

The Basics of Eminent Domain in Texas

Freeport, Texas
November 2, 2019



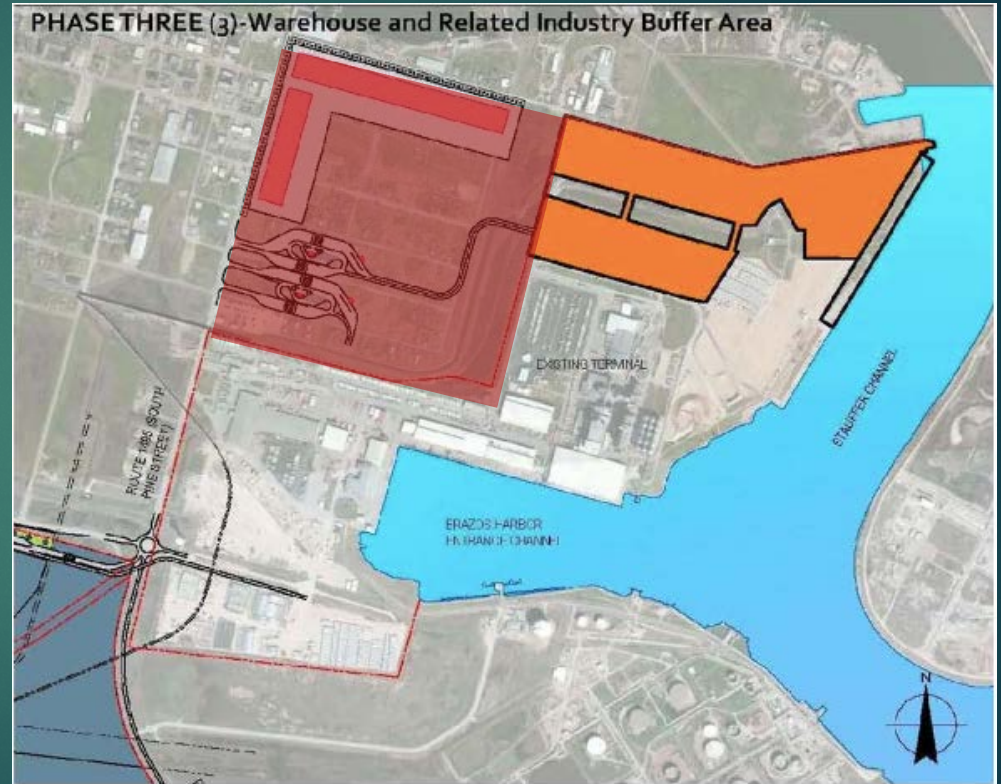
L O N E S T A R
L E G A L A I D



The University of Texas at Austin
School of Law

Why are we here?

- The Port of Freeport has a plan to expand its terminal and wants all East End property to do so.



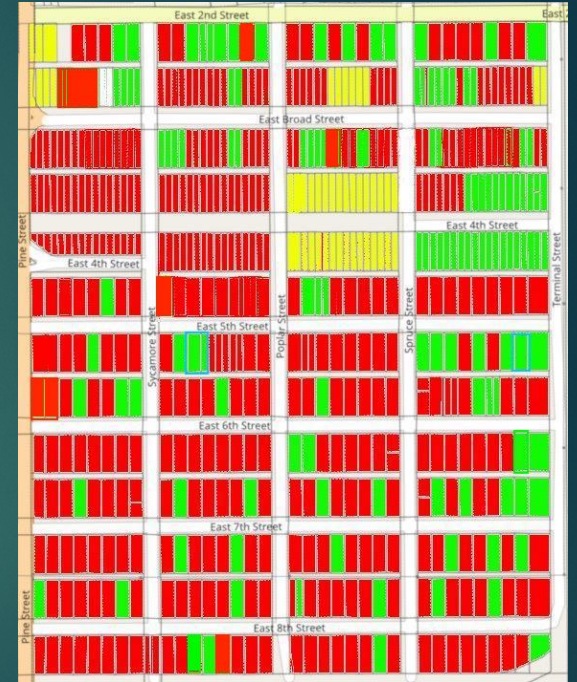
Properties the Port Seeks to Acquire



2017: 358 properties



2018: 382 properties



2019: 399 properties

What is the Port?

- Independent government entity created by Texas in the 1920s.
- Provides for the construction and improvement of waterways to aid in navigation.



What Is Eminent Domain?



- Eminent domain = government's power to take private property for public use.
- Condemnation = the process of taking property using eminent domain.
- Taking = the same thing as condemnation

Common Terms in Eminent Domain

- Condemnor = the government unit that wants to take the private property.
- Landowner (condemnee)= the property owner whose property the government wants to take.

When Does the Law Allow Eminent Domain?

- U.S. Constitution: the government may take private property for “public use” after paying “just compensation” to the owner.
- Texas Constitution: the government may take private property for “public use” after paying “adequate compensation” to the owner.

Who Can Use Eminent Domain?

- Texas law gives many government units eminent domain authority.
 - Examples: Cities, counties, state agencies.
- Texas law gives “navigation districts,” like ports, eminent domain authority.

Limits on Eminent Domain

- Public Use
- Compensation to landowner
- Notice to landowner
- Opportunity for landowner to challenge the taking
 - Three-step process

What Is Public Use?

- ← **A use that benefits the public**
 - May also benefit a private business
 - Courts have often sided with the condemnor on public use
 - Ports can do many different things and call them public use

Changes in Public Use Law



- 2005: US Supreme Court case
 - *Kelo v. City of New London*
- 2005: Changes to Texas Government Code
- 2009: Amendment to Texas Constitution
 - Giving land to a private business for economic development is NOT public use

What Is Adequate Compensation?

- ← Texas law says the compensation must be adequate and tied to current market value.
- ← Getting an appraisal helps you get adequate compensation.

Port of Freeport's Plan to Use Eminent Domain

- Port Commissioners' Resolution on October 10, 2019
- Port has to assert a "public use" for each taking.
- Port has to pay "adequate" or "just" compensation to each landowner.



Condemnation Procedure in Texas

Three-Step Process (at most)

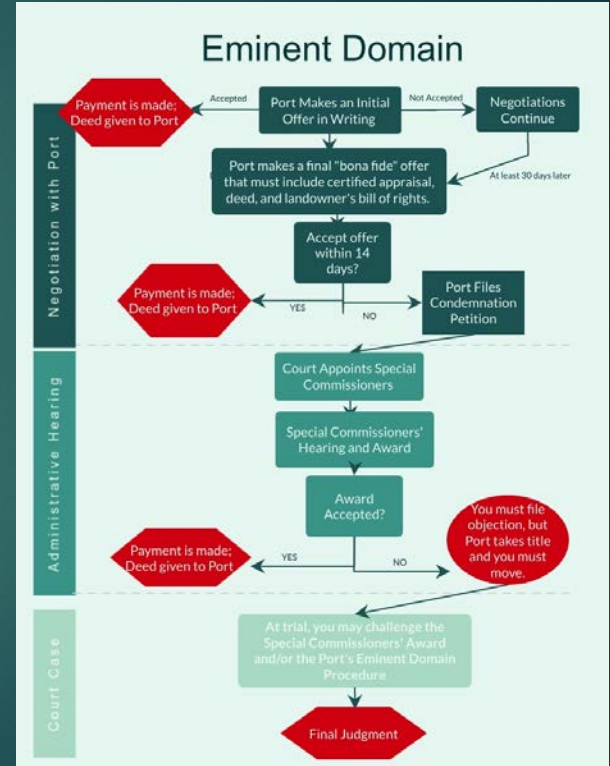
← Step #1: Negotiation

- If negotiation does not work, move to step #2

← Step #2: Administrative Hearing

- If you object to the Commissioners' decision, move to step #3

← Step #3: Court Case





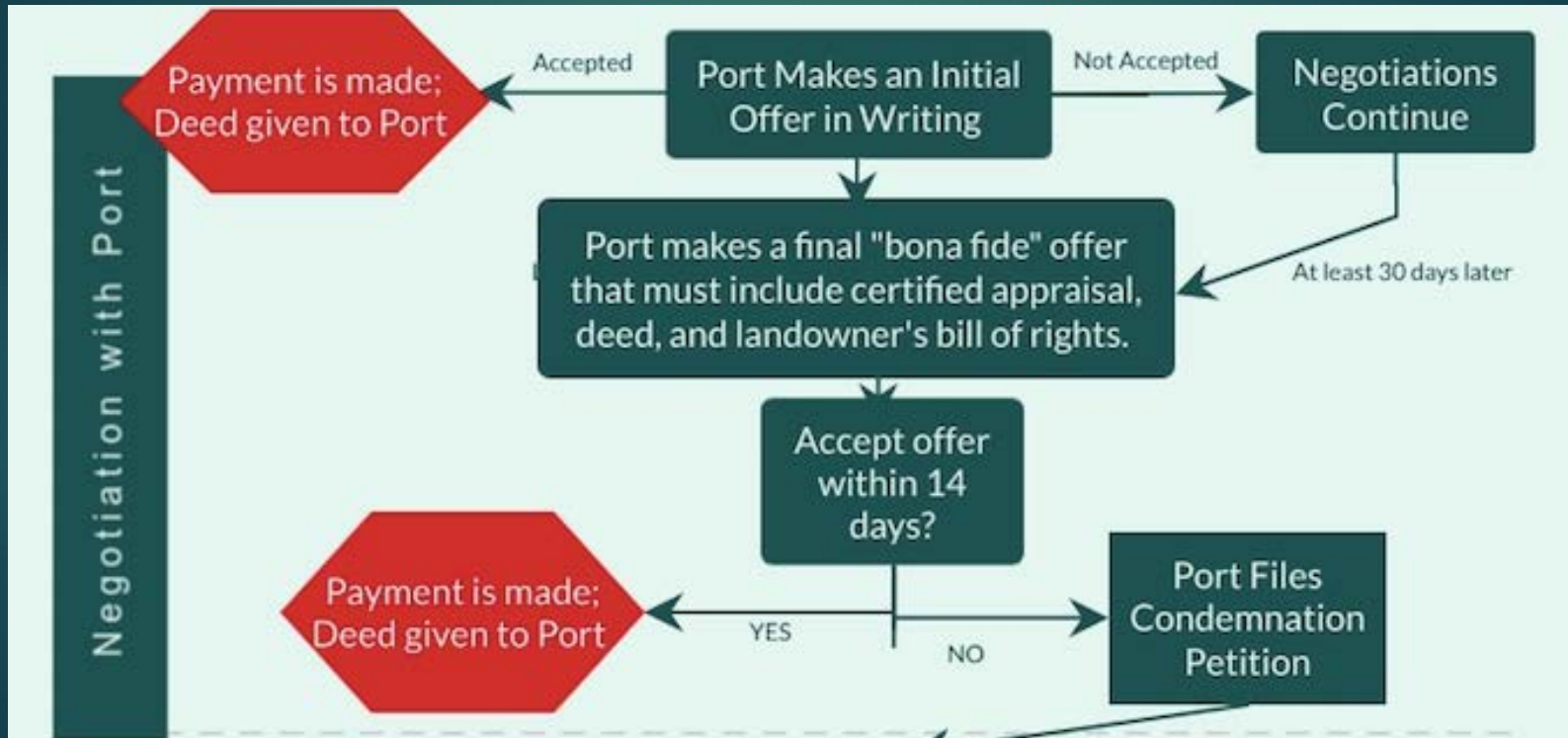
What are your Rights in the Eminent Domain Process?

- You always have the right to an attorney
- You have the right to adequate compensation for the loss of your property
 - Current local market value

Your Strategy in the Eminent Domain Process

- Focus on maximizing compensation
 - Attorney
 - Appraisal
- Be aware: challenging “public use” is possible but has rarely succeeded.

Step #1 – Negotiation with Port



Step #1 – Negotiation with Port

- ← Port makes first offer in writing; you don't have to respond.
- ← Port makes final offer in writing 30 days later
 - Must include an appraisal of your property by a certified appraiser
- ← You have 14 days to accept or the offer expires; you don't have to accept this offer

Step #1: Your Rights During Negotiation

← You are entitled to a "bona fide offer" from Port in writing, which includes:

- Copy of the Port's appraisal of your property
- Copy of the deed
- Landowner's bill of rights (if not already given)

Step #1: Your Rights During Negotiation

- ← Right to discuss the terms of your offer or agreement with others or keep it confidential.
- ← Port must disclose any appraisals of your land for the past 10 years in its possession.
- ← You have the right to get your own appraisal, but you must pay for it.

Step #1: Your Strategy During Negotiation with Port



- ← Hire an attorney on a contingency basis.
- ← You/your attorney may get an appraisal from a certified appraiser.
 - But: Be strategic.
- ← You may share offers with your neighbors.
- ← Keep and record every communication between you and Port.

Step #1: Your Strategy During Negotiation with Port

Initial offer: \$20,000

What you get in the end: \$30,000

Difference: $\$30,000 - 20,000 = \$10,000$

Lawyer takes percent of the difference = 40% of \$10,000 = \$4,000

In the end:

Lawyer gets: \$4,000

You get: $\$30,000 - \$4,000 = \underline{\$26,000}$

Step #1: Your Strategy During Negotiation with Port



- ← Hire an attorney on a contingency basis.
- ← You/your attorney may get an appraisal from a certified appraiser.
 - But: Be strategic.
- ← You may share offers with your neighbors.
- ← Keep and record every communication between you and Port.

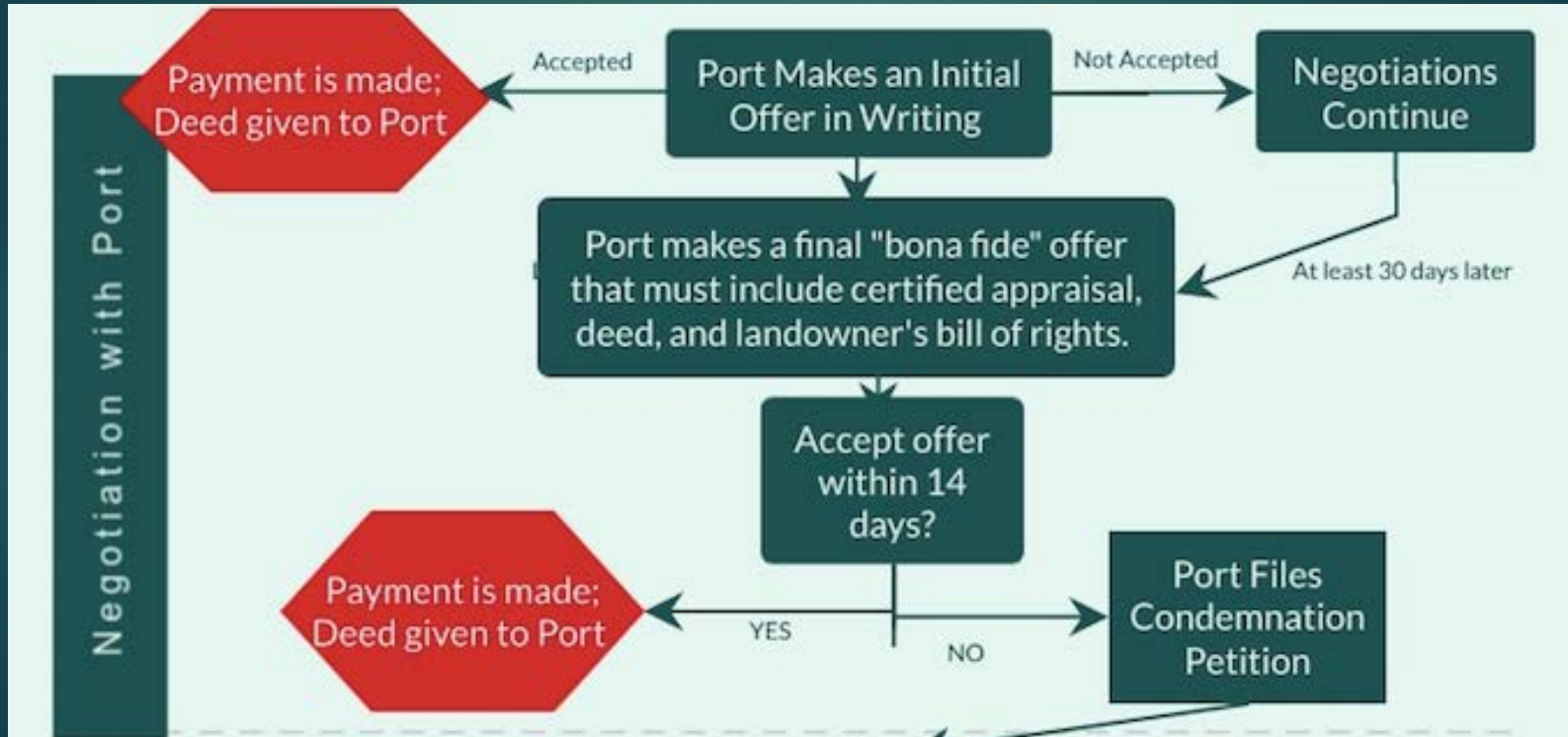
Step #1: Your Strategy During Negotiation with Port

- ← Stay calm; some tactics are likely—
 - The first offers are likely to be low.
 - The Port's appraisal might not be accurate.
 - The Port may try to rush you.
 - *You do not have to accept the Port's offers during this phase.*

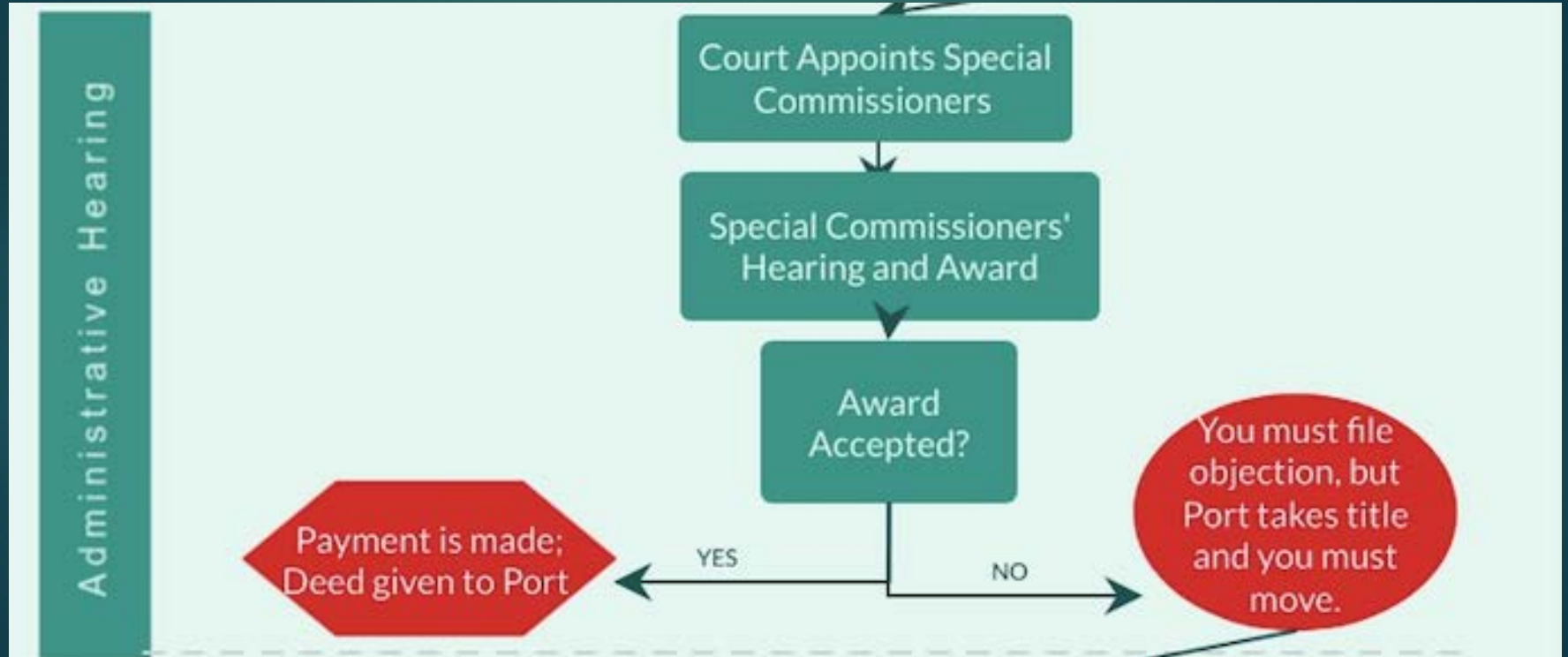
Step #1: Important Deadlines

- ← You must share any appraisals that you have with the Port before:
 - the 10th day after receiving an appraisal report; or
 - the third business day before the date of a special commissioner's hearing if an appraisal report is to be used at the hearing,
 - whichever comes first.

Step #1 – Summary



Step #2 – Administrative Hearing



Step #2 – Administrative Hearing



I. First, the Port files a petition for condemnation.

II. Then, judge picks 3 landowners to be the special commissioners.

III. At the hearing, the commissioners:

- decide what amount of money should be paid for your land (award)
- but cannot decide if the Port is properly using eminent domain procedure.

Step #2: Your Rights in Administrative Hearing

- ← Before the special commissioners' hearing:
 - Port must send you a copy of its condemnation petition.
 - You must be notified of the time and place of the hearing at least 20 days before the hearing.
 - You have the right to strike one commissioner.

Step #2: Your Rights in Administrative Hearing

← During and after the hearing:

- You have the right to speak and present evidence and witnesses at the hearing.
- You must be notified of the commissioners' award in writing.
- You can accept or object to the commissioners' award.

Step #2: Your Strategy in Administrative Hearing

- ← Use an attorney.
- ← Your attorney might recommend that you present your own appraisal and the testimony of your appraiser as evidence at the hearing.

Step #2: Be aware!

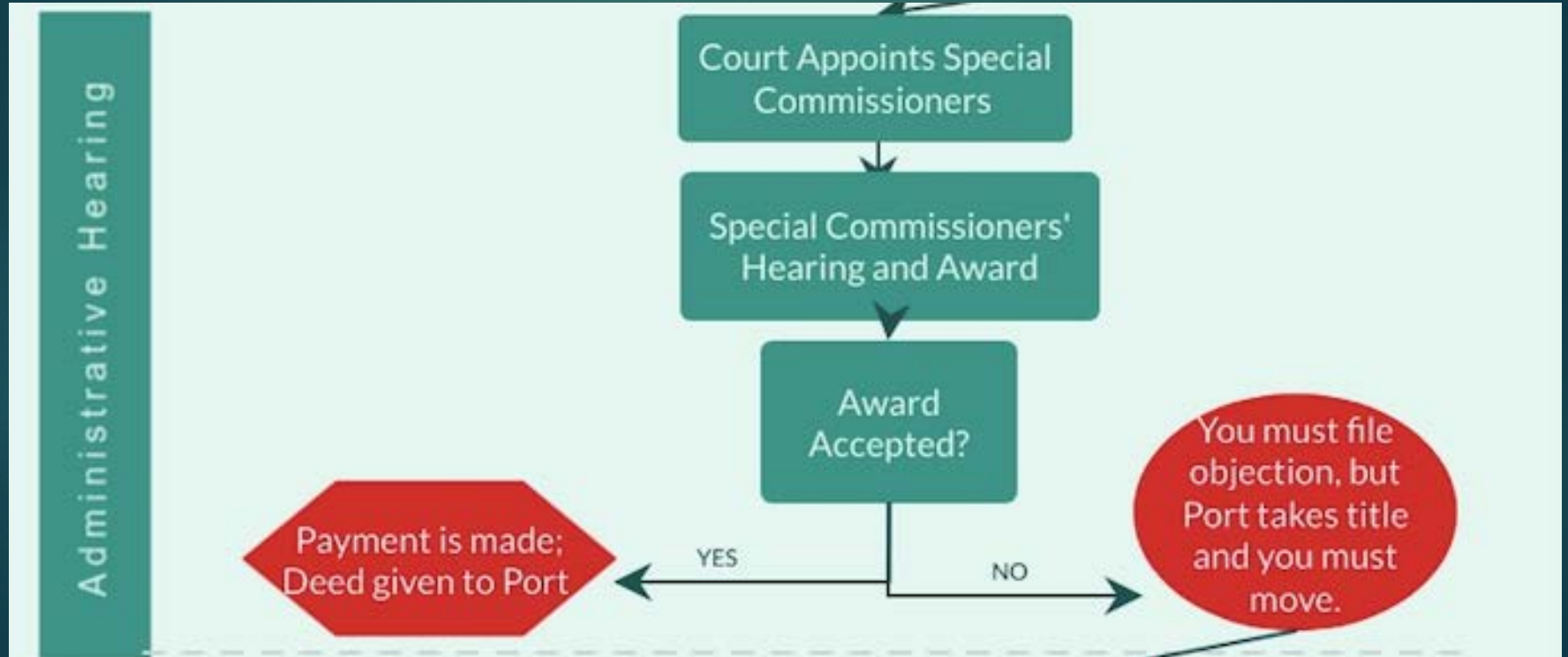


← If the commissioners' award is less than or equal to the amount the Port offered during the negotiation stage, then you must pay the costs of the hearing.

After Step #2:

- ← Once the commissioners make an award, the Port puts the money into escrow
- ← The Port can take your property and evict you, even if you move to the court trial (Step # 3)
- ← If you take the money from escrow, you can't challenge public use in Step #3

Step #2 – Summary



Step #3 – Court Case



Step #3 – Court Case

- ← You need to file specific objections within less than a month of commissioners' award decision.
- ← You can request a jury
- ← Trial in Brazoria County Court
- ← Trial can review the award AND whether the taking is legal (if Port is following procedure).

Step #3: Your Rights in the Court Case

- ← Right to challenge the award decision of the special commissioners and the Port's use of eminent domain.
- ← If the court says the Port did not make a bona fide offer in step #1, you are entitled to:
 - A bona fide offer
 - Special commissioners' hearing fees
 - Attorney's fees

Step #3: Your Strategy in the Court Case

- ← Use an attorney.
- ← Use all the correspondence with the Port you have saved to show procedural errors.
- ← Use your appraisal and appraiser to get fair compensation.

Step #3: Be Aware!



← If the court's award is less than or equal to the amount the Port offered during the negotiation stage, the you must pay the costs of the proceeding.

Step #3 – Summary





The Port's Condemnation of East End Properties

What are the Port's next steps?



- ← The Port will appraise the value of each property it seeks to acquire.
- ← The Port will make offers to East End landowners.
- ← The Port will negotiate with each landowner.

How long does this take?



- ← Step #1: as little as 30 days.
 - Port can give extensions, but it's optional
- Step #2: usually 4–7 months.
 - Port gets title after step #2 even if proceeding to #3
 - So, usually around 8–9 months from first offer to the taking/eviction, but it can be sooner.
- ← Step #3 can take more than 2 years.

What are your next steps?



- Start researching attorneys:
 - Landowners can hire attorneys before or after getting an offer from the Port.
- Start researching the appraisal process:
 - Landowners can hire an appraiser directly, or their attorney can hire one.

Be Aware: Hiring Attorneys

- ← You can hire attorneys on a contingency basis.
- ← Ask your potential attorney:
 - If they specialize in eminent domain.
 - What appraisers they often work with.
 - If they have done an eminent domain case (how many?)
 - If they have they ever gone to trial?
 - If they have references?

Be Aware: Appraisals

← If you hire an appraiser, s/he must be certified.

➤ <https://www.talcb.texas.gov/>

- Talk to your appraiser about appraisal methods.
- Appraisers might give discounted prices if hired by a large group in the same neighborhood.

Things to know if you are renting:

- ← Check your lease: Does it waive your right to receiving part of the award? (condemnation clause)
- ← If there is no condemnation clause, you are entitled to a portion of the award.
- ← If you are a month-to-month renter, you may not be entitled to part of the award.

SAMPLE Condemnation Clause of Lease

- ▶ Condemnation. If the whole or any part of the Premises, Building or Project shall be **taken by power of eminent domain or condemned** by any competent authority for any public or quasi-public use or purpose . . . Landlord shall have the option to terminate this Lease . . .
- ▶ Tenant shall not because of such taking assert any claim against Landlord or the authority for any compensation because of such taking and **Landlord shall be entitled to the entire award** or payment in connection therewith . . .

Summary



- 1) The Port is using eminent domain and has to follow the law.
 - You may want an attorney challenge public use and to get you more money.
- 2) You do not need to accept the Port's offers during negotiations.
- 3) You have the chance to increase your compensation with lawyers and appraisers.

Citations

- ▶ US Constitution, 5th Amendment – Takings Clause
- ▶ TX Constitution, Article 1, § 17 – Takings Clause
- ▶ Tex. Water Code § 62.105 – the Port's power to use eminent domain
- ▶ Tex. Water Code § 60.101 – the Port's many types of public use
- ▶ Tex. Property Code § 21.0111 – the condmenors must share appraisals
- ▶ Tex. Property Code § 21.0112 – condemnation petition
- ▶ Tex. Property Code § 21.0113 – bona fide offer (initial and final offer)
- ▶ Tex. Property Code §§ 21.011–21.022 – three-step process

East End Overview



2017: 357 properties



2018: 382 properties



2019: 399 properties

Property Acquisition

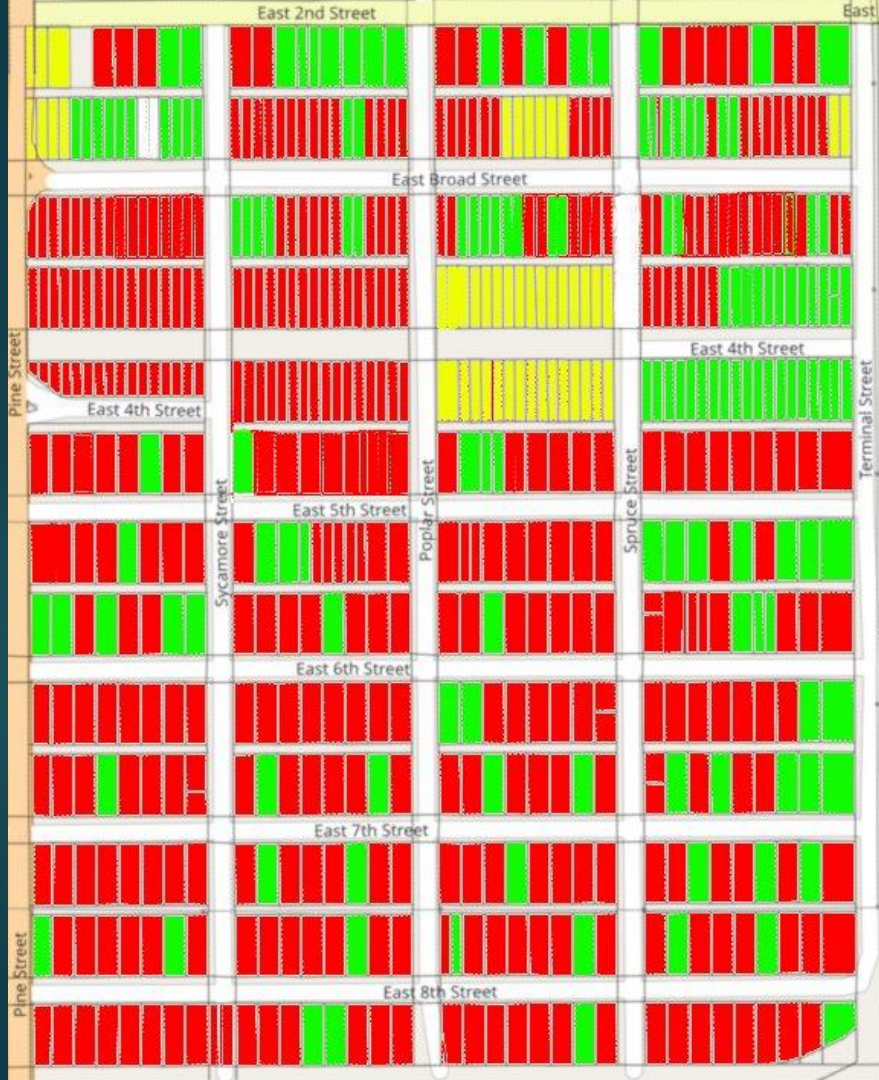


PORT FREEPORT™

THE COAST IS CLEAR



City Properties in the East End



City-Owned Lots in
Freeport's East End
as of March 2019

46 Lots

Lincoln Park

500 E. Fourth St. @ Poplar St.



Lincoln Park

Location

Address: E 4TH-POPLAR ST
FREEPORT,

Mapsco: SBR101

Neighborhood:
Neighborhood CD:

Map ID:

Owner

Name: CITY OF FREEPORT
Mailing Address: 200 W 2ND ST
FREEPORT, TX 77541-5773

Owner ID: 21410
% Ownership: 100.0000000000%

Exemptions: EX-XV

Section 253.001 - Texas Local Government Code

- Allows a city to sell land “that the [city] owns, holds, or claims as a public ... park.”
- Requires the City Council to obtain voter approval first.
- City must adopt an ordinance directing the mayor or city manager to execute the sale or transfer.

Section 26.001 (a) – Texas Parks & Wildlife Code

- City must also provide:
 - public notice and
 - a hearing

before approving any program or project that requires the taking of any public land used as a park.

Interlocal Agreement between Port and City of Freeport

- Port Commission approved an agreement with City of Freeport on February 25, 2016:

24. Approval of an Interlocal Agreement between Port Freeport and the City of Freeport.

A motion was made by Commissioner Kresta to approve the agreement contingent on the City providing a title policy of the park. The motion was seconded by Commissioner Pirtle with all Commissioners present voting in favor of the motion.

Freeport City Council discussed the Interlocal Agreement



2016

JANUARY	FEBRUARY	MARCH	APRIL
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30
MAY	JUNE	JULY	AUGUST
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SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

February 16
April 4
May 24

2019: City of Freeport claims no agreement exists

2. The Interlocal Agreement between the City and Port of Freeport, approved by the Port Commission on or about February 25, 2016, concerning Lincoln Park.

We have no records responsive to your request.





L O N E S T A R
L E G A L A I D

Amy Dinn

Colin Cox

Heejin Hwang

Velimir Rasic

Equitable Development Initiative

713-652-0077 ext 8108

QUESTIONS?

Join LSLA's EJ Team's mailing list.

Just send your email address
by text message:

Text

EJUSTICE

to **22828** to get started.

