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Eminent Domain: Compensation for Business Damages in Florida

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except for the division of utility regulation. The instant case clearly indicates that not all utility consumers are adequately protected. Adequate protection could best be furnished by legislation granting the Public Service Commission regulatory powers over municipal utilities.[39] It will require such legislation to provide an answer to the problem of proper utility consumer protection.

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EMINENT DOMAIN: COMPENSATION FOR BUSINESS DAMAGES IN FLORIDA

Young v. Hillsborough County, 215 So. 2d 300 (Fla. 1968)

Petitioner owned and operated a hardware store, the front portion of which was situated on condemned land. Part of the building was destroyed by the taking of the condemned portion, thus necessitating the removal of the remainder of the building from the uncondemned land. Petitioner alleged that the county's action caused the destruction of his hardware business since it was not economically feasible to continue operation at that location. Petitioner sought damages for the value of the land and the building taken, as well as compensation for damage to his business, under Florida Statutes, section 73.071.[1] Damages were denied by the trial court, and the Second District Court of Appeal affirmed.[2] The Supreme Court of Florida granted certiorari and HELD, property owners are entitled to an award for business damage in addition to the value of the property actually taken where the property taken includes the front of a business building and such taking requires the subsequent removal of the entire building.[3] Judgment reversed.

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39. Fla. H.R. 580, 1st Sess. (1969), introduced in the 1969 session of the Florida legislature, sought to amend FLA. STAT. §366.02 (1967) and to repeal FLA. STAT. §366.11 (1967), to remove the exemption of municipal public utilities from regulation by the Public Service Commission. The bill died in committee.

1. FLA. STAT. §73.071 (3) (1967) provides: "The jury shall determine solely the amount of compensation to be paid, which compensation shall include: (a) The value of the property sought to be appropriated; and (b) Where 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 state road department, 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 five years' standing, 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; any person claiming the right to recover such special damages shall set forth in his written defenses the nature and extent of such damages."

2. 206 So. 2d 405 (2d D.C.A. Fla. 1968).

3. 215 So. 2d 300 (Fla. 1968).

Eminent domain is legally justified on the theory that the state has an original and absolute right of ownership in all land within its boundaries, and that citizens hold land subject to the state's resumption of ultimate ownership.[4] Under this power the state can take property for public use without the owner's consent[5] subject, however, to the payment of just compensation.[6] The owner of a tract of land, part of which is taken for public use, is entitled not only to compensation for that part of his land actually taken, but also for injury resulting to the remainder.[7] This damage, called "severance damage," may occur when there is any element of value that arises out of the relationship of the condemned parcel to the tract of which it was a part.[8] In order for "severance damages" to be compensable there must be both an actual taking of land and a relationship between that part taken and the remainder sufficient to indicate that compensation for injury to the remainder would in effect be compensation for the taking.[9] Severance damages are distinguished from "consequential damages," which do not flow immediately and directly from the act of the condemning authority, but from a mere consequence of such act.[10] Consequential damages are *damnum absque injuria*.[11] The Supreme Court of Florida has consistently held that under the Florida Constitution there must be an actual physical invasion before such an injury can be compensable.[12] Therefore, consequential damages are not compensable.

The majority of American courts hold that business damage falls within

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4. Daniels v. State Rd. Dep't, 170 So. 2d 846, 848-49 (Fla. 1964).

5. *See generally* Osceola County v. Triple E Dev. Co., 90 So. 2d 600 (Fla. 1956); Demeter Land Co. v. Florida Pub. Serv. Comm'n, 99 Fla. 954, 128 So. 402 (1930); Brest v. Jacksonville Expressway Authority, 194 So. 2d 658 (1st D.C.A. Fla. 1967).

6. *See generally* Jacksonville Expressway Authority v. Henry G. DuPree Co., 108 So. 2d 289 (Fla. 1958); Board of Pub. Instruction of Dade County v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955); Myers v. City of Daytona Beach, 158 Fla. 859, 30 So. 2d 354 (1947); Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 183 So. 145 (1938); City of Jacksonville v. Shaffer, 107 Fla. 367, 144 So. 888 (1932).

7. State Rd. Dep't v. Zetrouer, 105 Fla. 650, 142 So. 217 (1932); Orange Belt Ry. v. Craver, 32 Fla. 28, 13 So. 444 (1893); City of Tampa v. Texas Co., 107 So. 2d 216 (2d D.C.A. Fla. 1958).

8. Worth v. City of West Palm Beach, 101 Fla. 868, 132 So. 689 (1931). The theoretical basis for allowing compensation for injury to land remaining with the owner is that the damage to the remainder area results directly and immediately from the taking of what was originally an integral part of the land.

9. Note, *Severance Damage in Eminent Domain Proceedings*, 10 U. FLA. L. REV. 354, 356 (1957).

10. Selden v. City of Jacksonville, 28 Fla. 558, 575, 10 So. 457, 461 (1891).

11. Moore v. State Rd. Dep't, 171 So. 2d 25, 29 (1st D.C.A. Fla. 1965). The Latin phrase refers to "damage without injury."

12. *See generally* Lewis v. State Rd. Dep't, 95 So. 2d 248 (Fla. 1957); Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956); Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (1906); Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891). *See* FLA. CONST. Decl. of Rights §12 (1885); FLA. CONST. art. XVI, §29 (1885). The newly enacted Florida Constitution provides in article 10, §6(a) that: "No private property shall be taken or damaged except for a public purpose and with full compensation therefor . . . paid to each owner or secured by deposit in the registry of the court and available to the owner."

the category of consequential damages and is thus noncompensable.[13] Various reasons are given for the maintenance of this policy. Chief among these is that profits from a business are often too uncertain and speculative to become the basis of an award from the courts.[14] The true value of a business as a going concern depends upon a number of largely unascertainable factors, such as the amount of capital invested, general business conditions, the skill and ability of the proprietor, and the manner in which the owner conducts his business.[15] Because of the uncertain nature of damages suffered by business concerns, courts have been very reluctant to allow recovery beyond the value of the land actually taken by the condemning authority. In *Sgarlat Estate v. Commonwealth*,[16] the Pennsylvania supreme court said the state "does not condemn an owner's business acumen or its results expressed in value. It condemns his property, which one man may use exceeding [*sic*] well, another ill, and a third not at all. The use of one's talents is a private, not a public matter."[17] Although the policy for the rule is unquestionably sound, there is likewise no doubt that its strict application often results in hardship.

It is common knowledge that many businesses are completely dependent upon their location for economic survival. Many small concerns draw their trade almost exclusively from the residents of the areas in which they happen to be located. In many instances, it has taken years to build a reputable business with an assured clientele. Still other establishments are situated in unique locations where their fronts provide maximum exposure to potential customers. Often, no other suitable location can be found in an entire city. In such situations the taking of adjacent land by the government often works a greater hardship on the owner of a business than would the actual taking of the entire business. In attempts to alleviate this situation, only Vermont[18] and Florida[19] have passed statutes that allow an award for business damages suffered as a result of condemnation proceedings.

The Florida Legislature first provided compensation for business damage in 1933.[20] The original act was, with limited exceptions, similar to the current Florida Statutes, section 73.071, which provides in part that the sole jury function is to determine what the compensation is to include and

13. *See generally* Douglass v. Hillsborough County, 206 So. 2d 402 (2d D.C.A. Fla. 1968); *accord*, Wilden Co. v. United States, 357 F.2d 988 (U.S. Ct. Cl. 1966); Elson v. City of Indianapolis, 246 Ind. 337, 204 N.E.2d 857 (1965); Johnson County Broadcasting Corp. v. Iowa Highway Comm'n, 256 Iowa 1251, 130 N.W.2d 707 (1964); Department of Highways v. Rogers, 399 S.W.2d 706 (Ky. 1965). *Contra*, Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966). For a general treatment, *see* 2 P. NICHOLS, THE LAW OF EMINENT DOMAIN §5.76 (3d ed. J. Sackman ed. 1963).

14. Department of Highways v. Ray, 392 S.W.2d 665 (Ky. 1965); Department of Highways v. Acme Brick Co., 162 So. 2d 37 (La. App. 1964); Mississippi State Highway Comm'n v. McCardle, 243 Miss. 111, 137 So. 2d 793 (1962).

15. 2 P. NICHOLS, *supra* note 13, at 184.

16. 398 Pa. 406, 158 A.2d 541 (1960), *cert. denied*, 364 U.S. 817 (1960).

17. *Id.* at 409, 158 A.2d at 543.

18. VT. STAT. ANN. tit. 12, §1904 (a) (1957).

19. FLA. STAT. §73.071 (3) (b) (1967).

20. Fla. Laws 1933, ch. 15927.

what the amount shall be.[21] Additionally, the statute provides that the probable damages to a business are to be compensable when less than the owner's entire property is to be appropriated and the business is located on the remaining land.[22]

While the Florida statute departs radically from the general rule that damages suffered by a business as a result of eminent domain proceedings are noncompensable, an award under the statute is contingent upon the presence of *each* of a series of limiting factors. The first element is that the condemnation proceedings must constitute only a *partial* taking.[23] Second, the taking must be by the state road department or a county, municipality, board, district, or other public body.[24] Further, the statute operates only in proceedings for the condemnation of rights of way.[25]

The First District Court of Appeal initially held that compensation for business damage could be awarded only if the owner of the business also owned the land on which it was located.[26] However, the court has since construed the statute to include a lessee of land under a written lease as an "owner" of land in a constitutional sense, thereby allowing a recovery of business damages by the lessee for the *partial* taking of leased property in eminent domain proceedings.[27] Nevertheless, treatment of a lessee is no different from that of a fee owner when the land upon which the business is located is condemned in its *entirety*. In such cases neither the lessee nor the owner is entitled to compensation for business damages.[28]

In addition to the foregoing limitations, the nature and extent of the damage to the business in question must be specifically alleged and proved.[29] When proving the extent of damages, it has been held that courts must allow admission of testimony of expert witnesses as to the business value of comparable business properties.[30] The statute further requires that a business must have been in existence for at least five years in order to be eligible for an award of business damages.[31] This requirement has been held to be satisfied if the owner at the time of condemnation has not owned the business

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21. FLA. STAT. §73.071 (3) (1967).
22. FLA. STAT. §73.071 (3) (b) (1967).
23. *Id.*
24. *Id.*
25. State Rd. Dep't v. Lewis, 170 So. 2d 817, 819 (Fla. 1964). FLA. STAT. §334.03 (15) (1967) defines right of way as: "Land in which the state, the department, a county or a municipality owns the fee or has an easement devoted to or required for the use as a public road."
26. Orange State Oil Co. v. Jacksonville Expressway Authority, 110 So. 2d 687 (1st D.C.A. Fla. 1959).
27. Pensacola Scrap Processors, Inc. v. State Rd. Dep't, 188 So. 2d 38 (1st D.C.A. Fla. 1966), *cert. denied*, 192 So. 2d 494 (Fla. 1966).
28. Intercoastal Drydock, Inc. v. State Rd. Dep't, 203 So. 2d 19, 20 (3d D.C.A. Fla. 1967), *cert. denied*, 210 So. 2d 223 (Fla. 1968).
29. City of Tampa v. Texas Co., 107 So. 2d 216, 227 (2d D.C.A. Fla. 1958), *cert denied*, 109 So. 2d 169 (Fla.1959).
30. Rochelle v. State Rd. Dep't, 196 So. 2d 477 (2d D.C.A. Fla. 1967).
31. FLA. STAT. §73.071 (3) (b) (1967).

for five years, so long as the business has been in existence for a five-year period.[32] The final requirement is that the business must be located on the *remaining uncondemned portion* of the owner's property in order for business damage to be compensable.[33] It is this limitation that was at issue in the instant case, since the business was located partially on the portion of land condemned and partially on the remainder.

The Second District Court of Appeal reasoned that the value of the land actually taken by the county was enhanced by the operation of petitioner's business thereon, and that the value of the compensation for that land had been adjusted accordingly.[34] The court further indicated that it did not "see any distinction between a partial taking and a total taking where the business was destroyed."[35] The district court of appeal in the present case relied upon *Guarria v. State Road Department*,[36] which held that the statute did not require an award of business damages to be severable from damages awarded for the condemnation of real property where the effect of the condemnation was to destroy the business by an entire taking of both the business and the land.[37] This line of reasoning paralleled that of *Glessner v. Duval County*,[38] which held that business and severance damages flowing from an eminent domain proceeding were identical and therefore the condemnee, upon principles of justice and fair play, should not be allowed to recover double compensation.

The Florida supreme court granted certiorari on the basis of the application of the *Guarria* decision by the Second District Court of Appeal to a factual situation materially at variance with *Guarria*. *Guarria* dealt with the denial of business damages to an owner whose *entire business* was located on the condemned land. The condemnation proceedings in the instant case dealt with a business only *partially* on the condemned land. The supreme court held that the damages to the business were statutorily compensable, thereby rejecting the Second District Court of Appeal's argument that there was no difference between a partial taking and a complete taking where the effect of the partial taking was to destroy the possibility of the continued operation of the business. In so holding, the supreme court indicated that the statute allowed compensation where the effect of the taking resulted in either damage to, or destruction of, a business located on lands adjoining the condemned property of the owner. In the instant case, only part of the land upon which petitioner's business was located was condemned, resulting in serious damage to the remainder of the business located on the adjoining land. The district court of appeal held, essentially, that when the effect of

32. Florida State Turnpike Authority v. Anhoco Corp., 107 So. 2d 51 (3d D.C.A. Fla. 1958), *rev'd in part on other grounds*, 116 So. 2d 8 (Fla. 1959); Hooper v. State Rd. Dep't, 105 So. 2d 515 (2d D.C.A. Fla. 1958).

33. FLA. STAT. §73.071 (3) (b) (1967).

34. 206 So. 2d 405, 407 (2d D.C.A. Fla. 1968).

35. *Id.*

36. 117 So. 2d 5 (3d D.C.A. Fla. 1960).

37. *Id.* at 6.

38. 203 So. 2d 330 (1st D.C.A. Fla. 1967).