TESTIMONY OF EDWIN W. HECKER, JR.

BEFORE THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS ON HB 2401

January 23, 2020

Chairman Barker and Members of the Committee:

I appreciate the opportunity to submit this brief testimony to the Committee in support of HB 2401, a bill requested by Representative Dennis "Boog" Highberger.

As I understand it, HB 2401 is an attempt by Representative Highberger to fashion relief for what in fact is a cooperative association that was, for unknown reasons, incorporated as a for-profit stock corporation many years ago. I shall attempt to be both brief and clear in my description of why I believe this bill is necessary.

K.S.A. 2018 Supp. 17-6002(a)(4)(A) requires the articles of incorporation ("articles") of a for-profit corporation to state the number of shares of stock the corporation is "authorized" to issue. I have used quotation marks because the term "authorized" might cause you to think that the corporation must get permission from the State to issue a given number of shares. That is not the case. This number can be whatever the incorporators choose. The State has no role or stake in this choice, the number is simply a self-imposed cap on the amount of stock that can be issued. Standard practice is to select a number sufficiently large that the cap will never be a problem. If that is not done, over time the corporation may issue enough stock that the cap imposed by the articles is reached. At that point, it will be necessary to amend the articles to raise the cap before the corporation can issue any more stock. Again, ordinarily that should not be a problem. K.S.A. 2018 Supp. 17-6602(b)(1) simply requires the corporation's board of directors to initiate the amendment process by resolution, which then must be confirmed at a stockholders' meeting by the holders of a majority of the outstanding voting stock.

What should not be a problem becomes a problem when the corporation's stock does not represent a significant investment in the enterprise, but instead is merely a token that represents its owner's membership in a de facto cooperative. Lacking an economic interest in the corporation, it is easy (and common) for such stockholders/members to become apathetic about internal governance matters and to fail to attend, or even return proxies for meetings. The problem is exacerbated when there are thousands upon thousands of such apathetic stockholders/members. As a practical matter, even holding a meeting becomes impossible for lack of a quorum, let alone mustering the vote of an absolute majority of all of the outstanding stock.

That essentially is the situation in which representative Highberger's constituent finds itself. He and I have considered various strategies, such as a merger with a shell corporation or conversion to a nonstock corporation, to end the impasse. Unfortunately, both of those approaches entail the very same majority stockholder vote requirement that prevents a simple amendment of the articles. See K.S.A. 2018 Supp. 17-6701(c)(3), (e); 17-6703(a), (b), (c); 17-78-403(a)(1)(B)(ii). Consequently, Representative Highberger has concluded that the only workable solution is that offered by HB 2401, a conclusion I strongly support.

It is also worth noting that there may well be other incorporated de facto cooperatives that face the same dilemma. Moreover, even if they are not hampered by a stock cap that they have outgrown, they probably do struggle with raising a quorum for their annual stockholder meetings. For such entities, HB 2401's general permission to lower the quorum to 10% of the voting shares will bring a welcome relief.

The opinions I have expressed are my own and do not represent the views of the University of Kansas.

Respectfully submitted,

Edwin W. Hecker, Jr.