

PRESENTED AT
17th Annual Gas and Power Institute

September 20-21, 2018

Houston, Texas

History of Recent Eminent Domain Proposed and Approved Legislation

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The last time the Texas Legislature passed eminent domain reform was in 2011, when consensus legislation supported by industry and landowners was passed. Since then there have been attempts in subsequent Legislative sessions to pass additional eminent domain reform. The main landowner's contention in support of such legislation is that pipeline companies have been making low-ball offers to landowners. This and other issues raised in recent legislative sessions are discussed below.

Alleged “Low-Ball” Offers and SB 18. In the last few sessions a vocal handful of landowners have been appearing at the Capital of Texas and offices of Texas Senators and Representatives claiming that the Texas condemnation procedure (which has been in place since 1895) is unfair and that condemnors have been “low-balling” landowners on offers for lands rights sought allegedly to “force” landowners to settle “on the cheap” or participate in the Texas condemnation procedure which they claim favors condemnors. The alleged “low-balling” of which landowners complain, is simply a condemning authority's pre-condemnation offer being less than what the commissioners award, the court or jury awards or the amount the condemning authority pays to settle a disputed acquisition matter. But as explained below, it is impossible for a condemning authority to determine what commissioners, a local jury or a Court will award, and many times a condemnor will settle a disputed acquisition matter and pay many multiples of the what independent appraiser concludes the land rights sought are worth to avoid much more significant damages associated with delaying a public project or to avoid potentially adverse decisions of commissioners, juries and, or local courts who many times (i) are perceived to be friendly to local landowners, and (ii) award excessive compensation based on unreliable and many times inadmissible evidence. Condemning authorities have no crystal ball to predict what local commissioners, juries and Courts will award and such authorities' failure to accurately predict and offer pre-condemnation what is ultimately awarded in condemnation cannot be properly labeled “low-balling.”

In Texas as in most other states, the compensation to which a landowner is due under the Texas Constitution, for lands rights acquired through condemnation is “adequate compensation” determined as follows:

Compensation for land taken by eminent domain is measured by the fair-market value of the land at the time of the taking. The general rule for determining fair-market value is the before-and-after rule, which requires measuring the difference in the value of the land immediately before and immediately after the taking When, as here, only part of the land is taken for an easement, a partial taking occurs In this situation, the before-and-after rule still applies, but compensation is measured by the market value of the part taken plus any diminution in value to the remainder of the land

Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623 (Tex. 2002) (citations omitted). The value of the part taken is ascertained by determining the per acre value of the parent tract across which the easement is to traverse and then attributing that per acre value to the part taken. *Id.* at 628. Diminution in value to the remainder, if any, is determined by the difference in

the market value of the remainder before and after the taking. How does one determine the market value of land? The Texas Legislature, Texas courts and the other states' legislatures and courts dictate that market value of land is determined by licensed real estate appraisers, as there is simply no other reliable basis for such a determination.¹

In fact, the only independent way for a condemnor to determine the fair market value of land rights sought is to hire a licensed real estate appraiser to prepare an appraisal. This holds true for determining land market value for other types of cases, such as ad valorem tax cases, damages in land contamination cases, etc.

The manner in which to determine market value of property rights sought in condemnation matters was debated in several Texas legislative sessions until Senate Bill 18 authored by Senator Estes was passed. All affected parties had spent years trying to come up with a system that would prevent so called "low-ball" offers, and SB 18 picked the only reliable and independent objective value analysis that can actually be performed by a condemning authority at the time a final offer has to be made—a certified appraisal by a licensed appraiser. **Senate Bill 18** which was the result of much compromise and bipartisan support became effective in 2011. The Legislature had worked on eminent domain reform for three sessions and ultimately passed SB 18 in the 82nd Session. The primary purpose of SB 18 was to give landowners more rights in condemnation proceedings and the bill was ultimately agreed to and supported by landowners and condemnors. One of the many issues SB 18 addressed was landowners' contentions that condemnors were making "low-ball" offers. Various solutions were considered including attorneys' provisions like those contained in SB 474, but after years of debate and compromise, the Legislature decided on detailed good faith offer requirements and an award of attorneys' fees if a condemnor failed to satisfy those requirements.

SB 18 requires all condemnation offers to be based on a certified appraisal of the property interests sought. There is no other uniformly reliable and objective basis on which to value property rights sought by condemnors. Appraised value is always based on fair market value and is the appropriate method for determining the amount due landowners in condemnation actions. SB 18 (i) requires that the pre-condemnation offer be equal to or more than the appraised value of the rights sought, (ii) prevents condemnors from offering less than appraised value as determined by certified appraiser, and (iii) requires that if a condemnor is found to have failed to make a good faith offer, then a condemnation proceeding is delayed until the condemnor does so, and the condemnor is required to pay the landowners' attorneys' fees.

Condemnation Procedure. Condemnation in Texas is a two-step process—first there is a special commissioners' hearing before three local landowners and then if either side objects to the commissioners' award, then second, there is a trial in county or district court without any consideration of what the commissioners awarded. There is no judge presiding over the commissioners' hearing and it is mostly a free for all as to what evidence

¹ Additionally, where a landowner is familiar with true market value of land based on objective facts, figures and evidence the landowner can testify to market value of land. *Natural Gas Pipeline Co. of America v. Justiss*, 397 S.W.3d 150, 159-60 (Tex. 2012).

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First appeared as part of the conference materials for the
17th Annual Gas and Power Institute session

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