

Transcript Excerpts

Glenn Sodd's Testimony before the 79th Texas Legislature's Interim Committee to Study the Power of Eminent Domain

My name is Glenn Sodd. I represent landowners in condemnation cases. I love having the chance, and I applaud your interest in the subject of adequate compensation and condemnation cases because it answers, if its done right, the problems with pipelines and what they do to property and the restrictions on the way we currently look at adequate compensation.

The first problem is really defined this way: while the constitution says “adequate compensation,” the courts have said what that means is market value on the date of taking. And they are not the same thing. If you’re talking about buying my regular rattletrap car, what it’s worth on the open market might be a fair deal. But if you’re talking about the car that my daddy drove and my granddaddy drove, and it’s a collector’s item to me because of what it means to me, market value of that old used car is not an appropriate amount of money to pay me if I catch you stealing it.

Condemnation is nothing more than theft. If you drive up to my driveway and get in my car and turn the key and drive off with it, you go to jail. If you drive up to my driveway and take my property, you don’t go to jail. The only condition that allows you not to go to jail is that you pay adequate compensation.

Our problem is that what we call “adequate compensation” is often not adequate. That poor lady with eight pipelines going across her three-and-a-half acres only got paid once for each one of those, and for the second, third, fourth, and the fifth, those pipeline companies argued that she was entitled to less damage because she already had a pipeline there. A virgin tract. And that’s why pipeline or power line companies routinely parallel each other, so they can argue: “Well, it’s true that you lose privacy. And it’s true there’s danger associated with gas pipelines. And its true that power lines are ugly and dangerous. But you already had one. And you’re already suffering from that danger and that ugliness. So you’re a blemished woman. And you’re not worth as much as an unblemished woman was, effectively speaking.” That’s their argument. And it’s wrong. But it’s exactly what happens to a landowner.

One of the damage factors in a pipeline case ought to be: “If you get one, you’re going to get another, and you should get paid for the expectation of future easements that are going to come along and follow your property.” If you were privately negotiating one, that’s a factor you would insist on taking into account before letting the first one enter

your property if you were aware of those facts. But in condemnation cases, we can't consider those kinds of things.

Is there an adequate compensation problem? Let me just run down a list with you. I just settled a Dallas Cowboys case for \$2.75 million dollars for a lady named Evelyn Rae. Do you know what she was offered from the City of Arlington? \$351,200 dollars for her property. And we settled for \$2.75 million. Does that sound like the offer, based on an appraisal, was a fair thing? No.

Twenty thousand dollar offer for Richland Chamber in relation to the Lake Intake Station. Recovery in the jury trial: \$2.5 million.

Twenty thousand dollar offer for some oil wells covered up by Richland Chambers Reservoir. Recovery in a bench trial: \$7.5 million. In front of a judge.

Six hundred thousand-dollar offer for property belonging to the Curtis Mathis family at the ballpark in Arlington. Recovery judgment: \$7.6 million. The property was appraised as warehouse space even though it was right across the street from a high-rise hotel, the Arlington Convention Center, backed up to the Six Flags parking lot, and was across the street from the old existing baseball stadium.

Those kinds of differences between what landowners are offered and what they ultimately, if they can afford the fight, end up recovering are relatively commonplace. Much more so than would be true if the reality was: "Well, we get an honest appraisal, and you get an honest appraisal, and they'll be about the same amount of money." That's just not the way it usually works for folks.

Unfortunately, people like the little homeowners at the Dallas Cowboy stadium today run into a real problem that you should address, and I know you can. That is, we can't fight about the constitutionality of taking that property for a football stadium. We can't fight about whether there's a public necessity or a public use for these little homeowners who can't afford not to draw down the money on the commissioner's award so they can go buy a new house. In other words, if you've got an \$80,000 house, and they offer you \$80,000, and that's what the commissioner's award, you can draw that money down to go buy you another house while you're still fighting whether you've got another \$150,000 coming—or \$500,000 coming, or some higher number—but if you're challenging the public necessity, the public use, or the constitutionality of the taking, they get your property, they get to go build their stadium or their highway or whatever they're building, but you can't draw that money down so you've got to have enough money in the hole or a family member that will let you live with them in the meantime in order to be able to challenge public use, public necessity, and those kinds of things.

If they take your property, the law should provide that you can draw down that money—because they've got your property, you take their money. If you win the fight, and they aren't entitled to condemn your property, fine, they give you the property back; you give them the money back. But the problem right now is that property owners under

the Property Code are not given the right to make those challenges unless they can stand to do without the money for the one year, or, the last case I got out of the Texas Supreme Court on an issue like this took six years on appeal.

What is adequate compensation versus just compensation? If you've ever met an oil lease on your property, you get paid a bonus and you get paid a royalty on the revenue generated from the use of your property. Wind turbines are doing the same thing nowadays. You can't condemn property for wind turbines yet, at least no one has claimed you can, and the landowners are making deals where they get a royalty on the electricity generated on their property.

When you're talking about pipelines, we do have a need to be able to move gas from Point A to Point B. We have a need to get electricity from Point A to Point B. We don't have a need to subsidize gas and power companies in the operation of their business. The jury should be allowed to consider, and they'll only be allowed to consider it if you guys make it so, the revenue generated from any revenue-generating project. Instead of the jury issue being, "Ladies and gentlemen of the jury, what's the market value?" they should be asked, "Ladies and gentlemen of the jury, what is adequate compensation?" And among the things the jury should consider in adequate compensation is the market value of the property, but they should also consider the revenue that is going to be generated by the condemning authority for the project. That would apply to a Trans-Texas corridor, for example. There's going to be a lot of revenue generated by private businesses operating that facility for the state of Texas, and part of adequate compensation to those landowners ought to be that the jury should be able to consider the revenue that the projects are going to generate. I don't mean recover it; I just mean they should be able to consider it in deciding fair compensation.

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Q: If we're pulling gas out of the ground underneath your house, we know, at least on some market value today and tomorrow and the day after, we can continue to determine what that gas is worth. To go to a pipeline company and say, "Well, we're going to charge you on cubic-feet-per-second moving through—"

A: No, no. I didn't say that. I didn't say order them to pay me part of it. But let the jury consider that fact. And don't think that Pipeline Company doesn't know, if they're spending 500 million dollars to build that pipeline, exactly how much revenue they are going to generate in fees and moving the pipeline. If you want a lease, especially if you want a lifetime-and-forever lease, on my property to run gas across it, part of what is just compensation, adequate compensation, is letting the jury consider that fact.

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I've got a client in Sweetwater, Texas who had a water field and sold water to the City for thirty years. The city decided he was charging too much for the water, so

they've condemned it. They want to pay him the current market value of the property, and they won't include any considerations of the profits he would have generated over the years selling the water. But they're selling the water. They're selling it to their citizens and other cities. So if they're generating revenue for it, one fact that ought to be considered by juries is the fact that they're to be charging people revenues to use the water from this property. And that's not unfair. If it ends up costing them ten-percent more to buy the property to produce the water, they're going to pass it on to their customers. And that's as it should be. The people getting the benefit of the water are paying for it.

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Q: Are you aware of any damage models in Texas law that would translate easy to [providing landowner's adequate compensation for the negative impact to the property]?

A: *All* the other damages models. In a business dispute between two parties in a contract, the jury is to consider every kind of damage that is there. In a personal injury case, if you're hurt, they are to consider every kind of damage that is done to your life. In every kind of litigation where damages are caused by one party to another, as a rule, we allow all those damages to be considered by a jury in determining what a fair verdict is.

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Q: Could you draft something up like that and submit it to the committee.

A: Absolutely. You bet. Incidentally, a new project coming along since Senate Bill 7 that's abusing the process, look in Fort Worth, Texas at what's called the Trinity River Vision Project. They haven't even started condemning on it yet, but as soon as you passed a bill saying that economic development—that was an economic development project, widely admitted as so for the last ten years they've been talking about it, where they were going to develop a little Venice-like lake north of downtown, wipe out all these ugly old business down there, and replace them with nice, big, high-rise building—as soon as you passed Senate Bill 7, it became a flood-control project. It's going to do exactly the same thing and take exactly the same land. If you don't think that the word "blight" can be misused and those exceptions to Senate Bill 7 are going to be misused and are now being misused, you're misunderstanding the acuity with which city government and the developers who are working with them can think. They're pretty smart cookies, and they will find loopholes in any exceptions you make to these rules.

These business down there in this old section of town—I was just with a man yesterday, Buck Wills in Fort Worth, his daddy started the company in 1951, and he replaces wheels on cars and has been in the same location since 1951—he can't find another piece of property that will suit his deal, because he's got to have these deep bays and cut them off. So he's going to need to build a building. He's in an old building and it works just fine, but when he replaces it, he's going to have to replace it with a new

building because no one else has a building like his for his business. And when he moves, the customers who found him always and have been finding him since 1951 won't know where he's at. They get business from truckers passing through the Metroplex because they know where they are, because they've been there several times before. He's scared to death. He says, "It doesn't make any difference if I move ten blocks, I don't know how the customers are going to find me anymore."

These are industries that serve customers. I'm not talking about a convenience store on a corner location. My law office could get condemned and moved and it wouldn't make a difference because I don't get much walk-in traffic. For some kinds of businesses, that's not that big of a deal. If you're a manufacturing facility, changing locations isn't that big of a deal, because, again, a customer doesn't need to walk through your front door to buy your services. But for business that deal with customers, you condemn them and move them, a type of loss they have that isn't at all covered by the market value that old tin building they're working out of is the profits they lose because half their customers won't ever know where they're at in a new location.

Those kinds of things *should* be considered in adequate compensation. I think that's what the people meant when they wrote that back at the turn of the century, or 1880's or something when that constitutional provision was originally written, but the way we've interpreted in courts, we've limited it and restricted it down to the market value of the real estate on a given day, which ignores your lady's plans for it to be a corner development site in the future. A jury should be able to be told, "In deciding adequate compensation, you can take into account those trees that got tore down for that pipeline. You can take into account the future price appreciation that might have been expected on this property."

Those are all the kinds of things that *regular* people take into account in business transactions. There's *no legitimate reason* why a jury shouldn't be able to take them into account. They're answering the question: "What would a hypothetical seller and a hypothetical buyer agree to arrive at here?" Well, let them consider everything that real people in the real world consider when they're doing business transactions.

Q: You mentioned a couple of instances where the initial offer and the settlement—there was a large disparity. Could I not argue that the current system seems to be working?

A: Sure you could, but look, my client at the ballpark at Arlington that recovered the \$7 million settlement, he had to pay me a percentage of that or would have had me to pay an obscenely high hourly rate. He had to hire experts, and he had to spend years in the courts fighting about it. What I'm saying is, there's not any incentive out there for condemning authorities, especially these for-profit authorities, to make a fair offer in the first place. There's no penalty for not doing so. "Let's start at a low figure." We know, as the state just told you, 80% of the people take what they offer them. And I laughed at the notion that they were being fair. What that means is that 80% of people don't want to go to court!

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I represented ten homeowners whose homes were condemned to expand the northeast mall in Hurst, Texas. I met with 121 of them to begin with. I told them, “The difference between the value of what they’re offering you and what we might recover you is very marginal, and you can’t draw down the money while you’re fighting over the constitutionality of being condemned to expand a shopping center. If I were you, I wouldn’t do it!” And a hundred and ten of them settled, but ten of them said, “No, doggone it, we’re going to fight!” And at the end of the day, we settled those cases in the neighborhood of six times what they’re homes were originally priced for. The reason we settled instead of going to trial is because five of the ten no longer could live with their kids and had to have some money to buy a new home. They just got worn out by the fact that litigation takes so long, and they didn’t have any money to go buy a house. They had to leave that money in the registry of the court, while they were fighting over the constitutionality of that take. And that’s absurd. That’s absurd, and that rule would be an easy one to change.

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If we want to fix the system, we need to fix it so there’s an incentive for the condemning authorities to make fair offers to begin with. Charge them the landowner’s legal fees, expert fees, and litigation costs if the landowner has to take them to court and beat them. If you knew for a fact your home was worth \$200,000—you just built it, and you know for a dead fact that it was worth that—and a condemnor offered you \$100,000, and you hired any condemnation lawyer on some percentage of what he could get you over \$100,000, and you paid an appraiser, and you went to court, and sure enough the jury was prescient, and sure enough they knew your house was worth exactly \$200,000. Would you walk away with \$200,000? No! You’d walk away with \$200,000 minus a third or so of that \$100,000 difference to a lawyer, minus anywhere from five to twenty-five thousand in trial costs in a *cheap* condemnation trial. In one of those flood cases I had, the expert fees for both sides exceeded \$2 million dollars, just to get hydrologists to prove where the water was coming from.

What you should get is market value, not market value minus what it costs you to get the market value. The way to fix that is, if the condemning authority makes an offer that’s so low that a landowner decides to fight about it, and the landowner prevails in court, fine! He gets the market value, or the just compensation that the jury set as a figure, plus his costs of getting it. Now, then, there’s a disincentive to start off with lowball offers, because if I start out with a lowball offer and the jury gives him more than I offered him to start with, I’m going to have to pay the other guy’s legal fees. All of the sudden, it becomes to the advantage of the condemning authorities—cities, water districts, the state, pipeline companies, power line companies, anybody else doing condemning—now then, they want to be sure the appraiser they hired is going to give me a figure where they’ve got at least a fifty-fifty chance of the jury going with my figure.

As it is today, there's no disincentive for a cheap offer, and there's a never a landowner getting condemned by someone with less money than he does to fight the battle. If you're a city official, you never have to pay the money for legal fees. You've got a city attorney hired anyway, but you don't pay it. If you're the city manager or the land acquisition department guy at a river authority or a water district or a city, you're not going to have to pay the legal fees. You don't even have to pay the jury verdict if you win! So you can start off lowball if you know that 50%, 60%, or 80% of the people are going to take what you offer. Even if you lose all the lawsuits, you still got the land bought cheaper. There's no disincentive, no penalty for low offers to begin with.