

Senate Judiciary Committee**SB 273****Presented by Eric Stafford, Vice President of Government Affairs, Kansas Chamber****Ryan Kriegshauser, Partner, Kriegshauser Ney Law Group****Thursday, February 25, 2021**

Madam Chair Warren and members of the committee, the Kansas Chamber appreciates the opportunity to appear in support of SB 273. Appearing with the Kansas Chamber is Ryan Kriegshauser, private counsel to the Kansas Chamber, who has had litigatory experience over the past year giving him some subject-matter expertise on the Kansas Emergency Management Act (“KEMA”). He is here to offer recommendations on KEMA but any advocacy on this bill is on behalf of the Kansas Chamber. That being said, we appreciate the opportunity to continue offering testimony on what we’ve learned and experienced over the last few months in response to the COVID pandemic, many of our suggestions and the suggestions of Ryan Kriegshauser in front of the Joint Special Committee on the Kansas Emergency Management Act have been incorporated into SB 273 which we greatly appreciate.

For the committee’s convenience, we also refer the committee to the Kansas Chamber and Ryan Kriegshauser’s testimony in front of the joint committee last year which provides some increased depth which we cannot provide verbally now because of time constraints.

After reviewing SB 273, we would offer the following suggestions to further improve this bill which has already made significant improvements to KEMA:

- In Section 1(b)(5)(b), it lists situations in which the same emergency proclamation can be extended, including when a “new or more virulent strain of the disease” may be a basis to continue the same proclamation. This has of course happened in the current pandemic is almost always likely to happen in a public health disaster. Accordingly, it may be helpful to limit this language to a “more virulent strain with a substantially higher mortality rate.”
- Section 1(f)(4) references the compensation provision in K.S.A. 48-933 making it clear that “utilizing private property” implicates K.S.A. 48-933 but SB 273 does not define “use” in Section 10, other than excluding “intangible” damages. It would help to provide additional clarification as to what constitutes “use” and “property.” Accordingly, the following language is suggested for K.S.A. 48-933(c):

(1) The word “use” in this subsection (c) shall include any “taking” as it is defined in the Kansas Private Property Protections Act, K.S.A. 77-701 et seq., or any other restriction, limitation on access to or operation of private property, or exertion of control over any private property for any amount of time pursuant to an order under K.S.A. 48-920 et seq.

(2) “Private Property” in this subsection (c) shall mean any private property as defined by the Kansas Private Property Protections Act, K.S.A. 77-701 et seq., as well as any other personal, business, or other property used by the state. This definitional shall include

substantially burdening the operation of any religious, civic, business or commercial entity, whether for-profit or not-for-profit.

(3) Any compensation under this Section shall be paid by the jurisdiction ordering the commandeering or use of the property at issue.

(4) Unless as provided in K.S.A. 48-925a, the commandeering or government use under this section shall be limited to the actual cost of such use as determined by the board of appraisers. Under this act, compensation for the commandeering or use of any property shall not include loss of present or future profits, opportunity cost, or other extraordinary damages.

The exclusion of intangible property is unclear. At a minimum, perhaps the word “speculative” might be more appropriate. Regardless, the applicability of the compensation provision should be clarified.

- In Section 3(a)(2)(A) it may be helpful to include language that the order shall be narrowly tailored to accomplish such remediation. It is suggested that this standard also be included in Section 4(d).
- We laud the inclusion of 72-hour hearing remedies in Section 4. However, experience dictates that businesses and individuals are hesitant to pursue this remedy in court without the help of counsel. Even in K.S.A. 65-129c where an attorney may be appointed, individuals are unable to navigate the initial process to get a matter on-file. This provision likely needs to provide some access to counsel. Perhaps, if an aggrieved party prevails on an action under this provision, attorney’s fees may be awarded.
- The committee should consider adding K.S.A. 65-119 to Section 4(a)(2) for additional clarity.
- It is unclear whether or not Section 5 applies to “private schools” in the school district. It is our suggestion that private schools be treated similarly to businesses as ceasing their operations is an existential threat to the private school just as it is to a business.
- It is recommended that rule-making by local jurisdictions should be dealt with by this bill in a ongoing disaster. Accordingly, the following language is suggested for Section 8:

During any state of disaster emergency declared pursuant to K.S.A. 48-924, and amendments thereto, which has been ratified by any legislative body authorized in K.S.A. 48-924, and amendments thereto, any order issued may not be clarified or interpreted by any government agency or government officer with the force of law without complying with the Kansas Rules and Regulations Filing Act, K.S.A. 77-415, as authorized in K.S.A. 48-926.

- Section 13(d)(1)(A) could include language that the order shall be narrowly tailored to accomplish such remediation similar to the proposal on Section 3(a)(2)(A).
- It is unclear whether or not Section 14 applies to “private schools” in the school district. It is our suggestion that private schools be treated similarly to businesses as ceasing their operations is an existential threat to the private school just as it is to a business.

- It is unclear whether or not Section 15 applies to “private schools” in the school district. It is our suggestion that private schools be treated similarly to businesses as ceasing their operations is an existential threat to the private school just as it is to a business.
- In Section 15, the language that county health officials “neglect” to fulfill the provisions of K.S.A. 65-126 were problematic at the beginning of the pandemic forcing the Governor to use K.S.A. 48-925 instead of the public health statutes in Chapter 65. The committee should consider whether or not the Secretary should be able to act without “neglect” at the county level in a public health disaster.
- Section 17(b)(3) could include language that the order shall be narrowly tailored to accomplish such remediation similar to the proposal on Section 3(a)(2)(A).

These have been difficult times. We know the Governor and local government officials are doing their best to protect the public as much as possible. We appreciate the efforts of this committee to increase the due process available under KEMA and taking the time to address this important issue.

In closing, we appreciate the opportunity to provide comments to the committee today on an important matter facing our state.