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Oregon Condemnation Procedure *Revisited*

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Condemnation procedure in Oregon varies significantly in key respects from other civil actions.[1] At the same time, for many years following the adoption of the General Condemnation Procedure Act in 1971[2] condemnation procedure was static. The past decade, however, has seen major changes in several central elements of condemnation procedure. This article outlines the unique facets of condemnation cases from the prefiling stage through trial and highlights the recent changes for the general practitioner who handles an occasional condemnation case.

There are two principal statutory sources of condemnation procedure applicable to public agencies[3] in Oregon.

The first is ORS Chapter 35, which creates the basic procedural framework governing condemnation cases. It is important to note at the outset that ORS Chapter 35 governs *direct* condemnation actions—where the government acts affirmatively under the power of eminent domain to acquire property. *Inverse* condemnation, by contrast, occurs when the government has taken property without invoking the power of eminent domain and the property owner affected brings an action against the government to recover compensation. Inverse condemnation actions in state court are governed solely by the Oregon Rules of Civil Procedure and not the specialized procedures

applicable to direct condemnations. *See generally Suess Builders v. City of Beaverton*, 294 Or 254, 656 P2d 306 (1982) (discussing inverse condemnation procedure); *accord Butchart v. Baker County*, 214 Or App 61, 75-76, 166 P3d 537 (2007).

The second is the portion of the federal Uniform Relocation Assistance and Real Property Acquisition Policy Act dealing with land acquisition, which is found at 42 USC §§ 4651-52[4] and which has been adopted as "guidance" for Oregon public agencies in their property acquisitions by ORS 35.510(3).[5] Neither the federal nor the state land acquisition policy provisions, however, create rights enforceable against a public agency in a condemnation action. *See State Dept. of Trans. v. Hewett Professional Group*, 321 Or 118, 129, 895 P2d 755 (1995).

Prefiling Procedure

When it becomes apparent during the planning of a public project that an agency will need to acquire property for the project, the public agency involved will typically commission a survey to create a specific legal description, possibly an environmental assessment and a title search to identify the owner and other interest holders.

The Legislature in 2003 adopted a significant clarification to a public agency's ability to temporarily enter property during the prefiling phase to perform both surveys and environmental testing. Although some agencies had at least

survey rights before the change, the ability to conduct invasive environmental testing under the prior survey and inspection provisions was less clear. Because a property's environmental condition is relevant to compensation under Oregon substantive valuation law (*see ODOT v. Hughes*, 162 Or App 414, 419-20, 986 P2d 700 (1999)) and might affect an agency's decision even to proceed with an acquisition, the Legislature created an expedited procedure, codified at ORS 35.220, for agencies to conduct testing with a property owner's consent or over the property owner's objection with a court order.[6] ORS 35.220 also creates a compensation mechanism to reimburse an owner for physical damage to the property caused by the testing or other substantial interference with the owner's use of the property. Compensable damage under ORS 35.220(3)(a) also includes "any damage attributable to the diffusion of hazardous substances found on the property[.]"

After the property needed has been identified and the owner located, the public agency must satisfy a number of procedural prerequisites before it can file a condemnation complaint.

First, under ORS 35.235(1)-(2) and *Highway Com. v. Hurliman*, 230 Or 98, 113, 368 P2d 724 (1962), the public agency's governing body must adopt a resolution or ordinance authorizing the acquisition of the property concerned before moving forward with a condemnation action. The resolution must declare generally that there is a need to acquire the property involved for a public project

that the public agency is authorized to carry out. The public agency's resolution is "presumptive evidence of the public necessity of the proposed use, that the property is necessary therefor and that the proposed use, improvement or project is planned or located in a manner which will be most compatible with the greatest public good and the least private injury." ORS 35.235(2). The public agency need not, however, have obtained all of the necessary land use permits required for the project before adopting its resolution or moving forward with condemnation. *See ODOT v. Schrock Farms*, 140 Or App 140, 144-46, 914 P2d 1116, *rev den*, 324 Or 176 (1996); *Powder Valley Water Control District v. Hart Estate Investment Company*, 146 Or App 327, 332, 932 P2d 101 (1997).

Second, under ORS 35.346(2), the public agency must appraise the property it plans to acquire before beginning negotiations with the owner. Under ORS 35.346(3), the public agency's appraiser must generally inspect the property and must provide the owner with at least 15 days' advance written notice of the inspection and the opportunity to accompany the appraiser on the inspection.

Third, under ORS 35.235(1), the public agency must attempt to acquire the property through negotiations before pursuing litigation. *See generally State Hwy. Comm. v. Freeman*, 11 Or App 513, 519-20, 504 P2d 133 (1972). ORS 35.346(2), in turn, generally prevents an agency from offering the property owner anything less than the agency's appraised value.

Fourth, ORS 35.346(1) requires the public agency to make a written offer to the property owner at least 40 days before filing a condemnation complaint. *See also Urban Renewal Agency v. Caughell*, 35 Or App 145, 148, 581 P2d 98 (1978) (noting that the offer under ORS 35.346(1) is a condition precedent to filing a condemnation complaint); *Dept. of Trans. v. Pilothouse 60 LLC*, ___ Or App ___, ___ P3d ___, 2008 WL 2120529 at *5 (May 21, 2008).[7] Under ORS 35.346(2), the public agency's initial written offer must be "accompanied by any written appraisal upon which the condemner relied in establishing the amount of compensation offered" if the amount involved is $20,000 or more. If it is less, then the agency is simply required to provide the owner with a written explanation of how it arrived at the compensation offered. In either event, the public agency must leave the initial written offer open for at least 40 days under ORS 35.346(4).[8]

Initial Pleadings and Early Possession

Under ORS 35.245(1), all condemnation actions—regardless of the amount involved—are generally handled in circuit court. If the amount involved is $20,000 or less, however, the owner may elect to have the compensation determined by court-sponsored binding arbitration under ORS 35.346(6)(a)-(b). If the amount at issue is between $20,000 and $50,000, then the owner may elect court-sponsored nonbinding arbitration under ORS 35.346(6)(c).

Venue under ORS 35.245(1) lies in the county where the property—or the greatest portion of it—is located.

ORS 35.245 and ORS 35.255 outline the elements the public agency must include in its complaint. The express statutory requirements include only a description of the property, a statement of ownership, the amount alleged to be the value of the property taken and any associated severance damages to the defendant's remaining property from the taking. *See generally Powder Valley Water Control District v. Hart Estate Investment Company*, 146 Or App at 330-32. In practice, however, public agencies usually also include a general description of the project for which the property is being acquired, the statutory authority for the taking, a reference to the condemnation resolution and an allegation that the agency has attempted to negotiate with the owner before filing the complaint. ORS 35.245(2) permits the public agency to join any person claiming an interest in the property as a defendant.

Of special note, in 1997 the Legislature amended ORS 35.346 to make it very difficult to reduce the agency's allegation of the compensation by later amendment of the complaint.[9] Under ORS 35.346(2), any such amendment must be by court order entered not later than 60 days before trial. Further, the court must find by clear and convincing evidence that the appraisal upon which the agency's original offer was based "was the result of a mistake of material fact

that was not known and could not reasonably have been known at the time of the original appraisal or was based on a mistake of law." *Id.*

ORS 35.295 governs the matters that must be included in a defendant's response. If a defendant has a legal defense to the taking, it must be raised by either a motion to dismiss or an affirmative defense. Defenses to the taking, which in practice are rare, usually focus on defects in the public agency's prefiling procedures or the public agency's need for the property. On this last point, a property owner challenging a public agency's need for the property must show that the agency abused its discretion. *See generally Wiard Memorial Park Dist. v. Wiard Community Pool*, 183 Or App 448, 452-58, 52 P3d 1080, *rev den*, 335 Or 114 (2002) (discussing the abuse of discretion standard in condemnation); *accord Emerald PUD v. PacifiCorp*, 100 Or App 79, 83-87, 784 P2d 1112, *on reh'g*, 101 Or App 48, 788 P2d 1034, *rev den*, 310 Or 121 (1990). Measure 39, adopted by the voters in 2006 and codified as to condemnation authority at 35.015, also imposes substantive limitations on the acquisition of some forms of property for subsequent conveyance to other private parties. The defendant's answer must also allege the value of the property being taken and any associated damages to the defendant's remaining property as a result of the taking.

If applicable, a property owner may also bring related counterclaims against the public agency within the context of the condemnation case. *See*

State ex rel Nagel v. Crookham, 297 Or 20, 22-24, 680 P2d 652 (1984). In *Nagel*, for example, the property owners asserted by way of a counterclaim that the value of their property had been diminished—or "blighted"—by the eight-year delay between the time that the public agency had initially announced its project and the point the agency actually filed its condemnation action.

In many instances, a public agency may wish to obtain possession of the property before the eventual trial on valuation so that its project can go forward in the interim. If so, it must deposit the alleged value of the property into the court under ORS 35.265. In 2005, the Legislature adopted a significant clarification on the method for acquiring early or "immediate" possession. ORS 35.265 is silent on whether simply depositing the alleged value of the property was, in and of itself, sufficient to entitle the public agency to possession without a court order, and practices varied among agencies in this regard.[10] Under the change enacted in 2005 and codified at ORS 35.352,[11] a public agency is now permitted to simply serve a notice on the defendants of its intent to take immediate possession (subject to the deposit requirement). At that point, the defendants have 10 days to file a written objection. The grounds for objection, however, are narrow: (1) whether the condemnation is "legal"; and (2) whether the agency has "acted in bad faith, engaged in fraud or engaged in an abuse of discretion under a delegated authority." If no objection is made, the public agency can simply apply for an order granting possession. If an objection is made, the court is to consider

it "expeditiously." In either event, a defendant is not precluded from asserting legal defenses to the taking in its answer for separate resolution by the court under ORS 35.295. If early possession is sought and allowed, the property owner may withdraw the public agency's deposit under ORS 35.285 without prejudice to any later argument the owner may make on value.

Discovery

Discovery in condemnation cases is, at one and the same time, more confined than a typical commercial case and more expansive.

It is more confined in the sense that the focus of most condemnation cases (absent a challenge to the taking itself) is solely on valuation. Discovery, therefore, typically involves an investigation of the possible uses of the property, the owner's plans for the property, any environmental or other permitting issues affecting the property and past sales or efforts to sell the property. Under a limited exception to OEC 701, a noncorporate owner of property can generally offer an opinion on the property's value. *Highway Com. v. Assembly of God*, 230 Or 167, 177, 368 P2d 937 (1962); *Dept. of Transportation v. El Dorado Properties*, 157 Or App 624, 636-38, 971 P2d 481 (1998); *see also Northwest Natural Gas Co. v. Shirazi*, 214 Or App 113, 120, 162 P3d 367, *rev den*, 343 Or 223 (2007) (allowing an owner of a nearby parcel to testify about the value of his property). Public agencies, therefore, often take property owners' depositions on this point.

Discovery is more expansive than in a typical commercial case because the parties are now required to exchange appraisal reports before trial. Until 1997, there was generally no expert discovery in Oregon condemnation cases—just as in other civil cases. *See Brink v. Multnomah County*, 224 Or 507, 516-18, 356 P2d 536 (1960) (cloaking appraisal reports within the attorney-client privilege); *City of Portland v. Nudelman*, 45 Or App 425, 432-34, 608 P2d 1190, *rev den*, 289 Or 275 (1980) (noting that the work product rule would protect appraisal reports prepared in anticipation of litigation). Because expert appraisal testimony is usually *the* key element of a condemnation trial, the limitation on expert discovery gave the phrase "trial by ambush" real meaning in a condemnation case.

In 1997, however, the Legislature brought expert discovery to Oregon condemnation cases.[12] Under revisions to ORS 35.346, the parties to a condemnation case are now required to disclose appraisal reports at three distinct points:

- As noted earlier, the public agency's prelitigation offer in acquisitions valued at $20,000 or more must be accompanied under ORS 35.346(2) by the appraisal report upon which the agency based its offer.
- If the property owner rejects the agency's offer and the acquisition moves into litigation, the property owner must provide the agency

with its appraisal report at least 60 days before trial or arbitration under ORS 35.346(4).

- If a case proceeds to trial, ORS 35.346(5)(b) requires each side to provide the other with all other appraisal reports obtained "as part of the condemnation action"—whether they will be used at trial or not.

The penalty under ORS 35.346(5)(a) for the failure to follow these exchange requirements is that the appraisal involved cannot be used at trial. In *Dept. of Trans. v. Stallcup*, 341 Or 93, 138 P3d 9 (2006), the Supreme Court held that the appraisal exchange requirement only applies to completed reports, not drafts. However, under ORS 35.346(8), if an appraisal "relies on a written report, opinion or estimate of a person who is not an appraiser, a copy of the written report, opinion or estimate must be provided with the appraisal" and if an appraisal "relies on an unwritten report, opinion or estimate of a person who is not an appraiser, the party providing the appraisal must also provide the name and address of the person who provided the unwritten report, opinion or estimate."

Trial

Several facets of condemnation procedure vary significantly from other civil cases at trial.

First, ORS 35.235 and the Court of Appeals' decision in *Emerald PUD v. PacifiCorp*, 100 Or App 79, in effect bifurcate the trial if the defendant challenges the public agency's right to take the property concerned. In that event, the trial court determines the issue of the right to take in a preliminary evidentiary proceeding. As noted earlier, under ORS 35.352(6) this preliminary hearing may—but not necessarily—coincide with any hearing on early possession. If the public agency prevails on the right to take, then the question of value is reserved for the jury under ORS 35.305(1).

Second, under ORS 35.305(2), neither party bears the burden of proof on the issue of value. *See Unified Sewerage Agency v. Duyck*, 33 Or App 375, 378, 576 P2d 816 (1978).

Third, because neither party bears the burden of proof on value, the defendant can elect under ORS 35.305(1) to proceed first with the presentation of evidence during the valuation phase and can present both opening statement and closing argument first as well. This election, however, must be made at least seven days prior to trial.

Fourth, ORS 35.315 permits either side to request a jury view of the property involved. If requested, the view is mandatory. The jury view typically follows opening statements.

Fifth, ORS 35.346(7)(a) provides for a defendant's recovery of both attorney and expert witness fees (including appraisal costs) if the amount

awarded at trial exceeds the public agency's initial written offer. Litigation cost recovery under ORS 35.346(7)(a) is not reciprocal; rather, it only runs in favor of a prevailing property owner. Litigation cost recovery in condemnation was altered in a major way by Measure 39, adopted by the voters in 2006 now codified as to fee awards at ORS 35.346(7)(a). Before that change, the trigger for fee recovery was whether the jury awarded the property owner more than the public agency's highest written offer made at least 30 days before trial. *See* 2007 Or Laws, ch 1, § 4(7)(a). Again before the change in 2006, initial offers were typically less than "30-day" offers for a variety of reasons, including the fact that they were made without the benefit of seeing the property owner's appraisal and were not influenced by the dynamics of a looming trial date. As noted, Measure 39 moved the trigger for litigation cost recovery from near the end of the condemnation process to the beginning. It is not yet possible to accurately gauge the ultimate practical impact of this amendment, but ironically this change returns the cost recovery mechanism to what it was for the state's principal condemner, the State Highway Commission (which is the predecessor to today's Department of Transportation), before the General Condemnation Procedure Act was adopted in 1971. *See 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) (same).

Finally, once the jury has determined the overall compensation the public agency must pay as a result of the taking, any disputes among the defendants concerning their respective shares of the overall award are determined by the court in a supplemental proceeding under ORS 35.285(1). *See Dept. of Transportation v. Weston Investment Co.*, 134 Or App 467, 473-75, 896 P2d 3 (1995).

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[1] Federal condemnation procedure is regulated by Federal Rule of Civil Procedure 71.1.

[2] 1971 Or Laws, ch 741.

[3] Some private corporations, such as utilities and railroads, have also been given condemnation authority by statute. The procedures applicable to private condemners are generally similar to, but not precisely the same as, those governing public condemners. *See, e.g.,* ORS 35.235(3) (effect of condemnation resolutions) and ORS 35.275 (early possession requirements). Except as noted, this article focuses on procedures applicable to public condemners.

[4] The federal statutes are supplemented by corresponding regulations at 49 CFR § 24.101, *et seq*.

[5] ORS 35.510(3) was formerly found at ORS 281.060(3). The Legislature in 2003 incorporated several sections of ORS Chapter 281, which dealt with other facets of governmental property acquisition, into ORS Chapter 35. *See* 2003 Or Laws, ch 534, § 1.

[6] 2003 Or Laws, ch 477, § 2.

[7] Owners and others having possessory interests in the property involved may also be eligible for relocation benefits and other related assistance under 42 USC § 4601, *et seq.*, and ORS 35.500, *et seq*.

[8] ORS Chapter 35 formerly contained a "20-day" pre-filing offer requirement. *See* 2003 Or Laws, ch 476, § 1. The Court of Appeals held in *Urban Renewal Agency of Salem v. Caughell*, 35 Or App at 148 that the "20-day offer" requirement was waived if the property owner did not object in the initial response. Since 1978, however, the Legislature also added a requirement that a public agency generally provide an appraisal along with its initial written offer. *See* 1997 Or Laws, ch 797, § 1, codified at ORS 35.346(2). *Caughell*'s conclusion that the prefiling offer requirement is waived if not raised in the initial response has not been revisited since the Legislature revised both the timing and content of the initial offer. *Pilothouse 60* does not address this issue as the property owners raised the lack of an offer in their answer, which led to the dismissal of the state's action.

[9] See 1997 Or Laws, ch 797 § 1.

[10] In *Harder v. Dept. of Fin. and Admin.*, 1 Or App 26, 27-29, 458 P2d 947 (1969), the Court of Appeals noted that due process requires a hearing and judicial approval of early possession at least in those cases where the party in possession of the property refuses to vacate.

[11] *See* 2005 Or Laws, ch 565.

[12] *See* 1997 Or Laws, ch 797, § 1