

Date: January 29, 2020
To: House Committee on Judiciary
From: City of Overland Park
Re: HB 2461 – Opponent

Thank you for allowing the City of Overland Park (the “City”) to submit testimony on HB 2461. Although the City would not oppose this legislation if a few key changes were made to it, the City opposes the current version of the bill because it infringes on local control and prevents the City from potentially advancing the interests of the community as determined by the Mayor and City Council.

HB 2461 would require the Attorney General to consent to any municipality’s contingency fee arrangement for legal services. Contingency fee arrangements are typically contracts for legal services where outside counsel are paid for their services by receiving a portion of the damages recovered, rather than paid from existing public funds. These arrangements are not widely used by municipalities, and the only such arrangement the City of Overland Park has entered into is to participate in the litigation against opioid manufacturers and distributors who have contributed to the the opioid epidemic (the City is one of over 2,000 local governments that are plaintiffs in this litigation). The City’s main purpose in using this fee arrangement to participate in the opioid litigation was not pursuit of damages (which will likely be minimal),¹ but to allow the City to be a party to a resolution that will hopefully help curtail the opioid addiction epidemic. Settlement discussions in the opioid litigation have included potential injunctive relief like requiring companies to change opioid marketing practices and fund programs that may include education, drug treatment, job programs, homelessness solutions, and counseling. These are exactly the types of solutions the City was hoping would result from its participation in the opioid litigation. By entering a contingency fee arrangement, the City will have supported these important achievements without spending any taxpayer money.

The City opposes HB 2461 because it infringes on local control and prevents the City from advancing the interests of the community as determined by the Mayor the City Council. However, it is important to distinguish between the parts of the bill the City does and does not oppose. The City does not oppose the ability of the Attorney General to facilitate public interest litigation that the City has determined to be in the best interest of the community. Although we think it’s unnecessary and may result in less overall damages flowing to the City and statewide, if the Attorney General believes his office is the proper party to pursue on behalf of the City legal actions that our Mayor and City Council have deemed to be in the public interest, the City is willing to accept the Attorney General’s office as counsel in such future litigation (even if it is in lieu of any counsel the City would have hired through a contingency fee arrangement). In that circumstance, there will at least be some party pursuing the litigation the City deems to be in the public's interest, which is our primary objective.

The part of HB 2461 that the City does oppose is the ability of the Attorney General to veto the City’s ability to pursue public interest litigation and then choose not to pursue that litigation on the City’s behalf. That is entirely different than coordinating litigation, because it allows the Attorney General to override

¹ The current estimated settlement would result in the City receiving about \$80,000, with \$20,000 going to pay for legal fees (for context, the 2020 City Budget was about \$300,000,000).

the public policy determination of our Governing Body, by picking and choosing what issues he deems worthy of litigation. Such a provision prevents cities' ability to pursue the interests that are important to our community. To prevent this infringement on local control, the City requests the following amendments to the bill:

- Removal of any basis for denial of an application to enter a contingency fee arrangement that is not directly related to the Attorney General's pursuit of a resolution in court of the legal matter that is the subject of the fee arrangement. Specifically, we understand that the Attorney General is considering revisions to the bill that would allow denial of waivers if the City desires to pursue litigation that is a "statewide concern." This broad basis for denial will essentially allow the Attorney General to veto participation in any public interest litigation because courts have said that few if any matters are of purely local concern, and that local interests are nearly always also state interests;² and
- Removal of the portion of Section 1(d)(3) that allows waivers to be "subject to conditions". Unlike the permissible bases for denial of a waiver of the contingency fee prohibition, there are no restrictions on the waiver conditions, which could include virtually anything (e.g. "Waiver is subject to the Attorney General's future discretion."). It would subvert the limits in the bill on the permissible bases for denial of a waiver if there aren't similar limits on these conditions, and cities should not have to monitor compliance for an unlimited number of conditions when they've been given approval to move forward with litigation they've deemed to be in the public interest.

Finally, the City believes its use of a contingency fee arrangement for the opioid litigation will result in benefits to Kansans and does not agree with arguments that such arrangements have been used irresponsibly. Furthermore, the City's participation in this litigation has in no way prevented the State from pursuing its own litigation in state or federal court, which could result in additional benefits to Kansans.

Thank you for allowing the City to submit testimony on HB 2461. Although the City is willing to withdraw its opposition to this legislation if the aforementioned amendments are made, we respectfully request that the Committee not advance this bill out of Committee without those amendments.

² "Few, if any, ordinances and resolutions deal with an exclusively local matter and no statute regulates a matter which can be exclusively of statewide concern. The interests of the municipality or the county in such cases are nearly always concurrent with an interest of the state." *Missouri P. Railroad v. Board of County Comm'rs*, 231 Kan. 225, 230-31, 643 P.2d 188 (1982).