EXERCISING THE POWER OF EMINENT DOMAIN

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CHAPTER 23

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I. SCOPE AND INTRODUCTION

This paper is intended to provide a brief review of selected portions of Chapter 21 of the Texas Property Code, an overview of a limited number of issues being currently litigated as parties exercise their power of eminent domain and a review of some of the appellate court decisions from 2004 through the present as they relate to those current issues.

The terms "eminent domain" and "condemnation" are often used interchangeably, but they do not mean the same thing. The important legal distinction is that eminent domain is defined as the power of the government to take private property for public use without the owner's consent but with payment of adequate consideration. Hudson v. Arkansas/Louisiana Gas Company, 262 S.W.2d 561 (Tex.App.– Texarkana 1981, writ ref'd n.r.e.; City of Austin v. Nalle, 120 S.W.2d 996 (Tex. 1909). The term "condemnation" refers to the process or the procedure by which the taking or appropriation of the property occurs.

II. POWER OF CONDEMNATION / SOURCE OF AUTHORITY

The First Amendment to the United States Constitution states in part . . . "nor shall private property be taken for public use, without just compensation."

Article I, Section 17 of the Texas Constitution states in part . . . "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 . . .".

Chapter 21 of the Texas Property Code is the legislative enactment of the law which governs the jurisdiction and procedures to be followed when the "government" is acquiring property for public use by exercising its power retained to it in the Texas Constitution.

Federal Constitution states that "due process" must be insured and "just compensation" must be paid to the owner. The Texas Constitution provides "adequate compensation" must be rendered. The general condemnation procedures followed in Texas are found in Section 21 of the Texas Property Code. The federal government may exercise its power of eminent domain within any state and is not subject to the control of the state legislature. It is subject only to the federal constitution and the federal statutes. The focus of this discussion will be the taking of private property by the state or other authorized entities under the state Constitution and Property Code.

The most often asked, and obviously most important, questions are whether the entity seeking to exercise the rights of eminent domain is vested with such rights and what are those rights. Eminent domain is the right of the state, 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 due compensation. Fort Worth & Denver City Ry. Co. v. Ammons, 215 S.W.2d 407, 409 (Tex.Civ.App.– Amarillo 1948, writ ref'd n.r.e.); Byrd Irrigation Co. v. Smythe, 146 S.W. 1064, 1065 (Tex.Civ.App.– San Antonio 1912, no writ). The power of eminent domain is vested in the Legislature and may be undertaken only by the Legislature itself or on its behalf by an agency to which it has delegated the prerogative. Davis v. Lubbock, 326 S.W.2d 699,714 (1959). The legislature has the power to name persons, corporations, and municipalities that may institute condemnation proceedings, and only those entities upon whom the requisite authority has been conferred by the legislature can put into motion the statutes furnishing the procedure for the condemnation of property. Benat v. Dallas County, 266 S.W. 539, 540 (Tex. Civ. App.– Dallas 1924, writ ref'd). Generally, when property is sought to be taken under the power of eminent domain for public use, the necessity, expediency of exercising the power, and the extent to which the property is to be taken are political or legislative questions, rather than judicial questions. Therefore, legislative determination of necessity is conclusive and not reviewable by the courts. Imperial Irrigation Co. v. Jayne, 104 Tex. 395, 138 S.W. 575, 587 (1911); West v. Whitehead, 238 S.W. 976, 978 (Tex. Civ. App.– San Antonio 1922, writ ref'd).

The exercise of the right of eminent domain is restricted by Article 1, Section 17 of the Texas Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution. 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, unless by the consent of such person; and when taken, except for the use of the State, such compensation shall first be made or secured by a deposit in 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."

The Federal Constitution clearly states that private property is not to be taken for public use without just compensation. Moreover, no state may deprive any person of property without affording such person due process of law.

Based upon these principles, the Legislature has delegated the power of eminent domain to include such entities as state and municipal governments, electric cooperatives, water supply corporations, railroads and pipeline companies qualifying as either a gas utility or common carrier. TEX. UTIL. CODE ANN. § 181.004 (Vernon 1998) and TEX. NAT. RES. CODE § 111.019 (Vernon Supp. 1999).

The Texas Railroad Commission regulates gas utilities as defined by the Texas Utilities Code § 121.001. A company may be classified as a gas utility by the Railroad Commission without having the power of eminent domain. See Roadrunner Investments, Inc. v. Texas Utilities Fuel Company, 578 S.W.2d 151 (Tex.Civ.App.– Fort Worth 1979, writ ref'd n.r.e.). However, the majority of Texas courts have held that a corporation that submits itself to the regulation of the Texas Railroad Commission meets the public use requirement and is therefore vested with the power of eminent domain. See Loesch v. Oasis Pipe Line Co., 665 S.W.2d 595 (Tex.App.– Austin, 1984, writ ref'd n.r.e.) (if a corporation, acting within its corporate powers, acquires land for the operation and transport of natural gas through a pipeline, pursuant to its exercise of power of eminent domain given in art. 1435, it thereby submits to the regulatory provisions of arts. 6050-6066 of the Texas Revised Civil Statute so that its ownership of the pipeline, under such regulations, is a "public use" by legislative declaration, irrespective of whether the pipeline is available for use.); Anderson v. TECO Pipeline Co., 985 S.W.2d 559 (Tex. App. – San Antonio 1998, writ denied); Mercier v. Mid Texas Pipeline Co., 28 S.W. 712 (Tex. App. – Corpus Christi 2000, no writ).

The Texas Legislature has delegated to common carriers the power to enter upon and condemn land, rights of way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of a common carrier pipeline. See TEX. NAT. RES. CODE § 111.019 (Vernon Supp. 1999). The methodology of the Texas Natural Resources Code is to set forth a broad definition of common carrier, and to carve out an exception for those owners and operators whose pipelines are dedicated solely to the service of their own facilities. The broad definition of common carrier is set forth in Section 111.002 of the Texas Natural Resources Code and includes any owner or operator who: (1) transports crude petroleum to or for the public for hire; (2) engages in the business of transporting crude petroleum by pipeline; (3) transports crude petroleum that has been purchased from a producer to any distributor, refiner, or re-shipping point; or (4) is classified as a common carrier under any other law. The exception for "private" pipelines is set forth in the Texas Natural Resource Code. Pursuant to the Texas Natural Resources Code, common carriers do not include owner or operators who utilize pipelines only for service to their own facilities and are not part of a common carrier's pipeline system who utilize pipelines to service property which is not "part of or necessarily incident to" the carrier's transportation system.

Railroad corporations have the power of eminent domain pursuant to Article 6351 of the Texas Revised Civil Statutes. Articles 6316 and 6317 of the Texas Revised Civil Statutes specifically authorize railroad corporations to construct rail lines and spurs. Article 6336 of the Texas Revised Civil Statutes specifically authorizes a railroad corporation to utilize the condemnation process if the railroad corporation is unable to agree with the landowner on the value of the real property to be acquired. Nevertheless, all entities with the power of eminent domain must comply with the procedural requirements of Chapter 21 of the Texas Property Code when exercising such authority.

III. RESTRAINTS OF CONDEMNATION

A. Public use

Private property may not be taken without justifying public purpose. Coastal States Gas Producing Company v. Pate, 309 S.W.2d 828 (1958). Whether a given set of facts constitutes a public or private use is question of law for the court to decide. West v. Whitehead, 238 S.W. 976, 978 (Tex. Civ. App.– San Antonio 1922, writ ref'd); Tenngasco Gas Gathering Co. v. Fischer, 653 S.W.2d 469, 474 (Tex. App.– Corpus Christi 1983, writ ref'd n.r.e.); Grimes v. Corpus Christi Transmission, 829 S.W.2d 335 (Tex. App.– Corpus Christi 1992, writ denied). Where the Legislature declares a particular use to be a public use, the presumption is in favor of this declaration, and will be binding upon the courts unless: (1) such use is clearly and manifestly wrong or unreasonable or (2) the purpose for which the Legislature's declaration is enacted is clearly and probably private. See West, 238 S.W. at 978; Tenngasco, 653 S.W.2d at 475. Courts give great

deference to both the legislative declaration that a use is public and the consequent delegation of eminent domain power. Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 704 (1959). The Court in Tenngasco applied the above rule of interpretation and relied upon the express grant of legislative authority in articles 1435 and 1436 (now codified in the Texas Utilities Code), in finding that "these articles delegate to corporations like [the pipeline carrier] the right to determine the location and amount of lands they need to carry on in good faith the business they are chartered to carry on." 653 S.W.2d at 476. A pipeline corporation's ownership of the pipeline is therefore a "public use" by legislative declaration, regardless of whether the pipeline is actually available for public use. See Arcola Sugar Mills Co. v. Houston Lighting & Power Co., 153 S.W.2d 628, 633 (Tex. Civ. App.– Galveston 1941, writ ref'd w.o.m.).

In West v. Whitehead, the landowners complained that a railway built from the railway station across an undeveloped section of the country suitable only for pasture purposes to an asphalt mine located at the terminus of the company's railway was not for any public purpose, and therefore, the railway lacked condemnation authority. 238 S.W. 976 (Tex. Civ. App.– San Antonio 1922, writ ref'd). In determining that the railroad was a public use, the Court relied on the fact the railway had declared itself a "common carrier" expressly subjecting itself to the control of the Texas Railroad Commission. Id. Moreover, the railway chartered for the purpose of building, operating and maintaining the rail line. Id. Lastly, by declaring itself a common carrier, the railway was required to accept, transport, and deliver to any point on its line, or to its connecting carrier, all commodities tendered for such purpose by the public. Id.

In Loesch v. Oasis Pipe Line Co., the landowners challenged Oasis' right to take based on the following: (1) Oasis would transport only gas owned by its shareholders (2) Oasis had no employees and (3) the actual transportation of gas would be managed and conducted by a subsidiary of one of Oasis' shareholders and eventually sold to its shareholders. 665 S.W.2d 595 (Tex. Civ. App.– Austin 1984, writ ref'd n.r.e.). The Court rejected the landowners' argument holding that if a condemnor subjects itself to the onerous regulatory provisions of the Texas Railroad Commission, such use is a "public use" by legislative declaration. Id.

In Thedford v. County of Jackson,, the owner of an interest in a gas well brought an action to declare that he had the right to construct a one-half mile pipeline along a county road. 502 S.W.2d 899, 900 (Tex.Civ.App.– Corpus Christi 1973, writ ref'd n.r.e.). The well owner contended that because the proposed half-mile line would connect at the other end of a pre-existing common carrier line operated by Texas Eastern, the half-mile line would be "part of a common carrier." Id. at 901. The Court rejected this argument, noting that the landowner did not plan to transport any products purchased from others, or to transport oil or gas for hire. Therefore, the condemnor did not qualify as a common carrier. Id. at 901.

Recently, both the San Antonio and Corpus Christi Appellate Courts have followed and expanded the principals set forth herein. See Anderson v. Teco Pipeline Co., 985 S.W.2d 559 (Tex. App. – San Antonio 1998, writ denied); Mercier v. Mid Texas Pipeline Co., 28 S.W.3d 712 (Tex. App. – Corpus Christi 2000, pet. denied). Both courts reiterated that the issue of public versus private use is ordinarily a question of law for the court to decide. Id.

B. Public necessity

The Legislature may not authorize, and the condemnor may not legally condemn more property than is reasonably required to serve its public use. However, the condemnor's determination of the necessary amount of the property is conclusive in the absence of fraud, bad faith, gross abuse of discretion, or arbitrary and caprious action.

The location chosen by the condemnor is final without a showing of bad faith, fraud, or arbitrary and capricious conduct. Wagner v. City of Arlington, 354 S.W.2d 759 (Tex.Civ.App.–Ft. Worth 1961, writ ref'd n.r.e.); Bevly v. Tenngasco Gathering Company, 638 S.W.2d 118 (Tex.App.– Corpus Christi 1992, writ ref'd n.r.e.).

A private entity vested with the power of eminent domain must make a determination of public convenience and necessity for the acquisition of property by condemnation. Houston Lighting and Power Co. v. Fisher, 559 S.W.2d 682, 685 (Tex.Civ.App.– Houston [14th Dist.] 1977, writ ref'd n.r.e.). Normally, a resolution of the board of entity's directors "clothed" with the right of eminent domain is the proper method of determining and declaring public necessity. Id.; Anderson v. Clajon Gas Co., 677 S.W.2d 702, 704 (Tex.App.– Houston [1st Dist.] 1984, no writ). In order to raise a judicial question regarding the pipeline company's determination of public necessity for the taking of particular property, the condemnee must plead and offer proof of fraud, clear abuse of discretion, bad faith or other arbitrary and capricious acts. Wagoner v. City of Arlington, 345 S.W.2d 759, 763 (Tex.Civ.App.– Fort Worth 1961, writ ref'd n.r.e.); Housing Authority v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 88 (1940);

Anderson v. Clajon Gas Co., 677 S.W.2d 702, 704 (Tex.App.– Houston [1st Dist.] 1984, no writ). Such pleading and proof raise issues of fact for the jury. Wichita Falls v. Thompson, 431 S.W.2d 909, 913 (Tex.Civ.App.– Fort Worth 1968, writ ref'd n.r.e.).

1. Clear Abuse of Discretion/Bad Faith

The burden of proof falls upon the party complaining of the condemnor's necessity determination to show that the decision amounted to a clear abuse of discretion or bad faith. T&R Associates, Inc. v. City of Amarillo, 688 S.W.2d 622, 626 (Tex. Civ. App.–Amarillo 1985, writ ref'd n.r.e.); Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex. 1971). Moreover, the decision as to whether a condemnor's action constituted an abuse of discretion is a question of law for the court. T&R Associates, Inc., 688 S.W.2d at 626. A condemnee's burden on this issue has been described by Texas courts as "extra-ordinary" and requires a showing that no conclusive, controversial, issuable facts exist which would justify the decision of the condemnor. T&R Associates, Inc., 688 S.W.2d at 626; Thompson v. City of Palestine, 510 S.W.2d 579, 581 (Tex. 1974); see also Zboyan v. Far Hills Utility Dist., --- S.W.3d ----, 2007 WL 1218679 (Tex. App.—Beaumont 2007, no pet.)(this recent opinion has not yet been released for publication); "Generally, the discretion of the condemnor is nearly absolute as far as what land it may condemn for its purposes." Ludewig v. Houston Pipeline Co., 773 S.W.2d 610, 614 (Tex. App.—Corpus Christi 1989, writ denied).

The decision of how much land to take is one for the condemnor and not subject to a challenge on the basis of abuse of discretion. Bradford v. Magnolia Pipe Line Co., 262 S.W.2d 242, 246 (Tex. Civ. App.—Eastland 1953, no writ). Likewise, the existence of alternate options or plans for a public project are not subject to a challenge on the basis of abuse of discretion. Ludwig, 773 S.W.2d at 614; Snellen v. Brazoria County, 224 S.W.2d 305, 310 (Tex.Civ.App.- Galveston 1949, writ ref'd n.r.e.). For example, in Snellen v. Brazoria County, the existence of better suited vacant lots did not hinder the exercise of the right of eminent domain to acquire land located in an esplanade for the purpose of constructing a fire station. 224 S.W.2d at 310. Similarly, in Ludewig v. Houston Pipeline Co., the existence of a feasible alternate plan for the pipeline project did not constitute evidence of an abuse of discretion. 773 S.W.2d at 614.

2. Fraudulent Taking

Whether a taking is fraudulent also falls under the umbrella of whether the taking was necessary for public use. Anderson, 985 S.W.2d at 565. The taking of property for private use under the guise of public use may violate due process and may constitute legal fraud upon property owners, even though there is no fraudulent intent. In the condemnation context, fraud means "any act, omission or concealment, which involved a breach of legal duty, trust or confidence, justly reposed and is injurious to another, or by which an undue and unconscientious advantage is taken of another." Wagoner, 345 S.W.2d at 763; accord Boucher v. Texas Turnpike Auth., 317 S.W.2d 594, 601 (Tex.Civ.App.-Texarkana 1958, no writ).

3. Arbitrary and Capricious Action

Arbitrary and capricious action has been defined as follows: (1) "willful and unreasoning action; (2) action without consideration; and (3) in disregard of the facts and circumstances that existed at the time condemnation was decided upon, or within the foreseeable future." Anderson, 677 S.W.2d at 704; Wagoner, 345 S.W.2d at 763. An act has been held not to be arbitrary and capricious when exercised honestly and with due consideration even if an erroneous conclusion was reached. Anderson, 677 S.W.2d at 705.

As with gross abuse of discretion and bad faith, the existence of a feasible alternative pipeline route is not evidence of an arbitrary and capricious action. In Ludewig v. Houston Pipeline Co., the landowners argued that the pipeline company could have avoided crossing their property by running the pipeline along public roads but instead opted for the shortest route over the landowners' property. 773 S.W.2d at 614. The Corpus Christi Court held that "choosing the most economically feasible path for a pipeline is not evidence of arbitrary and capricious action. Where there is room for two options, an action cannot be deemed arbitrary when it is exercised honestly and upon due consideration, regardless of how strongly one believes an erroneous conclusion was reached." Id. The landowners in this case further argued that the pipeline company condemned an excessive amount -- a 50-foot wide strip of land -- when the 10-foot strip was all that the pipeline required. However, testimony that there was a "remote possibility" that the extra footage was necessary for repairs was deemed by the Court a "legitimate reason" for the condemnation. Id. at 614-15.

C. Due Process

Chapter 21 of the Texas Property Code provides the

statutory framework within which the power of eminent domain must be exercised. The procedures set forth in the condemnation statute must be strictly followed and its protections liberally construed for the benefit of the landowner. John v. State, 826 S.W.2d 138 (Tex.1992).

IV. CONDEMNATION PROCEDURE

The condemnation process in Texas begins with an administrative proceeding, the procedure of which is outlined by the Texas Property Code. If, at the end of the administrative proceeding, one (or both) of the parties are dissatisfied with the results, the condemnation process moves into a judicial proceeding. Skaggs v. City of Keller, 880 S.W.2d 264, 265 (Tex. App.—Fort Worth 1994, writ denied)

A. Attempt to Agree

The Texas Supreme Court finally clarified this area of law in Hubenak v.San Jacinto Gas Transmission Co. 141 S.W.3d 172 (Tex. 2004). The Hubenak landowners claimed that the provision in Texas Property Code Section 21.012, which permits a condemning authority to begin condemnation proceedings if it is "unable to agree" with the landowner, raises a jurisdictional question, requiring a showing of good-faith negotiations on the condemnor's part. Id, at 174-75.

The Hubenak landowners further alleged that the condemnors had not satisfied this requirement because prior to condemnation, the condemnors submitted final offers to the landowners containing the following three terms:

(1) the condemnor would receive the right to transport "gas, oil, petroleum products, or any other liquids, gases or substances which can be transported through a pipeline;

(2) the condemnor would receive the right to assign the easement to any person or entity; and

(3) the landowners would be obligated to warrant and defend title to the easement.

Id., at 175-76. The landowners argued that the condemnors, by inserting the above three terms into the final offer, did not negotiate in good faith because these contractual terms could not be obtained through a condemnation proceeding. Id., at 177.

In first addressing whether failure to satisfy this statutory requirement raised a jurisdictional issue, the Texas Supreme Court held that the "unable to agree" language in Texas Property Code Section 21.012 is a mandatory statutory requirement but failure to satisfy it does not deprive courts of subject-matter jurisdiction. Id. at 180. As to whether the condemnors satisfied the "unable to agree" requirement, the high court stated: "The condemnors have established that they made offers to each of the condemnees before filing condemnation proceedings. Those offers were rejected or ignored by the condemnees. That is enough to satisfy section 21.012's requirements that the parties were 'unable to agree.'" Id. at 187. As a remedy for failure to satisfy the 'unable to agree requirement,' the Texas Supreme Court held that the trial court should abate the proceeding until such time as an offer is made. Id.

It is important to also note that Texas law has consistently held that if a landowner participates in the hearing before the special commissioners, the landowner waives the right to complain that the condemnor did not make an effort to agree. Id. at 179. Texas courts have further consistently held that where an attempt to agree upon the value of property to be condemned would be futile, the condemnor need not attempt to agree with the condemnee. Malcomson Road Utility District v. Newsom, 171 S.W.3d 257, 276 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); see also Houston North Shore Railway Co. V. Tyrrell, 98 S.W.2d 786, 795 (Tex. 1936); Anderson, 677 S.W.2d at 706 ("As a general rule, a condemnor is not required to continue to attempt negotiations, when any further attempts to agree with the landowner appear to be futile."); Willoughby v. Upshur Rural Elec. Co-op. Corp., 562 S.W.2d 33, 35 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.)("It is well settled law that in condemnation cases where an attempt to agree upon value of the condemned land would be futile that no attempt to agree need be made.").

B. Petition

If no agreement can be reached, the condemnor must file a petition in the proper court. TEX. PROP. CODE. ANN. §21.012.

1. Proper court

District courts and county courts at law have concurrent jurisdiction in eminent domain cases. TEX. PROP. CODE ANN § 21.001 (Vernon 1984). In many counties there are only district courts. However, where there is a county court at law, the court's enabling statute

located in the Government Code should be reviewed to determine if that court, rather than the district court, has exclusive jurisdiction over eminent domain proceedings.

Venue in a condemnation proceeding is proper in the county in which the owner of the property being condemned resides if the owner resides in a county in which part of the property is located. Otherwise, the venue of a condemnation proceeding is any county in which at least part of the property is located. TEX. PROP. CODE ANN. § 21.013 (Vernon 1984 & Supp. 1997).

In Taub v. Aquila Southwest Pipeline Corporation, 2002 WL 31318380 (Tex.App.–Hous. [14th Dist.] Oct. 17, 2002), the Court of Appeals on a *sua sponte* review of subject matter jurisdiction found that the statute creating the Harris County Civil County Courts at Law placed exclusive jurisdiction of eminent domain proceedings, both statutory and inverse, regardless of the amount in controversy, in county courts at law. In the Taub case, the landowner filed trespass and inverse condemnation proceedings in the district court. Aquila filed its statutory proceeding in the county court at law. Both parties then agreed to consolidate the actions into the district court, which proceeded to trial and judgment on all issues. Id.

Taub presented an issue of first impression and should alert anyone filing condemnation proceedings to check the Government Code in the county in which a condemnation petition is being filed. You must insure that the jurisdictional limits of the statutory county court at law in that particular county creates the appropriate subject matter jurisdiction. In other words, not all county courts at law are created equally. As a point of personal experience, the statutory county court at law in Denton County does not have eminent domain jurisdiction. In Denton County, the jurisdiction for eminent domain proceedings is in the probate court.

2. Contents of Petition

The condemnation petition must: a) describe the property to be condemned; b) state the purpose for which the entity intends to use the property; c) state the name of the owner of the property if the owner is known; and d) state that the entity and the property owners are unable to agree on damages TEX. PROP. CODE ANN. § 21.012.

a. *Description*

The adequacy of the description in the petition is tested by the same standard used to test the adequacy of a description in a deed. Boone v. Panola County, 880 S.W.2d 195 (Tex.App.– Tyler 1994, no writ). The description in the petition need not be flawless. If the land is described with sufficient certainty, "a false and contradictory element of description is harmless." Roberts v. County of Robertson, 48 S.W.2d 737, 738 (Tex.Civ.App.– Waco 1932, writ ref'd). The description is sufficiently certain if a surveyor can go upon the land and mark out the land designated. Smith v. Gulf States Utilities Co., 616 S.W.2d 300, 304 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.). It is sufficient if the petition describes the land by metes and bounds. Coastal Industrial Water Authority v. Celanese Corp., 592 S.W.2d 597, 600 (Tex. 1979). Furthermore, Texas courts hold that the description can identify the land to be taken either on the face of the petition or by other writing referred to. Phillips Pipeline Co. v. Woods, 610 S.W.2d 204, 207 (Tex. App.—Houston [14th Dist.] 1980, writ ref. n.r.e.). Nevertheless, it is clearly established that a condemnor has the rights to amend its petition and take less land. The only limitation to this right is that the landowner must not be prejudiced. Southwestern Bell Co. v. West, 417 S.W.2d 297 (Tex. Civ. App.–Tyler 1967, writ ref'd n.r.e.).

b. *Purpose*

The petition must state the purpose for which the land is to be used. TEX. PROP. CODE ANN. § 21.012(b)(2). However, the petition need only give an "adequate statement" of the intended use. Coastal, 592 S.W.2d at 600 (statement that land was to be used ". . . for the construction, inspection, operation, maintenance, repair, replacement with the same or different size pipe and removal of a pipeline for transporting gas, liquified minerals, and other mineral solutions and the normal appurtenances to such pipeline" was adequate for purposes of petition). The petition need not show that the property sought to be condemned is either necessary for the condemnor's purposes or required for public use. Phillips Pipeline Co. v. Woods, 610 S.W.2d 204, 207 (Tex.Civ.App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.).

c. *Landowner's identity*

The petition must state the name of the landowner, if known. TEX. PROP. CODE ANN. § 21.012(b)(3). The petition sufficiently names the owners if it alleges that specified defendants own or claim to own "some interest" in the lands in dispute. Rabb v. LaFeria Mutual Canal Co., 62 Tex. 24, 130 S.W. 916 (Tex. Comm'n App. 1910).

The "owner" includes not only the owner of the fee,

but also a life tenant, a lessee for a term of years, and any other person who has an interest in the property that will be affected by the condemnation. Houston North Shore Ry. Co. v. Tyrrell, 128 Tex. 248, 98 S.W.2d 787, 793 (1936). "Such are the rules, because only when every interest of every character in the land is acquired can the property be devoted fully and without restraint or interference to the public purpose, and because only when every person having an interest in the property is compensated as an owner is the constitutional mandate fulfilled." Id. at 793. Compensation would therefore be paid to not only the surface owner, but also to a mortgagee for the impairment of his security, Buell Realty Note Collection Trust v. Central Oak Investment Co., 483 S.W. 2d 24, 26 (Tex.Civ.App.– Dallas 1972) *writ ref'd per curiam*, 486 S.W.2d 87 (Tex. 1972); to a lessee for years; Elliott v. Joseph, 163 Tex. 71, 351 S.W.2d 879, 884 (Tex. 1961); but not a tenant by sufferance or at will, Fort Worth Concrete Co. v. State, 416 S.W.2d 518, 521 (Tex. Civ.App.– Fort Worth 1967, writ ref'd n.r.e.).

To determine what persons own interests in the particular subject property, a search of the land records of the county is conducted. Some interest holders may not appear of record such as the homestead rights of a non-owner spouse or the surface lessee with no recorded lease. Mortgagees should be a party to the condemnation or subordinate their rights to the easement. Otherwise, any rights secured by the condemnation proceeding would be subordinate to the mortgagee's lien. Lastly, only if the condemnation destroys the mineral estate should the mineral owner be included.

d. *Inability to agree on damages*

The petition must state that the entity exercising the power of eminent domain and the property owner are unable to agree on damages. TEX. PROP. CODE ANN. § 21.012(b)(4). The condemnor has the burden of pleading and proving that before it initiated the condemnation proceeding, it was "unable to agree" with the landowner as to the amount of damages that would result from the taking of the landowner's property. State v. Hipp, 832 S.W.2d 71, 75 (Tex. App. – Austin 1992), *rev'd on other grounds*, 867 S.W.2d 781 (Tex. 1993).

As previously stated, however, if the landowner refuses to negotiate, a condemnor is not required to continue negotiations if further attempts appear futile. Anderson v. Clajon Gas Co., 677 S.W.2d at 706. A landowner's silence upon receipt of an offer has been held to be a rejection and is a basis for "failure to agree." Schlottman v. Wharton County, 259 S.W. 2d 325, 330-31 (Tex.Civ.App.– Fort Worth 1953, writ dism'd). Even a single offer, rejected by a landowner as too low to be consistent with offers on surrounding property, with no further negotiation will satisfy the failure to agree requirement. Bradford v. Magnolia Pipe Line Co., 262 S.W.2d at 247; see also Hubenak, 141 S.W.3d 172.

C. Appointment of Commissioners

After the filing of the petition, the Judge must then appoint three disinterested freeholders who reside in the county as special commissioners TEX. PROP. CODE. ANN. §21.014[a].

In this regard, Pinnacle Gas Treating, Inc. v. Read illustrates this section of the Texas Property code. 160 S.W.3d 564 (Tex. 2005). Pinnacle filed statutory condemnation proceedings against several landowners in Leon County, Texas. Leon County does not have a statutory county court at law, but has three district courts, all of which also have jurisdiction in other counties. Pinnacle filed seven condemnation cases at one time, and in accordance with Section 21.013© of the Texas Property Code, the district clerk filed the petitions on a rotating basis in the three district courts.

Pinnacle then presented the orders requesting the appointment of special commissioners to the judge sitting on the bench the day of the filing, who appointed the same commissioners in all seven cases. That judge was technically assigned to one of the other courts. The commissioners took their oaths and gave notice of hearing to all parties. All parties attended the special commissioners hearing and the commissioners duly entered their award.

Thereafter, Pinnacle deposited the award, filed its bond, and proceeded to build its pipeline. The landowner in the case at hand filed a Motion to Dismiss for Lack of Jurisdiction urging that the appointment of the special commissioners in all of the cases filed by Pinnacle by the judge not assigned to the case, but exchanging benches, was in violation of Section 21.013(d) of the Texas Property Code. The trial court granted the motion, and dismissed the condemnation proceedings, and ordered a trial on the landowners damages, attorney's fees, costs and expenses. Pinnacle initiated a second condemnation proceeding to secure its right to the easement, over which it had already built a pipeline. A jury trial was conducted in the first proceeding; whereby the jury awarded the landowner damages for Pinnacle proceeding without jurisdiction. The trial court rendered judgment on the jury's verdict, and Pinnacle filed its notice of appeal.

A divided court of appeals dismissed the appeal, holding that the second condemnation proceeding

rendered the case moot. Pinnacle Gas Treating, Inc. v. Read, 69 S.W.3d 240 (Tex. App.—Waco 2002, reversed at 104 S.W.3d 544 (Tex.2003). Pinnacle petitioned the Texas Supreme Court for review. The high court reversed, holding that because damages were at issue, Pinnacle had a continuing stake in the outcome of the case, and it was therefore not moot. The case was remanded to the court of appeals for consideration on the merits. Read, 104 S.W.3d 544.

The court of appeals again affirmed, holding that the judge exchanging benches for the assigned judge lacked jurisdiction to appoint the commissioners because the assigned judge never agreed to exchange benches. Pinnacle Gas Treating, Inc. v. Read, 143 S.W.3d 165 (Tex. App.—Waco 2004, reversed at Read,160 S.W.3d 564). Pinnacle again sought review from the Texas Supreme Court. The Supreme Court again reversed the Court of Appeals, holding that an exchange of benches for the purposes of appointing commissioners does not raise a jurisdictional challenge, and any error is curable through a trial de novo — appealing the award of commissioners. Read, 160 S.W.3d at 567-68.

D. Oath of Commissioners

The special commissioners must take an oath to assess damages fairly and impartially and according to the law. TEX. PROP. CODE. ANN. §21.014[b].

E. Hearing of Commissioners

The special commissioners shall promptly schedule a hearing at the earliest practical time and at a place that is as near as practical to the property being condemned or at the county seat of the county in which the proceeding is being conducted. TEX. PROP. CODE ANN.§ 21.015 (Vernon 1984). Each party in an eminent domain proceeding is entitled to written notice issued by the special commissioners informing the party of the time and place of the hearing. TEX. PROP. CODE ANN.§ 21.016. Notice of the hearing must be served on all defendants not later than the eleventh day before the day set for the hearing. A person competent to testify may serve the notice. TEX. PROP. CODE ANN.§ 21.016(b).

Normally, all parties who own an interest in the property are given notice of the condemnation proceeding. If any party has settled or the condemnor does not seek to acquire rights from a particular party, they need not be made part of the condemnation proceeding or given notice thereof. A question arises where a condemnor seeks to acquire only an undivided interest in the property. In Metropolitan Transit Authority of Harris County, Texas v. Graham,, a number of landowners were included in the proceeding, but two of the owners of undivided interest were not located to be served. 105 S.W.3d 754 (Tex. App.-Houston [14th Dist.] 2003, pet denied); see also Guadalupe Blanco River Authority v. Canyon Regional Water Authority, 211 S.W.3d 351, 357 (Tex. App.—San Antonio 2006, pet granted). The commissioners in Graham proceeded and awarded damages against those owners who had been served. Id. The Houston Court held that there was no reason that the condemnor could not proceed against the undivided interest owners who were served with notice of the hearing. Additionally, service on the landowner's attorney will constitute service if it is clear that the attorney was authorized by the landowner to accept service on his behalf. Rotello v. Brazos County Water Control, 574 S.W.2d 208 (Tex.Civ.App. –Houston [1st Dist.] 1978, no writ).

Section 21.041 of the Property Code states that the special commissioners shall admit evidence on the following: (1) value of the property being condemned; (2) injury to the property owner; (3) benefit to the property owner's remaining property; and (4) use of the property by the condemnor seeking to acquire the property.

Moreover, it is well-settled law in Texas that any two of the three commissioners can render, return, sign, and file a valid award. Judge Madison Rayburn, Rayburn on Condemnation, Section 11.08 (21st Edition, 1998). The Galveston Court of Appeals addressed this issue in City of Houston v. Stovall. 249 S.W.2d 246, 247-248 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.). Stovall involved two separate condemnation proceedings in which only two of the three appointed commissioners attended the special commissioner's hearing. The landowners appeared and entered oral objections to the two commissioners. The commissioners overruled the landowners' objections. The hearing commenced, and the two commissioners rendered, signed, and filed the award. Following the award, the landowners filed a motion to dismiss with the trial court, claiming a jurisdictional defect in proceeding with only two commissioners. The trial court granted the landowners' motion and dismissed the condemnation proceedings.

On appeal, however, the appellate court reversed, relying on two previously-published opinions, both of which upheld condemnation awards rendered by only two special commissioners. Quoting the Texas Supreme Court case of Missouri, Kansas & Texas Ry. Co. Of Texas v. Rockwall County Levee Improvement, the Stovall court stated: "the decision of the commissioners, appointed to assess the damages sustained by plaintiff in error, was valid though not unanimous." 297 S.W. 206

(Tex. 1927). The Stovall court further relied on Angier v. Balser. 48 S.W.668, 672 (Tex. Civ. App—Austin 1932, writ ref'd). In Balser, the court stated: "[i]t may be regarded as settled law that two of the three commissioners required to be appointed in condemnation proceedings may award damages." Balser was appealed to the Texas Supreme Court, who refused to hear the case, thus, wholly agreeing with the appellate court's decision and giving that decision the same precedential authority as if rendered by the Texas Supreme Court. Accordingly, an award rendered by only two of the three appointed special commissioners is valid and will not deprive the court of subject-matter jurisdiction or support a plea in abatement.

F. Award

After hearing the evidence, the duly appointed special commissioners must assess the damages and compensation to be paid and file the award with the Court. TEX. PROP. CODE. ANN. §21.042[a] and §21.048 (Vernon 1984). The special commissioners' power is limited to filing a fair compensation award for the condemnation in the proper court. TEX. PROP. CODE ANN.§ 21.014; Brazos River Conservation and Reclamation Dist. v. Allen, 141 Tex. 208, 171 S.W.2d 842 (1943). The special commissioners have no power to decide whether the condemnor has the right or authority to condemn the subject property. Amason v. Natural Gas Pipeline Co., 682 S.W.2d 240, 242 (Tex.1984). The commissioners must file a written statement of the award with court on the day the decision is made or on the next working day after the day decision is made. TEX. PROP. CODE ANN.§ 21.048. The clerk of the court shall notify the parties of the award by certified or registered mail not later than the next working day after the decision is filed. TEX. PROP. CODE ANN.§ 21.049. If the clerk fails to give the required notice, the time to file objections is tolled until the clerk sends proper notice. John v. State, 826 S.W.2d 138, 140-141.

The condemnation proceedings are administrative in nature through filing of the commissioners' award. Lower Nueces River Water Supply Dist. v. Cartwright, 160 Tex. 239, 328 S.W.2d 752,754 (1959). The trial court has no power to enjoin or otherwise hinder the special commissioners from proceeding with the condemnation inquiry. Peak Pipeline Corp. v. Norton, 629 S.W.2d 185, 186 (Tex.Civ.App.– Tyler 1982, no writ) (where condemnor failed to obtain landowner's consent before building pipeline, condemnor was still allowed to invoke the administrative condemnation procedure, and condemnee could not enjoin or abate proceedings before the award of damages). See also Gulf Energy Pipeline Co. v. Garcia, 884 S.W.2d 821 (Tex.App.– San Antonio 1994, no writ). Furthermore, a court has no power to continue or control the timing of the special commissioner's hearings. Id. "Due to the absence of statutory authority for judicial oversight, a trial court may not become involved in the administrative phase of the proceeding." In re State, 65 S.W.3d 383, 386 (Tex. App.— Tyler 2002, no pet.).

G. Objections to Award

A party to a condemnation proceeding may object to the findings of the special commissioners by filing a written statement of the objections and grounds thereon with the court of jurisdiction over the proceeding. The statement must be filed on or before the first Monday following the twentieth day after the day the commissioners file their findings/award with the court. TEX. PROP. CODE ANN. § 21.018(a). In the absence of timely filed objections, the court has no jurisdiction to do anything more than accept and adopt the award of the special commissioners as its judgment. Blasingame v. Krueger, 800 S.W.2d 391 (Tex.App.– Houston [14th Dist.] 1990, no writ).

The filing of objections converts the administrative proceeding into a judicial proceeding. Amason v. Nat. Gas Pipeline Co., 682 S.W.2d at 240, 242 (Tex. 1984). The filing of objections vacates the special commissioners' award, and a trial de novo is conducted. The special commissioners' award is not admissible as evidence on the issue of damages in an appeal. City of Houston v. Huber, 311 S.W.2d 488, 493 (Tex.Civ.App.– Houston 1958, no writ).

If a party files an objection to the findings of the special commissioners, the court shall cite the adverse party and try the case in the same manner as other civil actions. TEX. PROP. CODE ANN. § 21.018(b). Regardless of which party objects to the award of the special commissioners, the condemnor becomes the plaintiff and the condemnee-landowner becomes the defendant. However, the party filing the objections bears the burden of causing citation upon the adverse parties. Denton County v. Brammer, 361 S.W.2d 198 (Tex. 1962); Skaggs v. City of Keller, 880 S.W.2d 264 (Tex.App.– Fort Worth 1994, writ denied).

A condemnee who files objections to a condemnation award must, with reasonable diligence, fulfill his duty of causing the issuance of citation upon the condemnor. Upon a landowner's failure to act with such reasonable diligence, the landowner abandons his objections and exceptions as a matter of a law. Denton

County v. Brammer, 361 S.W.2d 198 (Tex. 1962). If the objecting party fails to secure service of citation on the other party within a reasonable period of time, the trial court should dismiss the objections for want of prosecution, and reinstate the special commissioners' award. State of Texas v. Ellison, 788 S.W.2d 868 (Tex.App.– Houston [1st Dist.] 1990, writ denied).

At trial, the condemnor generally has the burden of proof regarding the right to condemn and certain other matters. Religious of the Sacred Heart v. Houston, 836 S.W.2d 606, 613 (Tex. 1992). The landowner has the burden of proof concerning the value of the land taken by eminent domain authority and damages, if any, claimed by the landowner. IntraTex Gas Co. v. Hilbun, 485 S.W.2d 364 (Tex.Civ.App.– Houston [1st Dist.] 1972, no writ).

For tactical reasons, the landowner may wish to admit all issues except the value of the property taken and the damage to the remainder of property, as such admissions may be made in the objections or in a later admission filed with the court. When all other issues are conceded, the burden of proving the market value of the land becomes the landowner's. Thereafter, the landowner may assert and be granted the right to open and close the evidence and argument in accordance with Rule 266 of the Texas Rules of Civil Procedure. State v. Walker, 441 S.W.2d 168, 170 (Tex. 1969); Mullins v. State, 256 S.W.2d 454, 457 (Tex.Civ.App.– Waco 1953, no writ). The burden is on the landowner to bring forward all elements of damages that are reasonably foreseeable at the time of the taking and that might affect the market value of either the land taken or the remainder. LaGrange v. Pieratt, 142 Tex. 23, 175 S.W.2d 243, 246 (1943); Spindor v. Lo-Vaca Gathering Co., 529 S.W.2d 63, 650-66 (Tex. 1975)].

Additionally, in eminent domain cases, where condemnees file objections to the special commissioners' award, if the condemnees do not remove the award deposited in the registry of the court, it is the condemnor who has the burden to go forward with the case. Amason v. Natural Gas Pipeline Co., 682 S.W.2d 240, 242-243 (Tex. 1985); Skaggs v. City of Keller, Texas, 880 S.W.2d 264, 266 (Tex. App.–Fort Worth 1994, writ denied); Gordon v. Conroe Indep. Sch. Dist., 789 S.W.2d 395, 397 (Tex. App.–Beaumont 1990, no writ). In the Amason case, the trial court dismissed the case for want of prosecution "almost a year" after the filing of the special commissioners' award. Amason v. Natural Gas Pipeline Co., 682 S.W.2d at 241. The Texas Supreme Court held that "the trial court correctly dismissed this case for want of prosecution". Id. at 243. This case was dismissed well over one year [over fifteen months] after the case was transformed into a judicial matter.

H. Possession Pending Litigation

Subsequent to the duly appointed special commissioners' award, the condemnor may take possession of the property pending the results of further litigation, provided however, condemnor strictly complies with Texas Property Code §21.021 by depositing the amount of money awarded with the court. TEX. PROP. CODE. ANN. §21.021[a].

The landowner has the right to withdraw the award of the special commissioners. However, in doing so, the landowner waives the right to question compliance with jurisdictional prerequisites and may only challenge the issue of market value of the property. Coastal Industrial Water Authority, 592 S.W.2d at 599 (Tex. 1979); State v. Jackson, 388 S.W.2d 924, 925-926 (Tex. 1965). Furthermore, once a landowner has withdrawn the money from the registry of the court, the landowner may not redeposit the entire award with interest into the registry of the court and then contend the taking was unlawful. Tejas Gas Corp. v. Herrin, 716 S.W.2d 45 (Tex. 1986).

Section 21.021 of the Texas Property Code sets forth the requirements for a condemnor to assume possession of the property pending the results of further litigation. To secure the right to possess the property, the condemnor must pay either directly to the landowner or into the registry of the court, the amount awarded by the special commissioners. TEX. PROP. CODE ANN. § 21.021(a)(1). Additionally, the condemnor is required to deposit into the registry of the court, an amount equal to the commissioners' award, either in cash or in a surety bond and is required to execute a bond to secure payment of additional costs. TEX. PROP. CODE ANN. § 21.021(a)(2) and (3). Following compliance with the provisions of Section 21.021 of the Texas Property Code, the condemnor is entitled to take possession of the property.

V. THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN AND OTHER RIGHTS OVER PUBLIC USE LAND

A. Gas Utilities and Common Carrier Pipelines Have Right to Lay Lines in Public Road Rights of Way

In addition to its power to exercise the right of eminent domain, a gas utility has the right to lay and maintain a gas facility through, under, along, across, or over a public highway, a public road, a public street or

alley or public water. TEX. UTIL. CODE ANN.§ 181.022 (Vernon 1997). A gas utility proposing to lay or maintain a gas facility in the right-of-way of either a state highway or a county road which is not situated in a municipality must give proper notice of such proposal. If the proposal is for a state highway, proper notice of such proposal must be given to the Texas Transportation Commission. Alternatively, if the proposal relates to a county road, proper notice of such proposal must be given to the commissioners' court of the respective county. TEX. UTIL. CODE ANN.§ 181.024 (Vernon 1997). On receipt of notice, the Texas Transportation Commission or the commissioners' court may designate the location for the proposed gas facility. Id. Recently, some counties have attempted to impose fees for county road crossings. Such charges appear contrary to the statutory and case law. The statute requires notice but does not require state or county consent to the laying of facilities within the right-of-way of a state highway or county road outside the city limits of an incorporated city or town. City of Corpus Christi v. Southern Community Gas Co., 368 S.W.2d 144 (Tex.Civ.App.– San Antonio 1963, writ ref'd n.r.e.)

Common carriers enjoy similar rights with respect to state highway and county road crossings. The Texas Natural Resources Code also allows common carriers, upon filing a written election, to construct pipelines along, across, and under any public highway or stream in the state. TEX. NAT. R. CODE § 111.020 (Vernon 1993). The election is made by "filing with the commission a written acceptance of the provisions of this chapter expressly agreeing that, in consideration of the rights required, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter." TEX. NAT. R. CODE § 111.020(d) (Vernon 1993). Furthermore, this section provides that the common carrier's operations in this respect must not obstruct traffic on the proposed road or highway. Moreover, the carrier must restore the highway to its "former condition of usefulness following its construction activities. TEX. NAT. R. CODE § 111.020(b) (Vernon 1993). Section 111.020 also obligates the carrier to compensate the appropriate county or road district for any damage to the road by such operations. TEX. NAT. R. CODE § 111.020© (Vernon 1993). Section 111.021 allows the common carrier to lay its pipeline under any railroad or railroad right-of-way in the state. TEX. NAT. R. CODE § 111.021 (Vernon 1993).

Although gas utilities and common carriers are granted broad powers when crossing state and county roads, the same powers do not extend to public streets or alleys once the pipeline route enters a municipality or an incorporated or unincorporated city or town. However, a gas utility may exercise its authority under Section 181.022 of the Utility Code in a municipality with the consent of and subject to the direction of the governing body of the municipality. TEX. UTIL. CODE ANN. § 181.023 (Vernon 1997). A city has authority, where authorized by its charter, to make a street rental charge as consideration for granting franchise to a utility. City of Corpus Christi v. Southern Community Gas Co., 368 S.W.2d 144 (Tex.Civ.App.– San Antonio, writ ref'd n.r.e.). The primary concern for the pipeline company is the right of the city or municipality to withhold consent and thereby preclude construction and/or operation of the pipeline within the boundaries of the city or municipality. See West Texas Utilities Co. v. City of Baird, 286 S.W.2d 185 (Tex.Civ.App.– Eastland 1956, writ ref'd n.r.e.) Section 111.022 of the Texas Natural Resources Code places similar restrictions on common carriers. See also City of San Antonio v. United Gas Pipe Line Co., 388 S.W. 2d 231 (Tex.Civ.App.– San Antonio 1965, writ ref'd n.r.e.).

For instance, in Harlingen Irrigation Dist. Cameron County No. 1 v. Caprock Communications Corp., landowner sought to impose charges on Caprock who was laying a fiber optic cable along a state road. 49 S.W.3d 520 (Tex. App. – Corpus Christi 2001, no pet.). The court essentially found that Caprock had laid their line inside the State's easement based on the evidence of the case. Section 181.082 of the Texas Utility Code provides that a telephone or telegraph company may install a facility of the corporation along, on or across a public road, a public street, or a public water in a manner that does not inconvenience the public in the use of the road, street or water.

B. Prior Public Use Defense / Paramount Importance Test

In 1898, the Texas Supreme Court enunciated the prior public use defense also known as the Paramount Importance Test. Sabine & E. Tex. Ry. Co. v. Gulf & Interstate Ry. Co. of Tex., 46 S.W. 784 (Tex. 1898). In Sabine, the condemnor was a railroad corporation seeking to condemn land for a connecting rail line across a rail yard owned by another railroad corporation. Id. at 784-785. The condemnee challenged the condemnor's right to exercise eminent domain power. Id. The appellate court certified questions to the Texas Supreme Court for determination. Id. First, the appellate court inquired whether a condemnor could condemn public use property. Id. at 785. Second, the appellate court sought the appropriate standard to determine when a condemnor could condemn public use property. Id. at 785. In response to these certified questions, the Texas

Supreme Court enunciated the prior public use defense/Paramount Importance Test. Id. at 786-787.

In Sabine, the Texas Supreme Court stated:

> "[T]he law does not authorize the condemnation of property which has already been dedicated to a public use when such condemnation would practically destroy the use to which it has been devoted. No express authority is given by our statutes to condemn such property, and the authority cannot be implied from the general power conferred by the law unless the necessity be so great as to make the new enterprise of paramount importance to the public and it can not be practically accomplished in any other way. ... When such a conflict arises as that presented by the facts found in this case the private interest of the corporation can not be regarded, but it is the duty of the commissioners for condemnation and of the courts to keep in mind the interest of the public, which is superior to that of any private person. Since the property is already devoted to public use as found by the Court of Civil Appeals, it is not to the interest of the public to destroy that use for the convenience or interest of another corporation and to establish simply another public use. The authorities before cited fully sustain the proposition that such property will not be taken in condemnation proceedings when the taking will destroy the use to which it is devoted, unless it be found that the constructing road or the connection sought to be made is of so great importance to the public as to demand that another public use of less importance shall be set aside for its benefit and that the new enterprise can not be accomplished in any other practical way." Id.

More recently, the Texas Supreme Court ratified this legal doctrine in 1973. Austin Indep. Sch. Dist. v. Sierra Club, 495 S.W.2d 878, 880-881 (Tex. 1973). In Sierra Club, the Texas Supreme Court held that the prior public use defense/Paramount Importance Test was not a jurisdictional question, but rather an issue to be decided at the trial court level. Id. at 881. This clarification of the doctrine is important since it greatly reduces the likelihood of a successful collateral attack on a condemnation proceeding. Moreover, it greatly reduces the number of parties who can challenge condemnation proceedings falling within the doctrine.

The procedure to be employed in making determinations under the prior public use defense/Paramount Importance Test is best enunciated in a pair of opinions arising from the same case but handed down by different courts of appeals. City of Houston v. Ft. Worth and Denver Ry. Co., 619 S.W.2d 234 (Tex. App.–Houston [1st Dist.] 1981, writ ref'd n.r.e.); Ft. Worth and Denver Ry. Co. v. City of Houston, 672 S.W.2d 299 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.). In these cases, the City of Houston sought to condemn property owned by the railroad for roadway purposes. Id. at 235. The property was being used for railroad tracks and yards. Id. The railroad asserted the prior public use defense/Paramount Importance Test. Id. The Houston Court of Appeals [1st Dist.] held that once that defense was asserted, the railroad had the burden of proving that the proposed taking would "practically destroy" the existing use. Id. Upon such proof, the City would then have the burden of proving both the paramount importance of the new project and that the new project could not be accomplished in any other practical way. Id. Thus, the prior use defense/Paramount Importance Test creates a shifting burden of proof. The party asserting the defense must first prove that the taking will "practically destroy" the devoted and/or existing use. Upon such proof, the condemning authority may overcome the defense by proving paramount importance and lack of reasonable alternative. Id. The original opinion also infers that the issue is a question of fact for the jury. Id. at 237. The appellate court ruled on challenges to the jury charge and remanded, in part, based upon an improper jury instruction (holding that neither party was entitled to judgment based upon the facts as determined). Id. The case was remanded to the trial court based upon the instructions in the appellate court opinion. Id. at 238. A new trial was conducted and the City of Houston prevailed on the first part of the shifting burden and thus the second part was never reached. Fort Worth, 672 S.W.2d at 300. The condemnee filed its appeal in the 14th District after this second trial and challenged the sufficiency of the evidence to support this jury answer. Fort Worth, 672 S.W.2d at 300. In overruling this challenge, the Houston Court of Appeals [14th Dist.] directly cited the previous opinion of the Houston Court of Appeals [1st Dist.] in this same case. Id. The 14th Court of Appeals also adopted the shifting burdens of proof for the prior use defense/Paramount Importance Test. Id.

Importantly, a new public use does not "practically destroy" a prior public use merely because it impacts an ancillary part of that prior public use. Snellen v. Brazoria

County, 224 S.W.2d 305, 311 (Tex. Civ. App.–Galveston 1949, writ ref'd n.r.e.).

Even if a condemnee asserts the prior public use defense, the condemning authority is still entitled to a writ of possession pending a trial on the merits. Gulf State Pipe Line Co., Inc. v. Orange County Water Control and Improvement Dist., 526 S.W.2d 724 (Tex. Civ. App.–Beaumont 1975, writ ref'd n.r.e.). The Gulf State opinion creates a foothold for arguing that the prior public use defense applies not only to existing public uses but also to proposed public uses. All of the seminal cases in this area of Texas jurisprudence, other than the Gulf States opinion, imply or clearly state that the prior public use defense/Paramount Importance Test is applicable to "devoted" and/or "existing" public uses, not "proposed" public uses.

C. Health & Safety Code § 756.101 *et seq*.

This recently enacted Code provision is being utilized as a sword by pipeline companies to protect their easements and to make it difficult for others to cross such easements. The Code provides:

> A person may not build, repair, replace, or maintain a construction on, across, over, or under the easement or right-of-way for a pipeline facility unless notice of the construction is given to the operator of the pipeline facility and:
>
> (1) the operator of the pipeline facility determines that the construction will not increase a risk to the public or increase a risk of a break, leak, rupture, or other damage to the pipeline facility;
>
> (2) if the operator of the pipeline facility determines that the construction will increase risk to the public or the pipeline facility, the constructor pays the cost of the additional fortifications, barriers, conduits, or other changes or improvements necessary to protect the public or pipeline facility from that risk before proceeding with the construction;
>
> (3) the building, repair, replacement, or maintenance is conducted under an existing written agreement; or
>
> (4) the building, repair, replacement, or maintenance is required to be done promptly by a regulated utility company because of the effects of a natural disaster.

Under the provisions:

> (1) "Construction" means a building, structure, driveway, roadway, or other construction any part of which is physically located on, across, over, or under the easement or right-of-way of a pipeline facility or that physically impacts or creates a risk to a pipeline facility.
>
> (2) "Constructor" means a person that builds, operates, repairs, replaces, or maintains a construction or causes a construction to be built, operated, repaired, maintained, or replaced.
>
> (3) "Pipeline facility" means a pipeline used to transmit or distribute natural gas or to gather or transmit oil, gas, or the products of oil or gas. TEXAS HEALTH & SAFETY CODE § 756.101.

This subchapter applies to a construction or the repair, replacement, or maintenance of a construction unless there is a written agreement to the contrary between the owner or operator of the affected pipeline facility and the person that places or causes a construction to be placed on the easement or right-of-way of a pipeline facility. A Texas Department of Transportation right-of-way agreement qualifies under this subchapter.

However, this subchapter does not apply to (1) construction done by a municipality on property owned by the municipality, unless the construction is for private commercial use; or (2) construction or repair, replacement, or maintenance of construction on property owned by a navigation district or port authority created or operating under Section 52, Article III, or Section 59, Article XVI, Texas Constitution.

VI. CURRENTLY LITIGATED ISSUES

A. Jurisdictional Matters

1. Evidence Problems:

City of McKinney v. Eldorado Park, Ltd, 206

S.W.3d 185 (Tex. App.—Eastland 2006, pet. filed (Jan 18, 2007)) involved the issue of whether the parties to an eminent domain proceeding are confined to using the same evidence at trial that was before the special commissioners during the commissioner's hearing. Specifically, the parties presented expert testimony at the special commissioner's hearing. Id. at 189-191. Both parties' experts relied upon flood plain studies and maps issued by the Federal Management Agency (FEMA), which determined that a portion of the property being condemned was in a flood hazard area. Id. at 189.

After the commissioner's issued their award, the City appealed. The City then designated a new appraisal expert, who produced an expert report wherein he relied upon a drainage study and maps that differed from the FEMA materials presented at the commissioner's hearing. Id. at 190. The landowner then filed a plea to the jurisdiction, claiming that the material change in the issues to be tried from the issues presented at the commissioners's hearing divested the court of jurisdiction. Id. at 191. The trial court dismissed the proceeding for lack of subject-matter jurisdiction, and the City appealed.

In reversing and remanding, the court of appeals stated:

> When the City filed its objections to the award, this matter became a judicial proceeding in the trial court subject to a trial de novo. The special commissioners considered and decided the damages issues. The same damages issues were before the trial court during the judicial proceeding. The [parties] were not confined to using the evidence offered at the hearing before the special commissioners. Section 21.018(a) of the Property Code provides for a trial de novo, not a substantial evidence review, in the trial court. Nothing in Chapter 21 of the Property Code prohibits the parties from changing expert witnesses, identifying new expert witnesses, or using different documentary evidence after the hearing before the special commissioners. Thus, either party could have designated new witnesses or used different evidence on the damages issues in the trial court.

Id. at 193.

Eldorado Park has filed a petition for review with the Texas Supreme Court. To date, however, the high court has not yet granted or denied the petition.

2. Necessity

In the Board of Regents of the University of Houston System ("Board"), the Board condemned approximately 1 acre of property for the public purpose of complying with its Highway 35 right of way obligations. Board of Regents of the University of Houston System vs. FKM Partnership, Ltd., 178 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2005, pet granted). The landowners filed objections to the commissioner's award as well as a plea to the jurisdiction. Id. at 3-4. The Board later amended its petition, significantly reducing the amount of land taken and amending the stated purpose of the project (the Board's initial petition stated that the purpose of the condemnation was for road use, but its amended petition stated that the purpose was to expanded the campus). Id. at 4.

Following the Board's amendment, the landowners filed an amended plea to the jurisdiction claiming the Board failed to "(1) demonstrate public necessity for the taking of the smaller tract; (2) comply with the statutory prerequisites; and (3) negotiate in good faith for the smaller tract prior to filing the fourth amended petition." Id. Upon hearing, the trial court granted the landowner's plea to the jurisdiction.

On appeal, the appellate court held that a condemning authority has the right to amend its petition to take less property. Id. In so holding, the court reaffirmed long-standing Texas law that it is only in the event a condemning authority amends its petition to enlarge the taking that a court is divested of jurisdiction over the proceeding. Id. at 5-7. With respect to the good-faith negotiations and whether or not the Board had demonstrated a necessity in the taking, the Court remanded to the county court, instructing the court to abate the proceedings to permit the Board "a reasonable time to satisfy the statutory requirements." Id. at 8-9. Both parties have petitioned the Texas Supreme Court for review of the appellate court's decision. On December 15, 2006, the high court granted petition.

State v. PR Investments and Specialty Retailers, Inc., 180 S.W.3d 654 (Tex. App.—Houston [14th Dist.] 2005, pet. granted) involves issues somewhat similar to ones raised in City of McKinney and FMK Partnership. In PR Investments, the State of Texas condemned certain property for a planned highway project. Id. at 657-59. The State presented one plan of highway construction at the commissioner's hearing. Id. However, five days before trial, the State changed the specifics for the plan. Id. 659-660. Although the amendment did not change the amount of property sought to be condemned, the trial court found that the new plan substantially restricted safe access to the landowner's property, and therefore, the trial court dismissed the proceeding. Id. at 661-664.

The state appealed. The appellate court reversed the trial court. In doing so, the court held that nothing in the statutory scheme prohibits a condemning authority from changing its plan so long as the change does not enlarge the scope of the proceeding by adding land. Id. at 667. Like the holding in City of McKinney, the appellate court further held that there is no requirement that the issues in the trial be the same as those raised in the commissioner's hearing. Id.

Not surprisingly, PR Investments has been appealed to the Texas Supreme Court. The high court granted review of the petition on the same day it granted review of the FMK Partnership, December 15, 2006.

Another recent appellate court case addressing the necessity issue is Whittington v. City of Austin, 174 S.W.3d 889 (Tex. App.—Austin 2005, pet denied). In Whittington, the City of Austin attempted to condemn a landowner's property for the purpose of building a parking garage and an energy chilling plant. Id. at 894. Although in the context of a summary judgment motion, the appeal in Whittington, turned on whether or not the City of Austin had proven public use and public necessity. The Austin appellate court held that the City of Austin failed to establish either aspect.

Regarding "public use under Texas law", the court stated:

> At most, the City's summary judgment proof might establish that, as an abstract proposition, parking garages and chilling plants can be public uses under Texas law. But nowhere in the City's summary judgment evidence is there proof of any legislative determination to condemn the Whittingtons' property for one of these uses.

Id. at 900. Regarding "necessity", the court stated:

> Under these general concepts, the City had the summary judgment burden to conclusively establish that its governing body had made a 'a determination ..... of the necessity for acquiring certain property.' [citations omitted] Absent such proof, the City cannot meet its summary judgment burden on the substantive element that the taking actually advanced its intended public use.

Id. at 902.

Interestingly, the Austin appellate court indicated it believed the "necessity" aspect was jurisdictional, stating in footnote #11 that: "Even if the proof-of-necessity-determination requirement is implied in section 21.012, we believe it is distinguishable from the purely procedural requirements addressed in Hubenak, as it controls the substantive issue of whether the presumption of necessity arises." Id. at 904 (citations omitted).

The court then considered the proof required to establish the "necessity" aspect — first acknowledging that other courts appeared to require condemnors to demonstrate an explicit resolution from their governing body that a particular taking is "necessary" or "needed" to advance a specified public purpose. Id. (citing Mercier v. MidTexas Pipeline Co., *overruled on other grounds by* Hubenak, 141 S.W.3d 172 (resolution of governing board stated that company "needed to build and operate the pipeline to serve a public purpose" and made findings regarding the best route); Anderson v. Teco Pipeline, 985 S.W.2d at 565 (proof of both unanimous consent of shareholders and unanimous consent of board of directors stating that pipeline was needed to serve a public purpose, and describing route); Saunders v. Titus County Fresh Water Supply Dist. No. 1, 847 S.W.2d 424, 425 (Tex. App.- Texarkana 1993, no writ) (express finding by water supply corporation board that taking was necessary to settle lawsuit); Anderson v. Clajon Gas Co., 677 S.W.2d 702, 704 (Tex. App.-Houston [1st Dist.] 1984, no writ) ("Normally, a resolution of the board of directors ... is the proper method of determining and declaring public necessity."); see also Stirman v. City of Tyler, 443 S.W.2d 354, 357-58 (Tex.Civ.App.-Tyler 1969, writ ref'd n.r.e.) (construing two resolutions together to constitute required determination of necessity).

However, the Whittington court concluded that the City of Austin's resolution was clearly deficient in this regard and, in addition, the City of Austin had not produced any evidence of orders, other resolutions or minutes that might have elaborated on the proceedings underlying board resolution. Id. at 903-04; see also Horton v. County of Mills, 468 S.W.2d 876, 877-78 (Tex. Civ. App.—Austin 1971, no writ).

The court then emphasized that absent an adequate resolution, proof of other "affirmative acts" must manifest a determination by the City's governing body that the taking was necessary to advance its stated and intended public use. Id. at 902; 903-04. The Austin appellate court concluded that the City of Austin had not produced any proof of such acts. Id. at 905. Thus, the City of Austin had failed to establish the "necessity" aspect as a matter of law, either via a sufficient resolution or through "affirmative acts" which illustrated

the ostensible public use. Id.

B. Valuation Theories

1. Undivided Fee Rule

State v. Ware, while not dealing with pipeline issues, is instructive in determining how damages are to be awarded. 86 S.W.3d 817, (Tex. App.–Austin 2002, no pet.). As a general rule, in determining adequate compensation in eminent domain proceedings, a landowner must be paid for what he has lost, rather than what the condemnor has gained. A condemnor is only liable for compensation for the property actually taken by the condemnation. This case has a good discussion of the *undivided fee rule*. Simply stated, the rule states that the sum of the parts cannot exceed the whole. Numerous attempts are made to segregate the land into its constituent parts such as clay, timber, gravel, etc. By placing unit prices on each of the enumerated elements, a tract of land may be worth thousands of dollars per acre, but if the land as a whole were sold, it would only bring the market value as land.

Additionally, in Dahl v. State of Texas, the State filed a statutory condemnation proceeding, and the landowner filed an inverse condemnation proceeding on the same tract of land. 2002 WL 31769422 (Tex.App.–Hous [14th Dist.] 2002). (Note: The Court concludes that this is not permissible by the very definition of the two actions.) In Dahl, there was a vendor's lien against the subject tract of land in the amount of $611,060.00. The special commissioners awarded $400,000.00 as total compensation. Upon jury a trial, the jury found the market value of the tract of land condemned to be $502,941.00. The owner of the security interest was attempting to recover the difference between the $611,060.00 and $502,941.00. The Court concluded that the amount of the indebtedness against the property has no bearing on the market value of the property, as the law requires the condemnor to pay fair market value.

2. Subdivision

Another attempt to add value to property is to take undeveloped land and value it according to what it would bring if already developed into a subdivision, taking into account the costs of the development and discounting to present values. This has been attempted a number of times in different ways by many attorneys representing landowners. However, to date, such attempts have not been successful in Texas. The Texas Supreme Court has recognized that this method requires many hypothetical valuations. Because of the resulting speculation, a question of reliability arises. Therefore, the fact finder should not be allowed to consider testimony regarding a purely speculative development project. Southwestern Bell Tel. Co., v. Radler Pavilion Ltd. P'ship, 77 S.W.3d 482 (Tex. App – Houston [1st Dist.]2002, pet denied). Also See Guadalupe-Blanco River Authority v. Kraft, 77 S.W.3d 805 (Tex. 2002) wherein the Texas Supreme Court held that the property owner's expert opinion as to value, based on comparisons of current sales to a hypothetical tract vastly dissimilar from the easement taken, was not reliable. Also See City of Harlingen v. Estate of Sharboneau, 48 S.W.3d 177 (Tex. 2001) in which the Supreme Court of Texas held that the use of the subdivision development method of appraisal, as applied by the landowner in this case, was not relevant to determining the market value of condemned, undeveloped acreage. This is a very important case in that it describes the various methods to value property in condemnation cases. Traditionally, such methods include the comparable sales method, the cost method, and the income method. The Court held that in this particular case, the landowner's appraisal failed to count for basic marketplace realities. The Court did not specifically disapprove of the subdivision development method of appraisal, but in this case, the appraisal was insufficient to establish a current fair market value. NOTE: See Justice Baker's dissent.

3. Pipeline Corridor

The court in Bauer v Lavaca-Navidad River Auth., 704 S. W. 2d 107 (Tex. App. – Corpus Christi 1985, writ ref'd n.r.e.) gave life to the theory that partial takings for easements were takings of separate economic units. The Court held that the trial court erred by refusing to consider the landowner's evidence of the market value of his land as a "pipeline corridor". The landowner maintained that the highest and best use of the property being "taken" was for use as a pipeline corridor and not the same as the remaining parcel that he owned. In this regard, the landowner argued that he was entitled to have comparable sales of other pipeline easements admitted to determine the value of the easement that the condemnor sought.

However, the Supreme Court in Exxon Pipeline Co. v. Zwahr, held that the general rule for determining the fair market value of property taken by eminent domain is the "before and after rule", which requires

measuring the difference in the value of the land immediately before and immediately after the taking. 88 S.W.3d 623, (Tex. 2002). Texas law permits landowners to introduce testimony that the condemned land is a *self-sufficient economic unit*, independent from the remainder of the parent tract, with a different highest and best use and a different value from the remaining land. When the condemned land is a self-sufficient economic unit, independent from the remainder of the parent tract, with a different highest and best use and different value from the remaining land, the market value of the severed land may be determined without reference to the remaining land. However, when the portion of land taken cannot be considered as a separate economic unit, the "before and after" method requires determining the market value by evaluating that portion taken as a proportionate part of the remaining land.

The Court further recognized that the objective of the judicial process in the condemnation process is to make the landowner whole. In determining market value, the *project-enhancement rule* provides that the fact finder may not consider any enhancement to the value of the landowners' property that results from the taking itself. To compensate the landowner for value attributable to the condemnation project itself would place the landowner in a better position than he would have enjoyed had there been no condemnation. NOTE: This case contains a clear and succinct outline with respect to the admissibility of expert testimony under Texas Rule of Evidence 702 as applicable in the condemnation process. In this regard, compare this case with City of Harlingen v. Estate of Sharboneau, 48 S.W.3d 177 (Tex. 2001) and Guadalupe-Blanco River Authority v. Kraft, 77 S.W.3d 805 (Tex. 2002).

This decision by the Supreme Court appears to severely limit the possibility that a landowner can introduce evidence of other sales of pipeline easements as comparable sales. It would appear that instance would be limited to a true pipeline corridor situation. Perhaps when a condemnor is condemning an entire pipeline corridor which actually is a strip of land that goes a stated distance and is owned by one owner (such as Exxon), other sales of easements within that corridor just might be used as comparable sales.

In a recent case, the Houston Court of Appeals (1st Dist) followed the Zwahr case and held that the factfinder may not consider any enhancement to the value of the landowner's property that results from the taking itself. To compensate a landowner for value attributable to the condemnation project itself, would place the landowner in a better position than he would have enjoyed. Westtex 66 Pipeline Co. v. Baltzell, 2003 WL 21665312 (Tex. App.–Houston [1st Dist]). The Zwahr Court also held that the right to "assign" the easement obtained by condemnation was not a separately compensable damage. The landowner was entitled to the difference in value of the land before and after the condemnation.

In Bulanek v. WesTTex 66 Pipeline Co., 209 S.W.3d 98 (Tex. 2006), a condemning authority took a 50-ft wide strip across undeveloped land. The strip paralleled and overlapped seven existing pipeline easements. Id. at 100. The landowner's experts testified that the highest and best use of the land was as a pipeline corridor. The trial court allowed the testimony. Upon appeal, the Houston Court of Appeals [1st Dist.], based on the decision in Zwahr, reversed the trial court award. Id.

The landowners sought review by the Texas Supreme Court. The high court held that the record did not establish the existence of a pipeline corridor, and thus, the question of whether a pipeline corridor could constitute a separate economic unit for the purposes of valuation could not be reached. Id. The landowners argued that the case should be remanded for a new trial because they did not have the benefit of the Zwahr opinion at the time of trial and would have proceeded differently otherwise. Id. The Texas Supreme Court agreed and remanded the case for further proceedings. It will be interesting to see if the landowners establish the existence of a pipeline corridor and whether the appellate courts will eventually reach the issue of whether a pipeline corridor can be evaluated as a separate economic unit.

4. Highest and Best Use

The highest and best use of a tract of land is generally defined as: "[t]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value." City of Sugar Land v. Home and Hearth Sugarland, L.P., 215 S.W.3d 503 (Tex. App.—Eastland 2007, pet. filed) (citing Appraisal Institute, The Appraisal Of Real Estate 269 (9th ed.1987)). Four factors are utilizing in determining the highest and best use — 1) legal permissibility, 2) physical possibility, 3) financial feasibility, and 4) maximal productivity. Id. 511. Thus, consideration must be given to "all of the uses to which the property is reasonably adaptable and for which it is, or in all reasonable probability will become, available within the foreseeable future." Id. (quoting State v. Windham, 837 S.W.2d 73, 77 (Tex.1992). Conversely, uses which are purely speculative and unavailable must

not be used. Id.; see also City of Austin v. Cannizzo, 153 Tex. 324, 267 S.W.2d 808, 814 (1954).

In City of Sugar Land, the condemning authority condemned a portion of land that was being used as a hotel. The landowner's expert introduced evidence that the highest and best use of the property taken was for restaurant purposes. It was undisputed that 1) the property was zoned for commercial purposes and 2) no restaurant existed on the property. The court stated that "[w]hen property is being valued for purposes other than that for which the property is being used at the time of the taking, before testimony is admissible as to the value for those purposes, it must be shown that the other use is one for which the property is adaptable, that such use is reasonably probable within a reasonable time or the immediate future, and that such use enhances the market value of the property." Id. at 512; see also Sw. Bell Tel. Co. v. Radler Pavilion Ltd. P'ship, 77 S.W.3d 482, 486 (Tex.App.-Houston [1st Dist.] 2002, pet. denied).

The evidence before the court established that other hotels in the area had adjacent restaurants. The experts testified that the property was adaptable to restaurant development in the near future and same would enhance the property's value. The testimony likewise established that the proposed use was "legally permissible, physically possible, financially feasible, and maximally productive." Id. Accordingly, the appellate court held that the trial court did not abuse its discretion allowing the testimony as evidence of "highest and best use." Id.

VII. CONCLUSION

The coming year promises more litigation regarding the process of condemnation. The condemnor's attorney will continue to work with his client to acquire properties on their behalf. The condemnee's attorney will continue to look for some procedural defect that will justify the dismissal of the proceeding, thus creating value in the case that exceeds the property's value. What interesting times to be exercising the power of eminent domain!