

**PA10-148**

SB131

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**JOINT  
STANDING  
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HEARINGS**

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Thank you for your testimony.

Bob Dahn followed by Scott Basso.

ROBERT DAHN: Good afternoon committee chairs and committee members. My name is Robert Dahn, I'm on the Board of Directors of the National Society of Professional Surveyors. I'm the past President of the Connecticut Association of Land Surveyors and their current legislative liaison.

I'm here to speak in support of Raised Bill 132 as -- the 132 as presented. The language contained in this bill is language that representatives of the surveying community and the landscape architecture community worked in concert on last year and we support the language as presented. Just to be brief.

SENATOR COLAPIETRO: Any questions from the Committee?

Thank you, Bob, for your testimony. That was good. Short and sweet.

ROBERT DAHN: Do you like that?

SENATOR COLAPIETRO: Scott Basso followed by Scott Basso. We have you twice down here.

SB 133

SB 131

SCOTT BASSO: Good afternoon. My name is Scott Basso. I'm actually here from -- I'm on the legislative committee of the Connecticut Heating and Cooling Contractors Association, a trade association whose objectives are to strengthen and further trade relations and attract and educate and train necessary man power and represent members at all levels of government and review and establish quality standards and procedures. The association represents a hundred -- over 125 heating and

cooling companies in Connecticut.

The short of my written testimony is that we are in support of both the S.B. 133 Bill and the S.B. 131. We appreciate the changes and the strides that have been made to bring the apprenticeship ratios more in line with every other trade that -- that is governed by the state. And we appreciate the efforts that have gone into making that -- that happen. We would like to see further efforts made to reduce it to a one-to-one ratio but we realize that there really isn't the support at this time for that. But we are grateful and appreciative that we've been able to move to a more unified apprenticeship ratio program.

In regards to S.B. 131, in changing the retainage to 5 percent, we are also in favor of that bill. We think that it is -- it's very good for our constituents. Retainage can be held back. Retainage can definitely impact a small business owner like myself or any other contractor negatively.

Unfortunately, many contractors fail to even have a profit margin of the retainage. So they are under water until that retainage is paid, if ever. So we appreciate the efforts once again to move it to a -- to 5 percent. We think that is a very good bill and it's very favorable for our associates and all the member companies that we represent.

SENATOR COLAPIETRO: Thank you.

I just think you probably already know my position on retainage. I just call it black mail money. That's all.

SCOTT BASSO: Exactly.

SENATOR COLAPIETRO: And I understand this -- what started this and I'm glad that the industry has agreed to a lower percentage that what it -- it was already 7-and-a-half percent I think. And before it was whatever anybody felt like doing. And it definitely was -- was hurtful to some of the small subcontractors because it would actually be their margin of profit and some people may never get that and if you don't have the cash flow then you go belly up.

I understand that. So -- but thank you for your testimony. And before I go to Steve, I think I want to -- somebody just walked in and that was Bob Duguay unless anybody else has got any -- any questions from the Committee?

Bob. Do you want to take the stand now?

Thank you for your testimony.

SCOTT BASSO: Thank you.

ROBERT DUGUAY: Thank you, Chairman Colapietro and Shapiro. I'm here representing really my industry and mostly my own company to some degree but I'm a florist and fruit basket person. And circumstances are that there's not a level playing field here in Connecticut for a small businessman like myself.

HB 5139

If at Christmas time you wanted to send your neighbor a bottle of wine with some cheese or crackers or nuts or mints or whatever, you couldn't call me. You could call an out-of-state company that does business in California or Chicago or Illinois or Washington, D.C. or anywhere that you wanted to but you couldn't call me because laws are such that out-of-state companies can ship wine to a resident of Connecticut as long as

ROBERT DUGUAY: Thank you very much, sir. Thank you.

SENATOR COLAPIETRO: Thank you for your testimony, Bob.

Steve Kaplan, and could -- do the three of you want to come up together because you're all testifying in favor of the same thing. Kaplan, Flynn, and Butts. If you want to.

A VOICE: Sure.

SENATOR COLAPIETRO: That's good with me.

STEVEN KAPLAN: Thank you, Senator and Representative Shapiro and the rest of the Committee. I'm Steve Kaplan. I'm legal counsel for the Connecticut Subcontractors Association. I've been a construction lawyer in Hartford since 1982, working primarily with subcontractors and other people in the trade. With me is Bill Flynn, who is the vice president of Electrical Contractors and the president of the Connecticut Subcontractors Association. And John Butts, I think, will speak with us or right after us.

We are here in favor of Raised Bill 131, which would reduce retainage to 5 percent on virtually all private construction jobs other than smaller residential jobs less than four units. So you'd be dealing with the commercial -- basically the private, commercial, industrial and institutional construction in the state. Retainage, I think as you all know but just to make sure everybody's aware of it, this is money that's been earned, approved, accepted, signed off on by everybody but not paid.

That means when a contractor does \$100 worth of work it's accepted, it's approved, or 1,000, or one million. Whatever the retainage amount is will not be paid, normally, until the very end of the job. There are some exceptions but that's generally how it works. When you're talking about larger contracts, you're talking about if you have 5 percent retainage, which is what we're suggesting here. You may have \$50,000 upwards of those amounts or higher not being paid sometimes for several years after the work has been installed and accepted.

On any scale, whether it's a \$10,000 job, \$100,000 job those percentages will apply. What that means is the contractor, the subcontractor, the sub-subcontractor -- because this is all passed through from the owner down the contract chain for payment; will have paid their laborers, paid their suppliers, paid all their bills to do that work and would not have been paid for six months, nine months, a year, two years, what have you.

It's a big problem in the industry because you're talking about not paying somebody for something they've already done. Now the -- the counterargument to that is owners say we need this for leveraging purposes. We need retainage for leverage purposes. And Senator Colapietro and I have spoken about this and we sort of share each other's views I think.

But that's really a misnomer and I call it a red herring in my testimony -- written testimony. Lawyers like to throw out those terms, red herrings. But this really is a red herring because owners do not approve work that they don't want to pay for. Architects do not sign off on requisitions when they

don't think that work has been done. It goes the other way.

There's a great jockeying every month in the requisitions as to how much work will be approved and will be paid for. I have never heard of owners who want to pay for work that has not been done and not approved. At the end of the job if work is not done, it's not getting paid for.

Retainage is on top of all that. And it simply -- this bill would simply unify across the board at a 5 percent level what we already have on the books for municipalities under separate law. Department of Transportation does 2-and-a-half percent retainage under their statute. And by administrative practices the Department of Public Works is implementing about a 5 percent retainage.

So that's the overview. I'll let Mr. Flynn talk about it a little bit more.

WILLIAM FLYNN: Well Steve has pretty much covered it but the bottom line is every month contractors submit a pencil requisition usually to the general contractor they're working for, which is their bill for all of their labor and materials that they've already expended and performed on the project for the previous month. That penciled requisition is then reviewed by the general contractor, the architect, and representatives of the owner. And if I bill for \$100 for this month or \$100,000 for this month and anyone of the parties in that food chain don't agree with me, they will come back and say no, we're only going to pay \$80,000 out of the \$100,000 because that's all we believe is due to you.

Usually the subcontractor is in no position

whatsoever to argue with them and say okay. And they change their requisition in ink now to reflect the \$80,000 payment. Then, the owner takes the retention out of the \$80,000. So we all agree that I've done \$80,000 worth of work not 100 and then I -- but then they still get to keep another ten, five or whatever their retainage percentage happens to be for that particular entity out of my payment.

Now, that money isn't fictitious money, it's money I've spent. I've paid my employees. I've paid my suppliers. So I am now the bank. I'm bankrolling projects in the state of Connecticut at -- to the tune of two and a half to DOT, 5 percent for municipal projects and 7-and-a-half percent on all the rest for private projects. At UConn, it's 10 percent.

So, I mean I don't see how anybody can think that's fair because at no time in the payment process does the owner ever pay, ever pay for more than what they believe is the fair amount for paying me at that particular time. So retention is just another -- just another philosophical way of taking my money and holding it on top of the money you're already holding by just simply reducing my payments every month.

So subcontractors, especially in this economic climate, really need every dime they can get. And some of us are out there taking jobs in this environment right now right to the bone. There's no fat. There's no profit. They're barely -- taking jobs to barely survive. And retention could be the vehicle that puts them under. Especially, when -- when a client holds it for a year, two years, as Steve said, sometimes three years. It's unbelievable.

SENATOR COLAPIETRO: I agree. I still call it blackmail money. By the way, there's no such word as retainage in the dictionary. If anybody wants to look it up, it's not there.

WILLIAM FLYNN: You're very right, Senator. Spell-check pops up every time.

SENATOR COLAPIETRO: It's not there. John, go ahead.

JOHN BUTTS: Thank you very much, Senator Colapietro. Every time I right in for retainages the red underline indicating there's no word for it. So, I approach this from the -- as the executive director of the Associated General Contractors of Connecticut. AGC is a part of the Connecticut Construction Industries Association.

We are in favor of S.B. 131. We think 5 percent, it is a reasonable approach to this. Five percent is pretty standard in the industry in other states. I think even the federal government has it at 5 percent as well. We do think that they're in agreement with Bill Flynn that the economic conditions are producing a big cash flow problem for some subcontractors. That may add to some of the -- the pressures that this bill would relieve.

So, not to take any more of your time because Steve and Bill have done an adequate job of explaining the bill, but the AGC, the general contractors, we represent subcontractors as well, we are in favor of this bill and we'd ask you to act favorably upon it. Thank you.

SENATOR COLAPIETRO: Thank you.

Any questions from the Committee?

REP. SHAPIRO: Thank you, gentleman for your testimony. I have a couple of questions.

To start out with, you say that sometimes the money is held for nine months after a project is completed, sometimes a year, sometimes two years. When it's held for that period of time is it in violation of the contract between the subcontractor and the general contractor?

STEVE KAPLAN: No, sir. And this is -- this is really the problem. Or that's -- that goes to one of the main issues. As you all know, construction is phased and on many larger projects, even smaller projects, you get a site contractor in doing work and being complete. And then the job itself may go for a year, two years, three years. Many commercial projects go for two or three years.

That site contractor has been a hundred percent done, lock, stock and barrel for maybe two years and they're tied into the retainage provisions with the general contractor and the owner. And until the job is finally complete and all contract funds are paid, those funds will then not be distributed down the various chain or the contract pyramid, which is the phrase often used.

That's not in violation of any contract. It's not in violation of any statutes because the construction industry works, for the most part, on a pay when paid basis except when you get to my friend Bill Flynn or any other contractor who has to pay their vendors. Those guys are getting paid on a 30-day basis; the materials suppliers. And if we all know laborers obviously are getting paid on a weekly, maybe a biweekly basis. So, that's really -- a nice term would be that's where

the rubber meets the road for the contractors.

They are literally financing these projects. It's not a hyperbole. They are literally financing these projects by putting their money, their cost into that building and for a year, two years, sometimes longer they are not going to be paid. So what you're talking about is, the percentage that they are financing the project on until it's completely -- completely done. And we are just asking you to reduce it to 5 percent from what's currently 7-and-a-half percent.

WILLIAM FLYNN: It's also important to note, Senator Colapietro calls it blackmail. It is blackmail in certain cases. At the end of a number of projects it is used, sometimes, as a -- as a means to get subcontractors to accept lower values on outstanding change orders that haven't been agreed to yet. You get to the end of the project to try to button everything up. You may have \$100,000 of additional work that -- that have been kind of approved. You have a verbal approval to go ahead and go.

And now it's time to write the written change order for that amount and mysteriously the owner is now saying well, you know, I really think -- I really think now that you're done, I think that that work is really only worth 90. And if you'll take 90 then we can button the whole job up and give you the 90 and your retention. So don't think for a minute that -- that it isn't blackmail, you know, because on a daily basis I see it all the time.

JOHN BUTTS: And another thing that bothers me too -- I'm sorry about that -- is that -- that somebody will hold that money, that retainage until the sub may go belly up. Then they don't have to pay a dime. They put it in

their pocket --

STEVEN KAPLAN: Exactly. It happens

JOHN BUTTS: -- And they go away with 10, 15, \$20,000. So that's why I think something needs to be done.

STEVEN KAPLAN: Especially in this kind of an economy where they think that if I wait and stretch you out long enough you will go under.

REP. SHAPIRO: So, if in your view this practice is essentially fraudulent if not criminal, why 5 percent and not the 2-and-a-half percent that we have with DOT or a zero percent ultimately?

WILLIAM FLYNN: I actually like Senator Colapietro's point of view, zero percent.

STEVEN KAPLAN: We -- I'm sure I don't have to go back to our group to say that we would be very happy if you'd like to amend this and make it 2-and-a-half percent or zero. Our group would be ecstatic.

REP. SHAPIRO: And if we passed it at five would you be back next year at two and a half or zero?

STEVEN KAPLAN: I don't think so, sir, and the reason obviously is there's -- every -- this industry works in context with public owners, private owners. We tried very hard with the subcontractors who work with AGC. We work with the public agencies. We try and do things in a nonconfrontational way as much as we can. We've worked with members of this committee on various bills the last few years trying to coordinate folks because we all know that if we're fighting each other we're not going to get anywhere. DPW came in and said,

we don't like that.

This committee would look askance at what we're recommending and I use that as an example. So we really are tuned in to the fact that public owners, private owners do want to have some retainage. Whether we agree or not, we have to be practical about what to do with it.

JOHN BUTTS: I think from a general contractor's point of view, there are those general contractors who feel that retainage is necessary to some degree. And a lot of it has to do with the release of retainage -- the proper release of retainage. How it's released. Whether or not there's an agreement that the work has been done and completed.

That's where you get into an interpretation, so if you say fraudulent, it's not really fraudulent. It could be the difference of interpretation as to whether or not that's complete and whether or not retainage should be released. But a lot of general contractors use it and they use it well as well as owners but sometimes it is abused as well. So --

REP. SHAPIRO: Thank you, gentleman.

Are there further questions from members of the Committee?

STEVEN KAPLAN: Thank you.

WILLIAM FLYNN: Thank you very much.

REP. SHAPIRO: Thank you for your testimony.

JOHN BUTTS: Thank you.

REP. SHAPIRO: Bill Ethier followed by Cam



**TESTIMONY  
SCOTT BASSO  
STEVE BASSO PLUMBING, HEATING & AIR CONDITIONING  
CONNECTICUT HEATING & COOLING CONTRACTORS (CHCC)  
BEFORE THE  
GENERAL LAW COMMITTEE  
FEBRUARY 16, 2010**

Good afternoon. My name is Scott Basso. I am on the Legislative Committee for the Connecticut Heating & Cooling Contractors Association (CHCC), a trade association whose objectives are to strengthen and further trade relations, attract, educate and train necessary manpower, represent members at all levels of government and review and establish quality standards and procedures. The association represents over 125 Heating & Cooling Companies in Connecticut

**CHCC supports SB-131, An Act Concerning Retainage.**

Allowing owners to retain up to 7.5% in retainage from construction contracts unfairly ties up revenues that could be put to better use by contractors. We therefore support reducing the retainage amount to 5%. This will help our bottom lines and allow us to use those funds to invest in our business and meet our payroll.

Under the current system, retainage is used by owners to help finance construction projects, which places a financial burden on contractors. Too often, retainage is held for a long period after our work is done and we don't have access to that capital. This is unfair and places a burden on small contractors, particularly during difficult economic times when money is tight and credit is not readily available.

Lowering the amount to 5% is reasonable given that owners have other remedies for managing contracts and ensuring that the work is done to their satisfaction. It will also lower project costs and make it more attractive for smaller contractors to bid on jobs.

For these reasons, we urge your support for SB-131.

*For more information, please contact Jennifer Jennings at CHCC, 22 Skyview Terrace, Manchester, CT 06040 or [jjennings@chcca.net](mailto:jjennings@chcca.net), Tel., 860-533-1163.*



**TESTIMONY  
JENN JENNINGS  
EXECUTIVE DIRECTOR  
CT PLUMBING, HEATING & COOLING CONTRACTORS ASSOCIATION  
BEFORE THE  
GENERAL LAW COMMITTEE  
FEBRUARY 16, 2010**

**The Connecticut Plumbing, Heating and Cooling Contractors Association (CT-PHCC) supports the intent of SB-131, An Act Concerning Retainage.**

Lowering the retainage amount in construction contracts from 7.5% to 5% will go a long way toward freeing up cash flow for the state's plumbing, heating and cooling contractors so they can invest in new equipment and/or hire additional workers.

Historically, the amount of retainage was established to match the contractor's expected profit. Given that in today's construction on market, the average anticipated profit is between 2% - 5%, it makes sense to lower this amount. Retainage amounts in excess of profit margins impose an undue financial burden on contractors.

Many of our members are also finding that retainage is held back for too long, well beyond the completion of the construction work. This results in many lost opportunities because contractors may not have the capital to hire additional journeymen to bid on new jobs or purchase equipment and materials needed to do other jobs. With some companies going out of business or filing for bankruptcy during this economic cycle, this creates uncertainty regarding whether retainage will ever be paid back.

Owners have other effective means of withholding reasonable amounts until a subcontractor's work is satisfactorily completed. For example, reasonable amounts can be withheld, per item, for uncompleted punch list items.

Lowering the retainage amount will also attract more bidders for public projects and lower overall project costs. In fact, the federal government no longer holds retainage on construction projects where satisfactory performance is being achieved and has proven that elimination of retainage works. We therefore urge your support for SB-131.

*CT-PHCC is a not-for-profit trade association that represents the professional plumbing, heating and cooling contractors in the state of Connecticut. CT-PHCC and its members are committed to protecting the health and safety of the public. Contractors who belong to the association have demonstrated reliability and trustworthiness and are licensed by the state of Connecticut.*



## Independent Electrical Contractors of New England, Inc.

**TO:** The Honorable Tom Colapietro and Rep. Jim Shapiro  
Members of the General Law Committee

**From:** Lisa Hutner, Executive Director

**Date:** February 16, 2010

**Re:** SB-131, An Act Concerning Retainage

The Independent Electrical Contractors of New England (IEC-NE) *supports SB-131*, which lowers the retainage amount in construction contracts from 7.5 % to 5% to free up much needed capital to help contractors expand their businesses and create jobs.

Retainage hits subcontractors especially hard, particularly during difficult economic times when cash flow is stretched to the limit. In many cases, subcontractors and contractors must wait for unreasonable periods of time for retainage amounts to be released. Anything that can be done to eliminate or reduce retainage and to assure the prompt release of funds benefits everyone in the construction chain. In the construction industry, where the typical profit margin is between 2% and 5%, retention of up to 7.5% can put a contractor deep in the hole for the duration of the project.

Retainage is particularly difficult for electrical contractors because electricians are often the first on a job and the last to leave so their money can be tied up for the duration of the construction project, which is killing our members' bottom lines. Lowering retainage will free up more of our money so that we are in a position to bid on new jobs and bring in more manpower to get jobs done.

Recognizing that freeing up cash flow and reducing construction costs is critical to economic recovery, more states and local governments, as well as private owners, are reducing their retainage rates to lower costs. This gives contractors the breathing room needed to bid on more jobs, purchase new equipment and hire additional employees.

Opponents of lowering retainage claim that retainage is needed as a hammer to ensure that work is completed to the satisfaction of the owners. But owners have contractual rights well beyond retainage to address faulty or defective work. During construction, owners have rights to withhold more than retainage until defective work is corrected. After project completion, if faulty work is discovered, warranties provided by contractors make the contractors liable for correction or completion. Holding retainage as protection from these problems is therefore unnecessary. In reality, retainage is being used as a tool to finance construction, which is inappropriate.

We therefore urge lawmakers to support SB-131, which will help stimulate Connecticut's economy by lowering and unnecessary retainage provisions.

*The Independent Electrical Contractors of New England is the premier trade association representing Connecticut, Massachusetts and Rhode Island independent electrical contractors aggressively working with the industry to establish a free environment for merit shop – a philosophy that promotes the concept of free enterprise, open competition and economic opportunity for all.*

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## CONNECTICUT BANKERS ASSOCIATION

**FEBRUARY 16, 2010**

**TO: MEMBERS OF THE GENERAL LAW COMMITTEE**

**FROM: CONNECTICUT BANKERS ASSOCIATION**

**CONTACTS: Tom Mongellow, Fritz Conway**

**RE: S. B. 131, AN ACT CONCERNING RETAINAGE.**

**POSITION: OPPOSE**

This bill would inappropriately reduce the ability of property owners, developers and borrowers to safeguard their construction projects from potential inferior or incomplete workmanship by contractors. Employing a "retainage clause" during a construction project allows an owner/developer the ability to withhold a portion of the contractor's fee until that service is completed or product is properly installed. Retainage is similar to holding an amount in escrow during a residential sale, until a property condition is rectified. By using a retainage provision in a construction contract, owners/developers can reduce the overall risk of completing the project.

By decreasing the statutorily allowed amount of retainage, as S. B. 131 proposes, the risk profile of construction loans will increase for borrowers, and the banks that lend to them. That increased risk on construction loans will raise safety and soundness concerns for banking regulators, who are giving Commercial Real Estate Loans (CRE's), ever increasing scrutiny. The most likely results of this bill will be more expensive loans (e.g. larger down payments), and/or a tightening of industry wide underwriting standards on this type of credit throughout the state. This proposed bill if passed, will only make it tougher for borrowers to get credit.

When a lender makes a construction loan in Connecticut, that lender underwrites the loan on the assumption that the borrower (i.e., the owner/developer of the property) will be able to: (1) manage the construction project so that improvements are completed in a manner that will support loan advances; and (2) manage cash flow to ensure timely completion of the project and repayment of the loan. Banks regularly require retainage clauses as a condition of the loan, to reduce the risk profile and thus the cost. This bill would impair an owner's or borrower's ability to manage these two concerns.

Connecticut statute already provides a strong existing system of contractor remedies for mechanics liens, (strengthened by the Fairness in Construction Contract Act several years ago), for contractors and subcontractors. Those remedies, versus reducing retainage amounts, should be used to resolve any disputes between owners/developers and contractors.

We respectfully urge your opposition to the bill.

**CSA****Connecticut Subcontractors Association**1131-O Tolland Turnpike, # 272 • Manchester, CT 06042-1679 • (866) 995-3919  
www.connecticutsubcontractors.org

**Testimony of William Flynn**  
**President, Connecticut Subcontractors Association**  
**Raised Bill 131, An Act Concerning Construction Change Orders**  
**General Law Committee**  
**February 16, 2010**

My name is Bill Flynn. I am the President and a founding Board Member of the Connecticut Subcontractors Association, a trade association that represents all segments of the Connecticut construction subcontracting industry. I also am Vice-President of Electrical Contractors, Inc. of Hartford, one of the largest electrical contractors in the State. Our construction firm has performed hundreds of projects for the State Department of Public Works, Department of Transportation, many towns and cities, and a variety of large private owners in our state.

The Connecticut Subcontractors Association strongly supports Raised Bill 131, An Act Concerning Retainage. The CSA thanks this committee for raising the bill.

Presently under Connecticut law, retainage for towns and cities in Connecticut is limited to 5%. Retainage for the Connecticut Department of Transportation is limited to 2½%. Retainage is currently being withheld administratively by the Connecticut Department of Public Works at 5%. The present bill would bring the retainage level for private commercial, institutional, and industrial construction in Connecticut to an amount in line with these requirements for public construction.

Raised Bill 131 addresses a critical problem in our construction industry—paying contractors and subcontractors for the work they have properly performed, and that has been duly accepted by the owner and its representatives. "Retainage" is the amount of contract money that has been approved for payment for work performed, but is "retained" by the owner until the project has been completed and closed out. Oftentimes, retainage includes work a contractor has successfully performed one, two, or even three years before it finally gets fully paid for that work. Yet the contractor must pay its laborers every week, and must pay its material suppliers within a thirty to sixty day period.

Retainage is withheld primarily so that a contractor can be forced to partially finance construction of a project out of its funds, rather than from the owner's funds. Even at the proposed 5% level, this means that 5% of the construction costs are being financed by the contractors and subcontractors until the final completion and acceptance of the project—oftentimes, many months after the owner has taken beneficial use of the project. Withholding large amounts of retainage over an extended period of time—especially in these very difficult economic times for the construction industry—imposes an unfair burden on contractors and subcontractors.

Often times, owners argue in favor of higher retainage levels by claiming that it "guarantees that a contractor will complete its work." But this argument is bogus. In actuality, contractors can't, and don't get paid regular contract payments until their work is approved and accepted by the owner and its representatives. And then they get paid only for the amount of work that has been accepted. If work is not properly performed, it should not be paid for—period. But equally so, if work is properly performed, it should be paid for promptly. Owners should not be allowed to enjoy the benefit of the work completed by contractors and subcontractors, and also withhold large sums for this accepted contract work under the guise of "retainage"—simply so they can use those funds as leverage over a contractor for unrelated issues.

**Raised Bill No. 131 should be approved because:**

- It will bring the retainage levels for private commercial, institutional, and industrial construction in line with the requirements for most of the public construction being performed in Connecticut;
- It is critical that contractors and subcontractors be paid promptly for the labor and materials they have performed, and that has been duly accepted by the owner;
- Owners should not be allowed to enjoy the benefit of the work performed by contractors and subcontractors while withholding excessive amounts of "retainage" – as opposed to paying for that work in a timely manner;
- Contractors and subcontractors should not be forced to "finance" the construction costs of private projects.

Again, thanks to the General Law Committee for considering this important legislation.

**MICHELSON, KANE, ROYSTER & BARGER, P.C.**

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**Testimony of Attorney Steven B. Kaplan  
 Legal Counsel, Connecticut Subcontractors Association  
Raised Bill 131, An Act Concerning Construction Change Orders  
 General Law Committee  
 February 16, 2010**

My name is Steven B. Kaplan. I am Legal Counsel to the Connecticut Subcontractors Association, a trade association that represents the subcontracting industry in our state, and I submit this testimony on the CSA's behalf. I have practiced construction law in Connecticut for 28 years. I also am a founding member and the current chairman of the Construction Law Section of the Connecticut Bar Association.

I strongly support Raised Bill 131, An Act Concerning Retainage.

Under the present Connecticut law, retainage for towns and cities is limited to 5%. By statute, the Connecticut Department of Transportation is limited to retainage of 2½%. On an administrative level, the Connecticut Department of Public Works retains 5%. The present bill would bring the retainage percentages for commercial, institutional, and industrial construction in Connecticut to an amount in line with these requirements for public construction.

Payment problems plague contractors and subcontractors—especially at the end of a project. Raised Bill 131 addresses this critical problem—paying contractors and subcontractors for work that has been duly accepted by the owner and its representatives.

"Retainage" is the amount of money that has been approved for payment for work performed, but is "retained" by the owner until the project has been 100% completed. Frequently, retainage includes work a contractor has successfully performed several years before it finally gets fully paid for that work. Meanwhile, the contractor must pay its laborers every week, and its material suppliers on an ongoing basis. This means, quite simply, that the contractors and subcontractors are financing the owner's project.

Even at the proposed 5% level in this bill, this means that 5% of the construction costs are being financed by the contractors and subcontractors until the final completion and acceptance of the project—oftentimes, many months after the owner has taken

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beneficial use of the project. Withholding large amounts of retainage over an extended period of time imposes an unfair burden on contractors and subcontractors. It also provides owners with unfair leveraging tools to use to pressure contractors and subcontractors in all sorts of situations that have nothing to do with payment for completed contract work.

Owners try to justify higher retainage levels by claiming that it "guarantees that a contractor will complete its work." This argument is a red herring. In reality, contractors don't get paid periodic contract payments until their work is approved and accepted by the owner and its representatives. It is the rule, not the exception, for owners to underpay contractors for the percentage of work completed and accepted—"staying ahead of the contractor"—which provides owners with another mechanism of forcing contractors to finance their projects.

Unless work is properly performed, it does not get paid for. But when work is properly performed, it should be paid for promptly. And by law, that means no less than thirty days after receipt of an approved payment application. Owners should not be allowed to enjoy the benefit of the work completed by contractors and subcontractors, and also withhold large sums for this accepted contract work under the guise of "retainage."

**Raised Bill No. 131 should be approved because:**

- It will bring the retainage levels for private commercial, institutional, and industrial construction in line with the most of the public construction being performed in Connecticut;
- It is critical that contractors and subcontractors get paid promptly for the labor and materials they have performed, and that has been duly accepted by the owner;
- Owners should not be allowed to enjoy the benefit of the work performed by contractors and subcontractors while withholding excessive amounts of "retainage" – as opposed to paying for that work in a timely manner;
- Contractors and subcontractors should not be forced to "finance" the construction costs of private projects.

Again, thanks to the General Law Committee for considering this important legislation.

# CONNECTICUT CONSTRUCTION INDUSTRIES ASSOCIATION, INC.



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**Senate Bill 131, An Act Concerning Retainage**  
**General Law Committee**  
**February 16, 2010**

**CCIA/AGC of Connecticut Position: Support**

The Connecticut Construction Industries Association, Inc. is the most diverse commercial construction industry trade association in Connecticut. Formed over 40 years ago, CCIA is an organization of associations, where all sectors of the commercial construction industry work together to advance and promote their shared interests. CCIA members have a long history of providing quality work for the public benefit.

CCIA is comprised of nine divisions, including the Associated General Contractors of Connecticut, Inc.; The Connecticut Road Builders Association, Inc.; Utility Contractors Association of Connecticut, Inc.; The Connecticut Ready Mixed Concrete Association, Inc.; and Connecticut Asphalt and Aggregate Producers Association. CCIA has more than 350 members statewide, including contractors, subcontractors, suppliers, and professional organizations that service the construction industry.

Associated General Contractors of Connecticut, a division of CCIA, represents commercial, industrial, and institutional construction contractors, subcontractors, material suppliers and professionals serving the construction industry. AGC of Connecticut is the Connecticut chapter of the Associated General Contractors of America, a national contractors trade association.

Senate Bill 131, An Act Concerning Retainage, would reduce the limit of retainage amounts in private commercial construction contracts from 7.5% to 5%. Connecticut law caps the maximum amount of a portion of a contractor's earned funds that may be withheld from each progress payment until the project is complete on covered private construction contracts at seven and one-half percent.

Senate Bill 131 provides a modest reduction in the amount of funds that may be retained on private commercial construction projects in the state. It would provide a balance of fairness and accountability on these projects, particularly for many subcontractors who go long periods of time without being paid the amount of retainage withheld after fulfilling their contractual obligations.

This reduction in the amount of retainage would provide additional relief. Delay in an owner's final acceptance of projects exacerbates the financial pressure of retainage for general contractors and subcontractors. When the release of retainage to general contractors is delayed, subcontractors often have to wait until after the owner releases the general contractor's retainage. This bill would limit that exposure.



The early release of retainage, bonds in lieu of retainage, and other methods have worked successfully to ensure proper performance on private commercial construction projects in the state. In many cases, assurance of subcontractors' proper performance on projects does not hinge on a withholding of 7.5% retainage until the whole project is complete.

Please contact John Butts, Executive Director of AGC of Connecticut, or Matthew Hallisey, Director of Government Relations and Legislative Counsel for CCI, at 860-529-6855, if you have any questions or if you need additional information.

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**CONNECTICUT  
GENERAL ASSEMBLY  
HOUSE**

**PROCEEDINGS  
2010**

**VOL.53  
PART 16  
4949 – 5314**

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HOUSE OF REPRESENTATIVES

219  
May 5, 2010

House Bill 5186 as amended by House "A."

Total Number voting	151
Necessary for adoption	76
Those voting Yea	151
Those voting Nay	0
Those absent and not voting	0

DEPUTY SPEAKER ALTOBELLO:

The bill as amended is passed.

Representative Olson of the 46th, you have the floor, madam.

REP. OLSON (46th):

Thank you, Mr. Speaker.

I rise to move that the items acted upon which require further action in the Senate should be immediately transmitted.

DEPUTY SPEAKER ALTOBELLO:

The items acted upon in immediate transmittal to the Senate. Without objection? Seeing none, so ordered.

The Clerk, please call Calendar 427.

THE CLERK:

On page 19, Calendar 427, Senate Bill Number 131,  
AN ACT CONCERNING RETAINAGE, favorable report by the  
Committee on General Law.

DEPUTY SPEAKER ALTOBELLO:

Representative Shapiro of the 12 dozen, you have the floor, sir.

REP. SHAPIRO (144th):

Thank you, Mr. Speaker.

Mr. Speaker, I move acceptance of the joint committee's favorable report and passage of the bill in concurrence with the Senate.

DEPUTY SPEAKER ALTOBELLO:

The question is acceptance and passage in concurrence with the Senate.

Please proceed, sir.

REP. SHAPIRO (144th):

Thank you, Mr. Speaker.

Mr. Speaker, this bill reduces the amount of retainage allowable under state statute from 7 and a half percent to 5 percent on commercial contracts. These contracts do not include residential. They do not include construction contracts for state buildings and to state departments.

In addition, these contracts are prospective contracts. It does not apply retroactively, but to contracts that would come into effect on or after the effective date of this bill. And the intent of this

bill is to retain and create jobs in our economy as subcontractors are struggling with these large amounts of retainage. This would help them to pay their bills, pay their employees and keep going in their businesses.

And I move passage of the bill, Mr. Speaker.

DEPUTY SPEAKER ALTOBELLO:

The question before the Chamber is passage of the bill.

Representative Bacchiochi of the 52nd District, you have the floor, madam.

REP. BACCHIOCHI (52nd):

Thank you, Mr. Speaker.

I also agree with the chairman of General Law. This is a good bill. It will help the subcontractors who are sometimes struggling in collecting all of the money that is due to them and I urge your support.

Thank you.

DEPUTY SPEAKER ALTOBELLO:

Thank you, madam.

Further on the bill? If not, staff and guests please retire to the well of the House. Members take your seats. The machine will be open.

THE CLERK:

The House of Representatives is voting by roll call. Members to the chamber. The House is taking a roll call vote. Members to the chamber, please.

DEPUTY SPEAKER ALTOBELLO:

Have all members voted? Have all members voted?  
Please check the board to make sure your vote is properly cast.

Have all members from Bethel voted?

Thank you.

Have all members from Mansfield voted?

Thank you, madam.

Please check the board to make sure your vote is properly cast. If all members have voted the machine will be locked. Will the Clerk please take a tally. Will the Clerk please announce the tally.

THE CLERK:

Senate Bill 131 in concurrence with the Senate.

Total Number voting	150
Necessary for adoption	75
Those voting Yea	149
Those voting Nay	1
Those absent and not voting	1

DEPUTY SPEAKER ALTOBELLO:

This bill passes in concurrence with the Senate.

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**CONNECTICUT  
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SENATE**

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item on the consent calendar.

Seeing no objection, so ordered.

Senator Looney.

SENATOR LOONEY:

Yes, Mr. President, thank you.

If the Clerk may now proceed along the -- the list of items previously marked go in regular order. .

THE CHAIR:

Mr. Clerk.

THE CLERK:

Calendar page three, Calendar Number 61, File Number 43, Senate Bill Number 131, AN ACT CONCERNING RETAINAGE, favorable report of the Committee on General Law.

THE CHAIR:

Senator Colapietro.

SENATOR COLAPIETRO:

Thank you, Mr. President.

I move the Joint Committee's favorable report and passage of the bill.

THE CHAIR:

Acting on approval and passage, sir, would you like to remark further?

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SENATOR COLAPIETRO:

Thank you, Mr. President.

THE CHAIR:

Please proceed.

SENATOR COLAPIETRO:

This bill came out of committee unanimously and virtually no one testified against it in the public hearing so the industry has accepted the reduction of seven and a half percent down to five percent and they seem to be okay with that. I myself -- my personal preference is that there shouldn't be any but if retainage for the members of the Circle is money that's withheld, I can't give you an honest answer why it's withheld. It's withheld so that -- when they -- everything is okay again and again and again then they will give the money back supposedly.

Hopefully they think that if somebody goes belly up while they're holding that money back they can put it in their pocket, Mr. President.

THE CHAIR:

Thank you, sir.

Will you remark further on Senate Bill 131?

Senator Witkos.

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SENATOR WITKOS:

Thank you, Mr. President.

I also rise in support of the bill before us today. There was some concerns most recently that were being discussed out in the hallways as to members of the banking community may have some reservations about this bill but let me set those reservations and concerns aside.

What we're talking about here basically are commercial construction loans wherein the -- a developer will go to a bank and take out a loan, we'll use an example of \$1 million, and they're required under our Connecticut state statutes to hold back seven percent of that money. What happens is as the building is being built, the contractor will say I need you to come out and we need a release of funds. Say we've -- we've completed \$500,000 worth of work on the building, we'd like you to come out and approve the release of \$500,000.

So the bank will send a representative out to the construction site, generally at a -- at a fee of \$100 to \$150, and they will make the determination, the bank at this time, whether or

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not they believe that \$500,000 worth of work has been done. If the bank determines that, in their estimate, only \$400,000 of work is done, they only advance \$400,000 of the loan.

So there is a built-in safeguard for the financial institution to make sure their project gets done. They won't release the money unless, through their own interpretation or somebody that they hire, believes that that work is done.

There are concerns from prior years when the loan to value ratio was being lent at 100 percent. That's not done anymore. Right now when somebody comes in, the bank will say well we're going to loan you 65 percent, 80 percent of the cost of the value of when it's done. So if the project went belly up at the very beginning, there's equity built into that project so the bank can recover any costs that they might have lost.

Years ago they couldn't because they were lending at 100 percent so if the project flipped, the bank had no equity so they couldn't sell it out, that was the concern. But reducing the retainage from seven percent to five percent will certainly allow -- more money is available to

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contracts -- contractors to go out and do more work  
is a pro job bill.

I'd ask the Chamber's support.

Thank you, Mr. President.

THE CHAIR:

Thank you, sir.

Will you remark further?

Senator Kane.

SENATOR KANE:

Thank you, Mr. President.

Through you, a couple of questions to the  
proponent of the bill.

THE CHAIR:

Senator Colapietro.

SENATOR KANE:

I'll give you a second.

Through you, Mr. President, I believe this  
bill talks about contractors who work with  
municipalities in -- in the State of Connecticut.

Through you, Mr. President.

THE CHAIR:

Senator Colapietro.

SENATOR COLAPIETRO:

Thank you, Mr. President.

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The bill actually only deals with commercial construction so it could be municipalities or it could be anyone commercially.

THE CHAIR:

Senator Kane.

SENATOR KANE:

Oh okay so -- so it can be State of Connecticut municipalities, any -- any commercial endeavor, okay.

If a contractor, and I understand Senator Witkos's point about creating jobs and giving the contractors the ability to hold more funding and maybe use that towards their -- their potential programs, potential jobs, I -- I get that and I -- I appreciate that, but at the same time I wonder if there were an issue with a particular project that, you know, that's -- I know in -- in my town we've -- we've done three schools recently and there were many change orders, there were many unseen circumstances, unforeseen I should say, and that extra money is used for those type of events, for those type of things that occur.

So, through you, Mr. President, do you not -- do you believe that maybe this would put the towns

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in jeopardy because of those particular change orders or -- or keep them in a situation where they don't have the ability to meet those requirements because there is not enough funding in that -- in that monies that are held?

THE CHAIR:

As soon as he gets his phone, he'll be all set.

Senator Colapietro, tell them you're busy that's all.

SENATOR KANE:

Thank you. ...

Through you, Mr. President.

SENATOR COLAPIETRO:

Thank you, Mr. President.

That -- that money is not supposed to be used for patching up something. You already have final payment. You have a punch list, what they call a punch list, when something goes wrong say a light bulb isn't put in or a fixture is supposed to be put in, they've gotta finish that up then they get their final payment.

The 5 percent retainage, which there is no such word in the dictionary retainage, it's just

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the way for somebody else to make more money off of somebody's money and they can also turn around and hold that money back, like I said before, and wait until they go belly up and hope that they go belly up and then they put the money in their pocket and go away with it.

So it's not money that is supposed to be used. You also have a year's warranty. After a year if something is going wrong and something should be fixed, I'm sure that the contractor or the person who messed it up somehow would fix it or they'd never get another job again.

I have to shut it off.

THE CHAIR:

It's busy.

SENATOR COLAPIETRO:

So through you, Mr. President.

THE CHAIR:

Senator Kane.

SENATOR KANE:

Apparently, someone else has a few questions as well.

THE CHAIR:

Absolutely.

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SENATOR KANE:

Through you, Mr. President, I guess one more question. It has been brought to my attention and I'm sure the attention of others that when you lower this level, this threshold, then it potentially may cost that contractor more money in the long run because of the creditworthiness question. So for example I guess in -- in our own homes, in our own businesses, if we have a greater down payment on -- on a particular project, then maybe we get a lower rate.

Can you speak to that at all?

Through you, Mr. President.

THE CHAIR:

Senator Colapietro.

SENATOR COLAPIETRO:

Certainly, Mr. President.

Like I said before, that money is not used for down payments or anything else. It's only extra money besides what they've already agreed upon. And I'll give you a perfect example. One contractor told me of a -- of a -- I mean a subcontractor told me of a contractor that came up from Tennessee and said, well, in Tennessee, we get

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20 percent and the contractor, with our law here in Connecticut, scratched it off and said no in Connecticut we only get seven and a half percent. And the guy said well, in Tennessee, we get 20 percent and the contractor said, no, in Connecticut, we get 7 and a half percent.

So the industry as a whole has decided that they would settle for 5 percent.

THE CHAIR:

Senator Kane.

SENATOR KANE:

Then I'm confused. If -- let's -- give you -- let's do a simple math example then. If -- if the project is valued at \$100,000, if this bill goes through, the retainage is 5 percent that would be \$5,000. If that is not used and -- and I know I -- I said it quite elementary you know as a deposit, if that is not used for those purposes, what is the 5 percent used for?

Through you, Mr. President.

THE CHAIR:

Senator Colapietro.

SENATOR COLAPIETRO:

Through you, Mr. President, that's the

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question I keep asking everybody, what is the 5 percent for. I never could get an answer. I always get the same answer every time. What do you do when somebody doesn't finish the job right and then you say this is wrong and they finish it? Then you pay them final payment. Okay. Then if you have what they call a punch list, which means there's scratches here, scratches there, what do you do after they do that? Well we give them the rest of the money, final payment. Okay so then they got that.

Then they turn around and I say, well what do you have the 5 percent for? This is after they get a year's warranty on almost anything you -- you can buy or -- or build. I get the same exact answer what's the 5 percent for; I don't know. And so I said that it's -- it's actually -- what it is -- is an accepted construction industry way of holding back money for years but it's gotten so far out of hand that it went up to 25 percent in some cases and we're just trying to reduce it to five with the industry's blessing.

Through you, Mr. President.

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Senator Kane.

SENATOR KANE:

Thank you, Mr. President.

I guess, you know, I'm still trying to figure all this out. If the -- how -- well let me go -- let me ask this question first. How long has it been seven and a half percent?

Through you, Mr. President.

THE CHAIR:

Senator Colapietro.

SENATOR COLAPIETRO:

I think it's been four years since the last time I did the contract -- the -- and I preferred zero percent and I settled for seven and a half percent.

Through you, Mr. President.

THE CHAIR:

Senator Kane.

SENATOR KANE:

Thank you, Mr. President.

So then if -- if it were zero percent then there would be no retainage at all which would create quite a risk I guess in my mind. I'm still trying to figure out this whole -- how this money

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is being used. The -- if the -- the industry standard was seven and a half percent and now we lower it to five, that's -- that's -- I guess my concern is that on these particular projects the companies that are making the -- or doing the contracting, they're doing the work, they have to go out for credit for the rest of those dollars I'm assuming and I believe that that would change their rate based on the value of the project.

So that's why -- I guess I still have some concerns about the project.

Thank you, Senator Colapietro, I -- I guess I have no more questions but I -- I do want to hear the rest of the debate before I make my decision because I'm still a little not quite sure on how the retainage is used and how much a percentage it really should be and then lastly how that affects that said contractor when they go out for credit.

Thank you, Mr. President.

THE CHAIR:

Thank you, sir.

Will you remark further on Senate Bill 131?

Senator Colapietro.

SENATOR COLAPIETRO:

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Through you, Mr. President, the only thing I can say is that I agree with Senator Kane that we don't why they have the 5 percent -- the seven and a half percent retainage. We haven't been able to figure that out and I haven't been able to figure it out in five years or six years so we did settle for seven and a half percent and if -- if there's no further discussion, I would move --

THE CHAIR:

Senator Colapietro, I believe Senator Fasano would like to speak.

SENATOR COLAPIETRO:

Oh thank you, Mr. President. I'm sorry.

THE CHAIR:

Thank you, sir, that's okay.

Senator Fasano.

SENATOR FASANO:

Thank you, Mr. President.

Mr. President, I rise in support of the bill. I think that Senator Kane has very good questions and makes some very good points however my experience is that, in the business world when you do contracts for construction, road construction, site improvement construction, it's usually 5

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percent of each line item that is held as a retainage.

I don't know where 7.5 percent came in -- in these other issues but I'll tell you it's 5 percent and when a contractor is held back on 5 percent, Mr. President, in this economy, that's still a lot of money. Going from 7.5 to 5 would be in keeping with the standards of practice that I see in a daily routine as a lawyer who does developments for various clients that the 5 percent is what I see as a normal.

Now, I understand that some banks want to hold 7.5 percent and I'm not suggesting their motive may be of a different caliber which is obviously the more money they can retain from giving out the more money they get to lend because they get to secure that extra two and a half percent on all their construction contracts, hold that in reserve in their bank and use that as -- as on their balance sheets if you would.

I'm not suggesting that's the case but I can't find a rationale from the five that's the standard practice to 7.5. Mr. President, I've been involved in a lot of projects, both municipal, maybe not

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state, but municipal and private and I find that the 10 percent is enough of a -- of a lure to keep the contractor on the table. Usually when you get down to that 5 percent you're into their profits because they pay the suppliers, they pay the other people along the way. This is what they get to take home at the end of the day.

So I think you have a motive for them to come back so I don't think it's an issue that they're going to walk away from 5 percent or they wouldn't walk away from a seven and a half percent.

Nevertheless, Mr. President, I think this bill makes a lot of sense. I think it makes most sense in this industry at this time and I would support the passage of this bill.

Thank you, Mr. President.

THE CHAIR:

Senator Colapietro, would you like to speak again?

SENATOR COLAPIETRO:

Thank you, Mr. President, I would.

I would just like to thank Senator Witkos and Senator Fasano for their explanation of the 5 percent. I just want to add to it that I had calls

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from several contractors that were just teetering on the borderline of going under and they told me that at seven and a half percent it's really borderline whether they're going to be able to stay in business or not if they got that money. If they've withheld the money too long, they would have to go belly up and go under and I didn't want to see that.

Thank you, Mr. President.

And if there's no further discussion I would move this item to the consent calendar.

THE CHAIR:

Is there any further discussion on Senate Bill 131?

There is a motion on the floor to place the item on Consent.

Seeing no objection, so ordered, sir.

Mr. Clerk.

THE CLERK:

Calendar Number 69, File Number 37, Senate Bill Number 62, AN ACT CONCERNING THE LEGISLATIVE COMMISSIONERS' RECOMMENDATIONS FOR TECHNICAL CORRECTIONS TO LABOR STATUTES, favorable report of the Committee on Labor.

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has been ordered in the Senate on the consent calendar. Will all Senators please return to the Chamber.

Mr. President, the items placed Consent Calendar Number 1 begin on calendar page 1, Calendar 435, House Joint Resolution Number 102; calendar page 2, Calendar 436, House Joint Resolution Number 103; Calendar 437, House Joint Resolution Number 104; Calendar 438, House Joint Resolution Number 105; calendar page 3, Calendar Number 53, Substitute for Senate Bill 141; Calendar 61, Senate Bill 131; Calendar Number 69, Senate Bill 62; calendar page 5, Calendar 139, Substitute for Senate Bill 173; Calendar 151, Substitute for Senate Bill 149; calendar page 8, Calendar 221, Senate Bill 156; calendar page 11, Calendar 332, Substitute for Senate Bill 153, calendar page 12, Calendar 339, Senate Bill 443; calendar page 26, Calendar Number 54, Senate Bill 190; calendar page 29, Calendar 129, Substitute for Senate Bill 50 and calendar page 32, Calendar Number 191, Substitute for Senate Bill 407.

Mr. President, that completes those items placed on the first consent calendar.

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THE CHAIR:

Thank you, sir.

Please call the consent. The machine will be open.

THE CLERK:

The Senate is now voting by roll call on the consent calendar. Will all Senators please return to the Chamber. The Senate is now voting by roll on the consent calendar. Will all Senators please return to the chamber.

THE CHAIR:

Have all Senators voted? If all Senators have voted, please check your vote. The machine will be locked. The Clerk will call the tally.

THE CLERK:

Motion is on adoption of consent calendar  
Number 1.

Total number voting	35
Those voting Yea	35
Those voting Nay	0
Those absent and not voting	1

THE CHAIR:

Consent calendar passes.

Senator Looney.