



Caso Law Firm, PLLC

112 E. Cano St., Edinburg, Texas 78593 | jcaso@caso.law | 956-433-2276

June 13, 2024

Condemnation and Multi-Agency TxDOT Projects By Jose Caso, Caso Law Firm, PLLC

Texas City Attorneys Association
2024 Summer Conference
South Padre Island, Texas

Disclaimer: This presentation is intended for educational and informational purposes only and does not constitute legal advice or services. These materials represent the views, summaries and opinions of the authors. They do not necessarily reflect the opinions or views of Caso Law Firm, PLLC, or any of its respective employees, attorneys or clients.

Agenda

1. Introduction
2. Eminent Domain 101
3. Interactions Between Cities and TxDOT
4. Legal Framework for Easements and Utilities
5. Best Practices for Dealing with TxDOT
6. Challenges
7. No Immunity for Eminent Domain
8. Conclusion

1. Introduction

This paper aims to provide an overview of the complexities involved in condemnation and multi-agency road transportation projects.

This paper focuses on two scenarios:

- City is delivering transportation projects with TxDOT / MPO Funding, and
- TxDOT, County, RMA, or another governmental entity is developing a transportation project within the City.

This paper will quickly delve into the fundamental principles of eminent domain in Texas, the specific interactions between cities and TxDOT, and the legal circumstances pertaining to easements and utility relocations.

Additionally, it will outline best practices for ensuring smooth communications and negotiations.

2. Eminent Domain 101

Eminent domain is the power of the government to take private property for public use, with the requirement of providing just compensation to the property owner.

In Texas, the process of eminent domain follows specific steps:

A. Determination of Public Use and Necessity

The government or authorized entity identifies the need for a public project, such as roads, and determines that the property in question is necessary for this project.

B. Initial Offer

The condemning authority makes an initial offer to the property owner based on an appraisal of the property's fair market value. This offer is intended to compensate the owner for the property to be taken.

C. Negotiation

The property owner has the opportunity to negotiate the offer. If the owner believes the offer does not reflect the true value of the property, the owner can present evidence to support a higher valuation.

D. Special Commissioners' Hearing

If negotiations fail, the condemning authority files a lawsuit, and the case is referred to a panel of 3 special commissioners. These commissioners conduct a hearing, consider evidence from both sides, and determine the amount of damages.

At this point, once the government deposits the amount of damages into the Registry of the Court, the government can take possession over the property.

E. Appeal

Either party can appeal the special commissioners' decision to a court, where the case is tried before a judge or jury. The court's decision can then be appealed to higher courts if necessary.

3. Interactions Between Cities and TxDOT

When it comes to TxDOT projects, cities will have various interactions with the agency in a variety of contexts. Here are some common scenarios:

- City is expanding a road with MPO / TxDOT Funding
- TxDOT is acquiring property rights from the City (fee simple or easement)
- TxDOT is requiring utility relocation by the city from its Right of Way

4. Legal Framework for Easements and Utilities

If a city has a utility in place and has a fee simple or easement interest within the condemned property, TxDOT must compensate the city for the fair market value of the utility relocation costs, in addition to the land value.

However, if the city is in TxDOT's right of way, and it does not have a fee simple or easement interest within the condemned property, the city must pay for the utility relocation costs. Usually, TxDOT will provide a right-of-way for the utility relocation to go in at no cost.

5. Best Practices for Dealing with TxDOT

Proactive Communication

- **Respond Promptly:** Always respond to initial correspondence from TxDOT. Early engagement ensures that the city's interests are considered in budget allocations.
- **Provide Accurate Data:** Supply accurate and comprehensive data on city-owned utilities and easements to avoid funding shortfalls and project delays.

Early Planning and Coordination

- **Participate in Planning Meetings:** Engage in TxDOT's planning processes to influence project design and timelines.
- **Negotiate Terms Early:** Address terms of utility relocations, compensation, and other critical issues early in the project lifecycle.

Long-Term Relationship Management

- **Evaluate Long-Term Relationships:** Consider the long-term relationship with TxDOT when making decisions. A cooperative relationship can facilitate smoother project execution and future collaborations.
- **Require Developer Donations:** Always require developers to donate easements for utilities. This practice can save costs and ensure proper utility placement.
- **Purchase Backup Easements:** As a backup, purchase easements for utilities, as relocations are becoming prohibitively expensive. Securing easements early can prevent future financial strain.

Funding and Cost Management

- **Seek Grants and Funding:** Look for grants and other possibilities to offset costs, such as those available for low-income neighborhoods.
- **Timing Projects:** Time projects to coincide with available funding opportunities, such as the Texas Water Development Board's Economically Distressed Areas Program (EDAP).
- **Use State Infrastructure Bank Loans:** Consider using TxDOT's State Infrastructure Bank (SIB) loans, which offer subsidized-interest loans, as a plan to cover costs.

6. Challenges

In the realm of eminent domain and multi-agency TxDOT projects, cities face a myriad of challenges that require strategic planning, proactive coordination, and a deep understanding of both legal and practical implications.

Here, we explore seven sample scenarios and provide insights on how to navigate these complexities:

A. Budget Overruns in MPO-Led Projects

Cities often face budget overruns due to price escalations and unforeseen issues. For instance, if a project initially budgeted at \$3 million for ROW acquisition escalates to \$6 million due to delays and market changes, immediate reassessment and alternative funding methods, such as issuance of certificates of obligation by the city, are crucial. It is essential to act swiftly to secure funds and prevent further cost increases.

Example:

Imagine that TxDOT funding is issued by your local MPO to offset ROW acquisition costs, with an 80% TxDOT and 20% city funding split. The original budget was \$3 million for ROW, based on initial appraisals conducted in 2019. However, due to delays and unforeseen changes, including the post-COVID-19 pandemic price escalation, the 2024 ROW acquisition budget has now doubled to \$6 million due to price escalation.

Strategies:

- **Immediate Action and Reassessment:** Recognize that costs will likely continue to rise. Immediate action should be taken to address the current budget overrun rather than delaying further.
- **Negotiating a New AFA:** While negotiating a new Advanced Funding Agreement (AFA) with TxDOT can be time-consuming, it is essential to start this process if the city cannot cover the additional costs.
- **Alternative Funding Methods:** Explore using certificates of obligation and other debt methods instead of relying solely on Maintenance and Operations (M&O) budgets. This can provide the necessary funds more quickly and efficiently.
- **Securing Additional Funding:** When seeking additional funding, ensure that requests cover not only ROW costs but also potential escalations in construction and other project components.

Takeaway:

It will probably never be cheaper to do this project than today. If possible, the city should secure the necessary funds and proceed on its own to avoid further delays. If securing additional funding on its own is impossible, the city should negotiate changes with TxDOT but anticipate additional funding needs for the entire project.

B. Zoning / Conditional Use Permit Compliance Issues

When property acquisitions lead to non-compliance with zoning laws, cities can issue variances to address these issues. This proactive approach helps avoid significant compensation claims from property owners. However, cities must carefully balance short-term solutions with long-term zoning integrity and public interest considerations.

When property is acquired for a TxDOT project, compliance with existing zoning or conditional use permits may no longer be feasible. This can create significant issues, such as a property becoming non-compliant with parking requirements, drainage retention, or setback regulations. Here are some considerations and potential solutions:

Issuing Variances Without Landowner Request

City-Initiated Variances:

Does the city have the ability to issue variances on its own initiative (*sua sponte*) without the landowner requesting them? This proactive approach could help address compliance issues and prevent landowners from leveraging non-compliance to negotiate higher compensation.

Ordinance for Eminent Domain Exceptions:

The city could adopt an ordinance stating that any non-compliance resulting from eminent domain actions will be automatically waived. This ordinance should clearly outline the conditions and scope of such waivers to avoid future legal complications. However, such a policy might have undesired long-term consequences, including setting precedents for future development and land use determinations.

Long-Term Consequences and Successors:

Any variances granted or waivers issued should specify whether they run with the land, defining whether they apply to subsequent property owners. Clear documentation and recording of these variances are crucial to ensure future buyers are aware of the conditions and restrictions.

Streamlining the Variance Process

Expedited Approval Process:

Typically, variances require a review process involving planning and zoning commissions, followed by city council approval. To expedite this for eminent domain cases, the city council could handle the process directly, bypassing the usual planning and zoning review. This would require amendments to existing procedural rules and clear communication with all stakeholders.

Hydrology and Drainage Considerations

Stormwater Management Adjustments:

If the acquisition affects drainage retention ponds or other hydrological features, the city must ensure that the new road design can accommodate the displaced stormwater. This might involve:

- **Redesigning Road Infrastructure:** Incorporating advanced stormwater management systems into the road design to handle the additional runoff.
- **Alternative Retention Solutions:** Identifying nearby locations where new retention ponds can be constructed or utilizing underground retention systems.
- **Engineering and Environmental Reviews:** Conduct thorough engineering and environmental reviews to assess the impact of the changes on the city's overall stormwater management plan. Collaboration with hydrologists and civil engineers is essential to develop sustainable solutions.

Cities can issue variances proactively to address non-compliance due to eminent domain takings. This involves streamlined approval processes and clear documentation to ensure transparency. The decision to issue variances should weigh immediate benefits against potential long-term impacts on zoning and land use.

Legal and Procedural Considerations

City's Authority to Issue Variances:

Cities generally have the authority to issue variances without a formal request from the landowner, especially when the variance is necessitated by public projects like those undertaken by TxDOT. This proactive approach can help address compliance issues that arise due to takings.

Planning and Zoning Involvement:

Normally, variances are reviewed by the planning and zoning commission before being approved by the city council. However, for cases arising from eminent domain, the city could streamline the process by allowing the city council to directly handle such variances. This would require amendments to procedural rules and clear guidelines to ensure transparency and proper documentation.

Variance Duration and Applicability:

Whether a variance runs with the land (i.e., applies to subsequent property owners) depends on how it is issued. Generally, variances granted to accommodate eminent domain impacts are tied to the specific conditions created by the public project. However, clear documentation is essential to ensure future buyers understand the variance conditions.

Impact and Strategic Considerations

Adverse Long-Term Consequences:

Issuing variances to address non-compliance due to takings could have long-term implications, potentially altering land use patterns and zoning consistency. These variances might also affect property values and neighborhood dynamics.

Damages and Compensation:

If variances are not granted, property owners might argue that the taking has rendered their property non-compliant with zoning laws, effectively "damaging out" the entire property. This could lead to claims for full property value or significant depreciation, increasing the financial burden on the city or TxDOT.

Public Interest:

Deciding whether to issue variances or compensate property owners involves balancing public interest and financial prudence. While variances can prevent claims for full property value and keep projects on track, they might compromise long-term planning and zoning objectives.

Situational Application

When to Apply:

Variances should be considered when:

- The non-compliance is a direct result of eminent domain takings.
- The variance helps maintain the viability and usability of the remaining property.

- The public interest is served by allowing the variance rather than paying higher compensation.

Evaluating Public Interest:

Issuing variances may be in the public's interest if:

- It allows critical infrastructure projects to proceed without undue delay.
- It prevents excessive compensation claims that could strain public finances.
- Conversely, it might be better to pay compensation if:
 - The variance significantly undermines zoning integrity or long-term planning goals.
 - The cost of compensating for the variance is less than the potential long-term impacts.

Takeaway:

Cities must carefully evaluate the implications of issuing variances in response to eminent domain takings. While variances can mitigate immediate financial impacts and facilitate project progress, they should be weighed against potential long-term consequences on zoning and land use.

Proactive and flexible zoning and variance strategies, combined with robust stormwater management planning, can mitigate the negative impacts of eminent domain on property compliance. Addressing these issues promptly and transparently helps maintain project timelines and fosters cooperation between the city, TxDOT, and affected property owners.

C. Utility Relocation in TxDOT ROW

Cities must relocate utilities within TxDOT ROW at their own expense. Strategies include negotiating project alignments to minimize impacts, securing easements, and thoroughly budgeting for relocation costs.

Early coordination and strategic planning can significantly reduce financial burdens.

Legal Requirements and Challenges

Obligation to Relocate:

Under current law, if a city has utilities located within TxDOT ROW, it is required to relocate these utilities at its own expense upon TxDOT's request. This can place a substantial financial burden on the city, especially for extensive utility networks.

Strategic Approaches

Challenging the Alignment:

One potential strategy is to negotiate with TxDOT to modify the project alignment. For instance, the city could request TxDOT to expand only on one side (e.g., the south side) to avoid impacting utilities on the other side (e.g., the north side). Although this may incur higher acquisition costs for TxDOT, it could save the city significant relocation expenses.

Securing Easements:

If relocation is unavoidable, the city should prioritize securing easements for the new utility locations. Securing as many easements as possible through donations is ideal, but purchasing easements, although expensive in the short run, will result in a tremendous long-term investment. This approach ensures that utilities have a dedicated space, reducing the risk of future relocations and associated costs.

Budgeting for Relocation:

When budgeting for the relocation, the city should include the cost of acquiring easements in its relocation budget. It may be beneficial to secure financing through loans, such as certificates of obligation, to cover these expenses. Planning for these costs upfront can save the city millions of dollars in the long run by avoiding repeated relocations and ensuring a stable utility infrastructure.

It is also critical for the planning departments to require easement donations as a requirement for subdivision developments for this purpose.

Takeaway:

Addressing utility relocation proactively through strategic alignment negotiations, securing easements, and thorough budgeting can mitigate the financial impact on the city and ensure a more sustainable infrastructure.

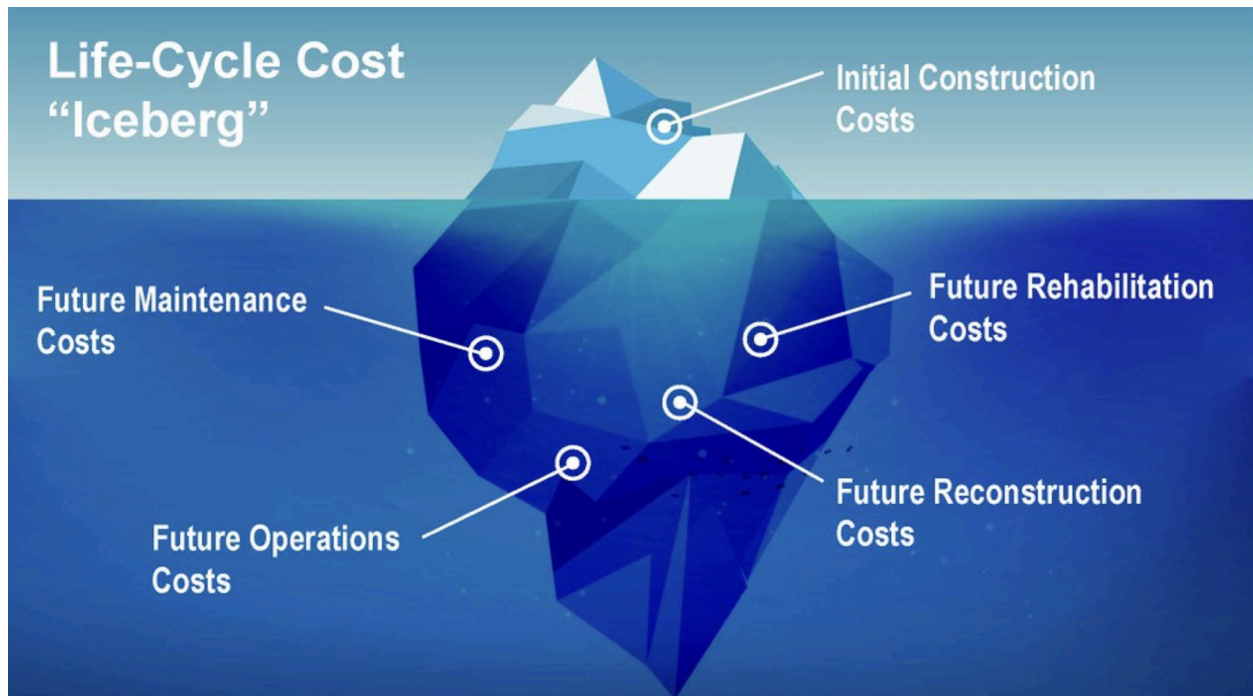
D. Taking Over Road Ownership Post-Expansion

Taking over road maintenance from TxDOT can strain city budgets. Cities should conduct detailed cost-benefit analyses and negotiate long-term agreements with TxDOT to ensure financial sustainability. Exploring diverse funding sources and collaborative maintenance plans are essential steps.

Maintenance and Operation Costs

Long-Term Financial Impact:

The maintenance and operation costs of a road can far exceed the initial construction and development expenses. Cities should be cautious about taking on these responsibilities, as they can significantly impact the city's budget and may lead to exceeding statutory spending limits.



Strategies and Considerations

Negotiation and Understanding:

Before agreeing to take over the road, the city should engage in thorough negotiations with TxDOT. This includes understanding the long-term financial commitments and obtaining detailed cost projections for future maintenance and operations.

Cost-Benefit Analysis:

Conduct a comprehensive cost-benefit analysis to evaluate the potential impact on the city's budget. This analysis should include:

- Projected Maintenance Costs: Estimations of annual maintenance costs, including resurfacing, repairs, and general upkeep.

- Operational Costs: Costs associated with traffic management, signage, lighting, and other operational requirements.
- Revenue Projections: Potential sources of revenue, such as state funding, grants, or local taxes, that could offset the costs.

Funding Sources:

- Explore various funding sources to cover the maintenance and operational costs. This could include:
 - State and Federal Grants: Identifying available grants specifically for road maintenance and infrastructure improvement.
 - Local Taxes and Fees: Considering local funding mechanisms, such as special assessments or dedicated taxes, to support the road's upkeep.

Long-Term Agreements:

- Negotiate long-term agreements with TxDOT that clearly outline the responsibilities and financial obligations of both parties. This could include provisions for periodic funding support from TxDOT to help with major maintenance activities.

Collaborative Maintenance Plans:

- Develop collaborative maintenance plans with TxDOT, where certain responsibilities are shared. This can help distribute the financial burden and ensure that the road is maintained to a high standard.

Takeaway:

- Cities should be wary of taking over road maintenance responsibilities from TxDOT without a thorough understanding of the long-term financial implications. Detailed negotiations, cost-benefit analyses, and exploring diverse funding sources are essential steps to ensure that the city's budget is not unduly strained.

E. Compliance with Texas Transportation Code Chapter 341

Using TxDOT funding requires strict adherence to Chapter 341, in addition to Chapter 21. Meticulous compliance is crucial to prevent legal challenges that could invalidate the entire process. Coordination with TxDOT and thorough legal oversight are key to ensuring procedural integrity.

Additional Requirements Under Texas Transportation Code Chapter 341

Enhanced Resolutions:

Resolutions for eminent domain under Chapter 341 may have stricter or additional requirements compared to Chapter 21. This includes detailed justifications for public use, specific language mandated by TxDOT, and potentially higher standards for public necessity.

Qualifications of Special Commissioners:

Chapter 341 may impose additional qualifications for special commissioners beyond those required under Chapter 21. Ensuring that commissioners meet these standards is crucial to prevent challenges to their authority and decisions.

Compensation and Appraisal Standards:

The standards for appraisals and compensation under Chapter 341 may be more stringent. This includes adhering to specific appraisal methodologies, documentation requirements, and possibly higher thresholds for determining fair market value.

Strategies and Best Practices

Meticulous Compliance:

- Cities must meticulously follow all legal requirements under both Chapter 21 and Chapter 341. This includes:
- Detailed Documentation: Ensure that all resolutions, appraisals, and notices comply with both sets of regulations.
- Training and Awareness: City officials and staff involved in the eminent domain process should be thoroughly trained on the nuances of Chapter 341 to prevent inadvertent non-compliance.
- Coordination with TxDOT: Maintain close coordination with TxDOT to ensure alignment with their requirements and expectations. This includes regular consultations and reviews of compliance with Chapter 341 provisions.
- Legal and Professional Oversight: Engage legal and professional experts with experience in both Chapter 21 and Chapter 341. Their oversight can help identify and address potential compliance issues early in the process.

Preventing Invalidations

Avoiding "Second Bite at the Apple": Non-compliance with Chapter 341 can give property owners grounds to challenge the eminent domain proceedings, potentially leading to a "second bite at the apple." This means that an unfavorable outcome for the city could be overturned if procedural flaws are found.

Stringent Review Process: Implement a stringent internal review process to catch and correct any deviations from required procedures before they become grounds for legal challenges.

Documentation and Record-Keeping: Maintain comprehensive records of all steps taken during the eminent domain process. This documentation is critical for defending the city's actions if challenged and demonstrating full compliance with legal requirements.

Takeaway:

Following the letter of the law at every stage of the appraisal, ROW acquisition, and eminent domain process is essential to prevent giving landowners a "second bite at the apple" and invalidating the entire process. Rigorous adherence to Chapter 341 requirements, in conjunction with Chapter 21, ensures a legally sound and defensible eminent domain procedure.

F. Relocation Challenges for Special Use Districts

Special use districts, such as irrigation districts, often lack the funds for utility relocations. Collaborative planning, exploring alternative solutions, and assessing financial impacts on consumers are critical. Strategies include retaining utilities under roadways, incorporating relocations into project bids, and seeking state and federal assistance.

Financial Constraints and Impacts

Inadequate Funding for Relocation:

Special use districts, such as irrigation districts, may have limited budgets and face financial constraints, particularly during times of drought. These districts often cannot incur debt without a bond election, which may not be feasible or supported by the wider community.

Service Disruptions:

Insufficient funding for utility relocation can lead to significant service disruptions, impacting citizens who rely on these utilities. For example, losing access to irrigation can have severe consequences for agricultural communities.

Strategies and Alternative Solutions

Coordination and Planning:

Early and proactive coordination with special use districts is crucial. Understanding their financial limitations and service obligations can help in developing viable relocation strategies.

Stakeholder Meetings: Conduct regular meetings with district representatives to discuss potential impacts and explore collaborative solutions.

Exploring Alternative Solutions:

Retention Under Roadways: Investigate whether the utility can remain in place under the new road design. This might involve additional engineering solutions to protect the utility infrastructure during and after construction.

Incorporating Relocation into Project Bids: Include the utility relocation in the overall project bid. Bundling the relocation with the main construction contract can create economies of scale, reduce costs, and streamline project management.

Design Modifications: Modify the project design to minimize the impact on utilities. This could involve altering the road alignment or incorporating utility corridors that allow existing infrastructure to remain undisturbed.

Assessing Financial Impacts:

- **Cost Sharing and Subsidies:** Explore cost-sharing arrangements where the city or other stakeholders contribute to the relocation costs. This can help alleviate the financial burden on the special use district.
- **Impact on Utility Rates:** Consider the long-term financial impact on citizens. If the relocation costs are passed on to consumers, utility rates might increase significantly. Assess whether this is a desirable outcome and if it aligns with public interest.
- **Regulatory and Legislative Actions:**
- **State and Federal Assistance:** Seek assistance from state and federal programs designed to support infrastructure projects. Grants and low-interest loans can provide necessary funding for utility relocations.
- **Legislative Changes:** Advocate for legislative changes that provide more flexibility for special use districts to manage relocation costs without extensive bond elections.

Takeaway:

The challenge of relocating utilities for transportation projects requires careful coordination, innovative solutions, and comprehensive financial planning. By exploring alternative strategies and ensuring stakeholder collaboration, cities can mitigate service disruptions and manage financial impacts effectively.

G. City has its utilities in an easement owned by the city. TxDOT is paying the city to relocate utilities into TxDOT ROW.

In this scenario, the city has its utilities located in an easement owned by the city. TxDOT is planning a project that requires the relocation of these utilities into TxDOT's Right of Way (ROW). The key points to consider include:

- TxDOT's Obligation to Pay: Since the city owns the easement and has its utilities within it, TxDOT must pay for the relocation of these utilities.
- Proposed Reimbursement: TxDOT is proposing to reimburse the city for the cost of relocating utilities into TxDOT ROW. This arrangement might seem beneficial initially but has long-term implications.
- Future Relocation Costs: If the city is required to relocate its utilities again in the future, the city will bear the relocation costs, which can be significant.

Recommended Actions for the City:

- Cost of Acquiring Easements: The city should request the cost of acquiring its own easement rather than relocating utilities into TxDOT ROW. Owning the easement where its utilities are located ensures control and avoids future relocation expenses.
- Exploring Other Options: The city should seek ways to retain its utilities within an easement owned by the city, ensuring long-term cost savings and control over utility placements.

By addressing these considerations, the city can make more informed decisions and protect its interests in the face of TxDOT projects.

H. Conclusion:

Navigating the challenges of eminent domain and multi-agency road transportation projects requires a multifaceted approach, combining legal compliance, strategic planning, best practices, and proactive stakeholder engagement.

By addressing these issues comprehensively, cities can ensure successful project outcomes while minimizing financial and operational disruptions.

7. No Immunity For Eminent Domain Lawsuits

The Texas Supreme Court has held that sovereign immunity does not apply in eminent-domain proceedings. See *Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, 669 S.W.3d 178 (Tex. 2023).

This case involved a condemnation suit filed by one water district to acquire a subsurface pipeline easement under an existing water canal owned by another district.

Key Takeaways:

There is no immunity in eminent domain cases.

Governmental entities cannot claim immunity in eminent domain cases.

The Texas Supreme Court has made it clear that such immunity does not apply in condemnation proceedings.

The *In Rem* Nature of Condemnation Suits: Condemnation suits are considered "*In Rem*" actions, focusing on the adjudication of property interests rather than imposing money judgments or personal liabilities on governmental entities.

Fair Market Value Compensation: Governmental entities involved in eminent domain cases are entitled to fair market value compensation for the property interest being acquired.

8. Conclusion

- An ounce of prevention is worth a pound of cure.

Effective management of condemnation and multi-agency TxDOT projects requires a clear understanding of eminent domain principles, proactive communication, and strategic planning.

By following best practices and leveraging legal expertise, cities can increase the likelihood of a smooth project execution.

- Don't throw out the baby with the bathwater!

Do not disregard any TxDOT, County, RMA, MPO, etc. correspondence of early coordination of a road transportation project. That may be a city's best, and only, chance to mitigate challenges that could cost it millions of dollars down the road.