Oregon State Bar

OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 30, No. 4
October 2008

Also available online

Highlights

Appellate Cases -- Real Estate

■ *COURT OF APPEALS UPHOLDS DISMISSAL OF CONDEMNATION CASE*

In May, the Oregon Court of Appeals issued a decision touching on important aspects of both substantive condemnation law and eminent domain procedure. *State, ex rel. Department of Transportation v. Pilothouse 60, LLC*, 220 Or. App. 203, 185 P.3d 487 (2008), involved a road widening project in Medford. The Oregon Department of Transportation (ODOT) was acquiring frontage strips along several adjacent parcels. One of the parcels was owned by Pilothouse 60, a limited liability company. Another was owned by a couple named Jensen, who also owned Pilothouse 60. The former was occupied by a vacant restaurant and the latter was used by an operating motel.

The Pilothouse 60 parcel had two "curb cut" driveways and the Jensen parcel had one. The two businesses shared a parking lot and a total of three access points. As a result of the project, the Jensens' individual parcel would lose its sole access point. During the early phase of ODOT's efforts to acquire the necessary strip of property, Pilothouse 60 owned both parcels. After rejecting ODOT's initial offer to purchase a strip along both parcels, Pilothouse 60 transferred ownership of one parcel to the Jensens. Thereafter, ODOT treated the parcels as one in its pre-filing negotiations rather than sending separate offers to Pilothouse 60 and the Jensens for the individual takings. After ODOT filed its condemnation case against both, the defendants moved for summary judgment arguing that ODOT had failed to present them with individual pre-filing offers under ORS 35.346(1) and that, as a result, ODOT lacked the statutory authority to proceed. The trial court dismissed the case on that basis and the Court of Appeals affirmed.

In doing so, the Court of Appeals first addressed the predicate issue of substantive condemnation law: were the parcels to be treated as one or two? *City of Salem v. H.S.B.*, 302 Or. 648, 733 P.2d 890 (1987), generally requires proof of both "unity of use *and* unity of ownership," *id.* at 210 (emphasis added), to treat two physically distinct parcels (even when they are contiguous) as one. Like the trial court, the Court of Appeals in *Pilothouse 60* found that the two parcels were under separate ownership despite their common owners. The court relied on *City of Salem* in refusing to disregard entity form in making this determination.

The equally important procedural ruling flowed directly from the substantive one. ORS 35.346(1) requires public agencies to serve the owners of property being acquired with an offer at least forty days before filing a condemnation complaint. The Court of Appeals, like the trial court, found that the defendants had not received separate offers on their individual parcels. It also agreed that service of an offer was a condition precedent to the exercise of the power of eminent domain—at least when the owner insisted on strict compliance.

The Court of Appeals affirmed the dismissal. *Pilothouse 60*, 220 Or. App. at 215. Although the dismissal was without prejudice to filing a new case, dismissed condemnation actions have been construed as "abandoned" under ORS 35.335 and entitle the owner to recover attorney and expert fees. *Pilothouse 60*, therefore, also serves as a reminder to agencies of the practical importance of strictly adhering to the procedural requirements of the condemnation code.

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State, ex rel. Dept. of Transp. v. Pilothouse 60, LLC, 220 Or. App. 203, 185 P.3d 487 (2008)