

EMINENT DOMAIN IN FLORIDA
AND
THE EASTERN UNITED STATES

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SECTION 1: INTRODUCTION

The power of eminent domain is an inherent attribute of sovereignty. It predates both the federal and state constitutions. The earliest record of its exercise is found in the Bible. I Kings 21 records how harsh the power can be. King Ahab, in all his sovereignty, took the vineyard of Naboth without compensation and put the owner to death when he complained. This Scripture also records the punishment of King Ahab for this abuse of power by higher authority. So, in any discussion of eminent domain, the axiom must also be stated that freedom is an inherent attribute of the individual. In the marvelous tradition of the Magna Carta, the Declaration of Independence of the first thirteen United States of America proclaimed:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, . . .”

When the sovereign with its power, and the individual with his unalienable right both seek to own and possess the same property for their respective purposes; the age old classic struggle between the two resumes. How that conflict is resolved is the subject of eminent domain law and practice and it is a practical measure of freedom.

To secure the right of individual liberty, while providing for the public good, constitutional government limits the exercise of the power of eminent domain to justifiable scope and fair procedures. Therefore, at each level of government, both the constitution and statutes¹ provide limitations on this harsh power.²

There are three constitutional limitations: The taking must be for a “public use,” “just compensation” must be paid, and substantive and procedural “due process” must be observed. The Fifth Amendment to the U. S. Constitution

prohibits the federal government from taking private property for public use without just compensation. It also mandates due process on the part of the federal government. The Fourteenth Amendment prohibits state governments from condemning private property without due process of law. In effect, it applies the requirements of the Fifth Amendment to state and local government.³ The taking of private property by the state or entities exercising a delegated power of eminent domain, therefore, must comply with the requirements of both the Fifth and Fourteenth Amendments. The failure to do so may be challenged in either state or federal courts.

SECTION 2: NATURE OF THE POWER OF EMINENT DOMAIN

In the federal jurisdiction the power to take private property is termed “eminent domain.” The process by which it is exercised is termed “condemnation.” The authorized exercise of that power has different names in the different states. For example in Florida and Texas it is known as “condemnation.” In Louisiana it is known as “expropriation” or “appropriation,” depending on whether it is an authorized or unauthorized use of that power. However, the State of New York itself takes property by “appropriation” and its political subdivision take by “condemnation.” In general, throughout the United States, the term “inverse condemnation” is used to describe an unauthorized exercise of this power.

2.A. Constitutional Provisions

The due process clause of the Florida Constitution, Article 1, Section 9, provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” Article X, Section 6(a), entitled “Eminent Domain,” provides:

No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner.

These are limitations on the power of the state legislature. Except as prohibited by the constitution, proceedings for the acquisition of property by eminent domain are as prescribed by statute.⁴

In federal law the “sovereign” comprises three separate branches of government. The eminent domain power is divided among them. It resides primarily in the legislative branch which determines what entities or persons may exercise the power and for what purpose. Initial studies and planning, as well as subsequent implementation, are the responsibility of the executive. The judicial branch—as historical guardian and interpreter of the constitution—determines “just compensation;” and to a limited extent, reviews the question of “public

purpose and necessity.” Other constitutional and statutory limits on the exercise of the power are also proper matters for the judiciary. Curiously, however, most American courts (particularly at the federal level) exercise only a minimal degree of review over legislative determinations of “public use.”⁵ But when it comes to “just compensation,” they strongly espouse a position of primacy.⁶

The “due course of law” clause in the Texas Constitution, Article 1, Section 19, provides that “[n]o citizen of[Texas] shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” Article 1, Section 17, covers takings and provides:

No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof.

The New York Constitution, in its Bill of Rights, Article 1, Section 1, provides that “[n]o member of [New York] shall be disenfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers, . . .” Section 7 provides that, “[p]rivate property shall not be taken for public use without just compensation.”

The due process clause of the Louisiana Constitution, Article 1, Section 2, provides that “[n]o person shall be deprived of life, liberty, or property, except by due process of law.” Article 1, Section 4, entitled “Right to Property,” provides:

Every person has the right to acquire, own, control, use, enjoy, protect and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to

expropriate except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss.⁷ No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects, other than contraband, shall never be taken.

2.B. Public Use

Both the United States and Florida Constitutions contain public use provisions. The Fifth Amendment of the United States Constitution prohibits the taking of private property for public use without just compensation. It does not expressly prohibit takings for private use, nor does it unequivocally specify that property may be taken only for public use. One reading, therefore, could be that there is only one limitation in the federal clause—if (or when) private property is taken for public use, then just compensation must be paid (and this obligation is the only limitation). However interesting such nuances may be, they have been preempted by the federal courts. They have held that the Fifth Amendment impliedly prohibits takings for private use.⁸

By contrast, Florida's constitutional prohibition is express, clear and direct—no private property shall be taken except for a public purpose. The state text is superior because it eliminates ambiguity. With the benefit of judicial construction though, it is acknowledged that the effect of the two texts is the same.

The existence of the power of eminent domain is recognized constitutionally, the right to take particular property exists only if (and when) the requirements of the statutes have been satisfied. In other words, the power of eminent domain, though an attribute of the sovereign, lies dormant until a statute brings it to life.⁹ It is dependent on statutory authorization before it can be exercised. Statutes, too, define limitations and conditions for the valid exercise of this power. Commonly, these are that the taking must be for a public purpose and must be necessary. Without a clear showing of both these elements, a taking is not lawful.

From the mandates of the constitution and the statutory requirements, several basic characteristics of public use have been established by the courts:

1. Property that is acquired for a public use or

purpose must be available to the public in common.

2. The public interest in the project must dominate the private gain.
3. The manner of enjoyment of use of the property acquired must be in the control of the public.

As to the first characteristic, the entire community need not participate directly in the benefits to be derived from the property taken. However, its use and benefit must be available to the public in common, not restricted exclusively to particular individuals or estates. For example, a schoolhouse site though serving a district of a only dozen families is as undeniably devoted to public use as the ground surrounding a statehouse. The number of people actually using the property is immaterial.¹⁰

That the public interest in the project must dominate the private gain does not preclude an incidental private use of the property acquired. It is well settled that an incidental private benefit is permissible when the purpose of the taking is predominantly public.¹¹ However, that private use must truly be incidental, for if it goes beyond this, neither the use of public funds nor the acquisition of property will be permitted.¹² This is true even if a private project would be of material benefit to the community.¹³

Where a significant private benefit results from a project a public purpose may still be found if that benefit is a necessary adjunct to the successful operation of the project.¹⁴ However, public benefit alone is neither synonymous with public purpose nor sufficient in itself to justify an exercise of the power of eminent domain.¹⁵

2.C. Necessity

Whether a project has a public purpose and whether it is necessary, are questions that frequently go hand in hand. However, unlike public purpose, which deals with the nature and quality of the overall project itself, public necessity focuses on more specific issues: which particular property and how much of that property is needed.¹⁶

The taking of private property affects such fundamental rights, even though compensation is paid, that the courts in Florida exercise the highest vigilance. They do not merely rubber stamp the taking and jump to the adequacy of compensation. Instead in contested cases, they carefully scrutinize the legality of the taking itself.

It is widely accepted that necessity should be construed as “a reasonable and not an absolute necessity.”¹⁷ This has been amplified as “a reasonable or practical necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner consistent with such benefit.”¹⁸ However, it does not include a taking which merely renders the improvement more convenient or less expensive.

Necessity is not a jury question. It is to be decided by the court in advance of the valuation jury trial. Indeed in eminent domain cases, just compensation is the only issue for the jury to determine. In Florida, eminent domain matters along with capital criminal charges are the only actions tried to a twelve-person jury.¹⁹ In Texas and Louisiana a six-person jury is used.²⁰ But in New York there is no provision for a jury; the court decides just compensation at the conclusion of the evidence.²¹

An authorized governmental body has wide discretion as to necessity. The amount of land selected, the location of the project, and the form of title to be acquired are all within its reasonable purview. But it will not be permitted to take more property than will serve the particular public use. Any “excess condemnation” would give rise to a constitutional problem. Similarly, the condemnor may not take a quality of interest or estate that exceeds what is necessary.²² An interesting exception has emerged in Florida; the Department of Transportation may acquire an entire lot where only a portion is needed in order to keep costs down. This is more fully discussed in Section 6 of this paper.

There are three alternate grounds upon which the condemnor may be challenged. Prevailing on any one is sufficient:

1. The condemnor has acted illegally. This involves acting without statutory authority or in a manner that is procedurally incorrect.
2. The condemnor has acted in bad faith.
3. The condemnor has abused its discretion.²³

There is no fixed or inflexible rule by which “necessity” is to be measured. Whether the quantity or quality of property sought is necessary will depend upon and vary with the facts in each particular case.²⁴

2.D. What Constitutes a Taking

A “taking” is a deprivation of a private property right. It is an exercise of the eminent domain power in such a way that the constitutional and statutory limitations on this power are observed. It is not an acquisition.²⁵ In many cases rights may be acquired by or accrue to the condemnor, but this is merely a

possible consequence of a taking, not a definitional element. Regulatory takings may involve the accrual of no property rights to the condemnor, but the regulation in question nonetheless gives rise to a taking.²⁶ Similarly, where property is destroyed there may be a taking, but clearly there is no acquisition.²⁷

Several state decisions have described the nature of a taking. In many, however, loose wording has crept in because the facts have not required rigor. Where it is not at issue whether rights have accrued to the condemnor the court has not needed to refine the principles that govern the more difficult cases. For example, one Florida court has described “taking” as an appropriation and conversion of private property to a public use or purpose. The court specifically defined taking as “entering upon private property and devoting it to public use or otherwise informally appropriating it in such a way as substantially to oust the owner.”²⁸

Florida differs from several other states in its approach to takings. The Florida Constitution does not provide compensation for mere “damage” to property, but only for a “taking” or “appropriation.”²⁹ By contrast, the Texas and Louisiana constitutions extend the compensation entitlement to include situations in which the property is “damaged” but the facts fall short of a “taking.” Texas extends the compensable category even further, and expressly includes situations where property is “destroyed for or applied to public use.”³⁰

The power of eminent domain and the police power are distinct. Under the police power the government is authorized to damage or destroy property or limit its use for the protection of the health, morals, and safety of the public. Unlike eminent domain, the police power may usually be exercised without creating the obligation to compensate.³¹ However, a governmental body may choose to exercise the power of eminent domain to accomplish objectives permitted under the police power.³²

There is no settled formula for determining when the valid exercise of the police power stops, and a compensable encroachment on private rights begins. The basic rights arising from ownership or property always must be balanced against the government’s power to protect and promote public health, safety, morals, and general welfare.

“Inverse condemnation” is largely a procedural term. It describes a situation in which an owner, claiming that private property has been taken by physical or non-physical means, files suit seeking “just compensation.”³³ Substantively, the law is no different in “inverse” cases. The most common situations involve physical invasions, such as flooding, or low aircraft overflights. However, overly restrictive regulations and executive actions, without actual physical intrusion, can result in a taking. But the owner must have been substantially deprived of the beneficial, or economically viable or reasonable, use of the property. Suffering a mere impairment of its use or diminution of its value

is not sufficient.³⁴ Inverse condemnation is discussed in more detail later in this paper.

Direct takings proceed according to statute. On the other hand the law of regulatory takings derives from a growing body of state and federal case law. At one end of the spectrum, an uncompensated exercise of the police power may be invalid as confiscatory, for example where a land use regulation denies all beneficial use of the property.³⁵ At the other end, a police power action, such as destroying healthy private nursery stock to prevent the potential spread of citrus canker, may be a valid exercise of the police power, yet require compensation.³⁶ Within this spectrum is the possibility that compensation may be required for a temporary taking by regulation.³⁷ The validity of such a regulation may also be capable of challenge.

Recognition that a compensable taking may arise out of harsh regulations has existed for many years.³⁸ When a regulation involves a taking of all or most of an owner's interest in the property, that regulation is a de facto exercise of the power of eminent domain.³⁹ And, the remedy under the Fifth and Fourteenth amendments, as has been recognized by the United States Supreme Court, is monetary.⁴⁰ In short, the just compensation clause requires the government to pay for regulatory taking, whether permanent or temporary.

SECTION 3: THE MEASURE AND METHOD FOR DETERMINING COMPENSATION

The Florida Constitution guarantees that “[n]o private property shall be taken except for full compensation therefore paid to each owner.”⁴¹ Texas requires “adequate” compensation, New York requires “just” compensation, and Louisiana requires “full” compensation as well.⁴²

The compensation should be based on “the fair actual market value at the time of the lawful appropriation.”⁴³ Fair market value is the amount that a willing, informed purchaser, under no compulsion to buy, would pay for the property to a willing, informed, seller, under no compulsion to sell.⁴⁴

The Florida Supreme Court states the measure of full compensation as the fair market value of the property, taking into account all facts and circumstances that bear a reasonable relationship to the loss suffered by the owner due to the taking of his property. Fair market value is one element in the compensation formula, not the exclusive standard. Full compensation requires a practical attempt to make the owner whole. When an owner is put to the expense, through no desire or fault of his own, of defending his property he can only be made whole by including his reasonable expenses in compensation. Reasonable expenses including moving costs, severance damages, and reimbursement of appraisers' fees.⁴⁵ The United State Supreme Court also

states the measure of the value of the property taken as “the owner’s loss, not the taker’s gain.”⁴⁶

3.A. Highest and Best Use

The value of condemned land is not determined by the current use of the property, nor even by its expected use. Rather, value is influenced of all available uses,⁴⁷ and is based on the “highest and best” use. This is the highest and best use for which the property is adaptable and needed, or is likely to be needed in the near future.⁴⁸ The Florida Supreme Court has held that the measure of compensation should be based on the highest and best use to which the property is being or might reasonably be put.⁴⁹ The following factors are relevant:

1. The property must be adapted to or suitable for the use.
2. A demand must exist for the use currently or in the near future.
3. Purely speculative uses must be disregarded.

Highest and best use is not necessarily limited to a use permitted by existing zoning regulation. In most jurisdictions, if there is a reasonable probability that the zoning may be changed or an exception made, the effect of that probability on the value of the property may be considered.⁵⁰ However, the property should not be valued as though rezoning had already occurred. Instead, the property should be appraised, taking into account both the present zoning and the impact on value that the probability of rezoning would have in the mind of a prospective purchaser.⁵¹ In practice, this may involve discounting the value as rezoned, to factor time, uncertainty, and the cost of rezoning, into the final value as appraised. Actual market sale transactions of property under like circumstances would be the best evidence.

3.B. Extent of Compensation

Regardless of the valuation method used, the objective in Florida is full compensation.⁵² The spirit of this guarantee requires a practical attempt to make the owner whole for compensable losses. The courts in Florida have thus determined that in addition to the fair market value of the land, such items as moving costs, costs to cure, severance damages, interest, court costs, attorneys’ and appraisers’ fees, are necessary elements of full compensation, where applicable.⁵³

Since “just compensation,” as construed by the courts, is a constitutional matter, the legislature may not diminish the concept of full compensation as defined by the courts.⁵⁴ However, the state legislature may authorize by statute

a greater amount or additional element of compensation than the courts have held the state constitution to require.⁵⁵

The compensation payable belongs to the owner(s) of the property at the time of the taking. It does not pass to any subsequent owner, except by provision in a deed or by assignment.⁵⁶

The interest of a mortgagee or lienholder is not “taken” in the constitutional sense. Rather, the only effect of condemnation is that monetary security is substituted for real security; this is not considered to rise to the level of a taking. Accordingly, the holders of security interests have no standing on the issue of compensation, and may not take part in the actual trial, unless their security is in jeopardy. However, they are still necessary parties to a condemnation action. This is to ensure that the title obtained is free and clear of all competing interests. The compensation payable to the holder of a security interest is limited to an award sufficient to cover the impairment of security. This is determined either in a post-trial apportionment proceeding,⁵⁷ or possibly in a pre-trial hearing to determine and allocate funds withdrawn from the deposit.

By contrast, the holders of divided proprietary interests, for example lessees and easement holders, do have interests which are “taken” within the meaning of the constitution. When the parcel is condemned, the lessee or easement-holder is considered an “owner,” and has a constitutional and statutory right to compensation.⁵⁸

If the lease contains a condemnation clause, this will govern the tenant’s right to share in the compensation proceeds. However, such clauses are strictly construed in favor of the tenant to avoid forfeitures.⁵⁹ Often the clause provides that the lease is terminated in the event of a taking. However, if the clause also mentions a division of the proceeds, the tenant is entitled to compensation.⁶⁰ In any event the tenant is entitled to recover for his trade fixtures, moving expenses, and business damages.⁶¹ A lessee who abandons leased premises prior to the date of taking is not entitled to compensation.⁶² However, if the lessee abandons under threat of condemnation he is still entitled to compensation.⁶³

The value of a leasehold interest can be measured using a comparable sales approach (what would the leasehold estate realize if offered for sale on the open market?) or using an income approach (what is the capitalized value of the lessee’s right to remain in undisturbed possession of the premises for the term of his lease relative to what he would pay for alternative premises?).⁶⁴ Options to renew are considered to the extent that they enhance the value of the leasehold estate. Because bonus value is affected by the remaining term of the lease, renewal options can be important determinants of value. If they extend the time over which the bonus value is calculated, even unexecuted options to renew are compensable, provided that they would have been exercised but for the condemnation.⁶⁵ After the first phase of trial (in which the overall compensation

is determined) a lessee is entitled to an apportionment of the jury award (for the value of his leasehold plus improvements).⁶⁶

3.C. Special Damages

The constitutional measure of just or full compensation would include the fair market value of the property taken and the loss of the fair market value of the property remaining.

Damages to the remainder when only part of a property is taken⁶⁷ are termed “severance” damages in Florida (and elsewhere) and “consequential” damages in New York. A Florida statute provides that “any damages to the remainder caused by the taking” are compensable.⁶⁸ The measure of severance damages is the reduction in the value of the remainder.⁶⁹ The rationale is that the owner should be put in as good a position financially as if his property had not been taken.⁷⁰

Businesses can suffer losses, or even be destroyed, by a condemnation. Under the Federal Constitution, damages to a business are not considered to be within the meaning of a “taking” and consequently do not qualify for compensation. The majority of states provide compensation for business losses only when specifically authorized by statute. Some states, however, elevate this to the level of a constitutional requirement. Regardless of the level at which this right is protected, it seems that compensation should be paid whenever an unavoidable economic loss is suffered by reason of a taking. In Florida, the authorization is given by statute; but eligible claims are limited to situations of partial taking where the business has been operating for the past five years.⁷¹ The legislative rationale, apparently, is that where the entire parcel is taken, the business can move elsewhere; but where only part is taken, an exception is justified because the business is economically forced to stay on a damaged remainder and suffer the loss. The compelling factors in partial takings do not justify denying business losses in cases of full takings, and statutory reform seems desirable. At present, business damages are not specifically defined or limited. However, within the eligible category, they may include lost profits, loss of goodwill, and costs attached to moving and selling equipment.⁷² Both severance damages and business damages may be available in appropriate cases, except to the extent that they overlap.⁷³

A further example of “damages” caused by a condemnation is “moving costs.” These are recoverable by the fee owner.⁷⁴ In general though, these costs are not recoverable by a lessee, except under relocation programs. However, in a partial taking the lessee is awarded the cost of moving his personal property from the part taken to the remainder.⁷⁵

SECTION 4: “INVERSE CONDEMNATION” AND OTHER LANDOWNER REMEDIES

A “taking” is a deprivation of a private property right. When government limits an owner’s private property rights to such a degree that an essential element is lost, a “taking” may have occurred. Government can take property directly by instituting condemnation proceedings, or indirectly (de facto) by an uncompensated out-of-court act. The owner has a remedy for an indirect taking in inverse condemnation. This action is commenced by the aggrieved property owner, against a governmental or quasi-governmental defendant, to obtain the constitutionally guaranteed compensation for a taking even though no formal exercise of eminent domain has occurred.

The constitutional limitations on eminent domain and the protection afforded individuals by the Bill of Rights provide the basis for inverse condemnation actions. In Florida, the remedy of inverse condemnation has been recognized as an inherent right of a property owner.⁷⁶ It has been held to be “self-executing,” in the sense that its foundation is constitutional, and not dependent upon specific provisions of a statute.⁷⁷

The essential elements of an inverse condemnation action in Florida are:

1. private property,
2. which has been “taken” de facto,
3. for a public purpose,
4. without “full” compensation.

Property is often defined as a “group of rights inhering in the citizens’ relation to the physical thing, as the right to possess, use and dispose of it.”⁷⁸ Property of course includes fee simple title to real estate, but it extends to subordinate, intangible and incorporeal rights.⁷⁹

The requirement of a physical invasion to constitute a “taking” has been abandoned, so that now an “impermissible encroachment on private property rights” will suffice.⁸⁰ The state may not interfere with an owner’s right to use his property, unless it pays full compensation, or unless it lawfully exercises its police power.

Some acts of governmental interference do not reach the level of a taking. Damage alone will not support an action in inverse condemnation.⁸¹ Whether a taking arises is a question of degree, and is determined by the court on a case-by-case basis. It is sufficient for the owner to show that the alleged taking occurred with the actual or constructive knowledge of the governmental agency and within its sphere of responsibility. It must also be shown that the alleged taking was in furtherance of a public project, or was beneficial to the public, or was an inevitable consequence of the construction or operation of the public

project.⁸² And when an inverse taking is found to have occurred, the Florida Constitution requires full compensation, the same as the situations of direct taking.

Under the following fact patterns, claims of inverse condemnation have been upheld:

1. Where a public project (such as highway construction) causes flooding of private property, substantial injury must be demonstrated.⁸³
2. Where direct access to a property is cut off, no taking exists if the new access is merely less convenient. A taking would require a substantial diminution of access.⁸⁴
3. Noise, vibration, fumes, and severe annoyance from aircraft landings and takeoffs are compensable, provided a substantial interference with the property is demonstrated. Often the argument is made that an “avigation easement” has been obtained by the airport.⁸⁵
4. Where there is a material change in the project description or construction plans after a taking has occurred (and even if this arises after the condemnor has obtained a final judgment), this change may support a second claim in inverse condemnation for a further taking. The change, however, must be material and must cause a significant additional loss of property.⁸⁶
5. Where land use regulations substantially deprive the owner of beneficial use, they may be attacked as takings.⁸⁷ If they unreasonably or unnecessarily curtail the right to make a legitimate use of the property, they will be stricken as an unconstitutional invasion of private property rights.⁸⁸ If they are held to rise to the level of a taking, they may be upheld but the constitution will then mandate the remedy of monetary compensation.⁸⁹

In eminent domain cases, zoning ordinances may not be collaterally attacked. However, this principle does not apply in situations where the condemnor, purporting to exercise its police power by adopting a zoning ordinance, has in reality discriminated against a particular parcel or parcels of land. This may have been done in order to depress their value with a view towards their future taking. The courts have vigorously renounced such actions as confiscatory, and have permitted the condemnee to attack the zoning ordinance collaterally.⁹⁰

SECTION 5: PROCEDURE AND EVIDENCE

At the outset, the condemnor in Florida must decide whether the proceeding is to be a “quick” take⁹¹ or whether it is to follow the conventional procedures, a “slow” take.⁹² There are advantages to both proceedings. Under the slow take the condemnor is required to deposit the compensation awarded only within 20 days after final judgment is rendered (failure to do so makes the proceedings null and void). Therefore if the condemnor obtains an unfavorable verdict it can simply decline to pay the final judgment and walk away.⁹³ This is not the case under a quick taking procedure in Florida. Once the condemnor has deposited its estimate of value into the court registry, title transfers upon deposit and the condemnor must pay the ultimate award whatever the amount. However, the advantage of the quick taking procedure is that the valuation date is fixed at the date of deposit to avoid escalating market prices. The condemnor can also obtain immediate possession without waiting for trial. Often this is essential to meet scheduling commitments and other obligations of the projects. This can be especially important where federal funding is involved.

Under a slow take procedure in Florida, a petition is filed, along with a summons to show cause, a notice of eminent domain proceedings, and a notice of lis pendens. The quick take procedure requires additional pleading. A declaration of taking containing an estimate of value based on a valid appraisal must be filed together with a summons to show cause that sets out the date, time and place of the hearing on the order of taking. There are instances where the petition may be filed for a slow take and subsequently converted to a quick take by serving a declaration of taking if circumstances change and the property becomes urgently required.

In Texas, the procedure differs. A hearing is conducted by three special commissioners. They consider evidence as to four factors:⁹⁴

1. The value of the property being condemned;
2. Other damages suffered by the property owner(s);
3. The benefit to the remainder, if any; and
4. The use of the property for which it is being condemned.

Two of the three commissioners must concur on the findings. Either party may appeal from the finding of the commission. In which event, a de novo jury trial ensues in court before a six-person jury. Appeals from the commission proceeding are handled by the court with a six-member jury. It hears the controversy de novo. If no appeal is taken within the time prescribed by statute, the commissioners’ finding becomes a binding decision.

5.B. Valuation Evidence

In Florida, as in other jurisdictions, the trier of fact is responsible for determining fair market value. (In Florida the trier of fact is a twelve-member jury.) It is not obliged to use any particular valuation method. Within reasonable limits, it may apply any method that is fair and just. It is guided by the reports and opinions of expert appraisal witnesses. Customarily, three methods are used:

1. The market data approach, by which the value of the property taken is determined by comparison with the sales prices of other similar properties.
2. The income approach, by which the value of the property is determined by capitalizing the income stream attributable to the real estate. This is particularly significant on income-producing property.
3. The cost approach, by which the value of the property is determined in consideration of the direct and indirect costs of the land and building improvements and depreciation, if any, plus the value of the land, together with any increment of value created by their combination.

The courts in Florida have expressly recognized all three methods.⁹⁵ Generally, a combination of these is used, each as a guide to determining fair market value and full compensation. Occasionally, other methods are used.

The comparable sales approach is the most widely used and easily understood method. However, because any parcel of property is unique, the accuracy of this approach depends on the care and skill with which the appraiser makes adjustments for the differences between the properties. Although the court has the power to exclude evidence, a wide discretion is generally afforded an appraiser in selecting comparables. Dissimilarities between the comparables tend to affect their weight rather than their admissibility. Unless a sale is so remote as to prejudice its evidentiary value, its admissibility is largely within the discretion of the court.⁹⁶ The more stable the market, the more remote the sale may be and yet still be comparable. In a rapidly changing market, the line of admissibility should be drawn much closer to the date of valuation.

The price the owner paid for the property taken is normally considered to be the best comparable sale and very convincing evidence of value. The admission into evidence of the owner's property is a matter for the court's discretion the same as any other comparable sale. It must be an arm's length transaction and sufficiently recent in time. "If, however, the sale took place several years before the taking, evidence of the price is usually not admissible."⁹⁷

The totality of circumstances is considered.⁹⁸ The conditions surrounding the sale and the location of the subject property outweigh distance.⁹⁹ The Florida courts have held that sales as far as nine miles away from the subject property were not inadmissible, especially when the evidence indicated that they were closely comparable.¹⁰⁰ The courts have also held that comparable sales from other Florida counties should not be excluded on that ground alone.

The income approach can also be used to determine the value of a property. In the case of income-producing properties, this is the best approach. Based on an annuity principle, the stream of income that will flow from the property is capitalized to determine its present value. This approach assumes that this income will continue in the future and can be projected. The courts distinguish between income from the property itself and income from the business conducted there unless the latter is a direct result of the physical characteristics and location of the property, as with parking lots, apartment buildings, rock quarries, certain agricultural uses, etc. Also, to the extent that rents are based on the income of a lessee's business, it too is capitalized. However, the marketplace may indicate a different basis in a particular instance. Rental apartments may often be valued on a "gross rent multiple."

Capitalization may be based on net income. Once this is ascertained, selecting the appropriate discount rate is the critical factor. Appraisers normally choose a rate prevailing locally, that allows for risk, for nonliquidity, and for a "safe" rate of return on investment. These three factors are elements that would be considered by a prudent investor. Selecting a proper rate can be difficult and controversial, since the value yielded is sensitive to even small variations in this rate.

Reproduction or replacement cost is the foundation of the cost approach. In general, the courts have rejected original or historical cost, unless it is sufficiently recent to qualify: original cost represents the "false standard of the past," not the present market value.¹⁰¹ This approach involves estimating the actual current cost of reproducing the structure, and then subtracting estimated depreciation (physical, functional and economic).¹⁰² Economic obsolescence is determined by extrinsic or environmental influences such as changes in the neighborhood and traffic patterns. Functional obsolescence is intrinsic, and involves structural inadequacies that arise through technological advances. When there is sufficient market data of comparable sales, the cost method is considered less reliable. However, on certain properties which are not commonly bought and sold, it may be the only method or the best method. The cost approach should take into account all of the out-of-pocket expense whether it is directly paid to the building contractor or incurred as indirect costs. For example, the carrying charge of holding the land while the construction is taking place is an indirect cost, as are the financing charges.

No one intends to expend the cost of buying land and constructing a building on it only to sell it for that cost. Ordinarily, the sale price will be greater than the actual cost. This increment of value is sometimes called “developer’s margin” or “entrepreneurial profit” or an “increment for assemblage.”

5.C. Costs and Fees

In Florida, the condemnor is required to pay the reasonable costs of the proceedings “including, but not limited to, a reasonable attorney’s fee, reasonable appraisal fees, and when business damages are compensable, a reasonable accountant’s fee, to be assessed by the court.”¹⁰³ The reasonableness of costs, which are taxed against the condemnor, is within the discretion of the court.¹⁰⁴ The judge is responsible for determining whether the costs were considered reasonably necessary, and whether the charges of experts are within the range customarily charges and paid. The rationale for reimbursing the owner’s costs and attorney’s fees is to place the owner on an equal footing with government, to assure that the owner receives a net result equal to the constitutional guarantee. An owner would pay more for the public good than everyone else if he were required to deduct from the value of his property the amount of the attorney’s fees and costs paid to defend eminent domain proceedings to which the owner is an involuntary defendant.¹⁰⁵

The amount of attorney’s fees assessed against the condemning authority is discretionary with the court.¹⁰⁶ The factors to be considered by the trial judge in determining reasonableness are established by Florida Statute Section 73.092 as follows:

1. Benefits resulting to the client from the services rendered. However, under no circumstances shall the attorney’s fees be based solely on a percentage of the award.
2. The novelty, difficulty, and importance of the questions involved.
3. The skill employed by the attorney in conducting the case.
4. The amount of money involved.
5. The responsibility incurred and fulfilled by the attorney.
6. The attorney’s time and labor reasonably required to adequately represent the client.

Further, an award of attorney’s fees is proper even though the jury verdict was for zero compensation. The purpose behind the statute’s requirement that the condemnor pay all costs and fees incurred by the owner is to permit the owner to

contest the value placed on his property by the condemnor and still come out whole.¹⁰⁷

In Texas, the condemnor pays costs only if the award is higher than the condemnor's original offer.¹⁰⁸ In New York, the property owner can recover attorney's fees and costs only if the award is substantially in excess of the amount of the condemnor's proof.¹⁰⁹ In Louisiana, the condemnee recovers costs and fees only if the condemnor abandons the project or did not have the right to take the property.¹¹⁰

5.. Abandonment

In Florida, slow take proceedings may be dismissed by the condemnor at any time before compensation is paid or possession is taken.¹¹¹ Title passes to the condemnor only on condition that the judgment is paid. As stated above, instead of making that payment, the condemnor may abandon the taking.¹¹²

Under the quick taking procedure, pre-trial deposit of the estimated compensation transfers title to the condemnor and irrevocably commits it to pay whatever compensation is ultimately determined. Once filed, the condemnation proceeding may not be abandoned unless the condemnor pays all fees and costs incurred by the owner.¹¹³

In New York, if the condemnor abandons the taking it must reimburse the condemnee for costs and attorneys' fees.¹¹⁴ If it has already acquired fee title by condemnation and has not effected material improvements, the condemnor may not dispose of the property without first offering it back to the condemnee.¹¹⁵

SECTION 6: RECENT DEVELOPMENTS AND FUTURE TRENDS

The increasing shortage of funds for state and local governments has already impacted the field of eminent domain in significant ways. No longer is there an abundance of federal funds. The politicians promise no tax increase while the need for public projects to accommodate growth continues unabated.

This recent austerity has made state and local government more resourceful in pursuing alternate approaches to acquisition. For example, land swaps have been offered in place of cash for the acquisition. Needed private property has been contributed to the condemning authority without cost in exchange for enhanced development rights over the public project. In one such case, land area needed for surface parking for a rapid transit station was given by the private owner in exchange for a lease to develop commercial office buildings and hotel in the air rights over the station. The owner was delighted with an enhanced project. The property stayed on the tax roll, ridership on the rapid transit system was increased, and the government earned revenue from the lease.

However, a less desirable influence of the funding shortage has been a deliberate campaign in the media and in the legislature to acquire property needed for public projects more cheaply at the owners' expense and in derogation of private property rights. The resolve of the judicial branch of government to protect the individual's right of private ownership will be tested.

Once such test involved the longstanding rule in eminent domain that the condemnor may not take more property than is "necessary" for the public purpose. In 1984 a statute enacted in Florida, Section 337.27(2) sought to change this rule:

In the acquisition of land and property, the department [of transportation] may acquire an entire lot, block, or tract of land if, by doing so, the acquisition costs to the department will be equal to or less than the cost of acquiring a portion of the property. This subsection 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.

The Supreme Court of Florida upheld the constitutionality of this statute in Department of Transportation v. Fortune Federal Savings and Loan.¹¹⁶ It held that there was a public purpose in minimizing the acquisition costs of public projects. If the condemnor had taken only the part it needed, it would have faced a \$2,000,000 claim for business damages under the Florida statute (discussed above). However, the law does not provide business damages for full takes and thus the acquisition costs would be reduced significantly. The court stated that "cutting acquisition costs to expand the financial base for further public projects constitutes a valid public purpose."

Another recent development involves the willingness of some courts to address inverse condemnation cases alleging the taking of access rights when there has been no physical taking of the owner's land. Such a claim was dealt with in Palm Beach County v. Tessler.¹¹⁷ A retaining wall built by the state in front of commercial property blocked direct access and visibility from the road. The wall made it necessary for customers to take a tedious and circuitous route. Also, since visibility was now blocked, new customers would not see the business from the road. The trial court found this to be more than noncompensable inconvenience. The following question was certified to the Florida Supreme Court:

Are the owners of commercial property located on a major public roadway entitled to a judgment of inverse condemnation when the county government blocks off any access to the property from the roadway and leaves access thereto only through a circuitous alternative route through residential streets?

The Florida Supreme Court answered in the affirmative.¹¹⁸ Loss of convenient access, it held, is not compensable through inverse condemnation where other suitable access continues to exist. However, in this case suitable access did not exist.

In still another effort to acquire right-of-way more cheaply in disregard of the constitutional guarantee of private ownership, the Florida legislature in 1987 enacted a law purporting to give the State Department of Transportation authority to file a map reserving private property for future right-of-way. The admitted purpose of the legislation was to reduce the cost of acquisition should the state later decide to condemn the property. In the April 26, 1990 decision of Joint Ventures, Inc. v. Department of Transportation, treated more fully in endnote 89 of this manuscript, the Supreme Court of Florida struck down the legislation as unconstitutional taking of private property without compensation.

SECTION 7: RECOMMENDATIONS FOR REFORM AND CONCLUSION

The individual right of private ownership should mean more than the ability to receive compensation for property whenever government wants to take it. An owner should have the right not to have private property taken in the first place unless and until it is reasonably necessary for a public purpose. The United States Supreme Court's opinions in Berman v. Parker¹¹⁹ and Hawaii Housing Authority v. Midkiff¹²⁰ have been argued to restrict judicial review of public purpose and reasonable necessity to a meaningless, if not extinct, ritual. The separation of power into three branches of government in our system of checks and balances has secured our freedom. There is no meaningful opportunity in the political forum and process of the executive branch or of the legislative branch for a deliberate consideration of the issues of public purpose and necessity in the light of an individual's property right. The judiciary is the only branch of government which has the ultimate responsibility to interpret and apply the constitutional limitation on the sovereign power of eminent domain in the taking of an individual's private property. The abandonment of judicial review of the legislative and executive decisions to take private property short circuits the checks and balance system and allows deprivation of property without due process of law. Judicial review of the condemning authority's decision to take private property should require proof by sufficient competent evidence of public

purpose and reasonable necessity the same as any other issue in civil litigation without presumption of correctness on the part of the government.

The current worldwide resurgence of freedom emphasizes the responsibility of eminent domain lawyers to reaffirm the worth of private ownership to individual liberty and to society and to put these beliefs into effective practice.

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¹ Fla. Const. Art.1 §9; art. 10, §6, Fla. Stats. Chs. 73 & 74, Texas Const. Art.1 §§ 17 & 19, Texas Stats. Ch. 21, New York Const. Art.1 §§ 1 & 7, New York Eminent Domain Procedure Law (NYEDPL) § 101 et seq., La. Const. art.1 §§ 2 & 4, La. Code § 19:1 et seq.

² See *City of Lakeland v. Bunch*, 293 So.2d 66, 68 (Fla. 1974); *Sapp v. Hillsborough County*, 262 So.2d 256, (Fla. 2d DCA 1972); *Peavey-Wilson Lumber Co. v. Brevard County*, 31 So.2d 483 (Fla. 1947).

³ *Chicago B & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

⁴ *DeSoto County v. Highsmith*, 60 So.2d 915 (Fla. 1952).

⁵ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

⁶ *State v. Calhoun*, 115 Gfa. App. 155, 154 S.E.2d 37 (1967); *United States v. New River Collieries*, 262 U.S. 341 (1923).

⁷ Louisiana has interpreted this phrase to require more liberal compensation than any other American jurisdiction.

⁸ See *Hawaii Housing Authority v. Midkiff*, 467 U. S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954); *Hairston v. Danville Ry.*, 208 U.S. 598 (1908).

Nichols on Eminent Domain §7.01[2] (Matthew Bender & Co. rev. 3d Ed. 1986).

⁹ Hohfeld W.N., Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913). This article has been cited with approval in Golden State Transport Corp. v. City of Los Angeles, 110 S.Ct. 444 (1989).

¹⁰ *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527 (1929).

¹¹ *City of Miami v. Coconut Grove Marine Properties, Inc.*, 358 So.2d 1151 (Fla. 3d DCA 1978), cert. Den. 372 So.2d 932; *State v. Cotney*, 104 So.2d 346 (Fla. 1958); *Hanna v. Sunrise Recreation*, 94 So.2d 597 (Fla. 1957); *Gate City Garage v. City of Jacksonville*, 66 So.2d 653 (Fla. 1953).

¹² *Baycol v Downtown Development Authority*, 315 So.2d 451 (Fla. 1975); *Adams v. Housing Authority of Daytona Beach*, 60 So.2d 663 (Fla. 1952).

¹³ *State v. Cotney*, 104 So.2d 346 (Fla. 1958)

¹⁴ *Panama City v. State*, 93 So.2d 608 (Fla. 1957).

¹⁵ *Baycol, Inc. v. Downtown Development Authority*, 315 So.2d 451 (Fla. 1975).

¹⁶ *Dade County v. Paxson*, 270 So.2d 455 (Fla. 3d DCA 1972) reh. den. 283 So.2d 862 (1973).

¹⁷ *Canal Authority v. Miller*, 243 So.2d 131, 134 (Fla. 1970).

¹⁸ 29A Corpus Juris Secundum Eminent Domain §90. (The earlier C.J. version of this statement was quoted with approval in *Central Hanover Bank & Trust Co. v. Pan American Airways*, 137 Fla. 808, 188 So. 820, 824 (1939).)

¹⁹ Fla. Stats. §73.071. In Florida, as in other jurisdiction, the right to a jury trial may be waived.

²⁰ Texas Code §21.063; La. Code §19:8.

²¹ NYEDPL §512.

²² Canal Authority, supra.

²³ City of Miami Beach v. Broida, 362 So.2d 19 (Fla. 3d DCA 1978), cert. den. 372 So.2d 466 (1979); Ball v. City of Tallahassee, 281 So.2d 333 (Fla. 1973), modified 346 So.2d 988 (1977).

²⁴ State Department of Transportation v. Myers, 237 So.2d 257, 262 (Fla. 1st DCA 1970).

²⁵ United States v. General Motors Corp., 323 U.S. 373 (1945).

²⁶ Ruckelhaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984).

²⁷ Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988); Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957).

²⁸ Alizieri v. Manatee County, 396 So.2d 240, 241 (Fla. 2d DCA 1981).

²⁹ Fla. Const. Art. 10, §6; N.Y. Const. Art. 1, §7.

See also Northcutt v. State Road Department, 209 So.2d 710 (Fla 3d DCA 1968), cert. disch. 219 So.2d 687.

³⁰ Texas Const. Art. 1 §17; La. Const. Art. 1 §4.

³¹ Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959).

³² Grubstein v. Urban Renewal Agency of City of Tampa, 115 So.2d 745 (Fla. 1959). (The City of Tampa had an area that covered 40 acres that constituted a slum or blighted area. This slum area was a breeding place for disease and crime constituting a menace to the health, safety, morals and general welfare of the citizens. It was concluded that the city's police power was inadequate to accomplish the removal or elimination of the slum condition. The city used the power of eminent domain in conjunction with the Urban Renewal law to accomplish this goal.)

³³ Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), cert. den. 454 U.S. 1083.

³⁴ Pinellas County v. Brown, 420 So.2d 308 (Fla. 2d DCA 1982), reh. den. 430 So.2d 450.

³⁵ Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984).

³⁶ Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988). Note that on this point, Florida Law is more generous to the owner than federal law; See, Miller v. Schoene, 276 U.S. 272 (1928).

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- ³⁷ First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), ___ U.S. ___, 110 S.Ct. 866 (1990).
- ³⁸ Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), per Justice Oliver Wendell Holmes.
- ³⁹ Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), reh. den. 649 F.2d 336 (1981), cert. den. 455 U.S. 907 (1981).
- ⁴⁰ First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), ___ U.S. ___, 110 S.Ct. 866 (1990); Hurley v. Kincaid, 285 U.S. 95 (1932).
- ⁴¹ Art. X, §6(a), Fla. Const.
- ⁴² N.Y. Const. Art. 1 §7; Texas Const. Art. 1 §17; La. Const. Art. 1 §4; La. Rev. Stats. 19:9.
- ⁴³ 3,535 Acres of Land, More or Less, in Jackson County Florida v. U.S., 146 F.2d 872 (1945); Sunday v. Louisville & N.R. Co., 62 Fla. 395, 57 So. 351 (1912).
- ⁴⁴ Olson v. United States, 292 U.S. 246 (1934); State Road Department v. Stack, 231 So.2d 859 (Fla. 1st DCA 1969).
- ⁴⁵ Jacksonville Expressway Authority v. Henry G. DuPree Co., 108 So.2d 289 (Fla. 1959); Dade County v. Brigham, 47 So.2d 602 (Fla. 1950).
- ⁴⁶ United States v. Causby, 328 U.S. 256, 261 (1946). The U.S. Supreme Court, adhered to “fair market value” as the usual equivalent of just compensation. However, it also cautioned that it does not mean to “make a fetish” out of just compensation because in rare cases it may not be a fair measure of the owner’s loss. See generally, United States v. 50 Acres 469 U.S. 24 (1984).
- ⁴⁷ Atlantic Coast Line R. Co. v United States, 132 F.2d 959 (5th Cir. 1943).
- ⁴⁸ Stack v. State Road Department, 237 So.2d 240 (Fla. 1st DCA 1970).
- ⁴⁹ State Road Department v. Chicone, 158 So.2d 753 (Fla. 1963).
- ⁵⁰ Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., 100 So.2d 67 (Fla. 1st DCA 1958), cert. den. 101 So.2d 817 (1958); 108 So.2d 74 (Fla. 1st DCA 1959), cert. quashed 116 So.2d 762 (1959).
- ⁵¹ In re Northwest Harbor v. Firester, 382 N.Y.S. 2d 1022 (N.Y. App. Div. 1976); Papovitch v. State, 235 N.Y.S.2d 97 (Ct. Cl. 1962).
- ⁵² Dade County v. General Waterworks Corp., 267 So.2d 633 (Fla. 1972).

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- ⁵³ Grinaker v Pinellas County, 328 So.2d 880 (Fla. 2d DCA 1976); State Road Department v. Abel Investment Co., 165 So.2d 832 (Fla. 2d DCA 1964), cert. den. 169 So.2d 485; Jacksonville Expressway Authority v. Henry G. DuPree Co., 108 So.2d 289 (Fla. 1958); Dade County v. Brigham, 47 So.2d 602 (Fla. 1950).
- ⁵⁴ State Highway Dept. v. Calhoun, 115 Ga. App. 155, 154 S.E.2d 37 (Ga., 1967).
- ⁵⁵ Daniels v. State Road Department, 170 So.2d 846 (Fla. 1964).
- ⁵⁶ Publix Super Markets, Inc. v. Cheesbro Roofing, Inc., 502 So.2d 484 (Fla. 5th DCA 1987); Canney v. City of St. Petersburg, 466 So.2d 1193 (Fla. 2d DCA 1985).
- ⁵⁷ Shavers v. Duval County, 73 So.2d 684 (Fla. 1954); Seaboard All-Florida Ry. v. Leavitt, 105 Fla. 600, 141 So.886 (1932). See Grieser v. Division of Administration, State Department of Transportation, 371 So.2d 164 (Fla. 2d DCA 1979).
- ⁵⁸ Dama v. Record Bar, Inc., 512 So.2d 206 (Fla. 1st DCA 1987); Mulkey v. Division of Administration, State of Florida Department of Transportation, 448 So.2d 1062 (Fla. 2d DCA 1984); Mullis v. Division of Administration, 390 So.2d 473 (Fla. 5th DCA 1980).
- ⁵⁹ Mullis v. Division of Administration, 390 So.2d 473 (Fla. 5th DCA 1980).
- ⁶⁰ Elmore v. Broward County, 507 So.2d 1220 (Fla. 4th DCA 1987).
- ⁶¹ Sweeting v. Hammons, 521 So.2d 226 (Fla. 3d DCA 1988); Rosenbaum v. State Road Department of Florida, 129 Fla. 723, 177 So. 220 (1937).
- ⁶² Orange State Oil Co. v. Jacksonville Expressway Authority, 143 So.2d 892 (Fla. 1st DCA 1962).
- ⁶³ Coleman v. Escambia County, 405 So.2d 227 (Fla. 1st DCA 1981).
- ⁶⁴ Dama v. Record Bar, Inc., 512 So.2d 206 (Fla. 1st DCA 1987); Orange State Oil Co. v. Jacksonville Expressway Authority, 110 So.2d 687 (Fla. 1st DCA 1959), cert. den. 114 So.2d 4 (1959).
- ⁶⁵ Dama v. Record Bar, Inc., 512 So.2d 206 (Fla. 1st DCA 1987); State Road Department v. Tampa Bay Theaters, Inc., 208 So.2d 485 (Fla. 2d DCA 1968), cert. den. 212 So.2d 869 (1968).
- ⁶⁶ Dama v. Record Bar, Inc., 512 So.2d 206 (Fla. 1st DCA 1987); Division of Administration, State of Florida, Department of Transportation v. Allen, 447 So.2d

1383 (Fla. 5th DCA 1984); *Carter v. State Road Department*, 189 So.2d 793 (Fla. 1966).

⁶⁷ The following are typical examples of factors that may cause severance damages:

1. Impairment or reduction of access.
2. Reduced size or altered shape of the remainder, affecting its utility.
3. Damage resulting from the use of the acquired part (typically noise, dust, fumes, apprehension of harm, etc.)
4. Change in grade between the part taken and the remainder.

⁶⁸ Fla. Stats. §73.071(3)(B). This is a constitutional rule; see *United States v. Grizzard*, 219 U.S. 180 (1911).

⁶⁹ *Mulkey v. Division of Administration, State of Florida, Department of Transportation*, 448 So.2d 1062 (Fla. 2d DCA 1984).

⁷⁰ *Department of Transportation, Division of Administration v. Jirik*, 498 So.2d 1253 (Fla. 1986).

⁷¹ Fla. Stats. §73.071(3)(b).

⁷² *Mulkey v. Division of Administration, State of Florida, Department of Transportation*, 448 So.2d 1062 (Fla. 2d DCA 1984); *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966).

⁷³ *Division of Administration, State of Florida, Department of Transportation v. Ness Trailer Park, Inc.*, 489 So.2d 1172 (Fla. 4th DCA 1986), reh. den. 501 So.2d 1281 (1986).

⁷⁴ *Malone v. Division of Administration, State of Florida, Department of Transportation*, 438 So.2d 857 (Fla. 3d DCA 1983); *Jacksonville Expressway Authority v. Henry G. DuPree Co.*, 108 So.2d 289 (Fla. 1958); *Rose v. State*, 24 N.Y.2d 80, 246 N.E.2d 735 (Ct. App. N.Y. 1969). See also Texas Code §21.043.

⁷⁵ *State Road Department v. Thibaut*, 190 So.2d 53 (Fla. 4th DCA 1966), cert. den. 196 So.2d 922 (1967).

⁷⁶ *State Road Department of Florida v. Tharp*, 146 Fla. 745, 1 So.2d 868 (1941). See also Texas Const. Art. 1 §17; La. Const. Art. 1 §2, Art. 2 §15.

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- ⁷⁷ State Road Department of Florida v. Tharp, 1 So.2d 868 (Fla. 1941).
- ⁷⁸ United States v. General Motors Corp., 323 U.S. 373 (1945). See also the first sentence (quoted above) of Article 1, Section 4, of the Louisiana Constitution.
- ⁷⁹ Pinellas County v. Brown, 450 So.2d 240 (Fla. 2d DCA 1984). (A prospective assignment of a lease.)
- ⁸⁰ Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), cert. den. 454 U.S. 1083 (1981). (The Florida Land and Water Adjudicatory Commission denied a permit for a development of an area that was substantially wetland. A Florida District Court of Appeal reversed the commission's decision. The Florida Supreme Court held that there was sufficient evidence for the denial because the development would not only fail to prevent adverse environmental impact but would in fact pollute surrounding bays.)
- ⁸¹ Northcutt v. State Road Department, 209 So.2d 710 (Fla. 3d DCA 1968), cert. disch. 219 So.2d 687 (1969); Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956).
- ⁸² State Road Department of Florida v. Darby, 109 So.2d 591 (Fla. 1st DCA 1959).
- ⁸³ Thompson v. Nassau County, 343 So.2d 965 (Fla. 1st DCA 1977).
- ⁸⁴ City of Orlando v. Cullom, 400 So.2d 513 (Fla. 5th DCA 1981), rev. den. 411 So.2d 381 (1981). (Right of access to one's property is a valuable right which cannot be taken without compensation. Even a serious diminishment is a taking and must be paid for. Before an owner can be compensated for diminishment in the right of access to his property, it must be shown that owner suffered damages peculiar to him and not common to the general public.)
- State, Department of Transportation v. ABS, Inc., 336 So.2d 1278 (Fla. 2d DCA 1976). (Right to compensation for impairment of access resulting from construction of limited access highways and service roads depends on whether there has been a substantial diminution in access as a result of the taking and not upon whether the right of access taken was a direct right of access. It is for the jury to decide whether such diminution in access is nominal or substantial.
- State, Department of Transportation v. Stubbs, 285 So.2d 1 (Fla. 1973). (Ease and facility of access constitute valuable property rights for which an owner is entitled to be adequately compensated in a condemnation case.)
- ⁸⁵ Hillsborough County Aviation Authority v. Benitez, 200 So.2d 194 (Fla. 2d DCA 1967), cert. den. 204 So.2d 328 (1967).

⁸⁶ Division of Administration, State of Florida Department of Transportation v. Mobile Gas Co., 42 So.2d 1024 (Fla. 1st DCA 1983), rev. den. 437 So.2d 677 (1983); Central & Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974).

⁸⁷ Forde v. City of Miami Beach, 146 Fla. 676, 1 So.2d 642 (1941).

⁸⁸ Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984); Burritt v. Harris, 172 So.2d 820 (Fla. 1965).

⁸⁹ First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), ___ U.S. ___, 110 S.Ct. 866 (1990); Joint Ventures, Inc. v. Department of Transportation, 15 F.L.W. s.246 (Fla. April 26, 1990). In its recent holding in the Joint Ventures case, the Florida Supreme Court moved Florida law more into line with the United States Supreme Court in First English. In Joint Ventures the court declared unconstitutional a statute providing for the filing of maps of reservation on property. These had the effect of establishing a building setback line and effectively freezing development on the property for a five-year period, which period could be extended for a total of ten years of restriction on the property. All this without the payment of compensation. The court viewed the statute as “an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain.” The court rejected the characterization of the statute as a permissible exercise of the state’s police power, viewing it rather as “thinly veiled attempt to ‘acquire’ land . . .” Furthermore, the court expressly stated that the aggrieved owner’s right to seek compensation through an inverse condemnation action did not cure the statute’s failure to provide for compensation. The court noted that the remedy under inverse condemnation is not equivalent to an owner’s remedy under eminent domain.

⁹⁰ Department of Public Works and Buildings v. Exchange National Bank, 334 N.E.2d 810 (Ill. App. 2d 1975); Dade County v. Still, 377 So.2d 689 (Fla. Supp. 1979).

⁹¹ Fla. Stats. Ch. 74.

⁹² Fla. Stats. Ch. 73.

⁹³ Of course the condemnor would still be liable for attorneys’ fees and the other consequences of abandonment. However, these may be considered preferable to the alternative of honoring an unfavorable judgment.

⁹⁴ Texas Code §21.041.

⁹⁵ McNayr v. Claughton, 198 So.2d 366 (Fla. 3d DCA 1967).

⁹⁶ Stainger v. Jacksonville Expressway Authority, 182 So.2d 483 (Fla. 1st DCA 1966).

⁹⁷ Nour v. Division of Administration, State, Department of Transportation, 267 So.2d 365 (Fla. 1st DCA 1972), quoting from Nichols on Eminent Domain (Matthew Bender 3d Ed).

⁹⁸ The following are some of the items of similarity that may be considered in determining the comparability of property: (1) time of sale, (2) size of property, (3) type of property, (4) neighborhood, (5) motives of buyer or seller, (6) topography of property, (7) productivity, (8) financing, (9) construction, (10) age, (11) location, (12) access, (13) drainage, (14) proximity to beneficial or obnoxious facilities or projects, (15) zoning.

⁹⁹ Claiborne v. City of Jacksonville, 260 So.2d 257 (Fla. 1st DCA 1972).

¹⁰⁰ Rochelle v. State Road Department, 196 So.2d 477 (Fla. 2d DCA 1967).

¹⁰¹ Whidden v. Division of Administration, State Department of Transportation, 281 So.2d 419 (Fla. 1st DCA 1973); Nour v. Division of Administration, State, Department of Transportation, 267 So.2d 365 (Fla. 1st DCA 1972).

¹⁰² State, Department of Highways v. Jones, 166 So.2d 538 (La. 1964).

¹⁰³ Fla. Stats. §73.091.

¹⁰⁴ Dade County v. Brigham, 47 So.2d 602 (Fla. 1950).

¹⁰⁵ Grinaker v. Pinellas County, 328 So.2d 880 (Fla. 2d DCA 1976).

¹⁰⁶ Florida Power & Light Co. v. Flichtbeil, 475 So.2d 1250 (Fla. 5th DCA 1985), rev. den. 486 So.2d 597 (1986); Division of Administration, State Department of Transportation v. Denmark, 354 So.2d 100 (Fla. 4th DCA 1978).

¹⁰⁷ Hodges v. Division of Administration, State, Department of Transportation, 323 So.2d 275 (Fla. 2d DCA 1975); City of Miami Beach v. Liflans Corporation, 259 So.2d 515 (Fla. 3d DCA 1972).

¹⁰⁸ Texas Code §21.047.

¹⁰⁹ NYEDPL §701.

¹¹⁰ La. Rev. Stats. §19:201.

¹¹¹ Conner v. State Road Department, 66 So.2d 257 (Fla. 1953).

¹¹² State Road Department of Florida v. Zetrouer, 105 Fla. 650, 142 So.2d 217 (1932).

¹¹³ See *Dade County v. Oolite Rock Co.*, 311 So.2d 699 (Fla. 3d DCA 1975) cert. den. 330 So.2d 20 (1976); *City of Hallandale v. Chatlos*, 236 So.2d 761 (Fla. 1970).

See also Fla. R. Civ. Pro. 1.420(a)(1); *O'Sullivan v. City of Deerfield Beach*, 232 So.2d 33 (Fla. 4th DCA 1970).

¹¹⁴ NYEDPL §702.

¹¹⁵ NYEDPL §406.

¹¹⁶ 532 So.2d 1267 (Fla. 1988).

¹¹⁷ 518 So.2d 970 (Fla. 4th DCA 1988).

¹¹⁸ *Palm Beach County v Tessler*, 538 So.2d 846 (Fla. 1989).

¹¹⁹ *Berman v. Parker*, 348 U.S. 26 (1954).

¹²⁰ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).