Chapter 2
AUTHORITY TO EXERCISE POWER

WILLIAM C. McLEAN, JR.*(1)†

KIMBEL L. MERLIN**(2)

MARK S. BENTLEY***(3)

PAUL D. BAIN****

I. [§ 2.1] DEFINITIONS AND SOURCE OF POWER

"Eminent domain" is the fundamental power of the sovereign to take private property for a public use without the owner's consent. 1 Nichols on Eminent Domain § 1.11 (Matthew Bender & Co. rev. 3d ed. 1996). See also Art. X, § 6, Fla. Const. The power of eminent domain is an inherent attribute of sovereignty that is not derived from the constitution, *Daniels v. State Road Dept.*, 170 So.2d 846 (Fla. 1964), and is absolute, except as limited by the constitution, *Demeter Land Co. v. Florida Public Service Co.*, 99 Fla. 954, 128 So. 402 (1930). The power is implied from the "superior dominion - the 'eminent domain' - which the State holds over all the soil within its bounds," *Daniels*, 170 So.2d at 848, and to which the right of an individual to own and acquire property is subject, *Shavers v. Duval County*, 73 So.2d 684 (Fla. 1954).

The power of eminent domain arises from the practical necessity to take properties for the public good, and every property owner holds title to property subject to the superior right of the government to retake that property. *Demeter Land Co.*

The terms "eminent domain" and "condemnation" as used in this manual refer to intentional, voluntary takings by government through the condemnation process. However, there are circumstances in which other governmental action may effect a compensable "taking" independent of the condemnation process. See Chapters 13 and 19 of this manual. "Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" *Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), quoting *U.S. v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980). See *City of Jacksonville v. Schumann*, 167 So.2d 95 (Fla. 1st DCA 1964). See also *F.S.* 70.001, the Bert J. Harris, Jr., Private Property Rights Protection Act, which is discussed extensively in Chapter 19 of this manual.

II. CONSTITUTIONAL LIMITATIONS ON POWER

A. [§ 2.2] In General

The exercise of eminent domain power is one of the most onerous proceedings known to the law. *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (1947), 172 A.L.R. 168. Therefore, the United States and Florida constitutions, as well as the constitutions of almost all states, contain express provisions to safeguard private property rights. *Daniels v. State Road Dept.*, 170 So.2d 846 (Fla. 1964).

B. [§ 2.3] United States Constitution

The Fifth Amendment to the United States Constitution prohibits the federal government from taking private property for public use without just compensation, and the Fourteenth Amendment prohibits state governments from condemning private property without due process of law.

The Fourteenth Amendment, in effect, applies the requirements of the Fifth Amendment to state and local governments. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), 93 A.L.R.2d 733. The taking of private property by a state, its political subdivisions, or other units may be challenged in either state or federal court.

C. [§ 2.4] Florida Constitution

The due process provision of the Florida Constitution mandates that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const.

Florida's constitutional eminent domain provisions state:

(a) 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.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

Art. X, § 6, Fla. Const. These provisions are simply limitations on the power of the legislature. Therefore, except as prohibited by the constitution, proceedings for the acquisition of property by eminent domain must be prescribed by law. *De Soto County v. Highsmith*, 60 So.2d 915 (Fla. 1952); *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926).

The Florida Constitution, unlike the constitutions of other states, does not provide compensation to the property owner for "damage" to the property, but only for the "taking" or "appropriation" of it. Damages unaccompanied by a taking are consequential and *damnum absque injuria*, *Northcutt v. State Road Dept.*, 209 So.2d 710 (Fla. 3d DCA 1968), unless those damages rise to the level of an inverse condemnation of the owner's property, *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So.2d 622 (Fla. 1990). However, damages are an integral part of every citizen's guaranteed full compensation. *Division of Administration, State Dept. of Transportation v. Grant Motor Co.*, 345 So.2d 843 (Fla. 2d DCA 1977). Consideration of the constitutional distinction between "damage" and "taking" is essential when researching case law in non-Florida jurisdictions.

The practitioner should also note that the Florida Constitution guarantees "full" rather than "just" compensation. Art. X, § 6(a), Fla. Const. This provision is intended to guarantee that the owner receives full, fair, and complete compensation and is "made whole." *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So.2d 289, 292 (Fla. 1959), 69 A.L.R.2d 1445 (quoting *Dade County v. Brigham*, 47 So.2d 602, 604 (Fla. 1950), 18 A.L.R.2d 1221).

See Chapter 9 of this manual.

III. DELEGATION OF POWER

A. [§ 2.5] Florida Statutes
B. Conflicting Powers Of Condemnors

A. [§ 2.5] Florida Statutes

The exercise of the power of eminent domain and the constitutional limitations on that power are vested in the legislature. The right to exercise the eminent domain power is delegated by the legislature to the agencies of government and implemented by legislative enactment. When the power to exercise eminent domain is delegated to a condemning authority, that authority will be required to exercise its power subject to the limitations and conditions set forth in the delegation of authority. *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926).

F.S. Chapters 73 and 74 set forth the procedures generally applicable to eminent domain actions. *F.S.* Chapter 73 is often referred to as the "slow take" statute, and *F.S.* Chapter 74 is referred to as the "quick take" statute. Both chapters satisfy the constitutional due process requirements of notice and an opportunity to be heard. *City of Lakeland v. Bunch*, 293 So.2d 66 (Fla. 1974); *Couse v. Canal Authority*, 209 So.2d 865 (Fla. 1968). Compare *Buckley v. City of Miami Beach*, 559 So.2d 310 (Fla. 3d DCA 1990). *F.S.* 70.001 addresses private property rights claims under the Bert J. Harris, Jr., Private Property Rights Protection Act. See Chapter 19 of this manual.

A condemnor may initiate a "quick take" only if *F.S.* Chapter 74 or another applicable statutory provision expressly authorizes this procedure. *F.S.* 74.011 lists the specific entities that are authorized to take possession and title of an owner's property in advance of entry of final judgment.

Specific authorization to exercise the power of eminent domain, together with particular limitations on it, are contained in numerous other sections of the Florida Statutes. Some examples follow:

- *F.S.* 6.02-6.03 - state consent to acquisition by the United States for "forts, magazines, arsenals, dockyards, and other needful buildings"
- *F.S.* 6.06 - state consent to acquisitions by the United States for national forests
- *F.S.* 73.151 - railroad and canal companies
- *F.S.* 73.161 - telephone and telegraph right-of-way over railroad right-of-way
- *F.S.* 74.011 - list of condemnors who may use *F.S.* Chapter 74 quick take authority
- *F.S.* 74.111 - special provisions relating to drainage districts and housing

authorities

- *F.S.* 125.012(3), 125.015 - port facilities
- *F.S.* Chapter 127 - counties (in addition to constitutional home rule provisions)
- *F.S.* 153.03(5) - county water and sewer facilities
- *F.S.* 153.62(7) - county water and sewer district boards
- *F.S.* 155.15 - county hospitals
- *F.S.* 157.03 - ditch, drain, and canal rights-of-way by counties
- *F.S.* 161.36 - counties acting as beach and shore preservation authorities
- *F.S.* 163.01(7)(f) - legal entity created by interlocal agreement and wholly owned by municipalities and counties.
- *F.S.* 163.370(1)(e)2, 163.375 - community redevelopment by county, municipality, or redevelopment agency
- *F.S.* 163.511(1)(g) - municipal and county special neighborhood improvement districts
- *F.S.* 163.568(1) - regional transportation authorities
- *F.S.* 166.401-166.411 - municipalities
- *F.S.* 180.22 - municipalities and private companies and corporations for municipal public works
- *F.S.* 190.011(7)(a) - community development districts
- *F.S.* 191.006(12) - independent special fire control districts
- *F.S.* 215.64 - Division of Bond Finance
- *F.S.* 250.40(5)(d) - Armory Board "for armories, buildings, and other facilities needed for military purposes."
- *F.S.* Chapter 253 - state lands and agencies
- *F.S.* 258.007, 258.021 - Division of Recreation and Parks
- *F.S.* 259.041(14) - conservation or recreation lands
- *F.S.* 260.015(1)(a) - Florida Recreational Trails System (to cure title defects)
- *F.S.* 288.15(2)(a), 288.23 - Division of Bond Finance, State Board of Administration

- *F.S.* 298.57; Art. X, § 6(b), Fla. Const. - private drainage easements
- *F.S.* 298.62 - drainage and water control districts for canal rights-of-way
- *F.S.* 315.03(2) - county, port district, port authority, or municipality for or in connection with port facilities
- *F.S.* 331.10, 331.305(24), 332.02(2), 333.12 - airports, air commerce, and Florida Spaceport Authority
- *F.S.* 334.044(6), 337.27 - Department of Transportation
- *F.S.* 338.04 - transportation and expressway authorities for limited access facilities
- *F.S.* 343.54(3)(c) - Tri-County Commuter Rail Authority
- *F.S.* 343.64(2)(c) - Central Florida Regional Transportation Authority
- *F.S.* 343.74(2)(c) - Tampa Bay Commuter Rail Authority
- *F.S.* Chapters 348 and 349 - expressway, bridge, and transporta tion authorities
- *F.S.* Chapter 361 - public works, construction of dams for water power, railroad companies, electric railway companies, waterworks companies, natural gas companies, petroleum and petroleum products pipeline companies, sewer or wastewater reuse systems companies, coal pipeline companies, electric utilities
- *F.S.* 362.02 - telegraph and telephone companies
- *F.S.* 372.771(1) - state consent to acquisition by the United States for "managing, protecting and propagating fish and wildlife and for other conservation uses"
- *F.S.* Chapter 373 - water resources
- *F.S.* 373.086, 373.139, 373.1961(1)(g) - water management districts
- *F.S.* 373.1962(2)(e) - regional water supply authorities
- *F.S.* 374.984(1) - Florida Inland Navigation District
- *F.S.* 375.031(6) - Department of Environmental Protection, out door recreation and conservation
- *F.S.* 380.055(7) - Big Cypress Area and Big Cypress National Preserve Addition
- *F.S.* 381.0013 - Department of Health
- *F.S.* 388.191 - mosquito control districts

- *F.S.* 402.16 - Department of Children and Family Services
- *F.S.* 418.22(3) - recreation districts
- *F.S.* 421.12 - public housing authorities
- *F.S.* 425.04(12) - rural electric cooperatives
- *F.S.* 479.24 - outdoor advertising signs
- *F.S.* 582.43 - watershed improvement districts
- *F.S.* 589.27 - Division of Forestry
- *F.S.* 633.45(2)(e) - Florida State Fire College
- *F.S.* 704.01(2), 704.04 - private statutory way of necessity, analogous to, but not expressly designated as, eminent domain
- *F.S.* 945.27 - Department of Corrections
- *F.S.* 1001.64(35), 1013.25 - community college district boards of trustees
- *F.S.* 1001.74(30), 1013.25 - university boards of trustees
- *F.S.* 1004.73(7) - Board of County Commissioners and all municipalities of Pinellas County for St. Petersburg College
- *F.S.* 1013.24 - school boards

B. Conflicting Powers Of Condemnors

1. [§ 2.6] In General

The lands of the United States are not subject, either directly or indirectly, to the application by the states of the power of eminent domain without the consent of the federal government, nor is a county permitted to appropriate state property without state consent. *F.S.* 127.01(1)(a).

On occasion a public agency possessing the power of eminent domain has attempted to condemn the property of another public agency or has defended against such an attempt. In these situations, the authority to condemn is subject to the application of three doctrines: (1) the prior

public use doctrine, (2) the compatible use doctrine, and (3) the doctrine of superior power of condemnation.

2. [§ 2.7] Prior Public Use Doctrine

The prior public use doctrine states that property devoted to public use cannot be taken and appropriated to another public use unless the authority for the taking either has been given expressly by the legislature or is necessarily implied. This doctrine has particular application when one condemning authority seeks property held by another and neither authority possesses a superior power of condemnation by statute or by court decision. *Florida East Coast Railway Co. v. City of Miami*, 321 So.2d 545 (Fla. 1975); *Florida East Coast Railway Co. v. City of Miami*, 372 So.2d 152 (Fla. 3d DCA 1979). See *Housing Authority of City of Fort Lauderdale v. State Dept. of Transportation*, 385 So.2d 690 (Fla. 4th DCA 1980). The reason for the doctrine is that, if one co-equal body may condemn the property of another under a general power of condemnation, the latter could reacquire, and so on ad infinitum. *Florida East Coast Railway Co. v. City of Miami*, 372 So.2d 152 (Fla. 3d DCA 1979). The prior public use doctrine does not apply when property is condemned by a public entity for the same use to which it has been devoted by a private entity. *Florida Water Services Corp. v. Utilities Commission*, 790 So.2d 501 (Fla. 5th DCA 2001).

For a further discussion of this doctrine, see § 6.19 of this manual.

3. [§ 2.8] Compatible Use Doctrine

If a taking will neither materially impair nor alter an existing public use and the proposed use is not detrimental to the public, Florida courts may permit one condemning authority to appropriate the property of another authority under the compatible use doctrine. This is an exception to the prior public use doctrine. *Florida East Coast Railway Co. v. Broward County*, 421 So.2d 681 (Fla. 4th DCA 1982); *Georgia Southern & Florida Railway Co. v. State Road Dept.*, 176 So.2d 111 (Fla. 1st DCA 1965).

Although the doctrine was not expressly applied, the City of Dania was not permitted to intervene in an eminent domain action by Broward County to acquire land for expansion of the Fort Lauderdale-Hollywood International Airport. The city's claim included loss of an annual tax base and infrastructure expenditures. The court noted that intervention "would promote a never-ending battle between cities and counties in every eminent domain proceeding." *City of Dania v. Broward County*, 658 So.2d 163, 165 (Fla. 4th DCA 1995). See also *Leeberg v. Dept. of Transportation, State of Florida,* 714 So.2d 1159, 1160 (Fla. 5th DCA 1998) (DOT "failure to take into consideration concerns and objections of local government entities does not, of itself, preclude the taking").

4. [§ 2.9] Doctrine Of Superior Power Of Condemnation

The doctrine of superior power of condemnation, either expressly granted or necessarily

implied, suspends the prior public use doctrine and permits one condemning authority to appropriate the property of another condemning authority. *Housing Authority of City of Fort Lauderdale v. State Dept. of Transportation*, 385 So.2d 690 (Fla. 4th DCA 1980); *Florida East Coast Railway Co. v. City of Miami*, 372 So.2d 152 (Fla. 3d DCA 1979).

The Florida Department of Transportation, having an unrestricted power of eminent domain under state law, *F.S.* 337.27, can appropriate property of a railroad or a public housing authority for its public uses. Title to property taken by the department vests in the state of Florida. This is an example of the doctrine of superior power of condemnation. *Housing Authority of City of Fort Lauderdale*. However, the "superiority" does not relieve the department of its statutory duty to file a declaration of taking, including deposit of a good faith estimate of value based on a valid appraisal. *Division of Administration, State, Dept. of Transportation v. Dade County*, 388 So.2d 326 (Fla. 3d DCA 1980).

5. [§ 2.10] Statutory Construction

When interagency conflicts arise, counsel must examine the legislation granting the power of eminent domain to determine whether one agency has superior authority to condemn properties or whether the compatible use doctrine applies. If both agencies have equal power of condemnation, the prior public use doctrine applies.

Because the power of eminent domain is one of the harshest proceedings known to the law, any statute granting the power must be strictly construed. *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So.2d 451 (Fla. 1975); *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (1947), 172 A.L.R. 168. This construction applies not only to conflict between public agencies, but also to the manner in which these powers are exercised. See *Inland Waterway Development Co. v. City of Jacksonville*, 160 Fla. 913, 37 So.2d 333 (1948).

IV. PREREQUISITES TO EXERCISE OF POWER

A. Public Purpose And Necessity
B. [§ 2.17] Discretion Of Condemning Authorities
C. [§ 2.18] Precondemnation Planning
D. [§ 2.19] Resolutions Of Condemning Authorities
E. Statutory Requirements
F. [§ 2.22] Administrative Due Process
G. [§ 2.23] Surveys

A. Public Purpose And Necessity

1. [§ 2.11] Public Purpose
2. [§ 2.12] Public Necessity
3. Specific Applications Of Public Purpose And Necessity Requirements

1. [§ 2.11] Public Purpose

The Florida Constitution expressly prohibits use of the power of eminent domain "except for a public purpose." Art. X, § 6, Fla. Const. The terms "public purpose" and "public use" are used interchangeably in this manual. See § 3.4. Discussed below are some significant aspects of the public purpose doctrine, a subject that is treated in more detail in Chapter 3.

In determining whether a particular use of eminent domain is for a public use or purpose, the courts traditionally have held that "[t]he public interest must dominate the private gain." *Demeter Land Co. v. Florida Public Service Co.*, 99 Fla. 954, 128 So. 402, 406 (1930), quoting from *Boyd v. C.L. Ritter Lumber Co.*, 89 S.E. 273, 279 (Va. 1916). The public purpose test was set forth by the Florida Supreme Court in *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So.2d 451, 455 (Fla. 1975):

[E]minent domain cannot be employed to take private property for a predominantly Private Use; it is, rather, the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without which proper purpose the private property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law.

Applying reason to this basic proposition, our decisions have, however, consistently allowed an *incidental* private use where the purpose of the taking was clearly and predominantly a public purpose.

The analysis of predominant versus incidental use, although well-established in case law, is easier stated than applied, and has produced different results as the concept of "public" has evolved. The reader should note the discussion of prior decisions in *Baycol* and in *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1981). (The latter decision, a bond validation case, is discussed in § 3.9 of this manual.) In *Miami Beach Redevelopment Agency*, 392 So.2d at 890, the Florida Supreme Court applied the test established by the United States Supreme Court in *Berman v. Parker*, 348 U.S. 26, 33-34, 75 S.Ct. 98, 99 L.Ed. 27 (1954): "[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." See also *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), applying the *Berman* rule to uphold condemnation as part of a state legislative plan to change the scheme of land ownership.

The Community Redevelopment Act of 1969, *F.S.* Chapter 163, Part III, states that the redevelopment of slums and blighted areas in the state is a public purpose for which public funds may be expended and the power of eminent domain and the police power exercised. *F.S.*

163.335(3). However, before such powers may be exercised, the governmental agency exercising the power must first meet the specific requirements in *F.S.* 163.340(7)-(8), in making findings that slum and blighted conditions exist within a redevelopment area. *F.S.* 163.355; *Holloway v. Lakeland Downtown Development Authority*, 417 So.2d 963 (Fla. 1982), provides an example of statistical findings supporting a declaration that slum and blight conditions exist.

A review of these findings by the redevelopment agency is essential for the practitioner representing a landowner whose property is claimed to be either a slum or blighted. The condemning authority must establish the public purpose and necessity under the statutory guidelines. See *City of Jacksonville v. Moman*, 290 So.2d 105 (Fla. 1st DCA 1974). The decision designating the redevelopment area is a legislative function and is reviewed by the trial court on a "fairly debatable" standard. *JFR Investment v. Delray Beach Community Redevelopment Agency*, 652 So.2d 1261 (Fla. 4th DCA 1995). In *Rukab v. City of Jacksonville Beach*, 811 So.2d 727 (Fla. 1st DCA 2002), a property owner challenged the city's determination of blight even though another land owner within the same area previously litigated the issues concerning the findings of blight by the city. The burden remained on the condemning authority in an eminent domain action to establish a public purpose and reasonable necessity for the taking of Rukab's property. This right was reserved even though the property was bought subject to a previous determination of blight by the court.

In *Clark v. Gulf Power Co.*, 198 So.2d 368, 371 (Fla. 1st DCA 1967), the court held: "A state's power exists only within its territorial limits for the use and benefit of the people within the state. Thus, property in one state cannot be condemned for the sole purpose of serving a public use in another state." See *Town of Palm Beach v. City of West Palm Beach*, 239 So.2d 835 (Fla. 4th DCA 1970), concerning a city's use of the eminent domain power to acquire property within another city for construction of a sewage system. See also *Romero v. City of Pensacola*, 214 So.2d 88 (Fla. 1st DCA 1968). However, a city may not exercise its eminent domain powers when it intends to donate the condemned property to the state for construction of a state facility; a valid municipal purpose must be served directly, not merely incidentally. *Basic Energy Corp. v. Hamilton County*, 652 So.2d 1237 (Fla. 1st DCA 1995).

Public use was defined by the District Court of Appeal, Third District, in *Devon-Aire Villas Homeowners Association, No. 4, Inc. v. Americable Associates, Ltd.*, 490 So.2d 60, 63 (Fla. 3d DCA 1985), citing *Clark*, as "one which is fixed and definite, in which the public has an interest, and the terms and manner of its enjoyment must be within the control of the state." In *JFR Investment*, the agency declared 2,000 acres as a slum or blighted area designated for redevelopment. Public purpose was established even though parking facilities were included for anticipated private development because the overall purpose clearly and predominantly was public, and potential private use was incidental.

2. [§ 2.12] Public Necessity

Public necessity is essential to the valid exercise of the power of eminent domain. *F.S.* 73.021(1); *Canal Authority v. Miller*, 243 So.2d 131 (Fla. 1970). The necessity must be

reasonable, not absolute. Once the condemning authority demonstrates a reasonable necessity for the property, the owner must either concede the necessity or show bad faith or abuse of discretion. *City of Jacksonville v. Griffin*, 346 So.2d 988 (Fla. 1977); *Canal Authority*. Necessity is a matter for the court, not the jury, to decide.

In *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So.2d 451 (Fla. 1975), the court disallowed condemnation of land for the construction of a parking facility to serve a privately owned shopping mall. The court held that the test of public necessity had not been met: "The condemning body cannot proceed in this manner and 'create' a subsequent necessity by first taking the property and applying it to a private interest which constitutes a basis for a later created 'public need.'" *Id.* at 458.

Historically, a condemning authority could not take a greater title to land than it could demonstrate was necessary, *Canal Authority*, nor could it condemn a larger quantity of land than required, *Knappen v. State Dept. of Transportation, Division of Administration*, 352 So.2d 885 (Fla. 2d DCA 1977). See also *Cordones v. Brevard County*, 781 So.2d 519 (Fla. 5th DCA 2001). In *Dept. of Transportation v. Fortune Federal Savings & Loan Association*, 532 So.2d 1267 (Fla. 1988), the court held otherwise, and declared constitutional *F.S.* 337.27(2), which gave to the Department of Transportation the authority to acquire more property than necessary for a road project when the total acquisition cost would be reduced by doing so. That authority was extended to counties and municipalities under *F.S.* 127.01(1)(b) and 166.401(2), respectively. However, the 1999 Legislature repealed that authority effective January 1, 2000.

The courts have upheld the taking of property that was not blighted when necessary to a community redevelopment plan. In *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So.2d 745, 748 (Fla. 1959), the court held that "to deny to the City the right to include within the area certain houses or buildings in good condition would, in some instances, defeat the over-all purpose of the statute and the Project."

A taking for a public purpose may be allowed even when private enterprise carries out the public purpose. Thus, a taking for slum clearance is permissible when the property taken will be redeveloped by another private owner. *Baycol*; *Grubstein*. See also *Post v. Dade County*, 467 So.2d 758 (Fla. 3d DCA 1985) (owner's ability and commitment to redevelop property cannot defeat government's right to take parcel under comprehensive slum clearance and redevelopment project that includes redevelopment by private parties). The fact that a private concern provides a public function does not preclude government from condemning the property for the same public use. *City of Palm Bay v. General Development Utilities, Inc.*, 201 So.2d 912 (Fla. 4th DCA 1967).

A number of "necessity" cases involve the availability of alternative property to satisfy the public need. The question of necessity also frequently arises in connection with the immediacy and specificity of the use. See Chapter 4 of this manual for further discussion.

3. Specific Applications Of Public Purpose And Necessity Requirements

a. [§ 2.13] Parks And Open Space
b. [§ 2.14] Civic And Recreational Facilities
c. [§ 2.15] Parking Facilities
d. [§ 2.16] Prior Public Use Of Private Property

a. [§ 2.13] Parks And Open Space

The courts have traditionally recognized the public purpose and necessity of condemnations for roads, drainage, public buildings, transportation, communications, and utilities. The right to condemn land for public parks and recreational purposes has evolved more recently. In *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (1947), 172 A.L.R. 168, the court found that public necessity was lacking when the county attempted to acquire 490 acres of land in a sparsely inhabited area for unspecified recreational purposes. The court found that the authority to condemn was limited to "something that is basically essential, such as . . . parks and playgrounds in congested areas." *Id.* at 487. See also *City of Miami v. Cox*, 313 So.2d 443 (Fla. 3d DCA 1975).

The court in *Dade County v. Paxson*, 270 So.2d 455 (Fla. 3d DCA 1972), clearly recognized the authority to acquire vast areas near large population centers for preservation, park, and recreational purposes. This case involved the acquisition of approximately 180 acres for inclusion in a large metropolitan park serving some 250,000 residents within an eight-mile radius of the site. In allowing the acquisition, the court held that it was not necessary that the condemning authority prove "absolute necessity" or immediate need because of its duty to plan for the future.

In *Florida East Coast Railway Co. v. City of Miami*, 372 So.2d 152 (Fla. 3d DCA 1979), the court upheld the statutory right of a municipality to acquire railroad property for park purposes despite the contention that the property was necessary for railroad use. See Att'y Gen. Op. 74-357, concerning the power of a municipality to acquire property outside municipal boundaries for public park purposes.

F.S. 127.01(2) prohibits counties from condemning lands outside their boundaries for parks and recreational purposes. As amended in 1991, this statute now provides that "[i]n eminent domain proceedings, a county's burden of showing reasonable necessity for parks, playgrounds, recreational centers, or other types of recreational purposes shall be the same as the burden in other types of eminent domain proceedings." This is an apparent legislative "reversal" of *Hillsborough County v. Lutz Realty & Investment Co.*, 553 So.2d 1320, 1324 (Fla. 2d DCA 1989), which held that the de novo review requirement of the former statute "transform[ed] the trial court into the condemning authority."

b. [§ 2.14] Civic And Recreational Facilities

A public purpose sufficient to allow the sale of bonds and the expenditure of public funds may also support the use of eminent domain but does not totally resolve the issue. *State v. Miami*

Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1981); *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So.2d 451 (Fla. 1975). Guidance on the definition of "public purpose" is frequently found in bond validation cases.

In *Panama City v. State*, 93 So.2d 608 (Fla. 1957), the court upheld the public purpose of a multiple-use facility consisting of a city hall, a civic auditorium, concession buildings, an administration building, and a marine sales and service building, together with docks, docking facilities, waterways, parking, and other facilities required for the operation of two marinas. The project was challenged, in particular because of the many concession buildings. In upholding the project as a proper public purpose, the court observed: "The development of the law in this State on this question and particularly a study of the legislative history with relation to public projects of a recreational and entertainment nature reveals the allowance to the public bodies of an extremely wide latitude in this field." *Id.* at 613. See also *City of Miami v. Coconut Grove Marine Properties, Inc.*, 358 So.2d 1151 (Fla. 3d DCA 1978). Compare *City of West Palm Beach v. State*, 113 So.2d 374 (Fla. 1959) (lease of entire municipal civic center to private corporation held to be private, not public, use).

In *Poe v. Hillsborough County*, 695 So.2d 672, 679 (Fla. 1997), the court held that, "once a trial court has found that a 'paramount public purpose' exists, the court cannot micromanage the arms-length business negotiations of the parties by striking discrete portions of a complex arrangement which, as a whole, the court candidly finds to be substantially beneficial to the public."

c. [§ 2.15] Parking Facilities

In *Gate City Garage, Inc. v. City of Jacksonville*, 66 So.2d 653 (Fla. 1953), the Florida Supreme Court validated a statutory plan for the acquisition, through eminent domain, of off-street parking facilities, holding that neither competition with private enterprise nor the incidental leasing of a portion of the property for a private service station defeated the primary public purposes. On the other hand, in *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So.2d 451 (Fla. 1975), the court found that it was an improper use of the power of eminent domain to acquire land for the construction of a parking facility to serve a planned private shopping mall. See § 2.11.

d. [§ 2.16] Prior Public Use Of Private Property

In *City of Palm Bay v. General Development Utilities, Inc.*, 201 So.2d 912 (Fla. 4th DCA 1967), a municipality was authorized to acquire a privately owned water and sewer utility serving the public that was to be put to the identical public use. See also *Florida Water Services Corp. v. Utilities Commission*, 790 So.2d 501 (Fla. 5th DCA 2001). Most of the law in this area concerns the acquisition of property from railroads that also have authority to condemn. The leading cases are *Florida East Coast Railway Co. v. City of Miami*, 321 So.2d 545 (Fla. 1975), and *Georgia Southern & Florida Railway Co. v. State Road Dept.*, 176 So.2d 111 (Fla. 1st DCA 1965), which are discussed at length in § 3.8 of this manual. See also §§ 2.6-2.7.

B. [§ 2.17] Discretion Of Condemning Authorities

A condemnor's discretion in determining the location and amount of property necessary for public purposes is limited. See § 4.5 of this manual. Before a condemnor may exercise eminent domain power, it must determine that the property is reasonably necessary for a public use or purpose. The condemning authority need not show immediate need for the property or the project, but, within reasonable limitations, may condemn private property for future planned projects. *Dade County v. Paxson*, 270 So.2d 455 (Fla. 3d DCA 1972). Compare *City of Miami v. Cox*, 313 So.2d 443 (Fla. 3d DCA 1975). The condemning agency must also show a reasonable probability that the necessary governmental permits can be obtained for the project. *Seadade Industries, Inc. v. Florida Power & Light Co.*, 245 So.2d 209 (Fla. 1971), 47 A.L.R.3d 1255. However, the City of Jasper exceeded its authority when it attempted to condemn land to donate to the state for the construction of a state prison facility in the county in *Basic Energy Corp. v. Hamilton County*, 652 So.2d 1237 (Fla. 1st DCA 1995).

In *Gregory v. Indian River County*, 610 So.2d 547 (Fla. 1st DCA 1993), the county applied for permits from the Florida Department of Environmental Regulation (DER) to construct a stormwater treatment facility and to engage in certain dredge and fill activities relating to a proposed extension of Indian River Boulevard. The county sought to determine the extent of environmental mitigation required by the permitting agencies before deciding what property should be acquired through condemnation. The county submitted a mitigation plan that was accepted by DER. The owners of the property to be condemned under the plan immediately intervened and petitioned for a formal administrative hearing, challenging the DER wetlands calculations for being excessive and for requiring the county to take more lands than reasonably necessary. The county then initiated condemnation proceedings. The court held that the issue of wetlands jurisdiction should be resolved in the administrative process, but the reasonableness of the county mitigation plan should be resolved in the circuit court condemnation proceedings. DER had no outright authority over the county's decision concerning reasonable necessity for the lands taken.

A court may not substitute its discretion when a condemning agency acts properly within its legislative and executive prerogatives and does not abuse its discretion or exhibit bad faith in exercising the power of eminent domain. *City of St. Petersburg v. Vinoy Park Hotel Co.*, 352 So.2d 149 (Fla. 2d DCA 1977). Compare *Knappen v. Division of Administration, State Dept. of Transportation*, 352 So.2d 885 (Fla. 2d DCA 1977). The condemning authority may properly consider its future needs to establish the extent of a present taking. *Klatt v. Florida Power & Light Co.*, 414 So.2d 213 (Fla. 4th DCA 1982). In fact, public officials have a duty to plan for the foreseeable future. *Carlor Co. v. City of Miami*, 62 So.2d 897 (Fla. 1953). This is true even in the absence of a completed master plan. *City of Miami Beach v. Broida*, 362 So.2d 19 (Fla. 3d DCA 1978). The condemning authority may also acquire property by eminent domain and then lease it for commercial uses in furtherance of a public purpose. *City of Miami v. Coconut Grove Marine Properties, Inc.*, 358 So.2d 1151 (Fla. 3d DCA 1978).

In *Dept. of Transportation v. Fortune Federal Savings & Loan Association*, 532 So.2d 1267, 1270 (Fla. 1988), the court found that "the purpose of cutting acquisition costs to expand the financial base for further public projects constitutes a valid public purpose." The court upheld the constitutionality of *F.S.* 337.27(3) (1985), which allowed the acquisition of an entire tract to avoid business damage costs. The legislature repealed this statutory provision and similar statutes, effective January 1, 2000, removing the statutory authority for a "whole take" to avoid business damages.

C. [§ 2.18] Precondemnation Planning

During the past 50 years, Florida has changed from a rural to an urban state. Both the public and private sectors have felt the impact of development. The legislature has equipped its governmental agencies with certain planning tools to implement valid public policies, characterized as "legitimate state interests." However, the procedures have been challenged on the grounds of administrative due process, improper use of the police power, and inverse condemnation. The process continues to evolve.

Florida counties and cities and the Department of Transportation have been empowered by statute to exercise the power of eminent domain to secure rights-of-way for proposed or anticipated transportation facilities or designated transportation corridors without design plans and profiles or construction information. *F.S.* 127.01(1), 166.401(1), 337.27(1), 337.273(4)-(6). The department, any expressway authority, and the governing board of any municipality may approve and record corridor official maps for proposed transportation facilities under the procedures in *F.S.* 337.2735. The department is also required to plan and develop a proposed Florida Intrastate Highway System Plan of limited access and controlled access facilities, *F.S.* 338.001, and all transportation authorities of the state, counties, and municipalities are authorized to provide limited access facilities for public use, *F.S.* 338.01.

F.S. 337.241, enacted in 1987 and repealed in 1992, authorized the department or any expressway authority created under *F.S.* Chapter 348 to prepare and record maps of reservation delineating the limits of proposed rights-of-way for road construction. Subsections (2) and (3) were invalidated for failing to satisfy the requirements of due process in *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So.2d 622 (Fla. 1990).

Taking a different approach, Palm Beach County adopted by ordinance a thoroughfare map as part of its 1989 Comprehensive Plan based on *F.S.* 163.3161, the "Local Government Comprehensive Planning and Land Development Regulation Act," and *F.S.* 163.3177(6)(b), providing for a traffic circulation element including existing and proposed major thoroughfare and transportation routes. The map was intended to protect identified transportation routes from encroachment by other land use activities. The county's thoroughfare map adopted into the comprehensive use plan was found facially unconstitutional by both the trial and appellate courts. However, the District Court of Appeal, Fourth District, certified to the Supreme Court the following question:

Is a county thoroughfare map designating corridors for future roadways, and which forbids land use activity that would impede future construction of a roadway, adopted incident to a comprehensive county land use plan enacted under the local government comprehensive planning and land development regulation act, facially unconstitutional under *Joint Ventures Inc. v. Department of Transportation*, 563 So.2d 622 (Fla. 1990)?

Palm Beach County v. Wright, 612 So.2d 709, 710 (Fla. 4th DCA 1993). The Supreme Court answered the certified question in the negative. *Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994). The court distinguished *Joint Ventures* by holding that the adoption of the county's thoroughfare map was proper as it related to comprehensive plan goals. The court also held that an inverse condemnation action may lie on an individual basis should denial of development permits deprive an owner of substantially all economically beneficial use of the land. The practitioner should note the procedures and administrative review remedies discussed in *City of Jacksonville Beach v. Prom*, 656 So.2d 581 (Fla. 1st DCA 1995), citing *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993), and implementation of comprehensive plans adopted under *F.S.* Chapter 163. See also *Auerbach v. Dept. of Transportation of State of Florida*, 545 So.2d 514, 515 (Fla. 3d DCA 1989), holding that "administrative planning, which of necessity requires public hearings, does not in itself constitute a 'taking'. . . . This seems to us a self-evident proposition, else administrative planning of this sort, preparatory to a decision to institute eminent domain proceedings, would be, in effect, precluded."

When an owner loses business income because tenants relocate as a result of receiving mandatory notices of impending condemnation, the owner does not have a cause of action against the condemning authority that sent the notices. *Amerkan v. City of Hialeah*, 534 So.2d 796 (Fla. 3d DCA 1988); *State, Dept. of Transportation v. Donahoo*, 412 So.2d 400 (Fla. 1st DCA 1982) (modifying right-of-way plans over several years to avoid partial taking of building did not result in a taking).

Similarly, in *State, Dept. of Transportation v. FirstMerit Bank*, 711 So.2d 1217 (Fla. 2d DCA 1998), an owner who moved in anticipation of a proposed road construction project was not entitled to claim moving and relocation expenses based on "equitable estoppel." The court noted that equitable estoppel was an affirmative defense, not a cause of action. Because the trial court did not determine the bank's inverse condemnation claim, it was not addressed on appeal.

The legislature has recognized that acquisition of property within designated transportation corridors before the completion of construction plans may serve a public purpose. *F.S.* 337.273(4). Authority for this advanced acquisition has been given to counties (*F.S.* 127.01(1)(b)), municipalities (*F.S.* 166.401(2)), and the Department of Transportation (*F.S.* 337.27(1)).

Oppressive precondemnation conduct or delay tactics to coerce an owner to sell property below market value has been held to state a cause of action for damages against the public entity. *City of Fort Lauderdale v. Coolidge-South Markets Equities, L.P.*, 10 FLW Supp. 101 (17th Cir.

2002); *James Doyne York Trust v. South Florida Water Management District*, 3 FLW Supp. 277 (15th Cir. 1995).

A claim for inverse condemnation may arise in one of the following circumstances, permitting an exception to the general rule of "mere planning":

- When a condemnor's actions expressing an intent to take property required for a public improvement are followed by work in connection with the improvement.

- When "prohibitory actions" of the government substantially interfere with the owner's use and enjoyment of the property.

Annot., Condemnation - Preimprovement Planning, 37 A.L.R.3d 127, 131 (1971). See *Foster v. City of Detroit, Michigan*, 254 F.Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F.2d 138 (condemnor's precondemnation actions constituted taking when substantially contributing to and accelerating decline in property value); see also Chapter 13 of this manual.

Depression or depreciation in market value because of project anticipation was addressed in *State Road Dept. v. Chicone*, 158 So.2d 753 (Fla. 1963). The property is valued as of the date of valuation based on the market value if the property had not been subject to the debilitating threat of condemnation.

D. [§ 2.19] Resolutions Of Condemning Authorities

When a condemning authority exercises its delegated power to condemn property for a public purpose, the determination concerning necessity, the interest to be taken, and the use to be made of the property must be made by the governing board of the agency exercising the power. An attorney or employee may not make the determination. *Chalmers v. Florida Power & Light Co.*, 245 So.2d 285 (Fla. 1st DCA 1971).

Counties (*F.S.* 127.02) and municipalities (*F.S.* 166.041, 166.401, 166.411) are required to act by resolution to exercise the power of eminent domain. *F.S.* 373.086(2) states that "works of the [water management] district shall be those adopted by the governing board of the district." This provision requires the district to adopt a resolution that condemnation is necessary to fulfill a legitimate flood control purpose before initiating condemnation proceedings. *Tosohatchee Game Preserve, Inc. v. Central & Southern Florida Flood Control District*, 265 So.2d 681 (Fla. 1972).

With the exception of statutes applicable to counties and municipalities, no general legal provision appears to require an agency to express its decision to exercise the power of eminent domain by any means other than its own internal operating rules. Adoption of appropriate resolutions by a corporate board of directors having the power of eminent domain has been approved in *Florida Cent. & P.R. Co. v. Bell*, 43 Fla. 359, 31 So. 259 (1901). See *Gulf Power Co. v. Stack*, 296 So.2d 572 (Fla. 1st DCA 1974), *supple mented* 300 So.2d 41; *Chalmers*. The Secretary of the Department of Transportation may delegate the authority to execute eminent

domain resolutions to the chief administrative officer of the district in which the property is located. *F.S.* 337.27(1).

An eminent domain petition must state "the authority under which and the use for which the property is to be acquired." *F.S.* 73.021(1). When official action must be taken by a board or body to approve a taking, this action is evidenced by an authorizing resolution, ordinance, or other documentation of the official action, a copy of which must be attached to the petition. *Id.*; *Tosohatchee Game Preserve, Inc.* The resolution must be adopted before initiation of condemnation proceedings. A resolution adopted after commencement of the action is insufficient. *Florida East Coast Railway Co. v. City of Miami*, 346 So.2d 621 (Fla. 3d DCA 1977). Jurisdiction must be properly invoked and perfected, and a condemnation judgment based on a petition without the authorizing resolution attached is voidable. *Florida Power & Light Co. v. Canal Authority of State of Florida*, 423 So.2d 421 (Fla. 5th DCA 1982).

The resolution or official action must set forth the following:

- The use for which the property is to be acquired expressed in sufficient detail to enable the court to determine whether the power of eminent domain is being exercised for a public purpose. *City of Ocala v. Red Oak Farm, Inc.*, 636 So.2d 81 (Fla. 5th DCA 1994); *Wright v. Dade County*, 216 So.2d 494 (Fla. 3d DCA 1968).

- The performance or occurrence of any condition precedent. *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926). See *Seadade Industries, Inc. v. Florida Power & Light Co.*, 245 So.2d 209 (Fla. 1971), 47 A.L.R.3d 1255; *Gregory v. Indian River County*, 610 So.2d 547 (Fla. 1st DCA 1993); *Maples v. State, Dept. of Transportation*, 588 So.2d 25 (Fla. 1st DCA 1991).

- An adequate description of the property to be acquired, by reference to an approved official map of survey and location, right-of-way map, or other documentation sufficient to locate the boundaries of the property. *Walker v. Florida Gas Transmission Co.*, 491 So.2d 1286 (Fla. 1st DCA 1986); *State Road Dept. of Florida v. Southland, Inc.*, 117 So.2d 512 (Fla. 1st DCA 1960).

- A statement of the estate or interest to be acquired. *Carlor Co. v. City of Miami*, 62 So.2d 897 (Fla. 1953).

- A finding that the property is reasonably necessary for the stated public purpose. *City of Jacksonville v. Griffin*, 346 So.2d 988 (Fla. 1977); *Central & Southern Florida Flood Control District v. Wye River Farms, Inc.*, 297 So.2d 323 (Fla. 4th DCA 1974).

A petition that does not contain findings sufficient to comply with *F.S.* 73.021(1)-(3) and (6) is susceptible to a motion to dismiss, as is a petition that does not attach an authorizing resolution. *Tosohatchee Game Preserve*; *City of Clearwater v. Janet Land Corp.*, 343 So.2d 853 (Fla. 2d DCA 1976); *Salfi v. Division of Administration, State, Dept. of Transportation*, 312 So.2d 781 (Fla. 4th DCA 1975). A resolution expressing a need for the condemned land does not create a legal presumption of necessity; the condemnor must give the court proof of reasonable

necessity. *City of Miami v. Cox*, 313 So.2d 443 (Fla. 3d DCA 1975). Merely introducing the authorizing resolution at a quick taking hearing does not guarantee the entry of an order of taking. *Katz v. Dade County*, 367 So.2d 277 (Fla. 3d DCA 1979). A certification of public convenience and necessity under the Natural Gas Act, 15 *U.S.C.* §§ 717 *et seq.*, and the Natural Gas Transmission Pipeline Siting Act, *F.S.* 403.9401 *et seq.*, is admissible as evidence of public need and necessity in eminent domain proceedings. See *F.S.* 403.9423.

When a condemnor executes its resolution depicting the location of the project, there is a statutory presumption that any increase or decrease in the value of any property to be acquired is known in the market. *F.S.* 73.071(5). See §§ 5.4 and 9.38 of this manual.

Counties may contract with the Department of Transportation for the acquisition of rights-of-way for roads in the state highway system. A county filing a petition in eminent domain with the department must attach a previously adopted joint resolution of the department and the board of county commissioners. See *F.S.* 338.01.

E. Statutory Requirements

1. [§ 2.20] In General
2. [§ 2.21] Presuit Negotiations

1. [§ 2.20] In General

For a governmental entity or private "quasi-governmental" entity to exercise the power of eminent domain, it must have legislative authority under an express statute. For example, the Department of Transportation has eminent domain authority under *F.S.* Chapters 334 and 337. See § 2.5 for a list of statutes granting eminent domain authority. The entity must also fully comply with the provisions of *F.S.* Chapters 73 and 74. *F.S.* Chapter 73 applies to all eminent domain proceedings in Florida; *F.S.* Chapter 74 applies to "quick take" proceedings. See *Pichowski v. Florida Gas Transmission Co.*, 28 FLW D1861 (Fla. 2d DCA 2003) (gas pipeline company did not have quick take authority).

Eminent domain statutes must be strictly construed against the exercise of the power of eminent domain.

The power of eminent domain is an attribute of the sovereign. It is not a vesture of the state conferred by constitution or statute. It is circumscribed by the constitution and statute in order that cherished rights of the individual may be safeguarded. It is one of the most harsh proceedings known to the law, consequently when the sovereign delegates the power to a political unit or agency a strict construction will be given against the agency asserting the power.

Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So.2d 483, 485 (1947), 172 A.L.R. 168. "Statutes are generally subject to strict construction where they interfere with private property rights or are in derogation of individual ownership. This is true of statutes . . . divesting title against the owner's will. In such cases, all doubts are resolved in favor of the property

owner." 73 Am.Jur.2d *Statutes* § 285.

Once the condemnor has fully complied with all applicable statutory provisions, it must meet two additional requirements to condemn an owner's property: establish public purpose and necessity for acquiring the owner's land. See §§ 2.11-2.16 and Chapters 3 and 4 of this manual. Public purpose and necessity must be established in all eminent domain proceedings in Florida, whether the condemnor is instituting a "slow take" or a "quick take". However, if the condemnor is using *F.S.* Chapter 74 to do a "quick take," it must also meet its burden of making a good faith estimate of value for the property taken, under *F.S.* 74.031. See *Broward County v. Carney*, 586 So.2d 425 (Fla. 4th DCA 1991).

2. [§ 2.21] Presuit Negotiations

Substantial amendments to Florida's eminent domain statutes were adopted in 1999, which became effective July 1, 2000. One amendment created a mandatory presuit negotiation process in *F.S.* 73.015, to encourage presuit settlement and reduce litigation costs in eminent domain proceedings. See *1999 Amendments to Florida's Eminent Domain Statutes*, 73 Fla. Bar J. 68 (Nov. 1999).

The statute requires the condemning authority to provide a written offer and, if requested, a copy of the appraisal, to the fee owner and to attempt good faith negotiations to reach an agreement on compensation. *F.S.* 73.015(1). No later than the time the offer of compensation is made, the condemnor must also provide notice to the fee owner and to business owners, including lessees, who operate businesses on the property to be acquired. *F.S.* 73.015(1)-(2).

For detailed discussion of presuit negotiation procedures, see Chapter 5 of this manual.

F. [§ 2.22] Administrative Due Process

The decision of a public agency to take private property for a public use is a legislative function, and giving notice to a particular condemnee of an opportunity to be heard at the legislative or administrative level is not essential to due process. The opportunity afforded under *F.S.* 74.051(1) is sufficient because the validity of the exercise of eminent domain, including the issues of public purpose and necessity, is ultimately a judicial determination. *City of Lakeland v. Bunch*, 293 So.2d 66 (Fla. 1974).

The legislature has created administrative due process requirements in eminent domain proceedings by enacting extensive presuit requirements effective July 1, 2002. *F.S.* 73.015 requires all condemning authorities to conduct presuit negotiations in good faith with the property owner before instituting an eminent domain action. The term "good faith" was not defined by the legislature, but the condemnor should make every reasonable effort to acquire the property by negotiation at a reasonable price. If this does not occur, the court may deny the taking. The practitioner should carefully examine these requirements, which are strictly construed.

Statutory rights to notice also exist for specific proceedings. For example, *F.S.* 335.02 requires the Department of Transportation to conduct public hearings before a transportation facility can be located or designated and an official map delineating the limits of rights-of-way can be filed with the circuit court clerk. But see *Dade County v. Still*, 377 So.2d 689 (Fla. 1979); *Division of Administration, State of Florida Dept. of Transportation v. Frenchman, Inc.*, 476 So.2d 224 (Fla. 4th DCA 1985).

F.S. 336.02(2) authorizes boards of county commissioners to approve maps of reservation for any transportation facility or transportation corridor after notifying property owners, advertising, and conducting public hearings. *F.S.* 337.2735(1) grants similar authority to municipalities. Such approved maps of reservation are required to be filed with the circuit court clerk who shall use "special plat books" for such maps. See § 2.23 for further discussion.

In addition, *F.S.* 339.175 establishes a "metropolitan planning organization" (MPO) within each urbanized area of the state to "perform all acts required by federal or state laws or rules . . . which are necessary to qualify for federal aid." *F.S.* 339.175(5). The MPO develops long-range transportation plans, programs, and projects to be implemented by local governmental bodies having the power of eminent domain. Planning studies and hearings provide an opportunity for participation by citizens interested in transportation planning, site and route selections, and the specific locations and design of transportation facilities. Similar procedures are required by electrical utilities for siting power plants and corridors of proposed transmission lines. *F.S.* Chapter 403, Part II.

G. [§ 2.23] Surveys

The Department of Transportation is required under *F.S.* 334.24(1) to "[c]ollect data and information as to all roads in the state and, when practicable, have maps and plats thereof made." This information must be kept as a public record. *F.S.* 334.24(5). The department is authorized "to locate and designate certain [roads] as part of the State Highway System," *F.S.* 335.02(1), and to "survey and locate the line or route of any existing or proposed [road]," *F.S.* 335.02(2). To accomplish the designation and location of a road, the department must file a right-of-way map in the clerk's office of the circuit court of each county in which the state road is to be located. *F.S.* 177.131, 335.02(2); *Enzian v. State Road Dept.*, 122 Fla. 527, 165 So. 695 (1936).

Compliance with *F.S.* 335.02 is also compliance with *F.S.* 73.021(6) for roads in the state highway system. All agencies having the power of eminent domain are required to comply with *F.S.* 73.021(6) and must have sur veyed and located the line or area of construction and intend in good faith to construct the project on or over the described property. These allegations are in the nature of jurisdictional conditions precedent, because the statute must be strictly construed. *City of Miami Beach v. Manilow*, 232 So.2d 759 (Fla. 3d DCA 1970). It is not necessary, however, to show precisely when the proposed use will be developed or that funds are on hand. *City of St. Petersburg v. Vinoy Park Hotel Co.*, 352 So.2d 149 (Fla. 2d DCA 1977).

Detailed engineering plans, construction drawings, or specifications necessary for

construction of the project are not jurisdictional conditions. *State Road Dept. of Florida v. Southland, Inc.*, 117 So.2d 512 (Fla. 1st DCA 1960). See also *Carlor Co. v. City of Miami*, 62 So.2d 897 (Fla. 1953) (airport and port facilities); *City of Miami Beach v. Broida*, 362 So.2d 19 (Fla. 3d DCA 1978) (civic-convention center complex); *Central & Southern Florida Flood Control District v. Wye River Farms, Inc.*, 297 So.2d 323 (Fla. 4th DCA 1974) (water storage areas); *Wright v. Dade County*, 216 So.2d 494 (Fla. 3d DCA 1968) (hospital). Nor is it a jurisdictional condition to have detailed plans and specifications for the internal placement of park improvements or construction of public buildings and public improvements, public parks, playgrounds, or redevelopment and recreational areas. *Dade County v. Paxson*, 270 So.2d 455 (Fla. 3d DCA 1972); *R-C-B-S Corp. v. Tanzler*, 237 So.2d 279 (Fla. 1st DCA 1970); *Wright*.

The condemnor is required to provide to the owner on request right-of-way maps and detailed construction plans before an eminent domain proceeding is filed. *F.S.* 73.015(1)(a). Furthermore, if a presuit settlement is reached after mediation, the condemnor must incorporate the maps and plans into the written settlement agreement. *F.S.* 73.015(3). Because the condemning authority is mandated to provide these documents to the owner before an eminent domain proceeding is brought, the condemnor should be prepared to introduce the right-of-way maps and construction plans into evidence at the order of taking hearing. *Belvedere Development Corp. v. Dept. of Trans portation, Division of Administration*, 476 So.2d 649 (Fla. 1985); *Brevard County v. A. Duda & Sons, Inc.*, 742 So.2d 476 (Fla. 5th DCA 1999). Construction plans and specifications, admitted as evidence on the date of valuation, govern the evidence of valuation. Although broad discretion is granted condemnors, design decisions may become material if more property is sought than is necessary for the project. *Knappen v. Division of Administration, State Dept. of Transportation*, 352 So.2d 885 (Fla. 2d DCA 1977).

Endnotes

1 (Popup - Popup)

*LL.B., 1951, J.D., 1967, University of Florida. Mr. McLean is a member of The Florida Bar and the Hillsborough County Bar Association. He is of counsel to GrayHarris in Tampa.

2 (Popup - Popup)

**J.D., 1986, University of Florida. Ms. Merlin is a member of The Florida Bar and the American and Hillsborough County bar associations. She is a partner in Gaylord Merlin, LLP, in Tampa.

3 (Popup - Popup)

***J.D. with honors, 1987, University of Florida. Mr. Bentley is a member of The Florida Bar and the Hillsborough County Bar Association. He is a civil circuit mediator and a partner with GrayHarris in Tampa.

4 (Popup - Popup)

****J.D., 1993, University of Florida. Mr. Bain is a member of The Florida Bar and the Hillsborough County Bar Association. He is a partner in Gaylord Merlin LLP in Tampa.