

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 10, 1998 Revised: _____

Subject: Public Records/Eminent Domain

| | <u>Analyst</u> | <u>Staff Director</u> | <u>Reference</u> | <u>Action</u> |
|----|-----------------------------|-----------------------------|-----------------------------|-----------------------------|
| 1. | <u>Wiehle</u> | <u>Moody</u> | <u>JU</u> | <u>Fav/1 amendment</u> |
| 2. | <u>Rhea</u> | <u>Wilson</u> | <u>GO</u> | <u>Favorable</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:

Under Art. I, s. 24 of the State Constitution, and ch. 119, F.S., the Public Records Law, records of governmental and other public entities are open to the public unless made exempt. This bill creates a public records exemption for business records provided to a governmental condemning authority by an owner or onsite operator of a business for purposes of establishing business damages in an eminent domain taking. The bill states that there is a public necessity to hold business records confidential in order to encourage prelitigation settlements and in order to protect the privacy interest in these sensitive business records. The bill is related to Senate Bill 92.

The bill creates an undesignated section of law.

II. Present Situation:

A. Open Records

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909.¹ Floridians voted to adopt an amendment to the State Constitution in 1992 that raised the statutory right of public access to records of governmental entities to a constitutional level.² Article I, s. 24 of the State Constitution, expresses Florida’s public policy regarding access to public records and meetings.

¹Section 1, ch. 5942 (1909).

²Article I, s. 24 of the State Constitution.

Paragraph (a) of Art. I, s. 24 of the State Constitution, sets forth the rights of the public to access public records. The paragraph provides that:

(a) Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law,³ which pre-dates Art. I, s. 24 of the State Constitution, also specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. Section 119.07(1)(a), F.S., requires:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee. . . .

The Public Records Law states that, unless specifically exempted, all agency⁴ records are to be available for public inspection. The term "public record" is broadly defined to mean:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate,

³Chapter 119, F.S.

⁴The word "agency" is defined in s. 119.011(2), F.S., to mean ". . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the state constitution.

⁵Section 119.011(1), F.S.

communicate or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

The Constitution permits the Legislature to create exemptions by general law. The general law exempting a public record must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁸

Once again, the Public Records Law⁹ also contains requirements for the creation of exemptions. It provides that an exemption may be created or maintained only if it serves an identifiable public purpose and if it is no broader than necessary to meet the public purpose it serves. A public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption and if it:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

B. Constitutional Provisions Relating to Eminent Domain

⁶*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷*Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

⁸Article I, s. 24(c) of the State Constitution.

⁹Section 119.15, F.S.

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.¹⁰ 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.¹¹

C. 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.¹² 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.¹³ 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.¹⁴ 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.

¹⁰*Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc.*, 444 So.2d 926, 928 (Fla. 1983).

¹¹*Id.*, at 929.

¹²Section 73.021, F.S.

¹³Section 73.031, F.S.

¹⁴*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.¹⁵ 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.

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.

Prior to instituting litigation, the condemning authority must notify the fee owners of their statutory rights concerning attorney's fees and costs.¹⁶

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.¹⁷ The jury is 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 shall occur 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. 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.

¹⁵Section 73.032, F.S.

¹⁶Section 73.0511, F.S.

¹⁷Section 73.071, F.S.

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."¹⁸ 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.¹⁹ 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. Section 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.²⁰

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.

¹⁸Section 73.092(1), F.S.

¹⁹Section 73.092(1)(a), F.S.

²⁰Section 74.031, F.S.

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.²¹ 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.²²

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.²³ 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.²⁴ This notice must be sent by certified mail to the property owner at the last known address listed on the ad valorem tax roll.²⁵ 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.

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.²⁶ 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.²⁷ 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.²⁸ After exchanging appraisal and business damages reports, the parties may jointly agree to nonbinding mediation.²⁹ 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

²¹*Department of Transportation v. Fortune Federal Savings and Loan Association*, 532 So.2d 1267 (Fla. 1988).

²²*Id.*, at 1270.

²³Section 337.271(1), F.S.

²⁴Section 337.271(2), F.S.

²⁵Section 337.271(3), F.S.

²⁶Sections 337.271(4) and (5), F.S.

²⁷Section 337.271(7), F.S.

²⁸Sections 337.271(8), F.S.

²⁹Sections 337.271(9), F.S.

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, F.S. 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.

D. 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.³⁰ 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. Damages recoverable are limited to the reduction in the value of the property which was caused by the loss of access. Business damages are controlled by s. 73.071, F.S.³¹ 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.³² Thus, when a governmental action reduces access but the reduction in access is not substantial, there is no taking of access. 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.³³

E. Eminent Domain Records

Florida law provides a public records exemption for records acquired by a state executive branch agency seeking to acquire real property by purchase or through the exercise of the power of eminent domain.³⁴ The exempt records include “. . . all appraisals, other reports relating to value, offers, and counteroffers.” The exemption is operative until execution of a valid option contract or a written offer to sell that has been conditionally accepted by the agency, at which time the exemption expires. If a valid option contract is not executed, or if a written offer to sell is not conditionally accepted by the agency, then the exemption expired at the conclusion of the condemnation litigation of the subject property. The exemption does not apply to a public record which was made a part of a court file and which is not specifically closed by order of court.

³⁰*Palm Beach County v. Tessler*, 538 So.2d 846, 849 (Fla. 1989).

³¹ *Id.*, at 850.

³²*Weaver Oil Co. v. City of Tallahassee*, 647 So.2d 819, 822 (Fla. 1994).

³³ *Id.*

³⁴Section 119.07(3)(n), F.S.

There is no reported case law on the question of whether “other reports relating to value” includes business records provided by a business to a condemning authority to be used to establish a value for the business damages owed due to the eminent domain.

III. Effect of Proposed Changes:

The bill establishes an exemption from the public records disclosure requirements of Art. I, s. 24(a) of the State Constitution, and s. 119.07(1), F.S. The exemption is for business records provided by the owner or onsite operator of a business to a governmental condemning authority after the governmental condemning authority has tendered a prelitigation offer under s. 77.0511, F.S.³⁵ The exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and expires on October 2, 2003, unless reviewed and reenacted by the Legislature.

The bill makes a legislative finding of public necessity that the business records provided to a condemning authority by an owner or onsite operator of a business subsequent to a prelitigation offer in an eminent domain proceeding be held confidential in order to encourage prelitigation settlements. The term “business records” is not defined by this bill but is defined by Senate Bill 92 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.

Additionally, the Legislature finds that it would be an invasion of privacy for these sensitive business records to be revealed to the public.

The bill provides a conditional effective date. The bill takes effect only if Senate Bill 92 or similar eminent domain legislation becomes law, and takes effect on the effective date of that substantive legislation (Senate Bill 92 takes effect July 1, 1998). Senate Bill 92 relates to eminent domain and, as a part of the provisions concerning business damages, provides that 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. 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.

³⁵The citation to s. 77.0511, F.S., is in error and should instead be to s. 73.0511, F.S. An amendment adopted in the Committee on Judiciary corrects the reference.

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

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.

The bill provides that 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. This bill enacts the public records exemption necessary to provide that confidentiality pursuant to the constitution.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The Florida Constitution authorizes the Legislature to provide public records exemptions by general law. However, such a law must state with specificity the public necessity that justifies the exemption and may be no broader than necessary to comport with the public necessity. Additionally, it must relate only to exemptions and enforcement of public records.

As the bill relates only to an exemption, states the specific public necessity upon which the exemption is based, and is no broader than necessary to meet that necessity, it meets these requirements.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

In conjunction with Senate Bill 92 or similar eminent domain business damages legislation, the bill may result in more prelitigation settlements and decrease the cost of eminent domain cases involving such damages for all those involved.

C. Government Sector Impact:

In conjunction with Senate Bill 92 or similar eminent domain business damages legislation, the bill may result in more prelitigation settlements and decrease the cost of eminent domain cases involving such damages for all those involved.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Judiciary:
Technical amendment to correct a cross-reference.