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**A SHORT OVERVIEW OF THE TEXAS  
EMINENT DOMAIN PROCESS**



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## A SHORT OVERVIEW OF THE TEXAS EMINENT DOMAIN PROCESS

Eminent domain (also known as “condemnation”) is where a governmental entity seeks to acquire private property for a public purpose. Common examples are the acquisition of right of way for a road or utility project, or land needed for a school or park. The power of eminent domain is available to most governmental entities and certain private entities that operate as common carriers, such as pipelines, railroads, and electric transmission line companies (referred to as the “condemnor”).

No matter what entity is using the power of eminent domain, the land must be used for a “public purpose” and the landowner must be paid “adequate compensation” for the value of the property acquired.<sup>1</sup> The condemnor must also follow the proper procedure to condemn land found in Chapter 21 of the Texas Property Code and any other relevant statute that may limit a specific condemnor’s authority to act.<sup>2</sup> This paper provides a brief overview of the process to condemn land and the legal authority of a governmental entity to acquire property by eminent domain.

### **Steps to Condemn**

Below is a basic list of the steps to condemn land. For more details, see the attached “ED Checklist,” which details each step and the corresponding Property Code section.

1. Identify the property you need to acquire. This will require surveys and possibly engineering studies, depending on the type of property.
2. Contact the landowner and inform them about the project and that you may need to acquire their land. Coordinate the surveys and appraisals with the landowners.
3. Hire a state certified appraiser to value the property you need to acquire.<sup>3</sup>
4. Send the landowner (by CMRRR) an Initial Offer Letter, including the Landowner Bill of Rights, appraisals of the property within the last ten years, and the deed/easement document.<sup>4</sup>
5. Send the landowner a Final Offer Letter by CMRRR.<sup>5</sup>
6. File the Petition for Condemnation in the appropriate court.<sup>6</sup>
7. Contact the Special Commissioners and obtain their Oaths, Order Setting Hearing, and Notices of Hearing.<sup>7</sup>

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<sup>1</sup> Tex. Const. art. I, § 17.

<sup>2</sup> Tex. Prop. Code Ch. 21.

<sup>3</sup> *Id.* at § 21.0113(4).

<sup>4</sup> *Id.* at § 21.0111(a); 21.0113(b)(1).

<sup>5</sup> *Id.* at § 21.0113

<sup>6</sup> *Id.* at § 21.013.

<sup>7</sup> *Id.* at § 21.014-5.



8. Serve all parties with the Notice of Hearing at least 20 days prior to the hearing.<sup>8</sup>
9. Attend the Special Commissioners Hearing.
10. The objections period is the Monday following 20 days after the hearing. If objections are filed, serve all parties with copies of the objections (if required). The case will proceed as a typical trial in the court of jurisdiction.<sup>9</sup>
11. If no objections are filed, draft and file a Judgment in Absence of Objections and file a signed copy in the deed records.<sup>10</sup>

Each of these steps appears relatively simple. However, there are some issues to keep in mind. Below is a more detailed list that, based on experience, can be helpful to know ahead of the project.

### **Planning Ahead**

Pre-condemnation planning and negotiations are the key to getting ahead of any issues that may arise and avoiding any easily fixable issues. For example:

- Identifying the Part Acquired
  - Planning the route and determining the right of way needed for a given project is extremely important. While engineers design schematics based on what they need to complete the project, at times it is necessary to adjust the plans to avoid certain businesses or homes. Early engagement with the attorney and appraiser can help the condemning authority review project plans and engineer ways to avoid potentially costly pieces of property.
  - For example, an engineer may want to close one of three driveways that access a gas station/convenience store as part of a road improvement project. This may be because the current engineering standard dictates that driveways should be spaced a certain distance apart from each other for safety purposes. However, you need to consider how closing a driveway will affect the remainder property. Can a WB-53 (53-foot wheelbase) tanker truck still enter and exit the property to unload fuel? Did you perform autoCAD turning movements to determine this? If a tanker can no longer access the property, the gas station becomes a c-store without fuel, which is worth much less than a c-store with fuel. But, can you shift the driveway and combine it with a second driveway (i.e., enlarge it) and save the fuel component? If you can, you probably save \$1 million.

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<sup>8</sup> *Id.* at § 21.016.

<sup>9</sup> *Id.* at § 21.018.

<sup>10</sup> *Id.* at § 21.061.



- Title Issues
  - Determining who owns the land an entity needs to acquire can be a difficult task. The first step is to check the county tax rolls and determine who is paying taxes. The next step is to engage a title company to issue a title commitment. The title company will determine if there are any liens on the property, if the property is leased to a third-party, and if there are any outstanding title issues that must be “cured” prior to purchasing the property. Determining who has an interest in the land is important because all interested parties must sign off on the closing documents (if purchasing the property) or will need to be named in the petition for condemnation (if condemning the property). Title work is tedious, but it is necessary because, if you miss a party, you may have bought land that still has a valid lien on it.
- Cooperation with Appraisers, Land Planners, and Engineers
  - Because eminent domain cases are fact specific and rely heavily on opinions of value, hiring the right expert for the right case is crucial. In some instances, only an appraiser is required. In other cases, it may be necessary to hire an engineer, land planner, architect, or real estate broker to provide the right information to determine just compensation. Therefore, you need to determine what experts are required for your project and for any particular parcel. The best source for determining this is the appraiser, who can advise you if you need an engineer or architect to determine whether a building or site can still function after the acquisition.
  - For example, it is not uncommon for a project to impact some improvements on the property. If that is a canopy over fuel pumps, can it be cut back? If it is a million-square-foot concrete tilt wall warehouse, can it be cut at the end and put back together? You may need a land planner to help determine if the parking lot will be able to function and support the required number of parking spaces after the City acquires 10 feet off the front. Does a McDonald’s need 20 parking spaces, or will 15 suffice?
- Preparation of Litigation Documents
  - The attorney drafts the Petition for Condemnation, which determines what property rights the government needs to complete its project, be it an easement or fee simple title. Determining the type of property rights required is important and must be tailored to the project. For example, a road typically requires fee simple title because no one else will be allowed to use the property once the road is built. However, a powerline easement may allow some other uses that do not interfere with the powerline, such as parking or minimal landscaping. If you are condemning an easement, the landowner is going to want to know what they are allowed to do inside of the easement (as the servient estate). The answer to that question could impact the value of the remainder property and it is important to consider exactly



what you are acquiring and why. Whatever the answer is, you must state it in the petition.

- You also need to determine in what court you will file your case. Under the Texas Property Code, District Courts and County Courts at Law (if there is one in the county) have concurrent jurisdiction over eminent domain cases.<sup>11</sup> However, some counties have specific laws that dictate certain courts have exclusive jurisdiction. In other counties, the judges have local administrative rules that determine what court hears eminent domain jury trials. For example, in Travis County, you file the petition in Probate Court.<sup>12</sup> If any party files objections to the Special Commissioners Award, the case is transferred to the County Courts at Law, who handle the jury trial.

### **The Special Commissioners Hearing and Final Judgment**

- The best way to describe the Special Commissioners Hearing is non-binding arbitration. After you file the petition, the judge will appoint three Special Commissioners and two alternates.<sup>13</sup> Each side has ten days to strike one of the three commissioners, in which case the judge will appoint one of the alternates.<sup>14</sup>
- After the three commissioners are appointed and sworn, typically the condemnor contacts all relevant parties and finds an agreeable date for the Special Commissioners Hearing.
- At the hearing, the parties present their evidence. This is usually the live testimony of the appraiser(s), a project engineer, and a landowner or corporate representative. The rules of evidence do not apply.<sup>15</sup> The Special Commissioners only job is to determine the compensation due to the landowner.<sup>16</sup> They cannot (and usually will not) make legal rulings. The hearings are informal and usually last a few hours. At the end of the hearing, the commissioners will complete the Award of Special Commissioners, a written document prepared by the condemnor's attorney, that states the Commissioners' determination of compensation owed to the landowner.<sup>17</sup> The Award should be filed that day or as soon as possible.
- After the Award is filed, each party has twenty days plus a Monday to file objections to the Award.<sup>18</sup> If a party files objections, the case is converted into a regular trial in the court that has jurisdiction. This means a bench or jury trial and could be six or twelve jurors depending on the court. The trial is *de novo* and the

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<sup>11</sup> *Id.* at § 21.013.

<sup>12</sup> Tex. Gov't Code § 25.2293(c).

<sup>13</sup> Tex. Prop. Code § 21.014.

<sup>14</sup> *Id.*

<sup>15</sup> *See generally id.* at § 21.041.

<sup>16</sup> *Id.* at § 21.042.

<sup>17</sup> *Id.* at § 21.048.

<sup>18</sup> *Id.* at § 21.018.



Award amount is not admissible evidence.<sup>19</sup> However, prior adoptive admissions and testimony at the Special Commissioners Hearing can be used against a party at a trial.<sup>20</sup>

- Deposit of the Special Commissioners Award
  - After the Award is issued, the condemnor has the option to deposit the Award amount into the registry of the court and take possession of the property.<sup>21</sup> This gives the condemnor equitable, but not legal, title to the land. Condemnors typically deposit the Award and take possession as soon as possible so they can begin their project.
  - If the landowner withdraws the Award from the registry of the court, the landowner waives any challenge to the condemnor's authority to condemn the land and the only issue at trial will be compensation.<sup>22</sup>
- Final Judgment
  - If no one objects to the Award of Special Commissioners within the objection period, the Award becomes final and the trial court will enter a final judgment based on the Award amount (called a Judgment in Absence of Objections).<sup>23</sup> The condemnor drafts the JAO and files it with the court. This is a ministerial duty of the court and is not discretionary.<sup>24</sup>
  - If the case proceeds to a jury trial, the trial judge will enter a final judgment based on the jury verdict (subject to appeal). The Final Judgment (or the Judgment in Absence of Objections) is the document that delivers title in the land to the condemning authority and it is filed in the county deed records.

### **The Appraiser**

Of paramount importance for any condemning authority is that the landowner be paid just compensation for their property, as required by the Texas Constitution.<sup>25</sup> The most common dispute in an eminent domain case is how much compensation a landowner is due and how the acquisition affects the use of any remainder property that is not acquired. Consequently, eminent domain relies heavily on the use of experts who determine the utility and value of property, namely real estate appraisers. Therefore, it is necessary to discuss in detail how and why the appraiser is so important.

The real estate appraiser is the primary witness in an eminent domain case. They are the only party, other than a landowner, who can testify to the value of real estate in a trial. The Texas

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<sup>19</sup> *City of McKinney v. Eldorado Park, Ltd.*, 206 S.W.3d 185, 192 (Tex. App.—Eastland 2006, pet. denied).

<sup>20</sup> *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 847 (Tex. 2011).

<sup>21</sup> Tex. Prop. Code § 21.021.

<sup>22</sup> *State v. Jackson*, 388 S.W.2d 924, 925 (Tex.1965).

<sup>23</sup> Tex. Prop. Code § 21.061.

<sup>24</sup> *Pearson v. State*, 159 Tex. 66, 70 (1958).

<sup>25</sup> Tex. Const. art. I, § 17.



Property Code requires that an appraiser licensed in Texas value the property and any damages to the remainder.<sup>26</sup> While a condemnor can engage any licensed real estate appraiser to value the property it is acquiring, it is advisable to engage an appraiser with eminent domain experience.

First, an eminent domain appraisal should be more in depth than a typical “bank appraisal.” It will study the general market in which the property is located (i.e., the city or county), but it will also be hyper-focused on the type of property being appraised. A tract of vacant land could have several possible uses, but if it is located in a strategic area – near a railroad spur or highway interchange – it may have very specific highest and best use. The appraisal should also be free of any errors whatsoever, because a lawyer is going to cross-examine the witness about the report and will look for any weak points to exploit.

Second, the eminent domain appraiser should have personal knowledge of as much information contained in their report as possible. A typical appraiser may rely on staff to do much of this work. But testimony before a jury demands that, whenever possible, the appraiser personally has knowledge of each fact they used to determine value. They need to visit the subject property in person, visit their comparable sales, and talk with brokers and others in the industry who buy and sell that type of property. The appraiser must do their homework. This takes time and costs money, but it is necessary if they are going to make an effective witness.

Third, the eminent domain appraiser must be a good witness on the stand. Their job is to testify and be cross-examined. But most importantly their job is to convince a jury that their opinions are correct. They need to be unbiased, thoughtful, intelligent, diligent, honest, and authoritative – all without being rude, condescending, and defensive. This is a delicate balance and is not easy to do.

Eminent domain appraisers are niche. There are not many who excel at it, and those that do are expensive. But they are worth the cost if their testimony will save you hundreds of thousands, if not millions, of dollars.

## **Conclusion**

This paper is not meant to be a detailed how-to for condemnors. Others have written excellent treatises on the subject, and they are worth reading.<sup>27</sup> The laws governing eminent domain in Texas are usually found in Chapter 21 of the Texas Property Code which, for legislation, is a very short chapter. But much of the nuance of eminent domain is found in the case law, which began in earnest in the 1960s when the interstate highway system necessitated an unusual amount of condemnation. This case law, by and large, favors the condemnor. The facts, by and large, favor

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<sup>26</sup> Tex. Prop. Code § 21.0113(b)(1)(B)(ii).

<sup>27</sup> *Nichols on Eminent Domain* and *Rayburn on Condemnation* are the leading treatises. A good eminent domain lawyer will also be familiar with the appraisal process, and the Appraisal Institute publishes many excellent volumes on valuing different types of property. A personal favorite is *Real Estate Valuation in Litigation*, which is an easily digestible book that details how to win a battle of the expert appraisers from an appraisal point of view. But I would be negligent if I did not mention *The Appraisal of Real Estate*, the so-called “appraiser’s bible.” It is a textbook and it is dense, but it is a book every appraiser follows and one you should have on your bookshelf.





the condemnee. That is to say, a condemnor will win most questions of law but a landowner will win most questions of fact.

The most important thing the eminent domain attorney can do is to be realistic with their client about how expensive and long the process can be. The cases often take two years or more to reach a jury and no one, no matter how expert they are, can predict what a jury will decide. But if you follow these steps, and those in the checklist provided, you can assure your client that you will always get the land.

