

CONDEMNATION RUNS WILD IN TEXAS

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Condemnation (also called eminent domain) has always been hard on Texas landowners. The condemning party (often the government, sometimes private pipeline or power line companies), takes your property, and there is often not much you can do to stop it. You can always seek more adequate compensation, but even then, the government (who does most of the condemning) has set up a series of obstacles. When Republicans took control of the Texas Supreme Court over 20 years ago, we expected better days for our landowner clients from what we hoped would be more conservative justices who valued private property rights. Unfortunately, the opposite has occurred. Supreme

Court decisions since then have made it far more difficult for landowners to be adequately compensated when their land is taken. These problems are compounded by the fact that there is more eminent domain now than ever before. As population increases, the desire to take your land without your consent will continue to worsen. Private property is under attack.

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IS THE CONSTITUTION STILL ALIVE?

The State can condemn your property for public uses (supposedly for things like schools). The Texas Constitution contains two sections that were supposed to limit the use of eminent domain. Article 1 section 17 states that "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . .," and Article 1 section 19 provides that "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Taken together, these Constitutional provisions are intended to ensure that a condemner (like the State) only takes private property for a

public use, after due process of law, and after providing the landowner adequate compensation.

BAD CHANGES TO THE LAW

Economic Development. Many of you are aware of our firm's fights over condemning for baseball stadiums, shopping centers, football stadiums and privately-owned toll ways. Economic development is not a public use, and we argue that a privately operated for-profit highway is no more a public use than a private business would be. In *Kelo v. City of New London*, the US Supreme Court decided the Federal Constitution did not prevent a City from kicking long-time residents off their property and giving it to developers. In response, the Texas Legislature made

a law to try to stop condemnation for economic development in Texas, but condemners and lobbyists managed to get too many loop holes inserted for things like "flood control", "slums", "blighted areas" and a host of others. Those loop holes have allowed Fort Worth, for instance, to attempt a huge economic development project along the Trinity River by calling it a "flood control" project.

No More Good Faith Negotiations. Unfortunately, many of the protections laid out in the Texas Constitution and Property Code have been undermined by recent Texas Supreme Court decisions. For instance, the Property Code requires the government to attempt to agree on the compensation due to the landowner before filing suit. Older court decisions held that this

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meant the condemnor must engage in “good faith negotiations”, often holding that absent good faith negotiations, the court could dismiss the lawsuit. The fear of having to start over again provided at least some incentive for condemnors to make reasonable offers to landowners, although exactly what kind of negotiations rise to the level of ‘good faith’ has always been a matter of dispute.

However, in the recent case of *Hubenak v. San Jacinto Gas Transmission Company*, the Texas Supreme Court took all the teeth out of the good faith negotiations requirement. In that pipeline case, the Court held that the condemnor satisfied the good faith negotiations requirement by making offers only for condemning easement rights they had no power to condemn. No offer was made for the easement actually condemned. Then the Court held that the dollar amount of an offer was irrelevant to whether it was made in good faith. Finally, the Court held that even when no offer is made, the case is not dismissed, but merely postponed while an offer is made.

Taken together, these holdings remove any incentive for a condemnor to enter meaningful negotiations with a landowner before condemning. If the court decides there were no good faith negotiations, it just has to delay the proceedings for a little while and let the parties “negotiate”. This is of little use to the landowner because, by that point, he or she has already been forced to incur fees and expenses for attorneys and experts. On the other hand, delaying the proceeding briefly causes little added burden or expense for condemnors. In short, the *Hubenak* decision effectively eliminated any duty to negotiate in good faith before filing a condemnation suit.

The Pipeline Value Problem. Another recent Texas Supreme Court decision has made it more difficult for landowners to collect adequate compensation for easements. As many landowners know, if you have one pipeline on your property, other people will often come along and try to lay their pipelines next to an existing one. This happens because the geographic advantages that made the site attractive for the first pipeline hold true for subsequent pipelines, and because condemnors can argue that a second pipeline does not greatly diminish the value of land that already had a pipeline running through it. The way they see it, a second pipeline causes little additional damage. Thus, a landowner can wind up with multiple pipelines in a small area and have a harder time getting paid for them. This approach ignores the value of the pipeline itself, and attempts to limit the landowner’s compensation to the damage caused to agricultural land.

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The Law Must Be Changed
Landowners normally don't complain about eminent domain until it happens to them. On the other hand, TXDOT, water districts, river authorities, cities, pipeline companies, power line companies, etc. all have their own lobbyists working the legislature. The erosion of property rights by entities who think they know how to use the property better than the owner is rampant. Profits for the condemnor are paramount, while compensation to the owner whose land allows the profit must be fought for in increasingly unfavorable courts.

HOW DO YOU PROTECT YOURSELF?

Getting involved in politics can really help. The legislature and the courts have placed a series of obstacles between the landowners and fair compensation. That said, the system is simply flawed, not corrupt, and some well-aimed modifications to the Property Code could go a long way towards making the system work the way the framers of our Constitution

intended. If landowners will support friendly groups and let their legislators know that voters care about these issues, change can be accomplished. Judges are elected. Landowners have fared better under Democratic judges than Republicans, as crazy as that sounds. However, if elected judges know that landowner defendants in condemnation suits are not the same as "phantom-injury" car-wreck plaintiffs, perhaps that will change. Ask judges about their positions on property rights and eminent domain issues before you vote. If they won't talk to you about it, vote the incumbents out until they do. If you personally face condemnation, the Texas Property Code lays out the process. Broadly speaking, if the condemnor and landowner are unable to agree on an amount of money, the condemnor may file suit. The trial court then appoints three (allegedly) disinterested freeholders as special commissioners. The special commissioners hold a hearing, after notice to the parties, at which they recommend an amount of money the condemnor should deposit before they can

start using the land. The commissioners' award is not binding on either party, and if either files written objections with the court the case goes to trial like any other civil lawsuit. Of course, this summary of the process necessarily leaves out a lot of detail, and landowners must consult a competent eminent domain lawyer as soon as they are contacted by a condemning authority. Until you talk to an attorney, be very reluctant to share any information with your opponent. These often become wars, and you would not give any information to the opposing general in a war. And, if the case goes to trial, anything you have said can and will be used against you. The whole process is too complicated for you to assume it is just like any other sale. Most experienced eminent domain attorneys will educate landowners facing these problems free of charge, so you should not be afraid to ask questions. ★



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