

Why Your Florida Restaurant Lease Needs an Effective Condemnation Clause

Property Condemned? Not So Fast.

The restaurant had been there since about the time I was born (it pains me to say that I am now approaching 40). Perched out on the western tip of the man-made landing to the Courtney Campbell Causeway in Tampa, the eatery was literally one of the first **Red Lobster** restaurants in existence, and probably the only waterfront location for the now massive crustacean chain.

Despite the ebbs and flows of nearby businesses (which varied widely from ramshackle bait shops, four-star restaurants, adult entertainment venues and the locally, almost-famous, Mullet Inn) it seemed nothing would keep this pioneering site from living out its natural life as a restaurant.

The lease for this Red Lobster, drawn up and executed in 1968, might be considered by some Florida history buffs to be a collector's item, as it brought together for signature two men who would later become icons in their chosen fields.

One man, a restaurant visionary who expanded beyond seafood into multiple lines of casual dining spanning the nation and the culinary palette; the other, a true Florida Cracker and statesman, whose ambulatory campaign style would lead him to tenures in Tallahassee and Washington DC.

But for these signatures, the lease agreement itself was otherwise nondescript. Comprehensive, 15 legal-sized pages in length, with several modifications and extensions provided over the years, it contemplated all sorts of contingencies and was repeatedly and willingly extended from time to time by both parties.

Yet for all the verbiage and legal-ese, the lease contained no provisions which would govern the landlord-tenant relationship in the event of a taking by the government.

In 2004, 36 years after the Red Lobster opened its doors, and after the above-gentlemen had passed on, the Florida Department of Transportation (FDOT), as part of the Causeway widening project, condemned the entire site including the restaurant improvements.

The litigation with the government over the value of the overall property was straight-forward and resulted in a timely and favorable settlement with the state.

However, due to the absence of a condemnation clause in the lease, this settlement was held up in additional litigation and appeals spanning nearly two years over widely disparate views over how to divide the condemnation proceeds between the landlord and tenant.

Ultimately, it was left to a circuit court judge and the approval of an appellate court panel, rather than the parties to the lease, to determine the proper distribution of the settlement proceeds. This could have been avoided if there had been a condemnation clause with teeth (or claws).

The prospect of having all or part of your restaurant property

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condemned by a government agency (whether you are the owner of the building or a lessee) may seem but a remote possibility.

However, the very same characteristics that make the property an ideal location, (perhaps it was the major thoroughfare with good visibility that attracted you) may also suggest that it is not really so unlikely that the roadway may someday need improvement, and that all or part of the property may be acquired via eminent domain.

Just as it is important to set out the parties' rights and responsibilities in the unlikely event of a fire or broken window, it is every bit as important to set out the parties' rights and responsibilities in the event of a condemnation.

What Your Lease Should Consider

An "eminent domain clause" or "condemnation clause" is an important aspect of every lease in Florida, particularly when a landlord or his restaurant tenant considers:

- In Florida, a **tenant is an owner of property in the constitutional sense**, and is therefore entitled to compensation for the taking or damaging of that lease interest.
- A lease may contain provisions which substantially affect **a tenant's rights to share in the condemnation proceeds** with the owner.
- **"Full compensation" for the taking is decided first by all the parties or ultimately a jury.** This amount is later divided between the landlord and tenant by a judge in an "apportionment proceeding" according to the lease provisions, if any.
- When a lease contains no specific provisions to the contrary, **a tenant is generally entitled to compensation** for the resultant decrease in the value of the leasehold, which may be subject to wide interpretation and varying valuation methodologies.
- A tenant is otherwise generally able to **recover the value of trade fixtures, equipment, moving expenses**, and in certain instances, business damages.
- **"Business Damages"** are a very specific creature of Florida statute, and are separate and apart from the value of the real estate and the lease. The entitlement to or amount of business damages an owner is able to claim may also be affected by certain lease provisions.

Gregory S. Rix is an Eminent Domain & Property Rights Lawyer for Brigham Moore LLP, and an FRLA member.