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: April 20, 1998 Revised: _____ _____ _____ _____

Subject: Public Works

	Analyst	Staff Director	Reference	Action
1.	Wiehle	Moody	JU	Favorable/CS
2.	Wilson	Wilson	GO	Favorable/CS
3.	McAuliffe/Johnson	Johnson	TR	Favorable/CS
4.				
5.				

I. Summary:

The CS 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 CS 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 4 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 CS 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. This same authority is repealed for expressway authorities.

The CS transfers the ownership of road easements on property acquired by the state under the Murphy Act to the governmental entity currently having jurisdiction over the adjacent roadway. The CS provides that these easements will expire unless used by 2011, and provides a hardship provision for payment to impacted property owners. The governmental entity receiving jurisdiction must develop a process for evaluating the need for the easement.

The bill also provides that the 7.3 percent service charge for the cost of general government which is deducted from the proceeds of the county fuel tax and from the Local Option Fuel Tax Trust Fund, will be reduced over a specified period and will be eliminated for those funds on July 1, 2004.

This CS amends sections 73.0511, 73.071, and 73.092, 215.20, 215.22, 253.82, 337.19, 479.15, 712.04, and 712.05; and repeals sections 337.27(2), 348.008 (3), 348.759(3), and 348.957(3) of the Florida Statutes.

II. Present Situation:

EMINENT DOMAIN

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. Pursuant to s. 73.021, F.S., the eminent domain process begins by the governmental entity seeking to take the property filing a petition with the circuit court of the county where the property lies. Section 73.031, F.S., provides that upon the filing of the petition, the clerk of court is to issue a summons to all affected property owners to show cause why the property described in the petition should not be taken. The summons requires all affected property owners (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. The designated date must be not less than 28 nor more than 60 days from the date of the summons. A copy of the petition and summons must be served on all named resident defendants not less than 20 days before the return date. Nonresident and unknown or unlocated defendants are to be served by publication.

Section 73.032, F.S., provides that the petitioner (the governmental entity seeking to take the property) may make an offer of judgment no sooner than 120 days after the defendant has filed their written defenses and no later than 20 days prior to trial. A defendant may only make an offer for judgment for payment of compensation by the petitioner 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.

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. 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. 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.

Section 73.0511, F.S., provides that prior to instituting litigation, the condemning authority must notify the affected property owners of their statutory rights concerning attorney’s fees and costs.

Section 73.071, F.S., provides that at the trial on the petition for eminent domain, the court must impanel a jury of 12 persons as soon as practical to determine the amount of compensation for the property to be acquired. The amount of compensation is to be determined as of the date of trial, or the date upon which title passes, whichever occurs first. 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. When the condemning authority seeks to appropriate only a portion of the owners property, any damages to the remainder of the property caused by the taking; these are

known as severance damages. Severance damages may include the probable damages to a business, only when the taking of the property may damage or destroy an established business of more than 5 years' standing. 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

Section 73.091, F.S., provides that the petitioner must pay all attorney fees and reasonable costs incurred in the defense of the property owner, including appraisal fees, and accountant fees when business damages are applicable. Where the condemning authority and the property owner are unable to agree on fees the court decides what fees will be paid by the petitioner in the property owners defense. The court must be guided by the amount the defendant would ordinarily have been expected to pay for the services if the petitioner were not responsible for the cost.

Prior to an offer of judgement by the petitioner, the defendant's attorney fees, as well as appraisal fees and other reasonable costs incurred in the defense are set by the court if not resolved by the parties. When assessing attorney's fees the court must consider: the fee, or rate of fee, customarily charged for comparable services; the amount of money involved; the difficulty of the case; the skill employed by the attorney; and, the attorney's time and labor.

Section 73.092, F.S., provides that if an offer of judgement is refused and the defendant chooses to go to trial, attorney's fees after the offer of judgement are based "solely on the benefits achieved for the client." 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. 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. The section further 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, although s. 337.271, F.S., does require the Department of Transportation to enter into negotiations with the property owner. Section 74.031, F.S., provides that 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 included in the declaration of taking.

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). Section 337.271, F.S. 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. 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. This notice must be sent by certified mail to the property owner at the last known address listed on the ad valorem tax roll. A return of the notice as undeliverable constitutes notice. DOT is not required to give notice to anyone who acquires the property after the original notice.

The section further provides that 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. 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), the department must provide to the property owner all appraisal reports and business expense estimates prepared for DOT related to the property. 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.

After exchanging appraisal and business damages reports, the parties may jointly agree to nonbinding mediation. 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 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*.

OTHER ISSUES

A. Murphy Act

In 1937, the Legislature enacted the Murphy Act (General Law 18296) to facilitate the state sale of numerous tax certificates which had remained uncollected for two or more years as a result of the devaluation of Florida property after the 1929 stock market crash. The Murphy Act legislation provided for sale of 2-year-old tax certificates upon a demand for public sale. If after two years from the date a tax certificate became eligible for sale there had not been demand for sale, the act provided ". . . fee simple title to all lands, against which there remains outstanding tax certificates which on the date this Act becomes a law, are more than 2 years old, shall become absolutely vested in [the] State of Florida. . . ."

In May of 1940, the Trustees of the Internal Improvement Trust Fund (Trustees) adopted a motion relative to all lands acquired pursuant to the Murphy Act that reserved rights-of-way through any parcel where there was a designated State Highway. The Trustees then offered numerous parcels for sale.

Future advertisements for sale of such property and the deed conveying title contained the following reservation:

> Upon the State of Florida easement for State Road Right of Way Two Hundred (200) feet wide, lying equally on each side of the center line of any State Road existing on the date of this deed through so much of any parcel herein described as is within One Hundred (100) feet of said center line.

While the original deed conveying title to the property contained the reservation and all deeds in the chain of title should contain the reservation, problems have arisen. In some cases the language was eliminated from later recorded deeds. Additionally, when property was subdivided the reservation language was in some cases carried forward in all parcels whether that parcel was or was not within 100 feet of a state road. Finally, in some instances the road has been relocated and property which is currently on the road was not within 100 feet of the original center line.

Property owners receive notice of these reservations in several ways. Where the language is in the deed they are on notice of the easement at the time of purchase. When the language is not in the deed the reservation may be identified as an exception in a title policy or it is discovered when the state, a city, or a county notifies the property owner that some or all of the reservation will be used for a transportation project.

In some cases, building permits have been issued for construction within the easement because the easement did not appear on the deed and in some cases the property has been subdivided into lots so small that when the easement is considered no structure on the property can meet current building code requirements. In these cases the problem arose with some past transfer of the property which did not include the easement language in the deed and was compounded where a title company did not research sufficiently to identify the easement. In some cases a building permit could have been requested without information on the easement being provided in the permit application.

Chapter 253.03, F.S., provides for the Trustees to manage all lands owned by the state. To carry out this authority for the reservations on properties acquired pursuant to the Murphy Act, the Trustees adopted administrative Rule 18-2.018, F.A.C. This rule provides that road right-of-way reservations will be released to the record owner when an application is submitted, provided a recommendation from the transportation authority with jurisdiction has been obtained and the Trustees determine there is no further need for the reservation.

To implement this rule, the Trustees adopted an Application For Release of Reservations. The applicant must complete the information on the application, obtain approval by the Department of

Transportation (DOT), and where a road has been transferred, the county or city government determined to have authority over the adjacent roadway. Current proof of title to the property containing the reservation must be attached, which includes either title insurance, title binder, or title commitment obtained within the last 6 months, or an opinion of title from an attorney. Additionally, a survey may be required. Finally, there is an application fee of $300 payable to the Department of Environmental Protection (DEP). Upon receipt of the completed application, all required documents and the $300 fee, the DEP staff will review and approve or deny the application.

This application process is applicable for obtaining a statement of release for any deed which contained the reservation language whether the impacted property is within 100 feet of the center line of a state road or not.

The Marketable Record Title Act set out in chapter 712, F. S., extinguishes all interests in land prior to the root title except interests of federal or state government reserved in the deed transferring title from a federal or state agency. In this instance all reservations in these lands are extinguished if they are over 30 years old except the easements reserved by the Trustees.

B. Miorelli

Section 337.19, F.S., provides that suits at law and in equity may be brought and maintained by and against the department on any claim under contract for work done; provided, that no suit sounding in tort shall be maintained against the department.

C. County Fuel Tax Service Charge Exemption

Section 215.20, F.S., provides that the county fuel tax and the local option fuel tax are collected and deposited into the Fuel Tax Collection Trust Fund. A 7.3 percent general revenue service charge is then assessed on the county fuel tax and the remaining funds from the county fuel tax are distributed to the counties to primarily fund transportation projects. In the case of the local option fuel tax, all funds are transferred from the Fuel Tax Collection Trust Fund to the Local Option Fuel Tax Trust Fund where the 7.3 percent general revenue service charge is assessed, and the remaining funds are distributed to the counties and municipalities to fund transportation projects.

III. Effect of Proposed Changes:

EMINENT DOMAIN

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 property owners to whom it is made. The CS clarifies that the written offer and notice of statutory rights are to be given to the property owners appearing of record on the date the offer is made. Notice of eminent domain action to one fee owner constitutes notice to all fee owners on a multiple ownership property.

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 receipt of the request. The condemning authority may, of its own accord, provide appraisals, maps, and plans to the fee owners and business owners and make a written request for an initial concern letter from the fee owners.

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 condemning 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. If requested, the fee owner must also provide the condemning authority with a letter that sets forth the fee owner's initial concerns, if any, regarding the impacts known at that time of the proposed condemnation on any portion of the fee owners' remaining property based on a preliminary review of the maps and plans. Initial letters of concern from fee owners must set forth such issues as to reasonably inform the condemning authority of their concerns. Initial letters of concern and evidence of any written or oral statements made at a conference to discuss a fee owner's initial concerns may not be introduced into evidence by the fee owners, business owners, or the condemning authority in any proceeding under chapter 73 or 74, F.S.

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 construction plans, if any, and any right-of-way maps pertaining to the property to be acquired. Notice of eminent domain action to one business owner constitutes notice to all business owners on a multiple ownership business.

The condemning authority may, of its own accord, provide appraisals, maps, and plans to the business owners and make a written request for an initial letter of concern from the fee owners.

If requested, the business owner must also provide the condemning authority with a letter that sets forth the business owner's initial concerns, if any, regarding the impacts known at that time of the proposed condemnation on the business owners' business based on a preliminary review of the maps and plans. Initial letters of concern from business owners must set forth such issues as to reasonably inform the condemning authority of their concerns. Initial letters of concern and evidence of any written or oral statements made at a conference to discuss a business owner's initial concerns may not be introduced into evidence by the fee owners, business owners, or the condemning authority in any proceeding under chapter 73 or 74, F.S.

After tendering the offer of full compensation to the property 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. The term "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 four 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.

Business records not provided to the condemning authority may not be used by the business owner either individually or in conjunction with other business records to establish or prove business damages in any lawsuit, nor may they be used to establish any award of attorney's fees. This does not preclude a court from requiring the production of additional or supplemental business records, as determined by the court in litigation before that court.

After the records are obtained, the condemning authority may make a written offer of settlement for business damages. When an eminent domain action is initiated, the amount of the written offer of business damages must be deposited by the condemning authority into the court registry, available for withdrawal by the business owners to whom the offer was made, prior to the vesting of title to the property acquired if the offer was made at least 30 days before the date title vests, otherwise, within 30 days after the offer was made. Business owners are not entitled to interest on the difference between the deposit made by the condemning authority and the final award of business damages.

If a settlement is reached as a result of any conference, mediation, or other dispute-resolution procedure that is mutually agreed to by the parties, the agreement reached must be in writing. The written agreement must incorporate by reference the right-of-way maps and construction plans upon which the settlement is based and provide that if the condemning authority implements its project in a manner that differs from that shown, the property owners or business owners have the same legal rights that would have been available to them under law had the matter been resolved

through eminent domain proceeding in circuit court and the maps and plans had been part of the record.

B. Compensation, Including Business Damages and Right of Access

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

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 CS 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 CS also provides for: business damages due to "substantial diminution of access"; payment of business damages to a business of more than four 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.

The CS provides that compensation for business damages may not be paid if the taking is by a governmentally owned and operated utility or regional water supply authority and the property taken is limited to an easement not other than for utility purposes; or an entire parcel is taken for public transit intermodal or multimodal terminals and centers. Such business taken under these circumstances are still eligible for relocation and down time losses.

Section 479.15, F.S., is amended to provide that whenever land is acquired where there is a lawful nonconforming outdoor advertising sign, the sign may, upon receipt of a waiver of federal regulations, and at the election of its owner, be relocated or reconstructed adjacent to the new right-of-way at the same station along the roadway and any local ordinance to the contrary is preempted.

C. Attorney's Fees

The CS reduces that portion of attorney's fees based on benefits achieved, according to the following schedule:

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

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

The CS 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.

E. Repeal of Various Eminent Domain Sections in Chapter 348

The CS repeals provisions identical or substantially similar to 337.27 (2) which provide for taking an entire parcel to reduce costs in the Florida Expressway Authority Act [Part I of Chapter 348]; the Orlando-Orange County Expressway Authority [Part V of Chapter 348]; and the Seminole County Expressway Authority [Part VII of Chapter 348].

F. Effective Dates and Repeal Dates

Section 1 of the CS takes effect January 1, 1999 and is applicable to entry of orders of taking after that date. The CS provides that subsections (2), (4), (5), (6), (7), and (8) or s. 73.0511, F.S., will expire December 31, 2002. Further, the provisions of s. 73.071, F.S., relating to the appropriation of entire parcels and evidence of off-site mitigation will not apply after December 31, 2002.

OTHER ISSUES

A. Murphy Act

The bill transfers the ownership rights to all easements on property sold after acquisition under the Murphy Act to the governmental entity with current jurisdiction of the adjacent roadway.

Each governmental entity holding title to these easements would be required to establish a process for determining the validity of an easement when a review is requested or the easement is to be used for a road project. The governmental entity is required to determine if an easement in fact exists on the property, determine if the easement has previously been released or if it can currently be released, and record documentation of the non-existence of the easement or if the release is granted, record the release.

The CS authorizes any owner of property encumbered by a Murphy Act road reservation who has been denied a release of all or part of the reservation or who has received notice of a governmental entity's intent to preserve the reservation under section 712.05, F.S., to appeal to the entity and show that the reservation denies the property owner the current economic use of the property held by the owner. The determination of "current economic use" will be based on the use on the date of the notice of the easement.

If the governmental entity determines that the reservation substantially denies the property owner the current economic use of the property, the entity must purchase the real property and improvements not retained by the property owner in fee simple title or release all or part of the reservation as necessary to allow for beneficial use of the property. If the governmental entity and the property owner are unable to agree as to the denial of the current economic use of the property or the purchase price, the property owner may request mediation or binding arbitration pursuant to ch. 44, F.S., to resolve these issues. Prior to the payment of any compensation, the property owner must provide the governmental entity copies of any title insurance policies and notice of any compensation received from a title company related to the easement.

The CS clarifies that the process for release of road reservations covered by this act or payment for property impacted by the use of a reservation covered by this act shall be solely in accordance with this act. Any action for the taking of property related to road construction is separate and distinct from an action pursuant to this act. The governmental entity will not be liable for attorney fees or costs incurred by an owner in establishing the impact of the road reservation on the property.

The CS authorizes any governmental entity claiming a road reservation pursuant to a deed conveyed under the Murphy Act prior to July 1, 1991, to preserve the reservation or any portion of it necessary for future transportation projects in adopted transportation plans and protect it from extinguishment by the operation of the Marketable Record Title Act by filing for record, prior to July 1, 2001, a written notice in accordance with the provisions of ch. 712, F.S. The notice will have the effect of preserving the reservation or portion thereof for a period of 10 years. The easement must be used or in the final design plans of a project which is planned to be constructed within the 10 years.

B. Miorelli

Section 337.19, F.S., is amended to provide that suits at law and in equity may be brought and maintained by and against the department on any claim arising from breach of express or implied provision of a written agreement or a written directive issued by the department pursuant to the written agreement. In any such suit, the department and contractor will have all the same rights, obligations, remedies and defenses as a private person under a like contract, except that no liability may be based on an oral modification of the written contract or written directive. The section further amended to provide that no employee or agent of the department may be held personally liable to an extent greater than described under s. 768.28, F.S.

C. County Fuel Tax Service Charge Exemption

The bill amends s. 215.20, F.S., to reduce the 7.3 percent general revenue service charge from the county fuel tax and the Local Option Fuel Trust Fund by one percent annually beginning July 1, 1998, and ending July 1, 2004, when the service charge will be eliminated.

The bill also amends s. 215.22, F.S., to provide that beginning July 1, 2004, the proceeds from the county fuel tax and the Local Option Fuel Tax Trust Fund would be exempt from the general revenue service charge.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18, State 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 . . . .*

Because CS/CS/SB 92 affects all governmental condemning authorities it can require local governments to spend money or to take actions which require the expenditure of money. Article VII, s. 18, Fla. Const., applies. For an *exemption* to apply any one of eight conditions needs to be met, as follows:

1. Funding of pre- 1-8-91 pension benefits;
2. Criminal laws;
3. Election laws;
4. General Appropriations Act;
5. Special Appropriations Act;
6. Reauthorization (but not expansion) of existing statutory authority;
7. Insignificant fiscal impact;
8. Non-criminal infractions.

None of these conditions appears to apply. For an *exception* to apply to the provisions of the constitutional amendment, two tiers of requirements must be satisfied: *first*, the Legislature must formally declare in the proposed legislation that an important state interest exists; and *second*, any one of four other enumerated conditions must occur:

a. Estimated funds are appropriated to cover the mandate;
b. A new, post-February 1, 1989, simple majority funding source is provided locally;
c. Similarly situated persons are all required to comply; or
d. The implementing legislation is a federal requirement.

Without the important state interest declaration, no unit of local government is required to comply. The CS contains such a declaration. Absent any one of the four supplemental criteria, above, the CS requires a two-thirds vote of each chamber of the Legislature for a mandate to be effective. As indicated below, there is reason to believe that none of the criteria in this second tier is clearly satisfied as they affect the business damages provisions of the CS in partial takings. A discussion follows.

It has not been the policy of the General Appropriations Act to provide, nor does this CS contain, supplemental funds or authority to units of local government for business damages incidental to partial takings. As a result, new financial policy would have to be executed in the Appropriations Act or other substantive legislation for criterion (a) to be satisfied. The creation of a new standard of "substantial diminution of access" in section 2 of the CS will accelerate this cost issue since no statutory standards have been developed to guide jury awards.

In order to gauge the effect of criterion (b) three separate issues must be addressed concurrently: first, the incidence of funding sources available to local governments, i.e., cities and counties only; second, how many of those funding sources were "new" and enacted after February 1, 1989; and third, which of those enactments are governed by simple or extraordinary passage requirements. The source materials for this analysis are the 1997 *Florida Tax Handbook*, an annual joint publication of the respective standing fiscal committees of the Florida Senate and House of Representatives and *Florida's Transportation Tax Sources, A Primer*, a February 1997 publication of the Florida Department of Transportation. The *county local option motor fuel tax* imposed under s. 336.025, F.S., as amended by the 1993 Legislature, permits simple majority or referendum enactment of the first six cents on non-diesel motor fuel; imposition of the remaining five cents of the full eleven cents requires an extraordinary vote. Criterion (b) would be partially satisfied in the counties which have unused capacity but not in the remaining local governments which have reached the limits of this revenue source or wish to obligate any of the unused seventh through eleventh cents. The *ninth cent fuel tax* imposed under s. 336.021, F.S., would not satisfy this criterion since it requires more than a simple majority vote. The *charter county transit system surtax* authorized under ss. 212.054 and 212.055(1), F.S., may be available for large-scale transportation projects consistent with its purpose, but its enactment predates 1989. The *local government infrastructure surtax* authorized under ss. 212.054 and 212.055(2), F.S., may be available. As of January 1, 1997, thirty-one counties used this levy, all but two of which obligated the full one percent surtax amount. For small to medium sized counties with millage cap difficulties this alternative may prove workable; but for others which have obligated the full amount this source may not prove sensitive to any rights-of-way issues presented them in partial takings on their own transportation projects. The use of this tax source requires compliance with the local comprehensive plan. The original enactment date of this surtax occurred before 1989 but subsequent amendments after that date have expanded its application to other governmental purposes not in the pre-1989 statute. The *small county surtax* authorized by s. 212.055(3), F.S., was enacted after 1989 but its

implementation requires an extraordinary vote of the county commission, and for bonded indebtedness, a referendum as well.

Criterion (c) requires the legislation to affect all similarly situated persons. If the connotation of person is used in the individual citizen sense then this criterion may be satisfied. However, when it is used in the artificial, or governmental entity sense, not all counties would be treated similarly since the economic consequence of criterion (b), above, would have widely varying affects in each county based upon its tax structure and available tax capacity, the actions of the implementing authority, the amount of roadways functionally reclassified to it by prior legislatures or negotiated with the Department of Transportation, and any advance planning required to effect compliance with the appropriate element of the local comprehensive plan.

Criterion (d) makes an exception to Art. VII, s. 18, State Constitution, to the extent that the enactment of state law is a federal requirement. The Florida Department of Transportation advises that there is no federal requirement or reimbursement permitted for business damages in partial takings; these funds would have to be raised through other state or local sources. This is important since the CS has the effect of repealing the law of the case established in *Fortune*. Some local governments may receive specific federal funds for their local projects directly; in such instances this would mitigate the potential adverse effect of partial taking business damages, provided the use of those separately derived funds permitted it.

Three additional exceptions govern whether a two-thirds or simple majority vote is required:

a. A post 2-1-89 enhancement to state tax sources; or
b. A proclaimed fiscal emergency; or
c. A revenue replacement sufficient to offset local government reductions.

The CS's content does not contain any material which would invoke any of these provisions. However, the bill does provide funding through the phasing out of the service charge on county and local option fuel taxes which are estimated to be approximately $6 million for fiscal year 1998-99 increasing up to $60 million in fiscal year 2004-05. According to the counties approximation of the fiscal impact of this bill, the amount generated from the service charge exemption would not be sufficient to offset the bill's impact.

For the above reasons, it appears that the a two-thirds vote of each chamber of the Legislature is required to pass CS/CS/SB 92. In the absence of this voting provision, the CS in its present form may not uniformly impose a clear compliance requirement upon local governments. The effect of this circumstance upon the undertaking of non-state roadway projects with contested rights-of-way issues on partial takings could be significant in its financial effects although highly variable in its application.

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 CS 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 4 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. The Department of Transportation conducted a cost analysis of its estimate of the financial impact of CS/SB 92 on business owners. Based upon a thirty-month review of final judgments made between July, 1995 and December 31, 1997 the agency estimated an additional 49 business damage payments annually, averaging $107,209 each, attributable to the CS ’s reduction in qualifying time. An additional 80 annual business damage payments of $107,209 would be incurred. The estimated amount of cumulative additional payments to affected private business owners is $13,829,961.

C. Government Sector Impact:

The below analysis should be considered illustrative of policy effects rather than representative of statistical probability.

The cumulative effect of eliminating current law on whole takings, effectively repealing the law of the case in *Fortune*, accrues to the financial advantage of the business owner and to the adverse interest of the governmental condemning authority. Because there can be no cost shifting of business damage payments to other federally funded trust fund accounts in state or local treasuries, one financial effect is to obligate other tax revenue sources in those jurisdictions for any residual amounts. This will place a particular strain on those units of local government, principally counties, at or approaching their ten-mill *ad valorem* cap on operating levies. About one-third of Florida counties find themselves in this circumstance

today. As discussed above there are additional financial considerations affecting cities and counties relative to their utilization of statutorily available but locally enacted optional tax sources.

According to the Florida Department of Transportation this CS will have a substantial fiscal impact on the department. The increased costs associated with reducing the time a business must have been operating to claim business damages from four to three years, the increased cost of allowing a business to claim business damages on whole takings, and the increased attorney's fees associated with the increased payments is estimated at $25-30 million per year.

These figures do not include additional unknown costs affecting local governments due to jurisdictional differences or to the financial consequences of changes to access or mitigation. These can not be effectively estimated but are believed to be substantial, however, and greater than the exposure of the Florida DOT.

A direct consequence of changing the nature of the offering, specifically the time frame for computation of business damages and the effective repeal of the *Fortune* standard, is an increase in the cost basis. This is of some consequence to the governmental condemning authorities since the computation of attorney's fees is a function of the timing of the first offer and the nature of the offeror, i.e., business/property owner or government. When the condemning authority goes first, a low initial offer which is settled at a higher amount produces a substantial earned benefit for the property/business owner in actual as well as representational terms. Should the business/property owner make the first offer, however, a high initial valuation which results in a lower settlement amount would act as a detriment both to the owner and the legal representative.

Reductions in revenue to the state General Revenue Fund, and additional revenue to local goverments, due to phasing out the service charge on county and local option fuel taxes are estimated to be approximately $6 million for fiscal year 1998-99 increasing up to $60 million in fiscal year 2004-2005.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The two-thirds passage requirement is customarily noted in the journals of the proceedings of the respective legislative chambers upon announcement and recording of the vote on a bill requiring such extraordinary passage.

VIII. Amendments:

None.