

SUMMARY OF NEW EMINENT DOMAIN LAWS PASSED BY THE 87TH SESSION OF THE TEXAS LEGISLATURE

Bona Fide Offer

A condemning entity is required to make a bona fide offer to voluntarily acquire property before initiating condemnation. The law will now require the initial offer to a property owner to include:

- a copy of the Landowner Bill of Rights (LBOR) with an addendum to give notice of required easement terms that will be provided and terms that can be negotiated by the landowner,
- a bold and large font statement whether the compensation offered includes damages to the remainder of the property,
- an instrument of conveyance that contains the required easement terms and notice of additional terms that may be negotiated. An entity may be exempt from this requirement if:
 - the entity provided this document at an earlier occasion,
 - the property owner wishes to use a different document and certifies this in writing to the entity, or
 - the property owner provides his/her own document to the entity prior to this initial offer.
- the name and telephone number of the representative of the condemning entity.

Eminent Domain Database

The state is required to maintain an online database of those entities with eminent domain authority. This session, certain political subdivisions were exempted from the annual reporting requirement for the purpose of providing the Comptroller with information to maintain this database. This exemption only applies if the eminent domain authority information reported in the subdivision's most current filed report has not changed. Those political subdivisions exempted are:

- a public school district located in a county with a population of less than 25,000;
- a municipality or county with a population of less than 25,000; or
- a district created under the Texas Constitution, Section 52, Article 3 (districts allowed to issue bonds) or Section 59, Article 16 (conservation and reclamation districts) with a population of less than 25,000.

Land Agent Certifications, Requirements, and Ethics

Land agents now have an additional requirement for certification eligibility. In addition to being at least 18 years old and a citizen or lawfully admitted individual of the United States, the land agent must complete required coursework and maintain continuing education.

Land agents may be granted probationary certificates while completing 16 hours of coursework in the law of eminent domain, professionalism in contacting and negotiating with landowners, the ethics of right-of-way acquisitions, and other coursework the commission deems appropriate. The Occupations Code currently contains the section “Grounds for Suspension or Revocation of Certificate.” The Legislature added a section that specifically condemns a land agent who accepts a financial incentive [bribe] to make an initial offer that he/she knows is inadequate.

Land agents who apply for a certification or certification-renewal before January 1, 2023 are not subject to education requirements until the next renewal application.

Landowner’s Bill of Rights and Easement Addendum

There will now be additional protections within and attached to the Landowner’s Bill of Rights (LBOR). The landowner will be notified of their right to file a written complaint of alleged misconduct by a land agent in the eminent domain process. These complaints would be processed by the Texas Real Estate Commission (TREC).

The LBOR currently includes a description of the condemnation procedure, condemning entity’s obligations, and property owner’s options. It will now include an addendum describing the required easement terms for instruments of conveyance and additional terms that may be negotiated by the landowner. It will be the duty of the Attorney General (AG) to tailor the LBOR to the specifications of the Government Code while ensuring its readability by the common landowner. Before making those changes, the AG would be required to publish the proposed changes to the Texas Register and accept public comment before adopting the changes.

Notice of Filed Condemnation Petition

If the entity files a condemnation petition, it must send a copy to the landowner and the landowner’s attorney if he/she has one. The entity must provide the copy by first class certified mail with return receipt requested to the landowner. It must also provide a copy of the petition to the landowner’s attorney by first class mail, commercial delivery service, fax, or email.

Requirements for Instruments of Conveyance (Easement Agreements)

A pipeline instrument of conveyance provided to a property owner must address the following terms:

- the maximum number of pipelines,
- a description of the types of machinery and facilities allowed to be installed,
- the maximum diameter of each pipeline,
- the type of substance that will be transported through each pipeline,
- a general description of the facilities and equipment intended for the easement,
- a map-based depiction of the location of the easement on the property,
- the maximum width of the easement,
- the minimum depth of each pipeline,
- any double-ditching intentions,
- notice to the landowner when the entity is acquired by merger, consolidation, or similar transfer to another entity,
- the exclusivity of the easement,

- limitations on third-party access,
- the landowner's right to recover damages arising from the installation and construction of each pipeline or a statement that clarifies that these damages are included in the offer,
- the landowner's right to recover damages arising from the upkeep or removal of each pipeline or a statement that clarifies that these damages are included in the offer,
- the plan for altering fences to accommodate the private entity and the plan for restoring such damage or a statement that clarifies that these damages are included in the offer,
- the entity's obligations to restore and maintain affected areas to as near original condition as is reasonably practicable; or to reimburse the owner for damages; or a statement that clarifies that real property damages are included in the offer, and
- the entity's methods and rights of access to the easement.

An electric transmission line instrument of conveyance provided to a property owner must address the following terms:

- a general description of the intended uses,
- a map-based depiction of the location of the easement on the property,
- the maximum width of the easement,
- the manner in which the entity will access the easement,
- limitations on third-party access,
- the landowner's right to recover damages arising from the installation and construction of each line or a statement that clarifies that these damages are included in the offer,
- the plan for altering fences to accommodate the private entity and the plan for restoring such damage or a statement that clarifies that these damages are included in the offer,
- the entity's obligations to restore and maintain affected areas to as near original condition as is reasonably practicable; or to reimburse the owner for damages; or a statement that clarifies that real property damages are included in the offer,
- the exclusivity of the easement, and
- any prohibition against assigning the private entity's interest to an entity that will not operate as a utility without notice to the landowner.

Neither private pipeline entities nor private transmission line entities may use the property for rights other than those expressly granted in the instrument. In addition to the terms discussed above, the private entity must notify the landowner of the right to negotiate any of the following terms to be included in the instrument of conveyance:

- compensation for damaged vegetation or other existing agricultural production based on verifiable losses, and
- the private entity's obligation to carry insurance, protecting the landowner against liability for injuries or damage caused by the negligence of the private entity.

After the private entity complies with the requirements of this section and has made a bona fide offer, the entity may proceed with negotiations—meaning the entity and landowner can negotiate terms that differ entirely from the easement terms discussed above once they have met those minimum requirements.

Special Commissioners Appointment

Special commissioners must be appointed within 30 calendar days after the condemnation petition is filed. The judge shall appoint a first and second alternate. The parties must receive the contact information of each special and alternate commissioner from the judge. Either 10 days after the appointment or 20 days after the petition filing date, the parties may strike one special commissioner each. The parties must notify each other of their decision to strike. Any party represented by legal counsel must receive immediate electronic notice, while unrepresented parties must receive first class mail notice.

If a special commissioner is struck or unable to serve, the first alternate takes his/her place. The party who has not yet used a strike may now strike one commissioner from this new panel of two special commissioners.

All parties and their counsel are entitled to a copy of the court's appointment of the special and alternate commissioners.

Special Commissioners' Hearing Evidence

Condemnors are now required to provide any and all property appraisal reports they will use at special commissioners' hearings to determine an opinion of value at least three business days before the hearing. Landowners are already required to provide this same information, so disclosure by both parties will help even the playing field in eminent domain proceedings.

Surveying for a Pipeline

The requirements that a common carrier pipeline must meet before entering private property for the purpose of conducting a survey used in the exercise of the power of eminent domain were strengthened this legislative session. Additionally, landowners will be provided with safeguards and notices when their property is subject to these surveys.

The written notice of the carrier's intent to enter the property, as well as an indemnification in favor of the landowner with respect to damages, if any, must be provided to the landowner at least two days before entry is made. It must include a contact number, so the landowner can inquire further about the project. It may be provided by first class mail, email, personal delivery to an adult living on the property, or by any other method of service authorized by the Texas Rules of Civil Procedure.

Entry for the survey is limited only to the portion of the land meant for the proposed pipeline unless otherwise authorized by the landowner. If the property is altered in any way, the surveying company must restore the property to as close to its original condition as is reasonable. Finally, the landowner, upon written request, can obtain a copy of the survey at no cost. It does not, however, prevent an entity from seeking survey rights in a civil action.

Taxation of Property

Changes to the tax code provide additional protections for the landowner's remaining property after a condemnation. Land remains qualified for agricultural use tax valuation if the landowner was forced to stop using the property for agricultural use because of a condemnation. The qualification would only apply if the property owner continued to use the unaffected portions of land for agricultural use and the condemned right-of-way is less than 200 feet wide.

If the land cannot remain qualified under the provision, the condemning entity would be required to pay the owner's additional taxes and interest.

Note: This applies to 1-d appraised land, not 1-d-1 open-space qualified land. 1-d-1 land already has a similar provision in law.