

**Eminent Domain Report:**  
**IMMEDIATE POSSESSION**

**HB 2269**

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**I. Introductory Summary**

In eminent domain cases, generally there is no question of whether the property at issue will be condemned by the government. Instead, the value of the property is the focus of the case. The valuation negotiation process between condemner and condemnee sometimes culminates in trial when a settlement can not be reached. Should a case go to trial, it can take considerable time—more time than condemners can wait. For this reason and other reasons, sometimes there is a need for condemners to take the property immediately and complete the valuation process and potential trial later. This process, called immediate possession, is particularly common with condemners whom are putting in roadways, sewers, pipelines, etc. That is, it is sometimes in the best interest of the public to take the property immediately and complete the project to be done on the property.

At first, one might question why immediate possession would be lawful. The following summary of eminent domain power sheds light on the question. The power of eminent domain is an inherent power of the government; it is inherent in sovereignty. State of Ga. v. City of Chattanooga, 264 US 472, 480 (1924). The U.S. Constitution's Fifth Amendment, however, puts restrictions on the eminent domain power in the form of the just compensation clause and the due process clause.

The government may exercise its eminent domain power consistently with the 5<sup>th</sup> Amendment by physically seizing property without any prior notice, hearing, or compensation. In the U.S. Supreme Court decision of Hurley v. Kincaid, 52 S Ct 267, 76 L Ed 637 (1932), the Court held that a landowner was not entitled to an injunction to a taking because an action at law for compensation afforded the landowner with an

adequate remedy. In other words, the due process that was required was the opportunity to be heard and offer evidence in a proceeding to determine the just compensation for the property taken for a public use. The proceeding to determine the just compensation need not occur prior to possession. Id.<sup>1</sup>

Article 1, section 18 provides the taking provision in the Oregon Constitution and it is similar to the federal provision. In short, the Oregon Constitution also allows immediate possession before just compensation is assessed and paid.

Looking beyond the constitutions and looking at state law, one finds that Oregon does not presently have specific statutes regarding procedures for immediate possession. Rather, present state statutes provide only one additional requirement: that when a public condemner commences an action for condemnation and immediate possession of the property is considered necessary, a deposit in the amount estimated to be the just compensation for the property must be filed with the clerk of the court. ORS 35.265. However, at one time Oregon did have statutory procedure for immediate possession that required a motion, notice to the condemnee, and a hearing before the judge issued an order granting immediate possession. See ORS 35.050, 35.060 (1969), repealed in 1971.

The Oregon Supreme Court was faced with an immediate possession case in a mandamus proceeding after the immediate possession procedure was deleted from statute in State ex rel City of Eugene v. Woodrich, 295 Or 123, 665 P2d 333 (1983). In that case, Judge Woodrich had denied the City of Eugene an order of immediate possession. The Oregon Supreme Court held that the legislature did not unambiguously intend to “do away with the public condemner’s powers to secure immediate possession altogether” with the deletions. The Court in part reasoned that the 1971 bill had “retained the provision for funding and depositing estimated just compensation when a public condemner considers it necessary to obtain immediate possession of the property, the provision now found in ORS 35.265.” In this opinion, authored by Justice Hans Linde, the Court concluded that the legislature did not unambiguously foreclose immediate possession by public condemners nor challenges to such possession. The court ultimately issued the writ of mandamus brought by the city, thus requiring the court to enter an order of immediate possession; the court found that Judge Woodrich did not present an affirmative defense that the use for which the city demanded immediate possession actually would be unlawful.

Woodrich cautions that the trial court’s authority to deny immediate possession is limited. The opinion mentions formulas for judicial review in immediate possession

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<sup>1</sup> See also, Stringer v. United States, 471 F.2d 381, 383 (5th Cir.), cert. den., 412 U.S. 943, 93 S.Ct. 2775, 37 L.Ed.2d 404 (1973) (“The question on which issue is joined is whether the government may exercise its eminent domain power consistently with the Fifth Amendment by physically seizing property without any prior notice, hearing, or compensation. The answer to this question is yes.”)

cases that other states had found including defenses of “fraud, bad faith, or abuse of discretion,” but the court did not adopt such formulas. Instead the opinion discusses and adopts only one theory—the “defense of illegality.” The court seemed particularly concerned about land use decisions and emphasized that a court could deny a condemner immediate possession of the property if the proposed public use would be “unlawful,” “assum[ing] that ‘unlawful’ differs from ‘not presently necessary’ in that ‘unlawful’ refers to a legal obstacle that requires a change in a general law, such as a statute, a regulation, or a local ordinance, charter, or general plan, rather than only a permit, approval, or other discretionary action or factual judgment concerning the specific project.” Id. at 136.<sup>2</sup>

In sum, Oregon public condemners have the authority to take immediate possession of property to be condemned.

## II. History of the Project

In 2001, the Oregon Law Commission authorized the creation of an Eminent Domain Work Group to address ambiguities in eminent domain statutory provisions and to look at several law reform areas. Chaired by Commissioner Gregory R. Mowe, the Work Group met in the fall of 2001 and 2002 to prepare legislation for the 2003 session. Three bills were produced, namely House Bills 3370, 3371, and 3372.

In September 2003, the Oregon Law Commission authorized the Eminent Domain Work Group to continue their law reform work, picking up deferred issues, with a goal of recommending legislation for the 2005 session. The Group discussed several issues including immediate possession challenges. The immediate possession issue is addressed with this bill.<sup>3</sup>

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<sup>2</sup> More recently, in Department of Transportation v. Schrock Farms, 140 Or App 140, 914 P2d 1116 (1996), the Court of Appeals held that ODOT had authority to condemn property on which it intended to build a highway despite the fact that applicable zoning and land use regulations did not permit the building of the highway at the time. The court relied largely on Woodrich.

<sup>3</sup> The group decided to defer recommending any changes in the law regarding other issues related to appraisals and valuation issues, including the following:

1. who can testify on market value in condemnation cases and what should be the discovery requirements;
2. what is an “appraisal” for purposes of the appraisal exchange requirements (issues regarding drafts, updates, and reviews) (but see State v. Stallcup, 195 Or App 239, 97 P3d 1229, 1236 (2004)(recently defining “appraisal”);
3. discovery of appraisers’ and expert witness’ files;
4. the non-testifying appraiser and their appraisal report;
5. testifying to values different from that in the exchanged report;
6. feasibility in triggering appraisal exchange deadlines from the date of filing the case rather than the date of trial; and
7. time lines of appraisal exchanges (first appraisals and subsequent appraisals) (the present 60 days before trial is often unhelpful because trial dates get moved or are set over often).

Meetings were held at Willamette University College of Law, the Oregon State Bar Offices, and the Stoel Rives law firm during both interims. The Work Group has included several attorneys in private practice (representing condemners and/or condemnees), state attorneys, city attorneys, appraisers, a federal judge, and a representative from the State Court Administrator's office.<sup>4</sup> In addition, David Heynderickx, Acting Legislative Counsel, has worked with the Group to draft bills. Each draft bill was thoroughly reviewed and thoughtfully discussed by the entire Work Group before the final version of the bill was accepted.

### III. Statement of the Current Problems in the Law

Condemners, condemnees, non-attorneys, attorneys, and judges alike do not have a statutory procedure to follow when immediate possession is requested by a public condemner or challenged by the condemnee. Unnecessary inconsistency and surprise occurs as each court handles the issue differently. The lack of a statute is particularly problematic for attorneys who haven't been involved in a case involving immediate possession. The fact of the matter is that public condemners do take immediate possession from time to time and immediate possession is a lawful practice as described above in Section I. The ORS only contains a provision requiring a deposit when immediate possession is considered necessary by public condemners. See ORS 35.265. *Compare*, ORS 35.275 (regarding immediate possession for private condemners).<sup>5</sup>

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#### <sup>4</sup> Members for 2005 Session

Greg Mowe	Stoel Rives LLP
Jerry Curtis	Appraiser
Al Depenbrock	Trial Division of DOJ
Cynthia Fraser	Oregon Department of Transportation
John Junkin	Bullivant Houser Bailey PC
Edward Leavy	US Circuit Court Judge
Henry Lorenzen	Corey Byler Rew Lorenzen
Robert Maloney	Lane Powell Spears Lubersky LLP
Linda Meng	Portland City Attorney's Office
David Ross	Salem City Attorney's Office
Donald Stark	Bullivant Houser Bailey PC
Joe Willis	Schwabe Williamson & Wyatt PC

#### Interested Participants for 2005 Session

Susan Grabe/ Jill Mallery	Oregon State Bar
Christy Monson	League of Oregon Cities
Bradd Swank	Office of State Court Administrator

<sup>5</sup> Subsection (1) of ORS 35.275 provides that the private condemner must provide a motion for immediate possession to the court. Subsection (2) provides that on a hearing for the motion, the court will make a determination looking at the reasons for requiring speedy occupation and the prejudice to both parties. Subsection (3) provides for deposit requirements.

Public condemners around the state use different practices when they determine that immediate possession is necessary. The City of Portland for example routinely goes into circuit court and obtains an *ex parte* order to take immediate possession of property to be condemned. The Oregon Department of Transportation (ODOT) does not generally seek a court order before taking immediate possession. Instead, ODOT gives notice and if there are no objections, then takes possession. If there is an objection raised based on the notice, ODOT generally requests a hearing. Still other condemners do not have a common practice for immediate possession.

Another related problem is that there is not clear guidance in the law on the grounds for challenging immediate possession.

#### **IV. The Objectives of the Proposal**

In creating this bill, the Work Group sought to establish a statute that codified an accepted process for those public condemners who need to take immediate possession of property to be condemned and who seek an order confirming that possession. The bill's process is not a mandatory process but it represents a good first step that may require amendment as the process is used in upcoming years. The Group's intent was to balance the needs of condemners and condemnees. The Group's recommended reform hopes to comport with goals of fairness in condemnation proceedings.

The Group specifically sought to address the following issues:

- What matters may be raised during a right to take challenge, and what issues does the court have jurisdiction over?
- What is the public policy distinction between ORS 35.265 (re public condemners) and ORS 35.275 (re private condemners)?
- When is there a waiver of making a right to take challenge? What issues must be made at a right to take hearing?
- What due process rights, if any, does a property owner have with respect to immediate possession and right to take challenges?
- What procedure and timing requirements make sense for right to take challenges?

#### **V. Review of Legal Solutions Existing or Proposed Elsewhere**

The Work Group looked to state and federal case law and prior Oregon statutes for guidance. The Work Group also looked at the Uniform Eminent Domain Code.

#### **VI. The Proposal: See HB 2269 (LC 232 dated 12/14/04)**

## VII. Section by Section Analysis

### Section 1:

This provision provides that the bill will become a part of ORS Chapter 35. Chapter 35 is the Eminent Domain and Public Acquisition of Property chapter.

### Section 2:

This section was put in as a precaution to avoid any confusion and prevent unintended results. The provision is intended to make clear that public condemners retain all regulatory powers they have that are independent of their eminent domain power. This bill, regarding immediate possession, is not intended to somehow diminish existing emergency powers (sometimes referred to as police powers) of public bodies. Such powers would include for example, the power to go upon private property when there is a health, safety, or environmental emergency. For example, if there is a broken sewer pipe, there is a flood, etc., emergency repair and possession may be necessary. Eminent domain and the use of immediate possession is just one available process.

### Section 3:

This section provides a codified process for public condemners to use to take immediate possession of property to be condemned. It is a process of notice of immediate possession, opportunity for the condemnee to object to immediate possession, an expeditious hearing if there is an objection, and a court order confirming or denying the immediate possession.

**(1) Permissive process for condemners:** This subsection is intended to make clear that this bill is a permissive and non-mandatory process for obtaining immediate possession because it provides that a “public condemner may serve notice.” The Work Group opted for a permissive statute because such a process is unnecessary in all circumstances. The Group reasoned that this more formalized process is too expensive and burdensome for condemners in certain cases. For example, the Oregon Department of Transportation (ODOT) conducts hundreds of condemnations each year for road projects. The legal grounds to object to one of ODOT’s condemnations are so limited that generally there is not a concern that the immediate possession would be found unlawful; thus ODOT and some other condemners would not find necessary the benefit of obtaining an order confirming the public condemner’s possession of the property. The Work Group anticipates that many public bodies will indeed make use of this process because at the end of the procedure, the condemner is provided with an order that can be enforced. In addition, as a matter of practice condemners generally provide notice of immediate possession that is quite similar to that in the bill. Condemners also prefer to know if there are legal objections to condemnation at the front end of the process. It saves all parties time and money to address such issues at the beginning.

**Notice:** Subsection (1) also provides that should a condemner choose to use this immediate possession process, notice must be served to all defendants in the action. Service is required to be in the manner provided by ORCP 9. The ORCP 9 process is standard for written motions and is a process familiar to the bench and bar. It also

ensures that the papers will be filed with the court within a reasonable time after service along with proof of service. Finally, this subsection provides that notice is not a condition to taking immediate possession; this is true because the bill's process of immediate possession is not a mandatory process, but rather is a permissive process. It also means that if the notice was somehow improper, e.g. one of the parties didn't receive notice, the failure does not make the immediate possession unlawful.

**(2) Permissive process for condemnees:** The new codified process in this bill is also permissive for the condemnee (defendant). See subsection (2) which provides that a "defendant in a condemnation action may object." This means that a property owner may choose to not make any objections when served with the notice of immediate possession. See also the subsection (6) discussion below. The property owner remains free to choose to object by setting forth legal defense(s) in the answer at a later date as provided by ORS 35.295. Alternatively, the condemnee may choose to make some or all their objections at an immediate possession hearing. Subsection (6), discussed below, expands on this provision by stating that making objections at the immediate possession hearing does not preclude the condemnee from making objections again later in the answer solely because of the earlier filed objections.

If a condemnee elects to make objections to immediate possession of the property, (2) provides that the condemnee must file written objection with the court within 10 days after notice is served. Ten days was the agreed upon time frame as it strives to strike a balance between condemners and condemnees-- it does not postpone a public condemner's possession for too long and it gives the condemnee some time to assess the case and consult an attorney.

As with the condemner's service of notice, the condemnee is required to file a written objection on the condemner as provided by ORCP 9. As noted above, the ORCP 9 process is standard for written motions and is a process familiar to the bench and bar. It also ensures that the papers will be filed with the court within a reasonable time after service along with proof of service. The objection must request that the court schedule a hearing at the earliest possible time.

Last, this subsection lists the issues that a court may consider upon objection. The list is short and reflects the fact that a trial court's authority to deny immediate possession is limited. After careful research, the Work Group concluded that the only issues that a court may consider upon immediate possession objection are (a) whether the condemnation is illegal; and (b) subject to the presumption of ORS 35.235(2), whether the condemnation proceedings were the result of fraud or abuse of discretion. See State ex rel City of Eugene v. Woodrich, 295 Or 123, 665 P2d 333 (1983) and discussion in Part 1 of this report. A condemnation may be illegal or an abuse of discretion for failure to follow statutory procedures. The Work Group adopts no position as to which procedures, if not complied with, require dismissal of a condemnation action. This bill is not intended to change existing substantive law relating to condemnation defenses. Since the decision to take immediate possession is part of the condemnation proceedings, such decision is reversible only for illegality, fraud or abuse of discretion. There was

discussion in the Work Group that putting a process in statute may result in an increased number of immediate possession challenges. It was noted that today, in most cases, objections are not made and there is not a basis for a challenge. Listing the grounds is intended to make clear that the appropriate issues are quite limited and hopefully curtail unfounded objections.

**(3) Order granted if no objection to immediate possession notice:** This subsection provides that a condemner may file with the court a form of order confirming the condemner's possession of the property as of the date specified in the notice when there is no timely objection filed by the condemnee as provided by (2). Upon the condemner's filing the proper affidavit, the clerk of the court is required to affix the seal of the court to the form of order. Thereafter, the order may be enforced as other orders of the court. This subsection is significant to those condemners who are presently using an *ex parte* hearing process before taking immediate possession of property. The bill's process will be more efficient in such cases and save judicial time because a hearing will not be necessary when a condemnee does not make an objection.

**(4) Form of notice:** This subsection simply puts a form into statute of an acceptable notice of immediate possession.

**(5) Expeditious hearing on any objection filed with the court:** This subsection is a corollary to the request for a hearing in (2) that a condemnee must make if the condemnee wants to file objections to the immediate possession. The provision requires the courts to expeditiously consider objections to immediate possession. This provision will help standardize the process around the state. As explained earlier, there is not a constitutional right of a hearing, but see State v. Woodrich, 295 Or 123, 136 (1983), suggesting that a court can deny immediate possession if proposed public use would be "unlawful" and finding that legislature did not abolish immediate possession process. This provision in of the bill would provide for a statutory hearing when the process is followed and requested. Private condemners already have a process that includes a hearing. See ORS 35.275. The term "expeditious" hearing was used in the bill because courts across the state use a variety of terms; this term should cover the various practices used by trial courts, including expedited hearings, priority hearings, hearings put on the show cause calendar, etc.

**(6) Preclusion issues:** This subsection provides that the ability of the condemnee in a condemnation action to assert legal defenses in the answer is not affected solely by reason of the filing (or not filing) of an objection to a notice of immediate possession. The use of the word "solely" in subsection (6) was intended to allow for preclusion from asserting legal defenses in the answer in limited circumstances. This area of the law is not well developed in Oregon and thus the Work Group left some discretion to the judge in this area. For example, where parties fully litigate an issue at the immediate possession hearing, a court might find a condemnee precluded from raising the same objection again at trial by the law of the case. In short, as a policy matter, the Work Group believed that a property owner shouldn't get "two bites at the apple," but a "bite at the apple" should be meaningful and shouldn't include merely



raising an issue. The Work Group reasoned that at the time of immediate possession a condemnee is at a disadvantage given the shortness of time for discovery and its difficult burden of rebutting the presumptions of ORS 35.235. This predicament was discussed in Northwest Natural Gas Company v. Georgia-Pacific Corporation, 53 Or App. 89, 98 (1981). That case involved a private condemner. Still, the issue of preclusive effect would seem to apply in a public condemner case as well. In that case,  $\frac{3}{4}$  of an acre of timber property was taken for the purpose of running a natural gas pipeline to a production plant. Id. at 91. The defendant (property owner) apparently believed it was compelled to make certain legal challenges at the immediate possession proceeding. Id. at 97. The court explained however that,

“If a motion for immediate occupancy is filed on the heels of the complaint, nothing in ORS Chapter 35 requires or forbids the condemnee to challenge the rebuttable presumptions in the proceeding on that issue. Hearings on immediate occupancy may be held ‘any time after an action is commenced;’ the hearing on the validity of the presumptions may be held at any time ‘prior to trial.’” Id. at 98.

The court elaborated that,

“Nothing in the statute precludes a condemnee from contesting only the issues involved in immediate occupancy and later presenting its evidence on the right to condemn the property under the circumstances, although this creates the risk to the condemner that its right may later be successfully challenged.” Id.

This subsection of the bill then is intended to make sure that following the new process provided for in the bill does not somehow change the substantive law regarding preclusion or waiver. That is, this bill does not intend to change the law with respect to the ability of defendants to assert legal defenses in the answer under ORS 35.295.

## **VII. Conclusion**

This bill is the product of thoughtful deliberation, including consideration by persons with expertise in representing both condemners and condemnees. Enactment of this legislation will facilitate the immediate possession process in public condemnation cases in Oregon.

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## **VIII. Amendment Note**

An amendment, recommended by the Oregon Law Commission, was made to this bill in the House. The amendment did a couple of things. First by amending Section 3(2)(b) and the notice form in (4), it clarified that an objection to immediate possession based on a theory of abuse of discretion, applies only to condemners acting under a

delegation of authority. Second, the theory of an objection based on a condemner acting in bad faith was added to these same sections. Third, a new Section 3(7) was added to the bill to provide further emphasis and clarify that the immediate possession procedure provided for by the bill is optional. That is, some public condemners may choose not to follow it and for example, may provide a different type of notice or not seek a court order before taking immediate possession. Public condemners have immediate possession authority and this bill simply provides guidance and an option for those condemners who want to follow it, especially those who may not have an already established procedure.