

Eminent Domain.

A. Authority

1. Power of Eminent Domain

- a. The eminent domain power is an attribute of sovereignty. Daniels v. SRD, 170 So.2d 846 (Fla. 1964) (References to DOT are to "DOT" or "SRD"); City of Miami v. Cummings, 266 So.2d 122 (Fla. 3d DCA 1972). All property is subject to it. City of St. Petersburg v. Wall, 419 So.2d 1167 (Fla. 2d DCA 1982). It is distinct from police power: see Takings analysis below. It is limited by the Constitution, Demeter Land Co. v. Fl. P. Serv. Comm., 128 So. 402 (Fla. 1930). The oft-quoted "...one of the harshest proceedings known.." Peavy-Wilson L. Co. v. Brevard Cty., 31 So.2d 483 (Fla. 1947); Baycol, Inc. v. Downtown Dev. Auth. of City of Ft. Lauderdale, 315 So.2d 451 (Fla. 1975), should be rethought. After the broad expansion of owner protections since Peavy, Florida eminent domain is one of the most generous proceedings known to the law.

- b. The public use may be local and limited. The legislature may delegate power to determine necessity. Wilton v. St. Johns Cty., 123 So. 527 (Fla. 1929). Extraterritorial exercises: Prosser v. Polk Cty., 545 So.2d 934 (Fla. 2d DCA 1989); Town of Palm Bch. v. City of W. Palm Bch., 239 So.2d 835 (Fla. 4th DCA 1970). A municipality's power is limited to a valid municipal purpose. Basic Energy Corp. v. Hamilton Cty., 652 So.2d 1237 (Fla. 1st DCA 1995)

- c. Prior Public Use/Compatible Use/Superior Sovereign Doctrines. City of Dania v. Cent. and So. Fl. Flood Cont. Dist., 134 So. 2d 848 (Fla. 2d DCA 1961); Georgia So. & Fl. Ry. Co. v. SRD, 176 So. 2d 111 (Fla. 1st DCA 1965); DOT v. Dade Cty., 388 So.2d 326 (Fla. 3d DCA 1980); Hous. Auth. of City of Ft. Lauderdale v. DOT, 385 So.2d 690 (Fla. 4th DCA 1980); Fl. E. C. Ry. Co. v. City of Miami, 321 So.2d 545 (Fla. 1975); F. E. C. Ry. Co. v. City of Miami, 372 So.2d 152 (Fla. 3d DCA 1979); Fl. E. C. Ry. Co. v. Broward Cty., 421 So.2d 681 (Fla. 4th DCA 1982); Fl. Wat. Serv. Corp. v. Utilities Comm., 790 So.2d 501 (Fla. 5th DCA 2001); City of Dania v. Broward Cty., 658 So.2d 163 (Fla. 4th DCA 1995); Leeberg v. DOT, 714 So.2d 1159 (Fla. 5th DCA 1998).

- d. Various stat. auth.: F. S. 74.011 Summary proced. auth.;125.012(3), 125.015 ports;127 ctys. (plus home rule);153.03(5) cty. water and sewer;153.62(7) cty. water/sewer dist.; 155.15 cty. hosp.; 157.03 cty. ditch, drain, and canals; 161.36 ctys. as beach and shore preserve. Auths.;163.01(7)(f) interlocal entities;163.370(1f)(e)2, 163.375 cty. city, or ag. comm. redev.;163.511(1)(g) city, cty. neighborhood improve. dist.;163.568(f1) regional transp. auths.; 166.401-411 munic.180.22 munic; and private munic. public works;190.011(7)(a) comm.dev. dist.; 191.006(12) indep. spec. fire dist.; 259.041(14) conserve. or recr. lands; 315.03(2) cty., port dist., port. auth., or munic., for port facil.; 331.10, 331.305(24), 332.02(2), 333.12 airports, air commerce, Fl. Spaceport Auth.; 336.467 FDOT for other entities; 343.64(2)(c) Cent. Fl. Reg. Transp. Auth.; 343.74(2)(c) Tampa Bay Commuter Rail Auth.;348, 349, expressway, bridge, and transp.auths.;361 public works, construction of dams, railroad, electric railway, waterworks, natural gas, petroleum pipelines, sewer or wastewater reuse systems companies, coal pipeline cos., elec. util.;362.02 tel. and teleg. cos.;373 water resources; 373.086,.139,.1961(1)(g) water mngt. dist., .1962(2)(e) reg. water supply auths.;374.984(1) Fl. Inl. Nav. Dist.; 388.191 mosquito cont. dist.;418.22(3) recr. dist.; 421.12 public hous. auths.;425.04(12) rural electric coops; 479.24 outdoor adv. signs; 582.43 watershed improve. dist.; 704.01(2), .04 private stat. way of necessity; 1001.64(35), 1013.25 comm. coll. dist.;1004.73(7) Pinellas Cty. for St. Petersburg Coll.; 1013.24 school boards. See generally Fl. Jur 2d Eminent Domain.
- e. Statutory authority and limitations: S. Orlando Bus. Group v. City of Edgewood, 585 So.2d 985 (Fla. 5th DCA 1991); Basic Energy Corp. v. Hamilton Co., FL, 652 So.2d 1237; Pichowski v. Fl. Gas Trans. Co., 857 So.2d 219 (Fla. 2d DCA 2003)
- f. Slum clearance. Post v. Dade Cty., 467 So.2d 758 (Fla. 3d DCA 1985); see Fl. Jur. 2d Eminent Domain sec. 50.
- g. The expansive climate for redevelopment projects is under siege. See County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004); Kelo v. City of New London, 268 Conn. 1, 843 A.2d 500 (2004), on appeal to the Supreme Court.

2. Eminent Domain Power In Relation To Police Power

- a. All property is subject to police power. City of Miami Bch. v. Texas Co., 194 So. 368 (Fla. 1940). Regulation of roads is police power regulation. Selden v. Jacksonville, 10 So. 457 (Fla. 1891); Anderson v. Fuller, 41 So. 684 (Fla. 1906); City of Miami v. Girtman, 104 So.2d 62 (Fla. 3d DCA 1958). Virtually everything in right of way is there based on it. See: Awbrey v. City of Panama Bch., 283 So.2d 114 (Fla. 1st DCA 1973); Fl. Stats. chs.125, 166, 316, 334, 335, 336.

- b. Condemnation cases are sometimes loosely categorized as “access”, “inverse”, “change of grade”, “proximity”, “noise”, “flooding”, or “rezoning” cases. While acknowledging these distinctions, my analysis cuts across these categories to some extent because they have long been used to obscure more fundamental distinctions.

- c. Historically, government use of existing right of way, of property taken, interference with adjacent property or remainders, or with third parties' property, have been held noncompensable acts or interferences. Abutters' rights have been held subordinate to that of the public. Only a “taking” (eminent domain, inverse, or regulatory), involving total deprivation (or “substantial impairment” in the case of access) of all or a portion of property has been compensable. Pinellas Cty. v. Brown, 420 So.2d 308 (Fla. 2d DCA 1982). Government acts upon or use of private property, which result in compensable deprivation in an inverse context, are sometimes also confusingly referred to in de jure takings contexts as the “taking”. See Em. Dom. Prac. & Proc., 6th Ed., p. 9-7, citing Alizieri v. Manatee Cty., 396 So.2d 240 (Fla. 2d DCA 1981). However, the taking for which compensation is due, is, in both cases, the owner's loss of use of the property taken; the condemnor's subsequent acts upon or use of property taken, once it has been taken, are consequential. This is a fundamental distinction often overlooked or intentionally obscured, usually in a severance damage context. See Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla. 1979)(cited in Alizieri, but not at Em. Dom, p. 9-7.) See also mostly “access” cases, including inverse access cases: Dorman v. Jacksonville 13 Fla. 538; Selden; Jacksonville T. & K. W. Ry. Co. v. Thompson, 16 So. 282 (Fla. 894); Bowden v. City of Jacksonville, 42 So. 394 (Fla. 1906); Anderson; Arundel Corp. v. Griffin, 103 So. 422 (Fla. 1925); Fleming v. SRD, 25 So.2d 373 (Fla. 1946); Paty v. Town of Palm Bch., 29 So.2d 363 (Fla. 1947); Bd. of Public Instr. of Dade Cty v. Town of Bay Harbor Isls., 81 So.2d 637 (Fla. 1955); Weir v. Palm Bch. Cty., 85 So.2d 865 (Fla. 1956); Lewis v. SRD, 95 So.2d 248 (Fla. 1957);

Jahoda v. SRD, 106 So.2d 870 (Fla. 2d DCA 1958); Jacksonville Expy. Auth. v. Milford, 115 So.2d 778 (Fla. 1st DCA 1959); Blinkman v. Dade Cty., 115 So.2d 23 (Fla. 3d DCA 1959); Anhoco v. Dade Cty., 144 So.2d 793 (Fla. 1962); Moore v. SRD, 171 So.2d 25 (Fla. 1st DCA 1965); Northcutt v. SRD, 209 So.2d 710 (Fla. 3d DCA 1968); Benerofe v. SRD, 217 So.2d 838 (Fla. 1969); Langston v. City of Miami Bch., 242 So.2d 481 (Fla. 3d DCA 1969); Boney v. DOT, 250 So.2d 650 (Fla. 1st DCA 1971); Diss. Op., Stubbs v. DOT, 265 So.2d 425 (Fla. 1st DCA 1972); Stubbs v. DOT, 285 So.2d 1 (Fla. 1973); DOT v. Baredian, 287 So.2d 398 (Fla. 2d DCA 1973); DOT v. ABS. Inc., 336 So.2d 1278 (Fla. 2d DCA 1976); DOT v. W. Palm Bch. Gdn. Club, 352 So.2d 1177 (Fla. 4th DCA 1977); DOT v. Capital Plaza, 397 So.2d 682 (Fla. 1981); City of Orlando v. Collum, 400 So.2d 513 (Fla. 5th DCA 1981); DOT v. Palm Bch. W., Inc., 409 So.2d 1130 (Fla. 4th DCA 1982); City of Port St. Lucie v. Parks, 452 So.2d 1089 (Fla. 1984); Howard Johnson v. DOT, 450 So.2d 328 (Fla. 4th DCA 1984); DOT v. Frenchman, 476 So.2d 224 (Fla. 4th DCA 1985); Lee Cty. v. Testament Baptist Church, 507 So.2d 626 (Fla. 2d DCA 1987); Paradyne Corp. v. DOT, 528 So.2d 921 (Fla. 1st DCA 1988); DOT v. Ness Trailer Pk., Inc., 489 So.2d 1172 (Fla. 4th DCA 1986); Palm Bch. Cty. v. Tessler, 538 So.2d 846 (Fla. 1989); DOT v. Lakewood Travel Park, 580 So.2d 230 (Fla. 4th DCA 1991); DOT v. Gefen, 636 So.2d 1345 (Fla. 1994); City of Tall. v. Boyd, 616 So.2d 1000 (Fla. 1st DCA 1993); DOT v. Gefen, 636 So.2d 1345 (Fla. 1994); Weaver Oil Co. v. City of Tall., 647 So.2d 819 (Fla. 1994); Aspen-Tarpon Springs Ltd. Ptnrshp. v. Stuart, 635 So.2d 61 (Fla. 1st DCA 1994), this case may now be limited to the extent it relied on Agins v. City of Timburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), as now limited by Lingle v. Chevron U. S. A., Inc., 544 U. S. ___ (2005); DOT v. Landman, 664 So.2d 1141 (Fla. 5th DCA 1995); Rubano v. DOT, 656 So.2d 1264 (Fla. 1995); DOT v. Kreider, 658 So.2d 548 (Fla. 4th DCA 1995); Dixie Oil Co. v. DOT, 657 So.2d 1258 (Fla. 1st DCA 1995) (anomalous case holding consequential access evidence an election of remedies re admin hearing right); DOT v. Ansbacher, 672 So.2d 660 (Fla. 1st DCA 1996); Grandpa's Park v. DOT, 726 So.2d 789 (Fla. 1st DCA 1998); DOT v. S. W. Anderson, Inc., 744 So.2d 1098 (Fla. 1st DCA 1999); DOT v. Kirkland, 772 So.2d 566 (Fla. 1st DCA 2000); Benaim v. PCL Civ. Cont., Inc., 764 So.2d 920 (Fla. 4th DCA 2000); DOT v. Suit City, 774 So.2d 9 (Fla. 3d DCA 2000); DOT v. Gayety Theatres, Inc., 781 So.2d 1125 (Fla. 3d DCA 2001); Lost Tree Village Corp. v. City of Vero Bch., 838 So.2d 561 (Fla. 4th DCA 2002); 4 Nichols, Eminent Domain, '6.02[1]. See Also Harris, "Compensation for Takings of Private Property by State Governments", CLE Int'l.

Eminent Domain, 2004; eminent domain takings have not always been compensable.

d. Accordingly, incidental regulatory consequences of takings have usually been held consequential: costs of complying with police powers are consequential, a distinction between damages caused by a “taking”, versus damages caused by incidental police power actions or regs. Selden, etc. above; Fl. E. C. Ry. Co. v. Martin Cty., 171 So.2d. 873 (Fla. 1965); DOT v. Bennett, 592 So.2d 1150 (Fla. 4th DCA 1992); Malone v. DOT, 438 So.2d 857 (Fla. 3d DCA 1983); DOT v. Michelin, 702 So.2d 1326 (Fla. 4th DCA 1997); see Met. Dade Cty. v. Reineng Corp., 399 So.2d 379 (Fla. 3d DCA 1981); Dade Cty. v. Pepper, 168 So.2d 198 (Fla. 3d DCA 1964); Joint Ventures, Inc., v. DOT, 563 So.2d 622 (Fla. 1990); Tampa-Hillsborough Cty. Exprwy. Auth. v. A.G.W.S. Corp., 640 So.2d 54 (Fla. 1994); Gardens Country Club, Inc. v. Palm Bch. Cty., 712 So.2d 398 (Fla. 4th DCA 1998); see 4 Nichols, Eminent Domain, ' 1.42 [17] (citing Bd. of Transp. v. Terminal Warehouse Corp., 300 N.C. 700, 268 SE.2d 180 (1980)) (citing Richley v. Jones, 38 Ohio St.2d 64, 310 N.E.2d 236 (1974)); see also HBU/ Valuation/ Zoning/ Police Power below.

e. But see authority for consequential damages; City of Tampa v. Texas Co. 107 So.2d 216 (Fla. 2d DCA 1958); Lee Cty.v. Exch. Nat'l. Bk., 417 So.2d 268 (Fla. 2d DCA 1982). Lee Cty. has been improvidently followed in: Hubschman v. Bd. of Cty. Commrs., Collier Cty., 610 So.2d 691 (Fla. 2d DCA 1992), Taylor v. DOT, 701 So.2d 610 (Fla 2d DCA 1997). See also, Wye and Partyka below. See also F.S. 70.001(9)(10). See also Consequential Damages.

3. Public purpose and defenses thereto. A highway is a public use: Spafford v. Brevard Co., 110 So. 451 (Fla.1926). Public interest must dominate private gain: Demeter Land Co. v. Fl. Pub. Serv. Co., 128 So. 402 (Fla. 1930). Public benefit is not synonymous with public purpose: Grubstein v. Urban Renewal Ag. of Tampa, 115 So. 402 (Fla. 1959); Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975). Eminent domain for redevelopment is constitutional even though ultimately private. State v. Miami Beach Redev. Ag., 392 So.2d 875 (Fla. 1980). Owner entitled to de novo OT hearing on blight determination. Rukab v. City of Jacksonville Bch., 811 So.2d 727 (Fla. 1st DCA 2002).

B. Necessity, defenses, burdens of proof, scope of review for OT, presuit planning

1. Public projects require only reasonable necessity: Wilton v. St.Johns Cty., 123 So. 527 (Fl. 1929); Sibley v. Volusia Cty., 2 So.2d 578 (1941); Canal Auth. v. Miller, 243 So.2d 131 (Fla. 1970); Knappen v. DOT, 352 So.2d 885 (Fla. 2d DCA 1977); City of Ocala v. Nye, 608 So.2d 15 (Fla. 1992); DOT v. Barbara's Creative Jewelry, Inc., 728 So.2d 240 (Fla. 4th DCA 1998); F.S. 127.01(2) reversing Hillsborough Cty. v. Lutz Realty, 553 So.2d 1320 (Fla. 2d DCA 1989).

2. Not necessary to have funds, plans or specs; Carlor Co Inc., v. City of Miami, 62 So.2d 897 (Fla. 1953); Cent. & South. Fla. Fl. Cont. Dist. v. Wye River Farm, 297 So.2d 323 (Fla. 4th DCA 1974).

3. Planning is not a taking: Palm Bch. Cty. v. Wright, 641 So.2d 50 (Fla. 1994); City of Jacksonville Bch. v. Prom, 656 So.2d 581 (Fla. 1st DCA 1995); Joint Ventures; Auerbach v. DOT, 545 So.2d 514 (Fla. 3d DCA 1989); Amerkan v. City of Hialeah, 534 So.2d 796 (Fla. 3d DCA 1988); DOT v. Donahoo, 412 So.2d 400 (Fla. 1st DCA 1982); planning may be claimed actionable: City of Ft. Lauderdale v. Coolidge-South Markets Equities, L.P. 10 FLW Supp. 101 (17th Cir. 2002); James Doyne York Trust v. S.F.W.M.D., 3 FLW Supp. 277 (15th Cir. 1995); counties and municipalities may do advance acquisition: F. S. 127.01(1)(b), 166.401(2); see also Blight , Inverse Condemnation below.

4. SCALE due diligence requirements. Condemnors should consider Safety, Costs, Alternative sites, Long range planning, and Environmental factors, Fl. Power Corp. v. Gulf Ridge Council, 385 So.2d 1155 (Fla. 2d DCA 1980); Schl. Bd. of Broward Cty. v. Viele, 459 So.2d 875 (Fla. 4th DCA 1984); Fl. Power & Light v. Berman, 429 So.2d 79 (Fla. 4th DCA 1983).

5. Judicial review is limited. (But try strictly enforcing this.) Hillsborough Cty. v. Sapp, 280 So.2d 443 (Fla. 1973); Security Mngt. Corp. v. DOT, 718 So.2d 339 (Fla.4th DCA 1998). A court may not substitute its judgment. City of St. Petersburg v. Vinoy Pk. Hotel Co., 352 So.2d 149 (Fla. 2d DCA 1977). The summary nature, and short notice, of ch. 74 are not subject to the ordinary exercise of judicial discretion. See Fl. St. 74.051(2):"...not inconsistent with the provisions of this section."; Compare: Matrix Constr. Corp. v. Mecca Constr., Inc., 578 So.2d 388 (Fla. 3rd DCA 1991).

6. Only substantial compliance with applicable statutes is required. Inland Wtrwy. Dev. Co. v. City of Jacksonville, 37 So.2d 333 (Fla. 1948); Dist. Bd. of T. of Daytona Bch. C. Coll. v. Allen, 428 So.2d 704 (Fla. 5th DCA 1983). (Some cases say strict construction, eg Baycol.)

7. If federal funds are used, then a whole other level of planning, scheduling, and due diligence activities is required.
8. Right of entry for testing. Counties F.S. 127.01(1)(b).

C. Ch 74 Good faith estimate of value.

1. It is not presentable to the jury. SRD v. Wingfield, 101 So.2d 184 (Fla. 1st DCA 1958); Bainbridge v. SRD, 139 So.2d 714 (Fla. 1st DCA 1962); SRD v. Levato, 199 So.2d 714 (Fla. 1967); Fl. E. C. Ry. Co. v. Broward Cty., 421 So.2d 681 (Fla. 4th DCA 1982); Culbertson v. SRD, 165 So.2d 255 (Fla. 1st DCA 1964); no written report required: Cordones v. Brevard Cty., 781 So.2d 519 (Fla. 5th DCA 2001); non-appraiser opinion: Fl. Wat. Serv. v. Util. Comm., 790 So.2d 501 (Fla. 5th DCA 2001).
2. Cost to cure testimony. Capo Inv. Group Corp. v. DOT, 578 So.2d 513 (Fla. 5th DCA 1991). See Cost to Cure, and Severance Damages below.
3. Billboards (ODAs): DOT v. Allen, 447 So.2d 1383 (Fla. 5th DCA 1984) (based on F. S. 479.24, later amended); DOT v. Heathrow Land & Dev. Corp., 579 So.2d 183 (Fla. 5th DCA 1991) (Federal Uniform Relocation Act, URA, case); National Adv. Co. v. DOT, 611 So.2d 566 (Fla. 1st DCA 1992) (non-URA case); DOT v. Powell, 721 So.2d 795 (Fla. 1st DCA 1998) (URA case); Hernando Cty. v. Anderson, 737 So.2d 569 (Fla. 5th DCA 1999) (non-URA case). See also Appraisal Methodologies
4. ODAs F. S. 70.20 now requires local governments to compensate sign/ODA owners for relocation/removal of signs on any road within their jurisdictions, except those in amortization programs predating F. S. 70.20, and contains a statutory procedure which must be followed. F. S. 479.15 requires locals to pay for ODA removals on state and federal roads within their jurisdictions. See also "Unity Rule" and "ODAs" under H. below.

D. Presuit Negotiations and Offers

1. Ch.73 presuit good faith negotiations, written offer, and written appraisal requirements apply to local governments. These are technical and should be followed verbatim. See F. S. 73.015; negotiation duty only to send written offers and await a response. Simmons v. DEP, 849 So.2d 415 (Fla. 2d DCA 2003).

E. Initial Pleading and Procedure

1. Ch 73 is a “special statutory procedure” which controls procedure. F.S. 73.012, Rule 1.010 F.R.C.P.; See Wesley Constr. Co. v. Yarnell, 268 So.2d 454 (Fla. 4th DCA 1972). Rule 1.010 provides both that chapter 73 governs procedure, and limits use of other rules. Compare: Crocker v. Diland Corp., 593 So.2d 1096 (Fla. 5th DCA 1992). (Yet Ch 73 also defers to the Rules. Each defers to the other.)
2. The resolution must be attached. Tosohatchee Game Preserve Inc. v. Cent. and So. Fl. Flood CI Dist., 265 So.2d 681 (Fla. 1972); Salfi v. DOT, 312 So.2d 781 (Fla. 4th DCA 1975). It must contain the proposed use, that conditions precedent are met, a property description, the interest sought, and finding of necessity. F. S. 73.021. Spafford v. Brevard Cty., 110 So. 451 (Fla. 1926); Seadade Ind., Inc. v. Fl. Pow. & L. Co., 245 So.2d 209 (Fla. 1971); Gregory v. Indian R. Cty., 610 So.2d 547 (Fla. 1st DCA 1993); Walker v. Fl. Gas Trans. Co., 491 So.2d 1286 (Fla. 1st DCA 1960); City of Ocala v. Red Oak Farm, Inc., 636 So.2d 81 (Fla. 5th DCA 1994); Griffin; Wye River; Carlor Co Inc., v. City of Miami, 62 So.2d 897 (Fla. 1953); Houston Texas & Oil Corp. v. Hoefner, 132 So.2d 38 (Fla. 2d DCA 1961); City of Clearwater v. Janet Land Corp., 343 So.2d 853 (Fla. 2d DCA 1976)
3. The petition must allege that a resolution, when required, has been adopted. See F.S. 73.021. Substantial compliance is required.; Red Oak; Dist. Bd. Of Trustees of Daytona Bch. Comm. Coll. v. Allen, 428 So.2d 704 (Fla. 5th DCA 1983). See also F.S. 373.023(3) notice to DEP or WMDs.
4. Scope of project rule. The appraiser should consider this factor from the outset. F. S. 73.071(5); 325 W. Adams St., Ltd.,v. City of Jacksonville, 863 So.2d 380 (Fla. 1st DCA 2004). But see, DOT v. Nalven, 455 So.2d 301 (Fla. 1984), and below.
5. Answer should plead statutory damages. Tuttle v. DOT, 327 So.2d 841 (Fla. 1st DCA 1976). See Maples v. DOT, 588 So.2d 25 (Fla. 1st DCA 1991), on failure to plead a defense.
6. Condo owners: special notice rules. F.S. 73.073(1). After 1994, condo bylaws must include power to convey. If not, it's presumed. F. S. 718.111(7)(b), (2)(m). Also see MHP special pleading rules, ch 73.

7. Notice of disclosure of beneficial interests required. F. S. 286.23(1).
8. See also Inverse Condemnation/Threat of Condemnation below.

F. Chapter 74 Order of Taking Summary Procedure

1. Chapter 74, Fl. Stats. (1949), is a summary procedure, not merely a “quick take” procedure. SRD v. Forehand, 56 So.2d 901 (Fla. 1952); Belcher v. Fl. Power & L. Co., 74 So.2d 56 (Fla. 1954); Couse v. Canal Auth., 209 So.2d 865 (Fla. 1968). Palladino Holding Corp. v. Broward Cty., 504 So.2d 465 (Fla. 4th DCA 1987) Cusmano v. Tpa-Hillsb. Cty. Expwy. Auth., 301 So.2d 117 (Fla. 2nd D.C.A. 1974). No hearing is required(!). Sec. 74.051. Chapter 74 is also a “special statutory procedure”. Wesley, op cit. Rule 1.010 both provides that ch. 74 governs procedure, and limits use of other rules. Compare: Crocker v. Diland Corp., 593 So.2d 1096 (Fla. 5th DCA 1992). Pretrial, case management, mediation, and some motion practice rules are virtually inapplicable (unless you allow it). Discovery, including its sanctions, is limited by the summary nature of chapter 74: an OT can be set sooner than discovery responses are due. Sec. 73.031(1), 74.041(3); Rule 1.010. Discovery is not a due process right. Generally, an OT should not be continued: this would defeat ch. 74. Fl. St. 74.051(2), Forehand, id.
2. Ch 74 is not a "level" evidentiary or procedural playing field. Condemnors initially present only some evidence of public purpose, necessity, and an estimate of value, a prima facie case. City of Lakeland v. Bunch, 293 So. 2d 66 (Fla.1974); City of Jacksonville v. Griffin, 346 So.2d 988 (Fla. 1977); see City of Cocoa v. Holland Properties, Inc., 625 So.2d 17 (Fla. 5th DCA 1993); Fl. Power & L. Co.v. Berman, 429 So.2d 79 (Fla. 4th DCA 1983); Security Mngt. Corp. v. DOT, 718 So.2d 339 (Fla. 4th DCA 1998); Dade Cty. v. Paxson, 270 So.2d 455 (Fla. 3d DCA 1972); Canal Auth. v. Miller, 243 So.2d 131 (Fla. 1970). However, the defendant’s burden is clear and convincing evidence. City of Jacksonville v.Griffin, 346 So.2d 988 (Fla. 1977).
3. Judicial review is limited. Hillsborough Cty. v. Sapp, 280 So.2d 443 (Fla. 1973); Security Mngt. Corp. v. DOT, 718 So.2d 339 (Fla. 4th DCA 1998).
4. Only substantial compliance with applicable statutes is required. Inland Wtrwy. Dev. Co. v. City of Jacksonville, 37 So.2d 333 (Fla. 1948); see Dist. Bd. Of T. of Daytone Bch. v. Allen, 428 So.2d 704 (Fla. 5th DCA 1983). Contrast Peavy-Wilson Lumber Co. v. Brevard Cty., 159 So.2d 483 (1947) (Some cases require strict compliance, conflicting with the limited

standard of review, and implicitly raising, by lack of deference, separation of powers dilemmas.)

5. A summary OT hearing should not be very long. All day or multi-day hearings exist only because unversed government lawyers and judges set or allow them. Owner continuances should generally be opposed/denied.
6. A declaration of taking is required for ch.74 procedure.

G. Pretrial Procedure

1. Discovery. Elkins v. Syken, 672 So.2d 517 (Fla. 1996); Dept. of Health and Rehab. Serv. v. J.B., 675 So.2d 241 (Fla. 4th DCA 1996) ;Carrera v. Casas, 695 So.2d 763 (Fla. 3d DCA 1997); Allstate Ins. Co. v. Boecher, 733 So.2d 993 (Fla. 1999); Surf Drugs, Inc. v. Vermette, 236 So.2d 108 (Fla. 1970); Baptist Hospital, Inc. v. Rawson, 734 So.2d 1157 (Fla. 1st DCA 1999) ; Morgan, Colling & Gilbert, P.A. v. Pope, 756 So.2d 201 (Fla. 2d DCA 2001) ; TIG Ins. Corp. of America v. Aben E. Johnson, Jr., 799 So.2d 339 (Fla. 4th DCA 2001) ; Dos Santos v. Carlson, 806 So.2d 539 (Fla. 3d DCA 2002); Dept. of Agr. & Cons. Serv. v. Broward Cty., 810 So.2d 1056 (Fla. 1st DCA 2002).
2. Trial coordination. Coordination of eminent domain cases is necessary. Team concepts have become perhaps too popular a way to think about these (and other types of) cases. James A. Helinger has written several helpful articles explaining team concepts on the analogy of team sports. Team concepts can "go too far", however. (This can bedevil zealous condemnors too.)
3. The most important fact about cases brought under ch. 74 is that the other side already has your preliminary case, including your valuation analysis, damage analysis, cure, engineering, etc, before they even start preparing their case. You must take this enormous fact into account both in preparing your preliminary position, and in planning to confront the case the other side will inevitably create based in part on what you have given them.
4. The "Pyramid of Experts".

- a. In eminent domain condemnors often aren't confronting an isolated owner's appraiser's, or CPA's, value opinion. He piggybacks other opinions: engineers, planners, and others. Whole engineering or planning conclusions are perhaps even first incorporated into one another, and then into his opinion, "lock stock and barrel". This creates what I have coined a "pyramid of experts". This happens because experts may rely on other experts, and in a complex world, often they must do so. See Ehrhardt, Florida Evidence, secs. 301.1 and 704.1. Thus it becomes necessary to attack not just an isolated opinion, but the opposing team, by attacking how it is put, and hangs, together.
- b. Some pyramiding in a complex and technical world is legitimate, valid, and necessary; much is not. Predicate experts insulate value experts from responsibility, and can bolster false positions. Predicate opinions can cast a false veneer of objectivity on value opinions.
- c. A big assumption behind rules allowing incorporating predicate opinions is that they are independent and impartial. Otherwise, pyramiding them is highly speculative and incompetent. See F. S 90.105. Absent independence, the basis for incorporation vanishes.
- d. Courts are reluctant to police evidentiary abuses and risk reversal, perhaps especially after Armadillo Partners, Inc. v. DOT, 849 So.2d 279 (Fla. 2003); see Dissent. See Meyer v. Caruso, 731 So.2d 118, refusing to follow Vallott v. Central Gulf Lines, 641 F.2d 347, cited in Ehrhardt. See Ross Dress For Less, Inc. v. Irene Radcliff, 751 So.2d 126 (Fla. 2d DCA 2000). Who should police the cottage industry of professional expert witnesses? The answer in Florida seems to be: juries.
- e. The incorporated opinion must be the type reasonably relied on during practice when not in court. See Ehrhardt 704.1, and Burnham v. State, 497 So.2d 904 (Fla. 2d DCA 1986); See especially Bender v. State, 472 So.2d 1370 (Fla 3d DCA 1985).
- f. "Field" shouldn't mean the playing field of eminent domain. Eminent domain is not a very large or neutral "field". The rule clearly contemplates experts who have a professional life in a larger field or subject outside and not involving the courtroom. These larger fields, outside the courtroom, legitimize the process of in-court reliance.

- g. An important implication is that predicate experts be experts in fields based primarily “outside the courtroom”. See Bender.
 - h. Yet there is authority for a narrow interpretation of field, or subject, for incorporating one opinion into another. See Ehrhardt 704.1 and Thunderbird v. Great Am. Ins., 566 So.2d 1296 (Fla. 1st DCA 1990). In eminent domain, experts might even claim their “field” is testimony for one side only. Some even so hold themselves out, at their peril.
 - i. The rules of evidence are far behind courtroom practice, and tend merely to sanction the loose practices and prejudices of the players.
 - j. I suggest, as a possible, tentative, formulation regarding pyramiding: In order to pass the test for reliability, regardless of the size of the field or subject matter, an expert witness should rely only on experts whose objective independence is not in issue. Generally, this would mean experts insulated from the expert witness process itself, whose “field”, and whose livelihood, is not primarily expert witness work.
5. Discovery of Experts’ Identities. An opposing party may not identify an expert not expected to be called: Carrero v. Engle Homes, Inc., 667 So.2d 1011 (Fla. 4th DCA 1996), but see Surf Drugs, Inc. v. Vermette, 236 So.2d 108 (Fla. 1970), conformed to 236 So.2d 148; Dupree v. Better Way, Inc., 86 So.2d 425 (Fla. 1956); Jacksonville Transp. Auth. v. ASC Assoc., 559 So.2d 336 (Fla. 1st DCA 1990).
6. Discovery of Experts’ Opinions. After amendment to Rule 1.280, Zuberbuhler v. DOT, 344 So.2d 1304 (Fla. 2d DCA 1977), superceded: Pinellas Cty. v. Carlson, 242 So.2d 714 (Fla. 1971), Shell v. SRD, 135 So.2d 857 (Fla. 1961), Carlton v. Bielling, 146 So.2d 915 (Fla. 1st DCA 1962), City of Miami v. Culbertson, 263 So.2d 245 (Fla. 3d DCA 1972), and Corbett Motor Supply, Inc. v. City of Orlando, 245 So.2d 93 (Fla. 4th DCA 1971). See also Frantz v. Golebiewski, 407 So.2d 283 (Fla. 3d DCA 1981); Sun Charm Ranch Inc. v. City of Orlando, 407 So.2d 938 (Fla. 5th DCA 1981); Bogosian v. St. Farm Mut. Auto Ins. 817 So.2d 968 (Fla. 3d DCA 2002), Broward Cty. v. Cento, 611 So.2d 1339 (Fla. 4th DCA 1993) and G1 above.

7. Post-Judgment cost discovery can be opposed (although lawyers do it all the time). Costs are not a “cause of action” under R. 1.110, and therefore outside the scope of discovery. Further, discovery remedies under R. 1.380 presuppose a Court “...in which the action is pending...” But see Baker v. Falcon Power, Inc., 788 So.2d 1104 (Fla. 5th DCA 2001); Smithbilt; Nassau Partners, where post-judgment cost discovery might now be justified under F.S. 73.092(2) as “supplemental proceedings”.
8. Offers of Judgment. Sarasota v. Curry, 861 So.2d 1239 (Fla. 2d DCA 2003); Crigler v. DOT, 535 So.2d 329 (Fla. 1st DCA 1988); CSR Partnership v. DOT, 741 So.2d 623 (Fla. 2d DCA 1999); DOT v. Enterprising Prof. Inv. Co., 809 So.2d 19 (Fla. 2d DCA 2002); DOT v. Hall, 707 So.2d 1163 (Fla. 1st DCA 1998).

H. Appraisal methodologies

1. Parent tract: The appraiser needs to make an independent determination of the relevant parcel. Unities of ownership, use, and contiguity are required. DiVirgilio v. SRD, 205 So.2d 317 (Fla. 4th DCA 1967); Cty. of Volusia v. Niles, 445 So.2d 1043 (Fla. 5th DCA 1984); Columbia Sussex Corp. v. DOT, 425 So.2d 90 (Fla. 1st DCA 1982); DOT v. Sun Island Boats, Inc., 510 So.2d 603 (Fla. 3d DCA 1987); DER v. Schindler, 604 So.2d 565 (Fla. 2d DCA 1992); Town of Jupiter v. Alexander, 747 So.2d 395 (Fla. 4th DCA 1998). Unities are a question of fact for court: DOT v. Jirik, 498 So.2d 1253 (Fla. 1986); or matters of law: Mulkey v. DOT, 448 So.2d 1062 (Fla. 2d DCA 1984). Presumption of separate parcels if platted (“bursting bubble” presumption): Jirik; Dade Cty. v. Midic Realty, Inc., 551 So.2d 499 (Fla. 3d DCA 1989). “Fixed” parent tract applies to compensation, not business damages: Blockbuster Video, Inc., v. DOT, 714 So.2d 1222 (Fla. 2d DCA 1998). Blockbuster implicitly refutes flawed Mulkey, which had misconstrued cure and parent tract theory, business and severance damages.
2. Unity rule. DOT v. Powell, 721 So.2d 795 (Fla. 1st DCA 1998). Unity rule abrogated by ODA law. DOT v. Allen, 447 So.2d 1383 (Fla. 5th DCA 1984) Verdict should be single. Tilden Groves Holding Corp. v. Orlando/Orange Cty. Expwy. 816 So.2d 658 (Fla. 5th DCA 2002; Nat’l. Adv. Co. v. DOT, 611 So.2d 566 (Fla. 1st DCA 1992).
3. The general rule to appraise a partial taking is the “before and after” rule. Jahoda v. SRD, 106 So.2d 870 (Fla. 2d DCA 1958). An exception exists for cures which mitigate damage. Hill v. Marion Cty., 238 So.2d 163 (Fla. 1st DCA 1970); Canney v. City of St. Petersburg, 466 So.2d 1193 (Fla. 2d

DCA 1985); see Patel, Armadillo. Further, there are elements of damage for which no compensation will be given even though value may be adversely affected. Jahoda, (See Consequential damages)

4. Appraisal approaches; Depth rule: Jacksonville Expwy. Auth. v. Milford, 115 So.2d 778 (Fla. 1st DCA 1959); development approach, Boynton v. Canal Auth., 265 So.2d 722 (Fla. 1st DCA 1972); Div. of Bond Finance v. Rainey, 275 So.2d 551 (Fla. 1st DCA 1973); Cost approach: DOT v. Frenchman, Inc., 576 So.2d 224 (Fla. 4th DCA 1985); special use valuation: Dade Cty. v. General Waterworks Corp., 267 So.2d 633 (Fla. 1972); City of St. Petersburg v. Clarke, 492 So.2d 685 (Fla. 2d DCA 1986),
5. Speculation, misconception of law, or failure to consider factors, may bar opinion: Yoder v. Sarasota Cty., 81 So.2d 219 (Fla. 1955); Byrd, SRD v. Falcon, 157 So.2d 563 (Fla. 2d DCA 1963), Boynton; Stubbs; Peebles v. Canal Auth., 254 So.2d 232 (Fla. 1st DCA 1971); DOT v. Samter, 393 So.2d 1142 (Fla. 3d DCA 1981), Mulkey v. DOT, 448 So.2d 1062 (Fla. 2d DCA 1984), Sarasota Cty. v. Burdette, 479 So.2d 763 (Fla. 2d DCA 1985); Rochelle v. SRD, 196 So.2d 477 (Fla. 2d DCA 1967), Walters v. SRD, 239 So.2d 878 (Fla. 1st DCA 1970), weight rather than sufficiency: Falcon; Armadillo,
6. Comparable Sales
 - a. Mere offers are inadmissible. Rice v. City of Ft. Lauderdale, 281 So. 2d 36 (Fla. 4th DCA 1973); Orlando-Orange Cty. Expwy. Auth. v. Diversified Service, 283 So. 2d 876 (Fla. 4th DCA 1973).
 - b. Sale time not too remote. Stamiger v. Jacksonville Expwy. Auth., 182 So. 2d 483 (Fla. 1st DCA 1966).
 - c. Remote sale, transitional market, inadmissible. Nour v. DOT, 267 So. 2d 365 (Fla. 1st DCA 1972).
 - d. Purchase price inadmissible; improvements; inflationary trends; transition in use. Whidden v. DOT, 281 So. 2d 419 (Fla. 1st DCA 1973).

- e. Evidence of contamination. Finkelstein v. DOT, 656 So.2d 921 (Fla. 1995).
 - f. Comparables are usually discretionary with the court. DOT v. Samter, 393 So.2d 1142 (Fla. 3d DCA 1981); DOT v. Nalven, 455 So.2d 301 (Fla. 1984).
7. ODAs
- a. Signs are fixtures. Dot v. Allen, 447 So. 2d 1383 (Fla. 5th DCA 1984).
 - b. ODA removals: see “Ch. 74 Good faith Estimate” above.
 - c. Contributory value of bricks and sticks, the greater, must be deposited. DOT v. Heathrow, 579 So. 2d 183 (Fla. 5th DCA 1991).
 - d. The unity rule abrogated by Uniform Relocation Act. Gross rent multiplier approved. URA does not require separate trial of ODA leasehold, but discretionary with court. DOT v. Powell, 721 So.2d 795 (Fla. 1st DCA 1998).
 - e. ODA's are personalty. Hernando Cty. v. Anderson, 737 So.2d 569 (Fla. 5th DCA 1999).
8. Currentness of appraisal: Culbertson v. SRD, 165 So.2d 255 (Fla. 1st DCA 1964); Hengerford v. SRD, 212 So.2d 782 (Fla. 2d DCA 1968); DOT v. Nalven, 455 So.2d 301 (Fla. 1984); Getelman v. Levey, 481 So.2d 1236 (Fla. 3d DCA 1985); Homeowners of Winter Haven, Inc. v. Polk Cty., 320 So.2d 480 (Fla. 2d DCA 1975).
9. Condemnation Blight. A very unfavorable term. You don't want to have to ask for the jury instruction: the very discussion besmirches your case. Use a motion in limine where no material basis for a blight allegation exists, especially where their appraiser fails to understand the concept, often spoon-fed to them. See SRD v. Chicone, 158 So.2d 753 (Fla. 1963); Langston v. City of Miami Bch., 242 So.2d 481 (Fla. 3d DCA 1971); Dade Cty. v. Still, 377 So.2d 689 (Fla. 1979); Florio v. City of Miami Bch., 425 So.2d 1161 (Fla. 3d DCA 1983); Gleason v. SRD, 178 So.2d 199 (Fla. 2d DCA 1965); Hernando Cty. v. Budget Inns of Florida, Inc., 555 So.2d 1319

(Fla. 5th DCA 1990); Batmasian v. Boca Raton Comm. Red. Ag., 580 So.2d 199 (Fla. 4th DCA 1991); 325 W. Adams St., Ltd. v. City of Jacksonville, 863 So.2d 380 (Fla. 1st DCA 2003); Brown v. DOT, 884 So.2d 116 (Fla. 2d DCA 2004); compare with Scope of Project Rule

10. Easements. See Unity Rule and Inverse Condemnation.
11. Cost to cure. See Severance Damages below.
12. Tax assessments. Dist. Schl. Bd. Of Lee Cty. v. Askew, 278 So.2d 272 (Fla. 1973); Trad v. City of Jacksonville, 279 So.2d 384 (Fla. 1st DCA 1973); Kirkpatrick v. City of Jacksonville, 352 So.2d 545 (Fla. 1st DCA 1977); Hochstadt v. Sanctuary Homeowner's Assoc., 761 So.2d 1163 (Fla. 4th DCA 2000).

I. HBU/ Valuation/ Zoning/ Police Power

1. Highest and best use: Florida valuation law has long struggled with the distinguishing actual and potential from speculative uses.
2. Since zoning and other regs are police powers, Euclid v. Ambler Realty Co., 272 US 365 (1926), and compliance costs therewith are consequential in eminent domain, Selden, Martin Cty., supra., one might suppose that property taken should be valued "net" of regs affecting value. For example, one is not entitled to have a condemnation continued while litigating zoning. Rott v. City of Miami, 94 So2d. 168 (Fla. 1957). Evidence of improper zoning may be excluded. City of Miami Bch. v. Hogan, 63 So.2d 493 (Fla. 1953).
3. Yet, over time, zoning regs have become an inherent aspect of uses and values. See Swift & Co.. v. Hous. Auth. of Plant City, 106 So.2d 616 (Fla. 2d DCA 1958). HBU includes value based on legal uses, now or in the near future. Zoning evidence has long been admissible/inadmissible, depending on context. See Swift; Bd. Com'rs of St. Inst. v. Tall. B. & T, Co., 108 So.2d 74 (Fla. 1st DCA 1958); City of Miami v. Buckley, 363 So.2d 360 (Fla. 3d DCA 1978).
4. Proposed uses are proper. Bd. Com'rs. Of St. Inst.v. Tall. B. & T. Co., 108 So.2d 74 (Fla. 1st DCA 1958); SRD v. Stack, 231 So.2d 859 (Fla. 1st DCA

1969); Stack v. SRD, 237 So.2d 240 (Fla. 1st DCA 1970); DOT v. Cooper, 241 So.2d 419 (Fla. 1st DCA 1970).

5. Appraisals must be based on value at the time of the taking, not on purely speculative uses. Yoder v. Sarasota Cty., 81 So.2d 219 (Fla. 1955); Partyka, supra.; except where value is depressed by the prospect of condemnation, SRD v. Chicone, 158 So.2d 753 (Fla. 1963); see also Blight, Scope of Project, and Special Enhancement.
6. Broward County v. Patel, 641 So.2d 40 (Fla. 1994), court now micromanages the appraisal process, and extends probability/rezoning analysis to severance damages, thereby conflicting with Selden, Martin Cty., etc.. See above. Further, it conflicts in detail with much land use law. See M. S. Bentley, "The Reasonable Probability Doctrine Under Florida Eminent Domain Law", CLE Int'l. E. D. Conf., Florida, 2002. Additionally, it confounds "cost to cure" with "mitigation of damages". On the whole, an abominable opinion which should not be cited by condemnors if possible. (People will start to believe it is well reasoned law.)
7. There is also the anomaly that condemnation-related police power impacts, short of a taking, are not due process-protected interests, Selden, Martin Cty., etc. (barring the Johnson's Services v. Pinellas Cty., 863 So.2d 470 (Fla. 2d DCA 2004) sub-sub-anomaly); whereas post-Snyder, individual land use/zoning police power decisions are now quasi-judicial due-process protected, rather than legislative. The Court perhaps hadn't thought through the implications of deeming police power acts quasi-judicial, from a logistical, separation of powers, or conflict of laws perspective. Land use decisions had long been held legislative. (I had considered them more executive than legislative. See especially Snyder v. Bd. Of Cty. Commrs. Of Brevard Cty., 595 So.2d 65 (Fla. 5th DCA 1991), Reversed.)

J. Severance damages

1. Recall that damages are to the remainder, caused by the owner's loss of use of property taken; the condemnor's use of it is consequential (noncompensable). See A.2.c. above.
2. In early cases severance damages were limited to actual physical intrusion onto the remainder, Orange Belt Ry. Co. v. Craver, 13 So. 444 (Fla. 1893); SRD v. Darby, 109 So.2d 591 (Fla.1st DCA 1959); reduced

size or shape, Zetrouer v. SRD, 142 So.2d 217 (Fla. 1932); or taking of riparian rights, Worth v. City of W. Palm Bch., 132 So. 689 (Fla. 1931).

3. Abutters' rights analysis.

- a. When the law of severance damages was developing, many public roads were (and still are) acquired based on dedication, reservation, or prescription. The public agency acquired an easement, the adjacent owner retained the fee. Garnett v. Jacksonville St. A. & H. R.R. Co., 20 Fla. 889 (Fla. 1884); Robbins v. White, 42 So.2d 841 (Fla.1907); City of Jacksonville v. Shaffer, 144 So. 888 (Fla. 1932); Servando v. Zimmerman, 91 So.2d 289 (Fla. 1956). This easement "fiction" causes untold confusion.
- b. The abutting owner's fee title often extends to the center of the road. Smith v. Horn, 70 So. 435 (Fla. 1915); Burns v. McDaniel, 140 So. 314 (Fla. 1932).
- c. Use of these easements by public agencies has been limited to their purposes. Selden; Fl. S. Ry. Co. v. Brown, 1 So. 512 (Fla. 1887). But see Inverse Condemnation/Easements below.
- d. Breach of restrictions on use for roads was compensable. Seaboard Coastline Ry. v. So. Inv. Co., 44 So. 351 (Fla. 1907); Kendry v. SRD., 213 So.2d 23 (Fla. 4th DCA 1968) But see Inverse Condemnation/Easements below
- e. Reservations. In the 30s and 40s, the state acquired and then reconveyed property, reserving easements to the state for road purposes. Their subsequent use for roads does not give rise to a taking. Hillsborough Cty. v. Kortum, 585 So.2d 1029 (Fla. 2d DCA 1991); Ahlheit v. SRD, 114 So2d 623 (Fla. 1st DCA 1959); Laird v. DOT, 439 So.2d 918 (Fla. 4th DCA 1983).

4. Damages to abutters' rights caused by public work are damnum absque injuria unless they rise to the level of a taking. Selden, etc.

- a. These damages are damnum absque injuria , ie "consequential damages". Selden; See "Consequential Damages" section below.

- b. Damage to abutters' rights is also damnum absque injuria because they are subordinate to police power regulation. Selden; Anderson v. Fuller, 41 So. 684 (Fla. 1906); City of Miami Bch. v. Texas Co., 194 So. 368 (Fla. 1940); Tampa No. Ry. Co. v. City of Tampa, 107 So. 364 (Fla. 1946).
 - c. Regulation of roads is police power reg. Selden; Anderson; City of Miami v. Girtman, 104 So.2d 62 (Fla. 3rd DCA 1958); see chs.125, 166, 335, 336, F. S.
5. The police power standard applies to government use of property taken in de jure takings. See Selden, etc, under Police Power, and A 2 above.
- a. Some decisions interpret early de facto cases narrowly, condition compensability on a de jure taking, and note a discrepancy between de jure and de facto owners. City of Tampa v. Texas ; Weir; Lee Cty. The reasoning of these decisions is flawed. On proper analysis de jure and de facto owners are similarly situated, Capital Plaza, Inc. v. DOT, 381 So.2d 1090 (Fla. 1st DCA 1979), Dissent, because noncompensable damages are suffered by everyone, W. Palm Bch. Gdn. Club, Anhoco, and are subordinate to police power. Poe v. SRD, 127 So.2d. 898 (Fla. 1st DCA 1961). Capital Plaza, Martin Cty., and Stubbs, are not very susceptible to narrow interpretation. See A.2.c. above, M.1.c., and 8.d. below.
 - b. Municipalities and other political subdivisions have authority to regulate parking and traffic and to otherwise use the entire area of the street for the benefit of the public. City of Miami v. Girtman, 104 So.2d 62 (Fla. 3rd DCA 1958), 2A Nichols '6.10(3)(e).
 - c. Virtually everything in right of way is based on police power regulations. Awbrey v. City of Panama Bch., 283 So.2d 114 (Fla. 1st DCA 1973). They are incorporated into virtually all planning, design, and implementation of road projects, including minimum standards for roadway design generally. 2A Nichols '6.10(3)(e); See chs. 335, 336 Fla. Stats. All property (not just the part taken) is subject to police power regulation in the before condition. City of Miami Bch. v. Texas Co., 194 So. 368 (Fla. 1940).
 - d. Reduction in value of remaining property resulting from imposition of police power regulations of the remainder is not compensable or admissible, unless it rises to the level of a taking of the remainder.

6. Long ago, by statute, Florida allowed severance damages, originally termed “damages sustained by reason of the taking”. Orange Belt.
7. Damages based on condemnor’s use (See “Consequential Damages” below and A2 above).
 - a. In Doty v. City of Jacksonville, 142 So. 599 (Fla. 1932), a partial taking case, the Court required a condemnor to produce plans to show the proposed grade.
 - (1) This early misguided case held use of the part taken relevant for severance damages.
 - b. Doty’s reasoning and authority are weak. Doty is inconsistent with Bowden and Selden, as well as later de jure cases discussed above and below.
 - (1) Doty had erroneously relied on Chicago v. Lord, 115 N.E. 397 (Ill. 1917). In Lord the measure of damages was reasonably based on details of construction plans, because the part taken would be jointly used by condemnor and condemnee.
 - (2) In Doty, however, there was no joint use (only mere abutter’s rights) on which to base a need for plans to determine damages. There was no basis for overriding the police power regulatory authority over the part taken, or for admitting otherwise irrelevant plans into evidence.
 - c. Doty was inconsistent with earlier cases cited at A.2. above holding that a change of grade is not compensable, as well as later cases, discussed above and under “Consequential Damages” below.
 - d. Cent. and S. Fl. Flood C. Dist. v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974), erroneously relied on Doty for the admissibility of plans. Wye has been improvidently followed in many cases. See Trailer Ranch. But see also Rorabeck’s Plants and Produce, Inc. v. Schl. Dist. of Palm Bch. Cty., 853 So.2d 473 (Fla. 4th DCA 2003).

- (1) However, recall that severance damage is based only on denial of the owner's use of the part taken. If what the condemnor places there is irrelevant, then plans should normally be inadmissible under conventional rules of evidence. Selden, etc. See A.2.c. above.
- (2) Partyka v. DOT, 606 So.2d 495 (Fla. 4th DCA 1992) subsequently held fill requirements compensable, which under Martin Cty., Malone, Bennett, and Trevor Michelin, should not have been. It appears from the end of the opinion in Partyka that the Department had erroneously accepted the distinctions regarding consequential damages in Lee Cty and argued that the fill requirement fell under the project-wide consequential damage "exception" in Lee Cty. The court erroneously followed the "rule" in Lee Cty.

8. "Consequential Damages".

- a. The term has been used in different ways. Generally it was used as a term of exclusion from remedy: "Such damage, not being occasioned by any illegal or wrong act, has found expression in the phrase, damnum absque injuria. It has become the custom to speak of such damages as consequential damages meaning that they are simply the consequence of a legal act, and therefore are not a basis of recovery in the courts, nor of a lawful claim for compensation." Selden, etc.
- b. Change of Grade: "...the guaranty...that private property shall not be taken'...does not extend to mere consequential damages from a change of grade ..., but only to a trespass upon or physical invasion of the abutting property." Selden, etc. See also A2 above.
- c. "If the damage suffered by the plaintiff is the equivalent of a 'taking' or an appropriation of plaintiff's property for public use, then our constitution itself recognizes the plaintiff's right to compel compensation. On the other hand, if the damage suffered is not a taking or an appropriation within the limits of our organic law, then the damages suffered are damnum absque injuria and compensation therefor by the defendants cannot be compelled." Weir.

- d. City of Tampa v. Texas Co., 107 So.2d 216 (Fla. 2d DCA 1958) interpreted earlier cases prohibiting consequential damages narrowly, on the ground they were not de jure cases. Various senses of “consequential damages” from other jurisdictions were discussed, but not applied. There is no discernible basis for the holding. It cited as the “rule” the condemnor’s use of the part taken is compensable, and as the “exception” the consequences of the condemnor’s use of land taken from third parties are compensable.
- e. In Fl. E. C. Ry. Co. v. Martin Cty., 171 So.2d. 873 (Fla. 1965), the Court held that the owner’s severance damages were “not due to the taking”. Florida courts have flirted with the concept of consequential damages. But when the stakes have become serious, they have wisely generally retreated to a "takings" state posture, largely because the fiscal consequences have been far too costly to seriously contemplate. That was the lesson of Martin Cty.
- (1) This opinion cites and limits the expansive severance damage language in both Jacksonville Expwy. Auth. v. DuPree, 108 So.2d 289 (Fla. 1958) and Dade Cty. v. Brigham, 47 So.2d 602 (Fla. 1950). See also Behm v. DOT, 383 So.2d 216 (Fla. 1980).
- (2) After Martin Cty., “...all facts and circumstances bearing a reasonable relationship to the loss occasioned the owner...” explicitly excluded consequential damages.
- f. In DOT v. Stubbs, 285 So.2d 1 (Fla. 1973), the Court held that access as a property interest does not presently include a right to traffic flow even though commercial property might very well suffer adverse economic effects....”
- g. In DOT v. W. Palm Bch. Gdn. Club, 352 So.2d 1177 (Fla. 4th DCA 1977) consequential damages for noise were excluded.
- h. Lee Cty. v. Exch. Nat’l. Bk., 417 So.2d 268 (Fla. 2d DCA 1982): “We accept the general rule and its concomitant exception...”of consequential damages recognized in City of Tampa v. Texas.” Lee Cty. ignored adverse controlling precedent including Bowden, Selden, Lewis , Milford, and Weir, and conflicting precedent in Ness, Anhoco, and Jahoda, among others. It misinterpreted conflicting precedent in W. Palm Bch. Gdn. Club, and controlling

precedent in Capital Plaza, arguing that these cases were actually consistent with the Texas “rule.”

- (1) Review of Capital Plaza refutes this: “Severance damages are not available for a change in traffic flow.” It is not limited to the fact that the median happened to be in existing right of way. It doesn’t say, “where the change is effected in existing right of way”. Traffic flow is traffic flow, whether in the taking or in existing ROW.
- (2) If a median had been installed in the part taken the holding based on its reasoning would have been the same. This interpretation is clear from the 1st DCA opinion, J. Smith’s dissent, on which the Supreme Court later drew.
- (3) Milford recites Florida’s position on consequential damages quoted, ironically, in Texas: “The Florida courts have held uniformly that although an abutting landowner may suffer consequential damage for the use of public lands by public authority, such is damnum absque injuria and therefore not recoverable by the landowner in absence of an actual, physical taking by such public authority. Such use includes widening a street or changing the grade of a street.” “In the absence of an actual physical taking” means, in this context, in the absence of an actual physical ouster from the remainder. That’s what it meant in W. Palm Bch. Gdn. Club and earlier severance damage cases. Milford cites to Jahoda: “...there are elements of damage for which no compensation will be given...”
- (4) Partyka v. DOT, 606 So.2d 495 (Fla. 4th DCA 1992), misinterprets Milford, and misinterprets and conflicts with Capital Plaza. Additionally, Partyka severance damages were based on an incidental fill ordinance, which should have been held noncompensable under Selden, Martin Cty., etc.
- (5) Suit City discusses exercises of police power from Anhoco.
- (6) DOT v. Weggies Banana Boat, 576 So.2d 722 (Fla. 2d DCA 1991), consequential access business damages not compensable.

(7) Hubschman v. Bd. of Cty. Commrs., Collier Cty., 610 So.2d 691 (Fla. 2d DCA 1992), found consequential damages citing Lee Cty. 2d DCA flip-flopped, forgot Weggies, etc.

(8) Taylor v. DOT, 701 So.2d 610 (Fla 2d DCA1997), 2d DCA found consequential damages again, citing Lee Cty.

i. Lee Cty., Wye, and their progeny are in conflict with controlling precedent and should be repudiated.

j. Florida Power & Light v. Jennings, 518 So.2d 895 (Fla. 1987). Case involving fear and decreased value based on power lines, often cited by owner counsel for the proposition of the limitlessness of compensable damages. However, aside from having been poorly reasoned, this is a joint-use case similar in some ways to Chicago v. Lord., which had improperly underpinned flawed reasoning in Wye River (see above) Also, Florida Power, not a police power condemnor, is not entitled to subordinate owner interests to those of the public.

k. Special Enhancements Sunday v. Louisville & N. R. Co., 57 So. 351 (Fla. 1912); Chicone; Anderson v. SRD 204 So.2d 899 (Fla. 1st DCA 1967); Bray v. Dade Cty., 222 So.2d 778 (Fla. 3d DCA 1969); Pozin v. DOT, 281 So.2d 73 (Fla. 1st DCA 1973); Nalven; Mainer v. Canal Auth., 467 So.2d 989 (Fla. 1985); 325 W. Adams.

l. Construction damages have traditionally been held consequential. DOT v. Hillsboro Assoc., 286 So.2d 578 (Fla. 4th DCA 1973); Howard Johnson Co. v. DOT, 450 So.2d 328 (Fla. 4th DCA 1984); Frenchman; M & C Assoc., Inc. v. DOT, 682 So.2d 640 (Fla. 2d DCA 1996).

9. Leasehold damages

a. No separate jury award. City of Ft. Lauderdale v. Casino Realty, 313 So.2d 649 (Fla. 1975) See however ODAs and Unity Rule.

b. A partial taking is not an eviction. Orange St. Oil Co. v. Jacksonville Expwy. Auth., 143 So.2d 892 (Fla. 1st DCA 1962).

- c. Loss of rent not compensable. Gleason v. SRD, 178 So.2d 1999 (Fla. 2d DCA 1965); see also Amerikan v. City of Hialeah, 534 So. 2d 796 (Fla. 3d DCA 1988), City of Tampa v. Redner, 852 So.2d 27 (Fla. 2d DCA 2003).
 - d. Lessees may/may not share in award. Winn Dixie Stores, Inc. v. DOT, 839 So.2d 727 (Fla. 2d DCA 2003); K-Mart Corp. v. DOT, 636 So.2d 131 (Fla. 2d DCA 1994); Mullis v. DOT, 390 So.2d 473 (Fla. 5th DCA 1980) but see Elmore v. Broward Cty., 507 So.2d 1220 (Fla. 4th DCA 1987); Trump Ent. Inc. v. Publix Supermarkets, Inc., 682 So.2d 168 (Fla. 4th DCA 1996).
- 10. Cost to Cure. Hill v. Marion Cty., 28 So.2d 163 (Fla. 1st DCA 1970); Mulkey; Frenchman; Canney; Williams v. DOT, 579 So.2d 226 (Fla. 1st DCA 1991); Murray; Byrd, disapproved in Patel, reversed in Armadillo: Cost to cure is admissible only to extent it has an impact on market value of the remainder. A property owner is not entitled to additional compensation as a separate taking when the proposed cure includes a change of use for a portion of the remainder. Armadillo.
 - 11. Easements: See Inverse Condemnation/Easements below.
 - 12. Riparian Rights. Sand Key Assoc. v. Bd. Of Trustees, 458 So.2d 369 (Fla. 2d DCA 1984); Belvedere; Keisel; Intracoastal N. Condo. Assoc., Inc. v. Palm Bch. Cty., 698 So.2d 384 (Fla. 4th DCA 1997).

K. Business Damages. These are consequential damages, recoverable only by specific legislative largesse. F. S. ch 73.

- 1. Gas supplier had no retail presence, did not solicit, accept or conduct business at this location. DOT v. Standard Oil, Inc., 510 So 2d 324 (Fla. 2d DCA 1987) See Texaco v. DOT, 537 So.2d 92 (Fla. 1989); One Stop 76, Inc. v. DOT, 762 So.2d 962 (Fla. 4th DCA 2000).
- 2. No entitlement to lost rent for whole take. Amerikan.
- 3. Where whole take as to business: no business damages. Palm Bch. Cty. v. Awadallah, 548 So.2d 662 (Fla. 4th DCA 1989).

4. Quarantined citrus valued as if mature. Mid-Florida Growers v. Dept. of Ag. & Cons. Services, 570 So.2d 892 (Fla. 1990).
5. Name change does not ruin business damage claim. American Dive Center Inc. v. DOT, 632 So.2d 277 (Fla. 4th DCA 1994).
6. Must expense wages paid to self-employed owner (business "wipe-out"; see Murray); DOT v. Manoli, 645 So.2d 1093 (Fla. 4th DCA 1994).
7. Jury considers the minimum statutory period. Tampa-Hillsborough Cty. Expwy. Auth. v. Cassiano-Torres, 659 So.2d 1125 (Fla. 2d DCA 1995).
8. Measure damages from their inception, not necessarily from date of taking. Weese v. Pinellas Cty., 668 So.2d 221 (Fla. 2d DCA 1996).
9. A church cannot collect business damages. Trinity Temple Church v. Orange Cty., 681 So.2d 765 (Fla. 5th DCA 1996). Farming is/is not a business. Upton v. DOT, 270 So.2d 470 (Fla. 1st DCA 1972); Polk Cty. v. Grooms, 625 So.2d 1249 (Fla. 2d DCA 1993); growing crops: Lee Cty. v. T & H. Assoc., 395 So.2d 557 (Fla. 2d DCA 1981).
10. Unlike Manoli, where the business continues there can be an apportionment of costs between partial loss and ongoing concern. Murray v. DOT, 687 So.2d 825 (Fla. 1997).
11. "Right of Way" includes canals, ditches, etc. Joynt v. Orange Cty., 701 So.2d 1249 (Fla. 5th DCA 1997).
12. Business must have been conducted on the remainder and the damages measured will relate to that remainder. Night Flight Inc. v. Tampa-Hillsborough Cty. Expwy. Auth., 702 So.2d 538 (Fla. 2d DCA 1997).
13. Business damage claim not ruined by store's move within the shopping center. Blockbuster Video, Inc. v. DOT, 714 So.2d 1222 (Fla. 2d DCA 1998). Contrast with Mulkey.
14. Without a successful offer of judgment or a written offer, do not assume - 0- as initial amount and measure fees by Section 73.092(2); not a concern

with current statute where business makes 1st offer. DOT v. Smithbilt Ind., Inc., 715 So.2d 963 (Fla. 2d DCA 1998).

15. Family intrigues were inflammatory rather than relevant. Davis v. DOT, 717 So.2d 61 (Fla. 2d DCA 1998).
16. Damages according to the remaining term of the lease. Seminole County v. Sanford Court Investors, Ltd., 743 So.2d 1165 (Fla. 5th DCA 1999).
17. Business damages experts' costs not compensable where claimed; ruled not compensable DOT v. Jack's Quick Cash, Inc., 748 So.2d 1049 (Fla. 5th DCA 1999).
18. Whether the remainder activity is part of the business activity on the part taken is for the jury. One Stop 76, Inc. v. DOT, 762 So.2d 962 (Fla. 4th DCA 2000).
19. Water well on the remainder not enough for business damage claim. 9863 W Atlantic Ave., Inc. v. DOT, 851 So.2d 191 (Fla. 4th DCA 2003).
20. Business damaged by threat of condemnation, even when it moved early! Coleman v. Escambia Cty., 405 So.2d 227 (Fla. 1st DCA 1981). Bad law.

L. BUSINESS DAMAGES AND RELOCATION:

1. The following cases a-i below stand for independent propositions of business damages law, here ordered to argue that business damages can be measured by business relocation rather than only an in situ measure.
 - a. Business damages are compensable by statute in Florida. SRD v. Abel Investment Co., 165 So.2d 832 (Fla. 2d DCA 1964).
 - b. They are not compensable in most jurisdictions, based on the theory that the owner is at liberty to re-establish his business elsewhere. Nichols, The Law of Eminent Domain, sec.13.31(1). (I. e. They are relocable intangibles.)

- c. They are distinct from severance damages. LeSeur v. SRD, 231 So.2d 265 (Fla. 1st DCA 1970); Williams v. DOT, 579 So.2d 226 (Fla. 1st DCA 1991).
 - d. They are subject to the doctrine of mitigation of damages. Mulkey id. (See also Patel, for confusion of the issue.)
 - e. They are not subject to the site-specific limitation of the mitigation analysis of cost to cure. Mulkey v. DOT, 448 So.2d 1062 (Fla. 2nd DCA 1984); Broward Cty. v. Patel, 641 So.2d 40 (Fla. 1994); Blockbuster Video, Inc. v. DOT, 714 So.2d 1222 (Fla. 2d DCA 1998).
 - f. They are intangibles, not property in the constitutional sense. Behm v. DOT, 383 So.2d 216 (Fla. 1980).
 - g. They are inherently fact intensive. Murray v. DOT, 687 So.2d 825 (Fla. 1997).
 - h. They can be measured by the extent to which good will can, and cannot, be relocated. Mathews, id.
 - i. They can be mitigated (if applicable) by the extent to which good will can be relocated. Mulkey, Mathews, id.
2. "Super cures". Some cure efforts confuse business and severance damages by combining them in so-called "super cures". These result in conceptual confusion. Particularly after Blockbuster Video partially put to rest the business damage/parent tract confusions in Mulkey, there is no excuse. Cures cure only damages to land and fixed improvements, not business damages.

M. Inverse Condemnation

1. Inverse Condemnation

- a. Direct government takings are "de jure". Indirect "de facto" takings, government actions in the absence of formal proceedings, may result in an inverse action filed by the owner.

- b. Government "actions" may be physical or regulatory. The distinction has at times been lost on the courts. Sarasota Welfare Home, Inc. v. City of Sarasota, 666 So.2d 171 (Fla. 2d DCA 1995). See however, Lee Cty. v. Kiesel, 705 So. 2d 1013 (Fla. 2d DCA 1998). Physical and regulatory takings are different. Stover Cable T.V. of Fl., Inc. v. Summer Winds Apt. Assoc., Ltd., 493 So.2d 417 (Fla. 1986).
- c. The standards for de jure and de facto physical takings should always be, and in many cases under aberrant case law are, the same. "Appellate courts have consistently attempted to grant the same result to the property owner through inverse condemnation as the owner would have received by statutory condemnation." S. W. Moore, "Inverse Condemnation," Fl. Em. Dom. Prac. & Proc., 6th Ed. 2003, p. 13-5. Many inverse access cases are cited at A.2.c. above. Flooding is actionable. SRD v. Tharp, 1 So.2d 868 (Fla. 1941); Thompson v. Nassau Cty., 343 So.2d 965 (Fla. 1st DCA (1977)); Elliott v. Hernando Cty., 281 So.2d 395 (Fla. 2d DCA 1973); Martin v. City of Monticello, 632 So. 2d 236 (Fla. 1st DCA 1994). Even temporary flooding, delays, takings, and failed dedications are actionable. Pocock v. Town of Medley, 89 So. 2d 162 (Fla. 1956); St. Joe Paper Co. v. St. Johns Cty., 383 So.2d 915 (Fla. 5th DCA 1980); Genet v. City of Hollywood, 400 So.2d 787 (Fla. 4th DCA 1981); Town of Palm Bch. v. Palm Bch Cty., 313 So.2d 770 (Fla. 4th DCA 1975); DOT v. Ideal Holding Co., 427 So.2d 392 (Fla. 4th DCA 1983), DOT v. Ideal Holding Co., 480 So.2d 243 (Fla. 4th DCA 1985); Jacobi v. City of Miami Bch., 678 So.2d 1365 (Fla. 3d DCA 1996); Karatinos v. Town of Juno Bch., 621 So.2d 469 (Fla. 4th DCA 1993); Alexander v. Town of Jupiter, 640 So.2d 79 (Fla. 4th DCA 1994); Clay v. Monroe Cty., 849 So.2d 363 (Fla. 3d DCA 2003); Assoc. of Meadow Lake, Inc. v. City of Edgewater, 706 So.2d 50 (Fla. 5th DCA 1998); Redner; City of St. Petersburg v. Kablinger, 730 So.2d 409 (Fla. 2d DCA 1999); AGWS; Pondella Hall For Hire, Inc. v. Lamar, 855 So.2d 719 (Fla. 5th DCA 2004); Leon Cty. v. Gluesenkamp, 873 So.2d 460 (Fla. 1st DCA 2004); Hancock v. Tipton, 732 So.2d 369 (Fla. 2d DCA 1999); WCI Comm., Inc v. City of Coral Springs, 2004 WL 2171906 (Fla. 4th DCA 2004); Brevard Cty. v. Blasky, 875 So.2d 6 (Fla. 5th DCA 2004); Black v. Orange Cty., 888 So.2d 156 (Fla. 5th DCA 2004).
- d. Regulatory takings deny substantially all beneficial use. Graham v. Estuary Prop., Inc., 399 So.2d 1374 (Fla. 1981); Tampa-Hillsborough Cty. Expressway. Auth. v. A.G.W.S. Corp., 640 So.2d 54 (Fla. 1994).

2. Aviation/ Noise (see Consequential Damages discussion above)
 - a. Noise, etc. from aircraft or roads is perhaps actionable. Dean v. SRD, 165 So.2d 257 (Fla. 3d DCA 1964); Howard Johnson; Frenchman; Hillsborough Cty. Av. Auth. v. Benitez, 200 So.2d 194 (Fla. 2d DCA 1967); City of Jacksonville v. Schumann, 167 So.2d 95 (Fla. 1st DCA 1964); see Adams v. Dade Cty., 335 So.2d 594 (Fla. 3d DCA 1976); Batuis v. Broward Cty., 634 So.2d 641 (Fla. 4th DCA 1993); Fields v. Sarasota-Manatee Airport Auth., 512 So.2d 961 (Fla. 2d DCA 1987); Sarasota - Manatee Airport Auth. v. Icard, 567 So.2d 937 (Fla. 2d DCA 1990); Foster v. City of Gainesville, 579 So.2d 774 (Fla. 1st DCA 1991); Broward Cty. v. Wakefield, 636 So.2d 123 (Fla. 4th DCA 1994); compare Lee Cty. v. Exch. Natl. Bk. See Annot., "Airport Operations or Flight of Aircraft as Constituting Taking or Damaging of Property", 22 ALR4th 863 (1983); see W. Palm Bch. Gdn. Club.
3. Flooding. SRD v. Tharp, 1 So.2d 868 (Fla. 1941); Camp Phosphate Co. v. Marion Cty., 201 So.2d 793 (Fla. 1st DCA 1967); Kendry v. SRD, 213 So.2d 23 (Fla. 4th DCA 1968); DOT v. Burnette, 384 So.2d 916 (Fla. 1st DCA 1980); Leon Cty. v. Smith, 397 So.2d 362 (Fla. 1st DCA 1981); Hillsborough Cty. v. Gutierrez, 433 So.2d 1337 (Fla. 2d DCA 1983); Martin v. City of Monticello, 632 So.2d 236 (Fla. 1st DCA 1994).
4. Threat of Condemnation (Blight)
 - a. Precondemnation planning is not actionable. Auerbach v. DOT, 545 So.2d 514 (Fla. 3d DCA 1989). Likewise, failure to condemn. DOT v. Donahoo, 412 So.2d 400 (Fla. 1st DCA 1982).
 - b. Map of reservation statutes have been held facially unconstitutional. Joint Ventures, Inc. v. DOT, 563 So.2d 622 (Fla. 1990). A showing of market loss is required. Tampa-Hillsborough Cty. Expwy. Auth. v. A.G.W.S. Corp., 640 So.2d 54 (Fla. 1994); DOT v. DiGierlando, 638 So.2d 514 (Fla. 1994).
 - c. However, thoroughfare maps are not per se invalid. Counties F. S. 336.02(1)(b); cities 337.2735(1). Palm Bch. Cty. v. Wright, 641 So.2d 50 (Fla. 1994); Battaglia Properties, Ltd. v. Fl. Land and Water Adj. Comm., 629 So.2d 161 (Fla. 5th DCA 1993); City of Miami v. Romer, 73 So.2d 285 (Fla. 1954); See F. S. 163.3161, .3177(6)(b).

- d. Blight and Scope of Project rule. See Brown v. DOT, 884 So.2d 116 (Fla. 2d DCA 2004); 325 W. Adams St., Ltd. v. City of Jacksonville, 863 So.2d 380 (Fla. 1st DCA 2003).

5. Exactions

- a. Dedication of land to government as part of the land use approval process must bear a reasonable relation to the purpose of the regulation, and be proportional to the need created by the proposed use. Hernando Cty. v. Budget Inns of Florida, Inc., 555 So.2d 1319 (Fla. 5th DCA 1990); Lee Cty. v. New Testament Baptist Church of Ft. Myers, Florida, Inc., 507 So.2d 626 (Fla. 2d DCA 1987); Paradyne Corp v. DOT, 528 So.2d 921 (Fla. 1st DCA 1988); Hollywood, Inc. v. Broward Cty., 431 So.2d 606 (Fla. 4th DCA 1983); Sarasota Cty. v. Taylor Woodrow Homes, Ltd., 652 So.2d 1247 (Fla. 2d DCA 1995); St. John's W.M.Dist. v. Koontz, 861 So.2d 1267 (Fla. 5th DCA 2003).

6. Easements

- a. Use of existing public easements may expand or alter. Fee owners may claim the expanded use overburdens the easement.
- b. A right of way easement is not limited to travel and the transportation of persons and property. Public highways are designed as avenues of communication. If the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known. Nerbonne v. Fl. Power Corp., 692 So.2d 928 (Fla 5th DCA 1997); See City of Orlando and Tampa Elec. Co. v. MSD-Mattie, L.L.C. 30 FLW D341 (2005).
- c. The Nerbonne Court apparently thought this a matter of first impression. Utilities have long been held part of public infrastructure, a ubiquitous secondary use of ROW. Fl. Stats. 362.01; South. Bell Tel. & Tel. Co. v. State ex rel. Ervin, 75 So.2d 796 (Fla. 1954); Peninsular Tel. Co. v. Marks, 144 So. 330 (Fla. 1940); Gen. Tel. Co. of Fla. v. City of Bradenton, 192 So.2d 534 (Fla. 2d DCA 1966); Pinellas Cty. v. General Tel. Co. of Fla., 229 So.2d 9 (Fla. 2d DCA 1969); Awbry v. City of Panama Bch., 293 So.2d 114 (Fla. 1st DCA 1973); Fl. Stats. 337.401 et.seq.

7. Regulatory Takings

- a. The law is complex and conflicting. There are different kinds of regulatory takings. Lost Tree Village Corp. v. City of Vero Bch., 838 So.2d 561 (Fla. 4th DCA 2002).
- b. A temporary per se taking may be actionable. City of St. Petersburg v. Bowen, 675 So.2d 626 (Fla. 2d DCA 1996); but see City of Miami v. Keshbro, Inc., 717 So.2d 601 (Fla. 3d DCA 1998).
- c. A Fifth Amendment claim is not ripe until state procedures are pursued. Eide v. Sarasota Cty., 9808 F.2d 716 (11th Cir. 1990).
- d. However, a "facial" challenge to a land use ordinance does not require exhaustion or ripeness. Central Florida Investments, Inc. v. Orange Cty. Code Enf. Bd., 790 So.2d 593 (Fla. 5th DCA 2001).
- e. An "as applied" claim requires only substantial deprivation of use, rather than a taking of all uses. Golf Club of Plantation, Inc. v. City of Plantation, 717 So.2d 166 (Fla. 4th DCA 1998). But now see Lingle v. Chevron U. S. A., Inc., 544 U. S. ____ (2005) with respect to Golf Club's reliance on Agins.
- f. Deprivations less than complete require a balancing of factors. Penn Central Trans. Co. v. City of N.Y., 438 U.S. 104, 98 S.Ct. 2646, 57 L. Ed.2d 631 (1978). See also Lingle.
- g. State, federal constitutions require fair procedures for infringement of rights. McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).
- h. Some government acts have been held to be quasi-judicial rather than legislative, implicate procedural due process rights, and require strict scrutiny. Bd. of Cty. Commrs. of Brevard Cty. v. Snyder, 627 So.2d 469 (Fla.1993). See Coastal Dev. of N. Fl., Inc. v. City of Jacksonville Bch., 788 So.2d 204 (Fla.2001). For resulting anomaly vis-a-vis Eminent Domain law, see HBU/ Valuation/ Zoning/ Police Power above. See Consequential Damages/Patel case, and especially Bentley's article, above, for more judicial eminent domain/land use anomalies.

- i. Substantive due process rights are determined by the federal constitution. A state right to executive action issuance of a building permit is not so protected. City of Pompano Bch. v. Yardarm Restaurant, Inc., 834 So.2d 861 (Fla. 4th DCA 2002). But, the right to develop one's land may be protected. Moore v. City of Tall., 928 F. Supp. 1140 (N.D. Fla.1995); but see Collins & Co. v. City of Jacksonville, 38 F. Supp.2d 1338 (M.D. Fla.1998).
 - j. Equal protection claims rest on a classification unrelated to a legitimate state interest. Executive 100, Inc. v. Martin Cty., 922 F.2d 1536 (11th Cir. 1991).
 - k. Zoning law arose from nuisance law. Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L. Ed. 205 (1887); Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L. Ed. 303 (1926), 54 A.L.R. 1016; Forde v. City of Miami Bch., 146 Fla. 676, 1 So.2d 642 (Fla. 1941). If it excludes all use, it will be stricken. Forde, Burritt v. Harris, 172 So.2d 820 (Fla.1965). State law determines whether there is a property interest. Coastal Pet. v. Chiles, 701 So.2d 619 (Fla. 1st DCA 1997).
 - l. The remedy for invalid zoning has been invalidation, not compensation. Key Haven v. Bd. of Trustees of Int. Imp. T.F., 427 So.2d 153 (Fla.1983); City of Tampa v. Redner, 822 So.2d 270 (Fla. 2d DCA 2003).
8. Regulatory "Interference": The Bert J. Harris Act
- a. The Bert Harris Act provides a remedy for new regulations which inordinately burden (i.e. less than complete takings of) existing uses or vested rights. F.S. 70.001. This area is quite technical and continues to evolve.
9. Environmental Regulatory Takings
- a. No formula exists. Estuary Prop.; Nauron v. State, DER, 558 So.2d 504 (Fla. 3rd DCA 1990); Dept. of Ag. & Con. Ser. v. Polk, 568 So.2d 35 (Fla. 1990).

- b. Denial of a permit may be a taking. Taylor v. Village of N. Palm Bch, 659 So.2d 1167 (Fla. 4th DCA 1995).
- c. Ripeness is required. City of Jacksonville v. Wynn, 650 So.2d 182 (Fla. 1st DCA 1995); Tari v. Collier Cty., 56 F.3d 1533 (11th Cir. 1995)
- d. Exhaustion is required. City of Jacksonville Bch. v. Prom, 656 So.2d 581 (Fla. 1st DCA 1995); City of Key West v. Berg, 655 So.2d 196 (Fla. 3d DCA 1995); Tinnerman v. Palm Beach Cty., 641 So.2d 523 (Fla. 4th DCA 1994); Glisson v. Alachua Cty., 558 So.2d 1030 (Fla. 1st DCA 1990). Ch 120 F.S. provides appeal of permit denials in district court. An inverse may be brought in Circuit Court. Kay Haven; Lee Cty. v. New Testament Baptist Church of Ft. Myers, Inc., 507 So.2d 626 (Fla. 2d DCA 1987).

10. Riparian Rights. See Severance Damages/Riparian Rights above.

N. Mediation and Settlement

- 1. Early mediation has advantages, especially in cost savings. See F. S. 73.015.
- 2. Almost all cases are referred thereto. Many settle if properly prepared for.
- 3. You must choose a mediator familiar with eminent domain law.
- 4. Where offers of judgment have been made, these will affect negotiations.
- 5. Those new to this process must read Ch. 20, Fl. Em. Dom. Prac. And Proc., 6th Ed.
- 6. Beware of failing to settle all interests. Tilden Groves Holdings Corp. v. Orlando/Orange Cty. Exprwy. Auth., 816 So.2d 658 (Fla. 5th DCA 2002)
- 7. Also, beware settlements binding a particular zoning outcome. Chung v. Sarasota Cty., 686 So.2d 1358 (Fla. 2d DCA 1996); Morgran Co. v. Orange Cty., 818 So.2d 640 (Fla. 5th DCA 2002).

8. Opinions vary whether fees and costs can properly be mediated with compensation. The weight of opinion appears to be that mediating them together is not a conflict of interest.
9. City of Miami v. Coconut Grove Marine Prop., Inc., 358 So.2d 1151 (Fla. 3d DCA 1978). Settlement agreement determines various things. SFJ requires fraud to overturn M & C Assoc. Inc. v. DOT, 682 So.2d 640 (Fla. 2d DCA 1996). Terms merge into stipulated final judgment. Tilden Groves (See Settlement and Unity Rule). An omitted interest is not grounds for relief from final judgment. Broward Cty. v. Conner, 660 So.2d 288 (Fla. 4th DCA 1995). County attorney cannot bind county.

O. Trial

1. Jury questions.
 - a. Business damages. Tampa-Hillsborough County Expressway Auth. v. Cassiano-Torres, 659 So.2d 1125 (Fla. 2d DCA 1995).
 - b. Parent tract. See Parent Tract above.
2. Exclusion of Witnesses. Goodman v. W. Coast Brace & Limb, Inc., 580 So.2d 193 (Fla. 2d DCA 1991), Jones v. DOT, 351 So.2d 365 (Fla. 4th DCA 1977), SRD v. Outlaw, 148 So.2d 741 (Fla. 1st DCA 1963); Estate of Horowitz v. City of Miami Bch., 420 So.2d 936 (Fla. 3d DCA 1982).
3. Hypotheses: Behm v. DOT, 336 So.2d 579 (Fla. 1976). See Pyramid of Experts, above.
4. Owner witnesses: White v. DOT, 645 So.2d 114 (Fla. 5th DCA 1994).
5. Construction plans: Wright v. Dade Cty., 216 So.2d 494 (Fla. 3d DCA 1968); Wye; Hodges v. Jacksonville Transp. Auth., 353 So.2d 1211 (Fla. 1st DCA 1977); Bryant v. DOT and City of Jacksonville, 355 So.2d 841 (Fla. 1st DCA 1978); DOT v. St. Regis Paper Co., 402 So.2d 1207 (Fla. 1st DCA 1981); DOT v. Decker, 408 So.2d 1056 (Fla. 2d DCA 1981); Belvedere Dev. Corp. v. DOT, 413 So.2d 847 (Fla. 4th DCA 1982); Florida Power and Light Co. v. Berman, 429 So.2d 79 (Fla. 4th DCA 1983); Kempfer v. St. Johns River Water Mngt. Dist., 475 So.2d 920 (Fla. 5th DCA 1985); City of Pompano v. Abe, 479 So.2d 863 (Fla. 4th DCA 1985);

Trailer Ranch; Partyka; Brevard Cty. v. A. Duda & Sons, Inc., 742 So.2d 476 (Fla. 5th DCA 1999); Armadillo; Rorabeck's Plants and Produce, Inc. v. School District of Palm Bch. Cty., 853 So.2d 473 (Fla. 4th DCA 2003).

6. Jury Instructions

- a.** The Fl. Bar CLE Manual, Jury Instruction 1, at the bottom, is misleading unless one explains what "damages resulting from the taking" means, i.e. "what the owner can no longer do" (not what the condemnor does). Cite cases and law in this outline, rather than Behm and DuPree which were limited by Martin Cty as noted above.
- b.** Instruction 3, paragraph 1, should not be used in that it authorizes consequential damages, based on cases limited by Martin Cty., and other cases cited herein. Additionally, it refers to Jennings, although Jennings should be read narrowly based on the fact that Florida Power was not a police power condemnor entitled to deference under Selden and its progeny down to Suit City.
- c.** Instructions 4, 5, paragraphs 2-4 are contrary to Florida law for reasons set out elsewhere herein, and should virtually never be given, unless, under p. 4, virtually all access is taken.
- d.** Instruction 5 authorizes consequential severance damages, which the Florida Supreme Court has long overwhelmingly rejected, as set out elsewhere herein.

7. Burden of Proof. Bunch; City of Ft. Lauderdale v. Casino Realty, Inc., 313 So.2d 649 (Fla. 1975); Wilkerson v. DOT, 319 So.2d 585 (Fla. 2d DCA 1975); DOT v. Saemann, 399 So.2d 359 (Fla. 4th DCA 1981); City of Orlando v. Cone, 615 So.2d 793 (Fla. 5th DCA 1993)

8. Opening and Closing, range of testimony, cause, cross examination

- a.** Opening and closing order. See Casino Realty.
- b.** Improper remarks do occur. Conner v. SRD, 66 So.2d 257 (Fla. 1953); Rollins v. DOT, 373 So.2d 386 (Fla. 4th DCA 1979); Roadway Exp., Inc. v. Dade Cty., 537 So.2d 594 (Fla. 3d DCA

1988); Telemundo Network, Inc. v. Span. Tele. Serv., Inc., 812 So.2d 461 (Fla. 3d DCA 2002); Davis v. SOFWMD, 715 So.2d 996 (Fla. 4th DCA 1998).

- c. Range of Testimony. Award must be within range of testimony. Fleissner v. DOT, 298 So.2d 547 (Fla. 2d DCA 1974); Dade Cty. v. Renedo, 147 So.2d 313 (Fla. 1962); Behm v. DOT, 336 So. 2d 579 (Fla. 1976). Jury may return verdict lower than expert testimony. Mulkey; DOT v. Duplissey, 751 So.2d 117 (Fla. 5th DCA 2000). Award cannot be lower than testimony. Meyers v. City of Daytona Bch., 30 So.2d 354 (Fla. 1947). Award exceeding estimate. Youth for Christ of Sarasota v. Sarasota Cty., 765 So.2d 794 (Fla. 2d DCA 2000).
- d. Cause. City of Live Oak v. Townsend, 567 So.2d 926 (Fla. 1st DCA 1990); Boca Teeca Corp. v. Palm Bch. Cty., 291 So.2d 110 (Fla. 4th DCA 1974).
- e. Prior testimony. Langston v. City of Miami Bch., 242 So.2d 481 (Fla. 3d DCA 1971). See Discovery of Experts' Opinions, above.
- f. Basis of expert opinion unsupported. See Ayers Estate v. Hernando Cty., 706 So.2d 349 (Fla. 5th DCA 1998).

P. Attorney fees

- 1. Court must follow statutory criteria. Schick v. Dep. of Ag. and C. Ser., 599 So.2d 641 (Fla. 1992).
- 2. Fees for litigating entitlement to fees. St. Farm F. & Cas. Co. v. Palma, 629 So.2d 830 (Fla. 1993).
- 3. No prejudgment interest on fees. DOT v. Brouwer's Flowers, Inc., 600 So.2d 1260 (Fla. 2d DCA 1992).
- 4. No fees for mortgagees. Shavers v. Duval Co., 73 So.2d 684 (Fla. 1954).
- 5. Lien on proceeds for discharged attorney fee. Winn v. City of Cocoa, 75 So. 909 (Fla. 1954).

6. Fees a result of condemnation, or not? See: Terry v. Conway Land, Inc., 508 So.2d 4011 (Fla. 5th DCA 1987); DOT v. Skidmore, 720 So.2d 1125 (Fla. 4th DCA 1998); Dade Cty. v. Ooolite Rock Co., 311 So.2d 699 (Fla. 1975); DOT v. Grant Motor Co., 345 So.2d 843 (Fla. 2d DCA (1977)); DOT v. Beta Dev. Inc., 554 So.2d 555 (Fla. 1st DCA 1989); Seminole Cty. v. Butler, 676 So.2d 451 (Fla. 5th DCA 1996); Gatlin v. DOT, 763 So.2d 1232 (Fla. 1st DCA 2000); DOT v. Shaw, 303 So.2d 75 (Fla. 1st DCA 1974); DOT v. Ideal Holding Co., 480 So.2d 243 (Fla. 4th DCA 1985); DOT v. Spring Land Inv., Ltd., 695 So.2d 414 (Fla. 5th DCA 1997); Broward Cty. v. LaPointe, 685 So.2d 889 (Fla. 4th DCA 1996); DOT v. CNL Income Fund VIII Ltd., 823 So.2d 147 (Fla. 5th DCA 2002); see also below: What are "non-monetary benefits"?

7. What are "supplemental proceedings" under F.S. 73.092(2)? See: Gatlin v. DOT, 763 So.2d 1232 (Fla. 1st DCA 2000); Amoco Oil Co. v. DOT, 765 So.2d 111 (Fla. 1st DCA 2000); DOT v. Patel, 768 So.2d 1173 (Fla. 2d DCA 2000); DOT v. Smithbilt Ind., Inc., 715 So.2d 963 (Fla. 2d DCA 1998); DOT v. LaBelle Phoenix Corp., 696 So.2d 947 (Fla. 2d DCA 1997); DOT v. ABS Properties, 693 So.2d 703 (Fla. 2d DCA 1997); Enterprising Prof. Inv. Corp. v. DOT, 29 FLW D555a (Fla. 2d DCA 2004); Bay III, Inc. v. DOT, 873 So.2d 625 (Fla. 2d DCA 2004); DOT v. Nassau Ptnrs., Ltd., 29 FLW D1811i (Fla. 1st DCA 2004); City of N. Miami Bch. v. Reed, 863 So.2d 351 (Fla. 3d DCA 2003).

8. Inverse Condemnation fees. Cty. of Volusia v. Pickens, 435 So.2d 247 (Fla. 5th DCA 1983); SRD v. Lewis, 190 So.2d 598 (Fla. 1st DCA 1966); Ideal.

9. Inverse fees are contingent until a taking is determined. State, D.N.R. v. Grables-By-The-Sea, Inc., 374 So.2d 582 (Fla. 3d DCA 1979).

10. Lodestar fees under F.S. 73.092(2): Standard Guaranty Ins. Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990); See In Re Estate of Platt, 586 So.2d 328 (Fla. 1991); Seminole Cty. v. Clayton, 665 So.2d 363 (Fla. 5th DCA 1995); DOT v. Robbins & Robbins, Inc., 700 So.2d 782 (Fla. 5th DCA 1997).

11. What are "non-monetary benefits"? DOT v. Patel, 768 So.2d 1173 (Fla. 2d DCA 2000); Amerada Hess Corp. v. DOT, 788 So.2d 276 (Fla. 4th DCA 2000); See recently: DOT v. CNL Inc. Fund VIII, Ltd., 823 So.2d 147 (Fla. 5th DCA 2002), (an anomalous case where the owner lawyer got an added fee for obtaining a consequential benefit land use variance); Ward v. Collier Cty., 852 So.2d 892 (Fla. 2d DCA 2003).

12. Rule 1.525. Carter v. Lake Cty., 840 So.2d 1153 (Fla. 5th DCA 2003); Gulf Landings Assoc., Inc. v. Hershberger, 845 So.2d 344 (Fla. 2d DCA 2003).

Q. Costs. Unfortunately, with exceptions, courts generally neither understand nor sympathize with challenging excessive expert fee claims.

1. Refusal to include photo and copy costs not an abuse of discretion. Inland W. Dev. Co. v. City of Jacksonville, 38 So.2d 676 (Fla. 1948).
2. Expert costs allowed in court's discretion. Dade Cty. v. Brigham, 47 So.2d 602 (Fla. 1950); Dade Cty. v. Midic Realty, Inc., 549 So.2d 1207 (Fla. 3d DCA 1989); Sarasota Cty. v. Burdette, 524 So.2d 1064 (Fla. 2d DCA 1988); Metro Dade Cty. v. Curelli, Douglas, 511 So.2d 602 (Fla. 3d DCA 1987); Southeast Florida Cable, Inc. v. Islandia I Condo. Ass'n., 661 So.2d 91 (Fla. 4th DCA 1995).
3. Condemnor pays for supplemental proceedings. Orange St. Oil Co. v. Jacksonville Expwy. Auth., 143 So.2d 892 (Fla. 1st DCA 1962); Nassau.
4. Duplication of Effort. Grinaker v. Pinellas Cty., 328 So.2d 880 (Fla. 2d DCA 1976); Midic; Carter v. City of St. Cloud, 598 So.2d 179 (Fla. 5th DCA 1992); Mikes v. City of Hollywood, 687 So.2d 1381 (Fla. 4th DCA 1997); Garber v. DOT, 687 So.2d 2 (Fla. 1st DCA 1996).
5. Certain expert interactions and costs are non-taxable. James P. Driscoll, Inc. v. Gould, 521 So.2d 301 (Fla. 3d DCA 1988); Burdette; Thellman v. Tropical Acres Steakhouse, Inc., 557 So.2d 683 (Fla. 4th DCA 1990); Mitchell v. Osceola Farms Co., 574 So.2d 1162 (Fla. 4th DCA 1991); Martin v. Marlin, 528 So.2d 943 (Fla. 3d DCA 1988); Skidmore; Barnes v. City of Dunedin, 666 So.2d 574 (Fla. 2d DCA 1996); Centex-Rooney Const. Co., Inc. v. Martin Cty., 725 So.2d 1255 (Fla. 4th DCA 1999); Seminole Cty. v. Boyle Inv. Co., 724 So.2d 645 (Fla. 5th DCA 1999); Borja v. Nationsbank of Florida, N.A., 730 So.2d 799 (Fla. 3d DCA 1999); Dot v. Robbins & Robbins, Inc., 700 So.2d 782 (Fla. 5th DCA 1997); La Pointe ; Garber v. DOT, 687 So.2d 2 (Fla. 1st DCA 1996); DOT v. Spring Land Inv., Ltd., 695 So.2d 414 (Fla. 5th DCA 1997); Leeds v. City of Homestead, 407 So.2d 920 (Fla. 3d DCA 1981); Miami-Dade Cty. v. City National Bk. of FL., 761 So.2d 368 (Fla. 3d DCA 2000); Seminole Cty. v. Chandrinou, 816 So.2d 1241 (Fla. 5th DCA 2002); 9863 Atlantic Ave., Inc. v. DOT, 851 So.2d 191 (Fla. 4th DCA 2003); DOT v. Nassau Partners, Ltd, 878 So.2d 1286 (Fla. 1st DCA 2004).

6. Costs re condemnation or not? DOT v. Woods, 633 So.2d 94 (Fla. 4th DCA 1994); Spring Land; Skidmore; Mills v. Aronovitz, 404 So.2d 1328 (Fla. 3d DCA 1981); DOT v. Grant Motor Co., 345 So.2d 843 (Fla. 2d DCA 1977).
7. Business experts may not recover. DOT v. Jack's Quick Cash, Inc., 748 So.2d 1049 (Fla. 5th DCA 1999); Leeds.
8. Party seeking cost has burden. Starita v. W. Putnam Post No. 10164, 666 So.2d 278 (Fla. 5th DCA 1996).
9. Costs on dismissal. City of Hallandale v. Chatlos, 236 So.2d 761 (Fla.1970); Dade City v. Oolite Rock Co., 311 So.2d 699 (Fla. 3d DCA 1975); Barnes.
10. Section 57.071, Florida Statutes, says that an expert does not get paid if he fails to do a written report at least 5 days prior to deposition or 20 days prior to the close of discovery, whichever comes first. Failing to do the written report jeopardizes the fees. Baker v. Falcon Power, Inc., 788 So.2d 1104 (Fla. 5th DCA 2001); DOT v. Southtrust Bk., 29 FLW D2571 (Fla. 1st DCA Nov. 15, 2004).

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