

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: January 21, 1998 Revised: _____

Subject: Eminent Domain

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Wiehle</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	<u>_____</u>	<u>_____</u>	<u>GO</u>	<u>_____</u>
3.	<u>_____</u>	<u>_____</u>	<u>TR</u>	<u>_____</u>
4.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
5.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>

I. Summary:

The bill requires that all condemning authorities make a written offer of full compensation before instituting litigation. It defines "business records" and provides that governmental condemning authorities may seek to obtain business records from those operating businesses on the property sought to be acquired.

The bill makes a number of changes concerning compensation in eminent domain cases, including:

- creating a provision specifying that in determining the value of the property sought to be appropriated, if the property is used for an agricultural operation, income from farming is attributable to real property.
- revising current statutes to provide that business damages are payable in whole takings as well as in partial takings.
- creating a new statutory provision directing that business damages are payable for substantial diminution of access.
- amending current statutes to provide that business damages are payable to a business of 3 years standing instead of the current more than 5 years standing.
- creating a provision that business damages are limited to the total of the fair market value of the business and reasonable moving expenses.
- creating a provision that evidence of the ability to mitigate severance damages and business damages may be considered when the cost of mitigation is less than the total severance and business damages.

The bill repeals s. 337.27(2), F.S., which currently allows the Department of Transportation to take an entire parcel if the cost of doing so is equal to or less than the cost of taking only that portion of the property which is required for the project.

The bill reduces attorney's fees in eminent domain cases by reducing the percentage figures used in calculating these fees.

This bill amends sections 73.0511, 73.071, and 73.092 and repeals subsection 337.27(2) of the Florida Statutes.

II. Present Situation:

A. Constitutional Provisions

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

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

The payment of compensation for intangible losses and incidental or consequential damages, however, is not required by the constitution, but is granted or withheld simply as a matter of legislative grace. *Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc.*, 444 So.2d 926, 928 (Fla. 1983). As such, the statutes authorizing these damages must be strictly construed and any ambiguity in these statutes must be construed against the claim of damages, with such damages to be awarded only when such an award appears clearly consistent with legislative intent. *Id.*, at 929.

B. Eminent Domain Statutes

1. Generally

a. Eminent Domain Process

Chapters 73 & 74, F.S., provide for eminent domain and proceedings supplemental to eminent domain, respectively. Eminent domain is begun by filing a petition for eminent domain. s. 73.021, F.S. Upon the filing of a petition, the clerk of court is to issue a summons to show cause why the property described in the petition should not be taken. s. 73.031, F.S. The summons must require all defendants named in the petition and all others who claim an interest in the property to serve written defenses on a day specified in the summons. *Id.* The designated date must be not less than 28 nor more than 60 days from the date of the summons. *Id.* A copy of the petition and summons must be served on all named resident defendants not less than 20 days before the return date. *Id.* Nonresident and unknown or unlocated defendants are to be served by publication. *Id.*

The petitioner may make an offer of judgment no sooner than 120 days after the defendant has filed an answer and no later than 20 days prior to trial. s. 73.032, F.S. A defendant may make an offer to have judgment entered against defendant for payment of compensation by petitioner only for an amount that is under \$100,000, and such offer may be served on petitioner no sooner than 120 days after the defendant has filed an answer and no later than 20 days prior to trial. *Id.*

The offer of judgment must: be in writing; settle all pending claims with that party or parties exclusive of attorney's fees and costs; state that the offer is made pursuant to this section; name the parties to whom the offer is made; briefly summarize any relevant conditions; state the total amount of the offer; and include a certificate of service. *Id.* The offer of judgment is deemed rejected unless accepted by filing both a written acceptance and the written offer with the court within 30 days after service of the offer, or before the trial begins if less than 30 days. *Id.* At the time an offer of judgment is made by the petitioner, the petitioner must identify and make available to the defendant the construction plans, if any, for the project on which the offer is based. *Id.*

Prior to instituting litigation, the condemning authority must notify the fee owners of their statutory rights concerning attorney's fees and costs. s. 73.0511, F.S.

At the trial on the petition for eminent domain, the court must impanel a jury of 12 persons as soon as practical considering the reasonable necessities of the court and of the parties, and giving preference to the trial of eminent domain cases over other civil actions. s. 73.071, F.S. The jury is to determine the amount of compensation for the property to be acquired. *Id.* The amount of compensation is to be determined as of the date of trial, or the date upon which title passes, whichever shall occur first. *Id.* The jury is to determine solely the amount of compensation to be paid, with compensation to include, in part, the following:

1. The value of the property sought to be appropriated; and
2. Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking; these are known as severance damages. When the action is by specified condemning authorities for the condemnation of a right-of-way and the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, severance damages include the probable damages to the business which the denial of the use of the property so taken may reasonably cause. Any person claiming the right to recover business damages must set forth in his or her written defenses the nature and extent of the damages.

b. Attorney's Fees

In an eminent domain proceeding, an award of attorney's fees is based "solely on the benefits achieved for the client." s. 73.092(1), F.S. The term "benefits" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the

condemning authority before the defendant hires an attorney. s. 73.092(1)(a), F.S. If an attorney is hired before a written offer is made, benefits must be measured from the first written offer after the attorney is hired. *Id.* Paragraph 73.092(1)(c), F.S., provides that attorney's fees based on benefits achieved are to be awarded according to the following schedule:

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

c. Taking Possession of Property Prior to Final Judgment

Chapter 74, F.S., permits specified condemning authorities to take possession and title in advance of final judgment in eminent domain actions. The specified authorities include: the state, the Department of Transportation, any county, school board, municipality, expressway authority, regional water supply authority, transportation authority, flood control district, or drainage or subdrainage district, the ship canal authority, any lawfully constituted housing, port, or aviation authority; the Spaceport Florida Authority, or any rural electric cooperative, telephone cooperative corporation, or public utility corporation. Currently, the chapter contains no provision addressing presuit negotiations or mediation. At the time of filing a declaration of taking pursuant to this chapter, the petitioner must make a good faith estimate of value, based upon a valid appraisal of each parcel in the proceeding, which must be made a part of the declaration of taking. s. 74.031, F.S.

d. Cost of Partial Taking versus Whole Taking

Subsection 337.27(2), F.S., enacted in 1984, provides:

In the acquisition of lands and property, the department 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.

In 1988, the Florida Supreme Court heard a case in which a property owner challenged the constitutionality of this subsection, claiming that a whole taking under these circumstances violated the public purpose requirement for takings of private property. *Department of Transportation v. Fortune Federal Savings and Loan Association*, 532 So.2d 1267 (Fla. 1988). The Court upheld the minimization of acquisition costs as a valid public purpose for taking the whole property where doing so was less expensive than a partial taking. *Id.*, at 1270.

2. Department of Transportation Acquisition Negotiation Statute

There is an additional statute regulating real property acquisition negotiations conducted by the Department of Transportation (DOT). This statute requires DOT to negotiate with the property owner in good faith and to attempt to arrive at an agreed amount of compensation for the property sought. s. 337.271(1), F.S. At the inception of the negotiation, DOT must notify the owner of the acquisition sought, provide specified information about the project and inform the property owner of their statutory rights in the process. s. 337.271(2), F.S. This notice must be sent by certified mail to the property owner at the last known address listed on the ad valorem tax roll. s. 337.271(3), F.S. A return of the notice as undeliverable constitutes notice. *Id.* DOT is not required to give notice to anyone who acquires the property after the original notice. *Id.*

Within 120 days after receipt of the notice, the property owner may submit a complete appraisal report related to the parcel to be acquired and, if business damages are to be claimed, submit a complete estimate of those damages. s. 337.271(4) & (5), F.S. If the property owner submits the appraisal report, and business damages report if relevant, within 30 days of the date on which DOT receives the report(s), it is to provide to the property owner all appraisal reports and business expense estimates prepared for DOT related to the property. s. 337.271(7), F.S. Under these circumstances, DOT is also to make a written offer of purchase to the property owner and the business owner, if any, which includes the value of the land and improvements taken and any business or severance damages. s. 337.271(8), F.S. After exchanging appraisal and business damages reports, the parties may jointly agree to nonbinding mediation. s. 337.271(9), F.S. Upon submission of an invoice, DOT must pay all reasonable costs, including reasonable attorney's fees, incurred on behalf of a property owner who proceeds to prelitigation negotiation settlement pursuant to the provisions of this section. The attorney's fees are to be based upon the criteria of s. 73.092. The invoice must include complete time records and a detailed statement of services performed and time spent performing such services. Reasonable appraisal or accountant fees cannot exceed the general or customary hourly rate for appraisal or accounting fees in the community. If the parties cannot agree on the amount of costs and attorney's fees to be paid by DOT, the property owner may file a complaint in the circuit court in the county where the property is located to recover reasonable attorney's fees and costs.

C. Right of Access Case Law

When a governmental action causes a substantial loss of access to real property without a taking of the property, there is a right to compensation through an inverse condemnation action. *Palm Beach County v. Tessler*, 538 So.2d 846, 849 (Fla. 1989). However, the fact that a portion or even all of the access to an abutting road is destroyed does not constitute a taking unless, in light of the remaining access to the property, the property owner's right of access was substantially diminished. *Id.* Damages recoverable are limited to the reduction in the value of the property which was caused by the loss of access. *Id.* Business damages are controlled by s. 73.071, F.S. *Id.*, at 850. This statute does not authorize compensation for business damages under such circumstances; business damages are compensable only when there is a partial taking of land. *Weaver Oil Co. v. City of Tallahassee*, 647 So.2d 819, 822 (Fla. 1994). Thus, when a governmental action reduces access but the reduction in access is not substantial, there is no taking of access. *Id.* Additionally, even if the reduction in access does rise to the level of a taking,

if the governmental action did not involve a taking of a part of the property on which the business is located, there can be no business damages. *Id.*

III. Effect of Proposed Changes:

A. Settlement Offers, Exchanges of Records

1. Offer to Property Owner, Exchange of Appraisals

Section 1 amends s. 73.0511, F.S., to require that before instituting eminent domain litigation, a condemning authority must make a written offer of full compensation naming the fee owners to whom it is made. The bill clarifies that the written offer and notice of statutory rights are to be given to the fee owners appearing of record on the date the offer is made.

After the offer is made, the fee owner may request a copy of the most current appraisal and construction plans pertaining to the property upon which the offer is based. If the condemning authority is a governmental entity, it must provide the appraisal and plans within 15 days of the request. However, if the property is being acquired by the state for conservation or recreational purposes pursuant to s. 259.041, F.S., the condemning authority is not required to provide the current appraisal prior to execution of an option contract to purchase the property. Paragraph 259.041(7)(e), F.S., makes such appraisals confidential until an option contract is executed or, if no option is executed, until 2 weeks before a contract for purchase is considered for approval by the board of trustees.

Within 30 days after receipt of the governmental authority's appraisal, the fee owners must provide to the condemning authority a copy of the most current appraisal of the property prepared during the prior three years which is within the control or possession of the owner.

2. Notice to Business Owners, Business Records, Offer of Business Damages

When a governmental condemning authority is seeking to acquire property for a proposed road right-of-way project, before instituting litigation, the condemning authority must make a good faith effort to notify onsite operators of businesses located on the property of statutory rights. If requested, the authority is also to provide within 30 days a copy of the constructions plans, if any, and any right-of-way maps pertaining to the property to be acquired.

After tendering the offer of full compensation to the fee owners, the governmental condemning authority may seek to obtain from the owner or onsite operator of the business a copy of the business records kept in the ordinary course of business, if available. "Business records" is defined to mean copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, balance sheets, profit and loss statements, and state corporate income tax returns attributable to the property to be acquired for the last 3 years preceding notification. If these records are consolidated with records of other business operations, edited portions of the consolidated business records may be provided, along with a signed

acknowledgment from the business owner. These provisions are not mandatory and are not to be construed as a condition for claiming business damages.

If business records are provided to the condemning authority, they must be kept confidential and used only for the purpose of preparing the written offer or in the condemnation suit. After the records are obtained, the condemning authority may make a written offer of settlement for business damages. If an eminent domain action is initiated more than 90 days after receipt of the business records, the authority must include a good-faith estimate of business damages in its declaration of taking and must deposit the amount of the estimate into the court registry. The good-faith estimate constitutes a written offer of settlement.

B. Compensation, Including Business Damages and Right of Access

Section 2 of the bill makes a number of amendments to s. 73.071, F.S., concerning compensation in eminent domain cases.

1. Income from Farming

The bill provides that in determining the value of the property sought to be appropriated, if the use of the property is an agricultural operation as defined in s. 570.02(1), F.S., income from farming is attributable to real estate. Subsection 570.02(1), F.S., defines the term “agriculture” as follows: “the science and art of production of plants and animals useful to humans, including to a variable extent the preparation of these products for human use and their disposal by marketing or otherwise, and includes aquaculture, horticulture, floriculture, viticulture, forestry, dairy, livestock, poultry, bees, and any and all forms of farm products and farm production. For the purposes of marketing and promotional activities, seafood shall also be included in this definition.”

2. Business Damages

Currently paragraph 73.071(3)(b), F.S., provides that in partial takings, severance damages and business damages are to be included in the compensation to be paid. The bill splits out the provisions on business damages from this paragraph, thus providing for business damages in whole takings as well as in partial takings. The bill also provides for: business damages due to “substantial diminution of access”; payment of business damages to a business of more than 3 years standing, as opposed to the current 5 years; and, a limit on the total business damages awarded of the total of the fair market value of the business and reasonable moving expenses. Finally, evidence of the ability to mitigate both business damages and severance damages on site or by relocating may be considered when the cost of mitigation is less than the total severance and business damages claimed. Additionally, when determining severance damages, business damages, and the total cost to cure payable to the claimant, any increased cost of operation, reasonable expenses of mitigation, moving costs, downtime losses, and unmitigated damages may be included.

C. Repeal of Subsection 337.27(2), F.S.

The bill repeals subsection 337.27(2), F.S. This subsection currently applies to situations where the Department of Transportation is acquiring land for a project and needs only a portion of a particular parcel of land for that project. The subsection provides that if the costs of acquiring the entire parcel will be equal to or less than the cost of acquiring only that portion of the property which is needed for the project, the Department may acquire the entire parcel.

D. Attorney's Fees

The bill amends paragraph 73.092(1)(c), F.S., to reduce attorney's fees by reducing the percentages used to calculate these fees. The percentages are reduced as follows: 30% of the first \$250,000 in benefits instead of the current 33%; 20% of the next \$750,000 instead of the current 25%; and 12% of any benefit exceeding \$1 million instead of the current 20%.

E. Effective Date

Section 5 provides that the bill takes effect July 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill may be a local mandate. Article VII, Section 18 of the Florida Constitution provides in part:

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and unless: . . . the Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality

However, the bill would appear to be an exception to the mandate provision because similarly situated persons are all required to comply, i.e., the bill applies to both state and local governmental entities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may increase compensation to property owners as it: repeals the authority for the Department of Transportation to do a whole taking where the cost of acquisition is the same as or less than the cost for a partial take; provides for attribution of income from farming to real estate in determining the value of the property sought to be appropriated; provides for payment of business damages to a business of 3 years standing, instead of the current 5 years; and provides for payment of business damages for substantial diminution of access. However, there may be some offsetting reduction of business damages due to mitigation.

C. Government Sector Impact:

Expenses of government condemning authorities should increase accordingly.

VI. Technical Deficiencies:

The bill provides that a governmental condemning authority must provide an appraisal and plans “within 15 days of the request” for the documents. The bill does not specify whether this is 15 days from the date the request is made or 15 days from the date the request is received, a difference which could be important if the request is made by mail.

The bill provides that if the business records for the property to be acquired are consolidated with those of other business operations, edited portions of the consolidated records may be provided, “in addition to a signed acknowledgment from the business owner.” The bill does not state what the business owner is to acknowledge.

The bill provides that in determining the value of the property sought to be appropriated, if “the use of the property sought to be acquired is an agricultural operation as defined in s. 570.02(1), income from farming is attributable to real estate.” This raises two points. First, s. 570.02(1), F.S., does not define the term “agricultural operation.” Instead, it defines the term “agriculture” to mean

“the science and art of production of plants and animals useful to humans, including to a variable extent the preparation of these products for human use and their disposal by

marketing or otherwise, and includes aquaculture, horticulture, floriculture, viticulture, forestry, dairy, livestock, poultry, bees, and any and all forms of farm products and farm production. For the purposes of marketing and promotional activities, seafood shall also be included in this definition.”

As such, it is uncertain how the courts would interpret and apply the term agricultural operation. Second, the application of the language “income from farming is attributable to real estate” is similarly uncertain to the extent that it would include income which would have been earned from future crops.

The bill includes in business damages the “substantial diminution of access.” Current case law uses the standard of substantial diminution of access in light of the remaining access to the property. It is uncertain how the courts would interpret and apply the language of the bill.

VII. Related Issues:

None.

VIII. Amendments:

None.