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## **Court of Appeals Reverses Large Inverse Condemnation Award**

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In October, the Court of Appeals reversed a large inverse condemnation award in a hard fought case that may have broader legal application beyond its own facts. As this is written, Supreme Court review had not yet been sought, but seems likely.

*Hall v. ODOT*, 252 Or. App. 649, 288 P.3d 574 (2012), involved a 25 acre parcel abutting I-5 in Linn County. The property's only access was over an easement that led to the "Viewcrest" interchange. The property owners had attempted to develop the property for a number of years without success except for two billboards. At the same time, ODOT began evaluating the possibility of removing the interchange due to safety concerns. The effect would be to landlock the property. As a part of its evaluation, ODOT held public meetings and informed both the federal and local governments. While the public planning process was underway, the property owners sued ODOT on an inverse condemnation claim. The gist of their claim was that ODOT's public planning process that publicized the possibility of closing the interchange and landlocking the property had effectively devalued it by over \$5 million.

Following a jury trial that the Court of Appeals described as "contentious," the jury awarded the property owners nearly \$3.4 million and the trial court

followed with a fee and cost award of almost \$500,000. On appeal, ODOT argued that the trial court erred in allowing the claim to go to the jury because there was no dispute that some economically viable use of the property remained (such as the billboards) even assuming the impact of the publicity (which ODOT disputed). The Court of Appeals agreed and reversed the entire judgment, finding that the trial court should have granted ODOT's motion for a directed verdict.

In doing so, the Court of Appeals used the strict test employed for regulatory takings rather than the more relaxed standard used for physical takings and similar kinds of physical interference with property rights. The former requires that a plaintiff show that the governmental action involved deprived the owner of essentially all beneficial use of the property while the latter simply requires the plaintiff to show that the governmental action amounted to substantial interference with the use of the property. If Supreme Court review follows, it may turn on which of these two competing tests is the correct standard for what is often referred to as "condemnation blight," where the planning process for a major public project can affect the market value of properties in its path.

#### **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

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