



# Testimony

## Condemnation Compensation: Time to Get Back to Basics

*Testimony before the House Committee on Land Use and Regulation*

by Drew Thornley  
Policy Analyst,  
Center for Economic  
Freedom

### THE LAW OF CONDEMNATION COMPENSATION

Article I, Section 17, of the Texas Constitution states, “No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.”<sup>1</sup> Our task is, thus, how to define “adequate compensation.” To this end, we turn to the Texas Property Code and Texas state case law.

#### 1. Entire Takings

§21.042(b) states, “If an entire tract or parcel of real property is condemned, the damage to the property owner is the local market value of the property at the time of the special commissioners’ hearing.” Thus, when determining compensation for takings of whole tracts of property, all factors that go into a private purchase should be considered, and the resulting fair market value (FMV) should be paid to the landowner. The guiding case law is the 1936 Texas Supreme Court ruling in *State v. Carpenter*,<sup>2</sup> which held that “all circumstances which tend to increase or diminish the present market value”<sup>3</sup> of the condemned property should be considered.

#### 2. Partial Takings

Determining adequate compensation for partial takings, as opposed to entire takings, is a two-part process: First, FMV is always paid for the condemned tract, regardless of the taking’s effect on the non-condemned portion of the taking (i.e. remainder property).

Secondly, once FMV is paid for the condemned tract, compensation for the remaining tract of land must be calculated. This step is a more complicated process, as certain damages to remainder property are non-compensable.

#### *Community Damages*

§21.042(c) states, “If a portion of a tract or parcel of real property is condemned, 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 condemnation on the value of the property owner’s remaining property.” However, case law carves out exceptions to this FMV approach.

§21.042(d) of the Texas Property Code states, “In estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or benefit that is peculiar to the property owner and that relates to the property owner’s ownership, use, or enjoyment of the particular parcel of real property, but they may not consider an injury or benefit that the property owner experiences in common with the general community.” Thus, damages common to the community-at-large (e.g. noise or pollution) are non-compensable, while damages particular to the landowner (i.e. special damages) are compensable. The main subcategories of community damages are (1) diversion damages and (2) loss-of-access damages.

#### *Diversion Damages*

Prior to 1993, the general rule for determining remainder damages was *Carpenter’s* holding that “damages are to be determined by ascertaining 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 appropriation, taking into consideration the nature of the improvement, and the use to which the land taken is to be put.”<sup>4</sup>

900 Congress Avenue  
Suite 400  
Austin, TX 78701  
(512) 472-2700 Phone  
(512) 472-2728 Fax  
[www.TexasPolicy.com](http://www.TexasPolicy.com)

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However, the 1993 Texas Supreme Court case of *State v. Schmidt*<sup>5</sup> carved out exceptions to, and, thus, replaced, *Carpenter's* remainder rule. The *Schmidt* Court held that the following four factors shall not be considered, when determining FMV compensation for the remainder property in a partial condemnation: (1) diversion of traffic, (2) increased circuitry of travel to property, (3) lessened visibility to passersby, and (4) inconvenience of construction activities. In other words, a property owner's remainder losses from injuries in these four categories are non-compensable, as they are "shared by the entire area."<sup>6</sup>

The *Schmidt* Court acknowledged that the four exceptions are market-value factors,<sup>7</sup> though they held them non-compensable. Furthermore, while they classified the four exceptions as community injuries and, thus, non-compensable, the Court stated that the defendant landowners "may be impacted more severely than some others in the area, but the difference is one of degree and not of kind." Thus, even if landowners are injured to a greater degree by a community injury, excess injury (i.e. that portion above the injury suffered by parties other than landowners) is non-compensable.

#### *Loss-of-Access Damages*

In order to be compensable, a loss of access must be "material and substantial."<sup>8</sup> Under *State v. Northborough Center*,<sup>9</sup> "unsafe access" may justify a finding of "material and substantial" access loss.<sup>10</sup>

In practice, however, compensation is not awarded if any suitable access remains. For example, if condemnation eliminates four of a property's five driveways, and the remaining driveway is a suitable means of entry, then no damages are awarded for loss of access.

Like the other exceptions previously mentioned, non-compensable loss of access is the reality in public condemnations, even though such losses would be factors in private-purchase transactions.

### 3. Loss of Business Profits or Good Will

In general, lost business profits and lost good will that result from condemnations are non-compensable, as they are non-physical property taken. The exception to the general rule is when a taking forecloses the possibility of a business' relocating or continuing to operate. In such cases, lost business profits are compensable.<sup>11</sup>

## CONCLUSIONS & POLICY RECOMMENDATIONS

1. The very nature of eminent domain puts the government and landowners on unequal footing. Condemnations are not voluntary sales but rather are forced takings of one's private property. The Latin term "eminent domain" means "supreme lordship," clearly an indication that one party—the government—has superior power and leverage over the other.
2. Because of government's constitutional condemnation authority, landowners do not have the luxury of choosing to keep their property, if they are unhappy with the amount of the government's offer. At some point, the landowner must accept what is offered by the government or awarded by the judiciary. Therefore, true FMV does not occur in condemnations, as market transactions are voluntary exchanges between willing buyers and willing sellers. The Independent Institute's Anthony Gregory writes that "victims of seized assets have never consented, otherwise a pure exchange could take place that requires no police power. No such coerced transaction can be said to entail 'just compensation,' since compensation is only just when the party being compensated agrees to the deal."<sup>12</sup> Additionally, even for those who are willing, and have the financial resources, to appeal a condemnation award, a portion of the increased award to prevailing landowners is taken by attorneys, to cover their fees. Thus, even prevailing landowners do not receive full compensation.
3. Landowners should be made as whole as possible, being compensated in the amount of FMV loss, factoring "all circumstances which tend to increase or diminish the present market value"<sup>13</sup> of the condemned property. Factors that would be considered in voluntary, private-market exchanges should be considered, when determining the amount of compensation for condemned property.
4. Reform the eminent domain process, such that the process is as clear and least subject to abuse as possible. Increased transparency in the takings process will lead to a fairer and more transparent compensation process.
5. There was much concern about HB 2006, last session's eminent domain bill, over increases in compensation

costs. However, careful analysis by the Foundation and the Institute for Justice showed that the cost estimates may have been overstated. We recommend that the committee look more closely at these costs. Though

the State should always be mindful of spending of taxpayer dollars, fairly compensating landowners for condemned property is a proper government expense and is the right thing to do. ★

## ENDNOTES

<sup>1</sup> See <http://tlo2.tlc.state.tx.us/txconst/sections/cn000100-001700.html>.

<sup>2</sup> 89 S.W. 2d 194 (1936).

<sup>3</sup> *Ibid.* 200.

<sup>4</sup> *Supra* note 2, 197 (1936).

<sup>5</sup> 867 S.W. 2d 769 (Tex. 1993).

<sup>6</sup> *Ibid.* 781.

<sup>7</sup> See 867 S.W. 2d at 773: "It cannot be denied that traffic patterns, convenience of access, visibility, and the disruption of construction activities over an extended period of time can affect the market value of property."

<sup>8</sup> See *County of Bexar v. Santikos*, 144 S.W.3d at 460.

<sup>9</sup> 987 S.W. 2d 187 (Tex.App.-Houston [14th District], 1999, *pet. denied*).

<sup>10</sup> *Ibid.* 193.

<sup>11</sup> See *State v. Rogers*, 772 S.W. 2d 559 (Tex.App.-Eastland 1976, *no writ*).

<sup>12</sup> "The Trouble with 'Just Compensation,'" *Mises.org* (5 Dec. 2006) <http://mises.org/story/2379>.

<sup>13</sup> *Supra* note 3.

## About the Author

**Drew Thornley**, policy analyst in the Center for Economic Freedom and the Center for Natural Resources, joined the Foundation in September 2007.

Drew has a strong background in both law and public policy. After graduating summa cum laude with a B.A. in economics from The University of Alabama in 2002, he earned his J.D. from Harvard Law School in June 2005.

Following graduation, Drew joined Maddox, Thornley, & Sanders in Jasper, Alabama, practicing contracts and real property law. He then moved to Chicago, where he served as Staff Counsel and Director of the State Supreme Court Project for Americans United for Life, a non-profit bioethics law firm. As Director, he managed a project assessing the handling of bioethics issues by the states' highest courts, leading the editing of 50 state Supreme Court scholarly articles. He also travelled extensively throughout the country, speaking to various groups and leading state Supreme Court advisory sessions.

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