



APPRAISAL GUIDANCE MEMO: DAMAGES FOR IMPAIRMENT OF ACCESS

Material Impairment of Direct Access Damage Standard - Effective September 1, 2011, the Texas Property Code, Section 21.042, establishes a new standard for determining whether a property owner is entitled to damages for impairment of access resulting from the acquisition of property for a highway improvement project. The statute provides that:

(d) 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, *including a material impairment of direct access on or off the remaining property that affects the market value of the remaining property*, but they may not consider an injury or benefit that the property owner experiences in common with the general community, including *circuity of travel and diversion of traffic*. In this subsection, 'direct access' means ingress and egress on or off a public road, street, or highway at a location where the remaining property adjoins that road, street, or highway (*italics added for emphasis*).

Comparison to Prior Access Damage Standard - The prior standard of "material and substantial impairment of access" focused on access to the entire remainder and asked whether there was still "reasonable access" to the remainder after the state's restriction of access. Access to a different secondary public road could constitute reasonable access resulting in a finding of no material and substantial impairment of access.

The new standard focuses on direct access to the property from the public highway. The operative factors are whether the impairment to "direct access" (ingress and egress on and off the remaining property to or from the improved public highway) is "material" and, if so, whether it "affects the market value of the remaining property." Additional access to a different secondary public road may or may not prevent a finding of material impairment of direct access, depending upon the specific facts. However, a total denial of direct access cannot be completely replaced by other access to a different secondary public road.

Appraisal Instruction:

- A. A "material impairment" of direct access is one that is significant or important. Although the change must be significant or important, it no longer must be "substantial" (meaning considerable or large).
- B. In determining whether impaired access is material, the appraiser must look to whether other access points remain after the acquisition and whether those access points are sufficient to allow the remainder to have

similar utility. The concept of access impairment is not to be fragmented into a mathematical equation to focus only on the number of feet or percentage of closed access points.

- C. The appraiser should look at both the physical changes to ingress and egress on and off the remaining property and the anticipated impact on the use of the property to determine if the restriction is significant. Remaining access should be analyzed in light of the actual use of the remainder property as reflected by existing uses and improvements and applicable zoning unless the appraiser has concluded that the highest and best use of the property is different than its actual use. If the appraiser has concluded that the highest and best use of the property is different than its actual use, then remaining access should be analyzed in light of that highest and best use; making sure to avoid speculative or hypothetical uses that are not reasonably probable within the immediate future or within a reasonable time. Some of the factors to consider in the before and after scenario are:
1. the number, location, and width of existing, permissible, or permitted driveways;
 2. extent of difficulty for large trucks or other unique vehicles to enter the property (if that is the normal use of the property at the time of impairment);
 3. the manner in which the access impairment affects the functionality of existing improvements;
 4. whether the remaining property has access to another public road(s) (this is now just one factor and it may affect the analysis in two different ways:
 - a. it does not automatically prevent a finding of material impairment of ingress and egress on and off the remaining property from the public highway as it might under prior law, but access to another public road may have an effect on the determination of material impairment of direct access; and
 - b. if there is a determination that a material impairment of direct access did occur, a property's access to another public road may then have an effect on the difference in market value, if any); and
 5. whether it changes the highest and best use of the remainder (again, this is not determinative of "materiality," but is just one factor to be considered in making that determination). Material

impairment cannot be based on speculative or hypothetical uses of the remainder property. Prospective highest and best uses must be reasonably probable within the immediate future or within a reasonable time.

- D. "Circuity of travel" and "diversion of traffic" are specifically excluded from the concept of material impairment of ingress and egress on and off the remaining property.
- E. "Damages to remainder property" are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the use of the land acquired.

Statements in Appraisal Instruction - Every appraisal must contain the following statement:

The appraiser has considered access damages in accordance with Section 21.042(d) of the Texas Property Code, as amended by SB 18 of the Texas 82nd Regular Legislative Session, and finds as follows:

1. **Is there a denial of direct access on this parcel? _____ (yes or no)**
2. **If so, is the denial of direct access material? _____ (yes, no, or not applicable)**
3. **The lack of any access denial or the material impairment of direct access on or off the remaining property affects the market value of the remaining property in the sum of \$_____.**

All three blanks must be completed for every appraisal.

If there is no denial of access on the property then the answer to Question #1 is no, Question #2 is not applicable, and Question #3 is \$0.00.

If there is a denial of access, the appraiser must determine if it is a material impairment of direct access on or off the remainder that affects the market value of the remaining property. Some parcels may not have a material denial of access, so the sum attributable to the effect of market value would be \$0.00. Some parcels may have a material denial but the denial does not affect the market value; therefore the sum would be \$0.00.

For each appraisal, there must be a sum attributable to access denial, even when there is no access denial and that sum is \$0.00.