

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 248

SPONSOR: Committee on Comprehensive Planning, Local & Military Affairs

SUBJECT: Eminent Domain

DATE: January 3, 2002                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bowman	Yeatman	CA	Favorable
2.	Johnson	Johnson	JU	Favorable
3.			AGG	
4.			AP	
5.				
6.				

**I. Summary:**

The bill extends the January 1, 2003 sunset date of the 4-year period required for a standing business to be eligible to receive business damages where a governmental entity exercises the power of eminent domain to partially take a parcel of property for the purpose of right-of-way acquisition until January 1, 2005. On or after January 1, 2005, a business must be of more than 5 years' standing in order to qualify for business damages.

This bill repeals section 59 of chapter 99-395, Laws of Florida, and amends s. 73.071(3), Florida Statutes.

**II. Present Situation:**

In 1999, the Legislature amended s. 73.071(3), F.S., to change the number of years in which a business must have been in existence in order to be eligible for business damages resulting from property taken by the state or local governments in eminent domain actions associated with right-of-way acquisition. Chapter 99-385, Laws of Florida, provides that the language changing the time period from 5 years to 4 years is repealed, effective January 1, 2003. In addition, section 59 provides that the change from 5 years to 4 years is effective January 1, 2000.

**The Current Eminent Domain Process**

Chapters 73 and 74, F.S., provide for eminent domain and proceedings supplemental to eminent domain, respectively. Chapter 73, F.S., specifies the requirements for filing a petition for eminent domain and issuance of a summons or other notification to property owners by the clerk of the court.

*Presuit Negotiation*

In 1999, chapter 73, F.S., was amended to require condemning authorities to negotiate in good faith with the fee owner of the parcel to be acquired, provide the fee owner with a written offer, and, if requested, provide a copy of the appraisal upon which the offer is based. Most importantly, the condemning authority must attempt to reach an agreement on the amount of compensation to be paid for the property.

As part of the presuit negotiation process set forth in s. 73.015, F.S., condemning authorities are required to make a good faith effort to notify business owners, including lessees, who operate a business on the property to be acquired. The condemning authority must notify the business owner:

- 1) That all or a portion of his or her property is necessary for the project;
- 2) The nature of the project and the parcel designation of the property to be acquired;
- 3) That the condemning authority will provide a copy of the appraisal report upon which the offer to the fee owner is based within 15 days of receipt of a request by the business owner;
- 4) The business owner's statutory rights; and
- 5) The business owner's rights and responsibilities regarding negotiation and settlement.

If a business owner intends to claim business damages, pursuant to s. 73.071(3)(b), F.S., the business owner must submit to the condemning authority a good faith written offer to settle any claims of business damage, within 180 days of receipt of the initial notice from the condemning authority. The business damage offer must include an explanation of the "nature, extent, and monetary amount" of the damage and must provide to the condemning authority copies of the owner's business records that substantiate the good faith offer. (s. 73.015(2)(c), F.S.)

The condemning authority must accept or reject the business owner's offer or make a counter offer within 120 days after receipt of the good faith offer of business damages. (s. 73.015(2)(d), F.S.) The failure of the condemning authority to respond to the business damage offer, or rejection of the offer, is deemed to be a counteroffer of zero for the purposes of calculating attorney's fees based on the benefit received by the claimant in an eminent domain proceedings pursuant to s. 73.092, F.S.

If the business owner fails to submit a business damage offer within 180 days, absent a showing of good faith justification, the court must strike the business owner's claim for business damages. If the court finds that the owners can demonstrate good faith justification for their failure to timely submit a business damage offer, the court must grant the business owner up to 180 days to submit a business damage offer, which the condemning authority must respond to within 120 days.

If business damages are recovered by the business owner based on the condemning authority accepting the business owner's initial offer, or the business owner accepting the condemning authority's initial counter offer, attorney's fees are calculated based on the attorney's time and expertise employed in representing the business owner. If the resolution of the amount of damages is achieved after negotiation or litigation later in the process, attorney's fees are

calculated based on the benefits achieved for the client. Where business records were provided by the business owner to the condemning authority to substantiate a business damage offer submitted pursuant to s. 73.015(2)(c), F.S., benefits for the purposes of calculating attorney's fees are defined as the difference between the final judgment or settlement and the written counter offer made by the condemning authority pursuant to s. 73.015(2)(d), F.S. If the owner fails to provide business records to the condemning authority to substantiate a business damage offer, and such records are deemed material to the determination of business damages, benefits are calculated based on the difference between the first written counter offer made by the condemning authority within 90 days of receipt of the business records and the final judgment.

#### *Litigation Procedure*

Prior to instituting litigation, the condemning authority must notify the fee owners of their statutory rights concerning attorney's fees and costs. (s. 73.0511, F.S.) In addition, the condemning authority must follow the presuit negotiation process described above and set forth in s. 73.015, F.S.

Once a petition for eminent domain is filed, 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. A defendant may make an offer to have judgment entered against the defendant for payment of compensation by the petitioner only for an amount that is under \$100,000, and the offer may be served on the petitioner no sooner than 120 days after the defendant has filed an answer and no later than 20 days prior to trial. 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.

Pursuant to s. 73.071, F.S., eminent domain trials are argued before a twelve-person jury and have preference over other civil actions. 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,
  - (a) any damages to the remainder caused by the taking; these are known as severance damages;
  - (b) when the effect of the taking of the property involved may damage or destroy an established business of more than 4 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 business damages.

Landowners and business owners are entitled to attorney's fees calculated based upon the benefits achieved for the client, defined as the difference between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. (s. 73.092(1), F.S.) In addition, property owners, including business owners with a business damage claim, are entitled to reasonable costs, including appraisal fees and accountant fees. (s. 73.091, F.S.)

### *Business Damages*

The payment of business damages as a compensable portion of damages payable in an eminent domain action was first authorized in Florida Law in 1933. Section 1 of Chapter 15927, Laws of Florida 1933, provided for business damages where a public body engaged in the condemnation of a right-of-way:

...when the suit is by a board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may injure, damage or destroy an established business of more than five years standing owned by the party whose lands are being so taken, located upon adjoining, adjacent or contiguous lands owned or held by such party, and within two miles of the lands so sought to be taken, the jury shall consider the probable effect the use of the property so taken may have upon the said business, and assess in addition to the amount to be awarded for the taking, the probable damages to such business which the use of the property so taken may reasonable cause.

The requirement that a business must be established “of more than five years standing” in order to be eligible to business damages remained in Florida Statutes for 66 years until the time period was changed from five years to four in Section 58, Chapter 99-385, Laws of Florida.

In order to be entitled to business damages the following conditions must be met:

1. The eminent domain action is brought by the Department of Transportation, county, municipality, board, district or other public body;
2. The condemnation is for right-of way;
3. The action is for a partial taking, where less than the entire property is being taken;
4. The effect of the taking of the property involved is to damage or destroy an established business of more than 4 years’ standing;
5. The business is owned by the party whose lands are being taken, located upon adjoining lands owned or held by such party;
6. The action may reasonably cause damages to the business;
7. The extent of the business damages must be set forth as a written defense by the claimant.

Unlike damages attributable to the taking of the property itself, the award of business damages is not constitutionally guaranteed but is a matter of “ ‘legislative largess,’ and not a constitutional obligation” *Blockbuster Video, Inc. v. State of Florida, Department of Transportation*, 714 So.2d 1222, 1223 citing *Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc.* 444 So.2d 926, 928 (Fla. 1983); *Mulkey v. Division of Admin., State of Fla.*, 448 So.2d 1062 (Fla. 2d DCA 1984).

Statutes granting business damages are treated by the courts as “in the nature of a waiver of sovereign immunity and must be strictly construed in favor of the state.” *Blockbuster Video*, 714 So.2d 1222, 1223. However, Florida courts have interpreted s. 73.071, F.S., rather broadly.

For example, courts have awarded business damages to successors in title where the owner has not owned the business for the requisite period of time but the business has been in operation for more than the statutory period. *See Robert H. Hart & Sons, Inc. v. State, Department of Transportation, 559 So.2d 302 (Fla. 2nd DCA 1990)*. In addition, the business damage claim of a lessee, in addition to that of a fee owner is compensable. *See Blockbuster Video, Inc., 714 So.2d 1222, 1224 citing State Rd. Dep't v. White, 161 So.2d 828 (Fla. 1964), aff'g 148 So.2d 32 (Fla. 2d DCA 1962)*.

### **The Payment of Business Damages by Florida Department of Transportation (FDOT)**

Florida is one of very few states to award business damages. A Justification Review of FDOT's Right-of-Way Acquisition Program prepared by the Office of Program Policy Analysis and Governmental Accountability (OPPAGA), reports that only nine states pay business damages and that Florida pays more in business damages than any other state. According to the OPPAGA Report, in calendar year 1997, Florida paid business damages of \$16.4 million or 8.06% of acquisition costs, while Louisiana, which had the next highest value of business damages as a percentage of total acquisition costs, paid business damages, which represented 2.63% of total acquisition costs.

The OPPAGA Justification Review also states that for the past five years (calculated from 1999), the percentage of business damages relative to total acquisition costs paid by FDOT has remained stable at approximately 5% of overall acquisition costs. More recently, FDOT right of way expenditures for Fiscal Year 1997-1998 included total expenditures of \$355,059,246 of which \$18,791,739 was paid to satisfy business damage claims; these business damages represented 5% of total expenditures. In Fiscal Year 1998-1999, total FDOT expenditures for right-of-way acquisition were \$270,424,956 of which \$14,706,127 represented business damages; or business damages represented 5.5% of total expenditures. In Fiscal Year 1999-2000, FDOT spent \$25,730,025 in business damages, or 7.5% of \$345,383,284 in total right-of-way costs. In Fiscal Year 2000-2001, the percentage of right-of-way expenditures attributable to business damages actually declined slightly. Of a total expenditure amount of \$384,879,257, \$16,415,208, or 4% is attributable to business damages.

Lowering the time period required for a business to be in existence in order for a claimant to be entitled to business damages in a partial taking involving right of way inevitably increases the number of business damage claims made to condemning authorities and increases, to some degree, the cost of right-of-way acquisition.

#### *Business Damage Claims to FDOT by Businesses of More than 4 Years But No Greater Than 5 Years Standing:*

According to the data received from FDOT, during this time period of January 1, 2000 to August 27, 2001, 18 4-year claims have been received out of a total of 105 claims, or approximately 17 percent of the claims received during this time period.

The statewide total amount of initial business damage offers made to FDOT during this time period was \$154,028,941. Of this amount, \$5,281,445 in business damages were the initial offers to FDOT made by businesses in operation more than four years, but not greater than five years.

These figures do not represent the actual dollar amount paid by FDOT for damages, as the settlement of such amounts through presuit negotiation, mediation, or the final judgment of a circuit court are only now beginning to be resolved. Staff from FDOT reports that it will be another six to nine months before much data on actual business damages paid will become available as claims initiated at the beginning of the year 2000 begin to be settled. However, to put these figures in context, during Fiscal Year 2000-2001, FDOT paid \$385 million in right of way acquisition costs, and acquired a total of 1,973 parcels.

*Business Damage Claims to Local Governments by Businesses of More than 4 Years But No Greater Than 5 Years Standing:*

Staff prepared a survey, administered by the Legislative Committee on Intergovernmental Relations, addressed to all counties and the 20 municipalities with the highest population in Florida, which asks whether the local government has received any business damage claims from business that have been in operation for over 4 but under 5 years time.

Only one local government, Broward County, identified a business damage claim associated with a claim for business damages asserted based on more than four years, but not greater than 5 years of operation. This single claim involved the taking of a portion of a shopping center where one tenant was paid \$200,000 in business damages.

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

**Section 1** of the bill repeals Section 59 of chapter 99-385, Laws of Florida. Section 59 of chapter 99-385, providing “the amendments to subsection (3) of section 73.071, F.S., as contained in this act shall stand repealed effective January 1, 2003.” These amendments to s. 73.071, F.S., are contained in Section 58 of chapter 99-385, Laws of Florida, and change the time period required for an established business to be entitled to business damages from 5 years to 4 years. Because of the way Section 59 was drafted, unless the section is repealed, the entire subsection (3) of Section 73.071, F.S., may stand repealed, thereby eliminating the authority for condemning authorities to pay business damages.

**Section 2** of the bill amends s. 73.071, F.S., to extend the operation of the 4-year time period to January 1, 2005. On or after January 1, 2005, and established business must be of 5 years’ standing in order to qualify for business damages. This amendment would allow a longer test period for the 4-year time frame in order to adequately gauge the fiscal impact of the change.

**Section 3** of the bill provides an effective date upon becoming a law.

### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

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 will benefit businesses of more than 4 years but less than 5 years' standing by extending for two years, the operation of the lowered time criteria for a business to qualify for business damages. However, unless changed by the legislature, in the interim, the time period reverts back to 5 years on January 1, 2005.

C. Government Sector Impact:

The bill will increase the cost of right-way acquisition for governmental entities. The extent of the increase is difficult to estimate. Since January 1, 2000, the Department of Transportation has received 18 claims based on the 4 year criteria of 105, or an approximately 17% increase in the number of business claims. To date, very few claims have been reported from local governments. Because of the time-frames involved in eminent domain proceedings, claims that were made shortly after the January 1, 2000 effective date of the 4-year period are just beginning to be resolved. Hence, it will be another six months to 1 year before the amount of business damages paid by the condemning authorities for these claims will be available.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.