

Landowner property rights and the condemnation process

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You may have noticed the recent boom in energy infrastructure construction across the greater Metroplex (i.e. pipeline and power line construction). This construction typically involves replacing older or undersized pipelines and installing new transmission power lines to deliver power generated from wind farms in West Texas. Not surprisingly, when approached by pipeline and electric line operators to construct a power line, pipeline or other utility, landowners are often rightfully concerned about the potential loss of their property rights. In responding to their concerns, I've found that providing a brief overview of the landowner's property rights and the condemnation process often goes a long way toward easing the landowner's initial trepidation.

As a property owner, you should first understand that a pipeline or electric line operator is only authorized to construct pipelines or power lines across your land by one of two methods: via the process of eminent domain (condemnation) or through obtaining the landowner's permission, which is most often done through an easement. With that framework in mind, what do you do when an operator contacts you to construct or replace a pipeline/power line across your land? That depends. Is there an existing easement covering your property? If there is no easement, the operator will have to either negotiate a new easement or take the land by condemnation, assuming the operator has been given the power of eminent domain. (It should also be noted that even where an easement exists, sometimes the operator will nonetheless have to take land by condemnation if the new use of the land is not contemplated in the existing easement). Consequently, when you are contacted by an operator about building a pipeline/power line on your property, it is important to first confirm whether your property is already subject to an easement and, if so, whether that easement conveys the right to construct the new pipeline/power line on your property.

If condemnation proceedings are instituted against you, there are legislative safeguards in place to ensure landowners are afforded rights during the different phases of the condemnation process. In fact, in September 2011 new legislation came into effect that altered the condemnation landscape significantly for entities with the power of eminent domain. The new law put in place additional procedures, which have slowed the process to condemn private property in Texas. These procedures were intended to provide the landowner with significantly more time to consider any offers from condemning authorities and to allow for more opportunity to negotiate with the condemning authority before the filing of a condemnation lawsuit.

Among its many provisions, the new law now requires a pipeline or electric line operator to provide two written offers during the negotiation process – an initial offer and a final offer made no sooner than 30 days after the initial offer. The final offers must be based on a written appraisal, from a certified appraiser, of the value of the property being acquired and the damages, if any, to any of the property owner's remaining property. If the parties fail to agree after the final written offer (the landowner must be given a minimum of 14 days to respond), operators are authorized to proceed to condemnation by filing a lawsuit. As apparent, this minimum 45-day window between the initial offer and the filing of the condemnation lawsuit provides an opportunity for operators and landowners to negotiate for an easement in lieu of condemnation proceedings.

Given the intricacies in the condemnation process, it is essential that you are knowledgeable of the rights afforded to landowners under the new law (found in Chapter 21 of the Texas Property Code), and it is often helpful to engage a knowledgeable condemnation lawyer to guide you through the condemnation/negotiation process. Conversely, if your property is already subject to a pipeline/power line easement, it is important that you are fully aware of the rights that have been conveyed to the owner of that easement.

When your property is already burdened by an easement, there is often no need for the pipeline or electric line operator to initiate the condemnation process. Instead, the operator may be able to construct the pipeline/power line under the terms of the easement with payment of little or no additional compensation. In that case, it is critical that you review the easement to confirm the scope of the rights granted to the operator in the easement (usually a copy of the easement can be easily obtained from the county real property records). Generally speaking, if the easement was granted within the past 10-20 years, it is more likely that the easement specifically addresses the operator's right to construct a second or third pipeline/power line, or even to replace an existing pipeline/power line. Further, the more recent easements typically contain a metes and bounds description describing the exact location of the easement on your property. In those instances, assuming the easement does grant the right to install additional lines or replace such lines, the location for the new or replacement pipeline/power line would be typically limited to the space described in the metes and bounds description.

On the other hand, if your easement is from an earlier period, odds are the easement is a single-page "form" easement, containing undefined terms and broadly worded boiler plate provisions. Surprisingly, the majority of the easements I encounter are from this earlier period. It is therefore worth briefly addressing one of the more frequently litigated terms in these older easements: a provision granting the operator the right to construct "pipe lines" and providing predetermined compensation in the event the operator decides to construct additional pipelines in the future. This provision often leads to confusion when the operator places a pipeline in the ground shortly after executing the easement, and then 40 years later wants to construct a second, third or fourth pipeline. Unfortunately, Texas courts have held use of the plural term "pipe lines" in the easement, coupled with a provision setting the compensation for such additional lines, is enough to evidence intent to construct multiple pipelines, and the additional lines can be placed in the ground at any time in the future. This can be even more problematic for landowners with an easement that does not specifically define the location for the pipelines/power lines (i.e. blanket easement). In that instance, depending on the specific language of the easement, the operator may be able to construct the additional pipelines/power lines at the location of the operator's choosing.

As you can imagine, familiarity with Texas courts' construction of easements can also aid in negotiating an easement with an operator. For example, a landowner can avoid several of the common pitfalls encountered in the form easements discussed above by requiring any easement with an operator to contain well-defined limits to the space and activities allowed in the easement, the number and size of pipelines/power lines that can be constructed across the property, and the compensation the landowner will receive in the event multiple pipelines/power lines are constructed. Of course, these are but a few of the more straightforward issues that must be considered when negotiating an easement. By consulting an attorney well-versed in

condemnation and interpretation of easements, landowners can easily avoid the above-described problems, as well as the more complex issues that often arise when negotiating for an easement or enforcing existing easement rights.

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