



OREGON REAL ESTATE AND LAND USE DIGEST

Published by the Section on
Real Estate and Land Use,
Oregon State Bar

Vol. 26, No. 4 • September 2004

Highlights

- 1 **Legislature Changes
Condemnation Code in
Two Key Areas**
- 2 **Ninth Circuit Upholds San
Francisco Hotel Conversion
Ordinance Against Takings
Claim**
- 3 **Lake Oswego Exaction
Withstands Dolan
Challenge**
- 5 **U.S. Supreme Court Applies
ADA to State and Local
Governments**
- 7 **Court of Appeals Adds
Gloss to Practical Effect
Requirements for Standing
Under Utsey**
- 9 **Federal Court Denies
Takings Claim on
Oregon Land**
- 10 **Texas Supreme Court Finds
Taking in Road
Construction Requirements**
- 14 **Lake Tahoe Landowners
and Developers Lose
Another Round**

Article — Condemnation

■ LEGISLATURE CHANGES CONDEMNATION CODE IN TWO KEY AREAS

The Oregon Legislature last year enacted two key changes to the condemnation code that went into effect earlier this year and are now codified in ORS Chapter 35. The first, House Bill 3372, gives condemners (both public and private) the ability to temporarily enter property before a condemnation action is filed to conduct surveys and environmental testing. The second, House Bill 3371, requires condemners (again, both public and private) to give only a single 40-day prefiling offer rather than separate 20- and 40-day offers. Both changes have important practical benefits for agencies and utilities acquiring property through eminent domain.

Environmental Testing. Although some agencies had survey rights before the recent changes, the ability to conduct invasive environmental testing under the prior survey and inspection provisions was less clear. See Or Laws 2003, ch 477. Because a property's environmental condition is relevant to compensation under Oregon substantive valuation law and might affect an agency's decision whether to proceed with an acquisition, the changes enacted under House Bill 3372, which are now codified at ORS 35.220, offer an important practical tool to condemners. See generally *ODOT v. Hughes*, 162 Or App 414, 419–20, 986 P2d 700 (1999) (discussing the relevance of a property's environmental condition to its valuation in condemnation).

Under ORS 35.220(1), condemners may enter, survey, and conduct "tests upon and take samples from" real property that is subject to their condemnation authority. Under that same provision, the condemner must give notice of its intent to conduct testing, and may actually conduct testing only with the consent of the property owner or through a court order. ORS 35.220(2), in turn, establishes an expedited procedure for a condemner to obtain a court order by filing a petition in circuit court. The court may establish terms governing the inspection and sampling and may direct the condemner to pay compensation either before or after the inspection. Compensation may be awarded under ORS 35.220(3) for both physical damage caused during the inspection—including "any damage attributable to the diffusion of hazardous substances found on the property"—and for any "substantial interference" with the property's possession or use caused by the inspection. ORS 35.220(4), however, prevents double recovery by excluding damages for which payment has already been made under the inspection provision from any subsequent condemnation award. Finally, ORS 35.220(5) appears to reserve potential tort claim liability for other acts conducted during an inspection.

40-Day Offer. ORS 35.346(1) long contained a requirement that a condemner serve an offer on a property owner at least 20 days before filing a condemnation action. In 1997, the legislature enacted a number of significant reforms to the condemnation process—including a requirement that a prefilling offer remain open for at least 40 days, which was codified at ORS 35.346(4). See Or Laws 1997, ch 797. That led to confusion over whether condemners were subject to a single 20-day offer that had to remain open for 40 days, a 40-day offer that incorporated both the 20-day period outlined in ORS 35.346(1) and 35.346(4), or a combined 60-day period before a condemnation action could be filed. On time-sensitive projects, the differing interpretations had significant practical import.

The legislature clarified the prefilling offer requirement by amending ORS 35.346(1) to mirror ORS 35.346(4) and create a single 40-day offer requirement. See Or Laws 2003, ch 476. The requirement that an appraisal report accompany offers of \$20,000 or more remains. ORS 35.346(2). Although ORS 35.348 allows condemners to dispense with the 40-day waiting period (but not a prefilling offer) in an emergency, the new unified 40-day offer provision in ORS 35.346(1) will, as a practical matter, govern almost all project-related condemnations.

Mark J. Fucile

Stoel Rives LLP