



MEMORANDUM

TO: District Engineers
Region Directors
Region ROW Staff
Transportation Planning Directors
Right of Way Division Staff

DATE: August 3, 2011

FROM: John A. Barton, P.E. *John A. Barton PE.*
Interim Deputy Executive Director

SUBJECT: Eminent Domain – Changes and Guidance

Senate Bill 18 (SB 18) was passed into law during the Texas 82nd Regular Legislative Session. SB 18 amends Texas law with the stated purpose of making the eminent domain process fairer for property owners. One change resulting from this law is a revision to the Texas Property Code that creates a new legal standard for determining compensation for damages to the remainder property with respect to access.

Under the revised Property Code, the special commissioners will consider the impacts of “a material impairment of direct access on and off the remaining property that affects the market value of the remaining property” when determining compensation for damages to the remainder property in an eminent domain proceeding. The special commissioners will exclude from consideration any impacts of circuitry of travel and diversion of traffic. The law defines “direct access” as “ingress and egress on or off a public road, street or highway at a location of locations where the remaining property adjoins that road, street or highway.” Under the previous law, the threshold of compensability for damages for the impairment of access to the remainder property required proof of a “material and substantial” impairment of access.

This new access damage standard applies to all parcels for which eminent domain petitions are filed on or after September 1, 2011.

During the Texas Transportation Commission meetings held in June and July, some questions were raised concerning the minute orders authorizing the initiation of eminent domain proceedings on various parcels. The Commission was asked to consider postponing action on all condemnation proceedings until after September 1, 2011. The Commission and Administration evaluated this request and determined that it is in both the property owner’s, and the state’s best interest to proceed as follows:

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1. Petitions will be filed without delay for parcels located on non-controlled access facilities.
2. Petitions will be filed without delay for parcels located on controlled access facilities that are part of a CDA project.
3. Petitions will be filed without delay for parcels located on controlled access facilities that are not part of a CDA project if the parcel was included in a minute order approved prior to June 2011.
4. Petitions will not be filed until September 1, 2011, or later for parcels located on controlled access facilities that are not part of a CDA project if the parcel was included in the June, July or August 2011 eminent domain minute order.

In order to reduce any impacts this decision will have on our project schedules, TxDOT will attempt to enter into a possession and use agreement for parcels for which the petition filing will be delayed until after September 1, 2011, as long as there are no outstanding title issues associated with the parcel.

This decision will also require that the appraisal for all parcels whose petition is not filed until September 1, 2011, or later be updated in accordance with the new law. Attached is the *Appraisal Guidance Memo, Damages for Impairment to Access*. Please provide this guidance document to your appraisers for their use. Effective immediately, all new and updated appraisals must consider and apply the new access standard in accordance with the attached guidance.

Each new and updated appraisal must include 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 _____”

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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 no, 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 affect of market value would be \$0.00. Some parcels may have a material denial and yet, it 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.

Attachment

APPRAISAL GUIDANCE MEMO
DAMAGES FOR IMPAIRMENT TO ACCESS

Material Impairment of Direct Access Standard - Effective September 1, 2011, the Texas Property Code, Section 21.042, establishes a new access standard for determining whether a property owner is entitled to damages for impairment to 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* (italics added for emphasis). 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."

Meaning of "Material Impairment" - Although the courts have clearly defined the prior standard of "material and substantial impairment of access," there is very little in the way of legal authority to assist with a definition of "material impairment of direct access." The prior standard 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. The new standard, however, focuses on direct access to the property from the state highway. The operative factors are whether the impairment to "direct access" (ingress and egress on and off the remaining property) is "material" and, if so, whether it "affects the market value of the remaining property."

Appraisal Instruction:

a. A "material impairment" is one that is significant or important in the context of how the property is or may be used. Although the change must be significant or important, it no longer must be "substantial" (meaning considerable or large).

b. 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. Some of the factors to consider in the before and after scenario are:

- (i) the number, location, and width of existing, permissible, or permitted driveways;
- (ii) 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);

- (iii) the manner in which the access impairment affects the functionality of existing improvements;
- (iv) whether the remaining property has access to another public road(s) (this is now just one factor; it does not automatically prevent a finding of material impairment of ingress and egress on and off the remaining property from the state highway); and
- (v) 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).

c. "Circuitry 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.