

EMINENT DOMAIN
REPORT
(HB 2273)

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Eminent Domain Work Group Report

I. Introductory Summary

Pre-Condemnation Rights of Entry

Public bodies that have the statutory power of eminent domain often need to enter upon land to conduct preliminary surveys and tests before making a decision to condemn property. These entries are necessary for the condemning body to design projects and determine whether or not the particular property would be suitable for the intended purpose.

In Oregon, statutory pre-condemnation rights of entry vary dramatically among public bodies. Most statutes providing rights of entry are nonspecific, leading to uncertainty as to the scope of permissible inspections and testing. Moreover, some public bodies that have condemnation authority do not have explicit statutory authority for a pre-condemnation right of entry. These uncertainties result in an irregular system where condemners work largely by individual agreements with each landowner.

One purpose of this bill is to replace ORS 281.010 with a more thorough statute governing pre-condemnation rights of entry for inspections and testing. This bill consolidates all of the existing pre-condemnation rights of entry statutes, eliminating the confusion caused by the many different statutes currently in force. Additionally, this bill codifies procedures for a judicial determination of liability and damages.

Chapter 35 Reform

In addition to the clarification of the pre-condemnation rights of entry, this bill makes the deadlines for initial offers that are required prior to filing an action for condemnation consistent throughout the statutes. The bill also extends the existing right to immediate possession that road authorities possess, found in ORS 35.348, to all condemners in the case of certain emergencies. Finally, this bill consolidates ORS Chapters 35 and 281 to provide one location for most of the eminent domain provisions.

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 nine times between October 2001 and August 2002. Meetings were held at Willamette University College of Law and the Oregon State Bar Offices. The Work Group included several attorneys in private practice (representing condemners and/or condemnees), state attorneys, city attorneys, an appraiser, a federal judge, and a representative from the State Court Administrator's office.¹ In addition, David Heynderickx, Senior Deputy Legislative Counsel, provided the Group with drafting services.

¹ **Members**

Greg Mowe	Stoel Rives LLP
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
Spencer Powell	MAI
David Ross	Salem City Attorney's Office
Donald Stark	Bullivant Houser Bailey PC
Joe Willis	Schwabe Williamson & Wyatt PC

Interested Participants

Susan Grabe	Oregon State Bar
Jill Gelineau	Schwabe Williamson & Wyatt PC
Wendy Johnson	Oregon Law Commission
David Kenagy	Oregon Law Commission
Bridget Musgrave	Willamette University
Bradd Swank	Office of State Court Administrator

The Work Group focused its attention both on a technical review and clean-up of the existing eminent domain procedural chapter as well as several substantive reform areas. The Group put together seven Sub-Work Groups to look at seven different eminent domain law reform areas. One Sub-Work Group, consisting of chairman Gregory R. Mowe and members Robert Maloney and David Ross, was charged with the review and standardization of the statutes governing pre-condemnation inspections.

This Sub-Work Group, known as the Pre-condemnation Inspections Sub-Work Group, began by reviewing the existing pre-condemnation rights of entry statutes that had specific provisions on entering land and surveying. The Group also examined the Uniform Eminent Domain Code as well as statutory provisions from Alaska, Connecticut, Illinois, Michigan, Nevada, New York, and South Dakota. Next, David Heynderickx took the ideas from the Group and carefully drafted the bill. Each draft version was thoroughly reviewed and thoughtfully discussed by the entire Work Group before the final version of the bill was accepted.

Another Sub-Work Group, known as the Mechanics of Offer and Acceptance Sub-Work Group, considered changes to the current practice of settlement offers and the ability of condemners to amend their assessment of the property's value to a lower number after the initial offer. The Sub-Work Group consisted of the following members: John Junkin, Don Stark, Al Depenbrock and Joe Willis. After much discussion, the group agreed to make only technical changes to the initial offers statutory provision².

III. Statement of the Current Problems in the Law

Pre-Condensation Rights of Entry

Oregon law currently provides dramatic variation of pre-condemnation rights among the different condemning bodies. Chapter 281 of the Oregon Revised Statutes deals with condemnation generally. While at first glance ORS 281.010³ seems to provide a uniform pre-condemnation right of entry for all authorized condemners, the statute by itself does not grant entry. Instead, the statute is limited by the language that only allows pre-condemnation entry if another statute expressly grants the entry to the specific condemning body. Therefore, each condemning body must search for its own particular statute providing for a right of entry and then must follow the method prescribed.

In some cases, no specific statutory authority exists for a condemning body to enter upon land to conduct preliminary surveys and testing prior to condemnation. For example, while the State of Oregon may exercise the power of eminent domain to acquire land for public housing or to manage Oregon's waterways, uplands, and minerals, there is no statutory authority for the state to conduct preliminary surveys before condemnation. Often, even if the authority does exist, the statute granting the pre-

² The Eminent Domain Work Group decided to postpone legislation in the remaining five Sub-Work Group areas for this session. Those Sub-Work Groups were as follows: Pleadings Requirements; Appraisal Exchange and Discovery; Pre-trial Deposits/Immediate Possession/Withdrawal of Deposits; Amending Down/Entitlement to Attorney Fees; and Contaminated Property.

³ ORS 281.010 provides as follows:

“Whenever the law authorizes private real property to be appropriated to public uses, the property may be entered upon, examined, surveyed and selected, in the mode prescribed by the statute giving such authority. Thereafter, the state, county or other municipal or public corporation, seeking and authorized to make such appropriation, may proceed as prescribed in ORS chapter 35 to have such property condemned and the compensation therefor determined and paid, and not otherwise unless otherwise provided by law. The compensation in the case of such condemnation by the state, county, municipal or public corporation shall be paid by the deposit in court of an order duly drawn upon the treasurer thereof for the amount of such compensation.”

condemnation right to enter does not clearly outline the scope of the authority, the proper procedure required of the condemner, or the availability of remedies to the landowner.

Chapter 35 Reform

Currently, ORS 35.346 provides two different deadlines for pre-filing settlement offers. This inconsistency confuses both condemners and condemnees, leading to a difference in opinion as to the correct deadline. In addition, the current version of ORS 35.348⁴ only applies to road authorities. However, emergency situations may arise for all condemning bodies that require immediate possession to avoid a threat to persons or property. Lastly, practitioners in this field often needed to consult ORS Chapter 35 and 281, as well as many other ORS Chapters that grant condemnation authority. The existence of two Eminent Domain Chapters has been misleading and confusing.

IV. The Objectives of the Proposal

Pre-Condemnation Rights of Entry

In creating this bill, the Work Group sought to establish a uniform statute that provided clear, concrete, and useful guidelines for condemning bodies to enter and inspect property prior to condemnation that were both fair to landowners and met the needs of condemners. The intent was to address and correct the ambiguity in the current eminent domain statutes by providing a single statutory source for this authority. The Work Group's objective was to outline the permitted scope of inspection and the circumstances under which compensation will be required.

The Work Group was specifically concerned with the following issues:

- 1) Notice
Section 2 of the bill addresses the need for condemning bodies to make reasonable efforts to notify landowners and occupants of their intent to enter upon land for examination, surveying and/or testing. The bill would provide a standard procedure for entry upon, examination, survey, testing, and sampling of real property before commencement of a condemnation action. Specifically, the bill requires a condemner to attempt to provide actual notice to the owner or occupant of the property before entering upon any land to examine or survey. Posted written notice may be used if the condemner is unable to provide actual notice. A condemner must have the consent of the owner or obtain a court order to conduct tests upon or take samples from real property. A court order is also required for examination or survey if the owner objects to entry for examination or survey.
- 2) Judicial Enforcement of Right to Enter
The bill was drafted so that judicial involvement is not required, but can be used to enforce a condemner's pre-condemnation right to enter upon land. The bill gives the condemner the ability to obtain a court order to allow entry while at the same time providing the landowner with the ability to seek specific terms and conditions for entry.
- 3) Compensation
The bill requires compensation for actual damage or substantial interference with the property's possession or use. The bill does not make a determination as to whether entry onto property constitutes a taking. The intent of this bill is not to increase or decrease existing rights to

⁴ ORS 35.348 provides as follows:

"Notwithstanding the time limits in ORS 35.346(4), in cases where a road authority, as defined in ORS 801.445, determines that an emergency exists that requires immediate maintenance, repair, construction or other road work related to the emergency, the authority may assume rejection by the landowner of a compensation offer made under ORS 35.346."

compensation that landowners have. As written, the bill allows the courts to determine if and when compensation is appropriate.

4) Double Recovery

The Work Group agreed to a provision that ensured that just compensation accorded to the owner resulting from the preliminary entry, survey, and testing activities would not again be recovered by the owner in any subsequent condemnation award.

Chapter 35 Reform

The main objective of amending ORS 35.346 was to make the deadline for the pre-filing initial offer to be 40 days in both Section (1) and Section (4). The proposed change corrects the uncertainty of whether the offer must be made in 20, 40 or 60 days.

The Work Group also sought to extend the “emergency provision” of ORS 35.348 to all condemners. The Work Group agreed that the provision should apply to all condemners, and not only road authorities, in the event of an emergency that threatens persons or property.

The Work Group also concluded that it was good law reform to consolidate ORS Chapters 35 and 281.

V. Review of Legal Solutions Existing or Proposed Elsewhere

The Pre-Condemnation Inspections Sub-Work Group relied heavily on 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. In addition, the Sub-Work Group reviewed pre-condemnation inspection statutory provisions from Alaska, Connecticut, Illinois, Michigan, Nevada, New York, and South Dakota.

VI. The Proposal: See HB 2273 (2003) (formerly LC 964).

VII. Conclusion

This bill is the product of thoughtful deliberation and consideration by representatives of both condemners and condemnees. Enactment of this legislation will provide a single statutory source that outlines both the authority for pre-condemnation rights of entry for all condemning bodies and the procedures for landowners to obtain a judicial determination of liabilities and damages. Additionally, this bill eliminates deadline inconsistencies, extends a limited emergency provision to all condemners, and consolidates ORS Chapters 35 and 281. Policy choices have been made in the bill that attempt to strike a balance between the needs of condemnees and condemners.