

# 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.)

BILL: CS/CS/SB 940

SPONSOR: Committee on Fiscal Policy, Comprehensive Planning, Local and Military Affairs

SUBJECT: Eminent Domain

DATE: March 29, 1999

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bowman</u>	<u>Yeatman</u>	<u>CA</u>	<u>Favorable/CS</u>
2.	<u>Hayes</u>	<u>Hadi</u>	<u>FP</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The bill creates a presuit negotiation process in eminent domain proceedings which requires that all condemning authorities provide notice, a written offer of compensation, and, if requested, a copy of the appraisal report upon which the offer is based, to the property owner before instituting condemnation litigation. It requires notification of the proposed condemnation action to business owners located on the land to be taken, and requires business owners seeking business damages to provide the condemning authority with a written offer of business damages along with copies of business records which substantiate the business damage claim. The bill defines "business records." A business owner must follow this procedure of submitting a written offer of business damages or the court must strike a business damage defense during a subsequent condemnation trial, unless the business owner demonstrates a good faith justification for failing to provide a written offer.

The bill provides a time period, from January 1, 2000 to July 1, 2000 for condemning authorities to phase in the presuit negotiation provisions, and for phasing in the presuit negotiation business damages provisions, without being prohibited from filing an eminent domain action.

The bill provides that the condemning authorities shall pay all reasonable costs and attorney's fees incurred on behalf of a fee or business owner during the presuit negotiation process, including fees and costs incurred during mediation. Attorney's fees for presuit negotiation for business damage claims are based on factors set forth in s. 73.092(2), F.S.; for example, the rate customarily charged for comparable services, the time spent on the case and the expertise of the attorney, rather than a calculation of the benefit the attorney achieves for the client. In addition, the floor for calculating benefits for business damage claims if the case is ultimately litigated is defined as the rejection or the making of a counter offer by the condemning authority to the written offer made by the business owner.

The bill amends s. 73.092(1)(a), F.S., to delete provisions relating to the calculation of attorney's fees for business damage claims.

The bill clarifies the methodology for determining attorney's fees under the presuit negotiation process and when costs should be paid.

The bill repeals subsection (2) of s. 337.27, F.S., subsection (2) of s. 348.008, F.S., subsection (2) of s. 348.759, F.S., and subsection (2) of s. 348.957, F.S. These sections authorize the Department of Transportation (DOT), and several other condemning authorities to take an entire parcel of land, even if the entire parcel is not needed for the government project, where the acquisition costs would be less or equal to acquiring a portion of the property. The bill also amends ss. 127.01(1)(b), F.S., regarding county condemnation authority, and 166.401(2), F.S., regarding municipal condemnation authority, to eliminate a cross reference to s. 337.72(2), F.S. In addition, the bill repeals s. 337.271, F.S., which sets forth an acquisition negotiation process for the DOT.

The bill amends s. 479.15, F.S., concerning the relocation of non-conforming signs. The bill provides that if a local government ordinance prohibits relocation of a sign, the local government is responsible for compensating the owner for removal of the sign.

The bill creates s. 73.015, F.S.

## 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 Florida 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 the court is to issue a summons to all affected property owners to show cause as to 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.

#### **1. Offer of Judgment**

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.

#### **2. Notice**

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.

#### **3. Determination of Compensation**

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.

Subsection 73.071(3)(b), F.S., specifically provides that business damages are part of the compensation to be determined by a jury when less than an entire parcel of property is being taken for right-of-way by the DOT, county, municipality, board, district or other public body, and the effect of the taking is to damage or destroy an established business of more than five years standing. Any person claiming business damages must set forth in their written defenses to the condemnation complaint the nature and extent of the business damages.

#### **b. Attorney's Fees**

Section 73.091, F.S., provides that the petitioner must pay all attorney's 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 owner's 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.

Generally, attorney's fees awarded to a defendant in an eminent domain action are based "solely on the benefits achieved for the client" pursuant to s. 73.092, 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. 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.

There are several exceptions to the calculation of attorney's fees based on a determination of the benefits achieved for the client. First, in the case where the condemning authority rejects an offer of judgment made by the property owner defendant and the final judgment is equal to or more than the offer of judgment, the court must calculate a reasonable attorney's fee based on factors listed in s. 73.092(2) and (3), F.S. Under these sections, attorney's fees are calculated based upon

the attorney's time, expertise, the difficulty of the case, the amount of money involved, among other factors. Second, attorney's fees incurred in defeating an order of taking, for apportionment, or other supplemental proceedings are also calculated based on the factors listed in s. 73.09(2), and (3), F.S.

### **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 DOT, 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 DOT 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 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, 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.

According to representatives of the DOT, the negotiation procedures set forth in s. 337.271, F.S., are not closely followed because DOT usually follows federal eminent domain procedures which mandate presuit negotiation whether or not the property owner provides DOT with a copy of their appraisal.

### **3. Local Regulation of Billboards Along the Interstate or Federal-Aid Primary System**

Chapter 479, F.S., regulates outdoor advertising in Florida, including the use of signs and billboards adjacent to state highways. Many of the requirements of Chapter 479 implement requirements of the Highway Beautification Act of 1965. Under the federal act, states are required to provide for the effective control of the erection and maintenance along the Interstate System and the federal-aid primary system of outdoor advertising signs, displays and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas and visible from the road and erected with the purpose of being read from the road. For purposes of the Highway Beautification Act, the term "Federal-aid primary system" means the Federal-aid primary system in existence on June 1, 1991, and any highway which is on the National Highway System.

Under the federal act, effective control means that the state limits signs to the following categories: 1) directional and official signs; 2) signs advertising the sale or lease of property upon which they are located; 3) signs advertising activities conducted on the property where they are

located; 4) landmark signs; and 5) signs advertising the distribution of coffee by nonprofit organizations. If states do not comply with the requirements of the Highway Beautification Act, the federal Transportation Department shall reduce the amount of federal highway funds a state would otherwise receive by ten percent.

The federal Highway Beautification Act does not preempt the power of local governments or the state to enact ordinances or laws regulating or prohibiting signs that are more stringent than the federal act or enforcing such ordinances. *Lamar Outdoor Advertising v. City of Ormond Beach* (Fla. 5th DCA 1982). A nonconforming sign is defined pursuant to s. 479.01(14), F.S., to mean a sign which was lawfully erected but which does not comply with land use, setback, size, spacing and lighting conditions of state or local law, rule or ordinance, passed at a later date, or a sign which was lawfully erected but later fails to conform with state or local laws, rules or ordinances. Section 479.15(2), F. S., provides that no local government entity may remove, cause to be removed, or alter any lawfully erected sign along the interstate or federal primary highway system without the payment of just compensation if the removal or alteration constitutes a taking under state law.

### **III. Effect of Proposed Changes:**

#### **EMINENT DOMAIN**

Section 1 creates s. 73.015, F.S., providing a presuit negotiation process prior to the filing of a condemnation action by a condemning authority.

#### **Notice and Offer to Property Owner**

Subsection (1) requires that before an eminent domain action is brought under chapters 73 or 74, F.S., a condemning authority must negotiate in good faith with the fee owner of the property, provide the owner with a written offer of compensation and, if requested, a copy of the appraisal upon which the offer is based, and attempt to achieve settlement of the amount of compensation to be paid.

First, the condemning authority must notify the fee owner by certified mail:

- that all or a portion of property is necessary for an authorized project or use;
- the nature and designation of the project;
- how the owner may obtain right-of-way or project maps; and
- the owner's statutory rights and responsibilities.

Second, a written offer of purchase or compensation must be provided to the property owner. In addition, within 15 days of the request of the property or business owner, the condemning authority must provide the owner with copies of right-of-way maps or construction plans that depict the proposed taking, and a copy of the appraisal report on which the offer is based. The owner must be given at least 30 days to respond to the written offer before a condemnation

lawsuit for the parcel identified in the offer may be filed. The condemning authority is not required to provide a copy of the appraisal prior to the execution of an option contract for property acquired pursuant to s. 259.041, F.S., for preservation, conservation and recreation purposes.

The CS for CS/SB 940 provides a time period, from January 1, 2000 to July 1, 2000, for condemning authorities to phase in the presuit negotiations and to phase in the presuit negotiation business damages provisions without being prohibited from filing an eminent domain action.

### **Notice to Business Owners, Business Records, Business Damages Offer**

Subsection (2) 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 notify property owners and lessees who operate a business on the property to be acquired of their statutory rights under s. 73.091, F.S., and of the items for which the fee owner receives notice. Notice to the business owner may be perfected by certified mail, personal delivery or by newspaper notice if the business appears closed when notice is attempted and notice by certified mail and personal delivery fails to locate the business owner.

Notice to one owner of a multiple owner business constitutes notice to all owners of the business and the condemning authority is not required to give notice to an owner who acquires an interest in the business subsequent to the notice required by this section. After notice is accomplished, the condemning authority may file the condemnation action under chapters 73 or 74 for the property identified in the notice.

If the business owner intends to claim business damages under s. 73.071(3)(b), F.S., he or she must, within 120 days of receipt of the notice required by subsection (2), submit to the condemning authority a good-faith written offer to settle any claims of business damage to the property. The business owner must also provide the condemning authority with copies of business records which substantiate the business damage claim or a schedule for providing such information to the condemning authority. If the business owner fails to provide a written business damage offer to the condemning authority, the court must strike the owner's business damage defense in the condemnation lawsuit absent the business owner providing a good faith justification for his failure to provide a first offer to the condemning authority.

Business records are defined to include: copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, state corporate income tax returns for the preceding five years and other records which are relied upon by the business owner to substantiate the business damage claim. Business records which are not provided to the condemning authority to substantiate the business damage offer may not be used by the business owner to establish or prove business damages or an award of attorney's fee in the condemnation action.

The condemning authority has 90 days from receipt of the owner's business damage offer to accept, reject or make a counteroffer.

### **Mediation**

Subsection (3) provides that at any time in the presuit negotiation process, the condemning authority and property or business owner may agree to submit the compensation and business-damage claims to nonbinding mediation.

### **Attorney's Fees & Costs**

Subsection (4) requires the condemning authority to pay all reasonable costs and attorney's fees incurred on behalf of a fee or business owner in the presuit negotiation process, including reasonable costs and attorney's fees associated with mediation. Attorney's fees must be calculated based on the schedule set forth in s. 73.092, F.S., (fees based on the benefits achieved for the client) except for attorney's fees associated with the presuit negotiation of business damage claims which must be calculated based on the attorney's time, skill and complexity of the case. If the parties cannot agree on costs and attorney's fees, the property owner may file a complaint in circuit court to recover attorney's fees and costs.

The CS for CS/SB 940 provides that, subsequent to the submission of the business owner's good faith offer to the condemning authority, attorney's fees must be calculated as provided in s. 73.092(1), based on the difference between the final payment of business damages and the counteroffer to the business owner's offer by the condemning authority. If the condemning authority fails to respond to the business damage offer, such failure shall be deemed to be a counter offer of zero dollars.

The CS for CS/SB 940 provides that presuit costs should be paid after submission by the business or property owner to the condemning authority of all appraisal reports, business damage, reports, or other work-products for which recovery is sought, and upon transfer of title of the real property by closing, upon payment of any amounts due for business damages, or upon final judgment.

Section 2 amends section 73.012, F.S., to delete subparagraphs (1)(a)1. and (1)(a)2. which address the calculation of attorney's fees for business damage claims in prelitigation negotiations and subsequent to the filing of litigation. The calculation of attorney's fees for business damage claims is modified by the bill because the business owner, rather than the condemning authority, makes the first offer.

### **Repeal of Subsection 337.27(2), F.S., and Related Sections**

Sections 3 and 4 amend ss.127.01(1)(b), F.S., and 166.401(2), F.S., respectively, to delete cross-references to subsection 337.27(2), F.S. This repeals the authority of counties and municipalities to convert partial takings to whole takings when the cost of taking the whole parcel is less than the cost of the partial taking.

Section 5 repeals subsection 337.27(2), F.S. Subsection 337.27(2), F.S., applies to situations where the DOT is acquiring land for a project and needs only a portion of a particular parcel of land for that project. 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 DOT may acquire the entire parcel. In addition, the bill repeals provisions identical or substantially similar to 337.27 (2), F.S., which provide for taking an entire parcel to reduce costs in the Florida

Expressway Authority Act [s. 348.0008(2), F.S.]; the Orlando-Orange County Expressway Authority [s. 348.759(2)]; and the Seminole County Expressway Authority [s. 348.957(2)]. Finally, Section 5 repeals s. 337.271, F.S., regarding the DOT's acquisition negotiation process which would be replaced by the presuit negotiation process set forth in this section.

### **Outdoor Advertising**

Section 6 adds a new subsection (3) to s. 479.15, F.S., which applies to local government regulation of outdoor advertising located adjacent to the state highway system when the state is making improvements to such highways. The bill provides that, subject to approval by the Federal Highway Administration, a lawful nonconforming sign may, at the discretion of the sign owner and DOT, be relocated or reconstructed adjacent to the new right-of-way along the roadway. The sign owner shall pay for all costs associated with relocating or reconstructing any sign under this subsection and neither the state nor any local government shall reimburse the sign owner for such costs, unless part of such relocation costs are required by Federal law.

The bill also provides that in the event the relocation of the sign is inconsistent with the ordinances of the affected municipality or county, the local government is responsible for providing just compensation to the owner of the sign for its removal. In addition, the bill provides that the provisions of this section shall not impair any agreement or future agreements between a city or county and the owner of a sign or signs within the jurisdiction of the city or county.

The requirement of Federal Highway Administration approval is linked to the federal interest in a state's compliance with the federal Highway Beautification Act. However, such approval is only relevant to portions of the state highway system that are also part of the Federal-aid primary system as it existed on June 1, 1991, and any highway which is on the National Highway System. The State Highway System in Florida generally includes all interstates, US highways and roads labeled state road and is contains approximately 11,944 miles. In contrast, the National Highway System in Florida is comprised of approximately 4,298 miles and the federal-aid primary system as it existed in 1991 contains 8,042 miles. Hence, a number of miles of roads in Florida are not subject to the jurisdiction of the Federal Highway Administration for purposes of the Highway Beautification Act. Accordingly, the provisions in the bill concerning sign relocation would appear to operate on those portions of the State Highway System which are not subject to the Highway Beautification Act.

Section 7 provides an effective date of January 1, 2000.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

Indeterminate.

### **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, specifically with respect to business damages, as it repeals the authority for the DOT to undertake a whole taking where the cost of acquisition is the same as or less than the cost for a partial taking.

C. Government Sector Impact:

The bill could increase the costs to condemning authorities such as counties and municipalities that are not required under current law to provide a property owner with a written offer or engage in presuit negotiations or pay the costs to the property owner of presuit negotiation and settlement. However, if the requirements of the bill result in more presuit settlements, these costs should be offset by decreased litigation costs.

The effect of repealing the case law in *Fortune Federal*, accrues to the financial advantage of the business owner and to the adverse interest of the governmental condemning authority. However, any increased cost incurred for partial takings that could no longer be converted to whole takings could be offset by decreased litigation costs for business damage cases.

In addition, the bill may decrease the cost of right-of-way acquisition to the state of compensating billboard owners for the removal of nonconforming signs.

The bill may increase the cost for local governments for compensating billboard owners if the local government has an ordinance that prohibits relocation of signs.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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