

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

March 14, 1991Hearing Room 357 1:00 p.m.Tapes 49 - 53

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

MEMBER EXCUSED: Rep. Kelly Clark

STAFF PRESENT: Greg Chaimov, Committee Counsel Debbie Schieno,
Committee Assistant

MEASURES HEARD: HB 2020 - Civil Forfeitures - PH/WS HB 2027 -
Forfeiture - PH/WS HB 2037 - Forfeiture - PH/WS HB 2038 - Forfeiture -
PH/WS HB 2028 - Forfeiture - WS HB 2733 - Forfeiture - WS HB 2311 -
Criminal Procedure - PH/WS

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TAPE 49, SIDE A

004 REP. MILLER calls the meeting to order at 1:00 p.m.

PUBLIC HEARING - HOUSE BILL 2020 Witnesses:Representative Ron Sunseri,
District 22 David Fidanque, ACLU of Oregon Maurice L. Russell, OSB
Debtor/Creditor Section Ken Sherman, Oregon Bar Association Pete
Shepherd, Department of Justice

The Staff Measure Summary is hereby made a part of these minutes
(EXHIBIT A).

013 REP. SUNSERI: If a seller sells a property on private contract, he must anticipate the future actions of the person buying the property. If there were illegal activity, the property could be confiscated and the seller, who sold the property to someone else on a contract, then would lose equity in the property. >If a person were to report to a local police department, by writing, that there may be drug activity, and there is not, what type of liability will this place upon the

seller? >There is no problem with the bill itself and what it is trying to accomplish, but this has gone to a point where it could create a problem.

042 REP. MANNIX: The language on line 20, page 2 , "a person shall be considered to have acquiesced in prohibited conduct if the person knowingly failed to take reasonable steps ...", the term "knowingly" could and should be interpreted with tying in with the anticipated prohibitive conduct. The dialogue should make clear the connection between "knowingly" and "anticipated prohibitive conduct". Would this help the concern? The language "reasonable steps may include, but are not limited to:" would mean that one would not be required to report anticipated prohibitive conduct. If you did report it, this would be a type of reasonable step. The language would show good faith, but would not be required.

055 REP. SUNSERI: This will not help the market place. People believe they have a responsibility to report anything which may take place in the future, whether they know it will happen or not.

081 REP. MANNIX: Suggested deleting the language "anticipated prohibitive conduct". Would this be more comfortable?

083 REP. SUNSERI: Agreed. People are concerned with not being able to tell the future.

095 DAVID FIDANQUE, ACLU OF OREGON: Clarified the ACLU position on HB 2020. There is a major disagreement among various parties that would be affected by both HB 2020 and HB 202 7 regarding the language which would change the affirmative defense to acquiesce from consenting to or knowledge of. It may not be possible to reach an agreement on the language. The ACLU position is, if you are unable to agree on the acquiesce language, to still move ahead with the portion of the bill which allows innocent owners to have the availability of filing an affidavit contingent on the government's ability to file a counter affidavit. This would provide additional protection for innocent interest holders and support very strongly this portion of the bill.

118 MAURICE L. RUSSELL, DEBTOR/CREDITOR SECTION OF THE OREGON STATE BAR ASSOCIATION: Testified in support of the concept of HB 2020. The Debtor/Creditor Section is strongly opposed to those portions of the bill which propose that the seller be required to certify that they have not acquiesced in the unlawful use of the property. >He proposed section 2 (c) (E) and section 2 (d) be deleted from HB 2020. They take this position because there are serious doubts about the wisdom of compelling an innocent party to report knowledge of a crime in which they are not themselves participating.

160 REP. MANNIX: Suggested the language "without assisting the prohibitive conduct".

187 RUSSELL: This will be asking the seller in the situation to place himself in a position between true active participation and mere ignorance. This is basically asking people to avoid knowing anything about the property. Assisting would be much better than acquiesce in this situation.

193 REP. MILLER: This might encourage one to be interested in the activities on their property.

226 RUSSELL: Would generally agree in the landlord/tenant context, but in a land sale contract context the people are generally less equipped to handle this than the institutional lenders.

245 KEN SHERMAN, OREGON BANKERS ASSOCIATION: Testified in support of HB 202 0 and offered proposed amendments. (EXHIBIT B AND C)

320 REP. MANNIX: Asked for comments on the acquiesce provision.

330 SHERMAN: The acquiescence standard applies to non-financial institution claimants and is not directly in their line of interest. They do share some of the concerns regarding what is acquiescence and how is it going to be implemented without creating real problems in terms of turning property interest holders into private police. He is personally more comfortable now in looking at the state of mind of the interest holder at the time he/she acquired the interest. Did they know of the prohibitive conduct?

382 PETE SHEPHERD, OREGON DEPARTMENT OF JUSTICE: Testified in support of HB

202 0. >It is important for the committee to understand that very few forfeiture cases involve real property. Of the 505 cases reported to the Oversight Committee, as being closed forfeiture cases, 6 are real property cases. >The acquiescence provisions on lines 6-27, page 2, the committee has a policy choice represented in those sections. The choice is will the committee impose a responsibility on a landlord, or in this case, a land sale contract seller, who knows the property is being used for unlawful purposes. Will the committee ask that land sale contract seller to take some action? The Department of Justice supports this change in the law. >The Department of Justice would support the removal of the words "or avoid" in line 21, and the words "or anticipated prohibited conduct" line 23.

TAPE 50, SIDE A

020 REP. MANNIX: Suggested following up and trying to avert the concerns by using the language "a person shall be considered to have acquiesced in prohibitive conduct if the person knew of the prohibitive conduct and failed...". Would this create problems?

030 SHEPHERD: This language would not be objectionable as long as it still covers the case where the land sale contract seller makes a sale and the buyer later enters into unlawful transactions on the property.

058 REP. BELL: As a private citizen, why would my integrity be questioned any more than a banking institution? Why, in this section of the law, would the burden of proof be on the private citizen?

069 SHEPHERD: This is a fundamental policy question. We know that crooks are reading this law. They are intentionally taking on the coloration of innocent interest holders in order to prevent the interest holder from taking their assets. The Legislature placed the burden of persuasion on the party that had the best access to the facts that showed they were innocent. >The person who is truly an innocent interest holder will be successful in demonstrating his innocence. Whereas, the party who is not truly an innocent interest holder is not going to be able to demonstrate.

110 REP. JOHNSON: If the person who is subject to losing his property

is also the person who is suspected or accused of participating in the illegal conduct, then this policy choice would make sense. On the other hand, if the third party is far removed from the illegal conduct, the burden or proof does not hold as well.

124 SHEPHERD: The distribution of burdens of proof does make a difference in the remote transactions.

158 FRANK E. BRAWNER, OREGON BANKERS' ASSOCIATION: Any management officer, corporate officer, director, etc. is investigated prior to his appointment, including fingerprinting. Any background investigation which would reveal some wrong doing on the part of any officer or director is not permitted in the State of Oregon.

171 REP. MANNIX: We need to remember that this bill is to protect the people. The law already protects the banks. The law already allows forfeiture to proceed. HB 2020 was designed to help the innocent property owner who has the land sale contract.

190 REP. BELL: While trying to protect, we are making it harder for private ownership than for the interest of a bank.

210 REP. MANNIX: The individual, which we are adding the extra responsibility on, is not subject to the federal banking law and/or the state banking law and its regulations. There is a reason for the added burden on the individual. The banks have a separate burden.

229 SHEPHERD: The Department of Justice was involved in drafting the proposal and bringing it to the oversight committee. The Department's purpose is to provide an expedited way for the land sale contract holders, short of having to go to court, hire a lawyer, etc., to demonstrate that they are an innocent party. Secondly, they need to do that in a way which does not allow crooked claimants to take advantage of that short circuited process.

237 REP. MANNIX: Suggested line 18, page 2, "continue to hold the interest without acquiescing in the prohibitive conduct" change to "continue to hold the interest without knowingly acquiescing in the prohibitive conduct". Would this give more reassurance?

240 SHEPHERD: This would not change the meaning of the bill, but it may be a desirable change.

245 REP. JOHNSON: Does this bill mean any person who is given a piece of property, as the result of someone dying, will lose their property if something illegal is done on the property?

261 SHEPHERD: No. It is important to remember that what we are providing is an accelerated way for the claimant to assert their innocent interest without having to hire a lawyer and go to trial.

321 FIDANQUE: It was the intent of the Oversight Committee to adopt a standard in proposed HB 2027 for the purposes of these affidavits. If the Committee decides not to move on HB 2027 and changes the affirmative defense provisions, we could insert the language that currently appears for banks and financial institutions. The Oversight Committee was trying to provide greater protection for innocent owners who were going to find it difficult to prove they had no knowledge of the conduct. The financial institutions and the realtors believe the current language gives them more protection than the proposed language relating to

acquiescence.

363 SHEPHERD: Stated their support of the bill, as drafted and as it is before the committee. If the committee decides, as a policy matter, that it will reject the concept of acquiescence, then Mr. Fidanque's suggestion would be the next best. We do not recommend the policy choice.

373 REP. BELL: How do you know you can establish there is no knowledge of the misconduct?

379 SHEPHERD: Your word would be sufficient under this procedure, unless the government can produce evidence to the contrary.

420 FIDANQUE: The ACLU strongly agrees with the concerns relating to the innocent property owners. This is the reason we have proposed the process from the beginning. We support the concept of HB 2020 because it is an improvement over the existing situation, not because we feel it solves the inherent problems in the forfeiture statute.

TAPE 49, SIDE B

004 REP. JOHNSON: Suggested reviewing SB 818, which approaches the same issues from a different angle.

(Tape 49, Side B) PUBLIC HEARING - HOUSE BILL 2027 Witnesses: Pete Shepherd, Oregon Department of Justice David Fidanque, ACLU of Oregon Shawn McRae, OCDLA James Sanderson, Citizen Maurice Russell, OSB Debtor/Creditor Section Jenny Cooke, Citizen Genoa Ingram, Association of Oregon Realtors Ray Shaw, Association of Oregon Realtors

024 CHAIMOV: Reviewed the Staff Measure Summary and offered proposed amendments and testimony from the Manufactured Housing Communities and the Multifamily Housing Council of Oregon, amendments for Clackamas County, suggestions and comments from Oregon realtors (EXHIBIT D). There is no fiscal impact to HB 2027.

037 PETE SHEPHERD, OREGON DEPARTMENT OF JUSTICE: Testified in support of HB

202 7. This represents an improvement over the present law, both from the standpoint of fairness to certain categories of people who otherwise might not qualify for an affirmative defense under the present law. >Under present statute, due to an ambiguity in Section 8 of the law, a person who innocently acquires property and later determines and uses it in the course of prohibited conduct, may be entitled to an affirmative defense even though they have used the property subsequent to their acquisition in unlawful conduct. >We strongly support HB 2027, both as an improvement from the standpoint of getting all of the assets forfeited and from the standpoint of fairness.

085 DAVID FIDANQUE, ACLU OF OREGON: Current language may only apply to the knowledge of the interest holder at the time they acquire their interest, rather than any knowledge or actions they may have taken subsequent to their acquisition of the interest in the property. It may not be possible to create language that is going to satisfy the people who think they would do better under the current statute than they would under HB 2027. It was the intent of the Oversight Committee to protect interest holders who were innocent at the time of seizure of the property. We felt it impossible for an innocent property owner to prove

they had no knowledge.

>The ACLU would not object to eliminating the test of acquiescence.
Given the framework of the statute, this is an improvement.

186 SHAWN McRAE, PRESIDENT, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION:

They tried to come up with a change in the law which would provide for a situation when a spouse is financially and emotionally dependent upon another person who does not want to get the spouse in trouble with the police in order to keep what they have. To protect these people we came up with the term acquiesce as opposed to knowing of or consenting to. In trying to define acquiesce we discussed the possibility of setting up examples as in page 1, line 26, "reasonable steps may include, but are not limited to: (a) Reporting the prohibited conduct ... (b) Terminating a rental agreement; or (c) Seeking an abatement order ..."

220 REP. MANNIX: Are we going to require all of these as a listing? Should the language on line 28 read "or" and not "and"?

225 McRAE: The intent of the Oversight Committee was not to make these mandatory, but to make these possible steps which could be taken. That is the reason for the language on line 24, "Reasonable steps" meaning that it will depend on the circumstances in every case, what is considered reasonable.

238 REP. EDMUNSON: Because of the three examples, reporting to the police, terminating a rental agreement, or seeking an order, these are all taking public official steps. For purposes of making a record. Can we make it clear that wives, husbands and children do not have to report the relative to the police.

265 McRAE: Originally, she suggested better language on line 24 would be, "if the person knowingly failed to take reasonable steps under the circumstances", without getting into specific examples. This was not acceptable to the chairperson of the Oversight Committee. We need to make sure that everyone understands, as far as the legislative history, that these are by example and we will not require spouses and children to inform on their parents or loved ones.

280 SHEPHERD: The original language was "reasonable steps under the circumstances". This language is acceptable to the Department of Justice.

287 FIDANQUE: This particular language was developed at a meeting of the subcommittee dealing with legislation of the Oversight Committee. The chair of the Oversight Committee was unable to attend the meeting and the meeting was chaired by Rep. Courtney. Rep. Courtney would not allow anything to move forward unless it had mandatory steps that someone would be required to take. We agreed to accept the language because it was very important for the proposal to be forwarded to this committee to deal with this issue. We strongly support the proposed language.

303 REP. EDMUNSON: On line 24 change the language to read, "take reasonable steps, under the circumstances,..." . On line 25, could we pick up the words "terminate or avoid use of the property in the course of the prohibited conduct." This would cover the situation where the spouse moves out and avoids use of the property.

336 McRAE: Preferred to leave the language as "knowingly failed to take

reasonable steps under the circumstances", because realistically it is going to have to be decided on a case by case basis. The court is going to apply a common sense standard to what is reasonable and what is reasonable in one situation is going to be different from another. >The better approach would be to get rid of the example list.

372 REP. MANNIX: Suggested changing the language on line 26 to read "reasonable steps depend on the circumstances of a given case and may include but are not limited to:" >The reason for leaving the examples is to document that these things are reasonable, but not excluding other things. This will establish reasonable steps.

412 REP. BELL: This is not solving the situation of a spouse. How will the spouse prove she did not know he was carrying on the conduct.

463 FIDANQUE: There is no question that there is a substantial burden on an innocent spouse who may have taken reasonable steps in holding up their end of the case. There is no way, given the existing structure of the forfeiture statute, to adequately protect all innocent property owners.

TAPE 50, SIDE B

056 REP. EDMUNSON: Would we be better to have the simple statement "under the circumstances" because it will have to be determined on a case by case basis.

079 FIDANQUE: We do not want to list steps that will automatically get someone off the hook, but at the same time you do not want to be totally discretionary on the part of the court. The burden is so great on the innocent property owner under this statute that it would be worth taking the risk of leaving "under the circumstances" or add the list, making it clear that the list is not exclusive and complying with any of these things would constitute reasonable steps.

096 REP. JOHNSON: If someone acquires a piece of property by gift, is he automatically going to be unable to prevail on any forfeiture action?

109 SHEPHERD: The existing Section 8 of the law does limit itself to devise or intestate succession.

123 JAMES SANDERSON, ATTORNEY AT LAW: Suggested deleting the list. He sees this as capable of being read as a list of required escalating steps in order to reasonably take the steps to evict someone. >This is bad social engineering to require someone to embark on litigation in the private sphere as a way of solving a public problem.

153 MAURICE RUSSELL, OREGON STATE BAR DEBTOR/CREDITOR SECTION: HB 2027 requires persons who do not have a possessory interest in the property to take affirmative steps to prevent a use of the property by someone they have innocently sold the property. HB 2027 has the same objections to personal property with respect to contract sellers of real property requiring folks who do not have rights in the property, except in the event of a default, to take some action to prevent it from being used in a way they did not contemplate it being used in the first place.

226 JENNY COOKE, CITIZEN: Her earlier comments in the previous session on HB 2027 were her personal feelings. She stated her satisfaction with the position OCDLA has taken and the language from line 23 should read

"a person shall be considered to have acquiesced in prohibited conduct if the person knew of the prohibited conduct and failed to take reasonable steps under the circumstances to terminate or avoid use of the property in the course of prohibited conduct." >She feels the laundry list is a mistake.

239 GENOA INGRAM, OREGON ASSOCIATION OF REALTORS: Submits and summarizes (EXHIBIT E). Only six of the forfeitures dealt with real property. We are concerned that the problem seen during the interim and the letters from constituents are going to increase if something is not done to provide some direction to the property owners. >The "laundry" list provides no safe harbor. It sends a message to the property owner that the Oregon Legislature is not sure of the reasonable steps. Property owners are concerned with what should be done to provide a safe harbor for themselves to protect their property.

313 RAY SHAW, ASSOCIATION OF OREGON REALTORS: Feels the affidavit is preferable for the non-financial institution. >If the list were reasonable and required only reasonable requirements, this would be preferable to either the open ended reasonableness or the affirmative defense. The affirmative defense does require a showing after a hearing.

371 REP. MANNIX: What if we said reasonableness is: a) reporting to police, and b) doing any one of the following.

377 SHAW: This would be reasonable. It is advisable to report to the police. >HB 2027 would create an affirmative defense with another showing, the acquiesce issue, creates a presumption of guilt on behalf of the party holding the secured interest.

TAPE 51, SIDE A

WORK SESSION - HOUSE BILL 2027

023 MOTION: REP. EDMUNSON: Moves to amend HB 2027 by inserting on page 1, line 24, after the word "person" insert "knew of the prohibited conduct and...". Delete on line 24 the word "steps" and insert the word "action". Delete on line 25, "permitted by law or contract" and insert "under the circumstances". Delete on line 26, "Reasonable steps may include, but are not limited to:". Delete lines 27-29 and page 2, lines 1 and 2.

VOTE: Hearing no objection, Chair Baum so moves. Rep. Clark was excused.

052 MOTION: REP. JOHNSON: Moves HB 2027, page 1, line 8, be deleted.

VOTE: Hearing no objection, Chair Baum so moves. Rep. Clark was excused.

117 MOTION: REP. EDMUNSON: Moves HB 2027, as amended, to the full House Judiciary Committee with a do pass recommendation.

VOTE: In a roll call vote, the motion carries with all members present voting AYE. Rep. Clark was excused.

(Tape 51, Side A) WORK SESSION - HOUSE BILL 2020

142 MOTION: REP. MANNIX: Moves to adopt the amendments presented by

the Oregon Bankers Association, dated March 14, 1991, to HB 2020 (EXHIBIT C).

VOTE: Hearing no objection, Chair Baum so moves. Rep. Clark and Edmunson were excused.

159 MOTION: REP. MANNIX: Moves to amend HB 2020, page 2, lines 20-22, to read "have acquiesced in prohibited conduct if the person knew of prohibited conduct and knowingly failed to take reasonable action under the circumstances to terminate or avoid use of the property in the course of prohibited conduct."

169 REP. JOHNSON: Asked to draw the distinction between HB 2027 language and the proposed HB 2020 language. The language in HB 2027 would be addressed when a judge has an opportunity to make a decision and with the language in HB 2020 it would be an affidavit. This language would not be useful in an affidavit situation. >For purposes of the affidavit, he suggested language similar to that in SB 818 .

VOTE: Hearing no objection, Chair Baum so moves. Rep. Clark was excused.

252 MOTION: REP. MANNIX: Moves HB 2020, page 2, line 22, to read "For purposes of this section reasonable action under the circumstances includes one of the following: (A) Reporting the prohibited conduct to a police agency; (B) Serving a notice of intent to terminate a rental agreement; (C) Terminating a rental agreement; or (D) Seeking an abatement order..."

308 REP. JOHNSON: Offered a friendly amendment concerning (B), there are other types of interests in property other than a landlord's interest that should be included. For example, this could include someone who does not have a rental agreement or a purchase agreement. We need to cover any type of ownership.

321 SHAW: There is concern in terminating any kind of legally enforceable agreement wrongfully. This could be done prematurely without sufficient facts. If it is a requirement of the statute, could a trial judge foreclose a contract, a trust deed, or terminate a rental agreement.

409 REP. MANNIX: Suggested "Commence action which will assert rights of the affiant."

414 SHEPHERD: This would be appropriate if one is going to eliminate the language on line 22 "but are not limited to" and provide a list of things that would conclusively establish there was no acquiescence in the use of the property.

TAPE 52, SIDE A

019 REP. MANNIX: Suggested "For purposes of this section, reasonable action, under the circumstances, includes but is not limited to one of the following: (A) Reporting the prohibited conduct to a police agency; (B) Commence action which will assert rights of the affiant as to the property interest; (C) Terminating a rental agreement; or (D) Seeking an abatement order..."

021 SHAW: Supports this language.

028 AMENDED MOTION: REP. MANNIX: Moves HB 2020, page 2, line 22 to read "For purposes of this section reasonable action under the circumstances includes but is not limited to one of the following: (A) Reporting the prohibited conduct to a police agency; (B) Commencing action which will assert rights of the affiant as to the property interest; (C) Terminating a rental agreement; or (D) Seeking an abatement order..."

044 REP. BRIAN: Questioned the police agency having the jurisdiction.

VOTE: Hearing no objection, Chair Baum so moves. Rep. Clark was excused.

073 MOTION: REP. MANNIX: Moved HB 2020, as amended, to the full House Judiciary Committee with a do pass recommendation.

075 CHAIMOV: Suggested that lines 29, 34 and 36, page 2, need to have dates in the blank spaces.

110 MOTION: REP. MANNIX: Moves HB 2020, line 29, the blank space be inserted with 30, on line 34 the blank space be inserted with 20, and line 36 the blank space be inserted with 5.

VOTE: Hearing no objection, Chair Baum so moves. Rep. Clark was excused.

130 SHAW: The Association of Oregon Realtors is comfortable with the amendments. However, even though this will be litigated, the standard is still for attorneys' fees frivolity, and that concerns me. Believes there may be conceptual motions from the realtors that the prevailing party should be rewarded reasonable attorney fees.

163 SHEPHERD: Substituting "shall" for "may" with the existing language of the printed bill would not be a problem.

Changing the bill so that parties would recover attorney fees from the other party even in a case which was not frivolous would represent a significant change in the current statute.

Committee should consult Criminal Defense Bar about the concept of imposing attorney fees on people who seek and fail to demonstrate an affirmative defense.

The government would only have an out-of-pocket expense under this proposal if it filed an affidavit and the court determined that it was not frivolous, but it was not sufficient to raise a genuine issue of material fact.

199 FIDANQUE: Current statute allows the government to recover attorney fees because they are deductible off the top following a judgment of forfeiture and sale of the property.

Under current statute a successful claimant is barred from collecting attorney fees or costs unless they can show the government did not have reasonable suspicion at the time the property was seized. The ACLU objected to that when the law was considered last session. We continue to object to that provision and think it is unfair on innocent property owners. Would support any movement that would allow innocent property owners to have some chance of recovering the cost of the litigation and

upholding their property rights.

240 MOTION: REP. MANNIX: Moves that on page 3, line 3, we change "may" to "shall". Change line 5 to read "successor in interest if the forfeiting agency does not prevail.."

260 REP. MANNIX: Speaks to his motion. Realizes that it is saying prevailing transferor, conveyor, or successor in interest is implying that they prevailed. Does not mind redundancy in statutes knowing what attorneys can do with them. We will be redundant, but we will be saying "if the forfeiting agency does not prevail (we might want to say prevail in this proceeding - that might be more precise).

Changes motion to say "does not prevail in the proceeding".

270 VOTE: Without objection, amendment is adopted. Rep. Clark is excused.

315 MOTION: REP. MANNIX: Moves HB 2020, as amended, to the full Judiciary Committee with a do pass recommendation.

VOTE: On a roll call vote, motion carries with all members present voting aye. Rep. Clark is excused.

Rep. Mannix will carry the bill.

338 MOTION: REP. MANNIX: Moves to suspend the rules to allow the subcommittee to recall HB 2027 for reconsideration.

VOTE: Hearing no objection, motion passes. Rep. Clark is excused.

(Tape 52, Side A) WORK SESSION - HOUSE BILL 2027

355 MOTION: REP. JOHNSON: Moves to amend HB 2027 by deleting 6 (b) of Section 9 and adding on page 2, line 3 "If the forfeiting agency does not prevail, the court shall order the forfeiting agency to pay the costs and disbursements, including reasonable attorney fees, of the prevailing claimants and financial institutions".

Discussion of motion.

450 REP. MANNIX: What is Mr. Shepherd's reaction to this on behalf of your agency?

455 SHEPHERD: Reasonable suspicion language was used to avoid any possibility that police agencies would be discouraged from undertaking criminal enforcement actions that might also have a forfeiture component by the fear that some judge might later determine that they lacked reasonable suspicion or that the stop was not valid.

Under the proposed amendment, if the government seized a parcel of property in the course of executing a criminal search warrant that also included authority to seize the house for forfeiture, and the court later suppressed the search warrant, the government would have to pay the claimant's attorney fees.

TAPE 51, SIDE B

040 JENNY COOKE ATTORNEY: The proposed amendment would go a long way toward turning this into a civil remedy.

States her understanding of the proposed amendment.

100 MOTION: REP. MANNIX: Moves to amend Rep. Johnson's motion to include the phrase "if the court finds that the prevailing party was an innocent party or if they prevail on an affirmative defense".

115 COOKE: The problem with limiting it to an affirmative defense is what if the government did not have probable cause to begin with?

REP. JOHNSON and COOKE discuss her concerns.

122 REP. MANNIX: Stands by his motion which talks about an innocent party or an affirmative defense.

126 REP. JOHNSON: Concerned about use of word "innocent". Believes committee is heading in the right direction.

130 REP. MILLER: Will oppose the amendment.

161 REP. MANNIX: Withdraws his motion.

180 VOTE: Without objection, amendment is adopted.

183 MOTION: REP. MANNIX: Moves HB 2027 as amended to the full committee with a do pass recommendation.

VOTE: On a roll call vote, motion carries with all members present voting AYE. Reps. Brian and Clark are excused.

192 CHAIR BAUM: Rep. Edmunson will carry the bill.

(Tape 51, Side B) PUBLIC HEARING - HB 2038

201 CHAIMOV: Reviews provisions of HB 2038 which requires the government to speed up deciding what to do with seized property. Reviews past committee action on the bill.

Submits Staff Measure Summary (EXHIBIT G).

Rep. Calouri has seen the proposed Department of Justice Amendments (EXHIBIT H).

WORK SESSION - HB 2038

235 MOTION: REP. MANNIX: Moves adoption of the Department of Justice proposed amendments dated 3/6/91 (EXHIBIT H) to HB 2038.

238 VOTE: Without objection, amendments are adopted.

240 PAUL ELSNER, CITY OF PORTLAND: Testifies in opposition to HB 2038 summarizing written testimony (EXHIBIT I).

330 SANDRA ARP, LEAGUE OF OREGON CITIES: Has not had opportunity to view the proposed amendments.

360 CHAIR BAUM: Closes work session on HB 2038.

Opens work session on HB 2028.

WORK SESSION - HB 2028

375 CHAIMOV: Reviews provisions of HB 2028 which deals with the expedited hearings. Reviews developments since committee's last hearing on the bill.

395 MOTION: REP. MANNIX: Moves amendments in the hand engrossed version of the bill distributed by Counsel.

400 DAVE FIDANQUE, ACLU OF OREGON: Mr. Shepherd and I have a fundamental, philosophical disagreement about who should be entitled to interim relief.

The amendments distributed are Department of Justice amendments. The ACLU would still prefer the original bill or alternative amendments that I am prepared to discuss.

The issue on which we disagree is whether or not there should be the possibility of interim relief for someone who can not prove an affirmative defense at this early stage of the proceedings.

Original HB 2028 allowed for the entering of interim protected orders under Section 4 which the committee has since deleted.

Mr. Shepherd believes that no interim relief should be available to anyone who can not prove an affirmative defense at the early stage of the proceedings.

Believes that is an unfair burden to place on innocent property owners.

If the committee believes that is the appropriate standard, Mr. Shepherd's amendments are preferable to the bill as it stands now with Section 4 deleted.

Would prefer to see a proceeding in which a claimant is required to show that they are likely to prevail on the merits and they are going to suffer irreparable harm unless a protective order is entered. The intent of that amendment would be to impose on this process the standard that is used in federal courts for the issuance of an injunction.

Is prepared to offer language to accomplish that.

Understands Mr. Shepherd is not willing to support that concept.

485 SHEPHERD: We narrowed our differences to a certain extent. Mr. Fidanque has correctly described the fundamental difference.

TAPE 52, SIDE B

SHEPHERD: The best effort I could make to accommodate the problem was to provide in the draft I submitted that the person can renew his request whenever they develop additional evidence.

045 REP. MANNIX: Is satisfied with the Department of Justice proposal.

047 REP. EDMUNSON: Appreciates Fidanque's and Shepherd's efforts. Will give a courtesy yes vote.

060 VOTE: Without objection, amendment is adopted.

061 MOTION: REP. MANNIX: Moves HB 2028, as amended, to the full committee with a do pass recommendation.

065 VOTE: Motion passes with all members present voting Aye. Reps. Brian, Clark, Miller are excused.

(Tape 52, Side B) WORK SESSION - HB 2733

085 CHAIMOV: Reviews provisions of HB 2733.

100 MOTION: REP. EDMUNSON: Moves adoption of 2733-1 amendments (EXHIBIT J).

115 VOTE: Without objection, amendment is adopted.

117 MOTION: REP. EDMUNSON: Moves HB 2733, as amended, to the full committee with a do pass recommendation.

120 VOTE: On a roll call vote, motion passes. Reps. Brian and Clark are excused.

128 CHAIR BAUM: Rep. Edmunson will carry the bill.

(Tape 52, Side B) PUBLIC HEARING AND WORK SESSION - HB 2038
Witnesses: Paul Elsner, City of Portland Frank Brawner, Oregon Bankers Association Peter Shepherd, Department of Justice Al Elkins, Tow Truck Association

135 ELSNER: Has no objection to the amendment dealing with changing 15 days to 30 days. Has no objection to the amendment dealing with the issue raised in HB 2037 concerning the stay so that an automobile can be released upon proper notice to a third parties, other than the person from whom it was seized.

The only other provision which alters what HB 2038 does is the last proposal which deals with page 5, line 14, an insertion which allows for a negotiated settlement concerning claimants or potential claimants and asking them to pay storage costs as part of any settlement. Would like to include the phrase "financial institutions" in that phrase. Amendment would say "shall not prevent any claimant, or financial institution from reimbursing the seizing agency".

180 FRANK BRAUNER, OREGON BANKERS ASSOCIATION: That is not our understanding of the final part of the Department of Justice's amendments.

Why should a financial institution pay anything when it did nothing wrong? Agrees with extension from 15 days to 30 days to determine if there will be forfeiture.

195 REP. EDMUNSON: When an institution lends money for an individual to purchase a car it have a contract with them that they will repay the loan. The contract includes that they will also pay costs incurred in fulfilling the contract.

If the institution has an expensive vehicle in storage, don't you have a right under your contract to recover those costs from them?

205 BRAUNER: Yes. We also have the opportunity to go after the

deficiency.

There is no discipline now to make sure that automobiles and other property is not seized frivolously and believes there is potential for serious abuse.

240 BRAUNER: I was talking about the proposal that I had to include the phrase "financial institutions" after the word "claimant".

250 REP. MANNIX: Not willing to include financial institutions.

260 REP. EDMUNSON: Do you want the option to get the vehicle back as soon as possible?

268 BRAUNER: We want to get the car as soon as possible under certain circumstances.

We want to be included in the language at the top of page 2.

290 ELSNER: As it stands now, HB 2038 requires seizing agencies to pay all towing and storage costs of automobiles whether it forfeits or seizes them. The City of Portland's program will substantially impact the financial ability of the city to continue its forfeiture program because potential costs sometimes exceed the value of the automobile.

We want the ability to talk to a financial institution to be able to deal with towing and storage costs.

335 REP. MANNIX: Has not been convinced to change his motion.

347 REP. BELL: What did the seizing agency do wrong if it used a correct procedure for forfeiture that would make it right for them to assume costs?

355 BRAUNER: Nothing wrong. But if the car is going to be sold, the storage costs come out of proceeds.

Lenders consider the age and condition of the collateral. Most of the cars forfeited in Portland do not have lien holders.

400 VOTE: On a roll call vote, amendment is adopted. Reps. Brian, Clark, Baum are excused.

415 MOTION: REP. MANNIX: Moves HB 2038, as amended, to the full committee with a do pass recommendation.

420 ACTING CHAIR MILLER: Note subsequent referral to the Committee on Ways and Means.

425 REP. BELL: Notes lines 18 through 27 on page 4: questions why towing and storage costs could not be included in the list of payments after the sale.

465 AL ELKINS, OREGON TOW TRUCK ASSOCIATION: We usually don't release the car until we are paid.

470 REP. BELL: Could we have "recovery of costs" come out of the sale?

475 CHAIMOV: Assures Rep. Bell that an amendment that would allow storage and towing costs to be recovered by the forfeiting agency was

added in a prior bill, so we would not need to add that here.

490 VOTE: On a roll call vote, motion passes. Reps. Brian, Clark, and Baum are excused.

(Tape 53, Side A) PUBLIC HEARING - HB 2311 Witnesses: Frank Brawner, Oregon Bankers Association Dave Fidanque, ACLU Pete Shepherd, Department of Justice

044 CHAIMOV: Reviews the provisions of HB 2311. HB 2311 requires government agencies to keep property safe, regardless of why that property has been seized.

The bill has no fiscal impact.

Committee has materials stating why the Department of Justice objects to the bill (EXHIBIT K)

050 FRANK BRAWNER, OREGON BANKERS ASSOCIATION: Testifies in support of HB 231 1 which was pre-session filed on behalf of the Oregon Bankers Association from written testimony (EXHIBIT F).

123 DAVID FIDANQUE, ACLU OF OREGON: Supports HB 2311.

132 PETE SHEPHERD, DEPARTMENT OF JUSTICE: Testifies in opposition to HB 231 1. Government is not obliged to pay costs of investigation and damage to property in the course of that investigation that leads to a criminal conviction.

Policy question for the committee is: if this law passes, the government will have to pay those costs.

Urges committee not to make that the policy of the state of Oregon.

165 ACTING CHAIR MILLER: Not sure that you would be responsible for damage if it occurred while agency was acting reasonably.

180 SHEPHERD: Understands that this proposed legislation would make the government liable even if they executed the warrant in a reasonable fashion.

174 REP. MANNIX: If we include a specific exclusion for tests performed on property for purposes of obtaining evidence?

195 SHEPHERD: That would not entirely cover the concern, but we are getting closer.

Another scenario would be police officers executing a search warrant at a residence and using a "key" device.

210 BRAWNER: It is not our intent to reverse Emery. This has nothing to do with forfeiture. We are talking about property which is normally evidence, and about reasonable care.

220 SHEPHERD: The departments' concerns with this bill would be addressed if the committee provided that the government would not be liable for the cost of damages incurred in the execution of a search warrant or making the seizure.

230 REP. MANNIX: The bill says "shall take reasonable steps to

safeguard and protect the things seized". It does not address searching premises.

240 SHEPHERD: You might seize a house for search purposes.

247 REP. MANNIX: If the government seized the wrong house and caused damage I would expect them to pay for damages.

Does not see why the government needs to be protected against smashing down front doors.

260 SHEPHERD: Because the police officers are acting pursuant to an order of the court that directs them to enter that house.

270 REP. MANNIX: Is concerned about suggestions that this limits the authority of the officer to smash the front door down in appropriate circumstances. Are you concerned about that?

271 SHEPHERD: No.

WORK SESSION - HB 2311

315 MOTION: REP. MANNIX: Moves to amend HB 2311 to include the following sentence in Section 2. "This does not include tests or procedures performed on property in order to secure or develop evidence."

VOTE: Without objection, amendment is adopted.

327 MOTION: REP. MANNIX: Moves HB 2311, as amended, to the full committee with a do pass recommendation.

335 VOTE: On a roll call vote, motion passes. Reps. Brian, Clark, and Baum are excused.

350 REP. EDMUNSON: Have expressed my concerns about forfeiture. Is increasingly disturbed that we have cities and counties who are taking it upon themselves to pass ordinances which go far beyond the scope of the state law.

Has a firm belief that forfeiture law should be state law.

Would like Counsel to draft amendments to HB 2037 which would clarify the state law to preempt and supersede all ordinances that would attempt to go beyond the scope of the state forfeiture laws.

375 CHAIMOV: Do you mean for this bill to preempt the type of activity that leads to forfeiture, or just the procedures for the forfeiture itself?

380 REP. EDMUNSON: Both.

380 REP. MANNIX: Are we going to include things other than drug related crimes?

385 REP. EDMUNSON: That question will be appropriate in discussion.

388 ACTING CHAIR MILLER: Adjourns meeting at 5:10 p.m.

Transcribed by,

Pat Zwick

EXHIBIT LOG:

A:HB 2020 SMS - Staff - 1 page B:HB 2020 Testimony - Kenneth Sherman - 3 pages C:HB 2020 Proposed Amendment - Frank Brawner - 7 pages D:HB 2027 SMS, Proposed Amendment, Testimony - Staff - 6 pages E:HB 2020 Testimony - Genoa Ingram - 2 pages F:HB 2311 Testimony - Frank Brawner - 5 pages G:HB 2038 SMS - Staff 1 page H:HB 2038 Proposed Amendment - Dept. of Justice - 2 pages I:HB 2038 Testimony - Paul Elsner - 6 pages J:HB 2733-1 Amendment - Staff - 1 page K:HB 2311 Testimony - Peter Shepherd - 1 page