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TESTIMONY IN SUPPORT OF HOUSE BILL 2483
January 31, 2012 - Committee on the Judiciary

INTRODUCTION: HB2483 has to do with the procedure on appeal from final decisions of a local BZA/board of zoning appeals (KSA 12-759(f)) or other city/county final decision (KSA 12-760). The current rule is that appeals from final decisions must be made within 30 days. That would not change.

The question being addressed by HB2483 is what happens after a court has reviewed a matter appealed to it (which for this testimony I refer to as Final Decision 1 following Round 1 proceedings) and the Court orders remand back to the BZA or city/county for further review in remand proceedings (which for this testimony I refer to as Round 2 and Final Decision 2).

REASONS FOR HB2483: (a) **PROCEDURALLY:** Procedurally, if there is continuing disagreement over the Round 2 proceedings at the BZA or city/county level per the remand order, the parties will seek further intervention of the district court about Final Decision 2. HB2348 keeps Final Decision 2 in the same court and case number as Round 1. Existing statute requires a party appealing Final Decision 2 to start all over again with a new case file, filing fee, service of process and, most likely, a new judge

HB2348 simplifies procedure and makes it more "user-friendly" by keeping jurisdiction in the same district court and case file where the district court has been looking at the matter all along and from which the remand was ordered (whether directly by the district court or back from an appeals court ruling).

(b) **SUBSTANTIVELY:** Substantively, HB2483 keeps the district court in an oversight role during the Round 2 remand proceedings. This oversight gives better balance after whatever went wrong in Round 1. The extra balance is needed because in Round 2, the BZA or city/county has extra advantages. The BZA or city/county in Round 2 will have the benefit of the guidance of the courts from the remand order. The BZA or city/county can re-review in their proceedings (or closed sessions for a BZA as quasi-judicial) to touch up what went wrong in Round 1. Further, the BZA or city/county then has wide latitudes of reasonableness and the big benefit of a presumption of fair play on the side of the BZA or city/county which leaves an applicant an almost impossible burden to overcome. Having court oversight as the default rule balances the remand process of these BZA and city/county remand proceedings.

PROPOSED CHANGES BY HB2483: On page 3 please note the two proposed changes:

1. To KSA 12-759 (f) the following is added (applying to Board of Zoning Appeals decisions):
The district court shall retain jurisdiction of the matter for any remand proceeding.

2. To KSA 12-760 the following is added (applying to other city/county decisions): *The district court shall retain jurisdiction of the matter for any remand proceeding.*

POTENTIAL PROBLEM AND POSSIBLE AMENDMENT. I am thinking an objection to HB2483 is that the change could negatively affect the ability of courts to reach final orders and close cases. The district court may not want to or need to keep its file "open" during Round 2 particularly if the parties don't have any interest in doing so. My new suggestion today is to address this objection with an amendment to the proposed HB2483. With this amendment the default position is still that the court keeps jurisdiction during a remand but that the court can otherwise state in its order that it won't. The parties can argue for or against the court retaining jurisdiction as a part of Round 1 appeals. If the court does not keep jurisdiction, then the parties have clarity that any Round 2 proceedings will be with a new filing.

Here is what I think could be better language for the HB2483 changes (adding in bold):

***In any remand ordered under this statute**, the district court shall **state if it does not** retain jurisdiction of the matter for any remand proceeding.*

PERSONAL NOTE/CONCLUSION: My own experience in a remand on a zoning question was that my wife and I needed to take it back to appeals after the BZA's handling of Round 2. The Appeals Court issued a show cause order for lack of jurisdiction for failure to file under KSA 12-759(f) within 30 days after Final Decision 2. Luckily we had anticipated the problem. We had taken our Round 2 appeal back to the same district with the same case file, but we had also made a protective filing with a new case under KSA 12-759(f) within that 30 day window after Final Decision 2. With the new case we had a new filing fee, new case file, new judge and new requirements to serve which we never did. We let this new case sit there just for the backup which we eventually would need when the appeals court asked to show cause. With the show cause we also then asked our Round 1 district judge more than a year later to issue an order *nunc pro tunc* to go back and state in a formal written order that the court was retaining jurisdiction during the Round 2 proceedings (this had just been verbal before). All this created unnecessary stress, paperwork, filings and involvement not only for us, but for the district court clerk, district court judges 1 and 2 and for the Appeals Court - all of which could have been avoided with the improvements to the statute offered by HB2483.

Thank you for your consideration of HB2483. I think these changes will be positive, offer more efficiency and clarity and offer an important oversight to give a better balance of rights and procedures in local BZA and city/county proceedings.

Russell C. Leffel