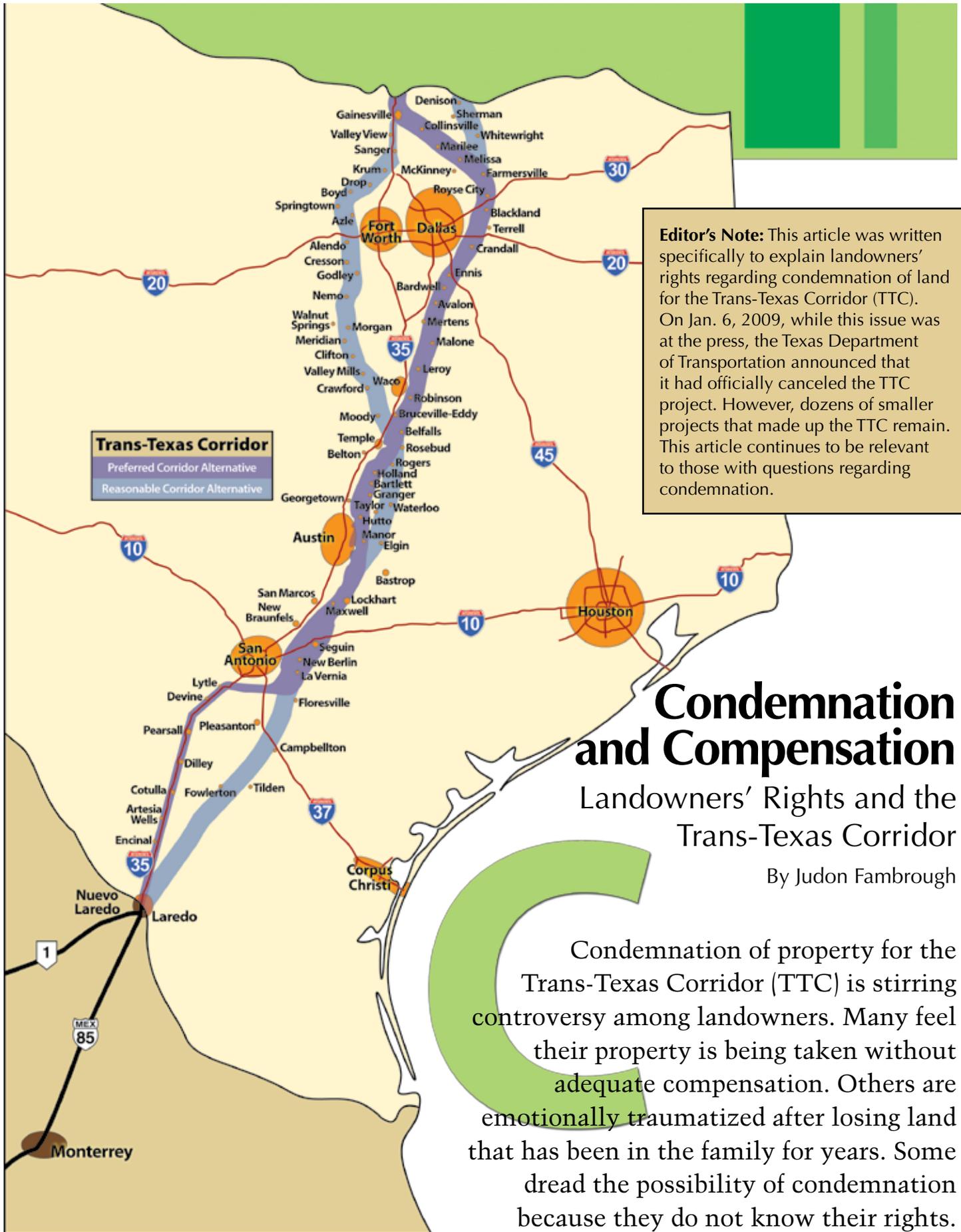


A Reprint from *Tierra Grande*



Editor's Note: This article was written specifically to explain landowners' rights regarding condemnation of land for the Trans-Texas Corridor (TTC). On Jan. 6, 2009, while this issue was at the press, the Texas Department of Transportation announced that it had officially canceled the TTC project. However, dozens of smaller projects that made up the TTC remain. This article continues to be relevant to those with questions regarding condemnation.

Condemnation and Compensation

Landowners' Rights and the Trans-Texas Corridor

By Judon Fambrough

Condemnation of property for the Trans-Texas Corridor (TTC) is stirring controversy among landowners. Many feel their property is being taken without adequate compensation. Others are emotionally traumatized after losing land that has been in the family for years. Some dread the possibility of condemnation because they do not know their rights.

Landowners are afforded some rights under the TTC. However, these rights need to be asserted during negotiations and before drafting any deed in lieu of condemnation.

Three statutes govern the taking of land for the TTC. Landowners need to understand Chapter 21 of the Property Code, Chapter 227 of the Transportation Code and Section 203 Subchapter D of the Transportation Code to preserve and protect their property rights when confronted with condemnation.

Condemnation Process

Chapter 21 of the Property Code outlines the overall condemnation process by dividing the procedure into three stages. The first stage contains no judicial involvement. Basically, the condemnor attempts to purchase the property without condemning it. If the parties cannot agree on “damages” (price), the process proceeds to the next stage.

Recent case law and legislation addressed the question of whether the purchase attempt requires an offer based on fair market value. The Texas Supreme Court said “no” in 2004 (*Hubenak v. San Jacinto Gas Transmission Co.*).

“The dollar amount of the condemnor’s offer,” said the court, “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 satisfies the requirement *regardless of the amount*” (emphasis added). For more details, see “This Property Condemned” at <http://recenter.tamu.edu/pdf/1710.pdf>.

In 2007, the 80th Texas Legislature attempted to rectify this problem by passing House Bill 2006. The statute required the offer to be based on a reasonably thorough investigation and honest assessment of the compensation due to the landowner as a result of the taking. The governor vetoed the bill.

The second stage begins when the condemnor petitions the court to appoint three landowners (freeholders) in the county to serve as special commissioners. These individuals conduct a hearing to determine the damages resulting from the taking. The Texas rules of civil procedure do not apply. Consequently, landowners do not need an attorney, but they should hire a competent appraiser.

After the special commissioners post their determination of damages, the condemnor may take possession of the property and begin the project by posting the required security.

The third and final stage begins after the special commissioners post their award. Either party may appeal the commissioners’ award to the court for a full-blown trial in which the rules of civil procedure apply. Landowners should hire both an attorney and appraiser for representation.

Before appealing the award, landowners should consider the costs. Landowners cannot recover attorney fees or expert witness

fees (appraiser fees) even if they prove the land is worth more than the condemnor’s final offer (*City of Houston v. Biggers*).

TTC’s Rights, Duties

Chapter 227 of the Transportation Code focuses on the rights and duties of the TTC when condemning property for the construction and maintenance of the Trans-Texas Corridor. Only two provisions address landowners’ rights.

Section 227.041(a) gives the TTC the same powers and *duties* (emphasis added) for the condemnation and acquisition of property for a *facility* as those held by the commission and department when condemning and purchasing real property under Chapter 203, Subchapter D, for a toll project. Among other things, a facility is defined as a state highway or turnpike (Section 227.001).

The TTC may acquire property for an *ancillary facility* located between the main lines of the highway or between the highway and a rail line (Section 227.041[b-1]). *Ancillary facilities* include gas stations, convenience stores and similar facilities that provide services directly benefitting the users of the TTC. The facility must be located more than ten miles from an intersection with a state or interstate highway.

The statute gives property owners the right to retain and develop these ancillary facilities (Section 227.0415). However, if the owner does not develop the property within the time set by the TTC, the development rights may be taken from the owner by purchase or condemnation. The retained development rights are not exempt from property taxes and are subject to local zoning ordinances and building standards. The retention of these development rights is the only benefit given landowners by Chapter 227.

When entering any deed in lieu of condemnation, property owners must remember that any property rights owned and not reserved are automatically conveyed to the TTC.

Landowner Rights

The Transportation Code restricts the TTC from mandatorily condemning fee title (Chapter 203, Subchapter D, Section 203.051[c]). It states “The department *may* condemn the fee or a lesser interest in property.” Landowners should ask the TTC to justify the condemnation of fee title versus the condemnation of an easement.

When entering any deed in lieu of condemnation, property owners must remember that any property rights owned and not reserved are automatically conveyed to TTC. Consequently, they should always reserve property rights that cannot be condemned. For example, Chapter 203 prohibits “. . . condemnation of oil, gas and sulphur that can be removed from beneath the real property” (Section 203.051[d]).

However, even though these substances cannot be condemned, the TTC does not have to provide any surface right for ingress or egress to explore, develop, drill or mine these substances. Landowners should reserve these rights and attempt to

reserve the groundwater, wind rights, uranium, coal and lignite as well.

Likewise, property used and dedicated for cemetery purposes under the Texas Health and Safety Code cannot be condemned (Section 203.051[e]).

Landowners are granted certain rights when part, but not all, of a tract is condemned (Sections 203.0521[a],[b]). This is sometimes referred to as a partial taking.

In the event the partial taking occurs along the boundary of the property and does not sever the tract, the code requires the department to offer to purchase the remaining uncondemned property (the remainder) if (1) it has little or no value or utility to the owner or (2) if the entire tract could be acquired at substantially the same price as the part taken. This does not apply when the remainder contains hazardous materials or substances.

In the event the partial taking severs (divides) the tract, the code mandates that the department pay damages to the owners of the remainder for inaccessibility of one side to the other.

This is important because tract severance is not compensable under Chapter 227, discussed earlier. Landowners must point this out to the condemnor. Otherwise, to reach the other side, owners may have to tunnel under the corridor in compliance with federal law and with



LIKE MANY OPPONENTS of the Trans-Texas Corridor, this landowner is not shy about expressing his views.

prior approval of the design from the TTC (Section 227.047). This is impractical or impossible for most landowners.

The rights granted the TTC under Chapter 203, Subchapter D, apply statewide. The transportation code states, "The authorization to purchase or exercise the power of eminent domain is not affected by location of the real property, the location of the real property right, or the location of the material" (Section 203.053).

Consequently, if the TTC needs material, water or mitigation rights to construct the toll road, it can look anywhere in the state to fulfill its needs. For example, the TTC could condemn a playa lake in the Panhandle to mitigate the loss of wetlands for a permit to construct a section of the toll road in South Texas.

The TTC also has the right to enter property without securing permission. Section 203.068 permits the department and its authorized agents to enter any real property, water or premises in the state to make a survey, sounding, drilling or examination that is necessary or appropriate for the development of a

toll project. The entry is not a trespass and does not constitute an entry pending condemnation. However, the department is liable for any damages to the real property, water or premises resulting from its activities.

Evaluation Date

The TTC recently announced the ten-mile preferred corridor for a route from Dallas to below San Antonio. After conducting public hearings and tests on the property, it will narrow the proposed route to a four-mile section and then eventually to the final quarter mile.

The announcement caused property values to plummet along the route. What effect, if any, will this have on the amount offered landowners when the land is eventually condemned? Will it be based on the value of the land immediately before the announcement or when the final quarter-mile segment is determined?

Little case law exists on this point. Most cases focus on the increase in land values (not the decrease) caused by the announcement of the project. For example, public announcement of the location of an airport may cause the commercial property values in the area to soar.

The rule in Texas is that no project enhancement (or blight) should be allowed in calculating the market value of the condemned property. Rather, the value should be set before the date the condemnor officially and publicly designates the taking. Any appreciation (or depreciation) in land values caused by the announcement of the project should be excluded.

The exact date for evaluating condemned property is the date the taking occurs. This is either the date of the special commissioners' hearing or the date the condemnor deposits the required security to begin the project when an appeal is taken to stage three, whichever is later. Specifically, compensation should be based on the value of the land immediately before the announcement of the ten-mile preferred corridor plus any appreciation (or depreciation) not caused by the announcement until the time of the special commissioners' hearing or the appeal.

For specific advice, consultation with an attorney is recommended. ♣

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THE TAKEAWAY

Property owners who face condemnation of their land for the Trans-Texas Corridor should protect their interests by learning about landowners' rights and knowing the fair market value of their properties before the condemnation process begins.



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