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## **SB 794 Changes Fee Recovery in Condemnation**

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Fee recovery presents very real strategic issues for both property owners and agencies in condemnation. For an owner, the ability to recover attorney and appraisal fees can be a significant factor in deciding whether to challenge an agency's estimate of compensation. For an agency, the risk of having to pay fees can be an equally significant factor in weighing whether to settle or try an eminent domain case. For many years, the measuring point for fees was near the end of a case, with the owner entitled to fees if the jury awarded more than the agency's final written offer made 30 days before trial. By that point, both sides were required to have exchanged appraisals and typically had a reasonably good idea of what the evidence was likely to show at trial. In 2006, Measure 39 upended fee recovery by moving the measuring point to the beginning of the case, with the owner entitled to fees if the jury simply awarded more than the agency's required initial offer made before the case was even filed. This past session, the Legislature in SB 794 effectively moved the measuring point back to the end of the case—but with several novel twists.

Under SB 794, settlement offers must be made at least 10 days before trial. The agency's offer must include compensation for the property being taken and, if a partial taking, any severance damages. The offer may also include separate compensation for fees. The owner then has three days to accept the

offer. An acceptance must be filed with the court. If not accepted, the offer is deemed withdrawn and cannot be used at trial. The owner, however, is not left with an “all or nothing” choice.

If the agency’s offer did not include separate compensation for fees, then the owner can accept the offer and the court will then determine reasonable fees incurred before the agency served its offer. If the agency’s offer did include separate compensation for fees, then the owner can either accept the entire offer or just the portion for the property concerned. If the latter, the court will determine reasonable fees incurred before the agency served its offer.

If the owner rejects an offer outright and the jury awards more at trial, then the owner is entitled to recover all fees through trial. (In situations where the offer included separate amounts for the property and fees, the owner is only entitled to all fees if the combined total of the jury’s verdict and the amount in fees the owner incurred prior to the offer exceeds the total offered by the agency.) If the owner rejects an offer and the jury awards less at trial, then the owner is still permitted to recover reasonable fees incurred before the offer.

In the unlikely situation when the agency makes no later settlement offer, the owner is entitled to fees if the jury’s award exceeds the agency’s highest written offer before the case was filed.

In its general approach, SB 794 is similar to ORCP 54E, under which offers of compromise “cut off” further fees if not accepted. That is a change from

the “all or nothing” approach long used in Oregon condemnation practice. SB 794, however, is consistent with Oregon condemnation practice in that the agency is not entitled to recover its fees (beyond usually nominal statutory costs) if it prevails and reasonable fees in any given case are determined by the trial court under the general procedures set out in ORCP 68 and ORS 20.075. Fee recovery also continues to include attorney, appraisal and other expert expenses. SB 794 will become part of ORS Chapter 35, which governs condemnation procedure. It is effective on January 1, 2010 and applies to new cases filed after that date.

#### **ABOUT THE AUTHOR**

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