

SENATE BILL 18

82nd LEGISLATURE

SB 18'S IMPACT ON NEGOTIATIONS AND EMINENT DOMAIN PRACTICES

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Right of Way Division**

OVERALL EFFECT

INTRODUCES ADDITIONAL DELAY,
RISK AND EXPENSE INTO THE
ACQUISITION PROCESS, ESPECIALLY
FOR THOSE PROPERTIES ACQUIRED
BY EMINENT DOMAIN

PRE-CONDEMNATION EFFECTS

- Significantly expands condemning authority's appraisal disclosure duties
- Confidentiality prohibition and notice
- Bona fide offer required

DISCLOSURE OF APPRAISAL REPORTS (BY CONDEMINING ENTITY)

- At the time of the initial offer, must disclose by certified mail “**ANY AND ALL**” appraisal reports of the owner’s property that were produced or acquired by the condemning entity which were prepared within 10 years prior to the offer.
- No longer just the appraisal(s) “used in determining the final offer”.
- Does not expressly except appraisals not approved by the entity.
- Made applicable to all condemning agencies, not just governmental.

DISCLOSURE OF APPRAISAL REPORTS (BY THE LANDOWNER)

- For landowner, is limited to appraisal(s) “used in determining the owner’s opinion of value” (existing law).
- Disclosure time shortened: not later than the earlier of 10 days after report’s receipt or the third business day before the special commissioner’s hearing (shortened from 10 to 3 days).

PROHIBITION: CONFIDENTIALITY OF ACQUISITION OFFER OR AGREEMENT

- Cannot include a confidentiality provision in any offer or purchase agreement.
- Requirement to inform the owner of the right to:
 - 1) discuss with others any offer, agreement or acquisition, or 2) keep the offer or agreement confidential (subject to public records act)
- Should be included in the initial offer letter.

**BONA FIDE OFFER REQUIRED
(NEW PROPERTY CODE SEC. 21.0113)**

Prerequisite to eminent domain:

MUST make a “bona fide offer” (“BFO”) to acquire the property voluntarily.

STATUTORY ELEMENTS OF A BFO

An entity makes a bona fide offer if meets ALL of the following requirements:

- written initial offer;
- written final offer, made 30+ days after initial offer, based on a written appraisal from a certified appraiser (final offer equal or greater than the appraised amount).

“Certified” appraiser: certified by Texas Appraiser Certification and Licensencing Board to appraise the type of property being appraised.

STATUTORY ELEMENTS OF A BFO

CAVEAT: to be a BFO, cannot make a FINAL offer based on an in-house value finding by a non-certified TxDOT employee.

- provide with final offer or earlier: (a) copy of the written appraisal on which final offer is based; (b) copy of the deed, easement or other instrument by which the property or property right is proposed to be conveyed; and (c) landowner's bill of rights as prescribed by Sec. 21.0112; and
- provide property owner at least **14** days to respond to final offer before filing E.D. petition (current TxDOT final offer letter provides 10 days).

LANDOWNER'S BILL OF RIGHTS UPDATE

The LOBR, which is required to explain condemnation procedures, is now a statutory element of making a bona fide offer.

Does not appear likely the Attorney General's Office will publish, prior to Sept. 1st, a revised Landowner's Bill of Rights reflecting SB 18's changes to condemnation procedures.

In the interim (until such time as the "official" AG revised version becomes available), provide a Landowner's Bill of Rights supplement/cover at the time the LOBR is furnished to the property owner.

RECOMMENDED INTERIM LOBR COVER SHEET

Attached is a copy of the Landowner's Bill of Rights in the form in which it was most recently modified by the Office of the Texas Attorney General, as of August, 2010. Please note that certain condemnation procedures provided in Chapter 21, Property Code were modified by Senate Bill 18, 82nd Legislature, effective September 1, 2011. Until such time as the Attorney General publishes on its web site the Landowner's Bill of Rights as revised to reflect SB 18's procedural changes, you may wish to review the procedural changes at:

- <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00018F.pdf#navpanes=0>

SB 18 REVISIONS TO TXDOT INITIAL OFFER LETTER FORM

- “You have the right to discuss with others any offer or agreement regarding the Department’s acquisition of the subject property, or you may (but are not required to) keep the offer or agreement confidential from others, subject to the provisions of Chapter 552, Government Code (the Public Records Act) as it may apply to the Department.”
- “Finally, we enclose copies of all appraisal reports relating to your property being acquired which were prepared in the ten (10) years preceding the date of this offer and produced or acquired by the Department, including the appraisal on which this offer is based.”

SB 18 REVISIONS TO TXDOT FINAL OFFER LETTER FORM

“If you desire to accept this offer, please contact _____ at (____) ____-____ as soon as possible. If this offer is not accepted within **fourteen (14) days** from the date of delivery of this letter, it will be considered as having been rejected. We enclose herein a copy of the proposed instrument by which the property or property interest would be conveyed to the State.”

PROVING THE REQUIRED 30 AND 14 DAY TIME INTERVALS

PROPOSED 43 TAC SEC. 21.10(H) (“NEGOTIATIONS”):

“..A DOCUMENT IS CONSIDERD TO BE DELIVERED ON THE EARLIER OF THE DELIVERY DATE INDICATED ON THE CERTIFIED MAIL RECEIPT OR THE FIFTH DAY AFTER THE DATE THAT DOCUMENT, PROPERLY ADDRESSED WITH POSTAGE PREPAID, IS DEPOSITED WITH THE UNITED STATES POSTAL SERVICE.”

RECOMMEND FOL P.O.M. OR CERTIFIED RRR

STATUTORY ELEMENTS OF A BFO

- **QUERY:** if mess up on one step, means failed to make a BFO, or just means the entity doesn't get the presumption which accompanies all the steps?
- **ANSWER:** do not miss a single step, as doing so exposes the condemnor to a potential bona fide offer challenge.

CONSEQUENCE OF FAILING TO MAKE A BONA FIDE OFFER

- If the court hearing the E.D. case determines the condemnor did not make a BFO to acquire the property from the owner voluntarily “as required by Section 21.0113”, the court shall:
 - abate (not dismiss) the E.D. proceeding;
 - order the condemnor to make a bona fide offer;
 - order the condemnor to pay **any reasonable attorney’s fees and other professional fees** incurred by the property owner that are directly related to the violation.

PROCEDURES AFTER CONDEMNATION PETITION FILED

CHANGED REQUIREMENTS:

Condemnation petition elements

Special commissioners hearing procedures

Access impairment compensability

Relocation program/benefits expanded to/mandated for
all governmental entities & political subdivisions

CONDEMNATION PETITION--new requirements:

- must state “with specificity” the public use (vs. the “purpose”) for which the entity intends to acquire the property.
- must state that the entity made a bona fide offer to acquire the property from the owner voluntarily “as provided by Section 21.0113”.

CONDEMNATION PETITION-new requirements:

- must provide a copy of the filed condemnation petition to the “property owner” by certified mail RRR.

Recommend, at minimum, providing copy of filed petition to fee owner(s) with the filed notice of lis pendens. However, since notice of filing of lis pendens has to be served on all parties anyhow...

Example of petition/lis pendens transmittal letter

“We enclose a copy of the notice of lis pendens the State of Texas has filed in the County's official records, related to an eminent domain proceeding filed by the State to acquire certain property for highway purposes (see enclosed copy of the filed petition for additional information). This required statutory notice of the filing of the petition and lis pendens requires no specific action by you at this time. In the future you will receive advance notice of the date of the scheduled special commissioners' hearing.”

SPECIAL COMMISSIONERS' HEARING

- “The judge shall provide each party a reasonable period to strike one of the three commissioners appointed by the judge.”
- The special commissioners “may not schedule a hearing...before the **20th** day after the date the special commissioners’ were appointed.”

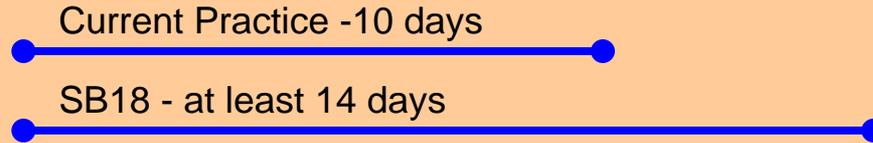
SPECIAL COMMISSIONERS' HEARING

- Means you have to wait 20 days before the commissioners can even sign an order setting the hearing date (presumably to accommodate a motion to strike a special commissioner)
- Notice of hearing must be served on a party not later than the **20th (formerly the 11th)** day before the day set for the hearing.
- **COMBINED EFFECT:** extends the theoretical minimum time for a SC hearing from current 11 days to 40, plus any motion to strike and re-appointment delay

Comparison of Elapsed Times

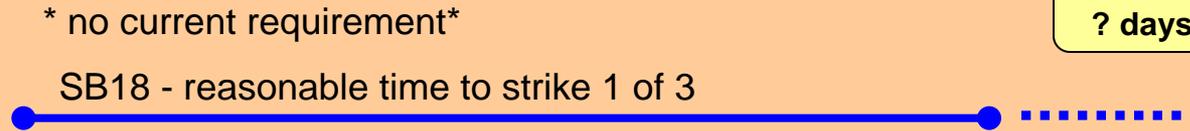
(Current Law or TxDOT Practice vs. SB18 Requirements)

From delivery of final offer to filing of E.D. petition



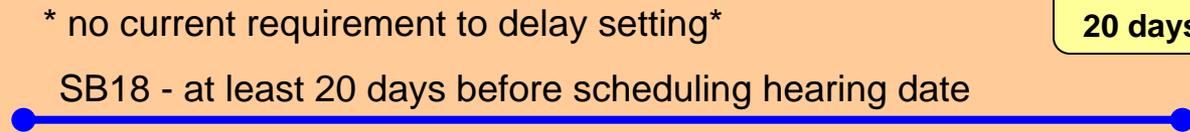
adds
4 days

From appointment of special commissioners to potential motion to strike commissioner



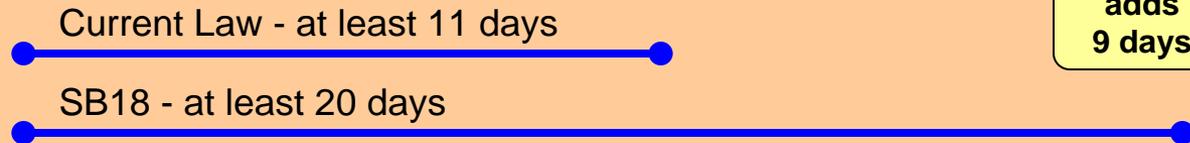
adds
? days

From appointment of special commissioners to order setting hearing



adds
20 days

From service of notice of SC hearing to hearing date



adds
9 days

**DISCLOSURE OF POTENTIAL RIGHT TO REPURCHASE PROPERTY
(CITY, COUNTY, STATE ROW NO LONGER EXEMPTED)**

An entity with eminent domain authority shall disclose in writing to the property owner, at the time of acquisition of the property through eminent domain, that the owners or his heirs, successors or assigns may be entitled to (a) repurchase the property under certain circumstances; (b) request from the entity certain information relating to the use of the property and any “actual progress” made toward that use; and (c) that the repurchase price is the price paid to the owner at the time the entity acquired the property through eminent domain. **THIS WILL BE HANDLED IN, OR VIA AN ATTACHMENT TO, THE EMINENT DOMAIN JUDGMENT.**

CHANGE OF ACCESS IMPAIRMENT COMPENSABILITY STANDARD

- Current law: “material and substantial” impairment; compensability threshold a question of law for the court.
- SB 18: “a material impairment of direct access on or off the remaining property that affects the market value of the remaining property.”
- “Direct access” defined: “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” (circuitry of travel and diversion of traffic excluded).

RELOCATION PROGRAM MADE MANDATORY FOR ALL GOVERNMENTAL ENTITIES AND POLITICAL SUBDIVISIONS (PROP. CODE SEC. 21.046)

- “may provide” relocation advisory services now “**shall** provide”.
- “may pay” displacee’s moving expenses, rental supplements, replacement housing assistance, etc. now “**shall** pay”.
- BUT no substantive change in relocation benefits.

EFFECTIVE DATE

- Property Code amendments apply only to a condemnation proceeding in which the petition is filed on or after 9/1/2011.
- Old law continued in effect for condemnation petitions filed before 9/1/11.

DID NOT PASS

- Attorney's and other professional fees if E.D. compensation result (at SC hearing or trial) more than 110% of final offer (house version rejected by conference committee).

NOT DISCUSSED

- Production of Information by Certain Entities (entities not subject to open records act)
- Authorizing the use of eminent domain (resolution/minute order)
- Specific circumstances under which right of repurchase may arise after 10 years.
- Notices to and information requests by previous property owner or heirs, successors or assigns if right of repurchase arises.

QUESTIONS?