

# ***EMINENT DOMAIN AFTER SENATE BILL 18***

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## I.

### **Senate Bill 18: The Next Step in Eminent Domain Legislative Reform**

On May 23, 2011, Texas Governor Rick Perry ceremonially signed Senate Bill 18, which had been declared an emergency item for the 2011 Legislative Session. According to Governor Perry and three of the bill's primary sponsors (State Senators Craig Estes and Robert Duncan, and State Representative Charlie Geren), the bill had been in the making for over a decade.<sup>1</sup> At the signing party, Governor Perry declared that he was "proud to sign into law stronger eminent domain provisions protecting Texas landowners from local and state government entities that might consider abusing private property rights."<sup>2</sup> Senator Estes echoed this theme when he stated that "Texas is thriving as a state and property is a valuable asset, but that growth should not come at the expense of property owners."<sup>3</sup> But perhaps Texas Agricultural Commissioner Todd Staples best summed up the landowner's rights theme underlying the passage of Senate Bill 18, when he stated: "The signing of this bill says, 'Don't mess with Texas, and don't mess with Texas land.' SB 18 sends a clear message that here in the Lone Star State, we hold dear to our heritage of land ownership."<sup>4</sup>

Much of the recent efforts at eminent domain legislative reform came about as a reaction to the 2005 decision of the United States Supreme Court in *Kelo v. City of New London*,<sup>5</sup> where the Court, in a 5-4 ruling, upheld the use of eminent domain for economic development, ruling that such development satisfies the "public use" requirement of the Takings Clause of the Fifth Amendment to the United States Constitution. Not unlike most states around the nation, Texas responded promptly to *Kelo*, with Governor Perry amending his call in 2005 for a special session on school finance by adding to the call proposed legislation to address the effects of *Kelo*. Senate Bill 7 (which amended the Texas Government

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<sup>1</sup> Governor Perry's press release and videotaped statements at the ceremonial signing of Senate Bill 18, along with the videotaped statements of Senator Estes, Senator Duncan, Representative Geren and Agricultural Commissioner Todd Staples, can be found at the Governor's website at <http://governor.state.tx.us/news/press-release/16160/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 545 U.S. 469 (2005).

Code by adding a new Chapter 2206) went far to protect private property from eminent domain for economic development purposes; however, it was a bill that exempted many projects, including Governor Perry's pet Trans-Texas Corridor and the new Dallas Cowboys Stadium in Arlington.<sup>6</sup>

Not happy with the 2005 legislation that addressed the issue of eminent domain (rather than a constitutional amendment to limit perceived eminent domain abuses), the 2007 session of the Texas Legislature attempted to refine the definition of public purpose by eliminating what many considered large loopholes that permitted eminent domain for blighted areas. Consequently, House Bill 2006 and House Bill 3057 were introduced in the 2007 legislative session. Both bills significantly narrowed the definition of "public use" and the procedures regarding the condemnation of private property and, specifically, the condemnation of blighted areas. House Bill 2006 would have limited local authority by providing that a city identify *each unit of real property* in the city that has the characteristics of blight. This would have been problematic since in almost every case, an area to be redeveloped has one or two properties that do not meet the definition of "blight," but that should be acquired as part of the greater redevelopment effort. Nevertheless, the restrictions in House Bill 2006 and House Bill 3057 would have hampered the ability of cities to revitalize such deteriorated areas. While House Bill 3057 did not make it to the Governor's desk, House Bill 2006, which passed both houses, was vetoed by Governor Perry in June 2005.

It is not surprising, therefore, that among the changes in law brought about by Senate Bill 18, that Government Code Chapter 2206 continues to be amended to reflect the pro-property rights and anti-*Kelo* sentiments found in the Texas Legislature.<sup>7</sup>

While these items and more will be explored in this paper, in a nutshell, Senate Bill 18 reforms the eminent domain laws for Texas cities by requiring that:

- (1) There be a public and record vote to initiate eminent domain proceedings.

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<sup>6</sup> See Tex. Gov't Code § 2206.001.

<sup>7</sup> For a complete analysis of *Kelo*, the backlash it created throughout the Nation, and the Texas response to *Kelo*, the author recommends an article by Robert F. Brown and Terrence S. Welch entitled "Pushing the Limits of Eminent Domain," presented at the 42<sup>nd</sup> Annual William W. Gibson, Jr., Mortgage Lending Institute, sponsored by the University of Texas School of Law, which article can be found at <http://www.bhlaw.net/articles/>.

- (2) Private property can be condemned only for public use, not private use.
- (3) All entities with eminent domain authority must register with the Comptroller by December 2012.
- (4) Condemning entities must make a bona fide offer in writing and, if not, pay the landowner's expenses and attorney's fees.
- (5) Landowners will be compensated for damages from a loss of direct access to their property. Landowners will receive relocation assistance when forced to move off of their property.
- (6) Under certain conditions, landowners will have the right to repurchase their condemned land at the original price (not market price) if it is not used for the public use for which it was condemned within 10 years.

This purpose of this paper is to identify the significant changes to eminent domain practice brought about by Senate Bill 18 and to, hopefully, provide some practical advice to city attorneys that engage in condemnation work. Moreover, this paper presumes that the reader has a basic familiarity of condemnation law as it is not the author's intent to provide an eminent domain overview or primer, but rather to focus of the changes inflicted by Senate Bill 18.<sup>8</sup>

## II.

### **Senate Bill 18 Changes Impacting Texas Cities**

Senate Bill 18 (a copy of which is attached as Tab 1 in the Appendix to this paper) made a number of significant changes to condemnation practice in Texas. The new provisions, which became effective on September 1, 2011, and which

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<sup>8</sup> For a good overview of condemnation law, practice and procedures, the author recommends an article by Zindia Thomas and Julian Grant of the Office of the Texas Attorney General entitled "2012 Texas Eminent Domain Laws Made Easy, Answers to the Most Frequently Asked Questions About Texas Eminent Domain Laws," which article can be found at the following: [https://www.oag.state.tx.us/AG\\_Publications/pdfs/eminent\\_domain\\_easy.pdf](https://www.oag.state.tx.us/AG_Publications/pdfs/eminent_domain_easy.pdf).

apply to any condemnation proceeding in which the condemnation petition was filed on or after September 1, 2011, are discussed below.<sup>9</sup>

### ***A. Changes to Government Code Chapter 2206***

#### **1. “Public Use” Versus “Public Purpose”**

Senate Bill 18 amended Government Code Section 2206.001 to clarify that a taking of public property must be for a public use. The amendment to Section 2206.001(b) provided as follows:

- b) A governmental or private entity may not take private property through the use of eminent domain if the taking:
  - (1) confers a private benefit on a particular private party through the 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, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas under:
    - (A) Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code; or
    - (B) Section 311.005(a)(1)(I), Tax Code; or
  - (4) is not for a public use.<sup>10</sup>

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<sup>9</sup> While Senate Bill 18 contained provisions related to schools, pipeline carriers, and other entities that possess eminent domain powers, this paper focuses on those issues that impact Texas cities.

<sup>10</sup> Tex. Gov’t Code § 2206.001(b).

Based on the author’s review of the legislative history behind Senate Bill 18, it appears that there was concern over the use of the term “public use” versus “public purpose.” The Fifth Amendment to the United States Constitution, commonly referred to as the “Takings Clause,” prohibits the taking of private property for public use without just compensation. Similarly, Section 17 of Article I of the Texas Constitution prohibits a person’s property from being taken, damaged, or destroyed for public use without adequate compensation, unless by consent of that person.

Both the Fifth Amendment to the United States Constitution and Section 17, Article I, of the Texas Constitution refer to “public use” in the context of the taking of property. Prior to Senate Bill 18, however, there was no express language banning takings not necessary for a public use. Concerns were raised that the blurring of the terms “public use” and “public purpose” by the Legislature and the courts somehow allowed condemnations of land to occur for a “public purpose,” but for land that was not required for a “public use.” This was certainly the position taken by the Texas Public Policy Foundation, which describes itself as a non-profit, non-partisan research institute, whose stated mission is to “promote and defend liberty, personal responsibility, and free enterprise in Texas by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.”<sup>11</sup>

The Texas Public Policy Foundation, which supported Senate Bill 18, expressed its concerns over the “public use” versus “public purpose” as follows:

According to the United States and Texas constitutions, eminent domain can only be used for a public use. However, the Texas Legislature and Texas courts have closely followed the national trend of blurring the distinction between public use and public purpose. For instance, Sec. 251.001 of the Texas Local Government Code states: “When the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a *public purpose* to acquire public or private property, whether located inside or outside the municipality, for any of the following *purposes*.” This confusion between public use and public purpose is what led the Supreme Court in its *Kelo* decision to allow takings for the purposes of increasing tax revenue and economic development, rather than

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<sup>11</sup> The reader can learn more about the Texas Public Policy Foundation at its website at <http://www.texaspolicy.com/index.php>.

limiting takings to public uses like building public schools and roads. This amendment simply inserts the constitutional term “public use” in place of “public purpose” in the provisions in statute that authorize the use of eminent domain for cities, counties and school districts. This is the next step—after banning takings for economic development purposes—to ensure that takings conform with the original vision of public use as contained in the Texas and U.S. constitutions.<sup>12</sup>

**Practical Pointer.** Whether the difference between a taking for a “public purpose” versus a taking for a “public use” is a meaningful one, either legally or factually, remains to be seen. What is clear, however, is that Texas cities should invoke the magic words “public use” when they condemn property and stay away from the term “public purpose,” at least as a stand-alone concept.

Senate Bill 18 also amended Local Government Section 251.001 (regarding city condemnation powers), Section 261.001 (regarding county condemnation powers), Section 263.201 (regarding county condemnation of land for certain water projects) and Section 273.002 (regarding city condemnation for certain enumerated purposes) to remove the term “public purpose” and replace it with the term “public use” throughout.

## **2. “Truth in Condemnation Procedures Act”**

Senate Bill 18 created a new subchapter in Government Code Chapter 2206 entitled the “Truth in Condemnation Procedures Act.” Despite the somewhat inflammatory title (which suggests that condemning authorities do not tell the truth in condemnation matters), the actual substance of the Truth in Condemnation Procedures Act addresses the procedures now required to initiate condemnation proceedings. This new subchapter reads as follows:

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<sup>12</sup> See the Texas Public Policy Foundation’s April 2011 Senate Bill 18 Analysis at <http://www.texaspolicy.com/pdf/2011-04-PB12-BillAnalysis-SB18-Summary-Revised-bp.pdf>.

## **SUBCHAPTER B. PROCEDURES REQUIRED TO INITIATE EMINENT DOMAIN PROCEEDINGS**

**Sec. 2206.051. SHORT TITLE.** This subchapter may be cited as the Truth in Condemnation Procedures Act.

**Sec. 2206.052. APPLICABILITY.** The procedures in this subchapter apply only to the use of eminent domain under the laws of this state by a governmental entity.

### **Sec. 2206.053. VOTE ON USE OF EMINENT DOMAIN.**

- (a) Before a governmental entity initiates a condemnation proceeding by filing a petition under Section 21.012, Property Code, the governmental entity must:
  - (1) authorize the initiation of the condemnation proceeding at a public meeting by a record vote; and
  - (2) include in the notice for the public meeting as required by Subchapter C, Chapter 551 [Open Meeting Act], in addition to other information as required by that subchapter, the consideration of the use of eminent domain to condemn property as an agenda item.
- (b) A single ordinance, resolution, or order may be adopted for all units of property to be condemned if:
  - (1) the motion required by Subsection (e) indicates that the first record vote applies to all units of property to be condemned; and
  - (2) the minutes of the governmental entity reflect that the first vote applies to all of those units.
- (c) If more than one member of the governing body objects to adopting a single ordinance, resolution, or order by a record vote for all units of property for which condemnation proceedings are to be initiated, a separate record vote must be taken for each unit of property.

- (d) For the purposes of Subsections (a) and (c), if two or more units of real property are owned by the same person, the governmental entity may treat those units of property as one unit of property.
- (e) The motion to adopt an ordinance, resolution, or order authorizing the initiation of condemnation proceedings under Chapter 21, Property Code, must be made in a form substantially similar to the following: “I move that the (name of governmental entity) authorize the use of the power of eminent domain to acquire (describe the property) for (describe the public use).” The description of the property required by this subsection is sufficient if the description of the location of and interest in the property that the governmental entity seeks to acquire is substantially similar to the description that is or could properly be used in a petition to condemn the property under Section 21.012, Property Code.
- (f) If a project for a public use described by Section 2206.001(c)(3) will require a governmental entity to acquire multiple tracts or units of property to construct facilities connecting one location to another location, the governing body of the governmental entity may adopt a single ordinance, resolution, or order by a record vote that delegates the authority to initiate condemnation proceedings to the chief administrative official of the governmental entity.
- (g) An ordinance, resolution, or order adopted under Subsection (f) is not required to identify specific properties that the governmental entity will acquire. The ordinance, resolution, or order must identify the general area to be covered by the project or the general route that will be used by the governmental entity for the project in a way that provides property owners in and around the area or along the route reasonable notice that the owners’ properties may be subject to condemnation proceedings during the planning or construction of the project.<sup>13</sup>

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<sup>13</sup> Tex. Gov’t Code §§ 2206.051-2206.053.

### 3. Breaking Down the New Procedural Requirements

- A. **Agenda Notice.** In addition to the traditional open meetings notice requirements for an agenda item, the law now requires that the agenda notice specifically state that the city may consider using eminent domain to condemn property.<sup>14</sup>

**Practical Pointer.** As a result, the typical practice of providing agenda notice of an executive session to “discuss land acquisition” and upon returning from executive session to “take appropriate action” will no longer suffice. Now, the agenda notice should state, at a minimum, “take appropriate action including consideration of the use of eminent domain to condemn the property.”

- B. **Record Vote Required.** No condemnation suit may be filed before there is a “record vote” by the city council to do so.<sup>15</sup>

**Practical Pointer.** While the law does not state what is required to constitute a “record vote” on a motion to condemn property, the author recommends that the minutes reflect and identify each person who voted for the motion, who voted against motion and, if applicable, who abstained from voting. As the clear intent of this law is to require transparency and accountability, the safer practice is to record each council member’s vote, rather than having minutes that simply state “the motion to condemn passed by a vote of 3 to 2.”

- C. **Language of the Approval Motion.** The new law requires that the approval motion to adopt an ordinance, resolution or order authorizing condemnation state the following phrase, or a phrase that is substantially similar to the following phrase: “I move that the (name of governmental entity) authorize the use of the power of eminent domain to acquire (describe the property) for (describe the public use).”<sup>16</sup> Once again, the purpose here is transparency.

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<sup>14</sup> Tex. Gov’t Code §§ 2206.053(a)(2).

<sup>15</sup> Tex. Gov’t Code §§ 2206.053(a)(1).

<sup>16</sup> Tex. Gov’t Code §§ 2206.053(e).

**Practical Pointer.** While not expressly stated as such, it is clear that an actual “ordinance, resolution or order” is now required to authorize condemnation proceedings. So, if a city’s typical practice was to simply vote on an oral motion to condemn, the approval of which was reflected only in the minutes, that practice will need to be changed to comply with the new law. A sample post-Senate Bill 18 condemnation resolution is attached as Tab 2 in the Appendix to this paper.

- D. Sufficiency of the Property Description in the Approval Motion.** The new law requires that the property description used in the condemnation approval motion will be “sufficient if the description of the location of and interest in the property that the governmental entity seeks to acquire is substantially similar to the description that is or could properly be used in a petition to condemn the property under Section 21.012, Property Code.”<sup>17</sup>

The Texas Property Code requires that a condemnation petition “describe the property to be condemned.”<sup>18</sup> While the statute is silent as to how a condemning authority must describe property, case law has provided guidance. The sufficiency of a condemnation petition’s description of the property to be condemned is tested by the standards used for adequacy of description in a deed.<sup>19</sup>

**Practical Pointer.** While a metes and bounds description is not required in the condemnation motion, the property does need to be described with enough certainty and specificity that a surveyor, using the description, could locate the described property on the ground.

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<sup>17</sup> Tex. Gov’t Code §§ 2206.053(d).

<sup>18</sup> Tex. Prop. Code. § 21.012(b)(1).

<sup>19</sup> *Lin v. Houston Cmty. Coll. Sys.*, 948 S.W.2d 328, 332 (Tex.App.-Amarillo 1997, pet. denied). In *Coastal Indus. Water Auth. v. Celanese Corp.*, 592 S.W.2d 597, 600 (Tex.1979), the Texas Supreme Court, quoting *Wooten v. State*, 142 Tex. 238, 177 S.W.2d 56, 57 (1944), noted “[t]he certainty required in the description of the land in a condemnation proceeding ‘is of the same nature as that required in conveyances of land, so that a surveyor could go upon the land and mark out the land designated.’ ” Further, it is well established that if the description is sufficiently certain that a surveyor could locate the tract, the fact that it might contain “a false and contradictory element of description is harmless.” *Boone v. Panola County*, 880 S.W.2d 195, 196 (Tex.App.-Tyler 1994, no writ), quoting *Roberts v. County of Robertson*, 48 S.W.2d 737, 738 (Tex.Civ.App.-Waco 1932, writ ref’d). See also *Lin*, 948 S.W.2d at 332.

**E. Combined or Single Motion to Condemn?** When a city is condemning a single tract or parcel of land for a water tower, fire station, lift station or other public use, the new law does not present any particular problem on the motion to condemn. When a city seeks to condemn multiple tracts for a road, utility lines, drainage easements and the like, however, further review of the new law is warranted. What Senate Bill 18 provides is that “a single ordinance, resolution or order may be adopted for all units of property to be condemned” if the condemnation approval motion “indicates that the first record vote applies to all units of property to be condemned,” and the minutes so reflect.<sup>20</sup> That part seems easy enough – as long as you describe and include all of the land needed for the condemnation in your motion, you do not need to have separate motions or condemnation resolutions for each individual property to be condemned.

If, however, for whatever reason, a council member objects to the single motion for all included properties, the new law requires that a separate record vote be taken for each property sought to be condemned, which would result in separate motions and separate condemnation resolutions for each property.<sup>21</sup>

**Practical Pointer.** If you believe that there is a possibility that a council member might object and thus require the city council to consider separate motions and resolutions for the acquisitions, you may want to consider having separate resolutions prepared for each property to be used at your meeting if needed. Otherwise, you may have to table a condemnation item for which staff has prepared only one condemnation resolution for all properties to be condemned.

**F. Water, Waste Water, Flood Control and Drainage Projects.** Under Senate Bill 18, water, waste water, flood control and drainage projects are treated differently than other public uses in two ways.

First, the city is not required to identify the specific parcels or tracts of properties that the city will condemn. The city is allowed to adopt a condemnation ordinance, resolution or order that will “identify the general area to be covered by the project or the general route that will be used by the

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<sup>20</sup> Tex. Gov’t Code §§ 2206.053(b).

<sup>21</sup> Tex. Gov’t Code §§ 2206.053(c).

governmental entity for the project in a way that provides property owners in and around the area or along the route reasonable notice that the owners' properties may be subject to condemnation proceedings during the planning or construction of the project.”<sup>22</sup>

**Practical Pointer.** For these covered projects, a city may use a route map or other general diagram that gives fair notice that an owner's property may be condemned for a water line, sewer line, flowage easement or drainage easement, even if the precise location of the planned public improvement has not been determined.

Second, Senate Bill 18 allows the city, for those projects which require multiple tracts of land for water lines, sewer lines, flowage easements and drainage easements, to adopt one ordinance or resolution for the project that “delegates the authority to initiate condemnation proceedings to the chief administrative official of the governmental entity.”<sup>23</sup>

**Practical Pointer.** Utilization of this provision of the new law allows the city manager, and presumably his/her designee, to authorize condemnations once the precise metes and bounds parcels needed for the project are determined by the engineers without having to go back to city council again for additional authorization. This process should help promote efficiency and potentially de-politicize the land acquisition process.

**G. Road Projects.** For road projects and any other projects that require the acquisition of multiple tracts of land that are not “water, waste water, flood control and drainage projects,” the city will have to identify each separate property interest to be acquired and describe such interests with enough certainty and specificity that a surveyor, using the description, could locate the described property on the ground. Also, the authorization for condemnation for these types of projects cannot be delegated.

**Practical Pointer.** For road condemnations, the requirement that the precise road layout be known in order to institute the condemnation process can be difficult sometimes. While a city certainly knows where the road is going to go, many times the fine tuning of the exact road limits is subject to further

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<sup>22</sup> Tex. Gov't Code §§ 2206.053(g).

<sup>23</sup> Tex. Gov't Code §§ 2206.053(f).

engineering review, particularly the need for slope easements, drainage easements, visibility clips and temporary construction easements. While a road route map can still be used as the framework for the condemnation resolution, at a minimum, the resolution will need to identify each owner of property over which the road (and all associated easements) may be located.

#### **4. Condemnation Sunset Provisions**

One of the stated legislative concerns over pre-Senate Bill 18 condemnation practice was there was uncertainty as to what entities possessed the power to condemn. In response, Senate Bill 18 created Government Code Section 2206.101, which requires that all entities, whether they be governmental or private, that possess the power of eminent domain to identify each provision of law that grants such power in a letter to the State Comptroller. The letter must be submitted by December 31, 2012. Failure to submit the required letter results in the expiration of that entity's condemnation power.<sup>24</sup>

**Practice Pointer.** While TML submitted to the Comptroller's office a submission for all general law and home rule cities in TML's database in the Fall of 2011, the author recommends that each city send in its own form by year end in an abundance of caution. The State Comptroller has prepared a form that cities can use for the Senate Bill 18 submission.<sup>25</sup>

#### ***B. Changes to Property Code Chapter 21***

Property Code Chapter 21 governs condemnation procedures. By way of an overview, the process of land condemnation in Texas involves several steps. If the condemnor and landowner cannot agree on the value of the condemned property, the condemnor must file a petition in condemnation in either the district court or county court at law.<sup>26</sup> The trial court will then appoint three special commissioners who hold an administrative hearing and file in the trial court an award that reflects the special commissioners' determination of the value of the condemned land.<sup>27</sup> The condemnor must pay the amount of the award to the landowner or deposit that

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<sup>24</sup> Tex. Gov't Code §§ 2206.101.

<sup>25</sup> The form can be found at <http://window.state.tx.us/sb18compliance/>.

<sup>26</sup> Tex. Prop. Code § 21.003.

<sup>27</sup> Tex. Prop. Code §§ 21.014, 21.015, 21.018.

amount in the registry of the trial court. If either party is dissatisfied with the award, the party may file objections with the trial court.<sup>28</sup> After citing the adverse party, the trial court then tries the case in the same manner as other civil cases.<sup>29</sup>

Senate Bill 18, while not changing this basic process, has created additional obligations on the condemning authority as it works through this process. Below, we will look at these changes and compare them to the old law where applicable.

### **1. Disclosure of Appraisal Reports**

At the time of the initial offer to purchase or lease land, the city must send to the owner by certified mail all appraisals of the property possessed by the city that have been prepared within 10 years prior to the offer.<sup>30</sup> Under the old law, the only appraisal the city was required to disclose was the one “used in determining the final offer.” In contrast, the property owner is only required to disclose the current appraisal upon which he relies in determining his opinion of value, which was the law before Senate Bill 18.<sup>31</sup> The landowner’s disclosure time, however, has been changed. Under the old law, a landowner was required to provide the city with his appraisal at least 10 days before the special commissioners’ hearings; under the new law, that time period has been shortened to 3 business days before the hearing.<sup>32</sup>

### **2. Prohibition of Confidentiality of Acquisition Offer or Agreement**

Senate Bill 18 provides that a city may not include a confidentiality provision in any offer or purchase agreement; it further requires that the city inform the owner of his right to discuss the offer or agreement with others, or to keep the offer or agreement confidential, subject to the city’s disclosure obligations under the Public Information Act.<sup>33</sup> Typical language in a post-Senate Bill 18 offer

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<sup>28</sup> Tex. Prop. Code § 21.018(a).

<sup>29</sup> Tex. Prop. Code § 21.018(b).

<sup>30</sup> Tex. Prop. Code § 21.0111(a).

<sup>31</sup> Tex. Prop. Code § 21.0111(b).

<sup>32</sup> Tex. Prop. Code § 21.0111(b).

<sup>33</sup> Tex. Prop. Code § 21.0111(c).

letter might read as follows: “You have the right to discuss with others any offer or agreement regarding the City’s acquisition of the subject property, or you may (but are not required to) keep the offer or agreement confidential from others, subject to the provisions of Chapter 552, Government Code (the Public Information Act) as it may apply to the City.” The author recommends that this, or substantially similar, language be included in all offer letters, from the initial offer letter to the final offer, and any offer letters that might fall between. A sample post-Senate Bill 18 offer letter is attached as Tab 3 in the Appendix to this paper.

### **3. Bona Fide Offer Required**

While case law has always required that (1) a city plead that the parties were unable to agree on the value of the land to be acquired and the damages, if any, to the remainder, and (2) a good faith offer be made as a prerequisite to initiate condemnation proceedings, case law has been somewhat muddled as to what constitutes a good faith offer.<sup>34</sup> Senate Bill 18 clarifies this obligation by making it statutorily required in Property Code Section 21.0113, and by defining what constitutes a bona fide offer.

This new section provides as follows:

#### **Sec. 21.0113. BONA FIDE OFFER REQUIRED.**

- (a) An entity with eminent domain authority that wants to acquire real property for a public use must make a bona fide offer to acquire the property from the property owner voluntarily.
- (b) An entity with eminent domain authority has made a bona fide offer if:
  - (1) an initial offer is made in writing to a property owner;
  - (2) a final offer is made in writing to the property owner;

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<sup>34</sup> See *Hubanek v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004), for a discussion of this requirement and the various treatments provided it by different courts.

- (3) the final offer is made on or after the 30th day after the date on which the entity makes a written initial offer to the property owner;
- (4) before making a final offer, the entity obtains a written appraisal from a certified appraiser of the value of the property being acquired and the damages, if any, to any of the property owner's remaining property;
- (5) the final offer is equal to or greater than the amount of the written appraisal obtained by the entity;
- (6) the following items are included with the final offer or have been previously provided to the owner by the entity:
  - (A) a copy of the written appraisal;
  - (B) a copy of the deed, easement, or other instrument conveying the property sought to be acquired; and
  - (C) the landowner's bill of rights statement prescribed by Section 21.0112; and
- (7) the entity provides the property owner with at least 14 days to respond to the final offer and the property owner does not agree to the terms of the final offer within that period.<sup>35</sup>

#### **4. Some Practical Bona Fide Offer Requirement Considerations**

A few items are worth pointing out and discussing when contrasting the new law versus the authorized practice under the old law.

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<sup>35</sup> Tex. Prop Code § 21.0113.

While the initial offer can be based on something other than an appraisal, **the final offer must be based on a written appraisal from a certified appraiser.**<sup>36</sup> This means that even for small, extremely low value corner clips, visibility clips, and other very small takings, that an appraisal will need to be done. The practice of using tax roll values by city staff to determine the offer amount for such low value takings, or using windshield appraisals,<sup>37</sup> while economically prudent, is no longer allowed.

The **final offer letter must include the deed, easement or other conveyance instrument.**<sup>38</sup> This provides clarity over an offer letter that requests a slope easement, drainage easement, or other easement without specifying the rights encumbered by the easement. The **final offer letter must provide a copy of the Landowner's Bill of Rights** (even if previously provided).<sup>39</sup>

The **final offer letter must provide the owner at least 14 days to respond** before the city may file suit.<sup>40</sup> The old law did not specify a time period by which the city had to wait before filing suit. While most cities, as a matter of policy, usually provided 10 to 14 days as a courtesy for a response, the author has seen, and been personally involved in, condemnations that were filed within a few days of the final offer letter having been served.

If the trial court determines that **the city did not make the required bona fide offer prior to instituting a condemnation suit, the court shall abate, but not dismiss, the suit** and shall order the city to make a bona fide order to the landowner and shall order the city to pay “any reasonable attorney’s fees and other professional expenses incurred by the property owner that are directly related to the violation.”<sup>41</sup>

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<sup>36</sup> Tex. Prop Code § 21.0113(b)(5).

<sup>37</sup> A “windshield appraisal” is one where the appraiser drives by the property, eyeballs it through the window, drives on and then prepares an appraisal.

<sup>38</sup> Tex. Prop Code § 21.0113(b)(6)(B).

<sup>39</sup> Tex. Prop Code § 21.0113(b)(6)(C).

<sup>40</sup> Tex. Prop Code § 21.0113(b)(7).

<sup>41</sup> Tex. Prop Code § 21.047(d).

## 5. Condemnation Petition Changes

Texas Property Code Section 21.012, regarding the requirements of a condemnation petition, has been amended to now require that a city **state “with specificity” the public “use” (vs. the public “purpose”)** for which the city intends to acquire the property.<sup>42</sup>

The law also requires that the **city plead that it has made the required bona fide offer.**<sup>43</sup> The following language will suffice: “The City, through its duly authorized agent, made a bona fide offer to acquire the required property interests from the fee simple owner of the property voluntarily as provided by Texas Property Code Section 21.0113.”

A copy of the **petition must be sent to the property owner by certified mail.**<sup>44</sup> The old law only required the service of the petition with the notice of the special commissioners’ hearing. While many cities routinely provided courtesy copies of condemnation petitions to landowners, as well as all other defendants (lien holders, mortgage holders, trustees, etc.), Senate Bill 18 requires that this now be done as a statutory requirement.

Senate Bill 18 requires that only the property owner be provided with a copy of the suit.<sup>45</sup> Given that prudent practice dictates that a lis pendens be filed on the property contemporaneously with, or immediately after, the filing of the suit, and given that the law requires that all defendants to the condemnation suit be provided a copy of the lis pendens,<sup>46</sup> the safest approach is to provide all parties to the condemnation proceeding with a copy of the suit by mail. One approach would be to simply provide the lis pendens and condemnation suit in the same transmittal letter to the landowner and other defendants.

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<sup>42</sup> Tex. Prop Code § 21.012(b)(2).

<sup>43</sup> Tex. Prop Code § 21.012(b)(6).

<sup>44</sup> Tex. Prop Code § 21.012(c).

<sup>45</sup> Tex. Prop Code § 21.012(c).

<sup>46</sup> Tex. Prop Code § 12.007(d).

## 6. Commissioners' Hearing Changes

Senate Bill 18 requires the court to give each party “**a reasonable period to strike** one of the three commissioners appointed by the judge.”<sup>47</sup> The law fails to provide guidance, however, as to what is considered a reasonable period of time and leaves this to the discretion of the trial court judge. Based on the author’s observations, the courts in the DFW area appear to be giving the parties between 7 to 14 days to strike a commissioner. While the old law required a party to have a reason to strike a commissioner (*i.e.*, for cause), the new law gives each party one preemptory strike without cause.

Additionally, while the old law did not place any limits on how quickly appointed special commissioners could convene to hear a condemnation case, the new law requires that the special commissioners **not convene a hearing “before the 20<sup>th</sup> day after the date the special commissioners were appointed.”**<sup>48</sup> This arguably means that a city must wait at least 20 days before the commissioners can even sign an order setting the hearing, presumably to allow the filing a motion to strike a commissioner under the “reasonable period” to strike provision of Senate Bill 18.

Senate Bill 18 also requires that notice of the special commissioners’ **hearing must be served on a party not later than 20<sup>th</sup> (formerly the 11<sup>th</sup>) day before the day set for the hearing.**<sup>49</sup> This provision, when combined with the requirement of waiting at least 14 days after a final offer to file suit,<sup>50</sup> waiting a “reasonable period” to allow the landowner to strike a commissioner,<sup>51</sup> and waiting at least 20 days before scheduling a hearing date after the commissioners are appointed,<sup>52</sup> adds around 40 to 50 days to the process allowed under the old law. A timeline of dates under Senate Bill 18 is attached as Tab 4 in the Appendix to this paper.

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<sup>47</sup> Tex. Prop Code § 21.014(a).

<sup>48</sup> Tex. Prop. Code § 21.015(a).

<sup>49</sup> Tex. Prop. Code § 21.016(b).

<sup>50</sup> Tex. Prop Code § 21.0113(b)(7).

<sup>51</sup> Tex. Prop Code § 21.014(a).

<sup>52</sup> Tex. Prop. Code § 21.015(a).

## 7. Disclosure of Right to Repurchase

Property Code Section 21.023 has been amended as follows:

### **Sec. 21.023. DISCLOSURE OF INFORMATION REQUIRED AT TIME OF ACQUISITION.**

An [A governmental] entity with eminent domain authority shall disclose in writing to the property owner, at the time of acquisition of the property through eminent domain, that:

- (1) the owner or the owner's heirs, successors, or assigns may be [are] entitled to:
  - (A) repurchase the property under Subchapter E [if the public use for which the property was acquired through eminent domain is canceled before the 10th anniversary of the date of acquisition]; or
  - (B) request from the entity certain information relating to the use of the property and any actual progress made toward that use; and
- (2) the repurchase price is the price paid to the owner by the entity at the time the entity acquired the property through eminent domain [fair market value of the property at the time the public use was canceled].<sup>53</sup>

This change in the law gives the owner of the property a **right to “progress reports”** on the status of whether or not the property condemned is being used for the public use for which it was condemned.<sup>54</sup> It also changes the law to require that the **repurchase price is the price paid for the land by the city** through condemnation.<sup>55</sup> This change apparently was in response to concerns that a condemning authority could condemn land, sit on it for years and let the market value diminish, and then sell it back to the prior owner at the diminished value.

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<sup>53</sup> Tex. Prop. Code § 21.023.

<sup>54</sup> Tex. Prop. Code § 21.023(1)(b).

<sup>55</sup> Tex. Prop. Code § 21.023(2).

The Legislature’s apparent concern, which resulted in the “buy-back” provisions of Senate Bill 18, was that under the old law, a condemning authority could condemn land in fee simple for a public purpose and then use the land for just about any purpose that that it wanted since the law did not require the condemning authority to use the land for the purpose for which it was taken. While the old law did allow for the repurchase of property by the original owner if the public use for which the property was taken was cancelled, it required the land sale to occur at the current market value, not the price paid to the former landowner. Senate Bill 18 requires the land to be resold to the original owner for the price paid at condemnation.<sup>56</sup>

The new law also states that the **right to repurchase notice must be given “at the time of acquisition.”**<sup>57</sup> Typically, this is done either in the condemnation judgment or by separate notice at the time the condemnation judgment is entered.

## **8. Right to Repurchase**

Senate Bill 18 essentially rewrote Property Code Section 21.101 to provide new requirements on the right to repurchase land. That section now reads as follows:

### **Sec. 21.101. RIGHT OF REPURCHASE.**

- (a) A person from whom a real property interest is acquired by an entity through eminent domain for a public use, or that person’s heirs, successors, or assigns, is entitled to repurchase the property as provided by this subchapter if:
  - (1) the public use for which the property was acquired through eminent domain is canceled before the property is used for that public use;
  - (2) no actual progress is made toward the public use for which the property was acquired between the date of acquisition and the 10th anniversary of that date; or

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<sup>56</sup> Tex. Prop. Code § 21.023(2).

<sup>57</sup> Tex. Prop. Code § 21.023.

- (3) the property becomes unnecessary for the public use for which the property was acquired, or a substantially similar public use, before the 10th anniversary of the date of acquisition.
- (b) In this section, “actual progress” means the completion of two or more of the following actions:
- (1) the performance of a significant amount of labor to develop the property or other property acquired for the same public use project for which the property owner’s property was acquired;
  - (2) the provision of a significant amount of materials to develop the property or other property acquired for the same public use project for which the property owner’s property was acquired;
  - (3) the hiring of and performance of a significant amount of work by an architect, engineer, or surveyor to prepare a plan or plat that includes the property or other property acquired for the same public use project for which the property owner’s property was acquired;
  - (4) application for state or federal funds to develop the property or other property acquired for the same public use project for which the property owner’s property was acquired;
  - (5) application for a state or federal permit to develop the property or other property acquired for the same public use project for which the property owner’s property was acquired;
  - (6) the acquisition of a tract or parcel of real property adjacent to the property for the same public use project for which the owner’s property was acquired; or
  - (7) for a governmental entity, the adoption by a majority of the entity’s governing body at a public hearing of a

development plan for a public use project that indicates that the entity will not complete more than one action described by Subdivisions (1)-(6) before the 10th anniversary of the date of acquisition of the property.

- (c) A district court may determine all issues in any suit regarding the repurchase of a real property interest acquired through eminent domain by the former property owner or the owner's heirs, successors, or assigns.<sup>58</sup>

In essence, this new provision **addresses the Legislature's concerns of "land banking"** by condemning authorities of land for long-range land planning through land speculation, where a government entity sits on property for years before beginning construction of the project for which the property was taken. For example, a school board could take land for a school that the board intends to build 10 to 15 years down the road as the community expands. While Senate Bill 18 does not prohibit such laudable long-term planning, it does prohibit the practice of taking land at today's prices when the land will not be used until much, much later.

Senate Bill 18 also requires that land acquired for a **particular public use be used for that particularly designated use within 10 years, or at least some substantial progress towards the use must be shown**, or the prior owner has the right to repurchase the land.<sup>59</sup>

Amended Property Code Section 21.102 requires that **a city has 180 days after it determines that a former owner has a repurchase right to so notify said prior owner.**<sup>60</sup> The specifics of the required notice are set forth in that section.

New Property Code Sections 21.1021 and 21.1022 address, respectively, the **procedures regarding requests for information regarding condemned property after 10 years**, and the creation of a **one-year limitations period on the right to repurchase** once the required repurchase notice has been given.<sup>61</sup>

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<sup>58</sup> Tex. Prop. Code § 21.101.

<sup>59</sup> Tex. Prop. Code § 21.101.

<sup>60</sup> Tex. Prop. Code § 21.102.

<sup>61</sup> Tex. Prop. Code §§ 21.1021, 21.1022.

## **9. Relocation Assistance Program**

Prior to Senate Bill 18, the relocation assistance program found in Property Code Section 21.046 had been required for the State and its agencies, but was discretionary for cities and other political subdivisions. Under the new language in Senate Bill 18, cities are required to provide a relocation assistance program for the displacement of persons or entities due to an acquisition of real property.

New Property Code Section 21.046 provides as follows:

### **Sec. 21.046. RELOCATION ASSISTANCE PROGRAM.**

- (a) A department, agency, instrumentality, or political subdivision of this state shall provide a relocation advisory service for an individual, a family, a business concern, a farming or ranching operation, or a nonprofit organization that is compatible with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C.A. 4601, et seq.
- (b) This state or a political subdivision of this state shall, as a cost of acquiring real property, pay moving expenses and rental supplements, make relocation payments, provide financial assistance to acquire replacement housing, and compensate for expenses incidental to the transfer of the property if an individual, a family, the personal property of a business, a farming or ranching operation, or a nonprofit organization is displaced in connection with the acquisition.
- (c) A department, agency, instrumentality, or political subdivision of this state that initiates a program under Subsection (b) shall adopt rules relating to the administration of the program.
- (d) Neither this state nor a political subdivision of this state may authorize expenditures under Subsection (b) that exceed payments authorized under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C.A. 4601, et seq.

- (e) If a person moves or discontinues the person’s business, moves personal property, or moves from the person’s dwelling as a direct result of code enforcement, rehabilitation, or a demolition program, the person is considered to be displaced because of the acquisition of real property.<sup>62</sup>

**The basic expenditure limits under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (“FURARPAPA”) are found at 42 USC §§ 4622-4626.** FURARPAPA<sup>63</sup> provides for residential displacees reimbursement for reasonable moving costs up to a 50-mile distance, purchase supplements of up to \$22,500 or rental assistance payments up to \$5,250 per month for 42-months. Businesses, farms and nonprofit organizations displaced by condemnation may be reimbursed on the basis of actual reasonable moving costs and related expenses or, under certain circumstances, a fixed payment of up to \$20,000.<sup>64</sup>

**The relocation assistance program is separate from the actual condemnation suit, however, and it is not an issue for the special commissioners.** Persons seeking relocation assistance would have the burden to show eligibility. Any unresolved disputes over eligibility assistance would need to be brought by a lawsuit filed by the expense reimbursement claimant.<sup>65</sup>

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<sup>62</sup> Tex. Prop Code § 21.046.

<sup>63</sup> No, this is not a Hawaiian delicacy.

<sup>64</sup> For a good overview of relocation expenses limits, plus the implementation of a relocation assistance program, the reader is referred to TxDOT’s Relocation Assistance Handbook, which can be found at the following website address: [http://ftp.dot.state.tx.us/pub/txdot-info/row/booklet\\_15.636.pdf](http://ftp.dot.state.tx.us/pub/txdot-info/row/booklet_15.636.pdf).

<sup>65</sup> Senate Bill 18’s relocation assistance program applies not only to properties acquired by condemnation, but to every “acquisition” of property, which is the term used in Property Code Section 21.046. In fact, Section 21.046(e) expressly states that “[i]f a person moves or discontinues the person’s business, moves personal property, or moves from the person’s dwelling as a direct result of code enforcement, rehabilitation, or a demolition program, the person is considered to be displaced because of the acquisition of real property.” Thus, Senate Bill 18 impacts city functions that go way beyond just condemnation.

## 10. Change of Access Impairment Compensability Standard

Senate Bill 18 amended Property Code Section 42.042, regarding the assessment of damages, by changing subsection (d) as follows:

- (d) In estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, including a material impairment of direct access on or off the remaining property that affects the market value of the remaining property, but they may not consider an injury or benefit that the property owner experiences in common with the general community, including circuity of travel and diversion of traffic. In this subsection, "direct access" means ingress and egress on or off a public road, street, or highway at a location where the remaining property adjoins that road, street, or highway.<sup>66</sup>

The prior law regarding what constituted "material and substantial impairment of access" was defined with a degree of certainty by the courts.<sup>67</sup> There is no legal authority of which the author could find, however, that defines or even discusses the term "material impairment of direct access" as used in Senate Bill 18. While the prior standard, as established by case law, focused on access to the entire remainder tract and asked whether there was still "reasonable access" to the remainder after the city's restriction of access, the new standard focuses on direct access to the property from the road system. The new operative factors, which have yet to be opined on by the courts, are whether the impairment to "direct access"

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<sup>66</sup> Tex. Prop. Code § 21.042(d).

<sup>67</sup> See, e.g., *City of Austin v. Avenue Corp.*, 704 S.W.2d 11, 13 (Tex. 1986) ("[I]n order to show a material and substantial interference with access to one's property, it is necessary to show that there has been a total but temporary restriction of access; or a partial but permanent restriction of access; or a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed."); *State v. Heal*, 917 S.W.2d 6, 9-10 (Tex. 1996) ("[A] landowner is entitled to compensation when a public improvement destroys all reasonable access, thereby damaging the property. [Also,] no right to compensation extends to a property owner who has reasonable access to his property after the construction of the public improvement because the benefits of private ownership have been preserved.").

(ingress and egress on and off the remaining property) is “material” and, if so, whether it “affects the market value of the remaining property”.

**Practical Pointer.** Consider instructing your appraiser on damages for impairment of access. While under the old law, access to a secondary road would typically defeat a claim of material denial of access, even if direct access to the primary road was taken, such a finding may not prevent a finding of material impairment of direct access under Senate Bill 18. Each case, of course, will depend on its specific facts. A suggested appraisal instruction, patterned in large part on TxDOT’s current appraisal instructions, is attached as Tab 5 in the Appendix to this paper.

### III.

#### **Closing Thoughts About Senate Bill 18**

Whether Senate Bill 18 will satisfy, or simply temporarily satiate, those special interests that seek to effectively erode eminent domain powers, remains to be seen as the impacts of this bill are implemented over time. What is crystal-clear right now, however, is that land acquisition for Texas cities will take more time, involve more risk, and cost more. City Attorneys will need to remain diligent to comply with the law’s new requirements as the new legal landscape is filled with landmines, booby-traps and quicksand designed to impede, if not totally derail, legitimate condemnation efforts.

## **APPENDIX**

### **Tab**

### **Item**

1	Senate Bill 18
2	Sample Post-Senate Bill 18 Condemnation Resolution
3	Sample post-Senate Bill 18 Offer Letter
4	Post-Senate Bill 18 Timeline
5	Post-Senate Bill 18 Suggested Appraisal Guidance Memo on Damages for Impairment of Access

**TAB “1”**

AN ACT

relating to the use of eminent domain authority.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (a), Section 11.155, Education Code, is amended to read as follows:

(a) An independent school district may, by the exercise of the right of eminent domain, acquire the fee simple title to real property [~~for the purpose of securing sites~~] on which to construct school buildings or for any other public use [~~purpose~~] necessary for the district.

SECTION 2. Chapter 2206, Government Code, is amended to read as follows:

CHAPTER 2206. [~~LIMITATIONS ON USE OF~~] EMINENT DOMAIN

SUBCHAPTER A. LIMITATIONS ON PURPOSE AND USE OF PROPERTY

ACQUIRED THROUGH EMINENT DOMAIN

Sec. 2206.001. LIMITATION ON EMINENT DOMAIN FOR PRIVATE PARTIES OR ECONOMIC DEVELOPMENT PURPOSES. (a) This section applies to the use of eminent domain under the laws of this state, including a local or special law, by any governmental or private entity, including:

- (1) a state agency, including an institution of higher education as defined by Section 61.003, Education Code;
- (2) a political subdivision of this state; or
- (3) a corporation created by a governmental entity to act on behalf of the entity.

(b) A governmental or private entity may not take private property through the use of eminent domain if the taking:

- (1) confers a private benefit on a particular private party through the 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, unless the

economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas under:

(A) Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code; or

(B) Section 311.005(a)(1)(I), Tax Code; or  
(4) is not for a public use.

(c) This section does not affect the authority of an entity authorized by law to take private property through the use of eminent domain for:

(1) transportation projects, including, but not limited to, railroads, airports, or public roads or highways;

(2) entities authorized under Section 59, Article XVI, Texas Constitution, including:

(A) port authorities;

(B) navigation districts; and

(C) any other conservation or reclamation districts that act as ports;

(3) water supply, wastewater, flood control, and drainage projects;

(4) public buildings, hospitals, and parks;

(5) the provision of utility services;

(6) a sports and community venue project approved by voters at an election held on or before December 1, 2005, under Chapter 334 or 335, Local Government Code;

(7) the operations of:

(A) a common carrier pipeline [~~subject to Chapter 111, Natural Resources Code, and Section B(3)(b), Article 2.01, Texas Business Corporation Act~~]; or

(B) an energy transporter, as that term is defined by Section 186.051, Utilities Code;

(8) a purpose authorized by Chapter 181, Utilities Code;

(9) underground storage operations subject to Chapter 91, Natural Resources Code;

(10) a waste disposal project; or

(11) a library, museum, or related facility and any infrastructure related to the facility.

(d) This section does not affect the authority of a governmental entity to condemn a leasehold estate on property owned by the governmental entity.

(e) The determination by the governmental or private entity proposing to take the property that the taking does not involve an act or circumstance prohibited by Subsection (b) does not create a presumption with respect to whether the taking involves that act or circumstance.

Sec. 2206.002. LIMITATIONS ON EASEMENTS. (a) This section applies only to an easement acquired by an entity for the purpose of a pipeline to be used for oil or gas exploration or production activities.

(b) A property owner whose property is acquired through the use of eminent domain under Chapter 21, Property Code, for the purpose of creating an easement through that owner's property may

construct streets or roads, including gravel, asphalt, or concrete streets or roads, at any locations above the easement that the property owner chooses.

(c) The portion of a street or road constructed under this section that is within the area covered by the easement:

(1) must cross the easement at or near 90 degrees; and

(2) may not:

(A) exceed 40 feet in width;

(B) cause a violation of any applicable pipeline regulation; or

(C) interfere with the operation and maintenance of any pipeline.

(d) At least 30 days before the date on which construction of an asphalt or concrete street or road that will be located wholly or partly in an area covered by an easement used for a pipeline is scheduled to begin, the property owner must submit plans for the proposed construction to the owner of the easement.

(e) Notwithstanding the provisions of this section, a

property owner and the owner of the easement may agree to terms other than those stated in Subsection (c).

SUBCHAPTER B. PROCEDURES REQUIRED TO INITIATE  
EMINENT DOMAIN PROCEEDINGS

Sec. 2206.051. SHORT TITLE. This subchapter may be cited as the Truth in Condemnation Procedures Act.

Sec. 2206.052. APPLICABILITY. The procedures in this subchapter apply only to the use of eminent domain under the laws of this state by a governmental entity.

Sec. 2206.053. VOTE ON USE OF EMINENT DOMAIN. (a) Before a governmental entity initiates a condemnation proceeding by filing a petition under Section 21.012, Property Code, the governmental entity must:

(1) authorize the initiation of the condemnation proceeding at a public meeting by a record vote; and

(2) include in the notice for the public meeting as required by Subchapter C, Chapter 551, in addition to other information as required by that subchapter, the consideration of

the use of eminent domain to condemn property as an agenda item.

(b) A single ordinance, resolution, or order may be adopted for all units of property to be condemned if:

(1) the motion required by Subsection (e) indicates that the first record vote applies to all units of property to be condemned; and

(2) the minutes of the governmental entity reflect that the first vote applies to all of those units.

(c) If more than one member of the governing body objects to adopting a single ordinance, resolution, or order by a record vote for all units of property for which condemnation proceedings are to be initiated, a separate record vote must be taken for each unit of property.

(d) For the purposes of Subsections (a) and (c), if two or more units of real property are owned by the same person, the governmental entity may treat those units of property as one unit of property.

(e) The motion to adopt an ordinance, resolution, or order

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authorizing the initiation of condemnation proceedings under Chapter 21, Property Code, must be made in a form substantially similar to the following: "I move that the (name of governmental entity) authorize the use of the power of eminent domain to acquire (describe the property) for (describe the public use)." The description of the property required by this subsection is sufficient if the description of the location of and interest in the property that the governmental entity seeks to acquire is substantially similar to the description that is or could properly be used in a petition to condemn the property under Section 21.012, Property Code.

(f) If a project for a public use described by Section 2206.001(c)(3) will require a governmental entity to acquire multiple tracts or units of property to construct facilities connecting one location to another location, the governing body of the governmental entity may adopt a single ordinance, resolution, or order by a record vote that delegates the authority to initiate condemnation proceedings to the chief administrative official of

the governmental entity.

(g) An ordinance, resolution, or order adopted under Subsection (f) is not required to identify specific properties that the governmental entity will acquire. The ordinance, resolution, or order must identify the general area to be covered by the project or the general route that will be used by the governmental entity for the project in a way that provides property owners in and around the area or along the route reasonable notice that the owners' properties may be subject to condemnation proceedings during the planning or construction of the project.

SUBCHAPTER C. EXPIRATION OF CERTAIN EMINENT DOMAIN AUTHORITY

Sec. 2206.101. REPORT OF EMINENT DOMAIN AUTHORITY; EXPIRATION OF AUTHORITY. (a) This section does not apply to an entity that was created or that acquired the power of eminent domain on or after December 31, 2012.

(b) Not later than December 31, 2012, an entity, including a private entity, authorized by the state by a general or special law to exercise the power of eminent domain shall submit to the

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comptroller a letter stating that the entity is authorized by the state to exercise the power of eminent domain and identifying each provision of law that grants the entity that authority. The entity must send the letter by certified mail, return receipt requested.

(c) The authority of an entity to exercise the power of eminent domain expires on September 1, 2013, unless the entity submits a letter in accordance with Subsection (b).

(d) Not later than March 1, 2013, the comptroller shall submit to the governor, the lieutenant governor, the speaker of the house of representatives, the presiding officers of the appropriate standing committees of the senate and the house of representatives, and the Texas Legislative Council a report that contains:

(1) the name of each entity that submitted a letter in accordance with this section; and

(2) a corresponding list of the provisions granting eminent domain authority as identified by each entity that submitted a letter.

(e) The Texas Legislative Council shall prepare for

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consideration by the 84th Legislature, Regular Session, a  
nonsubstantive revision of the statutes of this state as necessary  
to reflect the state of the law after the expiration of an entity's  
eminent domain authority effective under Subsection (c).

SECTION 3. Subsection (a), Section 251.001, Local Government Code, is amended to read as follows:

(a) When the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a public use [~~purpose~~] to acquire public or private property, whether located inside or outside the municipality, for any of the following uses [~~purposes~~]:

(1) the providing, enlarging, or improving of a municipally owned city hall; police station; jail or other law enforcement detention facility; fire station; library; school or other educational facility; academy; auditorium; hospital; sanatorium; market house; slaughterhouse; warehouse; elevator; railroad terminal; airport; ferry; ferry landing; pier; wharf; dock or other shipping facility; loading or unloading facility; alley,

street, or other roadway; park, playground, or other recreational facility; square; water works system, including reservoirs, other water supply sources, watersheds, and water storage, drainage, treatment, distribution, transmission, and emptying facilities; sewage system including sewage collection, drainage, treatment, disposal, and emptying facilities; electric or gas power system; cemetery; and crematory;

(2) the determining of riparian rights relative to the municipal water works;

(3) the straightening or improving of the channel of any stream, branch, or drain;

(4) the straightening, widening, or extending of any alley, street, or other roadway; and

(5) ~~for~~ any other municipal public use ~~[purpose]~~ the governing body considers advisable.

SECTION 4. Subsection (a), Section 261.001, Local Government Code, is amended to read as follows:

(a) A county may exercise the right of eminent domain to

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condemn and acquire land, an easement in land, or a right-of-way if the acquisition is necessary for the construction of a jail, courthouse, hospital, or library, or for another public use [~~purpose~~] authorized by law.

SECTION 5. Subsection (c), Section 263.201, Local Government Code, is amended to read as follows:

(c) The declaration of taking must contain:

(1) a declaration that the land or interest in land described in the original petition is taken for a public use [~~purpose~~] and for ultimate conveyance to the United States;

(2) a description of the land sufficient for the identification of the land;

(3) a statement of the estate or interest in the land being taken;

(4) a statement of the public use to be made of the land;

(5) a plan showing the land being taken; and

(6) a statement of the amount of damages awarded by the

special commissioners, or by the jury on appeal, for the taking of the land.

SECTION 6. Section 273.002, Local Government Code, is amended to read as follows:

Sec. 273.002. CONDEMNATION. Condemnation of property under this chapter shall be in accordance with state law relating to eminent domain, which may be Chapter 21, Property Code, or any other state law governing and relating to the condemnation of land for public use [~~purposes~~] by a municipality.

SECTION 7. Section 21.0111, Property Code, is amended to read as follows:

Sec. 21.0111. DISCLOSURE OF CERTAIN INFORMATION REQUIRED; INITIAL OFFER. (a) An [~~A governmental~~] entity with eminent domain authority that wants to acquire real property for a public use shall, by certified mail, return receipt requested, disclose to the property owner at the time an offer to purchase or lease the property is made any and all [~~existing~~] appraisal reports produced or acquired by the [~~governmental~~] entity relating specifically to

the owner's property and prepared in the 10 years preceding the date of the ~~[used in determining the final valuation]~~ offer.

(b) A property owner shall disclose to the ~~[acquiring governmental]~~ entity seeking to acquire the property any and all current and existing appraisal reports produced or acquired by the property owner relating specifically to the owner's property and used in determining the owner's opinion of value. Such disclosure shall take place not later than the earlier of:

(1) the 10th day after the date ~~[within 10 days]~~ of receipt of an appraisal report; or

(2) the third business day before the date of a special commissioner's hearing if an appraisal report is to be used at the ~~[reports but no later than 10 days prior to the special commissioner's]~~ hearing.

(c) An entity seeking to acquire property that the entity is authorized to obtain through the use of eminent domain may not include a confidentiality provision in an offer or agreement to acquire the property. The entity shall inform the owner of the

property that the owner has the right to:

(1) discuss any offer or agreement regarding the entity's acquisition of the property with others; or

(2) keep the offer or agreement confidential, unless the offer or agreement is subject to Chapter 552, Government Code.

(d) A subsequent bona fide purchaser for value from the acquiring [~~governmental~~] entity may conclusively presume that the requirement of this section has been met. This section does not apply to acquisitions of real property for which an [~~a governmental~~] entity does not have eminent domain authority.

SECTION 8. Subchapter B, Chapter 21, Property Code, is amended by adding Section 21.0113 to read as follows:

Sec. 21.0113. BONA FIDE OFFER REQUIRED. (a) An entity with eminent domain authority that wants to acquire real property for a public use must make a bona fide offer to acquire the property from the property owner voluntarily.

(b) An entity with eminent domain authority has made a bona fide offer if:

(1) an initial offer is made in writing to a property owner;

(2) a final offer is made in writing to the property owner;

(3) the final offer is made on or after the 30th day after the date on which the entity makes a written initial offer to the property owner;

(4) before making a final offer, the entity obtains a written appraisal from a certified appraiser of the value of the property being acquired and the damages, if any, to any of the property owner's remaining property;

(5) the final offer is equal to or greater than the amount of the written appraisal obtained by the entity;

(6) the following items are included with the final offer or have been previously provided to the owner by the entity:

(A) a copy of the written appraisal;

(B) a copy of the deed, easement, or other instrument conveying the property sought to be acquired; and

(C) the landowner's bill of rights statement prescribed by Section 21.0112; and

(7) the entity provides the property owner with at least 14 days to respond to the final offer and the property owner does not agree to the terms of the final offer within that period.

SECTION 9. Section 21.012, Property Code, is amended to read as follows:

Sec. 21.012. CONDEMNATION PETITION. (a) If an entity [~~the United States, this state, a political subdivision of this state, a corporation~~] with eminent domain authority [~~, or an irrigation, water improvement, or water power control district created by law~~] wants to acquire real property for public use but is unable to agree with the owner of the property on the amount of damages, the [~~condemning~~] entity may begin a condemnation proceeding by filing a petition in the proper court.

(b) The petition must:

- (1) describe the property to be condemned;
- (2) state with specificity the public use [~~purpose~~] for

which the entity intends to acquire [~~use~~] the property;

(3) state the name of the owner of the property if the owner is known;

(4) state that the entity and the property owner are unable to agree on the damages; [~~and~~]

(5) if applicable, state that the entity provided the property owner with the landowner's bill of rights statement in accordance with Section 21.0112; and

(6) state that the entity made a bona fide offer to acquire the property from the property owner voluntarily as provided by Section 21.0113.

(c) An entity that files a petition under this section must provide a copy of the petition to the property owner by certified mail, return receipt requested.

SECTION 10. Subsection (a), Section 21.014, Property Code, is amended to read as follows:

(a) The judge of a court in which a condemnation petition is filed or to which an eminent domain case is assigned shall appoint

three disinterested real property owners [~~freeholders~~] who reside in the county as special commissioners to assess the damages of the owner of the property being condemned. The judge appointing the special commissioners shall give preference to persons agreed on by the parties. The judge shall provide each party a reasonable period to strike one of the three commissioners appointed by the judge. If a person fails to serve as a commissioner or is struck by a party to the suit, the judge shall [~~may~~] appoint a replacement.

SECTION 11. Subsection (a), Section 21.015, Property Code, is amended to read as follows:

(a) The special commissioners in an eminent domain proceeding shall promptly schedule a hearing for the parties at the earliest practical time but may not schedule a hearing to assess damages before the 20th day after the date the special commissioners were appointed. The special commissioners shall schedule a hearing for the parties [~~and~~] at a place that is as near as practical to the property being condemned or at the county seat of the county in

which the proceeding is being held.

SECTION 12. Subsection (b), Section 21.016, Property Code, is amended to read as follows:

(b) Notice of the hearing must be served on a party not later than the 20th [~~11th~~] day before the day set for the hearing. A person competent to testify may serve the notice.

SECTION 13. Section 21.023, Property Code, is amended to read as follows:

Sec. 21.023. DISCLOSURE OF INFORMATION REQUIRED AT TIME OF ACQUISITION. An [~~A governmental~~] entity with eminent domain authority shall disclose in writing to the property owner, at the time of acquisition of the property through eminent domain, that:

(1) the owner or the owner's heirs, successors, or assigns may be [~~are~~] entitled to:

(A) repurchase the property under Subchapter E [~~if the public use for which the property was acquired through eminent domain is canceled before the 10th anniversary of the date of acquisition~~]; or

(B) request from the entity certain information relating to the use of the property and any actual progress made toward that use; and

(2) the repurchase price is the price paid to the owner by the entity at the time the entity acquired the property through eminent domain [~~fair market value of the property at the time the public use was canceled~~].

SECTION 14. Subchapter B, Chapter 21, Property Code, is amended by adding Section 21.025 to read as follows:

Sec. 21.025. PRODUCTION OF INFORMATION BY CERTAIN ENTITIES.

(a) Notwithstanding any other law, an entity that is not subject to Chapter 552, Government Code, and is authorized by law to acquire private property through the use of eminent domain is required to produce information as provided by this section if the information is:

(1) requested by a person who owns property that is the subject of a proposed or existing eminent domain proceeding; and

(2) related to the taking of the person's private

property by the entity through the use of eminent domain.

(b) An entity described by Subsection (a) is required under this section only to produce information relating to the condemnation of the specific property owned by the requestor as described in the request. A request under this section must contain sufficient details to allow the entity to identify the specific tract of land in relation to which the information is sought.

(c) The entity shall respond to a request in accordance with the Texas Rules of Civil Procedure as if the request was made in a matter pending before a state district court.

(d) Exceptions to disclosure provided by this chapter and the Texas Rules of Civil Procedure apply to the disclosure of information under this section.

(e) Jurisdiction to enforce the provisions of this section resides in:

(1) the court in which the condemnation was initiated;

or

(2) if the condemnation proceeding has not been initiated:

(A) a court that would have jurisdiction over a proceeding to condemn the requestor's property; or

(B) a court with eminent domain jurisdiction in the county in which the entity has its principal place of business.

(f) If the entity refuses to produce information requested in accordance with this section and the court determines that the refusal violates this section, the court may award the requestor's reasonable attorney's fees incurred to compel the production of the information.

SECTION 15. Subsection (d), Section 21.042, Property Code, is amended to read as follows:

(d) In estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, including a material impairment of direct access on

or off the remaining property that affects the market value of the remaining property, but they may not consider an injury or benefit that the property owner experiences in common with the general community, including circuitry of travel and diversion of traffic. In this subsection, "direct access" means ingress and egress on or off a public road, street, or highway at a location where the remaining property adjoins that road, street, or highway.

SECTION 16. Subsections (a) and (b), Section 21.046, Property Code, are amended to read as follows:

(a) A department, agency, instrumentality, or political subdivision of this state shall ~~may~~ provide a relocation advisory service for an individual, a family, a business concern, a farming or ranching operation, or a nonprofit organization that ~~[if the service]~~ is compatible with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ~~[Advisory Program]~~, 42 U.S.C.A. 4601 ~~[23 U.S.C.A. 501]~~, et seq.

(b) This state or a political subdivision of this state shall ~~may~~, as a cost of acquiring real property, pay moving expenses

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and rental supplements, make relocation payments, provide financial assistance to acquire replacement housing, and compensate for expenses incidental to the transfer of the property if an individual, a family, the personal property of a business, a farming or ranching operation, or a nonprofit organization is displaced in connection with the acquisition.

SECTION 17. The heading to Section 21.047, Property Code, is amended to read as follows:

Sec. 21.047. ASSESSMENT OF COSTS AND FEES.

SECTION 18. Section 21.047, Property Code, is amended by adding Subsection (d) to read as follows:

(d) If a court hearing a suit under this chapter determines that a condemnor did not make a bona fide offer to acquire the property from the property owner voluntarily as required by Section 21.0113, the court shall abate the suit, order the condemnor to make a bona fide offer, and order the condemnor to pay:

- (1) all costs as provided by Subsection (a); and
- (2) any reasonable attorney's fees and other

professional fees incurred by the property owner that are directly related to the violation.

SECTION 19. Subchapter E, Chapter 21, Property Code, is amended to read as follows:

SUBCHAPTER E. REPURCHASE OF REAL PROPERTY FROM CONDEMNING  
[GOVERNMENTAL] ENTITY

Sec. 21.101. RIGHT OF REPURCHASE [APPLICABILITY]. (a) A person from whom [~~Except as provided in Subsection (b), this subchapter applies only to~~] a real property interest is acquired by an [~~a governmental~~] entity through eminent domain for a public use, or that person's heirs, successors, or assigns, is entitled to repurchase the property as provided by this subchapter if:

(1) the public use for which the property was acquired through eminent domain is [~~that was~~] canceled before the property is used for that public use;

(2) no actual progress is made toward the public use for which the property was acquired between the date of acquisition and the 10th anniversary of that date; or

(3) the property becomes unnecessary for the public use for which the property was acquired, or a substantially similar public use, before the 10th anniversary of the date of acquisition.

(b) In this section, "actual progress" means the completion of two or more of the following actions:

(1) the performance of a significant amount of labor to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(2) the provision of a significant amount of materials to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(3) the hiring of and performance of a significant amount of work by an architect, engineer, or surveyor to prepare a plan or plat that includes the property or other property acquired for the same public use project for which the property owner's property was acquired;

(4) application for state or federal funds to develop

the property or other property acquired for the same public use project for which the property owner's property was acquired;

(5) application for a state or federal permit to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(6) the acquisition of a tract or parcel of real property adjacent to the property for the same public use project for which the owner's property was acquired; or

(7) for a governmental entity, the adoption by a majority of the entity's governing body at a public hearing of a development plan for a public use project that indicates that the entity will not complete more than one action described by Subdivisions (1)-(6) before the 10th anniversary of the date of acquisition of the property [~~This subchapter does not apply to a right-of-way under the jurisdiction of:~~

~~[(1) a county;~~

~~[(2) a municipality; or~~

~~[(3) the Texas Department of Transportation].~~

(c) A district court may determine all issues in any suit regarding the repurchase of a real property interest acquired through eminent domain by the former property owner or the owner's heirs, successors, or assigns.

Sec. 21.102. NOTICE TO PREVIOUS PROPERTY OWNER REQUIRED [~~AT TIME OF CANCELLATION OF PUBLIC USE~~]. Not later than the 180th day after the date an entity that acquired a real property interest through eminent domain determines that the former property owner is entitled to repurchase the property under Section 21.101 [~~of the cancellation of the public use for which real property was acquired through eminent domain from a property owner under Subchapter B~~], the [~~governmental~~] entity shall send by certified mail, return receipt requested, to the property owner or the owner's heirs, successors, or assigns a notice containing:

(1) an identification, which is not required to be a legal description, of the property that was acquired;

(2) an identification of the public use for which the property had been acquired and a statement that:

(A) the public use was [has been] canceled before the property was used for the public use;

(B) no actual progress was made toward the public use; or

(C) the property became unnecessary for the public use, or a substantially similar public use, before the 10th anniversary of the date of acquisition; and

(3) a description of the person's right under this subchapter to repurchase the property.

Sec. 21.1021. REQUESTS FOR INFORMATION REGARDING CONDEMNED PROPERTY. (a) On or after the 10th anniversary of the date on which real property was acquired by an entity through eminent domain, a property owner or the owner's heirs, successors, or assigns may request that the condemning entity make a determination and provide a statement and other relevant information regarding:

(1) whether the public use for which the property was acquired was canceled before the property was used for the public use;

(2) whether any actual progress was made toward the public use between the date of acquisition and the 10th anniversary of that date, including an itemized description of the progress made, if applicable; and

(3) whether the property became unnecessary for the public use, or a substantially similar public use, before the 10th anniversary of the date of acquisition.

(b) A request under this section must contain sufficient detail to allow the entity to identify the specific tract of land in relation to which the information is sought.

(c) Not later than the 90th day following the date of receipt of the request for information, the entity shall send a written response by certified mail, return receipt requested, to the requestor.

Sec. 21.1022. LIMITATIONS PERIOD FOR REPURCHASE RIGHT. Notwithstanding Section 21.103, the right to repurchase provided by this subchapter is extinguished on the first anniversary of the expiration of the period for an entity to provide notice under

Section 21.102 if the entity:

- (1) is required to provide notice under Section 21.102;
- (2) makes a good faith effort to locate and provide notice to each person entitled to notice before the expiration of the deadline for providing notice under that section; and
- (3) does not receive a response to any notice provided under that section in the period for response prescribed by Section 21.103.

Sec. 21.103. RESALE OF PROPERTY; PRICE. (a) Not later than the 180th day after the date of the postmark on a [the] notice sent under Section 21.102 or a response to a request made under Section 21.1021 that indicates that the property owner, or the owner's heirs, successors, or assigns, is entitled to repurchase the property interest in accordance with Section 21.101, the property owner or the owner's heirs, successors, or assigns must notify the ~~[governmental]~~ entity of the person's intent to repurchase the property interest under this subchapter.

(b) As soon as practicable after receipt of a notice of

intent to repurchase [~~the notification~~] under Subsection (a), the [~~governmental~~] entity shall offer to sell the property interest to the person for the price paid to the owner by the entity at the time the entity acquired the property through eminent domain [~~fair market value of the property at the time the public use was canceled~~]. The person's right to repurchase the property expires on the 90th day after the date on which the [~~governmental~~] entity makes the offer.

SECTION 20. Section 202.021, Transportation Code, is amended by adding Subsection (j) to read as follows:

(j) The standard for determination of the fair value of the state's interest in access rights to a highway right-of-way is the same legal standard that is applied by the commission in the:

(1) acquisition of access rights under Subchapter D, Chapter 203; and

(2) payment of damages in the exercise of the authority, under Subchapter C, Chapter 203, for impairment of highway access to or from real property where the real property adjoins the

highway.

SECTION 21. Section 54.209, Water Code, is amended to read as follows:

Sec. 54.209. LIMITATION ON USE OF EMINENT DOMAIN. A district may not exercise the power of eminent domain outside the district boundaries to acquire:

(1) a site for a water treatment plant, water storage facility, wastewater treatment plant, or wastewater disposal plant;

(2) a site for a park, swimming pool, or other recreational facility, as defined by Section 49.462 [~~except a trail~~];

(3) [~~a site for a trail on real property designated as a homestead as defined by Section 41.002, Property Code; or~~

~~[(4)] an exclusive easement through a county regional park; or~~

(4) a site or easement for a road project.

SECTION 22. Section 1, Chapter 178 (S.B. 289), Acts of the 56th Legislature, Regular Session, 1959 (Article 3183b-1, Vernon's

Texas Civil Statutes), is amended to read as follows:

Sec. 1. Except as provided by this section, and notwithstanding any other law, any [Any] nonprofit corporation incorporated under the laws of this state for purely charitable purposes and which is directly affiliated or associated with a medical center having a medical school recognized by the Council on Medical Education and Hospitals of the American Medical Association as an integral part of its establishment, and which has for a purpose of its incorporation the provision or support of medical facilities or services for the use and benefit of the public, and which is situated in any county of this state having a population in excess of six hundred thousand (600,000) inhabitants according to the most recent Federal Census shall have the power of eminent domain and condemnation for the purposes set forth in Section 2 and Section 3 of this Act. A charitable corporation described by this section may not exercise the power of eminent domain and condemnation to acquire a detached, single-family residential property or a multifamily residential property that contains eight

or fewer dwelling units.

SECTION 23. (a) Section 552.0037, Government Code, is repealed.

(b) Section 21.024, Property Code, is repealed.

SECTION 24. Section 11.155, Education Code, Chapter 2206, Government Code, Sections 251.001, 261.001, 263.201, and 273.002, Local Government Code, Chapter 21, Property Code, and Section 1, Chapter 178 (S.B. 289), Acts of the 56th Legislature, Regular Session, 1959 (Article 3183b-1, Vernon's Texas Civil Statutes), as amended by this Act, apply only to a condemnation proceeding in which the petition is filed on or after the effective date of this Act and to any property condemned through the proceeding. A condemnation proceeding in which the petition is filed before the effective date of this Act and any property condemned through the proceeding are governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 25. The change in law made by this Act to Section 202.021, Transportation Code, applies only to a sale or transfer

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under that section that occurs on or after the effective date of this Act. A sale or transfer that occurs before the effective date of this Act is governed by the law applicable to the sale or transfer immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 26. The changes in law made by this Act to Section 54.209, Water Code, apply only to a condemnation proceeding in which the petition is filed on or after the effective date of this Act. A condemnation proceeding in which the petition is filed before the effective date of this Act is governed by the law in effect on the date the petition was filed, and that law is continued in effect for that purpose.

SECTION 27. This Act takes effect September 1, 2011.

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President of the Senate

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Speaker of the House

I hereby certify that S.B. No. 18 passed the Senate on February 9, 2011, by the following vote: Yeas 31, Nays 0; April 19, 2011, Senate refused to concur in House amendments and requested appointment of Conference Committee; April 28, 2011, House granted request of the Senate; May 6, 2011, Senate adopted Conference Committee Report by the following vote: Yeas 30, Nays 0.

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Secretary of the Senate

I hereby certify that S.B. No. 18 passed the House, with amendments, on April 14, 2011, by the following vote: Yeas 144, Nays 0, one present not voting; April 28, 2011, House granted request of the Senate for appointment of Conference Committee;

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May 5, 2011, House adopted Conference Committee Report by the following vote: Yeas 145, Nays 0, two present not voting.

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Chief Clerk of the House

Approved:

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Date

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Governor

**TAB “2”**

**TOWN OF METROPOLIS, TEXAS**

**RESOLUTION NO. \_\_\_\_\_**

**A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF METROPOLIS, TEXAS, DECLARING THE NECESSITY TO ACQUIRE FEE SIMPLE TITLE TO 0.2369 ACRES (10,320 SQUARE FEET) OF LAND SITUATED IN THE LEX LUTHOR SURVEY, ABSTRACT NO. 50, IN SHERLOCK COUNTY, TEXAS, WITH A STREET ADDRESS OF 221B BAKER STREET, IN THE TOWN OF METROPOLIS, TEXAS, FOR ROADWAY EXPANSION/RECONSTRUCTION AND ASSOCIATED DRAINAGE/ UTILITY USES; DETERMINING THE PUBLIC NECESSITY FOR SUCH ACQUISITION; AUTHORIZING THE ACQUISITION OF PROPERTY RIGHTS NECESSARY FOR THE ROADWAY EXPANSION/RECONSTRUCTION PROJECT AND ASSOCIATED DRAINAGE/UTILITY USES; APPOINTING AN APPRAISER AND NEGOTIATOR AS NECESSARY; AUTHORIZING THE TOWN ADMINISTRATOR OF THE TOWN OF METROPOLIS, TEXAS, TO ESTABLISH JUST COMPENSATION FOR THE PROPERTY RIGHTS TO BE ACQUIRED; AUTHORIZING THE TOWN ADMINISTRATOR OR DESIGNEE TO TAKE ALL STEPS NECESSARY TO ACQUIRE THE NEEDED PROPERTY RIGHTS IN COMPLIANCE WITH ALL APPLICABLE LAWS AND RESOLUTIONS; AND AUTHORIZING THE TOWN ATTORNEY OR DESIGNEE TO INSTITUTE CONDEMNATION PROCEEDINGS TO ACQUIRE THE PROPERTY IF PURCHASE NEGOTIATIONS ARE NOT SUCCESSFUL.**

**WHEREAS**, the Town Council of the Town of Metropolis, Texas (“Town Council”), has determined that 0.2369 acres (10,230 square feet) of land situated in the Lex Luthor Survey, Abstract No. 50, in Sherlock County, Texas, with a street address of 221B Baker Street, Metropolis, Texas (“Doctor Watson Drive Property”), a legal description of which is attached hereto, is appropriate for use by the Town of Metropolis for the Town’s roadway expansion/reconstruction and associated drainage and utility uses (“Roadway Project”), and that there exists a public necessity to acquire the Doctor Watson Drive Property, in fee simple title, for the Town of Metropolis’ Roadway Project; and

**WHEREAS**, the Town Council desires to acquire the Doctor Watson Drive Property for the aforementioned public uses in conjunction with the Roadway Project because, in part, additional right-of-way is necessary for emergency vehicle operations on the Doctor Watson Drive cul-de-sac in the Town of Metropolis, Texas; and

**WHEREAS**, the Town Council desires that the Town Administrator, or designee, take all necessary steps to acquire the needed property interests, including but not limited to the retention of appraisers, engineers and other consultants and experts, and that the Town Attorney, or designee, negotiate the purchase of the property interests and, if unsuccessful in purchasing the needed property interests, to institute condemnation proceedings to acquire the Doctor Watson Drive Property.

**NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF METROPOLIS, TEXAS, THAT:**

**SECTION 1**

All of the above premises are hereby found to be true and correct legislative and factual findings of the Town Council of the Town of Metropolis, Texas, and they are hereby approved and incorporated into the body of this resolution as if copied in their entirety.

**SECTION 2**

The Town Council hereby finds and determines that a public use and necessity exists for the Town of Metropolis to expand/reconstruct the Doctor Watson Drive cul-de-sac and undertake associated drainage and utility improvements as part of the Roadway Project, and to acquire the necessary property rights in the Doctor Watson Drive Property deemed necessary for expansion/reconstruction of the Roadway Project, as allowed by law, together with all necessary appurtenances, additions and improvements on, over, under, and through those certain lots, tracts or parcels of land.

**SECTION 3**

The Town Attorney, or designee, is authorized and directed to negotiate for and to acquire the required property rights for the Town of Metropolis, and to acquire said rights in compliance with State and Federal law. Moreover, the Town Attorney, or designee, is specifically authorized and directed to do each and every act necessary to acquire the needed property rights including, but not limited to, the authority to negotiate, give notices, make written offers to purchase, prepare contracts, to retain and designate a qualified appraiser of the property interests to be acquired, as well as any other experts or consultants that deemed necessary for the acquisition process and, if necessary, to institute proceedings in eminent domain.

**SECTION 4**

The Town Administrator, or designee, is appointed as negotiator for the acquisition of the needed property interests and, as such, the Town Administrator or designee is authorized and directed to do each and every act and deed hereinabove specified or authorized by reference, subject to the availability of funds appropriated by the Town Council for such purpose. Further, the Town Administrator or designee is specifically authorized to establish the just compensation for the acquisition of the Doctor Watson Drive Property. Additionally, if the Town Administrator or designee determines that an agreement as to damages or compensation cannot be reached, then the Town Attorney or designee is hereby authorized and directed to file or cause to be filed, against the owner(s) and interested parties of the needed property interests, proceedings in eminent domain to acquire the above-stated interests in the Doctor Watson Drive Property.

**SECTION 5**

This resolution shall become effective from and after its passage.

**DULY RESOLVED** by the Town Council of the Town of Metropolis, Texas, on this the \_\_\_\_\_ day of Nevermore, 2012.

\_\_\_\_\_  
Clark Kent, Mayor

**ATTEST:**

\_\_\_\_\_  
Lois Lane, Town Secretary

**APPROVED AS TO FORM AND LEGALITY:**

\_\_\_\_\_  
Superman, Town Attorney

**TAB “3”**

[Date]

[Owner Address]

**Re: Acquisition of 167,159 square feet (3.837 acres) for use as Right-of-Way, 27,567 square feet (0.633 acres) for use as a Gas Pipeline Easement, 11,786 square feet (0.271 acres) for use as a Temporary Construction Easement, 450 square feet (0.010 acres) for use as a Drainage Easement and an additional 937 square foot (0.021 acres) for a Temporary Construction Easement, all located in the Tony Stark Survey, Abstract No. 575, Avengers County, Texas in association with Infrastructure Improvements and Widening of Batman Parkway.**

Dear Owner:

As you know, it is necessary for the City of Gotham City to construct portions of Batman Parkway, Catwoman Lane and associated utilities. The construction of these necessary infrastructure improvements requires the purchase of the property referred to above. Inasmuch as negotiations to purchase this property have not been successful to date, a final offer is hereby submitted to you. The total sum of **One Gizillion Dollars** (\$\_\_\_\_\_) is offered in settlement for the required property rights, which includes 3.837 acres of land for use as right-of-way, 0.633 acres of land for use as a gas pipeline easement, 0.271 acres for use as a temporary construction easement, 0.010 acres for use as a drainage easement and 0.021 acres for use as a temporary construction easement, save and except oil, gas and sulphur rights with no right of exploration on the above described property, subject to clear title being secured.

Any compensation that may be due to you or a tenant for Relocation Assistance is not included in this offer, in that such funds are paid to eligible persons separately through the City's relocation assistance program.

If you desire to accept this offer, please sign below and return this original signed offer letter to my office. Upon receipt of the accepted offer, the City will notify the title company to initiate a closing. If this offer is not accepted within 14 days from the date of delivery of this letter, it will be considered as having been rejected. We enclose herein, for your records and review, a draft copy of the proposed instruments by which the property or property interest would be conveyed to the City. A final copy of the documents will be signed at time of settlement. We have also enclosed a second copy of the Landowner's Bill of Rights and the appraisal by Commissioner Gordon Appraisal Services. **[If applicable: I have also enclosed copies of all appraisal reports relating to your property being acquired which were prepared in the ten (10) years preceding the date of this offer and produced or acquired by the City.]**

If you elect to reject this offer, eminent domain proceedings will be initiated by the City. Thereafter, the Court will appoint three disinterested real property owners who reside in the County to serve as Special Commissioners, a date will be set for a hearing and you will be

notified of the time and place set for the hearing at which the Special Commissioners will hear the evidence presented and arrive at an award which will be filed with the Court. The City may then deposit the amount of the award with the Court, at which time the City will be entitled to take possession of the property involved. After the deposit is made, you may withdraw your share of the award. If the award exceeds the amount of any subsequent judgment, you are required to repay the City the excess amount. If either you or the City is dissatisfied with the amount of the Special Commissioners' award, objections may be filed within the time prescribed by law and the case subsequently tried before the Court as are other civil cases.

You have the right to discuss with others any offer or agreement regarding the City's acquisition of the subject property, or you may (but are not required to) keep the offer or agreement confidential from others, subject to the provisions of Chapter 552, Government Code (the Public Records Act) as it may apply to the City.

Do not hesitate to call my office at 1-800-WE-WILL-SUE, should you have any questions regarding the acquisition process.

Sincerely,

Dragon Lady  
City of Gotham City  
Real Estate Acquisitions Administrator

**AGREED:**

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Owner

ENCLOSURES:

Draft proposed conveyance instrument(s)  
Landowner Bill of Rights  
Copy of Appraisal by Certified Appraiser

**TAB “4”**

## Timeline of dates under Senate Bill 18

This process may begin prior to or after the adoption of a condemnation resolution:

- Day 1** Initial offer made in writing to Property Owner. The initial offer does not have to include or be based on an appraisal; however, there is no prohibition from the initial offer being based on an appraisal. Must include a Landowner's Bill of Rights. A confidentiality provision must not be included. City shall inform Property Owner of his/her right to: (1) discuss offer with others; or (2) keep the offer confidential.
- Day 31** Final offer made in writing to Property Owner. The final offer *must* be based on a written appraisal obtained by the City from a certified appraiser regarding the value of the property acquired and damages, if any, to the remainder of the property. This offer *must* be greater than or equal to the appraisal. The City shall inform Property Owner of his/her right to: (1) discuss offer with others; or (2) keep the offer confidential. Property Owner must be given at least 14 days to respond to final offer. Must include a copy of the following with the final offer:
- (a) Written, certified appraisal;
  - (b) Proposed conveyance instrument; and
  - (c) Landowner's Bill of Rights, if not previously provided.
- Day 45** Last day to accept final offer if only 14 days are allowed by the City to respond to final offer.
- Day 46** Condemnation Petition may be filed – in accordance with Texas Property Code 21.012. Motion to Appoint Special Commissioners also filed. Certified copy of Petition *must* be provided to Property Owner.
- SC - 1** Appointment of Special Commissioners. Depending on the court, this usually occurs between 1 – 5 days after the date the Petition is filed. Receipt of Special Commissioners Appointment. Assuming that this information is received immediately, which may not always be the case, the hearing may be set not earlier than 20 days from today (see below). Commissioners contacted and hearing set, City receives signed Notice of Hearing from Commissioners. [Approximately 48 days from Day 1]
- SC-22** Earliest Commissioners' hearing date. Landowner must be served not later than 20 days before the hearing. Hearing must be at least 20 days after commissioners are appointed. This date presumes that the Property Owner can be served in one day. [Approximately 60 days from Day 1]

**TAB “5”**

## **APPRAISAL GUIDANCE MEMO: DAMAGES FOR IMPAIRMENT OF ACCESS**

Material Impairment of Direct Access Damage Standard - Effective September 1, 2011, the Texas Property Code, Section 21.042, established a new standard for determining whether a property owner is entitled to damages for impairment of access resulting from the acquisition of property. The statute provides that:

(d) In estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, *including a material impairment of direct access on or off the remaining property that affects the market value of the remaining property*, but they may not consider an injury or benefit that the property owner experiences in common with the general community, including *circuity of travel and diversion of traffic*. In this subsection, "direct access" means ingress and egress on or off a public road, street, or highway at a location where the remaining property adjoins that road, street, or highway (italics added for emphasis).

Comparison to Prior Access Damage Standard - The prior standard of "material and substantial impairment of access" focused on access to the entire remainder and asked whether there was still "reasonable access" to the remainder after the city's restriction of access. Access to a different secondary public road could constitute reasonable access resulting in a finding of no material and substantial impairment of access.

The new standard focuses on direct access to the property from the public highway. The operative factors are whether the impairment to "direct access" (ingress and egress on and off the remaining property to or from the improved public highway) is "material" and, if so, whether it "affects the market value of the remaining property." Additional access to a different secondary public road may or may not prevent a finding of material impairment of direct access, depending upon the specific facts. However, a total denial of direct access cannot be completely replaced by other access to a different secondary public road.

### Appraisal Instruction:

- A. A "material impairment" of direct access is one that is significant or important. Although the change must be significant or important, it no longer must be "substantial" (meaning considerable or large).

- B. In determining whether impaired access is material, the appraiser must look to whether other access points remain after the acquisition and whether those access points are sufficient to allow the remainder to have similar utility. The concept of access impairment is not to be fragmented into a mathematical equation to focus only on the number of feet or percentage of closed access points.
- C. The appraiser should look at both the physical changes to ingress and egress on and off the remaining property and the anticipated impact on the use of the property to determine if the restriction is significant. Remaining access should be analyzed in light of the actual use of the remainder property as reflected by existing uses and improvements and applicable zoning unless the appraiser has concluded that the highest and best use of the property is different than its actual use. If the appraiser has concluded that the highest and best use of the property is different than its actual use, then remaining access should be analyzed in light of that highest and best use; making sure to avoid speculative or hypothetical uses that are not reasonably probable within the immediate future or within a reasonable time. Some of the factors to consider in the before and after scenario are:
1. the number, location, and width of existing, permissible, or permitted driveways;
  2. extent of difficulty for large trucks or other unique vehicles to enter the property (if that is the normal use of the property at the time of impairment);
  3. the manner in which the access impairment affects the functionality of existing improvements;
  4. whether the remaining property has access to another public road(s) (this is now just one factor and it may affect the analysis in two different ways:
    - a. it does not automatically prevent a finding of material impairment of ingress and egress on and off the remaining property from the road as it might under prior law, but access to another public road may have an effect on the determination of material impairment of direct access; and
    - b. if there is a determination that a material impairment of direct access did occur, a property's access to another public road may then have an effect on the difference in market value, if any); and

5. whether it changes the highest and best use of the remainder (again, this is not determinative of “materiality,” but is just one factor to be considered in making that determination). Material impairment cannot be based on speculative or hypothetical uses of the remainder property. Prospective highest and best uses must be reasonably probable within the immediate future or within a reasonable time.
- D. “Circuity of travel” and “diversion of traffic” are specifically excluded from the concept of material impairment of ingress and egress on and off the remaining property.
- E. “Damages to remainder property” are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the use of the land acquired.

Statements in Appraisal Instruction - Every appraisal must contain the following statement:

**The appraiser has considered access damages in accordance with Section 21.042(d) of the Texas Property Code, as amended by SB 18 of the Texas 82nd Regular Legislative Session, and finds as follows:**

1. **Is there a denial of direct access on this parcel? \_\_\_\_\_ (yes or no)**
2. **If so, is the denial of direct access material? \_\_\_\_\_ (yes, no, or not applicable)**
3. **The lack of any access denial or the material impairment of direct access on or off the remaining property affects the market value of the remaining property in the sum of \$\_\_\_\_\_.**

All three blanks must be completed for every appraisal.

If there is no denial of access on the property, then the answer to Question #1 is no, Question #2 is not applicable, and Question #3 is \$0.00.

If there is a denial of access, the appraiser must determine if it is a material impairment of direct access on or off the remainder that affects the market value of the remaining property. Some parcels may not have a material denial of access, so the sum attributable to the effect of market value would be \$0.00. Some parcels may have a material denial, but the denial does not affect the market value; therefore the sum would be \$0.0.

For each appraisal, there must be a sum attributable to access denial, even when there is no access denial and that sum is \$0.00.