

EMINENT DOMAIN
State of Florida

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Who is Eligible to Condemn?

The authority to exercise the power to condemn rests with the state legislature. De Soto County v. Highsmith, 60 So.2d 915 (Fla. 1952). Other government entities having power delegated by statute include:

1. Certain state departments and agencies. See, e.g. Department of Health, §381.0013, Fla. Stat. (2006); Department of Children and Family Services, §402.16, Fla. Stat. (2006).
2. Counties. §127.01, Fla. Stat. (2006).
3. Municipalities. §166.401, Fla. Stat. (2006).
4. School Boards. §1013.24, Fla. Stat. (2006).
5. Utilities (gas companies, power companies). §361.13, Fla. Stat. (2006).
6. Water management districts. §373.1961(1)(g), Fla. Stat. (2006).

Entities that have a delegated power must exercise the power subject to the limitations in the delegation of authority. Spafford v. Brevard Co., 110 So. 451 (1926).

What Can Be Condemned?

Other than private real property, the following may be condemned:

A. Public Property:

Generally, no entity may condemn public property unless there is express or necessarily implied legislative consent, the uses are compatible, or one entity has a superior power of eminent domain.

Housing Authority of City of Fort Lauderdale v. Dept. of Transp.,
385 So.2d 690 (Fla. 4th DCA 1980).

B. Personal Property:

Property owners have had successful inverse condemnation actions to gain compensation for personal property taken by the government. See e.g. Flatt v. Brooksville, 368 So. 2d 631 (Fla. 2nd DCA 1979).

The Condemnation Proceedings

A. Pre-filing Requirements:

At least 30 days before filing a judicial proceeding, a condemning authority must provide written notice and a written offer of compensation. The notice must state that: the property is necessary for a project, the nature of the project, the condemning authority will provide, on request, the appraisal report upon which the offer is based and other documents, and the owner's statutory rights to attorneys' fees and costs. A condemning authority must also negotiate in good faith with the property owner and attempt to reach an agreement regarding the amount of compensation. § 73.015, Fla. Stat. (2006).

If a business is operated on the property, condemnors must make a good faith effort to notify business owners of their additional statutory rights. §73.015(2), Fla. Stat. (2006).

B. Initiating Condemnation:

1. With Whom?

After having complied with the pre-filing requirements, a condemnor files a petition in the circuit court of the county where the property is located.

2. By What Form?

The petition must contain:

- a. the authority under which the property is sought
- b. the use for which the property is sought and a declaration that the property is needed for that use
- c. the estate or interest in the property sought
- d. the names and addresses of all persons with an interest in the property, so far as ascertainable by a diligent search
- e. whether any mobile home is located on the property and whether it must be removed

- f. statement that the petitioner has surveyed and located its line or area of construction and intends in good faith to construct the project over the property
 - g. a demand for relief that the property be condemned for the uses set forth and that the interest sought vest in the petitioner
- §73.021, Fla. Stat. (2006).

A petition may seek either a “slow-take” under Chapter 73, Florida Statutes or a “quick-take” under Chapter 74, Florida Statutes. A slow-take is available to all condemners. In a slow-take, title does not pass until the condemner deposits the jury award of full compensation after final judgment. A “quick-take” condemnation allows title to pass in advance of final judgment but is available to a limited group of condemners. §74.011, Fla. Stat. (2006).

3. Decision Making Body

In Florida, the initial decision of whether to grant a taking is made by a judge sitting without a jury. Compensation is determined in a separate proceeding by a 12-member jury. §73.071, Fla. Stat. (2006). Only eminent domain and capital punishment cases share the right to 12-member juries in Florida.

4. Appeals

a. Procedure

Appeals are to the district courts of appeal under the Florida Rules of Appellate Procedure.

- i. An owner may appeal a quick-take order of taking as a non-final appeal under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii).
- ii. An owner may also appeal a pre-trial order finding reasonable necessity in a slow-take proceeding via a certiorari petition. The owner must show a departure from the essential requirements of law and harm that cannot be remedied on appeal from the final judgment.
- iii. Either the condemner or the owner may appeal the final judgment under Florida Appellate Rule of Procedure 9.110.

b. Fees and Costs

The condemnor pays reasonable appellate attorneys' fees and costs unless an appeal is taken by the owner and the judgment is affirmed. §73.131 (2), Fla. Stat. (2006).

5. When Does Title Pass?

In a slow-take, title passes when the condemnor deposits the amount of the final judgment following jury trial in the court registry or pays the owner. §73.111, Fla. Stat. (2006). In a quick-take, title passes when the condemnor deposits into the court registry the sum required by the court in its order of taking.

Procedure to Challenge Condemnation

Florida has a two-tiered procedure to address issues raised in a condemnation.

A. Order of Taking Hearing:

A judge sitting without a jury determines whether the condemnor can take the property. The condemning authority has the initial burden of presenting evidence of necessity and public purpose for the taking. Lakeland v. Bunch, 293 So. 2d 66 (Fla. 1974). If the condemnor meets its initial burden, then the burden shifts to the landowner to show illegality, bad-faith or abuse of discretion. Canal Authority v. Litzel, 243 So. 2d 135 (Fla. 1970). The owner can also raise any other defenses to the taking at this hearing. In a quick-take order of taking hearing, the condemnor will also produce evidence of a good-faith estimate of the property's value. If the court approves the quick-take, it will enter an order of taking specifying the amount of the estimate which must be deposited in the court registry before the condemnor may take title.

B. Valuation:

If the judge determines that the taking should be allowed, then the case will go to a 12-member jury to determine full compensation.

Inverse Condemnation

A. Who Files?

A property owner may file an inverse condemnation claim in the circuit court of the county in which the property is located.

B. Other Forms of Relief:

A property owner may file a claim under the Bert J. Harris Private Property Rights Act to seek protection from property burdens that may not

rise to the level of a taking, but are severe enough to warrant relief. Chapter 70, Florida Statutes. The Act gives relief for specific government actions which inordinately burden existing uses or vested rights to specific uses of real property. §70.001, Fla. Stat. (2006). Relief may include compensation for actual loss to the fair market value.

Valuation Issues

A. Calculation of Compensation:

1. Whole Taking

In a whole taking, the jury makes a determination of full compensation. The Florida Constitution requires *full* compensation, which has been interpreted as greater than the federal standard of *just* compensation.

2. Partial Taking

In a partial taking, the jury verdict of full compensation will include damages for the part taken, severance damages to the remainder, and business damages (if applicable according to the terms of the statute). §73.071, Fla. Stat. (2006).

B. Discovery:

Condemnors must provide, upon request, the appraisal for their good-faith estimate of value which forms the basis of their initial, pre-litigation offer as well as any right-of-way maps or construction plans. §73.015, Fla. Stat. (2006). After the petition is filed and the case proceeds into litigation, normal rules of discovery apply.

C. Scope of the Project:

Under Florida statute, increase or decrease in value which is solely a result of project knowledge and which occurs after execution of a resolution depicting project location may not be considered in valuing the property. §73.071(5), Fla. Stat. (2006). Increases in property values in anticipation of a project before a precise location is known may be considered. 325 West Adams Street, Ltd. V. City of Jacksonville, 863 So.2d 380, fn 1 (Fla. 1st DCA 2003).

D. Downzoning:

Downzoning to devalue the property for later acquisition is not permissible. Board of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co., 108 So.2d 74 (Fla. 1st DCA 1958).

E. Date of Valuation:

The date of valuation is the earlier of the date of trial or the date title

F. Parent Tract:

Florida courts determine whether separate parcels may be treated as a single “parent tract” for purposes of valuation by examining three factors: physical contiguity, unity of ownership, and unity of use. Dept. of Transp., Div. of Admin. v. Jirik, 498 So. 2d 1253 (Fla. 1986). Florida recognizes a presumption of separateness for platted lots, but once this presumption is overcome, the parent tract becomes a question for the trier of fact. Dade County v. Midic Realty, Inc., 551 So.2d 499 (Fla. 3rd DCA 1989).

G. May Tax Valuation be Used as Evidence?

Traditionally, tax valuations have been inadmissible to prove property value in condemnation actions, except that tax valuations may be admitted as an admission against the condemnor where the condemnor is the same legal entity that made the tax assessment. Trad v. Jacksonville, 279 So. 2d 384 (Fla. 1st DCA 1973).

H. Who May Testify as to Value?

1. The courts, within their discretion, may qualify experts to testify as to value. Fla. Water Services Corp. v. Utilities Comm’n, 790 So.2d 501 (Fla. 5th DCA 2001).
2. The property owners may also testify as to value. City of Orlando v. Cone, 615 So.2d 793 (Fla. 5th DCA 1993).
3. Lay witnesses with special knowledge may testify as to value. Orange Belt Railway Co. v. Craver, 13 So. 444 (Fla. 1893).

I. Issues of Access:

Even if no land is taken, a landowner may recover for either total or substantial loss of access. Anhoco Corp. v. Dade Co., 144 So.2d 793 (Fla. 1962); Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989).

However, Florida courts have held that damages resulting from medians that just amount to a change in traffic flow, rather than deprivation of access, are not compensable. City of Jacksonville v. Westland Park Associates, II, 2007 WL 437220 (Fla.1st DCA Feb. 12 2007); Division of Admin., State Dep't of Transp. v. Capital Plaza, Inc., 397 So. 2d 682, 683 (Fla. 1981); State v. S.W. Anderson, Inc., 744 So. 2d 1098 (Fla. 1st DCA 1999).

J. Appraisal Rules/Limitations:

1. Comparative sales analysis may be used in Florida.
2. The income approach may be used.

3. The replacement cost approach may be used.
4. The courts have used a “value in use” concept to address unique properties. Dept. of Transp. v. West Palm Beach Garden Club, 352 So.2d 1177 (Fla. 4th DCA 1977); State Dept. v. Byrd, 273 So.2d 400 (Fla. 1st DCA 1973).

How Are Various Ownership Interests Treated?

- A. Competing Ownership Interests:**
Florida follows the single unit rule in that a jury values the property as a whole without regard to different interests when awarding full compensation. Upon motion, a judge will apportion the award among competing property interests in supplemental proceedings. §73.101, Fla. Stat. (2006).
- B. Full Compensation:**
Florida has a constitutional standard of full compensation. The owner should be “made whole as far as possible and practical.” Dade Co. v. Brigham, 47 So.2d 602 (Fla. 1950). Therefore, a number of items other than fee simple value may be included, such as moving costs, lost rent, or business damages. Business damages are available in certain partial takings to businesses of more than five years’ continuous operation. §73.071(3)(b), Fla. Stat. (2006).
- C. Reverter or Other Interest:**
§73.013, Fla. Stat. (2006) specifies that before the condemnor may transfer condemned property to a private entity (with certain limited exceptions), owners must have the opportunity to repurchase the land for the same amount the condemnor paid them for the property.

What if the Condemnation is Abandoned?

A condemnor may abandon its proceedings even after judgment is entered in a slow-take. §73.111, Fla. Stat. (2006). In a quick-take, the condemnor may not abandon after it deposits the good-faith estimate ordered by the court. §74.061, Fla. Stat. (2006). Upon abandonment, the condemnor must pay reasonable attorneys’ fees and court costs.

Attorneys’ Fees and Costs

Attorneys’ fees and costs in Florida are part of full compensation to be paid by the condemnor. Dade Co. v. Brigham, 47 So. 2d 602 (Fla. 1950). Reasonable costs include but are not limited to appraisal fees and

accountant's fees (if business damages are applicable). §73.091, Fla. Stat. (2006). Generally, §73.092, Florida Statutes (2006) sets fees based upon a percentage of the benefit achieved, as measured by the difference between the initial offer and the final judgment, in matters where the property is taken. This includes monetary and non-monetary benefits. However, if the defendants defeat a taking, if the attorneys' fees are incurred in the apportionment phase or in connection with supplemental proceedings, the court will award a reasonable attorneys' fee based upon the factors set out in the statute. §73.092, Fla. Stat. (2006).