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Journal HOME
May, 2009 Volume 83, No. 5

Eminent Domain: Identifying Issues in Damages for the General Practitioner

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"The power of eminent domain is an inherent feature of the sovereign authority of the state."[1] (In other words, the fleas go with the dog.) The Florida Constitution limits this power by requiring that full compensation be paid to an owner for property taken,[2] and our court system seeks to achieve full compensation with the remedy of damages. In evaluating the merits of a damages claim in an eminent domain proceeding, counsel should recognize the types of damages that are available. This article will briefly review the three categories of compensation in eminent domain and then focus on a single category: the damages that may be available when less than the entire property is sought to be appropriated.

Types of Damages Available

F.S. §73.071 addresses compensation and related issues in an eminent domain proceeding. Section 73.071(3) describes the three categories of compensation. The first category is "[t]he value of the property sought to be appropriated."[3] In the next category, severance damages and business damages may be available where less than the entire property is sought to be appropriated.[4] Finally, the third category allows for an award of the reasonable removal or relocation expenses incurred by a mobile home owner.[5]

Before exploring these three categories of damages, an understanding of some basic concepts associated with eminent domain takings will be helpful. To begin with, counsel should recognize there are different interests in real property available to the condemning authority, which is the party exercising the power of eminent domain.[6] For example, the condemning authority can acquire an easement interest or a fee simple interest in a particular parcel of land. In addition, a condemning authority can seek a partial taking or a whole taking, the difference being that a partial taking involves acquiring an interest in less than the entire parcel of real property owned, while a whole taking involves acquiring an interest in the entire parcel.

The damages in the first category (the value of the property taken) and in the third category (the reasonable removal or relocation expenses incurred by a mobile home owner) can be readily calculated. Of the three categories of damages, those available in the second category — the severance and business damages described in §73.071(3)(b) — are the least straight-forward. For example, severance damages require not only that less than the entire property be taken, but the taking must cause the damages.[7] Similarly, business damages are available only where there has been a partial taking; they are not recoverable in a whole taking.[8] In addition, as shown in the statutory text, a party seeking business damages must show that the taking of a right-of-way, by the state or other specified governmental body, has damaged or destroyed an established business of a certain longevity, which is owned by the party whose lands are being taken, and which is located upon the adjoining lands owned or held by that party.[9] As severance damages and business damages can be more difficult to ascertain, the balance of this article addresses both of these types of damages exclusively.

Working with Severance Damages and Business Damages

Though severance damages and business damages are related, they are not based upon identical concepts.[10] The two are related because, in order to be awarded, less than the entire property must be sought by the condemning authority.[11] Significant differences between the theoretical underpinnings of severance damages and business damages exist, however, as will be demonstrated.

The Conceptual Basis for Severance Damages and Business Damages. Severance damages may be awarded when a part has been severed from the whole.[12] Stated another way, severance damages are compensation for the reduction in value to the portion of the property not taken by condemnation.[13] Severance damages are considered part of the "just compensation required to be given" for the public taking of private property pursuant to the Florida Constitution.[14] Severance damages and business damages are not duplicative of each other, as illustrated in *Division of Admin., State Dept. of Transp. v. Ness Trailer Park, Inc.*, 489 So. 2d 1172 (Fla. 4th DCA 1986).

Before trial in *Ness Trailer Park*, the Department of Transportation had contested entitlement to business damages, but stipulated if business damages were available, their amount was $105,000.[15] On appeal, one of the issues raised was "[w]hether the trial court erred in awarding business damages in addition to compensation for the land taken and severance damages," on the grounds that an award of business damages was duplicative of damages for the reduced value of the land remaining with the land owner (*i.e.*, duplicative of severance damages).[16] In reaching the conclusion that severance damages and business damages were not duplicative, the Fourth District Court of Appeal observed that §73.071(3)(b) "permits both severance damages — if suffered — and business damages, if proven. It does not say the condemnee may have one or the other, but not both."[17] The Fourth District Court of Appeal concluded that "[t]here is nothing inconsistent about being paid for the land's loss of value and also for a loss of income from a business conducted thereon. There is no requirement of an election of remedies if the remedies are not inconsistent."[18]

Business damages, on the other hand, are a matter of legislative grace as opposed to a constitutional requirement.[19] From a conceptual standpoint, business damages are akin to lost profits: They are attributable to the reduced profit-making capacity of the business caused by taking a portion of the realty or improvements.[20] The purpose of an award of business damages is to mitigate the hardship that may result when the state exercises its eminent domain power by paying only the constitutionally required full compensation for the property taken.[21] This is because the legislature, in authorizing business damages, has recognized that a business location may be an asset of considerable value, which could be substantially damaged by a partial taking.[22]

Of critical importance to a party seeking business damages is satisfaction of the statutory requirement that the business must have operated for at least five years on land adjoining the condemned property. In *Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Service, Inc.*, 444 So. 2d 926, 928 (Fla. 1983), the Tampa-Hillsborough County Expressway Authority instituted eminent domain proceedings against several parcels of land in Hillsborough County, including a small tract owned by K. E. Morris Alignment Service, Inc.[23] K. E. Morris Alignment Service, Inc., had been in business at the location adjacent to the land being taken for only three years and two months, but made a claim for business damages on the grounds that its business had been in continuous operation for more than 30 years.[24] The trial court read §73.071(3)(b) to exclude K. E. Morris Alignment Service, Inc., from eligibility for an award of business damages because its business had been in operation at the location

for which business damages were claimed for less than five years.[25] The Second District Court of Appeal reversed, holding that §73.071(3)(b) "does not require, as a prerequisite to an award of business damages, that the business have been in operation at the location for which business damages are claimed for more than five years."[26]

The Florida Supreme Court, however, held that the Second District Court of Appeal erred in its construction of the statute because "[t]he statute indicates that the legislative intent is to allow business damages only to concerns having a physical existence for more than five years at the location where the partial taking is alleged to have caused business damages."[27] Commenting that "[s]tatutes should be construed in light of the manifest purpose to be achieved by the legislation," the Florida Supreme Court observed that the legislature, in order "[t]o assure the existence of a substantial business interest in the location as a prerequisite to an award of business damages," required five years of operation at the location.[28]

With an understanding of the theories supporting severance and business damages, we can now turn to how they are measured. As will be seen, severance damages and business damages are not unlimited. Rather, substantive principles of law apply to restrict severance damages and business damages in particular circumstances.

Measuring Severance Damages and Business Damages. The next two sections explore some of the limits on the measure of severance damages and business damages. A survey of all the limits on the measure of severance and business damages is beyond the scope of this article. Such only emphasizes the point, however, that identifying the limits of the measure of damages is important in order to prepare one's case for negotiation and trial.

"[S]everance damages . . . are generally measured by the reduction in value of the remaining property."[29] In *Mulkey v. Division of Admin., State of Fla., Dept. of Transp.*, 448 So. 2d 1062 (Fla. 2d DCA 1984), the court recognized, however, that this general measure of damages can be replaced by a cost-to-cure approach when the cost is less than the decreased value of the remainder.[30] In *Mulkey*, the Department of Transportation's real estate appraiser, utilizing the cost-to-cure method, testified at trial that the severance damages were $36,300.[31]

On appeal, one of the issues reviewed was whether the trial court erred in allowing the jury to consider the Department of Transportation's cost-to-cure method of calculating severance damages.[32] While the Second District Court of Appeal recognized the cost-to-cure approach, the court held, however, that the trial court erred by admitting the testimony of the Department of Transportation's appraiser because he had classified the use of two distinct parcels as a single parcel for the purpose of calculating the cost-to-cure.[33]

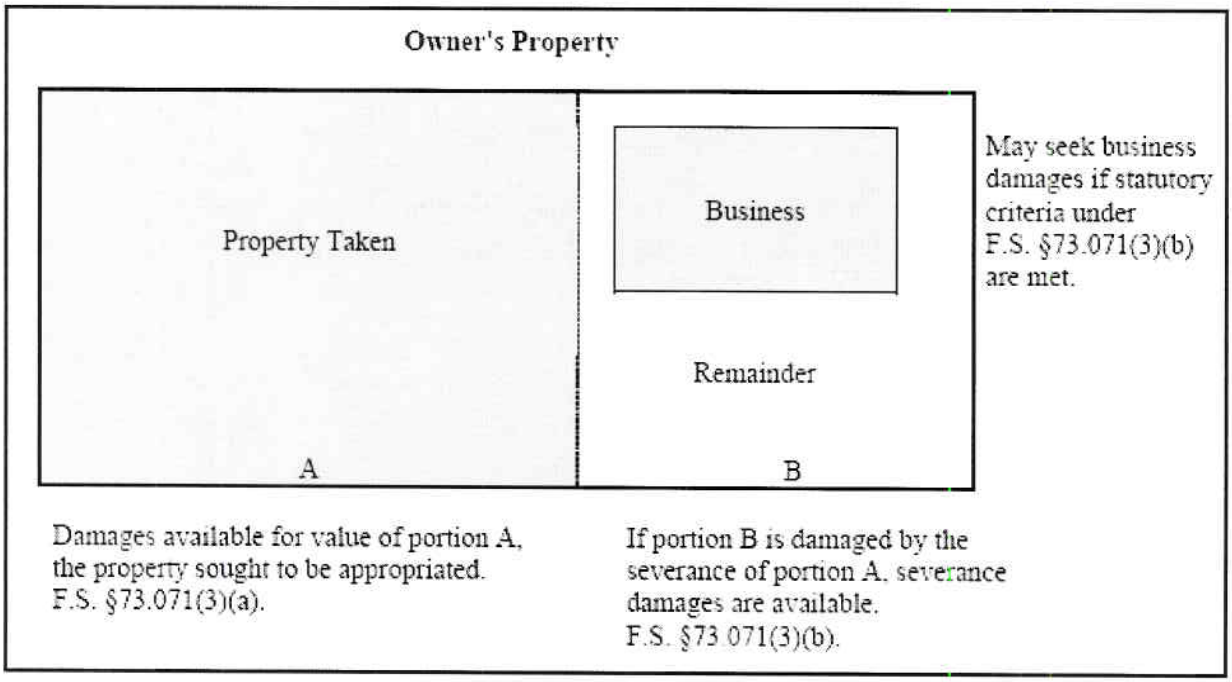
The Second District Court of Appeal noted that the evidence presented at trial indicated that patrons of the tenant-operated convenience store impacted by the taking occasionally parked on an adjoining vacant lot owned by the same people who owned the lot on which the convenience store sat.[34] The appellate court observed there was no indication, however, that the adjoining vacant lot was intended to be used as a parking lot for the convenience store or that the tenant held a legally recognized interest in the vacant lot.[35] After the appellate court determined that admission of the testimony by the Department of Transportation's expert was error, the court then noted that only the expert testimony offered by the tenant and the landowners remained.[36] The appellate court expressed a temptation to enter an order awarding severance damages in an amount commensurate with the testimony given by the appraiser for the tenant and the landowners.[37] Resisting the temptation, however, the appellate court observed "that the jury, as the ultimate trier of fact in this condemnation case,

was not bound to accept the expert's evaluation."[38] The appellate court decided to remand the case for a new trial on the question of severance damages because "the jury was authorized to return a verdict on the claim of severance damages in an amount less than the valuation offered by the condemnees' appraiser, even without rebutting testimony."[39]

Business damages may include several components, but are limited according to the interest in the property taken. For example, a tenant is entitled to recover business damages resulting from a condemnation proceeding, but the damages are limited by the duration of the tenant's lease-hold interest in existence when the court enters the order of taking.[40] In *Seminole County v. Sanford Court Investors, Ltd.*, 743 So. 2d 1165 (Fla. 5th DCA 1999), two tenants of the land owner sought business damages.[41]

At trial, the tenants' expert testified he calculated the business damages based on a letter from the owner to one of the tenants stating that, but for the condemnation, the owner fully expected the tenant could have continued as such "'for the indefinite future.'"[42] The jury entered a verdict awarding business damages to the two tenants and the trial court entered a final judgment in accordance with the jury's verdict.[43] On appeal, Seminole County argued that the trial court erred in allowing the two tenants to submit expert testimony that they sustained business damages after the date their leases were terminated by the owner.[44] The Fifth District Court of Appeal agreed with Seminole County that the tenants were entitled to recover only those business damages sustained during the right of possession, not those for any period of time after the landlord terminated their right of possession.[45]

Another limitation on business damages is the duty to mitigate. In *Mulkey*, the second point raised on appeal dealt with business damages.[46] The tenant argued to the Second District Court of Appeal that the trial court erroneously allowed portions of the expert testimony offered by the Department of Transportation on business damages to go to the jury.[47] The tenant argued that the testimony was improper because it was based upon a theory of mitigation involving use of the adjoining vacant lot — the same vacant lot the Second District Court of Appeal had determined was improperly considered by the Department of Transportation's appraiser in calculating severance damages.[48]



The appellate court noted the expert testimony offered by the Department of Transportation in rebuttal on the business damages issue was based, in part, upon a theory involving relocation of the convenience store's parking to the adjoining vacant lot.[49] The appellate court agreed that a condemnee has a duty to mitigate losses, but found that the expert testimony involved a misconception of the law because the relevant portions of the expert's opinion required the tenant to use the adjoining vacant lot, located outside of the leased convenience store property.[50] The appellate court also noted that the cost of making physical changes or modifications needed because of the taking was in the nature of severance damages, rather than business damages.[51] Observing that "the jury's award of business damages was exactly the amount fixed by ... [the Department of Transportation's] expert," the Second District Court of Appeal found that admission of his testimony resulted in prejudicial error, which required a new trial on the issue of business damages.[52]

Whether the business owner is a tenant or the land owner,[53] business damages can be claimed if the other elements of §73.071(3)(b) are met. When a business owner can show that an established business has been destroyed by a taking of the business' adjacent property, business damages may include lost profits, the costs attached to moving and selling equipment, and the loss of good will.[54] The broad scope of business damages comports with the philosophy, as identified previously in this article, that the purpose of an award of business damages is to mitigate the hardship that may occur when the state exercises its eminent domain power but pays only the constitutionally required full compensation for the property taken.[55]

Claiming Severance Damages, Business Damages, and Damages for the Property Appropriated When They All Result from the Same Taking. As shown in *Ness Trailer Park,* "[s]everance and business damages are both available in appropriate cases."[56] If business damages are identical to severance damages, however, a condemnee may not receive a double recovery.[57] Assuming no overlapping recovery is present, counsel should recognize the wide variety of damages awards that may be available in a partial taking. In addition to any damages caused to the remainder by the taking, full compensation in a partial taking includes the value of the portion taken.[58] Counsel can also seek damages for a business damaged by a partial taking if the statutory criteria are met.[59]

Conclusion

Understanding the damages that may be available is one of the most important aspects of eminent domain practice, whether viewed from the perspective of the condemning authority or the owner of an interest in the real property sought in the condemnation. Identifying the damages that may be available because of a taking is best accomplished by breaking the damages into separate categories. The three categories include damages for the value of the property appropriated, damages resulting from a partial taking, and damages resulting from the relocation of a mobile home. The least straight-forward types of damages are those caused by a partial taking. Damages that may be available as the result of a partial taking include, in addition to damages for the property taken itself, severance damages and business damages. To fully appreciate the range of damages that may be available, counsel should remember that one can claim damages for the taking, severance damages, and business damages in an appropriate case, so long as there is no overlapping recovery.

[1] *Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 928 (Fla. 1983) (citations omitted).

[2] *Id.*, citing, Fla. Const. art. X, §6(a).

[3] Fla. Stat. §73.071(3)(a)(2008).

[4] Fla. Stat. §73.071(3)(b)(2008) provides, in relevant part, that compensation shall include: "[w]here less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including, when the action is by the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than [four] years' standing before January 1, 2005, or the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing on or after January 1, 2005, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause . . . ."

[5] Fla. Stat. §73.071(3)(c)(2008) provides that: "[w]here the appropriation is of property upon which a mobile home, other than a travel trailer as defined in s. 320.01, is located, whether or not the owner of the mobile home is an owner or lessee of the property involved, and the effect of the taking of the property involved requires the relocation of such mobile home, the reasonable removal or relocation expenses incurred by such mobile home owner, not to exceed the replacement value of such mobile home. The compensation paid to a mobile home owner under this paragraph shall preclude an award to a mobile home park owner for such expenses of removal or relocation. Any mobile home owner claiming the right to such removal or relocation expenses shall set forth in his or her written defenses the nature and extent of such expenses. This paragraph shall not apply to any governmental authority exercising its power of eminent domain when reasonable removal or relocation expenses must be paid to mobile home owners under other provisions of law or agency rule applicable to such exercise of power."

[6] *Cf. Florida East Coast Railway Co. v. City of Miami*, 346 So. 2d 621, 623 (Fla. 3d D.C.A. 1977) (noting that the authorizing resolution must identify, among other things, the estate or interest in the property sought by the condemning authority).

[7] *Partyka v. Florida Dept. of Transp.*, 606 So. 2d 495, 497 (Fla. 4th D.C.A. 1992).

[8] *Lee County v. T & H Associates, Ltd.*, 395 So. 2d 557, 560 (Fla. 2d D.C.A. 1981).

[9] *See* Fla. Stat. §73.071(3)(b)(2008).

[10] *Seminole County v. Sanford Court Investors, Ltd.*, 743 So. 2d 1165, 1170 (Fla. 5th D.C.A. 1999).

[11] *See Division of Admin., State Dept. of Transp. v. Ness Trailer Park, Inc.*, 489 So. 2d 1172, 1180 (Fla. 4th D.C.A. 1986) (noting that §73.071(3)(b) implements both severance damages and business damages).

[12] *See Florida Dept. of Transp. v. Armadillo Partners, Inc.*, 849 So. 2d 279, 283 (Fla. 2003) (noting that any damage to the remainder, which is caused by the taking, is also referred to as severance damages).

[13] *Rally's Hamburgers, Inc. v. State Dept. of Transp.*, 697 So. 2d 535, 537 (Fla. 1st D.C.A. 1997).

[14] *Division of Admin., State Dept. of Transp. v. Ness Trailer Park, Inc.*, 489 So. 2d 1172, 1180

(Fla. 4th D.C.A. 1986). While *Ness Trailer Park* uses the term "just compensation," Fla. Const. art. X, §6(a) specifies "[n]o private property shall be taken except . . . with full compensation . . . ."

[15] *Ness Trailer Park*, 489 So. 2d at 1173.

[16] *Id.* at 1175.

[17] *Id.* at 1181 (citation omitted).

[18] *Id.* (citation omitted).

[19] *Sanford Court Investors,* 743 So. 2d at 1169.

[20] *Id.* at 1168.

[21] *K. E. Morris Alignment Serv.*, 444 So. 2d at 929.

[22] *Id.*

[23] *Id.* at 927.

[24] *Id.*

[25] *Id.* at 927-28.

[26] *Id.* at 928.

[27] *Id.*

[28] *Id.* at 929.

[29] *Mulkey v. Division of Admin., State Dept. of Transp.*, 448 So. 2d 1062, 1065 (Fla. 2d D.C.A. 1984) (citation omitted).

[30] *Id.*

[31] *Id.* at 1064.

[32] *Id.* at 1065.

[33] *Id.* at 1066.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Sanford Court Investors*, 743 So. 2d at 1169.

[41] *Id.* at 1167.

[42] *Id.* at 1168.

[43] *Id.*

[44] *Id.* at 1168.

[45] *Id.* Interestingly, the Fifth District Court of Appeal, in footnote 2 of its opinion, stated "[r]eliance upon this opinion as authority for a tenant's entitlement to business damages should be guarded." The Fifth District Court of Appeal need not have been so guarded itself, as "Section 73.071 . . . has long been interpreted to include the business damage claim of a lessee, and not merely that of a fee owner." *Blockbuster Video, Inc. v. State, Dept. of Transp.*, 714 So. 2d 1222, 1224 (Fla. 2d D.C.A. 1998) (citing, *State Rd. Dep't v. White*, 161 So. 2d 828 (Fla. 1964)).

[46] *Mulkey*, 448 So. 2d at 1066.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 1067.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See id.* at 1064, n.1. *See* note 4 for text of Fla. Stat. §73.071(3)(b)(2008).

[54] *Mulkey*, 448 So. 2d at 1066.

[55] *K. E. Morris Alignment Serv.*, 444 So. 2d at 929.

[56] *Ness Trailer Park*, 489 So. 2d at 1180-81.

[57] *Mulkey*, 448 So. 2d at 1066 (citation omitted).

[58] *Armadillo Partners*, 849 So. 2d at 282-83.

[59] *Young v. Hillsborough County*, 215 So. 2d 300, 301 (Fla. 1968). *See* note 4 for text of Fla. Stat. §73.071(3)(b)(2008).

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the Eminent Domain Committee of The Florida Bar, and Suzanne M. Boy, an associate attorney at Henderson, Franklin, Starnes & Holt, P.A., for their time in reviewing drafts of this article and their helpful suggestions.

This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Sandra F. Diamond, chair, and William P. Sklar and Richard R. Gans, editors.

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[Revised: 05-04-2009]