



February 2006

Report No. 06-18

## The Legislature Has Several Options for Reducing the State's Road Right-of-Way Costs

### *at a glance*

The Department of Transportation spent approximately \$471 million to compensate landowners for right-of-way in Fiscal Year 2004-05, including \$387 million for land and improvements and \$84 million for associated landowner expenses and business damages.

To help reduce right-of-way acquisition costs, the Legislature could consider the following options:

- requiring landowners to provide information on a property's characteristics earlier in the acquisition process;
- establishing standards for hourly rates and the number of hours that may be billed by landowners' experts or capping the amounts paid for property owners' expert expenses similar to other states; and
- eliminating the payment of business damages. Most states do not pay business damages for property acquired for right-of-way purposes. However, eliminating payment of business damages would likely face strong opposition from land and business owners and other stakeholders.

### Scope

As requested by the Legislature, this report examines options for reducing costs for acquiring right-of-way needed for state road projects.

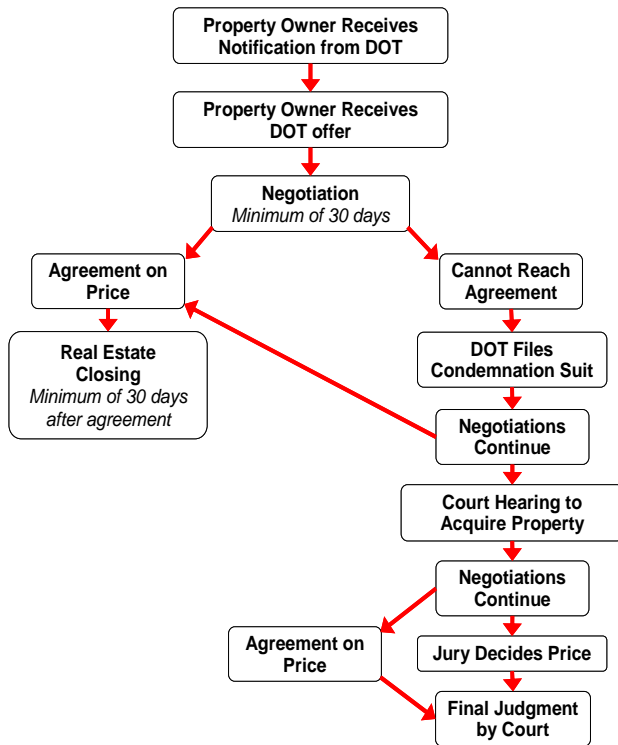
### Background

The Department of Transportation's Right-of-Way Acquisition Program is responsible for purchasing right-of-way property needed for road construction projects. The department follows a multi-step process to obtain needed property as shown in Exhibit 1.

1. It notifies the property owner that a portion or all of the property will be needed for a road project.
2. It appraises the property and provides the owner with a written offer to purchase the property at no less than its appraised value.
3. It attempts to negotiate a purchase price with the property owner.
4. If the department and the property owner are unable to agree on a price, the department files a condemnation suit and a jury determines the property's value. The department continues to attempt to negotiate with the property owner after filing the condemnation suit.

# Exhibit 1

## The Department of Transportation Uses a Multi-Stage Process to Acquire Right-of-Way



Source: Florida Department of Transportation.

The United States and Florida constitutions and state laws provide protections to property owners whose property is subject to condemnation. As provided in Ch. 73, *Florida Statutes*, the state compensates property owners for their property, attorney fees, appraiser fees, technical expert fees, relocation expenses, and severance damages.<sup>1</sup> If the state takes a portion of a business's property, it also pays business damages for permanently lost profits and the reduced profit-making capacity of the business. As shown in Exhibit 2, the department spent approximately \$471 million to compensate landowners for right-of-way in Fiscal Year 2004-05, including \$387 million for land and improvements and \$84 million for associated landowner expenses and business damages.

<sup>1</sup> Severance damages represent the loss in value of property remaining after an acquisition.

# Exhibit 2

## Department Expended \$470.8 Million on Right-of-Way in Fiscal Year 2004-05

Costs	Amount
Expert Fees	\$ 11,964,491
Property Owner Appraisal Fees	5,536,237
Property Owner Attorney Fees	27,148,491
Other Property Owner Expenses	18,414,185 <sup>1</sup>
Business Damages	21,032,814
<b>Total Property Owner Expenses</b>	<b>\$ 84,096,218</b>
Land/Improvements/Severance	386,720,999
<b>Total Costs</b>	<b>\$470,817,218</b>

<sup>1</sup> Other property owner expenses include relocation assistance, utility relocation, and miscellaneous expenses. Table does not add due to rounding.

Source: Department of Transportation.

The Legislature appropriated \$703.8 million and authorized 404 positions for department right-of-way activities in Fiscal Year 2005-06.

## Findings

### *The Department of Transportation uses various methods to acquire right-of-way*

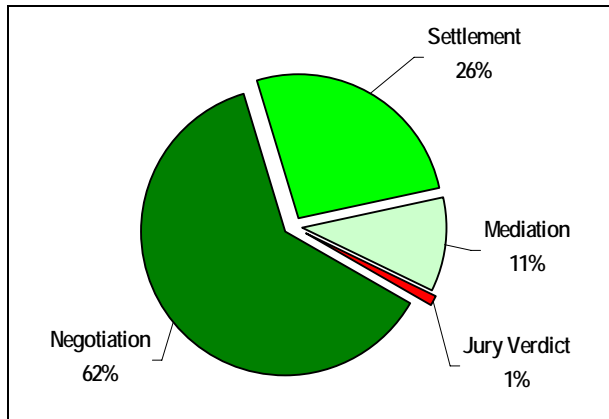
The department acquires right-of-way property through various methods including

- negotiation, by which the department and the landowner negotiate and settle on a price; the department seeks to negotiate a price for a parcel before it files a condemnation suit;<sup>2</sup>
- settlement, by which the department and the landowner settle on a price after a condemnation suit is filed, but prior to mediation or a trial being conducted;
- mediation, by which the department and the landowner agree on a price during a formal session mediated by a third party after a condemnation suit is filed; and
- jury trial, by which a jury determines the full value of a property.

<sup>2</sup> Section 73.015(1), *F.S.*, provides that effective July 1, 2000, before an eminent domain proceeding is brought, the condemning authority must attempt to negotiate in good faith with the owner of the parcel to be acquired and must attempt to reach an agreement regarding the amount of compensation to be paid for the parcel.

Over the last 10 years, 62% or 4,434 of the 7,143 parcels acquired by the department were obtained through negotiation. (See Exhibit 3.) The remaining 2,709 parcels were acquired through condemnation (settlement, mediation, or jury verdict).

### Exhibit 3 The Department Acquires Most Parcels Through Negotiations <sup>1</sup>

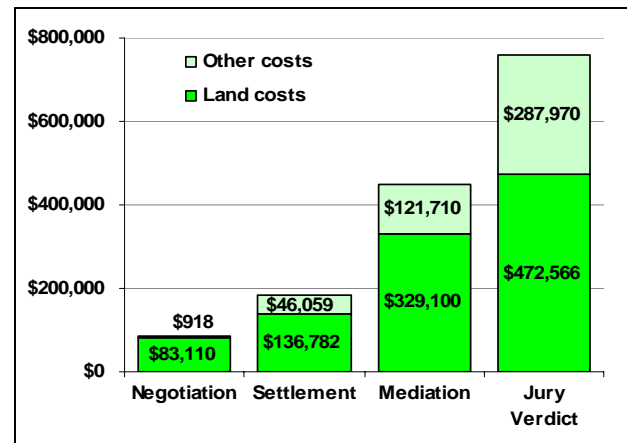


<sup>1</sup> Data presented in this exhibit is derived from our analysis of right-of-way costs paid by the department on 7,143 parcels acquired from June 30, 1995, to August 25, 2005, for which all activities and payments were completed.  
Source: OPPAGA analysis of Department of Transportation data.

### *The state benefits by acquiring parcels through negotiation rather than condemnation*

As shown in Exhibit 4, parcels acquired by the department through negotiation over the last 10 years had a substantially lower average total cost than parcels acquired through the other methods. For example, the state paid an average of \$84,028 for parcels acquired through negotiation (including land and other costs) compared to \$760,536 for parcels obtained through jury verdict in condemnation suits (including land and other costs). Land costs include the amount paid for land, severance damages, and improvements. Other costs included the costs associated with attorney fees, business damage payments, court costs, closing costs, expert fees, final judgment interest payments, and moving costs. The amount of these other costs increased as the department pursued acquiring parcels through the condemnation process.

### Exhibit 4 Average Right-of-Way Costs Increase as the State Pursues Condemnation <sup>1,2</sup>



<sup>1</sup> Data presented in this exhibit is derived from our analysis of right-of-way costs paid by the department on 7,143 parcels acquired from June 30, 1995, to August 25, 2005, for which all activities and payments were completed.

<sup>2</sup> Land costs include land, severance damages, and improvements. Other costs include attorney fees, business damages, court costs, closing costs, expert fees, final judgment interest, other fees and costs, and moving costs.

Source: OPPAGA analysis of Department of Transportation data.

While some of this variation reflects differences in the characteristics of the parcels being purchased (such as their size and value), a primary factor is the difference in the acquisition process itself. We used regression analysis to adjust for factors that could affect parcel cost. These factors include the dollar amount of the department's initial offer and parcel characteristics, such as size. This analysis showed that even when these factors were accounted for, parcels acquired through negotiation had lower costs than parcels acquired through condemnation.<sup>3</sup> These results indicate that the state would attain cost savings if the department obtained needed property through negotiation rather than litigation.

<sup>3</sup> Factors included in our regression model were acquisition method, land use, Department of Transportation District, the department's initial offer, highest real estate counter offer, and parcel size. These factors explained 82% of the variation in total costs.

***The department has implemented a pilot project that encourages early settlements***

In November 2001, with approval of the Federal Highway Administration, the department implemented a pilot project in Districts 2, 4, and 5. The project offered property owners an incentive payment above the fair market value of the property as determined by the department's appraisals if they agreed to sell their property without proceeding to a condemnation suit. The incentive amount was based on a standard percentage of the property's appraised fair market value as shown in Exhibit 5.

**Exhibit 5**

**Department Pilot Project Offers Property Owners Incentives to Quickly Settle Right-of-Way Acquisitions**

Appraised Land Value	Incentive Amount
Less than \$1,000	\$ 1,000
\$1,000- \$2,500	2,500
\$2,500-\$5,000	5,000
\$5,000- \$7,500	7,500
\$7,500-\$28,750	10,000
Over \$28,750	Incentive amount equal to 35% of a parcel's appraised value, with a maximum incentive of \$100,000

Source: Department of Transportation.

As of July 2005, the department had acquired 241 parcels through the pilot program. The department reports that the parcels acquired through the pilot program had lower costs and landowner expenses and were acquired more quickly than similar parcels acquired through the standard process, as well as district and statewide averages. For example, in the department's District 2, it took an average of 89 days for the department to obtain title to 51 parcels acquired through the pilot program compared to an average of 238 days for a control group of parcels in the same district and a statewide average of 235 days.

Given these promising results, the department is currently pursuing approval from the Federal Highway Administration to expand the program statewide.

**Options for reducing right-of-way acquisition costs**

There are several options the Legislature could consider for reducing state right-of-way costs, including options for enhancing the likelihood of the department making a reasonable offer for a property and changing provisions in Florida law that encourage property owners to litigate rather than negotiate with the department.

***Option 1: Require landowners to provide information on a property's characteristics earlier in the acquisition process***

The department attempts to make offers that property owners will accept, as acceptance of an initial offer will save time and reduce acquisition costs. However, the department's initial offer was accepted by landowners in only 25% of the right-of-way cases completed in the last 10 years.

Department managers and eminent domain mediators contend that the department is hampered in offering reasonable offers by a lack of information regarding a property's characteristics. Specifically, they said that property owners often do not provide the department with enough information about their property early enough in the acquisition process for the department's staff to consider in making their appraisals and initial offers. Property owners are not required to provide this information until after a property is condemned.<sup>4</sup> Our interviews with property owners and their attorneys as well as our review of department records supports this assertion. The department's lack of information contributes to differences of opinion between the department and property owners regarding a property's highest and best use, comparable sales, engineering and design issues, and other factors affecting a property's value.

<sup>4</sup>In the condemnation phase, the property owner and the department must provide the court and each other with information in the discovery process. However, Florida law provides that business owners who claim damages must submit good faith written offers and documentation to settle their claims with the department no later than 180 days after they receive the department's notice that they will need the property for a road project.



The acquisition process could thus proceed more readily and legal fees and other condemnation costs could be reduced if the department obtained more information about property early in the process. This would enable the department to make better offers to the property owners, which might increase the likelihood of the property being acquired through negotiation rather than through litigation.

A feasible way of attaining this goal would be to amend current law to require property owners to provide information on their property within a specified period of time after receiving the department's initial offer. This could be done by amending s. 73.015, *Florida Statutes*, to require property owners to provide the department with an appraisal and other information about the property within 90 days after receiving the department's initial offer of purchase. This time period would enable negotiations to proceed quickly yet allow a reasonable period of time for property owners to consult with counsel and obtain appraisals and other assessments of their property to proceed to negotiations.

### ***Option 2: Change Florida law to reduce incentives for property owners to litigate rather than negotiate***

As noted in prior OPPAGA reports, Florida law provides incentives for property owners to litigate rather than negotiate settlements with the department.<sup>5</sup> Because the state pays property owners' expenses if they refuse the department's offer and instead enter into litigation, there is no financial risk for property owners to hire advisors and little incentive for them to negotiate settlements with the state. The state will pay the landowner's litigation expenses, including attorney fees, appraiser fees, technical expert fees, relocation expenses, and business damages. Thus, the law encourages property owners to engage in

litigation in the hope of achieving higher values for their property.

Florida also currently pays more types of property owner expenses than other states. Florida is 1 of only 19 states that compensates property owners for attorney fees, 1 of only 18 states that pay appraiser fees, and 1 of only 17 states that pay fees for technical experts.

Florida has established limits on property owner's attorney fees, but does not have limits on the payment of most other property owner expenses. Since 1994, Florida has limited attorney fees to an amount based solely on the benefit achieved for the property owners, which is defined as the difference between the initial written offer made by the state and the property's final sale price.<sup>6</sup> Department data show that attorney's fees have decreased as a percentage of total right-of-way expenditures since the limits were in place.

However, Florida has not capped other types of fees such as landowners' appraisal and expert witness fees. Some of the other states that pay such expenses have established limits on how much they will pay. For example, Pennsylvania and Indiana limit total payments of property owner expenses to \$500 and \$2,500, respectively.

To help contain the cost of property owner expenses, the Legislature may wish to consider the option of establishing standards for hourly rates and limits to the number of hours that could be charged to the state by property owners' experts.

The state could establish standards for expert fees using an approach similar to the one used by the Article V Indigent Services Advisory Board.<sup>7</sup> That board was created to advise the Legislature in establishing qualifications and standards of compensation governing the expenditure of state funds for due process services provided through the courts for indigents. The board reviewed the services

<sup>5</sup> *Justification Review of the Right-of-Way Acquisition Program*, OPPAGA Report No. 99-02, August 1999; *Progress Report: Some Highway Right-of-Way Costs Decreased, But Legislative Changes Needed to Further Reduce Costs*, [OPPAGA Report No. 01-46](#), October 2001.

<sup>6</sup> According to s. 73.092, *F.S.*, attorney's fees are awarded as follows: 33% of any benefit up to \$250,000; plus 25% of any portion of the benefit between \$250,000 and \$1 million; plus 20% of any portion of the benefit exceeding \$1 million.

<sup>7</sup> Section 29.014, *F.S.*

and fees for appraisers, economists, and other experts. The board recommended fee ranges based on expert witness fee data from circuit courts and public testimony.

The Legislature could authorize the courts to approve additional compensation for landowner expert witness expenses above board limits if deemed necessary. The Legislature also could consider setting a maximum payment amount for property owner expert expenses as done in other states, such as Pennsylvania and Indiana.

### ***Option 3: Change Florida law to eliminate payment of business damages***

Business damages represent permanently lost profits and the reduced profit-making capacity of a business due to a portion of its property being taken by the state. In Florida, the right to collect business damages is provided by state law and is not protected by the United States or Florida constitutions. The department paid approximately \$21 million in business damages on property acquired in Fiscal Year 2004-05.

Most states do not pay business damages for property acquired for right-of-way purposes. Florida is one of 10 states that pay property

owners for business damages. The remaining 40 states do not pay business damages because they are buying property rather than businesses.

Prior OPPAGA reports recommended that the Legislature consider the option of eliminating the payment of business damages. Eliminating payment of business damages would reduce land acquisition costs by approximately \$20 million annually.

However, the elimination of payment for business damages would likely face strong opposition. Property and business owners and other stakeholders would contend that business damage payments are needed to compensate for losses to a business's profitability and economic viability resulting from the acquisition of the property.

## **Agency Response**—————

In accordance with the provisions of s. 11.51(5), *Florida Statutes*, a draft of our report was submitted to the Secretary of the Department of Transportation for his review and response.

The Secretary's written response is reproduced in its entirety in Appendix A.

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Gary R. VanLandingham, OPPAGA Director

## Appendix A

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### Florida Department of Transportation

JEB BUSH  
GOVERNOR

605 Suwannee Street  
Tallahassee, FL 32399-0450  
February 16, 2006

DENVER J. STUTLER, JR.  
SECRETARY

Mr. Gary R. VanLandingham, Director  
Office of Program Policy Analysis and Governmental Accountability  
111 West Madison Street, Room 312  
Tallahassee, FL 32399-1475

Dear Mr. VanLandingham:

Thank you for the opportunity to review and respond to the preliminary findings and recommendations of your report entitled *The Legislature Has Several Options for Reducing the State's Road Right-Of-Way Costs*. Our response is as follows:

**Option 1:** *Require landowners to provide information on a property's characteristics earlier in the acquisition process*

**Response:** The Department concurs because any additional information which the Department has concerning the property will result in more effective negotiations, increased settlements, and reduced litigation. However, the impact on costs is uncertain because costs such as attorney fees are calculated from the Department's initial offer to the property owner. Any information received after that first offer is made by the Department may not significantly impact reduction of these fees.

**Option 2:** *Change Florida law to reduce incentives for property owners to litigate rather than negotiate*

**Response:** The Department concurs that a more efficient and equitable means of establishing landowner costs, in a manner similar to that which was developed for establishing attorney fees in 1994, should be considered by the Legislature.

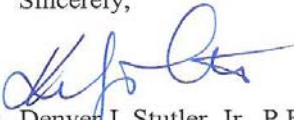
**Option 3:** *Change Florida law to eliminate payment of business damages*

**Response:** The Department concurs that changing Florida law to eliminate payment of business damages would reduce right-of-way costs. However, we feel this recommendation is impractical given the long history of business damage payments in this State. An alternative option might be for the Legislature to more clearly define what is to be included in business damages.

Mr. Gary R. VanLandingham  
February 16, 2006  
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Thank you for the opportunity to provide comments on the report recommendations. If you have any questions, please contact Kenneth Towcimak, Director, Office of Right-of-Way at 414-4557.

Sincerely,

  
(FOR) Denver J. Stutler, Jr., P.E.  
Secretary

DJS:hmt

cc: Cecil T. Bragg, Jr., CPA, Inspector General  
Kenneth Towcimak, Director, Office of Right-of-Way  
Derry Harper, Chief Inspector General, Executive Office of the Governor