

EMINENT DOMAIN

State of Texas

H. Dixon Montague

Billy Coe Dyer

Justin A. Hodge

Vinson & Elkins LLP

1001 Fannia St., Suite 2500

Houston, TX 77022-6760

(713) 758-2086, Phone

(713) 615-5461, Fax

dmontague@velaw.com

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RECENT LEGISLATIVE DEVELOPMENTS

Shortly after the United States Supreme Court's ruling in *Kelo v. City of New London*, 545 U.S. 469 (2005), in Special Session, Senate Bill 7 was introduced in the Texas State Legislature to restrict the eminent domain powers of governmental entities for private economic development purposes. On August 31, 2005, Senate Bill 7 (the "Act") was signed into law. Tex. Gov't Code Ann. § 2206.001 (b)(1), et seq. The Act states, among other things, that

[a] governmental or private entity may **not** take private property through the use of eminent domain if the taking . . . confers a private benefit on a particular private party through the use of the property.

Id. at § 2206.001(b)(1) (emphasis added). The Act, therefore, expressly restricts governmental entities, such as Economic Development Corporations, from exercising their taking powers to benefit a private party. The Act, however, provides several exceptions to its limit of the use of eminent domain power. *Id.* at § 2206.001(c). Although the effective date of the Act was September 1, 2005, the Act was not an attempt to change pre-existing law in Texas, but to state in no uncertain terms that it was never the legislative intent to allow for the taking of property for economic development purposes. *See Western Seafood Co. v. City of Freeport*, 202 Fed.Appx. 670, 676 (5th Cir. 2006).

In addition to Senate Bill 7, House Bill 2006, introduced in the Regular Session of the 2007 Texas State Legislature, overwhelmingly passed both houses of the Legislature. H.B. 2006 further clarified and limited the power to condemn for economic development purposes, narrowing the definition of "public use" from that provided in Senate Bill 7. However, Governor Rick Perry vetoed H.B. 2006 ostensibly because the bill also provided that a property owner is to be compensated for diminution to one's access caused by a public improvement.

WHO IS ELIGIBLE TO CONDEMN?

In Texas, the power of eminent domain is a legislative privilege that may only be exercised by the legislature or an entity to which the Legislature has delegated its power. *Davis v. City of Lubbock*, 326 S.W.2d 699, 714 (Tex. 1959). Statutes granting the power of eminent domain are strictly construed in favor of the landowner and against the entities vested with condemnation power. *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828 (Tex. 1958). A non-exhaustive list of some entities to which the Texas Legislature has expressly given the power of eminent domain include:

Government entities	State, counties, and municipalities. Tex. Local Gov't Code Ann. §§ 251.000 and 280.000; Tex. Gov. Code § 1505.114.
Utilities	Tex. Utilities Code § 181.004.
Drainage Districts	Tex. Water Code § 49.22; Tex. Gov't Code Ann. § 411.004 (providing eminent domain authority to counties for drainage).
Other	Municipal Utility Districts (“MUDs”). <i>See</i> Tex. Water Code § 54 <i>et. seq.</i> Common Carriers. <i>See</i> Tex. Nat. Res. Code § 111.019. Railroads. <i>See</i> Tex. Rev. Civ. Stat. art. 6336.
Private (right of access)	Generally not. <i>See See Phillips v. Naumann</i> , 275 S.W.2d 464, 467 (1955).

WHAT CAN BE CONDEMNED?

Private property

What interests:

Only real property interests may be condemned in Texas. An entity cannot condemn related business activities or other personal property interests connected to the real property as of the “date of taking.” *See Lone Star Gas Co. v. City of Fort Worth*, 98 S.W.2d 799, 803 (Tex. 1936) (itemizing aspects of doing business which are not proper subjects for condemnation); *see also City of Houston v. Southern Water Corp.*, 678 S.W.2d 570 (Tex.App.—Houston [14th Dist.] 1984, writ dism’d) (stating that franchises, easements, contracts, and goodwill of customers may not be condemned without some reasonable assurance that their loss will be compensated).

Any limitations, such as agricultural land?

A property may not be condemned if the property is used for cemetery purposes. *See, e.g.*, Tex. Gov't Code Ann. § 1505.114(b); *see also* Tex. Health & Safety Code § 711.035 (establishing that a railroad, street, road, alley, pipeline, telephone, telegraph, electric line, or other public utility or thoroughfare may not be placed through, over, or across a part of a dedicated cemetery without consent and that all property of a dedicated cemetery, including a road, alley, or walk in the cemetery is exempt from public improvements assessments, fees, and public taxation).

Can “Public” property be condemned (ex., city/county, school/city, etc.)?

Possibly. If the property sought to be condemned is already devoted to a public use, the property may not be condemned if the practical effect would be to destroy the property's existing use, unless the condemning authority shows that its intended use is of paramount public importance and that its purpose cannot be otherwise accomplished than by the condemnation. *See Ft. Worth & Denver Ry. v. City of Houston*, 672 S.W.2d 299, 300-301 (Tex. App.--Houston [14th Dist.] 1984, ref. n.r.e.); *see also Guadalupe-Blanco River Auth. v. Canyon Reg'l Water Auth.*, 211 S.W.3d 351, 359 (Tex. App.—San Antonio 2006, pet. filed) (holding that regional water authority did not satisfy paramount purpose test because it did not address whether its purpose could not otherwise be accomplished - set for oral argument in front of Texas Supreme Court on Nov. 15, 2007). Additionally, to the extent that Texas eminent domain law constitutes a regulation of railroads, it may be preempted by the Interstate Commerce Commission Termination Act. 49 U.S.C. §§ 10101, 10501 (2000); *Burlington N. & Santa Fe R.R. Co. v. City of Houston*, 171 S.W.3d 240 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

THE CONDEMNATION PROCEEDINGS

How Initiated:

Chapter 21 of the Texas Property Code sets forth the general procedure for determining the compensation owed in a statutory condemnation action. If the parties are not able to agree on the compensation owed, the condemnor may initiate proceedings to condemn the property by filing a petition in the proper court. Tex. Prop. Code § 21.012. Generally, district courts and county courts at law have concurrent jurisdiction in Texas. *Id.* at § 21.001. However, Tex. Prop. Code § 21.013(b) provides that if there is one or more county courts at law in the county in which the condemnation is initiated, the condemnation case shall be filed with the county court at law. Only if there is no county court at law in the county where the condemnor intends to file its condemnation case may the condemnor file its case with the district court. Tex. Prop. Code § 21.013(c). There are exceptions to this general rule. *See, e.g.*, (Bexar County; Travis County).

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 known; and
- d. state that the condemnor and the property owner are unable to agree on the damages.

Tex. Prop. Code § 21.012. Proper venue for the lawsuit is the county in which the property owner resides if the owner resides in a county in which part of the property to be condemned is located. Otherwise, venue is proper in any county in which part of the property is located. Tex. Prop. Code § 21.013.

Pre-judicial filing:

Is there a compensation commission or other inferior tribunal to the court which first determines just compensation?

Yes. Upon the filing of the petition to condemn, the judge of the court in which the petition is filed shall appoint three disinterested freeholders who reside in the county to serve as special commissioners. The special commissioners' charge is to preside over an administrative hearing in which they shall assess the compensation owed to the property owner. The commissioners have no authority to address any other issues. The requirements to serve as a special commissioner are only that the individual reside and own property in the county in which the lawsuit is filed. Tex. Prop. Code § 21.014.

Notice of the special commissioners' hearing shall be served on the property owner "not later than the 11th day before the day set for the hearing." Tex. Prop. Code § 21.016(b). Any person competent to testify may serve the notice. *Id.* Upon proper notice to all parties, the special commissioners will conduct a hearing referred to as a special commissioners' hearing. During the hearing, all parties are given the opportunity to present evidence, cross-examine the other side's evidence, and argue their respective positions on the compensation owed for the taking. Tex. Prop. Code § 21.015. At the conclusion of the evidence, the special commissioners will evaluate the claims, much like a jury, and sign an award reflecting their determination of the compensation owed to the property owner.

The special commissioners' award is to be based upon evidence of the value of the property to be taken, any injury or benefits to the property owner's remaining land, and the use of the property for the purpose of the condemnation. *Id.* at § 21.041.

Any requirements of negotiation prior to filing?

Yes. Before the condemnor can file its petition to condemn property, it must first make a good-faith offer to purchase the property. Further, when the offer is made, if the condemnor is a governmental entity, the condemnor must disclose to the property owner any and all existing appraisal reports that the condemnor has acquired which relate specifically to the owner's property and which were used in determining the final valuation offer. Tex. Prop. Code § 21.011(a). The property owner must disclose any appraisal report upon which he or she relies to the condemning authority at least ten days before the special commissioners' hearing. Tex. Prop. Code § 21.011(b).

Acquisition by agreement rather than formal negotiation.

Yes. In fact, in its original petition for condemnation, the condemning authority must state that it was unable to agree with the property owner prior to filing its lawsuit. Tex. Prop. Code § 21.012(b)(4); *but see Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 186 (Tex. 2004) (holding that when determining whether the condemning authority has satisfied the "unable to agree" requirement, the court should not examine the dollar value of the offer made, or whether the offer of the condemning authority was made in subjective good faith, because such inquiry would inevitably turn on the ultimate valuation of the property condemned, and would therefore require an examination of the merits of the condemnation action).

Initiating condemnation:

With whom?

The Condemnor should file its petition to take property with the court with jurisdiction over the case. Tex. Prop. Code § 21.012. *See* section above entitled "How Initiated."

By what form? (application for condemnation)

The Condemnor should file an original petition for condemnation. Tex. Prop. Code § 21.012.

Compensation commission

Qualifications

Chapter 21.014 of the Texas Property Code requires the appointment of three "disinterested freeholders who reside in the county" to serve as special commissioners.

Who chooses?

The judge of the court in which the petition is filed appoints the commissioners. Tex. Prop. Code § 21.014(a) further provides that the judge shall give preference to persons agreed to by the parties to the condemnation. However, in practice, most judges ignore this statutory requirement and appoint the commissioners without the parties' input.

Is discovery available at initial level?

No. However, as stated above, if the condemnor is a governmental entity, it must disclose to the property owner any and all existing appraisal reports that the condemnor has acquired which relate specifically to the owner's property and which were used in determining the final valuation offer prior to the special commissioners' hearing. Tex. Prop. Code § 21.0111(a).

If the condemnor is a governmental entity, the property owner must also disclose to the condemnor any and all existing appraisals produced or acquired by the property owner related specifically to the owner's property and used in determining the owner's opinion of the value of the property within 10 days of receipt of the appraisals from the condemnor, but no later than 10 days prior to the special commissioners' hearing. *Id.* at § 21.0111(b).

Appeal

To what body?

Any party may object to the special commissioners' award by filing, in the same court whose judge appointed the special commissioners, a written statement objecting to the award and stating the basis of the party's objections. The objections must be filed on or before the first Monday following the 20th day after the day the commissioners' award is filed with the court. Tex. Prop. Code § 21.018. If timely objections to the award are not filed, the special commissioners' decision will become final and the trial court will enter a judgment on the award as a ministerial act of the court. *Id.* at § 21.061. If objections are timely filed and the adverse party is served, the case returns to the court in which it was originally filed before commissioners were appointed, and will be handled and tried in the same manner as other civil cases. Tex. Prop. Code. § 21.063(a).

After the special commissioners' award has been filed, regardless of whether a party has filed objections, the condemnor may take possession of the condemned property upon its deposit of the amount of the special commissioners' award into the registry of the court. *Id.* at § 21.021. In some instances, depending upon whom the condemnor may be, there is the additional requirement that the condemnor post a cash or surety bond equal to the amount of the award and a separate bond to cover court costs. Tex. Prop. Code § 21.021(b), (c).

The property owner may withdraw the amount of the special commissioners' award from the court's registry even though he or she is contesting the amount of the commissioners' award. If the award is withdrawn and the parties continue to litigate the value question, when a final resolution is determined, either by settlement or trial, the condemnor will be responsible for paying to the property owner the difference between the award and the final value to the extent such final value exceeds the amount of the original award, plus pre-judgment interest at a pre-determined statutory rate from the date of taking to the date of judgment. If the final value is less than the amount of the award, the property owner must return the difference to the condemning authority, but has no obligation to pay any prejudgment interest on the difference.

De novo?

Yes, but the court proceedings are limited to consideration of substantially the same subject matter and issues addressed by the special commissioners. *See State v. Nelson*, 334 S.W.2d 788, 791 (Tex. 1960) (holding that the jurisdiction of the court is appellate as distinguished from original or concurrent). *Id.*

Is earlier determination of “just compensation” admissible

No. *State v. Hilton*, 412 S.W.2d 41, 42 (Tex. 1967); *State v. Berry*, 385 S.W.2d 711 (Tex.Civ.App.—San Antonio 1964, writ ref'd n.r.e.).

Jury

Yes, but only if demanded and appropriate jury fee is paid. *See* Tex. R. Civ. P. 216.

Discovery available at that level

Yes. On appeal to the trial court, the case is to be tried as any other civil case. Tex. Prop. Code § 21.018(b).

Further appeal

Yes. A final judgment in a condemnation case, just like a final judgment in any other civil case, may be appealed to the appropriate court of appeals so long as the amount in controversy or the judgment rendered exceeds \$100, exclusive of interest and costs. *See* Tex. Gov't Code Ann. § 22.220; *see also* Tex. Civ. Prac. & Rem. Code § 51.012. After a court of appeals renders its judgment, a case that is within the appellate jurisdiction of the Texas Supreme Court may be appealed by the filing of a petition for review with the clerk of the Texas Supreme Court. *See* Tex. Gov't Code Ann. §§ 22.001, 22.225; *see also* Tex. R. App. P. 53. Review of the Court of Appeals' judgment is discretionary with the Texas Supreme Court. In limited situations, an interlocutory order may be reviewed by the courts of

appeals and/or the Texas Supreme Court before a final judgment is rendered in the trial court. Tex. Civ. Prac. & Rem. Code § 51.014; *see also* Tex. Gov't Code Ann. § 22.001(c).

PROCEDURE TO CHALLENGE CONDEMNATION

Separate proceeding, or can it be heard in proceeding to determine just compensation or must it be challenged in mandamus, injunction or certiorari proceeding?

In Texas, challenging the condemning authority's right to take is generally raised in the statutory condemnation proceeding but, in some instances, it may be addressed in a separate proceeding. *See, e.g., Tex. Parks & Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 148 (Tex.App.—Austin 1998, no writ) (discussing available causes of action to challenge condemning authorities' right to take).

To challenge right of take, the property owner can file a plea to the jurisdiction in the condemnation case, or, at a minimum, allege the reasons why, as a matter of law, the condemnation should not be allowed. *See Pearson v. State*, 315 S.W.2d 935, 937 (1958) (holding that trial court is not a court of general jurisdiction, and its power to act in condemnation cases is both special and limited); *see also Board of Regents of the University of Houston System v. FKM Partnership, Ltd.*, 178 S.W.3d 1 (Tex.App. [14th Dist.] 2005, pet. filed) (stating that the condemning authority cannot enlarge the county court's jurisdiction by seeking to include new or additional land or rights by way of an amended petition). If the condemnor is a governmental entity, the trial court's ruling on the plea to the jurisdiction is subject to interlocutory appeal. Tex. Civ. Prac. & Rem. Code § 51.014. If the case is dismissed, then the trial court may make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, and other experts and for the other expenses incurred by the property owner. Tex. Prop. Code § 21.019(c).

INVERSE CONDEMNATION

Who files it and where?

The property owner files an inverse condemnation petition under Art. I, § 17 of the Texas Constitution with the court of competent jurisdiction for a taking, damaging, or destruction of his or her property. A property owner may also file an inverse condemnation counterclaim in condemnor's statutory condemnation case to recover taking or damaging of personal property, such as damages to one's business caused by the condemnation. *See, e.g., State v. Whataburger, Inc.*, 60 S.W.3d 256, 260-261 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) (holding that a property owner is entitled to be fully compensated for any involuntary taking of his property and that compensation is measured not solely by the taking of, or injury to, real property, but to all tangible and incorporeal property appurtenant

thereto). In addition, issues of substantive and procedural due process may be raised to defeat the condemnation. U.S. Const. 5th and 14th Amendments; Tex. Const. Art. I, §§ 17, 19; 42 U.S.C. § 1983.

JUST COMPENSATION/VALUATION ISSUES

At what point does condemnor need to disclose its estimate of just compensation?

If the condemning authority is a governmental entity, it must disclose to the property owner at the time an offer to purchase is made any and all existing appraisal reports produced or acquired by the condemning authority relating specifically to the owner's property and used in determining the final valuation offer. Tex. Prop. Code § 21.0111(a). If it is not a governmental entity, it must disclose the basis of its compensation estimate at the special commissioners' hearing.

Must condemnor provide appraisals, and when?

Yes and no. As indicated above, if the condemning authority is a governmental entity, it must disclose any and all existing appraisal reports to the property owner *at the time an offer to purchase is made*. Tex. Prop. Code § 21.0111(a) (emphasis added). Otherwise, it must disclose the basis of its compensation estimate at the special commissioners' hearing.

When does title pass?

If the matter is resolved without the necessity of a condemnation case, title passes to the condemning authority when the property is conveyed to the condemnor by written instrument, such as a deed; or if a condemnation action is filed, by judgment. However, upon deposit of the special commissioners' award – assuming right to take – the condemnor is entitled to possession of the property identified in the condemnation petition and addressed by the special commissioners.

Valuation issues

Can increase in value of property resulting from project be considered in compensation?

Yes and no. An increase in value of the property resulting from the project cannot be considered in connection with valuing the part taken. As a matter of fact, if the property owner waives any claim to damages to the remainder, project influence should never be considered. But any project influence – positive or negative – may be considered in estimating damages to the remainder. *See, e.g., State v. Meyer*, 403 S.W.2d 366 (Tex. 1966); *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 830-831 (Tex. 1974). If,

however, the acquisition is a second taking, then the property owner may recover the increase in value due to the project up to the time of the second taking. *City of Dallas v. Shackelford*, 1999 S.W.2d 503 (Tex. 1947). The property owner may also submit evidence of other legitimate and real factors that have affected a particular property's value after the project is announced that have no direct connection with the project.

May zoning be used to devalue in anticipation of acquisition?

No. *See State v. Biggar*, 873 S.W.2d 11 (Tex. 1994) (upholding takings award against the State for delaying approval of exchange application in order to reduce the value of property owner's property); *see also City of Houston v. Kolb*, 982 S.W.2d 949 (Tex.App.—Houston [14th Dist.] 1999, pet. denied).

Is property owner penalized by decrease in value due to lack of maintenance in anticipation of condemnation?

Yes, to the extent of physical deterioration before the taking within the reasonable control of the property owner.

Is compensation calculated as one step or two (part taken and loss of value in remainder)?

In Texas, compensation can be calculated both ways, depending on the court's and parties' preference. *See Callejo v. Brazos Electric Power Cooperative, Inc.*, 755 S.W.2d 73, 76 (Tex. 1988); *see also Uselton v. State*, 499 S.W.2d 92 (Tex. 1973).

What is date of valuation?

The date of valuation is the date the condemnor deposits the amount of the special commissioners' award into the registry of the court for the benefit of the property owner pursuant to Tex. Prop. Code § 21.021. *See Trinity River Authority of Texas v. Barrett*, 497 S.W.2d 91, 92 (Tex.Civ.App.—Houston [1st Dist.] 1973, no writ) (holding that when condemnor makes its deposit pursuant to the commissioners' award, the date of such deposit is considered the date of taking and the date for determining the market value of the property taken). If no deposit has been made before trial, the date of taking is the date of trial.

What specific elements of loss of value may or may not be considered?

Medians

Generally not. *See State v. Schmidt*, 867 S.W.2d 769 (Tex. 1993) (denying damages for impairment in the visibility of property owner's premises to passing traffic because of raised roadway and increased median height because damage to property was a community damage); *see also City of San Antonio v. Easley*, 368 S.W.2d 683 (Tex.Civ.App.—San Antonio

1963, writ ref'd n.r.e.) (denying injunction for median strip that prevented traffic from turning into property).

Circuitous route

Generally not. *See County of Bexar v. Santikos*, 144 S.W.3d 455, 460 (Tex. 2004) (holding that severance damages to the remainder for increased circuitry of travel are unrecoverable); *see also Houston v. Fox*, 444 S.W.2d 591 (Tex. 1969); *City of Beaumont v. Marks*, 443 S.W.2d 253 (Tex. 1969); *State v. Baker Bros. Nursery*, 366 S.W.2d 212 (Tex. 1963); *State v. Schmidt*, 867 S.W.2d 769 (Tex. 1993) (denying damages for circuitry of travel because damage to property was a community damage); *State v. Priesmeyer*, 867 S.W.2d 120 (Tex.App.—Austin 1993, no writ) (holding that landowner is not entitled to damages related to visibility loss, diversion of traffic, and loss related to circuitry of travel).

Proximity

Yes. *Interstate Northborough Partnership v. State*, 66 S.W.3d 213, 220-223, 227 (Tex. 2001) (holding that increased proximity damages are compensable “special damages”).

Impairment of access

Yes. However, to recover damages for a temporary or permanent impairment of access, the property owner must prove that the access to his or her property has been substantially impaired or brought about by an illegal activity or one that is negligently performed or unduly delayed. *See City of Austin v. Avenue Corp.*, 704 S.W.2d 11, 12 (Tex. 1986) (denying damage to property owner for temporary loss of access that was necessary and legally performed in a non-negligent manner).

May a large, multi-use tract be valued as several parcels or must it be valued as a unit?

Texas follows the economic unit rule to define the whole property. *See State v. Windham*, 837 S.W.2d 73, 76 (Tex. 1992). When a severed part of the land can be considered as a separate economic unit, the market value should be derived based on that separate economic unit, without referring to the whole property. If there is market demand for it as several parcels, then it should be so valued. However, in some instances the market value must necessarily be determined by considering some portion or all of the remainder in order to construct an economic unit. *Id.* Accordingly, parties may have competing economic units and present market evidence to support the appropriate economic unit which, in Texas, is a fact question for the jury’s consideration. *Id.*

May tax valuation be used as evidence?

No. Valuation for property tax purposes is generally not admissible in a condemnation proceeding to prove market value. *Houston Lighting & Power Co. v. Fisher*, 559 S.W.2d 682, 686-87 (Tex.App.—Houston [14th Dist.] 1997, writ ref'd n.r.e.); *American Guaranty Life, Health and Accident Ins. Co. v. State*, 332 S.W.2d 135, 144 (Tex.Civ.App.—Austin 1960, writ ref'd n.r.e.).

Who may testify as to value?

Owner

Yes. *City of Houston v. Collins*, 310 S.W.2d 697, 704 (Tex.Civ.App.—Houston 1958, n.w.h.) (holding that the landowner's opinion as to value is admissible).

Experts other than appraiser?

Yes. The property owner may offer expert testimony from realtors, brokers, developers, land planners, engineers, or any other person who is qualified to offer testimony concerning the damages to the property. See generally *Pipeline Co. v. Zwahr*, 88 S.W. 3d 623, 628-631 (Tex. 2002). (holding that the testimony of an expert witness as to the value of the condemned property is subject to Tex. R. Evid. Rule 702, which requires that the expert be qualified and that the expert's opinion be both relevant and reliable).

Access Issues – to streets

Nature of access right

Property abutting a public road has an appurtenant easement of access. *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996); *State v. Delany*, 197 S.W.3d 297, 299 (Tex. 2006) (holding that although abutting property has an easement of access to a public road, it does not have guaranteed access to any specific road absent a specific grant).

How decided

Typically, a property owner is granted a driveway permit by the State or other local governmental entity charged with reviewing requests for access. See *State v. Delany*, 197 S.W.3d 297, 300 (Tex. 2006). The access drive, however, must provide for safe and reasonable access to the property. *Id.* If the property owner does not have access to a roadway, to gain access by obtaining an easement over other private property, the property owner must have absolutely no other means of access to his or her property and must actually reside on the land to which access is being sought. See *Phillips v. Naumann*, 275 S.W.2d 464, 467 (1955); see also *Estate of Waggoner v. Gleghorn*, 378 S.W.2d 47, 48-50 (Tex. 1964); *Maher v. Lasater*, 354 S.W.2d 923, 924-25 (1962).

Appraisal rules/limitations

Use of income approach

Yes, if applicable to property being appraised.

Use of cost approach

Yes, if applicable to property being appraised.

Unique or no market properties

The cost approach is one way of valuing a special purpose property. *See Religious of the Sacred Heart of Texas. v. City of Houston*, 836 S.W.2d 606 (Tex. 1992). However, there is no need nor at times does it make economic sense to rely solely on market value and, in particular, the cost approach – especially if there is no market for the type of property being acquired.

TREATMENT OF OWNERSHIP INTERESTS

How are various ownership interests treated:

Tenant and owner divide “fee simple value of the property?”

Yes, Texas courts follow the Undivided Fee Rule. Under this rule, the fact finder must determine the market value of the entire property as though it belongs to one person. Once this is done, the fact finder then apportions the market value as between the lessee and the owner of the fee, by finding the market value of the lessee’s interest, which is then subtracted from the market value of the whole property to derive the market value of the lessor’s interest. *See, e.g., Urban Renewal Agency v. Trammell*, 407 S.W.2d 773, 774 (Tex. 1966).

Total compensation can exceed fee simple value of the property

No.

Reversionary and other interests

For remote future interests, it may be proper to award a nominal sum to the holder of the future interest when the entire fee is condemned. *See Leeco Gas & Oil Co. v. Nueces County*, 736 S.W.2d 629, 630-631 (Tex. 1987); *see also United States v. 50.822 Acres of Land*, 950 F.2d 1165, 1169-1170 (5th Cir. [Tex.] 1992). However, if the governmental entity is the grantee in a gift deed, and the grantor retains a reversionary interest, the proper compensation for condemnation of the reversionary interest is the amount by which the value of the unrestricted fee exceeds the value of the

restricted fee. *Leeco Gas & Oil Co.* at 631-632. A reversionary interest should be distinguished from a possibility of reverter.

WHAT IF THE CONDEMNATION IS ABANDONED?

What constitutes abandonment?

At any time during the proceeding, the condemning authority may move to dismiss its petition for condemnation. The trial court must, however, conduct a hearing on the motion. If the court grants the motion to dismiss, the court must make an allowance to the property owner for all necessary and reasonable fees for attorneys, appraisers, and other experts, and for the other expenses incurred by the property owner. Tex. Prop. Code § 21.019(b); *see also McCullough v. Producers Gas Co.*, 616 S.W.2d 702, 705-706 (Tex. App.—Waco 1981, ref. n.r.e.) (award of costs mandatory under former Tex. Rev. Civ. Stat. art. 3265, subd. 6, predecessor to Tex. Prop. Code § 21.019(b); *see also Board of Regents of the University of Houston System v. FKM Partnership, Ltd.*, 178 S.W.3d 1 (Tex.App. [14th Dist.] 2005, pet. filed) (condemnor’s amended petition eliminating 97% of the property it originally sought to take, constituted a dismissal as to the abandoned property). The property owner may also be entitled to temporary damages. Tex. Prop. Code § 21.044.

When can condemnation be filed again?

If a condemning authority dismisses a condemnation proceeding, after motion and a hearing, and subsequently files a petition to condemn substantially the same property interest from the same property owner, the court may not appoint new special commissioners but shall enter the award of the special commissioners in the first proceeding as the award in the second. Tex. Prop. Code § 21.020. Moreover, the court shall award the property owner triple the amount of the expenses that were allowed the property owner prior to the dismissal of the first proceeding. *Id.* The purpose of this statute is to prevent the condemning authority from dismissing the condemnation proceedings merely to institute new proceedings that involve substantially the same condemnation against the same property owner solely to obtain a lower condemnation award. *Cassity v. Gulf States Utilities Co.*, 628 S.W.2d 86, 87 (Tex.Civ.App.—Beaumont 1981, writ ref’d n.r.e.).

ATTORNEY AND WITNESS FEES AND COSTS

If attorney fees and/or costs are paid by condemnor

What circumstances?

If the condemnation suit is dismissed, reasonable and necessary attorneys' fees and other expenses incurred by the property owner may be awarded. *See* Tex. Prop. Code § 21.019.

What amount?

Chapter 21.019 of the Texas Property Code provides for reasonable and necessary attorneys' fees and other expenses of the condemnation suit if the case is dismissed.

Who determines?

The statute that provides for the recovery of fees and expenses states that the trial court shall determine the reasonable and necessary attorneys' fees and other expenses. *Id.*

Any limitations on what expenses are payable as "costs"

Chapter 21.019 of the Texas Property Code provides for recovery of necessary and reasonable fees and "*other expenses*" incurred by the property owner in the event of a dismissal.

Special appeal rules

Interest

The property owner is entitled to both prejudgment and post-judgment interest at the statutory rate.

Attorney and witness fees and costs

Yes, only if the condemnation case is dismissed.