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THIS

PROPERTY

CONDEMNED

## WHAT LANDOWNERS SHOULD KNOW ABOUT CHANGING PROPERTY RIGHTS

By Judon Fambrough

**T**o most landowners, condemnation is an unwanted and unjust process for taking land. But what seemed unfair in the past pales when compared with what may occur in the future.

On July 2, 2004, the Texas Supreme Court decided *Hubenak v. San Jacinto Gas Transmission Co.* and removed several key restraints in the condemnation process that were favorable to landowners. Landowners need to be aware of this decision and know what to expect when confronted with condemnation.

## Four Texas Restraints

Condemnation is not an unbridled process. Texas law imposes four restraints or limitations.

First, only land that serves a public purpose or provides a public benefit may be taken. No property may be condemned for private purposes. Currently, the U.S. Supreme Court is hearing a case to determine whether the public benefit is served by condemning homes to make way for public developments.

The Texas appellate courts have held that homes may be condemned to enlarge parking lots for shopping malls because the public derives a benefit from the increased sales tax. This may change depending on the Supreme Court's decision.

Second, no more property can be taken than is reasonably needed to serve the public use or provide the public benefit.

Third, the landowner must be compensated fair market value for the land taken. The valuation process, outlined in the statutes, varies depending on whether all or a part of the property is condemned.

Fourth, the landowner must be afforded due process. Chapter 21 of the Texas Property Code outlines the statutory procedure. The process may be

divided into three phases beginning with the condemning authority (condemnor) making a bona fide attempt to purchase the property.

The second phase begins if the condemnor and landowner are unable to agree on the amount of damages (fair market value). The condemnor petitions in the proper court. The petition:

- describes the property and the property rights to be condemned,
- states the public purpose for which the entity intends to use the property,
- specifies the name of the owner of the property, if the owner is known and
- declares that the entity condemning the land and the property owner were unable to agree on the damages.

Thereafter, the court appoints three disinterested county landowners (known as freeholders) to serve as special commissioners to hear evidence from both parties concerning the fair market value of the land and to make an award. This ends phase two.

If either the condemnor or the landowner is dissatisfied, he or she may start phase three by appealing to the court for a full-blown trial on all issues. The appellate process ultimately may reach the Texas Supreme Court as the *Hubenak* case did. In the meantime, condemnors may take possession of the land and begin the project by posting the proper amounts as security during the appeal.

## Due Process Rules Changed

Before *Hubenak*, condemnors had to plead and prove that they were unable to agree with the landowner on the amount of damages that would result from the taking of the property. Basically, they had to make a bona fide attempt to purchase by offering the estimated fair market value of the land through good faith negotiations. The offer could not be arbitrary, capricious or in bad faith.

The requirement attempted to save the time and expense of litigation, yet ensure the owners received just compensation. However, the definitions of "bona fide attempt to purchase" and "good faith negotiations" changed with the *Hubenak* ruling.

The first issue addressed in *Hubenak* was whether the offer to purchase had to be based on fair market value to satisfy the bona-fide-attempt-to-purchase rule.

The Texas Supreme Court ruled it did not, saying the dollar amount of the condemnor's offer generally should not be scrutinized or compared with other indications of value. The statutory scheme dictated by Chapter 21 does not contemplate such an examination. A single offer by the condemnor, wrote the court, satisfies the requirement regardless of the amount.

The court premised its decision on judicial economy. "It is not necessary to have two trials to reach the ultimate and only determination contemplated by the statute," it ruled, "which is a determination of the value of the property condemned."

The question is no longer whether the condemnor negotiated in good faith based on fair market value but rather whether the condemnor made a monetary offer to purchase. In essence, this decision eliminated phase one of due process. Negotiations are no longer required; tendering an offer is sufficient.

## Offering to Purchase More Than it May Condemn

In *Hubenak*, the condemnor attempted to purchase additional property rights beyond what it could legally condemn. These included the right to transport oil as well as gas through the pipeline, the right to subsequently assign all or a part of the easement to another company and the landowners' obligation to warrant and defend title to the land. The

landowners contended this violated the negotiating-in-good-faith requirement.

The Texas Supreme Court disagreed. "Generally, it is sufficient that the parties negotiate for the same physical property and the same general use that becomes the subject of the later eminent domain proceeding," the court ruled, "even if intangible rights sought in the purchase negotiations do not mirror those sought or obtainable by condemnation."

The court noted that the pipeline company never sought to condemn the additional property rights but merely sought to purchase them along with the easements; therefore, the issue of whether the condemnor could actually condemn the three additional property rights was "simply irrelevant."

### Jurisdictional Issue Changed

In the past, the failure to make a bona fide attempt to purchase and to negotiate in good faith was jurisdictional. This meant the court had no authority to hear and decide a case until these occurred. The court could dismiss a case for violating the rule. It ensured the landowners were offered fair market value. The rule was questioned in *Hubanak*.

The high court ruled making a bona fide attempt to purchase and negotiating in good faith are not required to confer jurisdiction on the court. The trial court, it said, had jurisdiction regardless of whether the condemnor satisfies the "unable to agree" provision.

"The modern direction of policy," ruled the court, "is to reduce the vulnerability of final judgments to attack on the grounds that the tribunal lacked subject matter jurisdiction. When, as here, it is difficult to tell whether or not the parties have satisfied the requisites of a particular statute, it seems perverse to treat a judgment as perpetually void merely because the court or the parties made a good-faith mistake in interpreting the law."

Apparently, protecting property rights is less important than judicial efficiency.

### The New Remedy

In the past, the court dismissed a case for lack of jurisdiction when the parties were unable to agree. With the jurisdictional requirement removed, the court had to decide the proper remedy when the landowner objects to receiving no offer.

According to the court, the purpose of the unable-to-agree provision is to

"forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties." Dismissal of the lawsuit, as the courts have done in the past, does not achieve this purpose. Rather, the statute's goal can be accomplished by abating the lawsuit (temporarily suspending the proceedings) until the requirement has been satisfied. If at the end of a reasonable period the condemnor has not made an offer, the lawsuit is then dismissed.

### Proper Response, If Any

Before *Hubanak*, landowners attempted to extend the good faith negotiations in phase one as long as possible. As long as negotiations continued, the condemnor could not initiate phase two, which allowed the condemnor to begin the project. The longer the negotiations continued, the more willing the condemnors were to offer a better price for the land.

To avoid triggering phase two, a landowner's initial response to the offer had to be correct. The court points out several incorrect responses made by the landowners in this case. For example, they:

- stated or implied that they would reject the pipeline easement on their property under all circumstances at any price,
- ignored or did not respond in a timely manner to the condemnors' offer and
- indicated that further negotiations would be futile.

It is unclear, though, what difference it would have made had the landowners done otherwise, because negotiations are no longer required.

However, the high court appeared to deviate from this position when addressing the condemnor's attempt to purchase rights it could not condemn. Condemnors may be required to negotiate for these rights. For this reason, landowners may wish to:

- ask the condemnor to separate the rights that can be condemned from those that cannot be condemned and require the condemnor make separate offers for each.
- stress that the rights the condemnor seeks to purchase cannot be condemned. Show how important they are and how much they are worth. In the *Hubanak* Case, the landowners presented no evidence that the

three additional property rights were material to the value of the land.

They also did not present evidence that the three rights would have made a difference in the amounts that should have been offered.

Landowners have no assurance that a "proper response" exists. Their only choices may be to accept the offer and end the process or prepare to spend time and nonrecoupable funds in preparation for the special commissioners court and possibly litigation.

### Bottom Line: Protecting Property Rights Expensive

The Texas Supreme Court greatly diminished the protection afforded landowners in condemnation cases by eliminating the condemnors' duty to make a bona fide attempt to purchase the property and to negotiate in good faith. Likewise, conferring jurisdiction on the courts when these two requirements are not satisfied leaves landowners with no option but to appear before the special commissioners to protest an inadequate offer.

Appearing before the special commissioners necessitates hiring an appraiser and possibly an attorney. Appealing the matter beyond the special commissioners requires both an appraiser and an attorney because Texas rules of civil procedure apply. None of these costs can be recovered, even if the landowner ultimately prevails. Thus, the *Hubanak* decision diminishes the landowners' property and property rights by the costs needed to protest an inadequate offer and prove what represents just compensation for the land.

The decision removes all incentives for the condemnor to make a bona fide attempt to purchase and to negotiate in good faith. Before, the court dismissed the lawsuit for lack of jurisdiction for failing to comply. The dismissal caused a project delay and required the condemnor to tender more money to the landowner.

Now, the court temporarily abates or suspends the legal proceedings when the condemnor fails to make an offer. The lawsuit is not dismissed and the condemnors' project continues even though the proceedings are abated temporarily.

The question remains whether the Texas Supreme Court's decision advances

or frustrates the purposes behind the condemnation statute. Will it avoid protracted litigation or will it encourage it? Does the decision ensure that landowners receive just compensation for their

property or reduce the chances? Time will tell.

For more information on condemnation, see "Understanding the Condemnation Process in Texas," at <http://recenter.tamu.edu/pdf/394.pdf>.

[tam.u.edu/pdf/394.pdf](http://recenter.tamu.edu/pdf/394.pdf). ↕

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*Fambrough (judon@recenter.tamu.edu) is a member of the State Bar of Texas and a lawyer with the Real Estate Center at Texas A&M University.*

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