

“2001 Case Law Update”

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The following outline summarizes Florida eminent domain and related cases of note rendered since last fall's Florida Eminent Domain Seminar.

Direct Condemnation

Defenses

Cordones v. Brevard County, 781 So.2d 519 (Fla. 5th DCA 2001) upheld the taking of easements over beachfront property for the purpose of a joint state-federal shore restoration project for which the County was local sponsor. To obtain federal funding, the County had to obtain 50 year easements over the area needed to carry out the project. The landowner's argued, relying on the Knappen decision, that federal funding cannot provide reasonable necessity for a taking in Florida. The Court rejected this argument by distinguishing Knappen on the ground that Brevard County was not taking any more property than was required to carry out the project. (The evidence in Knappen showed that the condemnor was taking more property than would actually be used for construction of a road to meet federal guidelines necessary to obtain federal funding.)

The Court also declined to reverse on the landowner's alternate argument that the good faith estimate of value was not based on a valid appraisal. First the landowner argued that the County's verbal appraisal was invalid because the appraiser did not provide a written report. The Court held that no written report is required to support an order of taking. Second, the owner argued that the appraiser followed an improper valuation method in which he did not independently value the easement, but rather, determined compensation by comparing the value of the parent tract before and after the easement was imposed. Relying on out-of-state and federal precedent, the Court affirmed that the County's method of estimating compensation was proper.

Florida Water Services Corporation v. Utilities Commission, 790 So.2d 501 (Fla. 5th DCA 2001) held that the prior public use doctrine does not apply when property is condemned by a public entity for the same use to which it has been devoted by a private entity. The Court also held that a condemnor's good faith estimate of value need not be based on the opinion of a certified real estate appraiser, but rather, any expert which the trial court deems qualified. Here, the trial court accepted the Commission's updated estimate of value, based on the opinion of an engineer who specialized in water and waste water utilities and who had obtained appraisals of the real estate component of the system from two state certified appraisers. The Court also found no error in the trial court's order requiring the Commission to deposit the engineer's updated estimate, which was several thousand dollars higher than the good faith estimate stated in its declaration of taking, without requiring the Commission to amend its declaration.

Compensation / Valuation

Nutt v. Orange County, 769 So.2d 453 (Fla. 5th DCA 2000), *rev. den.* 786 So.2d 579 (Fla. 2001). The County condemned approximately 2.5 acres from a 512 acre tract to improve the intersection of a state road and a cross street. The taking included a triangular tract not used for the intersection improvement but for a planned future correction of a sharp curve in the state road. The broad side of the triangle abutted the remainder, and would accommodate several alternative remedies for the curve. The landowner claimed the uncertainty about what alternative might be chosen in the future caused a \$3,000,000 loss in value of the remainder. The trial court

refused to allow compensation for uncertain future actions by the County, and the Fifth District Court affirmed. The Supreme Court of Florida also denied review.

Armadillo Partners, Inc. v. D.O.T., 780 So.2d 234 (Fla. 4th DCA 2001) reversed and remanded for new trial where the trial court, in a partial condemnation case, had improperly admitted DOT's expert's opinion on severance damages. DOT's appraiser testified, over the owner's objection, to a cost-to-cure and severance damage figure that did not take into account the loss of an "arbor area" which would be necessarily converted to replacement parking under DOT's proposed cure. DOT's appraiser also did not consider the value of physical improvements in the arbor area (sprinkler systems, decorative wall, etc.) that would be lost in the conversion. The Court also held it error for the trial court to allow DOT to testify to aspects of the proposed cure that were in conflict with the construction plans in evidence, finding them to be speculative and calling for appropriation of land different from that taken under the plans in evidence. A petition for review has been granted by the Florida Supreme Court.

Appellate Practice

Hartleb v. D.O.T., 778 So.2d 1063 (Fla. 4th DCA 2001) reversed a trial court's denial of post-judgment interest on attorneys fees which had accrued during the landowner's unsuccessful appeal of the order determining the amount of the fee. Even though DOT had deposited the awarded fee into the court registry, it was still liable for post-judgment interest because the landowner could not have withdrawn the fee without waiving his appeal. The Court relied heavily on the reasoning of the Florida Supreme Court in **Behm v. Division of Admin., Fla. Dep't of Transp.**, 383 So. 2d 216, 219 (Fla. 1980) that "[d]enying interest ... would ... place on appellants in eminent domain proceedings an unjustified double burden having to choose between taking an appeal or taking the award, as well as having to prevail on appeal in order to receive present value of the award. Under such a scheme, only winners would receive the full compensation mandated by the state constitution."

Attorneys Fees

In **D.O.T. v. Patel**, 768 So.2d 1173 (Fla. 2d DCA 2000), DOT moved to amend its petition in the middle of a valuation trial to seek an economic whole taking pursuant to (since repealed) § 337.27(2) Fla. Stat. (1997). The landowner's attorneys were successful in arguing for a denial of this motion. After trial, the court awarded fees based on the monetary benefit achieved in the verdict as well as on non-monetary benefits achieved by preventing the taking of the remainder property for an economic whole taking. The court also awarded expert fees for the lawyer and accountant who testified for the landowner during the hearing to quantify those benefits. The Second District Court of appeal reversed, holding that services of the landowner's attorneys in defeating a whole taking fell under § 73.092(2) which authorizes calculation of a reasonable fee for services such as defeating a taking, rather than 73.092(1) which awards fees as a percentage of benefits achieved. The Court also reversed the award of fees for experts testifying at the fee hearing, holding that such expert costs are not compensable since litigation over the amount of attorneys fees inures to the benefit of the attorney, not the landowner, citing **D.O.T. v. Robbins & Robbins, Inc.**, 700 So. 2d 782, 785 (Fla. 5th DCA 1997). The case was remanded for the trial court's determination of additional fees pursuant to § 73.092(2).

Amerada Hess Corp. v. D.O.T., 788 So.2d 276 (Fla. 4th DCA 2000) affirmed an award of attorneys fees based strictly on monetary benefits and upheld the trial court's denial of fees based on alleged non-monetary benefits. DOT had condemned a temporary construction easement ("TCE") across a Hess gas station in connection with improvement of a bridge. DOT offered \$112,000 for the TCE, and two years later Hess accepted a revised offer of \$142,000. In the interim, however, DOT had altered its original construction plans which would significantly reduce the impact on the gas station, and correspondingly lower the cost to cure. Hess' attorney claimed monetary benefit fees and non-monetary benefit fees based on the mitigation value of the amended plans. DOT acknowledged the changes and corresponding benefits, but denied that the benefits were procured by Hess' attorney, contending that DOT made the changes on its own initiative. The trial court conducted a two day hearing to resolve the dispute regarding which party brought about these benefits, ultimately siding with DOT and limiting Hess to monetary benefit fees only. Finding the trial court's decision was based on substantial competent

evidence, the Fourth District Court affirmed. Hess' attorney had alternatively moved to strike DOT's original settlement offer as a basis for calculating monetary benefit fees because the plans on which it had been based been significantly altered. The Fourth District also affirmed the trial court's denial of this alternate request distinguishing this case from Hartleb v. State, Department of Transportation, 677 So. 2d 336 (Fla. 4th DCA 1996) on the grounds that changes to the plans in Hartleb had resulted in a lower offer while Hess was given an higher monetary offer despite the mitigating plan changes.

Relocation Assistance

Coulter v. St. Johns Water Management Dist., 2001 Fla. App. LEXIS 12257 (Fla. 5th DCA 2001) held that immediate sale of conservation easement did not trigger right to Uniform Relocation Assistance. The St. John's WMD negotiated to purchase a large parcel in fee simple and a conservation easement across another adjacent parcel which had been in operation as a dairy farm. Because the contract required cessation of dairy farm operations, dairy operator had to relocate at substantial expense. The contract was contingent on the District entering a contract with the USDA. While the District's purchase contract was pending, it did contract with the USDA for purchase, by USDA, of a 30 year conservation easement on the non-dairy parcel which the District had purchased in fee. Prior to the District's closing with the landowner, USDA transferred the agreed purchase price for the conservation easement to the District.

Under the Uniform Act, to be eligible for relocation assistance, the displacing state agency must have received federal financial assistance. The dairy operator was denied assistance by the District and on administrative appeal by an administrative law judge. The Fifth District Court affirmed, holding the federal transfer of purchase money did not meet the statutory definition of "federal financial assistance" as a "grant, loan, or contribution." It reasoned that transfer of funds prior to its closing with the landowner did not convert it into a contribution, grant or loan.

Inverse Condemnation

Regulatory Takings

The United States Supreme Court rendered an important takings decision this summer in **Palazzolo v. Rhode Island, et al.**, ___ U.S. ___, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). The case addressed three vexing issues in takings jurisprudence:

- (1) ripeness where an owner theoretically could apply for a less intense use;
- (2) the effect of purchasing land after enactment of the offending land use regulations; and
- (3) the effect of a nominal residual value of land as regulated.

Here is a summary of the facts. Over the course of several decades, Anthony Palazzolo had attempted to develop approximately 20 acres of coastal land in Westerly, Rhode Island, most of which is salt marsh subject to tidal flooding. His applications ranged from filling the entire property for residential development to filling only 11 acres for a private "beach club" comprised of parking for cars with boat trailers, picnic tables, port-a-johns, barbeque pits and trash receptacles. All of his applications were denied, the last one being declined by the governing coastal council as failing to meet standards for a "special exception" to fill salt marsh. (The applicable regulations required that for a special exception, a proposed use would have to serve a "compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interest.") All indications from the council were that it would permit no filling of any salt marsh, leaving Mr. Palazzolo with the potential to build one residence on a small upland portion of his land. The parties conceded that such a residence would be worth approximately \$200,000.

Mr. Palazzolo filed an inverse condemnation action in state court claiming denial of all economic use (a Lucas takings claim) and denial of reasonable investment-backed expectations (a Penn Central takings claim). The matter was litigated up to the Supreme Court Rhode Island which held that his claim was not ripe, and even if it were, Mr. Palazzolo could not ever succeed on a takings claim because he had acquired title to the property after enactment of the coastal wetland regulations upon which his beach club application was denied and, alternatively, because he was not denied all economic use with the ability to build a home worth \$200,000. Mr. Palazzolo's petition for certiorari to the United States Supreme Court noted the conflict among jurisdiction on the issues presented and asked for much needed resolution. The high court obliged.

The Court first held that Palazzolo's claim was ripe despite the fact that he had not submitted an application for "less grandiose" development which would require filling fewer acres of marsh. It was sufficiently clear for ripeness purposes that the coastal council had decided it would not grant a special exception irrespective of the size of the proposed club. The Court announced the following rule:

Where the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-2302 (1988), federal ripeness rules do not require the submission of further and futile applications with other agencies. (121 S.Ct. at 2462.)¹

Second, the Court held that purchase of land after enactment of the offending regulations does not create an absolute bar to a subsequent takings claim. The Rhode Island Supreme Court had held essentially that there can be no reasonable investment-backed expectation of use for a post-enactment purchaser and that once enacted, a regulation becomes, the denial of which is essential to a takings claim. The Supreme Court noted how inconsistent such a rule would be with the ripeness requirement that a landowner make applications to determine the extent of allowable use before bringing a claim. (If one cannot usually challenge a regulation facially, it stands to reason one should not be precluded by buying with notice of the facial terms of a regulation, prior to specific application of the regulation to one's property.) The Court also noted the unfairness of such a categorical rule to owners holding title at the time of enactment because it would restrict their ability to transfer property. It also observed that such a rule would also impermissibly "put an expiration date on the Takings Clause" and rejected the argument that land use regulations become part of the Lucas nuisance exception as a "background principle of state background law." The Court summarized by stating:

A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensation for what is taken. 121 S.Ct. at 2463.

Third, the Court held that the potential to build one home, worth an estimated \$200,000, did not preclude Palazzolo's takings claim all together. The Court affirmed that, even under a Lucas analysis, "a State may not

¹ Some commentators suggest that the following language in Palazzolo has placed a duty on regulatory agencies to indicate what uses are available to the owner when the owner has submitted a meaningful application, and it is being denied:

There is no *indication* the Council would have accepted the application had petitioner's proposed beach club occupied a smaller surface area.

* * * *

These cases stand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and *explain the reach* of a challenged regulation. 121 S.Ct. at 2459.

evade the duty to compensate on the premise that the landowner is left with a token interest," but it found a potential home worth \$200,000 is not so an "token" interest that Palazzolo could claim deprivation of all economic use. Palazzolo should, however, have been allowed to proceed on his Penn Central claim that the denial of his application denied him reasonable investment-backed expectations. The case was remanded for consideration of that ripened claim.

While Palazzolo leaves open many questions (such as, how reasonable investment-backed expectations are determined and how they will feature in a Penn Central analysis), it answered some that sorely needed it. Its ripeness holding will guide both landowners and agencies in evaluating when a sufficiently final decision is made for purposes of takings analysis. Its rejection of any categorical rule barring post-enactment purchasers will obviate much of the current confusion on that point. And, its confirmation that Lucas and Penn Central comprise an "either or" takings standard (not a "both and" test) should prevent further premature dismissals.

For further discussion on the distinctions between the Lucas and Penn Central analyses, see Palm Beach Isles Associates v. United States, 231 F.3d 1354 (Fed. Cir. 2000) *modifying* 208 F.3d 1374 (Fed. Cir. 2000), *rehearing en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000) (holding that the issue of reasonable investment-backed expectations is relevant to question of whether there has been a taking in Penn Central takings claims, but not in categorical takings claims under Lucas.)

In Keshbro v. City of Miami, 2001 Fla. LEXIS 1409; 26 Fla. L. Weekly S 469 (Fla. 2001), the Florida Supreme Court resolved the long-pending certified conflict among City of Miami v. Keshbro, Inc., 717 So. 2d 601 (Fla. 3d DCA 1998) (finding no taking occurred upon 6 month closure of a motel for drug and prostitution abatement), City of St. Petersburg v. Bowen, 675 So. 2d 626 (Fla. 2d DCA 1996), and City of St. Petersburg v. Kablinger, 730 So. 2d 409 (Fla. 2d DCA 1999) (both cases finding compensable taking upon the one-year closure of an apartment buildings for drug-related nuisance abatement). In deciding the case, the Court had to resolve three related issues.

First, the Court determined whether a temporary taking can ever be a categorical taking under the United Supreme Court's Lucas categorical takings standard. The defending local governments contended that very *temporary* nature of their nuisance abatement orders did not deny all economically beneficial uses of the subject properties. This forced the court to wrestle with the governments' attempts to distinguish the United States Supreme Court's First English decision on the basis that it only provided a remedy for the period of time a property was regulated by a provision ultimately held invalid, not for deprivations of use that were "prospectively" temporary, such as the subject closure orders. The Florida Supreme Court rejected this argument as one which "elevates form over substance and defies economic realities." *Id.* at 24. Furthermore, the Court adopted the logic of several other courts essentially holding that the right to compensation should not turn on whether the temporary taking was retrospective (as a result of a regulation being declared invalid) or prospective (as a result of an regulation created to be temporary).

Next, the Court rejected arguments that availability other uses of the property defeated the categorical takings claims. Here again, the Court chose economic reality as its guide, finding it uneconomic to convert property already specifically improved with motels to other uses for such a short period. (The Court similarly rejected the argument that the Keshbro plaintiffs could not recover because they used four of the existing fifty-seven motel rooms as their personal residence.)

Finally, having found that the closures had categorically taken the subject properties for the duration of the orders, the Court turned to the question of whether the Lucas nuisance exception applied. Citing Lucas, the Court noted the defendant cities could resist compensation if they could identify "background principles of nuisance and property law that the prohibit the uses" proscribed by the closure orders. (Lucas, 505 U.S. at 1031). Specifically, the Court focused whether the offending orders "[did] no more than duplicate the result that could have been achieved in the courts--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public

generally, or otherwise" (Lucas at 1029). With this in mind, the Court noted Florida common law requires that nuisance abatement injunctions must be "specifically tailored" to abate the objectionable conduct without infringing on lawful enterprise.

Using this rubric, the Court upheld the denial of takings liability in Keshbro because of the record proof that the subject motel business had become inextricably intertwined with "persistent" drug and prostitution activity. Noting that less drastic abatement measures had been attempted prior to the closure, the Court found that the closure order in Keshbro was not overbroad under Florida common law and therefore fit within the nuisance exception. By contrast, the Court upheld the finding of takings liability in Kablinger because there was an absence of proof that the operation of the subject apartment building was tied to the illegal conduct, or that the closure order was specifically tailored. Noting that the one year closure was ordered solely upon evidence that cocaine sales had occurred at the apartment building on more than two occasions and that no less drastic abatement measures had been attempted, the Court refused to apply the nuisance exception. Ironically, then, the Court was able to affirm the results of two cases certified to be in direct conflict.

Shadek v. Monroe County, 16th Judicial Circuit Case No. CAP95-398 (July 17, 2001) is a case to watch. There, the Sixteenth Circuit Court entered a summary judgment finding Monroe County liable for a temporary taking due to a continuous series of planning moratoria which applied to the subject property from 1982 until 1990 when it was acquired by the State of Florida for preservation. Among many interesting features of the order is how the Court found the County liable even though the landowner ultimately sold the property to the State for approximately \$5.8 million, a value determined without regard to the applicable moratorium.

Ripeness

Central Florida Investments, Inc. v. Orange County Code Enforcement Board, 790 So. 2d 593 (Fla. 5th DCA 2001) involved a dispute between lakefront condominium / time share resort company and a county code enforcement board regarding whether a resort could operate motorized boats. The resort owner had applied for amendment to its development plan and had reached compromise with objecting neighbors. Despite the owner's settlement with the neighbors consenting to motorized craft, the County Commission denied the requested amendment and the code enforcement board issued citations. The owner then successfully appealed the Commission's denial and obtained a temporary injunction against further enforcement. Shortly thereafter, the owner withdrew its application for the amendment and instead filed an amended circuit court complaint seeking declaratory relief concerning its rights to use motorized craft and, alternatively, for inverse condemnation and civil rights violations. The County moved to dismiss for failure to exhaust administrative remedies, and the he owner argued that there were no administrative proceedings pending. The trial court dismissed, and the Fifth District Court affirmed, holding that the owner's as-applied claim could not be heard until the County's final decision on the matter was ascertained. The owner's argument that proceeding was futile was rejected because there was not sufficient record evidence to support the owner's claim that the County would not change its position. The owner's reliance on cases holding that administrative proceedings cannot decide constitutional issues was misplaced because that exception to the exhaustion doctrine applies to facial attacks on an ordinance, not as-applied challenges like the owner had raised.

In **Florida Department of Agriculture & Consumer Services v. City of Pompano Beach et al.**, 26 Fla. L. Weekly D 1695 (Fla. 4th DCA 2001), Broward County, several of its municipalities, and various property owners obtained a permanent injunction against the Department preventing further destructions of citrus trees under the Department's policy to eradicate all citrus trees within 1900 feet of a tree infected with canker. The Fourth District Court reversed, agreeing with the Department that the trial court should have dismissed their complaint for failure to exhaust administrative remedies. The Court held that, according to Chapter 120, papers served on landowners informing them of imminent eradication were final orders appealable directly to the District Court and that challenges to the 1900 foot eradication rule should have been filed before the Division of Administrative Hearings. The Court conducted the analysis established by Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund, 427 So. 2d 153, 156-57 (Fla. 1982), superseded on other grounds, Bowen v.

Fla. Dep't of Envtl Regulation, 448 So. 2d 566 (Fla. 2d DCA 1984) and concluded that the claims raised were not the type that could bypass administrative remedies.

This case is somewhat perplexing to read together with the Third District Court's decision in **Markus v. Florida Department of Agriculture & Consumer Services**, 785 So.2d 595 (Fla. 3rd DCA 2001) in which an affected landowner timely pursued the direct judicial appeal to the District Court pursuant to Chapter 120. Following its earlier decision in **Sapp Farms, Inc. v. Florida Dep't of Agriculture & Consumer Svcs.**, 761 So. 2d 347, 348 (Fla. 3d DCA 2000), the Court affirmed the eradication order as "lawfully entered and not defective," while conceding that:

Property owners as well as judicial tribunals are struggling with the issue of how and why the Department of Agriculture embarked on its dogged obliteration of the healthy back (or front) yard citrus tree. The frustrations of challenging this policy, either in a Chapter 120 proceeding or before this court, are staggering. Both infected and condemned trees are removed and ground into dust before any meaningful action can be taken by the property owner. The "final agency order" is nothing but a "Dear Resident" form from the Department of Agriculture. A "record on appeal" is an oxymoron. There is no record. Hence there is no meaningful appeal. We find that situation unacceptable as a matter of law, policy, and principle, yet must affirm. Although small consolation to the owners, this decision is without prejudice to bring an action for inverse condemnation, or to seek such other relief as they deem appropriate. *Id.* at 596.

Dept. Environmental Protection v. Youel, 787 So.2d 923 (Fla. 5th DCA 2001) reversed a trial court judgment finding liability for a temporary taking. Landowner claimed that DEP prevented her from using or selling her property from 1991 to 1999 by misleading her about permitting and mitigation requirements. In 1991, DEP had informed the owner that she was in violation of regulations and would have to remove fill and restore a disturbed area of her lot. In 1994, she was served with an official notice of violation which she did not appeal administratively. Thereafter, her architect was allegedly informed that the lot could not be permitted for development. The appellate court reversed, reasoning that the estoppel theory asserted by the landowner did not adequately support a takings claim. The Court noted that the proper remedy for a claim that the notice was erroneous would have been to appeal under Chapter 120. For the owner to have succeeded on a takings claim, under **Key Haven**, she would have had to admit the validity of the Department's action and claim that it deprived her use of the property. The Court was also heavily influenced by the fact that the owner never applied for a building permit from DEP and that her architect relied on alleged advice from a DEP official that was not in the permitting department.

Statute of Limitations

Lamar Texas Ltd. Partnership v. City of Ft. Walton Beach, 26 Fla. L. Weekly D 1226 (Fla. 1st DCA 2001) held that a claim for inverse condemnation of outdoor sign leaseholds was barred by the four year statute of limitations because the claim accrued when an ordinance was enacted which finally determined the property to which the ordinance applied. The ordinance provided no signs could be placed on property not owned by the owner of the sign. The Court rejected the leaseholder's argument that the claim did not accrue until receipt of a notice of violation. The four year statute of limitations was also enforced in **Szapor v. City of Cape Canaveral**, 775 So.2d 1016 (Fla. 5th DCA 2001) thought the opinion lacks sufficient statement of facts from which to discern the circumstances.

Millender v. D.O.T., 774 So.2d 767 (Fla. 1st DCA 2001) *rev. den.* 2001 Fla. LEXIS 2001 (Sept. 12, 2001) reversed a trial court's dismissal of a physical taking claim as time-barred by the statute of limitations. As part of bridge construction in 1975, DOT re-routed a river channel. Millender's property, located a few blocks from the bridge, began to erode as a result. Instead of suing DOT, Millender built a sea wall to slow the erosion. He was later ordered to remove the sea wall by the Department of Environmental Protection and fought the removal order

for eight years in court, ultimately losing that battle in 1993. As the erosion continued in 1993, Millender sued for inverse condemnation and injunctive relief. By the time he sued, much of Millender's seafood business property, including his docks and some buildings, had fallen into the river. The trial court dismissed his claim for failure to sue within four years of 1975. The First District Court reversed on two alternative grounds. First, the Court held that the erosion constituted a continuing tort for which a claim accrues upon each recurrence. Second, the Court held this case was appropriate for application of the federal Dickinson doctrine which deems claims to accrue when the damaging situation "stabilizes." See U.S. v. Dickinson, 331 U.S. 475 (1947). The Court reasoned that the circumstances affecting Millender's land did not stabilize until after it was known the sea wall had to be removed. Before the DEP litigation concluded in 1993, the extent to which Millender's property would be eroded could not be well ascertained. DOT objected to application of this federal doctrine in Florida, and though the Court noted its application in a previous Florida case, it certified the question of whether the Dickinson doctrine could be applied to an appropriate case in Florida. The Florida Supreme Court recently denied review, leaving the First District's opinion as controlling on this issues.

Diminished Access

In D.O.T. v. Kirkland, 772 So.2d 566 (Fla. 1st DCA 2000), the First District Court of Appeal reversed a finding of inverse condemnation due to diminished access. Prior to a DOT bridge construction project, the claimant's seafood restaurant enjoyed multi-directional access directly from a state road approaching a bridge. DOT built a new bridge to the west and re-aligned the state road with it. This left the restaurant on "old" SR. 77 which dead ends into the old bridge (now a fishing pier) and which intersected with the new SR 77 one thousand feet north of the restaurant. Consistent with previous Supreme Court decisions, and with the very similar case of D.O.T. v. S.W. Anderson, Inc., 744 So. 2d 1098 (Fla. 1st DCA 1999), *rev. denied*, 763 So. 2d 1044 (Fla. 2000), the First District reasoned that the restaurant had not lost abutter's access, but rather had lost non-compensable traffic flow.

D.O.T. v. Gayety Theatres, 781 So.2d 1125 (Fla. 3rd DCA 2001) reversed an order finding a compensable taking of access due to placement of a raised median in the center of Biscayne Boulevard. Though one direction of traffic had to travel an extra half mile to access the property, the theater still had direct ingress and egress from one side of a two way road. Following Capital Plaza and other access cases, the Court held that DOT had merely exercised its police power in regulating traffic flow.

Appellate Practice

The Supreme Court of Florida repealed Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv) which provided for review of non-final orders determining liability in favor of a party seeking affirmative relief, effective January 1, 2001. Amendments to Florida Rules of Appellate Procedure, 780 So. 2d 834 (Fla. 2000). This impacts inverse condemnation cases in which governments are held liable for takings. Under the former rule, a government agency could appeal an order finding a taking as an appealable non-final order, prior to a trial on the issue of compensation. Government defendants must now await conclusion of the compensation trial in order to appeal the issue of liability.