

**OREGON LAW COMMISSION**

**January 26, 2001**

**Hearing Room 350**

**2:30 pm**

**Tapes 1 - 5**

**MEMBERS PRESENT:     Rep. Lane Shetterly, Chair**

**Sen. Kate Brown, Vice Chair**

**Chief Justice Wallace P. Carson, Jr.**

**Jeff Carter**

**Sandra Hansberger**

**Prof. Hans Linde**

**Greg Mowe**

**Attorney General Hardy Myers**

**Prof. Bernie Vail**

**Prof. Dom Vetri**

**Rep. Max Williams**

**MEMBER EXCUSED:     Steve Blackhurst**

**Symeon Symeonides**

**STAFF PRESENT:**

- Dean David R. Kenagy, Executive Director**
- Michelle Mhoon, Assistant to the Executive Director**
- Shirley Gunter, Administrative Support**
- David Heynderickx, Deputy Legislative Counsel**
- Bill Taylor, Judiciary Committee Counsel**
- Marilyn Odell, Judiciary Committee Counsel**

**MEASURE/ISSUES HEARD:**

- Approval of Minutes for December 18, 2000 Meeting**
- Executive Director's Report**
- Judicial Review Procedures Act**

**These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.**

<b>TAPE/#</b>	<b>Speaker</b>	<b>Comments</b>
<b>TAPE 1, A</b>		
06	Chair Shetterly	Work session to review the final work product of the Judicial Review Procedures Act. Minutes to be approved for December 18, 2000 meeting. Makes a motion to approve the minutes. Minutes approved.
025	Dave Kenagy	Reports on the status of the ten Commission bills that are now in the legislative process. Announces that the first two Commission bills will be up for hearing Monday morning at 8:00 a.m., January 29th, in the Civil Sub-committee of the House Judiciary Committee. Rep. Williams chairs the Judiciary Committee and Rep. Cherryl Walker chairs the Civil sub-committee. He notes that there are also other hearings scheduled later in the week. Calls attention to the February 26th meeting of the Program Committee of the Oregon Law Commission and solicits suggestions for topics to build the Commission's agenda for the 2001-2003 session.

050	Chair Shetterly	Thanks the Willamette crew for hosting the open house last week. It was very successful and well attended. The remainder of our time will be spent reviewing in further detail the Judicial Review bill that we have before us – it is presently in LC form , but has since been designated as House Bill 2246 ( <b>EXHIBIT A</b> ). Asks Justice Carson to report on the meeting that took place at the Supreme Court on Wednesday, January 24th. Advises he will turn the meeting over to Hardy Myers and Phil Schradle to present the Report on the bill.
080	Justice Carson	Reports on the outcome of the annual conference of Appellate Court Judges Association held on Wednesday, January 24th. Advises that Phil Schradle made a presentation to the judges on the substance of the Judicial Review Procedures Act. Paul Snyder, Counsel for Association of Oregon Counties, Scott Parker, Special Counsel for Clackamas County and Christy Monson, Counsel for League of Oregon Cities presented their side and interpretation of the bill. Good discussion. States that the Association then went into their meeting and had a good discussion about the bill. The Appellate Court Judges Association approved making every reasonable effort for passage of legislation along the lines of the legislation proposed in HB 2246. Advises that sixteen members were present, one member was absent and the measure passed with 15 yeas and 1 abstention.
174	Chair Shetterly	Chair advises those attending this meeting (interested parties) that this is a work session on the Judicial Review bill which is different from a regular Commission meeting. The Commission has already approved this bill to go to the legislature. We will follow up on some areas that had some disagreement. Calls attention to the materials handed out today - Janice Krem’s testimony ( <b>EXHIBIT B</b> ) and Wendie Kellington’s letter ( <b>EXHIBIT C</b> ) are in your packet. There will not be any additional testimony. The purpose of this meeting today is to have a roundtable discussion among the Commission members to resolve issues that were presented at the December meeting. Mr. Schradle was to prepare a report in light of the concerns and questions that were raised and generally to explain the bill for the purpose of furthering the legislative and the Commission history of it. Encourages the Commission members to ask questions as Mr. Schradle goes through the Report.
218	Phil Schradle	Introduces himself as Special Counsel for the Attorney General. Advises he will be distributing a couple of revisions to the House Bill. Amendments might improve the bill.
<b><u>TAPE 2, A</u></b>		
005	Phil Schradle	Advises he prepared a report which is entitled “Clarifying Judicial Review: An Explanation of the Judicial Review Procedures Act”, that contains some background and history of the Judicial Review bill, as well as a section-by-section analysis. ( <b>EXHIBIT D</b> ). Goes into a lengthy detailed history of the bill. Discusses Dave Heynderickx’s proposed revisions to the bill ( <b>EXHIBIT E</b> ).
099	Phil Schradle	Gives an extensive overview of his Report that was distributed at the meeting. Talks about qualified petitioners. Sets out eligibility requirements to seek judicial review. Proposes an amendment –

		language is set out on the bottom of the first page in David Heynderickx's memo.
234	Chair Shetterly	Clarifies that Mr. Schradle is referring to Dave Heynderickx's memorandum dated January 25th to members of the Commission.
237	Phil Schradle	Confirms that is correct.
<b><u>TAPE 1, B</u></b>		
005	Phil Schradle	Continues his section-by-section explanation of the bill.
<b><u>TAPE 2, B</u></b>		
028	Phil Schradle	Explains the memorandum that Dave Heynderickx prepared dated January 25th, - in reviewing HB 2246, in Section 18 there is a redundancy that got incorporated into the language in Sections 5 through 11 - talks about how the record needs to be developed. And Section 18, sub 12 in the bill was an alternative that was proposed. It unfortunately was reprinted in the bill that was submitted. We suggest that section 12 be stricken and Section 5 to 11 governs.
051	Chair Shetterly	Asks Commission members for their input.
058	Sandra Hansberger	No problems at all with the concept of the bill but some of the language – which is a minor point. Identifies her concerns with Section 6, subsection 2(a) that discusses ORCP 21 as well as subsection 3 that talks about a preliminary Motion to Dismiss shall be treated as a Motion to Dismiss under ORCP 21. She continued to express her concerns.
091	Greg Mowe	Expresses the same concerns. Identifies different concepts between Mr. Schradle's' draft and ORCP 21. Believes this will cause confusion.
097	Hans Linde	Asks for clarification from Sandra and Greg on what they are saying.
107	Dave Heynderickx	Explains ORCP Rule 21. This is generally a Motion to Strike. Further explains Rule 21 and how it is to be used.
141	Sandra Hansberger	Rule 21 does list definite actions.
159	Hans Linde	Asks Ms. Hansberger which subsections she wants to exclude.
168	Sandra Hansberger	She would like to see Motion to Make More Definite and Certain excluded. States that Rule 21 is a little too broad. Further discussion ensued on exclusions.
210	Dom Vetri	States that he assumes the reason for the early attempt to dismiss is to avoid unnecessary expenses of accumulating big records in lots of cases that might otherwise be out of court several months later.
<b><u>TAPE 3, A</u></b>		
016	Sandra Hansberger	Does not disagree with Dom's statement about the draft but states that there is a lot more ways in ORCP 21 to get rid of claims that shouldn't be there.
051	Dom Vetri	Asserts that if the lawyer for the petitioner made a credible claim he should be able to see the record in order to determine whether he has a cognizable claim or not.
068	Hans Linde	Calls attention to page 6 of the bill – section 4, subsection 7, protective provision. Allow the people to bring in the claim. It is necessary to persuade the judge that it really is necessary to see the record.
090	Dave Heynderickx	Explains why the lawyer needs to see the record. Discusses the

120	Greg Mowe	language and the point of the motion to dismiss. Dom's point is that if you literally apply Rule 21 you could never see a record unless you could come up with the facts.
128	Chair Shetterly	Suggests that this discussion move along to make sure we have time to pick up any other points that need to be addressed Today we are only identifying issues since the bill is in the possession of the Judiciary Committee. States that it is worthwhile noting that this discussion raises the question of how well ORCP 21 motions fit the Notice of Pleading. This will take more time than what we have here today. We should note that issue for further discussion with David and the Judiciary Committee and so we should move on. It is a good issue as to how well Rule 21 fits.
173	Dom Vetri	Asks for further explanation on Section 6, subsection 2(b). It says one of the grounds for dismissal would be that the person has no significant personal interest – that is understood. But then it goes on to say “the court determines that the person who purports to represent the public interest is not able to competently represent the public interest. This is oddly worded. What is the purpose here?
191	Phil Schradle	This language was suggested by Hans Linde. Explains this further.
211	Dave Heynderickx	The idea is if someone is coming in on behalf of the public interest, the Court might want to make sure that the person is able to do a good job representing the public interest. Further discussion on this issue (public interest).

**TAPE 4, A**

020	Chair Shetterly	Expresses concern about what kind of finding the court makes and how it makes it.
022	Sandra Hansberger	Asks what competent really means?
026	Dom Vetri	If you are going to be represented by a lawyer you presume he is competent. We should be concerned about the person bringing a claim - to make sure he is filing this action to adjudicate the public interest and not for some private concern related to his own financial interest. Discussion continues between all members of the Commission.
086	Chair Shetterly	Maintains that this is a red flag issue.
132	Chair Shetterly Dom Vetri	Asks if there are any other issues that need attention. Expresses concern about the 35-day rule. Page 6 and 7, Section 5, subsection 3(a). Maybe we could come up with a longer time period. Can't we come up with a longer period of time that would be fair to both the government and the private citizen.
157	Hans Linde	The time period is just a policy choice. The legislature can change this time period. This will be a legislative decision.
208	Phil Schradle	Current practice under the Administrative Procedures Act differentiates between rule challenges and order challenges. Rule challenges would be enactments and order challenges would be an administrative act. Further explains the time limits on rule challenges and order challenges.

**TAPE 3, B**

004	Greg Mowe	Acknowledges that he has trouble with the 35 days. His reason is that there are a lot of legal proceedings where people get notice at the end
-----	-----------	---

of the proceeding saying they have so many days to appeal. Gives examples. He feels that a notice should be provided.

017 Dave Heynderickx States that under the APA generally the formal types of decisions made by government is required to give notice of 60 days.

039 Sandra Hansberger I like Greg Mowe's option. This is an access issue for un-represented people and I am concerned about that.

048 Dom Vetri This can cause a real malpractice problem for lawyers. If they come in two or three days before the time lapses and the lawyer doesn't pick up on the 30-day requirement. Asks questions.

056 Hans Linde States that we need to move on. Asks if there should be a motion.

064 Chair Shetterly Stresses that rather than to take actions with motions on all of these various issues we should highlight these issues and we should come back and re-visit. Asks if Greg has any questions.

076 Greg Mowe I have several points that I want to bring up. One conceptual issue – I really like the idea of combining the procedures. Thinks that the transfer mechanism is a wonderful and helpful idea for the practitioners. Asks if some of the divergents could be dealt with just by some exceptions. Goes over some of the sections where exceptions would work. Lengthy discussion.

**TAPE 4, B**

023 Greg Mowe Goes over some of the sections that relate to exceptions. Recommends to amend either Section 3, sub 5, sub (r) which refers to the general condemnation procedures or the tort section which is Section 3 sub 7 to specifically exclude actions for inverse condemnation.

060 Dave Heynderickx There are rights for a jury trial. There are some statutes that provide for the right to a jury trial even though the constitution doesn't.

070 Greg Mowe States that he was also troubled by the reading of Section 3, Sub 5 sub 7, which is a tort claim provision. Gives some detail about his concerns.

084 Phil Schradle Attempts to address Mr. Mowe's concerns.

105 Greg Mowe Stresses that his concern was that the draft has broadened the definition so much that it is not clear.

174 Sandra Hansberger We need to take a closer look at that. Expresses concern.

184 Greg Mowe Another local government point. Expresses concern about the Preamble section. Continues to address his concerns – recognizes there are exceptions and there are opportunities to request a proceeding but would feel more comfortable if this section were even more limited to only apply to either judicial or quasi judicial proceedings. – Gives examples.

**TAPE 5, A**

003 Sandra Hansberger Expresses her concerns as Greg did on Section 10. Concerned with the language in this section – on how it is worded. Also mentions Section 7 that deals with standing. Understands that current law is that anyone can currently challenge an administrative rule. Did this group consider this in drafting the bill to change that.

029 Phil Schradle Advises that there is litigation currently pending at the Appellate court level that is questioning whether “any person” actually means any person because there is still at least the requirement that there be a

- 050 Hans Linde justiciable controversy. Explains this further and gives examples. You have to have a distinction between adversaryness in terms of assuming an adversary position and having an “interest”. You need to be careful to distinguish between adversary and interest.
- 084 Chair Shetterly States that by David’s count he is telling us that we have two amendments and 11 ½ issues. Unless there is more that needs to come up today, we should probably bring this to a close.
- 085 Hardy Myers Asks how to handle the amendments. Should they be considered as points for consideration.
- 091 Chair Shetterly Indicates that Dave Kenagy should sit down with Max Williams, Chair of the House Judiciary Committee and Dave Heynderickx and work through this for amendments to the bill in Committee and see where that takes us.
- 109 Hans Linde Advises that Phil will do some fine turning of this Report that you see from the working group to the Commission.
- 113 Chair Shetterly Makes a Motion to approve the amendments that are before us in Dave Heynderickx’s memo of January 25, 2001 to make them part of our history and recommendations on the bill. Is there any further discussion on that motion? Any objections. If there are none, **SO ORDERED.**

Advises everyone that there are several bills going through on Monday. Adjourns the meeting at 4:00 P.M.

Submitted By,

Reviewed By,

ss

ss

Shirley Gunter,

David R. Kenagy,

Administrative Assistant

Executive Director

**EXHIBIT SUMMARY**

**A – Judicial Review Procedures Act, HB 2246, 20 pages**

**B - Memorandum from Janice Krem dated December 14, 2000, 6 pages**

**C - Letter from Wendie L. Kellington dated December 15, 2000, 4 pages**

**D - Clarifying Judicial Review: An Explanation of the Judicial Review**

**Procedures Act, 18 pages**

**E - Memorandum from David Heynderickx dated January 25, 2001, 2 pages**

**EXHIBITS NOT REFERENCED IN THE MINUTES:**

**F - Memorandum dated December 29, 2000, from Scott Parker, on behalf of the Assn. Of Oregon Cities, and Christy Monson, for the League of Oregon Cities, jointly as part of the Local Government Judicial Review Legal Team, 3 pages**