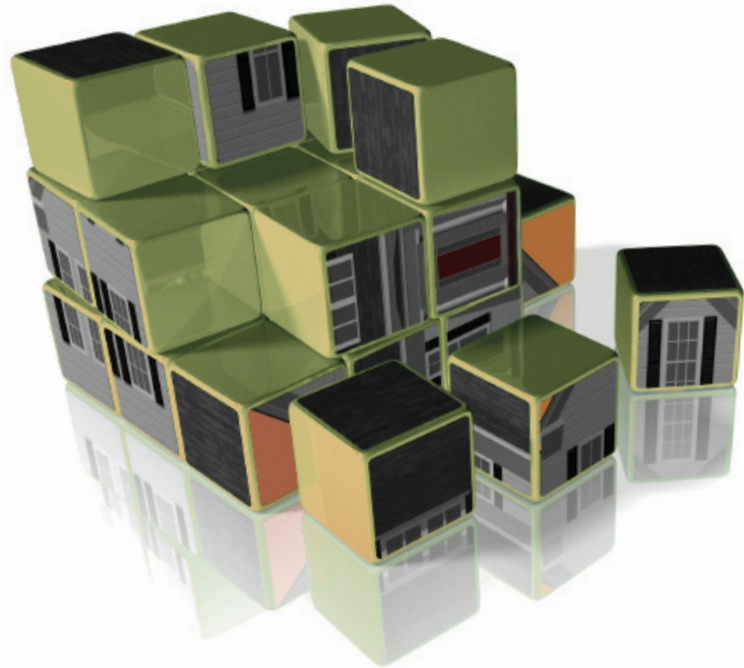
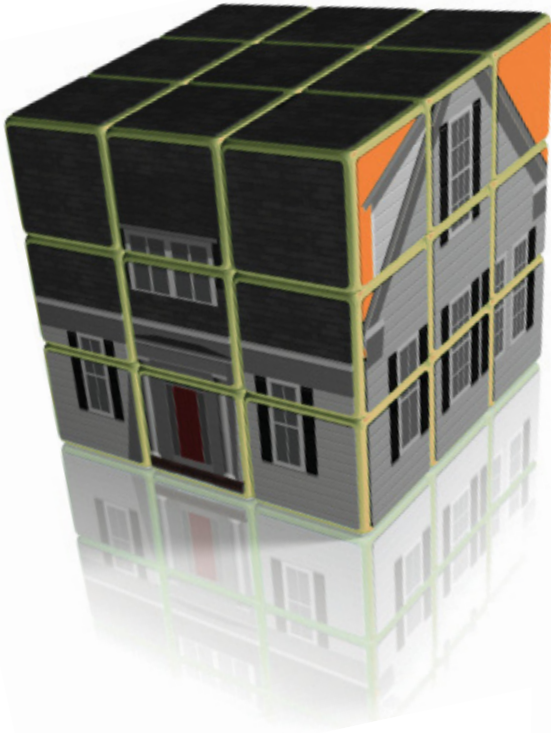


EMINENT DOMAIN

Identifying Issues in Damages



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The power of eminent domain is an inherent feature of the sovereign authority of the state. In other words, the fleas go with the dog.

One of the most important aspects of eminent domain practice involves understanding the different categories of damages available. In Florida, the three types 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. This article will briefly explore these three categories and then focus on partial taking damages applied using examples from eminent domain cases decided in Florida.

Types of Damages Available

The least straight-forward types of damages are those caused when less than the entire property is sought to be appropriated (often referred to as a partial taking). In addition to damages for the property itself, damages also available as the result of a partial taking may include severance damages and business damages. To fully appreciate the range of damages available, it's important to know 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.

Before exploring the three categories of damages, an understanding of some basic concepts associated with eminent domain takings will be helpful. To begin with, there are different interests in real property available to the condemning authority, which is the party exercising the power of eminent domain. 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) can be more difficult to ascertain. For example, severance damages require not only that less than the entire property be taken, but the taking must cause the damages. Business damages are similarly only available where there has been a partial taking. In addition, a party seeking business damages must show that a statutorily-specified body has taken a statutorily-specified real property interest and

that the partial taking has damaged or destroyed an established business owned by the party whose lands are being taken, and which is located on the adjoining lands owned or held by that party.

Working with Severance Damages

Though severance damages and business damages are related in the sense that they can only be awarded as a result of a partial taking, they are not based on identical concepts. Significant differences between the theoretical underpinnings of severance damages and business damages exist, as will be demonstrated.

Severance damages may be awarded when a part has been severed from the whole. Stated another way, severance damages are compensation for the reduction in value to the portion of the property not taken by condemnation. 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. Severance damages and business damages are not mutually exclusive, 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 Florida Department of Transportation (DOT) had contested entitlement to business damages, but stipulated if business damages were available, their amount was \$105,000. 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 identical to damages received for the reduced value of the land remaining (i.e., severance damages). In reaching the conclusion that severance damages and business damages were not mutually exclusive, the Fourth District Court of Appeal observed that Florida Statute §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.” 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.”

Working with Business Damages

Business damages are a matter of legislative grace as opposed to a constitutional requirement. From a conceptual standpoint, business damages are akin to lost profits. They are attributable to the anticipated reduced profit-making capacity of the business caused by taking a portion of either the realty or improvements. The purpose of an award of business damages is to mitigate the hardship that may result because the state is only constitutionally required to pay full compensation for the *property* taken. This is because the legislature, in

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authorizing business damages (separate from the taking or severance damages), has recognized that a business location may be an asset of considerable value, which could be substantially damaged by a partial taking.

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. The company 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. The trial court read §73.071(3)(b) to exclude K.E. Morris 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. 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.”

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

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five years at the location where the partial taking is alleged to have caused business damages.” 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.

Measuring the Damages

Severance damages and business damages are not unlimited. Rather, substantive principles of law apply to restrict these damages in particular circumstances. Exploring some of the limits placed on severance and business damages will help emphasize the point that identifying the limits is a vital part of preparing one’s case for negotiation and trial.

“[S]everance damages . . . are generally measured by the reduction in value of the remaining property.” 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. In *Mulkey*, the Florida DOT’s real estate appraiser, utilizing the cost-to-cure method, testified at trial that the severance damages were calculated at \$36,300.

On appeal, one of the issues reviewed was whether the trial court erred in allowing the jury to consider the DOT’s cost-to-cure method of calculating severance damages. 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 DOT’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.

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. 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. After the appellate court determined that admission of the testimony by the DOT’s expert was in error, the court then noted that only the expert testimony offered by the tenant and the landowners remained. The appellate court expressed a temptation to award severance damages in an amount commensurate with the testimony given by the appraiser for the tenant and the landowners. 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.” 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.”

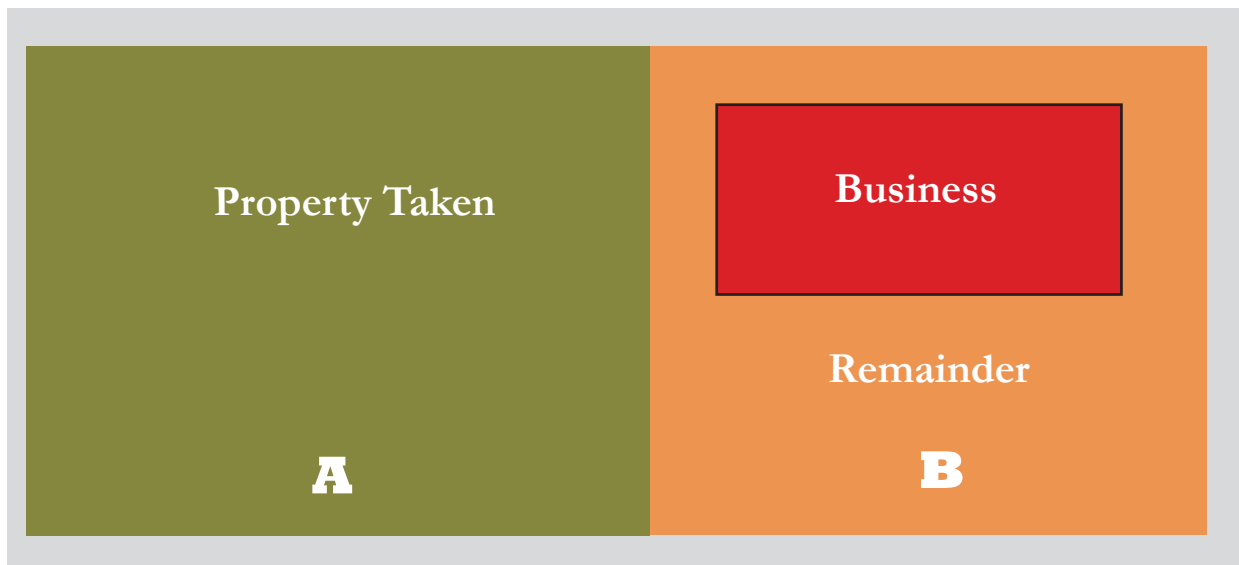
Business damages may include several components, but are limited according to the interest in the property taken. For example, a tenant is entitled to recover business damages resulting from a condemnation proceeding, but the damages are limited by the duration of the tenant’s lease-hold interest in existence when the court enters the order of taking.

In *Seminole County v. Sanford Court Investors, Ltd.*, 743 So. 2d 1165 (Fla. 5th DCA 1999), two tenants sought business damages. At trial, the tenants’ expert testified that 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.’ 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. 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. 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.

Another limitation on business damages is the duty to mitigate. In *Mulkey*, the second point raised on appeal dealt with business damages. The tenant argued to the Second District Court of Appeal that the trial court erroneously allowed portions of the expert testimony offered by the DOT on business damages to go to the jury. The tenant argued that the testimony was improper because it was based upon a theory of

OWNER'S PROPERTY

The owner may seek business damages if the statutory criteria are met.



Damages are available for the value of portion A, the property sought to be appropriated.

If portion B is damaged by the severance of portion A, then severance damages are available.

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 DOT's appraiser in calculating severance damages.

The appellate court noted the expert testimony offered by the DOT 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. The appellate court agreed that a condemnee has a duty to mitigate losses, but found that the expert testimony in this case 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. 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. Observing that "the jury's award of business damages was exactly the amount fixed by ... [the DOT'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.

Whether the business owner is a tenant or the land owner, 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 goodwill. The broad scope of business damages comports with the philosophy, as identified previously, 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.

So what happens when a business owner claims damages for the property taken, severance damages and business damages all for the same taking? As shown in Ness Trailer Park, "[s]everance and business damages are both available in appropriate cases." If business damages are identical to severance damages, however, a condemnee may not receive a double recovery. 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. Counsel can also seek damages for a business damaged by a partial taking if the statutory criteria are met.

Summary

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. Damages can be available for the value of the property appropriated, damages resulting from a partial taking, and damages resulting from the relocation of a mobile home. 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. ✪