Eminent Domain Report:

APPRAISAL EXCHANGES

HB 2268

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From
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I. Introductory Summary

In eminent domain cases, opinions of market value are generally the focus of the case. That number is based primarily upon the appraisals of the land owner and the government. But today, in many cases, even the experienced appraiser does not have the expertise to testify on the diverse specialties upon which fair market value opinions in appraisals are based. "Architects, planners, economists, agronomists, brokers, consultants, geologists, biologists, botanists and engineers of every stripe are finding their way into valuation proceedings."[1] For example, "though an appraiser may study the market and render an opinion of what the highest and best use of a property is for future development, the nature, scope, and suitability of the land for a particular development are questions for a land planner, engineer or architect."[2] Likewise, the type of property or feature of property at issue may affect the valuation process; for example, mineral rights cases may require the expertise of experts including geologists, petroleum engineers, quality engineers, etc. In short, while the appraisal remains the center of the eminent domain case, information from other experts or skilled persons that the appraiser relied upon are more and more necessary to understand the valuation theories of the case.

Discovery (specifically the discovery of appraisals) in eminent domain cases is different than traditional Oregon discovery rules. The difference is predicated upon the view that eminent domain actions are different than other forms of litigation in that

[1] James D. Masterman, Opinion Testimony in Eminent Domain Trials (975 ALI-ABA Course of Study 87 (Jan. 12, 1995).
[2] Id.

eminent domain actions are principally concerned with the determination of the single issue of the amount of just compensation to be paid. These actions can be tried or settled with greater efficiency and less cost if there is pretrial disclosure of valuation data. For this reason, Oregon law, like most states, requires that parties exchange appraisals prior to an eminent domain trial. See ORS 35.346. That is, the condemner (government) is required to provide any written appraisal upon which the condemner relied in establishing the amount of compensation offered when providing the property owner with the initial offer. ORS 35.346(2). Likewise, the condemnee (property owner) must provide the condemner with a copy of the owner's appraisal not less than 60 days before trial or arbitration. ORS 35.346(4). In addition, each party to the proceeding is required to provide all parties with a copy of every appraisal obtained by the party as part of the case (this covers additional appraisals acquired after the initial exchanges). ORS 35.316(5)(b). Failure to provide a copy of an appraisal prohibits the use of the appraisal in arbitration or at trial. ORS 35.346(5)(a).

Oregon law does not presently require the exchange of information other than the appraisal reports, even though appraisals often reference information from other experts or persons with scientific, technical, or other specialized knowledge. The proposed bill would expand the discovery requirements to require the exchange of written reports, opinions, or estimates of non-appraisers relied upon in the appraisal. If an appraisal relied upon an unwritten report, opinion, or estimate of a non-appraiser, the party providing the appraisal would be required to describe the material in a manner adequate to allow identification of the source of the report, opinion, or estimate.

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 the existing Oregon appraisal exchange statutes. One appraisal exchange issue is addressed with this bill.[3]

[3] 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 (the Work Group decided to defer such issues as the appraisal certification licensing board governs in this area);
2. what is an "appraisal" for purposes of the appraisal exchange requirements (issues regarding drafts, updates, and reviews) (see State v. Stallcup, 195 Or App 239, 97 P3d 1229, 1236 (2004)(defining "appraisal");

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.[4] In addition, David Heynderickx, Senior Deputy 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

Unnecessary surprise and gamesmanship occurs today with discovery in eminent domain cases. The requirement of the exchange of appraisal reports is less meaningful when the reports, opinions, and estimates relied upon in the appraisal are not exchanged. Present law does not require the exchange of reports, opinions, and estimates relied upon nor the identification of the source of such valuations. Valuation information constitutes the substance of the trial/arbitration, and pretrial disclosure is necessary if all parties are to fairly evaluate their claims for settlement purposes, determine the real areas of dispute,

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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).

[4] 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

narrow the actual issues, avoid surprise at trial, and prepare properly for direct and cross-examination.

IV. The Objectives of the Proposal

In creating this bill, the Work Group sought to establish a statute that provided clear, concrete, and useful requirements regarding production of those materials relied upon in an appraisal. The Group's intent was to balance the need to identify or review materials of experts or other skilled persons relied upon in appraisals, while at the same time keeping additional costs down and maintaining the adversarial process. The Group's recommended reform hopes to comport with goals of fairness in condemnation proceedings. As the Court of Appeals noted recently, the "overarching legislative intent [is] that the condemnation process be conducted without subterfuge, with full reciprocal pretrial disclosure of expert reports regarding valuation." State v. Stallcup, 195 Or App 239, 97 P3d 1229, 1236 (2004).

The Work Group was specifically concerned with the following issues:

1) The Group wanted to make sure that the materials required to be provided to the parties covered the types of materials that appraisals rely upon. For example, the term "report" alone was considered too narrow as it means different things to appraisers, real estate brokers, etc. Specific persons providing valuation information that the Group wanted to cover include but are not limited to engineers, geologists, real estate agents, and land use planners. Use of the terms "reports, opinions, or estimates" was intended to include the types of valuation data that all of these persons provide to appraisers.

2) The Group wanted to tie the requirement to disclose these reports, opinions, or estimates to the appraisal rather than to those persons who will or may testify as to these reports, opinions, or estimates at trial or arbitration. Those persons who prepare materials for a condemnation case but who are not linked to an appraisal would not be covered by the requirement.

3) The Group wanted to minimize extra costs to parties. The proposed legislation will not require parties to produce new documents, etc. to comply with the rule. That is, reports that were already created will need to be exchanged. For example, to keep costs down, the group specifically rejected the federal rules idea of requiring summary reports. Instead, the Group opted for
disclosure of the actual report when there was a written report or simply identification of the source of the report, opinion, or estimate when it was unwritten. It was discussed that parties can use discovery tools to find out more from sources with unwritten materials as needed.

4) The Group wanted to cover both written, as well as unwritten reports, opinions, or estimates so that gamesmanship would be avoided.

5) The Group wanted to leave issues regarding sanctions for failure to meet these disclosure requirements to the trial and appellate courts.

V. Review of Legal Solutions Existing or Proposed Elsewhere

The Work Group looked to the Uniform Eminent Domain Code for guidance. The Uniform Code arose out of a perceived problem with eminent domain procedures used in many states. The Special Committee on the Uniform Eminent Domain Code, which acted for the National Conference of Commissioners on Uniform State Laws, noted that the differences in procedure and application varied within a single state depending upon the identity of the condemner, the purpose of the taking, and the nature of the property being taken. The resulting Code became a Model Act in 1984. Section 702 of the Model Act provides for very liberal rules of discovery with respect to valuation issues that go beyond traditional discovery in civil actions. The Group rejected expanding discovery requirements to the extent of those of the Model Act. In addition, the Work Group reviewed FRCP 26 and the eminent domain statutes from New York.

VI. The Proposal: See HB 2268 (LC 231)

Section 1: Subsection 8 of the section has the new recommended provision. This new provision requires discovery as a matter of right and without prior court approval of written reports, opinions or estimates relied upon in an exchanged appraisal. Written reports are intended to include electronic reports including emailed reports. This valuation data must be provided along with the appraisal whether or not the person who prepared the materials will testify at trial. The section also requires discovery, as of right, of the identity of the sources when there are reports, opinions, or estimates that were relied upon in an appraisal but were not in a written form.

Section 2: The bill will take effect on January 1, 2006, as is the tradition in Oregon following a legislative session. No emergency clause is provided.

VII. Conclusion

This bill is the product of thoughtful deliberation, including consideration by representatives of both condemners and condemnees. Enactment of this legislation will facilitate investigation, settlement, and trial/arbitration preparation in eminent domain cases, providing more comprehensive information as to the theories of value.

VIII. Amendment Note

An amendment to the bill was made in the House that substituted the word "provided" for the word "served" in the new ORS 35.346(8). The term "served" has legal formalities associated with it that were not intended. That is, the bill simply requires parties to provide the other side with a copy of any written report, opinion or estimate relied upon in an appraisal. Likewise, parties must provide the name and

address of persons who provide unwritten reports, opinions or estimates relied upon in an appraisal.