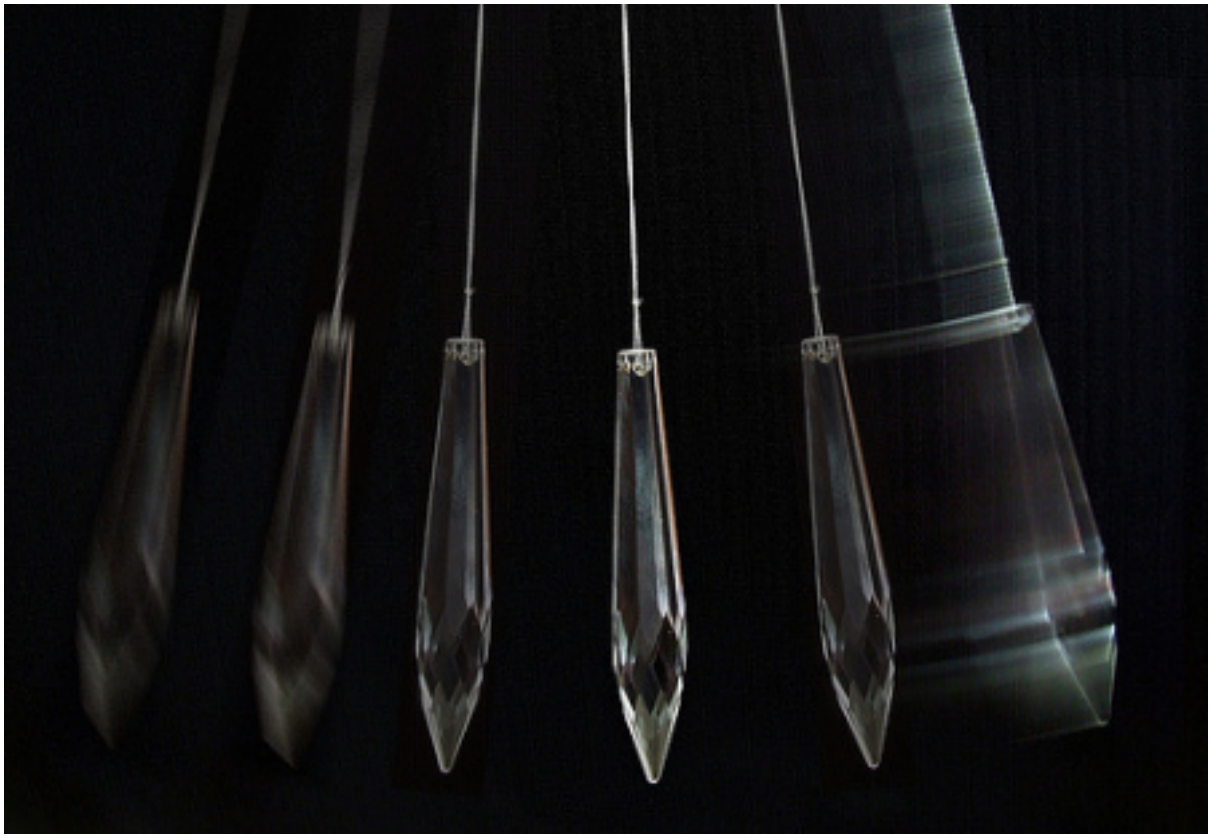
Eminent Domain: The Pendulum Swings



How Senate Bill 18 Changed the Practice of Eminent Domain Law

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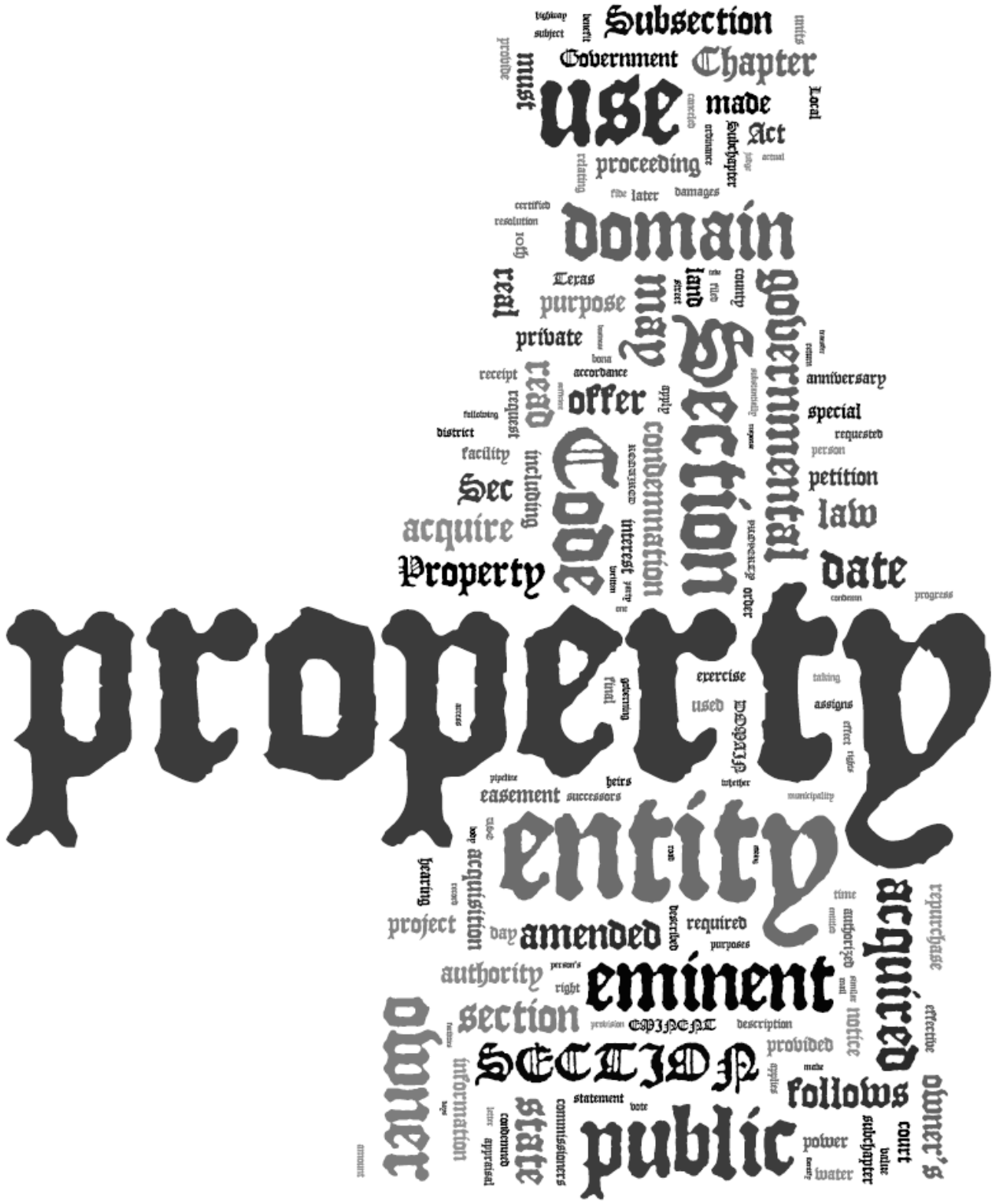

This is a word cloud of Senate Bill 18 created at wordle.net. The bigger the word, the more frequently it appears in the text.

In 2011, Gov. Perry signed Senate Bill 18 into law. At the time it passed, there was much discussion about what changes the law made. So, has the practice of eminent domain law actually changed after Senate Bill 18?

1. NO CASE LAW YET

Because the law has only been in effect for 2½ years, we don't have any appellate court opinions interpreting the changes made by Senate Bill 18. There is one opinion that enforced the effective date of Senate Bill 18, but that does not help us understand any of the changes made by the bill.[1] So, with no case law to talk about, we will discuss how the changes in Senate Bill 18 have affected the practice of eminent domain law in other areas, in pre-condemnation requirements, during the administrative phase of the condemnation proceeding, and in the lawsuit phase.

2. BACKGROUND

The most notorious change in Senate Bill 18 was the requirement that a condemnor make a "bona fide offer" before filing a condemnation lawsuit. That requirement was the result of several years of litigation, followed by several years of legislation. Let's briefly review the history of this requirement, because it will help explain some of the effects of Senate Bill 18.

In the years before 2004, the courts had differing opinions about what kind of negotiations and offers had to take place before a condemnor could file an eminent domain proceeding. The courts were mainly in two camps.

One camp held that a condemnor must negotiate in good faith, or make a bona fide effort to reach an agreement, before it was authorized to file a condemnation action. The standards for what constituted good faith negotiations or bona fide efforts were subjective and were argued on a case-by-case basis. How many offers did you have to make to constitute good faith negotiations? Was one enough? Two? Three? What was a bona fide offer? Did it have to exactly match the terms and conditions you condemned for, or could your offer include more rights than you ultimately condemned for? Under those requirements, it was difficult for a condemnor to have reasonable certainty, before it filed its eminent domain proceeding, that it had negotiated in good faith or made a bona fide offer. You would not know that for sure until after the proceeding had reached the lawsuit stage and the court ruled on the issue. And the remedy if the court found that the condemnor had not negotiated in good faith was harsh: the failure deprived the court of jurisdiction and required dismissal of the condemnation action.

[1] *See, e.g., McKinney v. City of Cedar Hill*, 05-12-00368-CV, 2012 WL 5971178 (Tex. App.—Dallas Nov. 29, 2012, pet. denied) (SB 18 provisions did not apply to case filed on Dec. 9, 2009).

The other camp held that a condemnor was required to make at least one offer before filing its condemnation petition, and that offer had to be for rights reasonably similar to, but not exactly the same as, the rights ultimately condemned for. Under this standard, the condemnor could be more certain that it had complied with the requirement before it filed its petition, although, again, you did not know for sure until the court later ruled on the issue.

The Texas Supreme Court resolved this issue in 2004 in *Hubenak v. San Jacinto Gas Transmission Co.*[2] The court held that the condemnor needed to make at least one offer that the landowner failed to accept, but it overruled the cases that had required good faith negotiations or imposed bona fide effort requirements. It also said that a failure to make an offer did not deprive the court of jurisdiction to hear the case; it just required the court to abate, or pause, the case and allow the condemnor to make the missing offer. If that was not done in a reasonable time, the court could then dismiss the case. But abatement, instead of immediate dismissal, removed much of the risk associated with offers. The *Hubenak* decision ended the extensive litigation over the adequacy of negotiations and offers. But it did not stop the proponents of good faith negotiations and bona fide efforts from trying to add those requirements to the law.[3]

The 2007 legislative session included several bills that would have added a subjective good faith negotiation or bona fide offer requirement to the property code, but none of them passed. In 2009, enough momentum developed to produce a bill that was quite similar to Senate Bill 18, but the bill got caught up in the legislative chaos that year over the voter ID issue. Democratic legislators fled the state to prevent the voter ID issue from being passed, and that killed a lot of bills that would otherwise have passed. The eminent domain bill, also numbered Senate Bill 18 in that session, was one of those. It had passed the Senate but never got voted on in the House.

Senate Bill 18, as it was filed in the 2011 session, was identical to the bill that died in 2009, and the word got around to lobbyists that Gov. Perry would sign Senate Bill 18, as long as it was not changed at all during the session. Of course, the legislature could not resist making some changes to the bill, but the rumor about what the Governor said helped fight off serious changes. So, Senate Bill 18 passed, he signed it, and it went into effect generally on September 1, 2011.

The bill made some changes to substantive law, but most of its changes were procedural, affecting both pre-petition and post-petition activities.

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[2] *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004).

[3] The unable-to-agree requirement was not removed by Senate Bill 18. It remains in Section 21.012(b)(4) of the Property Code, and *Hubenak* is presumably still good law as to that requirement.

3. PRE-PETITION PROCEDURES BEFORE SENATE BILL 18

Before Senate Bill 18, the required pre-petition procedures were comparatively simple. You had to give the landowner a copy of the Landowners Bill of Rights when you first told the landowner you had eminent domain authority or at least seven days before your final offer.[4] And under *Hubenak* you had to make at least one offer to the landowner to buy the rights you were seeking. That was it for pre-petition requirements. Senate Bill 18 made the list of pre-petition requirements longer.

4. BONA FIDE OFFER REQUIREMENT

The bona fide offer requirement was the most noticeable change in Senate Bill 18's new pre-petition condemnation procedures. A condemnor now had to make a bona fide offer to a landowner before it could file a condemnation petition. A bona fide offer is defined in the statute as meeting these requirements:

1. Make a written initial offer;
2. Before making the final offer, get a written appraisal from a certified appraiser of the value of the property being acquired and the damages, if any, to the landowner's remaining property;
3. Not sooner than the 30th day after you made the written initial offer, make a written final offer that:
    a. Is equal to or greater than the amount of the written appraisal; and
    b. Includes (unless previously given to the landowner):
        i. A copy of the written appraisal;
        ii. A copy of the deed, easement, or other instrument conveying the property sought to be acquired; and
        iii. The landowner's bill of rights; and
4. Give the landowner at least 14 days to respond to the final offer.[5]

If the landowner does not accept the final offer within that 14-day period, you can then file your condemnation petition. This new bona fide offer requirement made it harder to file a condemnation case in several ways. But it is much better than a less-specific, more-subjective test such as negotiating in good faith.

As the court in *Hubenak* noted, a subjective negotiation test is problematic:

> Nor does the statute contemplate a subjective inquiry into "good faith." As discussed earlier, the purpose of the statute is "to forestall litigation

[4] TEX. PROP. CODE § 21.0112.
[5] TEX. PROP. CODE § 21.0113. The statute lists seven requirements, but above we reorganized them into four chronological stages, some of which include more than one of the requirements.

> and to prevent needless appeals." An inquiry into the subjective "good faith" of a condemnor's offer would be antithetical to this purpose.[6]

The court went on to explain that whether an offer was made in subjective "good faith" would usually be determined by how the offer compared to market value, and it made no sense to try the issue of market value twice: once in determining whether the offer was made in good faith and again at the trial on damages.[7] In drafting Senate Bill 18, the legislature wisely avoided a subjective good faith test and defined a bona fide offer as the accomplishment of several specific actions. So even though it made it harder to file a condemnation case, at least Senate Bill 18 created a relatively objective standard of good faith.

(a) REMEDY FOR FAILURE TO MAKE A BONA FIDE OFFER

Senate Bill 18 followed the example set by *Hubenak* in creating a remedy for failure to make a bona fide offer. Section 21.047(d) of the Property Code says that if "a court . . . determines that a condemnor did not make a bona fide offer," then the court must abate the suit, order the condemnor to make a bona fide offer, and order the condemnor to pay costs and professional fees caused by the failure to make a bona fide offer. The statute does not say what happens if the condemnor does not actually make a bona fide offer during the abatement.

The court in *Hubenak* fashioned a similar remedy for the failure to make an offer under the unable-to-agree requirement: abate the suit, allow the condemnor a reasonable opportunity to cure the failure, and if the failure was not so cured, then dismiss the suit. [8] Under *Hubenak*, the abatement would be triggered if:

> [A] landowner objects in a pleading that there has been no offer, and a trial court finds that the requirement that the parties are "unable to agree on the damages" has not been met.[9]

Section 21.047(d) includes, as a trigger, that the court "determines" that a bona fide offer had not been made, but it does not mention a requirement that the landowner must object in a pleading that there had been no offer.

The basis for the *Hubenak* court's abatement remedy was its determination that the unable-to-agree requirement, although mandatory, was not jurisdictional.[10] In its opinion, it relied on its previous opinion in *Dubai Petroleum Co. v. Kazi*,[11] in which it

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[6] *Hubenak v. San Jacinto Gas Transmission Co., supra*, 141 S.W.3d at 186.
[7] *Id*.
[8] *Id*. at 184.
[9] *Id*.
[10] *Id*. at 183.
[11] *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000)

had held that a pre-suit requirement for allowing suits in Texas courts for torts committed in a foreign state or country was not jurisdictional. One of the problems with making a requirement jurisdictional is that judgments subject to that requirement are never really final, because subject matter jurisdiction can be raised at any time.[12] *Hubenak* and *Kazi* were consistent with other Texas Supreme Court cases that had held that pre-suit requirements were mandatory but not jurisdictional, unless the applicable statute expressly made the requirement a jurisdictional one.[13]

Hubenak's holdings about whether pre-suit requirements were jurisdictional were noticed. In 2005, the very next legislature after the *Hubenak* opinion was issued, Section 311.034 of the Government Code was amended to provide that statutory prerequisites to a suit, including notice, were jurisdictional when the defendant was a governmental entity.[14]

(b) CONDEMNATION TAKES LONGER

The most obvious change made by the bona fide offer requirement is the extra time required from when you start the pre-petition process to when you file your petition. Before Senate Bill 18, the pre-petition process could take as little as 14 days: send a landowners bill of rights, wait seven days, send a final offer, wait about seven days (the time requirement was not specific), and file a petition. Now the process takes at least 45 days: make the initial offer, wait 30 days, make the final offer, wait 14 days, and then file your petition the next day. So the minimum time went from 14 to 45 days before the

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[12] *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 182 (Tex. 2004):

> If the "unable to agree" requirement were necessary to confer subject matter jurisdiction, then judgments in condemnation proceedings would be subject to collateral attack. FN59 In construing other mandatory statutory provisions, we have observed that " 'the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.' " FN60

[13] See *Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631, 632-33 (Tex. 2005), where the court cited these cases in its footnote 5 to support its conclusion that failure to meet the pre-suit notice requirement could be cured by abatement instead of dismissal:

> *Hubenak v. San Jacinto Gas Transmission Co*., 141 S.W.3d 172, 184 (Tex. 2004) ("Rather, the statute's goal—avoidance of protracted litigation—can be accomplished by requiring an abatement of the proceeding until the requirement that the parties 'are unable to agree' has been satisfied.") citing *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961–962 (Tex. 1999); *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992); *State v. $435,000*, 842 S.W.2d 642, 645 (Tex. 1992) (per curiam); *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934, 938 (Tex. 1983)); *American Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 805 (Tex. 2001) ("If a claim is not within a court's jurisdiction, and the impediment to jurisdiction cannot be removed, then it must be dismissed; but if the impediment to jurisdiction could be removed, then the court may abate proceedings to allow a reasonable opportunity for the jurisdictional problem to be cured.").

See also, City of DeSoto v. White, 288 S.W.3d 389, 398 (Tex. 2009).

[14] TEX. GOV'T CODE § 311.034.

petition could be filed. That is more than a 200% increase in minimum time required. And that assumes you could get an appraisal ordered and completed within the 30 days between the two offers. If your appraisal lead time was longer than 30 days, that would increase your minimum time.

As many of you know, the theoretical minimum time is not often achieved in the real world. Making the minimum time assumes that every step happens the moment the previous step finished, that none of your deadlines occur on weekends and holidays, that there is no gap between sending an offer and making the offer, etc. If the theoretical minimum time is 45 days, that minimum could easily end up being 50 or 60 days in the real world.

For time-sensitive condemnations, this extra time added to the pre-petition process created an incentive for condemnors to avoid condemnation. By dramatically increasing the time it takes to complete pre-petition procedural steps, Senate Bill 18 added a real hurdle for condemnors with time-sensitive projects.

(c) CONDEMNATION COSTS MORE

Requiring a condemnor to have a written certified appraisal in hand when the final offer goes out has added cost to condemnations. Although some of our clients waited for an appraisal before making a final offer even before Senate Bill 18, some only wanted to get the appraisal some time before the special commissioners' hearing. So if the final offer was accepted, or the case settled before the special commissioners' hearing, it often was not necessary to incur the cost of an appraisal.

(d) LANDOWNER GETS THE APPRAISAL WELL BEFORE THE SPECIAL COMMISSIONERS' HEARING

Requiring the final offer to include a copy of the condemnor's appraisal was good for landowners who want to participate in the special commissioners' hearing. Before Senate Bill 18, it was difficult for a landowner to see a copy of the condemnor's appraisal before the special commissioners' hearing when the condemnor was not a governmental entity.[15] There were discovery provisions available to landowners before Senate Bill 18, but the pre-petition timeline was short, and many landowners do not hire an attorney until the condemnation petition is served on them. This means that those discovery procedures, which gave the condemnor 30 days to answer discovery, often could not get the landowner a copy of the appraisal before the special commissioners' hearing had taken place. After Senate Bill 18, getting the condemnor's appraisal was no longer a problem for the landowner.

[15] Governmental entity condemnors had to furnish their appraisals to landowners during the pre-condemnation phase even before Senate Bill 18.

(e) CONDEMNATION BECOMES RISKIER

Naturally, the new pre-petition requirements mean more risk for the condemnor. The more steps you have to complete, the more chances there are to miss a step. If you know you missed a step, then you can fix it, but that takes more time. If you miss a step and do not realize it until after the condemnation petition is filed, you have a different kind of problem.

(f) UNANSWERED QUESTIONS IN THE NEW LAW

Any changes to a law add risk because the law is new, and we are never sure what a law means until a court tells us what it means, even for statutes that appear to be clear. But not every step in the bona fide offer requirement is clear, and the statute leaves unanswered questions.

(i) HOW ARE OFFERS MADE?

The new law says you must make an offer, but it does not say how the offer must be made. Is regular mail okay, or does it have to be by certified mail, return receipt requested? Is an offer sent by fax or e-mail a "written" offer? It makes sense not to rely on fax or e-mail. The best practice is to send by certified mail, return receipt requested.

(ii) WHEN IS THE OFFER CONSIDERED MADE?

A harder question is when is the offer considered to be made. When the offer is sent, or when it is received? The property code is no help on this question. Texas case law on contracts recognizes that an acceptance of an offer can be effective when it is deposited in the mail, if the offer does not specify a different method of acceptance.[16] But the same cannot be said for offers. It would be hard to argue that an offer has been made if the offeree has not received it. Although there may be a general presumption that an offer properly sent through the mail has been received,[17] that does not help us decide when the offer is considered to have been made. Until an appellate court gives us guidance on the issue, the most conservative approach would be to be sure the offer is received, by hand delivery, certified mail, or otherwise, and then count your days from when the offer is received. That will lengthen, maybe significantly, the pre-petition timeline. A more moderate course would be to allow a fixed period after mailing to allow

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[16] *See, e.g., Cantu v. Cent. Educ. Agency*, 884 S.W.2d 565, 568 (Tex. App.—Austin 1994, no writ).

[17] In *Bailey v. Hutchins*, 140 S.W.3d 448, 450 (Tex. App.—Amarillo 2004, pet. denied), the court said:

> The mailbox rule, in one form or another, has long been a principle of our law. For instance, the United States Supreme Court has applied it to create a presumption that an item properly sent through the United States mail was received in due course by the addressee. *See e.g. Hagner v. United States*, 285 U.S. 427, 430–31, 52 S.Ct. 417, 419, 76 L.Ed. 861, 864–65 (1932).

for delivery. A less moderate course would be to count days from when the offer is sent. But if you do that, you are taking some risk that your day count will turn out to be wrong.

(iii) HOW CLOSELY DOES THE OFFER HAVE TO MATCH WHAT IS CONDEMNED?

Sometimes a condemnor gets more information about its project and wants to change the route or the rights sought between the time of the initial offer and the final offer, or between the final offer and the petition. That raises the question of how closely do the offers have to match the property description and rights condemned for in the petition. Senate Bill 18 did not address this issue, but it was addressed in *Hubenak* for the offer made under the unable-to-agree requirement. The court first noted that the property descriptions in the offers were the same as in the petitions in the cases before it, noting that:

> It is the law in this state that the offer must be for the same tract of land described in the condemnation petition.[18]

The landowners in *Hubenak* claimed that the final offers were defective because they included three rights that were not condemned for: the right to transport oil and other products, the right to assign the easement, and a warranty of title to the easement. The court held that including those extra rights in the offers did not invalidate the offers, saying:

> Generally, it is sufficient that the parties negotiated for the same physical property and same general use that became the subject of the later eminent domain proceeding, even if the more intangible rights sought in the purchase negotiations did not exactly mirror those sought or obtainable by condemnation.[19]

In *Hubenak*, the court was addressing the adequacy of offers under the "unable to agree" requirement of Section 21.012(b)(4) of the Property Code. But, until we get more guidance from the courts, the *Hubenak* court's test for offers is probably the best guidance we have for the content of offers made under the bona fide offer process of Section 21.0113 of the Property Code.

(iv) IS FUTILITY A DEFENSE TO A CLAIM OF FAILURE TO MAKE A BONA FIDE OFFER?

Under the unable-to-agree requirement, a condemnor can avoid a claim that it failed to make an offer before the petition was filed by pleading and proving that it would

[18] *Hubenak v. San Jacinto Gas Transmission Co.*, *supra*, 141 S.W.3d at 190.
[19] *Id.* at 191.

have been futile to make an offer.[20] For example, making an offer is futile if you cannot identify the landowner, you cannot find the landowner, or the landowner makes it plain that there will never be an agreement to grant you an easement.[21] But we do not know whether the futility defense also applies to a landowner's claim that a condemnor failed to make a bona fide offer under Section 21.0113 of the Property Code. The statute creates no exceptions to the requirement that a condemnor make a bona fide offer, but the futility exceptions to the unable-to-agree requirement also would make sense for the bona fide offer requirement. But until a court writes about it, we will not know that for sure.

(v) CAN A LANDOWNER WAIVE A CONDEMNOR'S FAILURE TO MAKE A BONA FIDE OFFER?

(1) WAIVER BY WITHDRAWING THE AWARD

When a condemnor deposits the amount of the special commissioners' award with the court, it gets possession of the condemned property. The landowner has the right to withdraw the award, but if that is done, the landowner waives all issues in the proceeding, including the unable-to-agree requirement, except for the amount of damages to be awarded for the taking.[22] While we do not have any appellate opinions on this point yet, we have taken the position in our cases that this waiver also applies to the bona fide offer requirement under Section 21.0113. But withdrawing the award is not the only way for a landowner to waive the unable-to-agree requirement.

(2) WAIVER BY PARTICIPATING IN SPECIAL COMMISSIONERS' HEARING

"If a landowner participates in the hearing before the special commissioners, the landowner waives the right to complain that the condemnor did not make an effort to

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[20] *Anderson v. Clajon Gas Co*., 677 S.W.2d 702, 706 (Tex. App.—Houston [1st Dist.] 1984, no writ) (holding attempt to agree futile when the condemnor's representative was not authorized to make per/month price arrangement, as requested by landowner); *Houston N. Shore Ry. Co. v. Tyrrell*, 128 Tex. 248, 263-64, 98 S.W.2d 786, 795 (1936) (holding attempt to agree futile when some claimants are unknown and conflicting claims affect entire property); *Mid-Am. Pipeline Co. v. Hadwiger*, 471 S.W.2d 157, 159 (Tex. Civ. App.—Amarillo 1971, no writ) (holding attempt to agree futile when lessee holding undisclosed and unrecorded lease on land was present at unsuccessful conference between condemnor and landowner); and *Aronoff v. City of Dallas*, 316 S.W.2d 302, 309 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.) (holding attempt to agree with lessees futile when condemnor, after good faith effort, was unable to agree with dominant landowners).

[21] *See, e.g., Tyrrell, supra*, 128 Tex. at 263-64, 98 S.W.2d at 795; and *Hubenak v. San Jacinto Gas Transmission Co*., 65 S.W.3d 791, 799 (Tex. App.—Houston [1st Dist.] 2001) aff'd, 141 S.W.3d 172 (Tex. 2004):

> Being told by a property owner, in no uncertain terms, that one simply does not want to hear any proposal, or that one simply does not want a pipeline on one's property, demonstrates futility as a matter of law and satisfies the "unable-to-agree" requirement of section 21.012.

[22] *Amason v. Natural Gas Pipeline Co*., 682 S.W.2d 240, 242 (Tex. 1984); *Coastal Indus. Water Auth. v. Celanese Corp. of Am.*, 592 S.W.2d 597, 599 (Tex. 1979); *State v. Jackson*, 388 S.W.2d 924, 925 (Tex. 1965).

agree."[23] This waiver became less used or talked about after *Hubenak*, which made arguing about the offer requirement less advantageous for landowners. But it is still the law on the unable-to-agree requirement. Again, we do not know for sure whether a landowner waives the Section 21.0113 bona fide offer requirement by participating in the special commissioners' hearing, but it is an argument you should remember to make if you discover your bona fide offer steps were not all correctly completed. Even if your bona fide offer steps were in order, you may still want to plead the waiver in the alternative, just in case.

But, if you ever want to argue that a landowner has waived the bona fide offer requirement by participating in the special commissioners' hearing, be sure to plead the landowner's waiver in the trial court, or else you may waive your waiver defense.[24] Waiver is an affirmative defense that must be pleaded under Texas Rule of Civil Procedure 94.[25]

(3) WAIVER BY FAILING TO PLEAD NO OFFER

A landowner can also waive the unable-to-agree requirement by failing to plead the lack of a qualifying offer. As noted above, the *Hubenak* court said that an abatement would be called for "if a landowner objects in a pleading that there has been no offer" and the court then determines that the requirement had not been met.[26] The *Hubenak* court also said:

> [I]f a condemning entity files a condemnation petition without meeting section 21.012's requirements, **and a landowner opposing**

[23] *Hubenak v. San Jacinto Gas Transmission Co.*, *supra*, 141 S.W.3d at 179. See also footnote 37 on that page that lists other authorities that have also said that attending the special commissioners hearing waives the unable-to-agree requirement:

> *See, e.g., Jones v. City of Mineola*, 203 S.W.2d 1020, 1023 (Tex. Civ. App.—Texarkana 1947, writ ref'd); *Brown v. Lower Colo. River Auth*., 485 S.W.2d 369, 371 (Tex. Civ. App. —Austin 1972, no writ); *City of Austin v. Hall*, 446 S.W.2d 330, 336 (Tex. Civ. App. —Austin 1969), rev'd on other grounds, 450 S.W.2d 836 (Tex. 1970); *Lohmann v. Natural Gas Pipeline Co. of Am*., 434 S.W.2d 879, 882 (Tex. Civ. App. —Beaumont 1968, writ ref'd n.r.e.); *Aronoff v. City of Dallas*, 316 S.W.2d 302, 306 (Tex. Civ. App. —Texarkana 1958, writ ref'd n.r.e.).

[24] *See, Nueces County v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ), where the court said:

> Appellant contends that the appellees by appearing before the special commissioners and resisting the condemnation proceedings thereby waived the lack of efforts on the part of appellant to reach a settlement. We do not agree with this contention. It was incumbent upon appellant, if it desired to rely upon waiver, to affirmatively plead such waiver. Rule 94, Texas Rules of Civil Procedure. Furthermore, the case was not tried upon this theory. Appellant specifically pleaded that an effort was made to reach an agreement with the appellees as to the damages prior to the institution of the condemnation proceedings. This issue was submitted to the jury and found against appellant.

[25] *Id*.

[26] *Id*., 141 S.W.3d at 184 (emphasis added).

> **condemnation timely requests abatement**, the trial court should abate the proceedings for a reasonable time to permit the condemnor to satisfy the statutory requirements.[27]

Other courts have held that a failure by the landowner to raise the issue of the absence of an offer by the condemnor by plea in abatement or other pleading waives the issue.[28]

Section 21.047(d) of the Property Code, the statute providing a remedy for a failure to make a bona fide offer, does not expressly mention a pleading requirement to trigger abatement, but it does require that the court make a determination that no bona fide offer was made before abatement is required.[29] Again, we do not know whether a landowner waives the bona fide offer requirement by not pleading that the requirement has not been met, but it is an argument to consider.

5. EXCHANGE OF APPRAISALS

As mentioned earlier, the bona fide offer includes a requirement that the final offer include a copy of the condemnor's written appraisal.[30] And there is another requirement for the condemnor to give the landowner, at the time an offer is made to purchase or lease the property for a public use, copies of any appraisals on the landowner's property prepared in the previous 10 years.[31] But Senate Bill 18 also required the landowner to give the condemnor a copy of the landowner's appraisal.

The landowner must disclose to the condemnor any "current and existing" written appraisal used in determining the landowner's opinion of value. The disclosure must occur on the earlier of the 10th day after the landowner receives the appraisal or the 3rd day before the special commissioners' hearing.[32]

The statute creates no remedy if a landowner fails to disclose its appraisal as required. That means, during the administrative phase of the condemnation proceeding, your only remedy is whatever you can convince the special commissioners to do. We have had cases in which a landowner tries to use an appraisal at a special commissioners' hearing without disclosing it in advance. You can ask the commissioners not to consider the appraisal, but if they decide to consider it, your options are limited. You could ask them, in light of the nondisclosure, to continue the hearing for a couple of hours, or a few days, to allow you to review the appraisal, but in most condemnations, the condemnor

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[27] *Id*., at 191.
[28] *Lohmann v. Natural Gas Pipeline Co. of Am.*, 434 S.W.2d 879, 881-82 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.), citing *Dyer v. State*, 388 S.W.2d 226, 230 (Tex. Civ. App.—El Paso 1965, no writ) (landowner filed no plea in abatement or other pleading raising the absence of a bona fide effort to reach agreement and "we deem the matter to have been waived").
[29] TEX. PROP. CODE § 21.047(d).
[30] *Id.*, at § 21.0113(b)(6).
[31] *Id.*, at § 21.0111(a).
[32] *Id.*, at § 21.0111(b).

would rather finish the hearing that day rather than add more delay to the process. So a short break to look over the appraisal may your only practical remedy for an undisclosed landowner appraisal.

6. CONDEMNATIONS TAKE LONGER – PART II

Senate Bill 18 added a couple of provisions in the post-petition timeline that make condemnations take longer. One is the entirely new requirement that the special commissioners' hearing cannot be scheduled sooner than 20 days after the commissioners are appointed.[33] The language used in this provision is ambiguous: "may not schedule a hearing to assess damages before the 20th day after the date the special commissioners were appointed."[34] Does that mean that the hearing itself cannot take place before the 20th day, or does that mean the commissioners cannot not even meet to schedule the hearing until the 20th day?

Senate Bill 18 also provided that the special commissioners' hearing cannot take place sooner than 20 days after service of notice of the hearing.[35] This was an increase from 11 days of notice in the previous law.

The longer timeline caused by these provisions, when combined with the longer timeline caused by the bona fide offer requirements, makes condemnations take much longer overall. The minimum time for a condemning authority to get from the first offer to the special commissioners' hearing before Senate Bill 18 was about 21 days, and the minimum time after Senate Bill 18 is about 76 days. In the real world, the minimum increased from about 30 days to about 90 days. As mentioned before, for time-sensitive condemnations, this increase in minimum time was significant.

7. RIGHT TO STRIKE SPECIAL COMMISSIONER WITHOUT CAUSE

Parties in a condemnation proceeding have always had the right to move to strike a special commissioner that was not qualified to serve, either because the commissioner was not disinterested or because the commissioner did not own land in the county,[36]

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[33] TEX. PROP. CODE § 21.015(a).
[34] *Id*.
[35] *Id*., at § 21.016(b).
[36] *See, e.g., Schooler v. State*, 175 S.W.2d 664,670 (Tex. Civ. App.—El Paso 1943, writ ref'd w.o.m.) (fact that special commissioners appointed by special judge in proceedings to condemn land for public park had sat as special commissioners in approximately 40 other condemnation suits involving lands sought for the park, that they had discussed value of the land with officials of state park board prior to the hearing, and that they had received compensation for acting as special commissioners in prior cases, did not require setting aside of the awards made by them or the judgment based thereon); *Angier v. Balser*, 48 S.W.2d 668, 671 (Tex. Civ. App.—Austin 1932, writ ref'd) (special commissioner not disqualified because his wife was first cousin of judge's wife); *McInnis v. Brown County Water Improvement Dist. No. 1*, 41 S.W.2d 741, 743 (Tex. Civ. App.—Austin 1931, writ ref'd) (denying landowner's request that county judge and appoint special commissioners be disqualified because they were taxpayers in condemnor's water improvement district).

although appointing unqualified commissioners is not jurisdictional.[37] Senate Bill 18 added something new by requiring the judge to allow "each party" a "reasonable period" to strike one special commissioner without cause.[38] If a special commissioner is struck, the judge "shall" appoint a replacement.[39] This statute has the potential to add more delay to the condemnation proceeding. If a landowner waits until the end of the allowed reasonable period to strike a commissioner, and the judge does not immediately appoint a replacement, the special commissioners' hearing could be delayed. That concern was made more serious by Senate Bill 18's new provision that the special commissioners' hearing could not take place sooner than 20 days after the commissioners were appointed. Left unanswered was whether the replacement of a commissioner would restart the 20-day clock on holding the special commissioners' hearing.

We have dealt with this problem in two ways. First, we ask the judge to include, in the order appointing special commissioners, a provision setting a deadline for making a strike under Section 21.014(a). The statute does not say in what manner the judge would set the reasonable period, so it made sense to add that provision to our standard proposed order appointing commissioners. A sample provision for this reads as follows:

> IT IS FURTHER ORDERED that if any party chooses to exercise its right to strike one of the appointed Special Commissioners, that party shall, no later than ten days after service of this Order, file with the Court the party's written notice of its election to strike a Special Commissioner and identify the Special Commissioner to be struck.

The second thing we have done, in time-sensitive condemnations, is to ask the judge to appoint one or two alternate commissioners in the same order in which the three special commissioners are appointed. The purpose of this is to avoid any delay in the judge appointing a replacement if a party exercises the right to strike under Section 21.014(a). Some judges are willing to appoint the alternates, and some are not. And a downside is that you typically are required to pay a fee to the alternates even if they are not called on to serve. A typical provision for this that would be added to the order appointing commissioners reads as follows:

> IT IS FURTHER ORDERED that
>
> (a) _____
>
> (b) _____
>
> be, and they hereby are, appointed alternate Special Commissioners.

[37] *City of Bryan v. Moehlman*, 155 Tex. 45, 48-49, 282 S.W.2d 687, 689 (1955).
[38] TEX. PROP. CODE § 21.014(a).
[39] *Id*.

> In the event any party exercises its right to strike one of the appointed Special Commissioners set forth on lines (1), (2), or (3) above, upon the filing of the required notice with the Court, the alternate Special Commissioner set forth on line (a) shall immediately replace the Special Commissioner struck and shall serve as a replacement, and assess damages, if any, fairly, impartially, and in accordance with the law, occasioned by the condemnation.
>
> In the event another party thereafter exercises its right to strike one of the appointed Special Commissioners set forth on lines (1), (2), or (3) above, upon the filing of the required notice with the Court, the alternate Special Commissioner set forth on line (b) shall immediately replace the Special Commissioner struck and shall serve as a replacement, and assess damages, if any, fairly, impartially, and in accordance with the law, occasioned by the condemnation.

These alternate commissioner appointments have been made in several of our cases, and those appointments have yet to be challenged.

8. NOTICE OF RIGHT OF REPURCHASE

Senate Bill 18 gave condemnees the right to repurchase the condemned property under certain conditions.[40] It also requires the condemnor to give the condemnees written notice of the right to repurchase "at the time of acquisition of the property through eminent domain."[41] But the statute does not say in what manner that notice must be given. To be sure that the notice is effective and is delivered to the landowner, we include the required notice in the judgment the court enters if the special commissioners' award is not appealed or after trial on the merits. A sample notice provision to include in the judgment is as follows:

> That under Section 21.023 of the Texas Property Code, each owner of the property made the subject of this eminent domain proceeding is notified that:
>
> A. The owner or the owner's heirs, successors, or assigns may be entitled to:
>
> (1) Repurchase the property made the subject of this eminent domain proceeding under Subchapter E of Chapter 21 of the Texas Property Code; or
>
> (2) Request from Condemnor certain information relating to the use of the property and any actual progress made toward that use; and

[40] TEX. PROP. CODE §§ 21.101, 21.102, 21.1021, 21.1022, and 21.103.
[41] *Id.*, § 21.023.

> B. The repurchase price is the price paid to the owner(s) by Condemnor at the time Condemnor acquired the property through eminent domain.

We will then record a certified copy of the judgment in the official public records of the county in which the land is located. That way, not only the landowner, but also the landowner's heirs, successors, and assigns will have access to the right of repurchase information.

9. LETTERS TO COMPTROLLER

Something in Senate Bill 18 that caused frenzied activity in the last weeks of 2012 was the requirement that all condemnors had to submit a letter by certified mail to the State Comptroller on or before December 31, 2012; the letter had to state that the entity had the power of eminent domain and identify the statutes under which it claimed that authority.[42] If you want to see a list of everyone that submitted a letter, the Comptroller has put it online: http://www.trackingtx.org/index.php/sb18report/. You can either view the entire list or search for a specific entity.

An entity that did not file a letter lost its power of eminent domain on September 1, 2013.[43] What about new companies? This law does not apply to an entity that was created, or that acquired the power of eminent domain, after December 31, 2012.[44]

The Texas Legislative Council will be submitting a bill to the 2015 legislature to make any non-substantive amendments to laws necessary to reflect the state of the law after the expiration of an entity's eminent domain power.[45] So we have that to look forward to.

10. TRUTH IN CONDEMNATION PROCEDURES ACT

Senate Bill 18 created a new subchapter in Chapter 2206 of the Texas Government Code entitled the "Truth in Condemnation Procedures Act" ("TCPA") (provided below). The TCPA is applicable exclusively to governmental entities, and requires increased transparency in a municipality's use of eminent domain.[46] A city's failure to comply with the requirements of the TCPA would likely result in the possible dismissal or abatement of a condemnation action until the TCPA's prerequisites are satisfied, so see below and make sure you are following them.

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[42] TEX. GOV'T CODE § 2206.101(b).
[43] *Id*., at § 2206.101(c).
[44] *Id*., at § 2206.101(a).
[45] *Id*., at § 2206.101(d).
[46] *Id.* at §§ 2206.051-.053.

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 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.

11. IMPAIRMENT OF ACCESS

Senate Bill 18 amended subsection (d) of TEX. PROP. CODE § 21.042, which defines what the special commissioners can consider in assessing damages, to now allow special commissioners to consider the material impairment of direct access to and from the remaining property that affects the market value of the remainder.[47] This amendment also codified Texas case law excluding from recoverable damages the circuity of travel and diversion of traffic cause by a taking. Subsection (d) now reads as follows (amendments are underlined):

> (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, <u>including a material impairment of direct access on or off the remaining property that affects the market value of the remaining property</u>, but they may not consider an injury or benefit that the property owner experiences in common with the general community<u>, 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</u>.

12. CONCLUSION

We do not yet have any guidance from appellate courts on applying or interpreting the changes made by Senate Bill 18. But however those changes are ultimately construed, the biggest real-world effect of Senate Bill 18 is that condemnations take a lot longer to get from the first offer to the special commissioners' hearing. This has given a condemnor with a time-sensitive project a big incentive to find a way to acquire their right-of-way without having to condemn. The second biggest change is that now all

[47] Senate Bill 18, § 15.

condemned landowners (not just those being condemned by governmental entities) get to see the condemnors' written appraisal well in advance of the special commissioners' hearing, which has made it easier for landowners who wish to participate in the hearing.

For answers to your questions about Senate Bill 18, or other eminent domain related questions, please visit www.brlaw.com. Having represented clients in over 100 Texas counties dating back to 1910, Burford & Ryburn, L.L.P. has the experience, expertise, and proven record to guide you through the eminent domain process.