

**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.)

Prepared By: The Professional Staff of the Committee on Community Affairs

**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.	Brown	Cibula	JU	<b>Fav/CS</b>
2.	Anderson	Yeatman	CA	<b>Pre-meeting</b>
3.			AP	
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 the owner of property taken by eminent domain at least some of the interest earned on the deposit securing payment for the property. Under existing law, the clerk must pay 90 percent of the interest earned exclusively to the petitioner.

Under this bill, the clerk may distribute interest to the defendant or the petitioner, or both, depending upon the outcome of the case.

The remaining 10 percent of interest earned on deposits stays with the clerk, and this does not change under the bill.

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.

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 in an amount that will fully secure and compensate the defendant. These monies are deposited into the court registry.<sup>17</sup> The order of taking is not effective until the deposit is made in the court registry. 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 the 2008 case of *Mallards Cove v. Pittman*, 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> In the case, the clerk distributed interest to the public entity. The court found, specifically, that the requirement to pay the interest to the petitioner constitutes 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

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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>17</sup> Section 74.051(2), 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).

case involved a sale of assets between two companies. The 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>

The case was not reviewed by a higher court. Therefore, it is unknown whether a higher court would find unconstitutional the same language in s. 74.051 (4), F.S., as the *Mallards* court, and if so, upon what basis.

### 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. 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:**

Data is not available to determine whether this bill may require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

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 the Tax/Fee Issues Section, the bill’s effect on revenues is uncertain. The Revenue Estimating Conference (REC) has not met to review the fiscal impact of SB 322. Estimates from the REC may clarify whether the bill is a mandate or exempt. 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 only \$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 of the interest earned on deposits made into a clerk’s registry during quick takings.

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

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.

The bill does not affect the 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 on 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.