# CIVIL FORFEITURE IN PORTLAND, OREGON: A PROGRAM TO REDUCE ILLICIT DRIVING BY OFFENDERS

Robert B. Voas, National Public Services Research Institute

## INTRODUCTION

Ensuring that DWI offenders who receive the license suspension penalty actually do not drive is a major problem in most states. This is clearly demonstrated by the fact that many suspended drivers continue to be involved in crashes and to receive traffic citation during periods of license suspension. Moreover, research in the states of California and Washington and experience in a number of other states indicates that half of those drivers who have been suspended fail to apply for license restoration when they become eligible. Many of these drivers delay for a year or more before reapplying for their licenses. As administrative per se laws are passed in more of the states and BAC limits are lowered, it is likely that an increasing number of individuals will receive license suspensions as a result of DWI convictions and that this compliance problem will grow. This paper describes a vehicle forfeiture program designed to reduce this problem.

An important feature of the Portland Ordinance is that it provides for civil forfeiture. The basic distinction between criminal forfeitures and civil forfeitures is the question of whether the penalty is assessed against the person of the object to be seized. A criminal forfeiture is based on conviction for a criminal offense and is viewed as a penalty for having committed that offense. In such actions, it is the individual who is charged and who must plead guilty or not guilty and who is ultimately judged to be at fault and penalized by, among other means, losing property through forfeiture.

On February 8, 1989, the City Council of Portland enacted Ordinance No. 161616 which provided that,

> A vehicle operated by a person whose operator license is suspended or revoked as a result of a conviction for driving under the influence of intoxicants in violation of the provisions of this Chapter, or of Chapter No. 813 of the Oregon Revised Statutes, may be impounded at the time of the arrest or citation for Driving While Suspended or revoked and be forfeited as a nuisance . . .

The background to this action was a serious problem that was developing in Portland and to a certain extent, in the state as a whole, in the enforcement of Driving While Suspended laws. The principle penalty for this serious offense was a jail sentence. However, Oregon jails were overloaded and many under court restraining orders. Therefore, many of the offenders convicted could not be accommodated in a timely manner and ultimately, some sentences had to be suspended.

The inability to effectively sanction offenders led to a search for alterative methods of preventing Driving While Suspended. An initial effort was made to amend the state forfeiture law to provide for the impoundment and forfeiture of vehicles driven by suspended drivers where the suspension resulted from a drunk driving conviction. The state legislature, however, failed to act on the bill, so the City Council of Portland took action. The original ordinance was passed in February 1989, but provided that it would not take effect until 90 days after the adjournment of the legislative assembly and then only if the assembly failed to enact a state-wide system for impounding vehicles operated by persons whose license had been suspended. Since the legislature failed to act, the ordinance came into effect and began to be enforced on December 15, 1989.

## OPERATION OF ORDINANCE

Civil forfeitures, on the other hand, focus upon the unlawful use of a piece of equipment or other property irrespective of the owner's culpability. The owner is usually not mentioned directly in the suit and it is not necessary for the owner to be convicted of a crime for the forfeiture to proceed. The action is taken against the vehicle because it has become a public nuisance, not as a penalty for criminal behavior. Therefore, the seizing and the confiscation of the vehicle can proceed before the trial and conviction of the operator for a criminal offense. The seizure does not depend upon a conviction.

The forfeiture procedure provides for the stopping of a vehicle by a police officer based on abnormal or illegal driving or involvement in a crash. If an officer determines that the driver is driving while suspended and revoked and that the suspension resulted from a DWI offense, the officer has grounds for seizing the vehicle. The officer then completes an impoundment form in triplicate and provides the original to the individual in charge of the vehicle at the time of the seizure. Normally, the officer will also cite the driver for Driving While Suspended. However, this is not a requirement of the civil forfeiture ordinance.

Currently, the vehicle is towed to a commercial wrecker's lot and held there pending a release from the police. A program is underway, however to build a city impoundment lot and, ultimately, vehicles seized under

this ordinance will be towed directly to the city lot or moved from the commercial impound lot to avoid high commercial storage rates. The vehicle owner, or anyone else having a valid interest in the vehicle, has 15 days (if the vehicle is worth less than $1,000 or up to 60 days if the value is over that amount) to file a claim with the City Attorney for return of the vehicle.

The ordinance provides for an expeditious hearing within 5 days after vehicle impoundment if the registered owner or a holder of other security interest files a written request for a hearing to show why the vehicle should not remain impounded. At such a hearing, the interested party can overturn the impoundment by demonstrating that the police officer did not have probable cause to make the stop or that the operator of the vehicle was not suspended or revoked for driving under the influence of the intoxicants. If a hearing is not requested or the hearing officer determines that the impoundment action was valid, then the City Attorney may institute legal proceedings to forfeit the vehicle to city within 42 days after impoundment. If the City Attorney does not take that action within 42 days, the vehicle is released to the registered owner.

## FIRST-YEAR EXPERIENCE WITH THE PORTLAND ORDINANCE

During calendar year 1990, 197 vehicles were seized of which 117 were ultimately released and 80 forfeited to the city. Of those 80, 30 have actually been auctioned. During this period, only one offender whose vehicle was seized has requested a hearing on the issue of probable cause to seize the vehicle. In that case, the judge determined that the seizure was valid and the forfeiture process proceeded. The fact that 60% of the vehicles were released might suggest that the forfeiture program is not working. However, most of these releases are to third-parties who have a financial interest in the vehicle. These owners or lien holders must pay the towing and storage cost in order to repossess their vehicle as well as execute a stipulated judgement form which requires them not to return the car to the suspended driver. The form requires that if they do, and the offender is again apprehended using the vehicle while his or her license is suspended, the vehicle will be forfeited to the city and the owners, or lien-holders, interest in the vehicle will be forfeited.

Many of the actions listed as a release of a vehicle actually deprive the offender of the use of that vehicle. In these cases, the City of Portland does not receive the income that would result from a forfeit and sale at auction. Nor, on the other hand, does the City sustain a loss from paying for the storage of a junk vehicle. These exceptions to the forfeit procedure make the ordinance accessible to the public by protecting the rights of innocent owners and lien holders (though these individuals must still pay out-of-the-pocket for towing, storage, and impoundment costs). This procedure also avoids running up the city's expense for forfeiting and auctioning vehicles where the costs of this action would probably exceed the price that could be obtained from the vehicle.

### Cost of the Vehicle Forfeiture Program in Portland, Oregon

An annual report to the City Council by Commissioner Earl Blumenauer in January, 1991, shows revenues from forfeited car sales of $60,000 with this increasing to $166,000 in the 1991-1992 year. This cash flow is based on the assumption of an average sale price of $980 per auctioned car, which has been the experience to date. In the F-Y 1991-1992 period, the city plans to open a storage lot of its own; therefore, it will create a new source of revenue from storage payments by the owners or lien holders of vehicles seized under the ordinance.

The value of approximately 70% of the first 53 vehicles sold was less than $1,000. This low value is typical of multiple DWI offenders, many of whom drive junk cars. However, while the average price received at auction for a vehicle was $980, a larger percentage of the more expensive vehicles were seized and sold by the City of Portland.

While the budget indicates that the program will be subsidized from public funds in the amount of approximately $70,000 for the FY 1991-1992 year, it should be kept in mind that the community would experience a considerable expense were these offenders given the more traditional penalty of time in jail. Data on the cost of alternative criminal prosecution of these offenders are not available, but it is clear that significant costs arise in prosecuting, convicting, and supervising individuals guilty of driving while suspended. Properly-run vehicle forfeiture programs have the potential benefit that since they raise some revenue to offset the costs of the program. It is possible that the amount of revenue could be increased, if program costs were added to the towing and storage charges which are paid by individuals to whom vehicles are released.

### Legal Challenge to the Forfeiture Ordinance

To date, there have been approximately 395 vehicle

seizures under the Portland Ordinance if those relating to prostitution are added to the DWI offenses. Only one of these seizures has been challenged in court and the ensuing trial in the District Court of Multinomah County resulted in finding in favor of the ordinance and an affirmation of the seizure. The plaintiff in this case put forward six issues challenging the validity of the ordinance, and in an unusual action, the court provided a lengthy written opinion with respect to each of the issues. The issues are raised and the court's response are significant since many of these issues are cited by critics of forfeiture laws. The issues raised are described below:

1. The claimant challenged the ordinance on the basis that it violated his rights under the 4th Amendment of the U.S. Constitution . . . in that it authorized the seizure of a motor vehicle for forfeiture without requiring the issuance of a warrant. Judge Michael H. Marcus's opinion cites several state and federal cases which support the position that crimes involving an automobile can be an exception to the Constitutional requirement. He notes that the mobility of the automobile justifies its warrantless seizure under an otherwise valid forfeiture ordinance.

2. The claim was also made that the ordinance violates the due process clause of the 14th Amendment in that it required the claimant to provide a $10 cash bond. In this particular case, the issue was mute because the City Attorney had waived the bond. The judge indicated that this might be an issue if the complainant was indigent but was not relevant in the present case.

3. The claim was made that the statute violates the individual's right against self incrimination in that it requires him to submit a written claim concerning his asserted interest in the property. However, the form does not contain information on the offense itself, but rather, on the ownership of the vehicle. In any case, the judge argued that the claimant should have filled out the form leaving any information blank which he felt involved self-incrimination.

4. The claim was made that the ordinance is actually a criminal law rather than a civil enactment, and thus, that the claimant is entitled to the full protection afforded the defendant in a criminal proceeding including that of an appointed council. The judge found, however, that the claimant's culpability is not a prerequisite to the forfeiture. The judge noted that a conviction for an offense is not a requirement for the forfeiture, which would be the case if it was viewed as a criminal forfeiture. The judge notes that "No opprobrium can attach against any claimant as the mere result of a judgment of forfeiture. A registered owner or lien-holder (other than a financial institution) might loose as much or more than an owner-occupant such as this claimant, but all that a judgement of forfeiture announces as to any of them is that they did not successfully assert a claim or affirmative defense. The proceeding is not even brought against a person by name."

5. The claim was also made that the ordinance violated § 1-25 of the Oregon Constitution that prevents "Forfeiture of Estate." However, the judge notes that this provision relates to the taking of an estate as a penalty for an individual's conviction and has not been applied to confiscation of personal property used in the commission of a crime.

6. The final claim was that the ordinance affected a "Taking" of property in violation of the 14th Amendment, and § 1-20 of the Oregon State Constitution. Here, the Judge noted that the "Taking" clause related to the confiscation of property for public use without just compensation. In this case, the property is not confiscated for public use but to eliminate a public nuisance.

## SUMMARY

Despite the relatively small number of cases to which the forfeiture ordinance has been applied within the City or Portland, this innovative effort provides a unique demonstration of the potential for using civil forfeiture as a tool for preventing convicted DWI offenders from driving while their licenses are suspended. The numbers of offenders affected are too small to provide a statistically valid evaluation of the impact of the ordinance. However, it is noteworthy, as pointed out in the annual report on the program, that whereas in 1987 and 1988, there had been 935 alcohol-related felony DWS cases, there were only 197 vehicles seized during the 1990 year. This may give some indication that the ordinance is having a deterrent effect.