



# The Florida Senate

Interim Project Report 2002-208

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Committee on Comprehensive Planning, Local and Military Affairs

Senator Lee Constantine, Chairman

## BUSINESS DAMAGES IN EMINENT DOMAIN PROCEEDINGS

### SUMMARY

Insufficient time has elapsed to adequately gauge the extent of the fiscal impact of changing the time period that a business must be established in order to be entitled to business damages in eminent domain proceedings involving the partial taking of property for right-of-way purposes. Staff recommends that the 4-year time period remain in place for 2 years beyond the initial repeal date of January 1, 2003, or until January 1, 2005. This would allow for 5 years of experience with the 4-year period to elapse. Effective January 1, 2005, the time period would revert to 5 years unless the time period is adjusted by the Legislature before that date.

### BACKGROUND

In 1999, the Legislature amended s. 73.071(3), Florida Statutes, (F.S.), to change from the number of years in which a business must have been in existence in order to be eligible for business damages resulting from property taken by the state or local governments in eminent domain actions associated with right-of-way acquisition. Chapter 99-385, Laws of Florida, contains this change and provides that the language changing the time period from 5 years to 4 years is repealed, effective January 1, 2003. In addition, section 59 provides that the change from 5 years to 4 years is effective January 1, 2000. The purpose of this interim project is to evaluate the consequences of the reduction in the time period necessary to establish business damages from 5 years to 4 years, and evaluate whether the 4-year time period should be retained or replaced by the historical 5-year period.

### The Current Eminent Domain Process

Chapters 73 and 74, F.S., provide for eminent domain and proceedings supplemental to eminent domain, respectively. Chapter 73, F.S., specifies the requirements for filing a petition for eminent domain

and issuance of a summons or other notification to property owners by the clerk of the court.

### *Presuit Negotiation*

In 1999, chapter 73, F.S., was amended to require condemning authorities to negotiate in good faith with the fee owner of the parcel to be acquired, provide the fee owner with a written offer, and, if requested, provide a copy of the appraisal upon which the offer is based. Most importantly, the condemning authority must attempt to reach an agreement on the amount of compensation to be paid for the property.

As part of the presuit negotiation process set forth in s. 73.015, F.S., condemning authorities are required to make a good faith effort to notify business owners, including lessees, who operate a business on the property to be acquired. The condemning authority must notify the business owner:

- 1) That all or a portion of his or her property is necessary for the project;
- 2) The nature of the project and the parcel designation of the property to be acquired;
- 3) That the condemning authority will provide a copy of the appraisal report upon which the offer to the fee owner is based within 15 days of receipt of a request by the business owner;
- 4) The business owner's statutory rights; and
- 5) The business owner's rights and responsibilities regarding negotiation and settlement.

If a business owner intends to claim business damages, pursuant to s. 73.071(3)(b), F.S., the business owner must submit to the condemning authority a good faith written offer to settle any claims of business damage, within 180 days of receipt of the initial notice from the condemning authority. The business damage offer must include an explanation of the "nature, extent, and monetary amount" of the damage and must provide to the condemning authority copies of the owner's

business records that substantiate the good faith offer. (s. 73.015(2)(c), F.S.)

The condemning authority must accept or reject the business owner's offer or make a counter offer within 120 days after receipt of the good faith offer of business damages. (s. 73.015(2)(d), F.S.) The failure of the condemning authority to respond to the business damage offer, or rejection of the offer, is deemed to be a counteroffer of zero for the purposes of calculating attorney's fees based on the benefit received by the claimant in an eminent domain proceedings pursuant to s. 73.092, F.S.

If the business owner fails to submit a business damage offer within 180 days, absent a showing of good faith justification, the court must strike the business owner's claim for business damages. If the court finds that the owners can demonstrate good faith justification for their failure to timely submit a business damage offer, the court must grant the business owner up to 180 days to submit a business damage offer, which the condemning authority must respond to within 120 days.

If business damages are recovered by the business owner based on the condemning authority accepting the business owner's initial offer, or the business owner accepting the condemning authority's initial counter offer, attorney's fees are calculated based on the attorney's time and expertise employed in representing the business owner. If the resolution of the amount of damages is achieved after negotiation or litigation later in the process, attorney's fees are calculated based on the benefits achieved for the client. Where business records were provided by the business owner to the condemning authority to substantiate a business damage offer submitted pursuant to s. 73.015(2)(c), F.S., benefits for the purposes of calculating attorney's fees are defined as the difference between the final judgment or settlement and the written counter offer made by the condemning authority pursuant to s. 73.015(2)(d), F.S. If the owner fails to provide business records to the condemning authority to substantiate a business damage offer, and such records are deemed material to the determination of business damages, benefits are calculated based on the difference between the first written counter offer made by the condemning authority within 90 days of receipt of the business records.

### *Litigation Procedure*

Prior to instituting litigation, the condemning authority must notify the fee owners of their statutory rights concerning attorney's fees and costs. (s. 73.0511, F.S.)

In addition, the condemning authority must follow the prelitigation negotiation process described above and set forth in s. 73.015, 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. A defendant may make an offer to have judgment entered against the defendant for payment of compensation by the petitioner only for an amount that is 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.

Pursuant to s. 73.071, F.S., eminent domain trials are argued before a twelve-person jury and have preference over other civil actions. The jury is to determine the amount of compensation for the property to be acquired. The amount of compensation is to be determined as of the date of trial, or the date upon which title passes, whichever shall occur first. The jury is to determine 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,
  - (a) any damages to the remainder caused by the taking; these are known as severance damages;
  - (b) when 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, severance damages include the probable business damages.

Landowners and business owners are entitled to attorney's fees calculated based upon the benefits achieved for the client, defined as the difference between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. (s. 73.092(1), F.S.) In

addition, property owners, including business owners with a business damage claim, are entitled to reasonable costs, including appraisal fees and accountant fees. (s. 73.091, F.S.)

### Business Damages

The payment of business damages as a compensable portion of damages payable in an eminent domain action was first authorized in Florida Law in 1933. Section 1 of Chapter 15927, Laws of Florida 1933, provided for business damages where a public body engaged in the condemnation of a right-of-way:

*...when the suit is by a board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may injure, damage or destroy an established business of more than five years standing owned by the party whose lands are being so taken, located upon adjoining, adjacent or contiguous lands owned or held by such party, and within two miles of the lands so sought to be taken, the jury shall consider the probable effect the use of the property so taken may have upon the said business, and assess in addition to the amount to be awarded for the taking, the probable damages to such business which the use of the property so taken may reasonable cause.*

The requirement that a business must be established “of more than five years standing” in order to be eligible to business damages remained in Florida Statutes for 66 years until the time period was changed from 5 years to 4 in Section 58, Chapter 99-385, Laws of Florida.

In order to be entitled to business damages the following conditions must be met:

1. The eminent domain action is brought by the Department of Transportation, county, municipality, board, district or other public body;
2. The condemnation is for right-of-way;
3. The action is for a partial taking, where less than the entire property is being taken;
4. The effect of the taking of the property involved is to damage or destroy an established business of more than 4 years’ standing;
5. The business is owned by the party whose lands are being taken, located upon adjoining lands owned or held by such party;

6. The action may reasonably cause damages to the business;
7. The extent of the business damages must be set forth as a written defense by the claimant.

Unlike damages attributable to the taking of the property itself, the award of business damages is not constitutionally guaranteed but is a matter of “‘legislative largess,’ and not a constitutional obligation” *Blockbuster Video, Inc. v. State of Florida, Department of Transportation*, 714 So.2d 1222, 1223 citing *Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc.* 444 So.2d 926, 928 (Fla. 1983); *Mulkey v. Division of Admin., State of Fla.*, 448 So.2d 1062 (Fla. 2d DCA 1984).

Statutes granting business damages are treated by the courts as “in the nature of a waiver of sovereign immunity and must be strictly construed in favor of the state.” *Blockbuster Video*, 714 So.2d 1222, 1223. However, Florida courts have interpreted s. 73.071, F.S., rather broadly.

For example, courts have awarded business damages to successors in title where the owner has not owned the business for the requisite period of time but the business has been in operation for more than the statutory period. See *Robert H. Hart & Sons, Inc. v. State, Department of Transportation*, 559 So.2d 302 (Fla. 2<sup>nd</sup> DCA 1990). In addition, the business damage claim of a lessee, in addition to that of a fee owner is compensable. See *Blockbuster Video, Inc.*, 714 So.2d 1222, 1224 citing *State Rd. Dep’t v. White*, 161 So.2d 828 (Fla. 1964), *aff’g* 148 So.2d 32 (Fla. 2d DCA 1962).

### The Payment of Business Damages by Florida Department of Transportation (FDOT)

Florida is one of very few states to award business damages. A Justification Review of FDOT’s Right-of-Way Acquisition Program prepared by the Office of Program Policy Analysis and Governmental Accountability (OPPAGA), reports that only nine states pay business damages and that Florida pays more in business damages than any other state. According to the OPPAGA Report, in calendar year 1997, Florida paid business damages of \$16.4 million or 8.06% of acquisition costs, while Louisiana, which<sup>1</sup> had the next

<sup>1</sup> *Office of Program Policy Analysis and Government Accountability*, “Justification Review: Right-of-Way Acquisition Program-Florida Department of Transportation,” Report 99-02, August 1999, at p. 20.

highest value of business damages as a percentage of total acquisition costs, paid business damages, which represented 2.63% of total acquisition costs.

The OPPAGA Justification Review also states that for the past five years (calculated from 1999), the percentage of business damages relative to total acquisition costs paid by FDOT has remained stable at approximately 5% of overall acquisition costs. More recently, FDOT right of way expenditures for Fiscal Year 1997-1998 included total expenditures of \$355,059,246 of which \$18,791,739 was paid to satisfy business damage claims; these business damages represented 5% of total expenditures. In Fiscal Year 1998-1999, total FDOT expenditures for right-of-way acquisition were \$270,424,956 of which \$14,706,127 represented business damages; or business damages represented 5.5% of total expenditures. In Fiscal Year 1999-2000, FDOT spent \$25,730,025 in business damages, or 7.5% of \$345,383,284 in total right-of-way costs. In Fiscal Year 2000-2001, the percentage of right-of-way expenditures attributable to business damages actually declined slightly. Of a total expenditure amount of \$384,879,257, \$16,415,208, or 4% is attributable to business damages.

## METHODOLOGY

Staff solicited data from the Department of Transportation on business damages claims that have been made from January 1, 2000, the effective date of the amendment imposing a 4-year rather than 5-year qualifying period for business damages, to August 27, 2001. In addition, staff composed a survey of Eminent Domain Business Damages that was administered by staff of the Legislative Committee on Intergovernmental Relations to all Florida counties and the 20 most populated municipalities. In addition, staff interviewed business and local government stakeholders.

## FINDINGS

Lowering the time period required for a business to be in existence in order for a claimant to be entitled to business damages in a partial taking involving right of way inevitably increases the number of business damage claims made to condemning authorities and increases, to some degree, the cost of right-of-way acquisition. In order to determine the magnitude of this increase, staff obtained data from FDOT, Office of Right of Way, documenting the number of business damage claims that have been asserted since the effective date of the amendment to Section 73.071, F.S.

### *Business Damage Claims to FDOT by Businesses of More than 4 Years But No Greater Than 5 Years Standing:*

According to the data received from FDOT, during this time period of January 1, 2000 to August 27, 2001, 18 4-year claims have been received out of a total of 105 claims, or approximately 17 percent of the claims received during this time period.

The statewide total amount of initial business damage offers made to FDOT during this time period was \$154,028,941. Of this amount, \$5,281,445 in business damages were claimed in initial offers to FDOT made by businesses in operation more than 4 years, but not greater than 5 years. These figures do not represent the actual dollar amount paid by FDOT for damages, as the settlement of such amounts through presuit negotiation, mediation, or the final judgment of a circuit court are only now beginning to be resolved. Staff from FDOT reports that it will be another six to nine months before much data on actual business damages paid will become available as claims initiated at the beginning of the year 2000 begin to be settled. However, to put these figures in context, during Fiscal Year 2000-2001, FDOT paid \$385 million in right-of-way acquisition costs, and acquired a total of 1,973 parcels.

### *Business Damage Claims to Local Governments by Businesses of More than 4 Years But No Greater Than 5 Years Standing:*

Staff prepared a survey, administered by the Legislative Committee on Intergovernmental Relations, addressed to all counties and the 20 municipalities with the highest population in Florida, which asks whether the local government has received any business damage claims from business that have been in operation for over 4 but under 5 years time. The survey included five questions addressing the effect of the change from more than 5 to more than 4 years in standing in order for business to qualify for business damages:

- 1) Between January 1, 2000 and the present, has the local government sought to obtain, through eminent domain, a partial taking of property involving a business of more than 4, but less than 5 years standing?
- 2) A description of the right-of-way acquired and the amount of business damages paid for partial takings noted in Question #1.
- 3) A list of pending claims for business damages associated with a partial taking that have not been settled or adjudicated and the amount of such claims.

- 4) The total amount of business damages paid from January 1, 2000 to present.
- 5) The percentage of business damages paid from January 1, 2000 to the present attributable to business damages paid for partial takings associated with those types of businesses indicated in Question #1.

Forty-three percent of the sixty-seven counties surveyed, and thirty percent of the twenty municipalities surveyed submitted a response to the survey. Only one local government, Broward County, identified a business damage claim associated with a claim for business damages asserted based on more than 4 years, but not greater than 5 years of operation. This single claim involved the taking of a portion of a shopping center where one tenant was paid \$200,000 in business damages.

### *Conclusions*

Since the effective date of the change from more than 5 years to more than 4 years has only been 21 months, it is difficult to draw any definitive conclusions regarding the costs of the change to condemning authorities. Obviously, the change increases the cost of right-of-way acquisition to the condemning government authority. However, because of the time lag between the initiation of the condemnation actions and the actual payment of damages the data available on the amount of business damages actually paid by governmental entities to claimants is limited.

In addressing the issue of the time period appropriate for awarding business damages, the interests of the governmental authorities in managing their right-of-way acquisition costs must be balanced against the interests of businesses whose livelihood is disrupted by the right-of-way project.

An additional factor to take into consideration is the timeframes associated with the planning of road construction in Florida. FDOT is required, pursuant to s. 339.135, F.S., to prepare and follow a 5-year work program that includes a 5-year listing of transportation projects planned for each fiscal year and for each FDOT district. Similarly, local governments, in the 5-year capital improvements element of their local government comprehensive plan must address the construction of public facilities, including any road construction by the local government, and shall be reviewed and modified on an annual basis. (s. 163.3177(3)(b), F.S.) In addition, local governments may designate within their local government

comprehensive plans transportation corridors as defined in s. 335.03, and 337.273, F.S.

In constructing the business damage compensation policy associated with property taken for the construction of rights-of-way by public entities, it is important to avoid creating any incentive for new business owners to start up a business in locations already slated for right-of-way acquisition based upon the speculation that they will be able to obtain a “windfall” of business damages. However, many business damage claimants are lessees of commercial property who are less likely to have actual knowledge of right-of-way construction plans of state and local governments than the owner of the fee property.

The following is a list of options for addressing the sunset of the provision reducing the time period necessary to establish entitlement to business damages from 5 years to 4 years.

*Option 1: No Action*—The effect of this option would be to allow the amendments to subsection (3) of section 73.071, F.S., contained in Section 59 Chapter 99-385, Laws of Florida, to stand repealed. Because Section 58 amends subsection (3) of section 73.071, and essentially republishes the entire subsection, the Section 59 repeal language could be interpreted as repealing the entire subsection (3) of Section 73.071 as amended by Chapter 99-385, Laws of Florida. Such a repeal would eliminate the statutory authorization for governmental condemning authorities to award business damages in eminent domain proceedings.

*Option 2: Repeal Section 59, Chapter 99-385, Laws of Florida.*—The effect of this action would be to leave the period of time in which a business must be established at “more than 4 years’ standing.” Under this option, business owners with businesses of more than 4 years standing would continue to be eligible to claim business damages. The disadvantage of this option is that it continues the enlarged eligibility for business damages before the fiscal impact of the change on the costs of right-of-way acquisition is fully known.

*Option 3: Repeal Section 59, Chapter 99-385, Laws of Florida, and, effective January 1, 2005, change the 4-year time period back to 5*—The effect of this action would allow additional time to assess the fiscal impact of the 4-year period on right-of-way acquisition costs. As of January 1, 2005, 5 years of data would be available on the number of claims and costs of paying business damages to business owners where the

business is more than 4 years but no greater than 5 years in standing.

*Option 4: Change the 4-year time period for a standing business to be entitled to business damages back to 5.—While this option would reduce the cost of right-of-way acquisition to condemning authorities, the number of business owners entitled to business damages would be reduced.*

### **RECOMMENDATIONS**

Staff recommends the repeal of section 59, Chapter 99-385, Laws of Florida, and the amendment of s. 73.071(3)(b), F.S., to provide that the 4-year time period for a standing business to be entitled to business damages reverts to 5 years, effective January 1, 2005. This change would allow for the fiscal impact of the 4-year “standing business” time period to be assessed for a period of five years.