

B-Engrossed
Senate Bill 794

Ordered by the House June 2
Including Senate Amendments dated April 30 and House Amendments
dated June 2

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Provides that defendant in condemnation action may not recover attorney fees from condemner unless amount of just compensation assessed by verdict exceeds highest written settlement offer submitted by condemner before filing of action.

[Allows condemner to make offer of compromise to defendant in condemnation action after filing of action and not less than 10 days before trial. Requires court, if defendant accepts offer and if offer does not specifically indicate otherwise, to give judgment to defendant for amount of costs and disbursements, attorney fees and other costs incurred before offer. Provides that, if defendant rejects offer and fails to obtain judgment more favorable than offer, defendant may not recover costs, prevailing party fees, disbursements or attorney fees that were incurred on or after date of offer, that defendant shall recover costs and disbursements, attorney fees and expenses incurred before date of offer, and that condemner shall recover costs and disbursements incurred by condemner after service of offer.]

Allows condemner to serve offer of compromise to defendant in condemnation action not less than 10 days before trial. Requires court, if defendant accepts offer under specified circumstances, to give judgment to defendant for amount of specified litigation costs incurred before service of offer. Provides, if defendant rejects offer and fails to obtain judgment more favorable than offer, that defendant may not recover specified litigation costs incurred on or after service of offer, that defendant will recover specified litigation costs incurred before service of offer and that condemner will recover specified litigation costs incurred on or after service of offer.

A BILL FOR AN ACT

1
2 Relating to condemnation; creating new provisions; and amending ORS 35.346 and 35.348.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 35.346 is amended to read:

5 35.346. (1) At least 40 days before the filing of any action for condemnation of property or any
6 interest in property, the condemner shall make [*an initial*] **a** written offer to the owner or party
7 having an interest to purchase the property or interest, and to pay just compensation therefor and
8 for any compensable damages to remaining property.

9 (2) The offer shall be accompanied by any written appraisal upon which the condemner relied
10 in establishing the amount of compensation offered. If the condemner determines that the amount
11 of just compensation due is less than \$20,000, the condemner, in lieu of a written appraisal, may
12 provide to the owner or other person having an interest in the property a written explanation of the
13 bases and method by which the condemner arrived at the specific valuation of the property. The
14 amount of just compensation offered shall not be reduced by amendment or otherwise before or
15 during trial except on order of the court entered not less than 60 days prior to trial. An order for
16 reduction of just compensation offered, pleaded by the condemner in the complaint or deposited with
17 the court for the use and benefit of the owner pending outcome of the condemnation action, may

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 be entered only upon motion of the condemner and a finding by clear and convincing evidence that
2 the appraisal upon which the original offer is based was the result of a mistake of material fact that
3 was not known and could not reasonably have been known at the time of the original appraisal or
4 was based on a mistake of law.

5 (3) Unless otherwise agreed to by the condemner and the owner, prior to appraising the property
6 the condemner shall provide not less than 15 days' written notice to the owner of the planned ap-
7 praisal inspection. The property owner and designated representative, if any, shall be invited to ac-
8 company the condemner's appraiser on any inspection of the property for appraisal purposes.

9 (4) The owner has not less than 40 days from the date the owner receives the [initial] written
10 offer required by subsection (1) of this section, accompanied by the appraisal or written explanation
11 required by subsection (2) of this section, to accept or reject the offer. If the owner rejects the
12 condemner's offer and obtains a separate appraisal, the owner shall provide the condemner with a
13 copy of the owner's appraisal not less than 60 days prior to trial or arbitration.

14 (5)(a) Failure to provide the opposing party with a copy of the appropriate appraisal as provided
15 in subsections (2) and (4) of this section shall prohibit the use of the appraisal in arbitration or at
16 trial.

17 (b) In the event the owner and condemner are unable to reach agreement and proceed to trial
18 or arbitration as provided in subsection (6) of this section, each party to the proceeding shall pro-
19 vide to every other party a copy of every appraisal obtained by the party as part of the condemna-
20 tion action.

21 (6)(a) If an action based on the condemnation is filed, the owner may elect to have compensation
22 determined by binding arbitration if the total amount of compensation claimed by any party does
23 not exceed \$20,000. Notice of an election of binding arbitration must be given to the condemner at
24 least 90 days prior to the date on which an arbitration hearing is scheduled under ORS 36.420.

25 (b) Notwithstanding the amount established under ORS 36.400, if the owner elects to proceed
26 with binding arbitration, the arbitration shall be conducted according to the mandatory arbitration
27 program established under ORS 36.400 to 36.425. Notwithstanding ORS 36.425, no party may request
28 a trial de novo after the filing of the decision and award of the arbitrator. Within 20 days after the
29 filing of the decision and award of the arbitrator under ORS 36.425, any party may file a motion
30 with the court for the vacation, modification or correction of the award. The court may vacate an
31 award only if there is a basis to vacate the award described in ORS 36.705 (1)(a) to (d). The court
32 may modify or correct an award only for the grounds given in ORS 36.710. Except as provided in
33 this subsection, no party may appeal from the decision and award of an arbitrator if the owner
34 elects binding arbitration in lieu of trial.

35 (c) If the total amount of compensation claimed exceeds \$20,000 but is less than \$50,000, the
36 owner may elect to have compensation determined by nonbinding arbitration under the applicable
37 provisions of ORS 36.400 to 36.425.

38 (7) If a trial is held or arbitration conducted for the fixing of the amount of compensation to be
39 awarded to the defendant owner or party having an interest in the property being condemned, the
40 court or arbitrator shall award [said] **the** defendant costs and disbursements including reasonable
41 attorney fees and reasonable expenses as defined in ORS 35.335 (2) in the following cases, and no
42 other:

43 (a) If the amount of just compensation assessed by the verdict in the trial exceeds the [initial]
44 **highest** written offer in settlement submitted by condemner **before the filing of the action** to those
45 defendants appearing in the action pursuant to subsection (1) of this section; or

1 (b) If the court finds that the first written offer made by condemner to defendant in settlement
2 [prior to] **before the** filing of the action did not constitute a good faith offer of an amount reason-
3 ably believed by condemner to be just compensation.

4 (8) If any appraisal provided to a party under this section relies on a written report, opinion or
5 estimate of a person who is not an appraiser, a copy of the written report, opinion or estimate must
6 be provided with the appraisal. If any appraisal provided under this section relies on an unwritten
7 report, opinion or estimate of a person who is not an appraiser, the party providing the appraisal
8 must also provide the name and address of the person who provided the unwritten report, opinion
9 or estimate.

10 (9) Costs and disbursements other than reasonable attorney fees and expenses as defined in ORS
11 35.335 (2) shall be awarded to condemner in all cases other than those in which defendant is entitled
12 to costs and disbursements under subsection (7) of this section.

13 **SECTION 2.** ORS 35.348 is amended to read:

14 35.348. Notwithstanding ORS 35.346, if a condemner determines that an emergency that poses
15 a threat to persons or property exists and that immediate possession of the property is necessary,
16 the condemner may immediately file a condemnation action after making [*an initial*] **the** written of-
17 fer **required** under ORS 35.346 (1) accompanied by the appraisal or explanation required by ORS
18 35.346 (2).

19 **SECTION 3.** The amendments to ORS 35.346 and 35.348 by sections 1 and 2 of this 2009
20 Act apply only to condemnation actions filed on or after the effective date of this 2009 Act.

21 **SECTION 4.** Section 5 of this 2009 Act is added to and made a part of ORS chapter 35.

22 **SECTION 5.** (1) After the filing of a condemnation action, a condemner may serve an
23 offer of compromise on the defendant in the action. An offer of compromise must be served
24 on the defendant not later than 10 days before the trial of the action. The offer of compro-
25 mise must identify the amount offered as just compensation for the property and as
26 compensable damages to remaining property of the defendant. The offer of compromise must
27 also indicate whether the offer includes any amount for costs and disbursements, attorney
28 fees and expenses and, if so, the amounts included for costs and disbursements, attorney fees
29 and expenses. If the defendant accepts the amount offered as just compensation for the
30 property and as compensable damages to remaining property of the defendant, the defendant
31 shall file with the court an acceptance signed by the defendant or the defendant's attorney.
32 The acceptance must be filed not more than three days after the time the offer was served
33 on the defendant. A copy of the offer must be attached to the acceptance.

34 (2) If an offer of compromise under this section does not specifically include amounts for
35 costs and disbursements, attorney fees and expenses, upon acceptance of the offer the court
36 shall give judgment to the defendant for the amount offered as just compensation for the
37 property and as compensable damages to remaining property of the defendant and, in addi-
38 tion, for costs and disbursements, attorney fees and expenses that are determined by the
39 court to have been incurred before service of the offer on the defendant.

40 (3) If an offer of compromise under this section specifically includes amounts for costs
41 and disbursements, attorney fees and expenses, the defendant may accept all amounts of-
42 fered, or may accept only that portion of the offer identified as just compensation for the
43 property and as compensable damages to remaining property of the defendant. If the de-
44 fendant accepts only that portion of the offer identified as just compensation for the property
45 and as compensable damages to remaining property of the defendant, the defendant is enti-

1 tled to an award for costs and disbursements, attorney fees and expenses incurred by the
2 defendant before service of the offer on the defendant. The court shall determine the amount
3 of costs and disbursements, attorney fees and expenses to be awarded to the defendant after
4 acceptance of the offer is filed under subsection (1) of this section.

5 (4) If an offer of compromise is not accepted within the time allowed under subsection
6 (1) of this section, the offer is withdrawn and may not be given in evidence at trial. If the
7 defendant fails to obtain a judgment more favorable than the offer:

8 (a) The defendant may not recover prevailing party fees or costs and disbursements, at-
9 torney fees and expenses that were incurred on and after service of the offer;

10 (b) Unless the parties agree otherwise, the court shall give judgment to the defendant for
11 costs and disbursements, attorney fees and expenses that were incurred by the defendant
12 before service of the offer; and

13 (c) The court shall give judgment to the condemner for the condemner's costs and dis-
14 bursements, other than prevailing party fees, incurred by the condemner on and after ser-
15 vice of the offer.

16 (5) For the purpose of determining whether the defendant has failed to obtain a judgment
17 more favorable than an offer of compromise that specifically includes amounts for costs and
18 disbursements, attorney fees and expenses, the court shall first determine the amount of
19 costs and disbursements, attorney fees and expenses incurred by the defendant before ser-
20 vice of the offer on the defendant. The court shall add that amount to the amounts awarded
21 under the judgment as just compensation for the property and as compensable damages to
22 remaining property of the defendant. If the sum of those amounts is equal to or less than
23 the total amount specified in the offer of compromise, the defendant has not obtained a
24 judgment more favorable than the offer of compromise.

25 (6) For the purposes of this section, "expenses" has the meaning given that term in ORS
26 35.335.