

**Board of County Commissioners**  
**Workshop Item**

Date of Meeting: January 24, 2006

Date Submitted: January 18, 2006

To: Honorable Chairman and Members of the Board

From: Herbert W. A. Thiele, Esq.  
County Attorney

Subject: Innovative Techniques for Reducing Overall Costs of Acquiring  
Rights-of-Way

---

**Statement of Issue:**

The purpose of this workshop is to present to the Board of County Commissioners (the “Board”) innovative techniques that may reduce the costs of acquiring rights-of-way for Leon County’s capital improvement projects and 2/3 road paving assessments projects.

**Background:**

At its February 22, 2005 regular meeting, the Board ratified the actions taken at the February 8, 2005 workshop on the final review of the Tharpe Street Corridor Study and Citizen Advisory Committee’s Final Report. Among those actions was the Board’s direction to the County Attorney to develop a workshop to present innovative techniques that will reduce the costs of acquiring rights-of-way for the County’s capital improvement projects.

This workshop was originally scheduled for July 12, 2005, as authorized by the Board at its April 12, 2005 regular meeting. The Board subsequently rescheduled the workshop on three different occasions to its currently-scheduled date. The County Attorney retained the services of a right-of-way acquisition consultant, David Bell, of Arrow Consulting Services, Inc, to assist in the development of materials and information necessary for the workshop. Mr. Bell was retained to provide input on his experience in utilizing various right-of-way acquisition techniques while working with governmental agencies including Florida Department of Transportation (“FDOT”) and Blueprint 2000 Intergovernmental Agency (“BP2000”). He will be presenting additional material in a slide show presentation at the workshop.

**Analysis:**

**PART 1: FACTORS CONTRIBUTING TO COSTS OF ACQUISITION**

In order to fully analyze the various techniques presented in this workshop, it is important to understand the numerous factors that contribute to a government agency’s costs in acquiring rights-of-way in accordance with Florida law. The state of Florida is often referred to as the most generous state in the country with regard to compensating owners of property taken under

the threat of condemnation. In addition to compensation for the property acquired, Florida law, unlike that of many other states, also provides compensation for loss of business profits and for the reasonable costs of an owner's attorney and expert consultants. A summary of the factors contributing to the costs of acquisition is provided as follows:

**A. Full Compensation to Owner.**

1. Value of the property actually acquired.
2. Severance Damages: damages to any of the owner's remaining property not included in the acquisition.
3. Business Damages: damages to any business established for more than five years on the remaining property adjoining the property acquired, when such damages result from the business owner being denied the use of the property acquired.
4. Reasonable costs of moving personal property in a home or business to another location as a result of the acquisition.
5. Reasonable costs of expert consultants and miscellaneous expenses.
6. Reasonable costs of an attorney.

**B. County's Costs of Acquisition.**

1. Costs of appraisal
  - a. Appraiser fees and costs; and
  - b. Fees and costs of engineer, land planner, fixture appraiser, and other such consultants needed to determine various issues involved in valuing the property acquired and the remaining property not acquired.
2. Title insurance and other closing costs
3. Costs of filing lawsuits, if necessary
  - a. Clerk's filing fees;
  - b. Newspaper advertisements for public notice of lawsuit filing.

**C. Escalating Costs of Real Estate.**

**PART 2: REDUCING COSTS THROUGH EFFECTIVE PROGRAM MANAGEMENT**

One of the most effective ways to reduce the costs of acquisition is by developing a more streamlined and efficient acquisition process, thereby shortening the time involved. In addition, the County's costs can be reduced by effective scheduling and management of resources. The key to the success of such a program is having an experienced program manager in place whose sole responsibility is the administration of the acquisition process. The placement of a program manager, experienced in the numerous requirements and issues involved in the eminent domain

acquisition process, would allow for effective use of the various innovative techniques presented below.

**A. Incentive Offer Program.**

1. An incentive offer program is currently being utilized in various districts of the FDOT and by BP2000 in the acquisition of parcels for its road projects;
2. The initial acquisition offer presented to the owner includes an additional dollar amount, in excess of the full compensation estimate determined by the appraisal, as an incentive to expedite the acceptance of the offer without extended negotiations and significant additional costs incurred.
  - a. The basis of determining the additional incentive amount is historical data compiled by FDOT from its districts across the state over several years. The data compilation reflects the following:
    - 1) The minimum costs to acquire any parcel by lawsuit exceed \$10,000 per parcel;
    - 2) On parcels for which the initial full compensation estimate for the property is less than \$10,000, the average amount of full compensation actually paid for the acquisition exceeds the initial estimate by 237%;
    - 3) On parcels for which the initial full compensation estimate for the property is greater than \$10,000, the average amount of full compensation actually paid for the acquisition exceeds the initial estimate by 58%; and
    - 4) In addition to the full compensation paid for the property acquired, the average amount paid to compensate the owner for attorney's fees and expert consultants' fees is 22% of the amount of full compensation paid for the property acquired.
  - b. If the initial offer is rejected, the incentive amount is withdrawn and the matter proceeds to lawsuit, if necessary, with the offer of full compensation reduced to the amount as determined by the appraisal.
3. The costs associated with escalating real estate values are reduced by encouraging quick settlements.
4. In most cases, the overall costs of the owners' fees for attorneys and expert consultants are reduced.
  - a. For those cases in which the incentive offer is accepted, it narrows the gap between the government's estimate of full compensation and the owner's expectations of full compensation, resulting in a reduction in the number of hours reasonably expected to be incurred by the attorneys and expert consultants.

- b. For those cases in which the incentive amount is withdrawn after being rejected and the matter proceeds to a lawsuit at the appraisal amount, the attorney fee is reduced, based on the percentage computation provided in Fla. Stat. §73.092, as follows:
  - 1) The attorney's fee is based solely on the statutory percentage of the benefit achieved for the owner;
  - 2) The benefit is defined as the difference between the amount of the final settlement or judgment and the initial offer to the owner;
  - 3) Since the initial offer includes the additional incentive amount, the amount of the benefit will be correspondingly reduced by the same amount, which in turn results in a reduced attorney fee after applying the statutory percentage to the reduced amount of the benefit.
    - i) In some cases, as in a case proceeding to trial and resulting in a jury verdict equal to or less than the initial incentive offer, the benefit achieved by the attorney for the owner could be zero, resulting in a corresponding attorney fee of zero.
5. The disadvantage of the incentive offer program is that it does not take into consideration the fact that some owners will accept an initial offer in an amount equal to or slightly more than the appraisal, without the need to add a significant additional amount as an incentive. Depending on the various amounts of the incentive offers, it seems unlikely that we could determine with assurance that the incentive offer program would actually reduce the County's acquisition costs.

**B. Taking Title Subject to Superior Liens in Closings of Negotiated Acquisitions.**

1. In many instances, acquisitions are successfully negotiated with an owner but are unable to be finalized at closing because of the inability of the owner to convey clear title to the County.
  - a. This usually happens in an acquisition of a small portion of an owner's property when the property is encumbered with a mortgage lien, judgment lien, or other such lien.
  - b. The mortgagee or lien holder is unwilling to provide the title agent or owner with a partial release without complying with several requirements, including a new appraisal, an application or administration fee, and numerous other such items.
  - c. Without a partial release of the lien, the title policy for the parcel acquired will exclude coverage for the lien, and the County would take title to the property subject to the superior lien.
  - d. The County's interest in the property could be put in jeopardy in the event of the owner's default of the lien. For example, the County's interest would be subject to a foreclosure if a superior mortgage lien went into default.

2. Although the County's interest in such a case would be subject to a foreclosure, the risk of such an occurrence is minimal.
  - a. Fla. Stat. §95.361 provides for a presumed dedication to the County, free and clear of all such liens and encumbrances, after four years of maintenance on roads constructed by the County. Therefore, in acquisitions for property needed to construct or widen a road, the risk of foreclosure would only be in effect until four years after the new roadway is constructed and maintained by the County.
  - b. Thus, even if the County took title subject to superior liens, such liens would be extinguished with the presumed dedication of the roadway to the County after four years of continuous maintenance.
  - c. Based on our research and experience with foreclosures, it is likely that, in the event the County was named in a foreclosure action before the presumed dedication, the matter could be quickly resolved with either a dismissal or a small monetary settlement.
3. The County's only alternative to taking title subject to superior liens is to cancel the closing of the negotiated acquisition and to proceed to the filing of an eminent domain lawsuit in order to extinguish the superior liens with an Order of Taking and deposit of the full compensation funds with the Court.
  - a. The filing of a lawsuit involves significant time and expense for the County.
  - b. Despite the lawsuit, the owner will still have to negotiate with the lien holder in order to obtain the funds deposited with the Court. This usually involves an attorney for the owner, whose fees are then required to be paid by the County.
4. In the County's Orange Avenue widening project, the filing of eminent domain lawsuits under these circumstances resulted in several thousand dollars of additional acquisition costs which could be avoided in the future by taking title subject to superior liens at closings of negotiated acquisitions.
5. In order for the Board to take such direction, it first must make a declaration that the primary purpose of such action is to benefit the public by reducing the costs of right-of-way, thereby serving a paramount public purpose.

### **C. Development and Use of Management Software.**

1. County staff has been working closely with a software consultant, OLH, Inc., over the last six months in developing a proposal for a custom software application designed specifically for use in the County's acquisition process.
2. The software is based in part on a similar application currently in use by BP2000 and designed by the same consultant.
3. The software is proposed for use by staff at the Public Works Department and the County Attorney's Office to efficiently organize and track all information needed in the

acquisition process. It would replace the current process whereby various staff persons maintain separate spreadsheets containing similar information.

4. The final design proposal is expected to be reviewed within the next three months.

**D. Creation of a Real Estate Staff Committee to Authorize Acquisitions Under Conditions Pre-Approved by the Board.**

1. On January 14, 2003, the Board adopted Policy 03-01, Approval Authority for the Acquisition, Disposition, and Leasing of Real Property (the "Policy").
2. With regard to acquisitions under the threat of eminent domain, the Policy authorized the County Administrator to approve any such acquisitions for which the full compensation to the owner is either (i) an amount no greater than the County's estimate of full compensation for that parcel; (ii) an amount no greater than \$25,000, regardless of the amount of the County's estimate of full compensation for that parcel; or (iii) an amount no greater than \$125,000, provided, however, that such amount does not exceed the County's estimate by more than 25 percent.
3. Any acquisitions which involve an amount in excess of the County Administrator's authority are required to be presented to the Board for consideration.
4. In the three years since the adoption of the Policy, the Board has had the opportunity at its regular Board meetings to consider the approval of several eminent domain acquisitions.
5. For the following reasons, we believe that it is not in the County's best interest to continue the presentation of acquisition approvals for consideration by the Board at its regular meetings:
  - a. In some instances, staff has presented an owner's position to the Board with a recommendation that the Owner's counteroffer be rejected.
    - 1) The presentation of such a matter has been awkward at best. It typically resulted in the owner and/or the owner's attorney and consultants presenting their case as if in Court;
    - 2) In some instances, the Board actually was forced into negotiating a settlement of the matter in the open meeting; and
    - 3) It jeopardizes the County's case by having to fully disclose the County's position in an open meeting.
  - b. It has a tendency to slow down the acquisition process by requiring the coordination of settlements with the Board's meeting calendar.

6. The creation of a real estate staff committee to consider and approve such acquisitions has worked well for other agencies.
  - a. The City of Tallahassee has utilized a real estate staff committee in its acquisition process for several years
    - 1) The City's real estate committee reviews and evaluates those acquisitions which involve amounts exceeding the City Manager's threshold of authority.
    - 2) The committee is made up of the Director of Public Works, the Real Estate Administrator, the Director of the department having project responsibility, and the City Attorney.
  - b. BP2000 has also included in its real estate policy a provision that authorizes the Intergovernmental Management Committee, made up of the County Administrator and the City Manager, to authorize and approve all acquisitions which exceed the Director's authority.
7. In order for a real estate staff committee to be effective, it would have to operate in a manner that would make its members and meetings subject to the Sunshine Law.
  - a. It is important that the committee members be able to conduct their daily activities without having to interact or communicate with the other committee members with regard to the issues presented to the committee. Otherwise, there would be a risk that their interaction could be construed as an unnoticed meeting in violation of the Florida Sunshine Law.
8. We recommend that a three-person real estate staff committee be created with its membership made up of the Senior Assistant to the County Administrator, the Director of Management Services, and the Senior Assistant County Attorney.
  - a. Each of these committee members would be able to consult with the various county staff persons involved in the acquisition process with minimal risk of a Sunshine Law violation.
  - b. In addition, it is not likely that the daily responsibilities of the persons in these three staff positions would lead to any interaction or communication regarding issues that would likely be considered at a real estate committee meeting.
9. We recommend that the Board revise the Policy to direct that any acquisitions which involve an amount in excess of the County Administrator's authority be presented to the real estate staff committee for authorization in accordance with the pre-approved conditions to be established in a revision of the Policy.

**E. Elimination of Temporary Construction Easement Parcels When Appropriate.**

1. A temporary construction easement ("TCE") is an interest in real property that gives the County the right to use a portion of an owner's property, as described in the easement, for a stated temporary period of time and for the purposes set forth in the easement. A TCE is typically acquired in order to obtain permission to enter and use an owner's property

during the road construction for various purposes including tying in and harmonizing the new road construction with the owner's driveway and gradually sloping off the changed elevation of new road construction within the area of the TCE.

2. The TCE has historically been used by the FDOT and most government agencies as assurance for the construction contractor that permission has been granted to the contractor for such use of the owner's property. The TCE typically expires upon the contractor's completion of the project.
3. Although it involves only a temporary use of an owner's property, a TCE must be acquired in the same manner as a fee simple acquisition, and it involves many of the same costs. A TCE acquired under the threat of eminent domain also entitles an owner to many of the same full compensation rights as with a fee simple acquisition including fees incurred for attorneys and expert consultants.
4. In some instances, there are alternatives to acquiring a TCE.
  - a. Owner's Grant of Right-of-Entry.
    - 1) If permission is needed to simply tie in and harmonize an owner's driveway to the new road construction, the owner will sometimes accept the government's offer to tie in and harmonize the driveway, at the government's expense, in exchange for giving written permission to enter the owner's property in the form of a Grant of Right-of-Entry.
    - 2) The disadvantage in relying on a Grant of Right-of-Entry is the risk that the owner will not agree to allow the contractor on the property. In that case, the driveway is not repaired and the connection to the new road may be difficult for the owner to maneuver and could result in a claim for damages against the government.
  - b. Construction of Retaining Walls to Replace Support Slopes.
    - 1) Rather than acquiring a TCE to gradually slope off the new road into an owner's adjoining property, it may be less expensive to design a retaining wall to be constructed within the existing right-of-way to support the changed elevation of the new road construction.
    - 2) If the elevation of the new road is raised, a retaining wall might be possible to support the new road and prevent it from falling into the adjoining property. With a lowered elevation of the new road, a retaining wall would prevent the adjoining property from collapsing into the new road.
    - 3) If there is sufficient room within the existing right-of-way, the construction of a retaining wall can sometimes be less expensive than acquiring a TCE.
5. Unfortunately, the alternatives to acquiring a TCE will often result in legal challenges from unhappy owners represented by aggressive attorneys.
  - a. An owner will often be unhappy with the way in which the government proposes to tie in and harmonize the driveway. For instance, the government may propose a

- steeper slope than the owner wants. The owner may demand less of a slope, which would result in a more expensive driveway repair.
- b. If the government refuses to meet the owner's demands, the owner will often refuse permission for the government to enter the owner's property. In order for the contractor to stay on schedule with the project construction, the driveway repair crews will simply move on without repairing the driveway.
  - c. This often results in an unhappy owner, threatening a claim from his attorney for inverse condemnation based on a denial of access to his property.
6. In cases such as these, the government is arguably not obligated to repair an owner's driveway when a new road is constructed. This position has been taken by at least one of the districts of FDOT in designing road projects to eliminate all TCE's. If an owner refused to give the FDOT contractor permission to enter his property to repair the driveway, the contractor was instructed to move on without repairing the driveway.
- a. Although this is not a well-settled area of law, our office is in agreement with FDOT's position. The County has no obligation to repair an owner's driveway under these circumstances. We believe it is likely that a judge would have a difficult time taking the owner's position that there is a denial of access, especially if the County has offered to repair the owner's driveway at the County's expense.
  - b. While we recommend that the Board give direction to consider the elimination of TCE's when possible, such direction may result in complaints from owners unhappy with the results.
  - c. However, the elimination of TCE's could result in a significant reduction in the costs of acquisition.
    - 1) For example, the County negotiated with an owner on Buck Lake Road for the acquisition of a TCE parcel from his residence to tie in and harmonize his driveway to the new Buck Lake Road project.
    - 2) A generous appraisal resulted in an initial offer of approximately \$3,500.
    - 3) The owner was unhappy with the slope of the County's proposed driveway repair and negotiated extensively with County staff. The last counteroffer from the owner before the project was postponed was for \$19,000.
    - 4) With the appropriate Board direction, this TCE, and others like it on Buck Lake Road, could possibly have been eliminated during the design stage.

#### **F. Corridor Preservation.**

1. On December 1, 2005, comprehensive plan amendment 2005-2-T-023 took effect which is intended to manage the community's existing and future transportation resources by protecting the future right-of-way along existing corridor alignments and roadways identified for improvement. Among those corridors designated for protection is Tharpe Street.

2. In addition, on January 25, 2006, the Tallahassee City Commission will consider an ordinance which will implement the corridor protection element of the comprehensive plan amendment.
  - a. Currently, the City's Land Development Code contains inadequate provisions regarding dedication of land within the proposed corridors of transportation improvements. The current provisions do not preserve enough right-of way and do not provide procedures stating when and how right-of-way must be dedicated. In some cases, this has resulted in parking, buildings, or other improvements being placed on land that will later need to be purchased as right-of-way, greatly increasing the acquisition costs to tax payers.
  - b. The proposed ordinance eliminates the existing, outdated setback requirements and creates new standards by which the City may require dedication of necessary right-of-way at the time a developer submits an application for subdivision or site plan. In return, the developer is provided flexibility to move the development onto other portions of the site. The intent is that the developer may build the same density and intensity as would be available on the pre-dedication parcel.
  - c. Specifically, the proposed ordinance would institute the following changes:
    - 1) Prohibits permanent structures within the right-of-way setbacks adopted in the 2005-2 Comp Plan cycle. Affected roadways are shown on the Right-of-Way Needs Map and the Long Range Transportation Plan, both of which are also adopted as part of the Comprehensive Plan;
    - 2) Provides standards for determining these setbacks in cases where specific alignments have yet to be engineered;
    - 3) Provides standards for requiring, determining, and recording dedications of land;
    - 4) Provides standards for interim uses of land prior to the roadway improvements;
    - 5) Provides incentives for dedicated land, such as on-site transfer of development.
  - d. Staff is also requesting that the Commission amend the Growth Management fee schedule to waive deviation fees and the difference between Type A fees and Type B fees when a governmental request for dedication results in those higher fees. In some cases, the difference between Type A and Type B fees may be a few thousand dollars, which would be insignificant when compared to the cost of purchasing right-of-way after the land is developed.
3. Planning Department staff will update the Board on the latest amendments and the proposed City ordinance, and how they may affect the acquisition of property planned for the Tharpe Street project.
4. In addition, staff will be discussing the need for the Board to adopt an implementing ordinance similar to the proposed ordinance being considered by the City Commission.

**Options:**

1. Direct the County Attorney to return to the Board for consideration of a revision to Policy 03-01, Approval Authority for the Acquisition, Disposition, and Leasing of Real Property, to include an incentive offer program consistent with this Workshop Item.
2. Direct the County Attorney to return to the Board for consideration of a revision to Policy 03-01, to include authorization to take title subject to superior liens in closings of negotiated acquisitions consistent with this Workshop Item.
3. Direct the County Attorney to return to the Board for consideration of a revision to Policy 03-01, to include the creation of a real estate staff committee to authorize acquisitions under conditions pre-approved by the Board consistent with this Workshop Item.
4. Authorize the County Administrator, or designee, to eliminate temporary construction easements from the County's capital improvements projects when appropriate in the County's best interest.
5. Direct the Planning Department staff to return to the Board for consideration of a proposed ordinance implementing the corridor protection element of the comprehensive plan amendment 2005-2-T-023.
6. Do not direct the County Attorney to return to the Board for consideration of revisions to Policy 03-01.
7. Do not authorize the County Administrator, or designee, to eliminate temporary construction easements from the County's capital improvements projects when appropriate in the County's best interest.
8. Do not direct the Planning Department staff to return to the Board for consideration of a proposed ordinance implementing the corridor protection element of the comprehensive plan amendment 2005-2-T-023.
9. Board Direction.

**Recommendation:**

Option #2, #3, #4, #5

HWAT: DJR/djr/jm