



Understanding the Condemnation Process in Texas

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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 Constitution 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 Fourteenth 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 new 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 appears 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 21.405 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.

Effective Sept. 1, 2011, any entity wishing to acquire property by eminent domain must disclose to the property owner, at the time the

initial offer to purchase is made, all appraisal reports produced or acquired during the preceding ten years relating to the determination of the amount of the offer. In turn, the property owner must disclose to the governmental entity all appraisal reports produced or acquired by the landowner in determining the owner's opinion of value. The owner must share the information within ten days after receiving the appraisal report but not later than three business days prior to the special commissioners' hearing.

A subsequent bona fide purchase for value from the condemnor may conclusively presume that all the appraisal reports were properly shared.

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. The first bill, 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 vetoed bill required:

- a bona fide attempt by the condemnor to purchase the property in lieu of condemnation based on its fair market value and
- an abatement of the condemnation process if no bona fide attempt was made.

In addition, the bill:

- defined the term fair market value,
- provided payment for diminished access and
- required payment of the landowners' attorneys' fees in limit instances.

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.

Before the condemnor begins negotiations, it must send a copy of the statement to the property owner's last known address listed on the most recent tax roll via first-class mail. 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,
- the condemnor's obligations to the property owner and
- the 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 82nd Legislative Session

Effective Sept. 1, 2011, the law gives landowners the right to construct streets and roads above pipeline easements. Section 22.06.002 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 parts: (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.

The **first phase** is completely without judicial involvement. The condemnor is required by law to make a bona fide attempt to purchase the property from the landowner. Only after the parties have failed to agree on the amount of damages can the condemnor begin judicial proceedings. 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.

Only a bona fide attempt to negotiate damages must be made. The terms of the agreement, location of the easement, the amount of land taken and similar issues must be disregarded at this point of the condemnation process.

Effective July 2, 2004, the Texas Supreme Court ruled that the condemnor no longer needs to make a bona fide attempt to purchase the property based on market value in the first place. The condemnor must make an offer, any offer, to purchase. Once the offer is made, this gives the trial court jurisdiction to proceed to the next stage in the condemnation process if the offer is refused.

Because of the adverse consequences of the Texas Supreme Court ruling, 82nd Texas legislators amended the TPC effective Sept. 1, 2011. Here is a summary of those changes regarding negotiations during phase one.

The condemnor must make a *bona fide attempt* to purchase the property in lieu of condemnation. The amendment does not require an offer based on fair market value. Instead, the condemnor must comply with the following to meet the bona-fide-offer-attempt requirements.

The initial offer to purchase must be in writing and sent by certified mail, return receipt requested. A final written offer must follow no sooner than 30 days later. The initial offer must include copies of all relevant appraisals produced or acquired by the condemnor during the prior ten years.

Before making the final offer, the condemnor must obtain an appraisal, rendered by a certified appraiser, to assess the value of the property being acquired along with the damages to the remainder, if any. The final offer must equal or exceed the amount of this appraisal.

The final offer must include a copy of the appraisal, a copy of the deed or easement sought by the condemnor to take the property and a copy of the required Landowner's Bill of Rights Statement. The landowner has 14 days to respond. Phase two begins if the landowner does not respond or responds unfavorably to the final offer.

In any offer to purchase, the condemnor may not include a confidentiality requirement. In fact, the statute requires the condemnor to inform the landowners that they have the right to discuss the terms of the offer or agreement with others or keep it confidential if they so choose.

Phase two 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 attempt to purchase the property as outlined in the statute. 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. 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.

The **third and final phase** 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 fees the landowner incurs throughout the proceedings, such as attorneys' fees or appraisers' fees, generally must be borne by the landowner. Landowners can never recover these expenditures from the other party except in limited circumstances.

For example, effective Sept. 1, 2011, Texas legislators added statutory procedures to ensure the condemnor complies with bona-fide-offer requirements. Basically, the court must order the condemnor to pay certain costs and expenses when the matter is appealed into the third stage (or phase three), and the court determines that the condemnor failed to make a bona fide offer as required by the statute in phase one. In such instances, the court must (not may) abate (stop) the suit and order the condemnor to (1) make a bona fide offer, (2) pay all court costs and (3) reimburse the landowner for reasonable attorney's fees and other professional fees incurred directly related to the violation.

Secondly, 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, suc-

cessors 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 is 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.

Section 227.041(a) of the Trans-Texas Corridor Statute gives the Trans-Texas Corridor authorities the “same power and duties relating to the condemnation and acquisition of real property” as is given to the turnpike authorities under Section 361 of the Texas Transportation Code. Thus, it appears that any covenants, restrictions or limitations are not binding on any property acquired in any manner by the Trans-Texas Corridor authorities either.

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 amount of payment they will receive. This is a natural inclination because the first two stages of the condemnation process are limited to this question. However, the landowner may choose to 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 than the initial offer lies with the landowner, an appraiser and possibly an attorney are indispensable. However, professional fees generally are not recoverable in any judgment. 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 an 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 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.

In addition, natural gas, electric current and power corporations in Texas have the right and power to enter, condemn and appropriate land, rights-of-way and easements. The right and power also extend to the property of any person or corporation if the property is necessary to operate lines at and between different points in Texas as is necessary for its purposes. The statutes delegating this right and power are located in Articles 1435 and 1436 of the Texas Revised Civil Statutes.

Although common carrier pipeline companies and gas or electric power companies must

follow the same general procedure for condemning private land, common carrier pipeline companies must obtain a permit from the Railroad Commission of Texas before operating any pipeline or gathering system in this state. Rule 70 of the Texas Railroad Commission was implemented to ensure that any proposed lines will be laid, equipped and managed to reduce the possibility of waste and to ensure compliance with the conservation laws and rules of the commission.

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. When challenged by the condemnee, the condemnor must be prepared to introduce such evidence to establish the jurisdiction of the court.

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 of 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 the statute?
- 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.

The importance of who sits on the special commission cannot be overemphasized. Recently, Section 21.019 of the TPC was amended to curb a practice of condemnors dismissing a condemnation action to have it re-tried 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 proceedings, 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 proceedings after the special commissioners have made an award in an effort to obtain a lower award. In such cases, if the condemnor dismisses and refiles to condemn substantially the same property, the court will not appoint new commissioners. Instead the award of the first proceedings 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 proceedings.

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 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.

Many of the following items cannot be included in the agreement if the condemnor takes the issue of market value to court. The landowner may attempt to negotiate some of the items in lieu of a possible higher judicial award.

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

- Is the proposed location of the easement or right-of-way for the pipeline or utility line accurately described in the agreement? The agreement should contain more than just the legal description of the property it crosses. Otherwise the condemnor may choose to place the utility line anywhere on the described property.
- Has the width of the easement or right-of-way been specified? Some landowners prefer to negotiate two easements—one a fairly wide, temporary working easement and the other, a more narrow, longer-term easement. These easements should be surveyed and clearly marked before operations begin.
- Does the agreement provide when the easement will terminate? 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, some landowners prefer to have the agreement state that the easement reverts when not used for a certain length of time.
- 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. By having a timetable, the landowner can “work around” the condemnor's operations.
- Does the agreement specify the condemnor's routes of ingress and egress? If not stated, the condemnor may use any convenient route or routes. The landowner may explore the possibility of the condemnor constructing and maintaining certain types of access roads. Does the agreement specify all roads

used by the condemnor will be repaired to their former condition or improved when the construction is finished?

- Will gates and/or cattleguards be constructed where the routes of ingress and egress enter and leave public roads? Most landowners prefer to keep gates locked where public trespass is a potential problem.
- 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 condemnor's actual use of the easement consider the following items?
 1. Limit number of pipes or lines to be laid or placed within the easement
 2. State the maximum size of the pipes to be laid
 3. State the maximum pressure or voltage the line or lines can transmit
 4. Determine the minimum depth for buried pipelines
 5. Limit the substances the pipeline(s) can transport
 6. Determine whether additional pipes or lines can to be laid or placed in the easement without further payments or additional damages
 7. Resolve whether the original pipes or lines can be replaced without additional payments or damages
 8. Establish maintenance and inspection schedules to be followed by the utility company (some landowners prefer to maintain the easement themselves)
 9. Resolve whether above-ground facilities can be built and state their locations
 10. Determine the manner trenches or ditches will be backfilled and compacted. (Some landowners state that only topsoil will be used to backfill the trench and a certain extra overburden of topsoil will be maintained for a given period of time to accommodate settling.)
 11. Specify how the easement will be cleaned and restored (Generally, the landowner will want all trees, brush and debris removed or burnt and rocks exceeding a certain diameter placed in a specific location to prevent erosion. Finally, the landowner will want the land restored to its former condition, including depth and fertility of topsoil, replanted or resprigged as soon as practical after the operations cease.)
- 12. Specify the type of electrical support structures to be used—i.e., single pole versus multibase supports (This should have some bearing on the amount of compensation due the landowner.)
- 13. Depict the precise location of electrical support structures (Landowners want them in places where they may least interfere with farming or ranching operations.)
- 14. Limit the height of the power lines transversing the property (Landowners want them placed at heights that cause minimum interference with aerial seeding, crop-dusting or similar operations.)
- 15. Specify the locations of any above-ground structures such as test leads, markers and valves (Landowners want them in places where they least interfere with their operations.)
- Is there an indemnity provision in the agreement to protect the landowner against any future lawsuits? An indemnity agreement provides that the condemnor will save and hold harmless the landowner against any legal causes of action, including environmental, levied against the landowner resulting from the condemnor's activities both on and off the land. The indemnity would be against both judgments and any legal fees incurred by the landowner in defense of a suit.
- Do the terms of the agreement state the condemnor's right to assign interest in the easement to a third party? If such provisions are present, some procedure to notify the landowner of such an assignment may be included. Further, the agreement should state that any assignment of rights must comply strictly with the original easement agreement and may not increase its burden.
- Do the payments coming to the landowner reflect three elements? (1) payment for the easement, (2) payment for damages to crops, timber or other products located within the easement and (3) payment for damages to crops, timber or other products located outside the easement. How will the payments be divided between the landowners and the surface tenant?
- Is the condemnor liable for potential payment of damages for up to three years after the work is completed? If so, this will

ensure the land is properly filled when settling occurs, spots of erosion are carefully tended, injured trees that die later are paid for and other similar occurrences are compensated. The statute of limitations in Texas for these events is only two years unless specified in the agreement.

- Is the condemnor liable for the payment of all survey and filing fees incurred incidental to the condemnation?
- What usage can the landowner make of the surface area within the easement after the construction is completed? Generally, the landowner should be able to use the surface in any way that will not interfere with the condemnor's activities.
- Does the price reflect the size and number of pipes or lines laid within the easement? For instance, the Oklahoma Wildlife Commission charges a set fee per rod for each pipe between one to six inches in diameter. For pipes exceeding six inches in diameter, a fixed surcharge is added. Similarly, for power lines, the Oklahoma Wildlife Commission charges a specific amount per rod for the easement, for a single pole, for a double post and per guy wire.
- Are the details of the agreement in writing? Oral agreements generally are unenforceable.

Miscellaneous

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

- Apportion the payments for the acquisition of the actual easement, for special damages (if any) and for special benefits (if any). The reason for apportionment is twofold.
First, each payment is treated differently for taxes. For instance, payments received for the easement itself are first applied against the cost or adjusted basis of the land condemned as a nontaxable return of capital. Should the payment exceed the landowner's cost of adjusted basis, the excess is taxable if qualified replacement property is not purchased within a stipulated period. (See sections 1033 and 1231 of the Internal Revenue Code and Revenue Ruling 73-161.)
Special damages, on the other hand, are applied first against any expenses incurred by the landowner in securing the severance damages. This would include items such as fees for attorneys, appraisers or photog-

raphers. Any excess received above fees is applied against specific items in the following order until the balance is depleted:

1. Special benefits received on the remaining uncondemned land,
2. Restoration costs or replacement property and
3. Basis in the retained property.

Any remaining damages above these items becomes taxable to the recipient.

If there is no apportionment of the payment or award, the lump sum is presumed for tax purposes to be a payment solely for the acquisition of the easement. (See IRS Revenue Ruling 59-173).

Secondly, should the dispute over value be taken to court, the appellate process may be made easier by arranging an apportionment. Suppose a landowner is satisfied with the award for the easement but dissatisfied with special damages. Unless an apportionment has been made, the landowner cannot appeal this single issue without appealing the total award.

- When negotiating with a condemnor, landowners may expect to defend their positions and be supported with pertinent facts. If the key issue centers on price, then current area market data and appraising services may be essential.
- Be reasonable, be fair and be courteous at all times.
- Resist the temptation to tell an over-aggressive or discourteous representative of the condemnor, "We'll settle this matter in court." This permits the condemnor to end phase one and petition the court for the special commissioners' hearing. After the commissioners filed their award, the condemnor could take possession of the land and begin construction of their project. By cutting short negotiations, the landowners may be doing the condemnor a favor. After July 2, 2004, it is unclear what, if any, attempt the condemnor must make to purchase the land, short of making an offer to purchase.
- Strive, within reason, to establish a favorable out-of-court easement agreement. As stated earlier, many of the items discussed in the prior section cannot be obtained once the matter goes to court. Some of those items might be worth more in the long run than a present higher payment.
- Be cooperative with advanced survey and construction crews. Do not try to block

their efforts as long as they are not conducting their operations negligently. However, do not forget to take comprehensive photographs of the area before, during and after their operations to authenticate any claims that may arise.

- Always make a counteroffer. Never remain silent in lieu of an offer. On July 2, 2004, the Texas Supreme Court ruled that silence signifies a rejection of the offer and justifies the condemnor to end phase one and petition the court for the special commissioners' hearing.

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.

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	Advance survey crews may enter condemnee's land.
Third	Before July 2, 2004, the condemnor made a bona fide attempt to purchase the land based on its fair market value. After July 2, 2004, the condemnor simply makes an offer, any offer, to purchase the land at any price.
Fourth	Before July 2, 2004, the condemnor petitions the court to condemn the land when the condemnor and landowner could not agree on the amount of compensation. After July 2, 2004, the condemnor may petition the court whenever the landowner does not accept the condemnor's offer. The condemnor need not negotiate with the landowner regarding the amount.
Fifth	A three-person special commission is appointed by judge to conduct informal hearing on compensation due landowner.
Sixth	Special commissioners send a ten-day notice of hearing to all interested parties.
Seventh	Hearing conducted.
Eighth	Special commissioners determine and post compensation due landowner with judge. (Two of three special commissioners must concur.)
Ninth	Condemnor can take possession of land by posting proper security with court.
Tenth	The landowner or condemnor may appeal special commissioners' award before the first Monday following the 20th day after the special commissioners' award is filed.
Eleventh	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.