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FISCAL IMPACT REPORT

ORIGINAL DATE 02/19/09

SPONSOR Strickler LAST UPDATED _____ HB 703

SHORT TITLE Forfeiture of Felony Drug Offense Property SB _____

ANALYST Weber

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	None		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorney (AODA)
 Attorney General (AGO)
 Public Defender Department (PDD)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

House Bill 703 adds a new provision to NMSA 1978, Section 30-31-34. The new subsection F is the inclusion of “all real property” subject to forfeiture if the real property “is used or intended to be used, in any manner or part, to commit or to facilitate the commission of a felony offense in violation of the Controlled Substances Act.”

FISCAL IMPLICATIONS

The respondents knew of no significant fiscal implications other than the possibility of additional funds after disposal of the real property.

SIGNIFICANT ISSUES

The AODA offers the following comments regarding the bill.

Forfeiture of Real Property may work to stop successful prosecution of the underlying Controlled Substance case because of serious Constitutional Double Jeopardy issues. Rental Property would become very risky to own. The owner would be taking the risk of any renter violating the Controlled Substances act and losing his property. Loans to buy Real property would become very difficult to get. Banks would lend with the knowledge that the owner might violate Controlled Substances Act and the property would be forfeited directly to the Police Agency. Seizure and Forfeiture of Real Property as a consequence of drug activity would have Constitutional due process issues.

The AGO response includes a variety of legal considerations.

The process and procedure for the forfeiture of real property is not specifically stated. For example, in Albin v. Bakas, 141 N.M. 742, 160 P.3d 923 (Ct. App.), cert. denied, 142 N.M. 16, 162 P.3d 171 (2007), the procedure used for the forfeiture process was irregular and the forfeiture was reversed.

Real property is held in various different titles: separate; community; tenants in common; joint tenancy. The possibility of an “innocent owner” defense is likely for real property interests and is a factual and legal issue. See 3 Patton and Palomar on Land Titles, § 660, Criminal and Civil Forfeiture Proceedings Against Real Property; 18 U.S.C. § 985, Forfeiture Reform Act.

Forfeiture of property, especially real property will be construed as a punitive act. Any ambiguity in the forfeiture statute will be construed against the State and against forfeiture. Albin v. Bakas, 141 N.M. 742, 160 P.3d 923 (Ct. App.), cert. denied, 142 N.M. 16, 162 P.3d 171 (2007); State v. Ozarek, 91 N.M. 275, 573 P.2d 209 (1978).

Exact terms should be used to describe the real property that may be subject to forfeiture. The terms “appurtenances” or “improvements” may be too general and require a more precise definition.

The proposal may impact other city or municipal ordinances that provide for forfeiture based on a public nuisance or public health and safety grounds and not a felony offense under the Controlled Substances Act.

As a guideline, reference may be made to the Arizona statutes concerning civil forfeiture of real property. Arizona Revised Statutes, Annotated, Title 13, Criminal Code, Chapter 39, Forfeiture. Subjects such as property subject to forfeiture, exemptions, powers and duties of peace officers and agencies, seizure and notice are adequately addressed.

The PDD adds other legal points.

Forfeiture is the complete divestiture of the ownership of property without compensation. State v. Nunez, 2000-NMSC-013, ¶ 33, 129 N.M. 63, 2 P.3d 264. It extinguishes one of the most fundamental liberty interests. Id. Both the federal and state constitutions provide that no person shall be deprived of life, liberty or property without due process of law; see U.S. Const. amends

V, XIV, § 1; N.M. Const. art. II, § 18; see also Nunez, 2000-NMSC-013 ¶ 32 (the ownership of property is as meaningful and fundamental as the rights to life, safety, and happiness). Pursuant to Nunez, civil forfeiture complaints and criminal charges for the same crime under the Controlled Substances Act must be brought in a single, bifurcated proceeding. Thus, Nunez also requires that the State prove, by clear and convincing evidence, that the property in question is subject to forfeiture.

MW/mt:mc