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To: House General Government Budget Committee

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Subject: **HB 2660** – Supporting Legislation to Protect Kansas Property Owners by Prohibiting Cities and Counties from Adopting Price Control Mandates on the Purchase or Sale of Private Property

Chairman Waymaster and members of the House General Government Budget Committee, thank you for the opportunity to provide testimony today on behalf of the Kansas Association of REALTORS® in support of **HB 2660**, which would require the state to provide notice to regulated professionals when the Kansas Legislature sweeps funds from a fee-funded regulatory agency and transfers those funds to the state general fund to provide funding for general governmental expenses. Through the comments provided in our testimony, we hope to provide some additional legal and public policy content on this issue.

KAR is the state's largest professional trade association, representing nearly 8,500 members involved in both residential and commercial real estate and advocating on behalf of the state's 700,000 property owners for over 95 years. REALTORS® serve an important role in the state's economy and are dedicated to working with our elected officials to create better communities by supporting economic development, a high quality of life and providing affordable housing opportunities while protecting the rights of private property owners.

Fee Fund Sweeps Have Caused Severe Problems for the Fiscal Soundness of the Kansas Real Estate Commission and the Commission's Ability to Regulate the Real Estate Industry

As a starting point, we are very concerned about the devastating impact that unconstitutional fee fund sweeps by the Kansas Legislature have had on the Kansas Real Estate Commission's (KREC) budget and the Commission's ability to adequately regulate the real estate industry. In addition to the ten percent annual transfer of fee funds authorized under K.S.A. 58-3074(a), which results in the transfer of \$100,000 a year from the real estate fee fund to the state general fund, the Kansas Legislature swept nearly \$900,000 in additional funding from the real estate fee fund into the state general fund from 2002 through 2009.

Following six years of customer service and employee reductions that were necessary to maintain a bare-bones minimum ending balance in the real estate fee fund, KREC was forced to increase real estate licensing fees by \$25 in December 2015 to stabilize the real estate fee fund and provide for additional resources to improve customer service to real estate licensees and increase consumer protection for the customers of real estate licensees. KAR reluctantly supported the legislation that authorized the increase in the real estate licensing fees because there was no other reasonable alternative to provide KREC with the resources it needed to regulate our industry.

Fee Fund Sweeps are Unconstitutional Since They are an Illegitimate Use of the Police Power Authority to Generate General Tax Revenue in Violation of Article 11, Section 1 of the Kansas Constitution

Fundamentally, the state government has the inherent power called the "police power" to regulate various businesses and industries for the protection of its citizens. While the term "police power" is difficult to define precisely, it basically "embraces the state's power to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health and general welfare of the community." 16A Am. Jur. 2d Constitutional Law § 313 (June 2002) (citations omitted).

In regulating the real estate industry, the Kansas Legislature has chosen to exercise its police power to place certain requirements and restrictions on those individuals acting as real estate salespersons and brokers. In doing so, the Kansas Legislature promotes the general welfare of the public through a highly regulated real estate industry overseen by KREC. We are strongly supportive of these requirements as it maintains the credibility of our industry and protects consumers who interact with real estate licensees.

While the police power provides the state with broad authority to regulate a particular business or industry, there is a definite constitutional distinction between a state's police power and its power to levy taxes and other revenue mechanisms to pay for general state budget expenditures. Under long-established precedent, the Kansas Supreme Court has explicitly recognized a clear distinction between the Kansas Legislature's authority to exercise its police power and the ability to enact revenue raising measures.

It is clear that under its police power the state may reimburse itself for the costs of otherwise valid regulation and supervision by charging the necessary expenses to the businesses or persons regulated. A statute, however, is void if it shows on its face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation, or if more than adequate remuneration is secured. *Panhandle Eastern Pipe Line Co. v. Fadely*, 183 Kan. 803, 806-07 (1958).

In order to determine whether a charge is a fee or a tax, it is first necessary to determine whether the particular charge is an exercise of the police power or is a tax imposed for the purpose of raising general revenue. If the Kansas Legislature attempts to exercise its policy power by enacting a fee on a regulated industry, the amount of the fee must be reasonably approximate to the cost of regulation because "once adequate remuneration has been secured the police power is exhausted." *State ex rel. Brewster v. Cumiskey*, 97 Kan. 343, 352 (1916).

After a full analysis of the case law on this issue, it is possible to extract a basic rule of law regarding this issue. If an assessment, charge or fee paid by a regulated business or individual grossly exceeds the cost of regulating that business or individual and there is no reasonable relationship between the actual costs involved and the amount of the fee, the portion of that assessment, charge or fee that exceeds the actual costs involved in regulating that business or individual is an unconstitutional use of the state's police power authority as a revenue raising mechanism or tax. Kansas Attorney General's Opinion 2002-45 (2002).

Notice Provisions Contained in **HB 2660** are a Good First Step, But in Reality the Kansas Legislature Needs to Stop Sweeping Fee Funds from Fee-Funded Regulatory Agencies

Having said that, the notice provision contained in lines 16 through 22 of Section 1 of **HB 2660** is a good first step that will at the very least require the state to provide written notice to regulated professionals that pay regulatory fees to fee funded agencies when their fees are unconstitutionally diverted to pay for other general governmental programs. KAR strongly supports this written notice requirement that will provide more notice to regulated professionals of the unconstitutional diversion of fee funds.

In reality, at the end of the day, the only way to finally stop fee fund sweeps is for the Kansas Legislature to stop sweeping fee funds from fee-funded regulatory agencies. Although the Kansas Supreme Court has now on two separate occasions ruled that fee fund sweeps are unconstitutional, the Kansas Legislature continues to unconstitutionally sweep fee funds paid by regulated professionals from fee-funded agencies.

Conclusion

In conclusion, **HB 2660** is a good first step and KAR would respectfully request that the members of the House General Government Budget Committee pass this legislation. Although it will not permanently end the unconstitutional practice of sweeping fee funds from fee-funded regulatory agencies, it will at the very least provide written notice to regulated professionals when their fees are swept and diverted for other purposes.