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Committee on Community Affairs

Senator John McKay, Chairman

RECENT ISSUES IN EMINENT DOMAIN LAW: PROPOSED EXPANSION OF THE STATUTORY ENTITLEMENT TO BUSINESS DAMAGES

SUMMARY

Acquisition of property by condemning authorities may result in damages to a business owner. In 1998, legislation was proposed to expand the entitlement to business damages. However, transportation resources are limited and such changes would increase the cost of right of way acquisitions.

If the Legislature chooses to expand access to business damages, some of the increase in project costs could be offset by implementing measures designed to expedite the acquisition process and reduce associated costs.

This report provides a general overview of Florida's constitutional and statutory provisions relating to eminent domain, reviews the recently proposed increase in entitlements to business damages, and outlines measures that could be implemented to offset the impact of paying more business damages.

BACKGROUND

Eminent domain is the power of the state to take private property for public use. Under both the federal and state constitutions that power is restricted. The Fifth Amendment to the U.S. Constitution provides that private property may not be taken for public use without just compensation. Article X, s. (6)(a), of the State Constitution, prohibits the government from taking property through the exercise of eminent domain without the payment of full compensation.

The payment of compensation for intangible losses and incidental or consequential damages, however, is not required by the constitution, but is granted or withheld simply as a matter of legislative grace. *Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc.*, 444 So.2d 926, 928 (Fla. 1983). The statutes authorizing these damages

must be strictly construed and any ambiguity in these statutes must be construed against the claim of damages, with damages to be awarded only when an award appears clearly consistent with legislative intent. *Id.*, at 929.

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.

Pursuant to s. 73.032, F.S., 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.

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.)

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 5 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.

Inverse Condemnation / Diminution of Access

When a governmental action causes a substantial loss of access to real property without a taking of the property, there is a right to compensation through an inverse condemnation action. *Palm Beach County v. Tessler*, 538 So.2d 846, 849 (Fla. 1989). However, the fact that a portion or even all of the access to an abutting road is destroyed does not constitute a taking unless, in light of the remaining access to the property, the property owner's right of access was substantially diminished. Damages recoverable are limited to the reduction in the value of the property which was caused by the loss of access.

Business damages are controlled by s. 73.071, F.S. This statute does not authorize compensation for business damages under such circumstances; business damages are compensable only when there is a partial taking of land. *Weaver Oil Co. v. City of Tallahassee*, 647 So.2d 819, 822 (Fla. 1994). Thus, when a governmental action reduces access but the reduction in access is not substantial, there is no taking of access. Additionally, even if the reduction in access does rise to the level of a taking, if the governmental action did not involve a taking of a part of the property on which the business is located, there can be no business damages.

DOT v. Fortune Federal

Section 337.27(2), F.S., allows the Department of Transportation (DOT) to acquire an entire parcel of land if, by doing so, the acquisition costs to the department is equal to or less than the cost of acquiring

a portion of the property. Enacted in 1984, this provision:

“... shall be construed as a specific recognition by the Legislature that this means of limiting the rising costs to the state of property acquisition is a public purpose and that, without this limitation, the viability of many public projects will be threatened.”

In 1988, this provision was upheld by the Florida Supreme Court. *Department of Transportation v. Fortune Federal Savings and Loan Association*, 532 So.2d 1267 (Fla. 1988). This same authority has been extended to counties and cities (ss. 127.01(1)(b) and 166.401.(2), F.S., respectively).

Attorney's Fees

Section 73.091, F.S., provides that the condemning authority must pay all attorney fees and reasonable costs incurred in the defense of the property owner, including appraisal fees, and accountant fees when business damages are applicable. Where the petitioner and the property owner are unable to agree on fees, the court determines the fees to be paid. The court must be guided by the amount the defendant would ordinarily have been expected to pay for the services if the petitioner were not responsible for the cost.

Prior to an offer by the petitioner, the defendant's attorney fees, as well as appraisal fees and other reasonable costs incurred in the defense, are set by the court if not resolved by the parties. When assessing attorney's fees the court must consider: the fee, or rate of fee, customarily charged for comparable services; the amount of money involved; the difficulty of the case; the skill employed by the attorney; and, the attorney's time and labor.

Section 73.092, F.S., provides that if an offer is refused and the defendant chooses to go to trial, attorney's fees after the offer of judgment are based “solely on the benefits achieved for the client.” The term “benefits” means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If an attorney is hired before a written offer is made, benefits must be measured from the first written offer after the attorney is hired. The section further provides that attorney's fees based on benefits achieved are to be awarded according to the following schedule:

1. Thirty-three percent of any benefit up to \$250,000; plus
2. Twenty-five percent of any portion of the benefit between \$250,000 and \$1 million; plus
3. Twenty percent of any portion of the benefit exceeding \$1 million.

Business Damages & “Non-Public Bodies”

Numerous statutory provisions grant both public and private entities the authority to condemn property for a variety of purposes. However, business damages are controlled by s. 73.071, F.S., which provides that damages are compensable only when “public bodies” take property. Privately owned utilities are not “public bodies.” *Sasnett v. Tampa Electric Co.*, 513 So.2d 157 (Fla. 2nd DCA 1987).

Costs in Eminent Domain Proceedings

In Fiscal Year 1997-98, DOT spent \$355 million in acquiring right of way for construction projects. (See TABLE 1.) (This figure does not include department legal and “expert” contract services.) Seventy-two percent of this was spent on land, a decrease from 83% in FY 1992-93. During the same period, there has been a corresponding increase in the percent paid for landowner fees. The percentage for business damages has remained relatively constant over this six year period.

TABLE 1

DOT Right of Way Expenditures: FY 1997/98			
	Expenditure	% of	Total
Land	\$ 254.4 m		72%
Business Damages	18.8 m		5%
Miscellaneous	18.3 m	5%	
Landowner Fees	63.5 m		18%
Attorney Fees	\$ 34.8 m (55%)		
Appraisal Fees	9.3 m (15%)		
Other Costs	19.4 m (30%)		
	=====		
	\$ 355.0 m		

Source: DOT, 9/98

Comparable information for cities and counties is not available.

TABLE 2 shows the historic benefit impact of DOT property acquisition and business damage payments.

DOT officials state that the difference between the department’s estimate and the final judgment is result, in part, of cost avoidance considerations in settlement agreements. The present structure rewards any challenge to an initial offer. Settlements includes an amount less than the cost to litigate. In FY 1997-98, 58 percent of the parcels acquired by DOT were negotiated purchases.

TABLE 2

Historic Benefit Impacts: DOT Property Acquisition and Business Damages Payments, 7/95 - 12/97			
<u>Agency Reports</u>	<u>Compensation</u>	<u>Average</u>	<u># of Cases</u>
<i>Property</i> [@ parcel]			1000
DOT Estimate	\$ 203.9 m	\$ 81,564	
Owner Estimate	\$ 561.3 m	\$ 224,535	
Final Judgment	357.4 m	142,961	
<i>Business Damages</i>			122
DOT Estimate	\$ 7.6 m	\$ 24,897	
Owner Estimate	123.2 m	403,829	
Final Payment	32.7 m	107,209	

Source: DOT, 2/98

Business Damages & Other States

Florida is one of 9 states that have a statutory right to business damages in eminent domain actions. [AK., CA., GA., LA., MD., MI., ND, & VT.] Of those nine, only six maintain records of expenditures. According to an analysis compiled by DOT, Florida “appears to be the most liberal in business damage payments by a considerable margin.” In addition, the analysis notes that Florida is one of five states that pay both business damages and landowner attorney fees, and “is exceeded by only one state (Michigan) in the percentage of land value expended for these purposes.”

PROPOSED EXPANSION OF ENTITLEMENTS TO BUSINESS DAMAGES

In the 1998 Legislative Session, a number of proposals were considered to increase the entitlement to business damages. TABLE 3 presents each major proposal, with a justification and rebuttal, and includes suggested limitations to the proposals to either reduce the anticipated fiscal impact or streamline the process.

TABLE 3: PROPOSED EXPANSION OF STATUTORY ENTITLEMENTS TO BUSINESS DAMAGES

	PROPOSAL	JUSTIFICATION	REBUTTAL	PROPOSED LIMITATIONS
①	Require condemning authorities to make a written offer for business damages before a suit is filed to condemn the property. <i>[This proposal was paired with a written offer requirement for land purchases and related severance damages.]</i>	Expedites the process. In addition, DOT is required by federal law when using federal funds to make a written offer before litigating. It is also their policy on any right of way acquisition.	Information is not made available to allow the condemning authority to make an accurate appraisal of business.	1- Require businesses, subject to penalties, provide access to appraisals and necessary business records before an offer is made; OR 2- Require business owner to make the initial claim for business damages; the condemning authority would then review the necessary records to substantiate the claim. Both options would require compensation for attorneys.
②	Allow business damages to be payable in whole takings.	<i>"...it is a matter of fundamental fairness, especially to lessees."</i>	Businesses can relocate to a similar site - current practice and federal law for federally funded project provides compensation for moving expenses.*	- Limit damages to total of fair market value and reasonable moving expenses; - Require mitigation be used when cost effective; - Award actual business damages after the fact, as opposed to speculative damages.
③	Repeal s. 337.27(2), F.S., which allows condemners to convert a partial taking into a total taking if the total cost will be equal to or less than the cost of acquiring a portion of the property and paying damages.	- Corrects the "inequity" in the government's ability to avoid paying business damages by taking all of the property. - Removes the incentive for taking property it does not need.	<i>"This is a means of limiting the rising costs to the state of property acquisition for a public purpose. Without this limitation, the viability of many public projects will be threatened."</i>	None proposed.
④	Allow compensation for business damages when access is substantially diminished.	Property owners can be compensated in limited circumstances for inverse takings, why not business damages?	Access may need to be limited for safety reasons and to improve the traffic flow.	- Require mitigation strategies be implemented before award of business damages. - Allow exclusions for health and safety concerns.
⑤	Allow business damages when access is diminished during construction.	Business profits decline when access is limited during construction.	The temporary decline is offset by the road improvements.	Require mitigation strategies be implemented; Allow exclusions for health and safety concerns.
⑥	Allow business damages for those businesses of 3 years standing instead of the current 5 years .	All businesses are subject to adverse impacts - not just more established ones.	Local plans provide new businesses at least 5 years warning of construction.	Restrict business damages to businesses in operation before right of way acquisition is identified.
⑦	Exclude utilities from these proposed changes.	Utilities are currently exempt from paying business damages.	There is no apparent policy reason for excluding utilities.	None.

*Indicates that DOT is currently required to provide or has a current policy to provide, or indicates that some local governments have a policy to provide.

Impact of Proposals on Condemning Authorities

Expanding the opportunities for businesses to obtain business damages will increase right of way acquisition costs by condemning authorities in three ways:

- amounts expended for business damages would increase;
- landowner costs, which are reimbursed by the condemning authorities, would increase, as business damage issues are usually litigated and frequently involve expert testimony; and
- condemning authorities will incur additional legal costs in defending against new claims for business damages.

At this time, DOT and local governments are unable to estimate the collective impact of these proposals.

MEASURES TO REDUCE THE COSTS OF RIGHT OF WAY ACQUISITIONS

During the debate of business damage issues, it was suggested that the right of way acquisition process could be expedited and costs of the overall process could be reduced by implementing a number of reforms. [See TABLE 4] Discussions of the current DOT pre-litigation process and current laws relating to offsetting benefits provide helpful background information for these reforms.

Current DOT Pre-Litigation Process

Section 337.271, F.S., requires DOT to negotiate with the property owner in good faith and to attempt to arrive at an agreed amount of compensation for the property in lieu of litigation. At the inception of the negotiation, DOT must notify the owner of the acquisition sought, provide specified information about the project and inform the property owner of their statutory rights in the process.

Within 120 days after receipt of the notice, the property owner may submit a complete appraisal report related to the parcel to be acquired and, if business damages are to be claimed, submit a complete estimate of those damages. If the property owner submits the appraisal report, and business damages report if relevant, within 30 days of the date on which DOT receives the report(s), it is to provide to the property

owner all appraisal reports and business expense estimates prepared for DOT related to the property. Under these circumstances, DOT is also to make a written offer of purchase to the property owner and the business owner, if any, which includes the value of the land and improvements taken and any business or severance damages. After exchanging appraisal and business damages reports, the parties may jointly agree to nonbinding mediation.

DOT is required to pay all reasonable costs, including reasonable attorney's fees, incurred on behalf of a property owner who proceeds to pre-litigation negotiation settlement pursuant to the provisions of this section.

According to DOT officials, the current prelitigation process is successful when the property owner submits to the process and, in the case of claims for business damages, provides all relevant data to develop a realistic business damage estimate. However, the property owner frequently elects to avoid the process, under the advisement of legal counsel, and pursues compensation through litigation. There is no statutory requirement that the property owner submit to the prelitigation process.

Offset of Severance Damages to Benefits

Currently, s. 73.071(4), F.S., requires that, in limited cases, when property is condemned the enhancement in value of the remaining adjoining property should be offset against any severance damage to the remaining property. However, applying this requirement has been problematic. The courts have limited the offset to benefits peculiar to a particular owner, as opposed to general benefits that would be enjoyed by the owner in common with other property owners. *Mainer v. Canal Authority of State*, 467 So.2d 989 (Fla. 1985) For example, the courts have ruled that appreciation in value to property as the result of increased traffic flow is a general benefit, which cannot be offset.

Federal law allows for benefits or enhancements to remaining property to be offset against both severance damages and compensation for property taken.

Research compiled by DOT reveals that of the 9 states that award business damages, 5 require the benefit to the property be considered in the calculation of business damages.

TABLE 4: MEASURES TO REDUCE THE COSTS OF RIGHT OF WAY ACQUISITIONS

	PROPOSAL	EXPECTED OUTCOME
1	<p>Establish a mandatory pre-litigation settlement process for all condemning authorities with the following characteristics:</p> <ul style="list-style-type: none"> ○ require, subject to penalties, the exchange of construction plans, appraisals, and necessary or relevant business records before initiating litigation, thus allowing all parties to quickly and accurately estimate all costs associated with the right-of-way acquisition; ○ allow property owners to appeal the mediated settlement in court; however, recovery of fees and costs should be denied unless the claimant is awarded damages beyond the condemning authority's offer. ○ include the notice provisions as specified in s. 337.271, F.S., for DOT's pre-litigation negotiation requirement. ○ require the court to assess reasonable and customary attorney's fees to compensate the defendant's attorneys. 	This may expedite the process and reduce costs and fees.
2	<p>Establish an appraisal process using an impartial, court-appointed panel of property appraisers, engineers, accountants, and economists (Subject to federal guidelines for federally funded projects.) If dissatisfied with the outcome, the property owner could appeal, with the state liable for costs and fees if the award exceeds a specified threshold above the court's appraisal.</p>	This would lower the costs of using competing appraisals and associated costs.
3	<p>Change the formula or method of determining attorney's and expert fees to encourage prelitigation settlements.</p>	This would remove present incentives which discourage the property owner from presuit discussions, exchanges of information, and settlements with condemning authorities.
4	<p>In whole or partial takings, require that any special or general benefits to the remaining property (including adjacent property owned by the same person owning the condemned property) be considered in the calculation of severance or business damages.</p> <p>These benefits could be calculated by comparing the fair market value of the property prior to the taking to the fair market value after the taking, with the benefit offsetting the damages.</p>	This recognizes the economic benefits that businesses realize from improvements to public transportation and other public works projects.
5	<p>Allow recovery of fees and costs only if the claimant actually is awarded damages beyond the condemning authority's offer.</p>	This would discourage pursuit of frivolous challenges to offers made in good faith.
6	<p>Allow recovery of fees and costs for appeals only if claimant wins the appeal.</p>	This would discourage frivolous appeals.
7	<p>Reduce the number of jurors in eminent domain cases from 12 to 6.</p>	This may expedite the process and result in less court costs and fees.

METHODOLOGY

Staff reviewed related legislation submitted in the 1998 Legislative Session.

Staff also interviewed legislative staff with experience on the issue, DOT officials, representatives from the Florida Association of Counties and League of Cities, local government attorneys, and members of the public with business interests in eminent domain law.

RECOMMENDATIONS

If the Legislature chooses to expand access to business damages, we recommend measures be implemented to expedite the acquisition process and reduce associated landowner fees.

COMMITTEE(S) INVOLVED IN REPORT *(Contact first committee for more information.)*

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MEMBER OVERSIGHT

Senators McKay and Brown-Waite