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# **Eminent Domain: Pre-condemnation Inspections Report**

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From  
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## I. Introductory Summary

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 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 resulted in an irregular system where condemners worked largely by individual agreements with each landowner.

The 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.

## 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 has met six times between October 2001 and May 2002. Meetings were held at Willamette University College of Law and the Oregon State Bar Offices. The Work Group includes several attorneys in private practice (representing condemners and/or condemnees), state attorneys, city attorneys, a surveyor, a federal judge, and a representative from the State Court Administrator's office.<sup>1</sup> In

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### 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
Bradd Swank	Office of State Court Administrator

addition, David Heynderickx, Senior Deputy Legislative Counsel, has provided the Group with drafting services.

The Work Group has 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 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.

### **III. Statement of the Current Problem in the Law**

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 281.010<sup>2</sup> seems to provide a uniform pre-condemnation right of entry for all authorized condemnors, 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 follow the method prescribed.

In some cases, no 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-condemnation right to enter does not clearly outline the scope of the authority, the proper procedure required of the condemnor, or the availability of remedies to the landowner.

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<sup>2</sup> 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.

#### IV. The Objectives of the Proposal

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  
This bill addresses the need for condemning bodies to make reasonable efforts to notify landowners and occupants of their intent to enter upon land for surveying and/or testing.
- 2) Judicial Enforcement of Right to Enter  
The Sub-Work Group drafted this bill so that judicial involvement is not required, but could 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. As written, the bill does not specifically define what types of entry and inspections are compensable. The Work Group decided to not include specific guidance on how to measure damages in order to avoid incorrectly interpreting the correct level of compensation. Instead, the bill allows the courts to determine compensation. Part of the reason for deferring specificity is that there are unresolved constitutional takings issues. [Research Pending]
- 4) Double Recovery  
The Work Group agreed to a provision that ensured that compensation for damages to property would be credited to the condemner in any subsequent condemnation award.

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

The 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 Appendix I (attached)**

**VII. Conclusion**

This bill is the product of thoughtful deliberation and consideration by representatives of both condemnors and condemnees. Enactment of this legislation would 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. Policy choices have been made in the bill that try to strike a balance between the needs of condemnees and condemnors.

