Approved: March 16, 2011
Date

MINUTES OF THE HOUSE LOCAL GOVERNMENT COMMITTEE

The meeting was called to order by Chairman Steve Huebert at 3:30 p.m. on February 15, 2011, in Room 144-S of the Capitol.

All members were present except Representatives Lane and Worley, both of whom were excused.

Committee staff present:
Martha Dorsey, Kansas Legislative Research Department
Eunice Peters, Office of Revisor of Statutes
Florence Deeter, Committee Assistant

Conferees appearing before the Committee:
John T. Smith, J.T. Smith Associates, Inc.
Mark Schreiber, Government Relations, Westar Energy
Brent Sonnier, OXY USA
Jack Glaves, Panhandle Eastern Pipeline Company
Len Stanton, Northern Natural Gas Company (written only)
Nicholas Hetman, Southern Star Central Gas Pipeline, Inc. (written only)
E. R. (Dick) Brewster, BP America (written only)
Brad Smoot, Attorney
Norman Pishny, Johnson County Farmer
Derek Sontag, Executive Director-Kansas, Americans for Prosperity (written only)
Erik Sartorius, Overland Park
Don Moler, Kansas League of Municipalities
Whitney Damron, City of Topeka
Jennifer Bruning, Overland Park Chamber of Commerce (written only)

Others attending:
See attached list.

The Chair opened the hearing on **HB 2187 - Platting land in unincorporated areas; certain counties** and **HB 2186 - Planning and zoning; blanket easements, subdivisions; void, exceptions.**

Staff Eunice Peters explained the provisions of **HB 2187**, saying that the owner of land outside a city or county planning jurisdiction is free to sub-divide land. Regarding **HB 2186,** she stated that the bill sets out regulations for platting or sub-dividing property and includes a provision making blanket easements unenforceable where there are no definable easement specifications.

John T. Smith, J.T. Smith Associates, Inc., after noting that the bills deal with two separate issues, spoke in support of **HB 2187**--the right of a landowner to sub-divide land. He said that the right to subdivide one's land extends back through the years—long before the permissive right of local units of government was granted to regulate property usage; the bill clarifies a vagueness in judicial decisions so that the right of a property owner to subdivide land is restored (Attachment 1).

Regarding **HB 2186**, Mr. Smith said the bill requires the easement holder to more specifically identify and record a defined location for the easement. He gave a brief history of blanket easements and noted the current problems with blanket easement holders who have no current use for the easement but are reluctant to relinquish it. He said the bill is a reasonable attempt to address blanket easement problems.

Mark Schreiber, Government Relations, Westar Energy, speaking as an opponent of the bill, addressed the issue of easements; he said that granting blanket easements was routine practice in the 1950s. A transmission or a pipeline company would negotiate a blanket easement, knowing the general area but not the specific location of a proposed line. **HB 2187** will void existing, legal contracts unless a written request is made to reduce the blanket easement. Further, the bill does not allow for recovery of costs. Current practice is for utilities to negotiate strip easements. Currently, for blanket easements, landowners and developers contact a utility company to modify a blanket easement before platting sub-division lots Attachment 2).

Brent Sonnier, OXY USA, speaking in opposition to the bills, declared that rendering blanket easements unenforceable will irreparably impair oil and gas operations in the state (Attachment 3). He explained that the random nature of oil and gas exploration makes restrictive easements, at best, onerous, and, at

worst, untenable. He said the bills will produce lawsuits to protect the business rights of gas and oil companies.

Jack Glaves, Panhandle Eastern Pipeline Company, also spoke in opposition to the bills, saying that by fiat making legally negotiated easements unenforceable creates a bad precedent and will result in unnecessary litigation (Attachment 4). He suggested a better alternative would be to confer with utility companies to develop amendatory language recognizing the sanctity of contract principles.

Written testimony in opposition was provided by:

Len Stanton, Northern Natural Gas Company (Attachment 5);
Nicholas Hetman, Southern Star Central Gas Pipeline, Inc. (Attachment 6); and
E. R. (Dick) Brewster, BP America (Attachment 7).

The hearing on **HB 2186** and **HB 2187** was closed.

The Chair opened the hearing on **HB 2294 - Annexation procedures; deannexation; board of county commissioners duties; election required, when; homestead exemption; appeal process.**

Staff Eunice Peters briefed the committee on the bill, saying that the bill would make a number of changes and additions to annexation law:

- Requiring homestead rights to continue after annexation;
- Restricting unilateral annexation if county commissioners deem the annexation to have an adverse effect on the county;
- Requiring a city, as a part of annexation, to submit a plan for extending services, allowing for de-annexation if the city fails to provide these services;
- Prohibit annexation of farm ground of 21-plus acres without the owner's consent;
- Nullify a bilateral election if a majority of the annexed voters vote to oppose the annexation.

Brad Smoot, Attorney, representing a group of rural landowners (Annexation Reform Coalition), testified in support of the bill. He stated that the bill is a result of years of study by the legislature and that a version of the bill was passed by the legislature but vetoed by Governor Parkinson (Attachment 8). He explained that Kansas law has two statutes that allow municipal annexation (**K.S.A. 12-520** and **K.S.A. 12-521**). The former allows a city to annex land when the owner consents. The latter allows a city to annex land without an owner's consent and without a public vote, as long as the county commission approves. The bill is an effort to place reasonable limits on the authority of local units of government to annex under the latter statute. The 21-acre limit and the requirement of a vote are safeguards built into the bill to protect areas from involuntary annexation. He also noted two new provision in the bill: recovery of attorneys' fees and the preservation of Homestead Exemption rights. Mr. Smoot cited anecdotal evidence to bolster the need for the bill.

Norman Pishny, Johnson County Farmer, expanded on Mr. Smoot's comments about the Homestead Exemption, stating that the proposed bill will protect the landowner's Homestead Act rights until the land is sold and will bring annexation laws in sync with the Kansas Constitution (Attachment 9).

Derek Sontag, Executive Director-Kansas, Americans for Prosperity submitted written testimony as a proponent (Attachment 10).

Erik Sartorius, representing the city of Overland Park, spoke in opposition to the bill, saying that even if the county commissioners approve a city's proposed annexation, a small group of voters can nullify the proposal for at least four years. Further, he said that any proposed annexation of more than 21 acres of agricultural land cannot be accomplished without the consent of the landowner, a provision that can stultify economic growth in certain areas. Agricultural land can still be farmed even if it is inside the city boundaries. Mr. Sartorius also objected to awarding of attorneys' fees to the prevailing side, commenting that the provision does not reflect traditional Kansas law (Attachment 11).

The meeting was recessed at 5:00 p.m. in order for members to attend a State of the Kansas Judiciary speech in the House Chamber. The committee was reconvened at 5:45 p.m.

Minutes of the House Elections Committee at 3:30 p.m. on February 15, 2011, in Room 144-S of the Capitol.

Don Moler, Kansas League of Municipalities, speaking in opposition to the bill, stated that the bill will eliminate most provisions of **K.S.A. 12-521** and reverse years of public policy in the state (Attachment 12). He said that the voting provision, motivated by those whose primary concern is self-interest, would replace the decision-making of county commissioners, who have a broader perspective and wider concern for the interests of the community at large.

Whitney Damron, representing the City of Topeka, noted several problems with the bill. He said that the retroactive aspect of the bill is unwarranted (Attachment 13). Further, the voting process regarding annexation allows voting by those unaffected by the annexation process (apartment dwellers, tenants, non-owner residents), and the 21-acre limitation is arbitrary and limits a city's ability to manage growth. Finally, traditionally Kansas law requires each party to pay their own attorney fees.

Doug Mays, offering testimony in opposition to the bill, noted that the bill blurs the distinction between voters' rights and landowners' rights (Attachment 14). He cited examples to show that the bill, by failing to make that distinction, is a defective bill.

Jennifer Bruning, Overland Park Chamber of Commerce, presented written testimony opposing the bill (Attachment 15).

The meeting was adjourned at 4:50 p.m. The next meeting is scheduled for Thursday, February 17, at 1:00 p.m. in Room 144-S of the Capitol.

HOUSE LOCAL GOVERNMENT

GUEST LIST

DATE: 2-15-2011

NAME	REPRESENTING
Marilyn Nichols	KS Reg. of Nurses KSROBs 3 KCOA (KS Co. Officials Assoc.)
Gretchen Skeen	KDOT
Chris Jordan	Sen. Morris (Intern)
ERIK SARTORIUS	City of Overland Park
Dave Hattesen	Kec
Don Stanton	Northern Natural Gas
Curt Casey	BPA
Don Moler	LKM
Stuart Little	Johnson County Government
Whitney Damron	City of Topeka
Carol Ann Brown	Annexation Reform Coalition
Cheryl Musil	
Norman P. Sneary	
Brad Snoot	
Doug Mayo	City of Olathe

JOHN T. SMITH ASSOCIATES, INC.

Land planning, development & management # investments # real estate brokerage
404 N Kansas Ave # Liberal, KS 67901-3330 # vox/fax 620-624-1834 # jtsa@liberal.net

February 14, 2011

House Committee on Local Government
Rep. Steve Huebert, Chairman
State Capitol, Room 149-S
Topeka, KS 66612-1504

Re: **House Bill 2186**

Rep. Steve Huebert, Chm.
Committee Members,

The above referenced bill addresses problems created by blanket easements in our state and their impact on the rights of land owners to the use of their property. **I support the substance & intent of this bill**, namely the requirement of the easement holder to more specifically identify, locate, and record a reasonably defined easement upon request of the landowner. I would ask for your review of the following in your considerations.

We all have lay knowledge of what a defined easement is – "I want to get from A to B across your property with my car/truck/whatever along this path and you agree to it in writing." But, distinguished from the defined easement, a **blanket easement**, lease, or agreement is one that allows the easement holder to locate its unspecified facilities (use) at undefined location(s), at undetermined times, on, over, under, or across the burdened property whenever, **if** the easement holder wants to. While this has existed for decades, in the last generation it has become more problematic with additional growth, center pivot irrigation, land subdivision and development, wind farms, etc, areas where once there may have been thought not to be any concerns.

How did these blanket easements come about? They generally grew out of a desire or need to acquire a right to access property for a probable use at a to-be-determined time and location. The once prevalent practice of taking a blanket easement on property for a noble and legitimate proposed use, at least implied the intention of the use ultimately being more specifically described and located. This practice was most common in the areas of utility and public service corporations, transportation, mineral exploration, and pipelines. But the end result today is that many properties have clouds to their title and impediments to achieving their highest and best use. In some cases, it may even cause problems in achieving any reasonable alternative use. It can be a problem to planners and to governmental entities in land use and permitting considerations. It can be a problem to realtors in marketing and land valuation. (Illustrative cases and problems are included in the accompanying "Blanket Easements – Their Impact on Land Owners.")

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Attachment 1

Most easement holders will acknowledge there is and has been problems and abuse associated with blanket easements. To address the problems most acquirers will say their recent practice requires the acknowledgment and recognition to a specific or defined location within a certain stated time limit, following notice, or upon placement and location of the proposed facility or use. But this is not universal. And more importantly, it does not deal with older unused blanket easements all over the state.

The greatest evidence of the problem, and the need for a fix, is probably the number of easement holders that don't have a reasonable and timely need to use the easement they hold, but just don't want the land owner to use the property "just in case..." And if really asked, they would probably acknowledge they could not or would not do the same thing today, but, they just don't want to make it right to the landowner. So what is being done?

- There are probably fewer blanket easements being acquired, or granted, in today's operating environment. And probably for the reasons that experience has shown it to be problematic to both the landowner and the acquirer. For the most part, however, that is generally voluntary, more likely fair, and good.
- But in many states, utility practices in particular, require the acknowledgment and recognition of a blanket easement, lease or agreement only when it is reduced to a specific or defined location within a certain stated time limit, following notice, or upon placement and location of the proposed facility or use.
- Some situations provide that only when a question arises as to location, width, or course of an easement, or upon written request by the specific property owner, does the easement holder then produce and record in a timely manner an instrument that provides a definite and specific description, based on the minimum width/dimensions necessary for the conduct of the business.
- Some states allow a blanket easement only if the instrument creating the blanket easement contains language that upon completion of the initial structure(s) or establishment of the use it explicitly fixes the burden, scope of use, and footprint within the express terms of the instrument, and also contains an express statement that the location of the burden shall be fixed to the degree occupied by the initial structure(s) upon the completion of such structure(s).
- Some states have determined that any blanket easement shall be void as against public and wholly unenforceable.

To characterize the solution approaches in lay terms, it is considered unconscionable for the easement holder to hold an entire property hostage indefinitely for an unknown or unidentifiable purpose at an undetermined location. Strictly as an illustration, for someone that's in, say, the business of running lines (of whatever type – gas, water, copper, etc), it seems extremely hard to justify a position that in effect says, "we've had this right for 40+ years to cross your southeast quarter somewhere, sometime, if we want to, and you can't do with it what you want because we may still want to that someday." That just doesn't seem right.

In Kansas the underlying principle of the problem has already been recognized. In the case of unused or abandoned pipelines easements, which are usually even defined, there

is a 10-year time limit for their existence if the easement is unused or the pipeline abandoned. (KSA 58-2271.) Also, the substance of the changes proposed borders on a codification of the logic and decisions of our own state court of appeals regarding the problems of blanket easements not enforceable unless expressly defined. (Case #96,103.) HB 2186 would seem to statutorily clarify their applicability and in the process make the use of a blanket easement more uniformly consistent and applicable state wide.

This **bill is a legitimate attempt to address the blanket easement problem.** Not being an attorney or revisor, I might word the amendment differently. But the substance is there.

- It causes no change to the present status quo; no party is caused to initiate any action just because of its adoption.
- It is not penal in nature.
- If an easement holder wants to use the easement, then all that is needed is a "*...reasonably defined or expressed use and the recorded...definite and specific description of the easement...*" (What most holders will say they are now doing.)
- If landowner wants changes or adds a use, it can if "*...upon written request* [the entity holding the easement] *provides the property owner and records in a timely manner a reasonable, definite and specific description of the easement appropriate for its use.*" (Again, it's what most will say they are doing now.)

I would encourage your support of the substance and intent of this bill.

My final comment relates to "New Sec. 3." at the end of the bill. I haven't made its connection; maybe it's to something I missed. But the problems addressed by the amendment are not limited to just subdivisions or the planning statutes referenced in Sec. 1 or Sec. 2. The problems can be applicable to any property burdened by blanket easements. Looking at feed lots, wind farms, and other uses, maybe the proposed change could be or should be incorporated in Chapter 58 covering Personal and Real Property rights, maybe in the Article 22 on Conveyances, by substituting the word "subdivision" to read "For any property which contains..." The problems are real; the fix is apparent.

Sincerely,

John T Smith, AICP, Realtor
Mbr, Am. Inst. Of Certified Planners

Enc "Blanket Easements – Their Impact..."

Blanket Easements - Their Impact on Land Owners and Tenants

Case 1

A simple 1945 utility easement agreement between an electric co-op and owners of 175 acres of land allowed easement for the complete area so the owners could have electricity service. A portion of that land, after multiple ownership transfers, in the early 1960's was surveyed, platted and developed for a housing subdivision. The original and currently updated plats define specific utility easement areas along streets and property lines. However, the co-op insists they have a "blanket" easement for all the land based on the 1945 easement and the 1960's platted easements are not enforceable. The 1945 easement does not assign the easement to the then current grantors, successors or assigns. Which set of easements is legal and if the plat easements do not replace the 1945 easements what can be done?

Case 2

Our subdivision plats (3) were recorded with specific utility easements defined and so limited followed by utility service placement within the easements in the 1970's. The land changed ownership numerous times before the land was platted as a 21 private home sites residential subdivision. The utility company now wants to place 3-phase equipment in areas never used by the utility. Service we don't need but is needed for adjacent developments. Our association and our private sub-division lot owners will suffer damage - lose common area trees, a sign, and who knows what else, without relief from the utility - because the utility now wants to have access to land not presently supporting any of their utilities. The utility refuses to vacate the blanket easement.

Case 3

A home owner bought a property that the previous owner had placed a garage on that turned out to be within 41 inches of a pipeline. The easement holder (appellant pipeline company) sought possession and removal of the garage based on alleged encroachment of the company's easement. District court found in favor of defendant home owners in large part because the easement did not expressly define the amount of space the company needed to adequately maintain its pipeline, and there was evidence that it could be maintained with the garage in place. The appeals court affirmed the district court's judgment, noting the company's easement is a blanket easement that does not have specified dimensions (width or location) as it crosses the property.

The above cases are illustrative of problems created by the once prevalent practice of taking a blanket easement on property for a noble and legitimate proposed use, and the at least implied intention of the use ultimately being more specifically described and located. This practice is most common in the areas of utility and public service corporations, transportation, and mineral exploration and pipelines.

The easements are the same whether acquired by purchase, gift, negotiation or condemnation. The end result today is that many properties, either already subdivided, or ripe for subdividing, platting and development, and even agriculture use have clouds to their title and impediments to achieving their highest and best, maybe even desired, use. In some cases, it may even cause problems in achieving any reasonable alternative use.

It may be helpful to clarify the meaning of the terms being used. An easement is a right of one person or entity, the easement holder (dominant tenant), to use the real estate of another (the land owner; servient tenant), for a special use or purpose. It does not include the right to possession or occupation (i.e. ownership) of the land or the right to its profits. Typically, an easement requires specificity in the description of use and location; it must be identifiable.

Blanket easements or rights grew out of a desire or need to acquire a right to access property for a probable use at a to-be-determined location. Distinguished from the easement defined above, a **blanket easement**, lease, or agreement is one where the instrument or order allows the holder to locate its facilities (use) at an undefined location(s) on, over, under, or across the burdened property. While this has existed for decades, in the last generation it has become more problematic with additional growth, land subdivision and development, particularly in areas where there may once have been thought not to be a concern.

To address the problems created by a blanket easement most recent practice requires the acknowledgment and recognition of a blanket easement, lease or agreement only when it is reduced to a specific or defined location within a certain stated time limit, following notice, or upon placement and location of the proposed facility or use. Some states allow a blanket easement only if the instrument creating the blanket easement contains language that upon completion of the initial structure(s) or establishment of the use it explicitly fixes the burden, scope of use, and footprint within the express terms of the instrument and also contains an express statement that the location of the burden shall be fixed to the degree occupied by the initial structure(s) upon the completion of such structure(s).

Minnesota, for example, requires that easements over private property must definitely and specifically describe the easement being acquired. But more importantly, when a question arises as to location, width, or course of an easement, or upon written request by the specific property owner, the easement holder shall produce and record in a timely manner an instrument that provides a definite and specific description, based on the minimum width (dimensions) necessary for the conduct of the business. The production and recording shall take place after the requesting property owner has had not less than 30 days in which to review or object to the terms of the description. This statutory requirement applies to every easement over private property regardless of when the easement was acquired or created or whether obtained by purchase, gift, or eminent domain proceedings.

For the unknown burden and restriction placed on the land owner, however, some states have determined that any blanket easement shall be void as against public and wholly unenforceable. To characterize the situation in lay terms, it is considered unconscionable for the easement holder to hold an entire property hostage indefinitely for an unknown or unidentifiable purpose at an undetermined location.

Kansas Situation.

The use, development, or subdivision and platting of land in Kansas is typically governed by statute in one of three sections. For land generally in or within 3 miles of a city having adopted planning and zoning procedures, KSA 19-752 is usually applicable. For land in unincorporated areas of counties having adopted planning and zoning procedures, KSA 19-2961 is usually applicable. For most other land not covered by planning and zoning procedures, KSA 19-2633 is usually applicable, though there is a question by the courts as to its validity. A fourth area with some possible application and precedence to the issue is KSA 58-2271 relating to pipelines.

It being recognized that blanket easements without some limit, control and definition are not in the public interest, amendment to the statutes governing land subdivision and development is the simplest and most prudent cure to the problems created. A land owner desiring to subdivide and/or develop and use property burdened by a blanket easement should be able to move forward upon giving the easement holder timely notice of his development intentions and have the easement holder provide specified locations consistent with the generally accepted practice appropriate for the intended use.

Almost as a parenthetic comment, it is worth noting that Case 3 referenced above is a Kansas Court of Appeals case (#96,103). The substance of the changes proposed in one sense borders on a codification of the logic and decisions of our own state courts. The outcome of this litigation seems to support by case law decision what the proposed changes would statutorily clarify and in the process make the use of a blanket easement more uniformly consistent and applicable state wide.

Suggested Solution.

The problems created by blanket easements are of state wide importance to Kansans. Clarifying the property rights of landowners, tenants and easement holders is highly desirable, as is the resulting reduction in problems associated with future land use and development in and around cities and counties. Clarifications can be accomplished by amending appropriate statutes to provide for more specifically identifying, locating and recording an easement holder's use within a reasonable time upon request by the landowner, otherwise allowing the landowner unencumbered use of the owned property.

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Westar Energy®

MARK A. SCHREIBER
Director, Public Affairs

Testimony of Mark Schreiber
On Behalf of Westar Energy, Empire District Electric, Kansas City Power & Light, Sunflower Electric Corporation, Kansas Electric Cooperatives, Midwest Energy, ITC Great Plains, Kansas Municipal Utilities, Kansas Gas Service, Black Hills Energy, Kansas Rural Water Association
Before the House Local Government Committee
On HB 2187
February 15, 2011

Good afternoon Chairman Huebert and members of the committee. Thank you for the opportunity to testify in opposition to HB 2187.

The focus of this bill is the use of blanket easements. A blanket easement was routine practice in the middle of the last century. Utilities would contact a landowner and ask for an easement across his/her property to allow the building of a new electric transmission line or oil/gas pipeline. At that time, the utility did not know exactly where the line/pipeline would be placed so the easement was placed on the entire property, for example a quarter section (160 acres). The easements were proper, paid for and recorded per the agreement. HB 2187 would essentially void existing, legal contracts across the state unless a written request is made to the easement holder to reduce the blanket easement. The bill does not allow for recovery of costs.

The utilities and Association listed above have many blanket easements across their service territory. In my company's case, many of these easements were obtained prior to the 1970's by KPL and KG&E, as was the industry practice. The general route of a new transmission line was estimated and a blanket easement negotiated with the landowners. In many cases we didn't know the exact location of the line's centerline until the completion of detailed surveying and design work, which typically was after the acquisition of the blanket easements. Virtually all the easements utilities acquire today are of the "strip" type, which describes our easement as a specific length and width across tracts of land.

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Telephone: (785) 575-8369 / Fax: (785) 575-8119 / Mobile: (785)
mark.schreiber@WestarEnergy.com

Currently, landowners and/or developers contact Westar and other utilities to modify their blanket easements. We request they provide a survey and legal description of the easement to be retained. We prepare a partial release and modification of right of way. Both parties sign and it is recorded. It is the owner's responsibility to clear the land of these easements before platting the subdivision lots.

Thank you again for the opportunity to testify in opposition to HB 2187 this afternoon.

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OXY USA Inc.
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February 15, 2011

The Kansas Legislature
House Committee on Local Government
Kansas State Capitol Building
915 Southwest Harrison Street
Topeka, Kansas 66612

RE: Testimony opposing House Bills 2186 and 2187

Mr. Chairman, Members of the Committee

My name is Brent Sonnier, and I am the Senior Regulatory Advisor for OXY USA Inc. ("OXY"), a wholly owned subsidiary of Occidental Petroleum Corporation, for OXY's Kansas operations. I also serve as a representative of major Kansas oil and gas operators through our trade association, the Kansas Petroleum Council ("KPC"). Our members operate thousands of wells primarily in the Hugoton Field area of Southwestern Kansas pursuant to rights granted via myriad oil and gas leases with Kansas mineral owners, who receive substantial rentals and royalty payments from proceeds generated by the prolific volumes oil and gas we produce. Moreover, the $4.3 billion in annual revenues generated by oil and gas operations in Kansas are the second largest funding source for the State, and the industry provides work for over 28,000 Kansans.

Pending before your Committee are the two captioned bills which would render unenforceable what are termed "blanket easements" on subdivided property unless the easement holder specifically declares such easement defined to an extent "appropriate for its use." Such law could seriously and irreparably impair the Kansas oil and gas industry in its operations and its contributions to the State.

Whereas oil and gas randomly occur in the subsurface in limited geologic settings, the law traditionally has inferred a contractual right under a mineral lease to use as much of the surface of the lease property as reasonably necessary to explore for and develop oil and gas resources to the mutual benefit of the operator and the royalty owner. The law acknowledges that the operator must have the reasonable flexibility to position its wells at the optimum surface locations to minimize the risk of dry holes and to assure maximum recovery of hydrocarbons to prevent economic waste. Thus, because of the random occurrence of such resources irrespective of artificial property boundaries, an operator can not be arbitrarily confined in the right of reasonable use by a restrictive easement on the surface that prevents orderly drilling and development. Efficient and economic oil and gas operations simply could not co-exist with such an untenable limitation.

In point of fact, the current law in Kansas as per case precedent, evolved over several decades, holds that, subject to reasonable accommodation for existing surface use at the time drilling is conducted, the right of reasonable use prevails. Even though directional drilling may be a possible alternative, the law does not force an operator into that more expensive (if

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even profitable) option, when a less-costly vertical well will suffice. If drilling commences after a subdivision is platted, the accommodation doctrine provides adequate legal protection for the subdivision owner. But conversely, the purchaser of property severed from the mineral estate and subject to an oil and gas lease who contemplates subdivision must be aware that future oil and gas drilling is a distinct possibility and plan accordingly. It is just this circumstance of a failure of an individual purchaser to acknowledge pre-existing oil and gas leases on property he subsequently platted and subdivided that has precipitated the filing of the subject bills, with immediate deleterious risk to the economic viability of the State's second largest industry.

That said, in the regrettable event that either of these bills moves out of Committee to full vote, to safeguard rights in contract the relevant language should conclude with the following:

"This subparagraph shall be of no legal effect on the right of the owner of a mineral estate, or of a mineral lessee granted pursuant to an oil and gas mineral lease, to use the subdivided surface property in the exploration for and the production of oil and gas resources as reasonably necessary therefor, or on the right of the owner of a pipeline or utility easement to make reasonable use thereof to the extent of the right conveyed, subject to reasonable accommodation of any pre-existing surface use."

In closing, the KPC respectfully submits that, should these bills pass as written, given the overarching imperative of the right of reasonable surface use to effectively and economically develop oil and gas resources, there will be a firestorm of litigation under the Contracts Clause of the federal Constitution to protect and maintain the right of reasonable surface use implied in the hundreds of thousands of existing mineral leases in Kansas. Such law would have tragic consequences for the Kansas oil and gas industry and the public and private revenues and employment it provides to the State.

The KPC appreciates the opportunity to present this testimony to the Committee.

Respectfully submitted,

Brent G. Sonnier
Kansas Petroleum Council Representative

BGS

STATEMENT OF
PANHANDLE EASTERN PIPE LINE COMPANY, LP
AND
DCP MIDSTREAM, LLC
IN OPPOSITION TO HB 2186 and HB 2187
HOUSE COMMITTEE ON LOCAL GOVERNMENT
FEBRUARY 15, 2011
PRESENTED BY JACK GLAVES

Mr. Chairman and Members of the Committee:

I am Jack Glaves of Wichita, Kansas. I represent Panhandle Eastern Pipe Line Company, LP and DCP Midstream, LLC, which respectively own and operate extensive natural gas transmission and gathering pipelines in Kansas.

We understand and appreciate the problem faced by a developer of land encumbered by a pre-existing easement and we recognize that a request to define the boundaries of the right-of-way to accommodate the use of the remainder of the land should be honored and my clients, in fact, adhere to written partial release policies upon request, as does industry in general, but there are some 85 gathering systems in Kansas, some quite small, so the unintended consequences of these Bills is of concern.

We have two major concerns; sanctity of contract and public safety.

We are concerned with the assertion in this Bill that all blanket easements in a proposed development are declared to be "unenforceable", notwithstanding an existing contract establishing the easement.

This pronouncement is bad precedent, contentious, unnecessary and bound to lead to litigation heaven. The US Constitution (Act 1, Sec 10) proscribes states from enacting laws impairing the obligation of contracts.

There are thousands of miles of natural gas pipeline in Kansas under blanket easements (see Exhibit A). DCP has over 2500. They are critical in getting Kansas gas to market. They are essential to drilling and development and to the Kansas economy.

Under the pending Bills an easement that is contractually binding and under which the pipelines were installed, suddenly becomes unenforceable to the extent it is located in a new subdivision, even if it is in a remote rural area. The bottom line is that part of the pipeline system is deemed valid and part is in jeopardy, even though it may be an integrated system and exists under the same binding contract.

High pressure natural gas transmission and gathering pipelines present unique problems requiring a minimum width of right-of-way to protect the public safety and permit the exercise of the rights granted by the right-of-way contract.

Pipelines and residential development are not very compatible. They have to be inspected, tested, occasionally repaired and replaced, which involves large equipment. The smaller the work area, the greater the danger. A developer has to recognize the obstacle that a pipeline presents and provide sufficient space in his platting to enable the pipeline to exercise its pre-existing rights in an efficient and safe manner.

Obviously, the developer is aware of the existence of the easement when he acquires the land and would presumably discuss the issues presented by its existence with the easement owner and do the platting in conformance with the special circumstances arising from the particular facilities. We respectfully suggest that the resolution of any dispute between the developer and the easement owner could and should be by negotiation and that a legislative solution should be reserved for evidence of a systemic problem. Industry is certainly not aware of such abuse as to warrant jeopardizing existing contracts.

If the Committee senses that there is a compelling need to address the issue then we would suggest that proponents and industry (gas, electric and others affected) try to agree to amendatory language to specifically recognize the sanctity of contract principles and to specify minimum widths, particularly for natural gas transmission and gathering pipelines in developed areas.

Without a specified standard the uncertainty of what is a "reasonable, definite and specific description" would lead to expensive and time consuming litigation to the detriment of all concerned.

We appreciate your consideration and will try to respond to any questions.

Respectfully submitted:

Jack Glaves
Glaves, Irby and Rhoads
155 N. Market, Suite 1050
Wichita, KS 67202
316-262-5181

Testimony of Lon Stanton on Behalf of Northern Natural Gas Company
In Opposition to HB 2186 and HB 2187
Before the House Local Government Committee
February 15, 2011

Mr. Chairman and members of the committee my name is Lon Stanton and I submit this written testimony on behalf of Northern Natural Gas Company, an interstate natural gas pipeline that has done business in Kansas for more than 75 years and that currently operates more than 15,000 miles of pipeline including more than 1,800 miles of pipeline in the state. Northern opposes House Bill 2186 and House Bill 2187.

Northern is deeply concerned that the bills as written threaten in certain instances to void potentially hundreds of fairly-negotiated arms-length contracts agreed to between Northern and landowners for the use of their property

Northern believes that any problems between companies and landowners can and should be worked out on a voluntary basis without the drastic changes, and perhaps unintended consequences, that may be caused by the passage of these bills. Northern urges the committee to reject HB 2186 and HB 2187.

House Local Government
Date 2-15-11
Attachment 5

GACHES, BRADEN & ASSOCIATES
PUBLIC AFFAIRS & ASSOCIATION MANAGEMENT

825 S. Kansas Avenue, Suite 500 • Topeka, Kansas 66612 • Phone: (785) 233-4512 • Fax: (785) 233-2206

STATEMENT OF
SOUTHERN STAR CENTRAL GAS PIPELINE, INC.
IN OPPOSITION TO
HOUSE BILLS NO. 2186 AND NO. 2187
HOUSE COMMITTEE ON LOCAL GOVERNMANET
FEBRUARY 15, 2011
PRESENTED BY NICHOLAS W. HETMAN

Mr. Chairman and Members of the Committee:

I am Nicholas W. Hetman, Senior Attorney for Southern Star Central Gas Pipeline, Inc. located in Owensboro, Kentucky. As the operator and owner of an extensive interstate natural gas transmission pipeline company with significant facilities located in Kansas, Southern Star has a keen interest in the proposed legislation.

A fundamental right pursuant to the United States constitution is the right to contract. Article 1, Section 10, of the U.S. Constitution says, "No State shall ... pass any ... Law impairing the Obligation of Contracts." This contract clause prohibits any state government from passing a law that would interfere with contracts made by citizens, either by weakening the obligations assumed by parties to a contract or by making a contract difficult to enforce.

The Bill of Rights themselves, likewise, included such protection in the Fifth Amendment. This right was affirmed by including it in the Fourteenth Amendment which explicitly binds the states with due process protections. The Supreme Court first granted 14th Amendment protection to corporations in Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886).

Increasingly, government regulators, for example, seem devoted to interfering with this right in order to advance a purported governmental interest.

The proposed language of both House Bills No. 2186 and 2187 contain language designed to deprive holders of historic "blanket" easements of the contractual rights that were achieved thru arms-length negotiations, some dating to the early 20th century. At the time these "blanket" easements were obtained, the parties were dealing with each other as equals. The interest being sought was obtained for compensation agreed up on by the parties, for which the acquiring party obtained the rights necessary to achieve the purpose of the easements. These easements are recorded documents of which any landowner performing a title search could locate. As such, it is traditional case law that since they are recorded and available upon appropriate search, the landowner would take SUBJECT TO any pre-existing easements of record.

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The proposed language would REQUIRE holders of such easements to provide a definite and specific description of the easement, with no compensation being provided for this reduction of rights. If one acquires a right, for adequate compensation at the time of the acquisition, it stands to reason that compensation, again adequate at the time of taking, should be paid to the easement holder.

Even this argument assumes that there does not exist other rights, the taking of which could deprive the easement holder of another contractual right. As an example, if the Easement contains language by which the easement holder has the right to multiple lines on the property, taken at the time to allow the easement acquirer the opportunity to expand its service based on public convenience and necessity, the cornerstone of federally granted Certificates from the Federal Energy Regulatory Commission.

When approached by a landowner, Southern Star traditionally works with the landowner to reach a mutually acceptable agreement by which both interests can be achieved, recognizing that the easement holder is giving up a valuable right acquired by contract. To deprive the easement holder of such a right would appear to fly in the face of our most fundamental rights.

If there was a specific exemption for interstate natural gas transmission pipelines, Southern Star's concerns would be significantly decreased. Otherwise, this could be seen as an interference with interstate commerce since the easements in question are often a vital part of the fabric of the interstate natural gas system.

Respectfully submitted,

Nicholas W. Hetman

Southern Star Central Gas Pipeline, Inc.

4700 Highway 56

Owensboro, Kentucky 42301

270-852-4941

Mr. Chairman, members of the committee, we believe that House Bill 2186 and 2187 could create uncertainty and litigation affecting our business operations in Kansas, and therefore BP cannot support these proposals.

As you know, BP is a significant gas producer in Kansas, and we operate a significant number of gathering lines, pipelines, and other facilities that were installed beginning in the 1950's. The presence of many such facilities and lines were recorded using blanket easements.

We understand that conflicts may arise regarding surface development, particularly when the surface and mineral interests have been severed. However we work diligently with surface owners to resolve any differences while assuring the protection of public health and safety and the environment. The cooperative relationships between mineral developers and operators like BP and the surface owners help assure that the surface owner's existing or proposed activities can be conducted safely and need to be encouraged. The proposed measures, declaring such easements to be unenforceable, we believe will discourage this cooperation and lead to conflicts and litigation.

In addition, we are concerned about the application of the language in the bill in perhaps unintended ways. For example, there are often on-lease gathering lines, production and other facilities necessary to allow production of the resource. These facilities have been constructed in accordance with surface use rights granted under standard oil and gas leases and mineral deeds, which could be construed as blanket easements. The proposed bills may, therefore jeopardize the mineral owner's or lessee's property rights by voiding the right to reasonable use of the surface, affecting the basic oil and gas lease and mineral deed. Kansas courts have consistently upheld the right of the mineral lessee and the mineral owner to make reasonable use of the surface to develop the land for oil and gas production. BP believes it has vested property rights for the reasonable use of the surface, which should not be disturbed by the bills under discussion.

We will be happy to be part of any process to study and thoroughly understand the potential implications of House Bills 2186 and 2187, and to determine whether more reasonable and less far reaching mechanisms are available to address concerns about blanket easements.

Mr. Chairman, members of the committee, thank you very much for your time and attention.

Sincerely,

E. R. (Dick) Brewster
E. R. Brewster & Associates, LLC
For BP America, Inc.

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Date 2-15-11
Attachment 7

BRAD SMOOT
ATTORNEY AT LAW

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STATEMENT OF BRAD SMOOT
LEGISLATIVE COUNSEL
ANNEXATION REFORM COALITION
HOUSE LOCAL GOVERNMENT COMMITTEE
REGARDING 2011 HOUSE BILL 2294
February 15, 2011

Mr. Chairman and Members:

On behalf of the Annexation Reform Coalition, a group of rural landowners whose land was annexed into the city of Overland Park in 2008, we thank you for this opportunity to discuss HB 2294. This bill is the result of years of study by the Kansas Legislature. The Special Committee on Eminent Domain in Condemnation of Water Rights recommended the contents of HB 2294 in 2008 and the House Local Government Committee combined all three into a bill in 2009 and passed it to the Senate. A version of this bill (House Sub for SB 51) was passed by both houses but vetoed by Governor Parkinson.

As Committee members probably know, Kansas law has two statutes that allow municipal annexations. One, K.S.A. 12-520, contains several specific situations in which annexation is allowed (for example, when the owner consents) and some limitations (such as when the land to be annexed involves more than 21 acres). K.S.A 12-520 is the statute used by most cities most of the time and the one with which most of you may be very familiar. The other statute, K.S.A. 12-521, gives cities authority to annex land of any size, without owner consent and without a public vote of those to be annexed. All that is required is approval by the county commission. Only a few cities have even used this "521" annexation procedure and even these cities rarely use it. The provisions of HB 2294 only affect "521" annexations; not the more common "520" annexations and thus this bill has no impact on the overwhelming majority of Kansas cities.

HB 2294 is an effort to place some reasonable limits on the nearly unbridled authority of local government to annex under section "521." As previously noted, there is no limit on the amount of land that may be annexed under this provision. For example, the city of Overland Park attempted to annex about 15 square miles of rural land in 2008, probably the largest city land grab in state history. The Johnson County Commission disallowed about half the annexation but still the annexation was enormous and unusual by any standard. Many of your colleagues who have reviewed this issue, some of them former city or county officials, are stunned to realize that "521" annexations do not contain the 21 acre limitation found in the more commonly used "520" annexation statute. Since nothing in the "521" statute limits the size of the annexed territory, the interim committee and the House have recommended the 21 acres limit on unplatted agricultural land. See Section 4(b). It's worth noting that even this limitation only applies if the land is "agricultural" and "unplatted." All other land would remain fair game for cities to annex under K.S.A. 12-521.

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A second safeguard for "521" annexations is built into a new election process (see Section 4(f)). The electors in the area to be annexed would be given an opportunity to vote by mail ballot on whether the annexation should be approved with the decision being made by majority rule. Again, many lawmakers are surprised to learn that we don't permit elections on a matter as important as annexation. We have reviewed the laws of other states and can only find a handful of states that allow such annexations without the right to vote. Indeed, such involuntary annexations are not allowed at all in many states. Lawmakers have found it odd that Kansas voters are allowed to express themselves at the ballot box on issues such as city/county consolidation; city incorporation; expansion of city services to unincorporated areas; creation of a variety of service districts like water and libraries, etc., but not involuntary annexations. Voters even have a say in noxious weed control but no say in whether they will be forced against their will into the zoning, traffic and taxing obligations of a city.

The final piece of the interim committee recommendation was the proposal to shorten the time in which counties must review whether a city has met its obligations to provide municipal services to a newly annexed area. See Section 6. Previous law required the review after 5 years and the amendment contained in HB 2294 shortens that period to 3 years. We also support this provision and believe that newly annexed landowners shouldn't have to wait 5 years before a city is held accountable for providing the promised services.

HB 2294 contains two provisions the Legislature as not seen before. Both are the result of the litigation pending from the Overland Park annexation of 2008. The first, Section 4(g)(2) allows a landowner who has challenged the legality of a 521 annexation to recover reasonable attorney's fees should he or she prevail in court. The Overland Park annexation litigation has already taken two years and hundreds of thousands of dollars in attorneys fees. The aggrieved landowners have spent more than $220,000 and the city more than $400,000 on legal fees alone. You might want to remember these numbers when opponents of this bill suggest that the current law "works well." You might also remember the statistics about our annexation laws prepared by your legislative staff. The 2011 report indicates that the last decade has included more than 24 bills introduced, with 7 going to the Governor and 3 of those vetoed. Contrary to the view of opponents, Kansas annexation law is very controversial and doesn't appear to many Kansans to "work well."

Second, during the Overland Park annexation litigation, it was discovered that the annexation of large chunks of unplatted farm land raised a disturbing question about the loss of one's constitutional Homestead Exemption rights. First adopted by our Kansas convention in 1859, Article 15, Section 9 grants protection from debt collectors for 160 acres of land in the county and 1 acre in an incorporated city. When a rural resident's land is annexed by a city, the constitutional protections are reduced from up to 160 acres to 1 -- loss of up to 159 acres of constitutional security provided to Kansas farm families

and rural residents. While this may not be a problem when the annexation is consensual as under K.S.A. 12-520, it is an alarming result when farmers and other landowners are dragged unwillingly into the city limits without consent or even the right to vote. The District Court of Johnson County recently ruled that such is the current state of the law. New Section 1 is an attempt to address that issue by preserving the Homestead Exemption for such rural landowners at least until the property is sold after annexation. Of all the injustices created by the current "521" annexation process, the destruction of constitutional Homestead Exemption rights may be the most shocking.

You are likely to be told that HB 2294 will cripple economic development although few, if any, specific illustrations of this claim have been provided. Since most states either don't allow involuntary annexations or allow landowners the right to vote and most cities don't even use the "521" statute, we fail to understand why this bill creates the "sky is falling" catastrophe the opponents have alleged. Instead, we think it is time Kansas got in line with other states in protecting its property owners from unwarranted and unlimited municipal land grabs.

Thank you for consideration of our views.

APPROVE HB 2294

House Committee on Local Government
RE: House Bill No. 2294
February 15, 2011
Topeka, Kansas

Testimony Presented By:
Norman C. Pishny
18750 Antioch
Bucyrus, KS 66013

Homestead Act:

The Kansas Constitution (Homestead Act) guarantees that "160 acres of farming land, or... one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner" is exempt from forced sale under any process of law (Kansas Constitution, Article 15, § 9). K.S.A. 60-2301 also protects our homestead rights. Further statutes also recognize the sanctity of the homestead. For example, the homestead may be set aside by the children of the deceased person under our probate code (K.S.A. 59-2235). The surviving spouse is also "entitled to the homestead" under our probate code (K.S.A. 59-6a215). Homestead rights are enshrined in our state constitution, but when annexed into an incorporated town, the liability protection is immediately reduced from 160 acres to 1 acre.

HB 2294 would protect the landowner's Homestead Act rights until the land is sold. Passing this measure would help get the statute in sync with the Kansas Constitution.

Where have all the flowers gone?

If a farmer owns greater than 21 ac. of unplatted agricultural land, it is not ripe for development. If he does not want to develop his farm at this time, and does not desire city services, he should not be required to enter the city and be subjected to city taxes and urban ordinances on his farm (e.g. prohibition against ATVs and chickens).

Even the City of Olathe provided written testimony to the Special Committee on Eminent Domain in Condemnation of Water Rights in 2008 that "The City maintains its belief that rural and/or agricultural areas should remain in the unincorporated areas of Johnson County and that only as these areas urbanize, should they become part of the city."

K.S.A. 12-520 requires landowner consent for such a takeover. HB 2294 adds that protection to K.S.A. 12-521 as well.

An Earlier Tea Party:

Kansas annexation statutes subject citizens to taxation and governance by a government they did not vote for. "Imposing Taxes on us without our Consent" was one of the "repeated injuries and usurpations" justifying our war of independence against Great Britain and the Boston Tea Party of 1773. We don't want to go to war, but do want our right to vote.

Section 2 of the Kansas Bill of Rights states "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

K.S.A. 12-520 and K.S.A 12-521 are by their very nature contrary to the premise on which our country was founded: government by the governed. The Declaration of Independence states "That to secure these rights, Governments are instituted among Men, **deriving their just powers from the consent of the governed.**"

Annexation statutes must be written from the perspective that the government serves the people, not the other way around. Yet, neither K.S.A. 12-520 or K.S.A. 12-521 provide for a vote of the people on what they want done with their homes and land. **This is tantamount to taxation without representation.**

- In Johnson County in 2008, our citizen coalition sent a postcard survey to all of the homes Overland Park sent its annexation petition to (540 houses in 15 sq. miles). The results were overwhelming: 88% of the residents returned their cards and 99% of those (471 of 477) were opposed to the Overland Park annexation proposal; but under current law, this clear message from residents doesn't matter. Kansans can be hit with huge additional and higher taxes (property, sales, franchise, special use & permit, etc.) from a government in which they had no vote.

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- The BOCC approved a partial annexation of over 8 sq. miles even though 24% of Overland Park was still unplatted. The land annexed was a larger land mass than the vast majority of Kansas towns and cities, without any vote of the people. According to www.maps-n-stats.com Hays is 7.5 sq. miles, Garden City is 8.5 sq miles, and Emporia is 9.9 sq. miles.

As Kansans, we get to vote on sewers, swimming pools, and a variety of other issues that affect us. Yet none of us can vote if a city wants to take over our land and home and put us inside the city boundaries to increase their tax base. **Kansas is one of only a handful of states left in the entire nation where citizens do not have the right to vote on an involuntary takeover by a municipality.**

HB 2294 provides Kansas citizens their basic right to vote on their future and helps protect their property rights.

Equal Protection is a Constitutional Right:

The 14th amendment of the U.S. Constitution provides for Equal Protection of all citizens. Kansas annexation statutes ignore that protection.

Throughout the involuntary annexation process in Kansas, the burden of proof (manifest injury) is upon the citizens. They have no representation during the proceedings, but are up against cities with seemingly limitless taxpayer funds.

- Prior to the February 2008 ruling, Overland Park had already paid outside legal consultants nearly $400,000 of taxpayer dollars for their work on the annexation. That is in addition to the city's in-house legal staff of 6 attorneys. City staff spent taxpayer dollars to generate more than 90,000 pages of documents for the unpopular annexation.

If landowners want to fight a BOCC approved annexation, they must file a lawsuit in District Court. This is an expensive and time consuming process, further frustrated by the fact that their own tax dollars are spent by the City and County to fight the lawsuit; but it is the only recourse the current law provides.

- Even if the citizens win an appeal, they are not compensated for their time and dollars spent to fight the illegal government takeover.

HB 2294 provides for reimbursement of reasonable attorney fees if a brave sole does go to the immense time, effort, and high costs to step forward and fight a city's illegal annexation in the judicial system (while at the same time, his tax dollars are paying the city's attorneys). This would be an important step in leveling the playing field.

What To Do:

The courts have ruled that the purpose of the annexation statutes is to protect the rights of landowners. *Leawood*, 245 Kan. at 283, Syl. ¶2, 777 P.2d at 831 (1989). But this is simply not what happens today.

When talking to individuals throughout the state regarding involuntary annexation attempts, citizens are appalled and outraged that Kansas' law does not give them the right to vote and they can loose their Homestead Act rights.

Some cities feel they must be able to take land without having the consent of landowners for city growth and taxes. We could argue about what dictates economic development. We could argue about urban vs. rural environments and disparate needs. We could argue that a city knows better than a landowner when and how to develop their land. **Yet, how can anyone argue that the people should not have a right to vote on their own future and should maintain their basic rights bestowed by the Kansas and U.S. Constitution?**

HB 2294 addresses these key flaws in the current Kansas annexation statutes:

- It synchronizes annexation statutes with the Kansas Constitution's Homestead Act.
- It prevents cities from seizing unplatted agricultural land before its time without owner consent.
- It implements a basic citizens' Right to Vote on their property and future.
- It provides for reasonable reimbursement of attorney fees for anyone brave enough to fight for their rights against uncontrolled cities.

VOTE to APPROVE HB 2294 and Give Citizens Back Their Rights.

AMERICANS FOR PROSPERITY
KANSAS

February 15, 2011

House Bill 2294
House Local Government Committee

Mr. Chairman and members of the committee,

I am proud to provide testimony today, in representing the more than 40,000 members of Americans for Prosperity-Kansas.

AFP Kansas supports HB 2294 relating to annexation. We support the bill because it protects private property rights and ensures Kansas' citizens rights of self-determination.

Cities should not be void of the application of the democracy the country was founded upon. The principle of consent of the governed has been a hallmark of America for more than 230 years.

Democratic rights and freedoms shouldn't be sacrificed upon the questionably applied mantle of "economic growth." Territory growth of a municipality is not economic growth. If it were, Kansas would be an economic giant as our laws have few limits on unilateral annexation.

Government growth is hardly a precursor of economic growth; it is the free market and individual decision making that has fueled our nation's and state's economy.

Governments should not be allowed to impose its will without consequence and without any boundaries.

Allowing for a mail ballot vote of the citizens impacted by the proposed annexation is an appropriate safeguard against over zealous annexation.

Thank you for the opportunity to provide testimony in support of HB 2294.

Derrick Sontag
State Director
Americans For Prosperity-Kansas

House Local Government
Date 2-15-11
Attachment 10

OVERLAND PARK
KANSAS

ABOVE AND BEYOND. BY DESIGN.

8500 Santa Fe Drive
Overland Park, Kansas 66212

913-895-6000 | www.opkansas.org

Testimony before the
House Local Government Committee
Regarding House Bill 2294
By Erik Sartorius

February 15, 2011

The City of Overland Park appreciates the opportunity to appear before the committee and present testimony in opposition to House Substitute for House Bill 2294. For over 100 years, Kansas has allowed its elective representatives to determine whether a city should be able to annex land, and there has never been a referendum on annexations.

Primarily, HB 2294 seeks to amend K.S.A. 12-521. This statute generally applies when a city cannot annex land under K.S.A. 12-520 or -520c, and the city must petition the board of county commissioners for approval to annex all or some of the land set out in the petition. The city must prepare a plan for the extension of services to the area and present other information to the county board which holds a public hearing on the proposed annexation. The board of county commissioners determines if the proposed annexation will result in manifest injury to the residents of the area proposed to be annexed if the annexation is approved, or to the petitioning city if the annexation is denied. In determining manifest injury, the board must consider a minimum of 14 factors. Any aggrieved landowner can appeal the board's decision to the courts if the annexation is approved.

If the board of county commissioners rules in favor of a petition to annex land, HB 2294 dictates an election must be held in the area proposed to be annexed. If a majority of the qualified electors "residing in the area proposed to be annexed and voting" reject the annexation, the petitioning city may not propose to annex the land for four years following the election. This prohibition would apply even if landowners consented to annexation.

The proposed bill is based upon the erroneous assumption that we cannot trust local elected officials to do their jobs and make decisions that are in the best interest of the people they serve. Elected officials in cities and counties are committed to serve the public interest. In our system of government, officials are elected to represent the people and to make decisions on their behalf, in most instances without any right of referendum. In large measure, this is due to the complexity of the decisions that elected leaders have to make.

It is hard to understand why a decision this complicated (the public record for Overland Park's 2008 annexation contained 3,000 pages of documents) should be left to what might be a

minority representation of resident voters. An annexation under K.S.A. 12-521 might have only a dozen or fewer residents who are registered to vote. Even when there are many landowners in the area proposed to be annexed, under this bill a majority might not be eligible to vote. In the 2008 Overland Park annexation, 61% of the land (other than right-of-way tracts) was owned by resident and non-resident entities (businesses and trusts) with no right to vote.

Finally, an underlying premise for petition annexations reviewed by a board of county commissioners is that consideration is given to what is best for the community at large. Narrowing the focus only to the effect of the annexation on the immediate area via an election would remove the broader perspective current law requires.

Another provision contained within HB 2294 would prohibit cities from annexing pursuant to K.S.A. 12-521 any portion of any tract of land that is 21 acres or more and devoted to agricultural use. Such a parcel could only be annexed with the consent of the landowner. Although the provision might seem well-intended, it will interfere with the proper growth and development of city and county governments and the regions in which they exist

K.S.A. 12-520(b) already prohibits cities from annexing such tracts unilaterally—meaning without the consent of the property owner and without the approval of the board of county commissioners. This same prohibition does not need to be applied to when cities must petition the board of county commissioners for approval to annex land.

Under K.S.A. 12-521(c)(1), the first factor for the board of county commissioners to examine when determining whether to permit a city to annex an area is the "extent to which any of the area is land devoted to agricultural use." However, the legislature recognized when they drafted K.S.A. 12-521, that numerous other factors might weigh in favor of annexation even if some the area proposed to be annexed consisted of parcels of land of 21 acres or more and devoted to agricultural use. The City believes that the board of county commissioners is in the best position to make decisions on the annexation of such parcels on a case by case basis applying the specific criteria that a board is required to consider.

It is important that as cities grow, they be able to bring in large parcels of land as well as smaller ones. At least in growing metro areas such as Johnson County, it is imperative that cities be able to plan, in conjunction with the present landowners, for the future use of large parcels of land whether they are currently devoted to agricultural purposes or simply vacant. Planners will confirm that land use planning is done best when it can be done comprehensively rather than on a piecemeal basis.

There is no reason that agricultural lands cannot be located within the boundaries of a city. Overland Park and other metropolitan cities have zoning classifications for agricultural land. Indeed, in its 1985, 2002 and 2008 annexations, Overland Park adopted Johnson County's zoning regulations so that the annexations would not affect existing agricultural uses. Under state law, annexed land comes into a city with its county zoning in place, and the use of such land becomes a lawful non-conforming use that the city cannot prohibit.

Most importantly, the mere fact that a city annexes agricultural land does not mean that such land must cease its agricultural use and be converted to urban development. The land use will change only if the owner of the land chooses to change it. In addition, the land cannot be negatively affected by city development if it is annexed any more than it would be by county development or city development that would occur at the boundaries of the enclave if it is not annexed. In any event, agricultural land in urban areas will face pressures from surrounding development whether the agricultural land is within cities or outside of cities.

In short, the annexation of tracts of land of 21 acres or more and devoted to agricultural use can provide benefits to the community as a whole and is not detrimental to the owner of the land or the community. Where such danger exists as part of an annexation, the board of county commissioners has the right to deny a city from annexing such land.

A new, disconcerting element is brought forward in House Bill 2294 in Section 4(g)(2). Specifically, attorneys' fees and costs would be required to be awarded to any landowner prevailing in a challenge to an annexation conducted under K.S.A. 12-521. Under Kansas law, attorneys' fees are generally not awarded. Should the committee feel compelled to include such language, it should be amended to award fees and costs to the prevailing party.

Overland Park would like to note its support for most of the provisions in Sections 5 and 6 of House Bill 2294. Current law generally requires that the board of county commissioners hold a public hearing 5 years after a city annexes land to determine whether the city is providing the services it set out in its service extension plan which was submitted in support of its proposed annexation. If it has not, then the county commissioners must hold a second hearing 2½ years later to determine if the city has cured the deficiencies in its performance. House Bill 2294 would reduce the time period between the annexation and the first review to 3 years, and reduce the time in which the city has to cure deficiencies to 1 ½ years. In addition, the bill provides a remedy for landowners in the annexed area if the county has not held the required review, found in Section 5(c) and Section 6(g).

The City also believes it is a sensible step to require that cities provide copies of their annexation service plans to the board of county commissioners, as seen in Section 3(b). Overland Park produces detailed service plans tailored to the area proposed for annexation. The City has submitted three petitions for annexations to the Johnson County Board of Commissioners during the course of Overland Park's 50 years of existence, and the accompanying service plans have ranged in size from 11 pages in 1985 to 63 pages in 2002 to 87 pages in 2007.

New Section 1 provides that homestead rights attributable to land prior to its annexation remain with the land after annexation until it is sold. The City does not have a position on this provision, per se. In general, however, the City opposes retroactive applicability of statutes, as seen in Section 8 of HB 2294. We are not aware of a compelling reason for doing so in this instance, nor do we believe there is a necessary reason for this bill to take effect at publication in the *Kansas Register* rather than the statute book.

House Substitute for House Bill 2294 will needlessly complicate an annexation process that has suited the state well for over forty years in its current version – over 100 years overall. The legislature carefully crafted statutes that recognize the need of cities to grow while placing proper oversight with counties to weigh the benefits of larger annexations on the community as a whole. The City of Overland Park disagrees with proponents who say this will not harm cities, and asks that the committee reject House Substitute for House Bill 2294.

LEAGUE OF KANSAS MUNICIPALITIES

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To: House Local Government Committee

From: Don Moler, Executive Director

Re: Opposition to HB 2294

Date: February 15, 2011

First I would like to thank the Committee for allowing the League to appear today in opposition to HB 2294. The history of the Kansas annexation statutes is long and storied. I will not bore the Committee with all of the details and nuances of its development today. Suffice it to say, the annexation laws, as they are currently structured, are the result of a major conflict and compromise which occurred in the mid-1980's. The League was a major player in this struggle and worked with many interested parties to reach the eventual compromise which led to the current statutes we see today. As far as the League knows, the annexation statutes have worked well over the past 24 years, and we believe they continue to work well today.

The Committee should be aware that what is suggested by HB 2294 is a significant change in public policy and one which should not be undertaken lightly. There is always a natural tension involved between landowners and cities when cities are growing as a result of economic development, population changes, and the need for public services. We understand that landowners feel the need to be protected, and that is why there are so many protections currently found in the Kansas annexation statutes. The simple reality is that to adopt the language found in HB 2294 would effectively eliminate most K.S.A. 12-521 annexations, and would completely reverse many years of sound public policy in this state.

HB 2294 provides that: "(b) No portion of any unplatted tract of land devoted to agricultural use of 21 acres or more shall be annexed by any city under the authority of this section,(K.S.A. 12-521) and amendments thereto, without the written consent of the owner thereof."

It goes on to say that: "If there are qualified voters residing in the area proposed to be annexed, then the county election officer shall conduct a mail ballot election under the provisions of K.S.A. 25-431, *et seq.*, and amendments thereto, in the area proposed to be annexed within 60 days of such certification. If a majority of the qualified electors residing in the area proposed to be annexed and voting thereon approve the annexation, the city may annex the land by passage of an ordinance. If a majority of the qualified electors residing in the area proposed to be annexed and voting thereon reject the annexation, the lands shall not be annexed and the city may not propose the annexation of any such lands in the proposed area for at least four years from the date of the election."

HB 2294 would effectively eliminate petitioned for annexations under K.S.A. 12-521 where the county commission now has the ability to review and approve or reject proposed city annexations. It would

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replace the decision-making of the county commission in those counties with a vote of the people who live in the area, who would be largely motivated by self-interest, not what is best for the community at large. Ultimately, HB 2294 takes the decision-making authority away from the elected county officials, who represent the individuals in the area to be annexed, and replaces it with a vote of the people who live in the area. The idea that a handful of landowners should be determining what is best for the community at large is bad public policy, and we would strongly urge this committee to reject it out of hand. Similarly, the 21 acre limitation is merely a device intended to eliminate the current city power to request approval from the county commission to annex larger tracts of land. This too is poor public policy, and the League would urge the committee to reject it as well.

I thank the committee for allowing our testimony today, and will be happy to answer questions at the appropriate time.

CITY OF TOPEKA

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TESTIMONY

TO: The Honorable Steve Huebert, Chair
And Members of the House Local Government Committee

FROM: Whitney Damron
On behalf of the City of Topeka

RE: HB 2294 – An Act concerning cities; relating to annexation.

DATE: February 15, 2011

Good afternoon Chairman Huebert and Members of the Committee. I am Whitney Damron appearing before you today on behalf of the City of Topeka in general opposition to HB 2294 that would restrict a city's ability to utilize annexation authority by petition to its county commission, also known as 12-521 annexation.

Last week I appeared before you expressing the City's concerns with HB 2065, which was targeted at a city's use of unilateral annexation authority (K.S.A. 12-520). HB 2294 would change the way a city seeks to annex property through the petition process – i.e., petitioning the county commission for the opportunity to annex property adjacent to a city.

Our concerns with the bill are as follows:

1. In Section 10 (page 10, lines 39-40), the act would become effective upon publication in the *Kansas Register* with its provisions made effective as of January 1, 2011 as outlined in New Section 1 (page 1, line 10).

Comment: The City believes it is not appropriate to adopt legislation that takes effect at a date/time preceding the bill's introduction and adoption. While the Legislature has on occasion adopted *ex post facto* laws under special circumstances, we do not believe a change to longstanding annexation law warrants such treatment.

2. Section 4. (f) provides for an election on the annexation following approval by the county commission of the qualified electors within the area to be annexed.

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Comment: Qualified voters and property owners are represented by the county commissioner or commissioners where the property is located who have to consider not less than fourteen factors in making a determination whether to allow a 12-521 annexation to proceed. Lack of an elected representative is often cited as a reason to repeal or limit unilateral annexation authority. Such is not the case with a 12-521 annexation. An additional factor for consideration is that under HB 2294, the person or persons allowed to vote for or against an annexation may not be the property owner and could create a situation where a property owner requested a city to annex their land, but a tenant, apartment dwellers or non-owner residents are allowed to vote it down.

3. Section 4. (b) found on page 4, on lines 16-18 prohibits a city from annexing more than 21 acres of unplatted agriculture land without the written consent of the owner.

Comment: The 21 acre limitation is found in 12-520 (unilateral annexation authority) and has no real applicability to 12-521 annexations, as the county commission is in place to safeguard property owner interests. A 21 acre limitation on petition annexations is an arbitrary number and would be highly detrimental to a city's ability to manage its growth.

4. Section 4. (g)(2), found on page 7, lines 6-8 requires attorney fees to be paid if the landowner successfully appeals the decision to annex their property.

Comment: This section mandates attorney fees for a successful landowner, but is silent in the case where a landowner loses. Kansas law traditionally requires each party to pay their own attorney fees. Should the Committee desire a change in this policy, we believe the judge can make a determination as to whether fees should be awarded. In addition, fees should be allowed for either side, not only the aggrieved landowner or qualified elector.

Closing Remarks.

As we testified on HB 2065, the City of Topeka has generally not opposed changes to various annexation notice provisions, efforts to compel a hearing by a county commission, shortened timelines for production of an extension of services plan or limitations upon future annexation attempts if an attempt to annexation fails or land is de-annexed. We do not oppose those changes found in HB 2294, either.

We are opposed to the substantive amendments proposed to 12-521 annexations that are found in the bill that materially impact a city's ability to utilize the petition annexation process, including providing for a post-decision vote by residents in the affected area and would urge this Committee to maintain current law. As we noted last week, these bills are generally brought to the Legislature as a result of local disputes that have or are being worked through the legal process. By and large, annexation laws are working; both 12-520 (unilateral) and 12-521 (petition) and no changes are needed. Legislation such as HB 2294 affects all cities and counties in Kansas – more than 700 municipalities, of which 2-4 are before you today seeking change.

On behalf of the City of Topeka, we ask for you to reject changes to longstanding annexation law and not pass HB 2294. I would be pleased to stand for questions at the appropriate time.

Thank you.

WBD

Testimony of Doug Mays
before the
House Committee on Local Government
February 15 2011

House Bill 2294

There are few issues that come before the legislature that cause more concern than those involving property rights. Indeed, many who are in favor of restricting or forbidding cities from growing via annexation would site the rights of property owners as their reason for seeking such legislation. Yet, HB 2294, by requiring a referendum of voters in any area proposed to be annexed, potentially robs land owners of the very rights that the proponents claim to be protecting.

The problem lies in the difference between voters' rights, and land owners' rights. The two are not necessarily the same people. Not everyone that resides on a tract of land is the owner of that land. Likewise, not everyone who owns a tract of resides on it. This difference would, if HB 2294 were to become law, create situations where land owners have no input as to whether or not their land would become a part of the city.

Many land owners request annexation, and many opposed it. If, for example a city were to attempt to unilaterally annex a tract of land owned by Mr. and Mrs. Brown who oppose annexation, but live elsewhere, have a renter who resides in the old farmhouse on the tract in question. Mr. and Mrs. Brown don't want their land annexed, but the renter likes the idea. As the only qualified voter on the property, the renter is the one who decides the future of Mr. and Mrs. Brown's land.

Likewise the reverse could be true with a land owner who welcomes annexation, with the renter rejecting it. Either way, it is the property owner, under HB 2294, has no rights unless the owner happens to reside on the land. Land owned by governments, corporations, trusts offer additional troubling scenarios.

This is a defective bill that will not solve the perceived problems associated with annexations. The Legislature should not be in the business of enhancing one set of citizens' rights, by diminishing those of others.

I ask you to not support the passage of HB 2294.

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Overland Park
Chamber of Commerce

Testimony in opposition to HB 2294

Submitted by Jennifer Bruning
On behalf of the Overland Park Chamber of Commerce

House Local Government Committee
Tuesday, February 15, 2011

Chairman Huebert and Committee Members:

My name is Jennifer Bruning, and I am Vice President of Government Affairs with the Overland Park Chamber of Commerce. I am submitting written testimony today in opposition to House Bill 2294 on behalf of our Board of Directors and our nearly 1,000 member companies.

One of the standing priorities of the Overland Park Chamber is to oppose changes to statutes further restricting a city's ability to annex unincorporated land needed for growth. Our Chamber has witnessed the successful growth of Overland Park for many years, and we believe it is due in large part to the city's willingness and ability to plan strategically to accommodate growth.

Throughout our history of development and growth, annexation has been a tool used by area cities to successfully allow our area to grow. Planning for growth is a fundamental responsibility of cities, and we believe HB 2294 will severely impact that ability should the proposed election requirements and annexation restrictions be implemented.

First, we see several possible issues associated with the election provisions of this bill. Residents already have a "vote" in the process because they elect the county commissioners who are involved in determining if the annexation should go forward or not. Elected officials in cities and counties are committed to serve the public interest, and we believe the process currently in place has been shown to work well and provides multiple opportunities for review and evaluation before annexation moves forward.

Second, the proposed agricultural land restriction (21 acres or more) could cause future growth in cities and counties to have unnatural gaps in an otherwise orderly development pattern by causing "leap frog development," thus leaving holes in a city where annexation consent is lacking from a landowner. This results in inefficient development. These fragmented and non-contiguous land uses can result in higher development costs and higher service costs resulting in higher taxes to citizens in the area.

HB 2294 would impede a city's ability to plan for and accommodate growth, causing the natural growth that is going to occur to be less efficient and more costly. In our area, policies and procedures are in place now to

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Overland Park
Chamber of Commerce

allow for the planning and future use of large parcels of land whether they are currently devoted to agricultural purposes or simply vacant. Good planning is done comprehensively, not on a piecemeal basis. For all these stated reasons, we urge you to oppose HB 2294. Thank you very much for your consideration.

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