

## **Recent Condemnation Issues**

*Compensation in power line and pipeline cases—new thoughts on an old subject*

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*U.S./Mexico border wall: the past, the present and what may come*

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Barron, Adler, Clough & Oddo, LLP is a boutique law firm with offices in Austin and Houston, Texas that practices exclusively in the area of eminent domain, condemnation, inverse condemnation, and regulatory takings of property. The firm's lawyers represents clients throughout Texas and have successfully handled eminent domain cases for a variety of landowners including individuals, Fortune 500 publicly traded companies, business owners, tenants, and public agencies and entities. The cases the firm's lawyers have handled cover a broad spectrum of properties, ranging from residential, commercial, and industrial properties to vacant land and special use properties. With a combined 80+ years of experience in eminent domain and regulatory takings, lawyers with the firm are routinely asked to educate the community, professional organizations and politicians on eminent domain issues and emerging case law and have assisted in both drafting and advancing legislation to protect landowners.

## ***Compensation in power line and pipeline cases—new thoughts on an old subject***

Representing landowners in eminent domain cases is always challenging, but is particularly so in utility easement acquisitions. The mandate of just or fair compensation under our federal and state constitutions is readily susceptible to mixed interpretation. This paper addresses several concepts to assist eminent domain and real estate practitioners in representing landowners in their efforts to obtain fair treatment when private property is taken for a utility easement.

### **A. Valuing utility easements on a per linear foot or per rod basis**

It is generally accepted that utility easements, including pipelines and power lines, are bought and sold on the open market between willing buyers and sellers on a per linear foot or per rod<sup>1</sup> basis. It would make sense, then, that when valuing utility easements in a condemnation case landowners should be permitted to use market data reflecting per linear foot or per rod transactions. Courts from around the country, however, have typically rejected the per linear foot or per rod method of valuation. In rejecting the per linear foot or per rod valuation of utility easements, these courts have declined to consider a whole universe of market driven transactions that provide valuable guidance in estimating just compensation for utility easements.

#### **1. Just compensation**

Just compensation for the taking of a utility easement is based on the “market value” of the property at the time of the taking. TEX. PROP. CODE § 21.042; *Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 261 (Tex. 2012). The fair market value standard drives the fair compensation determination, that being, the price a property would bring in a transaction between a willing buyer and willing seller. *City of Austin v. Cannizzo*, 267 S.W.2d 808, 813 (Tex. 1954); *see also United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

In determining fair market value, one of the most critical pieces of evidence is the value of sales for similar transactions in similar locations. *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001). When value is at issue, evidence of sales between willing sellers and willing buyers, similarly situated, is the most relevant and useful evidence available. *Bauer v. Lavaca-Navidad River Auth.*, 704 S.W.2d 107, 110 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.) (noting that comparable sales are even more reliable than expert valuations).

In partial taking cases, like most utility easement acquisitions, the landowner is entitled to compensation in the amount of the fair market value of the part taken, plus damages to the remainder caused by the acquisition. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 456 (Tex. 1992). In Texas, as in other jurisdictions, the preferred method of determining such compensation when the taking does not constitute a separate economic unit, is to calculate the difference between the market value of the whole property before the taking compared to the market value of the remainder after the taking. *State v. Petropolous*, 346 S.W.3d 525, 530 (Tex. 2011). The calculation

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<sup>1</sup> A “rod” is a commonly used term in pipeline easement negotiations and acquisitions and represents a sixteen-and-a-half foot segment of a pipeline. The term “rod” relates to an old surveying tool used by surveyors when measuring survey boundaries without the assistance of GPS or lasers.

of this difference then requires that the appraiser determine the impact of the proposed taking on the property.

The loss in remainder value constitutes the decrease in the fair market value of the landowner's whole parcel burdened with the utility easement. Essentially, this is the amount a willing seller should take in an open and willing marketplace to accept all of the added burdens, potential liability, uncertainty, and negative attributes associated with a utility easement. Remainder damages quantify these burdens and translate them into a monetary loss (*i.e.*, the market value is diminished due to these, and other, factors).

## **2. Per linear foot or per rod valuation**

Market participants in the business of buying and selling utility easements, including those with and without the power of eminent domain, often pay for utility easements on a per linear foot or per rod basis. In many of these open market transactions, there is no obligation to buy or to sell, rather one utility company is acquiring an entire utility easement line or valuing easements as part of the acquisition or divestiture of a company. The prices paid for the utility easements in these transactions indicate what, in the open market, a willing buyer is willing to pay and a willing seller is willing to accept and thus should serve as at least one of the potential bases for valuing utility easements in condemnation cases. Certainly this information is relevant to determining what constitutes fair market value and would be helpful to a jury in arriving at their verdict.

## **3. Paired sales problems and the need for market data**

Many appraisers attempt to use a paired sales analysis to determine the impact of a utility easement on property value. The recent Texas Supreme Court case of *Houston Unlimited Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820 (Tex. 2014), is particularly instructive in illustrating the problem of relying exclusively on this approach. In *Mel Acres*, the landowner's appraiser performed a paired sales analysis attempting to account for the difference in price attributable to stigma associated with environmental contamination. In striking the expert's opinion, the court relied upon the fact that the appraiser's ultimate opinion was "cause-dependent" in that her reasoning could only be sound if the losses found for the properties in question were attributable to market stigma and no other factors. Because the landowner's appraiser offered no evidence tending to establish the cause of the property's diminution in value, and instead merely assumed that the diminution in market value was attributable to nearby contamination, the court struck the opinion for its lack of adequate foundation and reliable methodology. *Id.* at 830–31

*Mel Acres* highlights the inherent problem with a paired sales analysis and emphasizes the importance of obtaining as much market data as possible to support or test its results. Because of the many inherent differences between properties, it is typically very challenging, if not sometimes impossible, to know exactly what caused the difference in value between the sales in a pairing. When viewing utility easement transactions in which the buyer did not have the power of eminent domain, it is undisputed that the *ONLY* issue being negotiated in that free market situation was the impact of the utility easement on the properties involved. Using such market data eliminates the issues and concerns raised by the Supreme Court of Texas in *Mel Acres*. However, the availability of these sales and other related market data may be limited.

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