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PROCEDURAL ISSUES IN EMINENT DOMAIN

By John P. Baker¹

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I. OVERVIEW

In Texas, an eminent domain proceeding is a two-part procedure involving an administrative proceeding and, if necessary, a judicial proceeding.² A condemnor initiates the administrative phase by filing a petition with the appropriate court.³ After the condemnor files the petition, the judge appoints three special commissioners to assess the property owner's damages.⁴ The special commissioners conduct a hearing, enter findings, and determine the property owner's damages from the taking, if any.⁵ From the time the condemnor files its petition up to the time the special commissioners issue the award, the proceedings are administrative in nature.⁶

Either party may object to the special commissioners' findings by filing written objections and the grounds for such objections with the

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2. *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 241 (Tex. 1984).

3. See TEX. PROP. CODE ANN. § 21.012(a) (West Supp. 2010).

4. *Id.* § 21.014(a) (West 2004).

5. See *id.* §§ 21.014, 21.018; *Metro. Transit Auth. v. Graham*, 105 S.W.3d 754, 757 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

6. *Amason*, 682 S.W.2d at 242.

court that has jurisdiction over the proceeding.⁷ The trial court's eminent domain jurisdiction is appellate, not original or concurrent.⁸ Accordingly, the parties may not avoid the administrative hearing before the special commissioners even if they wish to do so.⁹ Filing an objection triggers the trial court's appellate jurisdiction, and the cause becomes a judicial proceeding in the trial court.¹⁰

II. ADMINISTRATIVE PHASE

A. *Determination of Public Necessity*

The entity granted eminent domain power determines whether the particular project is a public necessity.¹¹ A resolution of the board of directors of a corporation with the power of eminent domain is the proper method for determining public convenience and necessity.¹² Prior to passing a resolution authorizing the property's purchase, any offer made by an agent of the condemning authority is not a binding offer on the corporation, thus it is not an offer under section 21.012 of the Texas Property Code.¹³ Accordingly, the best practice for a condemning authority is to pass a resolution prior to making a final offer to a landowner so that the offer is a valid offer under section 21.012. If a condemning authority is unable to agree with the landowner on the compensation for the property, the condemning authority may then file its petition.

B. *The Petition*

The petition must (1) describe the property to be condemned and state (2) the purpose for which the entity intends to use the property, (3) the property owner's name if known, (4) that the entity and the property owner are unable to agree on damages, and (5) that the condemnor provided the property owner with the landowner's bill of rights statement pursuant to section 21.012.¹⁴

1. Property Description

A court does not acquire jurisdiction over a condemnation proceeding unless the petition contains an adequate description of the prop-

7. TEX. PROP. CODE ANN. § 21.018 (West 2004).

8. *State v. Nelson*, 334 S.W.2d 788, 791 (Tex. 1960).

9. *Id.*

10. *Amason*, 682 S.W.2d at 241–42; *Graham*, 105 S.W.3d at 757.

11. *ExxonMobil Pipeline Co. v. Bell*, 84 S.W.3d 800, 804 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

12. *Phillips Pipeline Co. v. Woods*, 610 S.W.2d 204, 207 (Tex. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

13. *See Isaac v. Houston*, 60 S.W.2d 543, 545 (Tex. Civ. App.—Galveston 1933, writ dism'd).

14. *See* TEX. PROP. CODE ANN. § 21.012(b) (West Supp. 2010).

erty being condemned.¹⁵ To obtain an adequate description of the property, it is usually necessary for the condemnor to conduct a survey of the property. Many landowners, however, will not allow the condemnor to enter onto their property for such a survey. In those situations, the condemnor may obtain an injunction against the landowner to prevent the landowner from interfering with its survey activities on the property.¹⁶

2. Purpose of Condemnation

A condemning authority must state the taking's purpose in its petition and do so as specifically as possible to avoid a landowner's challenge. Recently, and largely in response to the widely publicized *Kelo v. City of New London* case,¹⁷ the Texas Legislature, through Senate Bill 7 and its amendments, passed legislation that prohibits the use of eminent domain for economic development.

3. Owner of Property

The petition must state the owner of the property if known.¹⁸ A condemnor may not acquire an interest in land from a party it does not condemn. Accordingly, the condemning authority must complete title work to determine the proper owner of the property and name the owner in its petition.

4. Unable to Agree Requirement

The Property Code requires that the condemning authority and the landowner be "unable to agree" on damages prior to filing the petition.¹⁹ One of the most significant shifts in the law regarding the "unable to agree" requirement came in the Texas Supreme Court's recent *Hubenak v. San Jacinto Gas Transmission Co.* decision.²⁰

The *Hubenak* case actually consisted of nine different cases from different courts of appeal throughout Texas that were consolidated into one opinion by the Texas Supreme Court. Although the court decided several issues in *Hubenak*, they all revolved around section 21.012(a) of the Texas Property Code. Section 21.012(a) provides:

If the United States, this state, a political subdivision of this state, a corporation with eminent domain authority, or an irrigation, water improvement, or water power control district created by law wants

15. *Lin v. Hous. Cmty. Coll. Sys.*, 948 S.W.2d 328, 332 (Tex. App.—Amarillo 1997, pet. denied).

16. *Lewis v. Tex. Power & Light Co.*, 276 S.W.2d 950, 955 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

17. *See Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that economic development is a valid public purpose).

18. TEX. PROP. CODE ANN. § 21.012(b)(3).

19. *Id.* § 21.012(b)(4).

20. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004).

to acquire real property for public use but is unable to agree with the owner of the property on the amount of damages, the condemning entity may begin a condemnation proceeding by filing a petition in the proper court.

The landowners in *Hubenak* argued that the trial courts lacked jurisdiction to hear the condemnation proceedings because the condemning authorities did not plead or prove that they had negotiated in "good faith" with the landowners for the pipeline easements sought by the condemning authorities. The court held the "unable to agree" requirement is mandatory but not jurisdictional.²¹ The court explained the legislature intended the "unable to agree" requirement to forestall litigation. Imposing jurisdictional requirements would undermine legislative intent because the dismissal of a condemnation proceeding may prompt additional litigation.

The court's decision reversed years of case law that required a condemning authority to plead and prove it had negotiated in good faith with a landowner before jurisdiction vested in the trial court. Prior to the court's decision in *Hubenak*, if the landowner raised the issue of good-faith negotiations, then a trial court would hold a "*Hipp* hearing" to determine if a condemning authority negotiated in good faith with a landowner. The term "*Hipp* hearing" comes from the case of *State v. Hipp*.²² The *Hipp* court was the first court in Texas to state that the "unable to agree" requirement only requires one offer by the condemning authority. Although the *Hipp* court determined that section 21.012(a) does not require prolonged negotiations between the parties, the court did determine the provision required both a "*bona fide offer* to a landowner that the condemner in good faith feels is the amount of compensation due" and the landowner's rejection of the offer.²³ The *Hipp* court went on to state that an offer is "*bona fide*" if it is "based on a reasonably thorough investigation and honest assessment of the amount of just compensation due the landowner as a result of the taking."²⁴ If, during the course of a *Hipp* hearing, a trial court determined that the condemning authority had not made a bona fide, good-faith offer to the landowner, the condemnation proceeding was considered void and would be dismissed for lack of jurisdiction. This result was very troublesome for a condemning authority because the condemning authority could be left without an easement and open to wrongful possession or trespass charges if the condemning authority had already taken possession of the property.

After the *Hubenak* court decided that the "unable to agree" requirement is not jurisdictional, the court went on to articulate a remedy for a condemning authority's failure to comply with the

21. *Id.* at 180.

22. *State v. Hipp*, 832 S.W.2d 71 (Tex. App.—Austin 1992, writ denied).

23. *Id.* at 77–78.

24. *Id.* at 78–79.

requirement. The court stated that the appropriate remedy for such a situation is abatement. That is, if the condemning authority has not met the “unable to agree” requirement, the trial court should simply abate the proceeding so that an offer can be made by the condemning authority and negotiations can take place between the parties. The court went on to state that “[i]f at the end of a reasonable period of time, the condemnor has not made an offer, the condemnation proceeding should be dismissed.” In other words, the court decided that even if a condemning authority has made no previous offer, a condemnation proceeding should not be dismissed for noncompliance with the “unable to agree” requirement of section 21.012(a). Rather, the proceeding should simply be abated so negotiations can take place. A trial court should dismiss a condemnation proceeding for a condemning authority’s noncompliance with the “unable to agree” requirement only if no offer is made once a proceeding is abated.

The next issue the court decided in *Hubenak* was whether “unable to agree” requires condemning authorities to negotiate in “good faith” with a landowner for the property it seeks from the landowner. The landowners claimed that there were fact questions as to whether the condemning authorities had negotiated with them in good faith. The court, however, held that section 21.012(a) does not “contemplate a subjective inquiry into ‘good faith.’”²⁵ Once again, the court noted that the purpose of the “unable to agree” provision is to forestall litigation and that an inquiry into the subjective good faith of the parties would be antithetical to this purpose. Accordingly, all that is required to meet the “unable to agree” requirement is an offer from the condemning authority and a rejection or ignoring of the offer by the landowner.²⁶

The landowners also claimed that the condemning authorities did not meet the “unable to agree” requirement because the condemning authorities’ final offer letters included three matters that were not included in their condemnation petitions. Additionally, the landowners argued that the condemning authorities could not legally acquire the rights included in those three matters by condemnation. The three matters at issue were the right to transport oil and other products, the right to assign the easements, and a warranty of title to the easements.

After examining each of the three additional matters, the court held that the condemning authorities had satisfied section 21.012’s “unable to agree” requirement even though the condemnation petitions did not include the additional matters. In reaching its decision, the court stated that “to require exact symmetry between the purchase offer and the property rights to be condemned could create an impediment to the condemnation process that is not contemplated by the purpose

25. *Hubenak*, 141 S.W.3d at 186.

26. *Id.*

of the ‘unable to agree’ requirement.”²⁷ The court went even further to state that it is generally “sufficient that the parties negotiated for the same physical property and same general use that became the subject of the later eminent domain proceeding, even if the more intangible rights sought in the purchase negotiations did not exactly mirror those sought or obtainable by condemnation.” In other words, although a condemning authority must condemn for the same physical property and use it negotiated with the landowner, the condemning authority can negotiate for certain intangible rights that may not be included in its condemnation petition.

Because *Hubenak* is a relatively recent decision, it has not yet been fully examined by the lower courts. Prior to *Hubenak*, it was rather clear that negotiations must be conducted in good faith. One example of a negotiation method that may now be acceptable is the “per rod” method of calculating the value of property a condemning authority seeks from a landowner. Many pipeline companies have traditionally offered a landowner the same “per rod” or “per lineal foot” dollar amount to acquire easement rights regardless of the individual characteristics or qualities of the landowner’s property. Such offers were previously held insufficient to satisfy the good faith negotiation standard required by courts prior to *Hubenak*.²⁸ Many pipeline companies, however, continue to use the “per rod” method of acquiring easement rights. Since the *Hubenak* decision, this method has not been successfully challenged to an appellate court as a violation of the “unable to agree” requirement. *Hubenak* will certainly be examined more closely in the coming years, but even if a lower court determines that a condemning authority’s use of the “per rod” valuation method does not satisfy the “unable to agree” requirement, the only remedy will be for the court to abate the proceedings for further negotiations.

a. Landowner’s Bill of Rights

The condemnor must provide a copy of the landowner’s bill of rights to the landowner not later than the seventh day before the date the condemnor makes its final offer to the landowner.²⁹ If, however, the condemnor in any manner represents to the landowner that it has the power of eminent domain, then the condemnor must provide a copy of the landowner’s bill of rights to the landowner either before or at the same time it makes such a representation.³⁰ The bill of rights statement must be sent by first class mail, or otherwise provided, “to the last known address of the person whose name is listed on the most recent tax roll of any appropriate taxing unit authorized by law to levy

27. *Id.* at 191.

28. *Brinton v. Hous. Lighting & Power Co.*, 175 S.W.2d 707, 710 (Tex. Civ. App.—Galveston 1943, writ ref’d w.o.m.).

29. TEX. PROP. CODE ANN. § 21.012(a) (West Supp. 2010).

30. *Id.*

property taxes against the property.”³¹ The statement must be printed in an easily readable type font and size, and if the condemning entity is a governmental entity, the statement must be made available on its Internet website, if technologically feasible.³²

C. Venue

The Property Code provides that “[t]he venue of a condemnation proceeding is 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 in any county in which at least a part of the property is located.”³³ The Property Code further provides that “[e]xcept where otherwise provided by law, a party initiating a condemnation proceeding in a county in which there is one or more county courts-at-law with jurisdiction *shall* file the petition with any clerk authorized to handle filings for that court or courts.”³⁴

In the case of *State v. Gracia*, the Texas Department of Transportation (“TxDOT”) filed a condemnation petition in district court and then later moved to dismiss the case so that it could re-file the case in the county court-at-law.³⁵ The landowners asked for attorneys’ fees and expenses under section 21.0195 of the Property Code. TxDOT argued that the district court could not award such expenses because it did not have jurisdiction over the case as it was not filed in the proper court. The Fort Worth Court of Appeals disagreed with TxDOT and held that section 21.013(a) is not a jurisdictional provision. Rather, the court held that it is a procedural provision. The court further explained that to accept TxDOT’s argument would render section 21.001 meaningless. Section 21.001 states that “[d]istrict courts and county courts-at-law have concurrent jurisdiction in eminent domain cases.”³⁶

D. Special Commissioners

Once the petition is filed, the judge “shall appoint three disinterested freeholders who reside in the county as special commissioners to assess the damages of the owner of the property being condemned.”³⁷ The special commissioners have the authority to compel witness attendance, compel testimony, administer oaths, and push for contempt in the same manner as a county judge.³⁸ The special commissioners

31. *Id.*

32. *Id.* § 21.012(b)(1)–(2).

33. *Id.* § 21.013(a) (West 2004).

34. *Id.* § 21.013(b) (emphasis added).

35. *State v. Gracia*, 56 S.W.3d 196 (Tex. App.—Fort Worth 2001, no pet.).

36. *Id.* § 21.001.

37. *Id.* § 21.014(a).

38. *Id.* § 21.014(c).

may not decide any issues regarding the condemnation other than the issue of damages.³⁹

E. *Notice of Hearing*

Each party to an eminent domain proceeding is entitled to notice of the proceeding no later than the eleventh day before the day of the hearing.⁴⁰ Notice may be served by delivering a copy of the notice to the party, the party's agent, or the party's attorney.⁴¹ The party may also be served by publication if: (1) the property being condemned belongs to a nonresident and there has been no personal service on the owner; (2) the identity or the residence of the property owner is unknown; or (3) the property owner avoids service of notice by hiding.⁴²

F. *Decision of Special Commissioners*

After hearing evidence and assessing damages, the special commissioners must make a written statement of the damages and file the statement with the court on the day the decision is made or the next working day.⁴³ The statement should include the amount of damages due to the landowner as a result of the taking. If the taking involves a whole taking of the entire tract or parcel of property, the damage to the landowner is the market value of the property at the time of the special commissioners' hearing.⁴⁴ If, however, the taking is only a partial taking, then "the special commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner, including the effect of the [taking] on the value of the property owner's remaining property."⁴⁵ The damages awarded to a landowner for the effect of the taking on the value of the remaining property are often referred to as "remainder damages."

G. *Appeal*

Any party to a condemnation proceeding may object to the findings of the special commissioners. Such objections must be filed on or before the first Monday following the twentieth day after the special commissioners' decision is filed with the court.⁴⁶ If the special com-

39. See *Lo-Vaca Gathering Co. v. Gardner*, 566 S.W.2d 366, 368 (Tex. Civ. App.—San Antonio 1978, no writ).

40. TEX. PROP. CODE ANN. §§ 21.016(a)–(b).

41. *Id.* § 21.016(d)(1).

42. *Id.* § 21.016(d)(3).

43. *Id.* § 21.048(1) (West 2000).

44. *Id.* § 21.042(b) (West Supp. 2010).

45. *Id.* § 21.042(c).

46. *Id.* § 21.021(a)(1); *Blasingame v. Krueger*, 800 S.W.2d 391, 394 (Tex. App.—Houston [14th Dist.] 1990, no writ) (emphasis added).

missioners do not file their decision with the court within the time allowed by section 21.048, the time for filing objections is tolled and begins to run when the decision is filed.⁴⁷ Upon the filing of objections, the special commissioners' award is vacated and the administrative proceeding converts into a pending cause before the court.⁴⁸ Without timely filed objections, however, an eminent domain proceeding never becomes a civil case.⁴⁹ Further, in the absence of timely filed objections, a court has no jurisdiction to do anything more than accept and adopt the special commissioners' award as its judgment.⁵⁰

"[W]hen no timely objections to the award are filed, there is no right of appeal from the judgment subsequently entered in the proceedings even though the same does not conform to the award."⁵¹ Rather, "a party who is aggrieved by the . . . judge's refusal to proceed or by the entry of a judgment that does not conform to the award has his remedy by a mandamus proceeding to compel the entry of judgment in accordance with the award."⁵² That is, if the judge refuses to enter a judgment or enters a judgment that does not conform to the special commissioners' decision, then the aggrieved party's remedy is a mandamus proceeding.

H. *Possession*

If the condemning authority is the state; a county; a municipal corporation; or an irrigation, water improvement, or water power control district, it must either pay the landowner the amount of the special commissioners' award or deposit an amount equal to the special commissioners' award into the registry of the court to take possession of the condemned property.⁵³ In addition to the requirements of section 21.021(a)(1), all other condemning authorities must meet the requirements of sections 21.021(a)(2)–(3) to take possession of the condemned property. These requirements include an additional deposit into the registry of the court of money or a surety bond in an amount equal to the special commissioners' award.⁵⁴ Additionally, the condemning authority must execute a cost bond that has two or more solvent sureties and is approved by the judge.⁵⁵

47. *State v. Garland*, 963 S.W.2d 95, 101 (Tex. App.—Austin 1998, pet. denied).

48. *Blasingame*, 800 S.W.2d at 393.

49. *Dickey v. City of Houston*, 501 S.W.2d 293, 294 (Tex. 1973) (affirming rulings that the trial court had no jurisdiction).

50. *Blasingame*, 800 S.W.2d at 394.

51. *Pearson v. State*, 315 S.W.2d 935, 939 (Tex. 1959).

52. *Id.*

53. TEX. PROP. CODE ANN. § 21.021(a)(1), (c) (West 2004).

54. *Id.* § 21.021(a)(2).

55. *Id.* § 21.021(a)(3).

III. JUDICIAL PHASE

The filing of an objection triggers the trial court's appellate jurisdiction, and the cause becomes a judicial proceeding in the trial court.⁵⁶ Unless citation is waived, the appealing party must serve the other party with citation within a reasonable time to avoid having the case dismissed for want of prosecution.⁵⁷ Citation is waived if the opposing party voluntarily appears in the suit and demonstrates that it had notice of the judicial suit, as opposed to the administrative proceeding.⁵⁸

When a party files an objection to the special commissioners' findings, the trial court conducts a trial de novo.⁵⁹ The special commissioners' award is vacated and inadmissible in the trial de novo.⁶⁰ Additionally, the parties are not confined to using the evidence they offered at the special commissioners' hearing.⁶¹

If the landowner withdraws the money awarded as damages by the special commissioners, or takes payment directly from the condemnor, then the landowner waives the right to contest the legality of the taking. Specifically, a landowner who receives payment of the award directly from the condemning authority, or who withdraws the money deposited in the registry of the court, is deemed to have consented to the taking and is only entitled to litigate the adequacy of the compensation due as a result of the taking.⁶²

The law of eminent domain is full of potential pitfalls, all of which could not be addressed in this Article. With proper knowledge and attention, however, these pitfalls are avoidable.

56. *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 241-42 (Tex. 1984); *Metro. Transit Auth. v. Graham*, 105 S.W.3d 754, 757 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

57. *Denton County v. Brammer*, 361 S.W.2d 198, 200 (Tex. 1962).

58. *Gordon v. Conroe Indep. Sch. Dist.*, 789 S.W.2d 395, 397 (Tex. App.—Beaumont 1990, no writ).

59. *In re State*, 65 S.W.3d 383, 387 (Tex. App.—Tyler 2002, no pet.) (orig. proceeding); *Blasingame v. Krueger*, 800 S.W.2d 391, 394 (Tex. App.—Houston [14th Dist.] 1990, no writ) (orig. proceeding).

60. *Amason*, 682 S.W.2d at 242; *Blasingame*, 800 S.W.2d at 394.

61. *Kennedy v. City of Dall.*, 201 S.W.2d 840, 841-42 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.).

62. *State v. Jackson*, 388 S.W.2d 924, 925-26 (Tex. 1965); *Sw. Bell Tel. Co. v. Brasell*, 427 S.W.2d 709, 711 (Tex. Civ. App.—Tyler 1968, writ ref. n.r.e.).