The Inverse Condemnation Avoidance and Defense Notebook

A County Attorney's Field Guide to Identification and Amelioration of Physical Invasion Inverse Condemnation Claims

Presented by

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Every G. I. Joe[1] episode used to end with a public service announcement and the line, "*... and knowing is half the battle!*" In that same spirit of *pro bono publico*, the purpose of this **field guide** is to promote awareness of what activities can lead to claims against the county for "physical invasion" inverse condemnation, so such activities can be avoided; or if such activities are necessary for a public purpose, that they may be undertaken in such a fashion so as to minimize the claim.

Description:

Inverse condemnation is a lawsuit brought by a property owner seeking compensation for land taken for a public use by an entity (usually a governmental entity) with eminent domain powers in the absence of the entity having initiated formal condemnation proceedings.[2] As the term *inverse* condemnation connotes, it is often seen as the opposite of "conventional" or "direct" condemnation, in which the condemning authority initiates formal eminent domain proceedings in circuit court under applicable statutory procedures. Although the concept of inverse condemnation has been around in Florida for quite some time,[3] term "inverse condemnation" has become part of our vernacular relatively recently, having been first penned by Judge Horton in the case of Proser v. Berger, 132 So.2d 439, 441 (Fla. 3rd DCA 1961).

An action in inverse condemnation must show (1) a taking[4] (2) of private property (3) for a public use or purpose (4) without permission or full compensation.[5] An action for inverse condemnation is available only against an entity having the power of eminent domain.[6] Although the burden of proof in establishing an inverse condemnation action is upon the land owner,[7] a lack of intent by the condemnor to take property is ordinarily of no consequence in establishing inverse condemnation.[8] Generally, suits involving claims of inverse condemnation in Florida are

bifurcated proceedings, with the judge first determining whether, as a matter of law, a taking has occurred, followed by a twelve-person jury trial on the issue of compensation owing as of the date of the appropriation.[9] A finding that a taking has occurred is an interlocutory order and is not appealable unless it grants immediate possession of the property.[10] The statute of limitations for inverse condemnation actions is four years, but the date on which the four years starts running is a topic of some controversy.[11]

An inverse condemnation claim might arise from a direct, "physical invasion" of or interference with real or personal property by a public entity (sometimes referred to as a "*de facto*" or a "direct appropriation" taking), or from a "regulatory" (or "*de jure*") taking, in which a governmental entity passes a regulation, law, or ordinance that deprives an owner of all or substantially all of the value of real or personal property.[12]

Typology and Indications:

"Regulatory Takings" come in two varieties: "categorical" (a/k/a "per se") and "as applied." Examples include exactions, overly restrictive zoning regulations, denial of building or demolition permits, and overly burdensome conditions placed on development. A

detailed discussion of the numerous issues and conflicting rulings underpinning the regulatory takings realm is well beyond the scope of this paper, and the practitioner is urged to consult his or her favorite learned treatise or local constitutional law professor should questions arise.

With respect to "physical invasion" takings, actual occupation of the land, dispossession of the land owner, or physical touching of the land is not necessary; although the majority of "garden variety" inverse condemnation claims do include a physical occupation component. Examples of "physical invasion" inverse claims include such obvious sins as physical encroachment, flooding, escaping sewage, and impairment of access, as well as the more esoteric arenas of loss of riparian/littoral view, loss of fresh water supply, noise from aircraft overflight, and removal of body parts during a statutorily required autopsy. In general, physical invasion claims need not be permanent to be compensable; deprivation of all beneficial use of property, even temporarily, can constitute a taking.[13] A partial compendium of physical invasion claims (not all of which have been found to be viable) follows:

Physical Encroachment: In my experience, actual occupation of a landowner's property is the most common form of inverse condemnation. Such

occupation might occur inadvertently; for example, a county is constructing a road project and the survey is not 100% accurate, accidentally including private property within the limits of construction. Alternatively, the survey might be perfect, but the workers stray onto private property and install sewer pipes thereon. Either can facilitate a claim for inverse condemnation.[14] Another commonly occurring class of inverse condemnation by physical encroachment is **Non-Joinder in a Direct Eminent Domain Action.** Florida Statutes Chapter 73 requires anyone with an interest in property being condemned to be named as a defendant in a direct eminent domain action. This has been interpreted to include easement holders (electric, water, gas, neighbors with cross access agreements), mortgagees, lessees (even tenants without leases), mining and mineral rights owners, both spouses on homestead property, beneficiaries of unprobated estates, and judgment creditors, among others.[15] It may also include licensees.[16] If the county acquired property by direct eminent domain action but didn't name all interested parties, the non-joined parties can sue the county in inverse.

Flooding: Florida recognizes a claim of inverse condemnation for the flooding of private property when government conduct constitutes an actual, permanent physical invasion of land amounting to an appropriation, rather than mere injury to property.[17] This statement of the law has been applied as a two–pronged test requiring a litigant to prove both (1) a degree of permanency; and (2) substantial ouster depriving the owner of all beneficial use of the property (substantial ouster being an apparent analog for "physical invasion of land amounting to an appropriation").[18] The first prong, "permanency," is a bit of a malapropism. Florida courts have not interpreted "permanent" in the context of flooding to mean "continuous," but rather, "recurrent."[19] In addition to the requirement of "permanency," a landowner must also demonstrate that the flooding caused by the government action substantially deprives him or her of the beneficial use of the land.[20] Claims from flooding include the obvious (actively dumping water), and the consequential (such as increasing the grade of an abutting roadway such that water is impounded on the affected property).[21]

Loss of Access: Florida recognizes that a landowner whose property abuts a public road

generally has a right of access to and from the property; however, such right is tempered by, and subordinate to, the government's right under its police power to erect or construct lawful improvements within the right-of-way which are designed to meet the public need.[22] Such valid exercises of a government's police power include the construction of "guardrails, telephone poles, manholes, metered water lines, fire hydrants, parking meters, electric power poles, street light standards, public mail boxes, retaining walls, street and traffic signs, gas main valves, traffic retaining devices, curbs, guy wires, concrete marker posts, planted shrubbery, trees, and the like [within the right-of-way]."[23] Moreover, "specifying the location of driveways in and out of abutting property,"[24] as well as constructing right-of-way improvements designed to correct dangerous conditions and improve public safety,[25] have been specifically recognized by Florida courts as constituting valid exercises of the government's police power, not takings. In 1973 the threshold at which point curtailment of access becomes a compensable taking was first iterated by the Florida Supreme Court as "whether there has been a substantial diminution in access as a direct result of the taking."[26] Since then,

both the Florida Supreme Court and the various district courts of appeal have provided further guidance for determining when a curtailment of access and/or increased inconvenience of access rises to the level of a compensable taking.[27] Notwithstanding, in my opinion, predicting whether a given set of facts will give rise to a successful claim for inverse condemnation due to a reduction in access remains among the most challenging aspects of inverse condemnation defense. At this point, I should also note that Florida *does not* recognize a right to traffic flow (*i.e.* a landowner is not entitled to compensation a *decrease* in drive-by traffic, but *c.f.* a landowner's right to compensation due to an *increase* in drive-by traffic[28]).

Loss of Adjacent Parking: A municipality prohibiting parking on its street is an exercise of its police power, and not a condemnation.[29]

Proximity to Highway/Construction: As a general rule, an increase in noise, dust, and fumes due to the expansion of a proximate highway do not constitute a compensable take.[30]

Loss of Littoral/Riparian Rights: Florida recognizes several rights inherent in ownership of littoral and riparian real property including the right to an unobstructed view toward the channel, unobstructed ingress to and egress from the water, the right to use the water and the right to wharf out to the channel.[31] However, those rights are not absolute: The riparian right of access is subservient to right of public to safe navigation of a waterway,[32] and although riparian/littoral owner automatically takes title to dry land added to his property by accretion, the owner does not take title to formerly submerged land that has become dry by avulsion.[33] Such land continues to belong to the owner of the seabed (which is usually the State), as do all future accretions.[34] Consequently, it is not an unconstitutional taking of littoral property owners' rights when the State restores an eroded beach by filling in submerged land, so long as that submerged land was owned by the State.[35]

Avigation Easements: Under Florida Law, a successful claim for inverse condemnation due to aircraft overflight requires a plaintiff to plead and prove that aircraft invade the airspace superadjacent to the plaintiff's property; that such invasion causes a direct and immediate

interference with the use of the land; or that the plaintiff has suffered a substantial ouster and deprivation of all beneficial use of the property subjacent to the overflights.[36]

Termination of Grandfathered Nonconforming Uses: The termination of grandfathered nonconforming uses may constitute a taking unless such uses are eliminated by attrition (amortization), abandonment, or acts of G-d.[37]

Right of Light, Air, and View/Visibility: Florida recognizes a rights to light, air and view (or visibility) appurtenant to other real property rights; but such rights seem to be gossamer at best.[38]

Release of Effluent: The weekly discharge of treated effluent one inch deep over a landowner's property has been held to constitute a fee simple taking.[39]

Failure to Maintain Right-of-Way: Egregious failure to maintain a drainage ditch or roadway can lead to a successful claim for inverse condemnation. These two specimens are the only examples I know

of stemming from a condemning authority's *failure* to act.[40]

Right to Draw Fresh Water from Underlying Aquifer: The diversion of water from a shallow-water aquifer is not a "taking" or an appropriation of property for public use requiring condemnation proceeding unless there is a resulting damage to the land itself.[41]

Holding Over as a Tenant: When the government enters into a written lease with a private land owner and the government temporarily remains in possession of the demised premises as a result of a dispute with the landlord, it is doubtful that a taking has occurred.[42]

Loss of Contractual Rights to Real Estate Vested in Third Party Beneficiary: The putative assignee of a long term lease agreement between the assignor and a condemning authority may maintain a suit for inverse condemnation when the condemning authority unreasonably withholds its consent to assignment of the lease agreement.[43]

Personal Property: Seizure or destruction of personal property can give rise to a cause of action for inverse condemnation.[44]

Removal of Body Parts during State Required Autopsy: The removal of corneal tissue during a statutorily required autopsy does not constitute taking of private property when tissue is needed for transplantation. There is no property right in the remains of a decedent.[45]

Possible Side Effects:[46]

The adverse monetary side effects of a successful claim for inverse condemnation can be impressive. Beyond the value of the property taken, severance damages, and business damages, the law imposes serious monetary responsibilities on a condemnor liable for inverse condemnation of private property, including a myriad of things from appraisals to documentary stamps to paying for the panoply of experts on both sides of the transaction or lawsuit. The five most common "side effects" of an inverse condemnation claim are briefly outlined below.

Attorney's Fees: A successful plaintiff in an inverse condemnation case is entitled to recovery of

attorney's fees from the defendant.[47] There are various ways of measuring the amount of fees recoverable. In my experience it is most common for a court to award an hourly rate fee during the liability phase and a fee based on the benefit conferred for the valuation portion.[48] An experienced eminent domain attorney who launches a successful inverse condemnation claim can receive between $350.00 and $400.00 per hour for the liability portion alone.[49]

Expert Costs: A successful plaintiff in an inverse condemnation case is entitled to recovery of litigation costs, including expert witness fees, from the defendant.[50] In my experience, the bulk of these costs have been payment to appraisers, engineers and surveyors. Depending on the case, other experts such as CPAs, land planners, and marketing experts may be reasonable. Plaintiff's expert costs vary case by case, but it is not out of the ordinary for me to see claims for expert costs between $50,000.00 and $60,000.00. Note that these figures don't include the county's experts, which, in my experience usually run at about 75% of owners' costs.

Judgment not Precluded or Capped by Sovereign Immunity. Sovereign immunity is not a defense to inverse condemnation. The statement may be

obvious to us now, but in 1941, attorney James N. Daniel apparently thought differently, raising the defense of "Immunity of the State" to the charge of one J. V. Tharpe that the State Road Department had (inversely) condemned his water mill on Hard Labor Creek in Washington County which he and his predecessors in title had been operating as a saw mill, grist mill, or shingle mill for more than seventy years.[51] Florida Supreme Court Justice William Glenn Terrell, who was not one want to hide his feelings, was not amused:

> *Immunity of the State from suit does not ... relieve the State against any illegal act for depriving a citizen of his property; neither will it be permitted as a plea to defeat the recovery of land or other property wrongfully taken by the State through its officers and held in the name of the State. It will not be permitted as a City of refuge for a State agency which appropriates private property before the value has been fixed and paid.*
>
> *[...]*
>
> *If a State agency can deliberately trespass on and destroy the property of*

> the citizen in the manner shown to have been done here and then be relieved from making restitution on the plea of nonliability of the State for suit, then the constitutional guaranty of the right to own and dispose of property becomes nothing more than the tinkling of empty words. Such a holding would raise administrative boards above the law and clothe them with an air of megalomania that would eternally jeopardize the property right of the citizens. It would reverse the order of democracy in this country and head it into a blind alley.[52]

Understandably, in the wake of that rebuke, not too many attorneys have since raised sovereign immunity as a defense to inverse condemnation.[53]

Prejudgment Interest: Sometimes insignificant, sometimes five figures, prejudgment interest will be owed from the date the property was wrongly taken.[54]

Patient Counseling Information:

In these tough economic times, an unexpected inverse condemnation claim really has the potential to spoil

your budget. Whereas construction costs have come down 30% and the price of land in some places has plummeted even more, the costs of getting an appraisal and prosecuting a lawsuit have not. Furthermore, it has been my recent experience that with fewer construction projects affecting fewer landowners, the property owner's bar seems more likely to pursue actions for inverse condemnation.

Ipso facto, the G. I. Joe coda, "... and knowing is half the battle" only gets us half way to victory. If knowing is half the battle, what is the other half? Doing. Apart from *knowing* how to recognize potential claims, what can you *do* to help your county avoid inverse condemnation claims, or ameliorate a claim once one has been made?

Cross-Train: You don't have to get your P.E. license, but if you can read a set of construction plans and ROW maps, you'll be able to help identify and avoid potential issues. Likewise, if your design engineer or project manager has never heard the term "substantial diminution," you're likely to have more inverse claims. Most training opportunities occur within your own organization and are usually encouraged by management. However, outside cross-training is also available.[55]

Work as a Team and Get Involved Early in the Design Process: Many inverse condemnation cases are precipitated as a result of roadway improvement projects. Access and flooding seem to be particularly fruitful areas for inverse claims, and most can be avoided. If you can get invited to public works or transportation project planning meetings, even as early as the 30% phase, you can counsel your client about the risks of eliminating a landowner's driveway or super-elevating a curve such that the land abutting the road is flooded with runoff.

What should you do if faced with an inverse claim?

Consider Hiring Outside Counsel: Eminent domain is an unusual area of the law, and inverse condemnation defense is a peculiar niche in an unusual area of the law. Given the favorable fee structure in Florida, owners have no trouble finding competent attorneys to represent them in condemnation cases -- most often counsel whose practice is dedicated exclusively to eminent domain and condemnation. Counties often have a very different problem. Many counties have fairly small legal staffs and do not have an in-house expert to handle condemnation proceedings or inverse condemnation claims. If you don't have experience defending inverse condemnation claims, consider

hiring outside condemnation defense counsel as one way to try and level the playing field. While hiring outside counsel is an expenditure often abhorred by commissioners, in the long run, it may very well save funds by preventing or ameliorating an adverse judgment.

If you anticipate handling inverse claims in-house, there are techniques, methods and "tricks of the trade" you might use save your county money. These should not be seen as an attempt to circumvent the requirements of the law, but rather as practical solutions that over the long term can help your county minimize its exposure in the face of a claim.

Build a Professional Working Relationship with the Other Side: It is a small coven of us folks that comprise the Florida Eminent Domain Bar. In my experience, the Eminent Domain Bar isn't cliquish, but it is a bit partisan. The more you engage in ROW acquisition, eminent domain, and inverse condemnation, the more you will see the same people. It's a small group and once you establish a reputation, you'll either benefit or suffer from it. As with other types of litigation, effective relationships between adversaries are always based on mutual respect and a sense of integrity. Whether that mutual respect is developed as a result of hard fought battles or through

cooperative efforts, it is important to keep the big picture in mind. It's a small school. Word spreads fast.

Communicate With the Other Side; Don't Have Secrets, Avoid Surprises: As one of my fellow condemnor attorneys says, "Okay, you have to have some secrets, but probably not as many as you think." In my experience a government secret is an oxymoron, and from a policy viewpoint, transparency in government is, at least, publicly favored if not always privately practiced. As I am sure you already know, the Sunshine law (Chapter 286, Florida Statutes) and the Public Records Act (Chapter 119, Florida Statutes) require a high degree of transparency such that the secret you are hiding would have to be disclosed if someone asked the right question. This is not meant to encourage anyone to disclose legally exempt or confidential information, trial strategy or attorney work product, but I have found that frequent courteous communication as the claim wends its way toward resolution builds rapport.

Settlements are Often Cheaper than Litigation: Because of Florida's statutory scheme, it is expensive for condemnors to litigate lost inverse condemnation claims. A jury trial will cost a

condemnor an estimated $35,ØØØ.ØØ per day of trial, taking into account the time from depositions through verdict. Most members of the eminent domain bar (both condemnors and property owners' attorneys) know this fact, but in some situations this disadvantage to condemnors can be mitigated: If liability favors the county, seek an early resolution of that issue. If liability strongly favors the property owner, consider admitting liability (cuts off hourly attorney's fees) and foster an early settlement. Less litigation translates to less money spent by the condemnor.

Get Out of the Office. Internet-based aerial photos are a great help in orienting yourself to the location of the subject but they are not as effective in viewing the subject property and understanding the dynamics of the neighborhood. It is often time consuming, hot and inconvenient, but absolutely necessary. Similarly, when reviewing case law, an in-person site visit can make a critical difference in your understanding of the legal principal involved. Although site visits to the subject property of appellate cases are often impractical, in access cases, for example, the site visit can be an epiphany. Learning opportunities occur when you take the time to go with your

appraiser on their parcel inspections. It's a chance to talk to the owner or the owner's attorney and get a better understanding of what their concerns are. Training opportunities in the field should be taken whenever presented. Understanding construction issues first hand, touring the neighborhood, knowing what the rod dog and eyeman do on the survey crew are experiences that will give you the advantage at the negotiations table or in the courtroom.

Jeffrey L. Hinds of Smolker Bartlett Schlosser Loeb & Hinds, P.A. focuses his practice on eminent domain, condemnation, and related issues. Mr. Hinds has acquired hundreds of parcels for condemning authorities on a wide-array of projects and has extensive experience defending inverse condemnation actions as well. He has acted as special condemnation counsel to several Florida counties, municipalities and school boards and has also represented a variety of natural gas and petroleum products transmission companies. He has lectured and been published in the field of condemnation law and has been profiled in the "Career Spotlight" section of the University of Florida College of Law's FlaLaw Magazine. Mr. Hinds has been selected as an Eminent Domain Super Lawyer by Florida Super Lawyers Magazine for the past four years, and was also included in US News & World Report's The Best Lawyers in America for the past three years. Mr. Hinds was recently reappointed to serve on the Eminent Domain Committee of the Florida Bar.

Mr. Hinds received his B.A., M.A., and J.D. Degrees from the University of Florida. He was admitted to the Florida Bar in 1994, and also maintains licensure in the District of Columbia and Texas.

Notes

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[1] Sold separately, batteries not included.

[2] USLegal Definitions < http://definitions.uslegal.com/i/inverse-condemnation/> (visited May 5, 2014).

[3] The concept of inverse condemnation in a form in which we would recognize it today was first considered in the case of Florida Southern Railway Co. v. Brown, 23 Fla. 104 (Fla. 1884). In Brown, a Gainesville land owner built a livery stable and rented stalls. Id. at 117-118. Not only did his property abut a public roadway (West Main St.), but the owner owned the fee to the middle underlying the road, subject to an easement for public highway (as such was extant in 1884). Id. at 118. Florida Southern Railway built tracks within the public easement for West Main St. without Brown's permission and without having initiated formal condemnation proceedings. Id. Brown claimed to have suffered significant damages because the trains frightened the horses and he lost rent revenue as a result. Id. The owner sued the railway, and won at the trial level. Id. Although Brown lost on appeal, the Florida Supreme Court said that a cause of action did exist when an entity with condemning authority appropriates private property and causes damage without having initiated formal condemnation proceedings. Id. at 119-120.

[4] Note that Florida is a *takings* state as opposed to a *damages* state. That is, unless there has been a *taking*, injury to property by a condemning authority may be *damnum abseque injuria*. Arundel Corp. v. Griffin, 89 Fla. 128, 103 So. 422 (Fla. 1925); Village of Tequesta v. Jupiter Inlet Corporation, 371 So.2d 663, 669 (Fla. 1979).

[5] *See* Alizieri v. Manatee County, 396 So.2d 240 (Fla. 2d DCA 1981); Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla. 1979).

[6] State of Fla. Dept. of Health and Rehabilitative Services v. Scott, 418 So.2d 1032 (Fla. 2d DCA 1982).

[7] Rubano v. Department of Transp., 656 So.2d 1264 Fla. 1995).

[8] In Re: Sioux Tribe of Indians, 315 Fed. 2d 378, 379 (1963).

[9] Dept. of Ag. And Consumer Services v. Mid-Florida Growers, 521 So.2d 101 (Fla. 1988); State Dept. of Transportation v. Board of Supervisors of St. John's Water Control District, 981 So.2d 605 (Fla. 4th DCA 2008).

[10] Osceola County v. Best Diversified, Inc., 830 So.2d 139 (Fla. 5th DCA 2002).

[11] *See* Szapor v. City of Cape Canaveral, 775 So.2d 1016 (Fla. 5th DCA 2001); Millender v. State of Fla. Dept. of Transp., 774 So.2d 767 (Fla. 1st DCA 2000); Suarez v. City of Tampa, 987 So.2d 681(Fla. 2d DCA 2008); Sutton v. Monroe County, 34 So.3d 22 (Fla. 3rd DCA 2009); Judkins v. Walton County, 128 So.3d 62 (F;a. 1st DCA 2013).

[12] Id., Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

[13] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN 243340M, 576 So.2d 261 (Fla. 1991); Alexander v. Town of Jupiter, 640 So.2d 79 (Fla. 4th DCA 1994); Gardens Country Club, Inc. v. Palm Beach County, 712 So.2d 398 (Fla. 4th DCA 1998); Associates of Meadow Lake, Inc. v. City of Edgewater, 706 So.2d 50 (Fla. 5th DCA 1998).

[14] Broward County v. Bouldin, 114 So.2d 737 (Fla. 2d DCA 1959); State of Fla. Dept. of Transp. v. Donahoo, 412 So.2d 400 (Fla. 1st DCA 1982).

[15] City of Miami v. Sirocco Co., 137 Fla. 434 (1939); Shavers v. Duval County, 73 So.2d 684 (Fla. 1954); Wingert v. Prince, 123 So2d 277 (Fla. 2d DCA 1960); State Road Dept. v. White, 148 So.2d 32 (Fla. 2d DCA 1963). Mullis v. Division of Administration, 390 So.2d 473 (Fla. 5th DCA 1980); Mulkey v. Division of Administration, State of Florida, Dept. of Transportation, 448 So.2d 1062 (Fla. 2d DCA 1984); Dama v. Record Bar, Inc., 512 So.2d 206 (Fla. 1st DCA 1987); K-Mart Corp. v. State, Dept. of Transportation, 636 So.2d 131 (Fla. 2d DCA 1994.

[16] *See* The Night Flight v. Tampa-Hillsborough County Expressway Authority, 7Ø2 So.2d 538 (Fla. 2d DCA 1997); MH New Investments v. State of Florida, Department of Transportation, (Fla. 5th DCA Case No.: 5D1Ø-2697).

[17] Dudley v. Orange County, 137 So. 2d 859, 863 (Fla. 2d DCA 1962); Kendry v. State Road Dept., 213 So.2d 23, 28 (Fla. 4th DCA 1968); Elliott v. Hernando County, 281 So.2d 395, 396 (Fla. 2d DCA 1973); Martin v. City of Monticello, 632 So.2d 236 (Fla. 1st DCA 1994); Diamond K Corp. v. Leon County, 677 So.2d 9Ø, 91 (Fla. 1st DCA 1996); Associates of Meadow Lake, Inc. v. City of Edgewater, 7Ø6 So.2d 5Ø (Fla. 5th DCA 1998); Blankenship v. Dept. of Transportation, 89Ø So.2d 113Ø (Fla. 5th DCA 2ØØ5); Drake v. Walton County, 6 So.3d 717 (Fla. 1st DCA 2ØØ9); Hansen v. City of Deland, 32 So.3d 654 (Fla. 5th DCA 2Ø1Ø); *c.f.* South Florida Water Management District v. Basore of Florida, Inc., 723 So.2d 287 (Fla. 4th DCA 1999). *Accord* Sanguinetti v. United States, 264 U.S. 146, 149, 44 S.Ct. 264, 265, 68 L.Ed. 6Ø8 (1924) (to be a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property").

[18] *See* Diamond K Corp. v. Leon County, 677 So.2d 9Ø, 91 (Fla. 1st DCA 1996).

[19] See Elliot v. Hernando County, 281 So.2d 395, 396 (Fla. 2d DCA 1973) ("... flooding is permanent in the sense that rain is a condition that is reasonably expected to continually reoccur in the future"); and Assocs. of Meadow Lake, Inc. v. City of Edgewater, 7Ø6 So.2d 5Ø (Fla. 5th DCA 1998) (cause of action for inverse by flooding can lie where cause of flooding had been remedied, so long as periodic flooding and likelihood of recurrence could have been established for some period of time).

[2Ø] Dudley v. Orange County, 137 So.2d 859, 863 (Fla. 2d DCA 1962) (awarding no compensation as there was no evidence that the flooding "work[ed] an almost complete destruction of the value of the land in order to destroy its value entirely, inflicting irreparable injury to effect a constructive taking"); Leon County v. Smith, 397 So.2d 362, 364 (Fla. 1st DCA 1981) (finding a taking where the flooding

"rendered the land useless and permanently deprived plaintiffs of all beneficial enjoyment thereof"); Bensch v. Metropolitan Dade County, 541 So.2d 1329, 1331 (Fla. 3rd DCA 1989) (dismissing amended complaint for taking as "the flooding was not sufficiently extensive to constitute a required 'substantial ouster'"); Diamond K Corp. v. Leon County, 677 So.2d 90, 91 (Fla. 1st DCA 1996) (holding that no taking occurred as a result of flooding of a creek because the landowner failed to show that the flood substantially ousted or deprived it of all reasonable use of its property); Drake v. Walton County, 6 So.3d 717, 720 (Fla. 1st DCA 2009) (requiring "a substantial deprivation of the beneficial use of property" in order to find a permanent taking).

[21] S.R.D. v. Tharp, 146 Fla. 745, 1 So.2d 868 (Fla. 1941); Thompson v. Nassau County, 343 So.2d 965 (Fla. 1st DCA 1977).

[22] Selden v. City of Jacksonville, 10 So. 457, 459 (Fla. 1891); Weir v. Palm Beach County, 85 So. 2d 865, 868-869 (Fla. 1956); Travis v. State Dept. of Transp., 333 So.2d 86, 86 (Fla. 1976);

[23] Awbrey v. City of Panama City Beach, 283 So.2d 114, 116 (Fla. 1st DCA 1973).

[24] Anhoco Corp. v. Dade County, 144 So.2d 793, 798 (Fla. 1962).

[25] Fla. Dept. of Transp. v. Suit City of Aventura, 774 So.2d 9, 12 (Fla. 3d DCA 2000).

[26] Fla. Dept. of Transp. v. Stubbs, 285 So.2d 1, 3 (Fla. 1973).

[27] See e.g., Palm Beach County v. Tessler, 538 So.2d 846, 849 (Fla. 1989) ("[T]he fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished. The loss of the most convenient access is not compensable where other suitable access continues to exist."); State of Fla. Dept. of Transp. v. FMS Management Systems, 599 So.2d 1009 (Fla. 4th DCA 1992); Weaver Oil Co. v. City of Tallahassee, 647 So.2d 819, 821 (Fla. 1994); Dept. of Transportation v. Gefen, 636 So.2d 1345 (Fla. 1994); State Dept. of Trans. v. Kreider, 658 So.2d

548 (Fla. 4th DCA 1995); Dept. of Transportation, State of Florida v. Landman, 664 So.2d 1141 (Fla. 5th DCA 1995); USA Independence Mobile Home Sales v. City of Lake City, 908 So.2d 1151 (Fla. 1st DCA 2005).

[28] *c.f.* Div. of Admin., State of Fla. Depart. of Transp. v. West Palm Beach Garden Club, 352 So.2d 1177 (Fla. 4th DCA 1977); Div. of Admin., State of Fla. Dept. of Transp. v. Frenchman, 476 So.2d 224 (Fla. 4th DCA 1985).

[29] *See* City of Orlando v. Cullom, 400 So.2d 513, 516 (Fla. 5th DCA 1981).

[30] Northcutt v. S.R.D., 209 So.2d 710 (Fla. 3rd DCA 1968); *c.f.* Div. of Admin., State of Fla. Depart. of Transp. v. West Palm Beach Garden Club, 352 So.2d 1177 (Fla. 4th DCA 1977); Div. of Admin., State of Fla. Dept. of Transp. v. Frenchman, 476 So.2d 224 (Fla. 4th DCA 1985).

[31] Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491 (1918); Game & Fresh Water Fish Commission v. Lake Islands, Ltd., 407 So.2d 189 (Fla. 1982); Sand Key Associates, Ltd. v. Board of Trustees of Internal Improvement Trust Fund of State of Florida, 458 So.2d 369 (Fla. 2d DCA 1984), *approved* 512 So.2d 934; Lee County v. Kiesel, 705 So.2d 1013 (Fla. 2d DCA 1998)); *c.f.* Duval Engineering & Contracting Co. v. Sales, 77 So.2d 431 (Fla. 1955)..

[32] Intra-coastal North Condominium Ass'n, Inc. v. Palm Beach County, 698 So.2d 384 (Fla. 4th DCA 1997).

[33] Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot., 560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010).

[34] Id.

[35] Id.

[36] City of Jacksonville v. Schumann, 167 So.2d 95 (Fla. 1st DCA 1964), *cert. denied*, 172 So.2d 597 (Fla. 1965), *cert. denied* 390 U.S. 981, 88 S.Ct. 1101, 19 L.Ed.2d 1278 (1968); Adams v. Dade County, 335 So.2d 594 (Fla. 3rd DCA 1976); Young v. Palm Beach County, 443 So.2d 450 (Fla. 4th DCA 1984); Fields v. Sarasota-Manatee Airport Authority,

512 So.2d 961 (Fla. 2d DCA 1987) *n.b.* that a "decreased increase" in value of property is not sufficient to establish an inverse taking via overflight. Id. at 964.

[37] Lewis v. City of Atlantic Beach, 467 So.2d 751 (Fla. 1st DCA 1985).

[38] *See* Selden v. City of Jacksonville, 28 Fla. 558 (1891); Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956); Anhoco Corp. v. Dade County, 144 So.2d 793 (Fla. 1962); Benerofe v. State Road Dept., 217 So.2d 838 (Fla. 1969); State Dept. of Transportation v. Stubbs, 285 So.2d 1 (Fla. 1973); Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989); State, Dept. of Transportation v. Suit City of Aventura, 774 So.2d 9 (Fla. 3rd DCA 2001) *see also* Fla. Stat. §338.04.

[39] Martin v. City of Monticello, 632 So.2d 236 (Fla. 1st DCA 1994).

[40] Hancock v. Piper, 219 So.2d 746 (Fla. 2d DCA 1969); Jordan v. St. Johns County, 63 So.3d 835 (Fla. 5th DCA 2011).

[41] Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663, 672 (Fla. 1979).

[42] State Dept. of Health & Rehab. Services v. Scott, 418 So.2d 1032 (Fla. 2d DCA 1982), *n.b.* this decision predates the United States Supreme Court's determination that a "temporary take" was compensable in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

[43] Pinellas County v. Brown, 450 So.2d 240 (Fla. 2d DCA 1984).

[44] Flatt v. City of Brooksville, 368 So.2d 631 (Fla. 2d DCA 1979), *approved* In re Forfeiture of 1976 Kenworth Truck, 576 So.2d 261 (Fla. 1990); Grande v. Hillsborough County, 623 So.2d 1254 (Fla. 2d DCA 1993);

[45] State v. Powell, 497 So.2d 1188 (Fla. 1986).

[46] This section and the next section, "Patient Counseling Information" rely heavily on my journal, "Jeff's Little Black Book of Condemnor Secrets -- How to Clear the Right-of-Way on Time and On

Budget" as well as a CLE presentation by my friend and mentor, Richard Vickers, "How to Save Money Buying ROW -- Practical Solutions for Condemnors" (used with permission). I was fortunate to be apprentice to Richard's problem-solving approach to condemnation, and I am very thankful for his direct and indirect contribution to this paper.

[47] Volusia County v. Pickens, 435 So.2d 247 (Fla. 5th DCA 1983); City of Jacksonville v. Schumann, 223 So.2d 749 (Fla. 1st DCA 1969).

[48] *See* Fla. Stat. §73.091; §73.092.

[49] *See* Order Awarding Attorney's Fees, State of Florida Department of Transportation v. Inland Southeast Lakewood, LLC., Manatee County Circuit Court Case No. 2005CA-4838, September 12, 2006.

[50] City of Jacksonville v. Schumann, 223 So.2d 749 (Fla. 1st DCA 1969); Volusia County v. Pickens, 435 So.2d 247 (Fla. 5th DCA 1983); City of Jacksonville v. Schumann, 223 So2d 749 (Fla. 1st DCA 1969).

[51] State Road Dept. of Florida v. Tharp, 146 Fla. 745, 1 So.2d 868 (Fla. 1941).

[52] Id. at 748-49, 869-870.

[53] *E.g.* Schick v. Fla. Dept. of Agriculture, 504 So.2d 1318 (Fla. 1st DCA 1987); Crowley Museum and Nature Center, Inc. v. Southwest Florida Water Management District, 993 So.2d 605 (Fla. 2d DCA 2008).

[54] Flatt v. Brooksville, 368 So.2d 631 (Fla. 2d DCA 1979); Stewart v. City of Key West, 429 So.2d 784 (Fla. 3rd DCA 1983); Department of Agriculture & Consumer Services v. Bogorff, 35 So.3d 84 (Fla. 4th DCA 2010).

[55] *E.g.* The Appraisal Institute, the organization that certifies the best of eminent domain appraisers (the MAI certification) offers training that non-appraisers can take as well. Go to www.appraisalinstitute.org. An inexpensive way to learn about discreet title issues is through Attorneys' Title Fund Services. Generally they have half-day sessions geared for their agents, but some are open to anyone for a small membership fee. The courses are held at various locations around the state and with the membership

you get their newsletter with case law. Go to http://www.thefund.com/portal/services/education/index.jsp for a list of seminars updated each year. In addition, three other organizations have training opportunities over a wide range of eminent domain-related topics, CLE International, www.cle.com; The Florida Bar Eminent Domain Committee, www.floridabar.org; The Association of Eminent Domain Professionals, www.aedp.org; and the International Right of Way Association wwwjrwaonline.org.