

**LAW OF EASEMENTS:
LEGAL ISSUES & PRACTICAL CONSIDERATIONS
IN TEXAS**

**Litigating Utility Easements in Eminent Domain /
Condemnation Proceedings**

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I. Eminent Domain and Condemnation¹

Article I, section 17 of the TEXAS CONSTITUTION sets forth the power and authority of eminent domain in Texas. It reads:

No 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; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

A. What Does It Mean?

Traditionally, eminent domain is the right of the state or federal government (or 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 adequate compensation.² Condemnation is the procedure by which private property is confiscated, without consent, for public use through the exercise of the power of eminent domain, but upon the payment of just compensation.³ Constitutional considerations require that the property be taken for public use, and a person deprived of property must be: (1) adequately compensated for the property; and (2) afforded due process⁴ of law.⁵

¹This paper is only designed to provide a general overview of litigating utility easements in eminent domain / condemnation proceedings. Publication or receipt of this paper does not create an attorney/client relationship between PCP&B and the reader, nor does it constitute an offer of legal advice or service by PCP&B. If you have specific legal questions, you may contact Mr. Cappuccio directly. This paper should not be relied upon for such purposes.

²*Fort Worth & Denver City Ry. Co. v. Ammons*, 215 S.W.2d 407, 409 (Tex. Civ. App. – Amarillo 1948, ref. n.r.e.); *Byrd Irrigation Co. v. Smythe*, 146 S.W. 1064, 1065 (Tex. Civ. App. – San Antonio 1912, no writ).

³*See City of Houston v. Boyle*, 148 S.W.3d 171, 178 (Tex. App. – Houston [1st Dist.] 2004, no pet.).

⁴While the TEXAS CONSTITUTION is textually different from the UNITED STATES CONSTITUTION in that it refers to “due course” rather than “due process,” these terms are without meaningful distinction. *Univ. of Tex. Medical Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

⁵*See* U.S. CONST., Amend. V & XIV § 1; TEX. CONST., art. I §§ 17 & 19.

B. Who Has the Power?

Texas, as a sovereign, has the power of eminent domain, which can be exercised only by the legislature itself, or on its behalf by an agency to which it has delegated the power.⁶ The legislature has the power to name persons, corporations, and municipalities that may institute condemnation proceedings, and only those entities to which the legislature has conferred such authority can condemn property.⁷ The power of eminent domain must be conferred expressly or by necessary implication; it cannot be gathered from doubtful inferences.⁸

Statutes codifying the power of eminent domain are construed strictly in favor of the landowner and against the condemning authority.⁹ However, if the legislature imposes no restrictions on eminent domain powers granted by statute, then courts may not impose a condition on the exercise of those powers.¹⁰

The legislature has expressly granted the power of eminent domain to acquire utility easements to the following “corporations:”¹¹

⁶See *Davis v. City of Lubbock*, 326 S.W.2d 699, 714 (Tex. 1959).

⁷See *Benat v. Dallas County*, 266 S.W. 539, 540 (Tex. Civ. App. – Dallas 1924, writ ref’d).

⁸See *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 717-718 (Tex. App. – Corpus Christi 2000, pet. denied); *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 564-565 (Tex. App. – San Antonio 1998, pet. denied); *Roadrunner Inv., Inc. v. Tex. Util. Fuel Co.*, 578 S.W.2d 151, 152-154 (Tex. Civ. App. – Fort Worth 1979, writ ref’d n.r.e.).

⁹See *Hailey v. Texas-New Mexico Power Co.*, 757 S.W.2d 833, 835 (Tex. App. – Waco 1988, writ dismissed w.o.j.); *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (1958); *Flores v. Military Highway Water Supply Corp.*, 714 S.W.2d 382, 383-384 (Tex. App. – Corpus Christi 1986, no writ).

¹⁰See *Baird v. Sam Houston Elec. Co-op, Inc.*, 627 S.W.2d 734, 736-737 (Tex. App. – Houston [1st Dist.] 1981, writ dismissed).

¹¹Under Chapter 181 of the TEXAS UTILITIES CODE, a “corporation” includes: (A) a partnership, limited partnership, or master limited partnership; (B) a combination of business entities composed exclusively of corporations or in which a corporation is a general partner; (C) a limited liability company; and (D) a gas utility or electric utility regardless of form of organization, but not including a municipally owned utility. TEX. UTIL. CODE § 181.001(1).

- a. Telephone and telegraph corporations;¹²
- b. Gas corporations; and¹³
- c. Electric corporations.¹⁴

Specifically, TEX. UTIL. CODE § 181.084 grants telephone and telegraph corporations the right to: (1) appropriate as much land owned by a private person or a corporation as is necessary to construct a facility;¹⁵ and (2) condemn land to acquire a right-of-way or other interest in the land for the use of the telephone or telegraph corporation.¹⁶ TEX. UTIL. CODE § 181.004 grants gas and

¹²A “telephone corporation” is a corporation created to construct and maintain telephone lines, and a “telegraph corporation” is a corporation created to construct and maintain magnetic telegraph lines. TEX. UTIL. CODE § 181.081.

¹³The TEXAS UTILITIES CODE does not define what a “gas corporation” is. However, courts may use TEX. UTIL. CODE § 121.001(a)(2) as guidance for determining whether or not a gas corporation has the right of eminent domain. *See Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 564 (Tex. App. – San Antonio 1998, pet. denied), *citing Loesch v. Oasis Pipe Line Co.*, 665 S.W.2d 595, 597-598 (Tex. App. – Austin 1984, writ ref’d n.r.e.), *and Roadrunner Investments, Inc. v. Texas Utilities Fuel Co.*, 578 S.W.2d 151, 154 (Tex. Civ. App. – Fort Worth 1979, writ ref’d n.r.e.), *and Grimes v. Corpus Christi Transmission Co.*, 829 S.W.2d 335, 339 (Tex. App. – Corpus Christi 1992, writ denied). Under TEX. UTIL. CODE § 121.001(a)(2), “gas utility” means a person who owns, manages, operates, leases, or controls in this state property or equipment or a pipeline, plant, facility, franchise, license, or permit for a business that owns, operates, or manages a pipeline: (A) that is for transporting or carrying natural gas, whether for public hire or not; and (B) for which the right-of-way has been or is hereafter acquired by exercising the right of eminent domain. Based on TEX. UTIL. CODE § 121.001(a)(2)’s predecessor statute, courts have held “that a corporation operating a gas pipeline has the power of eminent domain if it devotes its private property and resources to public service and allows itself to be publicly regulated.” *Id.*

¹⁴An “electric corporation” is an electric current and power corporation. TEX. UTIL. CODE § 181.001(2).

¹⁵“Facility” means a pole, pier, abutment, wire, or other fixture related to a telephone or magnetic telegraph line. TEX. UTIL. CODE § 181.081. A telephone or telegraph corporation has authority to install a facility in relation to *public* property in a manner that does not inconvenience the public. *See* TEX. UTIL. CODE § 181.082.

¹⁶*See Mo. Pac. R.R. Co. v. Buenrostro*, 853 S.W.2d 66, 76 (Tex. App. – San Antonio 1993, writ denied), *citing* V.A.T.S. art. 1416 & 1417, *and Mellon v. S. Pac. Transp. Co.*, 750 F. Supp. 226, 231-232 (W.D. Tex. 1990) (*dicta*, under predecessor statute, MCI had the power to condemn property to bury underground fiber optic lines); *cf. Southwestern Bell Tel. Co. v. Ramsey*, 542 S.W.2d 466, 469 (Tex. Civ. App. – Tyler 1976, writ ref’d n.r.e.) (Bell condemned land for underground communications cable); *see also Southwestern Bell Tel. Co. v. Radler Pavilion, LP*, 77 S.W.2d 482, 483 (Tex. App. – Houston [1st Dist.] 2002, pet. denied) (discussing condemnation initiated by Bell); *City of Austin v. Capitol Livestock Auction Co., Inc.*, 434 S.W.2d 423, 436-437 (Tex. Civ. App. – Austin 1968), *modified on other grounds*, 453 S.W.2d 461 (recognizing by analogy that telephone company had right to condemn since telegraph company did and both perform similar services); *Gully v. Southwestern Bell Tel. Co.*, 774 F.2d 1287, 1290 n.5 (5th Cir. 1985) (Bell counterclaimed to condemn); *Greenway Plaza Ltd. v. Southwestern Bell Tel. Co.*, 2002 Tex. App. LEXIS 7037, *1-2 (Tex. App. – Houston [1st Dist.] 2002, no pet.). *But see Southwestern Bell Tel. Co. v. Gordon*, 705 S.W.2d 767 (Tex. App. – Houston [14th Dist.] 1986, writ ref’d n.r.e.) (Bell’s condemnation action was dismissed for want of jurisdiction, but opinion does not state basis).

electric corporations the right and power to enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation. It is important to note that subsection (1) includes the phrase “as is necessary,” while subsection (2) does not.

II. Requirements to Exercise Power of Eminent Domain in Texas

A. Public Use and Necessity

The power of eminent domain can only be used to take property for “public use.”¹⁷ There are two aspects to “public use.”¹⁸ First, it must be intended that the property will be used for a public purpose.¹⁹ This prong is referred to as “public use.” Second, the property must be necessary to achieve or advance the intended public purpose.²⁰ This prong is known as “public necessity.”²¹ A mere recitation by the legislature that a particular use is a public use or necessity will not control if the true intended use is a private use.²²

1. Public Use

“No hard and fast rule can be laid down for determining public use,” and “each case is usually decided upon the basis of its own facts and the surrounding circumstances.”²³ “A ‘public use’ is one which concerns the whole community in which it exists, as contradistinguished from a

¹⁷See *Anderson*, 985 S.W.2d at 565, citing TEX. CONST. art. I, § 17; *Maher v. Lasater*, 354 S.W.2d 923, 924-925 (Tex. 1962); *Davis v. City of Lubbock*, 326 S.W.2d 699, 703 (Tex. 1959); *Dallas Cotton Mills v. Indus. Co.*, 296 S.W.3d 503, 505 (Tex. Comm’n App. 1927, judgm’t adopted); *Saunders v. Titus County Fresh Water Supply Dist. No. 1*, 847 S.W.2d 424, 427 (Tex. App. – Texarkana 1993, no writ).

¹⁸*Whittington v. City of Austin*, 174 S.W.3d 889, 896-897 (Tex. App. – Austin 2005, pet. denied).

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²*Maher*, 354 S.W.2d at 925; see also *Whittington*, 174 S.W.3d at 896-897.

²³*Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958).

particular individual or number of individuals.”²⁴ Stated another way, a use is public when the public obtains some definite right or use in the undertaking to which the property is devoted.²⁵ For example, an electric utility’s condemnation of land for an electric power line easement was constitutes a public use because the power line would benefit the public.²⁶ It has also been held that a road utility district’s condemnation of land for a retention pond and drainage constituted a public use for the purpose of regulating excess or flood waters for the area.²⁷ On the other hand, at least one Texas court has held that the use of land for a sewer line did not constitute a public use because the sewer line to be placed in the easement would be the private property of the one entity that would use the sewer line.²⁸ While Texas law has adopted a liberal view of what constitutes public use, it has rejected a definition that requires nothing more than public benefit or good, reasoning that almost any kind of business that promotes the prosperity or comfort of the community might then be aided by the power of eminent domain.²⁹

²⁴*Leathers v. Craig*, 228 S.W. 995, 998 (Tex. Civ. App. – Galveston 1921, no writ); *see also Tenngasco Gas Gathering Co. v. Fischer*, 653 S.W.2d 469, 475-476 (Tex. App. – Corpus Christi 1983, writ ref’d n.r.e.).

²⁵*See Bordon v. Trespalacios Rice Irrigation Co.*, 86 S.W. 11 (Tex. 1905), *aff’d* 204 U.S. 667 (1907); *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 266-268 (Tex. App. – Houston [1st Dist.] 2005, pet. denied) (“What is important in the public-use determination is the character of the right inuring to the public, not the extent to which the public’s right is exercised. It is immaterial if the use is limited to citizens of a local neighborhood, or that the number of citizens likely to avail themselves is inconsiderable, so long as it is open to all who choose to avail themselves. The mere fact that the advantage of the use inures to a particular individual or enterprise, or group thereof, will not deprive it of public character.”) (internal citations omitted).

²⁶*See Dyer v. Tex. Elec. Serv. Co.*, 680 S.W.2d 883, 885 (Tex. App. – El Paso 1984, writ ref’d n.r.e.).

²⁷*See Malcomson Rd. Util. Dist.*, 171 S.W.3d at 257.

²⁸*See Bay Ridge Util. Dist. v. 4M Laundry*, 717 S.W.2d 92, 101 (Tex. App. – Houston [1st Dist.] 1986, writ ref’d n.r.e.).

²⁹*Malcomson Rd. Util. Dist.*, 171 S.W.3d at 267.

Traditionally, Texas courts give great weight to legislative declarations that a particular use of property is a public use.³⁰ Nonetheless, the question of whether a use is public or private is ordinarily one of law for the court to decide.³¹ When reviewing a complaint that a particular use did not serve a public purpose, a court must: (1) give great weight to the condemning authority's declaration that a use is public; and (2) overrule the decision only when the proposed use is clearly private.³²

2. Public Necessity

A condemning authority may only condemn property that is necessary to complete the legitimate ends of the project for public use.³³ For instance, a condemning authority cannot condemn more property than is necessary and sell the excess property for profit to assist in the financing of the project.³⁴

If the statute enabling condemnation does not require affirmative pleading and proof of necessity, then necessity is presumed from the condemning authority's determination to condemn

³⁰See *Whittington*, 174 S.W.3d at 897 and 899-900 (although Texas courts defer to such declarations by the legislature, a condemning authority must consider and identify the particular public use for which the property is being taken; a conclusory declaration that land is being condemned for an unidentified public use is insufficient).

³¹See *id.* at 897; *Anderson*, 985 S.W.2d at 565, citing *Tenngasco Gas Gathering Co.*, 653 S.W.2d at 474; *Maher*, 354 S.W.2d at 925.

³²*Anderson*, 985 S.W.2d at 565, citing *Coastal Indus. Water Auth. v. Celanese Corp.*, 592 S.W.2d 597, 600 (Tex. 1979), and *Tenngasco Gas Gathering Co.*, 653 S.W.2d at 475; see also *Davis v. City of Lubbock*, 326 S.W.2d 699, 704 (Tex. 1959); *Malcomson Rd. Util. Dist.*, 171 S.W.3d at 266-268; *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 718-719 (Tex. App. – Corpus Christi 2000, pet. denied).

³³See *Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137, 141 (Tex. Civ. App. – San Antonio 1954 writ ref'd n.r.e.).

³⁴See *id.*

the property.³⁵ In such cases, the condemning authority need only establish that its governing board determined that the taking was necessary to advance the ostensible public purpose.³⁶

Generally, the necessity of condemning a particular piece of property is a political or legislative question.³⁷ Where the statute authorizing condemnation does not require affirmative pleading and proof of necessity, in order for a judicial question to be raised regarding public necessity, the landowner must plead and offer proof of fraud,³⁸ arbitrariness, capriciousness, or bad faith (*i.e.*, a clear abuse of discretion) by the condemning authority.³⁹ For example, a Texas court found that the condemning authority acted arbitrarily and capriciously in seeking to condemn more land than necessary to construct a reservoir because the excess land would be leased to others for mere recreational purposes.⁴⁰ In contrast, it has been found that a condemning authority did not act arbitrarily and capriciously in condemning a larger amount of land than strictly necessary for a pipeline easement because there was a possibility that the excess land might be needed for maintenance purposes.⁴¹ On the other hand, if language in the statute contemplates a demonstration

³⁵See *Whittington*, 174 S.W.3d at 897, citing *Housing Auth. of the City of Dallas v. Higginbotham*, 143 S.W.2d 79, 88 (Tex. 1940).

³⁶*Whittington*, 174 S.W.3d at 898; *Anderson*, 985 S.W.2d at 565.

³⁷*Whittington*, 174 S.W.3d at 897; see also *Imperial Irrigation Co. v. Jayne*, 138 S.W. 575, 587 (1911); *Housing Auth. of the City of Dallas*, 143 S.W.2d at 88-89.

³⁸Fraud occurs when “contrary to the ostensible public use, the taking would actually confer only a private benefit.” *Whittington*, 174 S.W.3d at 898.

³⁹See *Wagoner v. City of Arlington*, 345 S.W.2d 759, 763 (Tex. Civ. App. – Fort Worth 1961, writ ref’d n.r.e.); *Housing Auth. of the City of Dallas*, 143 S.W.2d at 88; *Anderson*, 985 S.W.2d at 565-566; *Malcomson Rd. Util. Dist.*, 171 S.W.3d at 268-276 (stating that a condemning authority may be found to have committed a clear abuse of discretion as to whether, where, and how much of the property to condemn if the condemning authority fails to consider whether, where, and how much of the property to condemn prior to instituting condemnation proceedings).

⁴⁰See *Brazos River Conservation & Reclamation Dist. v. Harmon*, 178 S.W.2d 281 (Tex. Civ. App. – Eastland 1944, writ ref’d w.o.m.).

⁴¹See *Ludewig v. Houston Pipeline Co.*, 773 S.W.2d 610, 614 (Tex. App. – Corpus Christi 1989, writ denied).

of necessity by the condemning authority, the issue of necessity is a judicial question, which the condemning authority must plead and prove.⁴²

B. Adequate Compensation

The Texas Constitution provides, “no person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made...”⁴³ Because an easement is an interest in land, the owner of a legal right or interest in an easement has a constitutional right to compensation for the taking of his or her easement interest under both Article I, section 17 of the TEXAS CONSTITUTION and the Fifth Amendment to the UNITED STATES CONSTITUTION.⁴⁴

Damages in condemnation proceedings are assessed by three special commissioners appointed by the judge of a court in which a condemnation petition is filed or to which an eminent domain case is assigned.⁴⁵ If the landowner’s entire tract or parcel of real property is taken, the landowner must be compensated for the local market value⁴⁶ of the property at the time the special commissioners assess the damages in the condemnation proceeding.⁴⁷ If there is a partial taking,⁴⁸

⁴²See *Joyce v. Tex. Power & Light Co.*, 298 S.W. 627, 629 (Tex. Civ. App. – El Paso 1927, no writ).

⁴³TEX. CONST., art. I, § 17.

⁴⁴See *Zinsmeyer v. State*, 646 S.W.2d 626 (Tex. Civ. App. – San Antonio 1983, writ ref’d n.r.e.).

⁴⁵TEX. PROP. CODE §§ 21.014 and 21.042(a). As will be discussed below, Texas condemnation procedure requires that the court first refer the parties to a hearing before the special commissioners. See *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 179 (Tex. 2004).

⁴⁶The Texas Supreme Court has authorized the following jury instruction on the definition of “market value”: “‘Market value’ is the price that the property would bring if it were offered for sale by one who desires, but is not obliged, to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.” *State v. Windham*, 837 S.W.2d 73, 77 (Tex. 1992), citing *State v. Carpenter*, 89 S.W.2d 194, 202 (Tex. 1936) and *City of Austin v. Cannizzo*, 267 S.W.2d 808, 815 (Tex. 1954).

⁴⁷TEX. PROP. CODE § 21.042(b).

⁴⁸When only a portion of land is taken, such as an easement, a partial taking occurs. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 627 (Tex. 2002).

compensation must be made for two elements: (1) the market value of the part taken; and (2) any resulting damage to the remainder of the property.⁴⁹

III. Procedural Prerequisites

The exercise of eminent domain authority is governed by TEX. PROP. CODE §§ 21.012 through 21.016.⁵⁰

A. Corporate Resolutions

Before instituting an eminent domain action against a landowner, the condemning entity's board of directors must pass a corporate resolution authorizing the condemnation of a particular piece of property.⁵¹ As stated previously, under Texas law, a condemning authority's board of directors determination is presumed valid absent fraud, bad faith, arbitrariness, or capriciousness.⁵²

B. Landowner's Bill of Rights Statement

As of February 1, 2008, a condemning entity must, prior to beginning negotiations with a landowner to acquire real property, provide the property owner with a landowner's bill of rights statement as provided by TEX. GOV'T CODE § 402.031. It must be sent to the last known address of the person in whose name the property is listed on the most recent tax roll of any appropriate taxing unit authorized by law to levy property taxes against the property.⁵³ Pursuant to TEX. GOV'T CODE § 402.031, the attorney general shall prepare the landowner's bill of rights, which must notify

⁴⁹See *id.*; *County of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004).

⁵⁰TEX. PROP. CODE §21.011.

⁵¹See *Housing Auth. of the City of Dallas*, 143 S.W.2d at 90; see also *Whittington*, 174 S.W.2d at 889.

⁵²See *Wagoner*, 345 S.W.2d at 763; *Housing Auth. of the City of Dallas*, 143 S.W.2d at 88; see also *Brazos River Conservation & Reclamation Dist.*, 178 S.W.2d at 289; see also *Anderson*, 985 S.W.2d at 565-566; *Webb v. Dameron*, 219 S.W.2d 581, 584 (Tex. Civ. App. – Amarillo 1949, writ ref'd n.r.e.); *Malcomson Rd. Util. Dist.*, 171 S.W.3d at 268-276.

⁵³TEX. PROP. CODE § 21.0112(a).

each property owner that he or she has the right to: (1) notice of the proposed acquisition of the owner's land; (2) a bona fide good faith effort to negotiate the entity proposing to acquire the land; (3) an assessment of damages to the owner that will result from the taking of the land; (4) a hearing under Chapter 21 of the TEXAS PROPERTY CODE, including a hearing on the assessment of damages; and (5) an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages. The statement must include a description of: (1) the condemnation procedure provided by Chapter 21 of the TEXAS PROPERTY CODE; (2) the condemning entity's obligations to the property owner; and (3) the property owner's options during a condemnation, including his or her right to object to and appeal an amount of damages awarded.⁵⁴

The landowner's bill of rights shall be made available on the attorney general's Internet website.⁵⁵ If the condemning authority is a governmental entity, the landowner's bill of rights must be made available on the Internet website of the entity if technologically feasible.⁵⁶

C. Negotiations with Landowner

Under TEX. PROP. CODE § 21.012(a), the condemning authority may begin a condemnation proceeding if it is unable to agree with the landowner on the amount of damages.⁵⁷ However, failure of the condemning authority to attempt to agree does not deprive courts of subject matter

⁵⁴TEX. GOV'T CODE § 402.031(c)(2).

⁵⁵TEX. GOV'T CODE § 402.031(d)(2).

⁵⁶TEX. PROP. CODE § 21.0112(b)(2).

⁵⁷*See also Hubenak*, 141 S.W.3d at 180. At the time the condemning authority makes an offer to purchase the property, it must provide the landowner with any and all appraisal reports produced or acquired by the authority that relate specifically to the property and were used in determining the final valuation offer. *See* TEX. PROP. CODE § 21.0111(a). Within 10 days of the landowner's receipt of the appraisal reports and no later than 10 days before the special commissioner's hearing, the landowner must provide the condemning authority with any and all appraisal reports. *See* TEX. PROP. CODE § 21.0111(b).

jurisdiction.⁵⁸ If the condemning authority has failed to comply with TEX. PROP. CODE § 21.012(a)'s “attempt to agree” requirement, the court should abate the proceeding to allow the condemning authority to satisfy the requirement.⁵⁹ Thereafter, if the condemning authority fails to make an offer to the landowner within a reasonable period of time, the case should be dismissed.⁶⁰ An objection may be waived if the landowner participates in the hearing before the special commissioners.⁶¹

The “attempt to agree” requirement does not require prolonged negotiations or a series of offers and counteroffers.⁶² Rather, making one good-faith offer can be sufficient to satisfy the “attempt to agree” requirement even if the landowner rejects or ignores the offer or desires to continue negotiations.⁶³ To determine whether the condemning authority has satisfied the “attempt to agree” requirement, the court should not examine the dollar value of the offer made, or whether the offer of the condemning authority was made in subjective good faith.⁶⁴ That is because any such inquiry would inevitably turn on the ultimate valuation of the property condemned and would therefore require an examination of the merits of the condemnation action.⁶⁵

⁵⁸*See id.* at 180-181.

⁵⁹*See id.* at 184.

⁶⁰*See id.*

⁶¹*See id.* at 179.

⁶²*See State v. Hipp*, 832 S.W.2d 71, 77-78 (Tex. App. – Austin 1992), *rev'd on other grounds*, 867 S.W.2d 781 (Tex. 1993).

⁶³*See id.*

⁶⁴*See Hubenak*, 141 S.W.3d at 186.

⁶⁵*See id.*

IV. Filing Suit

A. When and Where

Upon the failure to agree on damages, the condemning authority may begin a condemnation proceeding by filing a petition in the proper court.⁶⁶ Pursuant to TEX. PROP. CODE § 21.012(b), the petition must:

- (1) describe the property to be condemned;
- (2) state the purpose for which the entity intends to use the property;⁶⁷
- (3) state the name of the landowner if the landowner is known,⁶⁸
- (4) state that the condemning authority and landowner are unable to agree on the damages; and
- (5) if applicable, state that the entity provided the landowner with the landowner's bill of rights statement in accordance with TEX. PROP. CODE § 21.0112.

Jurisdiction of a condemnation proceeding does not attach unless the condemnation petition has a legally sufficient description of the property sought to be condemned.⁶⁹ The reason for this requirement is “unless the land to be taken is adequately identified, the owner cannot know what portion of his property is required, nor the commissioners what damages to assess, nor can the court

⁶⁶TEX. PROP. CODE § 21.012(a).

⁶⁷The statement of purpose can be very broad. For example, “school purposes” may be adequate where the condemning authority is a college system, and “transportation of water” may be adequate where the condemning authority is a water authority. See *Lin v. Houston Cmty. Coll. Sys.*, 948 S.W.2d 328, 333-334 (Tex. App. – Amarillo 1997, writ denied), citing *Coastal Industrial Water Authority v. Celanese Corp.*, 592 S.W.2d 597, 600 (Tex. 1979).

⁶⁸Ideally, the petition should name all lien holders at the time of the taking because they have an ownership interest sufficient to allow them to participate in the condemnation proceeding. See *Wynnewood Bank & Trust v. State*, 767 S.W.2d 491, 493 (Tex. App. – Dallas 1989, no writ); *Olivares v. Nix Trust*, 126 S.W.3d 242, 250 (Tex. App. – San Antonio 2003, pet. denied). A lien holder will not have a sufficient ownership interest to justify an interest in the condemnation proceeding if he or she only holds a lien at the time the award is made, and not at the time of taking. See *Beutel v. Dallas Cty. Flood Control*, 916 S.W.2d 685, 692 (Tex. App. – Waco 1996, writ denied). If not all interested parties are named in the petition, the petition is only effective against the named interested parties. See *Metro. Transit Auth. of Harris County v. Graham*, 105 S.W.3d 754, 757-759 (Tex. App. – Houston [14th Dist.] 2003, pet. denied).

⁶⁹*Lin.*, 948 S.W.2d at 332.

by its decree effectively pass title.”⁷⁰ Courts test the sufficiency of a condemnation petition’s description of the property using the same standards for adequacy of a description in a deed.⁷¹

“The certainty required in the description of the land in a condemnation proceeding ‘is of the same nature as that required in conveyances of land, so that a surveyor could go upon the land and mark out the land designated.’”⁷² So long as the description is sufficiently certain that a surveyor could locate the tract of land, “a false and contradictory element” in the description is harmless.⁷³ “The general rule is that a land description in a writing is sufficient if it furnishes within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty.”⁷⁴ If the original condemnation petition includes a legally sufficient property description, the trial court may allow amendments unless allowing such would materially prejudice the landowner.⁷⁵

B. Jurisdiction and Venue

Generally, district courts and county courts at law have concurrent jurisdiction in eminent domain cases.⁷⁶ However, there is a general preference for eminent domain cases to be filed in county courts at law.⁷⁷ Pursuant to TEX. GOV’T CODE § 74.093, each county may adopt different

⁷⁰*Id.*, quoting *State v. Nelson*, 334 S.W.2d 788, 790 (Tex. 1960).

⁷¹*See id.*

⁷²*See id.*, citing *Coastal Industrial Water Authority*, 592 S.W.2d at 600, quoting *Wooten v. State*, 177 S.W.2d 56, 57 (Tex. 1944).

⁷³*Id.*, quoting *Boone v. Panola County*, 880 S.W.2d 195, 196 (Tex. App. – Tyler 1994, no writ), quoting *Roberts v. County of Robertson*, 48 S.W.2d 737, 738 (Tex. Civ. App. – Waco 1932, writ ref’d).

⁷⁴*Id.* at 333 (Tex. App. – Amarillo 1997, writ denied), citing *Wilson v. Fisher*, 188 S.W.2d 150, 152 (Tex. 1945).

⁷⁵*Id.* at 332.

⁷⁶TEX. PROP. CODE § 21.001 (also stating that “a county court has no jurisdiction in eminent domain cases.”).

⁷⁷*See* TEX. PROP. CODE §§ 21.013(b) & (c).

rules providing for the procedure to be used in filing and docketing eminent domain cases.⁷⁸ For example, Bexar County has granted the statutory probate courts jurisdiction over eminent domain cases.⁷⁹ Thus, in Bexar County, there is a *preference* for eminent domain cases to be filed in statutory probate courts rather than in a county court at law.⁸⁰

However, a county's preference for eminent domain cases to be filed in a court other than the district or county courts at law does not divest the district or county courts at law from the eminent domain jurisdiction granted to them by TEX. PROP. CODE § 21.001.⁸¹ TEX. PROP. CODE § 21.003 authorizes district courts to determine all issues, including the authority to condemn and the assessment of damages, in any suit: (1) in which this state, a political subdivision of this state, a person, an association of persons, or a corporation is a party; and (2) that involves a claim for property or for damages to property occupied by the party under the party's eminent domain authority or for an injunction to prevent the party from entering or using the property under the party's eminent domain authority.

Under TEX. PROP. CODE § 21.013(a), if the landowner resides in a county in which part of the property being condemned is located, the venue for the condemnation proceeding is the county in which the landowner resides. Otherwise, the venue for the condemnation proceeding is any county in which at least part of the condemned property is located.⁸²

⁷⁸TEX. GOV'T CODE § 74.093; *Schumann v. City of Schertz*, 100 S.W.3d 361, 366 n.1 (Tex. App. – San Antonio 2002, no pet.) (stating that district courts may adopt local rules providing for the assignment of cases subject to the jurisdictional limits of the courts).

⁷⁹*See* TEX. GOV'T CODE § 25.0173(a).

⁸⁰*See Schumann*, 100 S.W.3d at 364-366 n.1.

⁸¹*Cf. Schumann*, 100 S.W.3d at 364-366 n.1 (Tex. App. – San Antonio 2002, no pet.) (holding that failure of the TEXAS GOVERNMENT CODE to explicitly mention that county court at law has jurisdiction over eminent domain cases is irrelevant because the TEXAS PROPERTY CODE otherwise establishes jurisdiction).

⁸²TEX. PROP. CODE § 21.013(a).

C. Special Commissioners Hearing

Once a condemnation petition is filed, the court must appoint “three disinterested freeholders who reside in the county as special commissioners to assess the damages of the owner of the property being condemned.”⁸³ The special commissioners must promptly schedule a hearing,⁸⁴ where they determine the value of the property being condemned and any damage to the remainder of the property.⁸⁵

The special commissioners are required to issue written notice to each party, informing them of the time and place of the hearing.⁸⁶ Notice of the hearing must be served on a party not later than the 11th day before the date set for the hearing, and can be served by any person competent to testify by delivering a copy of the notice to:

- (1) the party or the party’s agent or attorney;
- (2) the legal representative of the landowner of the property being condemned if the landowner is a deceased’s estate, minor, or other legally disabled person; or
- (3) publication if: (a) the property being condemned belongs to a non-resident of Texas and there has been no personal service on the landowner; (b) the landowner’s identity or residence is unknown; or (c) the landowner avoids service of notice by hiding.⁸⁷

⁸³TEX. PROP. CODE § 21.014(a).

⁸⁴The hearing should be scheduled at the earliest practical time and at a location as near as practicable to the property at issue or at the county seat of the county in which the condemnation proceeding is being held. TEX. PROP. CODE § 21.015(a).

⁸⁵See TEX. PROP. CODE § 21.015; *Hubenak*, 141 S.W.3d at 179.

⁸⁶ TEX. PROP. CODE § 21.016(a).

⁸⁷ TEX. PROP. CODE § 21.016(b) & (d).

The person serving notice must return the original notice to the special commissioners on or before the day set for hearing.⁸⁸ Such person must write a return of service on the notice, stating how and when the notice was served.⁸⁹

It is important to comply with the notice requirements provided by TEX. PROP. CODE § 21.016. For one, “unless notice has been properly served in accordance with the statute, the special commissioners do not have jurisdiction to assess damages or do anything that would declare a condemnation of the property.”⁹⁰ Furthermore, if the return of service for the notice strictly complies with TEX. PROP. CODE § 21.016’s requirements, it constitutes *prima facie* evidence of the facts stated therein.⁹¹ If the condemning authority offers the return of service into evidence, then in order to raise a fact issue, the landowner must provide evidence that the notice was not served.⁹²

Once service has been perfected, the special commissioners are to proceed at the scheduled time and place or at any other time or place to which they may adjourn the hearing.⁹³ The special commissioners have the power to compel the attendance of witnesses and the production of testimony, administer oaths, and punish contempt in the same manner as a county judge.⁹⁴

⁸⁸ TEX. PROP. CODE § 21.016(c).

⁸⁹*See id.*

⁹⁰*State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 641 (Tex. 2001), citing *City of Houston v. Kunze*, 262 S.W.2d 947, 951 (Tex. 1953) and *Parker v. Fort Worth & Denver City Ry. Co.*, 19 S.W. 518, 519 (Tex. 1892).

⁹¹*Bristol Hotel Asset Co.*, 65 S.W.3d at 639.

⁹²*Id.* at 642.

⁹³TEX. PROP. CODE § 21.015(b).

⁹⁴TEX. PROP. CODE § 21.014.

At the hearing, the only issue for the special commissioners to determine is the amount of compensation for the taking.⁹⁵ The special commissioners are not to decide, for example, whether a necessity exists for the taking.⁹⁶ To assess the landowner's actual damages due to the condemnation, the special commissioners shall admit evidence on: (1) the value of the property being condemned; (2) the injury to the property owner; (3) the benefit to the property owner's remaining property; and (4) the use of the property for the purpose of the condemnation.⁹⁷ The special commissioners are to assess damages according to the evidence presented at the hearing.⁹⁸

After the special commissioners have assessed the damages, they must write a statement of their decision, stating the damages, date it, sign it, and file it and all other papers connected with the proceeding with the court on the day the decision is made or on the next working day.⁹⁹ The special commissioners are required to write and sign a statement of the accrued costs of the proceeding, naming the party against whom costs are adjudged, and file the statement with the court.¹⁰⁰ No later than the next working after the decision is filed, the clerk must send notice of the decision by certified or registered mail, return receipt requested, to the parties or their attorneys of record at their addresses of record.¹⁰¹

⁹⁵See *Lo-Vaca Gathering Co. v. Gardner*, 566 S.W.2d 366, 368 (Tex. Civ. App. – San Antonio 1978, no writ).

⁹⁶See *id.*

⁹⁷TEX. PROP. CODE § 21.041.

⁹⁸See TEX. PROP. CODE § 21.042(a).

⁹⁹TEX. PROP. CODE § 21.048(1).

¹⁰⁰TEX. PROP. CODE § 21.048(2).

¹⁰¹TEX. PROP. CODE § 21.049.

If a landowner appears before the special commissioners and resists the condemnation proceeding on the merits, he or she waives any complaint regarding the condemning authority's lack of efforts to reach a settlement as to the amount of damages.¹⁰² Furthermore, if the landowner accepts payment from the condemning authority or withdraws the money deposited in the court's registry, he or she is deemed to have consented to the taking.¹⁰³ Thus, he or she waives the right to contest both the legality of the condemnation proceedings and the lawfulness of the taking.¹⁰⁴

D. Appeal of the Special Commissioners' Findings

Any party dissatisfied with the special commissioners' findings or award of compensation may object by filing a written statement of objections and their grounds with the court on or before the first Monday following the twentieth day after the special commissioners filed their findings with the court.¹⁰⁵ If no party files an objection, the judge must adopt the special commissioners' findings as the judgment of the court, record the judgment in the court's minutes, and issue the process necessary to enforce the judgment.¹⁰⁶

¹⁰²See *Jones v. Mineola*, 203 S.W.2d 1020, 1023 (Tex. Civ. App. - Texarkana 1947, writ ref'd); *Austin Home Center Assocs. v. State*, 794 S.W.2d 593, 596 (Tex. App. - Austin 1990, no writ).

¹⁰³See *State v. Jackson*, 388 S.W.2d 924, 925-926 (Tex. 1965); *Southwestern Bell Tel. Co. v. Bassell*, 427 S.W.2d 709, 711 (Tex. Civ. App. - Tyler 1968, writ ref'd n.r.e.); *Perry v. Tex. Mun. Power Agency*, 667 S.W.2d 259, 262 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.).

¹⁰⁴See *Jackson*, 388 S.W.2d at 925-926; *Southwestern Bell Tel. Co.*, 427 S.W.2d at 711; *Perry v. Tex. Mun. Power Agency*, 667 S.W.2d at 262.

¹⁰⁵TEX. PROP. CODE § 21.018; see also *Denton County v. Brammer*, 361 S.W.2d 198, 200 (Tex. 1962) and *Hilburn v. Brazos Elec. Power Coop.*, 683 S.W.2d 58, 60 (Tex. App. - Eastland 1984, writ ref'd n.r.e.) (stating that regardless of which party files objections, the condemning authority becomes the plaintiff at trial, and the property owner becomes the defendant).

¹⁰⁶See TEX. PROP. CODE §§ 21.061 & 21.018(a).

Pursuant to TEX. PROP. CODE § 21.018(b), when one party files objections, the court is required to cite the adverse party and try the case the same as other civil cases.¹⁰⁷ The trial will be held *de novo*.¹⁰⁸ Thus, the special commissioners' award will not even be admissible on the issue of damages at trial.¹⁰⁹

E. Possession Pending Trial

Generally, after the special commissioners have rendered an award in a condemnation proceeding, the condemning authority may take possession of the condemned property pending the results of further litigation by doing the following:

- (1) paying the landowner the amount of damages and costs awarded by the special commissioners or depositing that amount with the court subject to the order of the landowner;
- (2) depositing with the court either: (a) the amount of money awarded by the special commissioners as damages; or (b) a surety bond in the same amount issued by a surety company qualified to do business in Texas, conditioned to secure the payment of an award of damages by the court in excess of the special commissioners' award; and
- (3) executing a bond that has at least two good, solvent sureties approved by the judge and conditioned to secure the payment of additional costs that may be awarded to the landowner by the trial court or on appeal.¹¹⁰

Unless the parties agree otherwise, the deposit of the money awarded by the special commissioners with the court fixes the date of the taking of the property.¹¹¹ Fixing this date

¹⁰⁷TEX. PROP. CODE § 21.018(b) states that “the court” is to cite the adverse party. However, the objecting party has the burden of obtaining service of citation. *See City of Tyler v. Beck*, 196 S.W.3d 784, 786 (Tex. 2006). But, when both parties file objections, each invokes the court's jurisdiction and service of citation is not necessary on either party. *See id.* at 786-787 (Tex. 2006).

¹⁰⁸*See City of Houston v. Huber*, 311 S.W.2d 488, 493 (Tex. Civ. App. – Houston 1958, no writ).

¹⁰⁹*See id.*

¹¹⁰TEX. PROP. CODE § 21.021(a).

¹¹¹*See City of Fort Worth v. Corbin*, 504 S.W.2d 828, 830 (Tex. 1974).

becomes particularly important if either party anticipates that the property will increase or decrease in value before the start of the actual trial.

V. Valuation and Damages Issues

A. Valuation Issues

While the burden of proof regarding the right to condemn and certain other matters is generally on the condemning authority, the burden of proof as to the value of the land is on the landowner.¹¹² The general rule is that compensation for land taken by condemnation is measured by the market value of the land at the time of the taking.¹¹³ “‘Market value’ is ordinarily defined in terms of what the property would bring in a transaction between a willing seller and a willing buyer.”¹¹⁴ Generally, determining market value requires measuring the difference in the value of the land immediately before and immediately after the land was condemned.¹¹⁵

Under the project enhancement rule, when measuring market value, the fact finder may not consider any enhancement to the value of the landowner’s property that results from the taking.¹¹⁶ This is because the objective of a condemnation proceeding is to make the landowner whole.¹¹⁷ If the landowner was compensated for value attributable to the condemnation project itself, the

¹¹²*Religious of the Sacred Heart of Texas v. City of Houston*, 836 S.W.2d 606, 613 (Tex. 1992).

¹¹³*Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 627 (Tex. 2002); *Harris v. City of Rockwall*, 2007 Tex. App. LEXIS 5963, *1-2 (Tex. App. – Dallas 2007, pet. denied), *citing Corbin*, 504 S.W.2d at 830.

¹¹⁴*All American Pipeline Co. v. Ammerman*, 814 S.W.2d 249, 252 (Tex. App. – Austin 1991, no writ), *citing City of Austin v. Cannizzo*, 267 S.W.2d 808, 812 (Tex. 1954); *State v. Carpenter*, 89 S.W.2d 194, 201-202 (Tex. 1936).

¹¹⁵*See Exxon Pipeline Co.*, 88 S.W.3d at 62.

¹¹⁶*See id.*, *citing Corbin*, 504 S.W.2d at 830.

¹¹⁷*Exxon Pipeline Co.*, 88 S.W.3d at 628, *citing* TEX. CONST. art. I, § 17; *Corbin*, 504 S.W.2d at 831.

landowner would be in a better position than he would have been had the condemnation not taken place.¹¹⁸

On the other hand, the fact finder may consider the highest and best use to which the condemned land can be adapted.¹¹⁹ Consideration of uses other than those for which the property is being utilized at the time it is condemned may be permitted when determining the highest and best use for the property.¹²⁰ For example, evidence may be allowed that the highest and best use of land would be for commercial purposes.¹²¹ At least one Texas court has held that “[i]f it appears reasonably probable to the trial judge that the needs of the particular community may result, within a reasonable time, in the lifting of [zoning] restrictions, he should admit testimony of present value based on prospective use of the property for purposes not then available.”¹²²

B. Damages Issues

If the landowner’s entire tract or parcel of real property is taken, the landowner should be compensated for the local market value of the property at the time of the taking.¹²³ When only a portion of a tract of property is condemned, damages are assessed by estimating: (1) the injuries sustained and the benefits received by the landowner; and (2) whether and to what extent the remainder of the property is increased or diminished in value by reason of the condemnation.¹²⁴

¹¹⁸*Exxon Pipeline Co.*, 88 S.W.3d at 628, citing *Corbin*, 504 S.W.2d at 831.

¹¹⁹*Id.*, citing *Bauer v. Lavaca-Navidad River Auth.*, 704 S.W.2d 107, 109 (Tex. App. – Corpus Christi 1985, writ ref’d n.r.e.).

¹²⁰*State v. Tigner*, 827 S.W.2d 611 (Tex. App. – Houston [14th Dist.] 1992, writ denied); *Southwestern Elec. Power Co. v. Presswood*, 420 S.W.2d 182, 185 (Tex. Civ. App. – Tyler 1967, no writ).

¹²¹*See State v. Tigner*, 827 S.W.2d at 611.

¹²²*City of Austin v. Cannizzo*, 267 S.W.2d 808, 815 (Tex. 1954) (emphasis added).

¹²³TEX. PROP. CODE § 21.042(b).

¹²⁴*See* TEX. PROP. CODE § 21.042(c).

Texas is only one of 26 states that provides by its Constitution, as well as by statute, that the landowner is entitled to recover both the value of the portion of the land that is actually taken and any damage or destruction that is done to the remaining property as a result of the condemnation project.¹²⁵ “In partial taking cases, damages are measured by the ‘difference between (a) the value of the landowner’s entire tract before the taking, and (b) the market value of the remainder after the taking, giving consideration to the uses to which the condemned part is to be subjected.’”¹²⁶

In partial taking cases, injuries and benefits that the landowner experiences in common with the general community and that are not peculiar to the landowner should not be considered in assessing damages.¹²⁷ However, the mere fact that all landowners along a public street suffer the same type of damage does not mean that the injury is community in nature.¹²⁸ “Whether an injury is community cannot be decided simply by setting the size of the relevant area. ‘Community’ in this context means not only where, but, more importantly, what kind. It is the nature of the injury rather than its location that is critical in determining whether it is community.”¹²⁹

Likewise, where an easement is permanently taken, the landowner is entitled to compensation for the reduction in the market value of the area taken and for the reduction, if any, in the value of the remainder of the landowner’s property caused by the taking of the easement.¹³⁰

¹²⁵*State v. Munday Enter.*, 824 S.W.2d 643, 646 (Tex. App. – Austin 1992), *rev’d on other grounds*, 868 S.W.2d 319 (Tex. 1993).

¹²⁶*City of Austin v. Travis County Landfill Co.*, 25 S.W.3d 191, 201 (Tex. App. – Austin 199, no pet.), quoting *Westgate, Ltd. v. State*, 843 S.W.2d 448, 457 (Tex. 1992).

¹²⁷See TEX. PROP. CODE § 21.042(d).

¹²⁸See *Powell v. Houston & T.C.R. Co.*, 135 S.W. 1153, 1155-1156 (1911); *City of Abilene v. Bailey*, 345 S.W.2d 540, 543-544 (Tex. Civ. App. – Eastland 1961, writ ref’d n.r.e.).

¹²⁹*State v. Schmidt*, 867 S.W.2d 769, 781 (Tex. 1993).

¹³⁰See *Callejo v. Brazos Electric Power Co-op*, 755 S.W.2d 73 (Tex. 1988).

The measure of damages for a condemned easement is usually the difference in the market value of the land free of easement and its market value burdened with the easement.¹³¹ “If the easement leaves the landowner with some beneficial use of the land, as it does, for instance, in the case of easements for pipelines, power lines, or other similar purposes, then the damages for the condemnation thereof, as a matter of law, will be less than the value of the fee.”¹³² However, if the condemnation of an easement leaves the landowner with no beneficial use of the land, the landowner is entitled to recover the entire market value of the land.¹³³

The unity of use rule applies where there is a partial taking. It provides that where separate, but contiguous tracts are integral parts of an entity under common ownership, such that their physical and functional relationship are as one unified tract of land, they will be treated as one whole tract in assessing damages to the remainder.¹³⁴ In other words, although only a portion of a landowner’s property is condemned, if the property as a whole is devoted to a unity of use, then such land will be considered an entity for purposes of estimating damages to the remainder.¹³⁵

C. Assessment of Costs

¹³¹*Thompson v. Janes*, 252 S.W.2d 933, 934 (Tex. 1952), citing *Gulf Coast Irrigation Co. v. Gary*, 14 S.W.2d 266 (Tex. 1929).

¹³²*Id.*, citing *Texas Pipe Line Co. v. Hunt*, 288 S.W.2d 151 (Tex. 1950).

¹³³*Id.*

¹³⁴*McLennan County v. Stanford*, 350 S.W.2d 208, 209 (Tex. Civ. App. – Waco 1961, no writ).

¹³⁵*City of San Antonio v. Congregation of Sisters of Charity of Incarnate Word, Inc.*, 404 S.W.2d 333, 336 (Tex. Civ. App. – Eastland 1966, no writ).

TEX. PROP. CODE § 21.047(a) states that the “[s]pecial commissioners may adjudge the costs of an eminent domain proceeding against any party.”¹³⁶ However, this section goes on to state that:

If the commissioners award greater damages than the condemnor offered to pay before the proceedings began or if the decision of the commissioners is appealed and a court awards greater damages than the commissioners awarded, the condemnor shall pay all costs. If the commissioners’ award or the court’s determination of the damages is less than or equal to the amount the condemnor offered before proceedings began, the property owner shall pay the costs.¹³⁷

VI. Inverse Condemnation and Trespass

An action for inverse condemnation is available where a landowner’s property has been taken for public use without due process or a proper condemnation proceeding.¹³⁸ A landowner may sue a governmental entity in inverse condemnation if the governmental entity: (1) appropriates, invades, occupies, destroys, or damages the landowner’s property for public use; or (2) imposes regulations: (i) denying the landowner all economically viable use of his or her property; or (ii) unreasonably interfering with the landowner’s rights to use and enjoy his or her property.¹³⁹

¹³⁶TEX. PROP. CODE § 21.047(a) (emphasis added).

¹³⁷*Id.* (emphasis added); *see also Hopkins v. State of Texas*, 2006 Tex. App. LEXIS 3530, *18 (Tex. App. – Austin 2006, pet. denied) (“If the property owner ultimately recovers more than the condemnor’s offer, whether by administrative award of the special commissioners or the judgment of the trial court, then ‘the condemnor shall pay all costs.’ However, if the award of the commissioners or the trial court, whichever is final, is equal to or less than the amount of the condemnor’s offer, ‘the property owner shall pay the costs.’”) (internal citations omitted).

¹³⁸*Hudson v. Arkansas Louisiana Gas Co.*, 626 S.W.2d 561, 563 (Tex. App. – Texarkana 1981, writ ref’d n.r.e.).

¹³⁹*See Westgate, Ltd.*, 843 S.W.2d at 448; *Grunwald v. City of Castle Hills*, 100 S.W.3d 350, 353 (Tex. App. – San Antonio 2002, no pet.); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998).

There is a 10 year statute of limitations to bring an inverse condemnation action where property has been taken.¹⁴⁰ However, there is a 2 year statute of limitations to bring an inverse condemnation based on mere damages to property.¹⁴¹

A landowner can seek various remedies in connection with an inverse condemnation claim, including: (1) damages; (2) lost business profits;¹⁴² (3) an injunction to prevent trespass on his or her property when the property was taken without adequate compensation;¹⁴³ and (4) exemplary damages.¹⁴⁴

A. Investigation

1. Texas One Call

Texas One Call is a useful tool for landowners to use when investigating whether their land has been appropriated, invaded, occupied, destroyed, or damaged for public use. In 1999, Texas enacted the Underground Facility Damage Prevention and Safety Act, creating the Texas One Call system.¹⁴⁵ Pursuant to TEX. UTIL. CODE § 251.151, excavators using mechanical tools must call Texas One Call between 14 days and 48 hours prior to excavating.

Texas One Call is a computerized notification center that establishes a communication link between those who dig underground (excavate) and those who operate under facilities (operators). According to its website (www.texasonecall.com), Texas One Call system is funded by members who are operators engaged in: (1) communications; (2) gas distribution; (3) gas transmission and

¹⁴⁰*Hues v. Warren Petroleum Co.*, 814 S.W.2d 526, 530 (Tex. App. – Houston [14th Dist.] 1991, writ denied).

¹⁴¹*Id.*

¹⁴²*State v. Sungrowth VI, Cal. Ltd.*, 713 S.W.2d 175, 177 (Tex. App. – Austin 1986, writ ref'd n.r.e.).

¹⁴³*Matador Pipelines, Inc. v. Watson*, 626 S.W.2d 139 (Tex. App. – Waco 1981, writ ref'd n.r.e.).

¹⁴⁴*Id.*

¹⁴⁵TEX. UTIL. CODE Chapter 251.

gathering; (4) electric power; (5) products/pipelines; and (6) water and wastewater.¹⁴⁶ Texas One Call will determine the location of the work from the excavator and notify all members with underground facilities in the area where the excavation will occur. Thus, landowners may call to determine whether an excavator is working on their land. The number is 1-800-245-4545.

B. Other Claims and Defenses

The availability of creative claims and defenses depends on the identity of the condemnor. If the condemnor is the State of Texas or one of its political subdivisions, the doctrines of sovereign and governmental immunity protect the condemnor from liability for its agents' or officers' negligent acts unless it waives its immunity by consenting to being sued and to being liable.¹⁴⁷ Nonetheless, a landowner may sue a governmental unit for inverse condemnation if the governmental unit *intentionally* performed or failed to perform certain acts necessary acts in the exercise of its lawful authority.¹⁴⁸ Thus, a governmental unit may defend itself by claiming that the taking, invasion, occupation, destroying, or damaging of a landowner's property was the result of the governmental unit's mere *negligence*.¹⁴⁹

¹⁴⁶TEX. UTIL. CODE § 251.002(2) provides that water and wastewater are "Class B underground facilities," and thus not required to register with a one call notification center.

¹⁴⁷"Sovereign immunity" refers to the State of Texas's immunity from suit and liability, and "governmental immunity" refers to the immunity from suit and liability of the State of Texas's political subdivisions. See *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).

¹⁴⁸See *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007); see e.g., *City of San Antonio v. Pollock*, 155 S.W.3d 322, 328 (Tex. App. – San Antonio 2004, pet. granted) (finding that landowners' inverse condemnation claim was supported by the City's decision not to install a probes to monitor the spread of methane from a landfill).

¹⁴⁹The courts of appeals are divided as to whether a governmental unit's *gross negligence* will support an inverse condemnation claim. Compare *Pollock*, 155 S.W.3d at 328 (finding that gross negligence supports the requirement that the governmental unit's act be intentional); *Cozby v. City of Waco*, 110 S.W.3d 32, 39 (Tex. App. – Waco 2002, no pet.) (same); *City of Houston v. Boyle*, 148 S.W.3d 171, 178 n.10 (Tex. App. – Houston [1st Dist.] 2004, no pet.) (same), with *Karnes City v. Kendall*, 172 S.W.3d 624, 628 (Tex. App. – San Antonio 2005, pet. denied) (finding that gross negligence does not support the requirement that the governmental unit's act be intentional).

If the condemnor is a private actor vested with condemnation power, a landowner may try to bring a claim for trespass against the condemnor. In some circumstances, a landowner could arguably recover exemplary damages if the condemnor acted wilfully and wantonly in trespassing onto the property and a permanent injunction.¹⁵⁰ However, in Texas, a trespass that occurs prior to the condemnation generally prohibits the landowner from recovering separate damages for the pre-condemnation trespass.¹⁵¹ This is because “the difference between the before- and the after-taking values provides full compensation to the landowner both for any diminution in value caused by the trespass and for the taking itself, thereby eliminating the need for a separate issue to determine trespass damages.”¹⁵²

VII. Final Judgment and Conveyance

A judgment of a court under Chapter 21 of the TEXAS PROPERTY CODE vests a right granted to a condemning authority.¹⁵³ Pursuant to TEX. PROP. CODE § 21.045, the interest acquired by a condemning authority does not include the fee simple title to real property, either public or private, except where otherwise expressly provided by law. In other words, “the condemnation of property

¹⁵⁰See e.g., *Matador Pipelines, Inc. v. Watson*, 626 S.W.2d 139 (Tex. App. – Waco 1981, writ ref’d n.r.e.) (holding that an injunction was appropriate because trespass had occurred, and exemplary damages were proper where the condemnor wilfully and wantonly built a pipeline across landowners’ land without authority and prior to lawfully acquiring the property).

¹⁵¹See *Taub v. Aquila Southwest Pipeline Corp.*, 93 S.W.3d 451, 463 (Tex. App. – Houston [14th Dist.] 2002, no pet.), citing *O’Neil Corp. v. Perry Gas Transmission, Inc.*, 648 S.W.2d 335 (Tex. App. – Amarillo 1983, writ ref’d n.r.e.); see also *Gully v. Southwestern Bell Tel. Co.*, 774 F.2d 1287, 1293 (5th Cir. 1983).

¹⁵²*O’Neil Corp.*, 648 S.W.2d at 341.

¹⁵³TEX. PROP. CODE § 21.065.

for a public use divests its owner of no right further than is necessary for the purpose for which the condemnation was authorized.”¹⁵⁴

If the condemner prevails in the condemnation proceeding, at the time of acquisition of property through eminent domain, the condemning authority must disclose in writing that: (1) the owner is entitled to repurchase the property if the public use for which the property was acquired is canceled within 10 years of acquisition; and (2) the repurchase price will be the fair market value of the property at the time the public use was cancelled.¹⁵⁵ The condemning authority should obtain an abstract of judgment and have it recorded in the deed records of the county where the property is located. By doing so, the condemning authority validates its security interest in the condemned property.¹⁵⁶

If the landowner prevails, the condemner must return possession of the property to the landowner.¹⁵⁷ The court may award damages to the landowner for the condemner’s temporary possession if it finally determines that the condemner, who took possession of land pending litigation, did not have the right to condemn the property.¹⁵⁸

¹⁵⁴*City of Seabrook v. Port of Houston Authority*, 199 S.W.3d 403, 435 (Tex. App. – Houston [1st Dist.] 2006, pet. granted) (Keyes, J. dissenting), quoting *Meaney v. Nueces County Nav. Dist.*, 222 S.W.2d 402, 407 (Tex. Civ. App. – San Antonio 1949, writ ref’d), quoting 16 TEX.JUR. 679; see e.g., *Stirman v. Tyler*, 443 S.W.2d 354 (Tex. Civ. App. – Tyler 1969, writ ref’d n.r.e.) (holding that the trial court should have awarded the condemning authority an easement and not full title to the land because the condemning authority did not expressly state that it wanted to take fee simple from the landowner through eminent domain); cf. *Texas Elec. Railway Co. v. Neale*, 252 S.W.2d 451 (Tex 1952) (holding that even though the deed referred to the land conveyed as a right of way, condemning authority possessed fee simple title to condemned land because the granting clause in the deed granted, sold, and conveyed the tract of land).

¹⁵⁵TEX. PROP. CODE § 21.023.

¹⁵⁶See *Hoffman, McBryde & Co., P.C. v. Heyland*, 74 S.W.3d 906, 909 (Tex. App.–Dallas 2002, no pet.), citing *John F. Grant Lumber Co. v. Hunnicutt*, 143 S.W.2d 976 (Tex. Civ. App.–Waco 1940, no writ); see e.g., *Citizens Bank v. Del-Tex Inv. Co.*, 123 S.W.2d 450 (Civ. App.–San Antonio 1939, writ dismissed judgment corrected).

¹⁵⁷TEX. PROP. CODE § 21.062.

¹⁵⁸TEX. PROP. CODE § 21.044(a).