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■ MEASURE 39: THE OTHER BIG NEWS

Quite rightly, the "big news" in Measure 39 was its limitation on public agencies' ability to condemn property when the property will later be transferred to a private party. Following in the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London*, 545 US 469 (2005), Measure 39 may have a major impact on the shape of many urban renewal and other public-private development projects.

At the same time, Measure 39 contained another piece of "big news" that got less notice in the run-up to November's election. Measure 39 radically changes litigation fee recovery in *every* Oregon condemnation case.

A property owner's entitlement to attorney, appraisal, and other litigation fees in condemnation has long been measured against the yardstick of the condemning agency's "30-day offer." Under the pre-Measure 39 version of ORS 35.346(7)(a), a property owner was entitled to recover litigation fees as decided by the trial court using the procedural mechanisms and standards in ORCP 68 (see *Dept. of Trans. v. Gonzales*, 74 Or App 514, 703 P2d 271 (1985)) if the jury's verdict at trial exceeded the highest written offer made by the agency at least 30 days before trial. See *generally Dept. of Trans. v. Glenn*, 288 Or 17, 602 P2d 253 (1979) (discussing attorney fee recovery in condemnation). The practical effect of the "30-day" offer mechanism was that a public agency's "last dollar" typically went on the settlement table 30 days before trial. That date was also significant because other provisions in ORS 35.346 generally require both sides to exchange their appraisal reports by that point as well. With "all cards on the table," the "30-day" offer mechanism provided a powerful incentive to settle for both sides—the public agency wanted to avoid paying the property owner's litigation fees, which would accrue from the beginning of the case, and the property owner could compare the agency's offer against both sides' appraisal reports.

Section 4 of Measure 39, which is available on the Oregon Secretary of State's web site at www.sos.state.or.us/elections/nov72006/guide/meas/m39, retains the idea that the property owner must "beat" the agency's offer, but radically moves the temporal goalposts to the beginning of the case. Under Measure 39, ORS 35.346.7(a) was amended to make the gauge for litigation fee recovery the public agency's *initial written offer*, which under companion provisions in ORS 35.346 must generally be served at least 40 days before the case is filed. Initial offers have typically been less than "30-day" offers for a variety of reasons, including the fact that they are made without the benefit of seeing the property owner's appraisal and are not influenced by the dynamics of a looming trial date.

Like its predecessor, the new litigation recovery mechanism is not reciprocal. In other words, if the property owner "loses" at trial in the sense of not recovering as much as the agency's offer, the property owner does not pay the agency's attorney and expert fees; rather, the property owner simply absorbs its own and pays relatively nominal court costs to the agency (see ORS 35.346(8)).

Measure 39's change in the gauge for litigation fee recovery will likely alter the dynamics of Oregon condemnation cases in many ways that cannot be predicted or perhaps even anticipated by Measure 39's sponsors. Although the precise practical shape of those changes will play out over time, assuming no further changes by the Legislature, Measure 39 leaves little doubt that the dynamics of condemnation litigation will change in important ways for both agencies and property owners.

While lawyers for both agencies and property owners attempt to predict the shape of those future changes, it is important to note an interesting piece of history. Although most of the present generation of Oregon condemnation lawyers have known only the "30-day offer" mechanism, the system for litigation fee recovery that was in place before 1971 was remarkably similar to Measure 39. Former ORS 366.380(9), which governed fee recovery for the state's principal

condemner, the State Highway Commission (the predecessor to today's Department of Transportation), provided that a property owner could recover costs and disbursements, "'including a reasonable attorney's fee,'" unless "'it appears that the commission tendered the defendants before commencing the action an amount equal to or greater than that assessed by the jury . . . .'" *Dept. of Trans. v. Glenn*, 288 Or at 25 (quoting former ORS 366.380(9); *accord Highway Comm. v. Helliwell*, 225 Or 588, 590, 358 P2d 719 (1961) (interpreting former ORS 366.380(9)); *Highway Comm.* v. Lytle, 234 Or 188, 190, 380 P2d 811 (1963) (describing cost recovery under former ORS 366.380(9)).

Ironically, therefore, the answer to how the current change will affect us in the future may instead lie in the past.

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