Owner's Handbook

Florida's Eminent Domain Process

in State Court Proceedings

For the Clients of:

Brigham Property Rights

Law Firm PLLC

EMINENT DOMAIN, PROPERTY RIGHTS, and REAL ESTATE LITIGATION

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OVERVIEW

The following information focuses primarily on Florida state court condemnation proceedings. Readers should note that condemnation proceedings in federal court or other state jurisdictions may significantly differ from those in Florida.

What is condemnation?

- Condemnation is the power to take private property for a public purpose. The power of condemnation is also known as the power of eminent domain. It is said that eminent domain is an attribute of the sovereign.

Who can take my property?

- Federal, state and local governments have the power to condemn private property, and this power has been delegated to many governmental agencies. For example, the Florida Department of Transportation may have the power to condemn your property. The government has also delegated the power of eminent domain to public utilities and in certain, very limited situations, to private companies and individuals.

Can the State take my property for any reason?

- No. The condemning authority may only take your property for a necessary, public purpose. It is both state and federal constitutions that limit the power of eminent domain.

Who decides whether the condemnation of my property is for a public or private purpose?

- Only a judge can decide. Even if the condemning authority believes the condemnation is for a public purpose, a judge can rule otherwise and deny the government the right to take your property. It is the judicial branch interprets what the constitution means by public purpose or whether the government is exercising its proper authority. Thus, the judicial branch acts as a "check and balance" on the executive and legislative branches of government.

Do I have to take the amount the government offers?

- No. You are entitled to contest that amount and to receive full compensation. It is the state constitution which entitles the owner to full compensation. The measure of full compensation is that which makes the owner *whole,* or places the owner in the same position after the taking as the owner was before the taking in so far as is possible or practicable.

How will I know whether the government really wants to take my property?

- In most cases, you will learn far in advance of the proposed construction date of the project which may require the taking of your property. Your first knowledge of the project may come from reading a newspaper article or talking to a neighbor.
- In many cases, the public agency will hold a public hearing at which the agency will describe the boundaries of the project, so that you will be able to determine whether your property is included within the project.

- The condemning authority will give you a written notice that they intend to condemn your property, and they are required to give you a written offer to purchase your property prior to file a condemnation action in court.

THE RIGHT TO CONDEMN

Does the State have the right to take my property?

- It depends. The State has the power of eminent domain. All counties and cities in the State of Florida also have the power of eminent domain. Many state and local governmental agencies and public utilities have the power of eminent domain as well.

- While a specific governmental body or public utility may have the power of eminent domain, that does not necessarily mean that it has the right to take your specific property.

- If you do not want your property taken, only the Court can require that your property be condemned. If the Department of Transportation, for example, claims that it needs a portion of your property to construct a road, it may not take your property unless you give your consent or the court enters an order allowing the taking.

- If you do not consent to the condemnation, the condemning authority must prove to the court that the taking is for a *public purpose* and that your property is *reasonably necessary* to accomplish that public purpose. While the courts more often than not allow the requested condemnations, there have been several occasions in which the courts have not allowed the proposed condemnation.

Can the State take as much of my property as they want?

- No. The State can only take as much of your property as the court finds is reasonably necessary to accomplish a public purpose. If the court finds that only a portion of the property sought by the state is necessary, it may deny the state the right to take only as much of your property as it seeks. The *quantity* of property and *quality* of estate needed is to be examined by the court.

The State is trying to take a portion of my property. After the taking, the rest of my property will be less valuable or worthless. Can we force the State to take the entire property?

- No. The Court cannot require the condemning authority to take more of your property than it wants. If the taking renders the rest of your property less valuable or worthless, your remedy is a jury award which takes this into consideration.

- The full compensation to which you are entitled includes not only the value of the property taken but also includes compensation for reduction in value to the property which the government does not take. This compensation is called *"severance damages."*

PRECONDEMNATION PLANNING

Should I be doing anything before my property is condemned?

- There are several actions an owner may take before his property is condemned. In general, it is wise for an owner to seek the advice of an attorney when considering precondemnation action. This is because the actions an owner takes before the property is condemned may help orhurt his case.
- The owner should avoid taking positions, especially written positions, which may be used against him in the condemnation proceeding. If the owner contests the tax assessment, for example, stating that his property is worth less than the county's estimate, that appeal may be used against him if, in the condemnation case, the owner asserts a higher value.
- Leases and mortgage agreements signed by the owner prior to condemnation may affect the portion of the final award to which the owner will be ultimately entitled. The parties' attorneys should be consulted on condemnation clauses contained within these documents. See the compensation section for a discussion of apportionment issues.
- The owner should maintain the appearance and condition of the property. Visual impressions, even to sophisticated professionals, are important, and the condemning authority's appraisers will be inspecting the property long before it is condemned. It behooves the owner to have the property looking as good as possible.
- Contamination on the property could reduce the condemnation award, delay the payment of funds to the owner or result in the owner incurring liability for environmental cleanup charges. It thus behooves the owner to take those steps necessary to assure that the property remains free of contamination. In addition, if there is contamination on the property, the owner may be well advised to consult with an environmental attorney.
- Property owners are often in the process of planning for a development or redevelopment of their property when the government announces its plans to condemn the property. Land use and building applications can have a significant effect on both the use of the property and the condemnation case. For this reason, the owner should discuss all plans for the property with the condemnation attorney.

What can a landlord and tenant do to avoid uncertainty and legal disputes over the condemnation award?

- The single best protection for both landlord and tenant is a clear lease provision called a "condemnation clause." This clause should spell out what portion of the award goes to the landlord and what portion goes to the tenant in the event a taking occurs.
- The condemnation clause should anticipate an allocation in the event of a whole taking of all leased property, a partial taking which effectively destroys or severely damages the untaken remainder, and a partial taking which has little effect on the remaining property.
- The length or term of the lease may also have a significant effect on the amount awarded to the parties.
- If you have knowledge of a future taking, it is wise to consult your condemnation attorney about your lease before altering or renewing the lease.

TRANSFER OF TITLE AND POSSESSION

When will I be required to give up my property?

- There are a number of ways the date for surrender of possession may be determined. In no event will an owner be required to surrender possession of his property until (a) he agrees to a certain date, or (b) the judge sets a date.

- The date for surrender of possession is determined in different manners depending on whether the acquisition is accomplished by a sale of the property in lieu of condemnation, or by a court order of taking.

- If the owner sells his property to the condemning authority, then the owner and the condemning authority will agree upon a mutually acceptable date for surrender of possession. This mutually agreeable date is usually arrived at through negotiations. The owner typically indicates the time he needs to conclude business at the condemned property and relocate to a new site. The condemning authority typically indicates the time it needs to take over the property and demolish the buildings so as to meet its construction timetable. The owner and the state usually negotiate a date to surrender possession which meets both parties' objectives.

- If the owner does not sell his property to the state, and the state acquires it through a court order of taking, then the judge usually determines the date upon which the owner is required to surrender possession. The judge will make this determination after hearing evidence on the condemning authority's and the owner's needs.

Are there any disadvantages in getting the latest possible date to vacate my property?

- Yes, there may be. The state often condemns several properties as part of a larger project. Owners who remain in possession of their properties after others have vacated often experience burglaries and vandalism. This is because areas in which properties are condemned may lack the security of occupied properties.

- There is another reason why it may be disadvantageous to remain in possession as long as possible. If the state "quick takes" your property, that is, takes your property prior to the end of the case, the amount of interest to which you may be entitled may be less if you remain in possession.

- In a "quick taking" case, an owner receives the state's estimate of value when the court enters an order of taking. At the end of the case, if the jury awards a greater amount, the owner receives not only the difference between the final award and the "order of taking" estimate, but also interest on the difference between the final award and the "order of taking" estimate. This interest begins to run from the date at which the owner surrenders possession of the property to the condemning authority. The owner will thus receive a higher amount of interest if he surrenders possession of his property at an earlier date.

How does the State become the owner of my property?

- One of three ways.

1. You can sell the state your property. If you do this, the state takes title by deed.

OR

2. By an order of taking, if the condemnation is a quick taking. In this type of proceeding, title transfers upon the state's deposit of its estimate of value into the court registry.

OR

3. By a final judgment after a jury trial, if the condemnation is a slow taking. In this type of proceeding, title transfers upon the state's deposit of the jury award into the court registry.

What is the difference between a "quick taking" and a "slow taking?"

- In a "quick taking" case, the condemning authority takes title to the property early in the case, before the final amount of compensation is determined. The state typically uses this method when it knows that it must proceed with the project and it needs the property to meet construction deadlines. The "quick taking" method is typically used in condemnations for roads, schools and utilities. If a condemning authority has the power to "quick take" a certain property, it files a declaration of taking, which sets forth the condemning authority's estimate of value. If the court allows the taking, the condemning authority will then deposit into the court registry the government's estimate of value, and those funds will become available for withdrawal by appropriate parties (the owner, mortgagees, lien holders, etc.). In a "quick taking" case, title to the property passes to the state on the date it deposits its estimate to the court registry. The date of deposit of the funds becomes the "date of valuation" for the property at the trial.
- In "slow taking" cases, the condemning authority does not decide whether to take title to the property until after the jury determines the amount of compensation required. In "slow taking" cases, the condemning authority is not required to take the property even after the jury determines the appropriate amount of compensation to be paid. The state may utilize the slow taking method to condemn property for parks or to preserve environmentally sensitive properties or in other instances where the price may affect their decision. If, after the trial, the condemning authority decides to take the property, it will deposit the amount of the award into the court registry, and title will pass to the government as of that date. If, after the trial, the condemning authority, decides not to take the property, then it will simply decline to deposit the funds, in which case title remains with the owner. If the "slow taking" case is in a Florida state court, as opposed to federal court, then the condemning authority is responsible to pay the owner's reasonable costs and attorney's fees, even if the condemning authority decides not to take the property.

In a "quick taking" case in which the final award is greater than the amount originally deposited by the state, am I entitled to interest on the difference between the final award and the original estimate?

- Only in cases is which the compensation is determined by a *jury verdict*. If the jury award is greater than the amount originally deposited by the state, the owner is not only entitled to the difference between the final award and the original estimate, but is also entitled to interest on that difference, between the date of surrender of possession and the date on which the final award is deposited into the court registry.
- If your case is resolved through settlement and not a jury verdict, you are not entitled to interest on top of the settlement amount. If you feel that your settlement should include consideration of the delay in payment, you should take that matter into consideration in making or considering settlement offers.

If I am entitled to interest, how is the interest rate determined?

The interest rate is determined by statute and varies from year to year. It is set by the Florida's Chief Financial Officer with the Department of Financial Services. www.myfloridacfo.com/aadir/interest.htm

After the Court enters an Order of Taking, how do I get my money?

- Your attorneys will file a motion and schedule a hearing. The motion will ask the court for permission to withdraw the money and disburse it to you, as the owner. The motion and notice of hearing will be sent to all parties who have an interest in your property (mortgagees, tenants, lien holders, etc.).

- At the hearing, anyone who has an interest in the property may make a claim to the funds deposited by the condemning authority. If all of the property is taken, the court will generally pay all outstanding mortgage balances first. Prorated real estate taxes and special assessments are also deducted and paid to the appropriate officials before the owner's balance is determined and disbursed.

- In a small number of cases, usually involving complicated business property, the court will order the funds to be placed in a joint interest-bearing account. This situation arises when it is impossible for the court to make a precise apportionment of the Order of Taking deposit at the outset of the case, and is usually found in cases in which the owner, tenant and subtenant are unable to agree on their respective apportionment shares. In cases in which joint interest-bearing accounts are established, the funds are disbursed to the parties at the conclusion of the case, after the court enters a final order of apportionment or earlier, if the parties are able to reach a settlement amongst themselves.

If I withdraw the money which the State deposits in the court registry, will I be able to ask for more at the trial?

- Yes. Your withdrawal of the Order of Taking funds is without prejudice to your final claim. This means that neither the amount of the state's deposit, nor the fact that you use it during the case can be used against you in the trial.

Can my final award be less than the amount the condemning authority deposits pursuant to the Order of Taking?

- Yes. The fact that the state makes an estimate for the Order of Taking does not preclude it from asserting a lower value at trial.

APPRAISING THE PROPERTY

How will my property be appraised?

- Appraisers generally use three methods of appraisal to estimate the value of real estate: the market approach, the cost approach and the income approach.

Which one will they use to appraise my property?

- Appraisers generally prefer to use as many of the three approaches as they deem appropriate. It is not unusual, for example, for an appraiser to use all three approaches when valuing an office building.

- Appraisers may chose not to apply one or more of the three approaches if they feel application of a given approach would be inappropriate, given the particular approach or the particular property. Since the cost approach considers the cost of reconstructing buildings on the property, the cost approach is obviously not used to estimate the value of vacant property. Since the income approach is based upon the amount of rent an owner would receive for the property, the income approach is seldom used to value properties not typically rented.

How does the market approach work?

- Under the market approach, appraisers search for properties they feel are comparable to your property. They then use the sale prices of those properties to arrive at an estimate of value for your property.

- Since no two properties are exactly alike and since some of the dissimilarities between the appraiser's "comparable" properties and your property may be significant, the appraiser makes adjustments to the sales prices of the comparable properties before using the prices to arrive at an estimate of value for your property.

- These adjustments may be positive or negative, depending on whether the comparable property is viewed by the appraiser as having superior or inferior characteristics when compared to your property. If the adjustment is positive, the appraiser will increase the price of the comparable property before he compares that price to your property. If the adjustment is negative, the appraiser will decrease the price of the comparable property when using it to appraise your property.

Can you give me an example of how an appraiser may make an adjustment?

- Yes. Let's say you own a vacant piece of commercially-zoned property on Worthington Boulevard. The appraiser finds that, during the last three years, two other vacant pieces of commercially zoned property sold on Worthington Boulevard. He then uses these properties as his "comparable sales."

- Let's say the first "comparable sale" sold for $5.00 per square foot, but that property, unlike your property, is on a corner. Let's assume further that the appraiser observes that buyers pay 10% more for corner locations than for interior sites. Since the comparable property has a characteristic (corner location) superior to your property, the appraiser may utilize an adjusted price per square foot of $4.50 ($5.00 minus $.50 10% of $5.00 = $.50) when appraising your property.

- Let's say that the second "comparable sale" sold for $4.00 per square foot, but that property, unlike yours, is next to a railroad line. Let's assume further that the appraiser observes that buyers pay 20% less for properties next to the railroad tracks than others. Since this "comparable property" has an inferior characteristic (proximity to the railroad line), the appraiser may make a positive or upward adjustment to the price paid for this "comparable sale." Under this assumption, the appraiser may utilize an adjusted price per square foot of $4.80 [($4.00 plus $.80 (20% of $4.00)] when appraising your property.

I just bought my property recently. Will the appraisers use the price which I paid for the property recently in appraising its value today?

- Probably. In general, appraisers consider the purchase of the subject property as the most comparable sale available. If, however, the property itself or market conditions have changed dramatically between the date of purchase and the date of condemnation, the appraiser may choose not to use the sale of the subject property in preparing the appraisal. It may not be that the price agreed in a recent sale, even if the owner participated, is equal to the market value as of the date of taking.

A property similar to mine recently sold for a very low price; however, it was sold by a couple going through a divorce who needed to sell it quickly in order to liquidate their properties and to pay off their joint debts, including the monthly mortgage payments which were three months in arrears. They sold it to a company which buys up "distress" properties and then resells them for a profit. Will the appraisers use the sale of this property in appraising my property?

- Probably not. "Fair market value" is the price which a seller willing, but not compelled, to sell would receive from a buyer willing, but not compelled, to buy. It is the most probable price for which the specified property should sell after reasonable exposure in a competitive market under conditions requisite to a fair sale, with the buyer and seller each acting prudently and assuming neither is under any undue duress. Most appraisers would view this sale as involving a seller compelled and under undue duress to sell. The appraisers may also find that the property was not sold after reasonable exposure in a competitive market and was not sold under conditions requisite to a fair sale.

- Notwithstanding the above, appraisers often disagree as to whether a given sale should be eliminated from consideration because of the motivational factors influencing the buyer and the seller.

How does the cost approach work?

- Under the cost approach, the appraiser first estimates the value of the land, as if the land were vacant.

- He then estimates how much it would cost to rebuild, at today's prices, all of the improvements on the property.

- He then estimates the amount by which the improvements have depreciated and subtracts the depreciation from the cost of reconstruction new. He then adds the depreciated cost of reconstructing the improvements to the land value to arrive at a total estimate.

I have taken great care of my building. Will that affect my depreciation rate?

- Yes. Part of depreciation is physical depreciation. Physical depreciation is simply the wear and tear on your buildings. Everything else being equal, a building which is better maintained is less depreciated and, therefore, more valuable than one which is not well maintained.

How does the income approach work?

- First the appraiser estimates how much your property would rent for on the open market. He does this by finding rental rates of comparable properties and based on the research, he arrives at an estimate for annual gross income.
- He then estimates an amount for vacancy and collection and subtracts that amount from gross income to arrive at an estimate of adjusted gross income.
- The appraiser then estimates the annual expenses which would be paid by an owner of your type of property and subtracts the total amount of those expenses to arrive at an estimate of annual net income.
- Finally, the appraiser converts his estimate of annual net income to value by dividing his estimate of annual net income by a capitalization rate.

What are the types of expenses appraisers usually consider when arriving at annual net income?

- Maintenance, management, taxes and insurance.

Of the three approaches to value – market, cost and income – which approach will lead to the highest value for my property?

- The answer to this question depends upon your property, your appraiser and the real estate data used in the appraisal. More often then not, however, the estimates arrived at by all three approaches are very similar.

When using the income approach to appraise my property, will the appraisers use the actual rents on my property? I'm concerned because I rent out half of my property for rents based on a ten-year old lease and the other half I rent for half-price because, with the property about to be taken, I'm having a hard time finding tenants.

- Under the income approach, the appraiser determines gross income by estimating economic or market, rather than actual, rent. Economic or market rent is the rent which property similar to yours is renting for on the open market. This means that the appraiser will generally use your actual rents only when they are the same as economic or market rent.
- The appraisal must reflect the value of the property as of the date of condemnation. If the actual rents on the property were set ten years ago and are substantially below the rents paid on properties similar to yours around the date of valuation, then it is highly unlikely the appraisers will use the actual rents to appraise the property.
- The law also provides that the value of your property is not to be diminished by the threat of condemnation. If the rents paid on your property are substantially below the rents paid for

properties similar to yours, but not under the threat of condemnation, then the appraisals may not be based upon those rents.

- Although depending on the facts and circumstances, if the actual rents are substantially above rents paid on properties similar to yours, it may not be that the measure of full compensation would exclude consideration of the actual rents to value the property.

Why are some appraisal estimates so different from others for the same property?

- An appraisal is a subjective opinion of value. The appraiser's understanding of the facts, his or her factual assumptions, and his or her understanding of eminent domain law may all operate to affect dramatically the final dollar amount of value estimate.

BUSINESS DAMAGES

The taking of my property will hurt my business. Am I entitled to compensation for damage to my business?

- It depends. Florida has a business damage statute which allows an owner of a business to recover compensation for business damages if part of his property is condemned by the Department of Transportation, or by a county, municipality, board, district, or other public body. In order to qualify under this statute, however, the business owner must meet the following criteria:

    1. The condemnation must be undertaken by the Department of Transportation, or by a county, municipality, board, district, or other public body. For example, an owner whose property is condemned by the county may qualify, while another owner whose property is condemned by a public utility may not.

    2. The condemnation must be for a *right-of-way*. An owner whose property is condemned for the construction of a road, for example, may qualify, but an owner whose property is condemned for a school, for example, may not.

    3. The taking must be a *partial taking*, that is, a taking of only a portion of the property, and the business affected must be located on both the part taken and on the remaining portion.

    4. If the condemnation action is filed on or after January 1, 2005, the business must be an established business of at least *5-years standing*.

- If a business owner does not meet each of these requirements, it is probable that he will not be able to recover compensation for business damages, even if the taking damages the business.

- Florida law allows business damages in *partial takings* of *right-of-way* for businesses with *5-years standing* as a function of *legislative grace* separate and apart from the constitutional protections afforded as private property ownership under constitutional guarantee of *full compensation*.

I have only been in business for three years, but the business I operate has been at this location for 20 years. I bought the business three years ago and have continued the same operation. Do I qualify for business damages?

- It depends. The law allows "tacking" which means that in determining whether a business is "an established business of four years standing," a business owner may "tack on" or add the years of operation of prior owners in order to meet the four-year requirement.

- The court will generally allow "tacking" when it finds that the business on the condemned property has been substantially the same business for four years or more. If there has been a change in ownership, the prior owner's years will be "tacked on" if the court finds that the business, and not just the business site, was purchased and continued. In this regard, the court may look to such indications as whether accounts receivable were purchased and accounts payable assumed.

My business has been losing money, but the condemnation of my property will hurt my business even more. Am I prevented from recovering business damages because I haven't been showing a profit?

- No. If a business owner meets all of the tests for the recovery of business damages, he is not disqualified because he has not recently shown a profit.

If my business will be hurt by the taking and I qualify for business damages, is the condemning authority required to convey the first offer to settle my business damage claim?

- No. Under Florida law, the business owner, not the condemning authority, must convey the initial offer to settle a business damage claim. The condemning authority must provide written notice to all business owners, including tenants, who operate a business located on property to be acquired that it intends to condemn the property. Within 180 days after receiving the condemning authority's written notice, the business owner must submit to the condemning authority a good faith written offer to settle business damages. The business owner is also required to provide the condemning authority with copies of the owner's business records which substantiate the offer to settle the business damage claim. The condemning authority must respond to the business owner's offer within 120 days after receipt of the business damage offer.
- If a business owner fails to meet the 180 day deadline for submission of the business damage offer, then the Court must strike the business owner's claim for business damages absent a showing of a good faith justification for failing to meet the 180 day deadline.

LANDLORD ANT TENANT

I rent my property to tenants. Are they entitled to compensation?

- Yes, but the compensation which your tenants receive may affect your own recovery.

- Your tenants' rights will be protected in any condemnation case or precondemnation negotiations, but the tenants should hire their own attorney to represent their interests. The condemning authority usually seeks title free and clear of all interests, including leases.

- In order to assure that it receives free and clear title, the state will name the tenants as defendants in the condemnation case or will require the receipt of subordination or assignment of lease documents if the taking is settled before a condemnation lawsuit is filed.
- The real estate award which the condemning authority is required to pay is an all-inclusive award and is subject to the claims of all tenants. The award will be made in the name of all parties having an interest in the property, including tenants.
- The legal issue which concerns the division of any condemnation award between landlord and tenant is referred to as *apportionment*.
- Whether a tenant may recover a portion of the real estate award is generally determined by the terms of the lease and whether the tenant is paying less than fair market rent. If the lease is silent on the issue or allows the tenant to claim a portion of the award, the tenant may be able to receive a portion of the award. This portion is generally measured by the present value of the economic advantage of the lease during the remaining term of the lease and option periods.
- Since compensation for the taking of the tenant's lease comes from the all-inclusive real estate award, otherwise paid to the owner, the more the tenant receives for the value of his lease, the less the owner receives for his interest.
- In certain types of projects by certain condemning authorities, tenants may also be eligible for relocation assistance under the Federal Relocation Assistance Act outside the condemnation case.

Are tenants allowed to recover business damages?

- Yes, tenants are considered owners and may assert a business damage claim. However, as discussed in the preceding section, business claims are only allowed in the instances of *partial takings* of *right-of-way* for businesses with *5-years standing. See, preceding section.*
- In general, the terms of most leases allow for the tenant to maintain a separate claim for business damages apart from the landlord's claim for full compensation for real estate.
- There is no similar sharing arrangement for business damages. The amount a business tenant receives from the condemning authority does not serve to reduce the compensation to which the owner may be entitled, and the owner, who does not have an interest in the tenant's business, does not share in the business damage award.
- Tenants may also be eligible as owners to have the condemning authority pay for their attorneys' fees and costs.

BORROWER AND LENDER

What if my property has a mortgage, does my bank have an interest in any condemnation award?

- A lender, such as a bank mortgagee, whose security includes the subject property in an eminent domain case may have an interest in the condemnation award depending upon the terms found in the loan documents.
- The legal issue which concerns the division of any condemnation award between borrower and lender is also referred to as *apportionment*.
- Courts will enforce the contractual rights between a borrower and a lender regarding apportionment of the condemnation award in so far as the terms found in the loan agreement do not call for prepayment penalties resulting from condemnation.
- If loan documents are silent concerning condemnation, the courts will review whether the security of the loan is impaired because of the condemnation or whether the value of any remainder property yet secures the indebtedness after a taking.
- Often, a lender may agree to have monies earmarked for renovation or other types of mitigation of damages released to borrower if reinvested back into the property.
- A lender, such as a bank mortgagee, is not considered an owner under Florida law and, consequently, the condemning authority is not required to pay attorneys' fees and costs incurred by a lender. Notwithstanding, the terms in loan documents may set forth that the lender's attorneys' fees and costs are to be paid by the borrower from the proceeds of any condemnation award.

PRESUIT NEGOTIATIONS

Is the State required to make an offer on full compensation for real estate prior to filing a condemnation lawsuit?

- Yes, in so far as an offer on *full compensation for the taking of real estate*. There are statutory requirements that the State has to follow before filing an eminent domain lawsuit concerning presuit negotiations. These requirements include that the State provide written notice and an offer to the *fee owner* of the property being taken.
- The State is also required to provide written notice to other owners of the property, including tenants, but is only required to make the presuit offer to the *fee owner*.
- The presuit offer must be based upon a valid real estate appraisal, a copy of which must be provided to the owner along with right-of-way maps and construction plans within 15 days of the owner making such a request.

Is the State required to make an offer on a claim of business damages prior to filing a condemnation lawsuit?

- No, in so far as an offer on *a claim of business damages*. There are statutory requirements that a business owner, upon receiving notice from the State, has 180-days to make an offer on any claim of business damages resulting from the taking.
- The presuit offer on a claim of business damages must include an explanation of the nature, extent, and monetary amount of damage prepared by the owner, a certified public accountant, or business damage expert familiar with the nature of the business operations.
- The claim must also include copies of the business records that substantiate the offer.

What does it mean that negotiations be in good faith?

- There are statutory requirements that presuit negotiations be in *good faith* applicable to both the State and private property/business owners.
- Notwithstanding, in most instances, it is not surprising that there exists a significant difference of opinion between the State and the private property/business owner as to the amount of compensation.
- It is often the case that an appraisal may be valid, or technically correct, but “off the mark” in regards to measuring full compensation.

Is it possible to settle a matter before a lawsuit is filed?

- Yes, but caution should be exercised in preparing any settlement agreement, which should also be in writing. The property/business owner should have a thorough understanding of the use of the property taken and the potential impacts that may result to the remainder property.
- In most instances, it is advisable that a copy of the right-of-way map and construction plans be attached and incorporated to any settlement agreement. The settlement agreement should include provisions that bind the State to construct its project in accordance with the right-of-way map and construction plans.
- Once executed, a settlement agreement is binding on the parties. It is difficult to later argue that a settlement agreement be set aside without a showing bad faith, mistake, or fraud.

If I don't agree with the State's offer, who decides how much money I get?

- A jury. State law provides that a jury of twelve persons determines the amount of compensation to be paid to an owner who loses his property through condemnation.
- If not reaching a presuit settlement with the owner, the State may file an eminent domain lawsuit.
- Most courts will not schedule a jury trial until the case goes to mediation.

If I offer to settle for less than our claim and the case does not settle, will the jury be allowed to hear how much I offered to settle for?

- No. Offers to settle are not admissible in evidence at a jury trial. This includes offers made in presuit negotiations.

MEDIATION & GETTING A TRIAL DATE

What is mediation?

- Mediation is a process in which an impartial third party presides over a settlement conference between the condemning authority and the condemnees.

- The impartial third party is known as the mediator. The mediator will listen to the presentations of both sides and then attempt to persuade the parties to moderate their positions so that the case may be settled.

Will there be a mediation conference in my case?

- Probably. Most judges require the parties to try every possible means of settling their case before they allow a case to go to trial. Many judges will thus not allow a case to go to trial unless the parties participate in a mediation conference.

Can the mediator decide how much money I get or force me to settle my case?

- No. This is the primary difference between arbitration and mediation. There is very little likelihood that you will go through arbitration, since arbitration in condemnation cases is only used when the parties have previously agreed to submit their dispute to arbitration. In arbitration, the impartial third party (the arbiter) actually determines the settlement. In mediation, the impartial third party (the mediator) can only recommend a settlement.

Can I reject the recommendations of the mediator?

- Yes and the condemning authority is free to reject the mediator's recommendations as well.

Who serves as the mediator?

- Most mediators are either retired judges or practicing or retired attorneys. Most mediators have some familiarity with eminent domain cases, having either presided over them as a judge or having represented one side or the other as a practicing attorney.

Do I need to attend the mediation conference?

- Yes. The order requiring mediation generally orders the parties and their attorneys to be in attendance. This requirement makes it more likely that a settlement will be reached since the persons who must agree on the settlement (the parties themselves) are in attendance.

Who else will be at the mediation conference?

- In most cases, only the mediator, the parties and their attorneys will be in attendance. From time to time, one side or the other may find it helpful to have one or more of their expert witnesses in attendance.

Do I need to say anything at the mediation conference?

- No. In most cases, your attorney will speak on your behalf. Statements you make may affect the outcome of the mediation conference, overall negotiations or the trial, so it is important to discuss statements you may make with your attorney.

How does the mediation conference usually work?

- The mediator will generally begin the conference by introducing himself and asking the participants to introduce themselves. The mediator will then probably ask the attorneys to explain to him the facts of the case and their clients' positions.

- During the conference, the mediator may meet with only the condemning authority representative and the condemning authority attorney. On other occasions, the mediator may meet with only the owners and their attorneys. During these types of meetings (generally referred to as caucuses), the other side is typically asked to leave the main conference room. There will be occasions when the mediator will meet with all of the participants together.

- While some mediation conferences produce no offers of settlement, the majority of conferences produce offers and counteroffers.

- At the conclusion of the conference, the mediator will prepare a report to the judge. If the case settles, the mediator will write down the terms of the settlement and ask the parties to sign the report. If the case does not settle, the mediator may declare an impasse, continue the mediation conference to a later date or make other recommendations to the judge.

How do I get my case set for trial?

- Your attorney or the attorney of another party in the case will submit a notice or motion to set the case for trial. The judge will then enter an order either specially setting your case for trial on a specific date or putting your case on a docket with other cases.

When will my attorney or another attorney in the case ask for the case to be set for trial?

- The earliest a party may appropriately ask that the case be set for trial is as soon as the case is "at issue," which means as soon as all parties have submitted their required pleadings. This usually happens within 60 days of the filing of the case.

- From a practical standpoint, the parties usually ask that the case be set for trial once they have retained their expert witnesses and have received from those witnesses the opinions which will be presented as evidence at the trial.

What happens if the judge does not specially set my case for trial but, instead, puts my case on a docket with other cases?

- In that case, the judge will generally hold a special hearing known as "calendar call" a week before the commencement of the trial docket. At "calendar call," the judge will give the attorneys whose cases are set for the trial docket an idea as to when during the trial docket their cases will be called.

What happens if my case is not called during the trial docket on which it is set?

- If your case is not reached during a given docket, it is generally "rolled over" to the next available docket. Cases which are "rolled over" to a succeeding docket are generally given priority over cases which have not been "rolled over."

How will the judge decide which cases set on his or her docket to actually call up for trial?

- Every judge has a different practice in this respect. Some judges give preference to eminent domain actions and will set an eminent domain case for trial before personal injury or contract cases. Much depends upon the volume of cases already assigned to a judge.
- Other judges will call up for trial the older cases first. Under this approach, a judge may call up for trial a case filed in 2010 before he or she will hear a case filed in 2012.

How long are the judges' trial dockets?

- The length of jury trial dockets vary among the counties and the judges within a given county. The most common length of a trial docket is two weeks; however, it is not uncommon to be placed on a docket ranging from one to six weeks.

PRETRIAL HEARINGS

Do I need to attend any hearings prior to the trial?

- That decision will be up to you and your attorney. All hearings are open to the public and you are permitted to attend any of the hearings.
- Some hearings may require your attendance and may even require your testimony. Others may be technical and procedural and will not require your attendance.

What types of hearings may be held prior to the trial?

- There are many different types of hearings which may be held prior to the actual trial. The most substantial of these hearings is probably the order of taking hearing, at which time the court will determine whether the property may be condemned, how much property may be taken and the amount of money the condemning authority is required to deposit into the Registry of the court in order to take title to the property.
- Hearings may also be held to decide the appropriate way to determine compensation, the correct way to appraise the property or the admissibility of certain evidence, as well as many other questions and issues.

THE JURY TRIAL

Who serves on the jury?

- The jury is selected from the drivers' license rolls in the county in which the condemned property is located. The judge will summon a jury panel of prospective jurors. From those prospective jurors, the parties and their attorneys will select 12 people to decide the case, and perhaps one or two alternates to listen to the evidence and serve in the event that one or more of the jurors selected is excused during the trial.

- The court will excuse potential jurors for cause or in response to a peremptory challenge. A juror will be excused for cause if he is related to a party or is viewed by the court as being unable to serve as a fair and impartial juror.

- Typically, each party to the case is allowed three peremptory challenges, which means each side may reject three prospective jurors from the case, without being required to state any reason for their rejection.

Are there rules I need to be familiar with during the trial?

- Yes, and here are a few:

    1. You should be at the trial from jury selection through final verdict. Although attendance is not generally required, it is strongly recommended.

    2. Dress professionally. Conservative suits and ties for men; professional office wear for women.

    3. When the judge or jury enters the courtroom, please rise. When the judge or bailiff says: "Be seated" after the judge enters; you may retake your seat. When the jurors have all taken their seats, you too may be seated.

    4. Do not speak to the jurors.

    5. Unless your attorney gives you prior approval, do not discuss any testimony you have heard with any potential witness.

    6. Speak quietly, so your conversation is not overheard by jurors.

    7. Jurors are allowed to take notes during the trial and generally are allowed to ask questions.

How long will my trial last?

- Every case is different. A rule of thumb, for the "typical" condemnation case is 2 days for each piece of property involved in the trial.

Will my case be combined with another person's case?

- Perhaps. Ordinarily, all claims relating to one piece of property will be tried with the same jury. Thus, for example, if a property is leased to two business tenants, the value of the property and the two tenants' business damage claims will be decided by the same jury.

- In some cases, more than one property will be presented to the same jury. The law allows the condemning authority to include, in one lawsuit, numerous separate properties so long as all of those properties are needed for the same project. If more than one property is included in the same lawsuit and the judge does not separate them for trial, then those properties will be tried to the same jury.

- Even if two properties are included in separate lawsuits, the judge may combine the trials of these separate properties through an order for a consolidated trial.

Do I need to testify at my trial?

- It depends. You and your attorney will discuss the necessity of your testimony as a witness. The law allows an owner to testify as to his or her opinion of value of the property. In addition, there may be other facts or opinions about which the owner may testify at the trial.

Will the jury see my property during the trial?

- Probably. The law requires the jury to view the property. In the typical case, the jury takes a bus ride to the property during the trial and views the property together.

- In a "quick taking" case, the building may be demolished by the time of the jury trial and view, and the public project may even have been constructed by this time. Any view of your property would be in the form of photographs or video, etc.

ATTORNEY'S FEES AND COSTS

Must the government pay for my attorney's fees and costs, over and above what it pays me for the taking and damages?

- Florida law provides that the constitutional guarantee of full compensation includes payment of the owner's reasonable fees and costs. Because owners are made part of a condemnation cases through no fault of their own, the State must compensate owners for the defense of their case.

- In most cases, the government is required to pay the attorney's fees and costs you incur in connection with condemnation of your property, over and above what it pays for the taking and damages. Reimbursement of these expenses is governed by statute.

- Generally, the government will be required to pay *attorneys' fees* at the end of the case if you obtain monetary or non-monetary benefits over the government's first written offer for the taking, based on a percentage of any such increase. The fees are result-oriented. The statutory percentages are as follows: 33% of any benefit up to $250,000; plus 25% of any portion of the benefit between $250,000 and $1 million; plus 20% of any portion of the benefit exceeding $1 million.

- Whether or not you obtain an increase over the government's first offer, the government will be required to pay your *costs* incurred in the eminent domain proceedings (other than your attorney's fee, such as appraisal fees and engineering invoices) to the extent that the presiding judge rules the costs were *reasonable* and *necessary* at the end of the case.

- Any arrangement the owner has with his or her attorney to pay fees or costs in excess of those awarded according to statute should be clearly set out in the employment agreement between the owner and the attorney.

- Payment of fees and costs, as explained above, may be affected by the government filing of an *"offer of judgment,"* as explained in the next section.

What is an offer of judgment, and how does it work?

- An *offer of judgment* is a formal legal document which has at least two significant effects on a condemnation case. It is, first and foremost, a formal and binding offer to settle the case on the terms contained within the offer of judgment. It is an offer by the condemning authority to have judgment entered against it on the terms set forth.

- The second significant effect an offer of judgment has on a condemnation case is its effect on the condemning authority's obligation to pay the owner's costs.

- When an offer of judgment is made, the owner has 30 days in which to accept the offer, reject the

offer or allow it to expire. If the owner accepts the offer, then payment of the owner's costs proceeds according to the terms of the offer of judgment. If the owner rejects the offer of judgment or allows it to expire 30 days after the offer is served, and the jury returns a verdict in an amount lower than the offer of judgment, then the condemning authority is no longer responsible to pay the costs of the owner for services rendered after the date of the offer's rejection or expiration.

AFTER THE CASE IS OVER

Do I pay taxes on my award?

- It depends. A condemnation is considered an involuntary conversion and is treated differently from other sales and other cases.
- You will have a period of time to reinvest the proceeds of the case and defer your tax obligation until a later date.
- If a portion of your award is considered severance damages (compensation for damages to property you continue to own), you may be able to defer the payment of taxes on that portion of your award, as well.
- Those portions of your award attributable to business damages or interest are taxed as ordinary income.
- The tax-deferral benefits of condemnation are also available to sales in lieu of condemnation. You may thus defer the payment of taxes on a sale to the condemning authority even if you settle the dispute without the government being required to file condemnation action.
- You should consult a tax attorney for the current rules on IRS treatment of condemnation *awards.*