

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Appropriations

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BILL: CS/SB 322

INTRODUCER: Judiciary Committee and Senator Brandes

SUBJECT: Eminent Domain Proceedings

DATE: March 07, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Anderson</u>	<u>Yeatman</u>	<u>CA</u>	<u>Favorable</u>
3.	<u>Carey</u>	<u>Hansen</u>	<u>AP</u>	<u>Pre-meeting</u>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

CS/SB 322 requires a clerk of court to pay 90 percent of the interest earned on the deposit securing payment for the property taken by eminent domain to the property owner or the petitioner, or both, depending upon the outcome of the case. Under existing law, the clerk must pay 90 percent of the interest earned exclusively to the petitioner.

The remaining 10 percent of interest earned on deposits is retained by the clerk; this bill does not change the share of the interest retained by the clerk.

This bill only affects interest earned on deposits in quick, or accelerated takings. A quick taking occurs when a governmental entity takes physical possession of property prior to a final judgment in an eminent domain case. Currently, the defendant, or property owner, receives none of the interest, although the defendant has already been deprived of the use of the property.

There will be an indeterminate, but insignificant, negative impact to the State Transportation Trust Fund from interest earned on deposits in eminent domain proceedings.

This bill substantially amends section 74.051, Florida Statutes.

## II. Present Situation:

### Constitutional Provisions on Takings

The Fifth Amendment of the United States Constitution applies to the states through the Fourteenth Amendment and provides, in part: “nor shall private property be taken for public use, without just compensation.<sup>1</sup>”

Similarly, the Florida Constitution states that: “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.<sup>2</sup>”

### Florida Law on Eminent Domain

Florida affords generous treatment to private property owners, or defendants in eminent domain proceedings. In Florida, the owner is entitled to full and fair compensation.<sup>3</sup> Compensation is generally the payment of the fair market value of the property.<sup>4</sup> Fair market value is considered to be based upon what a willing buyer would pay to a willing seller.<sup>5</sup> Also, the petitioner must always pay attorney’s fees and reasonable costs to the defendant.<sup>6</sup> Reasonable costs include appraisal fees and, if business damages are involved, an accountant’s fee.<sup>7</sup> Defendants also have the right to a jury trial.<sup>8</sup>

Eminent domain is effected in one of two ways. The first is through the traditional eminent domain process. The second is considered a quick taking, and occurs when the governmental entity takes immediate possession of the property before the completion of the judicial procedure. A “taking” of property is considered to result from a physical invasion or a regulatory imposition.<sup>9</sup>

### Traditional Eminent Domain

The process for traditional eminent domain is as follows:

- Upon the filing of the petition, the clerk of the court issues a summons to the defendants (private property owners) listed in the filing. The defendants must show cause why the identified property should not be taken.<sup>10</sup>
- If a defendant challenges the action, the parties proceed to jury trial. The trial is given priority scheduling over other civil actions.<sup>11</sup>

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<sup>1</sup> U.S.C.A. CONST. AMEND V.

<sup>2</sup> FLA. CONST., art. X., s. 6(a).

<sup>3</sup> Debra Herman and Jorge Martinez-Esteve, *The Admissibility of Dedication Requirements in Condemnation Cases: No Longer the Road Less Traveled*, 85 Nov. FLA. B.J. 20, 21 (Nov. 2011).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Section 73.091(1), F.S.

<sup>7</sup> *Id.*

<sup>8</sup> Section 73.071(1), F.S.

<sup>9</sup> *Alachua Land Investors, LLC v. City of Gainesville*, 2013 WL 363376, at \*2 (Fla. 1st DCA 2013).

<sup>10</sup> Section 73.031(1), F.S.

<sup>11</sup> Section 73.071(1), F.S.

- At the trial, the jury determines the amount of compensation to be paid.<sup>12</sup> The amount of compensation is determined as of the earlier of the date of trial, or the date that title passes.<sup>13</sup>
- The judgment of the court provides that the title to the property vests in the petitioner when the money listed on the jury verdict is paid or secured by deposit.<sup>14</sup>
- Within 20 days after the date of judgment, the petitioner must deposit the amount of the verdict into the court registry.<sup>15</sup>

### **Eminent Domain Through a Quick Taking**

The second type of eminent domain is called a “quick taking.” Public entities that have the right to take possession and title before the entry of final judgment in the case must file a declaration of taking. The declaration must contain a good faith estimate of the value of the property.<sup>16</sup>

If the court determines that the petitioner is entitled to possession of the property before final judgment, it must enter an order requiring the petitioner to deposit money into the court registry in an amount that will fully secure and compensate the defendant. The order of taking is not effective until the deposit is made in the court registry<sup>17</sup>. The clerk is authorized to invest the deposit before its release to earn the highest interest rate possible. Ninety percent of any interest earned is paid to the petitioner.<sup>18</sup> The remaining interest remains in the registry of the court.<sup>19</sup>

The procedures are the same for both traditional and quick takings regarding service of process, opportunity for hearing, due process, and other rights of the defendant.<sup>20</sup>

### **Case Law on Interest on Deposits in a Court Registry**

In 2008 in *Mallards Cove v. Pittman (Mallard’s Cove)*, the circuit court struck down as unconstitutional the part of s. 74.051(4), F.S., which requires that the 90 percent of the interest earned on the deposit be paid to the petitioner.<sup>21</sup> There, the clerk distributed interest to the public entity. The *Mallard’s Cove* court found, specifically, that the requirement to pay the interest to the petitioner constitute an unconstitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution. As such, the defendant was entitled to the interest. The court based its decision on the reasoning of the United States Supreme Court in its review of a Florida Supreme Court decision in *Webb’s Fabulous Pharmacies v. Beckwith*.<sup>22</sup>

In *Webb’s*, the clerk exacted a fee for court services in addition to retaining the interest earned on deposits in the court registry. This case involved a sale of assets between two companies. The

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<sup>12</sup> Section 73.071(3), F.S.

<sup>13</sup> Section 73.071(2), F.S.

<sup>14</sup> Section 73.101, F.S.

<sup>15</sup> Section 73.111, F.S.

<sup>16</sup> Section 74.031, F.S.

<sup>18</sup> Section 74.051(4), F.S.

<sup>18</sup> Section 74.051(4), F.S.

<sup>19</sup> *Brock v. Bowein*, 99 So. 3d 580, 582 (Fla. 2d DCA 2012). Section 28.33, F.S., authorizes the clerk to retain 10 percent of the interest earned on deposits in the registry of the court, as a “reasonable management investment fee.”

<sup>20</sup> Sections 74.021, 74.041, and 74.051, F.S.

<sup>21</sup> *Mallards Cove LLP v. Jed Pittman, Clerk of the Circuit Ct. of Pasco County*, Case No. 51-2008-CA-7689 (2011).

<sup>22</sup> *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980).

court required an interpleader<sup>23</sup> fund to be set up to protect monies for creditors, as the seller's debts appeared to exceed the purchase price of the assets at the time of closing.<sup>24</sup>

At the time of the case, the clerk had access to monies under two different provisions in law:

- Section 28.24, F.S. This statute authorized a clerk's fee through an administrative fee in the amount of 1 percent of the first \$500 and ½ percent of the remainder for receiving funds into the registry.<sup>25</sup> In this case, the fee came to \$9,228.74. That amount came out at the time of deposit.
- Section 28.33, F.S. Regarding interest on the deposit, this section of law provided that "All interest accruing from moneys deposited shall be deemed income of the office of the clerk."<sup>26</sup> The interest in this case totaled more than \$100,000.<sup>27</sup>

The Court took issue with the clerk exacting, in essence, two fees for the same deposit. In declaring the interest earned on the money while it was in the registry of the court private property, the Court ruled that the deposit "was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors."<sup>28</sup>

*Mallard's Cove* was not appealed.

### III. Effect of Proposed Changes:

Currently, s. 74.051, F.S., requires that 90 percent of the interest earned on security deposits with the court registry in eminent domain cases be paid to the petitioner. This bill changes the recipient of the interest from the petitioner to the ultimate owner of the deposit.

The clerk can pay either the petitioner or the defendant interest from the deposit, depending upon the outcome of the case. The clerk can also distribute interest to both the petitioner and the defendant, if the petitioner overpaid the deposit into the court registry as compared to the final judgement in the eminent domain proceeding. If each party is entitled to a share of the deposit, the amount of interest will be allocated accordingly, based on the ownership interests in the deposit.

This bill takes effect July 1, 2013.

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<sup>23</sup> The term "interpleader" is defined as "A suit to determine a right to property held by a usually disinterested third party (called a *stakeholder*) who is in doubt about ownership and who therefore deposits the property with the court to permit interested parties to litigate ownership. Typically, a stakeholder initiates an interpleader both to determine who should receive the property and to avoid multiple liability." BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>24</sup> *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. at 156.

<sup>25</sup> Section 28.24(14), F.S. This provision is no longer in the law. Instead, s. 28.24, F.S., provides a laundry list of set fees for various clerk services.

<sup>26</sup> Section 28.33, F.S. (enacted as ch. 73-282, §1, L.O.F.)

<sup>27</sup> *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. at 158.

<sup>28</sup> *Id.* at 161, 165.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

Article VII, s. 18 (b) of the Florida Constitution, prohibits the Legislature from “enacting, amending, or repealing any general law if the anticipated effect” is to reduce county or municipal aggregate revenue generating authority as it existed on February 1, 1989.

Subsection (d) provides an exemption from this prohibition. Laws determined to have an “insignificant fiscal impact,” which means an amount not greater than the average statewide population for the applicable fiscal year times \$0.10 (which is \$1.9 million for FY 2012-13) are exempt.

As is discussed below in Section V, the bill’s effect on revenues is uncertain. If the bill is not exempt as having an insufficient fiscal impact, it may require a two-thirds vote of the membership of each chamber to become law.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

According to the Florida Department of Transportation (FDOT), since 1986, the FDOT has collected \$8,177,860 in interest earned on deposits in eminent domain proceedings. In the last 3 years, however, collections have declined significantly to \$17,452.<sup>29</sup> The fiscal impact on local entities is unknown as of the date of this analysis.

**B. Private Sector Impact:**

This bill may have a positive fiscal impact on private property owners whose property is taken through eminent domain. They will receive the benefit of some, or all, depending on the outcome of the eminent domain proceeding, of the interest earned on deposits made into a clerk’s registry during quick takings.

**C. Government Sector Impact:**

Under this bill, governmental entities that are parties to a taking will receive less money from interest earned on deposits made into a clerk’s registry.

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<sup>29</sup> Florida Dept. of Transportation, *SB 322 Bill Analysis* (2013) (on file with the Senate Committee on Judiciary).

The bill does not affect the portion or amount of interest that may be retained by a clerk of court.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on February 19, 2013:**

The committee substitute provides for distributions of interest earned on deposits made in the court registry to be allocated, rather than apportioned, based on the ultimate ownership in the deposit.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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