

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

February 7, 1991 Hearing Room 357 1:00 p.m. Tapes 16 - 19

MEMBERS PRESENT: Rep. Ray Baum, Chair Rep. Marie Bell Rep. Tom Brian
Rep. Kelly Clark Rep. Jim Edmunson Rep. Rod Johnson Rep. Kevin Mannix
Rep. Randy Miller

VISITING MEMBER: Rep. Ron Sunseri

STAFF PRESENT: Greg Chaimov, Committee Counsel Kathy Neely,
Committee Assistant

MEASURES CONSIDERED: HB 2355 (Public) HB 2356 (Public) HB 2357
(Public) HB 2362 (Public) HB 2352 (Public)

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TAPE 16, SIDE A

003 REPRESENTATIVE BAUM, CHAIR: Calls the meeting to order at 1:00 p.m.

PUBLIC HEARING ON HB 2355, 2356, and 2357 Witnesses: David Marcus,
Exhibit A Elyse Clawson, Exhibit C Vern Faatz Jose Matz Simon ffitich,
Exhibit B Bob Muir, Exhibit D Janet Carlson, Exhibit E Dennis Dowd

013 GREG CHAIMOV: Describes HB 2355. A recommendation of the Commission of Administrative Hearings. Would change the title of hearings officers to administrative law judge throughout the ORS. There are proposed amendments.

034 DAVID MARCUS, COMMISSION OF ADMINISTRATIVE HEARINGS: (EXHIBIT A). Provides background on the Commission. Offers testimony in favor of HB 2344, 2356, and 2357. The most pressing issue the Commission was presented with was a review of the concept of the centralized office of hearings. There are about 13 other states with that. The Commission took an incremental approach in revising the system. Regarding HB 2355, recognizes a uniform working title for those conducting state hearings. It does not establish a new job classification or minimum requirements or fiscal impact. It simply redefines the title of the function consistently. The title creates a better perception of the process by the public, more professionalism, provides some sense of separation between adjudication and decision making function of the agency.

107 CHAIR BAUM: Will do the bills one at a time.

110 DAVID MARCUS: Comments on the other two bills.

HB 2356 basically deals disclosure in the hearings process either on the record on issues of fact or in order prepared by hearings officer regarding directives. There is no fiscal impact.

HB 2357, a code of professional responsibility would be developed by the Attorney General's office and required for all agencies to adopt in some fashion.

HB 2363 is not a specific recommendation of the Commission. This was a subject of consideration by the Commission. It embodies the concepts the Commission did recommend with respect to reform of judicial review.

151 REP. MILLER: With respect to HB 2357, is there an existing association?

156 DAVID MARCUS: Yes, Oregon Association of Administration Law Judges, a professional organization.

REP. MILLER: Does that Association have a code of conduct?

DAVID MARCUS: No.

REP. MILLER: Is it possible to formulate one and not fill up the statutes?

DAVID MARCUS: Would be possible to do that. The Association has no standing to compel compliance with any code of ethics or responsibility. Has no authority over the agencies the officers work for. Even an informal code would not have any particular effect. This mode of implementation was seen as beneficial because it would subject all officers and agencies to a known code of ethics.

173 REP. MANNIX: Of all different agencies, officers, etc. covered by HB 235 5 which ones are: a) required to be attorney and b) have authority to issue final decision and not subject to review? Knows workers' compensation referees would fits.

DAVID MARCUS: The referees in WC are required to be attorneys and do issue final orders subject to review by the WC Board.

REP. MANNIX: The WC Board is an appellate tribunal. Is there distinction between hearing officers who may make recommendation as oppose to those who make final decision until appealed. Is there anyone else.

194 DAVID MARCUS: The hearings officers in DMV.

REP. MANNIX: Are they required to be attorneys?

DAVID MARCUS: No. The only other agency is the Employment Relations Board and the PUC requires that their examiners be attorneys.

REP. MANNIX: ERB and PUC requires they be attorney and WCB also. WCB referees issues final decisions. Does ERB?

203 DAVID MARCUS: No.

REP. MANNIX: PUC?

DAVID MARCUS: No. They use recommended orders.

205 REP. JOHNSON: Understands that part of the rationale is to improve moral.

1:20 Rep. Sunseri comes in.

216 DAVID MARCUS: Responds the Commission's report gave no consideration to moral. A benefit is an enhanced level of professionalism.

225 REP. MILLER: Proceeds with the witnesses.

226 SIMON FITCH, PRESIDENT OF THE OREGON ASSOCIATION OF ADMINISTRATIVE LAW JUDGES: (EXHIBIT B) Not representing any agency. Employed by the PUC as a hearings officer. Describes the Association. Offers testimony on HB 2355, 2356, and 2357. The Oregon Association for Administrative Law Judges strongly supports these bills. Discusses the PUC's procedures with hearings officers. The use of the title has not been restricted to the specific situation where the hearings officer has statutory authority to issue final orders. Been used in a much more general way and universally found to be workable. Eliminates confusion. HB 2356 will increase the pool of information for the hearings officers to draw. This change would promote actual fairness and the appearance of fairness within the process. HB 2357 establishes clear standards and guidelines that will help the officers and agencies to earn the trust of the public.

339 MAX REA, LAWYER AND MEMBER OF ASSOCIATION: Discusses draft amendments to HB 2355. The changes made in the summer session were not reflected in the LC draft. They are not substantive.

348 ELYSE CLAWSON, DEPARTMENT OF CORRECTIONS, ASSISTANT DIRECTOR OF THE COMMUNITY SERVICES BRANCH: (EXHIBIT C) The DOC does not support Sections 7 and 8 of HB 2355. It is not appropriate for the DOC because of the hearings officers' authority and work load. Reads from written testimony given to the Committee.

VERN FAATZ, CHAIRMAN OF THE BOARD OF PAROLE AND POST PRISON SUPERVISION: Here to answer questions. The Board supports the position taken by the Department in opposition.

415 DENNIS DOWD: Here to answer questions.

430 REP. MANNIX: You would draw a distinction where hearings officers are required to be attorneys as a matter of statutory requirement and they adjudicate items involving members of the general public and they issue final orders. Not addressing that kind of concept in terms of administrative law judges but the DOC's operations.

ELYSE CLAWSON: That is correct.

TAPE 17, SIDE A

JOSE MATA, SENATE RULES COMMITTEE ADMINISTRATOR: Here at the request of Senator Roberts to put his strong support of the bills on the record.

039 ROBERT MUIR, OREGON DEPARTMENT OF JUSTICE: (EXHIBIT D) Testifying on behalf of the Department of Justice. The AG opposes HB 2355 because the term is misleading. It suggests incorrectly an association with the judicial branch. Refers to points in written testimony. HB 2356, the Department supports except for Section 1, paragraph 13, line 27 on the second page. Confused on intent of language. It makes more sense to

have the officer making the final decision sign the order. HB 2357 is supported by the Department except for the concern of Department resources to carry this out. That estimate is \$11,800. The AG would ask for an appropriation for that amount to cover it. There is an enforceability question. Once these rules are adopted or modified, the agency can create whatever enforcement mechanisms were appropriate to implement these rules.

105 REP. MILLER: Follow up on last point. If they develop their own code, they could enforce it without the statutes. They could actually do this by themselves?

109 ROBERT MUIR: Yes. The officers are sometimes contractors. It is desirable the standard applied be stated in advance.

118 REP. MILLER: If you act as a hearing officer must you belong to an association.

ROBERT MUIR: No.

121 REP. CLARK: Refers to comment on independence. What is the Dept's official position on that proposal?

126 ROBERT MUIR: That was not covered in preparation for testimony but can give broad answer. The Commission discussed and decided on an incremental approach and rejected the concept of a pool to decide administrative review cases for all agencies. Personal observation, there is significant policy question since cases decided by the agencies vary a great deal, the level of qualifications required vary, and the focus of those cases vary.

143 REP. CLARK: The same is true at the federal level. To address the first concern would be by requiring a certain level of qualification/education in administrative law judges. It is a substantial fiscal issue to create such as pool. If public perception and respect is issue trying to get act this is the way to go rather than a name change.

150 REP. JOHNSON: How easy would it be to design a code of professional responsibility that would apply to all those different categories?

155 ROBERT MUIR: Can develop some easily in certain areas of professionalism. There is a wide variety of agencies. With respect to honesty, etc. and general generic concepts that task would not be difficult.

165 CHAIR BAUM: Clarifies the testimony is on HB s 2355, 2356, and 2357.

168 JANET CARLSON, EXECUTIVE DEPARTMENT: (EXHIBIT E) The Department has studied the recommendations and found a number of them to be instructive and those the Department wants agencies to follow. The Department does not support the legislation for the following reasons:

HB 2355: Changing the name would cause inconsistency and confusion for the public. It is a de facto attorney designation which may cause barriers for recruiting. There are too many varied classifications of hearings officers.

220 REP. MANNIX: It seems you agree someone working for the state who holds hearings in which attorneys representing private parties come

before the hearings officer, the public would be better served if they knew that person was acting in an adjudicatory role and shouldn't they be called an administrative law judge?

234 JANET CARLSON: For some agencies, such as the WCB, yes. For other agencies they are not in the role where they hear two party cases but hear single party cases bringing an issues in front of the agency. They may not be a full times hearings officer.

238 REP. MANNIX: Shouldn't we take a look at individual titles?

JANET CARLSON: You may if you wish. The roots of administrative law are different than common law. In the civil law system the role of the judge is an investigator.

HB 2356: The Executive Department has included those provisions within the Department guideline. Do not disagree in concept. Agency's responsibility is to develop and apply policy. Believes it can be done through guidelines and rule process.

HB 2357: Leaving that response to the Dept. of Justice.

287 VERN FAATZ, BOARD OF PAROLE AND POST-PRISON SUPERVISION: On HB 2356 (EXHIBIT F) Not sure how this bill will apply to the Board of Parole. The Board opposes the proposed amendments to the statute regarding ex parte communications. They will conflict with ORS 144.125, 144.130, and 144.343. Reads from written testimony provided.

349 REP. JOHNSON: Suspects that there are agencies who have similar concerns?

VERN FAATZ: Cannot answer.

REP. JOHNSON: Thinking about county sheriff's offices, etc.

358 TOM BARKIN, MEMBER OF COMMISSION, ASSISTANT PUC COMMISSIONER, ADMINISTRATIVE HEARINGS DIVISION: Clarifies points on the bills the Commission had in mind. On HB 2356, line 27 is the sentence Mr. Muir pointed out as confusing. The person issuing order should sign it. It does not mean once the officer issues a proposed order it goes to the public and then the commission issues final order that the commission has to go back and ask the officer to sign the commission's final order.

Was not intended. Regarding ex parte contacts. The PUC deals with extremely complex cases. There is no intention to have any limitation on the agency heads or the hearings officers ability to discuss with staff technical issues related to the evidence already in the record.

TAPE 16, SIDE B

005 TOM BARKIN: Continues testimony. Talking about interpreting the evidence already in the testimony.

009 REP. BELL: Refers to HB 2355, how many states have this change?

TOM BARKIN: Don't know but can get the answer.

015 CHAIR BAUM: Closes hearings on HB s 2355, 2356, and 2357.

(Tape 16, Side B) WORK SESSION ON HB 2353

023 GREG CHAIMOV: Discusses why the bill is coming back before the committee. The definition of "dispose" is not in the statute. There have been questions on this definition. It requires more work to clarify the intent.

029 MOTION:REP. MILLER: Moves to reconsider the committee's motion to pass to full committee with a do pass recommendation, HB 2353.

CHAIR BAUM: Rep. Miller moves to reconsider HB 2353. Any discussion on the motion, any objections? Hearing none, it is so ordered.

(Tape 16, Side B) PUBLIC HEARING ON HB 2362 Witnesses: Dave Frohnmeier Mike Reynolds William Funk (Exhibits G, H, I, J, K) Peter Grundfossen (Exhibit L) John OSB orn (Exhibit M) Sandra Arp (Exhibit N) Bill Van Vactor (Exhibit O) Karen Hafner Paul Snider Ron Pulvers Dale Penn Carl Myers

059 GREG CHAIMOV: Discusses materials in packet. Recommends the flow chart (EXHIBIT H) provided by William Funk. No fiscal impact statement prepared as of yet.

087 CHAIR BAUM: Reads statement from Greg Chaimov regarding this bill. The committee has recently learned that one of counsel's (Mr. Chaimov's) partners will be testifying on HB 2362 today: It has been the committee's intent to screen Mr. Chaimov from participating in that situation. Given the scope of this bill and the scarce staff resources, the committee has at its disposal, the committee proposes to keep Mr. Chaimov working on this matter. To alleviate any appearance of inpropriety or conflict of interest, we have arranged to have our other counsel, Holly Robinson, watch Mr. OSB orn's testimony on TV and make herself available to answer member's questions about that testimony. Mr. OSB orn's and Mr. Chaimov have also agreed not to discuss the merits of this bill with each other.

102 DAVID FROHNMEYER, ATTORNEY GENERAL OF OREGON: Introduces Mike Reynolds who is with him. Invites Mr. William Funk to be at the table also because he is prepared to walk the committee through the bill. Supports the bill from the standpoint of good government and law reform.

114 WILLIAM FUNK, PROFESSOR AT LEWIS AND CLARK LAW SCHOOL: (EXHIBITS G, H, I, J, K) Offers testimony on HB 2362. Reviews the flow chart (EXHIBIT H). Gives an overview of the bill. See written testimony provided.

275 REP. CLARK: What section is that?

281 WILLIAM FUNK: Section 14, sub 4. Continues testimony (written material).

294 REP. CLARK: The bill does not effect the existing APA process of appeal from state agencies, correct?

WILLIAM FUNK: It repeals the exiting procedure and puts this in its place. This repeals the APA provision on challenging rules, etc.

REP. CLARK: For state agencies as well as local governments.

WILLIAM FUNK: For those under the APA and for local government.

302 REP. CLARK: The review of local government actions is very

difficult and complex. What is the problem with the APA appeal provisions?

WILLIAM FUNK: There are several: the difference between what is a rule and what is a contested case order, etc. It would cure the problem of filing in the wrong place; provisions for judicial review for other than contested cases and one of the grounds is substantial evidence on the whole record, but these proceedings are not record proceedings.

324 REP. CLARK: What do other states do in this regard? Parallels in other states' judicial review were this bill is similar.

331 WILLIAM FUNK: States are all over the lot. Some provide a uniform system of review, a minority. The notion of a uniform administrative procedure act has the same standard review for rules, orders, and other than contested cases plus a separate system for local government is the more general rule. Oregon does not fall in that category either.

351 REP. CLARK: Is it modeled after other state legislation?

WILLIAM FUNK: No.

359 GREG CHAIMOV: Will this bill force local government to make records in situations where they traditional do not?

WILLIAM FUNK: No.

363 GREG CHAIMOV: Section 5 sub 4, how often does the problem this subsection addresses happen?

371 WILLIAM FUNK: Almost never.

GREG CHAIMOV: What is an example of a person to whom government action is directed but that person is not a party to a proceeding?

379 WILLIAM FUNK: May not have a proceeding, just a government action. Gives example.

389 REP. CLARK: Will there be another shot at Professor Funk?

CHAIR BAUM: Yes.

REP. CLARK: There will obviously be questions as we go through this and wanted to know availability.

WILLIAM FUNK: Did not plan to go into a great deal of depth. Did want to make a statement in support of the bill and explain why.

405 CHAIR BAUM: Will definitely have another hearing for Judge Gillette.

409 DAVID FROHNMEYER, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE: The Dept. supports the bill. It gives the opportunity for the committee to do something very significant in a path breaking form. The climate for reform is ripe. This could truly be a national model in judicial review. For a citizen to find way through maze of court relief is a mess. Oregon is not unusually in that regard. Other states participate in the same mess is the short answer.

TAPE 17, SIDE B

022 DAVID FROHNMEYER: Continues testimony on the bill. The bottom line is for this bill to provide a clear guideline in an area that is a trap for unwary. Believes if properly implemented it will result in a quicker, clear, fairer, and less delays in decision reaching government action. It is fair to government and citizens. Brings needed clarity that is long over due.

059 REP. CLARK: Were you initially opposed to the bill?

DAVID FROHNMEYER: Yes. Explains why. Part of it was familiarity with the system or field. It was and is a leap into the unknown. Wondered if this would create a new hurdle that may be tied up in court. Those have been dealt with. Three were significant differences with state government and local government. Convinced this will give the government the power to correct error sit make at a much earlier date without losing jurisdiction of the case so that courts are making public policy instead of locally elected bodies.

095 MIKE REYNOLDS, ASSISTANT SOLICITOR GENERAL, APPELLATE DIVISION OF THE DEPARTMENT OF JUSTICE: Offers testimony on the bill. The bill is needed for law reform not because something is broken but needs to be fixed. The most important issues is the transfer issue. In 1987 when the legislature adopted the provision dealing with land use and concern of the transfer of cases. The fact is there are many cases in which the question of transfer is still there. There are ambiguous areas. Is ready to clarify those. Asks that two questions be asked with r o hypothetical raised: 1. what would the result be under the current system; and 2. what would result be under proposed bill. This gives a true understanding for changes the bill makes. This bill requires litigants to raise the issues with the local government before suing in court.

174 REP. CLARK: Concerned whether it might increase the amount of litigation. The role of legal costs can encourage or discourage litigation. Does the bill use the tool of cost of litigation one way or the other?

183 MIKE REYNOLDS: The bill does provide the court to award the local government against the petitioner the cost of preparing the record. Presently no requirement of posting bond to defray the cost of record preparation if local government prevails is set up. It would be appropriate to put in the bill. Might set an amount that would not deter people but will protect against litigating trivial things and to ward off the frivolous litigation.

200 REP. CLARK: Is there anything in the nature of attorney fee award for frivolous litigations or frivolous appeals?

MIKE REYNOLDS: Not in this bill. If there is in another provision that attorneys fees will be awarded, it will be incorporated.

206 REP. CLARK: Would it hurt to put in a frivolous litigation fee?

MIKE REYNOLDS: For frivolous there is a provision in Chapter 19 that does apply in proceedings brought under the judicial review act.

213 DAVID FROHNMEYER: The Dept. of Justice intends in the post-measure 5 climate to introduce a bill such as the one you are discussing in a generic kind of way. Discusses attorney's fees awards.

228 WILLIAM FUNK: Responds to Rep. Clark's concerns. Testified against predecessor of this bill. This bill has changed and is convinced this will benefit local government.

241 REP. MANNIX: As a suggestion have you considered having mini seminars to educate local government people about this bill to sell them on it?

WILLIAM FUNK: Yes, have talked at the Bar convention, CLEs, etc.

257 REP. MANNIX: There is an inherent tendency to fear change. There are objections that are more than just expressions of general concern. Suggests a way to find common ground.

269 WILLIAM FUNK: Does not agree with all parts. NJ is the only state that still uses a writ system for reviewing state government action. Local government still have these latin named writs with all the history attached to it to cover review of their actions. The idea of putting that in a comprehensive review provision is enviable.

288 DAVID FROHNMEYER: Comments on whether you go for incremental reform, cut and paste, or stand back and say it would be better to start from ground zero. There is no single source to go and find out how to challenge a state action. It is too confusing.

322 REP. MANNIX: What would the reaction be if we decided to take the exception and acception provision and broaden to narrow areas of local action that would be subject to review, conceptually. Is there some way of putting protective language in here or change the exemption language to address that concern by more limiting those actions which are subject to judicial review?

339 WILLIAM FUNK: If you exempt something from this bill it does not exempt it from judicial review. It would come around under another statute.

DAVID FROHNMEYER: Discusses point made. Is there any truly unreviewable government action, and should there be? That is the kind of underlying concern people have: will trivial actions be subject to full blown court proceedings.

369 REP. MANNIX: A more aggressive attorney fee provision or increasing filing fees would help. Triviality is in the eye of the beholder. Concern is not being judgmental about what is trivial but perhaps putting some barriers in this process so people have to be serious.

393 DAVID FROHNMEYER: Believes it can. Those are entirely public policy decisions to be made.

404 GREG CHAIMOV: Is there a particular type of government decision that causes most of the problems in this area?

410 MIKE REYNOLDS: In the state, boarder line kinds of administrative decisions made where it is not clear whether they are in order. Questions of administrative rules that are expression of broad policy.

TAPE 18, SIDE A

013 MIKE REYNOLDS: Continues. On the local level it is pretty much across the board.

019 CHAIR BAUM: The position of Chair is that would be radically changing the playing field and interested in seeing how it will play in the smallest communities without attorneys to review laws. Not interested in providing a process where those local officials receive additional harassment. Not interested in anything that would make the system easier for those who always stick their "nose into people's business".

031 MIKE REYNOLDS: The bill does provide a road map that is fairly straight to get from disagreement of a local government or state agency into court. There are a lot of hurdles to go over before getting to court. Things are spelled out in detail in the bill.

049 CHAIR BAUM: Intent of Chair to take recess after Ron Pulvers testifies.

057 RON PULVERS, STAFF ATTORNEY TO THE OREGON SUPREME COURT: Offers testimony for the bill. The Judicial Department submitted statements from State Court Administrator of no discernable fiscal impacts on the courts as a result of this bill. Notes this makes no governmental action that is not currently reviewable for a first time. This gives many means to keep cases that are currently going to court out of court.

087 CHAIR BAUM: Were are we on the fiscal impact statement?

RON PULVER: Discusses what Mr. Linden submitted regarding fiscal impact. Can provide further information if the committee.

095 CHAIR BAUM: Legislative Fiscal would appreciate that. Need the information.

RON PULVER: Would like a specific request from you to know what you wanted.

CHAIR BAUM: Please contact fiscal.

102 RON PULVER: This bill clarifies the judicial standard for review for government actions. It attempts to bring together in a coherent, clear way judicial standards. Clarifies the relationship between the court, administrative and legislative branches of government. The Judicial Department has stayed out of supporting this bill's provision like standing which involve policy decision for legislature. In terms of who can bring action is not an area The Judicial Dept. does not reflect upon.

130 CHAIR BAUM: Calls recess at 3:05 pm. Reconvenes at 3:15.

145 CARL MYER, OREGON STATE BAR: No position, but sections may take positions on bills.

157 PETER GRUNDFOSSEN, LEGISLATIVE LIAISON, ASSOCIATION OF OREGON HOUSING AUTHORITIES: (EXHIBIT L) Offers testimony against the bill. The AOHA deals with low income people who pay 30% of their income to the rent and AOHA subsidizes the rest. Discusses the Association and housing. Understands the Authorities would fall under the bill's scope. The problem is these rules of procedure for appeals decisions of government bodies would be opened to such an extent that it would be possible to challenge the Authorities on numerous decisions. Feel the

Authorities could be bogged down in appeal after appeal. Discusses authority the AOHA has with regard to tenants and how this proposed law would effect those decisions made. The Association proposes an amendment to the bill to add under Section 2 subsection 2 "(v) Any government action of a housing authority created under ORS Chapter 456 ." This will exclude the AOHA from the bill.

308 REP. MILLER: The AOHA gets sued on a regular basis. What is your record of success?

320 PETER GRUNDFOSSEN: Does not have any statistics now but can get information.

REP. MILLER: Do you have a sense?

PETER GRUNDFOSSEN: The AOHA wins most of them, relatively few get challenged in first place because AOHA is very careful and cautious on evictions. We go through a long hearings process before hand.

332 REP. MILLER: Impression is the current system is fairly confusing and in way, it works to government's advantage and they don't want shed light on it. Is that wrong?

343 PETER GRUNDFOSSEN: Understands how that could come across. All access necessary to protect citizens against the Housing Authority is currently available. This will provide a clearer road map underscoring of opportunities for those who would treat the availability frivolously or maliciously.

361 REP. MILLER: Interested in an opinion of those who would beef up standing requirement and to cause eatery into court to be serious undertaking.

383 PETER GRUNDFOSSEN: Are you saying that would be the case under the proposed bill?

REP. MILLER: That is th direction interested in.

PETER GRUNDFOSSEN: Would be concerned if bonds were attached to make it difficult for low income people to approach the process. Don't want to make it any easier than it already is to take frivolous lawsuits to the court however.

407 REP. MILLER: Understands middle of the road remarks. You don't want it to be less confusing or more burdensome. Thank you.

413 REP. BELL: On the full committee there are three members of Housing committee that have been trying to remove road blocks for the authority.

TAPE 19, SIDE A

016 PAUL SNYDER, ASSOCIATION OF OREGON COUNTIES: Offers testimony against the bill. Don't want to create a hardship for those who are unjustly accused. Discusses claims that have no basis or legal claim that just delay actions by private interests who depend on the local government actions to be final and valid. Concerned foundationless claims will get further into the judicial system. On the other side, it provides an opportunity for local governments to change their minds about the things subject to controversy. Discusses differences between state agencies and local governments. Discusses associations with

regard to this bill. Asks the committee to consider what is the compelling need for this legislation that so much outweighs all concerns raised by local government.

089 REP. BELL: If this has been coming repeatedly before the legislature, are local governments taking any offensive measures such as developing plans that would be better than this to clean up the system to make it easier for citizen. Are you just meeting this everytime it is put forward by a committee or task force.

097 PAUL SNYDER: The 1987 bill is a substitute for the predecessor for this bill. These are remaining concerns left over from then.

107 REP. BELL: What is your view for the future to make this work for agencies and local government?

PAUL SNYDER: To the extent free transfer is still a problem. Would allow for a plaintiff who picked the wrong form to transfer to the correct one without penalty. Just don't want to make it so easy that people get sloppy about what they should have known in the first hand.

123 REP. BELL: Was there adequate input into the formation of this?

127 PAUL SNYDER: Began with legislation from last session and clarified its meaning. Worked together to clarify meanings. Concerns were heard when raised but the bill did not reflect those concerns as well as wanted.

140 REP. BELL: Would it be proper to say "we are making progress but we are not there yet?"

PAUL SNYDER: It is better than it was last session.

143 REP. MILLER: Wants a sense of how you view the standing issue. Discusses ordinance in dispute in Lake Oswego.

158 PAUL SNYDER: They would have standing in that example.

162 JOHN OSBURN, CHAIRMAN OF THE PUBLIC LAW DEPARTMENT OF MILLER, NASH; PORTLAND PUBLIC SCHOOLS: Offers testimony against the bill. (EXHIBIT M)
*Note: The following is verbatim testimony as requested by the Chair.

Mr. Chairman, members of the committee, my name is John OSBURN. I am a Portland lawyer, Chairman of the Public Law Department of the law firm of Miller, Nash, et al. We are privileged to serve as legal counsel to numerous school districts, community colleges, cities and special districts both as general legal counsel and as municipal counsel. I am testifying today on behalf of Portland Public Schools. As is appropriate to this statute, the Attorney General has taken the high ground and that being the high ground of good government and law reform and not representing the special interest. We've been told this is a progressive reform bill, so I guess that we know where that leaves those of who oppose the bill.

I am testifying in opposition to the bill with some mixed emotions. One thing, it is hard to argue about any procedure which is uniform and therefore universal and clear to all. Second, it is reasonable to expect that, just as freeways generate traffic, broad and well marked avenues of judicial review will mean additional access for judges and lawyers to an Oregon growth industry. Third, our land use and worker's compensation

laws have become more understandable because of additional appellate review. It can be expected that under this bill the same kind of benefits would flow to local governments. A one size fits all procedure, like the tube sock, has the benefit of simplicity. This bill is intended to provide the same procedure for an incredible number and variety of issues that face our local government in Oregon. It is based on the notion that one can design a universal tool first and then figure out what problems to use it on. It is simply false advertising to say, as the bill summary does, that the bill creates the exclusive means of judicial review. The bill itself recognizes at least 21 other forms of legal review that are available.

My objection to HB 2362 is simply this. The bill begins with the notion that the decision of locally elected public bodies should be reviewed in just the same way and on the same basis as the court reviews decisions of state agencies. Next, it assumes that the fact that some decisions of local governments have over the course of years become subject to judicial review while others have not is a bad thing. Finally, the bill assumes that the kinds of issues which are decided by local governments are all sort of the same sort of thing and they should be reviewed in the Circuit court or the Court of Appeals if anyone is dissatisfied with what the local government did.

Now, many decisions of school boards and school officials can be reviewed in the courts only if a party has an independent legal basis for filing a lawsuit. Some decisions, particularly in the area of special education, involves hearings before hearings officers appointed by this local school district. Then hearings by hearings officers at the Department of Education level and final appeals to the state or as a practical matter to the federal court. There is no shortage of hearings before school boards, there is no lack of willingness on the part of citizens to take school boards to court. We are not short of lawsuits. The Attorney General speaks of traps for the unwary. I don't know where those unwary people are, they are certainly not the ones who are suing the school districts that we represent. They seem wary enough. I will describe that briefly in just a moment.

A generic judicial review procedure does not solve any problem which school districts have. If citizens feel they do not have sufficient access to sue school districts in the courts of this state, this committee should hear them say so. If Circuit courts need additional work, this committee should hear them. This committee should not broaden avenues of judicial review of actions by school districts merely out of some sense of legal tidiness. Anyone who has spent as much time as I have in City Council meetings, school board meetings, water district board meetings, fire district, and other citizen boards, can tell you that local democratic institutions do not need additional legalization. People want to be heard by their local government and they are. There is no need for judges to try to get a hold of local government and try to straighten it out.

The bill before you now is, I submit, step one of a two step procedure. The first step is to attempt to bring a judicial review under the Administrative Procedures Act. The next step will be to have all decisions made by locally elected officials subject to the Administrative Procedures Act on decision making. Elected school boards, county commissioners, and city councils are not part of the state bureaucracy for whom the Administrative Procedures Act was designed.

I urge you to table HB 2362 and give it no further consideration.

Having already generally called this baby ugly, it is perhaps more impolite for me to point out some of the features which are least attractive and which concern us the most. The things that concern us the most are first, the opportunity for judges to conclude that various decisions by local governments must be supported by substantial evidence. Second, the opportunity of judges to conclude that findings of fact should have been made by the local governmental body. We all know how findings of fact have elucidated and illuminated our land use law. I submit that our land use laws, as a result of findings of fact and substantial evidence, have become incomprehensible to the reasonable mind. Finally, the opportunity of judges to conclude that a decision violates past practices by the governmental body and is therefore illegal, is something that also ought to be avoided. In addition to the usual legal and ordinary responsibility of a school board to adopt budgets, to try to raise money to build schools, to buy facilities, to hire personnel to meet federal and state standards and to give everyone a due process hearing, school boards hear an incredible number of decisions which are important only to the people involved. I can tell you that all of the money that is spent on our law firm in representing school districts comes out of money that the people voted for the education of children.

Let me tell you about two hearings that one of my partners had. This is a hearing, and maybe this is not the unwary kind of people that the Attorney General is concerned about, maybe this is the wary kind. This is a case in which the baseball coach decided that he wanted a 9th grader to play in the outfield instead of being a catcher because the kid was left handed. If you have ever played baseball you know there is no such thing as a left handed shortstop or a left handed catcher because it is hard for a left handed catcher to reverse and throw to first base. The kid was on the baseball team, got a letter and all that sort of thing, but went to the school board for a hearing, which was heard before a hearing officer, on the question of whether the school was denying him his rights as a handicapped child being left handed. When the decision of the coach was affirmed, the matter was then appealed to a hearing officer before the State Board of Education which again heard the question of whether the kid was being denied the right to be a catcher because of a physical handicap.

Other decisions that are made by local government and these are decisions that get made because the local government wants to hear people. If a kid is denied a letter, this actually happened at one of the metropolitan school districts. The kid is denied an athletic letter because he missed an important game because he went elk hunting with his dad and then lied to the coach and said he had been sick and that is the reason he missed the practice or the game. What does the school do? The school district does just exactly what you do, they listen to everybody who has got anything to say and I can tell you that if access to the courts is going to be broadened even more than it is now, and it is hard to conceive that could be greater than it is now, we will simply advise the school districts not to listen to those kinds of issues. Maybe that is the way it ought to work. Maybe these decisions ought to get made by the coach or the building principal and the school board shouldn't hear them and they shouldn't be subject to judicial review, sent back for findings of fact, sent back for a determination of whether there was substantial evidence to support the decision. Maybe, if there is a lot of unwary people out there, the Attorney General ought to write a CLE article on how to sue the local governments. I can tell you that the

lawyers in our community don't need that.

I would be happy to respond to any questions.

387 KAREN HAFNER, OSB A: Willing to come back at another time to testify in order to save time today.

404 SANDRA ARP, LEAGUE OF OREGON CITIES: (EXHIBIT N) Offers testimony against the bill. Points out that administrative decisions are not the only decisions made by local governments. This is not a simple procedure. It is not a uniform procedure. There are numerous exceptions to the bill.

TAPE 18, SIDE B

033 SANDRA ARP: Continues testimony on bill. Have the problem of determining what kind of action is needed. Discusses trapping the "wary". This may compel governing bodies to explain reasons for every action for the record. This could lead to government by intimidation because the body might change mind rather than go through the court proceeding. There is the cost of increased litigation. Because this bill uses new terms the full extent will not be certain until a court has defined them.

082 REP. MILLER: Is the intent not to allow additional opportunities for challenge but to make the roadway a little more visible? Not so confusing?

087 SANDRA ARP: The stated intention was to simplify the procedure and unify it, making it easier for people to seek redress from the government.

REP. MILLER: Your fear and assessment is they open up flood gates for more people challenge government actions, causing more of those.

093 SANDRA ARP: Initially the proponents have been discussing CLE programs to enable lawyer to use the bill. If it makes it easier to sue the government, will increase litigation and genuine litigation will occur because of the need to construe the terms of this bill.

103 REP. MILLER: Concerned with the frivolous lawsuits. Concerned about having questions decided on the merits rather than failure to understand the process and never reach the merits. One way is to beef up standard requirements to allow prevailing parties to truly recover their costs so don't have to pay for defense if win on merits. Other concern is government changing mind because of litigation.

129 REP. BELL: The size of community makes a big difference.

135 REP. MILLER: Might have to go back to prevailing party scheme.

142 SANDRA ARP: Have numerous cities under 500 in population. To call an attorney can be very expensive for their budget.

147 CHAIR BAUM: Discusses witness list.

164 BILL VAN VACTOR, LANE COUNTY COUNSEL: (EXHIBIT 0) Offers testimony in opposition to this bill. This bill is better than ones brought before the legislature in the past. The three changes shown are 1) litigation goes to Circuit Court instead of the Court of Appeal which is

cheaper; 2) combination of provisions regarding exhaustion and reconsideration; and 3) establishment of uniform statute of limitation which is good public policy. Discusses Measure 5 passage. Believes now is no time to introduce legal uncertainties. Urges the committee to defer its consideration to the 19913 session.

Discusses amendments to the bill: 1. be applied to state government for an initial period to work the meaning out; 2 include land use; 3. change the period for challenging the procedures in adoption of an enactment; 4 revise the standard necessary to establish standing; 5. eliminate uncertainty over the coverage of the act; and 6 delete subsection 4 of section 14 which creates a brand new basis for invalidation of local government actions.

317 REP. MILLER: Under language proposed, would a group be able to challenge a city's ordinance?

338 BILL VAN VACTOR: Not clear in the bill, would have to be subject to litigation.

346 REP. MILLER: Failure to include land use, why?

BILL VAN VACTOR: Believes it was because it is "political hot potato".

358 REP. MANNIX: Comments on exceptions with regard to unity. Refers to written testimony. Struck by the new basis for invalidation of local government actions. Never seen court cases talking about unlawfully deviating from past practice. Have you?

BILL VAN VACTOR: Yes. Gives example.

377 REP. MANNIX: Policy makers don't get to decide to do it differently.

BILL VAN VACTOR: State agencies currently do not. There is an exception in this bill that if the agency explains why it is changing then the court is to look at it. It has been a relatively low threshold.

REP. MANNIX: Would it be enough to say that there are new people in charge now who look at things differently?

BILL VAN VACTOR: May ask Justice Gillette that.

TAPE 19, SIDE B

008 DALE PENN, DISTRICT ATTORNEYS ASSOCIATION: Offers testimony on the bill. Have been reassured by Justice Gillette this will not change but fearful because of the broad definition of government action. Concerned about the decision not to prosecute. Fears if the process is changed and streamlined, DAs will be susceptible to attack. Gives an example. Discusses interaction with inmate population. If there are legal avenues of attack, they exercise them. Discusses Measure 5 as it will impact DA's office in Marion County. Cases have to be prioritized because of cost now. Would exempt out criminal decisions from this bill.

066 CHAIR BAUM: Closes hearing on HB 2362. Adjourns at 4:35 p.m.

Submitted by: Reviewed by:

Kathy Neely David Harrell Assistant Office Manager

EXHIBIT LOG:

A - Testimony on HB 2355, 2356, and 2357 - David Marcus - 14 pages
B - Testimony on HB 2355, 2356, and 2357 - Simon ffitch - 1 page
C - Testimony on HB 2355 - Elyse Clauson - 1 page D-Testimony
on HB 2355, 2356, and 2357 - Robert Muir - 5 pages E-Testimony on HB
2355, 2356, and 2357 - Executive Dept. - 4 pages F -Testimony on HB
2356 - Vern Faatz - 2 pages G-Testimony on HB 2362 - William Funk - 83
pages H-Flow Chart on HB 2362 - William Funk - 1 page I-Testimony on HB
2362 - William Funk - 4 pages J - Supplementary Testimony on HB
2362 - William Funk - 3 pages K - Summary of LC 395-3 (HB 2362) -
William Funk - 12 pages L - Testimony on HB 2362 - Peter
Grundfossen - 2 pages M - Testimony on HB 2362 - John OSB urn - 5
pages N - Testimony on HB 2362 - League of Oregon Cities - 4 pages
O - Testimony on HB 2362 - Bill Van Vactor - 4 pages