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November, 1999 Volume LXXIII, No. 10

1999 Amendments to Florida's Eminent Domain Statutes **by Paul D. Bain**

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On June 18, Governor Bush signed into law substantial amendments¹ to Florida's eminent domain statutes. Originating from a Senate bill sponsored by the Committee on Fiscal Policy and the Committee on Comprehensive Planning, Local and Military Affairs,² the amendments seek to encourage pre-suit settlement and decrease litigation costs. Among several changes, the amendments create a mandatory pre-suit negotiation process and substantially overhaul recovery of business damages.

Pre-suit Notices and Negotiation

Previously, Florida law required only the Department of Transportation to notify, make an initial offer, and negotiate with a property owner before filing a petition in eminent domain.³ The 1999 amendments now apply this requirement to all condemning authorities. Counties, municipalities, other public bodies, and private entities with the power of eminent domain may no longer initiate condemnation proceedings without first attempting settlement. Mandatory pre-suit notices and negotiation are in the new provision, F.S. §73.015, which is effective July 1, 2000.⁴

Notice and Negotiation—Fee Owner. Pursuant to F.S. §73.015(1), before an eminent domain action can be filed a condemner must provide written notice by certified mail to the fee owner⁵ of the property. The notice must advise:

- 1) That all or part of the owner's property is necessary for a project;
- 2) The nature of the project and parcel designation of the needed property;
- 3) That the condemner will provide a copy of the appraisal report for its offer within 15 days of written request,⁶ along with right-of-way maps and construction plans for the project; and
- 4) The fee owner's statutory rights and responsibilities.⁷

The condemning authority must make a written offer to the owner and then negotiate in good faith to acquire the parcel. The condemner's offer must include the value of the property taken and, in partial takings, any severance damages to the remainder. Upon written request, the condemner must now provide a copy of the appraisal report for its offer, which will allow the property owner to evaluate the offer.

Before the condemning authority can file an eminent domain action, it must provide the owner with 30 days to respond to its offer. The 30-day time period may benefit the Department of Transportation, which previously had to wait 120 days before filing an action.⁸

Negotiating an acquisition before filing a petition in eminent domain is a common sense prerequisite to litigation. Requiring counties, municipalities, other public bodies, and private companies with the power of

eminent domain to make an initial offer holds all condemning authorities to the same standard. It further responds to *Pierpont v. Lee County*, 710 So. 2d 958 (Fla. 1999), in which the Florida Supreme Court found that a county's good-faith estimate upon which it acquired title to property was not an offer.

Notice—Business Owner. Pursuant to F.S. §73.015(2), before an eminent domain action can be filed, a condemner must provide written notice by certified mail to the business owner.⁹ This notice is identical to that provided to the property owner and must also advise the business owner of its right to business damages under F.S. §73.071.

Immediately after the condemner notifies the business owner, it may file an eminent domain action. Unlike the mandatory pre-suit negotiations when dealing with a property owner, the condemner is not required to negotiate with the business owner before initiating litigation.

Business Owner's Initial Offer

Once the business owner receives the statutory notice, the owner has 180 days to submit a written good-faith business damage offer by certified mail to the condemner. The offer may be prepared by the business owner, a certified public accountant, or a business damage expert. It must set forth an "explanation of the nature, extent, and monetary amount" of the business damages and must include copies of the business records used to substantiate the offer.¹⁰ The statute defines specific "business records,"¹¹ but does not require that these records be used to substantiate the offer.

The legislature now clearly provides that business records produced in eminent domain are confidential and exempt from disclosure under F.S. Ch. 119.¹² To qualify for confidentiality, the disclosure of business records should likely cause substantial harm to the owner's competitive position and the owner must request that the records be held exempt.

If the owner does not meet the 180-day deadline, the trial court is statutorily required to strike the claim for business damages in the eminent domain action. However, if the owner can make a good-faith showing for the failure to submit a timely business damage offer, the court may extend the deadline up to 180 days.

The 180-day deadline may pose new challenges for the owner claiming business damages. Before the deadline expires, the owner may need to retain several professionals to evaluate the damage claim: an engineer to review the taking, its impact on the remaining property, and any possible plan to mitigate damages; a land planner to research whether a plan for the property to mitigate damages would be permitted; a marketing expert to evaluate business losses resulting from the taking and any possible mitigation; and a certified public accountant to calculate business damages considering the findings of the engineer, land planner, and marketing expert.

When the business owner is a tenant, its inability to obtain the property owner's commitment to a mitigation plan for the property may frustrate its ability to evaluate business damages. The business owner may respond to these challenges by making the initial offer contingent upon specific conditions or assumptions.

Once the condemner has received the initial business damage offer and substantiating records, it has 120 days to accept or reject the offer or make a counteroffer. The condemner's rejection or failure to respond to the offer within the 120-day deadline is deemed a counteroffer of zero dollars.¹³ Now that the owner must make the first offer on business damages, a condemner may better evaluate a business damage claim and reduce litigation costs.

Pre-suit Mediation

During pre-suit negotiations, the condemner and owners may agree to submit the claims for compensation and business damages to nonbinding mediation. Such negotiations are inadmissible in any condemnation proceeding, except to determine the amount of the owner's costs and attorneys' fees the condemner must pay.

A pre-suit settlement agreement must incorporate the right-of-way maps, construction plans, or other documents related to the taking. Under a pre-suit settlement, both parties will have the same legal rights as if resolved in circuit court proceedings where such documents are part of the record.¹⁴ Now that pre-suit settlement agreements must incorporate these documents related to the taking and preserve the parties' legal rights, settlement agreements reached during litigation likely will meet the same standard.

Pre-suit Fees and Costs

The Florida constitutional guarantee of full compensation ensures that a property owner is made whole and includes the payment of attorneys' fees and costs in an eminent domain proceeding.¹⁵ No similar assurance exists before the filing of litigation or the taking of property. Pursuant to F.S. §73.015(4), when a property or business owner settles pre-suit, they are now statutorily entitled to recover fees and costs.

Pre-suit costs are presented, calculated, and awarded in the same manner as in a circuit court eminent domain proceeding.¹⁶ Attorneys' fees for pre-suit settlement of the property are calculated in the same manner as fees are calculated in a circuit court proceeding.

Attorneys' fees for pre-suit settlement of business damages are to be calculated using one of two formulas: If the initial business damage offer of the owner or condemner is accepted, then fees are calculated based on only the attorney's time; otherwise, fees for business damages are calculated in the same manner as in a circuit court proceeding.

If the parties are unable to agree on pre-suit fees and costs, the owner may file a complaint for recovery in circuit court. This provision only applies in actions to take road right-of-way¹⁷ involving the Department of Transportation, county, municipality, board, district, or other public body. Conspicuously missing from this list of condemners are private entities with the power of eminent domain.

Importantly, the statute does not require the condemner to pay the owner's fees and costs if the parties do not settle pre-suit. If the condemner should elect to abandon the taking after pre-suit negotiations, the statute affords no recourse for the owner to recover fees and costs expended in negotiating.

Recovery of Business Damages

The new pre-suit negotiation process creates substantial changes to asserting a claim for business damages in eminent domain. The legislature sought to balance these changes with revisions to the recovery of business damages.

Perhaps the most significant revision is the repeal of F.S. §337.27(2) effective January 1, 2000.¹⁸ Business damages are recoverable only when there is a partial taking of property.¹⁹ Under F.S. §337.27(2), the Department of Transportation could acquire property not physically necessary if the acquisition costs of the entire property, thereby eliminating recovery of business damages, were less than a partial taking. Known as a *Fortune Federa*²⁰ taking, the provision had produced several appellate decisions.²¹

In addition to repealing F.S. §337.27(2), the legislature repealed similar provisions as to condemners under: The Florida Expressway Authority Act;²² the Orlando-Orange County Expressway Authority;²³ and the Seminole County Expressway Authority.²⁴

Notably, excluded from the repeal are several similar statutes applying to: The Intrastate Highway System and Toll Facilities;²⁵ the Brevard County Expressway Authority;²⁶ the Broward County Expressway Authority;²⁷ the Pasco County Expressway Authority;²⁸ the St. Lucie County Expressway Authority;²⁹ the Santa Rosa Bay Bridge Authority;³⁰ and the Jacksonville Transportation Authority.³¹

With the repeal of *Fortune Federal* takings, business owners will no longer face the condemnation of the entire property solely to preclude recovery of business damages. However, business damages remain recoverable only for a partial taking and are not available in a total taking when the entire property is physically necessary for the condemner's project.

In addition to repealing *Fortune Federal* takings, the legislature now requires that a business be established for four years to qualify for damages, a reduction from five years.³² This one-year reduction is effective January 1, 2000, and expires January 1, 2003, when the standard returns to the five-year requirement.³³

To reflect the new pre-suit negotiation process and revisions to the recovery of business damages, the legislature has modified calculation of attorneys' fees based on business damages recovered.³⁴ Fees are now to be calculated based on the difference between the final judgment or settlement and the condemner's initial counteroffer.

However, if two conditions are satisfied, the condemner may have an additional 90 days from receipt of certain business records to make an initial counteroffer: First, if the owner did not provide existing business records, as statutorily defined, to substantiate the offer; and second, if such records are later deemed material to determining business damages. The condemner's 90-day counteroffer would then serve as the floor for determining attorneys' fees for business damages recovered.

Previously, the condemner would have additional time to make an offer by making a general discovery request for business records. By now specifying the business records not provided and requiring that the records be material to determining business damages, the 90-day tolling will be available in more limited circumstances. Unanswered is whether the condemner has constructive receipt of business records when the owner makes them available for inspection and copying.

Recovery of Prejudgment Interest

In response to the Florida Supreme Court's decision in *Boulis v. Florida Department of Transportation, So. 2d*, 24 Fla. L. Weekly S150 (Fla. Apr. 1, 1999), the legislature has amended F.S. §73.091(1) not to allow payment of prejudgment interest on costs or attorneys' fees.³⁵ However, because the court found that the constitution required payment of prejudgment interest,³⁶ this amendment may not withstand constitutional challenge.³⁷

Compensation for Billboard Takings

The amendments also add four new subsections to F.S. §479.15 of the outdoor advertising statutes.³⁸ These new subsections allow relocation of a billboard affected by a taking, subject to certain limitations³⁹ and with the billboard owner paying the cost of relocation.

If there is no remaining property on which to move the billboard, the Department of Transportation is responsible for compensating the owner. However, if local ordinances prohibit relocation, then the local government assumes responsibility for compensating the owner. Shifting responsibility for compensation as an attempt to preempt local government regulation of billboards may create friction between the state and the local authorities subject to the new subdivisions.⁴⁰

Conclusion

The legislature intended the 1999 amendments to encourage pre-suit settlement and reduce litigation costs in eminent domain. Mandatory pre-suit notices and negotiation will create new challenges and opportunities for both condemning authorities and owners. Parties will also adapt litigation and business practices to address the revised standards for recovery of business damages. The amendments seek to adjust the balance between the private sector and government over the taking of private property in Florida.

¹ 1999 Fla. Laws ch. 385.

² Senate Staff Analysis & Economic Impact Statement for CS/CS/SB 940 (Mar. 29, 1999).

³ Fla. Stat. §337.271. This section has been repealed effective January 1, 2000. 1999 Fla. Laws ch. 99-385, §4.

⁴ 1999 Fla. Laws ch. 385, §57.

⁵ The notice must be sent to the fee owner's last known address listed on the county ad valorem tax roll. Notice returned as undeliverable constitutes compliance. Notice is not required to a person who acquires title to the property after the condemner provides the initial notice.

⁶ However, a condemner acquiring property for preservation, conservation, and recreation purposes under Fla. Stat. §259.041 is not required to produce its current appraisal report.

⁷ Set forth in Fla. Stat. §§73.015(1)(b) and (c), 73.091, and 73.092, which concern notice, time to respond to the condemner's offer, and attorneys' fees and costs.

⁸ Fla. Stat. §337.271.

⁹ The notice must be sent to the address of the registered agent. If there is no registered agent, the notice must be sent to the address of the business. Notice returned as undeliverable constitutes compliance. Notice is not required to a person who acquires an interest in the business after the condemner provides the initial notice.

¹⁰ Fla. Stat. §73.015(2)(c).

¹¹ Fla. Stat. §73.015(2)(c)2. The provision lists seven categories of documents which must be "attributable to the business operation on the property to be acquired" to constitute business records: federal income tax returns; federal income tax withholding statements; federal miscellaneous income tax statements; state sales tax returns; balance sheets; profit and loss statements; and state corporate income tax returns.

¹² 1999 Fla. Laws ch. 224, §1. (effective July 1, 1999).

¹³ This amendment adopts FDOT's "zero-dollar offer" argument advanced unsuccessfully in *State Department of Transportation v. Smithbilt Industries, Inc.*, 715 So. 2d 963 (Fla. 2d D.C.A. 1998).

¹⁴ See *Central & Southern Florida Flood Control Dist. v. Wye River Farms, Inc.*, 297 So. 2d 323 (Fla. 4th D.C.A. 1974), *cert. den.* 310 So. 2d 745.

¹⁵ *E.g., Boulis v. Florida Dept. of Transp.*, So. 2d , 24 Fla. L. Weekly S150 (Fla. Apr. 1, 1999).

¹⁶ However, the owner must submit its expert reports before costs are awarded. Payment of costs is to be made at closing, upon payment of business damages, or entry of final judgment.

¹⁷ For a comparison of "road" right-of-way with other right-of-way, refer to *Joynt v. Orange County*, 701 So. 2d 1249 (Fla. 5th D.C.A. 1997); and *Nerbonne v. Florida Power Corporation*, 692 So. 2d 928 (Fla. 5th D.C.A. 1997).

¹⁸ 1999 Fla. Laws ch. 385, §64.

¹⁹ Fla. Stat. §73.071(3)(b).

²⁰ *Department of Transportation v. Fortune Federal Savings & Loan Ass'n*, 532 So. 2d 1267 (Fla. 1988).

²¹ *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992); *Karen's Tack, Inc. v. State Dept. of Transp.*, So. 2d , 24 Fla. L. Weekly D1224 (Fla. 4th D.C.A. May 19, 1999); *State, Dept. of Transp. v. Barbara's Creative Jewelry*, 728 So. 2d 240 (Fla. 4th D.C.A. 1998), *review granted*, Case No. 93,554 (Jun. 7, 1999).

²² Fla. Stat. §348.0008(2).

²³ Fla. Stat. §348.759(2).

²⁴ Fla. Stat. §348.957(2).

²⁵ Fla. Stat. §338.04(2).

²⁶ Fla. Stat. §348.224(2).

²⁷ Fla. Stat. §348.247(2).

²⁸ Fla. Stat. §348.88(2).

²⁹ Fla. Stat. §348.947(2).

³⁰ Fla. Stat. §348.972(2).

³¹ Fla. Stat. §349.10(3).

³² 1999 Fla. Laws ch. 385, §58.

³³ 1999 Fla. Laws ch. 385, §59.

³⁴ 1999 Fla. Laws ch. 385, §61.

³⁵ 1999 Fla. Laws ch. 385, §60.

³⁶ So. 2d , 24 Fla. L. Weekly S150 (Fla. Apr. 1, 1999) (“However, that principle would also include liability for interest where the constitution requires it. Here, the constitution provides for full compensation, which requires that the property owner be made whole.”).

³⁷ The legislature may not reduce the constitutional requirement of full compensation. *Daniels v. State Road Dept.*, 170 So. 2d 846 (Fla. 1964).

³⁸ 1999 Fla. Laws Ch. 385, §65.

³⁹ The relocation must be adjacent to the current site, within 100 feet of the current location, and the face of the sign may not be increased. The sign height and structure must also be consistent with current local building codes.

⁴⁰ The new subsections do not apply to municipalities engaged in litigation concerning its sign ordinance on April 23, 1999, or to any municipality with boundaries identical to the county within which it is located.