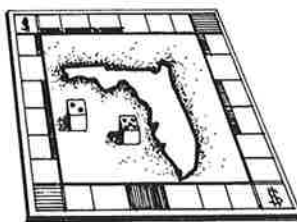


# Florida's Money Game

W. Forrest Norton, SR/WA



## ***What happens when a state pays for the property owners' legal fees and for a separate appraisal? How are private negotiating consultants representing property owners?***

The state of Florida has one of the most liberal set of eminent domain laws in the free world. There is little more sacred in a democracy than an individual's right of ownership in real property. The Florida legislature has gone the extra mile to protect this right.

Florida law guarantees a citizen's right to a 12-man jury trial should the state find it necessary to condemn his or her property. Further, the state's first offer must be for the full approved appraised value and the state will pay all reasonable legal fees, win or lose, should court action be required.

A relatively new law guarantees good faith negotiations by giving the property owner an opportunity to have a separate appraisal/business damage report made just before the negotiations phase at the state's expense. These fees are paid by the state, even if a negotiated settlement cannot be reached. And, if the property owner is not satisfied with the appraisal/business damage report, he or she may obtain a new one for court (again at the state's expense).

Florida lawmakers are to be commended for their efforts to protect private citizens. Property owners—that's most of us—are entitled to fair and just compensation for land acquired under the threat of public condemnation. Property owners are also entitled to legal representation when there

is a legitimate disagreement over values. Florida's rather liberal approach to eminent domain acquisitions has, however, caused a significant problem. Florida's eminent domain laws *do not* encourage negotiated settlements.

A property owner once told this writer that it didn't matter how much the state offered him for his land, it wouldn't be enough. He knew that the state would offer the full approved appraised value and would cover all of his legal fees, win or lose, should his parcel be condemned. Another property owner told this writer that he was not interested in selling his land for current or fair market value. He bought the land for investment, so why not go to court? He had nothing to lose.

The nothing-to-lose attitude, coupled with current economic conditions, are causing an increasing number of landowners to think about going to court. And, after all, they reason, the state is a huge, unfeeling bureaucratic entity, trying to acquire private land for as little as possible. It is difficult to convince some property owners that the state is not in the real estate investment business. Agencies like the Florida Department of Transportation are simply trying to provide a much needed transportation facility. The Florida Department of Transportation is a creature of the statutes and must operate by statute. The statutes call for just compensation where property is acquired under threat of condemnation.

Condemnation attorneys will tell you that they are in business to protect the poor, unknowledgeable property owner from the

powerful, bureaucratic, governmental agency. The truth is that they, like everyone else, are trying to make a living and they know that a fee is guaranteed once suit is filed.

It is not uncommon in Florida for the attorney's court-awarded fee to be as much as or more than the benefit to the property owner. For example, in *D.O.T. vs. Dave and Ted Enterprises*, the property owner's benefit over the original offer of \$80,685 was \$164,315. The defense attorney's fees were \$182,000 (the defense's expert witness fees were an additional \$77,403). One law firm, with offices throughout the state, advises prospective clients that "Any discus-

### ***Cost of Land Sold to the State seems Difficult to Fix Precisely***

Weaknesses in Florida's eminent domain laws seems to be illustrated vividly by a few figures from the state Department of Transportation.

Last year, the state bought land in parcels its appraisers valued at \$8 million collectively.

But appraisers for the landowners valued the same property at \$24 million—three times as much.

Juries wound up giving the landowners \$12 million, which is 50 percent of what the owners thought it was worth and 50 percent more than the DOT thought it was worth.

Considering all the implications, the surprising thing is that the state had to go to court only 30 percent of the time it took land from the public.

That was often enough, however, to add \$4 million to the public costs, \$2 million for attorney's fees and \$2 million in court costs.

So it cost the DOT twice as much for the land it bought in 1986 as its appraisers said the land was worth.

If the landowners had paid their own legal fees and costs, as they would have in any other state, they would collectively have received what the state said their land was worth anyway.

Lawyers who attempt to justify the Florida law that requires the state to pay legal costs no matter who wins say the individual must be protected against a state that would rob him.

Since it costs twice as much to go to court, there seems little incentive for the state bureaucrats to further incite litigation by offering the landowner too little for his property at the outset.

The DOT numbers make it look like a case where the present eminent domain law serves individual lawyers, not the individual landowners or the individual taxpayer.

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Dear Property Owner:

Very soon, the Florida Department of Transportation will notify you of its intention to acquire property that you own through the exercise of its eminent domain powers. The state will take your property as a necessary right-of-way for the subject road project.

I am well aware that the state's action can deeply concern a landowner. This concern is compounded when the owner is unfamiliar with the state's processes and must attempt to negotiate at a distance. My company and I, personally, would like to offer our services to assist you in dealing directly with the Department of Transportation to obtain a fair price for your property without the need for lengthy court proceedings and bureaucratic procedures.

Having worked in the inside of this giant state agency for more than 13 years, I know the property owner's legal rights—and I know how to protect those rights during the acquisition process. My staff and I can ensure that the state pays for all services it must furnish you by law and that it pays you a fair and just price for your property in a timely and efficient manner.

There is absolutely no fee for our work unless we obtain more payment for your land than the state originally offers. It's that simple. Our firm works on a contingency basis, with our fee—generally 25%—paid out of the *excess* recovery. This means you have nothing to lose and much to gain. You receive that total amount of the state's initial offer plus 75% of everything we are able to recover beyond that.

We are confident of our success because we have confidence in our experience. Did you know that the state, by law, must pay for an appraisal of your property, that you may select the appraiser, and that the state must use that appraisal in its valuation process? Did you know that the state, by law, must pay for an attorney of your choice in these proceedings? Because we helped write these laws, we know how to make them work for you as they were intended: to protect the property owner and to protect the taxpayer.

Please do not delay contacting us; the law imposes specific time limits on the exercise of your rights. Call us collect. We can explain your specific rights, and we can also assist you in selecting property appraisers, attorneys, and accountants with experience and proven track records all at no cost to you. If you like, you may also sign and return the enclosed letters of authorization, which will allow us to perform all work in your behalf. Each step we take will be thoroughly discussed with you and approved by you in advance. All paperwork and documents will be forwarded to you for review, approval, and signature.

Sincerely,

sions you have with agents of the Department of Transportation can be used against you by the Department of Transportation in later proceedings." This law firm likes to impress prospective clients with a list of cases they have won. No doubt they fail to mention the cases they lose.

Florida law ensures a lucrative income for condemnation attorneys. One former Florida Department of Transportation attorney stated for a leading Florida newspaper that an attorney working against the Department of Transportation could make more on one case than an attorney working for the Department of Transportation makes in one year. This same attorney now works for one of Florida's leading law firms.

Now we have private negotiating consultants who, like many attorneys, go out ahead of the condemning authority's appraisal and acquisition process to recruit clients. The Department of Transportation has to provide anyone who asks with the names and addresses of all property owners on proposed projects. Such requests are coming in well before this information is known by the Right of Way Acquisition Office.

One consulting outfit advises prospective clients that the condemning authority "has the power to take any citizen's property" and that "you can lose your rights." This consultant offers to deal directly with the condemning authority to "obtain a fair price—without need for lengthy court proceedings and bureaucratic procedures." The fee for this service is "generally 25 percent of the excess recovery." It occurred to this writer that a negotiating consultant working on a contingency basis would have to average fairly high increases to make any kind of reasonable profit.

Why, one might ask, would the Department of Transportation deal differently with a negotiating consultant than it would with the property owner? The Department is not going to do anything for a consultant that it wouldn't do for the property owner.

The Florida Department of Transportation, in an effort to settle more parcels and reduce court loads, has developed a rather liberal administrative increase policy. Even if changing market values will not support an increase, even if the state's appraisal is basically sound, other factors *must* be considered by the right of way specialist to reach a settlement. These factors are, but are not limited to, the following:

rate of inflation is applied to the amount offered?

- Will the property owner's personal situation encourage the jury to increase the award?
- Are there any questionable issues of law?
- Cost avoidance—what is the estimated cost to the Department should a suit be filed?

This policy has helped in settling some parcels, but it is subjective in nature. What kind of influence would an elderly widow with a bad back and little income have on a jury? And how much of an increase is warranted to keep her parcel out of court?

Of equal concern is the question of cost avoidance. How does one justify granting an increase to avoid condemnation expenses without appearing to succumb to blackmail? To illustrate, one consultant offered to settle his client's case for a \$7,000 increase, almost double the state's offer. It didn't matter that his client's own appraisals (for fee and for temporary easement) were for less than the state's appraisals. The consultant knew about the administrative increase policy and the cost avoidance feature. He knew it would cost the state at least \$7,000, and probably a good bit more, to go to court.

It is no longer just a matter of establishing market value or just compensation. The property owner is out for all he or she can get. Attorneys, if they settle at all, often do so on the courthouse steps with the state's attorney. Private negotiating consultants are trying to make a living; they, too, want a piece of the action. It's a money game and its understood, almost built into the system. One is perceived to be naive if he or she thinks otherwise.

That's not to say that there is no one left who is just looking for a fair shake. Indeed, property owners and attorneys alike are, for the most part, cooperative and fair. Department of Transportation right of way specialists are, overall, doing a respectable job. Some highway projects have a high percentage of negotiated parcels. Nonetheless, this writer occasionally gets the feeling that he has been mistaken for the host of "Let's Make a Deal."

The state of Florida is faced with a real dilemma. Something must be done to reduce the number of parcels that go to suit (reduce right of way costs). But how can

- What is the adjusted value when the

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tions overlooked where the easement rights had been deeded back to the property owner and the cable was placed in trespass. There were locations where we simply missed a parcel and failed to get an easement. Most of these instances were handled on the scene with no major problem except embarrassment. There are some, however, that have left scars that may never heal.

During the height of construction, 20 trenching, boring, and river crossing crews were working simultaneously and dealing with all types of terrain from solid rock to sugar sand. Generally, they were closely following the engineering staking crews who were right behind the right of way agents. There were four right of way agents, not 20, on the projects and a great deal of windshield time to handle the crises that arose. It also meant people other than right of way agents had contact with property owners. Lines of responsibility had been cast aside and everyone was willing to do what was necessary to keep the jobs on schedule. Construction workers were contacting landowners while right of way agents were handling cable and directing traffic.

When the end of the year arrived, all three cables were in service and everyone associated with them was very tired. Our condemnation was complete and three more were awaiting trial. We all left the job with a feeling of satisfaction, taking the challenge and a healthy respect for at least one other person's responsibility. From the right of way standpoint, the final score card has not been tallied. Lady Luck is still playing the trump card to remind us that "haste is waste." Every day we become more painfully aware of the truism: "If you don't have time to do it right, when will you (or someone else) have time to do it over?"

In retrospect, given the same situations, people, and experience levels we would

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probably do things the same way. Certainly, none of us want to see another crash program like 1986. However, the experience and confidence gained will make the normal job easier. It is worth mentioning that an early 1987 project gave us an opportunity to draw on our experiences. On this occasion time was available to do things correctly. The time and experience made a real difference. Construction was so uneventful, most of the upper level management people had no knowledge of the project until it was completed. We do learn from our mistakes! (IRWA)

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lawmakers address this problem and continue to protect individual property owners? The Florida Department of Transportation has been aware of this paradox and is trying to work with the legislature to remedy the situation. There is one thing for sure—as long as legal fees are guaranteed, win or lose, and as long as property owners are placed in a no-lose situation, the courts will continue to be flooded with condemnation cases and right of way costs in Florida will continue to rise. The money game will continue. (IRWA)

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