

House Judiciary Committee**Testimony in Support of HB 2416****Presented by Eric Stafford, Vice President of Government Affairs, Kansas Chamber****Ryan Kriegshauser, Partner, Kriegshauser Ney Law Group****Thursday, February 25, 2021**

Chairman Patton and members of the committee, the Kansas Chamber appears in support of House Bill 2416. 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 HB 2416 which we greatly appreciate.

For the committee’s convenience, we also refer the committee to the Kansas Chamber’s 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 HB 2416, we would offer the following suggestions to further improve this bill which has already made significant improvements to KEMA:

- We laud the inclusion of 72-hour hearing remedies in Section 1(f) using a strict scrutiny standard. 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. Additionally, the committee should consider orders issued under K.S.A. 65-202, 65-119, and 65-101 being subject to 72-hour hearings as well under strict scrutiny.
- In Section 5(c)(1) the use of the phrase “regulatory statute” is unclear, perhaps the phrase “statute granting regulatory authority” could be used.
- We suggest a clarification that Kansas Rules and Regulations Filing Act applies to Executive Orders issued under KEMA by including language in K.S.A. 48-925 that states:
 - “Any interpretation purporting to carry the force of law of an Executive Order issued under this Section shall comply with the Kansas Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.*”;
 - Similar language could be included in K.S.A. 65-101 for orders issued by the Secretary of the Kansas Department of Health and Environment.

- It would help to provide clarification as to what constitutes “use” and “property” in K.S.A. 48-933. 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.

- A new development during the pandemic is local municipalities using ordinances to create public health officers that can issue municipal orders or criminalizing state or county orders. The committee should consider how to deal with this development.

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.