



Decades of Experience Serving Florida's Property Owners & Businesses

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211 South Gadsden Street • Tallahassee, FL 32301 • 850-681-1800 • FAX 850-681-9017
2816 East Robinson Street, Suite 250 • Orlando, FL 32803 • 407-228-9522 • FAX 407-228-9665

EMINENT DOMAIN NEWSLETTER

In May of 2002, the law firm of Fixel & Maguire became Fixel, Maguire & Willis with the addition of Craig B. Willis as one of the firm's partners. The promotion of Craig to the partnership roster cements the professional relationship that began over four years ago when he left the Attorney General's Office to practice exclusively eminent domain law with partners Joe W. Fixel and Raymer F. Maguire, III. Craig brings over twenty-four years of legal experience at every level of trial and appellate practice in both state and federal courts, and enhances the total range of eminent domain legal services available to clients of the firm, from pre-condemnation planning to appeals in the district and supreme courts, if necessary. The firm's primary practice area continues to extend across North Florida from Pensacola to Jacksonville, south to Orlando, and down the complete West Coast from the Tampa Bay vicinity down to Naples.

If you would like information on a road project in your area, please contact us at either of our offices. In Orlando, our toll free number is 1-888-216-6870, and in Tallahassee, our toll free number is 1-800-848-7535.

Joe W. Fixel



Raymer F. Maguire, III



Craig B. Willis



The Latest Threat To Property Owners' Constitutional Rights

Florida's Constitution prohibits government from taking private property unless full compensation is paid. Full compensation means not only the fair market value of a citizen's property, but loss in value to any remainder property which is not taken and all reasonable costs associated with the taking. Reasonable costs to be paid by government include a citizen's reasonably incurred attorney fees, and expert costs necessary to become fully informed about the value of the property taken, and the possible negative impacts to the remaining property, in cases where not all of a citizen's property is targeted to be taken. Citizens are entitled to have adequate resources at no cost to them so they can make informed decisions when they are confronted with governments plans to take all or part of their property.

Many condemning authorities have historically attempted to evade their duty to pay these reasonable attorney and expert costs in the eminent domain process. The Florida Department of Transportation's (FDOT's) new "Incentive Offer Pilot Project," is the latest example.

The stated purpose of the "Incentive Offer Pilot Project" is to provide an "incentive" amount of money above the FDOT's opinion of "full" compensation, as an inducement to the property owner to quickly and voluntarily transfer title in lieu of condemnation. The incentive is set at an arbitrary percentage increase over the amount of the initial FDOT appraisal on a sliding scale from over 100 to 30 percent of the amount of the ap-

praisal, with the percentage decreasing as the total amount of the appraisal increases. The incentive can range from as little as \$1,000.00 and up to \$100,000.00, depending on the FDOT appraisal of the property sought.

The potential harm in the "incentive" program is its hidden component. The incentive generally is offered in exchange for a waiver of all attorney and expert fees and costs, and in exchange for a full waiver of all claims that might result from unanticipated and potentially devastating negative impacts to a citizen's remaining property which are caused by the FDOT's project. Because FDOT does not usually take into consideration and disclose its project's negative impacts to the remaining property, the "incentive" offer is a big gamble for the property owner. The determination whether it is a good deal or a disaster for the property owner cannot be established until the road project is built, or an independent site analysis and appraisal, with proper legal guidance, has been performed.

The FDOT thus seeks to tempt the property owners with its misleading incentive program to buy a "pig in a poke;" rather than retaining an attorney and other necessary experts to evaluate the proposed taking, and related consequences to remaining property. The fair and independent evaluation of the taking, and the effects of the taking on the remaining property is a crucial part of the intended constitutional and statutory structure in Florida. The FDOT is aggressively pursuing methods to evade

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that constitutional protection with programs and policies such as the “Incentive Offer Project.”

Fixel, Maguire & Willis is committed to providing every property owner, at no cost, a preliminary determination as to whether it appears to be in the owner’s

best interest to try to complete the voluntary property transfer, or whether there may be other issues and problems associated with the acquisition that are not adequately compensated or addressed by the so-called “incentive” offer.

Fixel, Maguire & Willis Uses Appellate Court to Enforce Multimillion Dollar Settlement

The Orlando/Orange County Expressway Authority recently sought to avoid honoring a multimillion dollar eminent domain settlement agreement secured for a landowner by Fixel, Maguire & Willis. After a final judgment and the money was paid by the Expressway Authority to the landowner in 2000, the Expressway Authority asked the trial judge to set aside the settlement and require the landowner to return all the money. The Expressway Authority wanted to back out of the settlement when the landowner refused to pay a portion of the settlement money to a tenant who occupied the property. The tenant had not been a party to the settlement nor mentioned in the agreement. The trial court set aside the settlement accepting the Expressway Authority’s excuse that it mistakenly had thought eminent domain law automatically forces landlords and tenants to jointly accept and divide settlements even when tenants are not a party to the agreement, nor mentioned in the settlement. On appeal, the

Florida Fifth District Court of Appeal refused to allow the Expressway Authority to get out of its agreement because the record was clear that the Expressway Authority had made a mistake by wrongly assuming that the settlement award included the compensation due the tenant. The appellate court held that the language of the mediated settlement agreement and final judgment was clear and unambiguous, that principles of contract law applied to an eminent domain agreement, just like any other agreement, and reversed the trial court and reinstated the final judgment. This successful appeal handled by Fixel, Maguire & Willis resulted in the landowner getting back all of the settlement money, plus statutory interest. Furthermore, the tenant was entitled to an independent resolution of its compensation claims. Tilden Groves Holding Corp. v. Orlando/Orange County Expressway Authority, 816 So.2d 658 (Fla. 5th DCA 2002).

Questions & Answers for Real Estate Brokers

Q: *When a lease is expiring, or the parties are contemplating a lease extension or option agreement, what issues from a condemnation perspective should be addressed?*

A: One of the major issues that should be addressed is the inclusion of a condemnation clause in the new lease, or if there is already a provision in the existing lease, whether that language should be amended. Many leases, including ones that already contain a condemnation clause, do not adequately address the respective parties’ rights and responsibilities in the event there is either a whole or partial taking of the property. Such matters as the landowner’s versus the tenant’s claims to compensation should be expressly spelled out. Judicial interpretation of certain standard “terms of art” in condemnation clauses can have some unexpected or unintended consequences. Even experienced real property attorneys are sometimes surprised by the outcome of an apportionment dispute of condemnation proceeds that involves condemnation language they had a hand in drafting.

At Fixel, Maguire & Willis we will be happy to consult with you regarding condemnation clauses and the special challenges of drafting language that clearly expresses the respective parties’ intent.

Q: *What should be taken into consideration in setting a listing amount for a property that is or may be subject to a governmental taking?*

A: Property owners and their real estate advisors (whether real property attorneys or real estate brokers) should be on notice that a current, or even recently expired, property listing can have tremendous impact on the compensation paid in the event that property is acquired by eminent domain. A listing has a limiting effect on the ceiling that a governmental agency will agree to pay for the property, or that a jury would be willing to award. This can be true even if the listing price intentionally has been set low to seek a quick sale due to the adverse effects of the announced road project.



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