

EMINENT DOMAIN

State of Oregon

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LAST REVISION: 12/29/2005

Who Is Eligible To Condemn?

State
State Agencies
Cities
Counties
Departments or Municipal Corporations such as:
 Port Authorities
 Irrigation Districts
 Railroads
 Electric Companies
 Gas Companies
 School Districts
 Community College Districts
 Transit Districts
 Metropolitan Service Districts
 People's Utility Districts
 Pipeline Companies
 Port Authorities
 Service Districts
 Sanitary Districts and Authorities
 Water Control Districts
 Drainage Districts and Authorities
 Water Control Companies
 Utility Cooperatives
Other Public Bodies
Certain Private Corporations

What Can Be Condemned?

Real Property (including trees, crops, mineral deposits). *Pape v. Linn County*, 135 Or 430, 438, 296 P65 (1931); *State Highway Com. v. Arnold*, 218 Or 43, 76, 341 P2d 1089, 343 P2d 1113 (1959).

Permanent and Temporary Easements. *Greater Baton Rouge Airport Dist. v. Hays*, 339 So2d 431, 439 (La App 1976); *Provo City Corp. v. Knudsen*, 558 P2d 1332, 1334 (Utah 1977); *US. v. 8.41 Acres of Land, Situate in Orange Cty.*, 576 F Supp 685, 690 (ED Tex 1983); *Kimball Laundry Co. v. US.*, 338 US 1, 7-8, 69 S Ct 1434, 93 L Ed 1765 (1949).

Access Sweet v. Irrigation Canal Co., 198 Or 166, 191, 254 P2d 700, 256 P2d 252 (1953); *State Highway Com. v. Burk*, 200 Or 211, 228, 265 P2d 783 (1954); *Oregon Investment Co. v. Schrunk*, 242 Or 63, 69, 408 P2d 89 (1965).

Personal Property can be condemned, but in order for just compensation to be paid, the property must be directly damaged by the government action rather than damaged as a consequence of the action. *Hawkins v. City of La Grande*, 102 Or App 502, 507, 795 P2d 556 (1990); *Dillon v. United States*, 230 F Supp 487, 491-492 (D Or 1964). *See also Coos Bay Oyster Coop. v. Highway Com.*, 219 Or 588, 348 P2d 39 (1959).

Public property is generally not subject to condemnation by another public body without specific statutory authority. *Road Company v. Tillamook Co.*, 31 Or 1, 5, 48 P 465 (1897); *Steelhammer v. Clackamas Co.*, 170 Or 505, 516, 135 P2d 292 (1943). *See* 21 Op Att’y Gen 103 (Or 1942).

The Condemnation Proceedings:

Condemnation actions in Oregon are governed by the General Condemnation Procedure Act, ORS chapter 35.

Preliminary Responsibilities:

Surveys and Descriptions: An accurate legal description of the property to be acquired must be made initially. ORS 223.010, 366.365, 772.010; *Highway Com. v. Hurliman*, 230 Or 98, 105-106, 368 P2d 724 (1962).

Title Search: Legal title of the subject property must be established (including discovering and documenting all liens, encumbrances, easements, restrictions and conditions affecting title, ownership, and use of the property acquired). ORS 35.235(1); *Highway Com. v. Hurliman*, 230 Or 98, 107, 113, 368 P2d 724 (1962).

Declaration of Public Necessity: Whenever, in the judgment of the condemning authority, it is necessary to acquire the property for an authorized purpose, the agency must first declare by resolution or ordinance the necessity and purpose for which the property is required. ORS 35.235(1); *Highway Com. v. Hurliman*, 230 Or 98, 107, 113, 368 P2d 724 (1962).

Appraisal: The property should be appraised to determine the just compensation for the proposed taking.

Negotiations for Purchase: The condemning authority must first attempt to agree with the owner as to the compensation to be paid for the property. ORS 35.245(1); *State Highway Com. v. Efem Whse. Co.*, 207 Or 237, 244, 295 P2d 1101 (1956).

Formal Procedure Requirements:

Resolution of Public Necessity: a formal resolution or ordinance describing the land or interest therein to be acquired, the purpose for which the property is sought, and declaring the necessity of the proposed acquisition and project for public use and benefit must be adopted by the condemning authority. *Highway Com. v. Hurliman*, 230 Or 98, 107, 368 P2d 724 (1962).

Advance Written Notice of Appraisal Inspection: before appraising the property, a condemnor must give the property owner at least 15 days' written notice of the planned inspection unless otherwise agreed. ORS 35.346(3).

Letter of Offer: the condemner is required to make a written offer to the property owner, at least 20 days before filing a condemnation action, to purchase the property and pay just compensation for it and any compensable damages to remaining property. ORS 35.346(1). The offer must be accompanied by any written appraisal on which the condemnor relied in establishing the amount of compensation offered. ORS 35.346(2).

If the condemnor fails to give the owner a copy of the appraisal, the condemnor is prohibited from using the appraisal in arbitration or at trial. ORS 35.346(5)(a).

However, if the condemnor determines that the amount of just compensation is less than \$20,000, the condemnor, in lieu of a written appraisal, may give the property owner a "written explanation of the basis and method by which the condemnor arrived at the specific valuation of the property." ORS 35.346(2). The owner has at least 40 days to accept or reject the offer. ORS 35.346(4).

Basis for Just Compensation:

Whenever any project is undertaken that will result in acquiring real property, notwithstanding any other statute, charter, ordinance, rule, or regulation, the public entity must be guided by the land acquisition policies of the Federal Uniform

Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC §§4651-4655. ORS 281.060.

The federal act requires the acquiring agency to provide the property owner with a written statement of and summary of the basis for the amount established as just compensation. When appropriate, the just compensation for the real property acquired and for damages must be separately stated.

Oregon law requires the disclosure of appraisals. ORS 35.346(2), (4)-(5). If the condemnor determines that the amount of just compensation due is more than \$20,000, the appraisal on which the condemnor relies must be provided with the required offer of compensation. ORS 35.346(2).

If the owner rejects the condemnor's offer and obtains a separate appraisal, the owner must give the condemnor a copy of that appraisal not less than 60 days before trial or arbitration. ORS 35.346(4). A party who fails to provide a required appraisal is prohibited from using the appraisal in arbitration or at trial. ORS 35.346(2), (4)-(5). If the owner and the condemnor cannot agree on the amount of compensation and proceed to trial, each party must provide to every other party a copy of every appraisal obtained by the party as part of the condemnation action. ORS 35.346(5)(b).

The Condemnation Proceeding:

If the condemning authority is unable to agree with or locate the owner of the property, a condemnation action may be commenced in the circuit court of the county in which the property, or most of the property, is located. ORS 35.245(1).

If a condemnation action is filed, the owner may elect to have compensation determined by binding arbitration if the total amount of compensation claimed does not exceed \$20,000. The owner must give the condemnor notice of the election of binding arbitration at least 90 days before the arbitration hearing is scheduled. ORS 35.346(6)(a).

No party may request a trial de novo after the filing of the arbitrator's decision and award; however, within 20 days thereafter, any party may file with the court exceptions to the award for reasons specified in ORS 36.355.

The court will rule on the exceptions and a party may appeal from the court's judgment on the exceptions as provided in ORS 36.360 and a party may appeal from the court's judgment on the exceptions as provided in ORS 36.365. Except as provided in ORS 35.346(6)(b), no party may appeal from the arbitrator's award and judgment if the owner elects binding arbitration in lieu of trial. ORS 35.346(6)(b).

If the total amount of compensation claimed is more than \$20,000 but less than \$50,000, the owner may elect to have compensation determined by nonbinding

arbitration under the applicable provisions of ORS 36.400-36.425. ORS 35.346(6)(c).

Physical possession of the property condemned may be taken after the complaint is filed, or earlier with the owner's consent. Precondemnation possession is usually achieved by agreement and execution of a permit of entry. ORS 35.265 provides that when a public condemning authority commences an action for the condemnation of property and the immediate possession of the property is considered necessary, the estimated just compensation must be deposited with the clerk of the court for the use and benefit of the defendants, pending final adjudication of the action. An order of immediate possession is ordinarily not a final order, because it does not determine the plaintiff's right to ownership of the property or the amount of just compensation to be paid for the property. *City of Portland v. Anderson*, 248 Or 201, 202, 432 P2d 1020 (1967). If the condemnor is a private party, the condemnor may apply to the court for an order to occupy the property in question. ORS 35.275 (1). At the hearing on the motion, the court may grant the motion if it is in the public's interest and the interests of the owners will be protected. If the motion is granted, the condemnor may be required to deposit a surety bond. ORS 35.275 (2).

Trial:

The trial is conducted in the same order and manner as a civil action in the circuit court, except that upon notice, the defendant has the option of being the last to present evidence. ORS 35.305 (1). The trier of fact in a condemnation proceeding is a jury. *Id.* Upon assessment of the compensation by the jury, the court will give a judgment appropriating the property to the condemnor, conditioned on the condemnor's paying into court the compensation assessed by the jury. After such payment is made, the judgment is effective to convey the property and right of possession to the condemnor. ORS 35.325

Appeal:

Either party may appeal from the judgment in a condemnation case. However, the appeal does not stay the proceedings. The condemning authority still may take possession of the property and use it for the purposes for which it is being appropriated. If the defendant prevails on appeal, the defendant may recover reasonable attorney fees. ORS 35.355. If the defendant withdraws the compensation awarded by the court or jury, the defendant waives the right of appeal. ORS 35.365. Prior withdrawal of the advance deposit made by the condemnor to secure immediate possession of the property does not waive the defendant's right of appeal. ORS 35.285(2).

Challenging The Condemnation:

Inverse Condemnation:

The substantive law of eminent domain and condemnation applies generally to inverse condemnation actions. *Tomasek v. Oregon Highway Com'n*, 196 Or 120, 248 P2d 703 (1952). The action may be commenced without notice by filing a complaint and causing service of process upon the appropriate public officer, agent, or employee. *Id.* The applicable statute of limitations in an inverse condemnation action allows six years within which to commence an action against a condemning authority for interference with or injury to any interest of another in real property. *Suess Builders v. City of Beaverton*, 294 Or 254, 267-268, 656 P2d 306 (1982).

If a condemnor fails to use the acquired property or any portion of it for the specified public purpose, within the time specified in an agreement or judgment, and the prior owner has not waived the right to repurchase the property, the condemnor must offer the property to the prior owner. ORS 35.390 (1). If the condemnor finds that it will be unable to use all or a portion of the real property for the specified public purpose within the period set by the agreement or judgment, the period may be changed. The condemnor must notify the prior owner and negotiate such a request. ORS 35395 (2). If the condemnor and prior owner cannot agree on the proposed change in period, the condmnor may petition the circuit court for to determine whether or not the proposed change is reasonable in the public interest. ORS 35.395 (4). The prior owner can contest any proposed change by the condemnor in the public purpose in the same manner. ORS 35.410.

Just Compensation Issues:

Valuation of real property is to be based on its highest and best use. *Dept of Trans. v. Lundberg*, 312 Or 568, 574, 825 P2d 641 (1992); *Highway Comm. v. Superbilt Mfg. Co.*, 204 Or 393, 412, 281 P2d 707 (1955). Highest and best use is the use that will return the greatest economic benefit to the owner. The highest and best use may be other than the current use of the property if it is reasonably probable that the property has actual potential for higher and better use. *Dept of Trans. v. Lundberg, supra*; *State Highway Corm. v. Arnold*, 218 Or 43, 57, 341 P2d 1089, 343 P2d 1113 (1959); *Highway Com. v. Assembly of God*, 230 Or 167, 176, 368 P2d 937 (1962); *Unified Sewerage Agency v. Duyck*, 33 Or App 375, 377-378, 576 P2d 816 (1978).

The date of valuation is the date of “taking” by the government. *Highway Commission v. Anderson*, 234 Or 328, 330, 381 P2d 707 (1963). The Oregon courts have yet to clearly hold at which date property is “taken” for determining just compensation—the date of filing the complaint, the date of possession, or the

date of taking title (judgment)-in cases in which the government does not take possession of the property before judgment.

When an entire parcel of real property is condemned, just compensation is the fair market value of the parcel plus any improvements; to the extent the improvements enhance the value of the land. *Highway Comm. v. Superbilt Mfg. Co.*, 204 Or 393, 412, 281 P2d 707 (1955); *Highway Commission v. Anderson*, 234 Or 328, 331, 381 P2d 707 (1963).

If only a portion of a parcel is condemned, or less than fee title is appropriated (as with an easement), just compensation equals the fair market value of the portion or interest condemned, plus any reduction in the fair market value of the owner's remaining property caused by the taking. The depreciation in the market value of the property remaining is frequently referred to as severance damage. *Dept of Trans. v. Lundberg*, 312 Or 568, 574, 825 P2d 641 (1992); *State Highway Comm. v. Hooper*, 259 Or 555, 560, 488 P2d 421 (1971); *Highway Commission v. Clark*, 238 Or 505, 509, 395 P2d 146 (1964); *State Highway Comm. v. Stockhoff* 16 Or App 647, 650, 519 P2d 1281 (1974).

An easement of access is a property right that the government may not extinguish without payment of just compensation. *Sweet v. Irrigation Canal Co.*, 198 Or 166, 191, 254 P2d 700, 256 P2d 252 (1953); *State Highway Com. v. Burk*, 200 Or 211, 228, 265 P2d 783 (1954); *Oregon Investment Co. v. Schrunk*, 242 Or 63, 69, 408 P2d 89 (1965).

In determining just compensation in a partial taking that involves depreciation in the value of the remaining property, it is necessary to ascertain the extent of the property affected by the appropriation. The three primary factors to be considered in determining whether property taken constitutes part of a single larger tract are (1) physical contiguity, (2) unity of ownership, and (3) unity of use. *City of Salem v. H.S.B.*, 302 Or 648, 733 P2d (1987).

Special Benefits:

Any enhancement in the value of property, a portion of which has been condemned, is considered a special benefit. To be considered a special and not a general benefit, this increase in value must be one not shared by the general public. Such a special benefit may be set off against any severance damage to the remaining property, but may not be set off against the fair market value of the property actually taken. *State Dept. of Trans. v. Montgomery Ward Dev.*, 79 Or App 457, 464, 719 P2d 507, *rev. denied*, 301 Or 667 (1986); *State Highway Com. v. Bailey*, 212 Or 261, 277, 319 P2d 906 (1957); *State Highway Comm. v. Stockhoff* 16 Or App 647, 650, 519 P2d 1281 (1974); *State Highway Comm. v. Hooper*, 259 Or 555, 560, 488 P2d 421 (1971); *State Highway Comm. v. Freeman*, 11 Or App 513, 517-518, 504 P2d 133 (1972).

Compensable Damage:

A change in the highest and best use of property remaining after a partial taking that reduces the market value of the remainder is compensable damage. For example, economic obsolescence caused by a taking that increased the cost of a farming operation, reduced the capacity of the farm improvements, and resulted in loss of efficiency constituted a compensable change in the highest and best use of the remaining property. *Soule v. State*, 315 NYS2d 791, 793 (1970); *State, by and through its Road Com'n v. Larkin*, 495 P2d 817, 821 (Utah 1972).

If a partial taking results in total loss of access or causes unreasonable or substantial interference with direct access, thus reducing the market value of the remaining property, the property owner may suffer a compensable damage. *State Highway Com. v. Burk*, 200 Or 211, 227-228, 265 P2d 783 (1954); *State ex rd Highway Comm. v. Center*, 23 Or App 693, 696, 543 P2d 1084 (1975); *Douglas County v. Briggs*, 286 Or 151, 156, 593 P2d 1115 (1979).

Severance damages are available when the physical division of a single parcel of land reduces the market value of the remainder. *State Highway Com. v. Burk*, 200 Or 211, 236, 265 P2d 783 (1954); *Soule v. State*, 315 NYS2d 791 (1970); *Pape v. Linn County*, 135 Or 430, 437, 296 P 65 (1931).

Non Compensable Damages:

Although partial taking may reduce the market value of the remaining property, not all such damage is compensable. Examples of noncompensable damages include the exercise of police power, the loss of business, restriction of access, temporary inconvenience, or remote or speculative damages.

In the case of restricted access, a property owner is not entitled to unrestricted access at all points along the property. As long as the property remaining has reasonable access, no compensable loss or damage occurs. *Highway Commission v. Beach*, 244 Or 162, 165-167, 416 P2d 316 (1966).

If the damage caused by a partial taking can be cured at a cost less than the reduction in property value, just compensation is limited to the cost of cure. If, on the other hand, the cost of cure exceeds the reduction in value of the remainder, just compensation equals the depreciation in market value and should not be increased to equal the cost of cure. *Tunison v. Multnomah County*, 251 Or 602, 604, 445 P2d 498 (1968); *La Grande v. Rumelhart*, 118 Or 166, 171, 246 P 707 (1926); *Pima County v. De Concini*, 285 P2d 609, 611 (Ariz 1955); *City of Columbus v. Farm Bureau Cooperative Ass'n*, 273 NE2d 888, 892 (Ohio 1971).

Methods of Valuation:

Just compensation is ordinarily determined by one or more of the three real estate valuation approaches: market, income, and cost.

The fair market value of property may be established by comparing the property with sales of similar property. *Highway Com. v. Parker*, 225 Or 143, 159-160, 357 P2d 548 (1960); *Highway Commission v. Callahan*, 242 Or 551, 553, 410 P2d 818 (1966).

The income or rent from property (as distinguished from business profits) is an accepted indicator of the market value of the property. *Highway Commission v. Nunes*, 233 Or 547, 557, 379 P2d 579 (1963); *State of Oregon v. Cerruti*, 188 Or 103, 108-109, 214 P2d 346 (1950); *City of Medford v. Bessonette*, 255 Or 53, 60, 463 P2d 865 (1970).

To estimate the value of land by the cost approach, the value of the land without improvements is first determined by the market or comparable sales approach. To this value is added the replacement cost of the condemned improvements, minus depreciation and an allowance for obsolescence or deterioration. For special use properties (ones not commonly bought and sold in an open market) the courts have approved both the cost approach and the income approach in valuing special use property. *In re Polo Grounds Area Project*, 233 NE2d 113, 116-117 (NY 1967).

In the case of a partial taking, just compensation may be determined by applying the “before and after” method. Just compensation equals the amount by which the fair market value of the entire property before the taking exceeds the fair market value of the remaining property after the taking. *La Grande v. Rumelhart*, 118 Or 166, 176, 246 P 707 (1926); *State Highway Com. v. Bailey*, 212 Or 261, 303-304, 319 P2d 906 (1957).

Just compensation under the “taking and damages” method equals the fair market value of the land and improvements actually taken, plus any depreciation in the value of the remaining property caused by the appropriation. *Tunison v. Multnomah County*, 251 Or 602, 604, 445 P2d 498 (1968); *State Highway Comm. v. Hooper*, 259 Or 555, 560, 488 P2d 421 (1971); *Highway Commission v. Clark*, 238 Or 505, 509, 395 P2d 146 (1964); *State Highway Com. v. Burk*, 200 Or 211, 238, 265 P2d 783 (1954).

If a special benefit exists, the Oregon courts hold that it may be set off against any condemnation-caused damage suffered by the remaining property. It may not be set off against the value of the property taken. Thus, the before and after method and the taking and damages method of determining just compensation in the event of a partial taking, both require modification when evidence of special benefits exists. *State Highway Comm. v. Hooper*, 259 Or 555, 560, 488 P2d 421 (1971); *State Highway Comm. v. Freeman*, 11 Or App 513, 517- 518, 504 P2d 133 (1972).

Who May Testify As To Value?

A competent real estate appraiser can testify as to the value of condemned property. Real estate appraisers may base their opinions in part on hearsay evidence. Expert witnesses, may also testify, but must disclose the facts and sources of information on which their opinions are based. *State Highway Com. v. Arnold*, 218 Or 43, 69, 341 P2d 1089, 343 P2d 1113 (1959); *Highway Com. v. Parker*, 225 Or 143, 163, 357 P2d 548 (1960); *City of Portland v. Nudelman*, 45 Or App 425, 432, 608 P2d 1190, *rev. denied*, 289 Or 275 (1980).

Property owners, including contract purchasers as well as neighbors, are also qualified to testify as to valuation and just compensation if they have sufficient knowledge of the facts and circumstances surrounding the property. *Junc. City Water Control v. Patterson*, 8 Or App 107, 493 P2d 76 (1972); *Hanns v. Friedly*, 181 Or 631, 184 P2d 855 (1947); *La Grande v. Rumelhart*, 118 Or 166, 168, 246 P 707 (1926); *Lunda v. Matthews*, 46 Or App 701, 613 P2d 63 (1980).

How Are Various Ownership Interests Treated?

When there are several interests or estates in one parcel of land, just compensation is ascertained as though the property belonged to one person, and that sum is apportioned among the various parties according to their respective interests. *State Highway Com. v. Burk*, 200 Or 211, 243, 265 P2d 783 (1954).

What If the Condemnation Is Abandoned?

If, at any time after filing the complaint, the case is dismissed or terminated or the condemnor elects not to take the property, a condemnation is deemed abandoned. If an election is not filed within 60 days after the verdict, the condemnor is considered to have elected to take the property. ORS 35.335.

Abandonment of the proceedings entitles the defendant to costs, disbursements, reasonable attorney fees, appraisal costs, and fees for experts incurred in preparing and conducting the defense to the action. ORS 35.335 (1)-(2).

When a condemnor takes prejudgment possession of property and subsequently elects to abandon its condemnation action, it is liable for damages both for loss of use of the land and for physical injuries to the land. The just compensation is equal to the fair market value of the temporary possession, analogous to a leasehold. *United States v. Dow*, 357 US 17, 26, 78 S Ct 1039, 2 L Ed2d 1109 (1958); *City of Silverton v. Porter*, 28 Or App 415, 420, 559 P2d 1297 (1977); *Port of Newport v. Haydon*, 10 Or App 271, 279, 498 P2d 825 (1972).

Attorney Fees And Costs:

Costs and expenses in a condemnation case include the costs of appraisals and fees of experts incurred by the defendants in preparing and conducting the defense of the action, as well as the ordinary costs and disbursements. ORS 35.335. In addition, the defendants may be awarded reasonable attorney fees. ORS 35.346(2).

Costs, expenses, appraisal costs, expert witness fees, and attorney fees are awarded to the defendant in any one of the following instances:

- (1) The amount of just compensation determined by the court or jury exceeds the highest written offer for the property submitted by the condemning authority to the defendants appearing in the action at least 30 days before the trial commences, ORS 35.346(2)(a);
- (2) The court finds that the first written offer made to the defendants before filing the action did not constitute a good-faith offer of an amount reasonably believed by the condemning authority to be just compensation, ORS 35.346(2)(b); or
- (3) The condemnation action is abandoned by the condemning authority before final adjudication, ORS 35.335(1).

Costs and disbursements other than attorney fees, appraisal fees, and expert witness fees are awarded the condemning authority in all other cases, ORS 35.346(3).

The appropriate statute and facts that provide the basis for attorney fees and costs must be pleaded. Application for attorney fees and costs should be made pursuant to ORCP 68 C(2). *Hawkins v. City of La Grande*, 315 Or 57, 71, 834 P2d 400 (1992)

With respect to the allowance of attorney fees and costs, interest is not part of just compensation and may not be considered in determining whether the just compensation awarded by the court or jury exceeds the written offer made to the defendants before taking possession of the property. *Highway Com. v. Helliwell*, 225 Or 588, 358 P2d 719 (1961). If, however, the condemnor has taken possession of the property before the offer controlling attorney fees and costs is made, interest from the date of possession is included in just compensation and is added to the amount assessed by the jury for purposes of determining the condemnee's right to attorney fees and costs. *State ex rel Dept. of Trans. v. Glenn*, 288 Or 17, 25-26, 602 P2d 253 (1979).