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COMMITTEE ON JUDICIARY

Fifth Meeting, August 29 and 30, 1974

Minutes

August 29, 1974

Senate Members Present: Senator Elizabeth W. Browne, Chairman
Senator Wallace P. Carson
Senator George Eivers

House Members Present: Representative Robert P. Marx, Chairman
Representative Stan Bunn
Representative Lewis B. Hampton
Representative Norma Paulus

Staff Present: Mr. Donald L. Paillette, Project Director
Mrs. Marion B. Embick, Research Counsel

Others Present: Judge George F. Cole, Former Chairman of House Committee
Capt. Larry Brown, Portland Police Department
Sgt. Michael Foss, Portland Police Department
Mr. L. E. George, Traffic Engineer, Department of Transportation
Miss Vinita Howard, Public Information and Publications, Motor Vehicles Division
Mr. Don Jepsen, Oregon Journal
Mr. Ralph Sipprell, Liaison Engineer, Department of Transportation
Capt. John Williams, Traffic Division, Oregon Department of State Police

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Agenda (Cont'd):



The meeting was called to order at 9:00 a.m. in the conference room at Sunriver Lodge by Senator Elizabeth W. Browne, Presiding Chairman.

Approval of Minutes of Meeting of June 12 and 13, 1974

There being no objection, the minutes of the meeting of the full committee on June 12 and 13, 1974, were approved as submitted.

POWERS OF STATE AND LOCAL AUTHORITIES; Preliminary Draft No. 2; August 1974

Section 1. Provisions uniform throughout state. Mr. Paillette explained that the section was formerly in the Article on General Provisions and has been incorporated into this draft.

Section 1 is a restatement of ORS 483.036, subsection (1) applying to the applicability throughout the state and subsection (2) to the applicability on the ocean shore. The section has been drawn to provide a clearer statement. Mrs. Embick indicated that the UVC states that no local authority may enact rules which deal with the same subject, but reported that it has been found to be more efficient when the local authorities enact ordinances dealing with traffic on items which might not be covered except where there could be a conflict. She noted that the cities had been contacted and it was their wish this be retained. Mr. Paillette advised he had been contacted by Jim Mattis, who explained that the cities preferred this although as a practical matter they did not anticipate any variation.

Representative Hampton asked if most cities would have enacted the new blanket adoption ordinances before the effective date of the new law and received an affirmative answer. He noted that it has previously been suggested that permitting cities to penalize with a different penalty from that of state law could raise problems and asked if there could be a future problem which would necessitate mandating that the cities could not impose any greater penalty. For example, if DUIL under state law is a Class A infraction it could be that the city would wish to change it. He wondered if it would require a constitutional amendment to prohibit cities from doing so. Senator Eivers referred to Winters v. Bisaillon, 152 Or 578, 54 P2d 1169 (1936), wherein the city attempted to place a lower speed limit and it was held by the court to be unlawful. Because of this, he did not believe the cities could impose a greater penalty with respect to DUIL.

Mr. Paillette stated that the question would arise whether a different penalty would amount to a conflict and Mrs. Embick indicated there has been no holding one way or the other on this question. There is little case law, Mr. Paillette continued, on the question of the cities' offenses penalties. Ceccacci v. Garre, 158 Or 466, 76 P2d 283 (1938), held that it is valid unless there is a clear conflict. Mrs. Embick was of the opinion that if there were a city ordinance on the drunk drive and a different penalty that what is under the state statute, there would clearly be a conflict. Senator Eivers offered that if there was any doubt incurred, language should be added to prohibit the cities from making an offense a felony, for example, when it has been determined it is a misdemeanor. Mrs. Embick suggested that the commentary state that a city ordinance penalty different from a state penalty would amount to a conflict.

Representative Hampton opposed a city imposing a greater penalty than that which the state would impose. Cities now impose lesser penalties because of the constitutional limit, he said.

The Chairman inquired if the city would proceed under the old or new statute if someone were cited before the code came into effect. Capt. Brown recalled that under the Criminal Code, if the offense had been committed before the new code was enacted, it would be handled under the old law. Mr. Paillette referred to the proposed section relating to the application of the new vehicle code which, he said, is similar to that in the Criminal Code and which amounts to a cutoff to the application of provisions. Subsection (2) of that section states that the Act shall not apply for any vehicle code offense committed before its effective date.

It was the consensus of the members that the commentary to the section should state that it is the legislative intent that cities not invoke greater penalties than does the state and that the committee expressly rejects the lesser.

Section 2. Transportation Commission to adopt sign manual. The section is taken from UVC s 15-104 and also relates to ORS 483.040 (1), which is the 1930 version of the UVC provision.

Representative Hampton referred to the provision relating to conformity with the standards issued or endorsed by the Federal Highway Administrator as stated in UVC s 15-104, and asked if this would affect any entitlement to funds. Mrs. Embick reported that the section was originally drawn to conform the specifications to the federal rules and it had been decided that there may be some which Oregon would not wish to conform to, consequently the requirement had been deleted. Mr. Sipprell was unaware of any entitlement of federal funds which would be placed in jeopardy by excluding this requirement. Mr. George explained that the Highway Commission adopts the federal manual and conforms to the federal standards. If the Commission had chose not to do so he would believe the funds would then be in jeopardy.

Section 3. Authority of Transportation Commission to mark highways and control traffic. The section, as amended by subcommittee action on August 19, 1974, provides that the Transportation Commission is vested with exclusive jurisdiction over placing, constructing and maintaining official traffic control devices on the state highways and on parts of the ocean shore which are part of state recreation areas. These devices must conform to the Commission's manual. The term "traffic control device," is defined in the Article on General Definitions.

Mrs. Embick called attention to the third sentence in which the language had been changed from discretionary to mandatory.

Subsection (2) relates to the relative roles of the cities or towns in making a determination that placement or construction is necessary on a city street or highway selected as the route of a state highway and provides that a city must submit its written findings and recommendations to the Highway Administrator. If the Administrator does not notify the city of disapproval within 90 days, he shall be considered to have approved the recommendations.

Subsection (3) was amended to provide that when the device is placed on a city street, and which should be kept separate from the controlled-access highway, Mrs. Embick explained, the Administrator of Highways shall assess the initial placement costs of the device to the Transportation Commission. She alluded to earlier discussions in subcommittee as to how to tie down the roles of responsibility between the initial construction costs and maintenance costs between the state and local authorities and with the deletion of paragraph (b), there is no longer a formula for this.

Subsection (4), as amended, states that if a device is to be placed or constructed on a state highway, not a controlled-access highway, and federal funds are available, the Administrator shall apportion those amounts 50-50 to the payment of the costs. Mrs. Embick was uncertain that the subsection would add anything to the section inasmuch as it has already been provided that the initial placing and construction costs will be the responsibility of the state.

With respect to subsection (5) which states there shall be no conflict between the provisions of the section and the authority of the Public Utility Commissioner over railroad-highway grade crossings, Mrs. Embick explained that during the 1973 session, ORS chapters 615 and 717 extended the authority of the Commission over these crossings so he could order the placing of a protective device to correct dangerous crossings, not so much at state highway intersections but at grade crossings with county roads.

Mr. George spoke to subsection (1) and voiced concern over the mandatory requirements placed on the Transportation Commission for placing and maintaining the devices, which under the definition would include markings and signs, as well as traffic signals. Existing law gives the commission the authority and it fears that under the proposed wording the chances for litigation would be much greater. For example, he said, if the determination has been made that a signal is warranted but no funds were available at that time to install the device, the mandatory requirement would leave the commission subject to possible litigation. In areas involving maintenance, he continued, if the sign were knocked down and the commission was not aware of it and consequently did not replace it on a maintenance basis, the chances again for litigation would be considerable.

The Chairman observed that if the funds were not available she would believe that under subsection (2) the request could be denied. Mr. George stated that, assuming silence were to mean consent, then after 90 days it would be necessary, under subsection (1), that something be done. Representative Paulus indicated that the tort liability would not arrive until the commission made the decision to place the signs. Representative Marx commented that if an engineering study was made which showed a safety need for a device, and which has not been done even though the need is determined, he would tend to believe that the word "shall" would place a duty on the commission to carry it out.

Representative Bunn asked what the liability of the commission would be in the situation where the determination has been made for need of a sign and the sign placed but eventually knocked down and not replaced. Representative Paulus indicated that under the Smith case, if it were due to the commission's negligence that the absence of the sign was not learned, it would be held liable. She wondered if the section had been examined by legal counsel for the Highway Commission in conjunction with case law and tort liability. The Smith case would be the key, she thought. Mr. George responded that it had been discussed with the legal staff and Mr. Sollis' concern was with the legal liability factor.

Representative Paulus suggested the possibility of requesting an opinion from the Attorney General's office as to what effect the adoption of the statute would have on the holding of Smith v. Cooper.

The Chairman proposed inserting in the commentary language stating that even though the Highway Administrator finds it necessary to place

a device, there would be a valid reason for refusal if funds were unavailable to follow through with the placement. Representative Hampton expressed concern that if a person were injured because of the sign being down and not replaced because of the list of priorities, even though the funds were available, he would wonder where the next step would be for the citizen to sue. The Chairman recalled that the subcommittee's rationale for placing the mandatory provision in the section was that often cities would make the studies and contact the Highway Commission and nothing transpired for years.

Judge Cole referred to section 5 of the draft which mandates the local authorities to also place signs and wondered if the same problem exists if they fail to erect the signs or do not discover those which were knocked down. Chairman Browne noted that in previous discussion it had been determined that the city asks the Transportation Commission to do the study in the first place as they do not have the ability to do this themselves. Representative Hampton stated that if the section remained as drafted, apart from the tort liability question it would give the local authorities some handle for mandating the sign placement, absent the finding that the funds were unavailable.

Mr. Paillette proposed that, rather than stating in the commentary that a valid reason for disapproval would be the non-availability of funds, subsection (1) could state: "Subject to the availability of funds," which would then exclude the commission from the tort liability question and would leave it unaddressed.

Mr. George commented that some cities do not wish the commission to maintain the devices within their cities. If this is the case, the Chairman said it could be done through contracts with the cities. Mr. George added that the city of Portland, rather than the state, receives all calls relating to the improperly regulated signals, etc., and they find it easier to do the work and have the total responsibility for maintaining the devices.

Representative Hampton asked if the question of tort liability were to be left unaddressed the section would then give the commission an out where it does not have funds and received an affirmative answer.

Mr. Paillette did not view the possible problem to be only limited to the local authority situation. Subsection (1) deals with traffic control devices on all state highways, whether or not local authorities are involved under subsection (2). He believed the same considerations would apply there with respect to possible liability for non-placement of the devices, and suggested section 5 contain a similar provision with respect to the unavailability of funds. The cities now have a mandatory provision, whereas existing law provides a discretionary provision for the state. By placing the clause in subsection (2) of section 3, Mrs. Embick reported it would limit the applicability only to the state highways routed over the city streets.

Senator Carson thought it should be determined who has the responsibility for placing the signs and not attempt to resolve the

state's Tort Claim Act at the same time. If it is determined the state has the jurisdiction, it should be ended there, funds or not, he said. If this is not to be the case, he was of the opinion ORS 483.040 should be reenacted. In response to ignoring the counties, which he thought was being done, Mrs. Embick said the question related to the dual authority of the state and city when it is a city street over which a state highway has been routed, but there is no similar situation with a county road. Senator Carson agreed that prior to the counties having ordinance powers this would be true, but they now have authority to pass parking regulations and he was concerned this factor was being ignored. In the matter of Keizer, for example, requesting a sign on a certain road, Mr. Sipprell advised that the state has clear jurisdiction over this matter. There is no provision in existing law with respect to routing a state highway over a county road - if this were done the state would take over the county road as a state highway and there would be no dual responsibility as is with the city.

The Chairman recapitulated the discussion that if the state were absolved from placing the sign because of lack of funds, the provision would be placed in subsection (1) of section 3. She asked if the members were satisfied to go under the Smith case. Representative Hampton stressed that he would not wish to take pressure off the Transportation Commission, although on the other hand he would not know how to balance the competing for priorities.

In response to Representative Marx's question, Mr. George said that any highway funds can be used for placement of the devices although normally they come out of a certain category. Representative Marx asked if it could be argued that the priorities were wrong with the draft stating "Subject to the availability of funds" and Mr. George replied this could occur. Inasmuch as the commission has unlimited funds, Representative Marx thought this clause would not make any difference.

Representative Paulus moved to delete section 3 and subsection (2) of section 4 and reinstate ORS 483.040.

The effect of her motion, she explained, would be to retain existing law inasmuch as it had not been determined a problem really exists under it. She added that the definition of "protective device" in subsection (1) of section 4 would be retained.

Senator Carson noted that highway protective signals are no longer called "protective devices" but rather "warning devices." The implication of liability is that it does not protect but only warns and he would wonder if the PUC would be responsible for failure to "protect."

The definition of "protective device," now in ORS ch 763, is intended to be reinstated in ORS ch 483, Mrs. Embick explained.

Representative Bunn expressed concern over the deletion of subsection (2) which provides for the 90 day procedure. With respect to

the discretionary provision in existing law, he would not object to its retention, he said. Representative Hampton objected to the return to the discretionary provision although he favored the retention of the 90 day provision.

Senator Eivers remarked that all agencies are being mandated to do certain things and if they are sued for negligence they have the right to prove negligence did not exist. If they can prove they have no funds they will be absolved but if the funds have been diverted to other areas, he was of the opinion they should accept the responsibility and he favored the retention of section 3.

It was the Chairman's contention that the state liability question should be ignored at the present time although Representative Bunn stated his objections to building in state liability in a way which was unreasonable. He thought the state should be sued for negligence but that it should not be made unduly easy. The Chairman stated that under the Smith case this is true already.

The policy decision as to whether installation of a traffic device after findings of need to regulate traffic should be discretionary or mandatory was before the committee. With respect to the question of liability, the Chairman asked what the draft would intend if the state did not have the funds. Senator Eivers thought the responsibility would be placed on the state to make a determination including whether the need was serious enough for them to take funds from other priorities and install the devices.

Representative Marx asked if there are occasions where devices should have been installed but no funding is available. Mr. George responded that 40 intersections are on its priority list at the present time, which represent an approximate $800,000.

Representative Hampton asked if the mandatory provision could intimidate the commission into refusing to make the findings. The commission could merely request the State Police to observe the situation during rush hours, for example. Because of the fear of tort liability, Representative Hampton thought this could happen rather than the commission's making a quick determination as to what should be done. Representative Paulus agreed with this assessment and remarked that until the commission makes a decision, the liability does not enter.

Representative Paulus withdrew her previous motion to delete section 3 and subsection (2) of section 4 and moved to reinstate ORS 483.040, incorporating the 90 day provision in subsection (2) of section 3.

The motion was subsequently withdrawn.

Senator Carson commented that by the insertion of subsection (2), the issues will again be raised concerning the liability problems. He believed the answer could be for the committee to recommend a sound

administrative procedure and adjust the budget to take care of those matters. Representative Paulus voiced concern with the effect on the tort liability if the section remained with the mandatory provision.

> Representative Paulus withdrew her previous motion and moved to delete section 3 and subsection (2) of section 4 and reinstate ORS 483.040.

No vote was taken on the motion.

Judge Cole referred to section 3 which initially, he said, is directed to the Transportation Commission. With subsection (2) speaking to cities, he proposed reinstating ORS 483.040 with respect to the Transportation Commission and place the provisions of subsection (2) in section 5 which deals with the cities. The procedures could then be set out for the cities to deal with problems involving state highways going through their jurisdictions, i.e., submission of a request, findings and recommendations to the commission. The 90 day provision could be inserted as well, Judge Cole explained, and it would then be clear that the committee's intent was not to change the liability of the Highway Commission but that it must respond to the city's request.

> Vote was taken on the motion to delete section 3, reinstate ORS 483.040; incorporate subsection (2) of section 3 into section 5. The definition of "protective device" in subsection (1) of section 4 to be inserted in the Article on General Definitions. Subsection (2) of section 4 would be reinstated in ORS 483.040.

Motion carried unanimously.

Section 4. Authority of Public Utility Commissioner over railroad-highway crossings. Mrs. Embick indicated that due to the previous amendments, subsection (1) will be retained in the Article on General Definitions and subsection (2) in ORS 483.040.

Section 5. Control of traffic control devices by local authorities. Subsection (1) refers to sections 3 and 4 and Mrs. Embick was directed to make the proper editorial changes. Mrs. Embick explained that an effort had been made to set up a system of priorities for replacement and maintenance but because there are presently no standards set for maintenance, the provision was deleted by subcommittee action.

Representative Hampton referred to subsection (2) and asked if it purports to place an affirmative duty on the Transportation Commission. Mrs. Embick said this was correct and is taken from ORS 483.044.

Representative Marx asked how far the Highway Department's jurisdiction extends to the county roads which intersect the highway and Mr. Sipprell advised it would be from the right of way line to the right of way line of the state highway. The commission has authority to set standards for the signs but does not have the authority for the actual placement, Mr. George explained.

Section 6. Regulation of pedestrian traffic by local authorities. The provisions are contained in subsections (4) and (6) of ORS 483.210. Capt. Brown indicated that the sections refer, either specifically or by implication, only to crossing the highway and the Chairman reported another section would relate to the pedestrian walking along the highway.

Mrs. Embick referred to the terms, "by ordinance" and "by order" used throughout the draft and was directed to delete the same inasmuch as each local authority has its own method of proceedings.

Section 7. Speed regulation in public parks by local authorities. The section is a restatement of subsection (3), ORS 483.042. Mrs. Embick proposed deleting "within" in line 3 and inserting "under", which she thought more appropriate, and was directed to make the change.

Section 8. Regulating use of freeway by parades, pedestrians. The section is comparable to ORS 483.041. With the adoption of the definition of "controlled-access highway," Mrs. Embick thought it advisable to use that term in lieu of "freeway."

"Freeway" is defined in ORS 483.041 (3), to mean a highway to which all rights of access have been acquired by the public authority having jurisdiction of the highway.

Representative Marx inquired as to the rationale for prohibiting pedestrians from utilizing freeways and then state in another Article that hitchhiking has not been banned on those freeways. Senator Carson stated the section grants authority to the state and city, through ordinances, to indirectly ban hitchhiking by prohibiting pedestrians on the road. Representatives Bunn and Marx emphasized that this was not the intent of the subcommittee during its discussion of the draft. Representative Marx posed the hypothetical situation whereby a hitchhiker, riding in a car through a locality which banned pedestrians on the freeway, was dropped off on the freeway; as soon as he exits the car he is violating the law because of the ordinance adopted by the locality. In this type of situation, Representative Marx said the hitchhiker would have no knowledge as to where his presence was banned or permitted. Senator Carson noted that subsection (2) provides for the posting of signs.

Representative Paulus asked if any language had been proposed for the section which would restrict the cities from prohibiting hitchhiking. Representative Bunn replied that the subcommittee had not intended to give them any option to restrict it.

Representative Paulus moved to amend section 8 to delete paragraph (c) of subsection (1).

The intent of her motion, she said, was not to allow cities and counties to prohibit hitchhiking.

Representative Hampton stressed that on certain areas of freeways hitchhiking should not be allowed because of the danger involved in

pulling over to the side on a narrow stretch. Although he thought over-restricting hitchhiking to be unrealistic, there should be authority given to someone for this type situation, he said.

In answer to the Chairman's question, Mr. George reported there are some sections on the freeway which have very restricted shoulder widths, for example, the metropolitan area of Portland, where the commission has prohibited pedestrians on the freeway.

It was Representative Paulus' contention that rather than prohibiting hitchhiking, the driver should be prohibited from picking him up, and signs could be posted to that effect.

Mr. Paillette reported that ORS 483.041 contains the same authorization with respect to restricting pedestrians on freeways. During the subcommittee discussion on this matter he did not recall any question raised that a problem existed which related to any conflict between allowing hitchhiking or allowing the local authorities to have this authority on freeways.

Representative Bunn noted that the subcommittee's action expanded the right to hitchhike and was apprehensive that existing law might restrict this expansion. He expressed concern over paragraph (c) and thought the cities could interpret it as a provision to ban hitchhiking. If the commentary were expanded to state that the intent is not to ban hitchhiking he would be in agreement to the retention of the paragraph. Mr. Paillette advised that the second paragraph in the commentary already states this but that perhaps it should be further expanded.

Mr. Sipprell reported that the counties would be involved in the section rather than the cities and that only two, Multnomah and Lane, have freeways under their jurisdiction. The risk, Representative Bunn stated, is that the county commissioners could share the concern that it is unsafe to hitchhike on the freeways and would use the paragraph as a tool to prohibit it.

Mr. Paillette proposed retaining paragraph (c) and further expanding it to state that it is not to be construed as a grant to ban hitchhiking. Representative Bunn maintained that by having a provision banning pedestrians on the freeway and another stating hitchhikers cannot be banned would make the provision unenforceable.

Capt. Williams reported a growing concern nationwide with respect to hitchhiking. Statistics showing a large number of crimes relating to this area reflect this concern and he believed that as it grows, the local authorities would opt to do something with the section which they had not done in the past.

Vote was taken on Representative Paulus' motion to delete paragraph (c) of subsection 1.

Voting aye: Eivers, Chairman Browne, Bunn, Paulus, Chairman Marx. Voting no: Carson, Hampton. Motion carried.

Section 9. Authority to designate through highways and stop intersections. The provision is a restatement of subsection (1), ORS 483.204. Senator Carson called attention to the phrase "should yield or stop and yield" in the last two lines of the section and was of the opinion "yield" is inferred as part of the stop.

Senator Carson moved to amend section 9 to delete "and yield" in the last line, following "stop".

There being no objection, the amendment was adopted.

Section 10. Authority to designate no-passing zones. The provision is new and vests authority in the Highway Division to designate no-passing zones for the state highway and the local authorities over highways under their jurisdiction. Violating a solid yellow line would be considered a traffic infraction.

Senator Carson asked for an example of a lane line of a roadway and further, where a no-passing line would be placed. He was informed this could be on a three lane highway or where there is a separate lane set out for a distance and used for a left turn.

Section 11. Authority to designate one-way highways, safety zones, turns and lanes. The intent of the committee when discussing an earlier section relating to "order, ordinance or resolution" was to delete these words throughout the draft. Paragraph (a) of subsection (1) would be so amended.

Senator Carson noted that when speaking to "jurisdictions," several sections of the draft contain the term, "respective jurisdictions." In order to be consistent in the draft, he recommended placing "respective" before "jurisdictions" in line 3 of subsection (1). Subsection (2), he said, contains superfluous language by the inclusion of "of any incorporated city" and also that "no local authority" would include both city and county. Inasmuch as there is no overlap of jurisdiction between the county highway and state highway, he proposed the deletion of the reference to the county.

Senator Eivers commented that some county roads go through a city and he thought the city should get the consent of the county if they desire to designate a one-way highway. By accepting Senator Carson's recommendation, he believed it would then exclude those roads. Existing law, ORS 483.043, Mrs. Embick reported, relates only to a city but requires them to obtain county authority.

Representative Marx moved to amend subsection (2) as follows:

"(2) A [No] local authority [of any incorporated city] shall not designate any highway within its incorporated limits as a one-way highway if the highway is under the jurisdiction of the Transportation Commission or of a county unless the local authority first obtains the written consent of the commission or the county [court or board of county commissioners, as the case may be].

Motion carried unanimously.

Section 12. Authority of municipalities and counties to control parking on city, county and state highways. The section was amended to delete language relating to towns. Capt. Brown remarked that with the UVC definition of "stopping, standing and parking" problems would arise under subsection (1) wherein the city could regulate parking but not stopping and standing. He suggested "stopping, standing and" be inserted in line 3 before "the".

Representative Paulus asked if the city of Salem has authority to regulate parking in the Capitol Mall area and was informed that the state is authorized to do so in this instance as well as the Fairgrounds and other state property by means of another statute.

With no objection, section 12 was amended to insert "stopping, standing and parking" in lieu of "parking" where appropriate throughout the section.

Judge Cole wondered if the definition of "city street or highway and county highway" was broad enough to encompass dedicated rights of way which have not officially been taken within the county road or city street system and they have not assumed control over them as far as maintenance improvement is concerned. Many have been improved by property owners, he said, but not sufficiently where the counties or cities would wish to take over their maintenance.

Capt. Williams reported that the 1973 session addressed this problem and amended the definition of "highway" to correct this situation. Unless the definition is changed in the draft, he believed no problem exists. Mrs. Embick indicated the definition was changed by subcommittee action to conform to the UVC, with an exception placed in subsection (2) that the terms do not apply in relation to size and weight restrictions either to any road or thoroughfare or property in private ownership or to any road or thoroughfare used pursuant to an agreement with a federal agency.

"Highway," as defined in UVC means:

> "The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel."

Mrs. Embick indicated that not all dedicated rights of way are publicly maintained.

"Highway," as defined in ORS 481.020 means:

> "Every public way, thoroughfare and place, including bridges, viaducts and other structures within the boundaries of this state, used or intended for the use of the general public for vehicles."

Representative Hampton noted that subsection (2), ORS 483.010, in excluding from the definition of "highway," that property in private ownership, would exclude dedicated, but not accepted property. Private property accepted for title purposes, but not for maintenance, under the UVC definition would not be a highway, he said, and that it was his understanding that the code would apply once it has been dedicated and accepted for title purposes and public vehicular use. Mrs. Embick indicated that this would be correct under ORS 481.020 but not what had been approved by the subcommittee at its August 19 meeting.

Representative Bunn voiced concern that by changing the definition of "highway," further repercussions would occur. Mrs. Embick did not think there was any need, for purposes of consistency with the definition of roadway or shoulder, to change from the definition of ORS 481.020 and was unaware of any conflict by retaining ORS 483.010 (2).

Senator Carson favored deleting references to "publicly maintained." Counties have refused to maintain dedicated streets and he thought the question should be whether it was public ownership rather than publicly maintained. Where it is being attempted to apply the Motor Vehicle Code to public parking lots, forest roads, etc., he believed it to be undesirable to state it must be maintained by the county, and that it should apply, if it is a public road, whether or not the counties accept the maintenance responsibility.

Representative Marx asked if, by stating that the code applies to all dedicated roads, even though they are not publicly maintained, a problem would arise with respect to signing. He alluded to areas which would be unsafe because of the poor maintenance of the road and inquired if the local authorities would be responsible for correcting the situation. Senator Carson thought this could be resolved by stating that the responsibility for signing, etc., is under the local authorities' jurisdiction. He would assume that a county road, which has been dedicated but not accepted by the county, is not under their jurisdiction and would not require them to do the signing.

Senator Eivers called attention to an apparent conflict between subsection (3) of section 12 and subsection (2) of section 13. Section 13 speaks to the authority of the commission to control parking except where such highway is routed over a city street and is, he said, in direct conflict with the last provision in subsection (3), section 12, which states that the local authorities may allow angle parking unless the Transportation Commission has determined the highway is of sufficient width.

Mrs. Embick reported that subsection (2) of section 13 had been added at the request of the Transportation Commission. The subsection would give them control over the state highway, such as the Banfield freeway, where they have the fee from one edge of the right of way to the other. She explained that the state would have the authority to control parking on that freeway within the city limits of Portland.

It does not address itself to the state highway which is routed over a city street. The authority of the commission on such a city street made a state highway route is subject to the authority of the city, except that the city must receive written permission from the commission that it is safe for angle parking before it can do so.

Senator Carson viewed that the problem could be resolved by adding the word "exclusive" in subsection (2) of section 13, which would be parallel wording with subsection (1) stating the commission shall have "exclusive authority."

Representative Hampton inquired if the intent is that the commission has authority over angle parking, but otherwise does not have authority over city streets for other parking. It it is intended to limit the authority, he believed the draft should state it.

With respect to dedicated ways, it was the consensus of the members that law enforcement should have authority over rules of the road in these areas. Mrs. Embick thought it appropriate to place this authority in the definition section. If ORS 481.020 were to be used for the definition of "highway," she proposed adding the language in that statute.

Alluding to Senator Eivers' concern over sections 12 and 13, Senator Carson noted that it is implied in section 13 that the state has no authority, although section 12 indicates that they have at least one negative authority, prohibiting angle parking. He proposed adding language in subsection (2) of section 13 stating "Except as provided in subsection (3) of section 12 . . . . "

Representative Marx referred to subsection (3) of section 12 and asked what would happen if the angle parking is already there. It was Representative Bunn's interpretation that the cities could lose what angle parking they previously had. Mrs. Embick reported this is already existing law and whether they would lose the existing angle parking, she would be uncertain. Mr. George explained that the statute does not speak to existing angle parking.

Mr. Paillette proposed amending subsection (3) to delete "unless" in line 5 and insert "if", and in line 6 following "is", insert "not". Representative Bunn contended that this proposal would not protect the existing angle parking. The commission could come in and remove parking, he said, although by changing from an affirmative action to a negative one as was proposed by Mr. Paillette, it would at least take some action by the commission before that angle parking is removed.

> Representative Bunn moved to amend subsection (3) of section 12 to delete "unless" in line 5 and insert "if" and in line 6 following "is" insert "not".

Motion carried unanimously.

The committee recessed for lunch and reconvened at 1:00 p.m. with the same persons in attendance as were present for the morning session.

Section 13. Authority of Transportation Commission to control parking on state highways. Senator Eivers withdrew his objection to any conflict between this section and section 12 because of the previous amendment made to section 12.

Senator Eivers moved to amend subsection (2) of section 13 to insert "exclusive" following "have" in line 1.

There being no objection to the motion, the amendment was adopted.

Section 14. Entry of commission's parking regulations in official records; erecting appropriate signs; regulations as having force of law. The section was amended as a matter of housekeeping and uses the term, "Transportation Commission" in lieu of "Department of Transportation."

Section 15. Jurisdiction of courts. The section would amend ORS 484.030. Under existing law the prosecution of a state offense in a city court requires the presence of a city attorney. By the addition of the proposed subsection (3), the city attorney is authorized to prosecute for violation of a state traffic offense committed in the city's jurisdiction and need not appear at any trial involving a traffic infraction. This would take into consideration the situation where there would not be an appearance of an attorney in the trial of a traffic infraction and would also allow the cities to prosecute for violation of a state offense without enacting an ordinance which would duplicate the state traffic code. Mr. Paillette was of the opinion the section would be complementary to section 1 of the draft from the standpoint of having uniformity as well as simplifying at the city level the prosecution of a traffic offense.

Representative Marx moved the adoption of the Article on Powers of State and Local Authorities; Preliminary Draft No. 2; August 1974, as amended.

Voting for the motion: Carson, Eivers, Chairman Browne, Bunn, Paulus, Chairman Marx. Voting no: Hampton. Motion carried.

In explaining his negative vote, Representative Hampton expressed concern in allowing pedestrians on highways, some which he believed were not designed for them, and he was hesitant in taking this authority away from the local authorities.

TURNING AND MOVING: SIGNALS ON STOPPING AND TURNING; Preliminary Draft No. 1; April 1974

Section 5. Signals by hand and arm or by signal lamps. Mrs. Embick explained the amended section provides two means to give a turn signal, one by hand and the other by activating the signal lamp. The section is drawn to place a positive duty to give the turn or stop signal by activating the signal lamp and the manner of giving the hand signal is the exception. The section does not require the antique vehicle to be equipped with a mechanical signal but does require that the signal lamp be used when driving at night.

Judge Cole noted that subsections (1) and (2) make reference to stop or turn signals whereas section 6 makes reference only to signal lamps activated for turns. He thought some reference should be made to activating the rear stop lights as well and proposed additional language be added to section 6 stating that stop lamps must be activated at the appropriate time.

There being no objections to the above proposal, section 6 was amended to require stop lamps to be activated at appropriate times.

Senator Eivers moved the adoption of section 5, amended by subcommittee action on August 19, 1974.

Voting for the motion: Carson, Eivers, Chairman Browne, Hampton, Paulus, Chairman Marx. Voting no: Bunn. Motion carried.

Representative Paulus moved the adoption of the Article on Turning and Moving, Signals on Stopping and Turning; Preliminary Draft No. 1; April 1974, as amended.

Voting for the motion: Carson, Eivers, Chairman Browne, Hampton, Paulus, Chairman Marx. Voting no: Bunn. Motion carried.

MISCELLANEOUS RULES; Preliminary Draft No. 1; June 1974

Section 1. Unattended motor vehicle. The section incorporates the UVC s 11-1101 requirement that the ignition be locked and the key removed, which provision is not contained in existing law.

Representatives Marx and Paulus voiced objection to this requirement but Senator Carson stated that deleting the provision would contribute to the delinquency of the younger people and because of the theft problem he felt the provision was necessary.

Senator Eivers asked if under the definition of "highway," this would include mailmen and delivery men performing their duties. Mrs. Embick indicated that the vehicles need not be considered unattended simply because the person was a short distance away making a delivery.

Ms. Howard thought there was a safety aspect for including the provision and said that statistics show a high rate of accidents involving stolen cars.

Representative Marx asked if the provision would make the person responsible for any liability. Representative Hampton believed the driver would be civilly liable if there were a city ordinance prohibiting leaving the keys in the ignition and it had been established that the purpose of such an ordinance was to prevent theft and accidents.

Mr. Paillette explained that the definition of "park" concerns passengers and merchandise, whereas "stand or standing" means "the

halting of a vehicle whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in receiving or discharging passengers."

Representative Marx moved to amend section 1 to delete "locking the ignition, removing the key from the ignition," in lines 4 and 5.

Voting for the motion: Paulus, Chairman Marx. Voting no: Carson, Eivers, Chairman Browne, Bunn, Hampton. Motion failed.

Discussion was held as to whether the commentary should address the question relating to what "unattended" means. Mr. Paillette reported there is no definition of the term. Senator Carson expressed the view that a person could not go any distance without leaving the car unattended and thought this should be stated in the commentary.

Section 2. Limitations on backing. There is no comparable provision in existing law. Mr. Sipprell asked if the section would permit emergency or highway maintenance vehicles to back up on the freeway even though it might cause interference with other traffic. Mrs. Embick explained another section addresses the question of maintenance vehicles on the road with someone officially directing traffic, but that it does not deal with the emergency vehicle or tow truck.

Section 3. Passengers in front seat; interfering with driver, in mobile home or travel trailer. The section combines the provisions of UVC ss 11-1104 and 11-1106.

Representative Marx referred to paragraph (b) of subsection (1) and asked if it is a violation if the driver has a person in his lap in such a way as to prevent the free unhampered operation of the vehicle, or does the violation occur because a person is in the driver's lap. Mrs. Embick indicated there should be some qualification as to what would hamper the operation of the vehicle.

Mr. Paillette asked how this matter is handled from an enforcement standpoint under the existing statute, and if the officer must make a judgment decision as to whether or not the operation is hampered. Capt. Williams explained this is covered by citing for interfering with the operation of a vehicle.

Mr. Paillette remarked the section could distinguish between the person and the baggage or other encumbrances. Representative Hampton proposed stating "When he has in his lap or in his embrace a person, or when baggage or encumbrance prevents the free unhampered . . . . "

Mrs. Embick was directed by the committee to place in the commentary language stating that the thrust of section 3 (1) (b) relates to that which prevents the free and unhampered operation of the vehicle.

Section 4. Opening and closing vehicle doors. Judge Cole asked if "traffic" in all instances included pedestrians and Mrs. Embick said that it did.

Section 5. Driving on mountain highways. The section is based on UVC s 11-1107. ORS 483.333 requires an audible signal with a horn to be given on curves, regardless of the position of the vehicle. The draft section only requires the warning to be given when the view is obstructed and the driver is unable to drive entirely to the right of the center of the roadway. The thrust of the section is that the driver shall keep his vehicle under control and as near the right side as possible. The horn, Mrs. Embick explained, is not required unless the car is unable to stay on the right of the center line. Representative Marx asked if existing law requires a logging truck to use a horn and was informed that ORS 483.338 requires this where the view is obstructed within a distance of 200 feet.

Representative Paulus moved to delete section 5 and repeal ORS 483.338.

Voting for the motion: Eivers, Chairman Browne, Bunn, Paulus. Voting no: Carson, Hampton, Chairman Marx. Motion carried.

Section 6. Coasting prohibited. There is a similar provision in ORS 483.336 which relates to the vehicle being in neutral and a motor truck coasting with the clutch disengaged. Senator Carson asked if citations had been given for this violation and Capt. Williams responded that they have and it was desirable to retain this provision for controlling trucks on downgrades.

Section 7. Following fire apparatus prohibited. Representative Paulus called attention to paragraph (b) and the word "into." Mr. Paillette said this would deal with a car going into the area and not parking it. Senator Carson alluded to an earlier subcommittee discussion as to how to resolve the problem of driving on Commercial Street when a fire was in progress on High Street. Although the fire could be a distance away, Commercial Street is two blocks from High Street. Mrs. Embick reported the thrust of the paragraph is that if the vehicle is parked in the area, the driver has the affirmative duty to remove it, as well as the affirmative duty to not drive into the area within two blocks where fire apparatus has stopped or three blocks of a point where the fire is in progress. The section is a restatement of ORS 483.330.

Judge Cole referred to UVC s 11-1109 which provides that a driver shall not stop closer than 500 feet from fire apparatus and thought this was a clearer statement.

Mr. Paillette referred to the subcommittee minutes of May 22, 1974 in which it had been suggested that the language be changed to read "driving into and parking."

Capt. Brown alluded to the concern with respect to driving on parallel streets and driving into and stopping. He suggested using a two or three block distance and state that the apparatus be visible. This, he thought, would tend to place it on the same street.

Senator Carson wondered if, rather than stating the distances in the section, it would be more feasible to use an interference concept. The draft could state that the driver may not drive in an area would unreasonably interfere with the apparatus. Capt. Brown reported that this is actually the way the law is used and agreed with this proposal.

The Chairman asked if the draft should relate to emergency or rescue equipment as well as fire apparatus. Representative Hampton thought there to be a difference between these inasmuch as a driver could come close to the scene of a wreck where an ambulance is present, although Senator Eivers indicated that in some situations the vehicles are driving slowly and are hampering the arrival of the ambulance.

> The Chair moved to amend section 7 to include emergency equipment; amend paragraph (b), subparagraphs (A) and (B) of subsection (1) to prohibit a driver from driving or parking in a manner which would interfere with the fire or emergency equipment.

There being no objections, the amendment was adopted.

Section 8. Crossing fire hose. The section is based on ORS 483.332. Representative Hampton referred to the fire department official in command and inquired as to who was in command when several units were on the scene. Capt. Brown advised there are several areas of command, for instance, the highest fire official might be in charge of the fire fighting and the highest police official would be in charge of the hoses and all traffic around the area.

Section 9. Removing injurious substance from highway. Mrs. Embick stated that the section, as drafted, addresses itself more to the wrecker than the person in the accident. She indicated that Mr. Mattis had proposed that the broader wording of the Uniform Traffic Ordinance "the party to a vehicle accident or a person causing broken glass or other debris to be upon a street" might be the appropriate subject, rather than the person removing the glass or injurious substance. In this manner it would not only apply to the wrecker.

Representative Hampton expressed concern over the driver removing any debris from the highway. Capt. Brown stated that it is also extremely dangerous if the driver, for instance, leaves a wheel out on the freeway. Representative Hampton wondered if it were advisable to leave this to law enforcement personnel or those trained in this area who are equipped with emergency warning lights, etc. Capt. Brown replied in the negative and said the section applies itself to when the vehicle is moved off the highway. If there is someone capable of removing the vehicle off the highway, it could be done long before the enforcement people arrive on the scene. The Chairman noted that

the section also requires the person removing the damaged vehicle to also return to the highway and remove any and all glass, etc. Representative Hampton believed that if there is an affirmative duty placed on the person to remove all the debris once he has started the cleanup, then civil liability could occur if someone is injured by what has not been removed.

Mr. Sipprell suggested placing the words, "promptly thereafter" following "remove" in line 4 which would then prevent the person from coming back several hours later to remove the glass.

Capt. Williams was of the opinion the section was a mandate to every person involved in an accident to immediately clean up the debris, which in itself presents a hazardous situation. He favored continuing with existing law and possibly citing the person for littering. With respect to a tire being left on the road, civil liability now would be involved, he believed.

It was Representative Marx's interpretation of the section that it only applies once the person or tow truck operator takes on the task of removing the vehicle and the section does not actually place a duty on the driver to remove the debris. Representative Hampton's concern was that once a driver starts removing it and does not do so completely, civil liability would be involved and because of this the drivers would be discouraged from undertaking the initial cleanup even when it could be done safely. He recommended placing in the section language stating the person should pursue all reasonable efforts to clean up.

Chairman Browne expressed the view that if the driver were involved in a collision and was capable of removing the vehicle from the road, he should have the responsibility to do so without going back and removing all the glass.

Representative Paulus presented a situation where the engine had dropped out of the car and the driver was able to remove the car from the road, but not the engine. Representative Marx asked what would happen under existing law if a person were injured under these circumstances and where the civil liability would lie. In this instance, he believed there would be liability.

The Chair proposed deleting the section and Mr. Paillette stated another section could be drafted placing the duty on the professionals.

> Representative Paulus moved to amend section 9 to delete "person" in line 2 and substitute "tow truck operator".

There being no objections, the amendment was adopted.

Capt. Williams indicated accidents are occurring and no reports are being made. He suggested that rather than requiring the driver to remove the debris, he should be required to report the accident and that litter is on the highway. The appropriate authority would then

have the responsibility for its removal, he said. The Chairman responded that if the driver were dazed or unconscious there would be no way to do this and Capt. Williams suggested the provision state that in this instance he would not be held liable.

Section 10. Stop when traffic obstructed. There is no comparable provision in existing law. The law has been enacted throughout the state by city ordinances, Mrs. Embick explained.

Senator Carson moved the adoption of the Article on Miscellaneous Rules; Preliminary Draft No 1; June 1974, as amended.

Motion carried without opposition and the Article was adopted.

Pages 1 through 22 reported by:

Norma Schnider, Clerk
Judiciary Committee

SPECIAL RULES FOR MOTORCYCLES; Preliminary Draft No. 1; August 1974

Section 1. Unlawful motorcycle operation. Mrs. Embick explained that section 1 was taken from the UVC and there was nothing comparable in existing Oregon law.

Rep. Bunn contended that it was unsafe for children to ride in front of their parents on a motorcycle designed to carry two people. Rep. Marx, while agreeing it was an unsafe practice, said it was nevertheless safer to have a small child in front of the driver than behind him.

Rep. Hampton asked if section 1 was applicable only on a highway and was told by Mrs. Embick that it would apply only on a highway because of section 2 of the Article on General Provisions limiting the provisions of the rules of the road to vehicles upon highways.

Rep. Hampton questioned the meaning of the term, "regular seat," as used in paragraph (b) and was told by Mrs. Embick that the provision referred to any seat, whether to the front, back or side of the motorcycle, so long as it was properly attached.

Rep. Bunn said that if the use of footrests were required, it would preclude small children from riding behind the driver because their feet would not reach the footrest. Rep. Marx objected to such a provision on the ground that it was impossible to legislate parental discretion. Sgt. Foss pointed out that children wore helemets and, while motorcycles by their very nature were unsafe, agreed with Rep. Marx that this matter should be left to the discretion of the parent.

After further discussion, Miss Howard recommended that paragraph (f) be adopted as drafted and the committee decided to approve the section without amendment.

Section 2. Unlawful motorcycle riding by passenger. Rep. Paulus had serious reservations concerning section 2. It was her view that the responsibility for operation of the motorcycle and for the safety of passengers should be placed on the driver. Under section 2 a five year old child could be cited for violation of the statute. Rep. Hampton said he was inclined to agree, based on earlier statements that the child was safest when sitting in front of the driver.

Following further discussion, Rep. Bunn moved to delete section 2 and the motion carried unanimously. Voting: Sens. Carson, Eivers, Chairman Browne; Reps. Bunn, Hampton, Paulus, Chairman Marx.

Section 3. Motorcyclist's right to full traffic lane. Mrs. Embick explained that section 3 gave a motorcyclist the right to the use of a full traffic lane and would also allow cyclists to ride two abreast in a single lane.

Rep. Hampton asked if this provision was directed toward a particular problem and was told by Miss Howard that one of the chief complaints of motorcyclists was that drivers of cars squeezed them in and deprived them of the use of part of a traffic lane. From an educational standpoint, she said, it would be good for motorists to know a motorcyclist's rights in this area.

Section 4. Unlawful passing or moving in lane with vehicle. Following Mrs. Embick's explanation of section 4, Rep. Hampton commented with respect to paragraph (a) that vehicles other than motorcycles were permitted to pass on the left in the same lane occupied by another vehicle providing the lane was of sufficient width and the passing could be done safely. He cited as an example the circumstance where a truck moves over to the right to permit a car to pass. This point was discussed briefly and the committee decided to make no change in section 4.

Section 5. Clinging to other vehicles. There was no discussion of section 5 other than Mrs. Embick's explanation.

Section 6. Protective headgear and eye device required. Mrs. Embick advised that section 6 would augment the present requirement for protective headgear by requiring an eye device when the motorcycle was not equipped with a windscreen.

She noted that the exception in subsection (4) had been amended by the subcommittee to apply only to a person in an enclosed cab. Eugene, Salem and Portland had all expressed approval of the amendment. Mr. Paillette explained that the exception in the present statute was meant to exclude meter maids from wearing protective headgear. A

problem arose when the Portland City Attorney said that the statute did not exclude Portland meter maids because their vehicles were designed to travel at speeds greater than 15 miles per hour and they were therefore being required to wear helmets while making their rounds.

Judge Cole said he was not certain the vehicles used by meter maids in Astoria had enclosed cabs and for that reason the amended version would not exclude them. He proposed an "either/or provision" to apply to both enclosed cabs and to three-wheeled vehicles designed to travel at speeds of less than 15 miles per hour.

Chairman Browne stated that Judge Cole's motion was to amend subsection (4) of section 6 to read:

> "This section does not apply to any person who is operating or riding on a vehicle designed to travel with three wheels in contact with the ground at speeds of less than 15 miles per hour or within an enclosed cab."

Motion carried without opposition.

Section 7. Division to establish standards for protective headgear and eye-protective devices. There was no discussion of section 7 other than Mrs. Embick's explanation of it.

ORS 483.402. When lights are required to be on; application of visibility and height provisions. Mrs. Embick suggested the committee consider transferring from the equipment section to this Article the provision requiring motorcycle lights to be burning while the vehicle is moving. Miss Howard voiced her approval of this proposal.

Sen. Carson moved that the provision in ORS 483.402 requiring motorcycles to travel with their lights on be transferred to the Article on Special Rules for Motorcycles. Motion carried without objection.

Section ___. Required position of equipment. Mr. Paillette indicated that Chairman Browne had been advised by the Harley-Davidson Co. that all "choppers" were manufactured in California to comply with the California law which is similar to this section. Therefore, choppers would automatically conform to this provision, so far as the height of handlebars was concerned, when they left the factory.

Rep. Hampton inquired as to the rationale for this section. Sgt. Foss informed him that the mechanical advantages inherent in the turning and steering mechanism of an ordinary motorcycle were greatly reduced by the extended forks on choppers and by the fact that the rider had to raise his arms to reach the handlebars. There was both reduced control and reduced visibility because the driver's arms were in the line of sight to either side of him.

Rep. Paulus asked if the choppers were designed and sold in that condition or if they were modified. Sgt. Foss replied that there were several shops in Portland that modified the vehicles, and it was the "backyard mechanics" that went to the vast extremes. The raised handlebars, he said, were called "eight hangers" because they were raised as high as the driver could reach.

Rep. Bunn recalled that the subcommittee had been told that choppers could be cut back down to their original design at small cost and asked Sgt. Foss if he agreed with that statement. Sgt. Foss replied that many times the handlebars were simply pushed up and they could easily be moved back down. If the handlebars had been removed and replaced, the owner would in all probability still have the old handlebars because it was doubtful that he would throw away a set of handlebars worth $35 or more.

Rep. Marx moved to delete the section. Motion failed. Voting for the motion: Reps. Bunn, Paulus, Chairman Marx. Voting no: Sens. Carson, Eivers, Chairman Browne; Rep. Hampton.

Rep. Hampton moved to adopt the unnumbered section limiting handlebar height on motorcycles. Motion carried unanimously with the same seven members voting.

SPECIAL RULES FOR ANIMALS ON HIGHWAY; Reference Paper; March 1974

Mr. Paillette explained that the Subcommittee on Revision, when considering the reference paper dealing with animals on highways, had not changed existing law except in two areas. The first dealt with riding horses or herding livestock on the highway and the second with the duty of a driver striking an animal with his vehicle.

Section ___. Livestock on highway; duty of caution; yielding right of way to livestock. Subsection (1) of this section, Mr. Paillette said, imposed a burden on a person riding a horse or leading livestock on a highway to keep a lookout and to use caution to keep the animal under control. This was in contrast to the approach in the existing statute requiring the rider to signal by raising his hand. Once he had done that, the entire burden transferred to the driver of the vehicle. The new subsection attempted to allocate a duty of caution on both sides.

Subsection (2) gave special attention to the herding of livestock and required a person to travel ahead of the livestock to warn approaching motorists of the presence of the herd. When that was done, the driver of a motor vehicle would then be required to yield right of way to the livestock.

Subsection (3) stated a burden of care and caution on the part of the motorist.

Subsection (4) was analogous to existing law and required the person riding or leading livestock to give a distress signal by raising his hand. When he did so, the driver was required to stop his vehicle.

Rep. Hampton noved that the definition of "livestock" in subsection (5) mixed the plural and singular and asked if there was a reason for using that vernacular. Mr. Paillette replied that he had examined the statutes of a number of other states and apparently the accepted method was to use the plural with respect to some species and the singular with respect to others. The committee decided to make no change in the wording of the subsection. Rep. Paulus asked if geese should be included in the definition and was told by Mr. Paillette that the section was not intended to authorize herding a flock of geese down the highway.

Section ___. Duty of driver striking animal. Mr. Paillette advised that the existing statute on this subject, ORS 483.614, required a person striking an animal to stop and give that animal reasonable attention. The subcommittee wanted to place an affirmative duty upon the driver to report the injury of an animal. Their intent was to require something to be done about an injured animal so it wouldn't just lay on the road without any type of attention. In reply to a question by Capt. Williams, Mr. Paillette said that "domestic animal" was not defined in the code.

Rep. Hampton questioned the accuracy of saying that the driver was the one who struck the animal when it was actually the motor vehicle that hit it. Mr. Paillette explained that the section was aimed at the driver because there was an element of culpability involved in that the driver had to knowingly strike the animal; it was not a strict liability statute.

Rep. Marx was critical of the requirement that a person give reasonable attention to the injured animal. A dog, for example, might bite a person who approached it. Rep. Bunn advised that the subcommittee had discussed the fact that "reasonable" could mean that a person should stay away from the animal if it appeared dangerous to approach it.

Rep. Marx asked what the duty of an officer was after he had been notified of the injury of an animal. Mr. Paillette replied that the driver was absolved from further duty once he notified the owner of the animal or a peace officer. No obligation was imposed upon the peace officer to take any affirmative action.

Rep. Hampton noted that the statute requiring a driver to stop and give notification when he injured personal property was not amended by this Article and there was, therefore, some double stacking under that statute and the proposed section in that an animal would fall into the category of personal property.

Sen. Eivers moved the adoption of the Article on Special Rules for Animals on Highway including the two unnumbered sections just discussed. Motion carried. Voting for the motion: Sen. Carson, Chairman Browne; Reps. Bunn, Hampton. Voting no: Sen. Eivers; Rep. Paulus, Chairman Marx.

GENERAL DEFINITIONS; Reference Paper; August 1974

Mrs. Embick proposed to discuss only those definitions that represented a change from existing law unless one of the members wanted to take up others. She further noted that the definitions of "ambulance" and "authorized emergency vehicle" would be discussed in connection with the Article on General Provisions which would be considered following the General Definitions.

Controlled access highway. Mrs. Embick advised that the subcommittee had approved the UVC definition as set out in s 1-110.

Rep. Bunn asked if public authorities had now purchased access rights to all controlled access highways. Mr. George informed him that they had and, in reply to a further question by Rep. Bunn, indicated that nothing in this section would change the requirement that access rights must be acquired.

Crosswalk. Mrs. Embick advised that the subcommittee had discussed the fact that in some locations there was no crosswalk at an intersection and the crosswalk existed only as a prolongation of the sidewalk, bearing in mind that a sidewalk need not be paved to qualify as a sidewalk. The subcommittee had pointed out that there might be a sidewalk leading to one side of the roadway but not to the other and under the current definition of "crosswalk" in ORS 483.006 (4) such an intersection would not be a crosswalk. For that reason they had instructed her to add the following language to paragraph (a), subsection (4), of ORS 483.006:

> "if there is no sidewalk, that portion of a roadway at an intersection that would be included within the prolongation of the lateral lines of the sidewalks on the opposite side of the street or highway if there were a sidewalk; or"

Capt. Brown was of the opinion that a crosswalk would exist without the proposed amendment in view of the definition of "sidewalk" approved by the subcommittee. Rep. Hampton agreed but added that the amended language, although redundant, helped clarify the meaning. Mrs. Embick said she was not certain the additional language was necessary and in some locations it could set up a situation where an unmarked crosswalk would exist at an intersection where people really shouldn't be walking. However, if the committee wanted a crosswalk to exist at each intersection, whether or not there was a sidewalk, this language would accomplish that objective.

Mr. Paillette stated that the intent of the subcommittee was to furnish a pedestrian a crosswalk and a place where he could cross a roadway, even though the crosswalk was unmarked.

Rep. Hampton observed that the proposed language did not state a specific width for the crosswalk. He favored addition of a minimum imputed width for the crosswalk to apply to locations where there was no actual sidewalk leading to the roadway.

Following further discussion of this subject, Rep. Hampton moved that a provision be added to ORS 483.006 (4) stating that where there is no actual sidewalk leading to an unmarked crosswalk, the minimum width of the unmarked crosswalk would be six feet extending from curb line to curb line or from roadway edge to roadway edge. There was no objection and the motion was adopted.

Driver. Mrs. Embick indicated that the definition of "driver" in ORS 483.008 (2) was approved by the subcommittee with the deletion of ", other than a chauffeur,".

Mr. Paillette advised that he had examined the statutes but was unable to find a historical reason for including in that statute the reference to a chauffeur. He said it had since occurred to him that there might be some relevance with respect to equipment violations where for some reason a chauffeur might not have the same liability as an owner. Even in that situation, however, he was still an "operator." He indicated he would research this matter further.

Highway. Mrs. Embick advised that the definition of "highway" approved by the subcommittee appeared on page 29 of the reference paper and related to the highway being publicly maintained. It also incorporated the exceptions found in ORS 183.010 (2) for vehicles used pursuant to an agreement with any agency of the United States as not being subject to the weight and size restrictions imposed on other vehicles.

Mrs. Embick pointed out that the definition in ORS 481.020 was compatible with the UVC definitions of such terms as "roadway" and "shoulder" and suggested it might be appropriate to reconsider the action taken by the subcommittee in redrafting the definition.

Rep. Hampton said that in view of the action taken by the full committee earlier today in connection with the Article on Powers of State and Local Authorities, [see page 13 of these Minutes] "publicly maintained" as used in the subcommittee version of the definition was no longer appropriate.

The committee unanimously agreed to withdraw from the definition approved by the subcommittee and to retain the definition of "highway" as it appeared in ORS 481.020.

Capt. Brown asked if ORS 481.020 would include parking lots and was told that it would not apply to privately owned parking lots.

Intersection. Mrs. Embick advised that the subcommittee recommended retention of the definition of "intersection" in ORS 483.012 (2) with the addition of subsection (c) of UVC s 1-126:

> "The junction of an alley with a street or highway shall not constitute an intersection."

Rep. Hampton asked if the reference in ORS 483.012 (2) should be to edge of the roadway rather than to "curb lines." Mrs. Embick noted that the subsection also referred to the "lateral boundary lines of two or more highways." This reference would not be the same as "edge of roadway" because in this definition it would mean "edge of highway" which would include sidewalk, shoulder, etc. It might be advisable, she said, to refer to a "roadway" rather than a "highway," but if that were done, subsection (b) of UVC s 1-126 should be added. "Highway," she said, could include more than one roadway.

> Rep. Hampton moved that the prevailing term in the definition of "intersection" be changed to "roadway" in place of "highway" and that subsection (b) of UVC s 1-126 be added to ORS 483.012 (2). There was no objection and the motion was adopted.

Local authorities. Mrs. Embick noted that the subcommittee had approved ORS 483.012 (3) in the following amended form:

> "Local authorities" means every county, municipal and other local board or body having authority to adopt and administer local police regulations under the Constitution and laws of this state.

There was no discussion of or objection to the subcommittee's recommendation.

Motorcycle. The subcommittee had recommended the definition of "motorcycle" as set out in UVC s 1-135, and the full committee approved their recommendation.

Official traffic control devices. The subcommittee recommended adoption of the definition in ORS 483.016 (1), the only revision being to change the defined term from "official traffic signs and signals" to conform to the UVC term, "official traffic control devices," as used throughout the revision of the rules of the road. The committee had no objection to the definition.

Park or parking. Mrs. Embick advised that a definition of "park or parking" did not appear in the existing Oregon code but was needed in this revision to clarify the manner in which it was used in section 1 of the Article on Stopping, Standing and Parking. The subcommittee had approved the definition in UVC s 1-141.

Mr. Paillette requested the committee to look at the definition of "stand or standing" appearing on page 65 of the reference paper. The two definitions, he said, were so similar that it was difficult for him to see why a distinction should be made between the two. "Stand or standing" was limited to receiving or discharging passengers whereas "park or parking" referred to loading and unloading both passengers and property. It appeared to him, and Rep. Hampton agreed, that the rationale for unloading property could apply equally to both terms.

Chairman Browne suggested the distinction might apply to a taxicab, for example, where the driver could "stand" against a yellow curb to discharge passengers but he could not "park" in that zone. Rep. Hampton's interpretation was that "standing" was less permanent than "parking," yet both definitions included the phrase, "otherwise than temporarily."

Mrs. Embick advised that subsection (1) of section 2 of the Article on Stopping, Standing and Parking prohibited a driver from stopping, standing or parking in specific places; subsection (2) from standing or parking; and subsection (3) from parking in the enumerated locations. She contended, therefore, there was a degree of difference between the three terms.

Rep. Bunn asked if there were any places where a person should be allowed to stop and let out passengers but not stop and unload goods. Chairman Browne replied that a bus stop would be an example of that type of location. Rep. Bunn said he assumed that was the reason for maintaining a distinction between passengers and goods.

Sen. Carson observed that where the authorities didn't want parking, they simply placed a "no parking" sign. If the statute was aimed at impeding traffic, he could see no difference between impeding traffic to unload people as opposed to unloading some other type of property. Rep. Bunn replied that usually people could be unloaded faster than goods or property.

Rep. Bunn next asked if parking had been prohibited in areas where it was proper to unload goods and was told by Mr. Paillette that it had not. Rep. Bunn said that if the statute allowed passengers to be unloaded in approved areas and goods to be unloaded in areas approved for that purpose, he could not see where a problem existed.

Mrs. Embick called attention to the definition in UVC s 1-171 of "stop or stopping":

> "When prohibited means any halting even momentarily of a vehicle, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic-control sign or signal."

The UVC also defined "stop" in s 1-170:

"When required means complete cessation from movement."

Rep. Hampton moved that the definitions in UVC ss 1-170 and 1-171 be included in the General Definitions Article for purposes of clarity and to assist the courts in interpreting the code. Motion was adopted without opposition.

Pedestrian. The UVC definition in s 1-143 had been approved by the subcommittee and the full committee approved their recommendation.

Right of way. Mr. Paillette noted that the subcommittee had adopted the UVC definition of "right of way" in s 1-156 which did not conflict with the present Oregon code but instead augmented it.

Roadway. Mrs. Embick advised that the Subcommittee on Revision recommended adoption of the definition of "roadway" in UVC s 1-158. It would specifically exclude the berm or shoulder and was related to the hitchhiking statute. In the event a highway had two roadways, the term would refer to such roadways separately but not to all such roadways collectively.

Rep. Paulus asked if this definition applied to areas where the road had been widened to permit space for vehicles to pass left-turning vehicles. Rep. Hampton said the committee had concluded earlier that space inside the fog line in that situation would be included in the definition of "roadway" because the definition used the phrase, "designed for vehicular travel." Therefore, the roadway would be within the fog line because the moving of the fog line one way or the other was part of the road design.

Mr. Paillette suggested that "berm or" be deleted from the definition of "roadway." Rep. Paulus so moved and the motion was unanimously adopted.

Shoulder. Mrs. Embick said a definition of "shoulder" did not appear in existing law but one was needed to show where the pedestrian should be when on the highway. The one approved by the subcommittee was derived from the 1970 proposed Michigan Motor Vehicle Code. It was imperative, she said, to set out the definition of "shoulder" in terms of use because there were places where it would be impossible to tell by looking at the highway whether it was a shoulder or an unpaved sidewalk. The only alternative was to attempt to show whether the area was intended for use by pedestrians or for emergency parking.

Sen. Carson asked if hitchhiking would be excluded by the proposed definition. Mr. Paillette replied that the committee had allowed hitchhiking on the "roadway" and the definition of that term in turn incorporated the definition of "shoulder." Hitchhikers were specifically excluded from the roadway but could hitchhike from the shoulder.

Rep. Paulus moved to amend the definition of "shoulder" to read: " . . . for the accommodation of pedestrians, stopped vehicles . . . "

Rep. Bunn opposed the motion. Although he favored hitchhiking, he said the main purpose of the shoulder was not for hitchhiking and it was inadvisable to foster the idea that the statute encouraged hitchhikers to be on the shoulder.

Rep. Paulus withdrew her motion and moved to insert "primarily" before "for the accommodation of". There was no objection and the motion was adopted.

Sidewalk. Mrs. Embick advised that the subcommittee recommended retention of the definition of "sidewalk" in ORS 483.024 (1) which was stated in terms of "intended for the use of pedestrians" but did not mean that the sidewalk necessarily had to be paved.

Rep. Marx moved adoption of the Article on General Definitions. Motion carried unanimously. Voting: Sens. Carson, Eivers, Chairman Browne; Reps. Bunn, Hampton, Paulus, Chairman Marx.

Rep. Hampton indicated that although he had voted for the motion to approve the definitions, he believed there were some "minor bugs that that might be massaged out" of the definitions of stopping, standing and parking.

GENERAL PROVISIONS; Preliminary Draft No. 3; November 1973

Section 2. Provisions of chapter refer to vehicles upon the highways and ocean shore; exceptions. Mrs. Embick explained that section 2 applied the entire rules of the road chapter to vehicles upon the highways only, unless there was an exemption to the contrary in a specific provision.

Rep. Paulus asked if "state recreation area" would include a state forest and was told by Mrs. Embick that it would not. "State recreation area," she said, was specifically defined. Rep. Paulus next asked if state forest roads would fall under the definition of "highway" and received an affirmative reply from Mrs. Embick who added that federal forest roads would also be included, when used by the public, under the definition of "highway" and they would come under the rules of the road with specific limited exclusions for certain highways which relate to the fact that the vehicles using them need not meet the usual required weight and size restrictions for vehicles.

Rep. Paulus inquired as to the status of trails open to use by motorcycles on publicly owned property to which the rules of the road should apply but which were not technically recreational areas. Mrs. Embick replied that as far as she could tell, such areas would not be subject to the rules of the road. Rep. Paulus noted that section 2 would apply to parks and parking lots therein and asked that the

committee consider what to do about areas that were neither recreational areas nor highways. Rep. Hampton was of the opinion that such areas were best handled administratively by the park bureaus. He believed their regulatory powers in this area were adequate. Rep. Bunn added that the rules of the road probably should not apply to some of the areas in this category.

Mrs. Embick advised that Jim Mattis of the Bureau of Governmental Research and Service had suggested that serious offenses, accidents and accident reports be excepted from this section. Mr. Paillette submitted that this was the purpose of the "escape hatch" at the end of section 2.

Section 3. Required obedience to traffic laws. Mrs. Embick read section 3 and commented that "violation" might more properly be termed "traffic infraction" in this instance. Mr. Paillette concurred.

Rep. Paulus moved to substitute "traffic infraction" for "violation" in the third line of section 3. There was no objection and the motion was adopted.

Section 4. Permitting unlawful operation of vehicle. Mrs. Embick explained section 4 and the committee expressed no objection to it.

Section 5. Failing to obey police officer. Section 6. Uniform or badge required. Mrs. Embick briefly explained sections 5 and 6. There was no discussion concerning the two sections.

Section 7. Public officers and employes. Mrs. Embick advised that section 7 was a rewording of subsection (1) of ORS 483.032. The committee made no comment on the section.

Section 8. Persons working on highways; exceptions. There was no discussion of section 8 following Mrs. Embick's explanation.

Section 9. Application of speed regulation and traffic signals to emergency vehicles. Mrs. Embick called attention to the definition of "ambulance" in section 10 of this Article and the definition of "emergency vehicle" in section 9. Under the definition of "authorized emergency vehicle" in current law, ORS 483.002 (1), an ambulance was not an emergency vehicle unless it was both displaying the required lights and sounding an audible signal while being used for emergency purposes. That definition would be superseded by the two definitions stated in subsections (1) of sections 9 and 10 for the reason that the two categories of "emergency vehicle" and "ambulance" were treated quite differently in the proposed statutes.

Mrs. Embick noted that subsection (4) qualified the privileges granted the driver of an emergency vehicle by stating that those privileges applied only when he was using a blue revolving light and a flashing red light while parking or standing in disregard of the rules prohibiting parking or standing, when exceeding the designated speed limits or when proceeding in disregard of the rules pertaining to

turning or direction of movement. His privilege to go past a red light or stop sign applied only when he was using both his visual signal and his audible signal. Paragraph (c) of subsection (4) prohibited the driver from using an audible signal while parked or standing.

Mr. Paillette suggested that "shall" be substituted for "may" in paragraph (c) of subsection (4). There being no objection to this revision, it was adopted.

In summation, Mrs. Embick commented that the privileges of the driver of an emergency vehicle were more extensive than those of an ambulance driver.

Section 10. Application of speed regulations and traffic signals to ambulances. Mrs. Embick advised that the definition of "ambulance" in subsection (1) of section 10 and the definition of "emergency medical technician" in subsection (2) were those enacted by the 1973 session of the legislature. Subsection (3) set out the privileges of an ambulance driver to disregard the rules of the road. She pointed out that paragraph (c) of that subsection permitted him to exceed the speed limit only by 10 miles per hour. Subsection (4) qualified the privileges extended in subsection (3) and Mrs. Embick indicated that the reference to ORS chapter 407 would be changed in the final draft to the correct ORS section number.

Mr. Paillette asked if the reference to "Department of Transportation" in subsection (4) (b) was correct and was told by Mr. George that it should be amended to read "Transportation Commission."

Rep. Marx moved to adopt the revision recommended by Mr. George by inserting "Transportation Commission" in place of "Department of Transportation" in paragraph (b) of subsection (4). There was no objection and the motion was adopted.

Rep. Hampton asked if it was the intent of the committee to place a fixed speed for ambulances of 10 miles per hour over the designated speed limit whereas other emergency vehicles were permitted to go faster than that so long as they could prove it was safe to do so. Sen. Carson replied affirmatively.

Sen. Eivers moved approval of the Article on General Provisions, sections 2 through 10. Motion carried unanimously. Voting: Sens. Carson, Eivers, Chairman Browne; Reps. Bunn, Hampton, Paulus, Chairman Marx.

The meeting was adjourned until 9:00 a.m. the following morning.

August 30, 1974

Senate Members Present: Senator Elizabeth W. Browne, Chairman
Senator Wallace P. Carson
Senator George Eivers

House Members Present: Representative Robert P. Marx, Chairman
Representative Stan Bunn
Representative Lewis B. Hampton
Representative Norma Paulus

Staff Present: Mr. Donald L. Paillette, Project Director
Mrs. Marion B. Embick, Research Counsel

Others Present: Judge George F. Cole, Former Chairman of House Committee and Clatsop County District Judge
Mr. Gil Bellamy, Administrator, Traffic Safety Commission
Capt. Larry Brown, Portland Police Department
Mr. John F. Charles, City Attorney, Springfield
Sgt. Michael Foss, Portland Police Department
Mr. Jack Frost, Linn County District Attorney, appearing on behalf of the following organizations:
Oregon State Bar Committee on Criminal Law and Procedure
Oregon Law Enforcement and Research Committee
Oregon District Attorneys' Association (Vice President and Chairman of ODAA Legislative Committee)
Mr. L. E. George, Traffic Engineer, Department of Transportation
Judge Robert L. Gilliland, Benton County District Court
Miss Vinita Howard, Public Information and Publications, Motor Vehicles Division
Mr. Don Jepsen, Oregon Journal
Mr. Ralph Sipprell, Liaison Engineer, Department of Transportation
Capt. John Williams, Traffic Division, Oregon Department of State Police

The meeting was called to order at 9:00 a.m. by Representative Robert P. Marx, Presiding Chairman.

CLASSES OF OFFENSES; DISPOSITION OF OFFENDERS; Preliminary Draft No. 4; August 1974

Mr. Paillette first reviewed the draft in its entirety, pointing out particularly the major changes made by the Subcommittee on Adjudication since the full committee last considered the proposal.

Section 1. Traffic infraction described. Section 1, he explained, defined a traffic infraction as a civil offense with no jail sentence authorized and was similar to the definition of "violation" in the Criminal Code. Subsection (3) recognized that procedurally, even though a traffic infraction was called a civil offense, the criminal procedure provisions would be available to handle the day-to-day mechanics of arrests, citations, etc. As a result of this section and the existing statutes in ORS chapter 484, an arrest would be authorized even though the defendant was cited for an infraction. It would also authorize and anticipate the use of the Uniform Traffic Citation for traffic infractions.

Section 2. Classification of traffic infractions. Section 3. Fines for traffic infractions. Section 2 classified traffic infractions into four categories and section 3 was a companion section setting out the penalty range of fines for each of the four classes of infractions.

Section 4. Certain offenses not classified as traffic infractions. Section 4, Mr. Paillette continued, was one of the key sections of the draft. Subsection (1) classified certain offenses as traffic crimes. Under the Article on Serious Traffic Offenses each of these offenses was defined and classified as a degree of misdemeanor. Dangerous driving in paragraph (c) of subsection (1) was a new offense which would supplant reckless driving in the existing code, one reason being to get away from an offense that over the years had grown to be looked upon, both procedurally and substantively, as a lesser included offense of DUIL. From a penalty standpoint, it was anticipated that dangerous driving would be a greater offense than DUIL.

Paragraph (e) of subsection (1) set out the prior offender classification and provided that if a defendant had been convicted of a Class A traffic infraction or a traffic crime within a five year period prior to the commission of the Class A infraction charged and it was not part of the same transaction, he would then be charged with a traffic crime rather than a Class A infraction. This paragraph also contained a savings clause stating that even though the prior offense occurred before the effective date of the Act, it would nonetheless be covered by this provision.

Mr. Paillette indicated that question had arisen in subcommittee as to whether this provision would cause an ex post facto problem. He called attention to a research paper he had written on that subject wherein he concluded that the decisions in this area made it abundantly clear that this provision would not be ex post facto and would not punish something that was legal at the time it was committed but would merely provide an enhanced penalty for a later offense.

Subsection (2) of section 4 set out Class A traffic infractions, also leaving room for other offenses defined in the rules of the road that might be graded as Class A infractions. He pointed out too that the subcommittee recommendation in paragraph (b) was to reduce the .15 statute to .10.

Section 5. Proof of previous conviction submitted only to trial judge. Mr. Paillette advised that both the Adjudication Subcommittee and the Consulting Committee had mixed emotions about section 5. The provision was based on the theory that the jury should not know about the defendant's prior conviction because it might cause them to be unduly prejudiced. The policy question for the full committee to decide was whether there was anything wrong with letting the jury know about a previous conviction.

Section 6. Plea agreements limited. Mr. Paillette indicated that section 6 was an attempt to ensure that a defendant charged with a traffic crime would not be permitted to "cop out" and plead to a Class A infraction which would thwart one of the major objectives of this draft.

Section 7. Trial; burden of proof; pre-trial discovery. Section 7 eliminated jury trials for traffic infractions. Mr. Paillette called attention to a research paper he had written on the constitutionality of the elimination of jury trials. It was his view, with which the Consulting Committee and Judge Schwab generally agreed, that under both the Federal Constitution and the Oregon Constitution, there was nothing unconstitutional about elimination of jury trials so long as the classification carried no possibility of a jail sentence.

Subsection (3) was aimed at the concern that if the criminal pre-trial discovery procedures were not incorporated into the process, civil discovery rules would apply with the possibility of dilatory delays by means of deposition of witnesses, etc. Under the Criminal Code, because these would not be circuit court cases, automatic discovery provisions would not apply, but under section 7, upon written request filed upon the district attorney by a defendant charged with a traffic infraction, all the discovery requirements would then come into play.

Section 8. Counsel for state and defendant. Section 8 would eliminate court-appointed counsel for traffic infractions under the same basic rationale as for elimination of the jury trial; i.e., there was no possibility of the defendant going to jail. A defendant would, of course, be entitled to counsel if he chose to pay for his own defense. The section, Mr. Paillette said, was consistent with existing Oregon case law.

Subsection (2) had caused a great deal of discussion and was intended to give the district attorney some latitude as to whether he should be in court for run-of-the-mill traffic cases yet would permit him to be there, at the judge's discretion, when he was needed.

Section 9. Prosecution involving traffic infraction not a bar to subsequent charge. Section 9 would negate the former jeopardy provisions of the Criminal Code. It provided that if, as a result of a single episode, the defendant was charged with both a traffic infraction and a crime, the prosecution for one offense, in any sequence, would not be a bar to a subsequent prosecution for the other offense. However, evidence of the first conviction would not be admissible in the second.

Section 10. Trial judge's authority to order suspension of license, permit or right to apply. Section 10, Mr. Paillette continued, was an attempt to give the court a great amount of latitude with respect to penalties when a defendant was before the court convicted of a traffic offense. Subsection (1) applied to any offense while subsection (2) was limited to the more serious traffic crimes and to Class A traffic infractions.

Mr. Paillette explained section 10 in some detail and advised that the last sentence in subsection (4) was an attempt to eliminate many of the problems that have arisen under the existing treatment of suspensions. One of the problems at the present time is that although the defendant's license is suspended, the suspension does not take effect until he has been notified of the suspension by the Motor Vehicles Division. The proposed provision attempted to correct this problem by saying that when the defendant's license is removed from him at the time he is in court, the suspension is effective on that date.

Section 11. Court ordered suspension to run concurrently. Mr. Paillette explained that section 11 was aimed at the subcommittee's concern about a double penalty in situations where the court imposed a suspension and where there was also provision for a mandatory suspension by the Motor Vehicles Division. This section would say that the two suspensions would not run consecutively but would be concurrent, providing they arose from the same conviction.

Section 12. Conviction of certain offenses as grounds for mandatory revocation or suspension. Subsection (4) of section 12, Mr. Paillette said, was a continuation of the policy laid down in section 10 whereby the court would take possession of the defendant's license and send a copy of the court order to the Motor Vehicles Division with a further statement that the revocation became effective on that date.

Section 13. Permissive suspension or revocation. Section 13 conformed ORS 482.450 to the culpability provisions for criminal negligence in the Article on Serious Traffic Offenses.

Section 14. Appeals. Section 14 was a further recognition of the appeals provisions. The understanding of the subcommittee with respect to appeals provisions was that the District Judges' Association would be submitting a bill relating to district courts as courts of record along the lines of Senate Bill 403 of the 1973 legislative session. It was contemplated that this subject would be handled as a separate bill and the subcommittee wanted to coordinate the draft with the approach recommended by the district judges, even though any bill coming out of this committee would have to take into account the municipal and justice courts as well as the district courts.

General comments. Mr. Jack Frost indicated that the Oregon State Bar Committee on Criminal Law and Procedure favored the classification system set out in this Article. The Oregon Law Enforcement and

Research Committee had not taken a formal position. It was his impression that the classification system was not generally well received at first blush, but when it was thoroughly understood, most people came to a different point of view and accepted it. He indicated that both the Oregon Sheriffs' Association and the Oregon Association of Chiefs of Police would be meeting in September. Mr. Paillette and Judge Schwab were invited to attend those meetings at which time he expected both organizations to take a formal position on the Article. Mr. Frost said he was Vice President of the District Attorneys' Association and as such was Chairman of their Legislative Committee. They had just completed a meeting, had no general opposition to the Article and had endorsed it in broad terms, although they did have some specific reservations which he would discuss at the proper time.

Judge Robert L. Gilliland expressed concern about several areas in the draft:

(1) Despite Supreme Court decisions to the contrary, many courts were dealing with DUIL and .15 as enhanced penalty situations.

(2) Some of the existing problems that occurred when a defendant was charged with the two separate crimes of .15 and DUIL would not be resolved by this draft because .10 and DUIL would still be separate crimes.

(3) Under section 5 the jury was not supposed to know about the defendant's record of prior convictions. The fact that there was a jury trial would in and of itself be an indication to the jury that the defendant was being tried because he had a prior conviction.

(4) Under section 4 (1) (e) a Class A infraction would become a traffic crime if the defendant had been previously convicted of a Class A traffic infraction or crime. The officer who issued the citation would not know whether the person had a prior conviction within the last five years and his concern was that the court might not know the status of the defendant either at the time he appeared to enter his plea. Therefore, the court could not know whether the defendant should plead to a traffic crime or to a Class A infraction.

Mr. Paillette conceded that this was a legitimate question. Although the draft did not specifically speak to it, it had been discussed in subcommittee and he had also talked about it to Mr. Frost and other district attorneys. The subcommittee contemplated that the district attorney would be running a records check on Class A infraction citations. The biggest question, he said, was how much time could be worked into the system between the date of the citation and the date of the appearance of the defendant in order to give the district attorney an opportunity to run the check. Following the records check, if the defendant proved to be a prior offender, the district attorney would then file a district attorney's information in the district court charging the offense.

Capt. Larry Brown asserted that the first time drunk driver was just as much a killer as was the second time drunk driver. For that reason, he said, he opposed reducing the first offense to the infraction category.

Sgt. Mike Foss added that Portland police department statistics showed that among 12 drunk drivers involved in fatal accidents, there were six prior convictions. To de-emphasize the first conviction would only strengthen the possibility of giving drivers of that kind another chance to hit someone else.

Rep. Hampton commented that those would be collision instances and if collisions were involved along with drunk driving, the conduct of the driver causing the collision could result in a charge of dangerous driving in the first degree which was a serious offense and carried the possibility of a jail sentence.

Capt. Brown's contention was that dangerous driving in the first degree should contain the element of drunk driving. Rep. Hampton replied that it was unnecessary because it was more difficult to prove DUIL than to prove dangerous driving.

Chairman Marx commented that one of the goals of the proposed system was to shorten the time lag between time of arrest and time of conviction. Capt. Brown recommended that instead of telling the defendant he was not going to be bothered for a first time DUIL charge, it might be better to change the court system to handle the caseload in a more expeditious manner.

Mr. Paillette observed that it was a misstatement to say that nothing was going to be done to a person charged with a first time DUIL. A Class A infraction carried a maximum $1,000 fine and he could also have his driver's license suspended just as under present law; the penalties for driving while suspended had been increased as had the efficiency of the manner in which the state would be required to prove DWS. The burden would be on the defendant with respect to the question of notice of suspension. He reiterated that it was a mistake to say that the draft would de-emphasize the severity of a first offense; both the subcommittee and the Consulting Committee had been given statistics showing that the likelihood of going to jail was not as great as one might think at the present time for a first offender.

Mr. Frost concurred that it was not realistic in terms of what actually took place in the courts at the present time to say that it was a reduction in penalties to treat DUIL as a Class A infraction. DUIL offenders today do not go to jail, he said. Those who do go to jail do so because of some aggravating circumstance. The policy of this draft, therefore, is an already established policy in the courts.

Sgt. Foss commented that in his opinion the public information aspects of this draft would have to be very strong to convince the

public that the draft policy was not a de-emphasis on drunk driving. The first reaction of those he had talked to was that the draft did indeed de-emphasize that offense.

Rep. Hampton asked Mr. Paillette to explain what the consequences would be in the following hypothetical situation: A person is picked up by the police, cited for a first offense DUIL, first offense .10 and for the traffic crime of dangerous driving in the first degree with no negligent homicide involved.

Mr. Paillette explained that this draft, together with the Article on Serious Traffic Offenses, recognized that in order to trigger the implied consent provision, there must be an arrest. There would, therefore, be an arrest for a DUIL even though it was a Class A infraction. The policeman would run the Breathalyzer test and thereafter make the appropriate charge. He could use the Uniform Traffic Citation to cite for dangerous driving in addition to DUIL. The district attorney then could go to trial on the UTC or he could file a complaint or a district attorney's information. The committee, he said, could write in a provision with respect to a time factor so that the district attorney's office would have an opporunity to run a records check to make sure that if there were a prior offense, he would have an opportunity to file his charge in court before the defendant went to court to plead and be sentenced.

Rep. Hampton asked what would happen procedurally in the same situation he had described above after it had been determined that there was no prior conviction and the defendant then appeared before the district judge and pleaded guilty on all three charges. Mr. Paillette replied that he would go through the arraignment on all three counts and would be advised of his rights with respect to the charges. The matters would then be set for trial, and it could be a single, consolidated trial, assuming all charges arose from the same transaction.

Rep. Hampton said that in that same set of circumstances if the defendant were found guilty and convicted, there was nothing to prevent the judge from sending him to jail for conviction of the dangerous driving charge. Mr. Paillette confirmed the accuracy of this statement and added that because of the dangerous driving charge, the defendant would be entitled to a jury trial, a lawyer and all the other procedures attaching to a criminal charge.

Capt. Brown reiterated his earlier contention that DUIL should be an element of the dangerous driving statute. He asked what would be wrong with defining "dangerous driving" as DUIL plus one other moving violation. He believed this would draw a reasonable distinction between the first time drunk driver who was driving carefully down the street and another first time drunk driver who was going down the street at 70 mph. Mr. Paillette replied that under the definition of

dangerous driving where there was the element of culpability of either criminal negligence or recklessness, the kind of behavior described by Capt. Brown would go in as evidence of that degree of culpability. Capt. Brown was convinced that unless DUIL was set forth in the dangerous driving statute, convictions for dangerous driving involving drinking would be almost non-existent. Mr. Paillette's response was that it was probably correct that the charge would not be proven if drinking was all there was, with nothing else to go with it -- and it shouldn't be. However, when there was conduct on the part of the defendant to aggravate the drinking charge, it would get into the criminally negligent or reckless conduct area, and he failed to see why the prosecution could not establish and prove its case in that situation.

Rep. Bunn returned to the hypothetical posed earlier by Rep. Hampton adding the circumstance that the defendant was convicted of dangerous driving and six months later was picked up again for drunk driving. He asked whether that offense six months later would be considered a second infraction since he had not been convicted of drunk driving the first time around. Mr. Paillette replied that he would still be a prior offender because he had committed a traffic crime the first time. On the second offense he would be charged with a traffic crime regardless of whether he was convicted of DUIL or dangerous driving on the first charge. Either would trigger the charge of a traffic crime on the second offense.

Capt. Brown asked if .10 or DUIL could be a lesser included offense of dangerous driving, assuming a person was charged on all three counts. Mr. Paillette replied that he believed it could be. Capt. Brown asked if the charge of dangerous driving could be negotiated away by the defendant and Mr. Paillette said it could not the second time around but it would be negotiable on the first offense.

Capt. Brown next asked if the portion of the dangerous driving charge that had nothing to do with drinking could be negotiated. Mr. Paillette answered that it could be, just as it is at the present time. In that event, Capt. Brown said, when a person was arrested on his second offense, he would not have a record of a prior conviction of a Class A infraction. Rep. Hampton confirmed that this was true and added that this was a consequence that would result any time prosecutors refused to step up to the bar of justice. The subcommittee, he said, had considered that problem and the closest they could come to a solution was the provision in section 6 of this Article. There was only so far they could go in enforcing a "no reduction" rule. Mr. Paillette added that if there were an absolute bar to plea bargaining, the district attorney would be placed in an either/or situation. In effect, it would say that the district attorney was stuck with the charge made by the police officer in any circumstance. If the proper evidence didn't come in, all the district attorney was left with was the choice of a dismissal or going to trial and getting beat. Should a defendant be charged with dangerous driving and negotiate to a Class A infraction, the consequences as a repeat offender would not be too

much different than they would be had he been convicted of dangerous driving. Capt. Brown agreed this would be true unless the defendant negotiated the charge down to a Class B infraction.

Section 1. Traffic infraction described. Sen. Browne asked if "offense" as used in section 1 would include misdemeanors. Mr. Paillette explained that "offense" was the broad term and included both crimes and violations. Under the traffic code, "offense" included crimes and traffic infractions and "crime" included either a misdemeanor or a felony.

Rep. Hampton moved to approve section 1 as written. There were no objections and the motion carried.

Section 2. Classification of traffic infractions. Capt. Williams asked how it was to be determined which infractions would fit into the categories described in section 2. Mr. Paillette explained that they would be decided on an offense-by-offense basis at the time the committee graded the offenses.

Rep. Hampton moved to approve section 2. Motion carried without opposition.

Section 3. Fines for traffic infractions. Rep. Hampton asked Mr. Paillette how he arrived at the dollar amounts in subsection (2) and was told that they were admittedly arbitrary and were open to negotiation. It should be recognized, Mr. Paillette said, that the amounts were maximums and the fine might well be less. It was an attempt to inject some rationality into the system based on the seriousness of the offense, to assure that like offenses would fall into like categories, to place some limit on judges and to ensure that not every offense would fall into the category of a possible $1,000 fine.

Sen. Carson pointed out that there was a substantial difference between Class A and Class B -- $1,000 down to $250.

Following a brief discussion, Sen. Carson moved to amend the dollar amounts in subsection (2) of section 3 to read:

"(a) $1,000 for a Class A traffic infraction.

"(b) $500 for a Class B traffic infraction.

"(c) $250 for a Class C traffic infraction.

"(d) $100 for a Class D traffic infraction."

There was no objection and the motion was adopted.

Rep. Bunn moved to adopt section 3 as amended. Motion carried unanimously.

Section 4. Certain offenses not classified as traffic infractions. Miss Howard requested that the committee amend subsection (1) (d) of section 4 to read:

" . . . issued by the Motor Vehicles Division under ORS chapter 482 or under subsections (4) and (5) of ORS 486.211."

By common consent, the committee approved the revision as set forth above.

Miss Howard then commented that she found it difficult to understand the reason for two separate offenses when the disputable presumption was set at .08 and there was a separate offense of .10 with the same penalty for both.

Mr. Frost stated that the Oregon State Bar Committee on Criminal Law and Procedure planned to propose to the membership that it endorse repeal of the .15 statute. Their intent was to do away with two distinct offenses arising out of conduct while driving under the influence. The district attorneys were also inclined to favor that position. When a person was charged with DUIL, there were alternative means of proof, one being to show that he was so affected by the use of alcohol as to interfere with his ability to safely operate a motor vehicle and the other way to prove the offense was to show that he had .10 percent or over in his blood. It appeared to him that it would not depart too much from the Judiciary Committee's objective to pursue the possibility of combining the offenses into one charge but still keep separate the means by which the offense could be proved. This was the position favored by the Bar Committee, i.e., one crime with alternate methods of proving it.

Rep. Hampton was of the opinion that the legal standards should be in the alternative as they were at the present time, but it would be satisfactory to him to put DUIL and .10 into one statute and provide that the defendant could be sentenced only on one charge. However, he did not believe the committee should back away one inch from the .10 statute.

Mr. Frost said the position he was expressing was set out in UVC s 11-902 on page 36 of the Article on Serious Traffic Offenses. What he was trying to accomplish, he said, was to find a compromise between this committee's position and the position of the Bar committee which was to avoid situations such as those that were taking place at the present time where, in some counties, both charges were routinely made.

Sen. Carson suggested that one way to handle the problem would be to have one crime of driving under the influence and then deal with .10 and .08 totally as presumptions. Over .10 would be conclusive evidence of DUIL and if the blood alcohol content was over .10, it would be presumed that the defendant had violated the law. In other words, there would be one crime but two levels of presumptions.

Rep. Hampton moved the adoption of UVC s 11-902 as set forth on page 36 of the Article on Serious Traffic Offenses. His motion excepted paragraph (c) of subsection 4 of that section. The motion would have the effect of making one offense of DUIL and driving with .10.

Rep. Hampton explained that adoption of his motion would solve the problem Mr. Frost posed on behalf of the Bar Committee and would permit charging the offense conjunctively and proving it disjunctively.

Mr. Paillette pointed out that subsection 3 of UVC s 11-902 contained a somewhat different test than that in existing Oregon law. With respect to both drugs and alcohol, the test in present law was easier to prove than the UVC test, "renders him incapable of safely driving."

Rep. Hampton amended his motion to provide that subsection 3 of UVC s 11-902 would be revised by Mr. Paillette to conform to the test in existing law in place of the more rigorous test in the UVC section. There were no objections and both the main motion and the amendment thereto were adopted.

In response to a question as to where the revision just adopted would fit into the draft, Mr. Paillette explained that sections 1 and 2 of the Article on Serious Traffic Offenses would be deleted and the new language would be substituted.

Returning to section 4 of the Article on Classes of Offenses, Rep. Hampton asked if the classification of "Class A traffic infraction" was flexible enough to permit insertion or deletion of certain offenses. Mr. Paillette replied affirmatively and added that it could be expanded by classification of any specific offense.

Rep. Paulus moved to substitute ".08" for ".10" in UVC s 11-902 as approved by the committee under Rep. Hampton's motion. The motion assumed that Mr. Paillette was authorized to make any necessary conforming amendments. Motion carried. Voting for the motion: Sens. Carson, Eivers, Chairman Browne; Reps. Bunn, Hampton, Paulus. Voting no: Chairman Marx.

Rep. Paulus moved adoption of section 4 as amended. Motion carried unanimously with the same seven members voting as voted on the previous motion.

Section 5. Proof of previous conviction submitted only to trial judge. Rep. Hampton commented that section 5 conflicted with ORS 45.600 and suggested alternative methods of correcting the conflict.

Sen. Eivers pointed out that the very fact that there was a jury trying a case where the defendant was charged with an infraction would let the jury know that the defendant had a prior conviction; otherwise he would not be entitled to a jury trial.

Mr. Frost advised that the Consulting Committee was not unanimous in its approval of section 5 and he was one who opposed it. The Oregon District Attorneys' Association also objected to the section on the ground that a previous conviction should be an element of the offense.

Judge Gilliland expressed his opposition to section 5.

Mr. Paillette concurred with the previous speakers and urged the committee to delete section 5. Mechanically, he said, the section would not work and he was also of the opinion that the district attorneys were on solid ground in their position that the prior conviction should be an element of the offense to be pleaded and proven. He believed it would be a more straightforward approach to set out the prior conviction in the charging instrument that goes to the jury.

Sen. Browne moved to delete section 5. Motion carried without opposition.

Section 6. Plea agreements limited. Mr. Paillette explained that section 6 was aimed at the prior offender situation. If there was to be a distinction between a first offender and a subsequent offender on a DUIL charge, the subcommittee was concerned that the second offender should not be permitted to go out through a side door and plead to an infraction when he had a prior conviction but instead he should be charged and prosecuted for a traffic crime. Section 6, he said, was in effect a statement of policy, but he was not sure it was enforceable as a practical matter.

Rep. Bunn said he was convinced that if section 6 did not work, the entire procedure would not work. In some instances, he said, judges have thwarted the purpose of the mandatory sentencing law enacted by the last session of the legislature with respect to drinking drivers, and this disturbed him greatly. There were so many situations, he said, where defense counsel, if permitted to do so, will plea bargain. The district attorneys are busy and will continue to be busy and it will be to their advantage in some instances to plea bargain. Judges have to be reelected and they have consistently in the past been reluctant to give strong penalties for drunk driving. He was of the opinion that section 6 would not accomplish its purpose.

Mr. Frost commented that, while he was in favor of section 6, it was unrealistic. It should be recognized, he said, that there were going to be plea negotiations. His suggestion was that rather than this statutory provision, a strong statement in the commentary be included to the effect that it was the Judiciary Committee's intention that defendants should not be allowed to bargain for a dismissal of the offense charged in this situation. His opinion was that section 6 would bring about even broader devious activities in the courts to circumvent the intent of the legislature, and it would be more destructive than beneficial.

Capt. Williams said that in speaking to other law enforcement people in support of this revision, he had been able to make the point that the committee's intent was not to de-emphasize DUIL, a matter about which law enforcement personnel were deeply concerned. He said he had been able to point to section 6 as proof that the committee strongly believes that DUIL should not be de-emphasized, and he said he would hate to lose the section. If anything, it did not go far enough because it was applicable only to the second time infraction. He would like to see it apply to traffic crimes as well. With this section in the code, Capt. Williams said it would be easier for law enforcement to understand and support the concept of this revision.

Sen. Browne moved adoption of the following amendments to the commentary to section 6: In line 1, delete "to try" and in line 3, delete ".10" and insert ".08". Motion carried without opposition.

Rep. Bunn said he would like to hear further discussion on how this section might be enforced.

Rep. Paulus recalled that one of the Criminal Code provisions permitted prosecution of an elected official for abuse of public office. She suggested incorporating that section into section 6.

Mr. Paillette summarized ORS 162.405, official misconduct in the second degree, a Class C misdemeanor. Official misconduct in the first degree, he said, would not be appropriate because one of the elements of that crime was to obtain a benefit or to harm another.

Rep. Paulus moved to add a subsection to section 6 making it a violation of ORS 162.405 for an elected official to fail to carry out the policy set forth in section 6. Motion failed. Voting for the motion: Reps. Bunn, Hampton, Paulus. Voting no: Sens. Carson, Eivers, Chairman Browne; Chairman Marx.

Mr. Paillette supported the retention of section 6 and urged the committee to recognize that the removal of section 5 helped section 6 because the prior offense could now be pleaded in the accusatory instrument. The matter would be before the court from its inception and any subsequent action by a district attorney to try to negotiate a plea would be before the judge. He suggested the committee consider some additional language in section 6 to emphasize the strong feeling of the members concerning the policy of the section and proposed to add:

"No district attorney shall be permitted to make any motion and no judge shall be permitted to enter any order in derogation of this section."

Rep. Bunn inquired what the penalty would be if the judge or district attorney disregarded the provision and was told by Mr. Paillette that there would be none. Rep. Hampton commented that pressure to conform would come from public opinion. This was the case in Washington County with respect to the present DUIL law, he said, where the statute was being enforced through pressure of public opinion.

Chairman Marx moved to add to section 6 the sentence suggested by Mr. Paillette as set forth in the previous page. Motion carried without opposition.

Chairman Marx next moved to adopt section 6 as amended. Motion carried. Voting for the motion: Sen. Carson, Chairman Browne; Reps. Bunn, Hampton, Paulus, Chairman Marx. Voting no: Sen. Eivers.

Section 7. Trial; burden of proof; pre-trial discovery. There being no objection to section 7 as drafted, it was approved.

Section 8. Counsel for state and defendant. In response to a question by Rep. Hampton as to limitations upon the district attorney appearing in court for pleadings or other matters prior to trial, Mr. Paillette explained that section 8 was intended to apply only to his appearance at trial.

Mr. Frost advised that a number of experienced district attorneys and members of the Attorney General's office had raised serious questions concerning the provision of section 8 excluding district attorneys from trials except at the request of the judge. He said he was unable to articulate clearly their precise concerns, but one of them centered on a conflict with provisions appearing in ORS chapter 8 and another was that they questioned whether district attorneys technically could be excluded altogether from a trial involving a traffic infraction or whether the matter should be discretionary.

Mr. Paillette advised that the subcommittee in adopting this section was attempting to accommodate the district attorneys. Mr. Brasch, District Attorney in Coos County, had told the subcommittee that the District Attorneys' Association would like to get out of the traffic case business and had said they didn't want to be in court on run-of-the-mill traffic cases. During the evolution of this section, he said, changes were adopted; originally it left to the district attorney the option to appear in court.

Mr. Frost said it was true that district attorneys would like to get out of the traffic court business, particularly the minor cases, but sometimes when a police officer had a good case yet felt he was going to have difficulty getting it across, he would want the district attorney in court with him. He requested a further opportunity to discuss this more thoroughly with those who were particularly concerned so that he would be able to come back to the committee with more concrete objections together with suggestions for correcting them.

Capt. Brown said he would favor a provision that would permit the district attorney to appear when defense counsel was present.

It was Judge Gilliland's belief that the judges would follow a procedure whereby the district attorney would be in court on all Class A infractions and certainly when a defendant appeared with counsel. The possibility of a $1,000 fine, he said, would be of sufficient seriousness to involve the district attorney's office.

Rep. Hampton summed up the conversation thus far and asked if it was the committee's position that the district attorney should not be required to appear at a trial involving a Class A traffic infraction unless his appearance was requested by the judge, the defendant or defense counsel. That position, he said, would leave open the question of whether the district attorney should be present at a trial for a Class B, C or D traffic infraction. Chairman Marx asked Rep. Hampton how he would feel about providing defense counsel at public expense in that situation and was told that he would not favor court-appointed counsel even when the district attorney was present.

Mr. John Charles appeared to speak on behalf of the staff of the Springfield City Attorney's office and the Springfield Police Department. Both groups, he said, strongly urged that the district attorney be permitted to appear at trial.

Judge Gilliland commented that most of the time people charged with minor offenses weren't really disputing what the officer said but merely wanted their side of the story to be taken into consideration by the court. In the majority of cases, the elements of the offense were simple enough that there was no great controversy. However, the district attorney needed to be in court when the charge was for a more serious traffic offense in which there was a question of elements of the charge, a question of the defendant really understanding those elements and the court having to make certain that the district attorney satisfied all the elements of the offense. Judge Gilliland said he would feel uncomfortable being the one to bring out elements of the state's case. It was a procedure fraught with danger, he said, particularly in areas where there was a right of appeal.

Chairman Marx read the following language drafted by Mr. Paillette and moved that it be inserted in place of subsection (2) of section 8:

> "Except for a Class A traffic infraction or unless the defendant is represented by counsel, the district attorney shall not be required to appear at any trial involving a traffic infraction only."

Sen. Browne objected to the proposal on the ground that the district attorney should not be present for Class A traffic infractions when the defendant was not entitled to court-appointed counsel. Chairman Marx shared her concern and suggested that counsel be

provided at public expense for Class A infractions so that the case would not be weighted against the defendant. Rep. Bunn said he would rather provide that the district attorney didn't have to be there than to require appointed counsel. Rep. Hampton suggested that the statute provide that if the defendant was represented by counsel, the district attorney shall appear at trial. The other questions could then be left unresolved.

Judge Cole described the New York adjudication procedure which employed hearings officers, who were attorneys, where the police officers were not represented by district attorneys and the defendants could be represented by counsel if they wished. The system worked very well and the police liked the system. They felt they were getting a fair shake and were able to tell their story. Even when there was opposing counsel there to examine them, it didn't seem to bother the officers. The public apparently appreciated the opportunity to be heard heard and to have their case judged by an independent officer. His opinion was that the approach suggested by Captain Brown was a logical one -- i.e., permit the district attorney to appear when defense counsel was present. If a case involved elements that should be proved, he was convinced the judge would request the appearance of the district attorney.

Capt. Williams expressed agreement with Judge Cole. As far as the police officer was concerned, Capt. Williams said he probably wouldn't be uncomfortable without the presence of the district attorney in minor traffic cases but when it came to DUIL and other more serious matters where rules of evidence were involved, officers would probably like to be represented by the district attorney's office.

At the request of Chairman Marx, Rep. Hampton restated his earlier suggestion and said it would be accomplished by amending subsection (2) to read:

> "If defendant is represented by counsel, the district attorney, on request by the trial judge, shall appear at trial."

Rep. Paulus commented that this proposal would leave the district attorney at the mercy of the judge. Mr. Frost concurred and said this was one of the objections of the ODAA.

Rep. Hampton restated his proposal to read:

> "If the defendant is represented by counsel, the district attorney may appear at trial."

Rep. Paulus recalled that Rep. Hampton had suggested that the subsection be left calculatedly ambiguous and said that if "may" were used in the above sentence, it would imply that when the defendant was

not represented by counsel, the district attorney could not be there. Rep. Bunn responded that "shall" would make the district attorney appear at trial when he was not needed. Rep. Hampton's personal preference was to leave the entire matter to the discretion of the court.

Sen. Browne was of the opinion that if the district attorney was going to be at trial all the time, the defendant should be entitled to appointed counsel to avoid weighting the cases in favor of the state. Rep. Hampton disagreed on the ground that the offense carried no sanction of a jail sentence. Chairman Marx concurred with Sen. Browne's assessment that if the district attorney were permitted to appear, the case would be weighted in favor of the state. His personal preference would be to take out the attorneys for both sides.

Sen. Browne maintained that if the police officer was competent to write the ticket and put the charges on the citation, he was competent to stand in court and make his case. The judge could call the district attorney if he wanted to and in that case the defendant should have appointed counsel. Chairman Marx commented that the police officer still had an advantage over the defendant because he had been in court before whereas the defendant many times had not.

Rep. Bunn recommended that the matter be left to the judge's discretion and proposed to place the following phrase at the end of subsection (2): "or when defense counsel is present."

Sen. Eivers suggested that the simplest way to handle the problem would be to say that when defense counsel is present, the district attorney shall appear. The decision would then be up to the defendant. If he didn't want counsel, the district attorney wouldn't appear.

Mr. Paillette urged the committee to keep in mind that DUIL cases involved highly complicated proof and evidentiary problems and with all due respect to police officers, he said it was sometimes all the district attorney could do to get the Breathalyzer test into evidence, qualify the experts, etc. The judge would require a foundation to be laid whether or not a jury was present. This section, he said, did not waive the rules of evidence, regardless of the procedure.

Capt. Williams commented that all police officers were not competent to present their case in the best possible manner and for Class A traffic infractions, which were of a fairly serious nature, the state should present the best possible case.

After further discussion, vote was taken on Rep. Bunn's motion to add the following phrase to subsection (2) of section 8:

"or when defense counsel is present."

Motion carried. Voting for the motion: Sen. Carson; Reps. Bunn, Hampton, Paulus, Chairman Marx. Voting no: Sen. Eivers, Chairman Browne.

Mr. Paillette indicated he had located at least one of the sections about which Mr. Frost had spoken earlier when he said that some of the district attorneys thought there were provisions conflicting with section 6. It was ORS 8.660 which required a district attorney to attend all terms of court "having jurisdiction of public offenses within his county, and to conduct, on behalf of the state, all prosecutions for such offenses therein." That section, he said, would certainly need amendment and it was possible that there were others in the same category.

Sen. Browne was critical of the amendment just adopted by the committee and Chairman Marx ruled that since a majority of the Senate members had strong objections to the committee's action, the matter would be discussed further.

Sen. Browne proposed the following language to replace subsection (2):

> "At any trial involving a traffic infraction only, the district attorney shall not appear unless counsel for the defense appears."

Rep. Bunn said that approach went back to the statement made earlier by Capt. Williams that the State Police were not always qualified to handle complex matters such as laying a foundation for a Breathalyzer test. Sen. Browne asserted that they were better qualified to testify than the defendant.

Rep. Hampton said it was important to remember that in going to the system proposed by this draft, judges would be expected to act differently in this administrative adjudication situation from the way they act in adversary proceedings with counsel present. They would be expected to become a little bit aggressive in digging out the facts, and it might take a little time for both judges and officers to get used to the new system. As long as there was objection on the Senate side, however, he suggested the committee go back to the original position set out in the draft.

Judge Gilliland said he wouldn't mind asking questions but he would feel more comfortable in interrogating the police officer on behalf of a defendant than in carrying the state's burden inasmuch as the state was the initiator of the matter and carried the burden of proof.

Rep. Paulus noted that this matter had been discussed at great length and no new arguments had been presented other than those heard in the subcommittee. For that reason she proposed to adopt section 8 as drafted with the proviso that the staff would amend conflicting statutes. Sen. Browne opposed that suggestion, pointing out that the trial judge could then call in the district attorney on every infraction whether or not the defendant was represented.

Sen. Browne moved to adopt the language she had suggested earlier to replace the revision previously adopted by the committee. Under her motion subsection (2) of section 8 would read:

> "At any trial involving a traffic infraction only, the district attorney shall not appear unless counsel for the defense appears."

Her motion also included the directive that the necessary conforming amendments would be made to ORS chapter 8. Motion carried. Voting for the motion: Sens. Carson, Eivers, Chairman Browne; Reps. Hampton, Paulus, Chairman Marx. Voting no: Rep. Bunn.

Sen. Carson commented that the effect of the motion just adopted was to remove the trial judge from the decision as to whether the district attorney should appear at trial. He pointed out that Mr. Paillette should be authorized to draft a provision requiring notice to the district attorney if defense counsel was to appear which would give the district attorney an opportunity to prepare for trial.

Mr. Frost suggested inserting "defense" before "counsel" in subsection (1) of section 8. Chairman Marx so moved and the motion carried without opposition.

Rep. Hampton suggested that Mr. Paillette also give some thought to how these cases would be presented and whether the prosecuting or citing officer should have authority to call witnesses.

Mr. Frost indicated he would call the district attorneys together and attempt to draw up a position paper for distribution to the committee regarding the concerns of the District Attorneys' Association.

Chairman Marx moved to adopt section 8 as amended with the understanding that Mr. Paillette would draw conforming amendments to ORS chapter 8 to take care of any conflicts requiring a district attorney to be present at all prosecutions and that he would further draft a provision requiring notice to the district attorney in cases where defense counsel will appear at trial. His motion also included the directive that Mr. Paillette would, if he considered it advisable, draft a provision permitting police officers to call witnesses. Motion carried unanimously. Voting: Sens. Carson, Eivers, Chairman Browne; Reps. Bunn, Hampton, Paulus, Chairman Marx.

Section 9. Prosecution involving traffic infraction not a bar to subsequent charge. Mr. Paillette explained that section 9 would remove traffic infractions from the operation of the former jeopardy statutes. He noted that in connection with the subcommittee discussion on this subject, a letter was received from Judge Liepe of Lane County who

raised the question of collateral estoppel. Mr. Paillette said he had researched this question and had prepared a survey of Oregon cases on the subject. It was his opinion that collateral estoppel would apply in this situation, whether or not it applied to traffic infractions, and some further language would be needed to clarify that point. Collateral estoppel under the case law applied in criminal cases as well as civil cases, he said.

Mr. Paillette said that Judge Liepe had suggested the following language be added to section 9:

> "Any plea, finding or proceeding upon any traffic infraction shall not be used as evidence or for purpose of res judicata or collateral estoppel in any other civil or criminal proceeding."

Mr. Paillette posed a hypothetical situation wherein there was an episode involving both dangerous driving and DUIL -- that is, both an infraction and a crime was charged. The element of DUIL was tried first, the defendant found not guilty and he was subsequently tried for dangerous driving. Question might then arise as to whether the state would be barred by collateral estoppel from proving the DUIL aspect of dangerous driving. In his opinion, the state would be barred under Oregon case law without some saving language to negate the possibility that collateral estoppel might create this type of problem.

At this point the committee recessed for lunch.

Pages 22 through 54 reported by:

Mildred E. Carpenter, Clerk
Judiciary Committee

Senate Members Present: Sen. Wallace P. Carson
Sen. George Eivers

Excused: Sen. Elizabeth W. Browne, Chairman

House Members Present: Rep. Robert P. Marx, Chairman
Rep. Stan Bunn
Rep. Lewis B. Hampton
Rep. Norma Paulus

The meeting reconvened at 1:00 p.m.

Chairman Marx moved a vote be taken on a policy decision that would prevent "collateral estoppel" and "res judicata" and not allow a prior finding on an issue to be raised in a subsequent trial. The motion passed unanimously.

Mr. Paillette agreed to draft language to negate collateral estoppel. Reference would be made also to "res judicata", which refers to rule preventing relitigation of same cause of action.

The language suggested by Judge Winfred Liepe, said Mr. Paillette, follows:

"Any plea finding or proceeding upon any traffic infraction shall not be used as evidence or for the purpose of 'res judicata' or 'collateral estoppel' in any other civil or criminal proceeding."

In answer to a question by Rep. Bunn, Rep. Hampton replied that evidence admitted in a prior hearing could be used. A prior finding would not bar an inquiry on the same issue. Mr. Paillette suggested that a reference to ORS 43.160, which is the statutory statement of collateral estoppel, be included.

Rep. Hampton stated that on a plea in a prior adjudication, which had been admitted or one that could not be denied, there would be no evidence admitted because it would be an admitted fact. It would not legally be a prior adjudication, continued Rep. Hampton. The language "used as evidence", said Mr. Paillette, could be deleted.

In answer to a question, Mr. Paillette stated the concern would be when two charges would evolve from one transaction and evidence of one would be extremely important and relevant to prove the other offense--for example, DUIL and dangerous driving. The issue of whether the defendant was under the influence could be an element of both offenses.

There was considerable discussion as to how to administratively handle a case when a driver would receive a citation for an infraction, and, because of a prior conviction, the infraction would be a crime. The problems that could arise with the issuance of a citation to an out-of-state driver, when no bail is required, and the driver has had previous convictions were also discussed.

Mr. Frost suggested that a statement of legislative intent would be helpful in order to prevent confusion. It would also help to clarify what the legislature expects and wants to happen in various situations.

Mr. Frost also suggested that the procedure for traffic crimes be the same as the procedure in the Oregon Criminal Procedure Code. In this way, an officer, if the situation warranted, could issue a citation for a crime rather than a Uniform Vehicle Citation at the time a driver is apprehended. In this way, the driver would not first receive a citation for an infraction and then later be charged with a crime and have two separate complaints against him.

Captain Williams stated that another concern is that with the issuance of a Class A infraction that would be forwarded to the district attorney for determination as to whether a crime had been committed, the charge might be dismissed by the judge if the complaint isn't on his desk the day of arraignment. It was Captain Williams' opinion that a procedure would need to be worked out but that he didn't believe the police officer should have the responsibility of determining whether the motorist had committed a crime.

Judge Cole stated that the district attorney or city attorney should make the decision whether a crime had been committed by reviewing the evidence.

Mr. Paillette suggested that with respect to either a Class A infraction or a traffic crime it could be provided, under the statute which sets out the UTC in ORS chapter 484, in those instances where one of the offenses occurred, that for the purpose of charging the offense, it would be an optional provision. This way, the district attorneys, in working with their law enforcement agencies, would be able to handle it the way they want within certain guidelines. If a district attorney wants to insure he has time to run a record check, he can specify that the cases be handled through his office. On the other hand, if a district attorney would prefer to use the UTC, particularly in the Class A infractions, he could do so, continued Mr. Paillette.

The suggestion was made by Mr. Paillette that an "either/or" clause could be used in a citation that would allow the respective prosecutors and police agencies to handle the cases to their satisfaction. It was his belief, said Mr. Paillette, that most district attorneys would want potential traffic crimes handled through their offices before the complaints are filed.

Rep. Hampton stated that before a defendant appears in response to a citation if the district attorney is given the opportunity to determine whether a crime has been committed and the fact is made known to the court, he couldn't see where a problem would exist.

Judge Gilliland explained that it would be possible for a driver to be cited and jailed if he didn't have the money to post bail. The defendant would want his case to be heard as quickly as possible and not have to wait for his case to be reviewed to determine whether a crime had been committed.

Mr. Paillette stated that the district attorney needs the opportunity with the prior offender situation to know what is going on and to control the kind of charge that is made against a defendant.

Mr. Paillette was asked to draft alternate procedures for section 9 and to include an "either/or" provision. Those present were asked to submit suggestions.

Section 10. Trial judge's authority to order suspension of license, permit or right to apply.

Rep. Hampton referred to the last sentence in subsection (4) and explained that if a defendant does not have a license in his possession, it should be made clear that the court can enter an order suspending the license and that oral notification should suffice in making the fact known to the defendant while he is in the courtroom.

In answer to a question, Mr. Paillette explained that subsection (7) refers to MVD making necessary changes in their records when a copy of a suspension order is received, which has been entered by a judge. The suspension, he continued, would be effective immediately when made by the judge in the courtroom.

Miss Howard suggested that the language "The division shall issue a license bearing the court limitations and" be inserted after the word "writing" in line three of subsection (3). When the court orders the limitations removed, the division would then return the old license to the defendant. Rep. Paulus explained that subsection (3) was drafted in the first place after listening to district judges from around the state. It was drafted in its present form to give the judges more discretion and leeway to work with offenders, continued Rep. Paulus. Miss Howard stressed that unless MVD knows about the restriction there can be problems. Sen. Eivers agreed that MVD would have to be notified of any restrictions imposed by a judge.

If a restriction imposed by a judge, stated Rep. Hampton, is one that would be enforced locally only and not statewide, it would not be necessary to inform the division. If, however, the restriction is broad in nature and would be enforced statewide, the division could then be informed.

Captain Brown suggested that a judge could take a license for an offense committed and issue a temporary license until MVD could send the defendant a new license bearing the restriction.

Rep. Hampton moved that section 10, subsection (4) be amended to insert the language "or orders suspension or revocation" in line 9 after the word "possession". There being no objections, the motion was adopted.

Judge Gilliland made reference to subsection (5) and explained that if a defendant's license is suspended under subsection (1), a reasonable amount of time should be allowed for the defendant to pay the fine, and if he does not comply, he should be presented with a bill by the division when he applies for an automobile license or driver's license the following year. A great deal of tax money, explained Judge Gilliland, is spent in an effort to collect fines.

Rep. Marx moved to amend subsection (5) to read: If the judge ordered the suspension under subsection (1) of this section, upon payment of the fine as ordered, the judge shall immediately [send a copy of an order to reinstate the defendant's license or permit to the division] reinstate the license or permit and send a copy of the order to the division. At the time of reinstatement the judge may issue a temporary permit.

In answer to a question by Rep. Bunn, Mr. Paillette answered that subsection (5) would not prevent setting up a mandatory suspension for a specific offense. There are mandatory provisions for suspensions now through MVD, and if a suspension is made mandatory, it wouldn't need to be directed to the judge.

Rep. Bunn moved the adoption of section 10 as amended. There being no objections, the motion carried.

Section 11. Court ordered suspension to run concurrently.

Rep. Hampton suggested causing a "no blow" suspension to concur with a court ordered suspension and a drunk driving conviction. After some discussion, the suggestion was not adopted.

Rep. Hampton moved the adoption of section 11 as drafted. There being no objections, the motion carried.

Section 12. Conviction of certain offenses as grounds for mandatory revocation or suspension.

Rep. Paulus pointed out that subsection (2), paragraph (c) will need to be changed from .10 to .08.

Miss Howard stated that since dangerous driving is now more serious than DUIL, it would be well to change the word "three" in subsection (1) paragraph (d), line 1 to "one".

Mr. Paillette explained that culpability should be kept in mind and that for reckless driving under existing statute "willful, wanton conduct" is the required culpability and the closest offense under comtemplated changes is dangerous driving in the first degree, because otherwise it would be getting into the area of criminally negligent driving, and the suspension would be extended into another area.

An attempt, continued Mr. Paillette, was made to correlate the new offense of dangerous driving and dangerous driving in the first degree more closely to parallel reckless driving.

Rep. Hampton moved to amend section 12, subsection (1), paragraph (d) as follows: Line 1, delete "three" and insert "two".

The two offenses should be within any 12 month period, stated Rep. Hampton.

After considerable discussion on the subject of revocation of licenses or permits for the offense of dangerous driving, Mr. Paillette was asked his opinion on the subject. His suggestion was to leave dangerous driving in the first degree under the revocation provision and dangerous driving in the second degree under the suspension provision, subsection (2), to be handled in the same manner as the DUILs. The suspension period, he continued, would depend on the number of convictions.

Captain Brown asked about the consequences of being charged with dangerous driving in the first degree if there has never been a previous arrest. Rep. Hampton commented that it was his opinion that it would be better to revoke a license with the occurrence of a second offense rather than a first.

Mr. Frost asked for an explanation of the difference between a revocation and suspension. Senator Eivers commented that a suspension is for a definite period of time, and after the time has passed, the license is restored. With a revocation, an individual needs to apply to have his license returned to him.

Rep. Bunn referred to Captain Brown's question regarding mandatory suspension when an individual is charged with dangerous driving in the first degree and there has never been a previous arrest. First offense dangerous driving in the first degree and in the second degree would involve a suspension, said Rep. Hampton.

In answer to a question by Chairman Marx, Mr. Paillette answered that a paragraph could be included under subsection (2) to insert the offense of dangerous driving in the first or second degree. In the first degree a defendant would get a revocation if he is a multiple offender under subsection (1).

Both dangerous driving in the first and second degree would come under mandatory suspension, subsection (2), and the period of suspension would be a part of the 10-day period, which is already in the statute.

Rep. Hampton commented that the language "or orders suspension or revocation", which was added to section 10, be included in section 12. Mr. Paillette stated that the language would be effective when a judge takes a permit or amended to coincide with the previous amendment in section 10 to when a judge enters an order and the defendant does not have his license or permit in his possession.

Rep. Hampton moved to have subsection (4) redrafted to parallel the language in section 10, subsection (3).

Sen. Carson moved to amend subsection (1), paragraph (d) as follows: Line 1, delete "three" and insert "two". Line three, delete "12" and insert "24". The motion carried.

Rep. Bunn moved to amend subsection (3) as follows: In paragraph (a) delete "30" and insert "60".

Rep. Bunn explained that the reason for his motion was because quite often when a person is suspended for 30 days the time he actually does not drive amounts to about 15 days, or a period of time much less than the 30 days. Miss Howard added that the occupational license is a factor in reducing the time of suspension.

In answer to a question by Rep. Bunn, Miss Howard stated that the occupational provision is used when the possibility exists an individual might lose his job without a permit to drive. She stated further that the division would prefer, rather than a 30 day suspension with an occupational provision, to have a shorter suspension period that would be absolute without any type of occupational provision.

The Chairman called for a vote on Rep. Bunn's motion to raise the period of suspension from "30" to "60" days in subsection (3), paragraph (a). The motion failed.

The Committee recessed for 10 minutes at 2:25.

Rep. Paulus moved the adoption of section 12 as amended. The motion carried.

Section 13. Permissive suspension or revocation. Mr. Paillette explained that section 13 amends the statute to insert the language "criminally negligent" with the culpability element in dangerous driving in the second degree.

Rep. Paulus moved the adoption of section 13 as drafted. The motion carried.

Section 14. Appeals. Mr. Paillette explained that section 14 will be presented to the committee as a separate bill as soon as a draft is worked out through the district judges. It will be part of the committee package in the form of a separate bill. Rep. Paulus stressed that the committee's intent is that appeals be directed to the Court of Appeals.

In answer to a question by Rep. Hampton, Mr. Paillette replied that the appeal would be de novo on the record to the Court of Appeals. Rep. Hampton recalled at a previous meeting with Judge Schwab it was agreed that the de novo appeal would instill confidence in the system in case of an obvious miscarriage of justice. Mr. Paillette explained that the Court of Appeals would review the record, not only for errors of law but for miscarriages of justice.

Mr. Frost added that a tape recording would be made of the trial, which would be available to the Court of Appeals from which a determination could be made. Chairman Marx added that no new testimony would be submitted.

The procedure, commented Judge Gilliland, would greatly increase the number of appeals since there would be no requirement for specification of error of law. Rep. Paulus did not agree, and it was her opinion that defendants involved in DUIL cases would be reluctant to appeal to the Court of Appeals unless a case warranted the action.

Mr. Frost indicated that if a municipal court does not make a record of a trial, then the defendant would be entitled to a de novo trial in district court, as is now appealed to the circuit court.

Mr. Charles commented that a defendant would have nothing to lose by asking to have his case appealed to the Court of Appeals. It wouldn't cost him any money because he wouldn't have to pay an attorney, and the process wouldn't take any of his time.

Mr. Frost commented that the defendant could appeal to the Court of Appeals only through an attorney. An attorney would have to write the letter to the Court.

Rep. Paulus moved the adoption of the Article Classification of Offenses; Disposition of Offenders; Preliminary Draft No. 4, dated August 1974, subject to proposed amendments to be drafted by Mr. Paillette. Voting aye: Carson, Eivers, Hampton, Paulus, Chairman Marx. Voting no: Bunn. Excused: Chairman Browne. The motion carried.

SERIOUS TRAFFIC OFFENSES; P.D. No. 2; August 1974

Sections 1 and 2. Mr. Paillette stated that the committee previously acted on the sections.

Section 3. Dangerous driving in the second degree.

Section 4. Dangerous driving in the first degree. Sections 3 and 4 deal with two degrees of dangerous driving and need to be read together, commented Mr. Paillette. The second degree offense, page 5, is a criminal negligent type of culpability, continued Mr. Paillette. Commenting on the distinction between criminal negligence and reckless conduct, Mr. Paillette stated that one is failure to be aware of a substantial risk and the other is disregarding a known risk. The second is more serious and graded accordingly. For that reason, a first degree offense with recklessness as the culpability is much closer to the existing reckless driving statute, which speaks in terms of wanton and willful conduct. The statutory definition, said Mr. Paillette, is set out verbatim on page 6 as commentary to the dangerous driving sections. The culpability definitions in the Oregon Criminal Code would be adopted by the proposed vehicle code.

Mr. Paillette explained that ORS 161.125(2) would also have a bearing on the reckless driver who is also intoxicated and referred to the first paragraph on page 7 of the draft. It would provide that a drunk driver could not use the defense that he was unaware of a known risk because he was intoxicated.

The related statute on reckless driving would be repealed by the draft, and ORS 483.343 dealing with careless manner driving would also be repealed, continued Mr. Paillette. ORS 483.345 dealing with reasonable control of a vehicle would not be repealed because there is no culpability in that offense, only liability, and it is a Class B misdemeanor.

Captain Williams asked whether driving under the influence of alcohol in a parking lot would fit into ORS 483.345. Mrs. Embick commented that the chapter is part of the "Rules of the Road" and would apply to highways only and not to parking lots.

The suggestion was made by Rep. Hampton that the committee have drafted language to cover in specific terms the offense of driving while intoxicated in parking lots or private areas open to the public.

Miss Howard asked, in view of the proposal to repeal the reckless driving and careless driving statutes, whether prior convictions for these offenses would still appear on a driver's record after the effective date of the new legislation. Mr. Paillette answered that the subject is dealt with in a proposed section titled "Application of new vehicle code provisions to prior and subsequent actions". In answer to another question, Mr. Paillette stated that language would need to be added to ORS chapter 484 to include the new offense of dangerous driving and to delete reckless driving.

In answer to a statement by Chairman Marx regarding the application of dangerous driving in the first and second degree to private areas open to the public, Captain Brown replied that an impossible enforcement task would be created. In order to properly enforce the proposal, continued Captain Brown, it would be necessary to use officers who are involved in other areas because there simply would not be enough personnel.

Chairman Marx explained that the state police wanted to have the authority to apprehend a drunk driver in a parking lot, and Captain Brown remarked that he would agree with the proposal if it applied to drunk drivers, but that dangerous driving offenders were another matter.

Mr. Charles commented that because of a number of shopping centers in his area and the difficulty involved in prosecuting offenders, such authority would be welcome.

As an example, commented Captain Brown, his department has six officers involved with "hit and run" cases, and this number would have to be increased to 25 if they are to handle such cases in parking areas. The funds are not available to hire the additional officers, said Captain Brown. Senator Carson replied that making the offense a crime

would not increase the problem and that his concern was with damage to property and injury to persons. An individual whose car is damaged on a street may seek police assistance, and the same should be true for an individual whose car might be smashed in a parking lot.

Chairman Marx asked for a vote on whether all serious driving offenses and crimes should apply to areas open to the public. The motion passed.

Rep. Bunn suggested the committee review the Class A misdemeanors and make a decision as to which should apply to offstreet areas open to the public. Mr. Paillette added that Rep. Bunn's suggestion reflected the views of the subcommittee.

Class A misdemeanor and traffic infractions that would apply to offstreet areas open to the public would be:

(1) Driving while suspended or revoked
(2) Hit and run -- personal injury, damage to property
(3) Attempting to elude
(4) Dangerous driving
(5) Driving while intoxicated or with a .08 blood count

A vote was taken, and the members were in favor of having the offenses apply to parking lots and areas open to the public.

Rep. Hampton stated that generally "rules of the road" do not apply to private property, but negligence, criminal negligence and recklessness can be proven by the circumstances. Although negligence and recklessness may be proven by showing an array of specific violations of other rules of the road, it is not required to be done this way, continued Rep. Hampton. It simply is the traditional way, but is not required. If someone should squirrel through a parking area at 90 miles an hour, the state has a real interest in seeing that the public can expect some enforcement.

Mr. Paillette was asked to draft the proper language to make the above listed offenses apply to property generally open to the public.

Chariman Marx moved the adoption of section 3 as drafted. The motion carried.

Chairman Marx moved the adoption of section 4 as drafted. The motion carried.

Section 5. Fleeing or attempting to elude a police officer. Mr. Paillette explained that the definition of police officer in General Definitions had been retained, but that in section 5 there is a special definition, which includes the general definition, that specifies the police officer be in uniform, prominently displaying a badge and operating an appropriately marked vehicle.

Captain Williams, in answer to a question by Rep. Paulus, stated that the state police use unmarked cars to apprehend speeders. An unmarked car, he said, can be used to enforce all laws, but if the unmarked car is being used to actually stop vehicles, the officer wears a uniform and the car is equipped with a light, which usually is not on the roof.

Chairman Marx moved the adoption of section 5 as drafted. The motion carried.

Section 6. Conviction of traffic offenses as grounds for mandatory revocation or suspension. No action was taken on the section.

Section 7. Suspension for refusing breath test; notice of suspension. Mr. Paillette explained that subsection (1) increases the suspension period for refusing to take a breath test from 90 to 180 days.

Chairman Marx moved to amend subsection (1) by changing the suspension period from 180 days to 90 days. The motion failed.

In answer to a question by Mr. Charles, Mr. Paillette explained that the suspension referred to in subsection (3) is a disputable presumption and the suspension would occur as the result of a refusal to take a breath test.

Rep. Hampton moved the adoption of section 7 as drafted. The motion carried.

Section 8. Hearing on suspension under ORS 482.540. The section, explained Mr. Paillette, would delete reference to the drunk driving statutes and conform more to the present definition of driving under the influence.

Rep. Bunn moved the adoption of section 8 as drafted, subject to editorial changes. The motion failed

Section 9. Notice of suspension, revocation or cancellation.

Section 10. Driving while suspended or revoked. The two sections, 9 and 10, reported Mr. Paillette, should be reviewed together and went on to explain that section 9 amends the existing statute ORS 482.570 with respect to suspensions by the division. Language is included that the notice should indicate whether the suspension is court ordered and the nature and reason for the action. The suspension notice would be mailed to the person's address as shown by division records.

The definition of the offense of driving while suspended or revoked in subsection (1) of section 10 is essentially the same as it is now. Subsection (2) would shift the burden with respect to whether or not notice had been received or whether there were other extenuating circumstances. Paragraph (a) is an emergency provision and sets out an exception. Paragraph (b) places the burden on the defendant to prove that he did not receive notice of suspension or revocation, continued Mr. Paillette.

Subsection (3) removes the affirmative defense if the defendant had refused to sign a receipt for the certified mail containing notice of suspension, continued Mr. Paillette, or if the notice could not be delivered because the division wasn't notified of the defendant's change of address. Under paragraph (c), the affirmative defense would not be available if the defendant had been informed by a judge that the suspension was being ordered.

Rep. Bunn moved to amend subsection (4) to delete "Class A misdemeanor" and insert "Class C felony".

Rep. Bunn explained that when a person has had a license suspended for offenses such as dangerous driving, eluding police, hit and run and drunk driving and knowingly continues to drive, a Class C felony is warranted.

Captain Brown explained that one of the serious offenses is driving while suspended for financial responsibility.

Rep. Bunn amended his motion to specifically apply to when a license has been suspended or revoked for serious traffic offenses such as hit and run, dangerous driving, eluding a police officer, drunk driving and while driving under the habitual offender act.

Rep. Bunn restated his motion that a violation of driving with a suspended or revoked license where the suspension or revocation occurred because of dangerous driving, eluding a police officer, hit and run, drunk driving and while driving under the habitual offender act that the penalty would be a Class C felony, whereas if the suspension were for other causes, the penalty would be a Class A misdemeanor.

Rep. Hampton referred to ORS 161.705, which gives the court authority, if it is of the opinion that it would be unduly harsh to sentence the defendant for a felony, to enter a judgment of conviction for a Class A misdemeanor. A question asked by Rep. Hampton was that if the district court would be handling all traffic cases whether the circuit court would hear the Class C felony cases only. He questioned whether this would be a desirable policy when the circuit court would not be handling any other traffic cases.

Chairman Marx asked for a vote to determine whether the committee agreed with the policy set forth in Rep. Bunn's motion. The policy was accepted.

Miss Howard, in reference to subsection (3)(b), explained that a segment of the population has never bothered to acquire a driver's license and what would be suspended in their case would be the right to apply. Without a license, she continued, they would be under no obligation to notify the division of an address change.

Captain Brown added that the point made by Miss Howard would apply equally to the motion made by Rep. Bunn as to whether the right to apply would be suspended.

Judge Gilliland referred to subsection (3)(c) and explained that in his opinion whatever record the court had of a judge informing the defendant of a suspension would be ample proof that the suspension had been imposed by the judge. Mr. Paillette added that most likely there would be an order to back up the fact that the suspension had been imposed. The district attorney would also have records of the case that would show the defendant was sentenced and at what time the suspension was imposed, added Judge Gilliland.

Chairman Marx moved the adoption of section 10 as amended. The motion carried.

Section 11. Implied consent to chemical test; police report of refusal; evidence of refusal inadmissible. The section is a housekeeping amendment, said Mr. Paillette, because of the new provision of driving under the influence.

Mr. Frost explained that at present an individual may be involved in an accident and taken to an emergency room for treatment where he might be asked to take a breath test and can very well refuse. If there is probable cause, he continued, he can be given a test without even asking. For this reason, continued Mr. Frost, he suggested deleting the words "no test shall be given, but" in line 8 of subsection (2). Senator Carson questioned whether the information, when acquired in this manner, could be used.

Rep. Hampton moved to amend section 11, subsection (2), line 8 to delete "no test shall be given, but". The motion failed. Voting yes: Hampton. Voting no: Carson, Eivers, Bunn, Paulus, Chairman Marx. The motion failed.

Rep. Hampton moved to amend section 11, subsection (3), line 4 to delete the word "not". The motion failed.

Mr. Charles informed the members that in Springfield about 50 percent of the people involved in DUIL cases refuse to take a breath test, and, in answer to a question, he stated that he didn't believe the figure would change with the change in the suspension period of 90 days to 180 days. Chairman Marx added that he didn't believe the fact that a person refuses to do something should be used as evidence.

Mr. Frost referred to ORS 483.640, which specifies that only a duly licensed physician or a person acting under his direction or control may withdraw blood or pierce human tissues. He would recommend adding the language to read "...licensed physician, registered nurse or qualified person acting under his direction or control drawing the blood at the request of the police officer shall not, except in a case of gross negligence, be held civilly liable." Quite often, said Mr. Frost, when there is no physician present, it is difficult to get

someone to draw blood because of the fear of being sued. The members generally believed that the individual drawing the blood should not be liable for battery or assault, but that he should not have immunity from negligence.

Chairman Marx asked Mr. Frost to submit written amendments on his proposal to be considered by the committee.

Rep. Hampton pointed out that in making his motion to delete the word "not" in subsection (3), line 4, he wanted the members to be aware of ORS 17.250, which requires that juries be told "That if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

Rep. Bunn moved the adoption of section 11 as drafted. The motion carried.

Section 12. Use of chemical analyses to show intoxication. Mr. Paillette indicated that in view of the committee's action on the DUIL statute, section 12 will need to be amended further, since driving with a .08 blood count would be a DUIL. Paragraph (a) would not need to be changed. Paragraph (b), continued Mr. Paillette, if the blood alcohol count is more than .05 and less than .08 it could be left as direct evidence, or it could be substituted for what is now paragraph (c) indicating more than .05 but not less than .08 supports a disputable presumption that he was then under the influence of intoxicating liquor. Another alternative would be to leave paragraph (c) out altogether and write the language into paragraph (b).

The belief was expressed by Captain Brown that if Mr. Paillette's suggestion were enacted that the results would vary from what appears in UVC § 11-902. The violation, under § 11-902, would be that the defendant was in control of the vehicle with a blood alcohol count of more than .08, which would not be a disputable presumption. Rep. Hampton replied that the language would succeed that referred to by Captain Brown and asked how a jury would treat a case if there is no proof of blood alcohol or there is a .06

Senator Carson suggested doing away with the presumption since the difference between a .06 and .08 is so close. Mr. Paillette agreed that the difference has been narrowed. Rep. Hampton stated that it would be difficult for jurors to grasp the idea that if a blood test doesn't show a .08 the individual could still be under the influence.

Under § 11-902, commented Sen. Carson, if a person has a blood alcohol count of below .08, the case has to be strong in order to make the breath test charge stick. If the blood count is under .08, continued Sen. Carson, and the individual refuses to take the test, then it is necessary to run through the check list, which would include walking without weaving. This, it would seem, said Sen. Carson, would be sufficient. After that, the situation is more factual and the breath test score is introduced, but the amount of alcohol consumed or the alcoholic content is not the question but rather how the car was

operated on the highway. He was not willing, said Sen. Carson to say that .06 is drunk driving and that is what the presumption would be.

Rep. Hampton commented that he also didn't agree with that alternative but did believe there should be some evidence, such as telling a jury that between .04 and .08 is some evidence, indirect evidence that doesn't go either way.

Mr. Foss commented that it is extremely rare to apprehend a drunk driver with under a .08.

Rep. Hampton moved to delete section 12, repeal ORS 483.642.

The deletion of the section would mean that for the state to do anything with a .07 or .08, it would have to bring in an expert to testify that there was significant impairment, said Rep. Hampton. The defendant's driving would be the whole question.

Mr. Frost stated that section 12 would definitely be of benefit to the defendant with a .05 if the jury understands its instructions. Rep. Hampton agreed that enough of the section should be retained to be of advantage to the defendant with a .05 or under and that with between a .05 and .08 there would definitely need to be other evidence. Sen. Carson, in answer to a question, replied that the area is so narrow that the presumptions would be preferable to having a point under which the defendant would be favored and above which the prosecution would have the advantage.

As a matter of law or justice, asked Sen. Carson, can the statement be made that under a .04 the defendant is not driving under the influence and over .06 he is, because that is the presumption.

Captain Williams indicated that it had been his opinion to delete the section, because from a layman's point of view it seems redundant. After listening to the discussion, he said, it would seem there is a need for some of the language to deal with those cases with below .08 blood alcohol counts.

His greatest concern, commented Rep. Hampton, is for the jury to understand that there is some work involved in a case and that it cannot infer from a .07 that there is absence of guilt, or, on the other hand, it cannot infer from a .03 that there is guilt.

Chairman Marx asked the opinion of the committee members as to presumptions. Rep. Bunn stated that he would want to include language that would allow indirect evidence that could be used either way. Sen. Carson commented that he would be in favor of leaving in the .05 for the sake of the defendant. Now, he said, .03 has been mentioned and wondered if this is meant to be interpreted that a person is impaired at .03 but that a presumption is needed to indicate that he isn't. If the presumption under .08 is to work, perhaps it should be lowered to .02, he said. If it is left at .05, as suggested, and the defendant is presumed not to be intoxicated, there are many people who would be intoxicated with a .04, continued Sen. Carson.

Rep. Bunn moved to delete subsection (1), paragraph (a) and to delete in subsection (1), paragraph (b) "More than .05 percent but". The motion carried

Chairman Marx moved the adoption of section 12 as amended.

Sen. Carson made the suggestion to the law enforcement officials present and to Mr. Bellamy that they submit any new presumptions before January and that the committee would be most willing to work on them.

Chairman Marx amended his motion to delete subsection (1), paragraph (c) and to adopt section 12 as amended. The motion carried.

The comment was made by Sen. Carson that some language will be needed at the beginning of paragraph (b) because the paragraph no longer deals with a presumption but with evidence.

The meeting was adjourned at 4:45.

Pages 55 through 69 reported by:

Anna McNeil