

## Eminent Domain: The Pendulum Swings



### How Senate Bill 18 Changed the Practice of Eminent Domain Law

TCAA Summer Conference  
June 20, 2014

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## Presenters

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## Main Changes

- More costly
- More time
  - Pre-petition considerations
  - Negotiations
  - Administrative requirements

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### The Law: Pre-2004

- Courts had differing opinions about the quality of negotiations
  - elements of “good faith” offer
  - number of offers or counters, thereto
- Did the offer match the property condemned?
  - property descriptions or rights
  - concessions that could not be condemned for

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### The Law: Pre-2004

- Uncertainty as to satisfying pre-petition negotiations
- Remedy for deficiency:
  - Dismissal for lack jurisdiction
  - Not ruled on until after Commissioners’ Award appealed to the trial court

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### Hubenak v. San Jacinto Gas Transmission Co. - 2004

- Need only one offer
- Offer must be for same land and same purpose
- Offer can contain other terms not condemned for
- If no offer made, abatement, not dismissal, is the remedy



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### Senate Bill 18 signed by Governor Perry - May 23, 2011



- Also present:
- Agriculture Commissioner Todd Staples
  - Sen. Craig Estes
  - Sen. Robert Duncan
  - Rep. Charlie Geren

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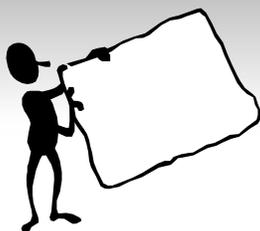
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### Senate Bill 18 requires a “bona fide offer”

- Day 0 - Make initial offer
- Before Day 30 - Get written appraisal
- Day 30 - Make final offer at least as large as appraisal amount; include bill of rights, appraisal, and conveyance instrument
- After Day 30 - Give 14 days to respond
- Day 45 or later - File petition



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### Delay caused by bona fide offer requirements



- Time from offer to petition:
- Old law – 14 days
  - New law – 45 days

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**Unanswered questions about a “bona fide offer”**

- How are offers made?
- When are offers considered made?
- Does the offer have to match the rights condemned for?
- Is futility a defense?
- Can the bona fide offer requirement be waived?



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**Bona Fide Offer Made?**

- Statute does not specify the manner in making the offer
  - Regular Mail
  - Certified mail, RRR
  - Via Fax or Email

Best practices suggest CMRRR and Regular 1<sup>st</sup> Class Mail

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**Bona Fide Offer Made?**

- When is the Offer made?
  - When sent
  - When received
- hard to argue that an offer has been made if the offeree has not received it!
- Mailbox Rule- presumes an item properly sent thru U.S. Mail was received in due course.

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### Bona Fide Offer Made?

- Best Practice is to be sure the offer is received by
  - Hand delivery
  - Certified mail
- Then count days from when received before issuing FOL or filing petition

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### DOES THE OFFER HAVE TO MATCH WHAT IS CONDEMNED?

- SB 18 does not address this
- *Hubenak* upheld
  - General property description
  - For same public purpose
  - Including rights such as warranty or title, or intangibles, not violative
- Court in *Hubenak* was testing the adequacy of the “unable to agree” under Tex. Prop C. §21.012(b)(4), not “bona fide offer”.

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### Pleading changes

- SB 18 amended §21.012, by adding subsection(c)
- Requires that condemnor provide a copy of the petition to the property owner via CM RRR, but does not specify when
  
- Formerly, owner might first see the petition when served with notice of hearing

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### Notice of Lis Pendens

- Not apart of SB 18, but effective 9-1-09, Tex. Prop. C. §12.007(d) requires that no later than the third day after a Lis Pendens is recorded, that a copy be served on each party to the action that has an interest in the real property.

Best Practice: serve a copy of the petition at same time

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### Exchange of appraisals



- Final offer must include condemnor's appraisal
- Landowner must disclose its appraisal at earlier of:
  - 10 days after receiving it; and
  - 3 days before hearing (if it will be used at the hearing)

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### Condemnation takes longer - Part II

- Hearing must be at least 20 days after special commissioners appointed
- Hearing must take place at least 20 days after service of notice of the hearing (formerly 11 days)
- Overall, timeline delayed from about 30 days to about 90 days



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### Vagueness on Scheduling Hearing

- Special Commissioners . . . “may not **schedule** a **hearing** to assess damages before the 20<sup>th</sup> day after . . . appointment[sic].”
    - Meet to “schedule”, or
    - Convene the hearing?
- I.E.-Is this referring to the act of scheduling or convening the hearing?

Tex Prop. C. §21.015(a)

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### Right to strike special commissioner without cause



- Each party gets **one** strike
- Judge must appoint a replacement within **reasonable period**
- Think about including in order appointing commissioners:
  - Deadline for strikes
  - Appointment of alternate commissioners

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### Truth in Condemnation Procedures Act Tex. Govt C. §2206.051, et seq

- Applies exclusively to **governmental** entities
- Requires **record vote** at **public meeting** to initiate E.D.
- With notice as an agenda item
- Allows for single ordinance/resolution for all units, provided not more than one member objects
- Otherwise, second record vote on individual properties required
- Suggested language for ordinance/ resolution provided

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### Impairment of Access

- 21.042(d) codified and qualified consideration for impairment of access, formerly limited to non-community damages resulting from “material an substantial” test from case law.
- Now lowers the standard for threshold admissibility to “material impairment of direct access. . .that affects the market value of the remaining property”, but not community damages (circuity, diversion of traffic, noise)

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### Letters to Texas Comptroller

- Condemnors had to send letter by Dec. 31, 2012
- If not, lose eminent domain power on Sep. 1, 2013
- Does not apply to new companies
- Comptroller prepared report
- Legislative Council will propose legislation in 2015



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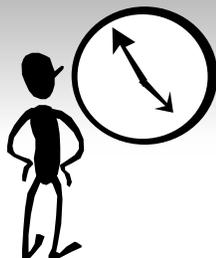
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### Conclusion



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Thanks for listening.

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