

# Come and Take It? Not So Fast Eminent Domain Revised

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This last legislative session, several bills were passed by the Texas Legislature and signed into law by Gov. Greg Abbott that will alter eminent domain discussions between landowners and condemning authorities (companies or government entities putting in pipelines, utilities, roads, etc.).

Under the revised laws, landowners will receive more information up front regarding the contract terms of an easement and the eminent domain process. These revisions should improve the transparency of the process for the landowner and, hopefully, the initial offer received from the entity seeking to use private property.

Although these bills may not go as far as some landowners would like, they are steps in the right direction.

## What is Eminent Domain?

Eminent domain laws in Texas allow for the government or a private entity authorized by law to “condemn” or take private property for the benefit of public use. That means the intended project must be in the best interest of

## Takeaway

Recently passed laws will change the state’s eminent domain process, improving transparency of the process and the initial offer made by the entity seeking to use private property.

the general public and not solely for the economic gain of the private entity.

The government or private entity may seek all or part of the land outright or may seek an easement across a portion of the land, generally allowing the landowner to continue to use the surface area. But the government or authorized private entity cannot take private property for free. The Takings Clause of the Fifth Amendment of the United States Constitution and Article I, Section 17 of the Texas Constitution prohibit taking or damaging of private property for public use without adequate compensation. What constitutes adequate compensation is usually the most heated area of negotiation between the

landowner and the entity with eminent domain authority. Other areas of negotiation revolve around surface use and other potential damage to the property, livestock, or crops.

## What is Condemnation?

Condemnation is the exercise of the power of eminent domain. In Texas, the condemnation process is outlined in Sections 21.012 through 21.016 of the Texas Property Code.

The formal condemnation process comes into play only if the landowner and entity with eminent domain authority (also referred to as a condemning entity) cannot agree on the amount of compensation for the land.

## What is the Landowner's Bill of Rights?

The Landowner's Bill of Rights requirements are set out in Texas Government Code Section 402.031 and Chapter 21 of the Texas Property Code. It applies to any attempt by the government or a private entity to exercise eminent domain authority to take private land.

The Office of the Attorney General (OAG) of Texas provides a plain-language statement of the landowner's rights contained in the referenced statutes. That statement is titled "Landowner's Bill of Rights" and is on the OAG's website. It contains 11 statements about what an entity must do and what a landowner can do when eminent domain is exercised. In addition, it includes information about the condemnation procedure, the condemning entity's obligations to the property owner, and the property owner's options during a condemnation.

Additional addenda described under HB2730 below are now a part of the Landowner's Bill of Rights. A recently updated version that includes all relevant legislative changes is online (use QR code to access it).



## Recent Legislative Changes

**HB 2730** (effective Jan. 1, 2022). This bill made the most comprehensive changes to the eminent domain process. It changed relevant sections of the Texas Government Code, Occupations Code, and Property Code. Specifically, the revisions:

- require the Landowner's Bill of Rights prepared by the OAG to
  - include notice that the property owner has the right to file a written complaint with the Texas

Real Estate Commission (TREC) about misconduct by a registered easement or right-of-way agent acting on behalf of the entity exercising eminent domain authority;

- add addenda of the new required terms for easement conveyance documents for pipelines (Addendum A) and electric transmission lines (Addendum B);
- add an addendum of optional terms for those easement conveyance documents that a landowner can negotiate (Addendum C); and
- be reviewed every two years with public input.
- allow the landowner and entity to amend, alter, or omit the contract terms set out in the above-referenced addenda by agreement;
- authorize TREC to
  - add continuing education requirements for right-of-way agents;
  - issue a probationary certificate to right-of-way agents; and
  - suspend or revoke a right-of-way certificate if the agent accepts a financial incentive to make an initial offer less than the adequate compensation required by law.
- require the initial offer by an entity with eminent domain authority to a landowner to be in writing and include
  - a copy of the Landowner's Bill of Rights, including prescribed addenda;
  - a statement in bold print, with larger font, indicating whether the compensation being offered includes damages to the remainder of the property or a certified appraisal of the property that includes damages to the remainder;
  - the conveyance document, unless certain listed exclusions apply; and
  - name and telephone number of a representative of the entity.
- require petitions in a condemnation lawsuit be sent by first class mail, in addition to certified mail, return receipt requested; and
- set deadlines for appointment of special commissioners and alternate special commissioners in a condemnation suit.

**HB 4107** (effective Sept. 1, 2021). This bill requires common carrier pipeline entities to provide two days advance written notice to the landowners of their intention to enter the property to conduct a survey under their

eminent domain authority. The notice must include an indemnification provision in favor of the landowner for any damages resulting from the survey and a contact phone number for questions or objections. The notice can be sent by first class mail, email, or any other delivery method authorized by the Texas Rules of Civil Procedure.

Entry to the property is limited to the portion that is anticipated to be used for the proposed pipeline.

Following the survey, the property must be restored to its pre-survey condition, and the landowner is entitled to receive a copy of the survey or depiction prepared on written request at no charge.

**SB721** (effective Sept. 1, 2021). If there is a special commissioners' hearing on the valuation of the property, this bill requires an entity with eminent domain authority to give the landowner copies of any appraisal reports produced or acquired by the entity at least three business days before the hearing, if an appraisal report is going to be used at the hearing.

**SB725** (effective Sept. 1, 2021). This provides that a property will not lose its agriculture exemption due to

a condemnation for a right-of-way that is less than 200 feet wide. If additional taxes are due because a condemning entity changed the use of land to nonagriculture use, that entity, and not the landowner, is responsible for any additional taxes and interest imposed.

**SB 726** (effective Sept. 1, 2021). This bill amended the law relating to a landowner's ability to repurchase their property from a condemning entity if the entity has not shown "actual progress" on the easement within ten years. The entity must now have completed three of the five actions enumerated to show actual progress, instead of two. There is one exception; a navigation district, port authority, or water district has to complete only one action to show actual progress.

Nothing in *TG* should be considered legal advice. For advice or representation on specific legal matters, readers should retain an attorney. 📌

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