

CONDEMNATION COMPENSATION

THE ISSUE

When a state or municipality takes title to private property, the private property owner must be compensated for the property condemned by the government. The United States Constitution calls for “just compensation” to be paid to the landowner, while the Texas Constitution calls for “adequate compensation” to be paid. At issue is what constitutes “adequate compensation” when private property in Texas is condemned by the State of Texas or a Texas municipality under the constitutional takings authority known as “eminent domain.”

The very nature of eminent domain puts the government and landowners on unequal footing. Condemnations are not voluntary sales but rather 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.

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 fair market value does not exist in condemnations, as market value can be determined only in 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.”

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.

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 might have been overstated. Since this issue is being raised again this session, we recommend a more transparent discussion of these costs. Though the State should always be mindful of government spending of taxpayer dollars, fully compensating landowners for condemned property is a proper government expense and is the right thing to do. However, it might be best handled in separate legislation.

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THE FACTS

- ★ 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.”
- ★ For entire takings, the guiding case law is the 1936 Texas Supreme Court ruling in *State v. Carpenter*, which held that “all circumstances which tend to increase or diminish the present market value” of the condemned property should be considered. This is known as fair market value (FMV).
- ★ 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 (diversion damages and loss-of-access damages) and lost business profits/goodwill.

RECOMMENDATIONS

- ★ 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” of the condemned property. Whatever factors would be considered in voluntary, private-market exchanges should be considered when determining the amount of compensation for condemned property.
- ★ 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.

RESOURCES

- *Article 1, Section 17, Texas Constitution*, <http://tlo2.tlc.state.tx.us/txconst/sections/cn000100-001700.html>.
- *The Trouble with ‘Just Compensation,’ Mises.org* (Dec. 5, 2006) <http://mises.org/story/2379>.
- *State v. Carpenter*, 89 S.W. 2d 194 (1936).
- *State v. Schmidt*, 867 S.W. 2d 769 (Tex. 1993).

