

# The Eminent Domain Process & Your Role as a Special Commissioner

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Harris County Civil Courts at Law

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## Presented By:

**Alejandra Galvan (Marrs Ellis & Hodge LLP)**

**Justin Hodge (Marrs Ellis Hodge LLP)**

**Tuan Nguyen (Harris County's Attorney Office)**

**Manpreet Singh (Fanaff, Hoagland, Gonzalez, &  
Baldwin)**

**Fran Watson (F. Watson Law PLLC)**

**Jeffrey Newport (Law Offices of Jeffrey R. Newport)**

**Michael Narsete (Michael S. Narsete P.C.)**

Marrs Ellis  
& Hodge  
LLP

Justin  
Hodge

Alejandra  
Galvan

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 <sup>3</sup> use.

# You are ruling on a Person's Constitutional Rights

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## 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

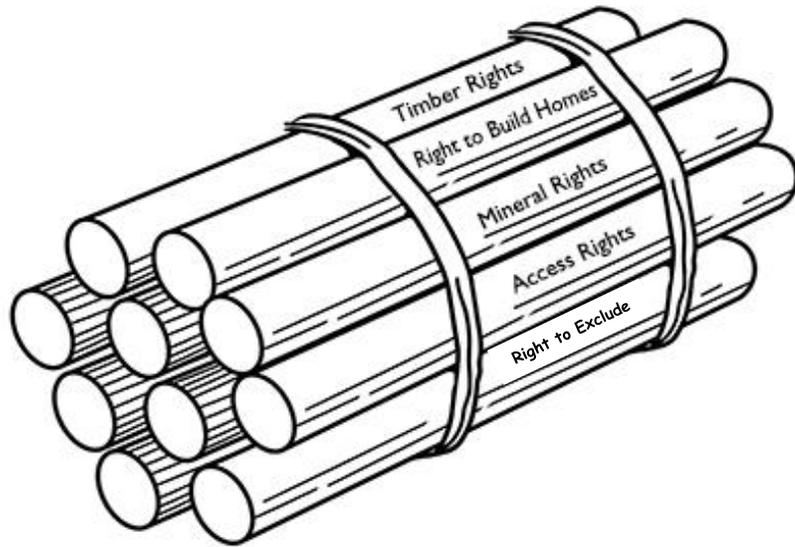
- CH 21 of the Property Code governs the exercise of eminent domain
  - Initial Offer, Final Offer, Landowners Bill of Rights, Filing the Petition
  - Special Commissioners (Section 21.014)
    - Judge must appoint 3 SC's no later than the 30<sup>th</sup> day after Petition is filed & 2 Alternate SC's
    - Duty: "to assess damages to the owner of the property being condemned"
    - Each Party may Strike a Special Commissioner
    - "The Special Commissioners shall swear to assess damages fairly, impartially, and according to the law."
  - 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 ..."
      - must wait at least 20 days after appointment & give 20 days notice
  - Objections to the Award (Section 21.018)
    - Each party may object to the Award issued

What will a  
condemnor  
get?

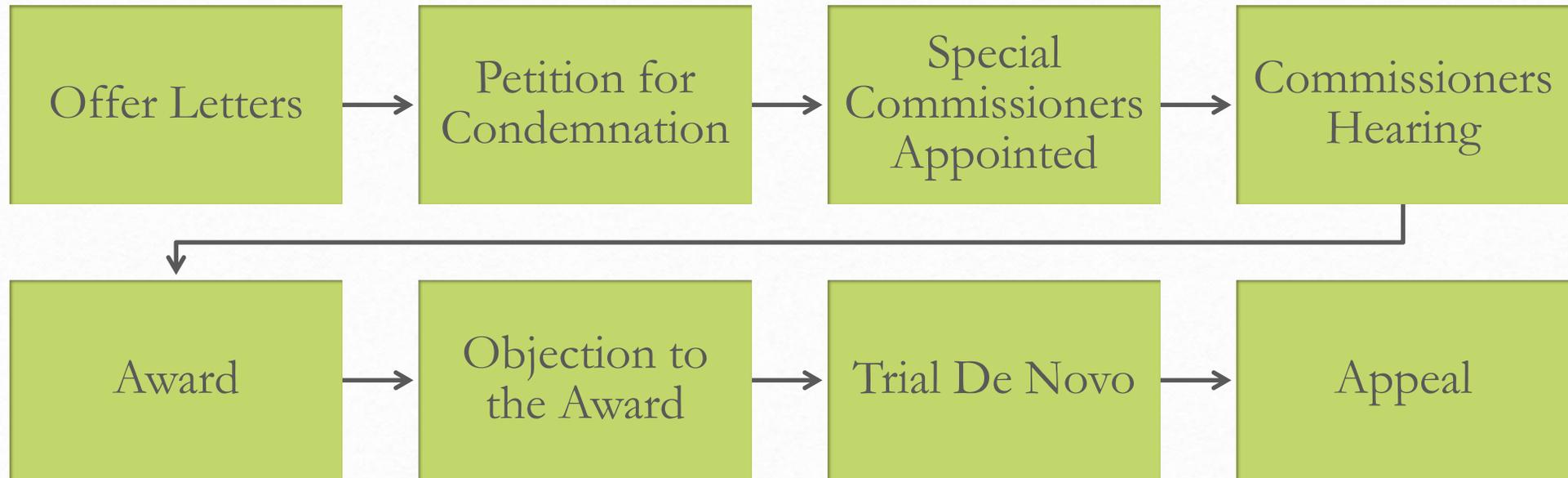
## The Taking

- 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.”)
    - “what if’s”
  - Temporary Easements on the property are also a “taking” for which condemnors are required to pay for

# Easements: Taking a Property Owner's Sticks

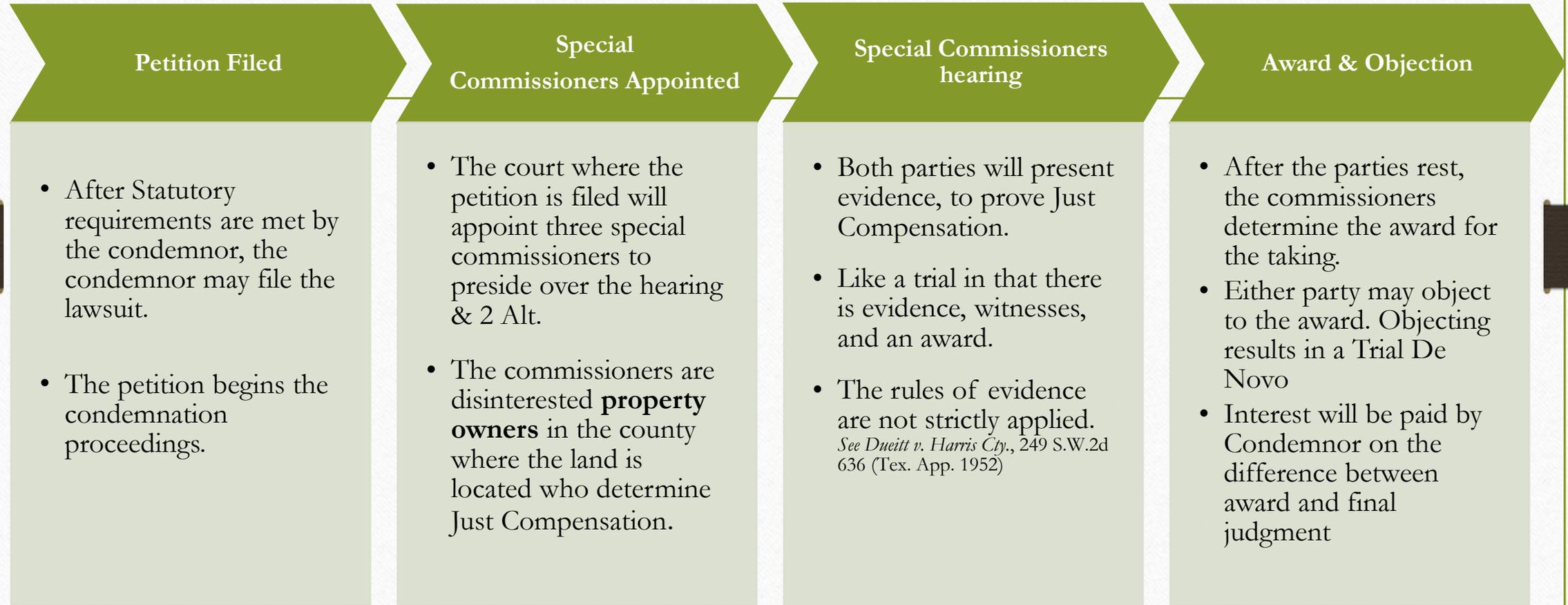


- What is commonly taken?
  - Right to Exclude
  - Right to use/enjoy the property
- Outlines what a condemnor can do on the property
  - Consider what is being constructed and how the condemnor can change or upgrade their facilities in the future.
  - Landowners one bite of the apple
  - What does the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



# Road Map of the Condemnation Process

# Administrative Phase



# 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.
    - Typical Issues: Fair Market Value of the Land, Damages to the Remainder
- Your Role
  - Evidentiary Issues
    - The special commissioners **shall** admit evidence on: the value of the property, the 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
    - Remember, the condemnor is **required** to pay adequate/just compensation under the Texas and U.S. Constitution

# 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
      - The value of the properties earning power based on the capitalization of its income
    - 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?



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ROAD



# 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?



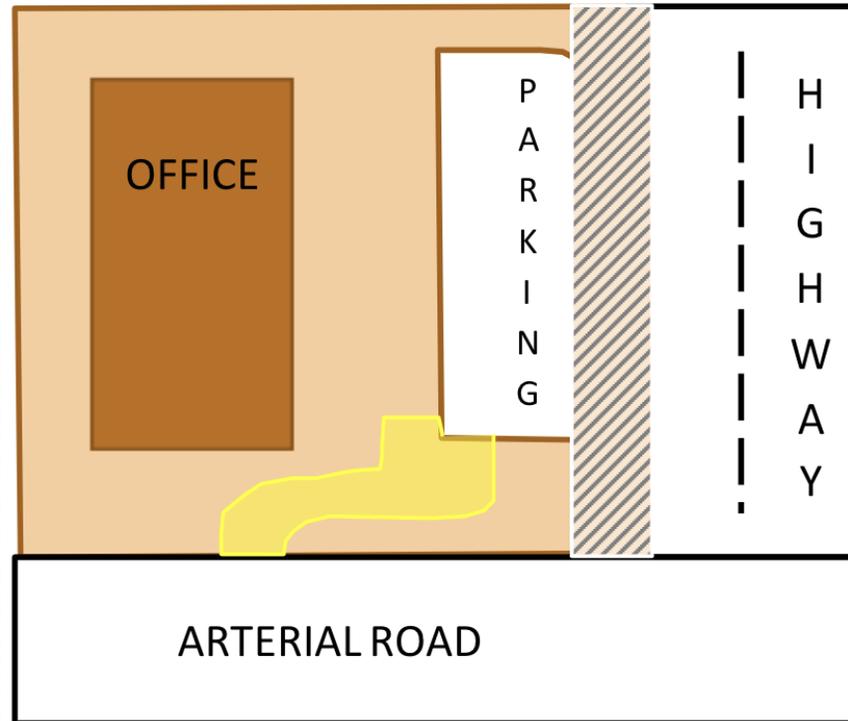
# Highest and Best Use – Economic Units

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- **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** you need  
To answer is: How Much  
Does it Cost to Cure the  
Property after the Taking?



**Second Question** you need to  
Ask is: Does this new plan still  
Damage the remaining property?

# 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
- COVID 19 & Special Commissioners Hearings
  - Not everyone has equal access to reliable internet or devices
  - This is a Landowners constitutional right that is being affected and Landowners now 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
- Balance of Private Property Rights & the Need for Public Projects

Harris  
County  
Attorney's  
Office

Tuan Nguyen

Rachell Hunt

Hermelinda  
Venegas





**Don Stricklin, SACA**  
Director-Real Estate Div.



**RaChell Hunt,**  
**ACA**



**Tuan Nguyen,**  
**ACA**



**Amanda Medford**



**Hermelinda Venegas**



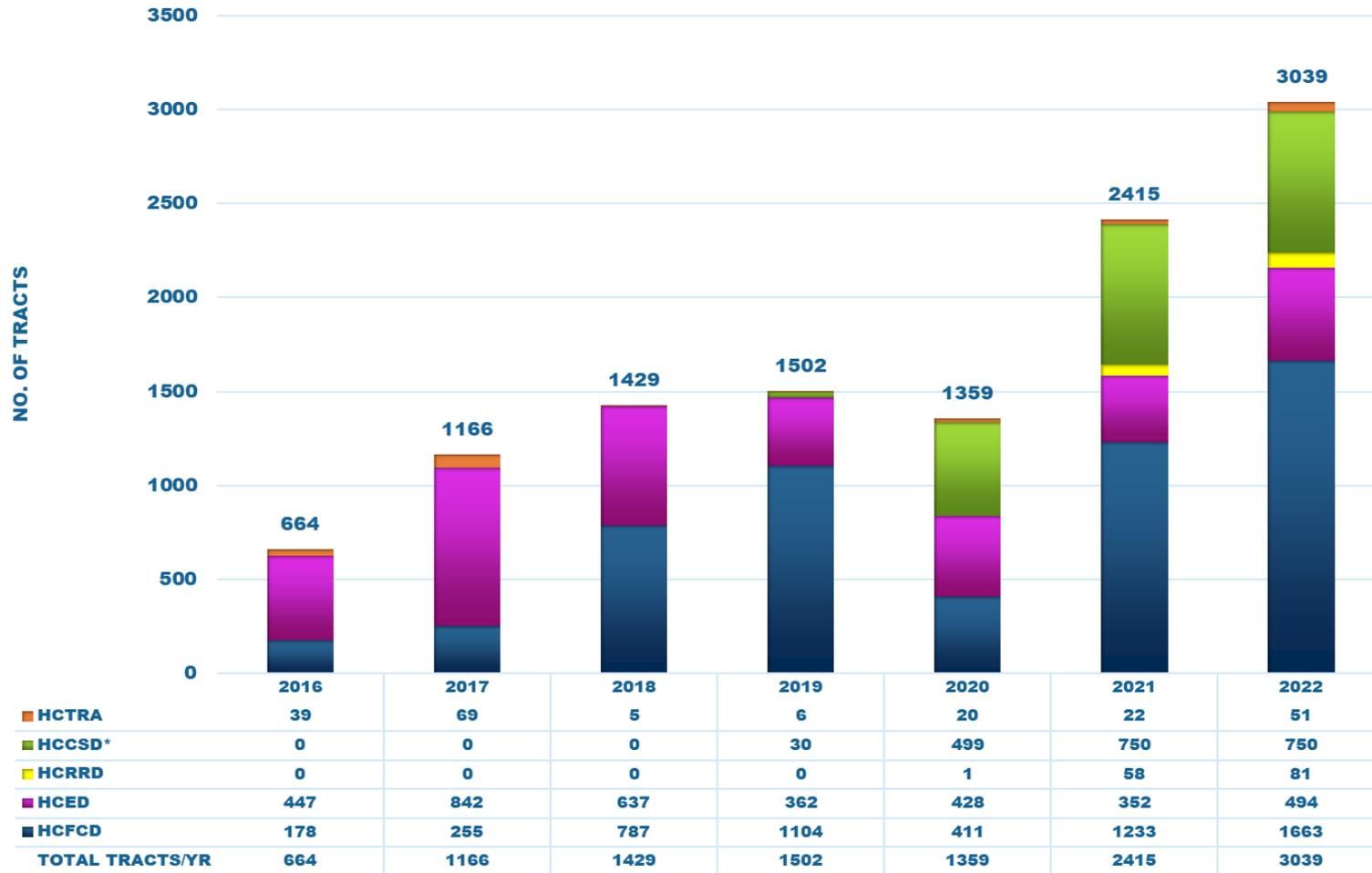
**Dawn McEwen**

# Condemnor's Perspective

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- Acquiring Property for Public Purpose
- Upholding the Constitution
- Service to the Community the Condemnee and Special Commissioners
- Fair and Impartial Decisions Based on Evidence and Fair Market Value

# GROSS TRACT ACQUISITION REQUESTS



## Number of Cases

2017	60	5%
2018	115	8%
2019	123	8%
2020	103	7.5%
2021	77	3%

## Other Reasons for Referral

- No Communication
- Title Issues
- Estate/Probate
- Divorce
- Multiple Parties
- Lienholder

# HEARING SCHEDULING AND ADMISTRATIVE PROCESS

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- Scheduling: Timely Communication is Critical
- Documents:
  - Notice of Hearing**
  - Oath of Special Commissioners**
  - Award and Exhibit**
  - Return Acknowledgment**
  - Statement of Service and W-9 (legal name required).**

# Legislative Update

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- House Bill 2730-
  - Section 21.014 (a) of the Property Code
    - 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.
  - Section 21.014(d)
    - Property owner(s) must receive a copy of the sign order appointing Special Commissioners.

# Legislative Update (Cont.)

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- Senate Bill 721
  - Section 21.0111 (a-1)
    - Requires disclosing of any and all current and existing appraisal reports that will be used at the Special Commissioners hearing to be produced to the property owner(s) 3 days prior to

Special  
Commissioners

Manpreet  
Singh

Fran  
Watson

# Do's and Don'ts

## Part 1- Before the Hearing

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### Do

- Sign the Oath and other paperwork
  - Pre-COVID: Travel to Courthouse.
  - COVID: Coordinate with Mobile Notary.
  - Post-COVID: Push for in person by parties
- Be on the lookout for and reply to emails and calls from those coordinating the hearing schedule.
- Think about logistics (parking, distance, directions, etc..)

### Don't

- Review the case materials before the hearing. Even if sent in advance by parties in the case.
- Look up the values of any real estate on any agency or property website.
- Travel to the property in question.

# Do's and Don'ts

## Part 2- The Hearing

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### Do

- Be mindful that this is a legal proceeding, and you are an extension of the Court.
  - Be on time
  - Be courteous
  - Keep your camera on and pay attention
- Be empowered- Ask questions and get clarity.
- Consider having a “foreperson” who takes the lead.
- Care about the larger issue.

### Don't

- Assume all special commissioners are attorneys.
- Assume all hearings are going to be the same.
- Focus on the quantity of the evidence. Quality is important.
- Shy away from camaraderie with other commissioners.
- Allow outside influences dictate the proceeding.

# Do's and Don'ts

## Part 3- After the Hearing

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### Do

- Complete and return post-hearing documents
  - Award
  - Statement of Service
  - W-9
    - Individual name and SSN  
(**No Firm Name or EIN**)

### Don't

Don't pad your  
hours

Attorney  
Ad Litem

Jeffrey  
Newport

# Necessity for an Attorney Ad Litem

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- Necessity
- History
- Duties
- AAL Check List
- Role during a Special Commissioners Hearing

# The Wrap Up

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- Final Reports
- Billing
- Discharge Documents

A  
Mediator's  
View

Michael  
Narsete

Judge's  
Notes

Judge  
Williams

# CLE Credit

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- "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: 174140210
- Course Hours: 2.00