



# Tear Down This Wall to Adequate Compensation

## *Senate Bill 474*

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### Key Points

- Texans have a categorical right to adequate compensation when their land is taken under eminent domain.
- The vigor of property rights depends on whether Texans have the equal opportunity to enforce those rights in open court
- SB 474 breaks down the biggest cost barrier that denies Texans equal access to the courts and deters them from challenging the undervaluation of their condemned property.

### Background

Both the federal and state constitutions expressly affirm that Texans have a categorical right to just and adequate compensation when their land is taken under eminent domain—what the courts repeatedly have interpreted to be the property’s fair market value. The vigor of this right, however, depends on whether Texans have the opportunity to enforce it in open court. The Texas Bill of Rights recognizes this important addendum, confirming that “every person for an injury done him . . . shall have remedy by due course of law.”

That guarantee is at its lowest ebb in a condemnation proceeding, where Texas landowners almost invariably enter at an institutional disadvantage, have no control over the litigation process, and are compelled to fork over substantial sums of money at every stage of their challenge. The combination can act as a sharp deterrent, if not flat-out bar, to Texas landowners defending their rights in court, particularly with respect to disputes over the property’s appraisal price since attorney fees are not reimbursed even in the event of a clear legal victory. In effect, condemnation creates a two-tier system for property rights, one for those who can afford drawn out litigation and another for those stuck with the condemnor’s first offer however inadequate it may be.

Furthermore, because state law obliges Texans to subtract their attorney fees from a final verdict, landowners may never receive the full amount when condemning entities undervalue their property. Instead, they are forced to eat this expense, so when everything is all said and done, Texas landowners are in a far weaker position financially than they would have been had the land sold on the competitive market or remained in their possession. This flouts the common understanding that a property owner should not have to disproportionately shoulder the costs of a public benefit as well as the Constitution’s basic command that Texans be made whole.

### Senate Bill 474

Senate Bill 474 proposes to bring the condemnation process back into alignment with Texas’ commitment to private property rights and open access to the courts by knocking down one of the biggest cost barriers standing between landowners and the vindication of their right to receive adequate compensation. Specifically, the bill implements a fee shifting arrangement, not too dissimilar to Texas’ loser-pay rule, where condemning entities reimburse the property owner for all reasonable attorney fees and professional fees related to the eminent domain proceeding whenever it undervalues the property by at least 10 percent.

Like the loser-pay rule, the proffered change alters the parties’ risk-benefit analysis throughout the condemnation process to reward meritorious claims all while discouraging needless litigation. Only here, SB 474 recognizes that the party best positioned to secure the landowner’s adequate compensation before trial is the one who initiated the taking. Condemning entities control nearly every step of the condemnation proceeding, including the property’s first appraisal and the amount offered.

They also have a visible advantage in both competency and resources. By shifting the risk of litigation expenses, SB 474 simply gives condemners extra incentive to use those resources prudently and take care that their initial offer accurately reflects the property's true market value.

In addition, the bill recognizes that appraisals are sometimes more art than exact science and therefore only requires that the condemnor come reasonably close to the property's fair-market-value—in this case, a 10 percent difference between the offer and either special commissioners award or the amount awarded at trial. This way the condemnor is not penalized for minor discrepancies in price but at the same time cannot use the buffer as excuse to evade its categorical responsibility to provide adequate compensation. Again, the purpose of the fee shifting arrangement is to secure Texans that which the condemnor already owes, not punish the condemnor for exercising the power of eminent domain or hinder its application.

Finally, SB 474 ensures that Texas landowners exit a successful challenge with their full compensation intact, meaning that the decision to contest a condemnor's offer will be made based on the merits of the case, not on how much the anticipated attorney fees will eat into a damages award or how long a condemnor can prolong the litigation. The right to adequate compensation will no longer depend on how deep a property owner can dig into their pockets before and during a trial.

## Conclusion

Energetic property rights represent a foundational principle in Anglo-American law, long recognized as an indispensable prop for personal autonomy and seen as a central reason for the wellspring of economic opportunities emerging from the Texas model. The Legislature accordingly has taken great pains this past decade to harmonize the condemnation process with this time-honored commitment. But, that effort will be for naught unless legislators can secure Texas landowners a way to enforce those reforms in open court, to say nothing of promises made in the U.S. and Texas Constitutions.

On that front, reimbursing landowners their attorney fees will break down the cost barriers that currently deter Texans from defending their right to be made whole. It also will put condemners on notice that their conduct is subject to thorough and systematic scrutiny by the courts, fostering better reparation practices before there is need for drawn-out litigation. Texas law already utilizes comparable arrangements to promote the fair and speedy resolution of cases, as does the legislatures of nearly two-dozen states, including Alaska, Idaho, Montana, Oklahoma, Oregon, and Washington. It's time that Texans enjoy the same security for a right as fundamental to personal liberty as the compensation requirement. ★

## About the Author



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