

TEMPORARY CONSTRUCTION EASEMENTS AND DAMAGES TO THE REMAINDER

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I. Introduction

When a condemnor takes a temporary construction easement across part of a property, it takes more than the express area of the easement: the taking potentially deprives the owner or hypothetical purchaser of the ability to use and develop the property at its highest and best use for the duration of the temporary construction easement. Because Oregon law requires the condemnor to pay just compensation for all takings and damages to the remainder according to the fair market value of the property at its highest and best use, the condemnor must compensate the owner for the damages to the remainder stemming not only from permanent takings, but also those from temporary construction easements.

II. Legal Analysis

Oregon courts hold that condemnees are entitled to compensation for temporary takings as well as for partial, permanent takings. Therefore, Oregon supports the recognition of severance damages for partial, temporary takings. Moreover, many other jurisdictions recognize the importance of compensating condemnees for the full value of their losses in condemnation actions involving partial, temporary takings.

A. Oregon Courts Liberally Interpret The Phrase “Just Compensation” to Fully Compensate Condemnees For Their Losses.

Article I, section 18 of the Oregon Constitution provides, in part: “Private property shall not be taken for public use, nor the particular services of any man demanded, without just compensation.” The touchstone of all eminent domain jurisprudence in Oregon is the “basic concept that private property shall not be taken for public purposes without just compensation.” *State ex rel. State Highway Comm’n v. Mayem*, 19 Or App 234, 236, 526 P2d 1390 (1974).

When the government takes property, it is required to pay just compensation: the “fair market value which . . . refers to what a willing buyer would pay a willing seller.” *State ex rel. Dept. of Transp. v. Alf*, 165 Or App 162, 167, 995 P2d 1197 (2000).

The Oregon Supreme Court has interpreted Article I, section 18 as requiring just compensation for “government acts that result in the appropriation of private property for public use,” regardless of whether the taking is restricted to a tangible, physical, thing, or other legal interests. *Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry*, 339 Or 136, 142–43, 117 P3d 990 (2005). Indeed, a government taking is generally “defined as any substantial interference with private property rights,” and “any destruction, restriction or interruption of the common and necessary use and enjoyment of the property of a person for a public purpose constitutes a taking thereof.” *State ex rel. Dep’t. of Transp. v. Winters*, 170 Or App 118, 123, 10 P3d (2000); *Lincoln Loan Co. v. State, By & Through State Highway Comm’n*, 274 Or 49, 52–53, 545 P2d 105 (1976).

1. Oregon Requires Compensation For Temporary Takings.

Oregon recognizes a condemnee’s right to compensation where the condemnor takes the condemnee’s property for a limited time. For example, in *City of Silverton v. Porter*, 28 Or App 415, 559 P2d 1297 (1977), the city took prejudgment possession of the defendant’s property for

two years and eventually elected to abandon the condemnation action. The defendant argued that the city owed him just compensation for the city's two-year possession of his property, and the trial court partially agreed, finding that the city owed the defendant compensation for the use of his land but failed to precisely calculate the value of the taking. *Id.* at 420–21. The court of appeals reversed for a more precise calculation of the value of the taking, but ultimately found that because the city had taken the defendant's property, it was liable for the loss of use of the land. *Id.* at 420. Similarly, in *Port of Newport v. Haydon*, 10 Or App 271, 273, 498 P2d 825 (1972), the condemnor elected to take prejudgment possession of the condemnee's property, and later abandoned the condemnation action. The court of appeals found that the condemnor owed the condemnee just compensation for the "use of the property." *Id.* at 279. Accordingly, in Oregon, it is well-settled that a condemnee is entitled to just compensation for the temporary use of its property by a condemnor.

2. Oregon Recognizes Severance Damages in Partial Takings.

"In the case of a partial taking of property, fair market value is measured by the value of the property acquired plus any severance damages, that is, any depreciation in the value of the remaining property caused by the taking." *Alf*, 165 Or App at 167. The case of *State By and Through State Highway Commission v. Boothman*, 22 Or App 576, 540 P2d 1020 (1975), aptly demonstrates the concept of severance damages. In *Boothman*, the condemnee rancher owned a 5,000-acre cattle ranch split by an existing highway with a cattle overpass, so that he could drive his cattle from one side of the road to the other. *Id.* at 578. The State expanded the highway, taking approximately 37.5 acres of the condemnee rancher's property, destroying the cattle-drive overpass, and failing to provide a means for the rancher to move his cattle across the road. *Id.* at 579. The court of appeals upheld the jury instructions given by the trial court, indicating that the State's failure to provide a crossing to the rancher could give rise to severance damages, *i.e.*, a

damage to the remaining cattle ranch through a diminution in value because the rancher could no longer drive his cattle across the road. *Id.* at 585–86. Accordingly, severance damages in connection with a permanent partial taking are well-established in Oregon.

B. Oregon Courts Recognize Severance Damages in Temporary Partial Takings.

Given that condemnees are owed compensation in condemnation actions where the condemnor temporarily takes an entire parcel, and severance damages when the condemnor permanently takes a portion of the condemnee’s property, Oregon law supports the recognition of just compensation including severance damages for temporary partial takings of condemnees’ property.

Oregon courts have consistently ruled that, in the case of a partial taking, relevant evidence of fair market value for the calculation of just compensation includes “consideration of the effect of the taking on the remaining parcel.” *Alf*, 165 Or App at 167–68. In *Alf*, for instance, the Oregon Department of Transportation took a narrow strip of land in fee simple and an adjacent easement along the condemnee’s property to widen a highway. *Id.* at 164–65. Although the taking in *Alf* was partial and permanent, rather than partial and temporary, the court of appeals observed that, in attempting to calculate the fair market value of the condemnee’s remaining property, “all considerations that might fairly be brought forward and reasonably be given substantial weight in negotiations between the owner and a prospective purchaser should be taken into account.” *Id.* at 167 (internal citations omitted).

The fact that a partial taking is temporary is immaterial to extension of the reasoning of *Alf* and *Boothman*, above, which hold that the fact finder must consider all damages to the remaining parcel in a partial taking. *See, also, State by and through State Highway Commission v. Vella*, 213 Or 386, 393, 323 P2d 941 (1958) (“This is not to say that inconvenience caused the

owner of the land in the operation of a business conducted thereon may not be a proper subject of consideration insofar as it may affect the market value of the remaining property.”).

C. Like Oregon, Other Jurisdictions Recognize That a Temporary Partial Taking Impacts a Property’s Remainder.

In *State by Humphrey v. Strom*, 493 NW2d 554 (Minn 1992), the Supreme Court of Minnesota determined that a temporary reduction in value to the remainder of a property as a result of construction could be considered relevant to the value of the property. In *Strom*, the condemnee owned an office building adjacent to a highway. The government condemnor took part of the property in fee simple, and took a temporary four-year construction easement to expand the highway. *Id.* at 557. The trial court granted the condemnee’s motion to allow the jury to consider evidence of construction-related interference with the property’s value, and the government condemnor appealed. *Id.*

The Court observed that Minnesota follows the “before and after” rule to determine severance damages, which measures the difference between “the fair market value of the entire piece of property immediately before the taking and the fair market value of the remainder of the property after the taking,” and that any competent evidence may be introduced if it bears on the market value of the remainder. *Id.* at 558–59. The Court reasoned that “evidence will be admitted concerning any factor which would affect the price a purchaser willing but not required to buy the property would pay an owner willing but not required to sell it,” and that to not admit evidence of factors “ordinarily considered when negotiating a price for a particular piece of property” would “result in the determination of a fair market value not of the property at issue but of some nonexistent hypothetical piece of property.” *Id.* at 559.

In the context of construction-related interference, the Court held that inconveniences affecting the use and enjoyment of the remainder of a piece of property are relevant to the market

value of that property and, although construction-related interference is temporary and impairment to the value of the remainder is temporary, that was no barrier to recovery because a “purchaser might pay less if he knew such [inconveniences] were to be inflicted.” *Id.* Accordingly, the Court held that evidence of construction-related interference was admissible “as a factor to be considered by the finder of fact in determining the diminution in market value of the remaining property.” *Id.* at 560–61.

Comparably, the Third Department of New York’s Supreme Court, Appellate Division, held that where a partial temporary construction easement affects the development potential of the entire parcel, just compensation included the rental value of the entire parcel for the duration of the easement. *Morton v. State of New York*, 8 AD2d 49, 54, 185 NYS2d 321 (1959). In *Morton*, the State took a temporary construction easement across the front of the condemnee’s property to widen a road. *Id.* at 53. At trial, the condemnee’s appraiser testified that the temporary easement prevented the development of the condemnee’s property because “a map could not be prepared and submitted to the Planning Commission while the easement existed,” and, accordingly, the fair rental value of the entire property was the appropriate measure of just compensation. *Id.* at 53–54. The court upheld the award to the condemnee, finding that it was warranted by the evidence. *Id.*

Likewise, the First Circuit Court of Appeals upheld the fact finder’s determination that a temporary construction easement inhibited development and, accordingly, the condemnee was owed compensation for the deprivation. *Portland Natural Gas Transmission System v. 19.2 Acres of Land*, 318 F3d 279, 285 (1st Cir 2003). In *Portland Natural Gas*, the condemnor took a permanent easement and temporary construction easement across the condemnee’s land to build a natural gas pipeline. *Id.* at 279. At trial, the condemnee’s expert “opined that the temporary

easement effectively delayed the sale of, and any development on,” the condemnee’s property, and that “developers had verified this hypothesis, stating that so long as unencumbered lots were available, buyers would go elsewhere.” *Id.* at 285. The trial court awarded the rental value for the entirety of the lots that the temporary easement encumbered, and the condemnor appealed. *Id.*

The First Circuit upheld the trial court’s award, noting that development on the land could not begin until the end of the temporary construction easement, and a buyer would either wait to purchase the property until the temporary taking was nearly complete or would offer less than the fair market value for the property. *Id.*

The Supreme Court of Georgia also held that temporary damage to a residual property in a temporary partial taking was compensable: “If the taking of a temporary easement can be shown by competent evidence to have diminished the fair market value of the land not taken, the owner is entitled to just and adequate compensation.” *Hillman v. Dept. of Transp.*, 257 Ga 338, 340, 359 SE2d 637 (1987).

IV. Conclusion

Oregon law requires the government to justly compensate a property owner for the taking of its property. Indeed, the Oregon Supreme Court acknowledges that “[e]minent domain is not a favorite of the law, and its exercise is subject to judicial scrutiny,” due to the substantial invasion of a condemnee’s property rights. *Moore Mill & Lumber Co. v. Foster*, 216 Or 204, 263, 337 P2d 810 (1959). Accordingly, in determining just compensation, Oregon courts have accepted a wide variety of legal theories all aimed at a singular purpose: to ensure that a condemnee is compensated for its losses as a result of a taking and damages to the remainder. Thus, just compensation under Oregon law must include damages to the remainder stemming from temporary construction easements.