Florida Inverse Condemnation Law: A Primer for the Litigator

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Abstract

Florida Constitutions have always prohibited the state from “taking” private property without paying just or full compensation to its owners.

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by  
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1. INTRODUCTION  

Florida Constitutions have always prohibited the state from “taking” private property without paying just or full compensation to its owners.1 Presently, Fla. Const. art. 10, § 6(a), often called the “prop-

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1. Section 14 of the Declaration of Rights of the Florida Constitution of 1838 provided that “private property shall not be taken, or applied to public use; unless just compensation be made therefor.” Fla. Const. of 1838; § 14. Section 14 was repeated verbatim in the Florida Constitution adopted in 1865. The language was amended in section 8 of the Florida Constitution of 1868 to provide that “private property [shall not] be taken without just compensation.” Fla. Const. of 1838, § 8. Section 8 of the
property clause,” provides that “[n]o 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.”2 Section 6(a) applies to the state, its agencies, and political

Florida Constitution of 1868 was repeated verbatim in section 12 of the Declaration of Rights of the Florida Constitution of 1885. The constitutional revisions in 1968 relocated the provision from the Declaration of Rights to article X, miscellaneous § 6.

2. Note that the 1968 constitutional revisions changed the requirement from “just” to “full” compensation. No definitive pronouncement has been made concerning whether the change has any significance. At least in the context of being compensated for business losses and attorney’s fees in eminent domain proceedings, the Supreme Court of Florida reached the same results under both the Florida Constitution of 1968 requiring “full compensation” and the predecessor constitutions requiring “just compensation.” Jameson v. Downtown Dev. Auth., 322 So. 2d 510 (Fla. 1975); Tosohatchee Game Preserve, Inc. v. Central & S. Fla. Flood Control Dist., 265 So. 2d 681, 684-85 (Fla. 1972); State Rd. Dep’t v. Bramlett, 189 So. 2d 481 (Fla. 1966). But see Riverside Military Academy v. Watkins, 19 So. 2d 870, 872 (Fla. 1944). The 1968 constitutional revisions also included a “public purpose” requirement. See Eckert, Acquisition of Development Rights: A Modern Land Use Tool, 23 U. MIAMI L. REV. 347, 353-56 (1968-69).


As a matter of federal constitutional law, the fifth amendment prohibition against the federal government’s “taking” property without “just compensation” applies to the states through the due process clause of the fourteenth amendment. Chicago B. & Q. R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

FLA. CONST. art. 16, § 29 (1885) also added a related, but different, provision that “[n]o private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be made to the owner, or first secured to him by deposit of money. . . .” Section 29 applied to private corporations and individuals rather than to the state, its agencies, and political subdivisions. State Rd. Dep’t v. Bramlett, 189 So. 2d 481, 483 (Fla. 1966); Carter v. State Rd. Dep’t, 189 So. 2d 793, 795 (Fla. 1966); DeSoto County v. Highsmith, 60 So. 2d 915 (Fla. 1952); Ellison v. State Rd. Dep’t, 169 So. 2d 485 (Fla. 1964); Daniels v. State Rd. Dep’t, 170 So. 2d 846 (Fla. 1964); Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So. 2d 433, 438 (1941). Some courts incorrectly applied section 29 to state agencies and subdivisions. City of Jacksonville v. Shaffner, 107 Fla. 367, 144 So. 888 (1932); Pinellas County v. General Tel. Co., 229 So. 2d 9 (Fla. 2d Dist. Ct. App. 1969); Wilson v.
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3. Florida courts have recognized section 6(a) and its predecessors as "fundamental" law, "universal" law, and "basic" to American democracy. In State Road Department v. Tharp, Justice Terrell wrote:

American democracy is a distinct departure from other democracies in that we place the emphasis on the individual and protect him in his personal property rights against the State and all other assailants. The State may condemn his property for public use and pay a just compensation for it, but it will not be permitted to grab or take it by force and the doctrine of nonsuability should not be so construed. Forceful taking is abhorrent to every democratic impulse and alien to our political concepts. Where the sovereign has a right to condemn for public use, it will not be permitted to appropriate except by orderly processes.

Section 6(a) is self-executing; it does not require enabling legislation to be effective. The legislature, however, has implemented section 6(a) in chapters 73 and 74 of the Florida Statutes. The statutes are particularly important "in those matters which are not specifically defined or prohibited" by section 6(a).

State Rd. Dep't, 201 So. 2d 619 (Fla. 1st Dist. Ct. App. 1967); Jacksonville Expressway Auth. v. Bennett, 158 So. 2d 821 (Fla. 1st Dist. Ct. App. 1963); State Rd. Dep't v. Bramlett, 179 So. 2d 137 (Fla. 1st Dist. Ct. App. 1965), rev'd on other grounds, 189 So. 2d 481 (Fla. 1966); Carlann Shores, Inc. v. City of Gulf Breeze, 26 Fla. Supp. 94 (Fla. 1st Cir. Ct. 1966). See State Rd. Dep't v. Chicone, 148 So. 2d 532 (Fla. 2d Dist. Ct. App. 1962). Those cases must be viewed in light of the Supreme Court of Florida's earlier unwillingness to determine whether section 29 applied to the state, its agencies, and political subdivisions. See, e.g., Seban v. Dade County, 102 So. 2d 706, 708 (Fla. 1958); Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954); State Rd. Dep't v. Forehand, 56 So. 2d 901, 903 (Fla. 1952).

3. State Rd. Dep't v. Bramlett, 170 So. 2d 846, 851 (Fla. 1964); State Rd. Dep't, 170 So. 2d 846, 851 (Fla. 1964); Cheshire v. State Rd. Dep't, 186 So. 2d 790, 791 (Fla. 4th Dist. Ct. App. 1966).

4. 146 Fla. 745, 1 So. 2d 868 (Fla. 1941).

5. Id.

6. Id. at 870.


Although Florida courts will often follow other jurisdictions in construing provisions similar to section 6(a), the Supreme Court of Florida has noted that “[w]e have our own Constitution and adjudicated cases by this Court which are controlling . . . .”

If a governmental body “takes” property without formally acquiring it by purchase, eminent domain pursuant to chapters 73 and 74, or otherwise, the property owner may sue the state, its agencies, or its political subdivisions in equity on the theory of inverse condemnation.

As the First District Court of Appeal noted in City of Jacksonville v. Schumann, inverse condemnation has been defined as the popular description of a cause of action against a governmental defendant to recover the value or property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency . . . . [I]nverse condemnation is a method of compensation wherein “an owner asserting a claim of appropriation of his property may pursue his right by an action in equity for an injunction, and for damages; the court may then, as an alternative to the injunction, make an award for the taking . . . .”

The sovereign immunity defense does not protect the government

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9. See Belcher v. Florida Power & Light Co., 74 So. 2d 56 (Fla. 1954).
10. Adams v. Housing Auth., 60 So. 2d 663, 665 (Fla. 1952).
11. As the Supreme Court of the United States recently noted in United States v. Clarke, — U.S. —, 100 S.Ct. 1127, 1130 (1980), “[t]he phrase inverse condemnation appears to be one that was coined simply as 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.” The term inverse condemnation has been used in at least sixty-six opinions of the Supreme Court of Florida and the district courts of appeal. E.g., Stanton v. Morgan, 127 Fla. 34, 172 So. 485 (1937); Hillsborough County v. Kengisett, 107 Fla. 237, 138 So. 400 (1931); Hillsborough County v. Kengisett, 107 Fla. 237, 144 So. 393 (1932); Wilson v. State Rd. Dep't, 201 So. 2d 619 (Fla. 1st Dist. Ct. App. 1967); City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. 1st Dist. Ct. App. 1964), cert. denied, 172 So. 2d 597 (Fla. 1965).
12. City of Jacksonville, 167 So. 2d 95.
from being sued in inverse condemnation.14

The basic policy issue involved in inverse condemnation is simple enough; it can be framed in one question: Should the individual property owner bear the economic cost of government actions or should those costs be distributed across the taxpaying community? As the First District Court of Appeal recently noted,

while government clearly has the right to expropriate private property for purposes beneficial to the general public, it cannot require a single property owner to bear the cost of such general benefits. This principle, which is the essence of the property clauses of the United States and Florida Constitutions, commands that the cost of public benefits be borne by the public.15

This article will discuss the elements of the prima facie case of inverse condemnation, possible defenses to an inverse condemnation claim, and the procedures involved in establishing such a lawsuit. It will focus on recent developments and issues in Florida and federal case law. Practice “pointers” have been suggested to aid the attorney who sues the government in inverse condemnation.

2. THE PRIMA FACIE CASE

A. Private Property

Like its predecessors, the 1968 Florida Constitution clearly requires a taking of “private property” in order for a plaintiff to prevail in an inverse condemnation lawsuit.16 It is questionable whether section 6(a) forbids the taking of government-owned property, even if the

14. State Rd. Dep’t v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941); State Rd. Dep’t v. Tharp, 1 So. 2d 868, 869 (Fla. 1941) (Sovereign immunity “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 taking has not occurred, sovereign immunity may bar a suit against the state. Venezia A., Inc. v. Askew, 363 So. 2d 367 (Fla. 1st Dist. Ct. App. 1978).


16. FLA. CONST. art. 10, § 6(a).
government holds the property in its proprietary capacity.17

The property may either be real or personal.18 It may be a fee
simple estate or less than a fee simple estate.19 The method of acquisi-
tion, i.e., by purchase, gift, or even lottery, is immaterial.20

Tangible property, such as sand and shells,21 oil and minerals,22
timber and trees,23 billboards,24 shrubbery and topsoil,25 are the clear-
est examples of private property. Monies also fit the definition.26

Private property includes franchises and other contract rights,27
easements,28 riparian rights,29 airspace,30 the common law rights for

17. See Myers v. Board of Pub. Assistance, 21 Fla. Supp. 177, 184 (Fla. 13th
Cir. Ct. 1963) (citing City of Key West v. Love, 116 So. 2d 223 (Fla. 1959), and City
of Orlando v. Evans, 132 Fla. 609, 182 So. 264 (1938)).
App. 1978); Pitz v. State Rd. Dep't, 32 Fla. Supp. 55, 62 (Fla. 11th Cir. Ct. 1966).
21. State Rd. Dep't v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941).
1976).
Supp. 196 (Fla. 7th Cir. Ct. 1979).
25. Florida Power Corp. v. McNeely, 125 So. 2d 311, 313 (Fla. 2d Dist. Ct.
1973); Carlann Shores, Inc. v. City of Gulf Breeze, 26 Fla. Supp. 94 (Fla. 1st Cir. Ct.
1966).
1969). See North Dade Water Co. v. Florida State Turnpike Auth., 114 So. 2d 458
(Fla. 3d Dist. Ct. App. 1959).
29. Kendry v. State Rd. Dep't, 213 So. 2d 23, 28 (Fla. 4th Dist. Ct. App. 1968);
Thiesen v. Gulf, F. & A. R.R. Ry., 75 Fla. 28, 78 So. 491, 507 (1918); Brickell v.
Trammell, 77 Fla. 544, 82 So. 221, 227 (1919).
30. Benitez v. Hillsborough County Aviation Auth., 26 Fla. Supp. 53 (Fla. 13th
Cir. Ct. 1966), aff'd, 200 So. 2d 194 (Fla. 2d Dist. Ct. App. 1967), cert. denied, 204
So. 2d 328 (Fla. 1967).
hunting and fishing on one's land, the difference in water elevation to operate a millrace, rights to "lateral support" for property in its unimproved condition, ingress and egress, rights to exclude others from one's property, and statutory, common law, permit or contract rights to develop one's land. Section 6(a) protects more than title to property; it also guards "the right to acquire, use and dispose of [property] for lawful purposes."

Other definitions of private property have included the opportunity of a regulated utility to earn a fair rate of return on its invested capital, a railroad's expenses in operating certain required services, and the right to use one's property free of an invalid exercise of the police power.

If the law does not recognize the interest as a private property

32. State Rd. Dep't of Fla. v. Tharp, 146 Fla. 745, 1 So. 2d 868, 869 (1941).
33. See Weir v. Palm Beach County, 85 So. 2d 865, 868 (Fla. 1956).
34. Anhoco Corp. v. Florida State Turnpike Auth., 116 So. 2d 745, 1 So. 2d 865, 868 (Fla. 1956).
40. Pinellas County v. Jasmine Plaza, Inc., 334 So. 2d 639 (Fla. 2d Dist. Ct. App. 1976) (county ordinance requiring a permit to remove certain trees, but failing to provide standards for issuing such permits).
right, there is no constitutional guarantee to "full compensation." As an example, the rights created by restrictive covenants, or so-called "negative easements," do not qualify as private property. Nor does Florida recognize a property right to lateral support for improved property. And because the unprotected right of a landowner to the "reasonable" use of underground water is merely a qualified right to use, it cannot form the basis of a claim for inverse condemnation.

Florida courts, without elaborating, have refused to define other interests, such as the loss of profit and business damages, as property within the meaning of section 6(a). Loss of profits, when combined with the taking of a recognized property right, does, however, warrant compensation under the Florida Constitution.

B. Taking

Like the fifth amendment to the United States Constitution, section 6(a) of the state constitution requires that compensation be paid only if property is "taken."

Florida courts have long noticed that the state constitution, unlike constitutions in approximately twenty-five other states, mandates compensation only for "taking" or "appropriations" and not for "damages." Without such a taking, the Supreme Court of Florida has

41. Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955).
42. Weir v. Palm Beach County, 85 So. 2d 865, 867 (Fla. 1956).
45. FLA. CONST. art. 10, § 6(a).
46. Id.
47. Village of Tequesta v. Jupiter Inlet Corp., 349 So. 2d 216 (Fla. 4th Dist. Ct. App. 1979), rev'd on other grounds, 371 So. 2d 663, 669 (Fla. 1979); Weir v. Palm Beach County, 85 So. 2d 865, 867 (Fla. 1956); Rabin v. Lake Worth Drainage Dist., 82 So. 2d 353 (Fla. 1955); Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955); Kendry v. State Rd. Dep't, 213 So. 2d 23, 29 (Fla. 4th Dist. Ct. App. 1968); Northcutt v. State Rd. Dep't, 209 So. 2d 710, 712 (Fla. 3d Dist. Ct. App. 1968); Moviematic Indus. Corp. v. Dade County, 44 Fla. Supp. 30, 37 (Fla. 11th
ruled that "the damages suffered are damnum absque injuria and compensation therefor by a [public agency] cannot be compelled." \(^{48}\)

Determinations of a taking are made on a case-by-case basis. \(^{49}\) The distinction between a taking and damages is much clearer in concept than in practice. The Supreme Court of Florida recently has noted that "[t]here is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins." \(^{49.1}\) The Fourth District Court of Appeal was correct when it noted that the law requiring compensation for taking and appropriation is "easier to state than [it is] to apply." \(^{50}\) Moreover, as that court observed, "Florida courts have not, over the years, been in consistent agreement on [what constitutes a taking], particularly where . . . there was no actual entry by the governmental authority on the owner's land." \(^{51}\) Similarly, the First District Court of Appeal has commented that Florida courts have found takings where technically only damage to the property existed. \(^{52}\)

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48. Weir v. Palm Beach County, 85 So. 2d 865, 867 (Fla. 1956).
49.1 1981 Fla. L. Weekly at 278.
50. Kendry v. State Rd. Dep't, 213 So. 2d 23, 27 (Fla. 4th Dist. Ct. App. 1968). Commentators also have observed in Florida case law "the absence of a cohesive doctrinal basis for judicial decisions, the inconsistency in cases holding 'a taking' or 'not a taking', and the need for predictive guidelines in this area of law." Haigler, McInerny and Rhodes, The Legislature's Role in the Taking Issue, 4 FLA. ST. U. L. REV. 1, 3 (1976).
ter of the rule, the court explained, reflected "the stresses to which tak-
ing concepts were subjected during years in which sovereign immunity
was regarded as barring more direct judicial remedies for damage by
the State's drainage trespasses and nuisances." 53

Despite the existence of an occasional difficult question, much con-
sistency runs throughout Florida case law. Certain governmental ac-
tions will invariably result in the judiciary determining a taking has
occurred. For example, government improvements which cause physical
removal or invasion of a landowner's property on a permanent or peri-
odic, but recurring, basis warrant compensation. 54 A taking also may
consist of an entirely negative physical act, such as the destruction of a
residence, shrubbery, or trees, 55 or the "washing away" of plaintiff's
land, rendering it unusable. 56 A taking may also occur when land is

53. Id. at 921.
1965) (installation of streets and canals on plaintiff's land), rev'd on other grounds,
189 So. 2d 481 (Fla. 1966); Kendry v. Division of Administration, 366 So. 2d 391 (Fla.
1978) (placing fill on plaintiff's land to raise elevation of roadway); City of Miami v.
Romer, 73 So. 2d 285 (Fla. 1954) (paving sidewalk on plaintiff's land); City of Miami
Beach v. Belle Isle Apartment Corp., 177 So. 2d 884 (Fla. 3d Dist. Ct. App. 1965)
(public road on defendant's property); Florida Power Corp. v. McNeely, 125 So. 2d
311 (Fla. 2d Dist. Ct. App. 1960) (placing electrical towers on plaintiff's land held to
be a taking, even though electrical company had pre-existing right to string electrical
transmission lines across plaintiff's land because, inter alia, merely stringing electrical
lines across the land did not preclude certain uses under those lines); Kendry v. State
Rd. Dep't, 213 So. 2d 23 (Fla. 4th Dist. Ct. App. 1968) (state filled and claimed
bottomlands and flooded certain other lands); Florida Power Corp. v. McNeely, 125
So. 2d 311, 313 (Fla. 2d Dist. Ct. App. 1960) (removal of property such as timber or
top soil from the private premises); State Rd. Dep't v. Darby, 109 So. 2d 591 (Fla. 1st
Dist. Ct. App. 1959) (construction causing clay, sand, and silt to be washed onto plain-
tiff's property held to be a taking over dissenting judge's claim that there was no evi-
dence that the invasion was permanent). A temporary physical invasion is generally
held not to be a taking. Dudley v. Orange County, 137 So. 2d 859 (Fla. 2d Dist. Ct.
(Fla. 11th Cir. Ct. 1966).
55. E.g., State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959); Kirkpatrick v.
City of Jacksonville, 312 So. 2d 487 (Fla. 1st Dist. Ct. App. 1975).
56. Elliott v. Hernando County, 281 So. 2d 395 (Fla. 2d Dist. Ct. App. 1973);
Pinellas County v. Austin, 323 So. 2d 6 (Fla. 2d Dist. Ct. App. 1975) (A taking may
occur when a street is vacated, even though it reverts back to adjacent property owners
taxed as municipal land when in fact no actual or potential municipal use is possible.\textsuperscript{57}

Once beyond these clear-cut cases, Florida courts have used a variety of factors and tests for determining whether governmental actions have resulted in a taking of private property. Unfortunately, the courts have not always applied them in a consistent manner. The Supreme Court of Florida has recently indicated six non-exclusive factors which have been considered in determining whether there has been a taking: (1) whether there has been a physical invasion; (2) the degree of diminution in value; (3) whether the regulation confers a public benefit or prevents a public harm; (4) whether the regulation promotes public health, safety, welfare, and morals; (5) whether the regulation is arbitrarily and capriciously applied; and (6) whether the regulation curtails investment-backed expectations.\textsuperscript{57,1}

\textbf{Some Factors and Tests}

\textit{Police Power.} Florida courts often had indicated that the reasonable exercise of the state's police powers\textsuperscript{58} did not constitute a taking of private property.\textsuperscript{59}

\textsuperscript{57} See Rabin v. Lake Worth Drainage Dist., 82 So. 2d 353 (Fla. 1955).

\textsuperscript{58} See Bair v. Central & S. Fla. Flood Control Dist., 144 So. 2d 818 (Fla. 1962). See also City of Coral Gables v. State ex rel. Landis, 129 Fla. 834, 177 So. 290, 291 (1937); State ex rel. Attorney Gen. v. City of Avon Park, 108 Fla. 641, 149 So. 409, 416 (1933).

\textsuperscript{59} See City of Miami v. St. Joe Paper Co., 364 So. 2d 439 (Fla. 1978); Sarasota County v. Barg, 302 So. 2d 737 (Fla. 1974); Keating v. State, 173 So. 2d 673, 677 (Fla. 1965); Adams v. Housing Auth., 50 So. 2d 663, 666 (Fla. 1952); City of Miami v. Romer, 58 So. 2d 849 (Fla. 1952); Garvin v. Baker, 59 So. 2d 360 (Fla. 1952); Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So. 2d 543 (1941) (sustaining dismissal of complaint alleging that prohibition of advertising signs within so many feet of

\textsuperscript{57,1}
Even prior to *Graham*, this principle was not sacrosanct;\(^{59}\) it was well-established that an overly restrictive exercise of the state’s police power,\(^{60}\) or an “unreasonable” exercise of police power\(^{61}\) may result in the appropriation of private property. Similarly, exercises of the police power that are unnecessarily restrictive,\(^{62}\) or standardless,\(^{63}\) or arbitrarily applied\(^{64}\) may give rise to a claim of inverse condemnation.

Like other judicially created tests, the police power test had its own assortment of problems. Courts frequently disagreed over where the line should be drawn between a reasonable exercise and an unreasonable or overly restrictive exercise of the police power. Furthermore, because of the ease with which one could mechanically apply the test, courts frequently used it without reasoned analysis. In referring to the conclusional character of this test, the Third District Court of Appeal in *Moviematic Industries Corp. v. Board of County Commissioners*\(^{65}\) recognized that under certain circumstances even a valid exercise of the police power may constitute a taking. In *Moviematic*, the court found that a rezoning of certain land from heavy industrial use to residential use was reasonably related to the public health and welfare.\(^{66}\)

\(^{59}\)1. 1981 Fla. L. Weekly at 278.


\(^{61}\) Grand Union Co. v. City of Tampa, 23 Fla. Supp. 113 (Fla. 13th Cir. Ct. 1963).

\(^{62}\) Field v. City of Miami, 18 Fla. Supp. 179 (Fla. 11th Cir. Ct. 1961).

\(^{63}\) Pinellas County v. Jasmine, 334 So. 2d 639 (Fla. 2d Dist. Ct. App. 1976).

\(^{64}\) See *Mayer v. Dade County*, 82 So. 2d 513, 519 (Fla. 1955).

\(^{65}\) 349 So. 2d 667, 670-71 (Fla. 3d Dist. Ct. App. 1977).

\(^{66}\) *Id.* at 672.
Under the traditional police power test, such a conclusion should have ended the court’s inquiry; instead, the court asked a second question: Whether the legitimate exercise of the police power so impaired the use of the property as to be a compensable appropriation?\(^67\) The court held that a taking did not occur only because the plaintiff could still use the property for residential purposes.\(^68\) An insufficient “reduction of the property’s market value”\(^69\) did not render the property valueless; consequently, the plaintiff failed to satisfy the second part of the two-part analysis fashioned by the court.

Laws requiring land developers to dedicate land and to maintain certain minimal lot sizes and the condition of the development have been sustained as valid exercises of the police power. In Garvin v. Baker,\(^70\) the city refused to approve certain plats or maps of property which failed to meet the specifications of a local ordinance. The trial court held the enactment, which required that at least sixty feet of land be dedicated for streets, sidewalks, and curb purposes and prohibited the platting of lots less than fifty feet in width and one hundred feet in depth, was reasonable.\(^71\) The Supreme Court of Florida noted that requiring specifications of street widths may prevent “hazardous traffic conditions,” thus involving the “public welfare and safety to a high degree.”\(^72\) Referring to the mandatory minimum lot size, the court wrote: “the size of lots upon which a one-family, two-family, or four-family, building may be erected was a subject for police regulation and when not unreasonable, such regulations do not deprive a person of his property without due process of law.”\(^73\)

\(^{67}.\) Id. at 670-71.
\(^{68}.\) Id. at 670.
\(^{69}.\) Id. at 671. In noting that the exercise of the police power may be reasonable and yet still take property, Moviematic was logically correct. The United States Supreme Court later agreed, recognizing that even a valid exercise of the police power may seriously interfere with private property rights. Penn Cent. Transp. Co. v. City of New York, ___ U.S. ___, 98 S. Ct. 2646 (1978). Accord, Graham 1981 Fla. L. Weekly 275 (April 16, 1981).
\(^{70}.\) 59 So. 2d 360 (Fla. 1952).
\(^{71}.\) Id. at 362.
\(^{72}.\) Id.
\(^{73}.\) Id. at 364-65. Garvin is not a definitive holding. It involved a petition for mandamus. The Supreme Court of Florida noted that the granting of a writ of mandamus was largely discretionary and would be granted only where “[t]he legal right . . .
In Wald Corp. v. Metropolitan Dade County,74 the Third District Court of Appeal sustained a county ordinance requiring dedication of drainage ways, streams, and rights-of-way as a condition of approval of a subdivision plat. These dedications, the court held, had a "rational nexus" to community needs.75 More recently, the Supreme Court of Florida upheld the constitutionality of the Marketable Record Title Act.76 In sustaining the Act's validity, the court wrote in City of Miami v. St. Joe Paper Co.:77

[D]ue process has never been an absolute prohibition against state legislation adversely affecting property rights. It has been held over and over again that general limitations on state actions do not extinguish the state's police power to enact legislation "reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community."

In determining whether state action violates due process principles, a court must choose between protecting the individual's guaranteed rights on one hand, and the welfare of the general public on the other. This method of determining whether a state meets the requirements of due process is called the 'balancing of interests' test . . . .78

Environmental restrictions have also been sustained as reasonable exercises of the police power.79 In Sarasota County v. Barg,80 certain landowners filed a complaint in circuit court, claiming that the statute

to an order compelling the performance of some particular act [is] clear and complete." Id. at 361.
74. 338 So. 2d 863 (Fla. 3d Dist. Ct. App. 1976).
75. Id. at 868.
76. City of Miami v. St. Joe Paper Co., 364 So. 2d 439 (Fla. 1978) (sustaining Fla. Stat. § 712.01 (1979)).
77. Id.
78. Id. at 444.
80. 302 So. 2d 737 (Fla. 1974).
creating the Manasota Key Conservation District was unconstitutional. The litigants argued, among other things, that section four of that law took their property. Among the law’s prohibitions are (1) that no land in the district may be used for commercial or multi-family purposes; and (2) that newer structures within the district may not be constructed over two stories high. The circuit court found the law unconstitutional. On appeal, the Supreme Court of Florida sustained the statute’s validity, holding that section four did not violate the due process clause.

Section four of the Act does not deprive appellees of their property, or of the use of their property; it simply regulates the use of that property. Reasonable restrictions upon the use of property in the interest of the public health, welfare, morals, and safety are valid exercises of the State’s police power. . . . The restrictions imposed by Section 4 of the Act are reasonable, in light of the legislative intent—expressed in Section 1 of the Act—to preserve the natural beauty of Manasota Key.

Nor does loss of business due to competition with the government deserve constitutional protection. In *Coast Cities Coaches, Inc. v. Dade County*, the county planned to extend its bus service in an area already worked by a common carrier. Plaintiff claimed that the competition would reduce its business, eventually causing the company to fail. The Supreme Court of Florida, citing precedent from the United States Supreme Court, held that “loss of business, through competition with a governmental agency, is not a taking of property. . . .” The court admitted a taking would have occurred had the county taken the common carrier’s physical property or certificate of necessity; but the “harsh impacts” to the common carrier were merely “damnum absque injuria.”

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81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 741.
85. 178 So. 2d 703 (Fla. 1965).
87. 178 So. 2d at 709.
88. *Id.* at 710.
OTHER FACTORS THAT MAY DETERMINE WHETHER A TAKING HAS OCCURRED

[a] Physical Invasion.

It is well-established that the state may take land without physically invading it, although Florida courts incline to find a taking where there is a physical encroachment.

[b] Deprivation of Beneficial Use.

In order to constitute a taking, some courts indicate that the plaintiff must be “deprived of the beneficial use of his property.” Other cases imply that the landowner must suffer “total” deprivation before compensation will be paid. Florida courts, however, have never defined the word taking to mean a total deprivation. In *Graham v. Estuary Properties*, the Supreme Court of Florida found there was no taking in part because the developer could still construct almost 13,000 residential units and commercial facilities; on the other hand, the court specifically noted that “[w]e do not hold that anytime the state requires a proposed development to be reduced by half it may do so without compensation to the owner.”

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89. See, e.g., Benitez v. Hillsborough County Aviation Auth., 26 Fla. Supp. 53 (Fla. 13th Cir. Ct. 1966) (a landowner could recover for taking of an aviation easement even though jets did not fly directly over his property), aff’d, 200 So. 2d 194 (Fla. 2d Dist. Ct. App. 1967), cert. denied, 204 So. 2d 328 (Fla. 1967).


91. City of Miami v. Romer, 58 So. 2d 849, 852 (Fla. 1952) (condemnation of a ten-foot strip for street purposes not considered a taking because the landowner was “free to use such strip of land in any lawful manner and for any lawful purpose, except for the construction of a building thereon”).


The landowner carries the burden of proving the taking. Adams v. County of Dade, 325 So. 2d 584 (Fla. 3d Dist. Ct. App. 1976).

preme Court of Florida held, *inter alia*, that a statute extending certain platted restrictions against any buildings other than apartments and residences had taken plaintiff’s contractual rights to develop his land. The plaintiff had intended to build a medical office and clinic on his property. Even though his land retained substantial value despite the statutory restrictions, the court awarded the plaintiff compensation. In *Benitez v. Hillsborough County Aviation Authority*, the Second District Court of Appeal affirmed a circuit court decision which found a taking of an aviational easement from certain landowners. Even though the property retained substantial value, i.e., persons continued to live on it, the court backed the award of compensation.

[c] Systematic Impacts.

Florida courts have also considered the impacts that finding a taking would have on governmental planning and developing. In *Northcutt v. State Road Department*, the plaintiffs alleged that the construction and operation of a highway near them had deprived them of the beneficial use of their property. In particular, the complainants argued that the highway had caused excessive shock waves, vibrations, and noises in their homes. The complaint read that the disturbances impaired the

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93. 65 So. 2d 751 (1953).
94. *Id.* at 751-52. The court, in rejecting the argument that the statute involved was purely an exercise of the police power, wrote:

This court has long recognized [the principle of the police power], but with the qualification that there must be present a reasonable use of such power and reasonable limitations thereto, else we let the gates down, as advocated here, and the whole field of private contract would be invaded and infected to the extent that security of contract in this respect would be lost and irreparable harm and damage to the legal, constitutional, and economic facets of what we know as the business and financial world of the State and the Nation, would inevitably and necessarily follow.

*Id.* at 752.
96. *Id.* at 200. In Pinellas County v. Austin, 323 So. 2d 6 (Fla. 2d Dist. Ct. App. 1975), the court held that the existence of some access to the property would not preclude the finding of a taking even though it might reduce the amount of recovery.
plaintiffs' health and welfare, causing them to become ill and nervous and depriving them of the maximum use and aesthetic beauty of their property. The trial judge dismissed the plaintiffs' amended complaint, which sought injunctive relief, for failure to state a cause of action. In affirming the dismissal, the Third District Court of Appeal made it clear that the plaintiffs' reliance on City of Jacksonville v. Schumann was misplaced. The court wrote: "there is a substantial difference between the use of an airport by airplanes and the use of highway and access roads by motor vehicles. The noise intensity factor is different; the safety factors are different; and the use factors are different." 

The complaint, however, had alleged that the plaintiffs had been permanently deprived of the use, benefit, and enjoyment of their property. The Third District Court of Appeal overlooked these allegations, yet these averments and the inferences which could have been drawn from them should have been accepted as true in testing the sufficiency of the complaint; instead, the perceived possibility of virtually unlimited liability appears to have influenced the district court's decision to dismiss. The court commented:

An airport may be placed at a considerable distance from a city while it is a public necessity for roads and highways to be built close to, or directly through a city, and sometimes through its most heavily populated areas. To sustain the amended complaint of the plaintiffs as sufficient for inverse condemnation would bring to an effective halt the construction, operation and maintenance of access roads and highways within the State of Florida. It would be impossible to determine and prepare with any degree of accuracy, a reasonable budget for the construction of highways and access roads in the future in Florida. After the access roads and highway were constructed and in operation, each individual land owner adjacent thereto could seek damages from the state for a "taking" of their property resulting from the increased noises, dust and vibrations, coming from the motor vehicles using the adjacent highway.

98. Id.
99. 167 So. 2d 95 (Fla. 1st Dist. Ct. App. 1964), cert. denied, 172 So. 2d 597 (Fla. 1965).
100. 209 So. 2d at 711.
101. Id. at 710.
102. Id.
Notwithstanding the position of the Third District Court of Appeal, the impacts of overflights and the impacts of highway traffic on the beneficial use of property may be similar. A taking can occur in both situations. Commentators have rightfully criticized the reasoning in Northcutt. 103

[d] Fraud or Abuse of Discretion.

Courts have at times applied improper standards to determine whether a taking has occurred. In Northcutt v. State Road Department, 104 the plaintiffs alleged, inter alia, that the state did not condemn sufficient land for a highway. In spite of the fact that purely legal and constitutional issues were raised by the complainants, 105 the Third District Court of Appeal focused exclusively on whether a “clear showing” of fraud or abuse of discretion 106 colored the state’s decision to condemn. The court, in citing two Florida cases, 107 failed to recognize that the fraud or abuse of discretion standard is a proper standard only for determining the propriety of a decision to initiate condemnation proceedings and not for testing a decision to refrain from initiating those proceedings. 108

[e] Profit-seeking Activity.

Until recently, single-family residence owners may have had a better chance of sustaining a condemnation claim than large-scale developers. In Wald Corp. v. Metropolitan Dade County, 109 the Third District Court of Appeal intimated that a taking will be found more often in a private setting than in a business setting. The district court, in

104. 209 So. 2d 710.
105. The Northcutts requested the court to order the State Road Department to institute eminent domain proceedings against their property so that they could recover compensation for the agency’s taking. Id.
106. Id.
108. 209 So. 2d 710.
sustaining the constitutionality of a county ordinance requiring a subdivider to dedicate certain rights of way, supranote 10 wrote that "[w]hile the [individual landowner] may not ordinarily have his property appropriated without an eminent domain proceeding, the [subdivider] may be required to dedicate land where the requirement is part of a valid regulatory scheme." supranote 11 But the Supreme Court of Florida recently noted that investment-backed expectations may be a factor in finding a taking. supranote 11

[f] Miscellaneous Considerations.

For a taking to occur, the governmental action must be pursuant to a plan or program. Damages caused by the commission of a tort do not in and of themselves constitute a compensable injury. For example, allegations that an agency sprayed plaintiff's land with a chemical herbicide, damaging and destroying his crops, do not state a cause of action under inverse condemnation. supranote 12 The recurrence of a tort may be one factor in favor of finding an appropriation. supranote 13

Kirkpatrick v. City of Jacksonville supranote 14 presents an interesting study of the distinctions sometimes made between a taking and damages. In that case, the complaint contained allegations that the city had destroyed buildings without sufficient proof that these buildings were adversely affecting the health or safety of the public. Holding that a one-year statute of limitations governing trespass actions was applicable to the case, the trial court dismissed the complaint. supranote 15 In explaining the distinction between a taking and damage, the First District Court of Appeal wrote:

Compensation to the owner [is] required as to [a taking], but not as to

10. Id.
11. Id. at 868.
12. Rabin v. Lake Worth Drainage Dist., 82 So. 2d 353 (Fla. 1955). See White v. Pinellas County, 185 So. 2d 468, 471 (Fla. 1966) (cutting down trees and shrubs on plaintiff's land pursuant to a planned program of highway development was a taking).
15. Id.
[a damage]. The distinction is valid but does not necessarily prohibit appellants from recovering herein. "Taking" has been defined as "entering upon private property for more than a momentary period and 'under the warrant or color of legal authority,' devoting it to public use or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof."116

As was noted in Graham, Florida courts are likely to consider certain intangibles in determining the existence of a taking. For example, where a private person purchases land from the state which can be used for limited purposes, and then the state restricts those uses, these actions will be a factor in favor of finding a taking. Conversely, where a person purchases land knowing that it is subject to certain restrictions, that knowledge will be a factor against finding an appropriation.116.1

C. Owner

The Florida Constitution requires that a person be an "owner" of property before he may recover for the taking of that property.117 The owner of a fee simple absolute estate obviously satisfies the ownership requirement.118 The holder of a valid leasehold also is an owner within contemplation of the constitution, regardless of whether he is a tenant for a term of years,119 or a tenant at will,120 or even a tenant at sufferance.121 A vendor under a contract for deed does not possess sufficient indicia of ownership to be able to assert a claim for inverse condemnation.122 Only the owner at the time of the taking may sue for inverse

116. Id. at 489 (emphasis in original, citing 12 Fla. Jur. Eminent Domain § 68 (1957)).
118. Id.
119. Carter v. State Rd. Dep't, 189 So. 2d 793 (Fla. 1966); State Rd. Dep't v. White, 161 So. 2d 828 (Fla. 1964).
122. Florida Dep't Transp. v. Trost Int'l Ltd., 47 Fla. Supp. 175 (Fla. 2d Cir. Ct. 1978). Trost characterized the vendor's title under an agreement for deed as "a
condemnation, unless the deed of conveyance specifies otherwise or unless there has been an assignment of the cause of action from the owner at the time of the taking.\textsuperscript{123} Department of Transportation v. Burnett\textsuperscript{e}\textsuperscript{124} provides a good illustration. The plaintiff purchased the land in 1977, approximately eight years after the government's interference with the property deprived the prior owners of its beneficial use. The First District Court of Appeal, in reversing the lower court's finding that the plaintiff's property had been taken, quoted with approval from the Minnesota case of Brooks Investment Co. v. City of Bloomington.\textsuperscript{125} In that case, the Supreme Court of Minnesota reasoned that

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[\textit{\text generation}}]
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\textit{[w]hen the government interferes with a person's right to possession and enjoyment of his property to such an extent so as to create a "taking" in the constitutional sense, a right to compensation vests in the person owning the property at the time of such interference. This right has the status of property, is personal to the owner, and does not run with the land if he should subsequently transfer it without an assignment of such right. The theory is that where the government interferes with a person's property to such a substantial extent, the owner has lost part of his interest in the real property. Substituted for the property loss is the right to compensation. When the original owner conveys what remains of the realty, he does not transfer the right to compensation for the portion he has lost without a separate assignment of such right. If the rule was otherwise, the original owner of damaged property would suffer a loss and the purchaser of that property would receive a windfall. Presumably, the purchaser will pay the seller only for the real property interest that the seller possesses at the time of the sale and can transfer.\textsuperscript{126}
\end{quote}

The subsequent owner is not, however, without protection. First, the rationale for the rule enunciated in Burnett\textsuperscript{e} lacks persuasion when the transferor and transferee do not know of the taking at the time of

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\textit{naked legal title as security for the indebtedness.}'' \textit{Id.} at 177 (citing Mid-State Investment Corp. v. O'Steen, 133 So. 2d 455 (Fla. 1st Dist. Ct. App. 1961).}
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123. Marianna & B. R. Co. v. Maund, 62 Fla. 538, 56 So. 670 (1911); Department of Transp. v. Burnette, 384 So. 2d 916 (Fla. 1st Dist. Ct. App. 1980); Florida Power Corp. v. McNeely, 125 So. 2d 311, 318 (Fla. 2d Dist. Ct. App. 1960); State Rd. Dep't v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941).
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124. 384 So. 2d 916 (Fla. 1st Dist. Ct. App. 1980).
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125. 305 Minn. 305, 232 N.W.2d 911 (1975).
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126. \textit{Id.} at 315, 232 N.W.2d at 918.
\end{quote}
the conveyance. Moreover, the equities in such a case rest with the plaintiff because the sales price would not reflect the diminution in the value of the property for the taking, that is, it is the plaintiff who bears the ultimate burden.

Second, as previously noted, the subsequent owner may sue if he has received an assignment of the cause of action. In Florida Power Corp. v. McNeely, the action which formed the basis of a taking claim occurred in 1955, one year prior to the purchase of the lot by the plaintiffs. Plaintiffs in this case were permitted to sue because they had "bought an assignment of the cause of action [which the earlier owner] had against the defendant."

Third, the subsequent owner may have remedies other than a suit in inverse condemnation. He may seek to enjoin the state from continuing its conduct. In Burnette, although the plaintiff was unsuccessful in making out a case for inverse condemnation, he nevertheless succeeded in enjoining the state from continuing to burden his land. The court, in answering the defendant's argument that the plaintiff was not the proper party to assert ownership, stated that "[i]t is no defense to this action, so conceived, that the drainage system was already in place when Burnette bought this acreage and so 'came to the nuisance.'" Of equal interest was the court's intimation that it may be necessary to the state to use its eminent domain powers should the tort continue.

Quite possibly the Department is unable to restore the old northwest drainage pattern without casting unmanageable water on North Florida Junior College. Condemnation of some land or easements may be appropriate to manage this drainage and compliance with the injunction, but

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127. In Burnette, Judge Booth wrote: "the rule [holding that the owner of the property at the time of the taking is entitled to compensation] does not apply in inverse condemnation proceedings in the absence of a showing that the plaintiff and his predecessor in title were aware of the existence of a cause of action at the time title was transferred." 384 So. 2d at 924 (citing Cox Enterprises v. Phillips Petroleum, 550 P.2d 1324 (Okla. 1976)).
128. Id. at 924-25.
129. 125 So. 2d 311 (Fla. 2d Dist. Ct. App. 1960).
130. Id. at 313.
131. 384 So. 2d 916.
132. Id. at 922 (citing Lawrence v. Eastern Airlines, Inc., 81 So. 2d 632, 634 (Fla. 1955)).
the manner and method of so relieving [plaintiff's] land are for the Department to determine in the exercise of its lawful powers.\textsuperscript{133}

Regardless of whether the subsequent purchaser acquires an assignment or sues in tort, his conduct should be beyond reproach because courts hesitate to provide a remedy if they find that the purchaser did not buy in good faith, but rather for “the sole purpose of [instituting] a vexatious lawsuit.”\textsuperscript{134}

D. Public Purpose

The Florida Constitution specifically provides that no property may be taken except for a “public purpose” without full compensation.\textsuperscript{135} The requirement of a public purpose limits the government’s right to take and may not be used defensively by the state in an inverse condemnation proceeding.\textsuperscript{136} In \textit{Kirkpatrick v. City of Jacksonville}, the city argued that the plaintiff was not entitled to compensation because the government did not have a public purpose for destroying his building. The First District Court of Appeal rejected the city’s argument because the constitutional requirement that private property be taken only for public purpose serves to protect the landowner, and not the municipality.\textsuperscript{137} The state may avoid altogether the issue of whether a public purpose exists if it can prove that the damage stems from an isolated trespass or tort rather than from a planned governmental program.\textsuperscript{138}

\begin{itemize}
  \item \textsuperscript{133} \textit{Id.} at 923.
  \item \textsuperscript{134} \textit{Id.} at 922 (quoting \textit{Prosser, Law of Torts} 611 (4th ed. 1971)).
  \item \textsuperscript{135} \textit{Fla. Const.} art. 10, § 6(a).
  \item \textsuperscript{137} 312 So. 2d 487 (Fla. 1st Dist. Ct. App. 1975).
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{See} White v. Pinellas County, 185 So. 2d 468 (Fla. 1966). In \textit{Kirkpatrick}, 312 So. 2d 487, the First District Court of Appeal misconstrued \textit{White}. \textit{White} held that a plaintiff would prevail in inverse condemnation only if governmental action was
E. Full Compensation

If a plaintiff succeeds in making out a prima facie case of inverse condemnation, the Florida Constitution demands that "full compensation [be] paid to each owner." The public body is liable to the same extent in an inverse condemnation proceeding as it is in a direct condemnation proceeding. The award of compensation seeks to make the property owner "whole so far as is possible and practicable." The constitutional provision does not seek to put the owner in a better position than he would have been in if there had been no taking.

Full compensation generally means the fair market value of the property taken. If less than the complete parcel is taken, severance damages should be awarded for the remainder of the parcel. The government bears the burden of proving the value of the property; the property owner has the burden of proving damage to the remainder of pursuant to a valid government program.

140. FLA. CONST. art 10, § 6(a).
142. Dade County v. General Waterworks Corp., 35 Fla. Supp. 71, 73 (Fla. 11th Cir. Ct. 1971) (citing Dade County v. Brigham, 47 So. 2d 602, 604 (Fla. 1950)), rev'd on other grounds, 267 So. 2d 633 (Fla. 1972). Accord, Division of Bond Fin. v. Rainey, 275 So. 2d 551, 554 (Fla. 1st Dist. Ct. App. 1978); Cheshire v. State Rd. Dep't, 186 So. 2d 790, 791 (Fla. 4th Dist. Ct. App. 1966); Jacksonville Expressway Auth. v. Bennett, 158 So. 2d 821, 827 (Fla. 1st Dist. Ct. App. 1964) ("the guiding light . . . is to secure to the owner of the property taken full compensation - to make him whole - nothing less, nothing more").
143. See Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954).
144. Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972) (stating that the property might have been acquired for less than fair market value is immaterial).
145. Kendry v. Division of Administration, 366 So. 2d 391 (Fla. 1978); Daniels v. State Rd. Dep't, 170 So. 2d 846 (Fla. 1964); City of Hollywood v. Jarkesy, 343 So. 2d 886 (Fla. 4th Dist. Ct. App. 1977). But see Stanton v. Morgan, 127 Fla. 34, 172 So. 485 (1937) (government liable for property taken but not for tort damages to other property). If the taking directly enhances the value of the remaining parcel, the enhancement may be offset against the severance damages. Limmiatis v. Canal Auth., 253 So. 2d 912 (Fla. 1st Dist. Ct. App. 1971).
his property.\textsuperscript{146} Once a taking has occurred, the landowner may recover for consequential damages to the remainder of his parcel.\textsuperscript{147} Fair market value may be insufficient in certain circumstances.\textsuperscript{148} Full compensation may at times require replacement value.\textsuperscript{149} Any evaluation methods serve merely as tools in ascertaining full compensation.\textsuperscript{150} If the court determines a taking has occurred, it may order the state to pay compensation. Some courts will give the state the option of discontinuing its action; other courts will enjoin the state from appropriating.\textsuperscript{151}

The Florida Legislature occasionally has tried to establish artificial limits on the amount of compensation for a governmental taking.\textsuperscript{152} Courts generally exhibit an antipathy towards these ceilings, occasionally striking them down as unconstitutional in violation of the full compensation requirement and of the separation of powers mandate in the Florida Constitution.\textsuperscript{153} Despite their negative reception, legislative determinations of full compensation, "while not conclusive or binding, are persuasive and will be upheld unless clearly contrary to the judicial

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\item \textsuperscript{146} Kendry, 366 So. 2d 391. See City of Fort Lauderdale v. Casino Realty, Inc., 313 So. 2d 649, 652 (Fla. 1975) (Overton, J., concurring).
\item \textsuperscript{148} Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972) (citing Jacksonville Expressway Auth. v. Henry J. Dupree Co., 108 So. 2d 289 (Fla. 1959)). \textit{But see} State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959).
\item \textsuperscript{149} State Rd. Dep't v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941). \textit{See} Rice v. City of Fort Lauderdale, 281 So. 2d 36 (Fla. 4th Dist. Ct. App. 1973). \textit{But see} Hill v. Marion County, 238 So. 2d 163 (Fla. 1st Dist. Ct. App. 1970).
\item \textsuperscript{150} Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972); Division of Bond Fin. of the Dep't of Gen. Servs. v. Rainey, 275 So. 2d 551 (Fla. 1st Dist. Ct. App. 1973).
\item \textsuperscript{151} Mayer v. Dade County, 82 So. 2d 513 (Fla. 1955); City of Ormond Beach v. Lamar-Orlando Outdoor Advertising, 49 Fla. Supp. 196 (Fla. 7th Cir. Ct. 1979); Field v. City of Miami, 18 Fla. Supp. 179 (Fla. 11th Cir. Ct. 1961).
\item \textsuperscript{152} Daniels v. State Rd. Dep't, 170 So. 2d 846 (Fla. 1964).
\item \textsuperscript{153} \textit{Id}.
\end{itemize}
view of the matter.\textsuperscript{154}

The jury takes its directions from the trial judge in determining the amount of money which should be awarded an injured plaintiff.\textsuperscript{155} The jury may not make an independent determination of the value of the property, but may evaluate, interpret, and weigh expert testimony.\textsuperscript{156} In \textit{Behm v. Division of Administration},\textsuperscript{157} the Supreme Court of Florida made it clear that "compensation . . . is by our constitution committed for final determination to the jury, not to an expert."\textsuperscript{158} Three limitations still exist to check the principle enunciated in \textit{Behm}. First, substantial evidence must support the jury determination.\textsuperscript{159} Second, the jury verdict must be at least equal to the state's admission of damages.\textsuperscript{160} Third, the judge may grant a new trial if the verdict "shocks" him by being contrary to the manifest weight of the evidence, even where the jury returns a verdict within the range of testified values.\textsuperscript{161}

Florida law grants reasonable attorney's fees in inverse condemnation and eminent domain proceedings.\textsuperscript{162} In \textit{State Road Department v. Lewis},\textsuperscript{163} the government argued that an award of attorney's fees was improper in an inverse condemnation action. The First District Court

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  \item \textsuperscript{154} Id. at 853.
  \item \textsuperscript{155} State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959) (citing Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926)). \textit{Accord}, \textit{Behm v. Division of Administration}, 383 So. 2d 216 (Fla. 1980); Daniels v. State Rd. Dep't, 170 So. 2d 846 (Fla. 1964); State ex rel. State Rd. Dep't v. Wingfield, 101 So. 2d 184 (Fla. 1st Dist. Ct. App. 1958); Dade County v. General Waterworks Corp., 35 Fla. Supp. 71 (Fla. 11th Cir. Ct. 1971), \textit{rev'd on other grounds}, 267 So. 2d 633 (Fla. 1972); Pitz v. State Rd. Dep't, 32 Fla. Supp. 55 (Fla. 11th Cir. Ct. 1966).
  \item \textsuperscript{156} \textit{Behm v. Division of Administration}, 326 So. 2d 579 (Fla. 1976).
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Id. at 582.
  \item \textsuperscript{159} Meyers v. City of Daytona Beach, 158 Fla. 859, 30 So. 354 (1947); Bainbridge v. State Rd. Dep't, 139 So. 2d 714 (Fla. 1st Dist. Ct. App. 1962).
  \item \textsuperscript{160} Meyers, 158 Fla. 859, 30 So. 354.
  \item \textsuperscript{161} Bennett v. Jacksonville Expressway Auth., 131 So. 2d 740 (Fla. 1961).
  \item \textsuperscript{162} \textit{FLA. STAT.} § 73.092 (1979). Askew v. Gables-By-The-Sea, Inc., 333 So. 2d 56 (Fla. 1st Dist. Ct. App. 1976); State Rd. Dep't v. Bender, 190 So. 2d 598 (Fla. 1st Dist. Ct. App. 1966); Dratch v. Dade County, 105 So. 2d 171 (Fla. 3d Dist. Ct. App. 1958).
  \item \textsuperscript{163} 190 So. 2d 598 (Fla. 1st Dist. Ct. App. 1966).
\end{itemize}
of Appeal called the state’s argument “absurd.”

[W]e find [the state’s] position to be that if [the state] complies with the law of this State by instituting an eminent domain action, it is liable for attorneys’ fees; but if it unlawfully appropriated a citizen’s property without instituting such an action, it thus escapes liability for the attorneys’ fees incurred by the aggrieved owner. The absurdity of this argument disposes of this point contra to the [state’s] contention.

The services performed by attorneys and experts in attempting to obtain federal relocation payments have been held not to be compensable.

Attorneys may receive sizeable amounts in inverse condemnation cases. In State of Florida v. Gables-By-The-Sea, Inc., the Third District Court of Appeal rejected the state’s argument that fees must be calculated upon a time and hourly-rate basis. The court noted that “[i]n an inverse condemnation proceeding, attorneys’ fees must be viewed as entirely contingent until a ‘taking’ is judicially determined.” Rejecting the contention that $850,000 in attorney’s fees for legal services over a five-year period was excessive, the district court cited to a number of factors which are permissible in establishing the propriety of a fee: the benefit to the client, the novelty, difficulty, and importance of the questions involved, and the attorney’s skill and talent may all influence the amount of the award given.

Expert witnesses must testify at trial concerning the value of ser-

164. Id. at 600.

165. Id. Because attorney’s fees in an inverse condemnation proceeding remain contingent until a taking has been determined and the proceeding itself is more complex than in eminent domain, the fees should be substantially greater than in a suit for eminent domain. See generally cases cited notes 167-69 infra.


167. 374 So. 2d 582 (Fla. 3d Dist. Ct. App. 1979), cert. denied, 383 So. 2d 1203 (Fla. 1980).

168. Id. at 584.

169. Id. The court used in part the factors outlined in the Code of Professional Responsibility and in FLA. STAT. § 73.092 (1977) as guidelines for determining the appropriate fee. As one expert testified in the litigation, “the skill required” to prevail in this complex case was “ten” on a one-to-ten scale. Id.
vices performed by the attorney.\textsuperscript{170} One should also keep accurate records of time and expenses.\textsuperscript{171}

Full compensation also includes interest on the value of the property taken from the time of its appropriation.\textsuperscript{172} A property owner may also recover his costs.\textsuperscript{173} These include reasonable and necessary expenses for appraisers and expert witnesses, at least when the testimony relates directly to the establishment of the prima facie case.\textsuperscript{174}

Business losses are not compensable injuries under section 6(a). Arguably, a plaintiff suffers just as much when he loses the goodwill of his trade and future income as he does when he must relinquish a fee simple interest.\textsuperscript{175} But Florida courts have adhered rigidly to the general rule that the proprietor lacks a complete remedy. Several ratio-


\textsuperscript{171} City of Miami Beach v. Manilow, 253 So. 2d 910 (Fla. 3d Dist. Ct. App. 1971); Division of Administration v. Condominium Int’l, 317 So. 2d at 812 n.2. See State v. Gables-By-The-Sea, Inc., 374 So. 582 (Fla. 3d Dist. Ct. App. 1979).

\textsuperscript{172} State Rd. Dep’t v. Lewis, 190 So. 2d 598 (Fla. 1st Dist. Ct. App. 1966); FLA. STAT. § 74.091 (1979).

\textsuperscript{173} FLA. STAT. § 73.091 (1979); State Rd. Dep’t v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941). But see Corneal v. State Plant Bd., 101 So. 2d 371 (Fla. 1958).

\textsuperscript{174} Florida Coast Ry. Co. v. Martin County, 171 So. 2d 873 (Fla. 1965); Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950); City of Miami Beach v. Manilow, 253 So. 2d 910 (Fla. 3d Dist. Ct. App. 1971); Cheshire v. State Rd. Dep’t, 186 So. 2d 790 (Fla. 4th Dist. Ct. App. 1966); City of Miami Beach v. Belle Isle Apartment Corp., 177 So. 2d 884 (Fla. 3d Dist. Ct. App. 1965) (expert witness fees part of costs). But see Inland Waterway Dev. Co. v. City of Jacksonville, 38 So. 2d 676 (Fla. 1948).

\textsuperscript{175} Behm v. Division of Administration, 383 So. 2d 216 (Fla. 1980); Division of Administration v. Grant Motor Co., 345 So. 2d 843 (Fla. 2d Dist. Ct. App. 1977); State Rd. Dep’t v. Abel Inv. Co., 165 So. 2d 832 (Fla. 2d Dist. Ct. App. 1964). See City of Tampa v. Texas Co., 107 So. 2d 216, 225 (Fla. 2d Dist. Ct. App. 1970). Where an interest of less duration than a fee is taken, the value of that interest has been held to be the loss in rental income. Pitz v. State Rd. Dep’t, 32 Fla. Supp. 55 (Fla. 11th Cir. Ct. 1966).
nates have been offered, none compelling. For the most part, courts fear that permitting recovery in a commercial setting would expand the scope of liability to unmanagable limits. As a final argument, the state may claim that because the proprietor can relocate and continue his business elsewhere, he never suffers a true loss.

Although business losses themselves rarely constitute compensable injuries, the value of the property to be condemned may reflect the property’s earning potential. The court, in calculating the size of an award, considers all those items in which a “willing buyer” would be interested if he were “purchasing the entire package.” Thus, factors such as past investments and projected future income influence the amount of compensation awarded.

Relief may also exist by statute; one in particular authorizes recovery for certain types of business losses under limited circumstances. As one court has noted “the right to business damages is a matter of legislative grace . . . .” It follows, then, that in order to receive an award under this enactment, the injured businessman bears the burden of proving his entitlement. And he may not use this statute for a “second recovery” of severance damages: “such a result, upon principles of justice and fair play, should not be allowed.”

176. See, e.g., State Rd. Dep’t v. Bramlett, 189 So. 2d 481, 483-84 (Fla. 1966) (“[W]e think we would be less than cautious and far from practical if we were to sanction what could well lead to a stampede into the field of damages in eminent domain proceedings. Allowing [business damages] could start the rush. We would hold the line.”). See also Northcutt v. State Rd. Dep’t of Fla., 209 So. 2d 710 (Fla. 3d Dist. Ct. App. 1968).


179. Id. at 554.

180. FLA. STAT. § 73.071(3)(b) (1979).

181. Tuttle v. Division of Administration, 327 So. 2d 811 (Fla. 1st Dist. Ct. App. 1976), aff’d, 336 So. 2d 583 (Fla. 1976).


3. DEFENSES

First, the state may claim that it has merely committed a trespass or other tort. Such an allegation, if successfully maintained, is fatal to a suit for inverse condemnation.

Second, the state may claim that it did not take property but merely exercised its police power.\(^{184}\) The First District Court of Appeal has suggested that the state has the burden of proving as an affirmative defense the proper exercise of its police power.\(^{185}\)

A defense may exist if the landowner gave the property interest to the state or otherwise "consented" or "acquiesced" to the taking.\(^{186}\) Similarly, if the taking conferred a privilege to the owner, the state may use this reciprocal exchange as a defense.\(^{187}\) Prescription, laches, and dedication may also be asserted by the state,\(^{188}\) although the one-year statute of limitations for tort actions does not apply to an equitable action in inverse condemnation.\(^{189}\) An estoppel can, according to at least one court, prevent a private property owner from asserting that a taking has occurred.\(^{190}\)

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184. FLA. CONST. art 10, § 6(a).
190. Compare Division of Administration v. West Palm Beach Garden Club, 352 So. 2d 1177 (Fla. 4th Dist. Ct. App. 1977), with Mayer v. Dade County, 82 So. 2d 513 (Fla. 1955). See also City of Miami v. Romer, 73 So. 2d 285 (Fla. 1954).
4. Procedures

In general, the judge determines whether governmental action has resulted in a taking.\textsuperscript{191} If compensation is to be awarded, the judge should order the state to institute condemnation proceedings.\textsuperscript{192} At these proceedings, the jury determines the extent of the appropriation and the amount of damages.\textsuperscript{193} The Florida Administrative Procedure Act cannot, consistent with the state constitution, relegate questions concerning a taking to administrative determination.\textsuperscript{194} Finally, the court, as part of its inherent power to enforce judgments and pursuant to the constitution, may order the agency to issue the necessary authorization to the state treasurer to pay the award, at least in those situations in which funds are available.\textsuperscript{195}

5. Practice Pointers

In preparing an inverse condemnation lawsuit, the attorney should not overlook other federal and state constitutional guarantees. Government action may violate the due process or equal protection clauses of the fourteenth amendment to the United States Constitution. Other obvious challenges also exist. For example, in\textit{State ex rel. Furman v. Searey},\textsuperscript{196} the Fourth District Court of Appeal invalidated permit re-


\textsuperscript{192} State Rd. Dep't v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941); Florida Power Corp. v. McNeely, 125 So. 2d 311 (Fla. 2d Dist. Ct. App. 1960) (citing Broward County v. Douldin, 114 So. 2d 737 (Fla. 2d Dist. Ct. App. 1959) and State Rd. Dep't v. Tharp, 146 Fla. 745, 1 So. 2d 868 (1941)); Askew v. Gables-By-The-Sea, 333 So. 2d 56 (Fla. 1st Dist. Ct. App. 1976).

\textsuperscript{193} FLA. STAT. § 73.10 (1979). Flatt v. City of Brooksville, 368 So. 2d 631 (Fla. 2d Dist. Ct. App. 1979). But there is no constitutional right to a jury determination. See Carter v. State Rd. Dep't, 189 So. 2d 793 (Fla. 1966).

\textsuperscript{194} Department of Rev. v. Young American Builders, Inc., 330 So. 2d 864 (Fla. 1st Dist. Ct. App. 1976); State v. State, 326 So. 2d 187 (Fla. 1st Dist. Ct. App. 1976); FLA. CONST. art. 2, § 3.

\textsuperscript{195} State Rd. Dep't v. Bankers Life & Casualty Co., 166 So. 2d 234 (Fla. 3d Dist. Ct. App. 1964).

\textsuperscript{196} 225 So. 2d 430 (Fla. 4th Dist. Ct. App. 1969).
quirements on a substantive due process ground. Ordinances have also fallen to vagueness and overbreadth challenges.¹⁹⁷

Both the Florida and the United States Constitutions may be relied upon by the property owner. Because no election problem exists, the attorney should attempt to base his claim on both constitutional guarantees. If federal case law gives less protection to his client, the attorney may still prove his case under the Florida Constitution.¹⁹⁸

Courts should hesitate before granting summary judgment in an inverse condemnation action.¹⁹⁹ Authority exists for the proposition that all doubts should be resolved against the state.²⁰⁰ As with other cases, legally competent, substantial evidence must support the plaintiff's prima facie case.²⁰¹ The attorney should exhaust his available administrative remedies.²⁰²

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²⁰⁰. Alford v. Finch, 155 So. 2d 790 (Fla. 1963); Benitez, 26 Fla. Supp. 53 (citing Alford), aff'd, 200 So. 2d 194 (Fla. 2d Dist. Ct. App. 1967), cert. denied, 204 So. 2d 328 (Fla. 1967).