

HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

Tapes 54

March 11, 1991

Hearing Room 357 1:00 p.m.

- 55 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 STAFF PRESENT: Greg Chaimov, Committee Counsel Jeff Steve, Committee Assistant MEASURES HEARD: HB 2530 - Construction Contracts SB 400 - "Holders of Interest In Easement" HB 3048 - Measure 5

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.

TAPE 54, SIDE A

004 CHAIR BAUM: Opens Subcommittee on Civil Law and Judicial Administration at 1:35 p.m.

HB 2530 - CONSTRUCTION CONTRACTS - WORK SESSION Witnesses: I Kim Mingo, Associated General Contractors 014 REP. MANNIX: Introduces conceptual amendments. HB 2530-3 Amendments. Exhibit A

044 MOTIONS, REP. MANNIX: Motions to do away with all other amendments to HB 253 0. 049 VOTE: No objection. Motion passes.

050 MOTION, REP. MANNIX: Moves to adopt conceptual amendments HB 2530-3. Discusses HB 2530-3 Amendments. See Exhibit A.

. DISCUSSION ON THE MOTION . 074 . KIM MINGO, ASSOCIATED GENERAL CONTRACTORS: Is concerned about previous amendments. Supports HB 2530-3 amendments. 083 REP. MILLER: Understands that the subsequent amendments reflect that those who were bidding on projects who failed and who would not have won the bid in any event should not be allowed to sue. 093 Rh P. MANNIX: Reputable bidders are not going to go suing each other back and forth. The Associated General Contractors view HB 2503-3 amendments as taking care of this. 101 MINGO: That is correct. 102 REP. MANNIX: Rep. Shiprack and Rep. Walden are in support of this as well. 106 REP. BELL: Should there be some kind of preference list. What happens when the bidder who is third in line sues and the second bidder waits to see the outcome, later asserting his priority?

108 REP. MANNIX: Two people can recover. They each have to have "clean hands."

115 REP. BEI 1: Who pays?

120 REP. MANNIX: The winning bidder. 124 VOTE: No objection. Motion passes. 126 MOTION, REP. MANNIX: Moves HB 2503 as amended to Full Committee with a "do pass" recommendation. 135 VOIE: 7-1 Motion passes.

AYE: Brian, Clark, Edmunson, Mannix, Miller, Bell, Baum NO: Johnson EXCUSED:

SB 400 - "HOLDERS OF INTEREST IN EASEMENT" - WORK SESSION 150 GREG CHAIMOV COUNSEL: Summarizes SB 400. Clarifies the new easement maintenance law to provide that people with a right to use an easement must help pay for its upkeep even if they do not own the easement. Grants the courts greater discretion to decide who should pay how much for maintenance.

180 MOTION, REP. MANNIX: Moves SB 400 A Engrossed to Full Committee with a "do pass" recommendation. 190 VOTE: 7-0 Motion passes. Rep.

Clark to carry.

AYE: Brian, Clark, Edmunson, Mannix, Miller, Bell, Baum NO: 0 House  
Committee on Judiciary March 11, 1991 - Page 3 1 EXCUSED: Johnson HB  
3048 - MEASURE 5 PROCEDURES - PUBLIC HEA] RING

Witnesses:

Elizabeth Stockdale, Department of Revenue Glen Kline, Oregon Cities Bob  
Muir, Department of Justice

210 GREG CHAIMOV: EXHIBIT B Summarizes HB 3048. Summarizes Exhibit B.  
. . 228 REP. CLARK: Most of the major issues have been addressed in  
the Department of Revenue Amendments to HB 3048. See EXHIBIT D

242 ELIZABETH STOCKDALE, DEPARTMENT OF REVENUE: EXHIBITS C and D. Reads  
from Exhibit C.

350 REP. MANNLY: Understands the 30 day option, that there are  
two options. One is 30 days after the governing body adopts the  
resolution or ordinance. If they don't adopt the resolution or ordinance  
then you there are two alternative triggers: 1) the date the tax  
statement is mailed or 2) the date of imposition of the tax. Is  
concerned that there might be long term exposure, but if someone in  
government wants to make sure it is clear and clean and resolved now  
they can adopt an ordinance making the affected person to take their  
position even though they may have 30 days to see if anyone wants to  
challenge it. . . 365 STOCKDALE: That is correct. Continues to  
read from EXHIBIT C. Perhaps makes additions to Exhibit B. Listen  
closely.

TAPE 55, SIDE A

037 STOCKDALE: Continues to read from Exhibit D.

060 REP. CLARK: Refers to Section 8d on page 5 of the Proposed  
Amendments. See Exhibit D The major dispute is always going to be  
whether something is or is not a tax limited by ballot Measure 5. Bonds,  
local improvements and incurred charges are not by definition subject to  
Ballot Measure 5. There are three ways that they come up. 1) Ten  
interested tax payers hear that city counsel is about to do something  
and they want a determination on that so they can petition in the tax  
court. 2) Another local government could challenge that determination  
because it interferes with their own taxes and the local government will  
want take the previous determination before the tax court to get a  
determination. 3) When the local government does not know and goes to  
tax court to settle it. It is this third proceeding that concerns him.  
How do you tell the taxpayers of West Linn when some group is going to  
the Oregon Tax Court to get a potentially binding ruling on the  
taxpayers of West Linn about Ballot Measure 5? How do you notify the  
taxpayers in a particular jurisdiction of what you are going to do and  
whether that is or is not binding on those tax payers? 098 GLENN KLINE,  
OREGON CITIES: Agrees with Rep. Clark's analysis. the question is House  
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whether a proceeding under 8(d) would have a binding effect? There are  
really two issues tied up in that: 1) How does that affect the tax payer  
add 2) to what extent does it affect the tax payer. 1 -How does it  
affect the tax payer. The way the amendments are drafted See Exhibit D  
it would have the effect of preventing that tax payer from obtaining a  
refund down the road if the local government gets an up front judicial  
determination that this fee charge is not a tax. It would not prevent  
the tax payer from litigating the issue. That up front judicial

determination under Section 8(d) would not have res judicata effect. The tax payer would be able to go in to tax court down the road at the time that the tax is actually imposed and ask the tax court to declare in fact that the tax or feed charge is subject to the limits.

122 CHAIR BAUM: What if the case gets to a favorable hearing at the first court proceeding (tax court) and no one shows up and the local government wins, then what is the next step.

133 KLINE: For example, local government may decide to adopt a new systems development charge. It is not sure whether that is subject to the limits or not. It adopts an ordinance that instructs the city attorney to give a determination about whether that systems development charge is inside or outside of the limits of Ballot Measure 5 before that charge is imposed. The local government would go to tax court, get that determination, assumes that no one showed up and the tax court says it believes that this is not subject to the limits of Measure 5 the local government then begins to impose that fee on the tax payers. Six months later there is a tax payer that is subject to that fee and the tax payer challenges it. That tax payer would then file a proceeding in the tax court. There are two qualifications: 1) The previous decision by the tax court that would have a stare decisis effect. 2) If the local government at the time that it adopted the systems development charge and if that ordinance contained a classification of the systems development charge as not subject to limits of measure 5 that 30 day statute of limitations period would have begun to run from the date that the ordinance was actually adopted. It is more likely than not that the local government would never have gone to the tax court for that judicial declaration. In a sense there are overlapping judicial appeal remedies. If the systems development charge ordinance had a classification in it that stated it was not subject to the limits of Measure 5 there would only be one 30 day statute of limitations that would run. Under Section 8a, page 1, Exhibit D it would run from the time that the systems development charge ordinance was adopted by the local government. If a challenge wasn't brought in the tax court by 10 interested tax payers within that 30 day period after adoption of the ordinance, that would be the only statute of limitations to run and that systems development charge would then not be subject to challenge in the tax court. A lot of local governments are not sophisticated enough even if you tell them what to do, to put in every ordinance that classification. If there is no classification, that is where you could wind up with a judicial declaration under 8d, page 5, Exhibit D, with a subsequent tax payer challenge. If you end up in that situation, the tax payer would go to tax court and ask the tax court notwithstanding that previous judicial declaration that I was not a part of, I want to challenge this now. The tax court would take a look at the issue and say that it agrees with its previous declaration. The tax payer could then appeal that to the Supreme Court. If an ordinance had a classification in it, it is unlikely that there would be any judicial declaration proceeding brought and the local government could wait the 30 days before imposing that new fee. If nobody or less than 10 interested tax payers brought a challenge then in essence you have validation that the new fee is not subject to Measure 5. You would not need subsequent judicial declaration.

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207 CHAIR BAUM: That leaves the tax payer with the options of either appealing it from the date of imposition of the tax, or the date they

received their tax statement in the mail.

212 KLINE: If there was a classification in the ordinance that the option that you referred to is not available then that option is available only if there is no classification in the ordinance.

216 CHAIR BAUM: So if they don't repeal within that 30 days even the tax payer who gets to pay the taxes is restricted from going any further? 218 KLINE: Correct. 219 CHAIR BAUM: That is where Section 8d, page 5, Exhibit D with respect to notice comes in?

220 KLINE: No.

221 CHAIR BAUM: In other words, we are relying on the same procedure that every city relies on in adopting ordinances and providing notice.

229 KLINE: That is correct.

230 SIOCKDALE: The idea behind the remedy in Section 8d came about as a result of the fact that there might be some things that a local government unit would be considering doing and would actually go to the court before they adopted the ordinance in the form of declaratory relief.

236 CHAIR BAUM: What are "feeholders?"

246 STOCKDALE: The language in Section 8d is picked up almost verbatim from ORS 33.710 which dates back to 1915. Some of that language may be a little archaic. The idea is to give notice within the jurisdiction of the local government that a proceeding is being commenced. 252 CHAIR BAUM: There is the potential situation under Measure 5 where somebody could be given a tax levied on them and they could be expected to be attuned to the regular procedures that cities have been engaging in for years on how they pass ordinances which leaves most of the public out because they don't pay attention, but they will find out about it 6 months later when their tax statement shows up. Is that the scenario? Are there any alternatives to this? 272 KLINE: We looked at a number of different options in trying to come up with a way to give local governments some type of certainty during the budget year that they weren't going to wind up with a budget short fall or that bonds that were going to be issued had to be pulled because there was a threat of a filing of a law suit based on Measure 5. Also, looked at the possibility of using writ of review and filings in circuit court. What we wound up with was something based on ORS 33.710. For purposes of tax payer challenges and appeals we relied on how existing law works and how the writ of review works. Tax payers now are subject to certain constraints with respect to the budget law and everyone that lives within the city if they want to challenge local ordinances they can do it under writ of review and either you know about that action that the local government is taking or after 60 days you have waived all right to challenge it. This was the best method that we came up with. \_ 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 March 11, 1991 - Page 6

299 BOB MUIR, DEPARTMENT OF JUSTICE: - With respect to the process that lead to this proposal the Municipal Debt Advisory Commission was asked by the State Treasurer to go around the state taking information and testimony from local governments and interested parties concerning how best to deal with Measure 5. There was substantial testimony from around the state for the need for validation procedures essentially like that

which exists now for government action which was dependent upon some type of Ballot Measure 5 determination. ORS 33.710 currently permits validation for the proceedings of a governing body and of a municipality providing for authorization and issuance of bonds. This was specifically in relation to bonds that they were concerned about validating and the tax treatment of the revenues that would be used to repay those bonds. It is a great concern that bond-issuing bodies know in advance that the tax treatment, especially the compression issue, be resolved in advance. If the revenues cannot be paid from the tax revenues they cannot be considered general obligation bonds. The problem with waiting for 10 tax payers to press the issue is that you may not get them.

357 REP. EDMUNSON: Would the decision of the local government unit to seek a declaratory judgement in the tax court be in a public meeting or in an executive session? Matters of litigation in Eugene are not subject to litigation. Suggests that the decision, for Measure 5 purposes, be made in a public meeting.

374 MUIR: The decision under current law would have to be made in a public setting. The litigation discussion could take place in an executive session. Under the current meetings law the decision itself would have to be made during public hearing.

384 REP. EDMUNSON: That could be an up or down vote?

385 MUIR: Yes. 386 REP. JOHNSON: Is there any provision that if 10 taxpayers bring a suit to interpret Measure 5 and prevail that they will get their attorney's fees paid?

391 STOCKDALE: There is nothing in the amendments that would provide attorneys fees.

395 REP. JOHNSON: Could we provide for attorneys fees?

TAPE 54, SIDE B

001 STOCKDALE: Under the current tax court law there are two situations where attorney fees are authorized. 1) Is for an individual who can test the personal income tax assessment and prevails and 2) For an individual or state who contests an inheritance or gift tax assessment and prevails. Generally, neither individuals nor tax payers can recover for property tax issues.

007 REP. JOHNSON: We are not talking about normal property tax issues here. We are talking about interpreting a constitutional provision. -Second question, is there any money provided for in HB 3048 that would allow additional staff and or additional temporary judges for the tax court to handle this huge load of potential cases? 013 STOCKDALE: There are no appropriations in HB 3048. The best expectation is that there is not going to be a flood of cases. There will probably be a number of lead cases in the next

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couple of years. Does not think that there is going to be a substantial amount of additional work. 022 REP. JOHNSON: You don't think that many people are going to take advantage of this? Sees a lot of people taking advantage of the situation to settle issues by declaratory judgement

027 KLINE: In lead discussions with other city attorneys does not believe that there is going to be that flood because there is a large cost to bringing that initial litigation itself.

032 REP. JOHNSON: Are there any expedited procedures put forth in this as far as requirements that the tax court address and decide these Measure 5 issues in a quick manner? 034 STOCKDALE: There is a provision in the draft amendments See Exhibit D that would require the tax court to place this ahead of all other litigation. That is similar to a current requirement on local budget law issues. There is no requirement on the Supreme Court to do the same.

038 REP. JOHNSON: To the extent that it is expensive ~ o mail out notices to people, was there any discussion in the Committee about requiring all local, governments in a given area proposing any new taxes to propose them all at the same time so th, It it would be easier to notify the public in one written thing and the cost could be shared? !

058 STOCKDALE: That issue was discussed in the House Revenue Committee and it was fairly short. The Committee did look at the issue. One idea that came out of it was to require local governments at the time that they are going to give notice of the proposed budget for the coming year that they also give notice as to whether an assessment was inside or outside Measure 5. 092 REP. JOHNSON: Is it true that local taxing districts only assess a tax once a year?

095 STOCKDALE: It depends on the type of charge. For taxes that are collected through the property tax system it is a once a year process. The other types of fees and charges that might be subject to Measure 5 might be monthly.

120 REP. EDMUNSON: When does the law require notice of tax assessment to be mailed to the taxpayer?

123 STOCKDALE: Under current law, tax statements are to be mailed out no later than November 1. Under the provisions of HB 2550 that the House Revenue Committee is now considering, tax statements would be mailed no earlier than November,10 and probably no later than 15 days after that.

~ 130 REP. EDMUNSON: In the tax statement, could you provide notice of possible hearings or procedures? 140 STOCKDALE: Currently, the tax statement would reflect two categories of taxes fees and charges: 1) Those that are subject to the compression limits and 2) Those that are taxes on property that would normally be collected through that mechanism that fit into an exception. The biggest category that is going to fit into an exception is bonded debt. There are a number kinds of fees and charges that may be subject to the limits of Measure 5 that would not normally appear in the tax statement. Those would be minimum charges for sewer service and garbage disposal,

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etc. 163 CHAIR BAUM: So if the city wanted to expand their sewer system and they want to raise the minimum fee they are going to be subject to limitations of Measure 5? 175 STOCKDALE: These amendments would not supersede any existing notice requirements. They would be in addition to them.

179 REP. BRIAN: Aren't these the types of questions that are going to be raised? This is going to get complicated because there are so many ways to do the same thing, i.e. raise money. The issues that are going to be challenged are not things that are going to be on the property tax statement. It is going to be fees such as FDC fees, sewer and water development fees, etc.

202 CHAIR BAUM: What about revenue bonds attached to the sewer fees?

205 STOCKDALE: Measure 5 applies to charges that are imposed on

property owners as a direct consequence of that ownership. If the fee is controllable by quantity of use or avoidable by choice of the property owner or if it is incurred because the property owner has failed to perform routine obligations of ownership then that charge fits into a special little pocket called incurred charges and is not subject to the limit. The problem that these amendments are trying to address is a process for drawing the line around what are incurred charges.

236 CHAIR BAUM: What does HB 3048 say about existing ordinances.  
240 STOCKDALE: HB 3048 does not, but HB 2550 is the bill that provides for this.

248 REP. BRIAN: Even on incurred charges that are controllable that are raised in excess of their cost of delivery to the point that they were incurring profit that could be challengeable too.

256 STOCKDALE: Measure 5 limits the amount of an incurred charge that is exempt from the operation of a measure to the actual cost. 259 REP. BRIAN: Is there no mechanism being established to challenge existing charges or their interpretation of Measure 5 to existing charges? 267 STOCKDALE: There is a provision in these proposed amendments See Exhibit D for review of existing charges and it would be either if the local government unit that imposes an SDC, adopts an ordinance classifying the SDC as not subject to Measure 5, then an appeal under these amendments would have to be brought within 30 days of the date of adoption. If there was no ordinance or resolution adopted by the local unit, then since the SDC is not going to show up on the property tax statement the time would run from the imposition on 1 of the 10 taxpayers, or the local government could bring a validation proceeding if these amendments go into law for validation of the existing ordinance. 284 CHAIR BAUM: The 30 day provision seems tight.

288 REP. EDMUNSON: Hypothetical: City council proposes a tax, seeks a validation proceeding and the tax court says it is valid under Measure 5. The tax payer learns of it when their tax . House Committee on Judiciary March 11, 1991 Page 9

statement comes. They file a law suit challenging the tax as unconstitutional. It is your position that that suit would be dismissed because there has already been a validation proceeding?

303 STOCKDALE: If the local government brought a validating process and a tax payer group subsequently wanted to challenge that they would not be precluded from doing that.

325 REP. EDMUNSON: Is it like an income tax where I can refuse to pay and then pursue the court proceeding?

327 STOCKDALE: Income tax payers have to prepay their tax before they can go to tax court under current law. Property tax payers have no relief from paying the tax. You pay the tax and have a right to a refund.

330 REP. EDMUNSON: If they win then they have already written the check out and they cannot get the money back, but next year they will get there money back.

333 STOCKDALE: They won't be charged as much because it would be limited. This is not a situation whether an ordinance is valid. The question is whether the tax that is being imposed has to be compressed within that limit of Measure 5 or whether it is outside that limit.

425 CHAIR BAUM: Adjourns Civil Law Subcommittee at 3:00 p.m.

Submitted by:  
Steve, Assistant

Reviewed by: J. Kennedy  
David Harrell, Office Manager

EXHIBIT LOG:

A Amendment to HB 2530 - Greg Chaimov - 1 page - B Testimony on  
HB 3048 - Greg Chaimov - 2 pages C Testimony on HB 3048 - Elizabeth  
Stockdale - 3 pages D Amendment to HB 3048 - Elizabeth Stockdale - 6  
pages

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statcmcab nude during this session. Only text enclosed in quotation  
marks report ~ speaker's exact words. For cornpictc contents of the  
proceedi IgS, please refer to the tapes.