



# The Florida Senate

Interim Project Report 2002-150

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Committee on Transportation

Senator Jim Sebesta, Chairman

## RIGHT OF WAY ACQUISITION

### SUMMARY

The Department of Transportation is vested with the power of eminent domain and may condemn lands and property for transportation purposes. In acquiring right of way, the department follows the constitutional and statutory restraints, which provide significant protections to the property owners.

Three recent reports and additional staff findings indicate the department's right of way acquisition costs could be reduced by:

- Promoting an incentive for landowners to resolve valuation issues through negotiation instead of litigation;
- Giving the department additional operational flexibility to promote efficiencies in its acquisition process; and
- Managing corridor development to minimize development within a planned transportation corridor and to acquire right of way well in advance of construction need.

constitutes an economic, health, safety, and welfare liability that imposes increasingly onerous burdens on public revenues, seriously impedes the ability to plan for future growth, substantially impairs or arrests sound growth, impedes the provision of transportation infrastructure concurrent with the impact of development, retards the provision of an adequate transportation system for the people in the state, aggravates traffic problems, and substantially hampers the elimination of traffic hazards and the improvement of traffic facilities." These legislative findings along with the fact the department is prohibited by law (s. 337.11(3)(c), F.S.) from advertising for the competitive procurement of a construction contract until title for all property needed for the project is acquired makes the department's right of way program an essential component to a transportation project's timely and successful completion.

The right of way program's primary activity is timely obtaining right of way needed for a transportation project. The department appraises the property and attempts to negotiate a purchase price with the landowner. If the parties are unable to agree on a price and the property is essential for the project to be constructed, the department files a condemnation suit and the court determines the property's value by a twelve-person jury.

The cost of land acquisition is subject to the factors of just and full compensation. Just compensation is mandated by the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. Article X, Section 6 of the Florida Constitution, mandates full compensation. Full and just compensation provide significant protections to property owners.

Based upon federal and state laws, the department must compensate landowners for their land, attorney fees, appraiser fees, technical expert fees, and relocation expenses, if necessary. If the department takes a business property, the department may also be required to pay business damages.

### BACKGROUND

#### *Generally*

This report examines the Department of Transportation's (department) right of way acquisition process with the intent of finding ways to lower transportation project costs through lower right of way acquisition costs. Because business damages are the subject of a separate interim mandatory review (2002-208), they are not fully discussed in this report.

Section 337.273(2)(b), F.S., sets forth Legislative findings indicating the "inability to timely protect or acquire property necessary to accommodate a transportation facility in a transportation corridor

### ***The Current Eminent Domain Process***

Eminent domain is the constitutional power of the government to take private property for public use. Through this power, the government may acquire land for transportation purposes. This occurs through condemnation and public acquisition and does not require a property owner's consent. However, a property owner whose land is taken through eminent domain must be justly and fully compensated.

Chapters 73 and 74, F.S., provide for eminent domain and proceedings supplemental to eminent domain, respectively. Chapter 73, F.S., specifies the presuit negotiation requirements, the petition filing requirements, the service of process and publication requirements, the pretrial process, jury trial process, and post trial process. Chapter 74, F.S., sets forth the supplemental proceedings to eminent domain including the provisions, which allow a governmental entity to take possession and title of property in advance of the entry of final judgment.

Before an eminent domain proceeding can be filed, the condemning authority must attempt to negotiate in good faith with the fee owner of the property to be acquired, must provide the fee owner with a written offer and, if requested, a copy of the appraisal upon which the offer is based, and must attempt to reach an agreement regarding the amount of compensation to be paid for the property. (s. 73.015, F.S.) Also before an eminent domain proceeding is brought, the condemning authority must make a good faith effort to notify the business owners of all their rights. (s. 73.015, F.S.) Prior to instituting litigation, the condemning authority must also notify the fee owners of their statutory rights to receive fees and costs. (s. 73.0511, F.S.)

Once a petition for eminent domain is filed, the petitioner may make an offer of judgment no sooner than 120 days after the defendant has filed an answer and no later than 20 days prior to trial. (s.73.032, F.S.) A defendant may make an offer to have judgment entered for payment of compensation by the petitioner only for an amount under \$100,000, and the offer may be served on the petitioner no sooner than 120 days after the defendant has filed an answer and no later than 20 days prior to trial. At the time an offer of judgment is made by the petitioner, the petitioner must identify and make available to the defendant the construction plans, if any, for the project on which the offer is based.

In accordance with s. 73.071, F.S., eminent domain trials for valuation of property are argued before a twelve-person jury and have preference over other civil actions. The amount of compensation is determined as of the date of trial, or the date upon which title passes, whichever shall occur first. The jury determines solely the amount of compensation to be paid, with compensation to include, in part, the following:

1. The value of the property sought to be appropriated; and
2. Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, and the effect of the taking of the property involved may damage or destroy an established business of more than 4 years' standing, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause.

Whether the parties settle prior to or after a petition is filed, the landowners and business owners are entitled to attorney fees calculated in accordance to s. 73.092, F.S., and reasonable costs incurred including appraisal fees and accountant fees in accordance to s. 73.091, F.S.

### ***The Department's Acquisition Process***

In accordance with s. 337.27, F.S., the department is vested with the power of eminent domain and may condemn all necessary lands and property for transportation purposes. In acquiring right of way, the department follows the eminent domain process established in chapters 73 and 74, F.S., and in The Uniform Relocation Assistance and Real Property Acquisition Policies Act, Public Law 91-646.

Approximately 460 full time right of way, legal, and support staff are employed in the department's right of way acquisition process. The department's right of way program is lead by the Director of the Office of Right of Way. The director is responsible for establishing and assuring the adherence to policies, procedures, guidelines, and standards, which are based upon existing federal and state law. Because the department is a decentralized agency, the department's District Right of Way Administrators are responsible for acquiring right of way in accordance with the policies, procedures, guidelines and standards established by the

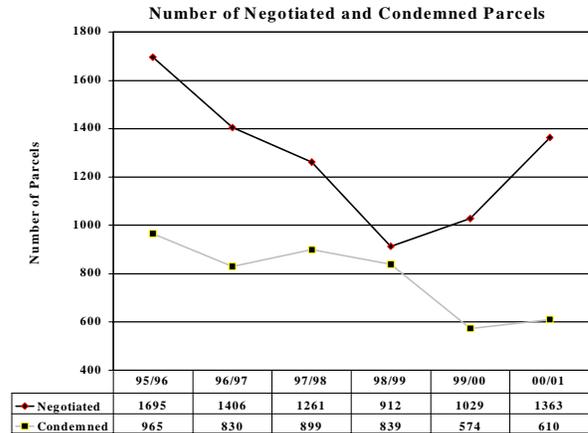
director and are responsible for supervising and managing all right of way staff in each district.

The right of way process includes all activities related to acquiring the property rights necessary for the construction and maintenance of the state transportation system. These activities include cost estimating, right of way maps, legal descriptions, title search, appraisal, appraisal review, negotiation, eminent domain litigation, demolition, and relocation assistance. The department out sources approximately fifty-one percent of these right of way related activities, including conducting title search, developing right of way plans, conducting appraisals, and negotiating with the affected property owners.

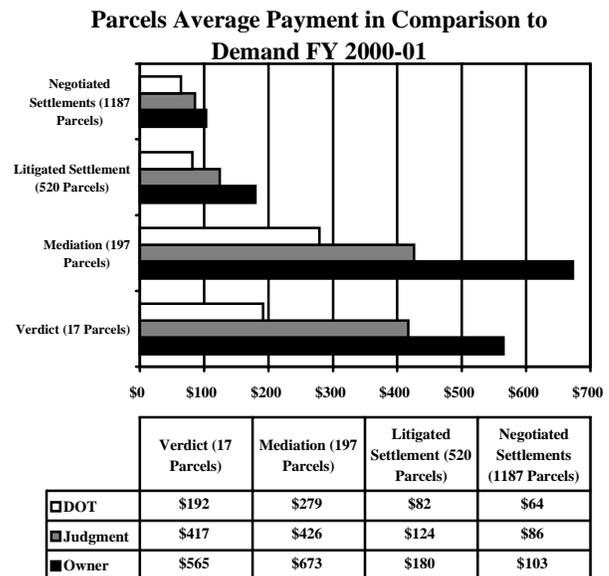
In most instances, the department schedules eighteen months to acquire title to all necessary rights of way for a transportation project. If title to property cannot be obtained through negotiation, the department normally acquires title to the property through the “quick take” process set forth in chapter 74, F.S. Acquiring title through the “quick take” process normally takes at least ninety days from filing of the petition. When the department acquires right of way through condemnation, an additional eighteen to twenty-four months are needed after title is acquired to obtain final judgments on all litigated parcels.

In FY 2000-01, the department expended a total of \$462 million for right of way acquisition. Of that amount, \$299 million was for land, \$63 million was for

In fiscal year 2000-01, the department acquired a total of 1,973 parcels, of which, 1,363 parcels – approximately 69 percent – were acquired through negotiation, and another 610 parcels – about 31 percent – were acquired through the condemnation process.



For negotiated parcels and for litigated (condemned) parcels, the following chart shows where the average purchase agreement or the average final judgment amount falls between the department’s last appraisal and the average property owner’s counter offer for those parcels fully resolved during FY 2000-01.

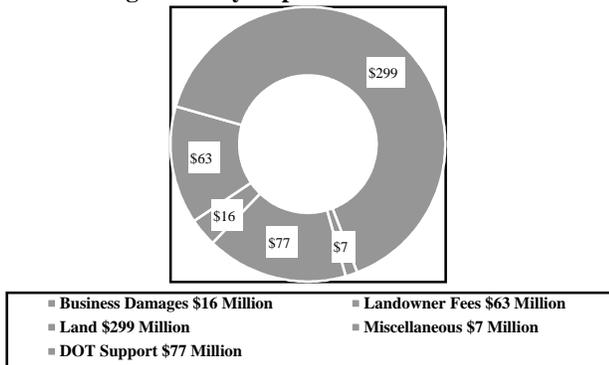


In Thousands

### METHODOLOGY

Committee staff conducted an extensive literature review of initiatives relating to right of way cost avoidance strategies. This review included Florida studies, as well as other documents and professional journals. Current laws regarding Florida right of way

**Right of Way Expenditures 2000/2001**



landowner expenses (\$32 million for attorneys fees, \$9 million for appraisers fees, and \$22 million for other expert fees), \$16 million was for business damages, \$77 million was for the department’s support of the acquisition program, and \$7 million was for miscellaneous expenses.

programs were reviewed. Staff also interviewed state agency managers and private sector stakeholders.

## FINDINGS

There have been three recent reports relating to the department's right of way acquisition program. The Florida Transportation Commission (FTC) issued its *Organizational and Operational Review of the Florida Department of Transportation* in January 2001. The Office of Program Policy Analysis and Government Accountability (OPPAGA) issued its justification review *Right-of-Way Acquisition Program Florida Department of Transportation* in August 1999. The Center for Urban Transportation Research (CUTR) issued its study *Managing Corridor Development* in October 1996. The following summarizes these reports, and summarizes the additional findings of committee staff.

### *Organizational and Operational Review of the Florida Department of Transportation*

In Senate Bill 772, the 2000 Legislature commissioned the FTC to conduct an operational and organizational review of the department. FTC's consultant KPMG Consulting LLC conducted the review.

KPMG found that for timely and cost-effective acquisition of right-of-way parcels, a great deal of coordination is required between the engineering design and right-of-way consultants. Many internal and external stakeholders interviewed during KPMG's review indicated several instances where lack of proper communication between the engineering design consultants and the right-of-way consultants had resulted in either changing of design plans during the later stages of the project design or extending the right-of-way acquisition process. KPMG recommended the department should consider including the following right of way acquisition related activities as an integral part of the preliminary engineering contract services: (1) preparing initial right of way maps and plans; (2) identifying affected property and performing title searches; (3) contacting affected property owners; (4) conducting appraisals of properties; and (5) supporting the department in property acquisition negotiation with property owners. Giving engineering design consultants the responsibility for selected right of way related activities would ensure better coordination and improved communication between the engineering design and the right of way activities.

In addition, KPMG recommended the department propose the following changes in Florida Statutes:

- Section 337.011(3)(c), F.S. requires the department to hold "clean" titles for all properties acquired – Allowing purchasing of title insurance could save valuable time and resources.
- Section 73.015(3), F.S., allows for an optional pre-litigation negotiation – Requiring a mandatory mediation prior to litigation would provide one more opportunity for reaching a negotiated settlement.
- Create a simpler right-of-way acquisition process for non-federal projects – projects that do not have to follow all federal requirements, as they are 100 percent funded by state funds.
- Presently, all registered real estate brokers and licensed salesmen are required to obtain a license from the Department of Business and Professional Regulation – Allowing reciprocity for registered real estate brokers and licensed salesmen from neighboring states would increase the pool of qualified talent available for the right-of-way acquisition process.
- Consider outsourcing or privatizing selected right-of-way processes, such as property condemnation casework. The department could examine historical data and profile case types to identify case characteristics that would justify outsourcing or privatization.

### *OPPAGA's Review of Right of Way Acquisition*

In August 1999, OPPAGA issued its justification review of the department's right of way program. OPPAGA found that although Florida laws governing right-of-way acquisition are intended to protect property owners, they create an incentive for landowners to litigate rather than negotiate the sale of their property. The broad range of landowner costs the state pays and the number of cases litigated contributes to Florida paying more in right of way acquisition costs than any other state in the nation.

OPPAGA believes because there is no financial risk to the landowner to hire expensive advisors and no incentive to negotiate a settlement with the state, the law encourages landowners to litigate. Florida law protects the interests of landowners more than most other states in the nation. Florida is one of only three

states paying landowner costs for hiring attorneys and property appraisers while the landowner and the state negotiate a price for right-of-way property. Florida is one of only two states that pay for landowners to hire technical experts during this negotiation process.

By hiring independent professionals during the negotiations, landowners can determine if the state is offering a fair price for their property. Knowing the state has made a fair offer should encourage landowners to accept the state's price and result in a quick sale. However, there is no financial incentive for a landowner to accept the state's purchase offer because the state will also pay for landowner attorney, appraiser, and technical expert fees if the landowner stops negotiating and goes to court to seek a higher purchase price.

Based upon a survey it conducted, OPPAGA concluded Florida pays more types of landowner costs than most states for right-of-way condemnation cases. Eighteen states pay some amount of landowner attorney fees for properties going to condemnation. In ten of these states, the court must award a sale price that is a specified percentage over the state's last offer before the state is responsible for attorney fees. Seven of these ten states require an increase between 10%-15% before the state pays attorney fees. Florida pays landowner attorney fees if the court awards a property value greater than the state's final purchase offer by any amount. Florida is also one of the few states paying the landowner's property appraiser fees and technical expert fees during the condemnation process. Under Florida law there is no defined monetary limit to the state's payment of appraiser and expert fees.

The 1994 Legislature limited the state's payment of landowner attorney fees to be based upon the benefits achieved for the clients. Benefits are defined as the difference between the last written offer made by the state before the landowner hired an attorney and the final sale's price. Attorney's fees are based on the following schedule:

- 33% of any benefit up to \$250,000; plus
- 25% of any benefit between \$250,000 and \$1 million; plus
- 20% of any benefit exceeding \$1 million.

Despite the 1994 legislation, OPPAGA concluded Florida still pays more for landowners' attorney fees

for right-of-way acquisition than any other state, both in dollars spent and as a percentage of property purchased. In calendar year 1997, Florida paid \$33 million in landowner attorney fees or 16.2% of what was spent for land. In contrast, the next-highest state, Louisiana, spent \$2 million in landowner attorney fees or 9.6% of what was spent for land.

Additionally OPPAGA found from Fiscal Year 1993-94 to 1997-98 the department purchased 19% fewer parcels, yet landowner costs increased 40%. There are too many variables and not enough historical data to definitively say why these costs are going up. According to department staff, the condemnation court process has become more complex and both the department and landowners are caught in escalating legal battles that pressure both sides to use more attorneys, appraisers, and technical experts. The state's policy of giving landowners carte blanche to hire eminent domain professionals fuels this situation.

OPPAGA identified five options for reducing state costs resulting from paying landowner expenses. These options would reduce right-of-way acquisition costs and bring Florida into closer conformity with landowner protections offered by other states.

1. Pay landowners for their property, but do not pay their appraiser, attorney, or other technical expert costs.
2. Maintain the current restrictions on state payment of landowner attorney fees and cap payment of landowner appraiser and other technical expert costs at specified dollar amounts.
3. Cap payment of attorneys, appraisers, and other technical expert costs at a specified dollar amount.
4. Pay landowner costs for an appraisal to a specified cap. Pay landowner costs for attorneys and technical experts only if the sale price is a specified percentage higher than the department's initial offer.
5. (A combination of options 3 and 4) Pay landowner costs for an appraisal to a specified cap. Cap the amount the state will pay for landowners' costs for attorneys and technical experts and only pay these costs if the

property's sale price is a specified percentage over the department's initial offer.

### *CUTR's Managing Corridor Development Study*

In October 1996, CUTR issued its report relating to managing corridor development. CUTR believes managing transportation corridor development will reduce right of way costs. Without transportation corridor management, new development may foreclose opportunities to expand or interconnect roads where needed. Buildings may be constructed too close to the roadway. Thoroughfare frontage may be subdivided into small lots or strip zoned for commercial development, with little attention to access control. Poorly coordinated access systems force more trips onto the arterial, traffic conflicts multiply, and congestion increases. Road improvements are needed sooner than expected, and the cycle begins again.

CUTR maintains transportation and land use problems are interdependent and require coordinated solutions. One solution is better collaboration between the agencies involved in transportation and development planning. Another solution is to integrate corridor management into local development planning and regulation.

Corridor management includes right-of-way preservation, advance acquisition, and access management techniques and involves the application of measures to:

- Prevent or minimize development within the right-of-way of a planned transportation facility or improvement;
- Acquire right-of-way well in advance of construction need; and
- Preserve the safety and efficiency of existing facilities through access management.

Florida planning law defines corridor management, as the coordination of the planning of designated future transportation corridors with land-use planning within and adjacent to the corridor. (s. 163.3164(30), F.S.)

CUTR believes corridor management promotes orderly development of a transportation network to serve land development. This helps to assure that transportation facilities will be adequate to serve existing and planned

development, thereby maintaining concurrency as required under Florida growth management law.

CUTR states corridor management benefits communities, taxpayers, and property owners by: (1) reducing property damage and displacement of homes and businesses; (2) minimizing environmental, social, and economic impacts of the corridor; (3) preventing foreclosure of desirable locations; (4) permitting orderly project development; and (5) reducing the costs of transportation facilities.

The private sector benefits from greater clarity of public intentions regarding the location and timing of roadway improvements and the desired level of access control. This reduces risk associated with timing and phasing of development projects. Corridor management enables developers to plan projects and site-related improvements compatible with the transportation functions of the corridor.

CUTR predicts if land for new roads and highways is not set aside as development occurs, then the corridor may be blocked by development, and a new location must be found. The corridor may need to be relocated into more environmentally sensitive areas that could otherwise have been avoided or cause greater damage and disruption to neighborhoods. In turn, plans must be redrawn, project development is delayed, administrative costs go up, and inflation consumes more of the budget.

Allowing development in planned rights-of-way also increases costs of acquiring right-of-way, at a time when many state and local governments are facing a transportation revenue shortfall. The costs are highest in Florida's growing urbanized areas, making it difficult to keep pace with the need for transportation improvements.

Failure to adequately preserve or acquire property for needed transportation facilities seriously impedes the ability of governments to plan for future growth.

CUTR determined a problem associated with the protection of future transportation right of way is uncertainty of the precise location or alignment and whether the facility will ultimately be constructed. For federally funded projects, a lengthy and comprehensive project development and environmental study must first be undertaken before right-of-way can be acquired.

The department has similar requirements for State Funded projects. The department cannot exercise eminent domain until environmental documentation is complete and the department receives location and conceptual design acceptance. In addition, years may elapse between completion of project studies and construction of the facility. In the meantime, public support may have eroded, funds may no longer be available for the improvement, or other impediments may arise.

This uncertainty makes it difficult for local governments to discourage development in the right-of-way. In anticipation of the facility, property owners may strive to rezone property for more intensive development, or expedite their development projects. Local ability to minimize development in the right-of-way is constrained if the precise alignment has not been defined, the time frame for acquisition is unclear, and there is no guarantee of construction.

CUTR also determined uncertainty as to when and if the facility will ultimately be constructed or improved is also problematic for developers and property owners. Public designation of a future highway corridor can increase property values due to the potential for more intensive development, but it can also depress property values and increase the risk of developing if the timing and actuality of construction are uncertain.

Corridor management requires participation of a variety of individuals, groups, and agencies. Primary responsibility for corridor management rests with the department, metropolitan planning organizations, and local planning and development departments in communities that share the corridor. These are the agencies that plan and set transportation improvement priorities. Other agencies that may be involved in the process include local expressway authorities, transit agencies, and regional planning councils.

### ***Additional Findings***

#### ***Incentive Bonus***

Currently, the department is required by federal regulation to offer the approved appraisal amount as its initial offer. The department has received approval from the Federal Highway Administration (FHWA) to apply incentive amounts to initial offers to property owners on a pilot project basis, and to assess the potential for incentive offers to reduce overall right of way costs and to reduce project delivery time. The incentive will be an amount of money, in excess of the

approved appraisal, offered to each landowner for a limited time as an inducement to settle quickly and prior to litigation. Because this is a pilot project, actual savings or costs to the department have not been determined; however, incentive offers are anticipated to result in a savings in attorney's fees, consultant costs, staff costs, and a reduction in acquisition time.

#### ***Market Review for Parcels Under \$20,000***

Currently, the department is required by federal regulation to appraise all parcels; however, the department may waive this policy and replace an appraisal report with a price estimate calculated by the right of way agent for parcels valued under \$10,000. The department has requested and received approval from FHWA for a pilot project allowing a waiver increase from \$10,000 to \$20,000. The use of the agent's price estimate should prove to be an efficient tool in reducing costs by eliminating appraisal fees, in some instances, for parcels below \$20,000.

#### ***Need for Review Appraisers***

Currently, the department is required by federal regulation to appraise each parcel needed for the transportation project. In addition, the department then has an independent staff/consultant appraiser review the initial appraisal. This policy creates a two-tiered appraisal process, which takes additional time and money. The department has requested approval from FHWA to waive its appraisal review process on a pilot project basis. The objective of the pilot project is to determine if time and cost savings can be achieved in relationship to reasonable risk management by waiving appraisal review. Because this is a pilot project, actual savings or costs to the department have not been determined; however, waiver of the appraisal review is anticipated to result in a savings of acquisition time and costs associated with the review.

#### ***Right of Way Bonds***

Section 206.46(2), F.S., provides in each fiscal year, seven percent of the revenues deposited into the State Transportation Trust Fund must be transferred to the Right of Way Acquisition and Bridge Construction Trust Fund. However, such funds may not exceed \$135 million. A total of \$913.7 million have been issued to date (November 1991 through March 1999) to reimburse for project advancement costs.

Passage of CS/CS/SB 862 during the 2000 Legislative Session increased the annual transportation revenues

and, therefore, the amount available for transfer under the seven percent requirement. According to the department, the current program consumes all capacity and reaches the \$135 million debt service cap by fiscal year 2005. Increasing the debt service cap from \$135 million to \$200 million would provide for additional debt service of approximately \$65 million and would provide additional bond capacity of approximately \$1 billion for use in purchasing right of way or constructing bridges.

#### *Need for Flexibility*

Section 337.107, F.S., authorizes the department to enter into contracts for right of way services on transportation corridors and facilities. The section provides right of way services include negotiation and acquisition services appraisal services, demolition and removal of improvements, and asbestos-abatement services. Section 337.11(7)(a), F.S., authorizes the department to combine the design and construction phases of a building, a major bridge, or a rail corridor project into a single contract (design-build contract). The department is not currently authorized to include right of way services in a design-build contract.

In addition, the department is not authorized to advertise for competitive procurement of a construction project until title to all necessary rights of way is acquired. This eliminates the department's ability to utilize a design-build contract where right of way is needed and inhibits the department's ability to begin construction on its bonded projects in a timely manner.

construction of bonded and design-build transportation projects prior to acquiring title to all necessary right of way.

Raise the cap on the department's maximum debt service of right of way acquisition and bridge construction bonds to \$200 million to ensure an uninterrupted flow of revenue to pay projected increases in debt service.

The connection between transportation and land-use planning must be strengthened and addressed comprehensively in any growth management legislation in order to minimize development within the right of way of a planned transportation facility or improvement.

## **RECOMMENDATIONS**

Consider measures, which create an incentive for landowners to resolve the sales of parcels through negotiation rather than litigation. Such measures may include positive inducements for landowners to accept initial offers or limitations on when the state must assume costs associated with litigation, particularly when a final judgment is reasonably consistent with the state's offers.

Acquire right of way well in advance of construction need in order to avoid inflation of property values.

Give the department maximum flexibility to incorporate right of way services in design and design-build contracts.

Give the department maximum flexibility to allow the advertisement, selection, and commencement of