Approved: May 23, 1994
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael O'Neal at 3:00 p.m. on March 22, 1994 in Room 313-S of the Capitol.

All members were present except:
Representative Joan Wagnon - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Others attending: See attached list

SB 790 - Registration fees of attorneys in certain counties, (see attachment 1).

Representative Carmody explained that the sub-committee deleted New Section 3 at the request of the Chief Justice and district magistrates, who wanted to study the issue. Some counties base the library fee upon the lawyers place of practice, others do it based upon where the attorney lives. The sub-committee recommended going to a residency only based charge for law libraries.

Representative Carmody made a motion to adopt the sub-committee report. Representative Shriver seconded the motion. The motion carried.

Representative Plummer commented that all lawyers would pay only one law library fee. Representative Carmody stated this was correct.

Representative Carmody made a motion to report **SB 790** favorably for passage as amended. Representative Robinett seconded the motion. The motion carried.

SB 741 - Evaluations of and notice to guardians and conservators by psychologists

Representative Carmody explained that the purpose of the bill was to allow psychologists to submit the initial report. There was some question with regards to whether a psychologist could give a diagnosis of mental illness.

Representative Garner made a motion to report **SB 741** favorably for passage. Representative Plummer seconded the motion. Chairman O'Neal commented that the Kansas Medical Society proposed an amendment that instead of "physician or psychologist" it would just say "or other physicians".

Representative Everhart commented that there has not been a requirement for a physical examination and she believes that there is reason to require a physical examination. The problem with only having a mental examination is that they might not know if there is a physical reason that created the mental symptoms. She made a substitute motion to add, on page 4, line 37, the requirement for a physical examination in addition to a mental examination.. Representative Scott seconded the motion. Representative Carmody stated that concern of the Medical Society was that a physician would, as part of their evaluation, conduct a physical exam, which a psychologist cannot do. Representative Garner stated that he didn't see any problem by adding psychologist because they are trained in the mental area and by requiring a physical examination would just be an extra safeguard. The motion carried.

Representative Garner made a motion to report **SB 741** favorably for passage as amended. Representative Everhart seconded the motion. The motion carried.

HCR 5040 - Amendment to bill of rights regarding parents' right to rear children

Representative Plummer made a motion to amend the proposed bill by striking "and guardians, and wards" and have the explanatory statement amended, (see attachment 2). Representative Carmody seconded the motion. Chairman O'Neal commented that the current bill had a poor explanatory statement that was not fair to anyone who would vote against it and this more accurately states what a vote for and against it would be. The motion carried.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Representative Everhart stated that one of the sponsors of this legislation commented to her that if this resolution were to pass then parents would be able to choose what school their child would attend. Representative Carmody stated that this point wasn't brought up by the conferees but they did complain about access to school records. Representative Mayans stated that this resolution talks about primary control, which acknowledges that there can be a secondary and therefore is not absolute. Representative Macy stated that it is very critical when the constitution is amended. The judges and attorneys that she has talked to are opposed to this resolution because the judicial process could be undermine with regard to children when the courts must intervene to protect children's rights. Representative Garner stated that this is a major change that shouldn't be entered into lightly. The resolution is well intended and the conferees that appeared had some legitimate concerns about actions of state agencies and school districts. He felt that this amendment wouldn't do much of anything to address the problems that they presented to the Committee. He was concerned that the resolution would effect the ability to enforce Child in Need of Care questions. Unfortunately, not all children are raised in a good environment. There are children who have parents that do terrible things to them, such as sexual abuse within families. The State has to maintain control to intervene in those type of situations. This resolution would create a constitutional right that could be used to prevent the State from exercising that power. The problems that the conferees brought to the Committee could be addressed through statutory language.

Representative Garner made a motion to refer **HCR 5040** to interim committee study so that it can be looked at in more detail and look at legislative alternatives to the constitutional amendment. Representative Shriver seconded the motion. Representative Goodwin stated that she looked into some of the problems in her area that conferees said they were having. She found that these cases as presented to the Committee were not accurate. A lady from her school district said that she was denied access to school curriculum. She was denied access for a total of twenty minutes until the person in charge of those records returned from off site. She commented that she felt that the conferees did not give an accurate picture of the situations. She stated that she had many calls on this issue and found only a few people that knew why they were calling, others stated that they were told by someone to call and support the bill.

Representative Mayans made a substitute motion to report **HCR 5040** favorably for passage as amended. Representative Wells seconded the motion. Representative Everhart stated that she opposed the motion and felt that no one has to put it in the constitution that parents have the right to control their children, they have that right currently. The big question is how this will effect Child in Need of Care cases. This is the Kansas Constitution we would be amending and would be supreme state law. If there is an error made she would rather see an error be made to protect the child. This will effect every Child in Need of Care case and for this reason she opposed the motion. The motion carried 10-9.

SB 742 - Jurisdiction of certain law enforcement officers to execute a valid search warrant

Chairman O'Neal stated that Judge James Buchele requested an amendment that would create a special docket for handling domestic violence cases, (see attachment 3).

Chairman O'Neal made a motion to insert Judge Buchele's requested amendment into **SB 742**. Representative Carmody seconded the motion. The motion carried.

Chairman O'Neal reminded the Committee that they adopted the sub-committees report on **SB 742** and therefore Sedgwick County was deleted and would limit it to Johnson County.

Representative Wells made a motion to report **SB 742** favorably for passage as amended. Representative Carmody seconded the motion. The motion carried.

SB 564 - Authorizing recovery of collection costs including attorney fees in consumer credit transactions

Representative Carmody explained that this would repeal Kansas law that would prohibit attorneys fees in certain transactions.

Representative Heinemann made a motion to reflect the Colorado & Missouri Credit Code where reasonable attorney fees would not exceed 15% of the amount due related to all transactions and strike the dollar limit. Representative Wells seconded the motion. Representative Carmody questioned if this would drop out the collection of fees other than attorney fees. Representative Heinemann responded yes. The motion carried.

Representative Heinemann made a motion to report **SB 564** favorably for passage as amended. Representative Wells seconded the motion. The motion carried.

SB 581 - Articles of organization of limited liability companies, articles of incorporation of corporations and annual reports of domestic cooperative associations

Representative Heinemann made a motion to incorporate the provisions of **SB 580** into **SB 581**. Representative Carmody seconded the motion. The motion carried.

Representative Heinemann made a motion to report **SB 581** favorably for passage as amended. Representative Carmody seconded the motion. The motion carried.

SB 513 - Prosecuting 16 & 17 year olds as adults for person felonies and misdemeanors

Chairman O'Neal explained that as the bill as originally drafted would have automatically tried 16 & 17 year olds as adults for any felony charge. The suggestion during the hearings on the bill was that currently this age group have their cases filed in juvenile court and the prosecutor would move to have the person certified as an adult. The balloon proposal would reverse that process and give rise to the presumption that the case could be filed in adult court and allow for the case to be sent to the juvenile courts after a hearing, (see attachment 4). This would allow discretion on the part of the prosecutor as to where to file the case and if the prosecutor chooses to file the case in adult court. It would allow for a procedure where by the juvenile could request that the case be sent back to juvenile court. In new section 3 (e) is a list of the factors that the court could consider to determine if the juvenile needs to be tried in adult court.

Representative Everhart stated that all 16 & 17 year olds who commit a felony would be tried as an adult until a motion is filed to have the case come before juvenile court. Chairman O'Neal explained that the prosecutor initially could file the case in either juvenile or adult court. In 90% of the cases they would get filed in the adult court.

Chairman O'Neal made a motion to adopt the balloon draft. Representative Heinemann seconded the motion. Representative Heinemann stated that there are kids that think that they can do anything and not get in trouble. There are some states that don't give an option of juvenile or adult court, they just place them in the adult court system, this is a compromise. These is a procedure where the juvenile has to convince the judge that he shouldn't be tried in adult court. Representative Everhart stated that this was an improvement from the Senate version of the bill. She had some concerns with the amount of discretion given to the district attorney. They would probably file the case in adult court and then see if the juvenile can make his case as to why he shouldn't be tried in adult court. This puts a lot of burden on the judge to decide which court system they should be tried under.

Representative Everhart made a substitute motion to amend to existing law so that upon the second felony they would be tried as an adult. This would handle situations of the repeat juvenile offender. Representative Garner seconded the motion. The motion failed 8-8.

The motion to adopt the balloon amendment carried.

Representative Heinemann made a motion to strike, on page 5, line 12, of the balloon the word "may" and replace it with "shall". Representative Goodwin seconded the motion. The motion carried.

Representative Heinemann made a motion to report **SB 513** favorably for passage as amended. Representative Wells seconded the motion.

Representative Garner made a substitute motion to table **SB 513**. He stated that the testimony from the proponents was that whenever a prosecutor currently wants to try a 16 or 17 year old as an adult about 95% of those cases are tried as an adult. Those that want juveniles tried as adults are currently doing this. Representative Adkins seconded the motion. The motion carried. Representatives Mayans, Mays, Scott & E. Wells requested that they be recorded as voting no.

SB 580 - Annual reports for certain business organizations

Jim Magg, Kansas Bankers Association, stated **SB 369** - Enacting the Kansas fictitious name act- was based on Missouri law that would create a filing requirement for fictitious names. He requested that the date that the secretary of states office would operate under the fictitious name statute be changed from 1995 to 1996.

Representative Heinemann made a motion that the provisions of **SB 580** be struck and replaced with **SB 369** to include the date change from January 1995 to January 1996. Representative Robinett seconded the motion. The motion carried.

Representative Heinemann made a motion to report **Substitute SB 580** favorably for passage. Representative Robinett seconded the motion. The motion carried.

SB 293 - Private property rights protection

Chairman O'Neal explained that the Committee had hearings on this bill late during the 1993 Legislative Session. The intent of the bill is that there be some recognition in the law of public policy protecting private property rights from undue governmental actions. He offered a substitute bill, (see attachment 5), in which some of the language in section 2 was taken from Congress regarding the public policy statement. Section 3 contains the definitions that were taken from **SB 293**. Section 4 & 5 gives instructions to the agency. This proposed balloon makes a clear statement of purpose and legislative intent, cleans up Senate amendments, includes valid exercise of police powers in exceptions, eliminates involvement by the attorney general and sets forth guidelines as to what each state agency would need to do to evaluate and put in a state report as an explanation of the action that they are taking, would be effective July 1, 1994 instead of 1995 and makes clear that the law doesn't effect the scope of judicial review of agency action, limit any rights or create any new cause of actions.

Chairman O'Neal offered the balloon draft as an amendment. Representative Heinemann seconded the motion. Representative Garner stated that if this amendment is approved it would be deleting everything that is in **SB 293** and replacing it with the proposed balloon draft. Chairman O'Neal replied this was correct, but most of what is in **SB 293** is included into the draft, it's just rearranged and has several new parts, such as the statement of policy. Representative Garner stated that this bill would not expand the definition of taking, or reduce the definition of taking and basically would have the state agencies filling out another document that is an impact statement on takings before they can take governmental action. Chairman O'Neal stated that the intent of the bill was not to create a new cause of action but more of a heads up that private property rights are important and we want the state agencies to stop and evaluate areas that are outlined in the statute and be prepared to back those up in writing.

Representative Garner made a substitute motion to adopt the Delaware statute (see attachment 6). Representative Everhart seconded the motion. He stated that the Delaware statute seems to do the same thing, with a lot less wording. This would make it clear that there would have to be a written takings impact statement before an agency can take action. Chairman O'Neal stated that the Delaware statute would have the process held up until the attorney general reviewed the rule and regulation and informed the agency in writing. It looks like it would be a request for an attorney generals opinion. The motion failed.

Representative Adkins stated that a balloon amendment on **SB 293** which was handed out and supported by the Property Rights Association and much of what was included in the balloon was included in the Substitute bill. The difference is that actual rules and regulations would have to be promulgated by each agency, (see attachment 7). Chairman O'Neal stated that he had problems with allowing each state agency to decide what they would consider as takings and would end up with each agency having a different set of guidelines as to what they are looking at.

On the motion to adopt the balloon amendment for **House Substitute SB 293**, the motion carried.

Representative Garner made a motion to add at the end of section 2 that "It is not the purpose of this act to expand or reduce private property rights as recognized by the State or Federal Constitution. Representative Everhart seconded the motion. Chairman O'Neal stated that section 6 clearly sets forth that this act wouldn't be expanding any rights. The motion failed.

Representative Adkins made a motion to require agencies to promulgate rules and regulations. There was no second to the motion.

Representative Adkins made a motion to insert on page 2, the following language "An estimate of financial cost to the state for compensation, and the source of payment within the agency's budget if a constitutional taking is determined. Representative Shriver seconded the motion. Representative Heinemann commented that if it has already been decided that there is going to be a taking then the state has already decided what is to be paid. If this was done then it would be showing how much the property is really worth before the biding starts. The motion failed.

Chairman O'Neal made a motion to report **House Substitute SB 293** favorably for passage. Representative Heinemann seconded the motion. The motion carried.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S Statehouse, at 3:30 p.m. on March 22, 1994.

SB 400 - Out-of-home placement of juvenile offenders in SRS custody; findings required

Chairman O'Neal stated that there is some urgency to get the bill passed because it is tied to federal funds. He stated that the recommendation has been that the Committee pass **SB 400** and have it re-referred to Appropriations Committee so they can take up the funding issues.

Representative Carmody stated that there was concern as to what constitutes a finding of "reasonable efforts" to keep the child in the home. He made a motion to include an amendment that would state that "if reasonable efforts had been made to eliminate or prevent the need for out-of-home placement or reasonable efforts are not possible due to an emergency threatening the safety of the juvenile offender or the community." Representative Heinemann seconded the motion. The motion carried.

Representative Carmody made a motion to request that the Speaker of the House recommend **SB 400** be re-referred to Appropriations Committee to appropriate funding. Representative Heinemann seconded the motion. The motion carried.

SB 517 - Law enforcement officers may issue notice to appear citations to persons violating criminal hunting statute

Representative Heinemann made a motion to amend the title to refer to the 1993 supplement cite. Representative Carmody seconded the motion. The motion carried.

Representative Everhart explained that **HB 2673** was requested by law enforcement of Shawnee County. This would amend existing laws to make it easier for law enforcement to give landlords notice of a hearing to determine whether there is probable cause to believe an unlawful activity is or has been occurring on the property. Chairman O'Neal stated that at the time of the hearings it was understood that the special problem wasn't covered under the party shack law. Representative Mays stated that this isn't a special problem, it's in any area of the State. Representative Everhart stated that this language would assist landlords in evicting tenants who commit criminal acts.

Representative Mays made a motion to insert the provisions of **HB 2673** into **SB 517**. Representative Everhart seconded the motion.

With permission of Representative Mays, Representative Shriver requested that he include in his motion changing the word "shall" in lines 25 & 33 to "may". Representative Everhart stated that the district or county attorney will want to do the petition the court for a hearing. Representative Garner stated he doesn't understand what this is needed and doesn't see what problem this is aimed at. Representative Mays stated that he had no objection to changing the wording.

On the motion to amend in the provisions of **HB 2673** into **SB 517** and changing the word "shall" to "may", the motion carried.

Representative Mays made a motion to report **SB 517** favorably for passage as amended. Representative Everhart seconded the motion. The motion carried.

The Committee meeting adjourned at 6:00 p.m.

GUEST LIST

HOUSE JUDICIARY COMMITTEE

DATE _____

NAME	ADDRESS	ORGANIZATION
Bill Craven	Topeka	Sierra Club
Tricia Sears	Topeka	KS. Audubon Council
EDWARD ROWE	EMPORIA	LEAGUE OF WOMAN VOTERS
Diane Gruner	Topeka	Ks Coop Council
Marty Vanier	Manhattan	KS Ag Alliance
Art Brown	Topeka	KS. CBA Dealers
Mike Beam	Topeka	Ks. Livstk. Assn
Jim Maag	"	KBA
Jerry Chadwick Wendy	"	"
Chuck Stones	"	KBA
Philip Hurley	"	PATRICK J. HURLEY & CO.
Mike Horan	Topeka	MHKRS
Karl Peterjohn	Wichita	Wichita Independent Business Assoc.
Jim McDaniel	Wichita	Ks Ed Watch.
Scott Feeken	Topeka	Governor's Office
Matt Lynch	Topeka	Judicial Council
Jim Clark	Topeka	KCDAA
Paul Shelby	Topeka	OJA
Carolyn Risley Hill	"	SRS
Jan Johnson	Topeka	ICDOC
Paul E. Fleener	Manhattan	Kansas Farm Bureau

3-15-94
SB 790

Judy Leonard

House Judiciary
Judiciary Subcommittee #2

Senate Bill 790

Chairman Carmody, committee members, I am Judge Leonard A. Mastroni from the 24th Judicial District, Rush County, representing the Kansas District Magistrate Judges Association. The association is taking the position as an opponent only to New Sec. 3 of S.B. 790.

I would refer you to page 5, line 16-18 of the bill which refers to the selection of district magistrate judges in nonpartisan districts:

> "...the judicial district nominating commission shall allow applicants for such position from both within the effected county and outside the county."

I have no problem with this concept of allowing outside applicants under certain conditions, however, the association opposes this bill because the present controlling statute K.S. A. 20- 2914., "Vacancies in district magistrate judge positions in judicial districts with nonpartisan method of selection" already provides for consideration of an applicant outside the county of residence. This statute refers to the authority of the district judicial nomination commission as follow:

> "The commission may authorize one (1) or more members of the commission to tender an appointment to any qualified person in order to ascertain his or her willingness to serve if appointed; but any such tender of appointment shall be subject to final action of the commission under the condition as prescribed by subsection (b) of K.S.A. 20-2907."

If we look and compare this statute with the language found pertaining to the method of selection for district judges in a nonpartisan district under K.S.A. 20-2909 (b) we find a similar concept as follows:

House Judiciary
Attachment 1
3-22-94

"(b) If there are not at least two attorneys deemed qualified by the district judicial nominating committee who reside in the judicial district who are willing to accept the nomination to fill a vacancy in a district judge position, the nominating commission need not limit its consideration of nominees to attorneys residing in the judicial district;

My comparison is simply leading to this; both statutes are consistence with each other when considering applicants/nominees for judgeships in their respective areas of jurisdiction by the district judicial nomination commission; and further, both statutes give the nominating commission the authority and flexibility to consider outside appointments/nominees when the commission deems it necessary.

In closing, the present statute has been in effect since 1981 and has clearly served its purpose. The judges association would request this committee to strike New Sec. 3 of S.B. 790 and allow the existing statute to stand.

SB 790

The Supreme Court of Kansas

Kansas Judicial Center

Topeka, Kansas 66612-1507

OFFICIAL NOTICE * * * OFFICIAL NOTICE * * * OFFICIAL NOTICE

SECOND DISTRICT JUDICIAL NOMINATING COMMISSION

READ CAREFULLY

Due to the death of the Honorable Verle Swenson, there is a vacancy in the office of District Magistrate Judge, Position No. 3, Second Judicial District. The Nominating Commission will convene Friday, April 1, 1994, at 9:30 a.m. in the courtroom of the Wabaunsee County Courthouse in Alma to consider nominees and to appoint a district magistrate judge.

The Commission will welcome recommendations of nominees to fill the vacancy. Recommendations must be accompanied by a nomination form, which is available from the Clerk of the Jackson, Jefferson, Pottawatomie, or Wabaunsee County District Courts. The nomination form must be completed and signed by the nominee.

The statutes require a district magistrate judge to be a graduate of a high school or secondary school or the equivalent; to be a resident of Wabaunsee County at the time of appointment by the Commission; and to either be a lawyer admitted to practice law in Kansas, or to pass an examination given by the Supreme Court and to become certified within 18 months of his or her appointment, as provided by K.S.A. 20-334 and K.S.A. 20-337.

An original and nine copies of the form, together with any supporting letters, should be returned to:

Mr. Marlin A. White
Commission Secretary
Denison State Bank Bldg.
Holton, Kansas 66436

promptly and no later than Noon on Friday, March 25, 1994.

Your cooperation in this matter will be greatly appreciated.

Sincerely,

Tyler C. Lockett

TYLER C. LOCKETT
Departmental Justice

court is resubmitted to the electors of a judicial district for the purpose of rejecting the same, as provided in subsection (e)[*] of K.S.A. 20-2901 and amendments thereto, and a majority of the votes cast and counted on such proposition is in favor of election of judges of the district court, the district judicial nominating commission in such judicial district shall be abolished on the date the results of the final canvass of votes is certified pursuant to subsection (f)[**] of K.S.A. 20-2901 and amendments thereto. The rejection of nonpartisan selection of judges of the district court in a judicial district shall not affect the term of office of any person serving as judge of the district court in the judicial district at the time of the general election at which nonpartisan selection is rejected. The rejection of nonpartisan selection shall not affect the term of office of any person retained in office as judge of the district court at the election. If the electors of the judicial district also vote at the election against retaining in office any judge of the district court, the office of that judge shall become vacant on the second Monday in January next following the election, and the vacancy shall be filled in the manner provided by K.S.A. 25-312a.

History: L. 1974, ch. 137, § 13; L. 1975, ch. 183, § 3; L. 1976, ch. 145, § 105; L. 1982, ch. 130, § 18; Feb. 25.

* Reference should be to subsection (f).
** Reference should be to subsection (g).

20-2914. Vacancies in district magistrate judge positions in judicial districts with nonpartisan method of selection; method of selection. (a) Whenever a vacancy shall occur in the office of district magistrate judge in any judicial district which has approved the proposition of nonpartisan selection of district court judges, or whenever a vacancy will occur in such office on a specified future date, the chief justice of the supreme court promptly shall give notice of such vacancy to the chairperson of the district judicial nominating commission of such judicial district. Said chairperson shall call a meeting of the commission to be held within five (5) days after receipt of such notice for the purpose of selecting a person to fill such vacancy. Any person so selected shall have the qualifications prescribed by subsection (c) of K.S.A. 20-334, and in order to obtain the best qualified person as a district magistrate judge, the commission shall not limit its consideration of potential appointees to those persons whose names have been submitted to the commission or who have expressed a willingness to serve. The commission may authorize one (1) or more members of the commission to tender an appointment to any qualified person in order to ascertain his or her willingness to serve if appointed; but any such tender of appointment shall be subject to final action of the commission under the conditions prescribed by subsection (b) of K.S.A. 20-2907. Under no circumstances shall the commission refer to or describe potential appointees as applicants or otherwise suggest that such persons are seeking to be appointed.

(b) Any appointment made pursuant to subsection (a) shall be contingent upon the acceptance of such appointment by the person so appointed and, if such person is not regularly admitted to practice law in Kansas, the appointment shall be made on a temporary basis until such person has been certified by the supreme court as qualified to hold such office, in the manner provided by K.S.A. 20-337.

History: L. 1976, ch. 146, § 20; April 19.

20-2915. Same; effective date of appointment; eligibility for retention under nonpartisan method. (a) Whenever a vacancy in the office of district magistrate judge exists at the time the appointment to fill such vacancy is made, as provided in K.S.A. 20-2914, the appointment shall be effective at the time it is made, but where any such appointment is made to fill a vacancy which will occur at a future date, such appointment shall not take effect until said date.

(b) Any person appointed to the office of district magistrate judge, as provided in K.S.A. 20-2914, shall commence upon the duties of office on the date such appointment takes effect, and any person so appointed shall have all the rights, privileges, powers and duties prescribed by law for the office of district magistrate judge. Except as otherwise provided in K.S.A. 20-337, any such judge shall be eligible for retention in office in the same manner and under the same conditions prescribed by law for the retention of district judges in judicial districts which have approved the proposition of nonpartisan selection of district court judges.

History: L. 1976, ch. 146, § 21; April 19.

20-2916. Method of selection of judges in newly formed districts. (a) Whenever a new judicial district is established which includes only a part of a single previously established district or all or parts of two or more previously

1-4

are necessary for the conduct of its proceedings and the discharge of its duties, consistent with the provisions of this act and the constitution and laws of this state.

(b) The commission shall meet only upon call of the chairman, and the commission shall not take any final action except at such meeting. A majority of the members of the commission shall constitute a quorum to do business, but no final action shall be taken except upon a vote of the majority of the members of the commission.

(c) Members of the commission shall receive no compensation, but shall be reimbursed for their actual and necessary expenses incurred in performing their official duties, as provided in subsections (b), (c) and (d) of K.S.A. 75-3223. Such expenses shall be paid from the judicial nominating commission fund as provided in K.S.A. 20-138, as amended.

(d) The board of county commissioners of each county in a judicial district shall cooperate with the district judicial nominating commission of such judicial district, and shall make available to the commission wherever possible the facilities and services of such county, in order to expedite the business of the commission.

History: L. 1974, ch. 137, § 7; March 21.

20-2908. Retention of incumbent judge; declaration of candidacy; rejection by electors, vacancy; retention, term of office; eligibility for office after rejection; applicability of election laws. Following the approval of nonpartisan selection of judges of the district court in a judicial district as provided in K.S.A. 20-2901 and amendments thereto, there shall not be an election or reelection of a judge of the district court at any succeeding general election, but any judge of the district court in the judicial district whose term of office expires on the second Monday in January next following any such succeeding general election shall be eligible for retention in office as provided in this section. Not less than 60 days prior to the holding of the general election next preceding the expiration of the judge's term of office, the judge may file in the office of the secretary of state a declaration of candidacy for retention in office. If a declaration is not so filed, the position held by the judge shall be vacant upon the expiration of the judge's term of office. If a declaration is filed, the judge's name shall be submitted at the next general election to the electors of the judicial district, if the judge is a district judge, or to the electors of the county, if the judge is a district magistrate judge. The name shall be submitted on a separate judicial ballot, without party designation, reading substantially as follows:

"Shall _____
(Here insert name of judge.)

_____
(Here insert the title of the court.)
be retained in office?

"If a majority of those voting on the question vote against retaining the person in office, the position or office which the person holds shall be vacant upon the expiration of the person's term of office; otherwise, unless removed for cause, the person shall remain in office for the regular term of four years from the second Monday in January following the election. At the expiration of each term, unless by law the person is compelled to retire, the person shall be eligible for retention in office by election in the manner prescribed in this section.

Wherever a majority of those voting on the question of retaining any judge in office vote against retention, the secretary of state, following the final canvass of votes on the question, shall certify the results to the chief justice of the supreme court. Any the judge who has not been retained in office pursuant to this section shall not be eligible for nomination or appointment to the office of judge of the district court in the judicial district prior to the expiration of four years after the expiration of the judge's term of office.

Election laws applicable to the general elections of other state officers shall apply to elections upon the question of retention of judges of the district court pursuant to this section, to the extent that they are consistent with the provisions of this act.

History: L. 1974, ch. 137, § 8; L. 1976, ch. 145, § 101; L. 1982, ch. 129, § 11; L. 1986, ch. 115, § 51; Jan. 12, 1987.

Attorney General's Opinions:

Effect of abandoning nonpartisan method on terms of judges appointed to fill vacancies. 82-75.

20-2909. Vacancy in office of judge of the district court; nominations for successor by district judicial nominating commission; tendering nominations; certification of nominations to governor; time limitations. (a) Whenever a vacancy occurs in the office of judge of the district court in any judicial district, or whenever a vacancy will occur in such office on a specified future date, the chief justice of the supreme court promptly shall give

1-5

notice of such vacancy to the chairperson of the district judicial nominating commission of such judicial district. The chairperson shall call a meeting of the commission to be held within five days after receipt of such notice for the purpose of nominating persons for appointment to such office. It shall be the duty of the commission to nominate not less than two nor more than three persons for each office which is vacant, and shall submit the names of the persons so nominated to the governor. Any person so nominated shall have the qualifications prescribed by subsection (b) of K.S.A. 20-2903 and amendments thereto, and in order to obtain the best qualified persons as nominees, the commission shall not limit its consideration of potential nominees to those persons whose names have been submitted to the commission or who have expressed a willingness to serve. The commission may authorize one or more members of the commission to tender a nomination to any qualified person in order to ascertain the person's willingness to serve if nominated, but any such tender of nomination shall be subject to final action of the commission under the conditions prescribed by subsection (b) of K.S.A. 20-2907 and amendments thereto. Under no circumstances shall the commission refer to or describe potential nominees as applicants or otherwise suggest that such persons are seeking to be nominated.

In order that a vacancy in the office of judge of the district court does not exist for an inordinate length of time, the commission shall conduct the business of selecting nominees for appointment to such office and certifying the same to the governor as promptly and expeditiously as possible, having due regard for the importance of selecting the best possible nominees. In no event shall the commission submit its nominations to the governor more than 30 days after the date a vacancy occurs, unless the chief justice permits an extension of such time period.

(b) If there are not at least two attorneys deemed qualified by the district judicial nominating commission who reside in the judicial district and who are willing to accept the nomination to fill a vacancy in a district judge position, the nominating commission need not limit its consideration of nominees to attorneys residing in the judicial district; however, in cases where there is one such attorney, such attorney shall be one of the nominees submitted to the governor. If an appointee is not a resident of the judicial district at the time of appointment to a district judge position, the appointee shall establish residency in the judicial district before taking office and thereafter shall maintain such residency while holding such office.

History: L. 1974, ch. 137, § 9; L. 1975, ch. 183, § 2; L. 1976, ch. 145, § 102; L. 1978, ch. 111, § 3; L. 1986, ch. 115, § 52; Jan. 12, 1987.

Cross References to Related Sections:

Constitutional provision for filling vacancy, see Kansas Constitution, article 3, § 6.

20-2910. Same; withdrawal of nomination; substitution of nominee; two or more vacancies, withdrawal of lists of nominations; resubmission of nominations. After a district judicial nominating commission has nominated and submitted to the governor the required number of nominees for appointment to fill a vacancy in the office of judge of the district court, and prior to the appointment of a successor to such office, any nomination may be withdrawn for cause of a substantial nature affecting the nominee's qualifications to hold office, and another nominee may be substituted therefor; and if any nominee dies or requests in writing that his or her name be withdrawn, the commission shall nominate another person to replace him or her.

Whenever there are existing at the same time two (2) or more vacancies in any judicial district and the nominating commission for such judicial district has submitted to the governor the required number of nominees for each of such vacancies, the commission may withdraw the lists of nominations, prior to any appointment being made, and change any of the persons so nominated from one list to another and resubmit them as so changed, or may substitute a new nominee for any of those previously nominated. The action of the commission in withdrawing nominations may be taken at the same meeting at which nominations are made, or at any later meeting called for such purpose.

History: L. 1974, ch. 137, § 10; L. 1976, ch. 145, § 103; Jan. 10, 1977.

20-2911. Same; appointment of successor by governor; time limitations; failure of governor to appoint, appointment by chief justice; effective date of appointment. (a) Whenever a district judicial nominating commission has submitted to the governor the required number of nominations for appointment to fill a vacancy in the office of judge of the district

1-6

House Concurrent Resolution No. 5040

By Representatives Cornfield, Bradley, Carmody, Crowell, Donovan, Farmer, Flower, Gilbert, Hayzlett, Henry, Jennison, Kejr, King, Lawrence, Lloyd, Long, Mason, Mayans, Mays, Mead, Mollenkamp, Morrison, Myers, Neufeld, O'Connor, Packer, Pauls, Powers, Scott, Shallenburger, Shore, M. Smith, Toplikar, Vickrey, Wagle and E. Wells

2-21

A PROPOSITION to amend the bill of rights of the constitution of the state of Kansas by adding a new section thereto, regarding rights of parents and guardians.

Be it resolved by the Legislature of the State of Kansas, two-thirds of the members elected (or appointed) and qualified to the House of Representatives and two-thirds of the members elected (or appointed) and qualified to the Senate concurring therein:

Section 1. The following proposition to amend the constitution of the state of Kansas shall be submitted to the qualified electors of the state for their approval or rejection: The bill of rights of the constitution of the state of Kansas is amended by adding a new section thereto to read as follows:

"**§ 21. Rights of parents and guardians.** Parents ~~and guardians~~ shall retain the fundamental right to exercise primary control over the care and upbringing of their children ~~and wards~~ in their charge."

Sec. 2. The following statement shall be printed on the ballot with the amendment as a whole:

"*Explanatory statement.* This amendment would recognize the right of parents ~~and guardians~~ to rear their children ~~and wards.~~

~~"A vote for this amendment would favor recognizing in the constitution the right of parents and guardians to rear their children and wards.~~

~~"A vote against this amendment would favor not recognizing the right of parents and guardians to rear their children and wards."~~

"A vote for this amendment would favor recognizing in the constitution the fundamental right of parents to exercise primary control over the care and upbringing of children in their charge."

"A vote against this amendment would favor not recognizing in the constitution the fundamental right of parents to exercise primary control over the care and upbringing of children in their charge."

Sec. 3. This resolution, if approved by two-thirds of the members elected (or appointed) and qualified to the House of Representatives and two-thirds of the members elected (or appointed) and qualified

House Judiciary
Attachment 2
3-22-94

SB 142

STATE OF KANSAS

JAMES P. BUCHELE
DISTRICT JUDGE

SHAWNEE COUNTY COURTHOUSE
TOPEKA, KANSAS 66603

(913) 233-8200
EX. 4396

House Judiciary
Attachment 3
3-22-94

22-3214. Subpoenas. (1) The prosecution and any person charged with a crime shall be entitled to the use of subpoenas and other compulsory process to obtain the attendance of witnesses. Except as otherwise provided by law, such subpoenas and other compulsory process shall be issued and served in the same manner and the disobedience thereof punished the same as in civil cases.

(2) All courts having criminal jurisdiction shall have the power to compel the attendance of witnesses from any county in the state to testify either for the prosecution or for the defendant.

(3) It shall not be necessary to tender any fee or mileage allowance to any witness when he is served with a subpoena to attend any criminal case and give testimony either on behalf of the prosecution or the defendant.

and to direct law enforcement officers to serve subpoenas to obtain the attendance of witnesses at all proceedings conducted by the court anytime after the arrest of any person.

History: L. 1970, ch. 129, § 22-3214; July 1.

Source or prior law:

62-1308, 62-1309, 62-1310, 62-1311, 62-1312, 62-1313, 62-1314, 62-1315, 62-1906.

Judicial Council, 1969: Subpoenas in civil cases, including deposition proceedings were governed by K.S.A. 60-245 (now repealed). It is the intent that this section also govern process for witnesses in criminal cases. The section is intended to emphasize and define the right of the parties and the power of the court to compel testimony in criminal cases.

CASE ANNOTATIONS

1. Error to deny defendant right to issue a subpoena duces tecum to examine medical records pertaining to complainant. State v. Humphrey, 217 K. 352, 361, 537 P.2d 155.

2. Section construed; magistrate's refusal to enforce subpoenas duces tecum at preliminary hearing not prejudicial error under facts of case. State v. Adams, 218 K. 495, 502, 545 P.2d 1134.

3. Mentioned; trial court erred in not issuing bench warrant for a minor who was material witness. State v. Jones, 226 K. 503, 509, 601 P.2d 1135.

4. Provisions hereunder along with K.S.A. 22-2902a regarding forensic examiner, provide defendant with constitutional protection at preliminary hearing. State v. Sherry, 233 K. 920, 930, 931, 667 P.2d 367 (1983).

5. Cited; complaining witness not subject to discovery (22-3212); attorney hired to assist prosecution (19-717) subject to limited discovery. State v. Dressel, 241 K. 426, 432, 436, 738 P.2d 830 (1987). Reversing 11 K.A.2d 552, 729 P.2d 1245 (1986).

22-3215. Motion to suppress confession

As Amended by Senate Committee

Session of 1994

SENATE BILL No. 513

By Senators Moran, Bond, Brady, Emert, Feleciano, Oleen, Parkinson, Petty, Ranson, Salisbury, Steffes and Vancrum

1-18

AN ACT concerning crimes and punishment; relating to persons who are 16 or more years of age; prosecution as adults for certain offenses; amending K.S.A. 38-1602 and 38-1636 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 38-1602 is hereby amended to read as follows: 38-1602. As used in this code, unless the context otherwise requires:

(a) "Juvenile" means a person 10 or more years of age but less than 18 years of age.

(b) "Juvenile offender" means a person who does an act while a juvenile which if done by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 21-3105 and amendments thereto or who violates the provisions of K.S.A. 41-727 or subsection (j) of K.S.A. 74-8810, and amendments thereto, but does not include:

(1) A person 14 or more years of age who commits a traffic offense, as defined in subsection (d) of K.S.A. 8-2117 and amendments thereto;

(2) a person 16 years of age or over who commits an offense defined in chapter 32 of the Kansas Statutes Annotated;

(3) a person 16 years of age or over who is charged with a *nonperson* felony or with more than one offense of which one or more is a *nonperson* felony after having been adjudicated in two separate prior juvenile proceedings as having committed an act which would constitute a felony if committed by an adult and the adjudications occurred prior to the date of the commission of the new act charged;

(4) a person who has been prosecuted as an adult by reason of subsection (b)(3) and whose prosecution results in conviction of a crime;

(5) a person whose prosecution as an adult is authorized pursuant to K.S.A. 38-1636 and amendments thereto;

(6) a person who has been convicted of aggravated juvenile de-

House Judiciary
Attachment 4
3-22-94

linquency as defined by K.S.A. 21-3611 and amendments thereto; ~~or~~

(7) a person 16 years of age or over who has been adjudicated to be a juvenile offender under the Kansas juvenile offender's code and who is charged with committing a *nonperson* felony or more than one offense of which one or more is a *nonperson* felony while confined in any training or rehabilitation facility under the jurisdiction and control of the department of social and rehabilitation services or while running away or escaping from any such institution or facility; *or*

(8) a person 16 years of age or more who is charged with a person felony~~, or misdemeanor~~.

(c) "Parent," when used in relation to a juvenile or a juvenile offender, includes a guardian, conservator and every person who is by law liable to maintain, care for or support the juvenile.

(d) "Law enforcement officer" means any person who by virtue of that person's office or public employment is vested by law with a duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes.

(e) "Youth residential facility" means any home, foster home or structure which provides twenty-four-hour-a-day care for juveniles and which is licensed pursuant to article 5 of chapter 65 of the Kansas Statutes Annotated.

(f) "Juvenile detention facility" means any secure public or private facility which is used for the lawful custody of accused or adjudicated juvenile offenders and which must not be a jail.

(g) "State youth center" means a facility operated by the secretary for juvenile offenders.

(h) "Warrant" means a written order by a judge of the court directed to any law enforcement officer commanding the officer to take into custody the juvenile named or described therein.

(i) "Secretary" means the secretary of social and rehabilitation services.

(j) "Jail" means:

(1) An adult jail or lockup; or

(2) a facility in the same building as an adult jail or lockup, unless the facility meets all applicable licensure requirements under law and there is (A) total separation of the juvenile and adult facility spatial areas such that there could be no haphazard or accidental contact between juvenile and adult residents in the respective facilities; (B) total separation in all juvenile and adult program activities within the facilities, including recreation, education, counseling, health care, dining, sleeping, and general living activities; and (C)

and whose prosecution as an adult is authorized pursuant to section 3

7
+

separate juvenile and adult staff, including management, security staff and direct care staff such as recreational, educational and counseling.

Sec. 2. K.S.A. 38-1636 is hereby amended to read as follows: 38-1636. (a) At any time after commencement of proceedings under this code against a respondent who was: (1) 14 or 15 years of age at the time of the offense or offenses alleged in the complaint, if any such offense is or offenses are a class A or B felony, or, on or after July 1, 1993, an off-grid felony, a nondrug felony crime ranked at severity level 1, 2 or 3 or a drug felony crime ranked at severity level 1 or 2, and prior to entry of an adjudication or the beginning of an evidentiary hearing at which the court may enter adjudication as provided in K.S.A. 38-1655, and amendments thereto, or (2) 16 or more years of age at the time of the offense *or offenses* alleged in the complaint, *if any such offense or offenses are a person misdemeanor or nonperson felony or misdemeanor,* and prior to entry of an adjudication or the beginning of an evidentiary hearing at which the court may enter adjudication as provided in K.S.A. 38-1655, and amendments thereto, the county or district attorney may file a motion requesting that the court authorize prosecution of the respondent as an adult under the applicable criminal statute.

(b) The motion may also contain a statement that the prosecuting attorney will introduce evidence of the offenses alleged in the complaint and request that, on hearing the motion and authorizing prosecution as an adult under this code, the court may make the findings required in a preliminary examination provided for in K.S.A. 22-2902, and amendments thereto, and the finding that there is no necessity for further preliminary examination.

(c) Upon receiving a motion to authorize prosecution as an adult, the court shall set a time and place for hearing on the motion. The court shall give notice of the hearing to the respondent, each parent of the respondent, if service is possible, and the attorney representing the respondent. The motion shall be heard and determined prior to any further proceedings on the complaint.

(d) If the respondent fails to appear for hearing on a motion to authorize prosecution as an adult after having been properly served with notice of the hearing, the court may hear and determine the motion in the absence of the respondent. If the court is unable to obtain service of process and give notice of the hearing, the court may hear and determine the motion in the absence of the respondent after having given notice of the hearing once a week for two consecutive weeks in a newspaper authorized to publish legal notices in the county where the hearing will be held.

4-3

(e) In determining whether or not prosecution as an adult should be authorized, the court shall consider each of the following factors: (1) The seriousness of the alleged offense and whether the protection of the community requires prosecution as an adult; (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether the offense was against a person or against property, greater weight being given to offenses against persons, especially if personal injury resulted; (4) the number of alleged offenses unadjudicated and pending against the respondent; (5) the previous history of the respondent, including whether the respondent had been adjudicated a delinquent or miscreant under the Kansas juvenile code or a juvenile offender under this code and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence; (6) the sophistication or maturity of the respondent as determined by consideration of the respondent's home, environment, emotional attitude, pattern of living or desire to be treated as an adult; (7) whether there are facilities or programs available to the court which are likely to rehabilitate the respondent prior to the expiration of the court's jurisdiction under this code; and (8) whether the interests of the respondent or of the community would be better served by criminal prosecution. The insufficiency of evidence pertaining to any one or more of the factors listed in this subsection shall not in and of itself be determinative of the issue. Subject to the provisions of K.S.A. 38-1653, and amendments thereto, written reports and other materials relating to the respondent's mental, physical, educational and social history may be considered by the court.

(f) The court may authorize prosecution as an adult upon completion of the hearing if the court finds that the respondent was: (1) 14 or 15 years of age at the time of the alleged commission of the offense, if the offense is a class A or B felony, and was committed before July 1, 1993, and that there is substantial evidence that the respondent should be prosecuted as an adult for the offense with which the respondent is charged;

(2) 14 or 15 years of age at the time of the alleged commission of the offense, if the offense is an off-grid felony, a nondrug severity level 1, 2 or 3 felony or a drug level 1 or 2 felony, and that there is substantial evidence that the respondent should be prosecuted as an adult for the offense with which the respondent is charged; or

(3) 16 or more years of age at the time of the alleged commission of the offense, *if the offense is a person misdemeanor or nonperson felony or misdemeanor,* and that there is substantial evidence that the respondent should be prosecuted as an adult for the offense with

4-4

which the respondent is charged. In that case, the court shall direct the respondent be prosecuted under the applicable criminal statute and that the proceedings filed under this code be dismissed.

(g) If the respondent is present in court and the court also finds from the evidence that it appears a felony has been committed and that there is probable cause to believe the felony has been committed by the respondent, the court may direct that there is no necessity for further preliminary examination on the charges as provided for in K.S.A. 22-2902, and amendments thereto. In that case, the court shall order the respondent bound over to the district judge having jurisdiction to try the case.

(h) If the respondent is convicted, the authorization for prosecution as an adult may attach and apply to any future acts by the respondent which are or would be cognizable under this code if the order of the court so provides.

(i) If the respondent is prosecuted as an adult under subsection (f)(1) or (f)(2) and convicted of a lesser included offense, the respondent shall be a juvenile offender and receive an authorized disposition pursuant to K.S.A. 38-1663, and amendments thereto.

New Sec. 3. see attached.

Sec. 3. K.S.A. 38-1602 and 38-1636 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

15-1

New Sec. 3. (a) If a person 16 years of age or more is charged with a person felony, the county or district attorney may file charges prosecuting such person as an adult under the applicable criminal statute.

(b) If charges are filed pursuant to subsection (a), the attorney representing the respondent may file a motion stating the respondent should be considered a juvenile and a complaint should be filed pursuant to the juvenile offender's code. The motion shall contain a statement that such attorney will introduce evidence stating the reasons the respondent should be considered a juvenile and request that, on hearing the motion, the court make the findings required in a preliminary examination provided for in K.S.A. 22-2902, and amendments thereto, and the finding that there is no necessity for further preliminary examination.

(c) Upon receiving a motion to consider the respondent a juvenile, the court shall set a time and place for hearing on the motion. The court shall give notice of the hearing to the juvenile and each parent of the juvenile, if service is possible. The motion shall be heard and determined prior to any further proceedings on the complaint.

(d) If the respondent fails to appear for hearing on a motion to consider the respondent a juvenile after having been properly served with notice of the hearing, the court may hear and determine the motion in the absence of the respondent. If the court is unable to obtain service of process and give notice of the hearing, the court may hear and determine the motion in the absence of the respondent after having given notice of the hearing once a week for two consecutive weeks in a newspaper authorized to publish legal notices in the county where the hearing will be held.

(e) In determining whether or not the respondent should be prosecuted as an adult, the court shall consider each of the following factors: (1) The seriousness of the alleged offense and whether the protection of the community requires prosecution as an adult; (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether the offense was against a person or against property, greater weight being given to offenses against persons, especially if personal injury resulted; (4) the number of alleged offenses unadjudicated and pending against the respondent; (5) the previous history of the respondent, including whether the respondent had been adjudicated a delinquent or miscreant under the Kansas juvenile code or a juvenile offender under this code and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence; (6) the sophistication or maturity of the respondent as determined by consideration of such respondent's home, environment, emotional attitude, pattern of living or desire to be treated as an adult; (7) whether there are facilities or programs available to the court which are likely to rehabilitate the respondent prior to the expiration of the

court's jurisdiction under this code; and (8) whether the interests of the respondent or of the community would be better served by criminal prosecution. The insufficiency of evidence pertaining to any one or more of the factors listed in this subsection shall not in and of itself be determinative of the issue. Subject to the provisions of K.S.A. 38-1653, and amendments thereto, written reports and other materials relating to the respondent's mental, physical, educational and social history may be considered by the court.

(f) The court may authorize the respondent to be considered a juvenile upon completion of the hearing if the court finds that the respondent was 16 or more years of age at the time of the alleged commission of the person felony and there is substantial evidence that the respondent should be considered a juvenile for the offense with which the respondent is charged.

(g) If the court finds the respondent should be prosecuted as an adult and if the respondent is present in court and the court also finds from the evidence that it appears a person felony has been committed and that there is probable cause to believe the person felony has been committed by the respondent, the court may direct that there is no necessity for further preliminary examination on the charges as provided for in K.S.A. 22-2902, and amendments thereto. In that case, the court shall order the respondent bound over to the district judge having jurisdiction to try the case.

(h) If the respondent is convicted, the authorization for prosecution as an adult may attach and apply to any future acts by the respondent which are or would be cognizable under this code if the order of the court so provides.

(i) This section shall be part of and supplemental to the Kansas juvenile offenders code.

H. SUB. S.B. 293

Section 1. This act shall be entitled The Private Property Protection Act.

Section 2. It is the public policy of the state of Kansas that state agencies, in planning and carrying out governmental actions, anticipate, be sensitive to and account for the obligations imposed by the fifth and fourteenth amendments of the Constitution of the United States and section 18 of the bill of rights of the Constitution of the State of Kansas. It is the express purpose of this act to reduce the risk of undue or inadvertent burdens on private property rights resulting from certain lawful governmental actions.

Section 3. As used in this act, unless the context requires otherwise:

(a) "constitutional taking" means due to a governmental action private property is taken such that compensation to the owner of the property is required by the fifth or fourteenth amendment of the constitution of the United States or section 18 of the bill of rights of the constitution of the State of Kansas;

(b)(1) "governmental action" means any of the following actions which may give rise to a claim of constitutional taking:

(A) proposed rules and regulations by a state agency that if adopted and enforced would limit the use of private property;

(B) proposed or existing licensing or permit requirements of a state agency which limit the use of private property;

(C) required dedications or exactions from owners of private property by a state agency.

(2) "Governmental action" does not include:

(A) activity in which the power of eminent domain is formally exercised;

(B) the repeal of rules and regulations, elimination of governmental programs, or amendment of rules and regulations such that limitations on the use of private property are reduced or removed;

(C) activity representing a valid exercise of the state's police powers, including seizure or forfeiture of private property for violations of law or as evidence in criminal proceedings; and

(D) state agency action authorized by statute or by valid court order in response to a violation of state law.

(c) "Private property" means any real or personal property in this state that is protected by the fifth or fourteenth amendment of the constitution of the United States or section 18 of the bill of rights of the constitution of the State of Kansas.

(d) "State agency" means an officer, department, division or unit of the executive branch of the state of Kansas authorized to propose, adopt or enforce rules and regulations. "State agency" shall not include the legislative or judicial branches of the state of Kansas or any political or taxing subdivision of the state of Kansas.

Section 4. To the extent permitted by law and not inconsistent therewith, each state agency shall adhere to the following if proposing, implementing or enforcing governmental action:

House Judiciary
Attachment 5
3-22-94

(1) If an agency requires an owner of private property to obtain a permit for a specific use of that property, any conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is to be issued, shall substantially and reasonably advance that purpose and shall be expressly authorized by law;

(2) any restriction imposed on the use of private property shall be proportionate to the extent to which the use of the property gives rise to the need for such restriction;

(3) if an action involves a permit process or any other procedure that will limit or otherwise prohibit the use of private property pending completion of the process or procedure, the duration of the limitation on or prohibited use of the property shall not extend beyond a reasonable period of time.

Section 5.(a). Before any governmental action restricting private property use on the basis of protection of public health or safety is taken, the state agency shall prepare a written report available for public inspection that:

(1) Clearly and specifically identifies the public health or safety risk created by the use of the private property;

(2) describes the manner in which the proposed action will substantially advance the purpose of protecting public health and safety against the specifically identified risk;

(3) sets forth the facts relied upon to establish that the restrictions to be imposed on the use of the private property are proportionate to the extent to which the use of the property gives rise to the need for such restriction;

(4) analyzes the likelihood that the governmental action may result in a constitutional taking;

(5) identifies the alternatives, if any, to the proposed governmental action that may:

(1) fulfill the legal obligations of the state agency;

(2) reduce the extent of limitation on the use of the private property;

(3) reduce the risk to the State that the action will be deemed a constitutional taking.

(b). If there is an immediate threat to public health and safety that constitutes an emergency requiring immediate action to eliminate the risk, the report required by this section shall be prepared when the emergency action is completed, in which case the report shall include a complete description of the facts relied upon by the agency in declaring the need for emergency action.

(c) Before any state agency implements a governmental action for which a report is required under this section, the state agency shall submit a copy of the report to the governor and the attorney general of the State of Kansas.

Section 6. Nothing in this act shall be construed to limit the scope of judicial review of an agency action, create a new private cause of action, or limit any right of action pursuant to other statutes or at common law.

Section 7. This act shall take effect and be in force from and after its publication in the statute book.

FEATURES OF H. SUB. FOR S.B. 293

* Clear statement of purpose and legislative intent

* Cleans up Senate amendments

* Includes valid exercise of police powers in exceptions

* Streamlines procedure to eliminate involvement by attorney general and requirement of separate rules and regulations

* Sets forth specific reporting requirements for the state agencies, with reports available to the public and furnished to the governor and attorney general.

* Makes clear that law doesn't effect scope of judicial review of agency action, limit any rights or create any new cause of action.

* Is effective July 1, 1994 instead of 1995.

enacted 1992

DELAWARE ADVANCE LEGISLATIVE SERVICE
1992 REGULAR SESSION
DELAWARE STATE SENATE
136th GENERAL ASSEMBLY
68TH LEGISLATURE
PUBLIC ACT 191 SENATE BILL NO. 130
AS AMENDED BY HOUSE AMENDMENT NO. 1
1992 Del. ALS 191; 68 Del. Laws 191; 1992 Del. SB 130

SYNOPSIS: AN ACT TO AMEND TITLE 29, DELAWARE CODE RELATING TO RULES AND REGULATIONS ESTABLISHED BY STATE AGENCIES BY ESTABLISHING APPROPRIATE PROCEDURES FOR ASSESSING WHETHER OR NOT RULES AND REGULATIONS MAY RESULT IN TAKING OF PRIVATE PROPERTY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

[*1] Section 1. Amend Chapter 6, Title 29, Delaware code by adding thereto a new section to read as follows: "@ 605. Promulgation of Rules and Regulations by State Agencies - Review by Attorney General To Determine Affect on Private Property Right

a) No rule or regulation promulgated by any state agency shall become effective until the Attorney General has reviewed the rule or regulation and has informed the issuing agency in writing as to the potential of the rule or regulation to result in a taking of private property.

b) Judicial review of actions taken pursuant to this section shall be limited to whether the Attorney General has reviewed the rule or regulation and has informed the issuing agency in writing.

c) The term "taking of private property" as used under this section shall mean an activity wherein private property is taken such that compensation to the owner of that property is required by the Fifth and Fourteenth Amendments to the Constitution of the United States or any other similar or applicable law of this State.

d) Nothing in this section shall affect any otherwise available judicial review of agency action." [*2] Section 2. This Act shall apply to all Rules and Regulations promulgated after the effective date of the Act, excluding those Rules and Regulations which do not purport to restrict the uses of which property could be put.

1992 Del. ALS 191, *2; 68 Del. Laws 191

HISTORY: Approved by the Governor January 24, 1992

[The Agency has ~~se~~ issued a Private Property Rights Impact Statement]

House Judiciary
Attachment 6
3-22-94

[As Amended by Senate Committee of the Whole]

As Amended by Senate Committee

Session of 1993

SENATE BILL No. 293

By Committee on Judiciary

2-11

AN ACT relating to agencies of the executive branch of state government; concerning actions by such agencies which may constitute a taking of private property; and imposing certain duties upon such agencies ~~and the office of the attorney general~~ in relation thereto.

[strike]

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act unless the context requires otherwise:

(a) "Constitutional taking" or "taking" means due to a governmental action private property is taken such that compensation to the owner of that property is required by ~~either~~ the fifth or fourteenth amendment of the constitution of the United States *or section 18 of the bill of rights of the constitution of the state of Kansas*;

(b) (1) "governmental action" or "action" *which constitutes a constitutional taking* means:

(A) Proposed rules and regulations by a state agency that if adopted and enforced may [~~limit the use of private property~~] *constitute a constitutional taking*;

or otherwise may

[reinsert stricken language]

(B) proposed or implemented licensing or permitting conditions, requirements or limitations [~~to the use of private property~~] *which constitute a constitutional taking*; and

may

[reinsert stricken language]

(C) required dedications or exactions from owners of private property by a state agency.

(2) "Governmental action" or "action" does not include:

(A) Activity in which the power of eminent domain is exercised formally;

(B) repealing rules and regulations discontinuing governmental programs or amending rules and regulations in a manner that lessens interference with the use of private property;

(C) law enforcement activity involving seizure or forfeiture of private property for violations of law or as evidence in criminal proceedings; and

House Judiciary
Attachment 7
3-22-94

(D) orders that are authorized by statute, that are issued by a state agency or a court of law and that were the result of a violation of state law.

(c) "Private property" means any real or person property in this state that is protected by ~~either~~ the fifth or fourteenth amendment of the constitution of the United States *or section 18 of the bill of rights of the constitution of the state of Kansas*.

(d) "State agency" means an officer or unit of the executive branch of state government that is authorized by law to adopt rules and regulations. "State agency" does not include the legislative or judicial branches of state government *or any political or taxing subdivision of the state*.

Sec. 2. (a) ~~The attorney general~~ shall adopt ~~guidelines~~ to assist ~~state agencies~~ in the identification of governmental actions that have constitutional taking implications. ~~In formulating the guidelines, the attorney general shall observe the following principles:~~

~~(1)~~ State ~~*formulate principles that ensure that state* agencies shall be *are*~~ sensitive to, anticipate and account for the obligations imposed by the fifth and fourteenth amendments of the constitution of the United States *and section 18 of the bill of rights of the constitution of the state of Kansas* in planning and carrying out governmental actions ~~to avoid imposing unanticipated or undue additional burdens on the state treasury;~~.

~~(2) governmental actions that are taken by state agencies and that result in a physical invasion or occupancy of private property and actions that affect value or use may constitute a taking of private property;~~

~~(3) governmental action may amount to a taking even though the action constitutes less than a complete deprivation of all use or value or of all separate and distinct interests in the same private property or the action is only temporary in nature;~~

~~(4) state agencies whose governmental actions are specifically to protect public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings; however, the mere assertion of a public health and safety purpose is insufficient to avoid a taking; therefore, actions that are purportedly to protect the public health and safety shall be:~~

~~(A) Taken only in response to real and substantial threats to public health and safety;~~

~~(B) designed to advance significantly the health and safety purpose; and~~

~~(C) no greater than necessary to achieve the health and~~

Each state agency

regulations

may

Such regulations shall be formulated to ensure that the agency is

(5) (6)

[reinsert stricken words]

~~safety purpose.~~

~~(5) although normal governmental processes do not ordinarily constitute takings, undue delays in decision making that interfere with private property use carry a risk of being held to be a taking; in addition, a delay in processing may increase significantly the size of compensation due if a constitutional taking is later found to have occurred;~~

~~(6) the constitutional protections against taking private property are self-executing and require compensation regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation.~~

(b) ~~The attorney general~~ shall: — Each state agency

(1) Complete the ~~guidelines~~ regulations on or before January 1, ~~1994~~ 1995; and

(2) review and update the ~~guidelines~~ regulations at least on an annual basis to maintain consistency with court rulings.

Sec. 3. (a) ~~The attorney general shall determine whether~~ a ~~proposed governmental action has constitutional taking implications and who is responsible for ensuring compliance with this act.~~

~~(b) Using the guidelines prepared under section 2,~~ a *A* regulations

[Based on the ~~guidelines~~ adopted ~~by the attorney general~~ pursuant to section 2, if a state agency determines that the governmental action has constitutional taking implications, the] state agency shall prepare an assessment of *[such]* constitutional taking implications that includes an analysis of at least the following elements:

(1) The likelihood that the governmental action may result in a constitutional taking, ~~including a description of how the taking affects the use or value of private property;~~ [reinsert stricken words]

(2) alternatives to the proposed governmental action that may:

(A) Fulfill the government's legal obligations of the state agency;

(B) reduce the impact on the private property owner; and

(C) reduce the risk of a constitutional taking; and

(3) an estimate of financial cost to this state for compensation, and the source of payment within the agency's budget if a constitutional taking is determined.

~~(c)~~ *(b)* In addition to the ~~guidelines~~ regulations prepared under section 2, each state agency shall adhere, to the extent permitted by law, to the following criteria if implementing or enforcing governmental actions that have constitutional taking implications:

(1) If an agency requires a person to obtain a permit for a specific use of private property, any conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is issued, shall substantially advance that purpose and shall be expressly au-

thorized by law;

(2) any restriction imposed on the use of private property shall be proportionate to the extent the use contributes to the overall problem that the restriction is to redress;

(3) if an action involves a permitting process or any other decision making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary;

(4) before taking an action restricting private property use for the protection of public health or safety, each state agency, in internal deliberative documents, shall:

(A) Clearly identify, with as much specificity as possible, the public health or safety risk created by the private property use;

(B) establish that the action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(C) establish, to the extent possible, that the restrictions imposed on the private property are proportionate to the extent the use contributes to the overall risk; and

(D) estimate to the extent possible, the potential cost to the government if a court determines that the action constitutes a constitutional taking.

~~(d)~~ *(c)* If there is an immediate threat to health and safety that constitutes an emergency and requires an immediate response, the analysis required by subsection ~~(b)~~ *(a)* of this section may be made when the response is completed.

~~(c)~~ *(d)* Before any state agency implements a governmental action that has constitutional taking implications, the state agency shall submit a copy of the assessment of constitutional taking implications to the governor, the attorney general and the ~~legislative budget committee~~ members of the legislative coordinating council.

(e) The provisions of this section shall be effective on and after July 1, ~~1994~~ 1995.

~~*Sec. 4. Nothing in this act shall be construed to grant any person a private right of action for damages or to eliminate any right of action pursuant to other statutes or at common law.*~~ [delete Sec. 4]

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

4-7