

**EMINENT DOMAIN**

A BRIEF OVERVIEW OF THE LAW OF  
EMINENT DOMAIN AND THE  
CONDEMNATION PROCESS

By

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## **BIOGRAPHICAL INFORMATION**

**Michelle Jones** is currently the principal of her law firm, Griffin & Jones, in Denton, Texas, practicing in the areas of eminent domain, real estate litigation and commercial litigation. Her practice has an emphasis on representing landowners and governmental bodies in real estate matters, including condemnation, easements, development problems and land use issues. Previously, Michelle was with the Office of the Attorney General, Highway Division, in Austin, Texas where she was responsible for securing right of way for the Texas Department of Transportation. She also interned for Chief Justice Tom Phillips in the Supreme Court of Texas. Michelle received a B.A. degree in accounting from the University of Texas at Austin and a J.D. degree from the University of Houston Law Center. Michelle is a former president, vice president and secretary/treasurer of the Denton County Bar Association.

## I. INTRODUCTION

This article will focus on the law of eminent domain and the condemnation process in the State of Texas, primarily from the landowner's perspective, with special emphasis being placed on the commissioners' hearing. It is intended to provide attorneys, landowners and real estate professionals with a basic understanding of the law of eminent domain and condemnation prior to civil litigation.

## II. THE LAW OF EMINENT DOMAIN

Eminent domain is the right or power of a sovereign state to appropriate private property for the promotion of the general welfare of its citizens.<sup>1</sup> In Texas, the state government's eminent domain powers are set forth in the Texas Constitution, which states:

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; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof.<sup>2</sup>

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<sup>1</sup> *Exxon Mobil Pipeline Co. v. Bell*, 84 S.W.3d 800, 804 (Tex. App. — Houston [1<sup>st</sup> Dist.] 2002, pet. denied).

<sup>2</sup> Tex. Const. art. I, §17.

The power to exercise eminent domain under the Constitution resides with the state legislature; however, the state legislature has delegated the power and authority to take private property for public use to the State of Texas, counties, municipalities and non-governmental (for profit) companies such as railroads, utility companies and oil and gas pipeline operators.<sup>3</sup> An example of a non-governmental entity having eminent domain power is found in the Texas Utilities Code, specifically §181.004, which states that "a gas or electric corporation has the right and power to enter on, condemn, and appropriate land, right-of-way, easement or other property of any person or corporation. Eminent domain powers also extend to common carriers."<sup>4</sup> Considering the current economic climate, price of oil and gas and the vast exploration going on inside Barnett Shale, oil and gas pipeline companies are not wasting any time exercising their eminent domain powers. The power to condemn private property is not absolute, however. There are constitutional and statutory restraints.

### A. Public Use Requirement.

One of the constitutional restraints is the "public use" requirement. The government, or private corporations with authority to exercise state eminent domain power, are authorized to take private property only if it is for public use. What constitutes "public use" has been broadly defined by Texas courts, and even more so by the federal courts. Texas courts have generally interpreted the term "public use" to mean situations where the public is entitled to share indiscriminately in the proposed use as a matter of right.<sup>5</sup> The United States

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<sup>3</sup> *Id.*; *Mercier v. MidTexas Pipeline Co.* 28 S.W.3d 712, 716 (Tex. App.—Corpus Christy 2000, no pet.).

<sup>4</sup> TEX. BUS. CORP. ACT. ANN. ART. 2.01(B)(3)(b) (Vernon Supp. 2001).

<sup>5</sup> *See Whittington v. City of Austin*, 174 S.W.3d 889, 897 n. 3 (Tex. App.—Austin 2005, pet denied).

Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005), provided a much broader interpretation of “public use.” The Supreme Court held a city may use eminent domain powers for a planned economic development that was not open to the general public provided there was an underlying *public purpose* for the development.<sup>6</sup>

In response to *Kelo*, the Texas legislature passed a new statute in 2005 that stated no government or private entity may take private property if the taking of the property: (1) confers a private benefit on a particular private party through use of the property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or (3) is for economic development purposes.<sup>7</sup> This new legislation does not apply, however, to the takings for the following types of projects:

1. Water supply, wastewater, waste disposal and flood control;
2. Libraries, museums and similar public buildings, such as hospitals and parks;
3. Utility services;
4. Transportation, common carriers or energy transporters, port authorities, navigational districts or conservation or reclamation districts;
5. Underground storage operations; and
6. Sports and community venue projects approved by voters after December 1, 2005.

The impact of the economic development limitation is further diluted by exclusion in the statute that allows private property to be taken for economic development purposes if the

economic development has a secondary purpose resulting from a municipal community development or municipal urban renewal activity.<sup>8</sup>

There are also limitations placed on the on the size and location of the property being acquired. The condemnor is prohibited from condemning more property than is reasonably necessary to serve the public use. This is commonly referred to as the public necessity requirement. For instance, the condemnor may not acquire more land than is necessary simply to sell it for profit to assist in financing the project. The condemnor has broad discretion, however, in determining the amount of property and the particular piece of property. In fact, the condemnor’s determination is conclusive in the absence of fraud, bad faith or gross abuse of discretion and the location chosen by the condemnor is final without the showing of bad faith, fraud or an arbitrary or capricious act.<sup>9</sup> Like any other lawsuit, trying to prove fraud, bad faith or gross abuse of discretion, absent unique facts or circumstances, is extremely difficult, and therefore contesting the size of the taking or location is rarely an issue in most condemnation proceedings.

#### **B. Adequate Compensation Requirement.**

The condemnor is also required to pay adequate compensation for the property.<sup>10</sup> And before filing a condemnation proceeding, the condemnor is statutorily required to negotiation in good faith with the

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<sup>6</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005)

<sup>7</sup> TEX. GOV’T CODE ANN. §2206.001 (Vernon Supp. 2006).

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<sup>8</sup> *Id.*

<sup>9</sup> *Malcolmson Road Utility Dist. v. Newsom*, 171 S.W.3d 257, 269 (Tex. App.—Houston [1<sup>st</sup> Dist] 2005, no pet.)(condemnor’s discretion to determine what and how much land to condemn for its purpose is nearly absolute).

<sup>10</sup> Tex. Const. art. I, §17.

landowner concerning the value of the property being taken.<sup>11</sup> The statutory prerequisite to negotiate in good faith may be satisfied by making a single offer provided it is a bona fide offer to the landowner that the condemnor believes in good faith is the amount of compensation due, and the landowner rejects that offer.<sup>12</sup>

The Texas Constitution is silent with respect to what constitutes adequate compensation, but the Texas Property Code refers to compensation in terms of the property's "market value."<sup>13</sup> Texas courts have defined market value as the price a willing buyer would pay for the property at the time of the taking if it were for sale.<sup>14</sup> Market value is not determined by the property's current usage; instead, Texas law permits the consideration of the highest and best use of the property.<sup>15</sup> Market value and highest and best use of a particular piece of property are discussed in more detail in the following section.

### III. THE CONDEMNATION PROCESS

Condemnation is the process by which the government exercises its eminent domain powers.<sup>16</sup> The condemnation process commences after the condemnor and landowner fail to agree on the amount of compensation, and the condemnor files

a petition with in the proper court.<sup>17</sup> The condemnation petition must describe (1) the property to be condemned, (2) state the purpose for which the entity intends to use the property; (3) state the name of the owner of the property if the owner is known; and (4) state the entity and the property owner are unable to agree on the damages.<sup>18</sup>

The rules and procedures governing condemnation proceedings are set forth in Chapter 21 of the Texas Property Code. The district court or county court at law have concurrent jurisdiction in eminent domain cases; a county court has no jurisdiction to hear such matters.<sup>19</sup> Venue is in the county in which the landowner resides if the landowner resides in a county in which part of the property is located; otherwise, venue is any county in which at least part of the property is located.<sup>20</sup>

After the condemnation petition is filed, the presiding judge is required to appoint three disinterested property owners who reside in the county as special commissioners to assess the damages to the condemned property.<sup>21</sup> The special commissioners must file an oath with the court stating they will fairly and impartially assess the damages according to the law, and then schedule a commissioners' hearing as soon as practical and as near as possible to the property or at the county seat.<sup>22</sup>

### IV. PRESENTING YOUR CASE AT THE COMMISSIONERS' HEARING

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<sup>11</sup> TEX. PROP. CODE ANN. §21.0002 (Vernon 2004).

<sup>12</sup> *Bell*, 84 S.W.3d at 803 (a condemnor is not required to continue to negotiate when further attempts appear futile).

<sup>13</sup> TEX. PROP. CODE ANN. §21.042(b)(Vernon 2004).

<sup>14</sup> *McKinney Independent School Dist. v. Carlisle Grace, Ltd.*, 222 S.W.3d 878, 883 (Tex. App.—Dallas 2007).

<sup>15</sup> *Id.*

<sup>16</sup> *City of Houston v. Boyle*, 148 S.W.3d 171, 178 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

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<sup>17</sup> TEX. PROP. CODE ANN. §21.012(a)(Vernon 2004).

<sup>18</sup> *Id.* at §21.012 (b).

<sup>19</sup> *Id.* at §21.001.

<sup>20</sup> *Id.* at §21.013(a).

<sup>21</sup> *Id.* at §21.014(a).

<sup>22</sup> *Id.* at §§21.014(b); 21.015(a).

A Commissioners' hearing is an administrative proceeding; therefore, neither the Texas Rules of Evidence nor the Texas Rules of Civil Procedure apply. The Texas Property Code does, however, provide some ground rules. Section 21.016 of the Texas Property Code requires that notice of the hearing must be served on a party not later than the 11<sup>th</sup> day before the day set for the hearing.<sup>23</sup> The notice may be served on the landowner, landowner's agent or attorney.<sup>24</sup>

Courts in the past have discussed the statutory provisions of the property code and have held that strict compliance was necessary to vest a court with jurisdiction over the proceedings and that ignoring the statutory requirements could render the proceedings void.<sup>25</sup> By attending the Commissioners' hearing, a landowner waives the statutory requirement that the condemnor negotiate in good faith with the landowner.<sup>26</sup> Because the parties are entitled to a trial de novo, some authorities have recommended that a landowner not attend a commissioners' hearing. This would preserve any challenge related to the duty to negotiate in good faith and possibly have a court dismiss a condemnation proceeding on a plea to the jurisdiction.

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<sup>23</sup> *Id.* at §21.016(a).

<sup>24</sup> *Id.* at §21.016(d)(1).

<sup>25</sup> *Brinton v. Houston Lighting & Power Co.*, 175 S.W.2d 707, 709 (Tex.Civ.App.—Galveston 1943, writ ref'd), *City of Houston v. Derby*, 215 S.W.2d 690, 692 (Tex.Civ.App.—Galveston 1948, writ ref'd).

<sup>26</sup> *Jones v. City of Mineola*, 203 S.W.2d 1020 (Tex.Civ.App-Texarkana 1947, writ ref'd), *Lin v. Houston Community College System*, 948 S.W.2d 328 (Tex. App.—Amarillo 1997, writ denied); *Austin Home Center Assoc. v. State*, 794 S.W. 593, 594 (Tex. App.—Austin 1990, no pet.).

However, in *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3rd 172 (Tex. 2004), the supreme court held that the failure to negotiate in good faith was not jurisdictional. The Court further held that an abatement for a reasonable period of time to allow a condemnor to satisfy this requirement is the proper remedy.<sup>27</sup> This recent holding has significantly reduced any advantage that might have been gained by not attending the commissioners' hearing. However, in order to take full advantage of the commissioner's hearing, you must prepare and put on a strong case.

A Commissioners' hearing is the landowners' first real opportunity to present their case to the condemning authority. Although there may have been some interaction with a right-of-way agent and possibly an appraiser, the commissioners' hearing usually causes the condemnor to focus on a particular property and the strengths and weaknesses of their case. It is most likely the only occasion, other than a trial on the merits, for a landowner to present their case in a formal fashion directly to the condemning authority. You have the opportunity to start "selling your property." In a very real sense, when you represent a landowner, you are selling their property to a condemning authority. At the hearing you have the opportunity to present the case in an evidentiary-type setting and you can create a lasting impression on the representative of the condemning authority.

#### **A. First things first...READ THE PLEADINGS**

What rights are being condemned? If you are representing a condemning authority, a landowner, or appraising the property, this should be the first question you ask. Is the taking an

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<sup>27</sup> *Hubenak*, 141 S.W.3rd at 184.

easement or fee simple? If it is a fee simple acquisition, evaluate the access rights. Determine if there are any improvements in the taking. Does the petition set forth who replaces any improvements, including fencing, driveways, or landscaping? If it is an easement, what rights are acquired and what remains in the landowner? As elementary as this seems, it is important to focus on the language in the petition. Tailor your questions of the condemnor representatives to the rights being condemned. In a commissioners hearing, the condemnor will typically put on evidence of what property is being acquired through an engineer or a company representative. This witness will describe for the commissioners what property is being acquired and how it will be utilized. If the testimony varies from the petition, it is important to point out the legal rights acquired versus the testimony of the witness regarding what is proposed.

A condemnor may acquire an unlimited easement.<sup>28</sup> When an unlimited easement is sought, it may be done by explaining the legal rights of the parties in language consistent with principles governing common law and statutory rights connected with the easement.<sup>29</sup> The *Celanese* case also goes on to describe a limited easement and that in “some situations a condemnor may not desire to use an easement to its full legal extent.” The condemnor may intend to limit its rights from those to which he is entitled under common law and statutory rules, or to create specific proprietary rights in the landowner. Under these circumstances the condemnor will be seeking only a limited easement...In these situations the petition should include allegations to that effect. Consistent with the

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<sup>28</sup> *Coastal Industrial Water Authority v. Celanese Corp.*, 592 S.W.2d 597 (Tex. 1979).

<sup>29</sup> *Id.*

pleadings, the charge may apprise the jury of any limitations on the easement and damages may be commensurately reduced.”<sup>30</sup>

If a pleading for an easement attempts to specify a right that belongs to the landowner (ie. the right to grow crops or cross the easement with utilities and roads), it should not require the approval of plans or the submission of information to the condemning authority. This sort of language converts the proposed limitations on the easement into “mere promises.” During the commissioners’ hearing a landowner should object to this testimony and, if either part objects to the award, special exceptions should be filed with the court urging that such language be struck from the petition.

Finally, evaluate the physical obstructions that may arise from the taking. With an easement, will the depth of any improvement conflict with your future development? Will you be able to put your gravity flow utilities be impacted? If it is a roadway, are there any restrictions on access due to grade changes, driveway policies, or drainage features. The petition may not restrict access, but the improvements themselves may place physical impediments in the way. You will most likely need an engineer and/or land planner to evaluate and testify regarding these issues.

## **B. Establishing Market Value**

At the Commissioners’ hearings, and the majority of trials, the only issue will be the amount of just compensation due the landowner. Your evidence will be the market value of the property before the taking, the market value of the property being acquired, and the market value of the remainder after the taking.

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<sup>30</sup> *Id.* at 601 (emphasis added).

Market value is defined as what a willing buyer and a willing seller would pay for the property.<sup>31</sup>

The components of your presentation are as follows:

- i) the highest and best use of the property before,
- ii) the value of the whole property before,
- iii) the value of the land being acquired,
- iv) the highest and best use of the property after the taking, and
- v) the value of the remainder after the taking.

Highest and best use is the “The reasonably probable and legal use of vacant land or improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest values.<sup>32</sup> If you are able to demonstrate a change in highest and best use because of the taking, it will generally increase your damages.

The three approaches to value that have been consistently approved by the courts are the cost approach, the sales comparison approach, and the income approach. The sales comparison approach finds comparable sales and adjusts them to estimate the value of the whole property before the taking; the cost approach incorporate the sales comparison method to value the land and then finds a depreciated value of all improvements, and the income approach looks at the market rents that are being paid for comparable properties and uses this information to formulate a value for the whole property.

Other approaches to value have been presented in the past. The duplicate facilities doctrine has been narrowly approved in a few instances. Its application was discussed at length and ultimately disapproved for valuing a private school in *Religious of the Sacred Heart of Tex. v. City of Houston*, 836 S.W.2d 606, 613 (Tex. 1992). In the case of *City of Harlingen v. Estate of Sharboneau*, 88 S.W.3d 177 (Tex. 2001), the Supreme Court held that the trial court improperly allowed the appraiser for the landowner to value the whole property before the taking based on a hypothetical subdivision analysis. The appraiser had basically analyzed a hypothetical subdivision and the prices that would be paid for lots and then backed into a value for the raw land by subtracting the costs of development.

Although rejected, an argument can be made that the subdivision analysis could still be useful in analyzing the damages to the remainder. If the taking impacts the development expenses or decreases the lot yield, this can be a factor that your appraiser considers in his opinion of damages to the remainder. For example, a diagonal easement crossing will likely cause unusable areas in a development thereby decreasing lot yield in a residential development. Additionally, a buried pipeline could create additional engineering expenses for residential or commercial property. Your expert should consider these sorts of issues in looking at both the highest and best use of the remainder as well as any damages to the remainder.

Pictures are often critical to a presentation and help support your market value. There are numerous aerial photography services that can provide you with photographs of the property as well as the surrounding areas. They can mount these photos,

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<sup>31</sup> *Carlisle Grace*, 222 S.W.3d at 883.

<sup>32</sup> *City of Sugar Land Texas v. Home and Hearth Sugarland, L.P.*, 215 S.W.3d 503, 511 (Tex. App.—Eastland 2007).



label roadways, developments, and color the taking. The aerials are far more effective than a verbal description of the property and area.

### C. The Award

After the hearing, the special commissioners enter an award. Sections 21.041 and 21.042 of the Texas Property Code require the commissioners to base the damages awarded to the property owner on the following categories of evidence: (1) the value of the property being condemned; (2) injury to the property owner; (3) benefit to the remaining property; and (4) use of the property by the condemnor seeking to acquire the property.<sup>33</sup> The decision by the special commissioners does not have to be unanimous, but at least two of the three commissioners must agree for the award to be valid and binding. If the commissioners award greater damages than the condemnor offered to pay the landowner before the condemnation proceedings or if the decision of the commissioners is appealed and a court awards greater damages than the commissioners awarded, the condemnor shall pay all costs. However, if the commissioners' award or the court's determination of the damages is less than or equal to the amount the condemnor offered before the condemnation proceedings, the landowner shall pay the costs.<sup>34</sup>

The special commissioners are required by statute to make a written statement of their decision, called the Award of the Special Commissioners, and file it with the court on the day the decision is made or on the next working

day after the decision is made.<sup>35</sup> Either side may appeal the Commissioners' Award by filing objections to the award on the Monday following the expiration of 20 days after the award.<sup>36</sup> By objecting to the Award, either party is entitled to a trial de novo in front of either a judge or a jury.

### V. POSSESSION OF PROPERTY PENDING LITIGATION

Section 21.012 of the Texas Property Code permits the condemnor to take possession of the property after the commissioners' hearing by paying, either directly to the landowner or into the registry of the court, the amount awarded by the special commissioners, plus any costs entered against it. The condemnor, except for states, counties, municipalities and water districts, are also required to place an amount equal to the commissioners' award, either in cash or surety bond, into the registry of the court and are required to execute a bond to secure payment of additional costs.<sup>37</sup>

After depositing the money, the condemnor is entitled to possession of the property it seeks to acquire.<sup>38</sup> The date the money is deposited into the registry of the court establishes the date of taking of the property.<sup>39</sup> The date of taking is significant because it establishes the date for which the property will be forever valued during the condemnation proceeding.

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<sup>33</sup> TEX. PROP. CODE ANN. §§21.041; 21.042 (Vernon 2004).

<sup>34</sup> *Id.* at §21.047.

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<sup>35</sup> *Id.* at §21.048.

<sup>36</sup> *Id.* at §21.049.

<sup>37</sup> *Id.* at §21.021(c).

<sup>38</sup> *Williamson v. County of Dallas*, 519 S.W.2d 495 (Tex. Civ. App. —Waco 1975, writ ref'd n.r.e.).

<sup>39</sup> *Id.*; *City of Fort Worth v. Corbin*, 504 S.W.2d 828 (Tex. 1974).

The landowner may withdraw the funds from the registry of the court, and continue litigating the amount of damages to the property. However, once the funds are withdrawn, the landowner is precluded from contesting the right to take the property.<sup>40</sup> Thus, if you intend on litigating whether the condemnor intends to condemn the property for public use, or the size or location of the taking, do not withdraw the funds. In addition, you should advise the landowner prior to withdrawing the funds, there is a chance the court will find the amount awarded by the commissioners was excessive, and order the landowner to refund the excess to the condemnor.<sup>41</sup> This could become problematic if your client has spent all of the money.

## VI. CONCLUSION

This article is intended to provide a general overview of the law of eminent domain and the condemnation process prior to trial. It is more complicated and comprehensive than many realize, and extends well beyond government projects related to building of roads, highways, schools and other public facilities. It is important to remember that the condemnation process does not conclude after the commissioners' hearing or once the funds are deposited into the registry of the court. If either side objects to the award, the matter is transferred to the presiding court for trial de novo. At that time, you are now involved in a civil lawsuit. It is recommended that both parties retain counsel, if they have not already done so.

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<sup>40</sup> *Celanese*, 592 S.W.2d 597 (Tex. 1979).

<sup>41</sup> TEX. PROP. CODE ANN. §21.044(b)(Vernon 2004).