

Timing Is (Almost) Everything

Why Appraisal Exchange in Condemnation Needs Fixing

By Mark J. Fucile of Stoel Rives LLP

In a condemnation trial, appraisers are usually the stars of the show. Although there are often important issues that influence the appraisal testimony—such as whether the property contains wetlands or whether an upward zone change is probable—ultimately everything comes down to valuation. In fact, the jury in a typical condemnation case only receives

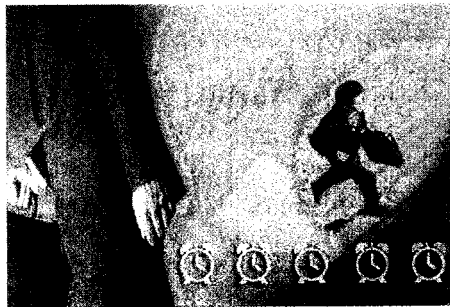


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a one-line verdict form asking it to fill in a number representing constitutional “just compensation” for the acquisition involved and any associated damages to the owner’s remaining

property. Given this context, knowing what the appraisers are going to say at trial is critical. Yet, until 1997, condemnation trials in Oregon shared a key element with their other civil counterparts—there was no expert disclosure or discovery. Instead, it was “trial by ambush,” with the accent on “ambush” in light of the important role played by appraisal testimony in these cases.

In many trials, neither side even knew *who* was going to be testifying for the opposing party, let alone *what* they were going to say. Instead, the appraisers would simply walk through the door



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of the courtroom, take the witness stand and present their testimony based on elaborately prepared written appraisal reports. Opposing counsel would then usually be afforded a few minutes to thumb through the appraiser’s report and work file before beginning cross-examination.

In 1997, the Legislature decided to take the “ambush” out of condemnation trials. The Legislature recognized that “trial by ambush” has long been a hallmark of Oregon civil practice. But, it concluded this was inappropriate in eminent domain cases because they were not simply disputes between two private parties. Rather, the condemnation process is how

a citizen’s right to “just compensation” under the Federal and State Constitutions is determined when the government takes private property involuntarily. In short, the Legislature found that vindicating citizens’ rights shouldn’t be a game.

In 1997, therefore, the Legislature passed Senate Bill 1036, which amended several key passages of the Oregon Condemnation Code that are found in ORS Chapter 35.1.² In doing so, the Legislature created three interlocking rings of appraisal disclosure:

- Under what became ORS 35.346(2), a condemning government agency is now required to provide the property owner with the appraisal report upon which the agency based its statutory pre-filing offer at the same time that the pre-filing offer is presented.³
- Under what became ORS 35.346(4), the property owner is required to provide the agency with its appraisal reports by at least 60 days before trial.⁴
- Under what became 35.346(5)(b), the Legislature included a “catch-all” provision requiring disclosure of all appraisals.⁵

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Senate Bill 1036 also included a remedial provision for the failure to exchange appraisals. In what is now ORS 35.346(5)(a), the failure by either the agency to provide its initial appraisal report or the property owner to provide its reports "shall prohibit the use of the appraisal in arbitration or at trial."⁶

So, you may be asking, what is the problem? The problem is this: Although Senate Bill 1036 clearly addressed the initial appraisal report that a government agency must now provide a property owner at the outset of a condemnation case and the property owner's appraisal reports that must be exchanged 60 days before trial, it is ambiguous as to the point that the government agency must provide the property owner with revised versions of the original reports or completely new reports.

Given the critical role of appraisal testimony at condemnation trials, this ambiguity has very real practical consequences. The appraisers who prepared the original precondemnation reports often completely revise their analysis to take into account such factors as new "comparable sales", changes in the condition of the property and new land use regulations that may affect value. Further, on more complex cases, government agencies often commission a second—and in some cases a third—appraisal after litigation has begun.

Therefore, unless the government agency provides these revised or new appraisals to the property owner before trial, the "ambush" is put back into the trial. Moreover, it is "ambush" with a perverse twist—only the government is doing the "ambushing."

This is clearly not what the Legislature had in mind. Rather, in the words of Senate Bill 1036's sponsor, Senator Neil Bryant of Bend, the Legislature contemplated full reciprocity of exchange:

"This bill [Senate Bill 1036] is a bill that I am happy to sponsor to correct a tactic that has been used by condemning attor-



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neys over the past few years that creates an injustice, I think, to the land owner. It also eliminates in condemnation proceedings trial by ambush. It requires full disclosures of appraisals ahead of time. Right now if you try a condemnation matter, you get the appraisal of the other side as that appraiser is taking the witness stand or shortly after they testify. We did away with that in the tax court on valuation issues many years ago, and this bill will also do that."⁷

Most government agencies in Oregon exchange their revised and new appraisal reports at 60 days before trial as well. But, a few—most notably and ironically the State itself—take the position that they only have to produce their revised and new reports at trial, or, in essence, they are free to "ambush" the property owner.

There is no appellate authority yet on this issue. But, it has been litigated at the trial court level in several counties around the State. The government agencies have always lost—with the trial courts either finding Senate Bill 1036 required advance disclosure of the reports involved or that the court could do so un-

der its inherent ability to regulate pre-trial discovery under UTCR 6.010.⁸ Nonetheless, even after being sanctioned in one case,⁹ the government agencies involved continue to advance the view that they are free to "ambush."

So what's the solution? Governmental and property owners' counsel could continue to litigate this issue at the trial court level and simply wait for appellate authority to develop. Governmental counsel could continue to fight their rearguard action by arguing that the Legislature had the opportunity to clarify when the government's revised and new appraisal reports must be exchanged and, for whatever reason, did not. Property owners' counsel, by contrast, will continue to rely on the clear record that the Legislature contemplated full reciprocity of exchange before trial.¹⁰

As with most discovery issues, however, an appellate decision is not likely to focus squarely on this issue unless it arises in the procedural context of a mandamus petition. Ironically, therefore, because the government agencies involved have uniformly lost this issue at the trial court level, property owners have not had to seek appellate review by way of mandamus. At the same time, litigating this issue repetitively imposes costs on both the parties and the courts.

The Legislature, therefore, would be wise to amend ORS 35.346(5) further to explicitly require government agencies to provide property owners with all of their revised or new appraisal reports at the same point property owners must produce their reports—60 days before trial. The Legislature clearly had full reciprocity of exchange in mind in 1997 when it enacted Senate Bill 1036. With a complex and, frankly, somewhat esoteric area like condemnation procedure, however, it is not particularly surprising that the Legislature did not fully grasp the significant role that government agencies' revised or second appraisals play at trial. Having spoken forcefully in 1997, the Legislature should speak forcefully once again. Be-

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cause property owners' constitutional right to just compensation is at stake, the Legislature should take the "ambush" out of condemnation trials once and for all. □

(Endnotes)

- 1 Senate Bill 1036 was sponsored by State Senator Neil Bryant of Bend. See Final Status Report for Senate and House Measures, 69th Or Legislative Assembly, Reg Sess (1997) at S-201. It was enacted as Chapter 797 of the 1997 Oregon session laws and, as noted, was codified in ORS Chapter 35. The complete legislative record, including committee hearing tapes, is available from the State Archives.
- 2 Senate Bill 1036 amended several other important aspects of Oregon condemnation procedure as well—including altering the timing of required precondemnation offers of settlement by public agencies and placing controls on public agencies' ability to "amend down" the amount stated in a complaint as just compensation.
- 3 See Or Laws 1997, ch 797, § 1(2).
- 4 *Id.* § 1(4).
- 5 *Id.* § 1(5)(b).
- 6 *Id.* § 1(5)(a).
- 7 Testimony of Senator Bryant before the House Transportation Committee on June 16, 1997.
- 8 See *State v. Henderson*, Josephine County Circuit Court Case No. 98-CV0267; *State v. Suva*, Washington County Circuit Court Case No. C97-1314CV; *State v. Houston*, Washington County Circuit Court Case No. C00-0402CV; *State v. Zemke*, Jefferson County Circuit Court Case No. 99CV-0028; *Marion County District 24J v. Taylor*, Polk County Circuit Court Case No. 99P1675; *Oregon City School District No. 62 v. Hess*, Clackamas County Circuit Court Case

- No. CCV0012588; *City of Medford v. Dubs*, Jackson County Circuit Court Case No. 001312-E-2; *State v. Stearns*, Washington County Circuit Court Case No. C00-0319CV; *State v. SIMA Mountain View LLC*, Deschutes County Circuit Court Case No. 01CV0284AB. The author litigated this issue against the State in the Spring of this year. Despite being presented with most of the preceding trial court opinions, the State offered no trial court opinions in response supporting the proposition that it could withhold its revised or new appraisal reports until trial.
- 9 See *State v. Stearns*, Washington County Circuit Court Case No. C00-0319CV, *supra*, Order on Defendant's Motion to Compel, filed July 25, 2001, at 2.
- 10 ORS 174.020(b) provides unequivocally that "[t]o assist a court in its construction of a statute, a party may offer the legislative history of the statute." ORS 174.020(c), in turn, reads, in relevant part: "A court shall give the weight to legislative history that the court considers to be appropriate." These provisions, which were enacted by the Legislature in 2001, afford a somewhat broader approach to the use of legislative history than the Supreme Court took in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) ("*PGE*"). In *PGE*, the Supreme Court took the view that a reviewing court should only resort to legislative history when the intent of the Legislature was not plain on the face of the statute involved. Here, property owners' counsel have generally argued that consideration of legislative history is required under *PGE* in any event because ORS 35.346(5)(b) is ambiguous on its face as to the point at which a government agency must provide a property owner with its revised or new appraisal reports prior to trial.

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