

HOUSE JUDICIARY COMMITTEE ON CIVIL LAW

February 16, 1999 Hearing Room 357

1:00 p.m. Tapes 35 - 36

MEMBERS PRESENT: Rep. Lane Shetterly, Chair

Rep. Max Williams, Vice-Chair

Rep. Judy Uherbelau, Vice-Chair

Rep. Vic Backlund

Rep. Randall Edwards

Rep. Kathy Lowe

Rep. Vicki Walker

Rep. Larry Wells

Rep. Bill Witt

STAFF PRESENT: Aaron Felton, Counsel

Nancy Richards, Administrative Support

MEASURE/ISSUES HEARD: HB 2481

HB 2482

SB 384

SB 385

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.

TAPE/#	Speaker	Comments
TAPE 35, A		

004	Chair Shetterly	Calls meeting to order at 1:04 p.m.
<u>HB 2481 n PUBLIC HEARING</u>		
011	Counsel Felton	HB 2481 amends current requirement that Court of Appeals schedule oral argument within 42 days of appeal from decision of Land Use Board of Appeals.
019	Jim Nass	Legal Counsel for Appellate Court Testifies and submits written testimony in support of HB 2481 (EXHIBIT A). Discusses the time limits imposed on the parties and the Court of Appeals on judicial review of Land Use Board of Appeals (LUBA) decisions. Explains the difference between a time limit established by rule and one established by statute. Explains that the removing of the forty-two day statutory requirement will provide necessary flexibility in scheduling the court's oral argument docket.
071	Rep. Uherbelau	How do you deal with a time line that isn't flexible?
080	Nass	The problem is having enough judges to fit the panel to hear all of the cases. For motions of time, the chief judge has taken the legislative direction to mean that there shall be no extensions of time.
091	Chair Shetterly	What is the volume of cases in a court of appeals?
092	Nass	We receive about 4,000 new cases a year and about 40% settle or are dropped by the party.
097	Chair Shetterly	How many of those are LUBA cases?
098	Nass	I don't know.
098	Rep. Uherbelau	Do you have the mediation program where there is a goal to send about 25% to appellate mediations?
101	Nass	Yes, but we do not include LUBA cases in that program.
104	Rep. Wells	Asks about the necessity to abide by the forty-two day limit.
110	Nass	In the rare case in which we could not get the job done in the time allowed, we would have the authority to extend that.
112	Rep. Uherbelau	The courts would still have the 91 days to make their decision.

119	Nass	The 91-day limit is found in ORS 197.855 .
121	Rep. Backlund	Has the court ever failed to meet the ninety-one day deadline?
124	Nass	The statute permits the court to do so if it makes certain findings.
128	Chair Shetterly	It is not the attempt of the court to extend the time line that is already applying to these cases, but to lift the statutory deadline and give the flexibility to do that within the practices now.
135	Nass	The court understands the legislative directive to decide these cases quickly and intends to continue this policy.
137	Chair Shetterly	States that the expedited schedule means that these cases go ahead unless some other statutory directive to require otherwise.
141	Rep. Wells	Relates the procedure by the Court of Appeals to make decisions and that they do not always need to explain why they came to those conclusions.
152	Nass	Discusses how an opinion works in the Court of Appeals and when they are used.
188	Chair Shetterly	How many opinions do the Court of Appeals issue each year?
189	Nass	I do not know exactly, but it is about 40% of the cases overall with the largest share being criminal, and post-conviction, and habeas corpus cases.
195	Rep. Wells	If the courts made an opinion on every decision that was made, would this increase the courts workload?
200	Nass	Yes, this would increase the workload of the courts. Explains unpublished decisions used by some states in their courts and the problems that comes from this procedure. Discusses an option that the courts could use for unpublished decisions by the court.
235	Chair Shetterly	Closes public hearing.
<u>HB 2481 Work Session</u>		
247	Rep. Uherbelau	MOTION: Moves HB 2481 to the floor with a DO PASS recommendation.
		VOTE: 7-0

AYE: 7 - Backlund, Lowe, Uherbelau, Wells, Williams, Witt, Shetterly
EXCUSED: 2 - Edwards, Walker
CARRIER: Rep. Shetterly

HB 2482 Public Hearing

260	Counsel Felton	HB 2482 allows a defendant in civil action or proceeding to appeal from default judgement if trial court has entered default judgement against defendant as sanction or has denied motion by defendant to set aside default judgment.
274	Jim Nass	Legal Counsel, Court of Appeals Testifies and submits testimony on HB 2482 (EXHIBITS A & B). Discusses and clarifies the permission of a party to appeal from a default judgment.
334	Chair Shetterly	Explains the default order and that it is not appealable.
349	Nass	Under current law, you would go back and have the opportunity to contest the appeal. Further explains on default judgments and the language to be changed in the bill. Speaks of a liable and slander case and how it relates to this bill.
429	Chair Shetterly	Does this change codify the default judgment?
416	Nass	Yes, it would codify it, but it does not change it. Discusses a default judgment that is void when entered by a trial court that didn't have personal jurisdiction or subject matter jurisdiction.
439	Rep. Uherbelau	Discusses changes to the bill's language to make it more clear on voided judgments.
451	Nass	This is one of those situations where the jurisdictional question and the question on the merits is all bound up.
456	Rep. Uherbelau	Explains that the language could be confusing to those who decide to represent themselves in appeal cases.
463	Nass	Agrees that the language could be more clear on that matter.
468	Chair Shetterly	Comments on line 18 of HB 2482 regarding the defendant and that it would not always be a defendant that is appealing. Discusses a change in language that could clarify that.

Tape 36, Side A

032	Nass	Discusses the cost of court transcripts and the change of language in the bill regarding the process of a indigent person getting a waiver or deferral of the filing fee first before they request a transcript. Discusses where they were getting the money to pay for transcripts where an indigent person could not pay for them.
087	Chair Shetterly	Refers to the language on lines 27-30 of page 3 and these lines how the changes of deferred collecting.
088	Nass	Discusses the judgment imposed by the court for collecting court fees and how it would effect property sales.
099	Rep. Uherbelau	Where in HB 2482 does it show that the court has the authority not waive filing fees?
103	Nass	The court could not afford to waive every personís fees, so there is a standard set to protect the costs of the court.
112	Rep. Uherbelau	Discusses the authority of the courts regarding the waiver of the filing fees and the language providing the authority.
128	Chair Shetterly	Explains the language on line 20, "the court may order", which makes it discretionary for the court to have the ability to establish standards regarding that discretion.
135	Rep. Uherbelau	Explains "may" to mean that the courts do not necessarily have to waive the fees if the person can not pay for them.
140	Nass	We would have no problem with the change as it would make it easier for people to find those standards.
147	Rep. Lowe	Would this proposed language allow the court to get a money judgment for deferred costs against the non-prevailing party where the costs fees are allowed to the prevailing party in appeal?
150	Nass	Yes it would. States that the transcript costs is paid by the state if the party can not pay the fee. The court then recovers those funds by filing a judgement.
154	Rep. Lowe	This bill would not prevent the court from collecting the fees?
161	Nass	Correct. Explains that if the prevailing party wins, they could recover the costs from the adverse party.
166	Rep. Lowe	Is the language in the bill sufficient enough to let the court assess the deferred costs against the losing party?

169	Nass	The language does not grant enough authority to defer costs against the losing party, but that could be changed.
174	Rep. Uherbelau	In your written testimony, on page 6, second paragraph, does not equate to what is actually proposed by the bill.
187	Chair Shetterly	States that a waiver is when the party does not have to pay the fee and a deferral is when they do pay the fees.
188	Nass	Advises that there hasn't been a case where the court has completely waived the fee. This waiver is a consideration given an indigent person who has made this type of showing that they are reasonably likely to win, so it becomes an obligation. Discusses the language change to clarify "waiver".
200	Chair Shetterly	States that language of the bill would change waiver to deferral, since the courts do not want the authority to waive a fee.
201	Nass	Yes. Discusses the language in the statutes regarding "Trial Court Clerk" and that it should be changed to "Trial Court Administrator" to eliminate confusion.
220	Chair Shetterly	Closes public hearing.
<u>HB 2481 Work Session</u>		
236	Shetterly	MOTION: Requests unanimous consent that the rules be SUSPENDED to allow REP. WITT and REP. EDWARDS to BE RECORDED as voting AYE on the HB 2481 Do Pass recommendation.
<u>SB 384 Public Hearing</u>		
253	Counsel Tweedt	SB 384 allows a state agency to withdraw certain orders for purpose of reconsideration after filing of petition for judicial review.
250	Stephen Bushong	Attorney General Office Testifies and submits written testimony in support of SB 384 (EXHIBIT C). Discusses the portion of the bill that gives the agencies an authority to withdraw an order for reconsideration.
280	Chair Shetterly	Comments on his concern that the language on line 29, page 1 of the bill modifies the order with only minor changes. Is that identical to what is in current law and what is the standard?
284	Bushong	Discusses what "minor changes" means and the standards.

294	Rep. Witt	Will the change frustrate the petitioner regarding the timing of a review hearing?
299	Bushong	Discusses the intent of the bill and the effect of time lines.
308	Rep. Witt	Where does the agency withdraw an order for the purpose of reconsideration from the petitioner and there any time constraints on the agencies?
320	Bushong	Discusses the protection that is contained in the provision for review of contested case orders.
333	Rep. Uherbelau	If a petitioner challenges an order on an uncontested case, that the agency has no time line to respond to that appeal.
339	Bushong	That is not the case because the agency is required to act within the time line of the agency's administrative rules, but if the agency isn't acting quickly then the person can bring it to the court's attention through another statute that requires immediate action.
353	Rep. Uherbelau	If the agency is wrong in withdrawing the order for purpose of reconsideration, could the petitioner be awarded attorney's fees.
357	Bushong	Yes, under the current provision of the Administrative Procedures Act.
360	Rep. Uherbelau	Asks what happens when an order and a petition are filed and the agency may or may not have time lines in their rules and then there is no allowances for attorney fees?
379	Bushong	Discusses the provision that is currently in the APA dealing with state agencies that can withdraw their judgment orders in contested cases.
400	Rep. Uherbelau	Asks if with the uncontested cases the time lines are more firmly established?
405	Chair Shetterly	Explains line 23 and line 24, which provides a better standard for time lines.
417	Rep. Uherbelau	Explains that the standard only applies once they have withdrawn their order for purpose of reconsideration and before that, there is no time line when the agency has to look at the petition for reconsideration.
428	Chair Shetterly	Discusses how this time line will be covered by SB 384.
444	Rep. Lowe	Asks if line 26 on page 1, assumes that the petitioner may file the petition again for review without a new filing fee?

456	Bushong	A new fee does not have to be paid because no significant changes are made in the order and you don't have to file again.
467	Rep. Witt	How does the court enter into setting a time that allows an agency to allow, affirm, modify or reverse its order?
479	Bushong	Discusses what happens when an agency withdraws its order of reconsideration.
Tape 35, Side B		
031	Rep. Witt	Are the petitioner's legal fees covered during the time the agencies are reconsidering the order?
040	Bushong	Discusses the existing standards for awarding attorney fees.
047	Rep. Witt	Discusses different cases where legal fees are covered.
058	Bushong	Explains the benefit of "second look" for the agency and how it relates to attorney fees.
066	Rep. Witt	States that the legal fees wouldn't have happened, once the petitioner has gone to the expense of filing the appeal, if the agency had corrected its order prior to the filing of the petition.
074	Bushong	That is correct. Discusses the practice of agencies withdrawing their orders for purpose of consideration which is the exception and discusses the legal fees involved.
082	Rep. Uherbelau	Explains the different legal fees that occur during the time a petitioner files an appeal.
095	Bushong	Advises that where there has not been any agency action on a petition then there can be no case filed because judicial review is only available when there is a final agency order.
106	Rep. Uherbelau	What is the difference between a contested and non-contested case?
111	Bushong	Explains the difference between a contested and a non-contested case and gives examples.
138	Chair Shetterly	What is there to prevent the agency and the property owner from settling which does the same thing as a judicial review?

147	Bushong	Agencies frequently negotiate settlements and sometimes they go to the courts and ask them not to act.
156	Rep. Uherbelau	States that Chapter 183, provides for alternative dispute resolution.
159	Rep. Lowe	Expresses that she likes the bill because it causes quick solutions.
181	Bushong	Encourages passage of the bill as written because it makes sense the way it works for contested cases and works well for non-contested cases.
198	Rep. Witt	Discusses the incentives of this bill would be to hold the agencies accountable for issuing an improper order and that it is justified and will cause them to be more careful.
214	Rep. Uherbelau	Discusses the issue of attorney fees and that SB 384 would be an incentive to resolution, saving everyone money.
234	Rep. Lowe	Expresses the need for agencies having an alternative solution for reversing their mistakes.
254	Rep. Witt	States that agencies need to be held accountable when issuing wrong and careless orders.
259	Rep. Edwards	Likes this bill because it does give the opportunity for an agency to withdraw their order. States uncertainty about the attorney fee issue in SB 384.
270	Rep. Backlund	Did this discussion come up in the Senate?
280	Tweedt	No, this was not discussed regarding the attorney fees in committee. Discusses the one vote filed on the floor against the bill and this member's concern.
295	Chair Shetterly	Close public hearing.
<u>SB 385 Public Hearing</u>		
303	Counsel Tweedt	SB 385 exempts voice mail and other telephone messages from public records maintained by State Archivist.
317	Peter Cogswell	Legislative Assistant, Department of Justice Testifies and submits written testimony in support of SB 385 (EXHIBIT D). Discusses how this bill would exclude voicemail from public record.

339	Rep. Edwards	Was there any deliberation on other technologies such as e-mail regarding record keeping?
343	Cogswell	This bill applies only to voice mail because e-mails are much harder to archive. Discusses why the concern is only with voice mail.
363	Rep. Edwards	Asks for further explanation on future technology regarding saving voice mail?
375	Cogswell	States that there was research done and there was no mechanism that would archive voice mail for any length of time.
382	Chair Shetterly	Close public hearing.
<u>SB 385 Work Session</u>		
384	Chair Shetterly	Opens work session.
392	Rep. Uherbelau	MOTION: Moves SB 385 to the floor with a DO PASS recommendation.
		VOTE: 8-0 AYE: 8 - Backlund, Edwards, Lowe, Uherbelau, Wells, Williams, Witt, Shetterly EXCUSED: 1 - Walker CARRIER: Edwards
	Chair Shetterly	The motion CARRIES.
404		MOTION: Requests unanimous consent that the rules be SUSPENDED to allow REP. WILLIAMS to BE RECORDED as voting AYE on the Do Pass recommendation on HB 2481.
410	Chair Shetterly	Closes meeting at 2:26 p.m.

Nancy Richards, Aaron Felton,
Administrative Support Counsel

EXHIBIT SUMMARY

A - HB 2481, Written testimony, Jim Nass, p. 5

B - HB 2482, Written testimony, Jim Nass, p. 6

C - SB 384, Written testimony, Stephen Bushong, p. 1

D - SB 385, Written testimony, Peter Cogswell, p. 1