

Understanding the Condemnation Process in Texas

Judon Fambrough

Senior Lecturer
and Attorney at Law

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Summary

The appropriation of private property by the government against the will of the owner sounds contrary to the policy of property rights adopted in this country. However, it can happen legally through a process known as condemnation. Many property owners are not aware of their rights when faced with condemnation and thus fail to act in their own best interests.

This publication explains where the power to condemn comes from, which entities have this power, what the condemnation procedure is in Texas and how property rights are best protected.

It should be noted that the taking of property by way of condemnation can sometimes be averted or delayed. One way is to discover a procedural error; another is to enter an out-of-court settlement. Both alternatives, and more, will be discussed.

The terms eminent domain and condemnation often are used interchangeably, but they are not synonymous. There is an important legal distinction. Eminent domain is defined as the power of the sovereign (or government) to take private property for a public use. Condemnation is the procedure by which the taking or appropriation occurs. Thus, the former is the power, the latter is the process. Only those entities on whom the power has been conferred properly may put in motion the procedure for condemning.

The power of eminent domain in this country is a bit unusual in that it is inherent or implied. Neither the federal nor Texas Constitutions explicitly grant this power. Instead, the law assumes or implies that the power exists in the government whenever a public use will be derived.

By the same token, the exact procedure for condemnation is not addressed by either constitution. Only certain limitations on the process are enumerated. For instance, the federal constitution states that "due process" must be ensured and "just compensation" must be paid to the owner. The Texas Constitution provides that only "adequate compensation" must be rendered. Due process, as pronounced in the federal constitution, applies to all states under the 14th Amendment of the U.S. Constitution. However, this constitutional guarantee does not ensure the citizens of every state a particular form or method of condemnation—only that reasonable notice and reasonable opportunity to be heard and to present a claim or defense must be provided. The general condemnation procedure followed in Texas is found in the Texas Property Code (TPC), Chapter 21, Subchapter B.

The right of the federal government to exercise eminent domain within any state is not subject to control by the state legislature. It is subject only to the federal constitution and the statutes emanating from it. This report does not include any discussion of the federal government, its agents or other entities delegated the power to condemn land in Texas under federal law.

The right of any entity, be it governmental or nongovernmental, to exercise the power of eminent domain must be authorized by statute. There can be no taking of private property against the will of the owner without a legislative directive. The myriad statutes on both the federal and Texas level delegating this power is beyond the scope of this report. Regardless of the entity having the power to condemn, the prescribed procedure is somewhat similar. This report focuses on the condemnation of pipeline and utility easements because of the quantity of Texas land that will be exposed to this process.

Legal Restraints on Condemnation

Condemnation is subject to four restraints: (1) public use, (2) public necessity, (3) just or adequate compensations and (4) due process.

Public Use

Public use is difficult to define. No hard and fast rule has been drafted for determining public use in every instance. Instead, each case must be decided on its own merits and in light of the surrounding circumstances. It is sufficient to say that if there results to the public some definite right or use in business or undertaking to which the condemned property is devoted, public use has been achieved.

After 2005, two new statutes provide that, "A governmental or private entity may not take private property through the use of eminent domain if the taking:"

- confers a private benefit on a particular private party through the use of the property,
- is for a public use that is merely a pretext to confer a private benefit on a particular private party,
- is for economic development purposes unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate slums or blighted areas or
- is not for a public use.

The 2005 statute does not affect the authority of the following entities to take private property through eminent domain for:

- transportation projects;
- port authorities, navigational districts, or conservation or reclamation districts;
- water supply, wastewater, flood control and drainage projects;
- public buildings, hospitals and parks;
- utility services;
- sports and community venue projects approved by voters after Dec. 1, 2005;
- common carrier pipelines or energy transporters;
- underground storage operations;
- waste disposal projects; and
- library, museum or related facilities and infrastructure.

The determination by the governmental or private entity that a taking does not violate this new statute does not create a presumption that the taking is valid.

Constitutional Update

Effective Nov. 3, 2009, Texas voters approved a constitutional amendment further clarifying the term *public use*. The amendment in Section 17, Article I. Section 17(a) reads, "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . . and only if the taking, damage, or destruction is for . . . an entity granted the power of eminent domain under law . . ." The next two subsections elaborate on this language.

Section 17(b) reads, "In this section, 'public use' does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues."

Section 17(c) provides, "on or after Jan. 1, 2010, the legislature may enact a general, local, or special law granting the power of eminent domain to an entity only on a two-thirds vote of all the members elected to each house."

Thus, the constitutional amendment limits the use of eminent domain for a public use.

Public Necessity

Public necessity pertains to the amount of land that can be condemned. The legislature may not authorize, and the condemnor may not legally condemn, more property than is reasonably required to serve the public use. However, the

condemnor's determination of the necessary amount of property is conclusive in the absence of fraud, bad faith or gross abuse of discretion. By the same token, without some constitutional or statutory restraint, the location chosen by the condemnor is final without the showing of bad faith, fraud or an arbitrary or capricious act. Consequently, the condemnor has much latitude in determining the public necessity.

Significantly, a Texas statute limits the type of estate that can be condemned. Section 21.045 of the TPC provides that, as a general rule, no fee-simple estate may be condemned except where expressly provided by law. For pipeline and utility companies, this rule generally limits condemnation to no greater interests than an easement.

An *easement* is defined as a right given to an individual, agency or company by a landowner to make a limited use of a portion of the land for a special purpose. The landowner is not divested of title, only a particular use.

Compensation

As to the element of compensation, Article 1, Section 17, of the Texas Constitution provides, "No person's property shall be taken, damaged or destroyed for or applied to public use without *adequate compensation* being made, unless by the consent of such person; and, when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money. . . ."

The word *property*, as used in the context of the constitution, has been construed to mean not only the physical area being condemned but also every right that accompanies and is incidental to it. In the condemnation of an easement, the *property* would include the land subject to the easement plus every interest, both tangible and intangible, attached to it.

Although the Texas Constitution speaks in terms of "adequate compensation," the Texas statutes refer to compensated damages in terms of "market value." *Market value* has been further defined in case law as "the price the property will bring when offered for sale by the one who desires to sell, but is not obligated to sell, and is bought by one who desires to buy, but is under no necessity of buying." (See *State v. Carpenter*, 89 SW 2d 194, CT. of Civil App., 1936.)

Because the sale must be free and voluntary, settlements of condemnation awards are not admissible evidence. Likewise, the sales must be so situated in terms of character, location and time that they are relevant to the proceedings at hand. The question of relevancy lies primarily with the presiding judge. It has been held that

sales occurring in the vicinity six years earlier were admissible. Also, the appraised value of land recently subject to inheritance taxes is admissible. However, the value of the property should be adjusted to the time of the taking. Consequently, any enhancement in value from the time of comparable sales to the time the condemnee is divested of possession should be considered in the award.

The issue of market value is not necessarily determined by current usage. Texas law permits the consideration of the highest and best use to which the land can reasonably be adapted in ascertaining market value.

The statutory method for establishing market value depends on (1) whether all of the property owner's land in a certain tract is being condemned or (2) whether only a portion of the tract is being taken.

Section 21.042(b) of the TPC applies when an entire tract is being condemned. It states, "If an entire tract or parcel of real property is condemned, the damages to the property owner is the local market value of the property at the time of the special commissioners' hearing."

Two different approaches are used when a partial taking occurs. Section 21.042 of the TPC presents the statutory approach and the case of *Useton v. State* (cited later) describes a possible alternative known as the unity-of-use approach.

The statutory approach takes into consideration three determinants: (1) the value of the parcel being condemned, (2) the injury to the property owner's remaining property (sometimes known as special damages) and (3) the benefit to the property owner's remaining property (sometimes known as special benefits).

If a portion of a tract is condemned for the use, construction, operation or maintenance of a state highway system or of a county toll project that is eligible for designation as part of the state highway system, a different approach is used as set forth in Section 21.042(e). The approach is beyond the scope of this publication on pipeline easements.

Special damages sometimes are referred to as "resulting damages, damages to the remainder, consequential damages, or severance damages." All these terms and phrases refer to the decrease in the value of the remaining land stemming from the partial severance. Depending on the circumstances, these damages could include items such as loss of frontage, loss of access to road or highway, loss of access to pastures, loss of access to a source of water, loss of natural drainage, cost of fencing or refencing certain areas, cost of restoration of property, cost of cleanup and other similar expenses.

Special benefits or special assessments are the opposite of special damages. Special benefits are the increases in value to the remaining uncondemned land resulting from a partial severance. Again, depending on the circumstances, these benefits could include items such as increases in values resulting from the leveling of rough land, draining of swamp land, overall drainage improvement, improved accessibility, adaptability of the remaining land to higher and better uses and other similar benefits.

The court determines the final award by adding the market value of the condemned land to any special damages and subtracting any special benefits. If the special benefits exceed the special damages, it would appear that the final award could actually be less than the market value of the parcel taken. This cannot happen under Texas law.

In Texas, as in most other states, the special benefits accruing to the remaining land may be offset only against the special damages and not against compensation due for the land taken. Texas landowners will not receive less compensation than the value of the condemned parcel. The matter of assessing special damages and special benefits may be avoided entirely if the landowner waives all rights to special damages at the beginning of the proceedings. *This precludes the admissibility of any special benefits into evidence.* However, no such waivers are permissible in the condemnation for state highways.

The other approach of assessing market value for a partial taking is called the unity-of-use submission. Theoretically, this method results in the same figure for the market value as the method just described. The Texas Supreme Court approved this method in cases involving a tract of land that commands a higher value when considered as a whole rather than in parts. (See *Useton v. State*, 499 SW 2d 92, TX. S. Ct., 1973.)

The procedure begins with establishing the value of the complete tract, then the part being condemned. The difference in the two figures yields the value of the uncondemned land *before the taking*. Next, the value of the uncondemned land *after the taking* is determined. (This figure includes any special damages.) The difference between the uncondemned land before and after the taking is then added to the value assessed on the condemned tract. The sum of these two figures yields the compensation due the landowner.

Another element of compensation not directly related to the value of the condemned land is relocation expenses administered under the

Relocation Assistance Program as described in Section 21.046 of the TPC. The program is patterned after the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Program. Basically, the law allows certain monetary assistance for moving and relocating individuals, families, property of business concerns, farm or ranch operations and nonprofit organizations displaced by the condemnation of their real property.

Also, Section 21.043 of the TPC allows for reasonable moving expenses of personal property being transferred from a place of residence or business to another if the person is not entitled to moving expenses under another law. This allowance can be granted only if the landowner is physically and permanently displaced from a dwelling or place of business. The maximum distance for remuneration of a move is 50 miles, and the amount cannot be greater than the market value of the personal property being relocated.

Special Assessment Rules for Possible Water Use from Condemned Land

Effective Sept. 1, 2003, Section 21.0421 of the Property Code imposes special rules for assessing damages when a political subdivision condemns land with potential for water development. Basically, the statute requires the admission of evidence regarding the market value of groundwater, apart from the surface of the land, when the political subdivision proposes to condemn fee title to land and the land may be used to provide groundwater for a public purpose.

In such instances, the market value of the groundwater rights being taken must be assessed using generally accepted appraisal methods and techniques. The statute lists eight specific items for consideration including the quantity of water that may be produced annually as well as its quality.

The 80th Legislative Session

In 2007, the 80th Texas Legislature passed two bills designed to remedy problems confronting landowners facing condemnation. House Bill 2006, later vetoed by the governor, attempted to restore many rights possessed by landowners prior to the Texas Supreme Court decision in 2004. See "This Property Condemned" publication 1710 at <http://recenter.tamu.edu/tgrande/vol12-1/1710.html> for details.

The other bill, House Bill 1495, better known as "The Landowner's Bill of Rights Statement," became effective Feb. 1, 2008. It requires the attorney general to prepare a bill of rights statement for property owners facing condemnation.

The statement must be written in plain language designed to be understood by the average landowner. It must be printed in an easily readable font and type size.

The statement must contain the following five facts or rights:

- you are entitled to notice of the proposed acquisition of your land,
- you are entitled to a bona fide, good faith effort to negotiate the acquisition by purchase in lieu of condemnation,
- you will lose your property once damages are assessed,
- you are entitled to a hearing before the special commissioners regarding the fair market value of your property and
- you have the right to appeal the special commissioners' award to a court of law.

In addition, the Bill of Rights Statement must describe the:

- condemnation procedure,
- condemnor's obligations to the property owner and
- property owner's options during the condemnation process, including the right to appeal the amount of damages.

The statement must be placed on the AG's website and on each condemnor's website if the condemnor is a governmental entity, and it is technologically feasible.

The timing of the presentation to the landowners depends on the circumstances as described later.

The 82nd Legislative Session

Senate Bill 18, effective Sept. 1, 2011, made sweeping changes to the condemnation process outlined in the Texas statutes. Interestingly, it describes two ways for the condemnor to make the initial offer to landowners. One has legal consequences, the other does not.

The first method, found in Section 21.0111 of the TPC, requires an entity with eminent domain authority that wants to acquire real property for a public use *shall* disclose to the owner at the time the initial offer is made, all appraisals produced or acquired during the preceding ten years relating to the determination of the amount of the offer. This offer must be sent by certified mail, return receipt requested. There are no penalties specified in the statute for failing to comply with this requirement.

The other method, found in Section 21.0113 of the TPC, requires an entity with eminent domain authority that wants to acquire real

property for a public use *must* make a bona fide attempt to purchase the property from the property owner voluntarily. The statute then describes the seven requirements for a bona fide attempt. One of these includes the condemnor having the property appraised by a certified appraiser before making the final offer. The final offer must equal or exceed the amount of the certified appraisal. Thirty days must expire between the initial and final offer.

If the condemnor fails to comply with Section 21.0113 and the matter reaches Stage 3, the courts shall order the condemnor to pay the landowner's attorney fees and professional fees and abate the suit. Obviously, a violation has serious consequences.

While Section 21.0111 requires the condemnor to share its appraisals, the same statute requires the landowners to share their appraisals with the condemnor. The owners must share an appraisal within ten days after receiving the appraisal but not later than three business days prior to the special commissioners' hearing.

Section 21.0111(d) provides that a subsequent bona fide purchaser of the property for value from the condemnor may conclusively presume the condemnor shared all their appraisal reports. No similar presumption appears in Section 21.0113 regarding the bona fide attempt to purchase.

In addition to the way the initial offer is submitted to landowners, the new statute addresses some other time limits in addition to the minimum of 30 days between the initial offer and the final offer. For example, landowners have 14 days after receiving the final offer to accept or reject it. If it is not accepted within the 14 days, it is automatically rejected.

In 2009, before the passage of SB 18 in 2011, Section 21.0112 of the Texas Property Code was amended. The new law requires condemnors to send landowners via first-class mail or otherwise provide them with a copy of the Bill of Rights Statement not later than seven days before the final offer is made. This is the same Bill of Rights Statement discussed earlier required to be presented to landowners before or at the same time the condemnor first represents that it possesses eminent domain authority.

Consequently, the Bill of Rights Statement must be given to landowners as many as three times depending how far the condemnation process proceeds:

- When the condemnor first represents to the landowner it possesses eminent domain authority (this does not necessarily mean on first contact),

- At least seven days before the final offer is made and
- With the final offer whenever the statement has not been presented to the landowner previously.

The final offer must include a copy of the certified appraisal along with copies of the proposed easement agreement. The inclusion of the Bill of Rights statement is optional if it has been presented previously to the landowner.

In any offer of purchase, the condemnor may not require confidentiality. In fact, the statute mandates the condemnor to inform landowners that they have the right to discuss the terms of the offer or agreement with others or keep it confidential as they choose.

Another change initiated by Senate Bill 18 addressed the ability of the landowner to construct streets and roads above the pipeline easement. Section 2206.002 of the Government Code allows the construction of streets or roads, including gravel, asphalt or concrete, at any location above the pipeline easement with certain restrictions.

The roads and streets must cross the easement at or near 90 degrees. They may not exceed 40 feet, violate any pipeline regulations or interfere with the operation of maintenance of the pipeline. However, the parties may agree to terms other than those specified.

The property owner must submit plans for the proposed construction of any asphalt or concrete street or road that will be located wholly or partly within the easement at least 30 days prior to beginning construction. Gravel and dirt roads are exempt from this requirement.

Due Process

Due process is a constitutional directive levied against each state. Basically, the condemnee must be provided a reasonable notice and a reasonable opportunity to be heard and to present a claim or defense. These conditions are satisfied in the general condemnation procedure adopted in Sections 21.011 through 21.022 of the TPC. The procedure is divided into three phases or stages: (1) the negotiation between the condemnee and the condemnor, (2) the hearing before the special commissioners and (3) an appeal, if any, from the special commissioner's award.

Stage 1 is completely without judicial involvement. The condemnor is required by law to make a bona fide offer to purchase the property from the landowner. Only after the parties have failed to agree on the amount of damages can the condemnor go to the next stage. However, no effort to purchase need be made if it is clear the parties could never agree or if the attempt would be futile because the owner suffers under

some legal disability. Likewise, where several persons have an undivided interest in the land, failure to agree with any one of them is sufficient cause for the condemnor to petition the court.

While the statute appears to limit the parties' discussion in Stage 1 to damages, landowners must realize this is the only time they can negotiate changes to the proposed easement agreement. Consequently, two things need to be addressed in the Stage 1: changes to the proposed easement and the amount of damages.

This was emphasized in the 2004 Texas Supreme Court decision that sanctioned the condemnors' right to attempt to purchase rights in Stage 1 in the proposed easement agreement even though those rights cannot be later condemned. The High Court ruled the landowners must attempt to remove these excessive rights from the proposed agreement in Stage 1 and possibly in Stage 2 or else the court will not address them in Stage 3.

Stage 2 begins when the condemnor petitions the court after the final offer is rejected. The condemnor files a petition with the proper court. The petition, a copy of which must be sent by the landowner by certified mail, return receipt requested, must contain six essential elements: (1) a description of the land, (2) a statement of the public use for which the land is being acquired, (3) the name(s) of the owner(s) if known, (4) a statement that the parties have been unable to agree on damages, (5) a statement that the condemnor provided the landowner with a copy of the Landowner's Bill of Rights Statement and (6) that the condemnor made a bona fide offer to purchase the property as outlined in Section 21.0113 of the TPC. If even one of these elements is defective or absent, the proceedings can be dismissed.

After the petition has been filed, the judge appoints three disinterested real property owners who reside in the county (giving preference to those agreed on between the parties) as special commissioners to assess damages. The judge must provide each party a reasonable period to strike one of the three commissioners appointed by the judge. If an appointee fails to serve as a commissioner or is struck, the judge shall appoint a replacement.

The special commissioners will be sworn to assess damages fairly, impartially and in accordance with the law. After this, the special commissioners will set a time and place for hearing the parties. The hearing must be held at the earliest practicable day and in a place as near as practicable to the property in question.

Notices of the hearing, issued by the special commissioners to each interested party, shall be served at least 20 days (excluding the day of service) prior to the date set for the hearing. If the interested party is a minor, deceased or legally disabled, a legal representative shall be served the notice. If the interested party is not a resident, is unknown or elects to hide, the notice may be served by publication.

The hearing conducted by the special commissioners is informal. The Texas Rules of Civil Procedure do not apply; hence, landowners may represent themselves without the aid of an attorney, but the assistance of an attorney cannot be discounted.

The special commissioners have the power to compel the attendance of witnesses for the production of testimony, to administer oaths and to punish for contempt. The only issues the special commissioners can legally determine, however, are market value, special damages and special benefits.

Effective Sept. 1, 2011, a new element has been added to the determination of damages. Now, the special commissioners must consider the "material impairment of direct access on or off the remaining property" caused by the taking. This is sometimes referred to as the loss of access. There are some qualifications. Direct access means, according to the statute, "ingress or egress on or off a public road, street or highway at a location where the remaining property adjoins that road, street or highway." It does not include an injury experienced in common with the general community such as indirect travel routes or traffic diversion. The loss of access must be specific to the property condemned.

Again, the propriety of the taking cannot be questioned at this stage. When the special commissioners reach a decision, their assessment is placed in writing, dated, signed and filed with the judge having jurisdiction. If a mutual accord among the special commissioners cannot be reached, the majority—two out of three—control.

Stage 3 begins with an appeal, if any, from the special commissioner's award. If either party is dissatisfied with the award, that party must file formal written objections with the appropriate judge before the first Monday following the twentieth (20th) day after the filing of the special commissioner's award. The proceedings then become a matter for a trial in the county court at law or district court. The case will be tried solely before the judge unless a jury trial is requested. If a jury is convened, it will be composed of six jurors. If no objections are filed

within this designated period, the award becomes final and unappealable.

The appellate trial at the county or district court is quite different from the commissioners' hearing. Here the Texas Rules of Civil Procedure apply. Consequently, an attorney will be needed to represent the landowner. Also, the judge may sit with a six-member jury. The jury will determine the facts—namely, the amount of damages. The judge will determine the legal propriety of the taking if brought into issue. This is the first time the question of the taking can be legally raised and determined. And lastly, the appeal is *de novo*. This simply means that a complete, new trial will transpire. No evidence of the prior special commissioners' hearing, including the final award, is admissible. The special commissioners may even be called as witnesses.

Before going to the special commissioners' hearing and also before appealing the special commissioners' award, the landowner needs to be aware of some critical facts. First, any professional fees the landowner incurs throughout the proceedings, such as attorneys' fees or appraisers' fees, generally must be borne by the landowner. These fees cannot be recovered except when the condemnor violates the bona-fide-offer requirement outlined in Section 21.0113 of the TPC.

Also, should the final award from either the special commissioners or the trial court be less than or equal to the condemnor's offer to the landowner before the proceedings, the landowner must pay, in addition to attorneys' and appraisers' fees, all court costs. However, if the award from either the special commissioners or trial court is more than the condemnor's final offer, the condemnor must pay all court costs but not the condemnor's attorney and appraiser fees.

And finally, it would be helpful for the landowner to know that the condemnor can take possession of the land any time after the special commissioners file their award, with the judge having jurisdiction. This is true whether the special commissioners' award is appealed or not.

To take possession, the condemnor must first post the amount of the special commissioners' award with the court clerk or give it to the landowner. In addition, the condemnor must post with the court clerk a sum (1) equal to the award or (2) a surety bond for the same amount. Also, the condemnor must execute a bond with two or more sureties with the same clerk. The added security is to ensure an adequate source of collateral for any subsequent damages that may be adjudged against the condemnor.

If the landowner intends to appeal the case, it would be wise to refuse acceptance of any part of the award and to have all the award posted with the court clerk. By either accepting the money or by drawing down the posted award, the only issue the court can address on appeal is the amount of monetary consideration due the landowner for the taking. The issue relating to the propriety of the taking is forfeited. Also, any objections to prior procedural irregularities are waived.

Post Condemnation Right to Repurchase

The 78th and 82nd Texas Legislatures affirmed the right of landowners, their heirs, successors and assigns, (landowner) to repurchase the property if certain contingencies occur. The condemnor must inform the landowner of this right when the property is acquired. Without going into details, the landowner has the right to repurchase the property when any of these three events occurs:

- The public use for which the property was acquired is canceled before the property is used for that public use.
- No "actual progress" is made toward the public use for which the property was acquired within ten years of the acquisition. Note that the term "actual progress" is defined in the statute with seven examples of when actual progress occurs.
- The property becomes unnecessary for the public use for which it was acquired or a substantially similar public use before the tenth anniversary date of the acquisition.

A district court may determine whether any of these events have occurred in a suit filed by the landowner. Likewise, the landowner may request the condemnor to make such a determination after ten years from the time of the taking. The condemnor must respond within 90 days.

The entity owning the property must notify the landowner within 180 days after one of the events occurs, triggering the right to repurchase. The landowner has 180 days after receiving the notice to inform the entity of his or her intent to reacquire the property.

Effective Sept. 1, 2011, the repurchase price is the amount paid to the landowner at the time the property was acquired by the condemnor, not the fair market value at the time of the repurchase. Also, unless otherwise specified, the new statute places a one-year limit, for the most part, on the time for the landowner to repurchase. After that, the condemnor is free to sell the property to a third party.

Deed Restrictions and Condemnation

A frequent question regarding condemnation is whether the condemnation of land automatically cancels any deed restrictions on the property. Chapter 21 of the Property Code is silent on the issue.

Section 361.142 of the Texas Transportation Code was very specific. This statute that deals with turnpikes and toll projects provides that covenants, conditions, restrictions or limitations affecting property acquired in any manner, including condemnation, do not impair the ability to use the property for a purpose authorized by the chapter. However, this statute has been repealed.

Effective Sept. 1, 2005, SB 7 amends Section 6, Chapter 178 of Article 3183b-1 and sheds more light on the question. The new statute requires special notices to be sent to landowners when charitable corporations seek to condemn or purchase their real property for a use not in compliance with existing deed restrictions. Before the charitable corporation initiates condemnation proceedings or records the deed, it must provide written notice by certified mail to the owner(s) that the corporation seeks to acquire or purchase the property for a use *that may contravene the existing deed restrictions*. The wording of the statute may require the same notice be sent to all landowners within 200 feet of the property being condemned or purchased.

When Confronted With Condemnation

The following items are some of a landowner's alternatives when all or a part of the owner's land is being considered for condemnation. For convenience, the alternatives have been divided into four categories. They are: (1) monetary, (2) procedural, (3) provisions of the easement agreement and (4) miscellaneous.

Monetary

Many times landowners concentrate solely on the monetary amount being offered. However, the landowner should focus on the provisions of the easement agreement rather than striving entirely for a higher payment.

Because the burden of proving a higher market value lies with the landowner, an appraiser and possibly an attorney are indispensable. However, professional fees generally are not recoverable in any judgment as discussed earlier. Hence, the landowner could easily become a net loser if the fees are not offset by a higher award. Finding an attorney who would take the case on

a contingency fee basis is a possible alternative to the dilemma.

To ascertain whether to employ professionals, the landowner may wish to find out what the special commissioners and the prior trial courts have awarded for comparable land in the county. Likewise, the appraisal reports disclosed by the condemnor should be scrutinized closely. Landowners may compare offers of compensations with other landowners because confidentiality cannot be required. If the condemnor's offer appears to be similar to these figures, the landowner may wish to concentrate on the provisions of the easement agreement.

Procedural

Landowners should scrutinize the condemnation process to ensure that due process is met. Many of the following items can be cured by the condemnor and the condemnation process continued. These procedures may improve the landowner's chances of getting a more favorable out-of-court settlement.

Check condemnor's credentials. Before attempting to negotiate, the landowner may choose to check the authenticity of the condemnor's power of eminent domain. In all probability, the condemnor possesses such power as a result of the frequency with which it has been delegated in Texas.

For example, Section 111.00 *et seq.* of the Texas Natural Resources Code is one of the empowering statutes for pipelines. Generally, any company or corporation qualifying as a *common carrier* in Texas has the right to enter and condemn all or part of land, rights-of-way and easements. This right extends to the property of any person or corporation, if the property is necessary for the construction, maintenance or operation of the common carrier pipeline.

To qualify as a common carrier, the company or corporation must meet two requirements. First, the condemnor must be in the business of transporting oil, gas or coal for *public hire*. However, the power to condemn applies only to property necessary for the pipeline transportation system and does not apply to property for equipment used for other purposes.

Secondly, common carrier pipeline companies must obtain a permit from the Railroad Commission of Texas before operating any pipeline or gathering system in this state. To do so, they must file a T-4 Form with the Railroad Commission and check the box indicating they are a common carrier.

When the condemnee challenges the right of the company to condemn the property, the condemnor must show that a determination of

convenience and necessity to serve the public has been made for the project in question by the governing body, the board of directors or other authority having the power to speak and act for the condemnor. The determination must be shown by some affirmative action such as a resolution from the board of directors declaring the convenience and necessity or other similar actions.

Likewise, the common-carrier pipeline must show they filed the T-4 Form with the Railroad Commission of Texas and checked the box for common-carrier status. Recent case law, however, still allows landowners to challenge the common-carrier status even when the right box is checked.

Right to enter and condemn. A frequently asked question is "When is the condemnor legally allowed to enter and survey the land?" In the statutes just cited, the law gives the companies the right to enter and condemn. Generally, the right to enter arises whenever the condemnor first proposes to take the land. Some landowners have objected and forcibly rejected condemnors' attempts to enter their land. However, the condemnor can get a temporary or permanent restraining order to prevent the landowner from interfering with the condemnor's activities.

Before a condemnor enters to begin any actual operations, the landowner may choose to document the condition of the property with comprehensive photographs of the area.

Section 24.044 of the TPC gives the property owner some protection. If the court determines that the condemnor who has taken possession of the property pending litigation did not have the right to condemn, the court may award damages resulting from the temporary, unauthorized possession.

Statutory procedure. To properly ensure due process, the landowner should check the condemnor's adherence to the following statutory procedural guidelines.

- Effective Sept. 1, 2011, a new wrinkle was added limiting the continued right of entities having the power to condemn. Section 2206.101 of the Texas Government Code requires all entities having the power of eminent domain prior to Dec. 31, 2012, to file a letter with the comptroller stating it is authorized to exercise the power and identify each provision of the law granting the power to the entity. The letter must be sent no later than Dec. 31, 2012, by certified mail, return receipt requested. If the letter is not sent by the end of 2012, the

entities' authority to condemn expires Sept. 1, 2013. Any landowner involved with condemnation after Sept. 1, 2013, should check with the comptroller to see if the letter was filed. Otherwise, the entity has no power to condemn.

- Did the initial petition filed with the court contain these six essential elements: (1) description of land, (2) statement for public use for the taking, (3) name or names of owners, if known, (4) statement that the parties have been unable to agree upon damages, (5) a statement that the condemnor provided the landowner with a copy of the Landowner's Bill of Rights Statement and (6) that the condemnor made a bona fide attempt to purchase the property as outlined in Section 21.0113 of the TPC.
- Did the condemnor file the T-4 Form with the Railroad Commission of Texas indicating a common-carrier status?
- Did the condemnor make an affirmative determination of convenience and necessity to serve the public for the particular project in the passage of a resolution by the board of directors or some similar means?
- Were notices given to all parties and served at least 20 days in advance of the date set for the special commissioners' hearing?
- Were all the special commissioners sworn in before the hearing began?
- Did at least two of the three special commissioners concur and sign the final award?
- Did the special commissioners file the award with the appropriate judge and with the court clerk?

Statutory Procedure for Condemning Water Rights

Effective Sept. 1, 2003, Section 21.0121 of the Property Code imposes specific procedural guidelines on political subdivisions when they propose to condemn groundwater or surface water rights.

In the petition filed with the court, the political subdivision must state and subsequently prove the following five elements. The political subdivision has:

1. prepared a drought contingency plan,
2. developed and implemented a water conservation plan for the highest practicable level of water conservation efficiency,
3. made a bona fide good faith effort to obtain alternative water supplies,

4. made a bona fide good faith effort to acquire the water rights being condemned by purchase or lease and
5. shown that it needs the water to provide for its domestic needs within the next ten years.

Statutory Procedure for Selecting Special Commissioners

The importance of who sits on the special commission cannot be overemphasized. Section 21.019 of the TPC was amended to curb a practice of condemnors dismissing a condemnation action to have it retried before a different combination of special commissioners. Section 21.019(b) of the TPC provides that if a court hears a motion to dismiss a condemnation proceeding, the court shall make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, photographers and other expenses incurred by the property owner up to the date of the hearing.

A party may not dismiss a condemnation proceeding after the special commissioners have made an award in an effort to obtain a lower award. In such cases, if the condemnor dismisses and refuses to condemn substantially the same property, the court will not appoint new commissioners. Instead, the award of the first proceeding will be entered. In addition, according to Section 21.020 of the TPC, the court shall award the property owner three times the amount of all the expenses and fees allowed the property owner prior to the dismissal of the first proceeding.

To ensure the judge appoints the special commissioners according to the statute, here are some items to remember.

- Did the judge provide a list of the potential appointees to the parties prior to their appointment so that the judge's appointments gave preference to the ones chosen by the parties?
- Did the judge give each party the opportunity to strike at least one appointee?
- Did each of the special commissioners reside in the county?

Provisions of Easement Agreement

The negotiation of the terms of the agreement may be the most important aspect of the condemnation process. The agreement will govern the rights and duties of the parties long after the condemnation process is finished. Because an easement or right-of-way constitutes an interest in land, it is imperative that all aspects of the agreement be placed in writing. Section 26.01 of

the Texas Business and Commerce Code provides that no promise or agreement involving a contract for the sale of real estate is enforceable unless the promise or agreement is in writing and is signed by the person to be charged with the promise or agreement.

Most, if not all, of the following items cannot be included in the agreement if the condemnor takes the matter to stages 2 and 3. The landowner may attempt to negotiate some of the items in lieu of a higher award.

The following checklist may be used by the landowner as a guide for negotiations.

- Does the agreement contain an accurate description of the location and width of the permanent pipeline easement with the centerline clearly depicted and surveyed? The agreement needs to contain more than just a description of the property the easement crosses. Otherwise, they can lay the pipeline or construct the transmission line wherever they please. These are better known as "blanket easements."
- Does the agreement contain an accurate description of the location and width of the temporary working easement located on one side or either side of the permanent easement? (The temporary working easement is to be used only during the initial construction period). Does the agreement state when the temporary working easement terminates? Without the termination date, its duration may last beyond the construction stage.
- Does the agreement provide when the permanent easement terminates? Any easement reverts to the landowner when abandoned. However, to prove abandonment in Texas, the landowner must show that the owner of the easement ceased to use it with the intent never to use it again. The intent of a pipeline or power company may be difficult to prove. Consequently, landowners should strive to negotiate a termination date whenever the pipeline does not transport materials for a continuous period such as six to nine months.
- Does the agreement have a written timetable for construction? To achieve the least interference, construction should be scheduled to coincide with periods when the landowner is not using the land. Without a timetable, the landowner must "work around" the condemnor's operations.
- Does the agreement specify the routes of ingress and egress the condemnor may use to access the easement? If not, the condemnor

may use any convenient route or routes. Landowners may wish to limit the condemnor to the easement itself without giving them the right to cross any other property. Otherwise, negotiate and specify the specific routes the condemnor must use. If they fail to use these routes, the personnel shall be viewed as trespassers.

- If they can use access routes outside the easement, does the condemnor have to maintain these roads in a specific manner or be liable?
- Will gates and/or cattleguards be constructed where the routes of ingress and egress enter and leave public roads? Will the gates be kept closed and locked when not in use?
- Will gates and/or cattleguards be constructed where the easement crosses fence lines? Will fences be well braced before they are cut?
- Will temporary crossings be provided across open trenches or ditches?
- Does the proposed pipeline easement address the following items? These are needed to protect the landowners' interest and avoid confusion.
 1. Limit the number of pipes that can be placed in the easement to those needed for the project. Generally, only one pipeline will be required even though more may be requested in the proposal.
 2. State the maximum size and pressure of the pipeline(s).
 3. Limit the products or materials that can be transported through the lines to the one or ones needed for the present project. If the company needs a gas pipeline, then permit only the transportation of gas. If possible, limit the direction the product can flow.
 4. Specify the minimum depth the pipelines must be buried. Texas statutes require a minimum depth of 36 inches measured from the top of the pipe. There is no requirement that the depth must be maintained at that depth in the event of erosion. Landowners may wish to insert a maintenance agreement. Be wary of allowing the pipeline to be buried below "plow depth." That is a very ambiguous term.
 5. Resolve if the original permitted pipe(s) can be repaired or replaced without additional surface damages being required. Likewise, when the easement ends, must the pipeline(s) be removed within a certain period or be forfeited? If they are removed, are surface damages required?
- 6. After the construction ends, make sure the condemnor gives the landowner advance notice before entering the property except in emergencies so the landowner can determine who is a trespasser.
- 7. Resolve what, if any, above-ground facilities may be placed on the easement. Pipeline companies will need to place markers and cathodic protectors along the easement. Allow them, but only at intersecting fence lines. Prohibit compressors without the landowner's prior permission.
- 8. Establish a maintenance schedule. Some landowners require the easement be mowed at least once every six months or whenever needed. However, in Texas, landowners may wish to prohibit any maintenance at least two weeks before and two weeks after the opening of deer season.
- 9. Specify what methods will be employed to keep the landowner's cattle from escaping when the fences are cut during the construction of the pipeline. Likewise, what methods will be employed to keep any wildlife from escaping when a deer-proof fence is breached.
- 10. Determine the manner in which the trench will be opened and closed. Many landowners require the double-ditch method to be employed where the land has topsoil or is in cultivation. The double-ditch method requires the topsoil to be placed on one side of the trench when opened and the subsoil on the other. When closed, the subsoil is replaced first, followed by the topsoil.
- 11. Specify how the debris will be disposed. Generally, the landowner will want all trees, brush and debris removed, chipped or burned. Never allow it to be buried. All rocks exposed during the construction stage will be removed and placed in areas designed by the landowner to inhibit erosion.
- 12. Specify how the area above the constructed pipeline will be restored. Landowners may require the disturbed area to be reseeded and re-established in a grass chosen by the landowner. Make sure berms are constructed on inclines and culverts constructed in low areas when water may collect.

13. Make sure the agreement requires the condemnor to *protect* and indemnify the landowner from any lawsuits arising from the condemnor's activities on the property. This would include any deaths, injuries, destruction of property or governmental lawsuits for environmental violation whether due to the condemnor's negligence or not. If the word "protect" is not included, then the condemnor need only reimburse the landowner for legal expenses. The landowner must hire and pay its own attorneys and look to the condemnor for reimbursement. This may be a perilous position. Likewise, Texas subscribes to the Express Negligence Rule. If the word "negligence" does not appear in the agreement, it is unenforceable. So make sure the words "protect" and "negligence" are included.
14. Make sure that the payment given the landowner at the commencement of the lease covers damages after the construction stage ends. Some easement proposals state that the lump-sum payment covers all present and future damages. Limit the lump-sum payment for damages only through the construction stage.
15. Make sure the lump-sum payment covers or addresses the following three items (1) payment for the easement (both for the permanent and temporary working easements), (2) damages to the remaining property caused by the presence of the pipeline (better known as damages to the remainder) and (3) damages for the impairment of direct access on and off the remaining, uncondemned property caused by the presence of the pipeline. As a general rule, condemnors do not address or ignore damages to the remainder and concentrate solely on the value of the permanent and temporary working easements. Most litigation focus on damages to the remainder.
16. Specify the uses the landowner can make of surface overlying the easement. The new statute allows the landowners to cross the easement if certain requirements are met. However, landowners may wish to specify the pipeline will be buried deep enough to allow heavy machinery to cross it without adding an extra burden on the surface. If an extra burden is required, the condemnor bears the expense.
17. Does the easement agreement contain all the oral promises the condemnor made during the negotiations? For the most part, oral agreements are unenforceable so make sure everything is reduced to writing and placed in the agreement.

Miscellaneous

The following items are other alternatives landowners may find useful when negotiating the easement agreement. No attempt has been made to rank them in the order of importance.

- Make sure you receive an apportionment of damages from the condemnor when you sign the easement agreement. The apportionment should be between payments received for the easement itself and for severance damages (i.e., damages to the remainder). The two are taxed somewhat differently.

The payment for the easement (or easement tract) reduces the landowner's basis in the area taken or condemned. If the easement is 50 feet wide and 1,000 feet long, the payment for the easement tract would be for approximately one acre. (One acre equals 43,560 square feet.) If the landowner paid \$3,000 an acre for the 100-acre tract, then the basis in the easement tract would be just over \$3,000. The award first reduces the landowner's basis in the easement tract (which is nontaxable). The excess is taxed to the extent it is not reinvested in like-kind property within a stipulated period.

The payment for severance damages is taxed in the same manner except the award is first applied to the landowner's basis in the remaining, uncondemned land, better known as the remainder. In this example, the remainder would be the remaining 99 acres with a basis of approximately \$297,000. Although the severance damages reduce the landowner's basis in the 99 acres, the payment is not taxed until it exceeds \$297,000. After that, the excess is still not taxed if it is reinvested in like-kind property as before.

The advantage of receiving severance damages over a payment for the easement is the ability to spread the award over a much larger area. The payment lowers the landowner's basis in the property, but the landowner is presently able to avoid a greater taxable income.

Without the apportionment, the entire payment is presumed to be for the easement and taxed accordingly.

- Try to stay in Stage 1 as long as possible to negotiate the best terms possible to the proposed easement agreement. Once the matter reaches Stage 2, the only issue that can be addressed is damages. Basically, landowners have two choices. They can strive to negotiate the best terms possible to the proposed easement and settle for the amount being offered for the easement. Or, they can attempt to get the most money possible and ignore the terms of the proposed easement. This will entail going to the special commissioners hearing (Stage 2) and possibly higher. Landowners cannot do both. Within reason, they must choose between a better agreement or more money.
- Be reasonable, fair and courteous at all times. If the right-of-way agent is unpleasant or unreasonable, do not hesitate to take the matter to a higher authority within the company. Many managers do not know what their right-of-way agents are doing.
- Be cooperative with the advanced survey team. Do not try to block their efforts as

long as they are conducting operations in a non-negligent manner. However document their activities with pictures to authenticate any claims you have for damages. Ask to be present when they are conducting operations for observation purposes.

- When negotiating with a condemnor, landowners may expect to defend their positions with pertinent data and facts and explore all viable options. This report contains some of them.

Conclusion

The condemnor's rights are paramount to those of the condemnee. However, the sooner landowners act, and act properly to protect their interests, the greater their choice of alternatives.

The sole intent of this report is to inform landowners about the power of eminent domain and the process of condemnation as they are applied and followed in Texas. Also some items have been included for landowners to consider when faced with condemnation.

This report is not a substitute for competent legal counsel or a competent land appraiser.

Glossary

Appropriation—The taking of private property for public use in the exercise of the power of eminent domain.

Assess—To fix the amount of the damages or the value of certain property.

Assignment—The transfer of property or property rights to another.

Bona fide—In good faith; honestly, openly, sincerely, without deceit or fraud.

Bona fide offer—The process required after Sept. 1, 2011, in Section 21.0113 of the TPC. Failure to follow the process may entitle the landowner to attorney and professional fees in Stage 3.

Condemnation—The process by which property of a private owner is taken for public use, without consent, but upon the award and payment of just compensation.

Compensation—The equivalent in money for a loss sustained; remuneration or satisfaction for injury, damage or loss incurred.

Condemnee—The person whose property is being taken by condemnation.

Condemnor—The person or entity taking private property through condemnation.

De novo appeal—An appeal from a lower court to a higher court whereby a complete new trial takes place. All records of the former trial are irrelevant in the new proceedings.

Divest (or divest)—To deprive; to take away.

Due process—A constitutional guarantee requiring every person to have protection of a day in court and the benefit of general law. It requires a notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case.

Easement—The right of one person or entity to use the land of another for a special purpose.

Egress—The right or permission to exit from the property of another.

Eminent domain—The power or right of the state, or someone acting in the name of the state and under its authority, to take private property for a public use.

Fair market value or market value—The price property will bring when offered for sale by one who desires to sell but is not obligated to sell

and is bought by one who desires to buy but is under no necessity of buying.

Fourteenth Amendment—An amendment to the U.S. Constitution that, among other things, secures all persons against any state action that is in deprivation of life, liberty or property without due process of law or denial of the equal protection of the laws.

Indemnity agreement—An agreement whereby one person secures protection from another against anticipated losses, liabilities or penalties.

Ingress—The right or permission to enter the property of another.

Petition—The initial pleadings in a judicial action; an application made to a court.

Private property—Property belonging absolutely to an individual; property not belonging to the sovereign.

Public necessity—A constitutional provision restricting the power of eminent domain to the amount of land absolutely needed for public purposes.

Public use—A constitutional provision restricting the power of eminent domain on occasions where the resulting service or use shall affect the inhabitants of the community as a whole, not merely certain individuals.

Right-of-way—A right of passage over another person's land.

Special benefits—The increase in value to a remaining tract of land resulting from part of it being taken by condemnation.

Special damages—The decrease in value to a remaining tract of land resulting from a part of it being taken by condemnation.

Suit or lawsuit—A proceeding by one person or persons against another or others in a court of justice.

Unity-of-use submission—A particular means of ascertaining market value in a partial taking. It is used whenever the condemnation of a part of a tract of land causes the value of the condemned and uncondemned land to be less than the two tracts taken as a whole.

Jurisdiction of Texas Courts in Eminent Domain Cases
Subchapter A of Chapter 21 of the Texas Property Code
Section 21.001. Concurrent Jurisdiction

District courts and county courts at law have *concurrent** jurisdiction in eminent domain cases. A county court has no jurisdiction in eminent domain cases.

Section 21.002, Transfer of Cases

If an eminent domain case is pending in a county court at law and the court determines that the case involves an issue of title or any other matter that cannot be fully adjudicated in that court, the judge shall transfer the case to a district court.

Section 21.003, District Court Authority

A district court may determine all issues, including the authority to condemn property and the assessment of damages, in any suit:

- (1) in which this state, a political subdivision of this state, a person, an association of persons, or a corporation is a party; and
- (2) that involves a claim for property or a corporation is a party; and occupied by the party under the party's eminent domain authority or for an injunction to prevent the party from entering or using the property under the party's eminent domain authority.

*Concurrent jurisdiction means that more than one court is authorized to hear and decide the matter. The one that actually hears and decides the case lies solely within the petitioner's discretion.

Steps in the Condemnation Process

Step	Event
First	Certificate of Public Convenience and Necessity determined by condemnor.
Second	Condemnor files a T-4 form with the Railroad Commission of Texas and checks the box for a common carrier.
Third	Advance survey crews may enter condemnee's land.
Fourth	Landowner contacted by right-of-way agent for proposed easement
Fifth	If parties are unable to agree, condemnor must comply with Section 21.0113 and have the proposed easement appraised by a certified appraiser before a final offer can be made.
Sixth	The final offer must be at least the amount of the certified appraisal, and at least 30 days must transpire between the initial offer and final offer.
Seventh	The landowner has 14 days to reject or accept the final offer. If rejected, the condemnor petitions the court for the appointment of special commissioners.
Eighth	A three-person special commission is appointed by judge to conduct informal hearing on compensation due landowner.
Ninth	Special commissioners send a 20-day notice of hearing to all interested parties.
Tenth	Hearing conducted.
Eleventh	Special commissioners determine and post compensation due landowner with judge. (Two of three special commissioners must concur.)
Twelfth	Condemnor can take possession of land by posting proper security with court.
Thirteenth	The landowner or condemnor may appeal special commissioners' award before the first Monday following the 20th day after the special commissioners' award is filed.
Fourteenth	If appealed, a full-blown formal trial is then conducted. A six-person jury may be asked for to determine the facts in the case.



MAYS BUSINESS SCHOOL

Texas A&M University
2115 TAMU
College Station, TX 77843-2115

<http://recenter.tamu.edu>
979-845-2031

DIRECTOR

GARY W. MALER

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