

2008 EMINENT DOMAIN MADE EASY

Answers to the most frequently asked questions
about Eminent Domain Law

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I. Introduction to Eminent Domain

Local governments are authorized to acquire real property for many different purposes. Sometimes the property owner will not accept the price the governmental entity offers or does not wish to part with the land regardless of the price. In that instance, the public entity must begin condemnation proceedings to obtain the needed real property. The following questions and answers provide a lay person's explanation of the laws that apply to these proceedings. They are intended to provide general guidance for local officials on the issues raised in this area. Local officials should consult legal counsel regarding the application of the law to the facts of each particular situation.

1. What is "eminent domain?"

The term "eminent domain" generally refers to the ability and power of a governmental entity to force the sale of real property to the governmental entity for public use. The owner of the private property that is taken must be paid just compensation.¹ The power of eminent domain is delegated by statutory provisions to state agencies, political subdivisions and certain private entities. This power may be exercised by governmental entities for properties that are located both inside and outside of the entity's taxing jurisdiction. All entities granted eminent domain authority are bound by constitutional restrictions imposed upon the use of such authority.²

2. What is "condemnation?"

Eminent domain refers to the general power of the government to force the sale of property; condemnation technically refers to the procedure of acquiring the property through a forced sale. The terms often are used interchangeably to refer to the process or procedure by which forced sales of real property to a governmental entity are achieved.

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

The power of eminent domain, although set out in detail by statute, is part of the sovereign power the State inherently possesses to take private property for public use.³ Both the United States Constitution and the Texas Constitution describe the limitation on this power that requires the State pay just compensation to the property owner.

a. The United States Constitution provides, in pertinent part:

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

The right of a property owner to be compensated for the taking of his property by eminent domain is a "vested right." Any state statute that attempts to take away this right would be unconstitutional under the Fourteenth Amendment.⁵

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 Dept. v. Weber*, 219 S.W.2d 70 (Tex. 1947); *City of Austin*.

⁴ U.S. Const. amend. V.

⁵ *Ettor v. Tacoma*, 228 U.S. 148 (1913).

b. The Texas Constitution states:

“No person’s property may be taken, damaged, or destroyed for or applied to public use without adequate compensation.”⁶

This constitutional provision, broader than its federal counterpart because of the reference to “damaged” property,⁷ prohibits the taking of property for private purposes as well as for public purposes without compensation and operates as a limitation on the power of the Legislature, governmental entities, and public and private corporations.⁸

Pursuant to both federal and state provisions, a public entity may not take private property for a public use without providing adequate or just compensation. Additionally, no person may be deprived of their property except by due course of law.⁹

c. Section 251.001 of the Texas Local Government Code provides the basic statutory authority of a city to use eminent domain to acquire public or private property inside or outside of the 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 purpose to acquire public or private property, whether located inside or outside the municipality ...”¹⁰

This general statute grants all municipalities (home rule, general-law and special-law) the power of eminent domain. It is important to emphasize that land may be taken by eminent domain either inside or outside the municipal limits. Additionally, the land may be taken from either a private entity or even from a public entity under the Texas statute. Other local entities or common carriers will have different statutes authorizing them to exercise eminent domain.

The procedures set out in Chapter 21 of the Texas Property Code, generally referred to as condemnation procedures, must be followed in order for an entity to exercise its eminent domain authority.

II. Initial Procedures

4. What are some preliminary concerns in acquiring property?

Local officials should closely supervise the preliminary acquisition process. This will resolve most situations short of condemnation and lay the appropriate framework for litigation where necessary.

⁶ Tex. Const. art. I, sec. 17 (Vernon 2007).

⁷ This language is invoked in many court decisions involving “inverse” condemnation, which does not involve direct acquisition of the property by the condemnor but instead focuses on the effect of government regulation or action on the property and is outside the scope of this paper.

⁸ *Maher v. Lasater*, 354 S.W.2d 923 (Tex. 1962).

⁹ U.S. Const. amend. XIV; Tex. Const. art. I, sec. 19 (Vernon 2007).

¹⁰ TEX. LOC. GOV'T CODE ANN. § 251.001(a) (Vernon 2005).

Whether the condemnor hires outside design professionals or uses its own staff to design public works projects, these persons should include realistic time periods in the project schedule for property acquisitions by the right-of-way agent and/or attorney. Public opinion in favor of or in opposition to the project will be a factor in estimating these time periods, as will general opinion about the local government entity in the project area. Many projects may occur in areas recently annexed, where property owners may be reluctant to deal with city officials, and where there may be opposition to further development in “the country.” Slight modifications in the project at an early stage may help avoid condemnation to a certain extent.

The acquisition process commences in earnest when the condemnor receives a property description, usually consisting of field notes and a plat, from a registered land surveyor for each parcel in the project. The local entity may have to acquire an assortment of property rights, including fee simple title, utility easements, temporary construction easements, drainage easements, and grading easements. The survey should reference the type of property right involved, since it will be an attachment to the prepared deed/easement and possibly the condemnation petition. One issue that will arise on road-widening projects is the description by the surveyor that “after diligent search of the real property records, no deed for _____ Road was discovered.” Even with this disclaimer, the plat should reflect an implied dedication or prescriptive easement over the presently maintained right-of-way in favor of the public if supportable facts exist. Whether or not the property owner of record will be compensated for this land is a project-specific decision depending on the length and extent of public use and the cost of acquiring such land from a property owner who also owns required land outside the existing right-of-way.¹¹

Once armed with a property description, title history must be checked. Either title insurance or independent research is necessary. Having a staff attorney perform the latter task will save the condemnor a good amount of money if “runsheets” can be obtained at a low rate from a local title company. These sheets have been prepared by the company for its own use and should contain references to all relevant deed, easement, lien, probate and divorce documents in the county records.

Next, hiring a licensed appraiser is usually necessary for a major project. Requiring limited-scope appraisals will speed up the production and lower the cost for the condemnor. Limiting the background information in the appraisal is also strategically important, as both the condemnor and the property owner must provide any appraisals to each other.¹² For smaller projects, real estate brokers can be hired to provide opinions of value. They will not be used for litigation purposes, in most instances; appraisers are the valuation experts used in this instance.

5. How does a condemnor initiate a condemnation proceeding?

The condemnation process begins when the condemning entity makes the determination that the taking of private property is necessary to meet a public purpose. Cities often have their own rules or procedures for determining the necessity of acquiring such property through this process. The finding that the acquisition is necessary to serve a public purpose should be clearly stated in a condemnation resolution, and the proposed public use of the property must be specified.¹³ Additionally, for home rule cities, the provisions involving the city’s power of eminent domain and

¹¹ See Tex. Att’y Gen. LO No. 95-0078 (general requirement is 10 years of continuous use).

¹² TEX. PROP. CODE ANN. § 21.0111 (Vernon 2004).

¹³ See *Whittington v. City of Austin*, 174 S.W.3d 889 (Tex. App.–Austin 2005, pet. denied).

its ability to use the condemnation process, if located in the city charter, should be cited in the resolution and any relevant procedures therein should be followed.¹⁴

A condemnor must now send by first-class mail a “Landowner’s Bill of Rights” in the form prepared by the Texas Attorney General’s office to the last known address of the person in whose name the property is listed on the property tax rolls. The statement must be in a easily readable font and type size. If the condemnor is a public entity, it must make the statement available on its website if technologically possible.¹⁵

6. Is the condemnor required to negotiate with the property owner?

After the entity has determined that it must acquire certain real property, it must negotiate in good faith with the landowner in an attempt to reach an agreement on just compensation for the property.¹⁶ A bona fide effort by the condemnor to come to an agreement with the landowner in advance regarding the value of the land and any damages to any remaining, adjacent land is a prerequisite to the institution of condemnation proceedings, as explained below. The entity must investigate all aspects of the property’s value and prepare worksheets and summary sheets that are necessary and convenient to determine the value of the property to be taken. The duty lies with the condemning authority to seek out and attempt to reach an agreement with the property owner as to the value of the property to be taken.¹⁷ If more than one party holds title to the property, the condemnor would not have to negotiate or make offers to all parties but might concentrate on one owner.¹⁸ These “ignored interests” might be partial fee simple interests, lease interests, or mortgage interests, among others. Nevertheless, the better practice would be to negotiate with all parties of interest if possible.

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

Frequently, an entity is unable to agree with the property owner on a price for the property. The fact that the condemnor and property owner cannot agree on just compensation does not mean that the condemnor cannot buy the property at any price. Rather, it means that the property cannot be bought at a price that the condemning party should reasonably be willing to pay. If no agreement on price can be reached, the entity must then file a petition for condemnation.

If the case later goes to trial, the court will determine as a threshold matter whether the condemnor satisfied the “unable to agree” prerequisite for using condemnation. This finding by the court should be made prior to the trial of the condemnation action. Failure to negotiate an offer leads to abatement of the proceedings, not dismissal, to allow time for such negotiations to occur.¹⁹ Section

¹⁴ Cities can issue 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 also choose to pass a second resolution to specifically authorize condemnation of each single parcel when negotiations prove unsuccessful.

¹⁵ TEX. PROP. CODE ANN. § 21.0112 (Vernon Supp. 2008). The form will be posted on the Attorney General’s website in January 2008 after notice and public comment. It must be used as of February 1, 2008.

¹⁶ *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); see also TEX. PROP. CODE ANN. § 21.012(a) (Vernon 2004).

¹⁷ *Lapsley v. State*, 405 S.W.2d 406 (Tex. Civ. App.–Texarkana 1966, writ ref’d n.r.e.).

¹⁸ *Texas-New Mexico Power Co. v. Hogan*, 824 S.W.2d 252 (Tex. App.–Waco 1992, writ denied).

¹⁹ *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004).

21.012 of the Property Code requires an entity to state in its condemnation petition that it has been unable to agree with the property owner on the damages (the compensation for the property).²⁰ This assertion in the petition does not create a cause of action for failure to negotiate in good faith.²¹

8. How does a condemnor file a condemnation action in court?

The condemnation proceeding is initiated by filing a Statement (or Petition) in Condemnation. An entity's Petition in Condemnation sets forth the interest sought to be acquired from the landowner. The Property Code requires that to be sufficient to invoke condemnation proceedings, the Statement in Condemnation must contain four elements:

- a. **A description of the property.** The description must be specific enough that a surveyor could go onto the land and mark out the property sought to be condemned. It may be fairly implied that such a description should be by metes and bounds, as used in deed conveyances, so that a surveyor could locate the property.²² The description in a petition for condemnation of the land to be taken must appear either on the face of the petition or by other writing referred to in the petition. Failure to adequately describe the land to be taken in the petition divests the court of jurisdiction over the condemnation proceeding.²³
- b. **A statement of the purpose of the intended use of the property by the condemning entity.** Such a use should be for a public purpose that the city plans to undertake or that is already performed by the city. Texas court cases have made it clear that any legislative declaration of public purpose (including a city council's resolution) will probably be upheld short of a showing of fraud.²⁴ Condemnation for economic development purposes was upheld against a challenge under federal law in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). In Texas, condemnors are restricted in their ability to condemn when economic development is the primary purpose for condemnation, unless one of many exceptions applies.²⁵
- c. **A listing of the names of the owners of the property.** The condemning entity must make a good faith effort to name all ownership interests in the property, but the petition does not necessarily have to name mortgagees of the property.²⁶

An allegation of ownership is also required to be included in the petition for condemnation. To prevent persons with an interest in the property from being able to later challenge the condemnation, it is necessary to make such persons a party/defendant in the case. The petition is sufficient when it alleges that the defendants owned or claimed to own some interest in the property to be taken.

²⁰ TEX. PROP. CODE ANN. § 21.012 (Vernon 2004).

²¹ *Dillard v. Austin ISD*, 806 S.W.2d 589 (Tex. App.–Austin 1991, writ denied).

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. chapter 2206 (Vernon Supp. 2008).

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

- d. **A statement of the inability of the condemnor and the landowner to agree on a price for the property.** This has been discussed above. See question #7.
- e. **Statement that a landowner's bill of rights statement has been sent.** Under Section 402.031 of the Government Code, the Texas Attorney General prepares a landowner's bill of rights statement notifying property owners of their rights, including notice of the proposed property acquisition; a bona fide good faith effort by the governmental entity to negotiate with the owner; an assessment of damages from the taking of the property; a commissioners' hearing; and an appeal of this hearing. The condemning entity must send the bill of rights by first-class mail or otherwise to the last known address of the person in whose name the property is listed in the property tax rolls. The bill of rights may be found on the Attorney General's Web site at www.oag.state.tx.us/agency/landowners.shtml.

9. What courts have jurisdiction in a condemnation proceeding?

Section 21.001 of the Property Code states that district courts and county courts at law have concurrent jurisdiction in eminent domain proceedings. The county courts and municipal courts have no jurisdiction.²⁷ If an eminent domain case is pending in a county court at law and a question arises involving title to the property, such as the entity claiming title to the property, the case must be transferred to the district court.²⁸ In a few instances the jurisdictional provisions of Chapter 21 do not apply, so always check the enabling statute for a particular county court at law.²⁹ Also, if the landowner of the property is an estate, the proceedings will be in the court handling the probate of the estate.

Section 21.013 also contains venue provisions relating to condemnation proceedings. Venue refers to the appropriate location for the suit to be heard. These provisions provide in part that:

- a. The venue of a condemnation proceeding is in the county in which the property owner resides if the owner resides in the same county as the property. Otherwise, the venue is in any county in which at least part of the condemned property is located.
- b. Ordinarily, if there is one or more county court at law with potential jurisdiction over the condemned property, a party initiating a condemnation proceeding shall³⁰ 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.³¹

²⁷ TEX. PROP. CODE ANN. § 21.001 (Vernon 2004).

²⁸ *Id.* § 21.002; *Zucht v. City of San Antonio*, 698 S.W.2d 168 (Tex. App.-San Antonio 1984, no writ).

²⁹ *See, i.e.*, TEX. GOV'T CODE ANN. § 25.1032 & 25.2293 (Vernon 2004) (special provisions for Harris and Travis County courts).

³⁰ Before changes enacted in 1999, the condemnor 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.

³¹ TEX. PROP. CODE ANN. § 21.013 (Vernon 2004).

In summary, these proceedings normally take place in county courts at law.

III. Special Commissioners

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

Upon the filing of a Petition in Condemnation that satisfies the requirements of Section 21.012 of the Texas Property Code, the judge of the court in which the condemnation petition is filed is required to appoint three (3) disinterested persons (called “freeholders”) who reside in the county as Special Commissioners to assess the damages (appropriate compensation) to be paid for the property being condemned.³² The judge has no discretion whether to appoint the commissioners.³³

The purpose of appointing special commissioners is to create an administrative proceeding.³⁴ The judge acts purely as an administrative agent; he appoints commissioners and gives them the oath. The Property Code mandates that the judge give preference in his appointments of commissioners to persons agreed upon by the parties.³⁵ However, failure to consult with the landowner regarding selection of the special commissioners does not invalidate the appointment of the commissioners.³⁶ In practice, the court will usually appoint commissioners with which it is familiar.

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.³⁸ The commissioners are given powers similar to those conferred upon a court of law and are required to administer fair and equal justice between the landowner and condemning city. The validity of the commissioners' proceedings depends upon their strict compliance with statutory requirements.³⁹

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

When appointed, the commissioners must schedule a hearing for the parties. Written notice informing the parties of the time and place of the hearing must be given at least 11 days prior to the hearing.⁴⁰

Notice of the commissioners' hearing may be served by anyone competent to testify (and therefore prove the notice was delivered).⁴¹ Notice is accomplished, usually by the condemnor acting for the commissioners:

³² *Id.* § 21.014(a).

³³ *Peak Pipeline Corp. v. Norton*, 629 S.W.2d 185 (Tex. App.–Tyler 1982, no writ).

³⁴ *State v. Giles*, 368 S.W.2d 943 (Tex. 1963).

³⁵ TEX. PROP. CODE ANN. § 21.014(a) (Vernon 2004).

³⁶ *Dueitt v. Harris County*, 249 S.W.2d 636 (Tex. Civ. App.–Galveston 1952, writ ref'd).

³⁷ TEX. PROP. CODE ANN. § 21.014(b) (Vernon 2004).

³⁸ *Id.* § 21.015(a).

³⁹ *Rotello v. Brazos Cnty. Water Control & Imp. Dist.*, 574 S.W.2d 208 (Tex. Civ. App.–Houston [1st Dist.] 1978, no writ).

⁴⁰ TEX. PROP. CODE ANN. § 21.016(b) (Vernon 2004).

⁴¹ *Id.*

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.⁴²

Note that the Rules of Civil Procedure do **not** apply to service of notice for the commissioners' hearing, unless specifically stated in the Property Code.

Once proper notice has been served upon all potential parties, the special commissioners may convene the hearing and consider the evidence presented by each party.⁴³ A landowner who makes an appearance before the special commission on the date and time of the special commissioners' hearing waives any claim about defective notice to the landowner.⁴⁴

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 condemnor has the right to condemn the property at all,⁴⁵ and as a result, the hearings are not required to follow strict rules of evidence and other procedures observed in a formal trial.⁴⁶ Special commissioners may compel the attendance of witnesses and the production of testimony, administer oaths, and punish for contempt in the same manner as a county judge.⁴⁷

The principal responsibility of the commissioners is to assess the damages a landowner will suffer as a consequence of the taking of his land. This duty involves a determination of the value of the land taken and the amount of consequential damages.⁴⁸ The authority of the commissioners ceases when they file their decision with the appointing judge. The judge may not interfere with the proceedings before they do so, however, as the court has no such authority in the administrative proceeding.⁴⁹

⁴² *Id.* § 21.016(d).

⁴³ *Id.* § 21.015(b).

⁴⁴ *Jones v. City of Mineola*, 203 S.W.2d 1020 (Tex. Civ. App.—Texarkana 1947, writ ref'd).

⁴⁵ *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240 (Tex. 1984)

⁴⁶ *Dueitt*.

⁴⁷ TEX. PROP. CODE ANN. § 21.014(c) (Vernon 2004).

⁴⁸ *Texas Electric Service Co. v. Perkins*, 23 S.W.2d 320 (Tex. 1930).

⁴⁹ *Peak Pipeline*.

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

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

Section 21.041 sets out the general types of evidence that may be received by the special commissioners. This section provides that the commissioners shall admit evidence on the following topics:

- a. the alleged value of the property being condemned;
- b. any alleged injury to the property owner;
- c. any benefit to the property owner's remaining property; and
- d. the use of the property by the condemnor seeking to acquire the property.⁵⁰

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

1. Special commissioners shall assess the damages according to the evidence presented.
2. Any valuation must always consider the highest and best use that the property could be put to now or in the reasonable, foreseeable future.⁵¹
3. If an entire tract is taken, the damage to the property owner is the local fair market value of the property at the time of the special commissioners' hearing.
4. 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 and taking 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 part taken and the damages, if any, to the remainder property as a result of the taking.)⁵²
5. In 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. The commissioners may not consider injury or benefit that the property owner experiences in common with the general public. (This includes increased traffic difficulties getting to the property or loss of visibility from the road.⁵³ It also includes difficulty traveling within the property due to grade

⁵⁰ TEX. PROP. CODE ANN. § 21.041 (Vernon 2000).

⁵¹ *City of Austin v. Cannizzo*, 267 S.W.2d 808 (1954).

⁵² *State v. Carpenter*, 89 S.W.2d 194 (Tex. Comm'n App. 1936, opin. adopted)

⁵³ *State v. Schmidt*, 867 S.W.2d 769 (Tex. 1993).

changes caused by an embankment for an adjoining street.⁵⁴

6. 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 improvement or 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.⁵⁵

The commissioners should not consider the effect of the condemnor's proposed project on the remainder property's value.⁵⁶ Neither generally should evidence comparing the raw land of the tract actually taken to subdivided, easily marketable property elsewhere be introduced.⁵⁷

After assessing the damages and allocating the costs, special commissioners are required to make a written statement of their decision.⁵⁸ The statement known as the "Award of Special Commissioners" should be executed and dated by the commissioners and filed with the court on the next working day after the decision is made. The Award is usually prepared by and filed by the condemnor 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.⁵⁹

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 assessment of the costs for the proceeding.

Section 21.047(a) of the Texas Property Code states:

"Special Commissioners may adjudge the cost 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 the proceedings began, the property owner shall pay the costs."⁶⁰

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

Heading off claims by filing "lis pendens." Always file this type of notice in the real property records of the county clerk's office at the same time the petition is filed initially. It is authorized by law and will protect the condemnor from any change in property ownership that occurs after its filing.⁶¹

⁵⁴ *Bexar County v. Santikos*, 144 S.W.3d 455 (Tex. 2004).

⁵⁵ TEX. PROP. CODE ANN. § 21.042 (Vernon Supp. 2008).

⁵⁶ *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623 (Tex. 2002).

⁵⁷ *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805 (Tex. 2002).

⁵⁸ TEX. PROP. CODE ANN. § 21.048 (Vernon 2000).

⁵⁹ *Id.* § 21.049.

⁶⁰ *Id.* § 21.047(a).

⁶¹ *Id.* § 12.007; see *Hartel v. Dishman*, 145 S.W.2d 865 (Tex. 1940).

Obtaining possession of the land. The condemnor may obtain possession by depositing the amount of the Commissioners' Award for damages plus any costs assessed, then obtaining an order and writ of possession and executing the writ, if necessary.⁶²

Obtaining and disclosing appraisal of land. It is necessary for the condemnor 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 condemnor.⁶³ The landowner will rarely go to the expense of preparing an appraisal because of this disclosure requirement. The condemnor does not have to reveal any property studies of the area that are not, strictly speaking, appraisals of the particular property.⁶⁴

Notice of Right of Repurchase. The condemnor must notify the landowner in writing that if the property is no longer required for the public use that served as the justification for its purchase within 10 years of the property's acquisition, the landowner has the right to repurchase the property at its then-fair market value.⁶⁵

Water rights. If the condemnor is acquiring the property to use its water rights, it must follow certain notification and procedural requirements.⁶⁶

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 case if objections to the commissioners' award are filed within the prescribed time under Section 21.018 of the Property Code. Section 21.018 states that a party to a condemnation proceeding may object to the findings of the special commissioners by filing a written statement of the objections and the grounds for the objections. The statement must be filed with the court that has jurisdiction over the 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

If a property owner fails to file 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.⁶⁸ The court must adopt the commissioners' award as a judgment of the court.⁶⁹

If objections to the commissioners' award are filed in a timely matter, the county court at law or district court 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.

⁶² See TEX. PROP. CODE ANN. § 21.021(a), (c) (Vernon 2004); see also *Brown v. City of Dallas*, 549 S.W.2d 787, 788 (Tex. Civ. App.–Waco 1977, no writ).

⁶³ TEX. PROP. CODE ANN. § 21.0111 (Vernon 2004).

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

⁶⁵ TEX. PROP. CODE ANN. § 21.023 (Vernon 2004); see subchapter E of Chapter 21, which was effective January 1, 2004 (Vernon Supp. 2008).

⁶⁶ *Id.* § 21.0121 (Vernon 2004) & 21.0421 (Vernon Supp. 2008).

⁶⁷ TEX. PROP. CODE ANN. § 21.018 (Vernon 2004).

⁶⁸ *Sinclair v. City of Dallas*, 44 S.W.2d 465 (Tex. Civ. App.–Waco 1931, writ ref'd).

⁶⁹ TEX. PROP. CODE ANN. § 21.061 (Vernon Supp. 2008).

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 on the other party within a reasonable time, the trial court should dismiss the objections for want of prosecution and should also reinstate the special commissioners' award.⁷⁰ 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.⁷¹

This trial will be a judicial proceeding such as normally conducted by the court. The same evidence discussed in question 12 above will be admissible at trial. The condemning authority will want to use experienced legal counsel in such trials.

Acknowledgments

This paper used several excellent sources, including articles by Ed Snyder, Clarissa Bauer, Richard Naylor, and Douglas Conner, as well as advice by Kristina Silcocks and Susan Bonnen in the Transportation Division of the Office of the Attorney General.

⁷⁰ *State v. Ellison*, 788 S.W.2d 868 (Tex. App.–Houston [1st Dist.] 1990, writ denied).

⁷¹ *City of Tyler v. Beck*, 196 S.W.3d 784 (Tex. 2006).