

February 6, 2013

Senate Committee on Judiciary
Oregon State Capitol
900 Court Street NE, Room 331
Salem, OR 97301



Re: Animal Legal Defense Fund's Support of SB 53
(Animal Abuse & Community Caretaking)

Dear Senate Judiciary Committee,

My name is Lora Dunn, and I am a third-year law student at Lewis and Clark Law School and a legal extern with the Animal Legal Defense Fund. The Animal Legal Defense Fund (ALDF), founded in 1979, is a national, nonprofit organization of attorneys specializing in the protection of animals and working to ensure the enforcement of existing animal protection laws within the United States. I thank you for giving me the opportunity today to present my testimony in support of SB 53 regarding the inclusion of "animals" as property under ORS 133.033, the community caretaking statute.

Both Oregon's legislative and judicial branches have long recognized the import of protecting animals from abuse and neglect. To that end, this state provides its peace officers with a broad complement of tools to use for enforcing our animal cruelty code.¹ By enacting SB 53 and expressly recognizing animals as property to be protected under the community caretaking statute (ORS 133.033), this Legislature would further ensure that our peace officers can better enforce the animal cruelty code and prevent further harm to cruelly treated animals.

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¹ Oregon is routinely ranked as one of states with the best animal protection laws on the books. See <http://aldf.org/article.php?id=2269> (last visited February 5, 2013).

I. Community Caretaking and the Warrant Requirement

A. Exceptions to the warrant requirement

Warrantless entry is *per se* unreasonable unless it falls within a specific exception to the warrant requirement. State v. Christenson, 181 Or. App. 345, 351, 45 P.3d 511, 514 (2002); State v. Bridewell, 306 Or. 231, 235, 759 P.2d 1054, 1057 (1988); State v. Davis, 295 Or. 227, 237, 666 P.2d 802, 809 (1983). Two exceptions to the warrant requirement, exigency and emergency aid, are applicable to a community caretaking situation. To qualify for the exigency exception, the state's warrantless entry must occur in the context of a criminal investigation and must be supported by probable cause of criminal activity. State v. Bridewell, 306 Or. 231, 235, 759 P.2d 1054, 1057 (1988). The rationale for this exception is that "the passage of time" needed to secure a warrant necessitates warrantless entry. *Id.* at 1058. In an exigency situation, "[p]revent[ing] serious harm to any person or property" would be the appropriate community caretaking purpose of warrantless entry. ORS 133.033(2)(a)(A).

In contrast, the state does *not* need probable cause of criminal activity to validate a warrantless entry pursuant to the emergency aid exception. Rather, an officer's objectively reasonable belief of an "urgent need to render aid and assistance" justifies warrantless entry under the emergency aid exception. State v. Davis, 295 Or. 227, 238, 666 P.2d 802, 809 (1983) (citing instances justifying emergency aid such as unattended children and persons held at gunpoint); *see also* State v. Baker, 350 Or. 641, 650 n. 6, 260 P.3d 476, 481 (2011) *citing* Mincey v. Arizona, 437 U.S. 385, 392, 98 S. Ct. 2408, 2410, 57 L. Ed. 2d 290 (1978) ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities").



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B. Community caretaking

After the *Bridewell* court declined to recognize any “generic ‘community caretaking functions’” due to lack of statutory authority, the Oregon Legislature enacted the community caretaking statute, ORS 133.033, and specifically defined “community caretaking functions.” Testimony, Senate Committee on Judiciary, HB 3448, May 27, 1991, Ex I (written testimony of Fred Avera, Polk County District Attorney, Oregon District Attorney's Association). The purpose of the community caretaking statute is to “serve and protect the public” by, among other mechanisms, “[p]revent[ing] serious harm to any person or property.” ORS 133.033(2)(a)(A).

However, community caretaking is not itself an exception to the warrant requirement. ORS 133.033 authorizes officers to enter premises, but their actions must also meet the Constitutional requirements described above. State v. Christenson, 181 Or. App. 345, 349, 45 P.3d 511, 513 (2002) (noting “the potential breadth of the statutory community caretaking function is constitutionally circumscribed”). In other words, warrantless state action must be authorized by both (1) the community caretaking statute and (2) a Constitutionally-recognized exception. *Id.* at 349. In practice, state action that is authorized under the community caretaking statute creates a presumption of validity under the exigency and emergency aid exceptions of the warrant requirement, given their overlap in purpose.

In sum, an officer may enter a premises without a warrant, to prevent serious harm to any person or property pursuant to ORS 133.033(2)(a)(A) under either the exigency exception (requiring probable cause) or the emergency aid exception (given a reasonable belief that aid is needed). As noted below, many jurisdictions authorize the warrantless search and seizure of animals—as property—under the community caretaking doctrine through exigency or emergency aid justifications.



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II. Animals as Property

A. Ownership defense to property destruction

Generally speaking, many laws criminalizing property destruction do not apply to the owner of that property. *See, e.g.*, Or. Rev. Stat. Ann. § 164.345 *et seq* (defining criminal mischief to include the destruction of “property of another,” meaning property belonging to “anyone other than the actor”). Under the criminal mischief statutes, a car owner could tamper with and destroy that car without violating the statute, but could not do the same to the car of another.

However, there are limitations to this defense. In the arson context, for example, intentionally damaging *any* property (even one’s own) can subject that person to criminal liability. ORS 164.325(1)(a). Likewise, though for different reasons, ownership is *not* a defense to animal cruelty, and therefore should not be a defense to harm to animals (property) under the community caretaking statute.

B. Animals’ property status

In addition to the limitations on property destruction set forth above, the animal cruelty statutes demonstrate that animals are unique property and that property ownership is not a defense to animal cruelty.

1. Animals are sentient beings.

While animals are property under the law, most jurisdictions recognize that animals are “unique” property given their sentience. It is widely recognized that animals are sentient beings capable of experiencing pain, stress and fear. *See, e.g., Animal Pain* (Charles E. Short & Alan Van Poznak eds., Churchill Livingstone 1992); P.M. Taylor, P.J. Pasco & K.R. Mama, *Diagnosing and Treating Pain in the Horse: Where Are We Today?*, Vet. Clin. North Am. Equine Pract. Vol. 18, Issue 1, Pages 1-19. While many of the first animal cruelty laws protected only property belonging to another person, focusing on harm done to the property owner, the law evolved to acknowledge animals’ individual sentience and worth, by criminalizing animal abuse

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regardless of the animal's owner. *See generally* David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1 Det. C.L. Rev. 1 (1993). In particular, the Oregon Legislature revised its cruelty code in 1985 to reflect changing public attitudes that "animals should be given greater protection from cruel treatment and neglect." State v. Nix, 251 Or. App. 449, 461, 283 P.3d 442, 449 (2012) *citing* Staff Measure Analysis, Senate Judiciary Committee, S.B. 508, Mar. 14, 1985, 1.

2. Animals are victims of crimes.

Today, animals' property status does *not* provide a defense to animal cruelty—and should similarly not provide a defense for excluding animals from the community caretaking statute aimed at preventing criminal harm such as cruelty. The Court of Appeals recently declared that an animal's legal protection is distinct from its owner's property interest in that animal, as the cruelty code was not meant to protect the property interest of an animal owner, but rather to protect the animal from harm incurred by *any* person. Nix, 251 Or. App. at 459. In recognizing that animals can be the victims of crimes, the *Nix* court clarified that animals can just as equally be victims of crimes perpetrated by their owners who have property interests in those animals. Thus, to conclude that the exception for destruction of one's own property applies to animals would frustrate this Legislature's purpose in enacting the cruelty statutes, as well as violate the clear conclusion of the Court of Appeals.

In *Nix*, decided last August, the Oregon Court of Appeals recognized the unique property status of animals by ruling that animals, despite their property status, can be victims of cruelty. *Id.* Significantly, the Court pointed out that the animal's owner (the person retaining "custody or control" of the animal) can violate the cruelty code regarding his own animals. *Id.* While some property damage statutes make the property owner the victim of the crime, an animal owner cannot use this same defense in the animal cruelty context. *Id.* at 459 (noting that "to conclude that the victim of a violation of ORS 167.325 [animal neglect] is the owner of the animal neglected would



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lead to anomalous results”). *Nix* not only recognized that an animal’s well-being is distinct from an owner’s property interest in that animal, but also that better animal protection is of public concern: “[E]ven though animals usually are the property of persons, there is a broader public interest in their health, care, and well-being that requires vindication when they are neglected.” *Id.* at 460-61.

Unfortunately, this vindication will never come for many animals whose suffering goes unnoticed, or found too late. For this reason, the inclusion of animals under the community caretaking statute is imperative.

III. Practicalities of Animal Seizure

A. Community caretaking as a tool to help animals in need

As noted above, the purpose of the community caretaking statute is to “serve and protect the public” by, among other things, preventing harm to persons and property. ORS 133.033(2)(a)(A). In *Nix*, Oregon recognized both the victim status of animals and the broad public interest in their well-being, yet too often these animal crimes go undetected because, like child abuse and domestic violence, they often take place behind closed doors—the recent seizure of 150 pets from a Marion County non-profit serving as an illustration of this point. In the animal context, emergency situations are unfortunately frequent, and officers lack time to obtain a warrant before seizing animals that are on the brink of death after enduring months of profound and protracted suffering that the perpetrator successfully concealed from law enforcement scrutiny.

If warrantless entry to prevent harm to animals, as property, is explicitly recognized as a community caretaking function, this entry and subsequent seizure are more likely to be deemed constitutional under the exigency or emergency care exceptions to the warrant requirement. Many other jurisdictions have recognized the importance of warrantless animal seizure, and have ruled that the exigency and emergency aid exceptions apply



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to animal care situations. *See, e.g., People v. Chung*, 185 Cal. App. 4th 247, 110 Cal. Rptr. 3d 253 (2010) (where exigent circumstances allowed officers to enter the defendant's condominium to check on the welfare of a live dog the officers reasonably believed to be in distress); *Pine v. State*, 889 S.W.2d 625 (Tex. App. 1994) (where emergency exception applied to sheriff's warrantless removal of malnourished colt from defendant's farm because obtaining a warrant was impracticable and the deputy reasonably believed that there was an immediate need to act to preserve its life); *Tuck v. United States*, 477 A.2d 1115 (D.C. 1984) (where exigent circumstances justified officers' warrantless seizure of a panting rabbit, lying semi-dazed in the bottom of its small cage without ventilation on a 103-degree day); *People v. Burns*, 197 Colo. 284, 593 P.2d 351 (1979) (where exigent circumstances justified a warrantless search of the premises to locate a missing calf that ran the risk of dying from lack of nourishment due to separation from its mother); *State v. Bauer*, 127 Wis. 2d 401, 379 N.W.2d 895 (Ct. App. 1985) (where the emergency doctrine authorized officers to seize horses in need of immediate aid from a barn based on the prior complaints received and examination of a dead horse).

B. Humane officers reclassified as peace officers

Protecting animals under the community caretaking statute is in keeping with recent Oregon legislation re-categorizing humane officers as peace officers. 2012 Oregon Laws Ch. 67 (H.B. 4021). By enabling humane officers to have the same powers as other police officers, this Legislature sent a message that animal cruelty investigations must be taken seriously. As explained above, a key component of combating animal cruelty is access to the areas where such cruelty occurs. Explicitly including animals under the community caretaking statute will better enable officers to enter the premises where these animals are being harmed, and prevent further harm by providing on-site care to the animals or seizing the animals in exigent or emergency situations.



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CONCLUSION

Including animals under the community caretaking statute is in keeping with the Oregon cruelty code, the recent *Nix* decision, and the reclassification of humane officers as peace officers. The Oregon courts and this Legislature have recognized the public's interest in animal well-being regardless of these animals' property status, as victims of crimes, and the necessity of equipping humane officers, as peace officers, with greater power to enforce the cruelty code. By explicitly including animals as property under ORS 133.033, this Legislature would ensure that fewer animal crimes go undetected and would send a clear message that animal cruelty should and must be taken seriously.

Sincerely,



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