



Eminent Domain & Condemnation: What, Why, Who, and When – The Things to Know

The Texas Supreme Court recently reiterated what most experienced condemning authorities already know: The past half-century has seen a shift toward strengthening landowner protections based on the public-use limit to the eminent domain power. Courts are holding condemnation by authorities to account in their practice and procedure and not giving lenience to those exercising the power of the sovereign. Inventive litigants are finding new and complicated issues that can affect a condemnor's ability to effectively plan, construct, and operate public works projects. Condemning authorities require experienced counsel that can navigate the contours of the unique nature of eminent-domain related litigation to ensure the public works project is able to proceed in accordance with plans and schedules.

Eminent domain and condemnation – What are they and is there a difference?

"Eminent domain" is the power of a sovereign, or of those to whom the power has been delegated, to condemn private property for public use, and to appropriate the ownership and possession of the property upon paying the owner a due compensation.

"Condemnation" is the procedure by which the sovereign exercises its right to take property of a private owner for public use, without consent, upon the payment of just compensation. That is, an entity that has the power of eminent domain may exercise such power through the process known as condemnation.

Who Has the Power of Eminent Domain?

The power of eminent domain is inherent in the state as the sovereign. The legislature may confer the power of eminent domain on political subdivisions or private corporations as it may determine. The Texas legislature has conferred the power on various political subdivisions and corporations, including counties, municipalities, university systems, school districts, navigation districts, municipal utility districts, gas or electric corporations, telephone corporations, common carrier pipelines, and railroads, just to name a few.

What Are the Limits?

Both the United States and Texas Constitutions require governments to compensate landowners for takings of their property for public use. Generally, the power to take property for public use extends to every species of property and every character of right, title, or interest therein.

The Texas Constitution recognizes both adequate compensation and public-use limits on the State's eminent domain power. Article I, Section 17 of the Texas Constitution provides, in relevant part, that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." Condemning authorities may not exercise the power of eminent domain to take private property for a private use.

What is the Condemnation Process?

As noted above, condemnation is the process by which the power of eminent domain is exercised. In Texas, that process begins well before any offers to purchase arise. Indeed, a condemning authority is charged by statute to provide certain materials to landowners the very first time they ever represent in any matter that possesses eminent domain authority.

Certain condemning authorities have rights to enter upon private property for the purposes of surveying the proposed taking area without committing a trespass, as the power is "incident" to the power of eminent domain. If the condemnor has the right to enter upon private property for the purpose of conducting a preliminary survey, the parties may seek to enjoin any interference from the landowner seeking to prevent the condemnor from taking the necessary steps to plan the project.

The condemnor must negotiate with every landowner in the structured way provided for in Chapter 21 of the Property Code, known as the bona fide offer. The Property Code contains strict requirements as to what a condemnor must be included in the initial offer and final offer sent to a landowner. Certain private entities with the power of eminent domain are required by statute to include specific easement terms in the instrument of conveyance sent to landowners with the bona fide offer.

If the landowner and the condemnor are unable to agree to the purchase of the proposed property, the condemnor may then file a petition in the appropriate court to condemn the property. A condemnor's petition is subject to statutory pleading requirements and must plead the proposed public use with specificity. Courts will construe a condemnor's pleading strictly and in favor of the landowner.

Condemnation Lawsuits – A Two-Part Procedure

The Texas Legislature has established a two-part procedure for condemnation lawsuits. The first phase of a condemnation proceeding is an administrative proceeding; then, if necessary, a judicial proceeding follows.

A condemnation proceeding is in the administrative phase from the filing of the condemnation petition through the entry of an award by the court-appointed Special Commissioners. The administrative phase is designed to provide a means to quickly award damages without the delays that occur in court proceedings. Condemning authorities have a “substantial right” in obtaining an expedited hearing and possession of the easement immediately after the commissioners file their findings. Any party dissatisfied with that award may file an objection, which begins the judicial phase of the proceeding. The judicial phase, if invoked, allows the parties to conduct a trial *de novo* in the appropriate court in the same manner as any other civil lawsuit.

After a petition is filed, the trial court has thirty days to appoint three special commissioners and two alternate special commissioners who will assess the damages of the owner of the property being condemned after a properly noticed evidentiary hearing. The appointed special commissioners must schedule a hearing to assess the damages owed to the property owner, and the landowners are entitled to at least twenty days’ notice before the hearing. The special commissioners must hold the hearing and file an award which, in their opinion, reflects the value of the sought-after land. The special commissioners’ power is limited to filing in the proper court an award of adequate compensation for the condemnation, and they have no power to determine any other issues, including whether the condemning authority has the right to condemn the property.

After the special commissioners file their award, if any party is dissatisfied with the commissioners’ award, it may file objections to the commissioners’ findings in the trial court, thus invoking the trial court’s jurisdiction and initiating the judicial phase. Once timely objections have been filed and citation is served, the commissioners’ award is vacated and may not be reinstated. The proceeding becomes a civil case, and the trial court has jurisdiction to determine all issues in the suit in a trial *de novo*. Without a timely objection to the special commissioners’ findings, the trial court lacks jurisdiction to do anything but enter a judgment adopting the special commissioners’ findings. The trial court has a “ministerial duty” to enter a judgment conforming to the special commissioners’ award if no timely objection is filed. Upon filing an objection, the special commissioners’ award is vacated, and the Court must cite the non-objecting parties and try the case *de novo* in the same manner as any other civil lawsuit.

During the judicial phase, a condemning authority may take possession of the condemned property pending the results of further litigation if it: (1) pays the landowner the amount awarded by the special commissioners or deposits that amount into the registry of the court; (2) deposits a surety bond to cover any damages that may be awarded by the court in excess of the amount awarded by the special commissioners; and (3) executes a bond to cover any additional costs that may be awarded to the landowner.

A condemnor is charged with proceeding forward and litigating the issues remaining in the case. Generally, the central issue in any eminent domain case is the issue of value of the proposed taking. Condemnors, however, may also be required to litigate any challenges to its right to condemn the property, whether the taking was arbitrary or in bad faith, and even whether courts may hear claims tangential to the underlying condemnation. The unique nature of eminent domain law also constrains the recoverable items from compensation and tightly governs standards relating to valuation.

Takeaway

As the discussion above demonstrates, Texas courts continue to expand landowner protections and to demand strict compliance with the procedural and substantive requirements governing condemnation. Condemning authorities that fail to strictly adhere to these requirements risk delays and possibly the proposed project itself. Given the increasingly complex and landowner-favorable legal landscape, condemning authorities should engage knowledgeable counsel early, well before the first contact with any landowner, to ensure that every step of the process is handled in strict compliance with Texas law.

Andrews Myers, P.C. represents condemning authorities and select landowners throughout Texas in navigating the eminent domain and condemnation process, from project initiation through trial and any related appeals.

For further information on these developments, please contact [Chris Robertson](#).