



COALITION FOR CRITICAL INFRASTRUCTURE

★ CONNECTING TEXANS ★

March 13, 2019

To: The Honorable Dan Patrick
Lieutenant Governor of Texas

Re: Committee Substitute S.B. 421
Eminent Domain

After providing substantive comments on S.B. 421 at the Senate State Affairs Committee last week and offering revisions that we believe make the bill more workable, we are dismayed that the committee substitute which passed out of committee exacerbates some of the problems we had identified with the original bill. We had hoped for the opportunity to review the substitute before the committee voted on it, but we'd like to offer our comments now.

Although the assertion is that the bill only applies to private condemners, the new language is overly broad and applies to all entities with eminent domain authority, including cities, counties, municipal utility districts, water authorities and districts, the Texas Department of Transportation, pipelines, electric companies, ports, and railroads.

Even more troubling is the fact that the key component of the initial offer, found on the first page of the bill, is probably unconstitutional. Art. 1, Sec. 17 of the Texas Constitution requires a condemner to provide "adequate compensation" to a property owner when property is taken under the power of eminent domain. Texas courts have long defined "adequate compensation" to mean fair market value. Fair market value is defined in Texas Property Code Section 21.042 and in decades, if not a century, of case law as "the price the property will bring when offered for sale by the one who desires to sell, but is not obligated to sell and is bought by one who desires to buy, but is under no necessity of buying." See State v. Carpenter, 89 SW 2d 194, Ct. of Civil App. 1936.

As written, CSSB 421 requires both private or public condemners to initially offer, at a minimum, 145% of the market value of the property as determined by a certified independent appraiser. This additional compensation is arguably a violation of the constitutional provision prohibiting public entities from gifting public money. The fiscal impact alone, especially for public entities, should give the Senate considerable pause.

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Another serious problem with the substitute is the requirement that the condemner must use an appraiser selected by or approved by the landowner. With no recourse articulated in the bill, the landowner could simply refuse to select or approve an appraiser and effectively shut down the process of acquiring the property for public use. Further, the easement provisions of the bill substitute include ambiguous language that was previously discussed in negotiations to be deleted because it would clearly incentivize litigation. Better options are available to satisfy landowner concerns, and CCI has provided those to Senator Kolkhorst.

Senator Kolkhorst did accept language suggested by CCI to recharacterize the public meeting as a property owner meeting, but the bill still contains some of the same procedural gotchas that appeared in the filed version. CCI proposed a sound counter that would provide landowners with a meaningful opportunity to meet with condemning entities without providing an opportunity for anti-development activists to attend and co-opt the legitimate concerns of landowners. Yet, the substitute version still includes a clunky process requiring our courts to “certify” landowner meetings. And, in the case of the electric utilities, the bill seems to compel yet another public hearing beyond the several already required during the CCN process. These hurdles do nothing to further landowner interests but do make the process more onerous for the judiciary and more expensive – in both time and money -- initially for the condemners, but ultimately for the citizens of Texas.

These are only a few of the many concerns we have with the committee substitute. Governor, as we have said for the past 18 months, CCI pledges to continue to work toward meaningful and workable eminent domain reform. However, CSSB 421 is not that bill.

We respectfully request you not recognize CSSB 421 for debate until these unconstitutional and unworkable provisions are addressed.

cc: Members, Texas Senate