

## **APPORTIONMENT**

### **I. APPORTIONMENT DEFINED**

#### **A. DEFINITION**

In the eminent domain context, "apportionment" is the judicial allocation of condemnation proceeds where there are conflicting claims to compensation awarded for the property taken.

Apportionment is authorized by §73.101, Florida Statutes (1993) which reads, in part:

Where there are conflicting claims to the amount awarded for any parcel, the court, upon appropriate motion, shall determine the rights of the interested parties with respect to the amount awarded for each parcel and the method of apportionment, together with the disposition of any other matters arising from the taking.

#### **B. QUESTION FOR THE COURT**

As the statute indicates, apportionment is a question for the court, not the jury. The "catch all" provision allowing the court to dispose of "any other matters arising from the taking" enables equitable disbursement in a myriad of circumstances.

While there may be interim disbursements made during the course of eminent domain proceedings, final apportionment is typically a post-trial or post-judgment procedure because it cannot take place until the ultimate compensation is determined by jury verdict or settlement.

#### **C. POTENTIAL CLAIMANTS**

Potential claimants with apportionment rights may include tenants, mortgagees, easement holders, mineral interests, liens, assignees, and those with various contractual rights.

### **II. APPORTIONMENT PROCEDURE**

#### **A. "UNDIVIDED FEE" RULE**

Article X, Section 6 of the Florida Constitution recognizes that there may be more than one property interest at stake when property is condemned by its guarantee that full compensation shall be paid "to each owner" of private property. However,

to promote efficient acquisition of land, the condemnor does not have to separately compensate each property interest, but rather, may pay one amount as though the property taken was wholly owned by one entity. This is known as the "undivided fee" rule. Apportionment, therefore, is an important mechanism to ensure that full compensation is ultimately paid to "each owner."

**B. DILIGENT SEARCH & NOTICE REQUIREMENT**

§73.021(4) Florida Statutes (1993) requires that a condemnor diligently search for and serve all potentially interested parties with a copy of its eminent domain petition, including lessees, mortgagees, judgment creditors, and lienholders. If a condemnor fails to give proper notice of a condemnation to an interested party, then the condemnor remains liable to compensate the omitted party even if full compensation had already been paid to the other owners. Seaboard All-Florida Railway v. Leavitt, 141 So. 886 (Fla. 1932).

**C. NO SEPARATE TRIAL, BUT INCLUSIVE VERDICT**

An eminent domain jury renders one verdict at the valuation trial, representing the value of the property taken as a whole and/or damages to the remaining property as a whole, irrespective of the interests of various claimants. The court subsequently apportions the proceeds of the verdict among the various claimants according to their interests. Baldwin v. Miami Mercantile Center Inc., 145 So.2d 881 (Fla. 3rd DCA 1962); Rice v. City of Ft. Lauderdale, 281 So.2d 36 (Fla. 4th DCA 1973), affmd, modified, reversed in part 313 So.2d 649 (Fla. 1975); Dama v. Record Bar Inc., 512 So.2d 206 (Fla. 1st DCA 1987) rev. den. 519 So.2d 988 (Fla. 1987); National Advertising v. Department of Transportation, 611 So.2d 566 (Fla. 1st DCA 1992); Bolduc v. Glendale Federal Bank, 19 F.L.W. D212 (Fla. 4th DCA 1994); K-Mart Corporation v. DOT, 19 F.L.W. D. 888 (Fla. 2nd DCA 1994). Of course, the aggregate amount apportioned among conflicting claims may not exceed the amount of the verdict. Valls v. Arnold Industries, 328 So.2d 471 (Fla. 2d DCA 1976).

A tenant is not entitled to a separate jury trial or verdict on the issue of damages to its leasehold. Carter v. State Road Department, 189 So.2d 793 (Fla. 1966); Division of Administration, State of Florida Department v. Allen, 447 So.2d 1383 (Fla. 5th DCA 1984). But a tenant is entitled to present evidence regarding the value of the whole. The jury may consider a particular interest in determining the whole value, such as a uniquely valuable leasehold. "[T]he trial court shall admit to the jury all pertinent proffered facts touching the value of the fee and the leasehold and . . . the jury must evaluate both interest and render an inclusive verdict". Carter v. State Road Department, 189 So.2d 793 (Fla. 1966). See also, Orange State Oil v. Jacksonville Expressway Authority, 110 So.2d 687 (Fla. 1st

DCA 1959).

**D. ITEMIZED VERDICT**

While the jury must determine value of the real estate taken (and damages to remaining property in a partial taking) as though owned in undivided fee, the verdict must separately state the amounts attributable to severance damages, business damages, moving costs, and permanent improvements. §73.081 Florida Statutes (1993). If the parties desire, a special verdict may be used to advise the court how much of the award should be paid to various claimants, but such a verdict is advisory only. State Road Department v. Hartsfield, 216 So.2d 61 (Fla. 1st DCA 1968); Sallas v. State Road Department, 220 So.2d 378 (Fla. 1st DCA 1969).

**E. WITHDRAWAL OF GOOD FAITH DEPOSIT**

**1. Statutory Authority**

Though final apportionment cannot take place until after full compensation is determined by verdict or settlement, parties may request disbursement of funds deposited before final judgment in "quick taking" procedures according to Chapter 74, Florida Statutes. §74.051(2) Florida Statutes (1993) describes the powers of the court to make disbursements at the order of taking stage of "quick take" proceedings as follows:

If a hearing is requested, the court shall make such order as it deems proper, securing to all parties the rights to which they may be entitled, not inconsistent with the provisions of this section. The court may make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, amount of the good faith deposit, and other charges, if any, as shall be just and equitable.

**2. Pro-rated Taxes**

Because title transfers to the condemnor upon making the initial deposit (§74.061 Florida Statutes), any unpaid or prorated ad valorem taxes due on the property taken are paid to the tax collector out of the initial deposit, analogous to a normal real estate closing. After payment of any taxes due, the tax collector may be dismissed as a party if the court so orders.

**3. Initial Disbursements Subject to Final Apportionment**

(a) Where verdict is less than initial deposit:

Disbursement of the initial deposit is subject to final apportionment. Should the compensation determined by the verdict be less than the

condemnor's initial deposit, the court must apportion the excess deposit back to the condemnor. §74.071 Florida Statutes (1993) states:

At any time, prior to the entry of final judgment, and upon motion by the proper defendants, the court may direct that the sum of money set forth in the declaration of taking be paid forthwith to such defendants from the money deposited in the registry of the court. If the compensation awarded for the property by the final judgment shall exceed the amount withdrawn by the defendant, the court shall enter judgment against the petitioner for the deficiency. If the amount withdrawn exceeds the compensation awarded for the property by the final judgment, the court shall enter a judgment against such defendant for the excess, and such judgment shall be a lien against any of his property except his homestead.

(b) Where withdrawal was improper:

Similarly, initial disbursement is subject to final apportionment among co-defendant owners. A defendant who unjustifiably withdraws the initial deposit may be required to pay prejudgment interest to claimants who, upon final apportionment, are determined to have been entitled to the funds. West v. Sunbelt Enterprises, 530 So.2d 433 (Fla. 1st DCA 1988). However, a claimant who failed to attend a properly noticed hearing on withdrawal of funds may waive objections to the initial disbursement, even though entitled to apportionment of the ultimate award. Jack Bakery Services v. Western Treats Meat Market, 530 So.2d 447 (Fla. 4th DCA 1988).

**3. Use of Interest-bearing Accounts:**

Where there are conflicting claims to be resolved, the parties or court may elect to place the initial deposit in an interest-bearing account pending final apportionment. This serves judicial economy by having only one apportionment hearing at the end of the case. It also makes economic sense for the defendants by eliminating the risk of judgment interest for over-withdrawal or the risk that improperly withdrawn funds will disappear, not to mention that the claimants who ultimately receive the award will have earned interest on the initial deposit, rather than the condemnor. According

to §74.051(3), 90% of the interest earned on monies deposited into the court registry pursuant to orders of taking goes to the condemnor.

## **F. FINAL APPORTIONMENT**

### **1. Upon Motion**

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After entry of final judgment, whether pursuant to jury verdict or stipulation of the parties, apportionment issues may be brought before the court by motion. §73.101 Florida Statutes (1993).

### **2. Motion Not Required**

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Many condemnation cases conclude without a formal apportionment because, as a practical matter, there are no apparent claims to the award and no motion arises.

### **3. Clause in Final Judgment**

Even where there are no readily apparent claims to the award, it may be good practice to include an apportionment provision in the final judgment and notice all potentially interested parties of its entry so that there will be no subsequent disputes regarding disbursement. For example, if compensation for a partial taking from a shopping center has been settled between the condemnor and the fee owner, that owner should consider inclusion of an apportionment provision in the stipulated final judgment and have it entered at a duly noticed hearing, even though his tenants have not announced any intention to claim apportionment. This would prevent subsequent objections by the tenants and lend certainty to owner's disbursement.

### **4. Condemnor's Interest in Apportionment**

Addressing apportionment may also protect the condemnor. If a condemnor settles with one of the property interests without advising others, the other interests might not be limited to mere apportionment of the settlement award because they had no opportunity to be heard regarding the amount of the total award. In such a case, the excluded interests might have the right to pursue additional compensation from the condemnor to sufficiently compensate for the interest. National Advertising v. Department of Transportation, 611 So.2d 566 (Fla. 1st DCA 1992).

### **5. Use of Experts**

Expert testimony is admissible regarding the value of various property interests. Dama v. Record Bar Inc., 512 So.2d 206 (Fla. 1st DCA 1987).

## **G. APPEALS**

### **1. Considered Final Orders**

Apportionment orders are appealable as final orders. They are not considered interlocutory. City of St. Petersburg v. Division of Administration, Department of Transportation, 276 So.2d 229 (Fla. 2d DCA 1973).

2. **No Disbursement Until Appeal is Final**

The award may not be disbursed until an appeal is final. Orange State Oil Company v. Jacksonville Expressway Authority, 110 So.2d. 687 (Fla. 1st DCA 1959); State Road Department v. Hartsfield, 216 So.2d 61 (Fla. 1st DCA 1968).

3. **Interest**

The prevailing claimant may be entitled to statutory interest for the period in which the appeal was pending. West v. Sunbelt Enterprises, 530 So.2d 433 (Fla. 1st DCA 1988); Dama v. Record Bar Inc., 512 So.2d 206 (Fla. 1st DCA 1987).

4. **Attorneys' Fees**

A claimant may not recover attorneys fees for an unsuccessful appeal of an apportionment ruling. §73.131(2) Florida Statutes (1993). Even if successful, a claimant may not be reimbursed by the condemnor for appellate fees if the appeal resulted from a private dispute that was not caused by the taking. Dama v. Record Bar, *supra*; Terry v. Conway Land Inc., 508 So.2d 401 (Fla. 5th DCA 1987). In this event, there may be a contractual provision relating to fees.

III. **OVERVIEW OF SUBSTANTIVE APPORTIONMENT LAW**

A. **CONTRACTUAL PROVISIONS CONTROL**

Where parties have agreed to division of condemnation proceeds, their agreement will be controlling even where it departs from common law apportionment principles, creates a windfall, or appears to be a bad bargain in retrospect. Mullis v. Division of Administration, 390 So.2d 473 (Fla. 5th DCA 1980); Simpson v. Fillichio, 560 So.2d 331 (Fla. 4th DCA 1990); NCNB National Bank of Florida v. Setzer, 596 So.2d 508 (Fla. 1st DCA 1992).

B. **LEASEHOLDS**

1. **Lessees are owner's in the constitutional sense.**

Tenants are considered "owners" in eminent domain proceedings, having constitutionally protected property interests:

Even where state constitutions command that compensation be made for property taken or damaged for public use, as many do, it has generally been held that that which is taken or damaged [in condemnation cases] is the group of rights which the ...owner

exercises in his dominion of the physical thing....

The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value.

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City of Topeka v. Nellie Mays Estate, 781 P.2d 721 (Kansas 1989) quoting

U.S. v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89

L.Ed. 311 (1945). The Florida Supreme Court has similarly held:

... a valid lease for a term of years constitutes a proprietary interest in land and we hold that, for the purposes of entitlement to compensation under Chapter 73, Florida Statutes, American Oil Company, lessee for a term of years, is an owner.

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Carter v. State Road Dept., 189 So.2d 793 (Fla. 1966) at 794. *See also*

State Road Department v. White, 148 So.2d 32 (Fla. 2nd DCA 1962) cert

den. 161 So.2d 828 (Fla. 1964); State Road Dept. v. Thibaut, 190 So.2d 53

(Fla. 4th DCA 1966); Pensacola Scrap Processors v. State Road Dept., 188

So.2d 38 (Fla 1st DCA 1966); Rice v. City of Ft. Lauderdale, 281 So.2d 36

(Fla. 4th DCA 1973), affmd, modified, reversed in part 313 So.2d 649 (Fla.

1975); Mullis v. Division of Administration, State DOT, 390 So.2d 473

(Fla. 5th DCA 1980); Pinellas County v. Brown 450 So.2d 250 (Fla. 2d

DCA 1984); Dama v. Record Bar Inc., 512 So.2d 206 (Fla. 1st DCA 1987)

rev. den. 519 So.2d 988 (Fla. 1987); West v. Sunbelt Enterprises, 530

So.2d 433 (Fla. 1st DCA 1988); National Advertising v. DOT, 611 So.2d

566 (Fla. 1st DCA 1992); Bolduc v. Glendale Federal Bank, 631 So.2d

1127 (Fla. 4th DCA 1994); K-Mart Corporation v. DOT, 636 So.2d 131

(Fla. 2nd DCA 1994).

## 2. Common Law Apportionment

### (a) No written provision required:

Because lessees are owners in the constitutional sense, courts may apportion condemnation proceeds to tenants without a specific lease provision to that effect. For instance, a tenant at will under an oral lease has a compensable leasehold interest. Pensacola Scrap, *supra*.

The same is true for a tenant at sufferance. Wingert v. Prince, 123 So.2d 277 (Fla. 2d DCA 1960).

(b) General entitlements:

Generally, absent a contract provision to the contrary, tenants may share proportionately in condemnation proceeds for the value of the leasehold interest taken. Dama, supra; West v. Sunbelt Enterprises, 530 So.2d 433 (Fla. 1st DCA 1988); Orange State Oil v. Jacksonville Expressway Authority, 110 So.2d 687 (Fla. 1st DCA 1959). A tenant is also generally entitled to receive the value any tenant improvements within the taking (Wingert, supra) or the value of trade fixtures. Sweeting v. Hammons, 521 So.2d 226 (Fla. 3d. DCA 1988); Div. Admin., Department of Transportation v. Allen, 447 So.2d 1383 (Fla. 5th DCA 1984); Department of Transportation v. Sun Island Boats, Inc., 510 So.2d 603 (Fla. 3d. DCA 1987). A constant theme in the common law of apportionment is that equity is to be a significant factor. See K-Mart, Dama, Orange State, supra; St. Petersburg v. Div. Admin., State Department of Transportation, 293 So.2d 781 (Fla. 2d DCA 1974).

(c) Method of Apportionment Varies with Each Case:

A review of common law apportionment leads to the conclusion that, where there is no lease provision governing the lessee's apportionment, the particular method of apportionment varies with the facts of each case. See *Nichols on Eminent Domain*, §12.42 and 17 A.L.R.4th 337.

Typically, a tenant cannot obtain an apportionment without some showing some damage to his leasehold. *Nichols on Eminent Domain*, §12D.

**3. Lease provisions control**

(a) Terms of a condemnation clause will govern:

Where a lease contains a condemnation clause, its terms will govern, regardless of whether its application seems fair under the circumstances or result in what appears in retrospect as a "bad bargain." Simpson v. Fillichio, 560 So.2d 331 (Fla. 4th DCA) rev. dism. 574 So.2d 140 (Fla. 1990); K-Mart, supra; Mullis v. Division of Administration, State Road Dept., 390 So.2d 473 (Fla. 5th DCA 1980); Elmore v. Broward County, 507 So.2d 1220 (Fla. 4th DCA 1987).

(b) Forfeitures disfavored:

However, the law disfavors forfeiture of a tenants's apportionment rights, an agreement will be construed not to waive apportionment rights if the language and circumstances possibly permit. Mullis, Elmore, supra.

(c) Option Periods to be considered:

Where there is a written lease, options to renew are fairly considered in valuation of the leasehold interest. State Road Department v. Tampa Bay Theaters, 208 So.2d 485 (Fla. 2d DCA 1968); Dama, supra.

**4. A tenant may not doubly recover.**

Where a lessee submits claims for its business damages and damage to its leasehold to a jury, he may not also claim apportionment for damage to his leasehold out of the owner's settlement. AAA Million Auto Parts v. Afron, 379 So.2d 707 (Fla. 3d DCA 1980).

**C. EASEMENTS**

**1. Constitutionally protected property interest**

Easements are constitutionally protected property interests. Glessner v. Duval County, 203 So.2d 330 (Fla. 1st DCA 1967). Easement holders should be given notice of eminent domain proceedings affecting their easement rights.

2. **Apportionment if easement is damaged**

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Easement holders may receive apportionment of condemnation proceeds to the extent they can show that their easement interest has been damaged by the taking. Columbia Sussex Corp., Inc. v. Div. Admin., State Department of Transportation, 425 So.2d 90 (Fla. 1st DCA 1982).

**D. MORTGAGES**

1. **Constitutes a Lien**

Because Florida is a lien theory state, mortgagees are not considered owners in the constitutional sense, but may still be entitled to apportionment under provisions of the mortgage or under common law.

2. **Mortgage Terms Control**

Where there is a specific condemnation clause in a mortgage agreement, it will control. NCNB National Bank of Florida v. Setzer, 596 So.2d 508 (Fla. 1st DCA 1992).

3. **Whole Takings**

Where there is no specific mortgage clause in a whole taking situation, a mortgagee should receive the entire award or the amount necessary to satisfy any remaining mortgage debt. Seaboard All-Florida Rwy. v. Leavitt, 105 Fla. 600, 141 So.886 (Fla. 1932); Investors Sydicate of America Inc. v. Dade County, 98 So.2d 889 (Fla. 3d DCA 1958).

4. **Partial Takings**

In a partial taking, a mortgage may obtain apportionment only to the extent that its security has been impaired. Washington Federal Savings & Loan Assoc. of Miami Beach v. Dade County, 221 So.2d 790 (Fla. 3d DCA 1969); Investors Syndicate, *supra*.

5. **Mortgage Interest and Prepayment Penalties**

Interest on the mortgage still runs until payment, but because condemnation is a forced sale, no pre-payment penalties against the condemnee do not apply. Associated Schools, Inc. v. Dade County, 209 So.2d 489 (Fla. 3d

DCA 1968).

**6. No Standing to Dispute Compensation for the Taking**

Because mortgagees are only considered as lien holders, they may not participate in the valuation trial and have no standing to challenge the amount of compensation determined by an eminent domain judgment. Shavers v. Duval County, 73 So.2d 684 (Fla. 1954); Seaboard All-Florida Ry. v. Leavitt, 105 Fla. 600, 141 So. 886 (1932).

**7. Validity of Mortgage May Be Challenged**

The validity of the mortgage itself may be challenged by the mortgagor in apportionment proceedings. For instance, where a mortgage was obtained by fraud, no apportionment is available to the would-be mortgagee. Commercial Acceptance Corp. v. Barnes, 179 So.2d 251 (Fla. 1st DCA 1965).

**8. Attorneys' Fees**

Because mortgagees are not considered "owners," they have no right to recover attorneys fees from the condemnor. Shavers v. Duval County, 73 So.2d 684 (Fla. 1954); Grieser v. Div. Admin., State DOT, 371 So.2d 164 (Fla. 2 DCA 1979).

**E. LIENHOLDERS / JUDGMENT CREDITORS**

**1. Treated the Same as Mortgagees**

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Lienholders, like mortgagees, are not "owners" in the constitutional sense. Their apportionment rights mirror those of mortgagees. Shavers v. Duval County, 73 So.2d 684 (Fla. 1954).

**2. Validity of Lien May Be Challenged**

A competing claimant may challenge the validity of the lien in apportionment proceedings. If the lien is invalid, no apportionment is due to the lienholder. Such a challenge is not an impermissible collateral attack because, in apportionment, the parties are in the same posture as if the lienholder were foreclosing the lien. Because condemnation proceeds

become a substitute for the land, the claims of all parties against the land may be adjudicated on apportionment. City of St. Petersburg v. Division of Administration, Dept. of Transportation, 293 So.2d 781 (Fla. 2d DCA 1974).

**F. ASSIGNEES**

Assignments of condemnation proceeds are valid so long as the assignment language appears in either the deed or separate written assignment. Canney v. City of St. Petersburg, 466 So.2d 1193 (Fla. 2d DCA 1985); Florida Citrus Nursery Inc. v. Dept. of Agriculture, 570 So.2d 1355 (Fla. 2d DCA 1990). An assignee may claim apportionment of the proceeds according to the terms of a valid assignment.

**G. OPTION HOLDERS**

**1. Exercised Option**

Where an option to purchase has been exercised as of the date of taking, the optionee is entitled to apportionment as the equitable and beneficial owner of the property. Pensacola Wine and Spirits Distillers, Inc. v. Gator Distributors, Inc., 448 So.2d 34 (Fla. 1st DCA 1984); J.C. Penney Co., Inc. v. Koff, 345 So.2d 732 (Fla. 4th DCA 1977); Arko Enterprises Inc. v. Wood, 185 So.2d 734 (Fla. 1st DCA 1966).

**2. Unexercised Option**

Where an option has not been exercised and has not become a binding contract by the date of taking, the optionee has no right to apportionment. Cravero v. Florida State Turnpike Authority, 91 So.2d 312 (Fla. 1956).

**G. EXECUTORY CONTRACTS**

**1. No rescission**

Condemnation does not cause rescission of a pending contract for sale of the property, absent a specific provision to that effect. Arko Enterprises Inc. v. Wood, 185 So.2d 734 (Fla. 1st DCA 1966). Contracts for sale in existence on the date of taking are valid enforceable through apportionment. Canney

v. City of St. Petersburg, 466 So.2d 1193 (Fla. 2d DCA 1985).

**2. Contract Vendor**

The seller under an executory contract has a lien for the amount of the agreed purchase price and should receive that amount upon apportionment. Because there is no rescission of the contract, the vendor may still enforce the contract for payment of the purchase price, even if the condemnation award is less than the agreed price. The rationale behind this rule is that all contracts are considered to be entered into subject to the sovereign power of eminent domain. Arko, *supra*.

**3. Contract Vendee**

Because a buyer under a valid contract for sale is the beneficial owner of the property, the buyer should receive any condemnation proceeds in excess of the contract price, subject to other valid claims. Likewise, the contract vendee should absorb the loss of any deficit below the contract price. If the condemnation proceeds are less than the contract price, the vendee must still pay the agreed price to the seller. Arko, *supra*.

**H. BENEFICIARIES OF RESTRICTIVE COVENANTS**

Beneficiaries of restrictive covenants are not "owners" and may not claim compensation where property subject to the restriction is taken, even where the proposed use of the taken property would be prohibited by the restriction. Condemnation extinguishes such covenants. Board of Public Instruction of Dade County v. Town of Bay Harbor Islands, 81 So.2d 637 (Fla. 1955).

**I. MINERAL RIGHTS**

Owners of mineral rights are entitled to apportionment for the value of their condemned mineral rights. Valls v. Arnold Industries, Inc., 328 So.2d 471 (Fla. 2d DCA 1976).