for economic development, namely, the Kansas

Speedway and Target Distribution Center. He stated that using eminent domain for economic development requires a majority of the board and he would not be opposed to making the vote unanimous (Attachment 11).

Jim Crawl, Shawnee County Counselor, explained that the Target Distribution Center needed 200 acres of flat land which was owned by twelve parties. Eleven of those agreed to the amounts that were offered and one, who owned three acres, did not. The City of Topeka had no other option than to acquire the land by using eminent domain. He believes that elected local officials should know their community and should be able to decide when to use eminent domain and when not to use it.

Carolyn Patterson, City Attorney, Hutchinson, explained that the Wiley Building in Hutchinson, has been purchased by an out of state business person, who continually suggests that he is going to do improvements on the building and has not done any. The City believes that this building is the key to revitalizing the downtown area and is considering using the current Tax Increment Financing Laws to take the building by eminent domain.

Christy Caldwell, Greater Topeka Chamber of Commerce, commented that there is a group that has met since the last legislative session to discuss eminent domain. They are looking at all parts of the issue and are seeking a common ground to bring back to the legislature for the 2005 session (Attachment 12).

The Committee requested that Ms. Caldwell's group look to see if there are any uniform standards for the term "private property" when using economic development to take land and look at all the cases where economic development was the reason for the eminent domain and find the problems it caused and suggest how to correct those problems so they do not happen in the future.

John Waltner, Mayor of Hesston, stated that governments do not casually resort to eminent domain, it is used as a tool to enhance communities and sees the current statute as working very well (Attachment 13).

Written testimony was provided by Howard Fricke, Secretary, Kansas Department of Commerce. It stated that "the Department of Commerce was only aware of three instances in which eminent domain has been used for the purpose of economic development", but the written testimony failed to provide those three instances (Attachment 14).

Representative Sydney Carlin provided the Committee with an e-mail she received regarding the City of Manhattan's redevelopment and the possibility of using eminent domain (Attachment 15).

Topic Number 7—Access to Victim Information by Law Enforcement and Social Rehabilitation Services

Jerry Ann Donaldson, Legislative Research Department, explained that HB 2636 was introduced in the 2004 Legislative Session where it was heard by the House Corrections and Juvenile Justice Committee and subsequently passed the House but then remained in Senate Judiciary Committee. The Department of Corrections (KDOC) and the Department of Social and Rehabilitation Services (SRS) entered into a Memorandum of Understanding, that KDOC would provide the necessary victim notifications on behalf of SRS. Therefore, KDOC and SRS believe that legislation is no longer necessary (Attachment 16).

Topic Number 4—Adult Care Homes and Prohibiting the Use of State Inspection Reports as Evidence in Civil Litigation

Jill Wolters, Office of Revisor of Statutes, briefed the Committee on HB 2306 and SB 430 from the 2004 Legislative Session.

HB 2306—provides that no inspection report shall be admissible as evidence in any judicial proceeding.

SB 430—in its current form is identical to HB 2306. However the bill that came out of the Senate was different. It allowed for the inspection report to be used solely to determine compliance with licensure, certification, or program participation requirements of the state and shall not be admissible as evidence unless the action is an appeal of an administrative action involving the licensure, certification, or program participation requirements of the state. Nothing prohibits the reports being used in a criminal investigation or prosecution ([Attachment 17](#)).

D.J. Sims, Conrad and Sims, Newton, reported that adult care homes that have any type of claim or any serious deficiencies on their inspection reports are finding it very difficult to find liability coverage and are entering into the non-admitted market ([Attachment 18](#)). The inspection reports are being used by plaintiffs attorneys in an attempt to show negligence. He supports limiting the use of inspection reports.

Larry Magill, Kansas Association of Insurance Agents, supports that in order for inspection reports to be admitted into evidence, the reports must relate to the claimant or the activity or situation that gave rise to the claim. He stated that his organization would consider compromise language to HB 2306 and would be willing to work with others to find a common ground ([Attachment 19](#)).

Committee requested staff research the following:

- The increase in the number of lawsuits relating to adult home care facilities.
- Amounts of judgement awards.
- Look for original legislative intent with regard to inspection reports.
- An example of an inspection report Form 2567.

Kevin Fowler, Kansas Health Care Association, commented that both bills were drafted to provide a general prohibition of the admission of inspection reports as evidence in civil actions. They support HB 2306 and have concerns with the language in SB 430 which allows inspection reports as long as it relates to the plaintiff and allegations. SB 430 may have the unintended effect of nullifying the prohibition against using reports as evidence in civil cases. The language does not specify any degree of relationship between the inspection report and the named plaintiff ([Attachment 20](#)). Both bills used Ohio legislation a model.

Mr. Fowler reported that last year 20 percent of adult care homes could not afford liability health insurance and it is already up to 25 percent for 2004.

He explained to the Committee that there are actually two types of inspection reports; federal report is called a survey and the state report is called the inspection report. They are supposed to only deem whether an adult care home is in compliance with licenses regulations.

When questioned if Ohio's insurance rates had gone down due the new law, Mr. Fowler stated that he did not believe so but that insurance companies spread their cost across all states where they write insurance, not just the state where the claim was filed.

Rodney Whittington, Kansas Health Care Association, explained that his company's insurance rates are lower than most in the state because they have negotiated all legal fees be paid by the insured and not by the insurance company. However, he still believes that action must be taken to help relieve the cost of insurance (Attachment 21).

John Federico, Kansas Health Care Association, commented that because of the lack of clarity with the use of inspection reports, adult care homes have a hard time with finding and affording liability insurance. The Kansas Department of Aging has been looking at redoing their inspection reports and the process they use when they do an inspection.

Becca Vaughn, Topeka Independent Living Resource Center, appeared in opposition to limiting the use of inspection reports because it is a serious issue of civil and human rights. Its a basic civil liberties issue and attempts to limit the rights of those who are seniors, poor adults, and those on medicaid and medicare. They are also engaged in talks with the Kansas Department of aging to discuss how inspection reports do not reflect the serious deficiencies found in adult care homes (Attachment 22). She believes that the whole report would be used to document the overall quality of the adult health care home and the judges are in the best position to decide what is admissible and what is not.

Margaret Farley, Kansas Trial Lawyers Association, (KTLA) does not support either bill. She uses inspection reports to do the following:

- □ Show a direct relation of injury or death;
- □ Show a history of poor care, such as failing to protect residents from serious injuries;
- □ Demonstrate prior notice of poor care practices; and
- □ Show that the nursing home has failed to have sufficient staff to meet residents needs.

KTLA agrees that there is rising costs of liability insurance rates, but does not believe that the proposed bill would reduce the rates since the cost is done by scoring (Attachment 23).

Ms. Farley provided the Committee with the following:

- Copy of Kansas Nursing Facilities Project Evaluation (www.agingkansas.org/kdoa) (Attachment 24).
- Correspondence with Dr. Mark McClellan with regard to survey reports (Attachment 25).
- Much Ado About Nothing, *Debunking the Myth of Frequent and Frivolous Elder Abuse Lawsuits Against California's Nursing Homes* (www.canhr.org) (Attachment 26).

Ms. Farley was not aware of any jury trials awarding more to the amount of an award due to the inspection report but they have been a factor in confidentially settlements. She suggested the Committee look at Arkansas law which codifies what their evidentiary rules are (Attachment 27). She agreed that if a proposed bill would simply codify what is currently being done in Kansas that they would support it.

Chairman O'Neal invited KTLA to provide language which would be acceptable to them to be considered at the October 20 meeting.

Jo Scott, Citizen, relayed her story about her mother passing away in an adult care home (Attachment 28).

Afternoon Session

Ernie Kutzley, American Association of Retired Persons, is involved in strengthening nursing home care and safety. He would like to see the liability rate decrease and wondered if a self-insured pool would be the answer. He wants the legislature to stand by current law and not change the statute with regard to inspection reports (Attachment 29).

Deanne Bacco, Kansas Advocates for Better Care, claimed that inspectors are seeing nursing homes at their best and are not finding many deficiencies. The report would be backup material in a trial and would have the ability to show what types of things are not receiving attention (Attachment 30).

Mike Donnelly, Kansas Advocacy and Protective Services, provided the Committee with a Form 2567 and stated that he was not sure what was broken that needed to be fixed (Attachment 31 and 32).

Written testimony was provided by Kansas Adapt which opposed any changes to the law with regard to inspection reports because the purpose is to limit nursing home exposure to medical liability cases (Attachment 33).

Chairman O'Neal announced that the next meeting was October 20 and that anyone who wanted to propose language would need to have it drafted by that time to be presented to the Committee.

The Committee meeting adjourned at 3:30 p.m.

Prepared by Cindy O'Neal
Edited by Jerry Donaldson

Approved by Committee on:

October 30, 2004

(date)

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