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## How to Obtain an Order of Taking

by Carlos A. Kelly

Page 66

In the wake of the Supreme Court's decision in *Kelo v. City of New London, et al.*, 545 U.S. \_\_, 162 L.Ed. 2d 439, 125 S.Ct. \_\_ (2005), there is much interest in just what constitutes an acceptable public purpose for exercising the power of eminent domain. The impact of *Kelo* is still being felt as various state legislatures, including Florida's, grapple with how to limit eminent domain.<sup>1</sup> Despite the attention the *Kelo* decision has garnered, *Kelo* will not be relevant to every eminent domain action. What will likely be relevant more often in eminent domain actions in Florida is the obtaining of an order of taking. That is because Florida's rapidly increasing population places heavy burdens on the public infrastructure, such as the roads and power supply. In order to meet these burdens — to build new roads and to build new power facilities — certain condemning authorities, such as the Department of Transportation or public utilities, can obtain possession and title to real property before proceeding to judgment.<sup>2</sup>

If the condemning authority is successful in obtaining a real property interest before final judgment, the decree entered by the court is called an order of taking.<sup>3</sup> In some cases, the parties will stipulate to an order of taking. In others, an order of taking will be contested. In yet other cases, while an order of taking might not be contested, it might not be subject to stipulation, either, which forces the condemning authority to be prepared to put on the proof necessary to obtain the order of taking.

In all three instances, many of the initial procedures will be similar. The purpose of this article is to explain the process for obtaining an order of taking, generally, and to identify a checklist of goals, which will assist the practitioner seeking an order of taking. The practitioner representing a condemnee can use the checklist, too. Counsel for the condemnee can identify those items the condemning authority's attorney is, or should be, considering.

This article will be broken into two areas. First, basic terms associated with obtaining an order of taking will be identified and defined. Second, the tasks that the condemning authority must accomplish in order to obtain an order of taking will be identified and explained.

### The Terms

The place to begin is a definition of the term "eminent domain" itself. Black's Law Dictionary defines "eminent domain" as "[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking."<sup>4</sup> In Florida, "eminent domain" has been described as "an inherent attribute of sovereignty that is not derived from the constitution<sup>5</sup> . . . and . . . absolute, except as limited by the constitution . . . ."<sup>6</sup> The power of eminent domain can be exercised not only by governmental authorities, such as the Department of Transportation or a county, but also by private entities vested with the powers of eminent domain, such as electric utilities.<sup>7</sup>

The authority exercising the power of eminent domain is referred to as the "condemning

authority”<sup>8</sup> and, once a condemnation action has been filed, the “petitioner.”<sup>9</sup> Those named as defendants may be referred to as “condemnees.”

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### **Obtaining an Order of Taking**

Before an order of taking can be obtained, there must be a need for the real property interest sought. That is because to obtain an order of taking, a condemning authority must “establish a public purpose and reasonable necessity for the taking.”<sup>10</sup>

While a condemning authority is vested with discretion in selecting real property, there are “five criteria that a condemnor must weigh in order to properly exercise its discretion . . . .”<sup>11</sup> The condemning authority must weigh the availability of an alternate route, costs, environmental factors, long-range area planning, and safety considerations.<sup>12</sup> If a condemning authority fails or refuses “to properly weigh these factors,” the court may find an abuse of discretion.<sup>13</sup> In such case, a court may dismiss a petition in eminent domain, thereby preventing a taking.<sup>14</sup>

Once the need for an interest in real property has been identified, the condemning authority should prepare a resolution, which needs to be approved by the governing body of the condemning authority. The resolution is a document that specifies, among other things, “the use for which the property is to be acquired”<sup>15</sup> and states “that the property is necessary for that use, an adequate description of the lands sought to be taken, and the estate or interest in the property” sought by the condemning authority.<sup>16</sup>

As part of the process of preparing a resolution, a condemning authority should hire a competent surveyor. A competent surveyor will be able to quickly and accurately identify the boundaries, size, and legal description of the interest sought. This is important in order to minimize the need for additional publication of the notice of the condemnation action and the chances of having to amend or re-open proceedings because of errors in the description of the interest sought.

Once the surveyor has rendered the legal description of the interest sought, the description should be used as the basis for obtaining an appraisal and an accurate title report. The appraisal will identify the value of the interest sought, including severance or remainder damages. The title report will identify other parties-in-interest, such as mortgagees, lienors, and other encumbrancers. It is important to try to obtain a title report as early in the acquisition process as possible for several reasons. First, Florida’s active real estate market hinders the ability of title insurance companies to provide a title report quickly. Second, it is important to identify the other parties-in-interest as quickly as possible so that a plan to deal with them can be devised early in the acquisition process.

After obtaining the title report, counsel should inspect the property in which an interest is sought. An inspection is important because it allows counsel to identify parties-in-interest, such as tenants, whose interest might not appear in a title report, but who must be named in the petition.<sup>17</sup> Ideally, the inspection will be conducted with the condemning authority’s engineer or other person responsible for construction of the project. Having this person present will ensure that counsel is aware of the parameters of the project. Along those lines, it might also be helpful to have the surveyor present, particularly if there are questions involving the dimensions of the parcel, so that the surveyor, engineer, and counsel are working from the same information.

At this point, the condemning authority can prepare an offer to the owner. In 2000, the legislature began requiring condemning authorities to provide certain precondemnation notices

to the owner and parties.<sup>18</sup> More particularly, F.S. §73.015(1) requires a condemning authority to negotiate in good faith with, and make a written offer to, the fee owner. In addition, specific information about the project must be provided to the owner.<sup>19</sup> Accordingly, a condemning authority's first deliberate contact with the owner must be in the form of the prelitigation offer required by F.S. §73.015(1). The statute is fairly straightforward about what must be included and can be used as a checklist. A failure to make the prelitigation written offer or send the prelitigation notice can be the basis for an owner to oppose an order of taking<sup>20</sup> unless an agreement to the contrary is reached with opposing counsel. F.S. §73.015 (2) requires certain condemning authorities to make a good-faith effort to notify business owners, including lessees, who operate a business located on the property to be acquired.

In order to determine whether the owner will accept, counsel for the condemning authority, or the condemning authority itself, might want to make follow-up contact with the owner once the prelitigation offer and notice have been sent. If the owner is opposed to selling the interest to the condemning authority or demands an unreasonable amount of compensation, it will be necessary to either proceed by condemnation, or to reevaluate the need for the interest sought.

If the owner does not accept the condemning authority's written offer, and the condemning authority desires to proceed with the acquisition of the interest in question, the next step is to decide whether to make use of Ch. 74's quick-take provisions. At this point, counsel should begin preparing the relevant condemnation pleadings and related papers, including the petition in eminent domain and, if Ch. 74's quick-take provisions are going to be used, the declaration of taking. F.S. §74.031 requires the declaration of taking to state that the property sought to be appropriated is taken for the uses set forth in the petition and to make a good-faith estimate of value, based upon a valid appraisal, of the interest sought. Excellent forms can be found in Ch. 5 of *Florida Eminent Domain Practice and Procedure*, which is published by The Florida Bar.

In preparing to file the petition in eminent domain (which, as specified in F.S. §73.021, is the pleading those having the right to exercise the power of eminent domain may file and which begins a condemnation action), counsel should keep in mind that condemnation actions typically involve many parties. Given the number of parties, counsel can move for an ex parte order allowing for service only on each affected party.<sup>21</sup> This helps to limit the number of papers that must be served in the case. In order to keep track of all the parties, counsel should prepare a litigation status chart, which shows each party and its status in the litigation (for example, date of service, pleadings filed, and other summary information). This document is particularly helpful in determining whether a default can be sought against any of the typically numerous parties defendant. A litigation status chart is also helpful when counsel seeks a return of any excess deposit in the registry, so that counsel can make sure that all parties connected with the parcel in question have first been appropriately addressed.

Counsel can accelerate the filing process, and thereby, the taking process, by contacting the clerk of court well in advance of filing. The clerk of court should be able to provide a case number and assign a judge to the case. This will allow counsel to consult with the judicial assistant in order to obtain an order of taking hearing date, which is, ideally, consistent with the condemning authority's construction schedule.

Whether seeking possession and title in advance of judgment or not, the condemning authority must notify the Department of Environmental Protection or the relevant water management district of the proposed taking.<sup>22</sup> In order to easily identify the relevant water management

district, counsel can consult [www.dep.state.fl.us/secretary/watman/default.htm](http://www.dep.state.fl.us/secretary/watman/default.htm), which contains links to each of Florida's five water management districts, and which displays a map showing the counties included within each water management district. Interestingly, F.S. §373.023(3) does not specify the form of delivery of notice to the Department of Environmental Protection or the water management districts. Ideally, the form of delivery will be one that generates evidence of receipt, such as registered or certified mail. However, delivery by overnight service or facsimile, or even via e-mail, would seem to satisfy the statute, since no particular form of delivery is specified.

Due process plays an integral role in eminent domain. Typically, notice of the condemnation will be placed in a newspaper published in the county where the action has been filed.<sup>23</sup> Accordingly, counsel should follow up with the newspaper in which the notice of action is to be published. Similarly, counsel should make sure the publication occurs in a timely fashion in order to satisfy F.S. §73.031 or §74.041, or both, as the case may be. The failure to accurately publish notice can be basis for delaying an order of taking or invalidating a taking entirely because of the lack of due process, which is a jurisdictional defect.<sup>24</sup> For the same reasons, counsel should also follow up with the process server on a regular basis in order to make sure that process is timely and properly served.

Well in advance of the order of taking hearing, counsel for the condemning authority should meet with the appraiser and the engineer in order to discuss the testimony to be presented at the order of taking hearing. Counsel will also need to prepare opening and closing statements, identify the relevant authorities, prepare and mark exhibits, obtain a court reporter, and visit the hearing room — all to make for the most straightforward presentation of evidence.

At the order of taking hearing, counsel for the condemning authority must demonstrate that the interest sought is reasonably necessary to serve a public purpose<sup>25</sup> and must demonstrate that the good-faith estimate of value contained in the condemning authority's declaration of taking is based upon a valid appraisal.<sup>26</sup>

In preparing for the hearing, it is important to identify all of the taxes and assessments that are due or that will come due so as to satisfy those liabilities in a timely manner. Counsel can make use of F.S. §73.061 or §74.051, or both, in order to address taxes and assessments on the property. This can be particularly helpful to prevent the property from being subjected to liens.

Along those lines, it is important to obtain a title report through the date the notice of lis pendens is recorded. That way, any additional encumbrances that have attached since the eminent domain action was filed can be identified, joined and addressed. If they are not, the interest of the condemning authority could be subject to the claims of the additional parties.<sup>27</sup> Similarly, it is a good idea to check the land records in the county in which the condemnation took place after the order of taking hearing in order to make sure that the order of taking has been properly recorded.

The most important function of counsel is to communicate well. Counsel should keep the condemning authority apprised of all developments, whether they are for the better or for the worse. That way, alternate plans can be developed, whether it is necessary to take advantage of a favorable development, or whether it is necessary to utilize a back-up plan in the event of an unfavorable one. Likewise, communication helps maintain good relations with the other parties in the litigation, regardless of whether they are represented. In this way, potentially favorable dispositions can be exploited, and potentially negative dispositions can be identified

quickly.

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## Conclusion

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Following all of the suggestions contained in this article will not, of course, guarantee a successful taking in advance of judgment. However, following these suggestions will help maximize the chances for a successful taking, or will, at the very least, identify, early in the process, situations where an acquisition might not be practicable. This, in turn, will allow a condemning authority to make suitable alternative plans.

*1 For example, on June 24, 2005, Speaker of the Florida House of Representatives Allan Bense issued a press release announcing, among other things, that he was "immediately appointing a select committee of the Florida House of Representatives ... to review Florida's Constitution as well as relevant statutes, rules and ordinances. Their task will be to identify any areas of ambiguity and recommend appropriate changes to make sure the unfortunate situation ... seen in Connecticut is not repeated in the state of Florida."* Available at

[www.myfloridahouse.gov/Sections/HouseNews/preview.aspx?PressReleaseId=64](http://www.myfloridahouse.gov/Sections/HouseNews/preview.aspx?PressReleaseId=64).

*Later, on July 15, 2005, Speaker Bense announced the members of the House Select Committee to Protect Private Property Rights stating, "[t]he right to own property is one of the most basic rights we enjoy as Americans. Unfortunately, due to the recent U.S. Supreme Court decision in the case of Kelo v. City of New London, there is concern that this most fundamental freedom may be in jeopardy."* Available at

[www.myfloridahouse.gov/Sections/HouseNews/preview.aspx?PressReleaseId=66](http://www.myfloridahouse.gov/Sections/HouseNews/preview.aspx?PressReleaseId=66).

*Proposed legislation was pending in both the Florida House and Senate at the time this article was written.*

*2 Fla. Stat. §74.011. In Florida, a condemning authority faced with the prospect of filing an eminent domain action may proceed by two alternatives in order to seek to obtain the desired real property interest. One method is through "slow take" proceedings under Fla. Stat., Ch. 73. If the condemning authority proceeds solely under Ch. 73, Fla. Stat. §73.111 specifies the condemning authority is only entitled to take possession and title of the desired interest after judgment has been entered in its favor and the requisite damages paid into the registry of the court. A condemning authority may also seek to obtain the desired interest by "quick take" proceedings under Fla. Stat., Ch. 74. In a quick take proceeding, Fla. Stat. §74.011 allows the condemning authority to take possession and title of the desired interest before judgment.*

*3 See Fla. Stat. §74.051.*

*4 Black's Law Dictionary 541 (7th ed. 1999).*

*5 Florida Eminent Domain Practice and Procedure §2-3, citing Daniels v. State Road Dept., 170 So. 2d 846 (Fla. 1964) (The Florida Bar ed., 6th ed. 2003).*

*6 Id., citing Demeter Land Co. v. Florida Public Service Co., 128 So. 402 (Fla. 1930).*

*7 See generally Fla. Stat. §74.011 which lists the condemning authorities that may make use of quick take proceedings. Additional condemning authorities can initiate slow take proceedings under Fla. Stat., Ch. 73. Florida Eminent Domain Practice and Procedure, §2.5, contains an extensive list of entities that may exercise the power of eminent domain under Ch. 73.*

*8 See generally Fla. Stat. §73.015, which lists the requirements imposed on the condemning authority for presuit negotiation.*

*9 See generally Fla. Stat. §73.021 which lists the contents of the petition.*

*10 Baycol, Inc. v. Downtown Development Authority of the City of Fort Lauderdale, 315 So. 2d 451, 455 (Fla. 1975) (citations omitted).*

*11 Florida Power Corp. v. Gulf Ridge Council, 385 So. 2d 1155, 1156-57 (Fla. 2d D.C.A. 1980) (citing, and agreeing with, trial court's reasoning).*

*12 Id.*

*13 Id.*

14 *Id.*

15 *Florida East Coast Railway Co. v. City of Miami*, 346 So.2d 621, 623 (Fla. 3d D.C.A. 1977). Document posted at JDSUPRA™  
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16 *Id.*

17 **Fla. Stat.** §73.021(4).

18 **Fla. Stat.** §73.015.

19 *Id.*

20 See *Simmons v. Department of Environmental Protection*, 849 So.2d 415 (Fla. 2d D.C.A. 2003).

21 Fla. R. Civ. P. 1.080(c). **Florida Eminent Domain Practice and Procedure**, §§5.40 - 5.41, contains a good form of motion and order.

22 **Fla. Stat.** §373.023(3).

23 **Fla. Stat.** §§73.031(2), 74.041(2).

24 Cf. *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 9 So. 2, 3 (Fla. 1891).

25 *Baycol*, 315 So. 2d at 455.

26 **Fla. Stat.** §74.031.

27 See **Fla. Stat.** §48.23(1)(b) providing "the filing ... of such notice of *lis pendens* shall constitute a bar to the enforcement against the property ... of all interests ... unrecorded at the time of filing ... such notice of *lis pendens* ...."

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