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## **Court of Appeals Rules on Valuation of Special Use Properties in Condemnation**

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Most properties are valued in condemnation using either the “market” approach or the “income” approach. The former looks at recent sales of comparable properties to estimate a value for the property at issue and the latter values the property based on the stream of income it produces. Single family homes are ready examples of properties valued using the market approach and apartment complexes are equally ready examples of properties valued using the income approach. Special use properties, however, such as schools and churches, may not have either comparable sales or income. Although relatively rare, Oregon recognizes a third valuation method—the “cost” approach—in that circumstance. The cost approach generally values specialized properties using reproduction cost less depreciation and obsolescence. Appellate decisions analyzing the cost approach are few, but the Oregon Court of Appeals recently addressed the cost approach at length in *City of Bend v. Juniper Utility Co.*, 242 Or App 9, 252 P3d 341 (2011).

*Juniper Utility* involved the condemnation of a private water and sewer utility by a municipality. The central issue at trial was the appropriate valuation method. Both sides conceded that the market approach was unavailable because there were no comparable sales. They hotly disputed, however, the

applicability of the income and cost approaches. The city contended that the income approach should be used because the utility had paying customers. The utility, in turn, argued that the income approach was inappropriate because its regulated rates were artificially low and, therefore, not an accurate measure of constitutional just compensation in eminent domain. Rather, the utility suggested that the cost approach was the only reasonable basis for valuation given the special nature of the assets involved (and the defects noted under the circumstances with the market and income approaches). The trial court agreed and the Court of Appeals affirmed.

In doing so, the Court of Appeals began by holding as a matter of first impression in Oregon that the determination of the appropriate method of valuation in a condemnation case is a question of fact. For appellate purposes, therefore, the review focuses on whether there was “any evidence in record” to support a trial court’s decision rather than whether that decision was correct as a matter of law. The Court of Appeals then readily found the requisite evidentiary support given the specialized nature of the property involved. The Court of Appeals also agreed with the trial court that regulated utility rates were not a definitive measure of income production in condemnation because utility ratemaking focuses on a reasonable return on a delineated asset base and eminent domain is concerned with fair market value of the property being acquired. This latter finding was significant because if the other recognized

methods of valuation are available, the cost approach generally cannot be used under *State Bd. of Higher Ed. v. First Methodist Church of Ashland*, 6 Or App 492, 495-96, 488 P2d 835 (1971) and *State Dept. of Trans. v. Southern Pacific*, 89 Or App 344, 347-48, 749 P2d 1233 (1988).

*Juniper Utility* adds to a small but important body of law that is central to valuing special use properties in condemnation.

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his condemnation practice, Mark both prosecutes and defends direct and inverse condemnation cases involving a wide variety of commercial, residential, industrial and specialty properties in Oregon state and federal court. Mark also handles the “court side” of land use cases for developers. Mark is the contributing editor-author for condemnation for the Oregon State Bar Real Estate & Land Use Digest and has also written articles on condemnation procedure and valuation for the Oregon State Bar’s Litigation Journal. He is a member of the Oregon State Bar’s Litigation and Real Estate & Land Use Sections. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.