

LAW LETTER

Easement Condemnation

Pipeline Explosions

On Tuesday, April 7, 1992, shock waves literally were felt across south-east Texas. The source? A gas explosion near Brenham, Texas. Although the investigation is not complete, a pipeline discovered burning in the aftermath is the suspected cause.

Aside from the costs in human suffering and the damage to both realty and personalty, other repercussions may affect Texas pipeline companies, assuming the pipeline caused the explosion.

To understand the repercussions, an explanation of Texas condemnation law is necessary. First, not all pipeline companies have the right to condemn an easement. A company or corporation qualifying as a common carrier (for public hire) is granted the power of eminent domain by the Texas Natural Resources Code, Section 111.00 *et seq.*

Second, when an easement is condemned, the condemnor (common carrier) must pay the landowner just compensation (sometimes called *market value*) for the property taken. When only a part of the landowner's property is condemned (better known as a *partial taking*), the formula for the just compensation becomes more complex. The market value of the property taken is added to any special damages to the landowner's uncondemned land. Special benefits, if any, offset special damages only. Special benefits never lower the payment for the part taken.

Special damages are decreases in the remaining land's value as a result of the taking. Depending on the circumstances, these could include items

such as loss of frontage, access or natural drainage.

Special benefits, on the other hand, are enhancements to the remaining land's value caused by the taking. Depending on the circumstances, these could include improved accessibility or adaptability of the remaining land to a higher and better use.

Third, the condemnation process in Texas involves three stages. The process, however, need not include all of them.

The first stage requires the condemnor to make a bona fide attempt to purchase the property from the landowner. If the parties cannot agree on the compensation, stage one ends.

The second stage begins when the condemnor petitions the court. The court will be either the county court at law or, if none, the district court. The petition must contain four elements: (1) a description of the land, (2) a statement of the purpose for which the land is being condemned, (3) the name(s) of the owner(s) if known and (4) an allegation that the parties have been unable to agree on the value of the land.

After the petition has been filed, the judge appoints three disinterested freeholders (landowners) in the county (giving preference to those agreed upon between the parties) as special commissioners to assess damages. The special commissioners will be sworn to assess damages fairly, impartially and in accordance with the law.

The hearing conducted by the special commissioners is informal. Landowners may represent themselves, but

the assistance of a qualified appraiser is recommended. The only issue the special commissioners determine is the fair market value of the property. When a decision is reached, the assessment is placed in writing, dated, signed and filed with the judge having jurisdiction. This ends the second stage.

The third stage begins with an appeal, if any, from the special commissioners' award. If either party is dissatisfied, the party may file formal written objections with the appropriate judge before the first Monday following the twentieth day after the filing of the special commissioners' 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 objections are not filed within this designated period, the award becomes final and unappealable.

But how do these principles relate to the gas explosion in Brenham?

According to the Texas Property Code, Section 21.041, the special commissioners (and ultimately the court if the case is appealed) shall admit four elements of evidence in making their award:

- value of the property being condemned,
- injury to the property owner,
- benefit to the property owner's remaining property and
- use of the property for the purpose of the condemnation.

The Brenham explosion becomes relevant under the second element, injury to the property owner. Six Texas appellate cases have addressed the issue of whether the fear of a gas line explosion is a proper consideration in awarding damages for a pipeline's

condemnation. One case was decided as recently as January 1992.

In *MAPCO, Inc. v. Holt*, 476 S.W. 2d 70 (1972), the court held that hearsay testimony of personal injuries from a pipeline explosion are inadmissible. Some personal knowledge of the event is required.

The second case was a bit more lenient for the landowner (*Buzzard v. MAPCO*, 499 S.W. 2d 352 [1973]). The court ruled that if actual danger of future leaks exists, and if the land suffers a present depreciation in value because of it, the facts may be taken into account as an element of damages.

The third case is the most comprehensive decision to date. Here is a brief summary of the court's conclusions in *Delhi Gas Pipeline Co. v. Mangum*, 507 S.W. 2d 631 (1974).

(1) Before any evidence can be admitted concerning a prior pipeline explosion, similarities must be shown between the line that exploded and the one being condemned. The similarities must be in their essential characteristics so that they are alike in the main or with regard to the overall picture. A showing only that an explosion occurred on a dissimilar pipeline is inadmissible.

(2) Evidence of pipeline ruptures or explosions under different circumstances or which were unrelated or unlike in characteristics or in products transported through the line in question and which would not affect market value of the land involved would be

prejudicial to the condemnor and inadmissible in a proceeding to condemn land for pipeline purposes.

(3) Fears of explosions may be considered in calculating the depreciation in land value if it is established that there is basis in reason and experience for fear of explosion, that such fear enters into calculations of a substantial number of persons who deal in the buying or selling of similar property and that market value has depreciated because such fear exists.

The fourth case, *Heddin v. Delhi Gas Pipeline*, 522 S.W. 2d 886, dealt more with the timing of the explosion than with the award. The case held that evidence of a rupture in another gas transmission pipeline almost eight months after date of taking was not admissible as a factor affecting market value before the condemnor's appraisal witnesses testified on the subject.

The fifth case, *Kaufman Northwest, Inc. v. BiStonne Fuel Co.*, 529 S.W. 2d 281 (1975), dealt with the cause of a pipeline leak. The landowner wanted to prove that pipelines are prone to leak no matter how well they are constructed. To do so, the landowner attempted to introduce evidence of a rupture caused solely by a bulldozer striking a line twice. The appellate court held the evidence inadmissible.

The sixth case, *Stinson v. Arkla Energy Resources, Inc.*, (6-91-081-CV), 1/28/92, reiterated the holdings in the prior cases. Here the landowner attempted to introduce evidence from

the Department of Transportation of approximately 200 reported pipeline explosions filed by energy companies. The trial court allowed only the reports on pipelines similar to the one being condemned. The court stated, "Reduction in market value of land because of fear of an unfounded danger is not recoverable in a condemnation proceeding." This ruling was upheld on appeal.

Thus, in the final analysis, if a common carrier pipeline company attempts to condemn an easement, evidence of the Brenham pipeline explosion may be introduced as an element of damages if:

- the proposed pipeline is similar to the one that exploded at Brenham;
- there is a basis in reason or experience (from personal knowledge) of both the explosion and the resulting damages;
- the fear of an explosion from the line being condemned enters into calculations of a substantial number of persons who deal in buying and selling similar property; and
- market value has depreciated because of such fear.

For more details on pipeline condemnation, order *Understanding the Condemnation Process in Texas*, technical report 394, \$2.

The Law Letter is published quarterly by the Real Estate Center to provide timely legal information that may affect the practice of real estate.

The Law Letter is for information only and is not a substitute for legal counsel. Cases and regulations should be researched carefully as some may have been repealed, reversed or amended after this issue was printed. The Center will not provide specific legal advice or regulatory interpretations.

Richard L. Floyd, director; **David S. Jones**, senior editor; **Shirley E. Bovey**, associate editor; **Robert P. Beals II**, art director; **Rolanda Warren-Yarbrough**, assistant editor; **Judon Fambrough**, attorney and member of the State Bar of Texas.

Real estate licensees may receive this newsletter free by sending name, address, telephone and license numbers to: Shirley E. Bovey, Real Estate Center, Texas A&M University, College Station, Texas 77843-2115. Other subscribers, \$20.