

The 82nd Legislature: Potential Changes in Eminent Domain Law And How They May Affect CREZ

On January 11, 2011 Governor Rick Perry announced three emergency items for the Texas Legislature to immediately address in the 82nd Regular Session. The State's purported 27 billion dollar budget shortfall did not make the emergency list—but eminent domain reform did. As of the date of this writing¹, there are a handful of bills that could have an effect on CREZ condemnation proceedings with none being more prominent than Senate Bill 18.²

Senate Bill 18 is a reincarnation of House Bill 2006 (filed in response to *Kelo* in 2007) and the senate bill bearing the same number filed in 2009. While both of those bills failed to become law for various reasons,³ the Governor's fast tracking of eminent domain reform coupled with his assurance to sign the law if it is passed, leads the author to discuss some of its possible ramifications here. In pertinent part, SB 18 makes the following changes which will likely have some affect on the condemners and landowners involved in the CREZ project:

- Amends section 21.0111 (Disclosures) to apply to any entity with eminent domain authority as opposed to just governmental entities. The amended language would require condemners to disclose with their offer to purchase any and all appraisal reports in their possession that specifically relate to the landowner's property and were prepared within 10 years preceding the date of the offer—as opposed to just the appraisal used to determine the final offer. The offer and the appraisals must be sent by certified mail, return receipt requested. The amended language would require landowners to disclose any and all current and existing appraisal reports the landowner had acquired that relate to the owners property and were used in determining the landowners valuation opinion to the condemner on the earlier of: 10 days after the day the landowner received the report or the third business day before the date of the Special Commissioner's hearing at which the report was to be used. The current law requires disclosure no later than 10 days prior to the special commissioner's hearing.⁴ As amended, section 21.0111 would also prohibit condemners from including a confidentiality provision within their offer and

¹ The author acknowledges that legislation is a moving target and the language of Senate Bill 18 discussed below is subject to change.

² If Senate Bill 18 looks and sounds familiar to you— it should. Similar legislation was attempted in House Bill 2006 in 2007 and Senate Bill 18 in 2009.

³ House Bill 2006 was vetoed by the Governor due to the alleged billion dollar negative fiscal impact it would have had on taxpayers. Senate Bill 18 filed in the 81st Legislative Session was a victim of gridlock in House of Representatives that resulted from the Voter Identification Bill.

⁴ In practice, landowners rarely produce an appraisal report in compliance with the 10 day requirement and more often than not, the condemner receives the landowners' appraisals around 3 business days before a hearing.

require condemnors to inform the landowner that he or she has the right to discuss any offer or agreement with others or to keep the offer or agreement confidential.

- Adds section 21.0113 (Bona Fide Offer) requiring a bona fide offer be made prior to instituting a condemnation proceeding.⁵ In order for the offer to be considered bona fide the following must occur:

1. The initial offer must be made in writing;
2. The final offer must be made in writing and made on or after the 30th day after the date on which the initial written offer was made;
3. Before making a final offer the condemnor must obtain a written appraisal from a certified appraiser of the value of the property to be acquired and any damages to the remainder of the property as a result of the acquisition;
4. The final offer must be equal to or greater than the amount of the written appraisal;
5. A copy of the written appraisal, a copy of the deed, easement, or other instrument conveying the property sought to be acquired, and a copy of the landowner's bill of rights⁶ must be provided with the final offer letter or at some earlier time; and
6. The landowner must have at least 14 days to accept or reject the final offer.

- Section 21.047 (Cost and Fees) would be amended to provide that the failure to make a bona fide offer would result in abatement of the suit and the landowner would be allowed to recover all costs—as well as attorney's fees and professional fees (appraisal fees) that were directly related to the failure to make a bona fide offer.

- Amends section 21.012 (Condemnation Petition) to require the condemnor to “state with specificity” the public use for the property is being acquired, state that a bona fide offer was made, and provide a copy of the petition to the landowner by certified mail, return receipt requested.

- Amends section 21.014 (Special Commissioners) to allow the parties to strike one of the three commissioners appoint and afford the parties a “reasonable period” of time to make such strikes. The bill would further amend section 21.014 to require that no Special Commissioner's hearing be set until after the 20th day after the date the commissioners were appointed.

- Amends section 21.016 (Notice) to provide that notice of the Special Commissioner's hearing must be served on a party not later than the 20th day, as opposed to the 11th day, before the day set for the hearing.

- Amends section 21.023 (Repurchase Disclosure) to require all condemnors, as opposed to just governmental entities, to disclose that the property may be repurchased under certain conditions.

- Repeals section 21.024, discussed above, and replaces it with section 21.025 (Production of Information) which simply requires all condemnors, as opposed to those deemed to be critical infrastructure, to produce information in the manner currently stated in section 21.024.

⁵ This amendment seeks to clarify what type of offer is required following *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004).

⁶ Section 21.0112 (a) requires that the landowner's bill of rights be sent to the landowner via first class mail 7 days before a final offer is made.

If Senate Bill 18 were passed without amendment, what affect would these changes have on CREZ? To a large extent, it would depend on the amount of work that could occur before the bill's effective date of September 1, 2011.⁷ Even if Senate Bill 18 became effective immediately, it should only slightly modify the current practice of the CREZ condemnors. The key for condemnors under Senate Bill 18 would be early preparation and organization. Condemnors may need to employ multiple appraisal teams—and the initial appraisals need to be legally and factually sound.⁸ Obviously, checklists and timelines for ensuring compliance with the bona fide offer would be necessary, and condemnation petitions would need to be amended to comply with the new requirements. Condemnors might also consider the filing of petitions earlier than they would under current law in an effort to start the clock running on the longer time periods that must elapse prior to a Special Commissioner's hearing. That said, the 9 day additional delay between the appointment of commissioners and the setting of a hearing would probably provide very little additional advantage to a landowner. Possession & Use Agreements should, and will, likely continue to be employed by all parties to allow the landowner more time to prepare his case while allowing the condemnor to move forward with its project.

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⁷ This assumes that the Legislature doesn't change the effective date of the legislation in light of the emergency declaration.

⁸ Senate Bill 18 requires all appraisals to be produced to the landowner. Multiple appraisals could lead the jury or Special Commissioners to question the competence and integrity of your appraiser. Furthermore, Senate Bill 18 could be read to require new final offer letters to be sent, petitions to be amended, and further delays to be experienced if an additional appraisal modified the condemnors' previous bona fide offer.

HOW THE 2011 AMENDMENTS MATERIALLY CHANGE CONDEMNATION PROCEDURE

The 2011 amendments apply to condemnation proceedings in which the petition is filed on or after September 1, 2011.¹ As will be shown, this really means that for a petition filed on September 1, the new amendments will govern pre-petition procedures beginning no later than June 29, 2011. What follows is a digest of the amendments and relevant portions of unchanged current law presented in the sequence of the steps necessary to secure possession through condemnation. The new requirements will be highlighted by italics.

1. Landowner's Bill of Rights.

- a. “[A]n entity with eminent domain authority shall provide a copy of the landowner’s bill of rights statement to a landowner before or at the same time as the entity first represents in any manner . . . that [it] possesses eminent domain authority.” TEX. PROP. CODE § 21.0112.
- b. Although not expressly required, anytime the bill of rights is given to the landowner, it should be sent by certified mail.²

2. The Initial Offer.

- a. Timing: *30 days before the final offer is made.* TEX. PROP. CODE § 21.0113(b)(3).³

¹ S.B. No. 18, § 24 and 27.

² TEX. PROP. CODE § 21.0112 is not changed by the amendments. It permits sending the bill of rights by “first-class mail or otherwise.” The amendments indicate a decided preference for certified mail. Because the issues may be proof of the landowner’s receipt of the bill of rights and when, it makes little sense not to use certified mail.

³ Prior law did not specifically require the making of an initial offer.

- b. The letter must contain:
 - i) The Bill of Rights if not previously sent to the landowner. TEX. PROP. CODE § 21.0112. Even if previously sent, there is no good reason not to include a copy of the bill of rights.
 - ii) “[A]ny and all appraisal reports produced or acquired by the entity relating specifically to the owner’s property and prepared in the 10 years preceding the date of the offer.” TEX. PROP. CODE § 21.0111.⁴
- c. The letter should be sent via certified mail. *It must be sent by certified mail if appraisals are enclosed.* TEX. PROP. CODE § 21.0111.

3. The Final Offer.

- a. Timing:
 - i) *No sooner than 30 days before the initial offer.* TEX. PROP. CODE § 21.0113(b)(3).
 - ii) The entity must “provide[] the property owner with at least 14 days to respond to the final offer.” TEX. PROP. CODE § 21.0113(b)(7).⁵ The statute does not say whether the 14 days runs from deposit in the mail or from receipt. There is no express statement in the statute that the mailbox-rule applies.
- b. Appraisal: *Before the final offer can be made, the entity must obtain “a written appraisal from a certified appraiser of the value of the property being acquired and the damages, if any,” to the remainder.* TEX. PROP. CODE § 21.0113(b)(4).

⁴ The new law adds appraisals going back 10 years and removes the statement that the appraisals were only those “used in determining the final valuation.”

⁵ Prior law set no specific period for the landowner to accept the offer.

- c. The offer must include:
 - i) *An offer “equal . . . or greater than the amount of the appraisal.”* TEX. PROP. CODE § 21.0113(b)(5).
 - ii) A copy of the appraisal. TEX. PROP. CODE § 21.0113(b)(6)(A).⁶
 - iii) *A copy of the conveyance instrument that the entity requests that the landowner sign.* TEX. PROP. CODE § 21.0113(b)(6)(B).⁷
 - iv) *A copy of the landowner’s bill of rights.* TEX. PROP. CODE § 21.0113(b)(6)(C).⁸
- d. The offer should be sent via certified mail.

4. The Petition.

- a. Timing:
 - i) *No sooner than the earlier of the landowner’s rejection of the final offer (there needs to be written proof of rejection because the offer was made in writing) or the 14-day period for the final offer has lapsed.*⁹
 - ii) *No later than “the 20th day before the date set for the hearing.”* TEX. PROP. CODE § 21.016(b).
- b. The petition must state:
 - i) A description of the property condemned. TEX. PROP. CODE § 21.012(b)(1).
 - ii) Describe “with *specificity* the public use.” TEX. PROP. CODE § 21.012(b)(2). The new law adds the word “specificity.”

⁶ Can be omitted if already provided. TEX. PROP. CODE § 21.0113(b)(6).

⁷ Can be omitted if already provided. TEX. PROP. CODE § 21.0113(b)(6).

⁸ Can be omitted if already provided. TEX. PROP. CODE § 21.0113(b)(6).

⁹ The period for acceptance of the offer is new.

- iii) The name of the owner of the property if the name is known. TEX. PROP. CODE § 21.012(b)(3).
- iv) “[T]hat the entity and the property owner are unable to agree on the damages.” TEX. PROP. CODE § 21.012(b)(4).
- v) “[T]hat the entity provided the property owner with the landowner’s bill of rights.” TEX. PROP. CODE § 21.012(b)(5).
- vi) “[T]hat the entity made a bona fide offer.” TEX. PROP. CODE § 21.012(b)(6). “Bona fide offer” is a new term of art defined to mean the proper communication of both an initial offer and a final offer to the landowner.
- vii) The landowner’s repurchase rights through the following disclosure:

The owner or the owner’s heirs, successors, or assigns may be entitled to either:

- (a) *repurchase of the property under Texas Property Code § 21.101-21.1022; or*
- (b) *request from the entity certain information relating to the use of the property and any actual progress made toward that use.*

The repurchase price will be the price paid to the owner by the entity at the time the entity acquired the property through eminent domain. TEX. PROP. CODE § 21.023.¹⁰

- c. *The petition must be sent to the landowner by certified mail, return receipt requested. TEX. PROP. CODE § 21.012(c).*

¹⁰ The new law significantly changes a landowner’s repurchase rights. Under prior law, the landowner had no right of repurchase until after ten years and the purchase price was based on the market value at the time of the repurchase. Under the new law, significant repurchase procedures are implemented and the right of repurchase is based on the condemnation amount.

5. Appointment of Commissioners.

a. Timing:

- i) There is no indication that this process must wait until any of the preceding events occur.
- ii) No later than the date that the commissioners provide 20 days' notice of the hearing. TEX. PROP. CODE § 21.015(a).

b. Selection:

- i) The judge where the case is filed “shall appoint three disinterested *real property owners* who reside in the county.” TEX. PROP. CODE § 21.014(a).¹¹
- ii) The judge “shall give preference to persons agreed on by the parties.” TEX. PROP. CODE § 21.014(a).¹²
- iii) “*The judge shall provide each party a reasonable period to strike one of the three commissioners appointed by the judge.*” TEX. PROP. CODE § 21.014(a). This entire sentence is new. Read literally, it requires the judge to initially select only three commissioners, and affords the landowner an undefined period of time, described as “reasonable,” to “strike one of the three.” Notice that the statute does not contemplate the landowner striking more than one of the three.

¹¹ The old law said “freeholders.”

¹² No change from prior law.

- iv) The judge appoints a replacement commissioner if either
 - (A) “a person fails to serve as a commissioner;” or
 - (B) *a person “is struck by a party to the suit.”* TEX. PROP. CODE § 21.014(a).

c. Authority of commissioners. The new law leaves unchanged the commissioners’ duty to be sworn to “act fairly, impartially and according to law” (TEX. PROP. CODE § 21.014(b)) and their right to subpoena, administer oaths and punish for contempt. TEX. PROP. CODE § 21.014(c).

6. Scheduling of the Hearing.

- a. Timing:
 - i) *No sooner than “the 20th day after the date the special commissioners were appointed.”* TEX. PROP. CODE § 21.015(a).¹³
 - ii) “[T]he earliest practical time” remains in the statute, given that it is after the 20-day period. TEX. PROP. CODE § 21.015(a).
- b. Location: “[A]t a place that is near as practical to the property being condemned or at the county seat.” TEX. PROP. CODE § 21.015(a). The new law makes clear that the commissioners decide the location.
- c. Notice: *“Notice of the hearing must be served on a party not later than the 20th day before the day set for the hearing.”* TEX. PROP. CODE § 21.016(b).¹⁴

¹³ The old law was eleven days’ notice.

¹⁴ *Supra*, at 13.

Landowner Requests for Production of Information,

The amendments do not substantively alter the request for information procedure that used to be found in Texas Property Code § 21.024. The amendments do refine the entities who are meant to be subject to the procedure. The amendments repeal Section 21.024 and replace it with Section 21.025. The new section applies to all entities with eminent domain authority other than those “subject to Chapter 552 of the Government Code.” TEX. PROP. CODE § 21.025(a). Practically, this means that all non-governmental entities with eminent domain authority are subject to the information production procedure in the Property Code, and all governmental entities with eminent domain authority are subject to the open records procedure in Texas Government Code Section 502.0037.

The authority for enforcement of the production of information by the Texas Attorney General’s office has been removed from Section 21.025. See 21.024(g) and (h), repealed.