EMINENT DOMAIN COMMITTEE

NEWSLETTER

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Message from the 2015-16 Chair

As I sit down to write my final newsletter comments as committee chair, I reflect back on the past year and marvel at how quickly it has gone by, then realize how thankful I am to each and every one of you for allowing me the great honor of leading this stellar group of talented individuals who comprise its membership. Here are just a few of the many things I respect and admire about the Florida Bar Eminent Domain Committee:

- Its diversity – age, experience, geography, private practice, government, various walks of life – there are many different perspectives united under one unique practice area of law, and that just makes it great...
- Its intelligence – it is a smart group with a lot of brain power, and that always keeps things challenging and interesting...
- Its sense of humor – let's face it, the subject matter can be a little dry at times, and some wit and even a bit of bombastic bellowing always keeps things lively...
- Its sense of family – people always enjoy reconnecting with each other, they keep tabs on each other, and genuinely care about one another...
- And its commitment to excellence – much is demanded to succeed: effort, homework, preparation, and being held to the highest professional standards...

It truly has been a fantastic year, and I want to thank our tremendous vice chairs, Joel Settembrini, Lorena Ludovici, Toby DeYoung and Heather Patchen, who put in so much hard work to keep the meetings and other aspects of the committee running smoothly, and we are all in their debt. I also want to thank our newsletter committee, Stan Chapman, Carlos Kelly and Heather Patchen, for their fantastic work as well. Additionally, we really lucked out with the Florida Bar Liaison newly assigned to us this year, Chase Early, who was extremely supportive, responsive, helpful and did an all-around amazing job.

Finally, please join me in congratulating and welcoming our new committee chair Joel Settembrini, and vice chairs Lorena Ludovici, Toby DeYoung, Heather Patchen and new vice chair this year Ken Pope. This committee is in more than capable hands going forward, and if you continue to support and encourage them as you did me, much more success is in our future. Thank you again for the privilege of serving as chair, and thank you for supporting our committee.

Dean R. DiRose

IN THIS EDITION:

Report of the Eminent Domain Committee of the Florida Bar (2015-16)

The Florida Bar states that the scope and function of the Eminent Domain Committee is to study and keep informed of recent developments in the field of condemnation of private property for public use by governmental agencies or private companies who have the power of eminent domain. The Bar states that the Committee should keep the members of the Bar informed of developments of great significance in this field, maintain liaison with private companies and governmental agencies who have and use the power of eminent domain, and study and consider legislation, law or problems in the area of eminent domain law as developed by the committee or assigned by the president or the Board of Governors.

As in the past, this year's 87 members of the Committee approach eminent domain from varying perspectives. The Committee is made up of both government employee attorneys and private practice attorneys. The private practice attorneys represent both government entities (and utilities) and land/business owners in eminent domain matters; exclusively government agencies in these matters; or exclusively land/business owners in eminent domain matters. Some of the attorneys practice exclusively in the area of eminent domain but many do not.

The continued upturn in property development and construction of capital improvements has again resulted in an active year for the Eminent Domain Committee. The Committee's meetings have been educational and collegial in nature, focused on identifying trends related to real property valuation, litigation practice, advancements in technology, recent eminent domain court decisions, and ethics presentations associated with law firm management, client relations as well as advertising and social media issues. The meetings, as always, provide a forum which encourages and fosters open discourse regarding differing perspectives of eminent domain jurisprudence.

The Committee Chair, Dean R. DiRose, acknowledges with gratitude the hard work of the Committee Vice-Chairs, Joel Settembrini, Lorena Hart Ludovici, D. Tobyn DeYoung, and Heather A. Patchen. Several of the Vice-Chairs have served the committee for many years. The Vice-Chairs helped plan the meetings, obtain speakers and sponsors, and introduced the presenters. The Chair also thanks the co-editors of our newsletter, Carlos Kelly, Stan Chapman, and Heather A. Patchen for their great work in preparing and producing the Committee newsletter and to everyone who made and will make

presentations (listed below) at our meetings. Further, the Chair gives great thanks to our Committee's liaison with the Florida Bar, Chase Early, who helped organize the resources for the meetings including projectors, podiums, etc. and obtained CLE credit and was instrumental in professionally resolving any and all issues or problems, no matter how big or small, as they cropped up throughout the year. On behalf of the Committee, the Chair also notes the support and encouragement of Florida Bar President, Ramon A. Abadin, and President-Elect William J. Schifino, as to the Committee's work. The Chair also expresses the Committee's appreciation of meeting sponsors, appraisers Calhoun, Collister & Parham, Inc.; engineers Mesimer and Associates, Inc.; engineering and environmental consultants Chastain-Skillman, Inc. and appraisers Durrance & Associates who generously underwrote, or will be underwriting continental breakfasts and sodas for the meetings. Last but, certainly, not least, the Chair thanks those Committee members who regularly attended the meetings and members, too numerous to mention, who provided input via the Committee's email exchange or at the meetings regarding various issues, including the proposed amendments to Rule 4-4.2 of the Rules Regulating the Florida Bar.

The Committee's September 18, 2015 meeting featured a presentation on e-filing and e-discovery for eminent domain lawyers by attorney Blake H. Gaylord and the Honorable Richard A. Nielsen of the 13th Judicial Circuit in Tampa. The meeting also included Jerrod S. Mills from Trial Exhibits, Inc. discussing and demonstrating the use of technology in eminent domain trials, and Committee Vice-Chair Joel Settembrini provided an update regarding the proposed amendments to Rule 4-4.2 of the Rules Regulating the Florida Bar and took comments from the Committee members. The meeting concluded with a presentation discussing the GO Hillsborough community-driven transportation plan, given by Mike Merrill, the County Administrator of Hillsborough County, Florida.

After the September meeting, Committee Vice-Chair Joel Settembrini solicited further comments from Committee members regarding the proposed amendments to Rule 4-4.2 via the Committee email exchange. In January, 2016 an updated summary of the Committee members' meeting comments and email responses was provided by Joel to the Florida Bar, which indicated that the majority of the Committee members who responded opposed the amendments out of concern that such change would potentially impede the free flow of information between representatives of government and representatives of property owners. This update to the Bar also indicated that a minority of the Committee members who responded supported the amendments primarily based on the belief that direct pre-litigation communications between property owners' attorneys and governmental representatives may, in some instances, undermine the interests of the government in litigation.

Our January 22, 2016 meeting began with an eminent domain caselaw update year in review presented by attorney Charles S. Stratton. Professor Joshua Harris from the University of Central Florida then presented a real estate market update discussing and analyzing trends in development, growth forces and valuation. Then one of the Committee's most well-respected and senior tenured members Andrew H. Schuster provided commentary entitled "How Eminent Domain May Impact the 2016 Presidential Election." The meeting concluded with an ethics-related presentation by Florida Bar attorney Sheila M. Tuma on advertising, social media and client relations.

Planning is underway for the June 17, 2016 meeting. It is expected that the meeting will include a presentation regarding a recent Florida Supreme Court decision of great significance in the area of

eminent domain. Other speakers and topics will be announced. This meeting should be conclusion of a productive year for the Committee.

The leadership of the Committee is in good hands going forward with Joel Settembrini taking over as Chair, Lorena Hart Ludovici, D. Tobyn DeYoung, and Heather A. Patchen being reappointed as Vice-Chairs and Kenneth C. Pope being appointed as incoming Vice-Chair for the upcoming year.

Respectfully submitted,

Dean R. DiRose

2015-16 Chair Eminent Domain Committee

JANUARY 2016 MEETING SUMMARY

By Carlos A. Kelly, Esq.
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The Eminent Domain Committee met on Friday, January 22, 2016 at the Hilton Orlando Lake Buena Vista Hotel. Committee Chair, Dean DiRose, presided over his first meeting as Chair, and opened the meeting by thanking sub-committee chairs and vice-chairs.

Next, Jim Helinger introduced Charlie Stratton, who presented the eminent domain case law update. Charlie Stratton also told the story-behind-the-story about the "Hess Remainder" in New York City. In the early 20th century, in order to install a portion of subway line, the City cut through eleven city blocks. The City thought it took the entire property owned by the Estate of David Hess, but a survey revealed that the City had left a triangular remainder of less than ten square feet. The City asked the Estate to donate the remainder, but the Hess heirs "who fought tooth and nail," refused and instead installed a mosaic on the remainder, proclaiming that the area was "PROPERTY OF THE HESS ESTATE WHICH HAS NEVER BEEN DEDICATED FOR PUBLIC PURPOSES."

Next, Joel Settembrini introduced Joshua Harris, Ph.D, who is the Director of the Dr. P. Phillips Institute for Research and Education in Real Estate at the University of Central Florida. Dr. Harris noted the recent negative news coverage of economic issues. As examples, he cited headlines that the Fed intended to raise interest rates, that China's growth was falling to 7%, and that oil was down to $25/barrel. Dr. Harris said that context was important: U.S. GDP shows long-term sustained growth, retail sales are growing, hiring is robust, and while corporate profits are uneven, U.S. total personal income continues to rise and U.S. per capita disposable income shows long-term sustained growth. Dr. Harris noted that demographics are important with millennials driving growth in sales and income. Dr. Harris believes that sustained investment has returned and that there may be a housing shortage. Dr. Harris believes that new Florida demand will come from real estate, health care, high tech, education, professional and business services, corporate headquarters relocations, and retirement. Dr. Harris commented that the U.S. economy has done well but will weaken in 2016 and 2017. Dr. Harris predicted that Florida will do well, especially central Florida. Dr. Harris believes that, while interest rates are "a curve ball," especially for home building and sales, the U.S. economy may be poised for a long-term boom.

Dr. Harris also discussed trends in valuation. He noted that interest rates, discount rates, and cap rates are subject to conflicting influences. Dr. Harris also noted the rise of the automated valuation model, citing Zestimate as an example. According to Dr. Harris, the academic literature is moving in the direction of option pricing as compared to comp pricing. Dr. Harris closed his remarks by posing the question whether USPAP would remain the governing standard.

Next, Dean DiRose introduced Andrew Schuster, who discussed the impact of eminent domain on the GOP primary season. Andrew Schuster commented on Donald Trump's use of eminent domain in New Jersey and predicted that it would be the subject of political commentary during the primary process.

Next, Lorena Hart Ludovici introduced Shelia M. Tuma, ethics counsel from The Florida Bar. Ms. Tuma noted that lawyer websites are considered advertising and reminded Eminent Domain Committee members to review the advertising rules. Ms. Tuma also warned about the dangers of using social media.

Regarding client relations, Ms. Tuma reminded Committee members of the duty to keep the client informed and the duty to explain matters to the client. Ms. Tuma said that in order to avoid or limit the risk of bar grievances, lawyers should supervise staff, communicate with clients, confirm important conversations with the client in writing, conduct conflict checks, reconcile trust accounts regularly, stay current with The Florida Bar (dues, rules, CLE, record bar address), keep notes of work done for the client, and use a tickler system for important dates and for deadlines. Ms. Tuma reminded Committee members that The Florida Bar has an ethics hotline available (1.800.235.8619).

Committee Chair Dean DiRose closed the meeting, announcing that the next meeting will take place on June 17, 2016 at the Orlando Hilton Bonnet Creek.

JUNE 2016 MEETING SUMMARY

By J. Stanley Chapman
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After a brief moment of silence for those slain in the nightclub mass shooting, Chairman DiRose introduced the incoming Chair, Joel Settembrini, and Vice-Chairs Lorena Hart Ludovici, D. Tobyn DeYoung, and Kenneth C. Pope.

Following member introductions, Blake Gaylord gave a presentation on the topic of Natural Gas Act Takings. Blake addressed the relationship of the Federal Energy Regulatory Commission's (FERC) authority to issue certificates of public convenience and necessity to NGA takings litigation and the potential importance of property owner intervention in FERC proceedings early on.

Such intervention may be desirable because, in Blake's experience, gas companies will usually decline to consider project changes, even if such changes are clearly beneficial to both sides. An example of a successful FERC intervention involved the development of a crop loss compensation formula that became the basis for compensation in the takings litigation.

It is important to note that once the FERC certification is issued, the district court lacks jurisdiction to consider any property owner challenges to the taking. Note, also, that a failure of an owner to answer within 21 days will result in a waiver of defenses.

Blake then explained the lack of procedural guidance for cases under the Act. The only applicable procedural rule is Rule 71.1, and although there is reference to a deposit in the rule, there is no requirement set out in the Act to require a deposit for taking title in advance of final judgment.

Gas companies have resorted to TRO hearings to obtain injunctions approving "quick take" authority. The legal requirement for a showing of irreparable harm has been met by self-serving contracts which create huge project delay cost exposure and the ability of gas company counsel to argue this exposure as grounds for expedited transfer of title. Importantly, there is no requirement for deposit, only for imposition of bond, and consequently, no clear path for property owners to receive any compensation for the acquisition in advance of final judgment. Property owner counsel should attempt to reach an agreement with gas company counsel in advance of TRO proceedings to establish by stipulation a process for deposit and deposit disbursement.

Blake then provided a brief overview of the compensation phase. The important initial issue is whether there will be a commission appointed to determine compensation. Blake set out his argument that the Courts should not afford the same deference to having a commission decide compensation where the condemning authority is a private for-profit corporation instead of the government. Judge Mark Walker, N.D. Fla., is presiding over some of the first cases that will determine such issues as appointment of commissions and attorney fee questions, and E.D. Committee members were encouraged to keep an eye out for his rulings.

Incoming Chair, Joel Settembrini, then presented a plaque recognizing Dean DiRose's excellent service as the E.D. Committee's 2015-16 Chairman.

A panel discussion followed on the Doerr decision, which approved the imposition of Section 73.092(2) attorney fees for excessive litigation, a case that led one property owner attorney to quip that a more suitable title for this segment of the program should have been: "Excessive Litigation – How Can We Get More of It?"

In all seriousness, the E.D. Committee was treated to a detailed presentation by the lawyers involved in Doerr at all levels of the litigation and insight from Jim Spalla. Vice-chair, Tobyn DeYoung introduced the panel: Craig Willis and Joe Fixel, of Fixel & Willis; Richard Milian, of Broad and Cassel, and Jim Spalla, FDOT (FDOT was not a party to the litigation and Jim was clear he was not speaking for FDOT in the presentation).

Craig provided the case history and background from his perspective as the owner's counsel, starting with the Tosohatchee court's declaration of attorney fees as part of full compensation. Craig tracked and summarized the development of fee statutes over time, which have resulted in the current iteration in FS 73.092(1) and (2).

From the owner's perspective, the Doerr case was "over-litigated," with both sides expending more than 1000 hours in connection with a relatively small taking of unimproved land, a 9.8-acre total take. Much of the time involved litigating the award of fees to the landowner.

Richard Milian, who represented the condemning authority, agreed that this was an uncomplicated case. The case was tried to verdict within the roughly $2 million spread of the compensation opinion testimony with a resulting benefit-based fee application. In the trial court, the owner's counsel successfully challenged the validity of the condemnor's first offer for purposes of benefit fee calculation. The condemning authority successfully appealed that decision, but on remand, the trial court again

awarded the same fee as before, this time accepting the owner's alternative argument for a lodestar calculation on the theory that a benefit only based fee under §73.092(1) would be unconstitutional as applied. The Fifth DCA again reversed leading to the supreme court's consideration of the case.

Joe Fixel then presented a segment addressing some of the practical implications of the supreme court's decision to reverse and order an evidentiary hearing for determination and award of excessive litigation fees under §73.092(2) as an additur to the benefit-based fee.

Joe provided his "Top Ten" list of recommendations for establishing entitlement to an excessive litigation fee:

1) document through periodic correspondence that property owner's counsel believes that excessive litigation is occurring;

2) keep contemporaneous time records;

3) provide a record for the trial court through appropriate discovery motions such as seeking protective orders, motions to compel, and motions to strike unreasonable requests;

4) always maintain credibility and a good relationship with the trial judge throughout the case;

5) include in a timely motion for fees both the statutory and constitutional basis for your claim;

6) schedule adequate time for the fee hearing – 1, 2 or even 3 days;

7) do good discovery relating to the fee claim, including requests for admissions that time expended by owner's counsel was reasonable and comparable to the of condemnor's attorneys and was a necessary response to actions taken by the condemning authority in the case, request production of the other side's time records, depose experts and trial counsel;

8) have other counsel assist to facilitate your direct examination at the hearing;

9) prepare just as you would for trial; and

10) prepare a proposed order containing all necessary findings of fact.

Jim Spalla, who ironically now serves as FDOT's right-of-way administrator, was an expert for the landowner's attorneys. He indicated that he still believes the condemning authority used its power to push an agenda in the Doerr case without concern for whether the proceedings were unnecessarily expanded to the detriment of the landowner and owner's counsel.

Takeaways for condemning authorities from the case, according to Jim, include the fact the supreme court stated a requirement the record show a "clear pattern" of excessive litigation. Jim suggested defending such a claim by distinguishing from the facts of Doerr including: evidence the condemnor introduced a last minute witness provoking response, and exclusion of the witness; the condemnor's attorneys expended twice as much time as the landowner's attorneys; condemning authority's use of outside counsel; and the fact that more than 2000 hours were expended in a relatively simple case.

Case law involving rejection of other arguments against application of a benefit-based fee on constitutional grounds should be fully researched and brought to the trial judge's attention as may be applicable to the arguments being asserted by owner's counsel. Condemnors should be aware of and avoid the factors that might support such a claim, including:

1) late changes of experts and opinions to lower values for trial;

2) not engaging in good faith negotiation;

3) engaging in unnecessarily lengthy depositions;

4) actively discouraging property owner retention of counsel;

5) any tardiness in response to opposing counsel requests and court directives;

6) "eleventh hour" motion practice;

7) any excessive expense of time in relation to issues in the case; and

8) refusal to settle one parcel without agreement to settlement of others.

Jim Hellinger then introduced the last speaker for the meeting, Bruce McArthur, P.E., as a preeminent expert on stormwater regulatory considerations. Jim described Bruce as a "serial killer (of wildlife)," presumably a reference to his hunter/gatherer skill set.

Of primary interest in the discussion of recent changes to ERC permitting of retention and detention facilities is CS CS HB 599. This legislation states that the FDOT is no longer responsible to obtain modification of permits for facilities on lands adjacent to project takings. There must be careful assessment of what modifications will or may be imposed on an owner in connection with new water quality standards if site redevelopment is needed to cure damages resulting from condemnation.

Bruce discussed how application of a "Nitrogen-Phosphorous Rule" for control of nutrients discharge is a serious issue in large areas of the State. The E.D. Committee was shown a graphic indicating that most of the State is considered to drain into "impaired water bodies," triggering application of this, and other rules. The result of a site redevelopment might include a requirement for construction of a separate dry retention area, which depending on site configurations and water tables, could functionally destroy the economic use of a remainder.

Bruce warned that certain water management districts are starting to allow other condemning authorities to take advantage of the FDOT exemption from addressing these issues as a condition of project permitting. The bottom line: hire an expert in this area before committing to a settlement that assumes there will be no significant permitting hurdles to implementation of a cure.

Jim Hellinger was thanked for his complaints about breakfast inadequacy that led to the nice "spread" graciously sponsored by Chad Durrance. The meeting adjourned after announcement of the October meeting to be held Friday, October 21, 2016, at the Tampa Airport Marriott, Hillsborough Ballroom West, beginning at 8:30 a.m.

January 2016
Eminent Domain Caselaw Update

By: Charles S. Stratton, Esq.
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Case Summaries

Adequate State Law Remedy

Lacy v. City of St. Petersburg, No. 14-14986 (11th Cir., June 26, 2015)

In order to show an unconstitutional taking, a property owner must show both a taking and either a lack of any adequate state process for obtaining just compensation. The taking alone is not a constitutional injury, but must be coupled with the lack of just compensation and no way to get it, though exhaustion of remedies is not the issue here. No showing that Florida action for inverse condemnation would not provide an adequate state law remedy.

Attorney Fees and Costs

Caribbean Condominium v. City of Flagler Beach, No. 5D14-205 (Fla. 5th DCA Sept. 18, 2015)

While property owners are entitled to

recover their costs and fees from the condemning authority in an eminent domain case, as well as a successful inverse condemnation case, condemning authorities are entitled to recover their costs and fees from property owners in unsuccessful inverse condemnation cases. This is because there is no taking in such cases, and thus the property owner-friendly provisions of statutes concerning takings do not apply.

General Commercial Properties, Inc. v. State of Florida Department of Transportation, No. 4D14-0699 (Fla. 4th DCA Oct. 14, 2015)

Offers made to property owners for arm's length purchases are not initial offers for the purposes of calculating attorney's fees using the benefits standard, provided that there is no threat of taking behind the offer, the express language of the offer precludes the use of the offer for calculating attorney's fees, and the owner expressly waives the right to use the offer for calculating attorney's fees.

Joseph B. Doerr Trust v. Central Florida Expressway Authority, No. SCI4-1007 (Fla. Nov. 5, 2015)

Where a condemning authority engages in excessive litigation, it is unconstitutional to calculate attorney's fees solely on the basis of the benefits achieved. Instead, courts shall award that portion of the work done to defend against the excessive litigation a fee computed using a more generous statute, and shall award the remainder of the work using the normal benefits achieved statute.

Attorney Fees - Appellate

Ryan v. City of Boynton Beach, 157 So. 3d 417 (Fla. 4th DCA 2015)

Trial court cannot rule on a party's entitlement to appellate fees, though it generally may rule on the amount of the appellate fees.

Trial court can award less than the party request, but cannot award $0 as an appellate fee merely because the party did not prevail on appeal.

Parties are not entitled to fees for claims that do not arise as a direct result of the eminent domain proceeding, which is to say, claims that are sufficiently independent of the proceeding that they could have been resolved even if the eminent domain proceeding did not occur, not merely claims that were brought because the eminent domain proceeding spurred parties to act on them.

Bert Harris Act

City of Jacksonville v. Smith, 159 So. 3d 888 (Fla. 1st DCA 2015), *juris. accepted,* No. SC15-534 (Fla. May 22, 2015), and FINR II, Inc. v. Hardee County, No. 2D14-788 (Fla. 2d DCA June 10, 2015), *juris. accepted,* No. SC15-1260 (Fla. Aug. 18, 2015)

District court split as to whether a property owner can bring a Bert Harris Act claim when the property suffering the burden is not the property that is the subject of the direct governmental action. In *Smith,* the 1st DCA holds that there is no cause of action; in *FINR,* the 2d DCA holds that there is.

The cases have been taken up by the Florida Supreme Court.

Compensable Property Interests

Homestead Land Group, LLC v. City of Homestead , No. 3D14-2448 (Fla. 3d DCA June 3, 2015)

A reversionary interest in property, which is immature at the time of the taking, is not a compensable property interest.

Condemnation Blight

Teitelbaum v. South Florida Water Management District, No. 3D14-963 (Fla. 3d DCA Sept. 30, 2015)

Condemnation blight is not, standing alone, a form of taking, but is instead relevant to valuation. To successfully argue that a given instance of condemnation blight is a taking, a property owner must follow existing tests for inverse condemnation. If this cannot be shown, no damages are owed for the effects of condemnation blight.

Deeds

Rogers v. United States, No. SC14-1465 (Fla. Nov. 5, 2015)

Where property formerly conveyed to a railroad, and used as a railroad right of way is reused as a recreational trail, the owners of the parent tracts from which the railroad obtained the property, do not suffer a taking from the change in use where the deeds conveying the land did so in fee simple.

The fee simple conveyances should not be treated as easements for railroad purposes only, on the basis that Florida law disfavors fee simple grants to strips of right of way land due to the problems that arise due to changes in use, because this policy is really about resolving unclear conveyances.

Nor is an unambiguous deed rendered invalid, or limited in effect, merely because of extrinsic evidence, such as the fact that a condemning authority might have obtained such deeds in part thanks to the authority's option of condemnation.

Interest on Deposit

Florida Department of Transportation v. Mallards Cove, LLP, Nos. 2Dl3-181 & 2D13-336 (Fla. 2d DCA Mar. 6, 2015)

Property owner has no right to interest earned while good-faith deposit is in court registry.

Inverse Condemnation

Howard v. Murray, Nos. 1DI4--1841, 1DI4-1984, & 1DI4-1996 (Fla. 1st DCA Nov. 9, 2015)

An inverse condemnation claim is not ripe until the condemning authority has made a final decision with regard to the property at issue, on which the claim is based. Extraordinary delay may obviate this requirement, but at the very least, the delay must not be attributable to the claimant.

Marketable Record Title Act

Department of Transportation v. Mid-Peninsula Realty Investment Group, LLC, No. 2D14-305 (Fla. 2d DCA July 29, 2015)

Note: This is the revised opinion issued after the Florida Supreme Court released its opinion in Florida Dep't of Transp. v. Clipper Bay Invs., 160 So. 3d 858 (Fla. 2015).

Property exempt from quiet title actions brought under the Marketable Record Title to Real Property Act (MRTA) include that held by DOT and used for right of way purposes, even if the actual interest held is different.

Property exempt from quiet title actions brought under the MRTA also includes land possessed by a party whose title would be extinguished. But merely using land as a right of way, as opposed to visibly occupying it, is not possession for the purposes of the MRTA.

Orders of Taking - Dismissal

Department of Transportation v. Prescott, No. 2D15-1051 (Fla. 2d DCA Jan. 6, 2016) *Per curiam decision, affirming an order of dismissal without prejudice by the trial court of a petition for an order of taking in State Department of Transportation v. Prescott, No. 14-003176-CI (Fla. 6th Cir. Ct. Feb. 11, 2014).*

The trial opinion stated that a condemning authority has a responsibility to procure all property interests that are required in a project. In this case, the authority's plans were found to require a temporary construction easement to enable a cut and reface of a building, though the authority did not try to obtain the easement, in fact claiming that it was not necessary.

Note: The Florida Department of Transportation's Right of Way Procedures Manual's Guidance Document for Partial Acquisition Involving Building Cut-Offs and Refacing includes the following:

Sections 1.5.1-1.5.5:

In order to decide which option would be best in a given situation, the district should evaluate the various advantages and disadvantages of each option and consider . . . the extent of the easement or right of entry required to perform the cut-off and reface.

Option 1 – The District Cuts and Refaces: The district could be responsible for the performance of the cut-off and reface. . . . The district should obtain a temporary easement or right of entry of sufficient depth to perform the cut and reface to ensure that the remainder of the building is in safe condition.

Option 2 – The District Cuts and the Owner Refaces: The district could be responsible for the performance of the cut- off and the property owner could be responsible for the performance of the reface. . . . It is also important to obtain a temporary easement for demolition or a right of entry for demolition of sufficient depth for the performance of the reface as well as the cut-off in the event the property owner fails to perform the reface to ensure that the building is left in a safest condition.

. . . . Option 4 – District Acquires Entire Building: Instead of severing a building, the district may decide to offer to acquire the building in its entirety . . . and have it demolished . . . . A right of entry agreement or temporary easement

would be required to accomplish the demolition.

Section 1.4.3: "Depending on how the cut-off and reface is to be accomplished, a temporary easement for demolition or a right of entry for demolition may be required."

Sections 1.4.1-1.4.3:

The appraiser should be properly advised regarding how the building cut-off is to be handled and informed of any specific costs that should be expected, including those that would be incurred in meeting local building codes. . . . The appraisal report should include information about the appraiser's discussions with local government building officials regarding what effect local building codes will have on the cut-off and reface.

. . . . The ability to obtain a permit to cut-off and reface the building should be evaluated by the appraiser.

Per Se Takings – Personal Property

Horne v. Department of Agriculture, No. 14-275 (U.S. June 22, 2015)

The Fifth Amendment's takings clause applies to personal property just as it does real property.

Where the government engages in a *per se* taking, the question of whether economically valuable uses remain does not arise; that question is directed at mere regulatory restrictions, which physical takings do not qualify as.

Generally, a government mandate to give up specific, identifiable property as a condition to engage in commerce is a taking. While some reasonable regulations are permitted, ordinary rights are not special governmental benefits which the government may condition on the waiver of constitutional protection.

Hypotheticals as to the value of property absent the takings program, or other benefits enjoyed by property owners due to the takings program, are irrelevant in determining the amount of just compensation, which is instead to be measured by the market value of the property at the time of the taking.

Verdicts – Additur

Orange County v. Buchman (Buchman II), No. 5D14-3544 (Fla. 5th DCA Jan. 8, 2016)

Not only must an overall award of damages fall within the range of the testimony adduced at trial, but each element of the award must fall within the pertinent range of testimony. The trial court must grant relief in such cases, where a material part of a verdict is not supported by substantial, competent evidence, and is contrary to the evidence, which in this case was by means of additur, as authorized by Fla. Stat. § 768.74(1).

The views expressed in this publication are those of the authors and do not necessarily reflect the position of The Florida Bar or the Eminent Domain Committee.

Have something you've been working on that you'd like to share in the next issue? Please email Carlos A. Kelly at carlos.kelly@henlaw.com.

MEETING REMINDER:

THE NEXT MEETING OF THE EMINENT DOMAIN COMMITTEE is Friday, October 21, 2016, 8:30 a.m. to 12:00 p.m. at the Tampa Airport Marriott, Tampa, Florida.