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Richard C. Bemis, B.S., Lewis and Clark College (1954); J.D., University of Oregon (1957); member of the Oregon State Bar since 1957; sole practitioner, Bend.

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I. (§22.1) SCOPE OF CHAPTER

This chapter reviews the Oregon laws of eminent domain and the procedures of condemnation as set forth primarily in ORS chapter 35 and Oregon appellate court decisions. For a more detailed analysis of specific problems, case law from other jurisdictions, and matters not discussed in this chapter, see NICHOLS ON EMINENT DOMAIN (Julian L. Sackman ed., rev 3d ed 1997).

II. JUST COMPENSATION

A. (§22.2) Defined

Just compensation is full indemnity for loss or damage sustained by an owner of condemned property. It is the fair market value of the property taken, or the fair market value of that which the owner has been deprived by reason of the acquisition of the owner’s property. Dept. of Trans. v. Lundberg, 312 Or 568, 574, 825 P2d 641, cert. denied, 506 US 975 (1992) (casenote in §22.69); State Highway Comm. v. Hooper, 259 Or 555, 560, 488 P2d 421 (1971); State Highway Comm. v. Hazapis, 3 Or App 282, 286, 472 P2d 831 (1970) (casenote in §22.42); Tunison v. Multnomah County, 251 Or 602, 604, 445 P2d 498 (1968).

Just compensation must be the full and perfect equivalent in money of the property taken. The landowner is to be put in as good a position pecuniarily as the landowner would have occupied if his or her property had not been taken. United States v. Miller, 317 US 369, 373, 63 S Ct 276, 87 L Ed 336 (1943); Monongahela Navigat’n Co. v. United States, 148 US 312, 13 S Ct 622, 37 L Ed 463 (1893).

B. (§22.3) Fair Market Value

Fair market value is defined as the amount of money the property would bring if it were offered for sale by an owner who desired, but was not obliged, to sell and was purchased by a buyer who was willing, but was not obliged, to buy. Dept. of Trans. v. Lundberg, 312 Or 568, 574, 825 P2d 641, cert. denied, 506 US 975 (1992) (casenote in
§22.6
§22.69); Dept. of Trans. v. Southern Pacific Trans. Co., 89 Or App 344, 346, 749 P2d 1233, rev. denied, 305 Or 671 (1988) (casenote in §22.69); Pape v. Linn County, 135 Or 430, 437, 296 P 65 (1931). The definition of fair market value necessarily assumes that both parties are reasonably well-informed and that the property has been on or exposed to the market for a reasonable length of time. Highway Comm. v. Superbilt Mfg. Co., 204 Or 393, 412, 281 P2d 707 (1955) (casenote in §22.9).

C. (§22.4) Highest and Best Use

Just compensation requires that property be valued at its highest and best use. Highway Comm. v. Superbilt Mfg. Co., 204 Or 393, 412, 281 P2d 707 (1955) (casenote in §22.9); Highway Com. v. Assembly of God, 230 Or 167, 176, 368 P2d 937 (1962). The highest and best use is the use that, at the time of appraisal, is the most profitable likely use of a property. It may also be defined as that available use and program of future use that produces the highest present land value. Dept. of Trans. v. Lundberg, 312 Or 568, 574, 825 P2d 641, cert. denied, 506 US 975 (1992) (casenote in §22.69).

The highest and best use of property may be other than its current use if it is reasonably probable that the property has actual potential for a higher and better use. Dept of Trans. v. Lundberg, supra.

NOTE: Current land use restrictions may affect the highest and best use of property. See LAND USE (Oregon CLE 1994).

See §22.20, infra, for further discussion of highest and best use.

D. (§22.5) Entire Takings


E. (§22.6) Partial Takings

If only a portion of a parcel is condemned, or if less than fee title is appropriated (as with an easement), just compensation equals the fair market value of the portion or interest condemned, plus any reduction in the fair market value of the owner’s remaining property caused by
§22.7 / CONDEMNATION


F. (§22.7) Special Benefits

If only a portion of property has been condemned, any enhancement in the value of the remaining property is considered a special benefit and may be set off against any severance damage. To be considered a special and not a general benefit, this increase in value must be one that is not shared by the general public. Oregon courts have held that although special benefits may reduce the severance damage to the remaining property, they may not be set off against the fair market value of the property actually taken. State Dept. of Trans. v. Montgomery Ward Dev., 79 Or App 457, 464, 719 P2d 507, rev. denied, 301 Or 667 (1986); State Highway Comm. v. Bailey, 212 Or 261, 277, 319 P2d 906 (1957); State Highway Comm. v. Stockhoff, 16 Or App 647, 650, 519 P2d 1281 (1974); State Highway Comm. v. Hooper, 259 Or 555, 560, 488 P2d 421 (1971); State Highway Comm. v. Freeman, 11 Or App 513, 517–518, 504 P2d 133 (1972). Federal courts, however, hold that special benefits may be set off against both severance damage and the value of the property taken. Georgia Power Co. v. 138.30 Acres of Land, 596 F2d 644, 649 (5th Cir 1979); United States v. Miller, 317 US 369, 376, 63 S Ct 276, 87 L Ed 336 (1943). Increased traffic volume is a general benefit to all property rather than a special benefit and, therefore, is not admissible to offset severance damages. State Dept. of Trans. v. Montgomery Ward Dev., supra.

A property has been specially benefited when “the construction of an improvement ‘add[s] anything to the convenience, accessibility and use of the property as distinguished from benefits arising incidentally out of the improvement and enjoyed by the public generally.’” Hutchinson v. City of Corvallis, 134 Or App 519, 523–524, 895 P2d 797, rev. denied, 321 Or 512 (1995) (quoting State Highway Comm. v. Bailey, supra, 212 Or at 306).

For a detailed analysis of the distinction between general benefits and special benefits, see Taylor v. State ex rel Herman, 467 P2d 251
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NOTE: Some local governments condemn rights-of-way for local street-improvement projects and then include the right-of-way acquisition costs in the special assessments levied against benefited properties. This procedure precludes reliance on special benefits in the condemnation proceedings. *City of Baldwin Park v. Stoskus*, 8 Cal3d 563, 105 Cal Rptr 325, 503 P2d 1333 (1973); *City of Tucson v. Rickles*, 488 P2d 180, 182 (Ariz 1971), *vacated on other grounds*, 505 P2d 253 (Ariz 1973).

*State Dept. of Trans. v. Montgomery Ward Dev.*, 79 Or App 457, 719 P2d 507, *rev. denied*, 301 Or 667 (1986). Defendants owned property on which Mall 205 was located. The state condemned a portion of defendants’ property to construct an access road to I-205, relocating S.E. 96th Street diagonally across defendants’ property, thus severing 4.2 acres from the rest of the shopping center. At trial, the state’s appraiser testified that defendants’ property would receive special benefits because (1) a portion of S.E. 96th Street would be vacated by the county in favor of defendants and (2) Mall 205 would benefit from the increased volume of traffic on I-205 as a result of the project. Defendants appealed a judgment in favor of the state, assigning as error the admission of evidence of special benefits and of the enhanced value of the property taken due to the announcement and construction of I-205. *Held*: Reversed on the issue of special benefits. As a general proposition, compensation for damages to the property not taken caused by severing a portion of the property by condemnation may be reduced by special benefits to the remaining property that are due to the project for which the property is taken. The state appraiser’s opinion that S.E. 96th Street would be vacated was speculative and without proper foundation. The decision to vacate a street rests with the county independent of the I-205 project. In addition, increased traffic on I-205 was not a special benefit peculiar to defendants’ property. It was a general benefit to all property in the area. The question of special benefits should not have been submitted to the jury. Under the “scope of the project” rule, the enhanced value of the property is not compensable if during the planning or construction it becomes evident that the land will be needed for public use. Factors to consider include the foreseeability of the taking, the time between announcing the project and the taking, and government representations concerning the certainty of the taking.

*State Highway Com. v. Bailey*, 212 Or 261, 319 P2d 906 (1957). When the state condemned part of defendants’ land for a limited-access highway, defendants sought compensation for the land taken and for damage to the remaining land. The state contested only the latter claim and attempted to introduce evidence to prove that the highway created numerous special benefits that minimized the damages. The trial court would not admit this evidence. *Held*: Reversed. The state was entitled to present evidence proving special benefits. Those benefits could be set off against injury to the
remaining land, but not against the value of land actually taken. Special benefits were defined as those that added to the convenience, accessibility, and use of the property, but not those that arose incidentally or that were merely speculative.