

A Practical Guide on Condemnation: Planning to Trial

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Condemnation is Eminent Domain

- Power of entity to take private property for public use without owner's consent
- Power derives from King's (or Queen's) sovereignty
- Eminent domain is proper under 5th Amendment when:
 - Appropriation of property is reasonably necessary for project and property is used for a public purpose
 - Property owner receives just compensation
- Property owner can contest public purpose or argue what is just compensation

Public Purpose

- US Const. 5th Amend. requires public purpose
 - Want to state specific purpose in resolution authorizing ED
- Rational basis is usual federal standard (*Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984))
- Even benefit to private parties is generally fine
 - Could transfer property to private individuals (not monetary sometimes)
 - Could lease property to private company to make a profit
 - Doesn't have to benefit all of the public directly

Public Purpose for a Private Interest?

- Property owner's perspective; the government wants to take my home (or business) for a parking lot for a private company, say for a shopping center or ballpark
- Government perspective:
 - Increased tax revenues
 - New jobs with higher wages
 - Eliminated blighted areas or contaminated properties
- Legal perspective:
 - *Kelo v. New London*, 545 U.S. 469 (2005); approves ED for economic development; when people discuss eminent domain, this is what comes up first
 - State legislative (and constitutional) reactions to *Kelo* decisions

Public Purpose for private parties, cont.

- State reactions to *Kelo*
 - Limit eminent domain for economic development (ED) to blighted areas, sometimes by clear and convincing evidence (Mich., Ariz.)
 - Banning eminent domain for ED and blight (Fla.)
 - Prohibit courts from deferring to legislative declarations of public use (Va.)

The Monstrous Process that is Eminent Domain

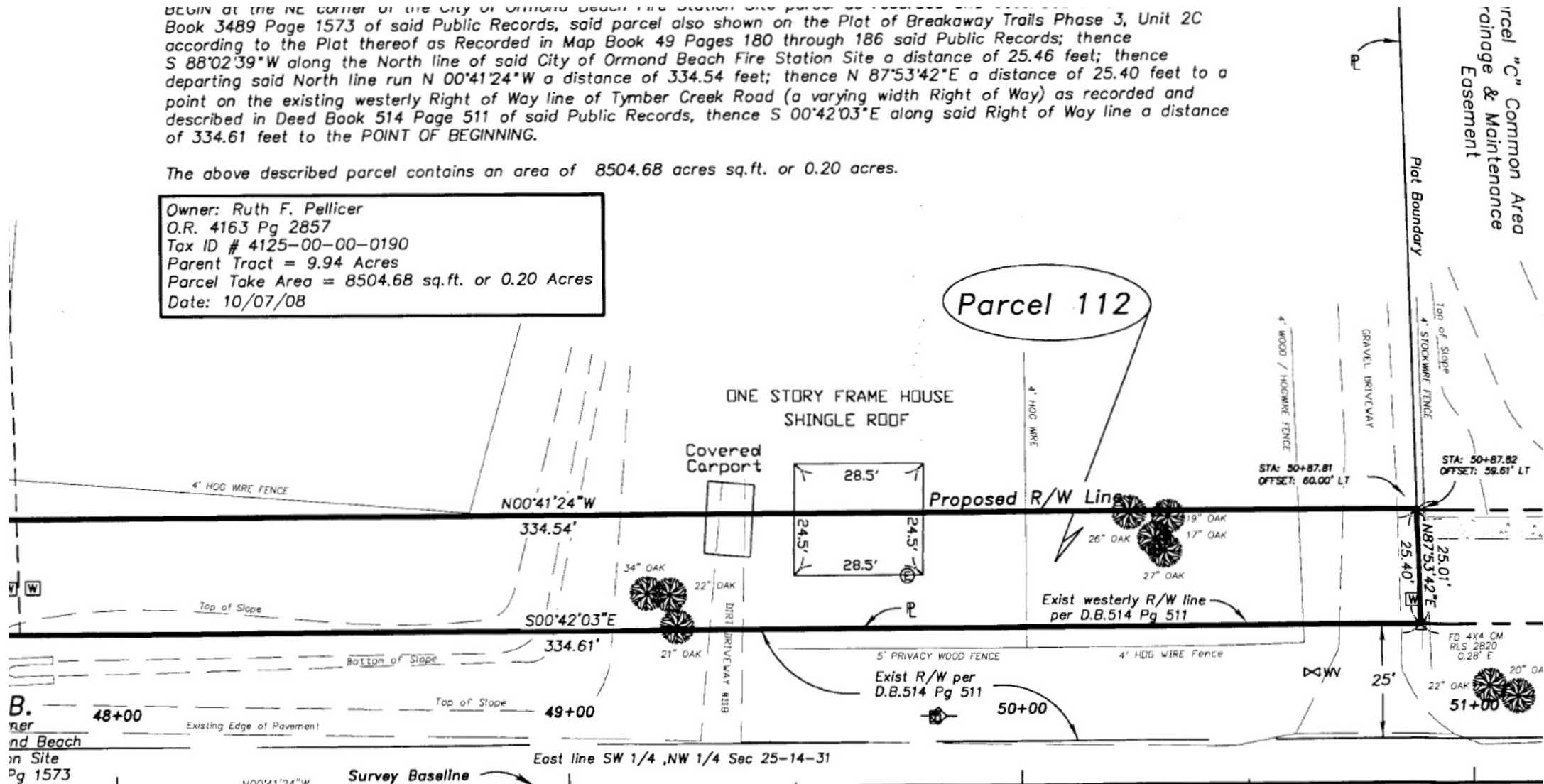
- Typical project is far along in the process when it gets to attorney
 - Project is already designed
 - Budget created
 - Federal and state transportation grants
 - Council may have approved the use of eminent domain
 - RFQ/RFPs already issued
- Competing pressures on you
 - Need to show voters approved bond issues are completed
 - Landowners unhappy with project or offers complain too

Looking at the Taking Details

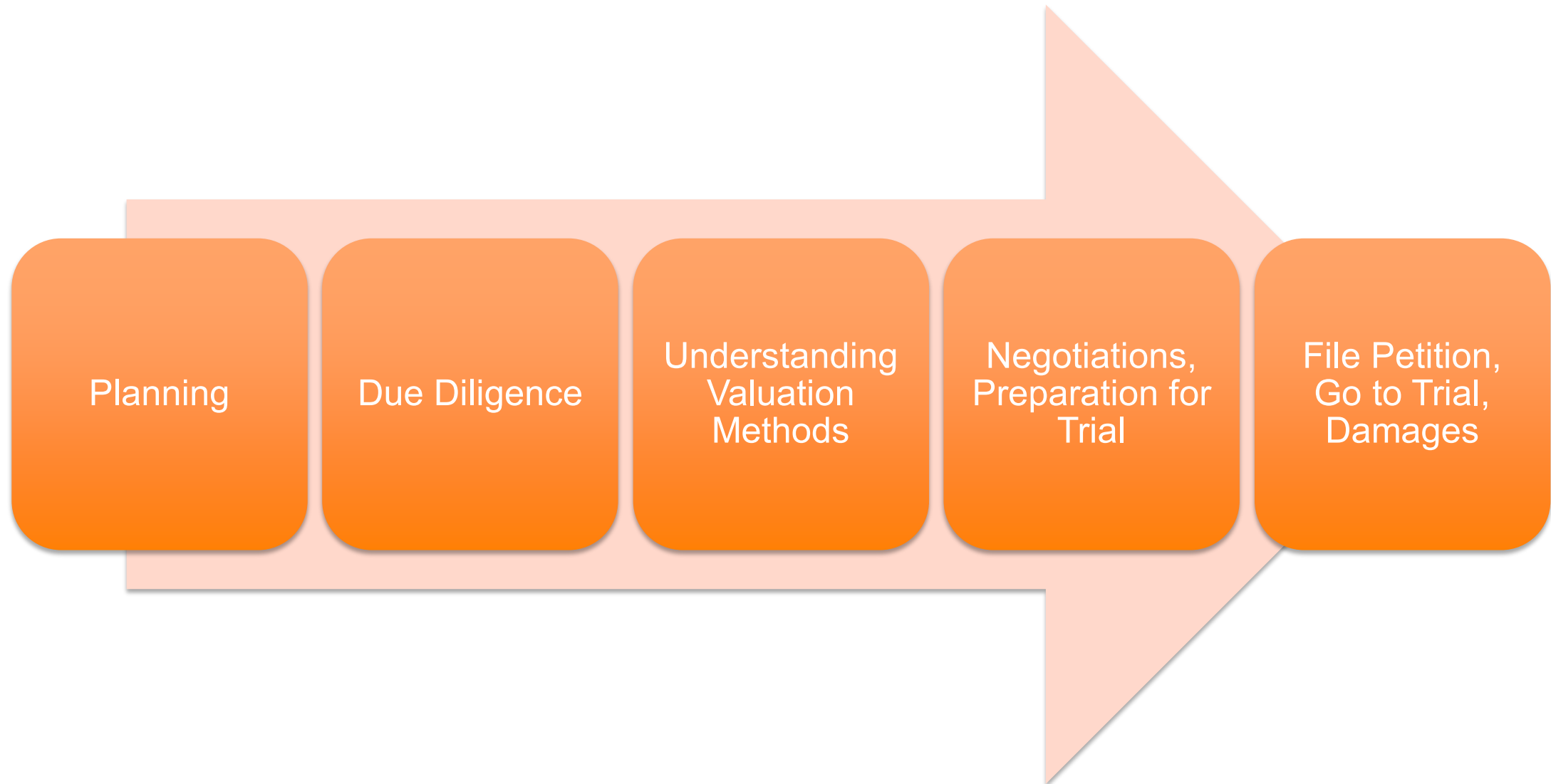
BEGIN at the NE corner of the City of Ormond Beach Fire Station Site parcel as recorded in Deed Book 3489 Page 1573 of said Public Records, said parcel also shown on the Plat of Breakaway Trails Phase 3, Unit 2C according to the Plat thereof as Recorded in Map Book 49 Pages 180 through 186 said Public Records; thence S 88°02'39"W along the North line of said City of Ormond Beach Fire Station Site a distance of 25.46 feet; thence departing said North line run N 00°41'24"W a distance of 334.54 feet; thence N 87°53'42"E a distance of 25.40 feet to a point on the existing westerly Right of Way line of Tymber Creek Road (a varying width Right of Way) as recorded and described in Deed Book 514 Page 511 of said Public Records, thence S 00°42'03"E along said Right of Way line a distance of 334.61 feet to the POINT OF BEGINNING.

The above described parcel contains an area of 8504.68 acres sq.ft. or 0.20 acres.

Owner: Ruth F. Pellicer
O.R. 4163 Pg 2857
Tax ID # 4125-00-00-0190
Parent Tract = 9.94 Acres
Parcel Take Area = 8504.68 sq.ft. or 0.20 Acres
Date: 10/07/08



Condemnation Process



Planning for Eminent Domain

- First step: Assure authority to take
 - State grant for public entities
 - Home rule charter may cover
 - Public purpose, affected by any relevant state limitation
 - Restrictions on taking state or federal property
 - Governments, railroads and public utilities; highest public use when they condemn each other's property
- One more twist: *PennEast Pipeline Co, v. N.J.* is pending in Supreme Court where state so far claimed 11th Amend. Sovereign immunity successfully in 3rd Circuit

Planning, cont.

- Comply with State imposed prerequisites, other than public purpose limitations
 - Initial listing with State AG or comptroller as having condemnation authority
 - Disclosure requirements (property owner bill of rights, appraisal reports)
 - Good faith offers and negotiations
 - Voting specifics for condemnation resolution (description of purpose, supermajority vote)

Planning, cont.

- Consider alternatives to initial interest in using eminent domain
 - Instead of using ED, provide companies economic incentives for private purchases (Hotel tax, Economic Development sales tax subsidy, property or income tax abatements, tax reinvestment zones)
 - Negotiate the purchase: This will save time of condemnation proceedings, cost of outside expert and attorney fees

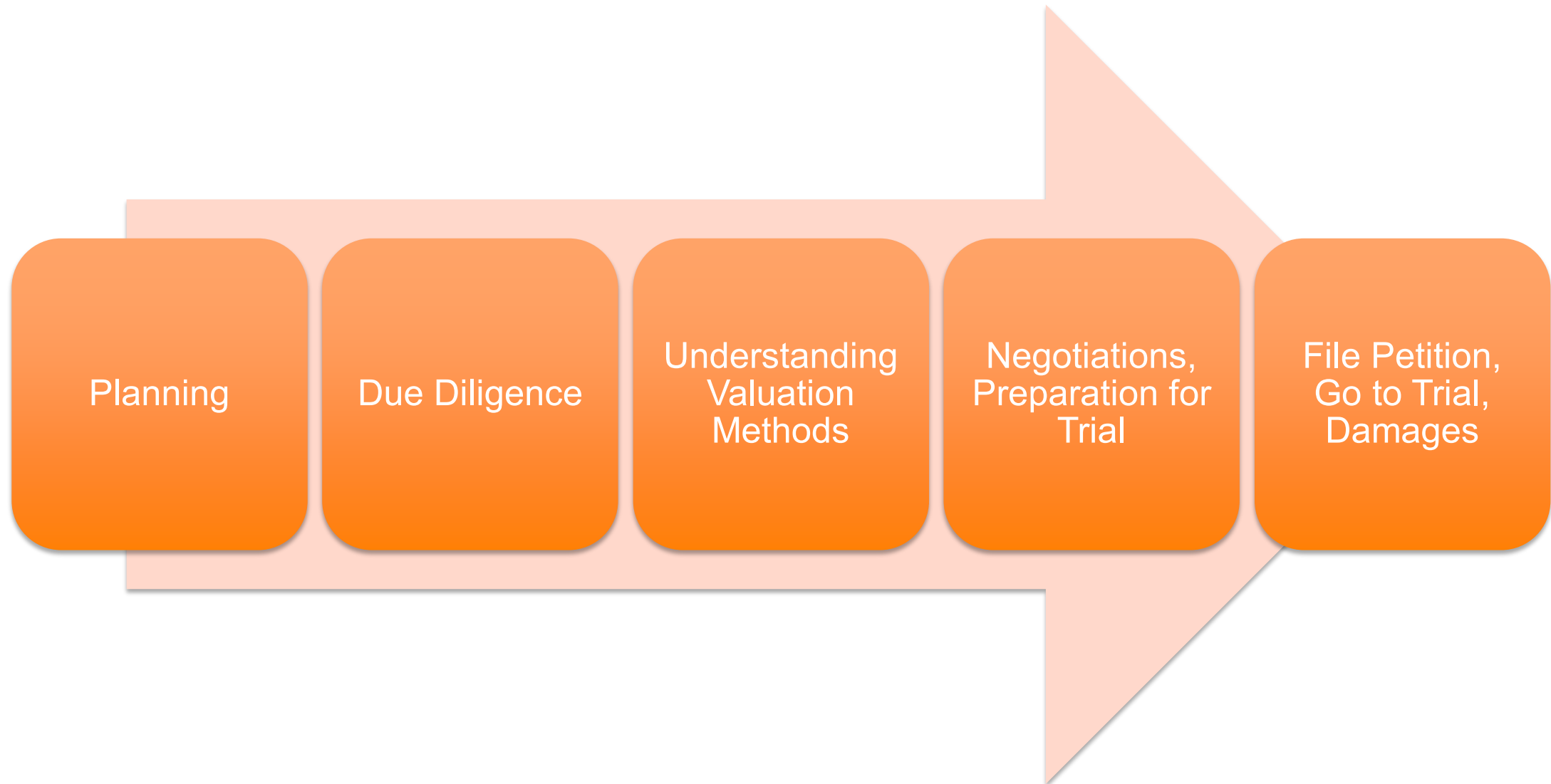
Planning, cont.

- Consider cost-effective procedures
 - Avoid encouraging speculative parcel buyers by keeping exact route of project out of public knowledge for a while
 - Use routes with more public property and platted dedications and easements
 - Avoid routes through parcels with environmental issues
 - Allow rural ag properties to finish their high season
 - Avoid railroad crossings

Planning, cont.

- Consider political sensitivities of conduct before eminent domain process begins
 - Create reasonable acquisition timeline allowing time for negotiations
 - Avoid project in areas forcibly annexed
 - Avoid forced utility connections in project area, like conversion of septic to sewer
 - Question need for immediate tax and fee increases
 - Carefully review re-zonings and comprehensive plan amendments in project area
 - Ask if timing of project is better before or after elections

Condemnation Process



Due Diligence

- First Step: Determine Appropriate Property Rights
 - Fee Simple may have a higher cost
 - Higher purchase price
 - Owner resistance to losing title
 - Taking property off tax rolls
 - Easement is usually sufficient
 - Temporary ones also important for construction access
 - Grading and drainage (and collection) permanent rights
 - Other owners may need access and noise buffer rights

Due Diligence, Title Inspection

- Collect parcel information
 - Known owners
 - Physical address
 - Legal description (preliminary, improved with surveys)
- Decide method of inspection
 - Title Insurance is costly: often done with state transportation departments
 - Attorney can save project money by reviewing title run sheets, work by real estate broker

Due Diligence, Title Inspection, cont.

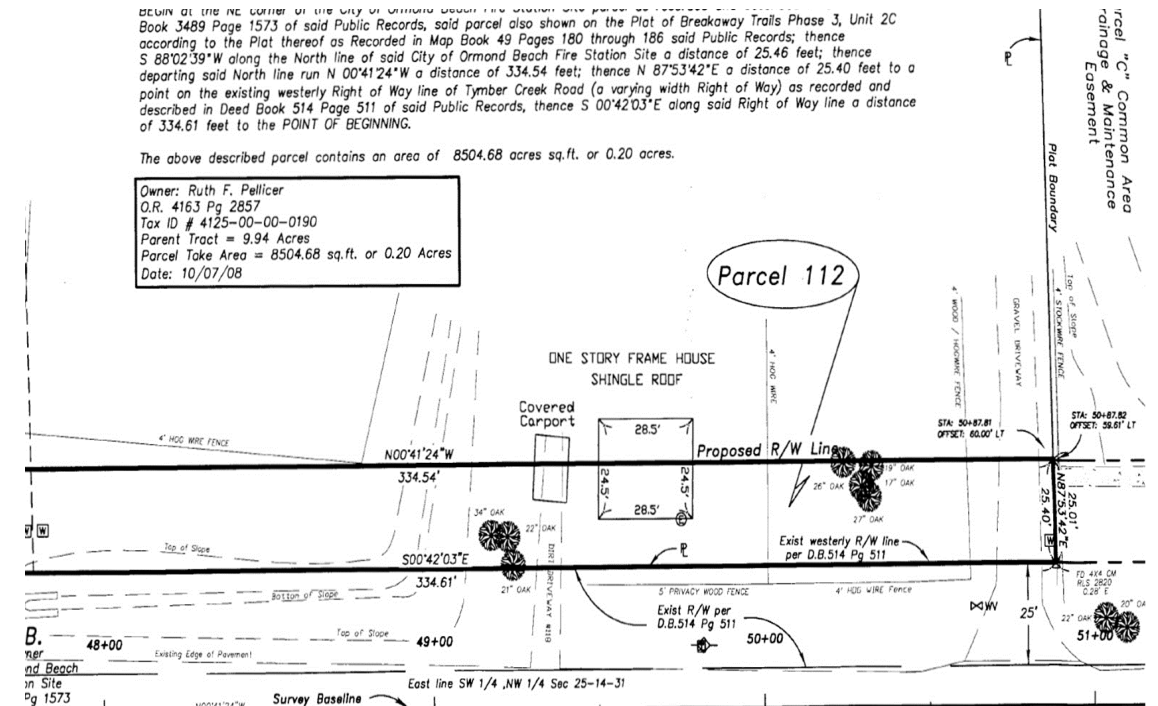
- Targets of inspection
 - Direct owners of all interests, incl. life estates
 - Mortgages and liens
 - Purchase money, reverse
 - Judgments
 - Code Enforcement
 - Tax
 - HOA restrictions with reversionary clauses
 - Divorce and probate
 - Lis pendens

Due Diligence, Title Inspection, cont.

- Additional title issues
 - Adverse possession (open, continuous, exclusive, adjacent, necessary)
 - Physical encumbrances (on survey or observed)
 - Undisclosed liens from current construction
 - Community spousal rights

Due Diligence, Surveys

- Key role of proper survey
 - Exhibit to condemnation resolution
 - Exhibit to condemnation petition
 - Attachment to offer letters
- Described by metes and bounds or subdivision Lot/Block
- Plat (map) attached to a metes and bounds
- Hire experienced surveyor (or use city professional)
- Important! Give title information and project construction information to surveyor



Due Diligence, Surveys, cont.

- Entering onto property to be condemned
 - Physical non-invasive entry usually permitted by statute, state common law, can sue for permission if necessary
 - Measure and draw surveys, take photographs, perform tests, soundings, borings, samplings—allowed under Uniform Law Commissioners' Model ED Code, if non-invasive
 - Preferable to be consensual, obtain written Right of Entry, do work during reasonable hours

Due Diligence, Surveys, cont.

- Attorney Review of a Survey
 - Make sure property description closes! Have city surveyor, engineer review, or learn how to yourself. No gaps, property owners identified.
 - Look for private rights of access (need to condemn), physical encroachments
 - Deed info, acreage, Lot/Block info
 - Stamped and sealed
 - Look at plat notes

Due Diligence, Environmental Assessment

- Best to avoid environmentally questionable sites
 - Dry cleaners, buildings with lead/asbestos issues
 - Worst of all, Superfund industrial property
- Same care in hiring EA firm as surveyor
- Same right of access for most Phase 1 EA's
(*Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887)
- Same care to get right of entry, get initial contact right

Due Diligence, Environmental Assessment, cont.

- Phase 2 EA does not get right of access for intrusive destructive testing
- Deep soil boring, subsurface water testing, geologic studies, wetland delineation are physical takings (*Kane Cty. v. Elmhurst Nat'l Bank*, 443 N.E.2d 1149)
- Attorney role
 - Getting survey, title work to EA
 - Right of Entry, condemnation if needed for temporary easement for phase 2

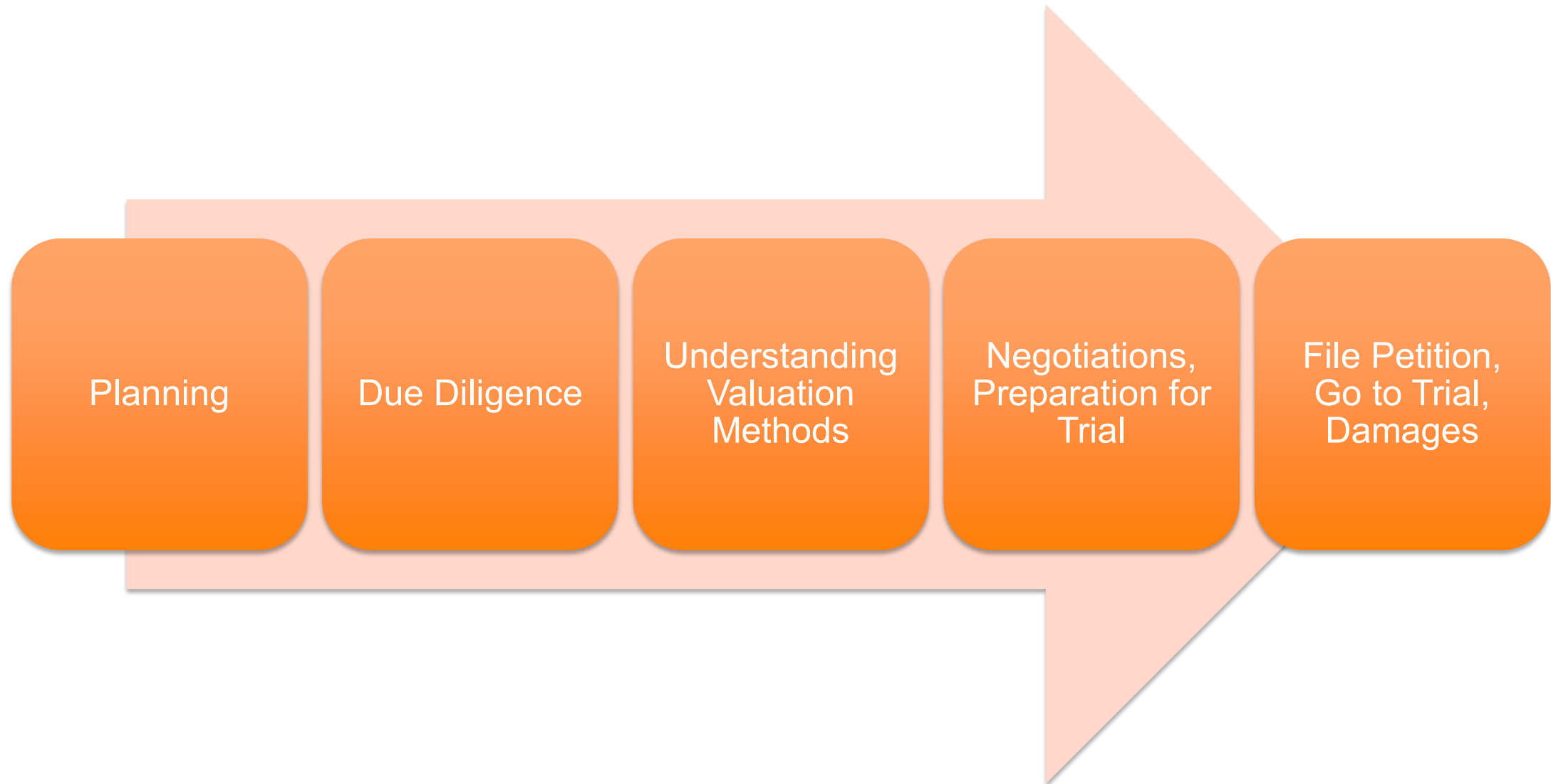
Due Diligence, Appraisal

- If, the EA doesn't rule the parcel out...time to value, negotiate, buy or condemn
- Hire broker or appraiser
 - Broker is good for parcels/projects when ED proceedings are not expected, also to avoid requirement that appraisal must be turned over to owner
 - Appraiser needed for:
 - Commercial/Industrial properties
 - Properties with valuation issues
 - Projects likely to go to ED proceedings

Due Diligence, Appraisal, cont.

- Qualities of good appraiser
 - Experience with the types of damages expected in project
 - Experience representing both condemnors and owners
 - No conflicts of interest
- Information for appraiser
 - Title searches, edited by attorney
 - Surveys
 - Construction plans and schedules
 - Environmental reports

Condemnation Process



Fair Market Value (FMV)

- Established on date of taking
- Based on willing buyer and willing seller with equal information
- No duress
- Reasonable time exposure on market
- Approach
 - Market Data (Comparable Sales); by far, the most common approach
 - Cost (Replacement of unique property)
 - Income (Business capitalization)

Value

- Market Sales—using 3-6 sales (not listings) to reach median value for subject property of ED
 - Want good sales close to parcel in distance, time, property details
 - Carefully review adjustments (in percentages) to each comparable
 - Most important sale's characteristics
 - Corner to corner matches
 - Vacant or developed twins
 - Similar infrastructure, frontage, access, zoning

Value

- Income valuation—establishing FMV by business rental calculation that will be lost due to taking; here, comparable sales aren't common enough or relevant
 - Complex!
 - But definitely introduce
 - Gross revenue
 - Expenses
 - Net income
 - Depreciation after initial income value
 - Use of direct capitalization rate, yield cap discount rate, or multiplier

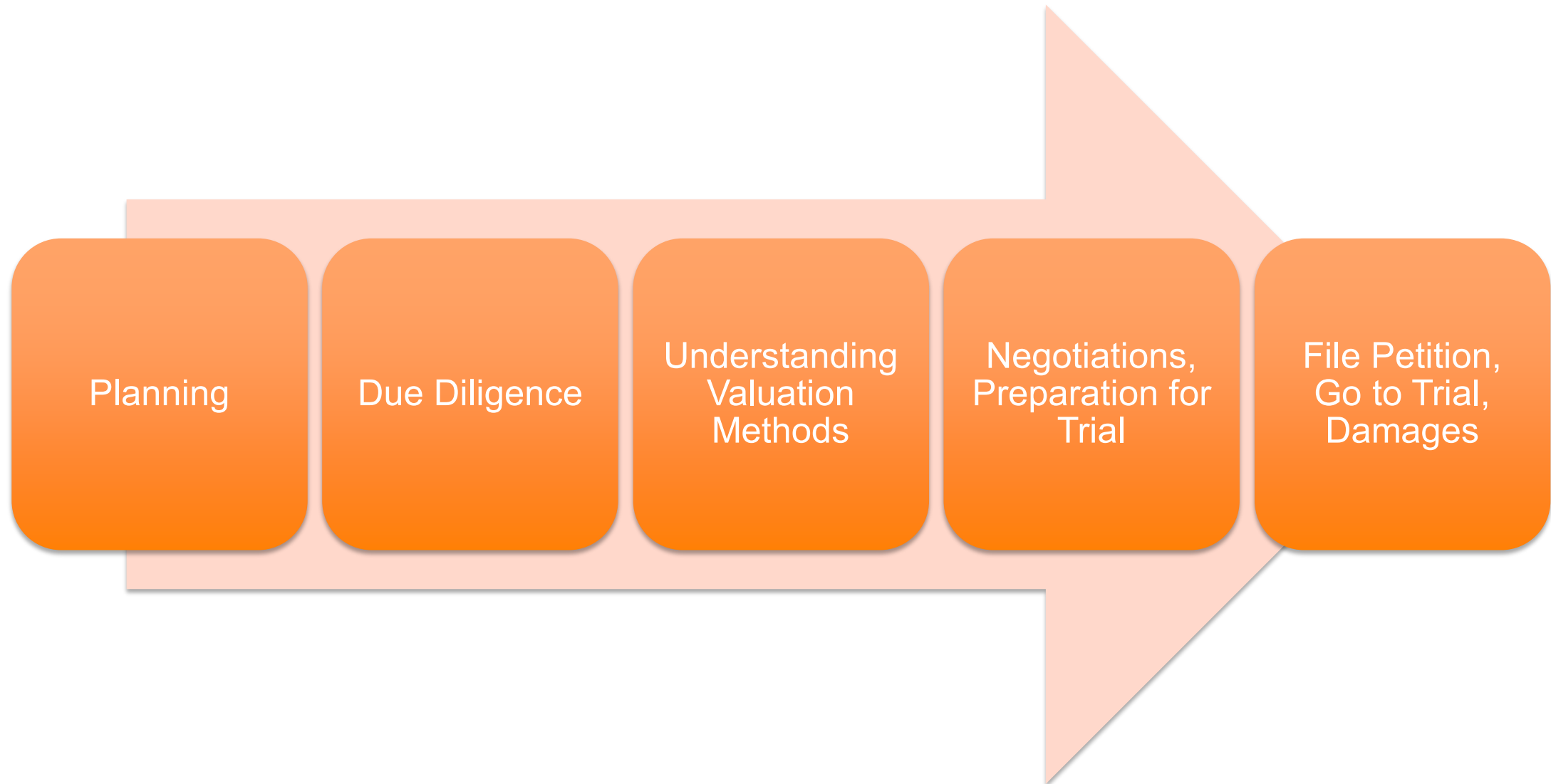
Value

- Cost valuation
- No comparable, or any sales to use
- Many commercial properties may also claim this method
 - Depreciation is important
 - Physical deterioration
 - Functional obsolescence
 - External obsolescence
 - Costing services, in the form of manuals with values, such as Marshall and Swift Valuation Service for replacement cost of unusual structures, materials

Due Diligence, Appraisal, cont.

- Attorney review of appraisal
 - Good site description; acreage, septic tanks, utilities, fixtures, floodplain info, road frontage
 - Details of any improvements; size, room layout, age, condition
 - Analysis and conclusion of highest and best use
 - Physically possible
 - Legally permissible
 - Financially feasible
 - Resulting in the highest value
 - Final number is Fair Market Value of parcel taken and any damages to remainder

Condemnation Process



Negotiations

- Choose experienced ROW agent as point of contact with owner
- Organize room in the legal office on big project
- Have ongoing meetings as project progresses for updates on parcel negotiations, project timeline and route
- Keep City Manager or relevant ACM up to date on ROW expenditures, getting approval as necessary
- Remember PO's Bill of Rights, appraisal disclosures, Uniform Relocation Act rights
- Encourage donations for tax purposes (can provide higher appraisal in that case)

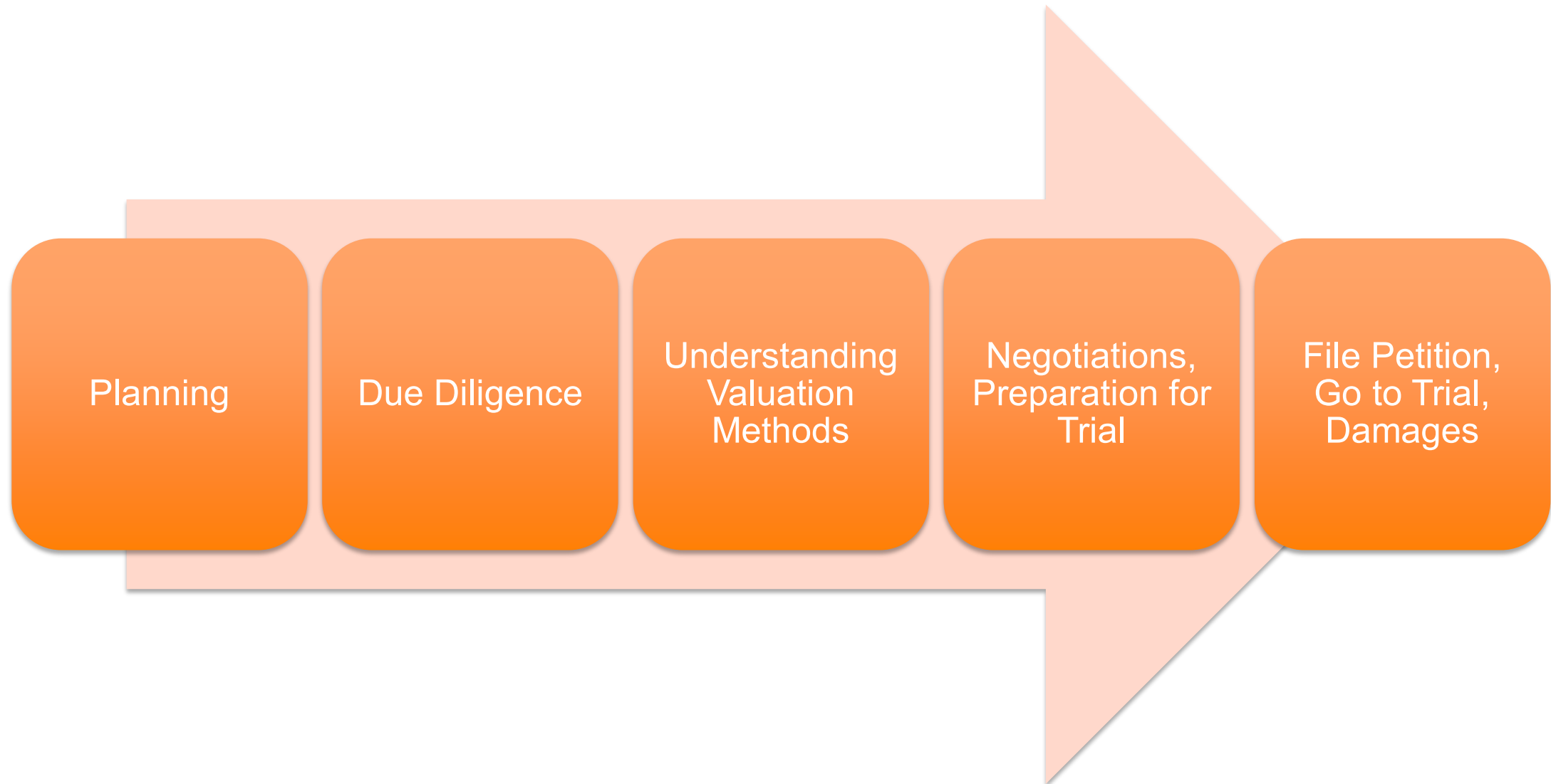
Negotiations, cont.

- Prepare initial offer with all required paperwork
 - Deed/easement
 - Mortgage releases/consent
 - POAs
 - Tax Forms
 - Family or probate documents
 - Corporate authorizations
- Try for early Right of Entry during negotiations
- Allow retention of access, crop yields, minerals

Preparation for Condemnation

- Obtain updated appraisals for those still in negotiation
- Send final offer letter by certified mail with deadline
- Obtain final resolution for condemnation for all needed parcels
- Follow any state required procedures for ED, especially for economic development purposes
- Ensure project has a clear public purpose!

Condemnation Process



File Condemnation Petition

- Bring action in proper court or commission, in county of parcel
- Petition needs:
 - Name of all owners, lienholders, lessees, life estate holders, etc.
 - Legal description with survey
 - Showing of authority to condemn, including governing body action
 - Recitations that statutory prereqs are met, such as good faith offer, appraisal disclosure, PO bill of rights, voting procedures for GB
- File Lis Pendens in county records that references petition to put any potential buyers on notice!! Very important!

Trial

- Remember: only goes to trial if negotiations fail
- Primary issues are:
 - Whether the procedures were followed
 - Existence of public purpose
 - Just compensation
- Utilities may have permits that presume public purpose
- Many states mandate jury trials for just compensation
- Some states (Texas) have special commissioners for first quasi-judicial proceeding that either side can appeal de novo to court

Slow Take versus Quick Take

- Choice of Quick Take or Slow Take in some states
 - Slow Take, can back out if proposed JC is too high, but owe fees and costs
 - Quick Take, get title once proposed JC is deposited with court
 - Example declaration of take:

DECLARATION OF TAKING

The Petitioner availing itself of the provisions of Chapter 74, Florida Statutes, to take possession and title in advance of the entry of a Final Judgment and having heretofore instituted eminent domain proceedings in the above-styled cause for the purpose of constructing and maintaining improvements to the Pioneer Trail and Turnbull Bay Road Project, as set forth in the Petition filed in these proceedings, hereby declares:

- (1) That the property sought to be appropriated in these proceedings is hereby taken for the use set forth in the Petition.
- (2) That estimate of value, made in good faith, and based upon valid appraisals of the parcels sought to be appropriated in these proceedings are as follows:

Common Primary Witnesses

- Appraiser
 - Your expert in the battle of experts
 - Use them to establish your value, to help you destroy the other side's valuation
- Engineer
 - Show how parcel/interest is needed for success of project
- Staff member such as ACM
 - Clarify the public purpose
 - Have this witness go first to introduce project

Damages

- Just Compensation based on the FMV of the property
- Remainder
 - Severance damages to remainder
 - Denial of access, reduced traffic visibility, circuity of travel
 - Enhancement of project to remainder value
 - Defining relevant parcel damaged under single economic unit doctrine
 - Cost to cure when remainder has impaired access or can't meet zoning standards anymore

Damages

- Business loss or economic damages not usually recoverable
 - Loss of profits
 - Loss of good will
 - Inability to find a new business location
 - Exceptions such as
 - hard to remove trade fixtures
 - unique location for business
 - denial of meaningful access to remainder
 - admissible to prove FMV, not for their own recovery

Damages

- Costs and Attorney's Fees
 - Often awarded as part of just compensation
 - Fights over expert witness fees when landowner shows
 - Condemnor made lowball offer and award is far greater
 - Good faith negotiations were lacking