



GARRETT HEMANN ROBERTSON P.C.

# AIA Contracts After Passing A Bond . . . Now What?

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# CONDEMNATION AUTHORITY AND LIMITATIONS

- Condemnation is the State's exercise of its power of eminent domain.
- An express restatement of the State's power of eminent domain and the basic just compensation limitation on that power is found in Article I, Section 18 of the Oregon Constitution:
  - “Private property shall not be taken for public use . . . without just compensation[.]”
- State also limited by the Fifth Amendment to the U.S. Constitution:
  - “Nor shall private property be taken for public use, without just compensation.”
- ORS Chapter 35: Oregon's General Condemnation Procedure Act
  - Creates basic procedural framework for exercise of the State's condemnation power.
  - Specifically limits and conditions the State's condemnation power.
  - Sets forth certain rights and obligations of property owners.
  - For public condemners, incorporates certain land acquisition policies of the federal Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 USC §§ 4651–4652). ORS 35.510(3)



## CONDEMNATION AUTHORITY AND LIMITATIONS CONT'D

- State has delegated authority to other public and private entities, including:
  - Counties
  - Cities
  - Transit, school, irrigation, metropolitan services and water control districts
  - Ports
  - Redevelopment agencies
  - Natural gas companies, electrical power companies, railroads
- Scope of such entities' power to condemn is governed by statute.
  - Examples:

Chapter 772—Private corporations such as railroads and public utilities

Chapter 267—Mass transit districts

Chapter 332—School districts

- “Condemnation statutes are in derogation of vested rights and must be strictly construed.” *Port of Umatilla v. Richmond*, 212 Or 596, 608, 321 P2d 338 (1958).



## ORS 35.015 – THE “ANTI-KELO” STATUTE: LIMITATION ON THE STATE’S AUTHORITY TO CONDEMN FOR PRIVATE PURPOSES

- Generally, a public entity may not condemn private real property used as a residence, business establishment, farm or forest operation if at the time of condemnation the public entity intends to convey fee title or lesser interest to another private party.
- Specific response to U.S. Supreme Court decision in *Kelo v. City of New London*, 545 US 469 (2005), which broadly defined “public use.”



## EXCEPTIONS UNDER ORS 35.015

- Improved or unimproved real property constituting a danger to the health or safety of the community by reason of contamination, dilapidated structures, improper or insufficient water or sanitary facilities or combination of the above.
- Timber, crops, topsoil, gravel or fixtures to be removed from the real property being condemned.
- Real property condemned for maintenance, improvement or construction of transportation facilities, transportation systems, utility facilities or utility transmission systems.
- Property sold to a new owner after condemner published notice of intent to condemn but before condemnation occurred.
- Lease of a portion of a public facility to a privately owned business to provide retail service designed primarily to serve patrons of the public facility.



# PRECONDEMNATION INVESTIGATION

- ORS 35.220
- Allows condemner to enter upon, examine, survey, conduct tests upon, and take samples from real property subject to condemnation.
- Provides that the potential condemner must:
  - First attempt to provide actual notice to the owner or occupant.
  - If actual notice not accomplished, post in a conspicuous place written notice containing the condemner's name, address, telephone number and purpose of entry.
- Condemner may conduct tests or take samples only with owner consent or pursuant to court order. Testing and sampling results must be provided to the owner upon request.
- If the owner objects to examination or survey or does not consent to the terms and conditions for testing or sampling, the condemner must obtain a court order allowing entry.



## PRECONDEMNATION INVESTIGATION CONT'D

- Court order may establish reasonable terms and conditions for entry and any examination, survey, testing or sampling requested.
- Reasonable compensation for damage or interference is required in certain circumstances:
  - Physical damage caused by the entry or examination, survey, testing or sampling, including damage attributable to diffusion of hazardous substances found on the property.
  - Substantial interference with possession or use of the property caused by the entry or the examination, survey, testing or sampling.
- Compensation for that same damage or interference will not be available in a subsequent condemnation action.
- Permits of entry or specific terms often negotiated.



## RESOLUTION OF NECESSITY

- Prior to attempting to acquire a property, condemner must declare by resolution or ordinance:
  - The necessity of acquiring the property; and
  - Purpose for which the property is required.
- Generally, “no greater interest can be taken than is necessary to accomplish the intended public use.” *City of Lake Oswego v. Babson*, 97 Or App 408, 441, 776 P2d 870 (1989).





## RESOLUTION OF NECESSITY CONT'D

- Resolution or ordinance of a public condemner is presumptive evidence of:
  - The public necessity of the proposed use;
  - The necessity of the particular property for the proposed use; and
  - The proposed use being planned or located in a manner that will be most compatible with greatest public good and least private injury.
- Presumptive evidence means the determination is deemed valid in absence of fraud, bad faith or abuse of discretion.
- *Wiard Memorial Park Dist. v. Wiard Community Pool, Inc.*, 183 Or App 448, 52 P3d 1080 (2002)



## RESOLUTION OF NECESSITY CONT'D

- The commencement of a condemnation action by a private condemner creates a disputable presumption of:
  - The necessity of the proposed use;
  - The necessity of the particular property for the proposed use; and
  - The project being planned and located in a manner most compatible with the greatest good and least private injury.
- Question of validity of these presumptions, if raised, is resolved by the court in a summary proceeding before trial.



## 40-DAY WRITTEN OFFER AND APPRAISALS

- ORS 35.346(1)–(5)
- At least 40 days before filing a condemnation action, the condemner must make a written offer to purchase the property interest and pay just compensation. ORS 35.346(1)
  - Offer generally must be accompanied by a written appraisal upon which the offer is based, and must provide a summary of the bases for the offer of alleged just compensation.
  - If the condemner determines the amount of just compensation owed is less than \$20,000, in lieu of a written appraisal, the condemner may give the owner an explanation of how it arrived at the valuation. ORS 35.346(2).



## 40-DAY WRITTEN OFFER AND APPRAISALS CONT'D

- Appraisal
  - Completed and issued opinion of value.
  - Complies with applicable administrative rules regulating activities of appraiser.
  - Made by a person certified or licensed to issue opinion. *Dept. of Transp. v. Stallcup*, 341 Or 93, 138 P3d 9 (2006).
- Requirements for appraisal of property by condemner:
  - 15 days' advance written notice of appraisal inspection and invitation to owner to attend any valuation inspection. ORS 35.346(3).
  - If the 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.
- Owner has 40 days to accept or reject offer. ORS 35.346(4)
  - The owner is not prejudiced by not responding or rejecting the offer from a just compensation perspective.
  - If the owner rejects the offer and obtains a separate appraisal, the owner must provide a copy of the appraisal to condemner not less than 60 days before trial or arbitration.



## 40-DAY WRITTEN OFFER AND APPRAISALS CONT'D

- *Dept. of Transp. v. Pilothouse 60, LLC*, 220 Or App 203, 185 P3d 487 (2008).
  - Condemner lacks authority to file a condemnation action without first making a 40-day offer pursuant to ORS 35.346.
  - A condemnation action is subject to dismissal if the condemner fails to “strictly comply” with the offer requirements.
  - Upheld dismissal of action based upon failure of ODOT to make separate offers to owners of separate properties.
- *Dept. of Transp. v. Singh*, 257 Or App 322, 306 P3d 745 (2013).
  - Followed Pilothouse 60’s strict compliance standard and dismissal remedy.
  - Found offer insufficient as a matter of law because it was based on an appraisal that assumed terms different from those set forth in the proposed real estate agreement accompanying the offer.
  - Upheld dismissal of action based upon insufficient offer.



## 40-DAY WRITTEN OFFER AND APPRAISALS CONT'D

- Offer and appraisal requirements of the federal Uniform Relocation Assistance and Real Property Acquisition Act of 1970.
  - Real property must be appraised before negotiations begin. 42 USC § 4651(2).
  - The property owner or his or her representative must “be given an opportunity to accompany the appraiser during [the] inspection of the property.” 42 USC § 4651(2).
  - Before negotiations for the property, the condemner must establish an amount believed to be just compensation for the property and must “make a prompt offer to acquire the property for the full amount so established.” 42 USC § 4651(3).
  - In no event can the amount offered be less than the government’s approved appraisal of the fair market value of the property. 42 USC § 4651(3).
  - The condemner must provide the property owner “with a written statement of, and summary of the basis for, the amount he [or she] established as just compensation.” 42 USC § 4651(3).



## 40-DAY WRITTEN OFFER AND APPRAISALS CONT'D

- Offer and appraisal requirements of Uniform Relocation Assistance and Real Property Acquisition Act of 1970, Cont'd.
  - The property owner is not required to surrender possession of the real property before the condemner pays the agreed purchase price or deposits with the court for the benefit of the owner the fair market value of the property or the amount of the award of compensation in the condemnation proceeding. 42 USC § 4651(4).
  - No person lawfully occupying real property is required to move without at least 90 days' written notice. 42 USC § 4651(5); see also ORS 35.505(2).
  - The condemner may not “advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court . . . , or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.”  
42 USC § 4651(7).
  - If acquiring only part of a property would leave its owner with an uneconomic remnant, the condemner must offer to acquire the entire property. 42 USC § 4651(9).
  - If the condemner acquires any interest in real property, it must “acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property” that it requires to be removed from the real property or that it “determines will be adversely affected by the use to which such real property will be put.” 42 USC § 4652(a).



# THE COMPLAINT

- Venue – ORS 35.245(1)
  - County within which the property or majority of the property lies.
- Defendants – ORS 35.245(2)
  - May be commenced against person in whose name record title appears.
  - May include as defendants lessees or other persons having possession and all other persons having or claiming an interest in the property.
- Complaint – ORS 35.255
  - Must describe the property sought to be condemned; typically attaching legal description.
  - Must allege “just compensation”—the true value of the property taken and the damages to the remainder, if any, resulting from the taking.
- Customary to also include:
  - Description of the project.
  - Verification that a resolution or ordinance of necessity was adopted and, if correct, that an attempt was made to negotiate purchase and attempt failed.





# NOTICE OF IMMEDIATE POSSESSION

- ORS 35.352
- Anytime after a condemnation action is filed, a public condemner may file a notice that it will deposit “just compensation” with the court and take immediate early possession of the property interests sought.
- Property owner may file written objections to possession within 10 days after the notice is served. Objections must request that the court schedule a hearing on the objections at the earliest possible time.



## NOTICE OF IMMEDIATE POSSESSION CONT'D

- The only issues that the court may consider upon objections are:
  - Whether the condemnation is legal; and
  - Whether the public condemner has acted in bad faith, engaged in fraud or engaged in an abuse of discretion under a delegation of authority.
- If no objection is filed, condemner may file a form of order with the court granting possession.
- Ability of defendant to assert legal defenses in the Answer is not affected solely by reason of the filing of an objection or failure to file an objection.
- Note that ODOT typically uses a different procedure to obtain immediate possession. See ORS 35.352(7).



## ADVANCE DEPOSIT BY PUBLIC CONDEMNER

- ORS 35.265
- Public condemner seeking immediate possession must deposit the amount estimated to be just compensation with the court for the use of the defendants.
- Upon deposit with the court, no interest accrues on the amount of the deposit, pending the final judgment.



## ADVANCE OCCUPANCY BY PRIVATE CONDEMNER

- ORS 35.275
- Private condemner may seek a court order for prejudgment possession.
- At the hearing, the court will grant the motion for early possession if the court finds the interests of the owner will be adequately protected.
- Court may make such provisions and orders it deems necessary to avoid prejudice to either party.
- Order may require deposit of alleged just compensation or a surety bond.
- If it appears necessary after order of possession is entered, court may require the private condemner to deposit an additional bond or sum on account of just compensation to be awarded.



## WITHDRAWAL OF DEPOSIT

- ORS 35.285.
- Defendant's withdrawal of the deposit does not waive right of appeal.
- Immediate possession and withdrawal of deposit often times done by stipulation.
- If the defendant is awarded at trial less than the withdrawn amount, the defendant would be required to refund to the condemner the excess amount.



## ANSWER AND REPLY

- Answer – ORS 35.295
  - May set forth legal defenses to the condemnation and counterclaims.
  - Potential defenses/counterclaims include:
    - Challenges to right to take, including challenges to authority to condemn property and challenges to authority to condemn the amount of property at issue.
    - Challenges to satisfaction of all statutory conditions precedent to initiating action.
    - Inverse condemnation counterclaims.
    - Trespass, etc.
  - If challenging public use or necessity, Answer should include specific allegations of fraud, bad faith or abuse of discretion.
- City of Eugene v. Johnson*, 183 Or 421, 192 P2d 251 (1948).
- Answer should, out of prudence, allege right and basis to award of attorney fees and expenses.
  - Defendant is required to allege the true value of the property taken and damage, if any, to the remainder. Not uncommon for a defendant's attorney to request an extension to file the Answer until the defendant's appraisal is prepared, and request the standard 10-day notice before a motion for default is filed.



## ANSWER AND REPLY CONT'D

- Reply to Answer may be filed to allege facts in avoidance of defenses and state defenses to counterclaims.
- Property owner may elect to have just compensation determined by binding arbitration if the total amount claimed does not exceed \$20,000.

ORS 35.346(6)(a).



# DISCOVERY

- Request for production of documents
- Depositions
- Request for inspection of property
- Request for admissions
- Typically, no expert discovery in Oregon state courts
- Subpoena non-party witnesses and documents





## DISCOVERY CONT'D

- Examples of potentially useful documents:
  - Project construction drawings, construction schedules, mapping, surveying, etc.
  - Project budgets, financial analyses, and bond offerings
  - Project and property related resolutions
  - Mitigation plans and cost to cure estimates
  - Property acquisition file
  - Photographs and videos of the property
  - Email and other correspondence regarding the property
  - Leases
  - Marketing materials
  - Income and expense reports
  - Development plans
  - Results of environmental studies
  - Land use applications and related decisions/correspondence
  - Electronically stored information (ESI)



## EXCHANGE OF APPRAISALS

- Condemner must provide appraisal with its original 40-day offer. ORS 35.346(2).
- If the owner rejects the pre-condemnation offer, and obtains a separate appraisal, the owner must provide appraisal to the condemner at least 60 days before trial or arbitration. ORS 35.346(4).
- If the parties proceed to trial, each party must provide every other party a copy of every appraisal obtained by the party as part of the condemnation action. ORS 35.346(5)(b).
- A party's failure to provide the other party such appraisals will prohibit the use of the appraisal at trial. ORS 35.346(5)(a).
- Date of value is earlier of the date the condemnation action is filed or when condemner enters the property.



## AMENDMENT OF PLEADINGS: ALLEGATION OF JUST COMPENSATION

- ORS 35.346(2)
- Amount of compensation offered may not be reduced by a amendment or otherwise before or during trial except by court order entered not less than 60 days before trial.
- Order allowing reduction requires a finding by clear and convincing evidence that the appraisal upon which the original offer was made was based on the result of a mistake of material fact that was not known or could not reasonably have been known at the time of the original appraisal or was based on a mistake of law.



## ATTORNEY FEES AND EXPENSES

- ORS 35.356(7)
- Court shall award to the property owner reasonable attorney fees, expenses, costs and disbursements if:
  - The amount of just compensation assessed by the verdict exceeds the condemner's highest written offer in settlement made before filing the action; or
  - The court finds that the condemner's first written offer was not a good faith offer of amount reasonably believed to be just compensation.
- Settlement



# OFFERS OF COMPROMISE

- ORS 35.300
- After filing a condemnation action, the condemner may serve on the defendant offers of compromise.
- Offers must be served no later than 10 days before trial.
- Content:
  - Must identify amount offered for just compensation for the taking and damages to the remainder.
  - Must explain whether offer includes an amount for costs, disbursements, attorney fees and expenses, and if so, how much.
- Must it be signed per ORCP 17A?
- Must it be filed within a reasonable time after service per ORCP 9C?



## OFFERS OF COMPROMISE CONT'D

- If the defendant does not file an acceptance of the offer within three (3) days of service, the offer is withdrawn and is inadmissible at trial.
- A copy of the offer must be attached to the acceptance.
- If the offer does not specifically include amounts for attorney fees, etc., the court, upon acceptance of the offer, shall give judgment on the amount offered plus attorney fees, expenses, costs, and disbursements determined by the court to have been incurred before service of the offer.
- If the offer includes an amount for just compensation and attorney fees, etc., the defendant may accept only the just compensation amount and have the attorney fees, etc. determined by the court.



## OFFERS OF COMPROMISE CONT'D

- If the defendant does not beat an offer of compromise at trial:
  - Defendant may not recover prevailing party fees or expenses, costs, and disbursements that were incurred on and after service of the offer.
  - Court shall give judgment to the defendant for attorney fees, expenses, costs and disbursements incurred by the defendant prior to service of the offer, assuming entitlement pursuant to ORS 35.346(7).
  - Court shall give the condemner judgment for costs and disbursements, other than prevailing party fees, incurred on and after service of the offer.
- In determining whether the judgment beats an offer that specifically includes attorney fees, expenses, costs and disbursements, the court shall determine those incurred before service of the offer.



# TRIAL MATTERS

- Burden of proof – ORS 35.305(2)
  - Neither side has the burden of proof on just compensation.
- Election to proceed first – ORS 35.305(1)
  - Defendant has option to proceed first at trial if notice filed with court and served at least seven (7) days before trial date.
- Motion for jury view – ORS 35.315
  - Must be provided upon request of either party.
  - Jury view is not evidence.
  - Typically, party requesting the jury view arranges for transportation to the property.
- Motions in Limine





# TRIAL MATTERS

- Potential witnesses: property owners, appraisers, review appraisers, architects, engineers, traffic engineers, real estate brokers, land use planners, contractors, etc.
- Demonstrative evidence
- Jury instructions – Uniform Civil Jury Instructions; specials.
- Post-trial:
  - Allocation of the award among the defendants
  - Interest
  - Attorney fees, expenses, costs and disbursements



# ABANDONMENT

- ORS 35.335
- Action considered abandoned if case is dismissed or terminated, or the condemner files an election not to take the property.
- If election is not filed within 60 days after verdict, condemner is considered to have elected to take the property.
- If action abandoned, the court shall award the defendant a judgment for reasonable attorney fees, expenses, costs and disbursements.



# APPEAL



# Contact Us

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