



2012 Texas Eminent Domain Laws **MADE EASY**

Answers to the most frequently asked questions about
Texas Eminent Domain Laws



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I. Introduction to Eminent Domain

State and local governments are authorized to purchase property for multiple purposes. If a state or local government needs a landowner's private property for a public use and the landowner refuses to sell his or her property, then Texas law allows the governmental body to take the property through a condemnation proceeding. In addition to governmental bodies, some private entities have condemnation authority – but only to an extent they are fulfilling a public purpose. A common example of such a private entity is a public utility which provides services to all members of the public. The following questions and answers provide a lay person's explanation of the Texas laws that govern the condemnation process. This document is intended to provide general guidance for local officials and landowners on the issues that arise during condemnation proceedings. Local officials and landowners should consult legal counsel regarding the application of the law to the particular set of facts.

1. What is “eminent domain”?

The term “eminent domain” generally refers to a governmental entity's legal authority to force a private landowner to sell his or her real property for public use. When the government exercises its eminent domain authority and takes a landowner's private property, the governmental entity must pay the landowner just compensation.¹ The State's eminent domain authority is delegated by specific legislatively enacted statutes to state agencies, political subdivisions (i.e. cities, counties, and special districts) and even some private entities. Governmental entities have eminent domain authority over both properties that are located inside and outside their taxing jurisdiction. All entities that are granted eminent domain authority are bound by relevant constitutional restrictions on their power.²

2. What is “condemnation”?

Condemnation refers to the procedure that governmental bodies and authorized private entities must follow when they exercise their eminent domain authority to force the sale of a landowner's private property.

3. What is the legal basis for the power of eminent domain?

Although the rules governing the condemnation process are governed in detail by applicable state laws, the State's power to exercise eminent domain authority is not limitless. For example, a governmental body cannot take a landowner's private property unless it is doing so for a public purpose – and therefore for the public's use.³ Both the United States Constitution and the Texas Constitution impose limitations on all condemning authorities' power to take private property. Additionally, constitutional provisions further require that landowners be paid just compensation when their private property is condemned.

a. The Fifth Amendment to the United States Constitution provides, in pertinent part:

“...nor shall private property be taken for public use, without just compensation.”⁴

¹ *City of Austin v. Nalle*, 120 S.W. 996 (Tex. 1909).

² *DuPuy v. City of Waco*, 396 S.W.2d 103 (Tex. 1965).

³ *State Highway Dep't v. Weber*, 219 S.W.2d 70 (Tex. 1947); *City of Austin*, 120 S.W. at 996.

⁴ U.S. CONST. amend. V.

b. The Texas Constitution states:

“No person’s property may be taken, damaged, or destroyed for or applied to public use without adequate compensation.”⁵

This provision of the Texas Constitution provides broader protection than the U.S. Constitution because it includes a reference to “damaged or destroyed” property.⁶ Thus, the State of Texas and its political subdivisions are prohibited from taking private property for non-public – or private - purposes. Because these limitations are enshrined in the Texas Constitution, neither the Texas Legislature nor local governments are authorized to pass laws or ordinances that run contrary to these constitutionally guaranteed protections.⁷

Pursuant to both federal and state constitutional requirements, a public entity may not take private property for a public use without providing adequate or just compensation to the landowner. Additionally, no person may be deprived of their property unless they are afforded due process under law.⁸

c. Section 251.001 of the Local Government Code provides the basic statutory authority that grants cities the power to exercise eminent domain both inside and outside of their city limits. It states:

“When the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a public use to acquire public or private property, whether located inside or outside the municipality...”⁹

This general statute grants all municipalities (home rule, general-law and special-law) the power of eminent domain. When the Texas Legislature granted cities that legal authority, it authorized them to condemn private land both inside and outside their municipal limits. Further, Section 251.001 of the Local Government Code allows municipalities to condemn private property—but also land owned by other governmental entities. In addition to cities, other local entities, public utilities, and common carriers have condemnation authority, but their powers are governed by different statutes than the laws that apply to cities.

II. Initial Procedures

4. What are some preliminary concerns in acquiring property?

Chapter 21 of the Property Code governs the process by which authorized entities exercise their eminent domain authority – which is generally referred to as condemnation procedures. In order for an entity to exercise its eminent domain authority, it must do so in a manner that complies with the Property Code.

⁵ TEX. CONST. art. I, § 17 (West 2007).

⁶ This language is invoked in many court decisions involving “inverse” condemnation, which does not involve direct acquisition of the property by the condemning entity but instead focuses on the effect of government regulation or action on the property, and is outside the scope of this paper.

⁷ *Maher v. Lasater*, 354 S.W.2d 923 (Tex. 1962).

⁸ U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19 (West 2007).

⁹ TEX. LOC. GOV’T CODE ANN. § 251.001(a) (West Supp. 2011).

Public officials should closely supervise the preliminary acquisition process, which refers to the stage wherein governmental entities must attempt to purchase private property before condemnation proceedings are instituted. Doing so will resolve most property acquisitions short of condemnation and should lay the appropriate framework in the event condemnation proceedings are ultimately necessary.

Whether the condemning entity hires out design professionals or uses its own staff to design public works projects, these individuals should include realistic time periods in the project schedule. Thus, the proposed schedule should provide right-of-way agents and/or attorneys adequate time to acquire any affected real property. Public opinion supporting or opposing the project should be taken into account when timelines are estimated. For example, when projects are planned in areas that were recently annexed, property owners may be reluctant to deal with city officials. In all circumstances, officials should endeavor to work cooperatively with landowners at all stages of the process in order to avoid unnecessary project opposition and condemnation litigation.

The acquisition process commences in earnest when the condemning entity receives a proper description of the property, which usually consists of a registered land surveyor's field notes and plat for each parcel in the project. Depending upon the nature of the project, the condemning entity may have to acquire an assortment of property rights, including fee simple title, utility easements, drainage easements, and grading easements. Because the property survey will be an attachment to the prepared deed/easement—and possibly the condemnation petition—the survey should reference the exact nature of the property rights that the condemning entity plans to acquire.

Governmental bodies that undertake road-widening projects may encounter a unique problem that arises when surveyors cannot find a real property deed for certain portions of the road that is being widened. In these cases, land surveyors will typically include the following language in their property description: “after diligent search of the real property records, no deed for _____ Road was discovered.” In addition to this disclaimer, the plat should also reflect an implied dedication or prescriptive easement – in favor of the public – over the preexisting right-of-way (if facts supporting that property interest exist).

Some projects may not require long-term ownership of real property, but instead only necessitate temporary usage. Whether the owner of temporarily acquired land must be compensated for the short-term use of their property requires a fact-specific analysis of the temporary use. Ultimately the compensation owed to the landowner will be determined by the length and extent of the use of the private property in question.¹⁰

Once the condemning entity prepares the necessary property description of the property in question, it must check the property's title history. Either title insurance or independent research is necessary to complete this step. The condemning entity may be able to save taxpayer dollars by having a staff attorney conduct title research using “runsheets” from a local title company – if the runsheets can be purchased at a low cost. Title companies prepare runsheets for their own use, so they should contain references to all relevant deed, easement, lien, probate and divorce documents that would otherwise have to be obtained by searching county records. Finally, when a governmental body wants to acquire property for a major project, it is usually necessary to hire a licensed appraiser. Requiring limited-scope appraisals will speed up the process and lower the appraisal costs.

¹⁰ See Tex. Att'y Gen. LO-95-78 (general requirement is 10 years of continuous use).

5. What does a condemning authority do after deciding to acquire parcels of property?

The acquisition process focuses on determining the property's value and current owners. Governmental bodies should always attempt to acquire property through an ordinary negotiation and purchase process with affected landowners. However, if those negotiations are unsuccessful – either because an agreed-upon purchase price cannot be reached or because the landowner will not sell the property at any price – then if a project meets the legal burden for a public use, authorized entities can condemn the property. The condemnation process begins when the condemning entity determines that the taking of private property is necessary to fulfill a public purpose.

When a city council or other governing board meets to discuss the property acquisition, its meeting notice must disclose that exercising eminent domain is a possibility. A motion by a member of the city council to adopt an ordinance or resolution authorizing condemnation proceedings should state, “I move that the (name of city) authorize the use of the power of eminent domain to acquire (property description sufficient to be used in the actual petition filed in court) for (the public use for the property).” For an exercise of condemnation authority to be valid, it must be approved by a record vote. A single ordinance or resolution vote may authorize multiple condemnations, but each condemnation must be the subject of its own separate motion. If one council member objects, each property must receive a separate record vote—unless the property subject to condemnation is owned by the same person. Authority to institute condemnations associated with water, wastewater, flood control, or drainage projects may be delegated to the city's chief administrative officer (mayor or city manager) – but the city council's delegation authorization must identify the general area or route affected by the project so that any potentially affected property owners have reasonable notice.¹¹

If a home-rule city's charter includes provisions recognizing the city's power of eminent domain, those charter provisions should be cited in condemnation resolutions. Any relevant condemnation procedures required by the city charter must be followed.¹²

6. Is the condemning authority required to negotiate with the property owner?

Under Texas law, condemning authorities are required to negotiate with landowners.¹³ To satisfy the legal requirements, condemnation authorities must be able to demonstrate a good faith attempt to reach an agreement for the sale of the property.¹⁴ Thus, the condemning entity must investigate all aspects of the property's value and prepare worksheets and summary sheets that help to determine the property's value.

Condemning entities may need to acquire property that is titled to more than one owner. Examples of partial property ownership interests include partial fee simple interests, lease interests or mortgage interests, among others. The best practice is always to negotiate with all property owners if possible. However, a Texas appeals court has ruled that, under certain circumstances, condemning entities may be authorized to focus their negotiation efforts on a single owner—rather than negotiate with

¹¹ TEX. GOV'T. CODE ANN § 2206.053 (West Supp. 2011).

¹² Even where the law allows a single resolution giving the city manager or city attorney authority to negotiate for and ultimately condemn all properties involved in a single project, many cities may choose to pass a second resolution to specifically authorize condemnation of each single parcel when negotiations prove unsuccessful.

¹³ *Lapsley v. State*, 405 S.W.2d 406 (Tex. Civ. App.—Texarkana 1966, writ ref'd n.r.e.).

¹⁴ *City of Houston v. Plantation Land Co.*, 440 S.W.2d 691 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); see *State v. Dowd*, 867 S.W.2d 781 (Tex. 1993).

minority ownership interests. Nevertheless, the better practice would be to negotiate with all parties of interest if possible.

7. What does the condemning authority do if unable to agree with the property owner on a price for the property?

Frequently, a condemning entity is unable to agree with the property owner on a price for the property. If an agreement on price cannot be reached, the condemning entity must then file a petition for condemnation.¹⁵

If the case later goes to trial, the court may be required to determine, as a threshold matter, whether the condemning entity satisfied the “bona fide offer” prerequisite for exercising condemnation authority. To satisfy the bona fide offer requirement, the condemning entity must follow the following steps: (1) make an initial good faith offer in writing; (2) obtain a written appraisal of the value of the property being acquired—and the damages to the remainder property—from a certified appraiser; (3) make a final written offer (along with a copy of the appraisal and the proposed deed, easement, or conveyance if these have not been previously provided) at least 30 days after the initial offer—which is equal to or greater than the value contained in the appraisal; and (4) give the property owner at least 14 days to respond to this final offer.¹⁶ Section 21.012 of the Property Code requires the condemning entity to state in the condemnation petition that it attempted to reach an agreement on the price of the property but was unable to do so.¹⁷ The parties’ inability to reach an agreement on the price does not automatically create a cause of action for failure to negotiate in good faith.¹⁸

The condemning entity must also send the landowner a copy of the “Landowner’s Bill of Rights” prepared by the Office of the Attorney General. The Landowner’s Bill of Rights must be sent to the last known address of the person in whose name the property is listed on the property tax rolls, and must be sent by first class mail either before or along with the condemning entity’s final offer. The statement must be in a legible font and type size. If the condemning entity is a public entity, it must make the Landowner’s Bill of Rights available on its website.¹⁹

8. How does a condemning entity file a condemnation action in court?

Condemnation proceedings are initiated when the condemning entity files a condemnation petition. A copy of this petition must be sent to the property owner by certified mail, return receipt requested.²⁰ A condemnation petition sets forth the property sought to be acquired from the landowner. The Property Code requires that the condemnation petition contain the following six elements in order to validly authorize condemnation proceedings²¹:

a. A description of the property.

The property description must be specific enough that a surveyor could go onto the land and mark out the property sought to be condemned. The description should be provided by metes and bounds, as used in deed conveyances, so that a surveyor could locate the

¹⁵ TEX. PROP. CODE ANN. § 21.012(a) (West Supp. 2011).

¹⁶ *Id.* § 21.0113.

¹⁷ *Id.* § 21.012(b)(4).

¹⁸ *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589 (Tex. App.—Austin 1991, writ denied).

¹⁹ TEX. PROP. CODE ANN. § 21.0112 (West Supp. 2011). The form is posted on the Attorney General’s website at <http://www.texasattorneygeneral.gov/agency/landowners.shtml>.

²⁰ *Id.* § 21.012(c).

²¹ *Id.* § 21.012(b) (West 2011).

exact property.²² The property description in a petition for condemnation must appear either on the face of the petition or by other writing referred to in the petition. Failure to adequately describe property to be condemned in the petition divests the court of jurisdiction over the condemnation proceeding.²³

b. A specific statement of the intended use of the property by the condemning entity.

The use of the condemned property must serve a public purpose or fulfill a function already performed by the governmental entity. Texas courts have ruled that any legislative declaration of public purpose (including a city council's resolution) will most likely be upheld short of a showing of fraud.²⁴ Under Texas law, property generally cannot be condemned for economic development purposes—so unless a specific exception applies, economic development is generally not a valid public purpose.²⁵

c. A list of the names of the all owners of the property.

The condemning entity must make a good faith effort to name all parties with ownership interests in the property subject to condemnation. However the condemnation petition does not necessarily have to name mortgagees of the property.²⁶

An allegation of ownership must also be included in the condemnation petition. To prevent parties with an interest in the condemning of property from being able to later challenge the condemnation, it is necessary to make those individuals named defendants in the petition. The petition is only legally sufficient if it asserts that the defendants owned or claimed to own some interest in the property to be taken.

d. A statement of the inability of the condemning entity and the landowner to agree on a price for the property.

This has been discussed above. See question #7.

e. A statement confirming that the “Landowner’s Bill of Rights” has been provided to the property owners.

Under Section 402.031 of the Government Code, the Attorney General of Texas prepares a Landowner's Bill of Rights statement notifying property owners of their legal rights. The condemning entity must send the Bill of Rights via first class mail to the last known address of the person in whose name is listed on the property tax rolls. This must be done no later than the seventh day prior to the date a final offer to the property owner is made.²⁷ The Bill of Rights may be found on the attorney general's website www.texasattorneygeneral.gov/agency/landowners.shtml.

f. A statement that a bona fide offer has been made.

This has been discussed above. See question #7.

²² *Wooten v. State*, 177 S.W.2d 238 (Tex. 1944); *Smith v. Gulf States Utilities Co.*, 616 S.W.2d 300 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

²³ *Purvis v. Mills County*, 424 S.W.2d 512 (Tex. Civ. App.—Austin 1968, no writ).

²⁴ *See Coastal Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958); *Hardwicke v. City of Lubbock*, 150 S.W.3d 708 (Tex. App.—Amarillo 2004, no pet.); *Western Seafood Co. v. City of Freeport*, 346 F.Supp.2d 892 (S.D. Tex. 2004).

²⁵ TEX. GOV'T CODE ANN. § 2206.001(b)(3) (West Supp. 2011).

²⁶ *Langston v. State*, 315 S.W.2d 90 (Tex. Civ. App.—Waco 1958, no writ).

²⁷ TEX. PROP. CODE ANN. § 21.0112 (West Supp. 2011).

9. What courts have jurisdiction in a condemnation proceeding?

Section 21.001 of the Property Code states that district and county courts at law have concurrent jurisdiction over eminent domain proceedings. However, constitutionally created county and municipal courts have no authority to preside over condemnation proceedings.²⁸ If an eminent domain case is pending in a county court at law and a question were to arise involving title to the property, the case must be transferred to the district court.²⁹ There are a few instances that the jurisdictional provisions of Chapter 21 do not apply. Therefore, it is important to reference the enabling statute authorizing a particular county court at law's creation.³⁰ Also, if the landowner of the property is an estate, the condemnation proceedings will be held in the court handling the probate of that estate.³¹

Section 21.013 also contains venue provisions relating to condemnation proceedings. Venue refers to the appropriate location in which a condemnation proceeding may be tried. These provisions provide in part that:

- a. The proper venue for a condemnation proceeding is the county in which the property owner resides—if the owner resides in the same county as the property. If the property owner does not reside in the same county as the property, proper venue lies in any county in which at least part of the condemned property is located.
- b. Ordinarily, if one or more county courts at law have jurisdiction over the condemned property, the party initiating a condemnation proceeding shall³² file the petition with any authorized clerk for that court or courts.
- c. A party initiating a condemnation proceeding in a county in which there is not a county court at law must file the condemnation petition with the district clerk.³³

In summary, the condemnation proceedings primarily occur in county courts at law.

III. Special Commissioners

10. Who are “special commissioners” and what do they do?

Once a condemnation petition satisfies the requirements of Section 21.012 of the Property Code, the judge of the court in which the condemnation petition is filed must appoint three (3) disinterested real property owners who reside in the county to serve as special commissioners.³⁴

The purpose of appointing special commissioners is to create an administrative proceeding.³⁵ The judge acts purely as an administrative agent. He or she appoints commissioners and administers their oath of office. The Property Code mandates that the judge give preference to persons agreed

²⁸ *Id.* § 21.001 (West 2004).

²⁹ *Id.* § 21.002; *Zucht v. City of San Antonio*, 698 S.W.2d 168 (Tex. App.—San Antonio 1984, no writ).

³⁰ *See, i.e.*, TEX. GOV'T CODE ANN. § 25.1032 (West 2004), § 25.2293 (West Supp. 2011) (special provisions for Harris and Travis County courts).

³¹ TEX. PROB. CODE ANN. § 4B (West Supp. 2011).

³² Before changes to section 21.013 were enacted in 1999, the condemning entity could file suit in either county courts at law or district courts. The changes made it mandatory to file in county courts at law if they exist.

³³ TEX. PROB. CODE ANN. § 21.013(c) (West 2004).

³⁴ *Peak Pipeline Corp. v. Norton*, 629 S.W.2d 185 (Tex. App.—Tyler 1982, no writ).

³⁵ *State v. Giles*, 368 S.W.2d 943 (Tex. 1963).

upon by the parties. The judge must provide each party a reasonable period to strike one of the commissioners. If this occurs, the judge must appoint a replacement commissioner.³⁶

The commissioners in condemnation proceedings constitute a special tribunal. Once the commissioners are appointed, they must file an oath with the court stating they will fairly and impartially assess damages according to the law.³⁷ After taking the oath, the special commissioners should schedule a hearing as soon as possible, but not sooner than the 20th day after they were appointed.³⁸ The commissioners are given powers similar to those conferred upon a court and are required to administer fair and equal justice between the landowner and condemning entity. The commissioners assess the damages (appropriate compensation) to be paid for the condemned property.³⁹ The validity of the commissioners' proceedings depends upon their strict compliance with statutory requirements.⁴⁰

11. What procedure must be followed for the hearing before the special commissioners?

Once appointed, the commissioners must schedule a hearing for the parties.⁴¹ Written notice informing the parties of the time and place of the hearing must be given at least 20 days prior to the hearing.⁴²

Notice of the commissioners' hearing may be served by anyone competent to testify (and therefore prove the notice was delivered).⁴³ Notice is accomplished, usually by the condemning entity acting for the commissioners:

1. By delivering a copy of the notice to a party, the party's agent or to the party's attorney;
2. If the property belongs to a deceased's estate, a minor or an otherwise legally disabled person and that person or estate has a legal representative, by delivering a copy to that representative; or
3. If the property belongs to a non-resident and such resident has not been personally served, the commissioners may use service by publication if the owner is unknown or if the owner of the property is avoiding service of process.⁴⁴

Unless the Property Code specifies otherwise, the Rules of Civil Procedure generally do **not** apply to service of notice for the commissioners' hearing.

Once proper notice has been served upon all potential parties, the special commissioners may convene a hearing and consider the evidence presented by each party.⁴⁵ A landowner who makes an

³⁶ TEX. PROP. CODE ANN. § 21.014(a) (West Supp. 2011).

³⁷ *Id.* § 21.014(b).

³⁸ *Id.* § 21.015(a).

³⁹ *Id.* § 21.014(a).

⁴⁰ *Rotello v. Brazos County Water Control & Imp. Dist.*, 574 S.W.2d 208 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

⁴¹ TEX. PROP. CODE ANN. § 21.015 (West Supp. 2011).

⁴² *Id.* § 21.016(b).

⁴³ *Id.*

⁴⁴ *Id.* § 21.016(d).

⁴⁵ *Id.* § 21.015(b).

appearance before the special commission during the special commissioners' hearing waives any ability to subsequently claim that service was defective.⁴⁶

The special commissioners' hearing is an administrative proceeding, not a judicial proceeding. Special commissioners have no authority to rule on questions of law, such as whether the condemning entity has the right to condemn the property at all.⁴⁷ As a result, the hearings are not required to follow strict rules of evidence and other procedures observed in a trial court.⁴⁸ Special commissioners may compel the attendance of witnesses, necessitate the production of testimony, administer oaths, and punish parties for contempt in the same manner as a county judge.⁴⁹

The principal responsibility of the special commissioners is to assess the economic damages a landowner will incur as a consequence of the taking of the property. This duty involves a determination of the value of the land taken and the amount of consequential damages suffered by the landowner.⁵⁰ The commissioners' authority over the condemnation proceedings ends once they file their decision with the appointing judge. The judge may not interfere with the proceedings before a decision has been filed, because the court has no such authority during the administrative proceedings.⁵¹

12. How will the special commissioners calculate the damages in a condemnation proceeding?

In fairly and impartially assessing damages, the special commissioners are governed by Sections 21.041 and 21.042 of the Property Code.

Section 21.041 provides that the commissioners shall admit evidence on the following topics:

- a. The value of the property being condemned;
- b. Any injury to the property owner;
- c. Any benefit to the property owner's remaining property; and
- d. The use of the property by the condemning entity seeking to acquire the property.⁵²

Section 21.042 sets out the parameters under which the special commissioners are to make their assessments:

1. Special commissioners shall assess the damages according to the evidence presented.
2. If an entire tract of land is taken, the damage to the property owner is the fair market value of the property at the time of the special commissioners' hearing.

⁴⁶ *Jones v. City of Mineola*, 203 S.W.2d 1020 (Tex. Civ. App.—Texarkana 1947, writ ref'd).

⁴⁷ *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240 (Tex. 1984).

⁴⁸ *Dueitt v. Harris County*, 249 S.W.2d 636, 639 (Tex. Civ. App.—Galveston 1952, writ ref'd).

⁴⁹ TEX. PROP. CODE ANN. § 21.014(c) (West Supp. 2011).

⁵⁰ *Texas Elec. Service Co. v. Perkins*, 23 S.W.2d 320 (Tex. 1930).

⁵¹ *Peak Pipeline*, 629 S.W.2d at 186.

⁵² TEX. PROP. CODE ANN. § 21.041 (West 2000).

3. If a portion of a tract of land is condemned, the commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner. The special commissioners must also take into account the effect of the condemnation on the value of the property owner's remaining property. (The damages will be the fair market value of the portion taken and the damages, if any, to the remainder property as a result of the taking.)⁵³
4. When estimating injury or benefit, the special commissioners shall consider 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—now or in the reasonable, foreseeable future. This includes any material impairment of direct access on or off the remaining property that affects the remaining property's market value. The commissioners may not consider injury or benefit that the property owner is likely to experience in common with the general public. (This includes increased traffic difficulties getting to the property or loss of visibility from the road.⁵⁴ It also includes difficulty traveling within the property due to grade changes caused by an embankment for an adjoining street).⁵⁵
5. If a portion of a tract or parcel of real property is condemned for use in conjunction with a highway project, the special commissioners shall consider the special and direct benefits that arise from the project that are peculiar to the property owner and that relate to the property owner's use, ownership, and enjoyment of a particular parcel or the remaining property.⁵⁶

Any valuation must always consider the highest and best use of the property—both immediately or in the reasonable, foreseeable future.⁵⁷

Additionally, evidence comparing the raw land of the tract taken with subdivided property elsewhere should not be introduced.⁵⁸

After assessing the damages and allocating the costs, special commissioners are required to make a written statement of their decision. The statement, known as the “Award of Special Commissioners,” should be executed and dated by the commissioners and filed with the court on the day of or the next working day after the decision is made.⁵⁹ The Award is usually prepared and filed by the condemning entity acting for the commissioners. The clerk of the court is then required to send notice of the decision to each party by certified or registered mail by the next working day, after the Award has been filed.⁶⁰

13. Who pays the cost of an eminent domain proceeding?

After assessing damages (the appropriate compensation for the property), the special commissioners must then determine the cost of the condemnation proceeding.

⁵³ *State v. Carpenter*, 89 S.W.2d 194 (Tex. Comm'n App. 1936, opin. adopted).

⁵⁴ TEX. PROP. CODE ANN. § 21.042(d) (West Supp. 2011); *State v. Schmidt*, 867 S.W.2d 769 (Tex. 1993).

⁵⁵ *Bexar County v. Santikos*, 144 S.W.3d 455 (Tex. 2004).

⁵⁶ TEX. PROP. CODE ANN. § 21.042(e) (West Supp. 2011).

⁵⁷ *City of Austin v. Cannizzo*, 267 S.W.2d 808 (Tex. 1954).

⁵⁸ *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805 (Tex. 2002).

⁵⁹ TEX. PROP. CODE ANN. § 21.048 (West 2000).

⁶⁰ *Id.* § 21.049.

Section 21.047(a) of the Property Code states:

Special commissioners may adjudge the costs of an eminent domain proceeding against any party. If the commissioners award greater damages than the condemnor offered...the condemnor shall pay all costs. If the commissioners' award...is less than or equal to the amount the condemnor offered before proceedings began, the property owner shall pay the costs.⁶¹

Section 21.047(d) of the Property Code states:

If a court hearing a suit under this chapter determines that a condemnor did not make a bona fide offer to acquire the property from the property owner voluntarily as required by Section 21.0113, the court shall abate the suit, order the condemnor entity to make a bona fide offer, and order the condemnor to pay (1) all costs as provided by Subsection (a); and (2) any reasonable attorney's fees and other professional fees incurred by the property owner that are directly related to the violation.⁶²

14. What are some other considerations important to the entity condemning the property during the initial condemnation process?

- **Obtaining and disclosing appraisal of land.**

It is necessary for the condemning entity to obtain an appraisal in order to make an offer of fair market value to the landowner. Appraisal reports must be disclosed to the landowner, and any appraisals the landowner may have obtained must likewise be disclosed to the condemning entity.⁶³ The condemning entity does not have to disclose any property studies of the area that are not appraisals of the particular property.⁶⁴

- **Notice of Right of Repurchase.**

The condemning entity must notify the landowner in writing if the property is no longer necessary for the public use that originally served as the justification for condemnation within 10 years of the property's acquisition if: (1) the use is cancelled; or (2) no actual progress (as precisely defined) is made within those 10 years. At that time, the landowner has the right to repurchase the property at the price paid by the condemning entity during the eminent domain process.⁶⁵

- **Relocation.**

The condemning entity must provide relocation advisory services for individuals, families, businesses, farming/ranching operations, and nonprofit organizations that are compatible with federal guidelines.⁶⁶

⁶¹ *Id.* § 21.047(a) (West Supp. 2011).

⁶² *Id.* § 21.047(d).

⁶³ *Id.* § 21.0111.

⁶⁴ *Pitts v. Sabine River Auth. of Texas*, 107 S.W.3d 811, 818 (Tex. App.—Texarkana 2003, pet. denied).

⁶⁵ TEX. PROP. CODE ANN. § 21.023 (West 2004); see 21.101-103 (West Supp. 2011).

⁶⁶ TEX. PROP. CODE ANN. § 21.046 (West Supp. 2011).

IV. Appealing the Decision of the Special Commissioners

15. How may a person appeal the decision of the special commissioners?

A condemnation proceeding only becomes a civil litigation subject to the courts' jurisdiction if objections to the commissioners' Award are filed with the appropriate court within the time prescribed by Section 21.018 of the Property Code.

Section 21.018 states that a party in a condemnation proceeding may object to the findings of the special commissioners by filing a written statement detailing both specific objections and the ground for these objections. The statement must be filed with the court that has jurisdiction over the condemnation proceeding. This filing must occur on or before the first Monday following 20 days from the date that the commissioners' findings were filed with the court.⁶⁷ However, the amount of time allotted to object the filing is tolled until the court clerk sends notice of the commissioners' award by certified or registered U.S. mail—return receipt requested—to the parties involved in the proceedings or their attorneys of record at their addresses of record.⁶⁸

If no party files objections to the special commissioners' award within a timely manner, the decision of the commissioners becomes final and the court is without authority to try the case.⁶⁹ The court must adopt the commissioners' award as a judgment of the court.⁷⁰ A party who files an objection to the special commissioners' award must ensure that notice of the citation (the appeal) is issued to the adverse party. If the objecting party fails to secure service of citation to the other party within a reasonable time, the trial court must dismiss the objections for want of prosecution and must also reinstate the special commissioners' award.⁷¹ However, some circumstances, such as filing one's own objections, may submit a party to the jurisdiction of the court even if a party has not been formally served.⁷²

If objections to the commissioners' award are filed in a timely matter, the county court at law or district court at law would try the case "de novo." A trial de novo is a judicial proceeding in which the entire case is reconsidered. Neither party is limited to the claims or evidence presented during the special commissioners' hearing. This trial will be a judicial proceeding as normally conducted by the court. The same evidence discussed in question 12 above will be admissible at trial.

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⁶⁷ *Id.* § 21.018 (West 2004).

⁶⁸ *John v. State*, 826 S.W.2d 138 (Tex. 1992).

⁶⁹ *Sinclair v. City of Dallas*, 44 S.W.2d 465 (Tex. Civ. App.—Waco 1931, writ ref'd).

⁷⁰ TEX. PROP. CODE ANN. § 21.061 (West 2000).

⁷¹ *State v. Ellison*, 788 S.W.2d 868 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

⁷² *City of Tyler v. Beck*, 196 S.W.3d 784 (Tex. 2006).