

The Eminent Domain Process & Your Role as a Special Commissioner

Harris County Civil Courts at Law

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U.S. CONSTITUTION,
5TH AMENDMENT

. . .nor shall private
property be taken for
public use, without just
compensation.

ART. 1, §17, TEXAS
CONSTITUTION 1876

No person's property shall
be taken, damaged or
destroyed for or applied to
public use without
adequate compensation
being made. . .

Who Can Take?

- The State & its Agencies
 - The Transportation Code gives Texas Department of Transportation the power to condemn property for a public use.
 - The Legislature can delegate this power
- Common Carriers (Pipelines)
 - If a company will own, operate, or manage a pipeline that transports crude, coal, carbon dioxide, hydrogen, or the products of carbon gasification **to or for the public**. A company that will build and transport only its own products for its own use is not a common carrier.
- Utility Companies
 - The Texas Utility Code gives Utility Companies the power to condemn private land for a public use.

You are ruling on a Person's Constitutional Rights

14th Amendment

...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*We the People
of the United States*

Fifth Amendment

*No person shall be deprived
of life, liberty, or property,
without due process of law;
nor shall private property
be taken for public use,
without just compensation.*

Ratified December 15, 1791

TeaParty.com

Property Code Chapter 21

Statutory Provisions

CH 21 of the Property Code

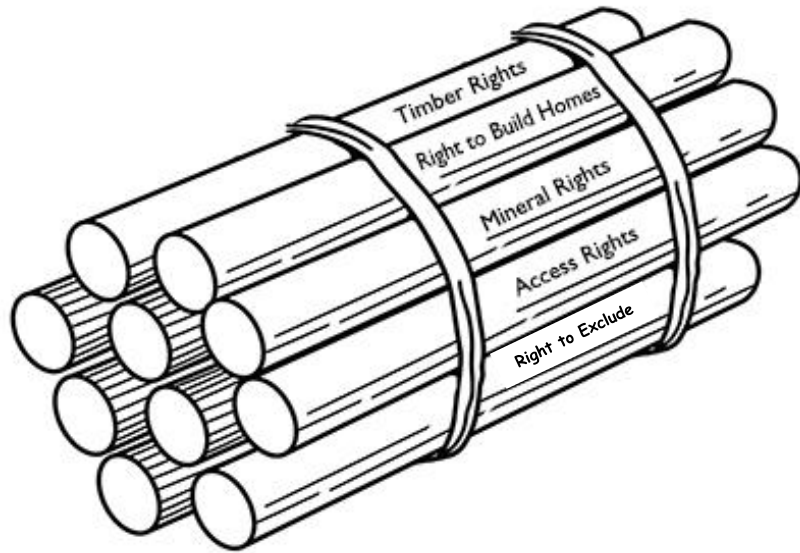
- Initial Offer, Final Offer, Landowners Bill of Rights, Filing the Petition
 - Special Commissioners (Section 21.014)
 - Judge must appoint 3 SC's no later than the 30th day after Petition is filed & 2 Alternate SC's
 - Each Party may Strike a Special Commissioner
 - Hearing (Section 21.015)
 - “The special commissioners shall schedule a hearing for the parties at a place that is as near as practical to the property being condemned or at the county seat ...”
 - In Person/Virtual Hearings/Hybrids?
 - Objections to the Award (Section 21.018)
 - Each party may object to the Award issued

What will a
condemnor
get?

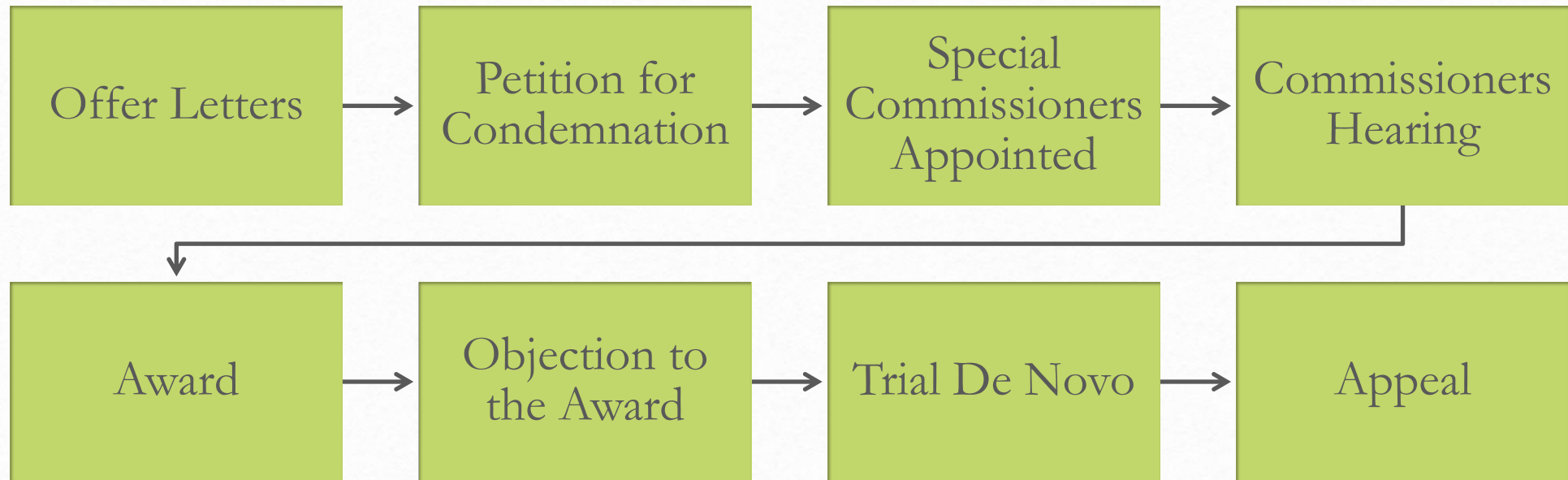
The Taking

- Real Property
 - The State & its agencies can take in fee simple, meaning that the property owner will not own the property (except for mineral rights)
 - Example: Road Expansions
- Easement
 - Easement – an agreed upon nonpossessory right to use someone’s land for a specific purpose. The property will become subservient to the easement.
 - The Petition will tell you what land and rights the condemnor is taking from the property owner.
 - *See White v. Natural Gas Pipeline Co. of Am.*, 444 S.W.2d 298, 300 (Tex. 1969) (“Mere promissory statements or declarations of future intentions by a condemnor are invalid.”)
 - Temporary Easements on the property are also a “taking” for which condemnors are required to pay for

Easements: Taking a Property Owner's Sticks



- What is commonly taken?
 - Right to Exclude
 - Right to use/enjoy the property
- Outlines what a condemnor can do on the property
 - Consider what is being constructed and how the condemnor can change or upgrade their facilities in the future.
 - Landowners one bite of the apple
 - What does the Petition say?



Road Map of the Condemnation Process

Administrative Phase

Petition Filed

- After Statutory requirements are met by the condemnor, the condemnor may file the lawsuit.
- The petition begins the condemnation proceedings.

Special Commissioners Appointed

- The court where the petition is filed will appoint three special commissioners to preside over the hearing & 2 Alt.
- The commissioners are disinterested **property owners** in the county where the land is located who determine Just Compensation.

Special Commissioners hearing

- Both parties will present evidence, to prove Just Compensation.
- Like a trial in that there is evidence, witnesses, and an award.
- The rules of evidence are not strictly applied.
See Dueitt v. Harris Cty., 249 S.W.2d 636 (Tex. App. 1952)

Award & Objection

- After the parties rest, the commissioners determine the award for the taking.
- Either party may object to the award. Objecting results in a Trial De Novo
- Interest will be paid by Condemnor on the difference between award and final judgment

Special Commissioners Hearing



- What to expect:
 - Can be as formal as a trial or informal. You will hear evidence on what is just compensation
 - Witnesses may include: Appraisers, land planners, cost estimators, engineers, landowners, etc.
- Your Role
 - Evidentiary Issues
 - The special commissioners **shall** admit evidence on: the value of the property, injury to the property owner, the benefit to the property owner's remaining property, and the use of the property for the purpose of the condemnation (Tex. Prop. Code § 21.041)
 - Rules of Evidence are not strictly applied during the Hearing. *See Dueitt v. Harris County*, 249 S.W.2d 636 (Tex. App.—Galveston 1952) (rehearing denied).
 - What is Just Compensation
 - You should base you decision on the **evidence presented** by both sides

What is Just Compensation?

The Big Question

- In Texas Just Compensation includes:
 - The Fair Market Value of the property being taken as of the **Date of Take**
 - Any Damages to the Remaining Property due to the taking
 - Cost to Cure
- How is Fair Market Value determined?
 - There are three recognized approaches
 - Cost Approach
 - What it would cost to rebuild the improvements today less depreciation of buildings. Then add in the Land Value.
 - Income Approach
 - Measures the value of property based on its known ability to produce income in its current use.
 - Comparable Sales Approach
 - The value indicated by recent sales of comparable properties in the market (as vacant/as improved)

Getting to Just Compensation

Fair Market Value: Highest and Best Use

- “[T]he price which a property would bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it, taking into consideration all for the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.” *See City of Austin v. Cannizzo*, 267 S.W.2d 808, 815 (Tex. 1954).
- The landowner is entitled to have a fact finder consider, in determining its fair market value, the highest and best use to which the land is adaptable.
- Four criteria are used to determine what the highest and best use is:
 - What is legally permissible?
 - What is financially feasible ?
 - What is physically possible?
 - What will result in the maximum productivity?

Highest and Best Use – Farmland or Development?



Highest and Best Use – Farmland or Development?



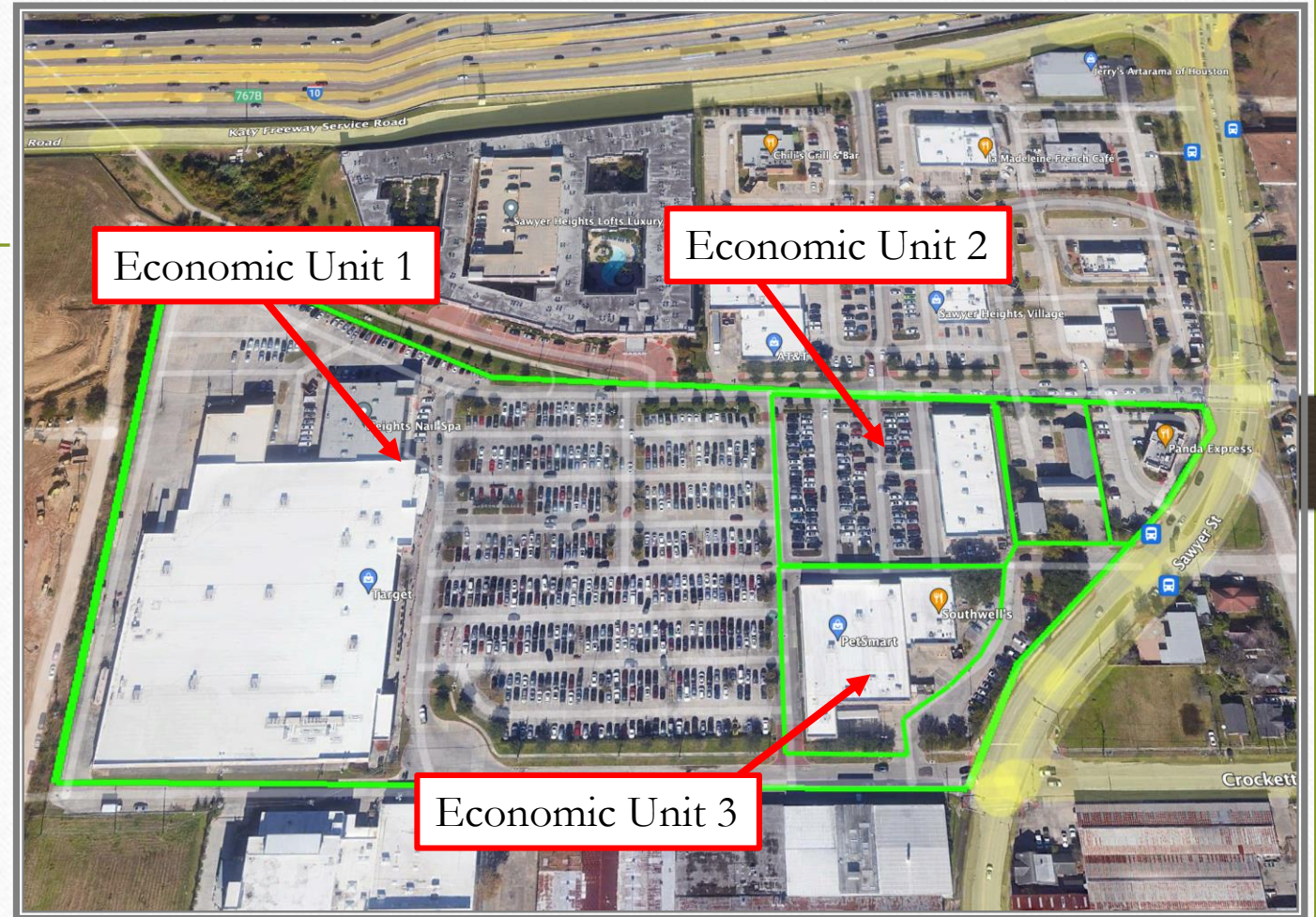
Highest and Best Use – Economic Units

- *In re State*, 355 S.W.3d 611 (Tex. 2011)
 - Landowners could present non-speculative evidence that condemned tract contained several self-sufficient economic units
- How would this 15-acre tract sell to achieve its highest and best use?
 - As one whole 15-acre tract?
 - Sell Economic Units/Pad Sites?



Highest and Best Use – Economic Units

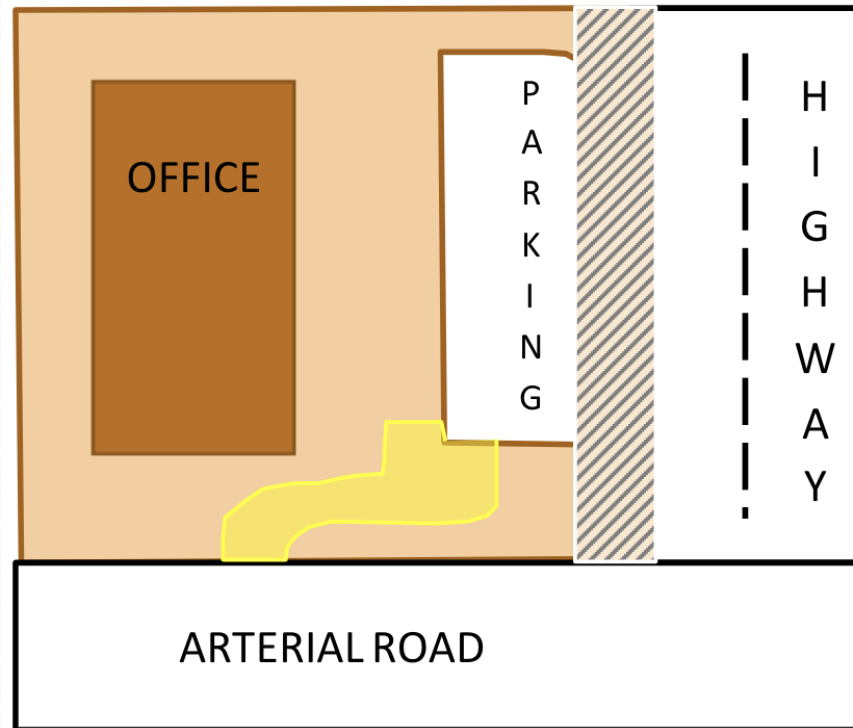
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- How would this 15-acre tract sell to achieve its highest and best use?
 - As one whole 15-acre tract?
 - Sell Economic Units/Pad Sites?
- **Keep the Highest and Best Use of a property in mind**



State v. Carpenter, 89 S.W.2d 979 (Tex. 1936) -
Cost to Cure

The First Question

How much does it cost to cure the property after the taking?



Second Question:

Does this cure make the property owner whole? If not, determine damages.

Getting to Just Compensation

Damages

- The Property Code (21.042) **requires** Special Commissioners to assess damages to the value of the remaining property after the taking.
- Remainder damages are calculated by taking the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after the taking.
- Ex.: proximity, safety, functional obsolescence
 - Functional Obsolescence – The property may still function but not as well as before the taking

Landowner's Perspective



- How Development via condemnation affects Landowners
 - Costs of a lawsuit (experts, exhibits, legal fees, time, etc.)
 - Out of pocket expenses limit how much/if a property owner can stand up for their constitutional right to just compensation
- Virtual/Hybrid/In Person Hearings
 - Not everyone has equal access to reliable internet or devices
 - This is a Landowners constitutional right being affected and Landowners should have the option to cannot sit face to face with those ruling on this right
 - Texas Property Code requires the SCH to be as close as possible to the property being taken

City of
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CITY OF HOUSTON CONDEMNATIONS

45% UTILITY EASEMENTS

New/Upgraded Water Lines

New/Upgraded Sewer Lines

40% STREET WIDENING EASEMENTS

Corner Clips, New Sidewalks, Wider Streets, Bicycle Lanes,
Upgrades to Drainage & Utility Lines

15% FEE TAKINGS

New Detention Ponds/Basins

New Lift Stations & Sewage Treatment Plants

New Parks & Hike Bike Trails

New Libraries or Government Buildings

Condemnor's Perspective

- Eminent Domain found in the US and Texas Constitution
- Texas Constitution requires Adequate Compensation
- Acquiring Property always for a Public Purpose
- Service to the Community, the Condemnee, and the Court
- Hearing is Key to Possession and Maintaining Project Timelines
- Landowner Attendance is not Mandatory
- Fair and Impartial Decisions Based on Evidence and Fair Market Value

Appointment of Special Commissioners

- The court appoints three Special Commissioners to determine just compensation.
- Special Commissioners must be real property owners and residents of the county in which the condemnation proceedings are filed.
 - Texas Landowner's Bill of Rights

Duties/Powers of the Commissioners

- The commissioners shall swear to assess damages fairly, impartially, and according to the law;
- The commissioners may rule on request/motion to reschedule the hearing.
- The commissioners may rule on evidentiary objections/motions.
- The commissioners may compel attendance of witnesses and the production of testimony, administer oaths, and punish for contempt in the same manner as a county judge. § 21.014

Sometimes We Just Have to Condemn

No Communication

Title Issues

Estate/Probate

Divorce

Multiple Parties

Lienholder

HEARING SCHEDULING AND ADMISTRATIVE PROCESS

- Scheduling: Timely Communication is Critical!
- Correct phone number and email address and responsive to both?
- Project Deadlines or Technical Issues sometimes dictate Timing of the Hearing Setting
- Harris County Property Owner?
- Live, Virtual, or Hybrid? Verify!
- Executed Documents:
 - Oath of Special Commissioners**
 - Award Signed by all three Commissioners**
 - Statement of Service (matching hours) and W-9 (legal name required)**
 - Service of Defendants Accomplished**

HUSCHBLACKWELL

Husch Blackwell's Condemnation Team

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Veronica Craven, Paralegal

Chival Washington, Paralegal

Recent Legislative Changes to the Texas Property Code

- HB 2730
- SB 721
- HB 4217
- HB 1707

HB 2730

- Signed on June 16, 2021, effective on January 1, 2022
- Texas Property Code Section 21.014(a)
- **Special Commissioners – Strikes and Services**
 - Requires the appointment of three Special Commissioners and two alternates.
 - Parties will have **10** days after appointment of or **20** days after the filing of the petition to strike a Commissioner
 - Notice of strike must be electronically filed and served on the parties
 - The first alternate will replace the stricken Commissioner
 - The non-striking party has **three** days after the date of the filing of the notice to strike or **the date of the original strike deadline** to make an additional strike.

HB 2730 continued

- Texas Property Code Section 21.014(d)
 - Property owner(s) must receive a copy of the signed order appointing Special Commissioners.

SB 721

- Signed on May 18, 2021, effective on September 1, 2021
- Texas Property Code Section 21.0111 (a)(1)
- Disclosure of appraisal reports:
 - Requires an entity with eminent domain power to disclose to the property owner “any and all current and existing appraisal reports produced or acquired by the entity relating specifically to the owner’s property and used in determining the entity’s opinion of value.”
 - **Requires the disclosure no later than three business days before the special commissioner’s hearing and applies if an appraisal report is to be used at the hearing.**

HB 4217

- Signed on June 18, 2023, effective immediately on June 18, 2023
 - Granting public utility agencies with the power of eminent domain needed for projects or purposes.
 - Public utility agencies are not required to give bond for appeal or bond for costs in any condemnation suit or deposit more than the amount of any award in any suit.
 - Applies only to public utility agency domiciled in a county with a population of more than 1.2 million.

HB 1707

- Signed on June 12, 2023, effective immediately on June 12, 2023
 - Prohibiting the extensions of eminent domain power to open-enrollment charter schools.
 - Classifying open-enrollment charter schools as school districts for purposes of zoning, project permitting, platting, utility services, and other regulations.

2023 Case Law Update

- ***Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, 669 S.W.3d 178 (Tex. May 19, 2023)**
 - Does governmental immunity bar a condemnation suit brought by one political subdivision against another political subdivision?
 - The Irrigation District filed a plea to the jurisdiction asserting that governmental immunity applied to condemnation suits and the Legislature has not waived that immunity. The trial court granted the plea and the court of appeals affirmed.
 - The Texas Supreme Court reversed, holding that sovereign immunity and governmental immunity does not apply to condemnation suits between political entities; the Court also reiterated the paramount-public-important doctrine controls in condemnation of land already dedicated to a public use.

2023 Case Law Update continued

- *Hlavinka v. HSC Pipeline Partnership*, 650 S.W.3d 483 (Tex. 2022)
 - Background: The Hlavinkas own several thousand acres of land in Brazoria County, across which run several privately negotiated pipeline easements. After failing to negotiate a deal with the Hlavinkas, HSC Pipeline Partnership, LLC, initiated condemnation proceedings to take an easement for its pipeline.
 - At trial, the Hlavinkas challenged:
 - Whether Texas Business Organizations Code gave HSC condemnation authority;
 - Whether any authority conferred by the Code applies to pipelines that transport polymer-grade propylene; and
 - Whether HSC is a common carrier for public use.

2023 Case Law Update continued

- *Hlavinka v. HSC Pipeline Partnership*, 650 S.W.3d 483 (Tex. 2022)
 - HSC moved for partial summary judgment as to its condemnation authority. The trial court granted HSC's motion for summary judgment and denied the Hlavinkas' jurisdictional plea.
 - **As evidence of the condemned easement's value, the Hlavinkas sought to admit testimony of two recent arms' length easement sales to other pipeline companies across the Hlavinkas' land. The trial court granted HSC's motion to exclude this testimony, thus limiting the land's market value to agricultural value.**
 - The court of appeals determined that the Texas Business Organizations Code granted independent condemnation authority and that polymer-grade propylene qualifies as an "oil product."
 - The court of appeals reversed the summary judgment in favor of HSC because it concluded that whether the pipeline served a public use was a fact question for the jury to resolve. **The court of appeals also reversed the exclusion of evidence, holding that the testimony was admissible as evidence of the property's market value.**

2023 Case Law Update continued

- *Hlavinka v. HSC Pipeline Partnership*, 650 S.W.3d 483 (Tex. 2022)
- Issues:
 - Whether a pipeline company transporting polymer-grade propylene can be a common carrier with condemnation authority under the Texas Business Organizations Code, and;
 - **Whether a property owner may testify during condemnation proceedings about recent arms' length transactions with other pipeline companies as evidence of the current highest and best use of the property in determining the market value of the easement taken.**

2023 Case Law Update cont.

- *Hlavinka v. HSC Pipeline Partnership*, 650 S.W.3d 483 (Tex. 2022)
 - Holding:
 - Affirmed: The Code grants condemnation authority, and polymer-grade propylene is a qualifying product under that section.
 - **Affirmed: A property owner may testify to arms' length sales of easements to other pipeline companies as evidence of the condemned property's highest and best use.**
 - Exclusion of such evidence was harmful error.
 - Reversed: Public use presents a legal question, and HSC's undisputed evidence demonstrates public use.
 - The Court remanded the case to the trial court for a new trial to determine the market value of the property taken.

Garcia Law
Firm

Bernardo
Garcia

Bernardo's Tips: The Questioning

The Questioning

- a) Let the Lawyers or Parties ask Questions of the witnesses
- b) Do not “take over” the Questioning
- c) However, if you have a question that is not addressed during the direct or cross examination, you can ask questions AFTER the Parties ask their questions first
 - a) For Example, you can ask an appraiser to explain their “adjustments” made to comparable properties
- d) If testimony is Confusing – Ask parties to Clarify or explain



Bernardo's Tips: Analysis

Analysis

- a) Make your Decision Based on the *Credible* Evidence
 - a) If One Side has NO Evidence, go with other side
 - b) BUT, one side can elicit “evidence” from the other side’s witness, and that *is* “evidence”
 - c) The Sworn Statement of a Property Owner is Evidence
 - d) If One’s Side’s Evidence is NOT CREDIBLE, that is the same as “no evidence”
 - e) You Do not have to take one Side’s Value. SCs are NOT Bound by the Expert’s Numbers – we are bound by the “Credible Evidence”



Bernardo's Tips: A Few More "Don'ts

Don't....

- a) Don't Make The Hearing Longer than it needs to be
 - a) Just make sure both sides have an opportunity to be heard and present their evidence
 - b) Don't Look for Comparable Properties or sales of nearby properties on your iPhone!
 - c) Don't forget to swear in the witnesses



Questions from the Audience???

Thank you for your time.

CLE Credit

- "An application for accreditation of this activity has been submitted to the MCLE Committee of the State Bar of Texas and is pending."
- Course Number:
- Course Hours: 1.50