

■ Oregon Supreme Court Discusses Common Law Access Rights in Condemnation

On the last day of December, the Oregon Supreme Court found that closure of an abutting property's common law access rights to a state highway was not compensable in condemnation—at least where reasonable alternative access remained. *ODOT v. Alderwoods (Oregon), Inc.*, involved a commercial property in Tigard fronting on State Highway 99W. The property had two driveways onto Highway 99W and two onto an adjacent city street. As a part of a project on Highway 99W, the Oregon Department of Transportation eliminated the two driveways onto the highway. The two driveways onto the adjacent city street remained.

ODOT condemned both a temporary construction easement to close the driveways and reconstruct the adjoining sidewalk and also any access rights the property owner claimed to Highway 99W. The property owner did not have a permit (or a deed right) for the two driveways and had not applied for a “grandfathered approach” exception for driveways that existed before 1949. Current safety regulations would not have allowed the driveways because they were less than the required distance from a nearby interchange.

In a pretrial motion, ODOT argued that any evidence on the diminished value of the property resulting from the access loss should be excluded as irrelevant because it did not constitute a compensable taking. The trial court agreed. The parties then stipulated to the compensation for the temporary construction easement and the property owner appealed on the access issue. In an equally divided decision, the Oregon Court of Appeals affirmed.

The Oregon Supreme Court began its review by synthesizing three general principles from its prior decisions. First, it readily noted that a property owner has a common law right of access to public roads, which it characterized as an “easement.” Second, the court observed that a common law right of access is limited and is subject to the government's interest in regulating the safe use of public roads. Third, it found that an abutting owner's common law right of access only involved reasonable access and not a particular or most convenient route. The supreme court then summarized these three principles in the takings context: “When governmental action interferes with an abutting landowner's right of access for the purpose of ensuring the safe use of a public road, and the abutting landowner retains reasonable access to its property, no compensable taking of the property owner's right of access occurs.”

Applying these general principles, the supreme court affirmed the trial court and the court of appeals. In doing so, the court found that on the record before it, there was no compensable taking as a matter of law because reasonable access to the property remained. The supreme court also rejected a secondary argument that ORS 374.035, which addresses ODOT condemnation authority, vested the property owner with any compensable rights beyond those available under the Oregon Constitution.

Because the Oregon Supreme Court's decision in *Alderwoods* turns on whether reasonable access remains, its analytical framework suggests that a more significant access restriction might trigger a compensable taking. Further, although the high court concluded that on the record before it the issue of reasonable access was one of law rather than a fact issue for a jury, it pointedly reserved for another day whether that will always be the case: “We save for another day the question of whether the reasonableness of remaining access could present a factual question under circumstances not present in this case, such as when reasonable minds could disagree about whether a property owner retains an adequate means of ingress and egress.”

ODOT v. Alderwoods (Oregon), Inc., 358 Or. 501 (Dec. 31, 2015).

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