



ORDER OF TAKING: WHAT YOU SHOULD KNOW WHEN THE GOVERNMENT SUES TO QUICKLY TAKE YOUR PROPERTY UNDER EMINENT DOMAIN

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ORDER OF TAKING: *WHAT YOU SHOULD KNOW WHEN THE GOVERNMENT SUES TO QUICKLY TAKE YOUR PROPERTY UNDER EMINENT DOMAIN*

April 4, 2017 by [Brandon C. Meadows, Esq.](#)

Whether you are a landowner, a tenant or a business on property subject to eminent domain, you should not be surprised when the government (or condemning authority) files a lawsuit against you to take your property. After all, the condemning authority is required to follow strict pre-suit notice and negotiation protocols before any lawsuit is filed to take your property. See Brandon C. Meadows' and Charles B. Jimerson's [article](#) on the procedures the government must follow before filing an eminent domain lawsuit.

Nonetheless, you have been sued by the government, which is seeking an order of taking against your property. Understanding the process and your substantive rights in the lawsuit will ensure that you are best equipped to obtain full and fair compensation for your property.

WHAT IS AN ORDER OF TAKING?

Florida's ever-increasing resident and tourist population places great demands on the state's roadways, utilities and infrastructure. To meet those time-sensitive demands, the condemning authority may seek a court order, allowing the government to take possession and title to the property before obtaining a final judgment. This pre-judgment ruling is also known as an Order of Taking. The Order of Taking merely refers to the government's *right* to take the property, while the final

judgment will address the final amount of compensation due to the owner.

Because the condemning authority may need to acquire property as soon as possible, the Order of Taking is often pursued under what is frequently known as the “quick take” statute, a process governed by Chapter 74, Florida Statutes. The quick take statute allows the government to take possession and title to the property by depositing a good-faith estimate of value before ultimate proof of valuation at trial and final judgment. Fla. Stat. § 74.031.

The “quick take” statute is an alternative to the “slow take” statute, governed by Chapter 73, Florida Statutes. The government may initially file its petition under Chapter 74, or a slow take petition may be converted to a quick take petition at any time before final judgment. Fla. Stat. § 74.011. While the quick take statute awards immediate possession and title to the condemning authority, the good-faith estimate of value must be immediately deposited with the court and the government cannot thereafter dismiss the lawsuit, regardless of the final compensation awarded by the jury.

Notably, the condemning authority can dismiss a quick take petition at any time before transfer of title. *Conner v. State Road Dept. of Florida*, 66 So.2d 257 (Fla. 1953). However, once a deposit is made, the government is entitled to the property, and the owner is entitled to fair compensation. *Manhattan Properties Ltd. v. Division of Administration, State, Dept. of Transportation*, 541 So. 2d 655 (Fla. 2d DCA 1989). In other words, the valuation date is fixed upon deposit of funds, and thereafter, the government is committed to the taking, no matter the outcome on final valuation. *See, Miami v. Florida East Coast Railway Co.*, 428 So. 2d 674 (Fla. 3d DCA 1983) (finding that the condemnor was obligated to pay the verdict of \$23.3 million, even though the

verdict exceeded the deposit of \$14.5 million, as well as the condemnor's budget for the entire acquisition).

QUICK TAKE PETITION REQUIREMENTS

An eminent domain petition may be filed in the county where the property is located. Fla. Stat. § 73.021. To pursue a taking, the condemning authority must file a petition that satisfies all of the requirements of Section 73.021, Florida Statutes, and the petition must include a resolution authorizing the condemnation action. *Tosohatchee Game Preserve, Inc. v. Central & Southern Florida Flood Control District*, 265 So. 2d 681 (Fla. 1972). A valid resolution must describe the property, detail the public purpose for which the property is to be acquired, and contain the nature and extent of title or easement sought to be acquired. *Walker v. Florida Gas Transmission Co.*, 491 So. 2d 1286, 1287 (Fla. 1st DCA 1986). If the resolution is not attached to the petition, such a defect may be cured by amendment. However, if the resolution was not adopted prior to institution of the proceedings, the petition is subject to dismissal for failure to meet the requirements of Fla. Stat. § 73.021(1). *Tosohatchee*, 265 So. 2d at 684.

If the government is pursuing a quick take proceeding, the government may also file—along with the petition and resolution—a declaration of taking under Fla. Stat. § 74.031. However, the declaration may be filed after the petition and at any time prior to the entry of final judgment. *Id.* The declaration must be signed by the condemning authority, stating that the property sought is to be used for the purposes set forth in the petition, and setting forth the good

faith estimate of value of the property, based upon a valid appraisal of the parcel. *Id.*

NOTICE OF QUICK TAKE PROCEEDINGS AND ORDER OF TAKING

Generally, the condemning authority must properly serve the petition on all parties with an interest in the property sought to be acquired. Fla. Stat. §§ 73.031(1) and 74.041(1). Upon filing the declaration—whether with the petition or later—the clerk will issue a summons to show cause setting forth the date that the court will confirm the proposed taking. *Id.*

Any defendant seeking to challenge the petition cannot merely rely upon an answer contesting the petition. Rather, the defendant must *affirmatively* request a hearing on the declaration of taking. Fla. Stat. § 74.051(1) (“Any defendant failing to file a request for hearing shall waive any right to object to the order of taking”). Therefore, if the defendant seeks to contest the jurisdiction of the court, the sufficiency of the pleadings, the authority to condemn, or the amount to be deposited, the defendant must file a request for an order of taking hearing.

An order of taking hearing cannot be held earlier than one day following the date set by the summons to show cause. Fla. Stat. § 74.041(3). Further, a hearing on the order of taking cannot occur earlier than 20 days after the filing of the declaration of taking. Fla. Stat. § 74.041(1). That said, if defendant requests a hearing on an order of taking, the hearing may not occur before an answer to the petition is due. *A Flair for Hair, Inc. v. State, Dept. of Transportation*, 562 So. 2d 851 (Fla. 3d DCA 1990).

WHAT TO EXPECT AT THE ORDER OF TAKING HEARING

The Order of Taking hearing is a critical phase in the eminent domain proceeding, as it is the point when the condemning authority takes possession of and title to the property for the purposes of initiating its project. At the Order of Taking hearing, the government will typically first present evidence of the public purpose and reasonableness of necessity to demonstrate the validity of the taking. The initial burden of proving necessity is on the condemning authority. *Kirkland v. City of Lakeland*, 3 So. 3d 398 (Fla. 2d DCA 2009). The government will then offer testimony of a real estate appraiser and the appraisal of the property to support the validity of its good faith estimate of value deposit.

To the extent that the taking is contested, the landowner should be prepared to address the following commonly raised defenses and considerations:

- **Jurisdiction.** As stated above, the petition must contain a resolution of authorization for the taking, and failure to attach the resolution results in a defective petition, insufficient to confer jurisdiction.
- **Lack of Public Purpose or Necessity.** The condemning authority has broad discretion in determining the use, location and need for the taking. *Rukab v. City of Jacksonville Beach*, 811 So. 2d 727 (Fla. 1st DCA 2002). If the condemning authority fails to meet its initial burden to establish the public use of the property, the burden shifts to the condemnee who must show illegality, bad faith, or gross abuse of discretion in defense. *Canal Authority v. Litzel*, 243

So. 2d 135 (Fla. 1971). Given the legal standards, this defense is difficult to sustain, and it is not often asserted.

- **Extent of the Taking.** The condemning authority can only take as much property as necessary to fulfill the stated public purpose. *See Wilton v. St. Johns County*, 123 So. 527 (Fla. 1929). This includes consideration as to whether an easement, rather than a full fee taking, would meet the government's purposes for a particular project. A taking should be denied where the taking sought exceeds what is necessary.
- **Good Faith Estimate of Value.** The good faith estimate of value—and thus, the amount of the deposit—is the most frequently challenged upon hearing for an Order of Taking. After all, the purpose of the deposit is to make the funds available for the condemnee's use in exchange for the government's use of the property. The estimate of value can be challenged by contesting the government's appraisal. The appraisal cannot be based upon erroneous facts or assumptions, and the appraisal must be current. *Culbertson v. State Road Dept.*, 165 So. 2d 255 (Fla. 1st DCA 1964) (holding at a trial on compensation that an appraisal prepared four months before the taking is invalid as being too remote in time).
- **Date of Surrender.** Given the fast-moving quick take proceedings, the property owner, tenant or business may have practical needs in relocating, and testimony regarding the time needed for relocation may be presented to extend the time for the taking of possession and title by the government.

ENTRY OF THE ORDER OF TAKING

If the court finds that the condemning authority has right to take the property, the court will enter an order consistent with the following considerations:

- Specify the amount to be deposited into the court registry as the good faith estimate;
- Transfer of possession and title to the property upon deposit of the good faith estimate;
- Establish a time and terms for the condemnee to surrender possession; and
- Any other terms to protect other parties with an interest in the property.

The Order of Taking may be the result of the adversary process (i.e. presenting evidence at the hearing), or, in the alternative, the parties may simply stipulate to the entry of the Order of Taking. A stipulated Order of Taking may be beneficial to the parties in that the government may immediately proceed with its project, while the condemnee may negotiate a favorable deposit and an extension of time to surrender and relocate.

A stipulation will undoubtedly save all parties the resources, as each party prepares for the final trial on compensation. Of course, the parties may also stipulate to compensation by including the order of taking and final judgment into one order. Any stipulated order must consider all of the parties in interest. *Sunshine Properties, L.L.C. v. State Dept. of Transportation*, 900 So. 2d 714 (Fla. 4th DCA 2005). A prudent condemnee or the condemnee's attorney will ensure that the plans are attached and incorporated into the stipulation to provide for

an amended final judgment or to vacate the order, should the government's plans change.

Upon entry of the Order of Taking, the case will be set for jury trial on compensation. It is important to note that a finding as to the good faith estimate of value, or otherwise, a stipulation as to the amount of the deposit, will not be admitted into evidence in proving ultimate award of full compensation. Fla. Stat. § 74.081("Neither the declaration of taking, nor the amount of the deposit, shall be admissible in evidence in any action.").

RIGHTS UPON DEPOSIT OF THE GOOD FAITH ESTIMATE

The Order of Taking will provide for the amount to be deposited into the court registry. However, the Order is only effective if the funds are deposited within 20 days after entry of the Order. Fla. Stat. § 74.051(4). If the deposit is not made timely, the Order becomes void. *Id.* If the Order is voided, it cannot be reinstated. *McMurrer v. Marion County*, 936 So. 2d 19 (Fla. 5th DCA 2006).

Upon deposit, the condemnee may move to withdraw the funds from the registry of the court. Fla. Stat. § 74.071. The owner may freely withdraw the funds without waiving any rights to the full compensation to be proven at the pending trial on compensation. Any and all competing claims to the funds on deposit may be disposed upon a hearing to withdraw the funds.

The legal consequence of depositing the funds is that the condemning authority can no longer dismiss the suit, and the government is thereafter committed to the taking. The property owner is entitled to treat the Order of Taking as a final transfer of title. *O'Sullivan v. City of Deerfield Beach*, 232 So. 2d 33 (Fla. 4th DCA 1970).

FINAL JUDGMENT

A final judgment will determine the ultimate compensation due to the condemnee, and the government is required to deposit full compensation within 20 days from the entry of the judgment, or the judgment is rendered null and void. Fla. Stat. § 73.111. Upon deposit of full compensation, the government will receive title to the property, if the title has not vested via the Order of Taking.

If the ultimate compensation is determined to be in excess of the good faith deposit, the government must pay the difference upon entry of the final judgment. Fla. Stat. § 74.071. In that case, the condemnee is entitled to interest on the amount of the final judgment that exceeds the good faith estimate of value. Fla. Stat. § 74.061. The measure of interest is set forth by statute (Fla. Stat. § 55.03(1)), and the interest accrues from the date of surrender of possession through the date of payment of the excess. *Id.* On the other hand, if the ultimate compensation is found to be less than the good faith deposit, the owner must reimburse the condemning authority.

Notably, interest only accrues in the event a final judgment of compensation is rendered. Therefore, a settlement or stipulation that provides for an award in excess of the good faith deposit will not entitle the owner to interest.

CONCLUSION

As with any condemnation or eminent domain proceeding, the condemnee should be cognizant of its procedural and substantive rights. Specifically, when the government seeks an Order of Taking under the quick take statute, the time sensitivity of the proceedings

may place the uninformed owner at a disadvantage. Understanding the burdens of the government and the commonly raised defenses to an Order of Taking will put the owner in the best position to create leverage and obtain full and fair compensation in an efficient manner.

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