



# The eminent domain case from the condemnor's viewpoint: seizing the advantage

by Michael H. Bailey

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**Methods are outlined in order that attorneys representing condemnors can obtain some measure of advantage in an eminent domain case.**

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There have been numerous articles published concerning the development of an eminent domain case from the landowner's standpoint.<sup>1</sup> However, there has been a dearth of such published material involving the other side of the coin, *viz.* the eminent domain case as developed, filed and tried by the condemnor. This article will be a brief attempt to describe such cases on behalf of a governmental entity based on Texas factual situations and law.

## **The preliminary stage**

Many employees of condemnors are burdened with the notion that the statutory requirements concerning negotiating with property owners are merely "window-dressing," which do not have to be strictly observed. The contrary is the law. When a land agent approaches a property owner with a ridiculously low offer, the property owner is not only going to be insulted, and reject it out of

hand; he very likely will also be determined to prosecute his claims to the limit. Thus even at this early stage the condemnor's case is in potential jeopardy. This is not necessarily because of any lack of legal expertise or because of the "rightness" of the landowner's position, but because of a simple matter of human nature: people like to be treated fairly and with respect.

It is generally required that a condemning authority must use good faith efforts to reach an agreement with the property owner.<sup>2</sup> Such negotiations are a prerequisite to the exercise of the power of eminent domain, although a property owner may waive any failure of this requirement by making an appearance before the special commissioners at the time of the hearing.<sup>3</sup> At any rate, the condemning authority should conduct the negotiations in a fair and open manner, as if the power of eminent domain was not a consideration.

If the negotiations fail, the condemning authority is then in a position to file its condemnation petition with a court of competent jurisdiction.

So, the first rule is: insure that your negotiator makes a fair offer, in writing, and that he does it with courtesy.

## **Appointment of Commissioners**

In Texas, the court is required to appoint a panel of "three disinterested freeholders" who reside in the county where the property sought by the con-

demning authority is located to determine the value of the property and any damages thereto.<sup>4</sup>

The attorney for the condemnor should carefully evaluate the qualifications of the commissioners appointed by the court. The court may give preference to persons agreed on by the parties, but such agreement is generally impossible. One suggested improvement in eminent domain procedure is in order here. It would appear that a better procedure would be to have a statutory requirement that the court appoint a panel selected by the parties from a listing of qualified property owners and/or licensed real estate brokers and appraisers, along the lines of a compulsory arbitration. Such procedures exist in labor disputes and civil service matters.<sup>5</sup> Each party would have a set number of preemptory challenges, as in jury selection. This type of procedure might be more cumbersome at the outset, but it would very likely reduce the number of cases appealed from the findings of special commissioners.

If any of the commissioners has exhibited any kind of bias or prejudice toward the condemnor in the past, the attorney should file a formal objection to that commissioner's appointment and service on the panel. The procedure for filing such an objection may not be spelled out in the statutes, but the grounds could be the relatively basic issue of fairness.

Governmental entities as parties to lawsuits are entitled to a fair trial.<sup>6</sup> Certainly the form of the objection should be as specific as possible. The courts generally do not look upon such an objection favorably, but bringing such potential problems to the judge's attention can have a beneficial effect for the condemnor, both during the case at hand and in future proceedings before the same judge. The court will hopefully place an excessive award in the proper context when the condemnor has to appeal from it, and the judge will not likely continue to appoint the objectionable commissioner to serve in subsequent cases.

**The Commissioners' hearing stage of the case**

One of the most important qualities of the eminent domain case at this stage is that it is not a full-blown lawsuit. Rather, it is in the nature of an administrative proceeding and is thus not subject to the rules of procedure pertaining to pretrial discovery. The most beneficial aspect of


this fact is that any appraisal reports which the condemnor (or the condemnee) may have obtained are not discoverable by the other party prior to the time of the hearing of the special commissioners.<sup>7</sup> As a result, both sides enter the hearing stage unaware of the type of testimony which will be presented by the other. Prior to the hearing stage the condemnor should have made a decision on what type of formal appraisal report to request. The most prudent course is to have the appraiser arrive at his opinion of fair market value without submitting a formal appraisal report.

The presentation of expert testimony at the commissioners' hearing stage is, of course, dependent upon the circumstances of the case. While it is difficult to state a general rule, it is generally advisable to have the appraiser prepared to testify at the hearing. Of course, his testimony will have been reviewed in some detail by the attorney representing the condemnor. Since the panel of special commissioners is often composed of

individuals who either have a real estate license or who are appraisers, they generally lend some weight to the opinion of one of their colleagues.

**The pretrial stage**

Following the hearing of the special commissioners and their determination of the award due the owner, the parties each have a most crucial decision to make: whether or not to file objections to the award. Naturally, if the condemnor feels that the award is excessive, the attorney for that entity must prepare and file his objections to the award (or the appropriate type of appeal, depending on the jurisdiction). The filing of objections or an appeal by either party transforms the proceeding from merely an administrative one into a case in court for the first time. Consequently, all the procedural requirements and rules of discovery attach to the case and become applicable in all subsequent aspects of it. The condemnor's attorney should keep in mind that eminent domain is one of the more obscure areas



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