

STORAGE NAME: h0913p1.rpp
DATE: March 15, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: PCS/HB 913

RELATING TO: Eminent Domain

SPONSOR(S): Representative Sublette

STATUTE(S) AFFECTED: Section 73.0511, Florida Statutes

COMPANION BILL(S): SB 806

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY & PROBATE
- (2) FINANCE & TAXATION
- (3) TRANSPORTATION & ECONOMIC DEVELOP. APP.
- (4)
- (5)

I. SUMMARY:

PCS/HB 913 requires any condemning authority, at least 60 days before instituting litigation, to make a written offer of settlement to each defendant for payment of full compensation.

The PCS specifies the contents of the offer, and provides that the offer is considered rejected unless accepted in writing within 30 days after receipt. At the time the offer is made, the condemning authority must identify and make available its appraisal information and construction plans.

Finally, the condemning authority must notify each defendant of all statutory rights under section 73.091, Florida Statutes.

The bill will take effect July 1, 1997.

This bill may have a negative fiscal impact on state and local governments.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Eminent domain is the power of the state to take private property for public use. Under both the federal and state constitutions that power is restricted.

The Fifth Amendment to the U.S. Constitution provides that private property may not be taken for public use without just compensation. Article X, s. 6(a), Florida Constitution, prohibits the government from taking property through the exercise of eminent domain without the payment of full compensation. That provision reads as follows:

No private property shall be taken 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.

RIGHTS OF THE PROPERTY OWNER

Section 73.0511, Florida Statutes, provides that prior to instituting litigation, the condemning authority shall notify the fee owners of statutory rights under section 73.091, Florida Statutes.

Expert Witness Fees

Section 73.091, Florida Statutes, provides that the petitioner (condemning authority), must pay attorney's fees as provided in section 73.092, Florida Statutes, as well as all reasonable costs incurred in the defense of the proceedings, including reasonable appraisal fees, and, when business damages are compensable, a reasonable accountants fee. This section requires the condemnee's attorney to submit expert witness time records, statement of services rendered, and costs incurred, along with any fee agreement. This must be done 30 days before the hearing to assess costs. This section provides guidance to the court in determining reasonableness of the costs.

Attorney's Fees

Section 73.092, Florida Statutes, provides for attorney's fees. Except as otherwise provided in this section, the court, in eminent domain proceedings, must award attorney's fees based solely on the benefits achieved for the client. The term "benefits" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.

This section further provides specific guidelines for determining the benefit achieved for purposes of attorney's fees for business damages.

Attorneys fees based on all benefits achieved are awarded as follows:

33 percent of any benefit up to \$250,000; plus

25 percent of any portion of the benefit between \$250,000 and \$1 million; plus

20 percent of any portion of the benefit exceeding \$1 million.

Subsection 73.092(2), Florida Statutes, provides guidelines for the court to consider in assessing attorney's fees incurred in defeating an order of taking, or for apportionment, or other supplemental proceedings.

B. EFFECT OF PROPOSED CHANGES:

PCS/HB 913 amends section 73.0511, Florida Statutes, to require the condemning authority to make a written offer of settlement to each defendant for payment of full compensation, at least 60 days before instituting litigation. The offer must:

-name the defendant to whom it is made;

-briefly summarize any relevant conditions;

-identify all interested parties who might have an apportionable interest in the compensation; and

-state that the offer is considered to have been rejected unless accepted in writing within 30 days after receipt.

The bill also requires that at the time the offer is made, the condemning authority must identify and make available to each defendant the appraisal information and construction plans, if any, upon which the offer is based.

Finally, the bill preserves the existing requirement that the condemning authority must notify each defendant of all statutory rights under section 73.091, Florida Statutes. The existing statute does not contain the word "all."

Chapter 74, Florida Statutes, permits specified authorities to take possession and title in advance of final judgment in eminent domain actions. Section 74.031, Florida Statutes, requires the petitioner, at the time of filing a declaration of taking, to make a good faith estimate of value, based upon a valid appraisal of each parcel in the proceeding, which shall be made a part of the declaration of taking.

Recently, the question of whether the good faith estimate is an offer, for purposes of determining the benefit achieved as a basis for attorney's fees. Section 73.092, Florida Statutes, provides that the term "benefits" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. In *Lee County v. Pierpont*, 22 Fla. L. Weekly D274 (Jan. 24, 1997), the court addressed the issue of the benefit achieved for the Pierponts. The court stated that it did not perceive it to have been the Legislature's intent to equate the statutorily mandated "good faith estimate of value" required by section 74.031, Florida Statutes, with the "written offer" contemplated in

section 73.092, Florida Statutes. The court went on to say that the good faith estimate is not even required or a part of a proceeding in eminent domain unless the condemning authority desires to acquire possession of and title to the property prior to entry of final judgment.

This bill would require that an "offer" would be made early in the process, thereby ensuring that attorney's fees would begin to be calculated at least 60 days before instituting litigation, if this is the last written offer before the property owner retains an attorney.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. Condemning authorities will be required to provide written offers of settlement 60 days before instituting litigation.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

No.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

See Effect of Proposed Changes section.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Unknown.

2. Recurring Effects:

According to the Department of Transportation, this proposed bill would have a significant detrimental fiscal impact. However, the exact amount of the impact is difficult to identify since this is a new procedure.

3. Long Run Effects Other Than Normal Growth:

Unknown.

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Unknown.

2. Recurring Effects:

There may be a fiscal impact resulting from the computation of attorney's fees from an earlier date, as well as from delays in projects.

3. Long Run Effects Other Than Normal Growth:

Unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

Arguably the condemnee will benefit from having a written offer of settlement at an earlier date. In addition, attorneys representing the property owners will benefit from having a clear point from which the "benefits achieved" can be measured.

3. Effects on Competition, Private Enterprise and Employment Markets:

None anticipated.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill may be a local mandate. Article VII, Section 18 of the Florida Constitution provides in part:

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and unless: . . . the Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality

However, this bill would appear to be an exception to the mandate provision because similarly situated persons are all required to comply, i.e., the bill applies to both state and local governmental entities.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

The Department of Transportation (DOT) expressed a concern that this bill may cause delays in their projects. Because many details in the design of a project must frequently be changed due to unforeseen circumstances, and because property interest holders are sometimes difficult to identify, the 60 day waiting period could frequently affect the DOT's ability to begin construction on a transportation project. If an interest owner such as a lienholder or mortgage holder is discovered subsequent to the initial offer, a new offer must be made and another 60 days must expire before litigation can be filed.

In addition, according to DOT, the proposed bill will be used by defense attorneys to argue that DOT's power to use eminent domain is dependent upon having final construction plans available upon which to make a written offer 60 days prior to initiating suit. Similarly, if an additional parcel or portion of a parcel must be added to the project to accommodate drainage or other final design matters, a new offer must be made and 60 days must expire prior to filing suit. According to DOT, the proposed bill would make it virtually impossible to secure property necessary for a transportation project in less than 6 months and, in many cases, it would be much longer.

The DOT further expressed a concern regarding the effective date of the bill. Due to the DOT's scheduling of projects, they indicated it would be very difficult for them to implement this proposed bill July 1, 1997. The DOT would be able to implement the 60-day requirement by July 1, 1998.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

HB 913 is substantially different from the proposed committee substitute. PCS/HB 913 only includes section 1 of HB 913. The provisions of HB 913 which are not included in the PCS/HB 913 are summarized below.

--the bill would eliminate the requirement that the jury determine "solely" full compensation. According to DOT, this provision may be interpreted to mean that the jury will determine other issues which are currently within the prerogative of the judge.

--the bill would expand the right to damages for property owners, allowing damages resulting "from the project" rather than "from the taking."

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--the bill would expand entitlement to business damages, including the right to business damages from the project. The bill would reduce the number of years a business must be established before business damages can be claimed from 5 years to 3 years.

--the bill would expand the concept of property under eminent domain law by providing for compensation for "air, light, and view,"

--the bill would require mandatory mediation prior to an order of taking hearing.

According to the Department of Transportation, the original bill would have a fiscal impact to state government of approximately \$100 million per year. There would also be a significant impact on local governments.

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Legislative Research Director:

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