EMINENT DOMAIN IN TENNESSEE

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Written By:

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Published By:

Center for Government Training

County Technical Assistance Service
and
Municipal Technical Advisory Service

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Business and Industry Officials
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Dear Local Government Official:

Eminent Domain in Tennessee was first published by The University of Tennessee as a guide for municipal and county attorneys who wrestled with condemnation law and its practice on the state.

Soon after the first edition was published in 1972, a series of training programs was held by the UT Center for Government Training, and this manual was used as the training guide.

Several notable changes have taken place in the legislation covering eminent domain in the ensuing seven years.

As a result, three of UT's public service agencies--Center for Government Training, County Technical Assistance Service and Municipal Technical Advisory Service--asked the original authors to update the 1972 edition.

The following revised manual was prepared this Spring by Charles E. Griffith, III and Ogden Stokes and will again be used in training programs.

We hope the 1979 edition will prove as beneficial to local government officials as the 1972 document.

Sincerely,

Robert S. Hutchison

Robert S. Hutchison
Executive Director

FOREWORD

The first edition of this booklet, which was published in 1972, was precipitated by the results of a questionnaire circulated by the Tennessee Municipal Attorneys Association. The responses to this questionnaire indicated that condemnation law and its practice in the courts were among the main areas of concern, and perhaps confusion, to municipal attorneys across the State of Tennessee. Accordingly, it was our purpose in this initial publication to summarize, clearly and concisely, the controlling principals of eminent domain in the State of Tennessee, and to attempt to clairfy certain areas of possible confusion and difficulty in this important governmental function.

Since the publication of the first booklet, a number of significant changes have occurred in the law of eminent domain, including the enactment of the federal Relocation Assistance Act. As a result of these changes, a revision of the publication became desirable. This revision represents an effort not only to reflect the statutory and case law changes which have occurred since the initial writing, but also to refine and expand the original scope of the work. In view of the pending release of the new volume of West's Tennessee Practice series on Pattern Jury Instructions - Civil, we have however omitted from this revision the suggested requests for special instructions which we had included in the initial publication.

We want to acknowledge the work and assistance of Diane Adashek in the preparation of this revision.

We hope that this brief work will be of use and practical assistance to those attorneys representing public entities engaged in condemnation proceedings, and that it will enable such attorneys to proceed with this litigation with minimum amount of additional research.

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CHAPTER ONE:
EMINENT DOMAIN DEFINED

Nature and Source of Power

Eminent domain has been defined as "the right or power to take private property for public use, the right of the sovereign, or of those to whom the power has been delegated, to condemn private property for public use, and to appropriate the ownership and possession thereof for such use upon paying the owner a due compensation."[1] As an inherent attribute of sovereignty,[2] the right of eminent domain does not require constitutional recognition for its existence,[3] but it may be limited or restricted by constitutional provision.[4]

The power of eminent domain lies dormant, however, and requires legislative action before it can be exercised.[5] The right will not be implied, but rather it is limited by the express terms or clear implication of the empowering statute.[6] Viewed as a grant of sovereign power in derogation of private property rights, such a statute will be construed strictly against the condemner.[7] Through such legislation, the power of eminent domain may be exercised by the State directly[8] or may be delegated to a county,[9] municipality,[10] public service corporation,[11] private corporation,[12] or even an individual,[13] subject only to the constitutional limitations that it be exercised for a public use, and that the owner receive just compensation for the property, or rights therein, taken.[14]

Eminent Domain vs. Police Power

The power of eminent domain should be distinguished from the police power, another sovereign right with which it shares certain qualities and sometimes appears to overlap. The two powers are similar in that they both arise from the very necessity of government and are limited by constitutional provisions. In their application to private property, the fundamental difference between the two is that eminent domain involves the compensable taking of property while the police power involves the noncompensable regulation of property.[15] Under the power of eminent domain, property is taken away from the owner and transferred to the State or its agent to be enjoyed or used by it as its own. Under the police power, however, the State does not appropriate private property to another use, but rather destroys it or impairs its value in order to promote the general welfare or to prevent a use that is detrimental to the public interest.[16]

While the two powers are theoretically distinct, in practice it is often difficult to delineate them, especially in those situations where government regulations or actions reduce the value or use of a particular piece of land without actually invading it. This problem of determining where noncompensable regulation ends and compensable taking begins has frequently been litigated in cases involving governmental control and construction of streets.[17] Thus, the construction of a highway in close proximity but not directly adjacent to a landowner's property was held to be a valid exercise of the police power and not compensable, even though the value of the property was reduced by the noise, dust, and general presence of the highway.[18] The conversion of a two-way street into a one-way street was similarly considered noncompensable, even though the change reduced the value of property fronting on the street.[19] However, the obstruction of a street, which destroyed an abutting landowner's right of access, was held to be a taking which required compensation under the power of eminent domain.[20]

The regulation/taking distinction has become especially difficult to draw in recent years when, in an attempt to circumvent the expensive process of land use control by eminent domain, municipalities have sought to accomplish by indirection what they cannot afford to do directly. They have relied increasingly on land use programs under the police power which require no compensation. This problem has been particularly noted in cases challenging zoning practices. While generally recognized as a valid exercise of the police power, zoning in its various forms has come under frequent attack in many jurisdictions as an invalid substitute for eminent domain proceedings. In one of the few Tennessee cases dealing with this issue, the Court of Appeals, Western Section, recently struck down a zoning ordinance which "froze" land for future commercial development, explaining that "where the regulation goes so far as to deprive an owner of the beneficial use of his property, then the regulation becomes confiscatory."[21]

In any case, where government has effected a taking under the guise of the police power, the landowner may seek compensation under the theory of inverse condemnation.[22]

FOOTNOTES

1. 29 C.J.S. Eminent Domain §1 (1960), quoted in City of Knoxville v. Heth, 186 Tenn. 321, 210 S.W.2d 326 (1948).

2. Allen v. Farnsworth, 13 Tenn. (5 Yerg.) 189 (1833); County Highway Commission of Rutherford County v. Smith, 61 Tenn. App. 292, 454 S.W.2d 124 (1970).

3. Trustees of New Pulaski Cemetery v. Ballentine, 151 Tenn. 622, 271 S.W. 38 (1925); County Highway Commission of Rutherford County v. Smith, supra, n. 2.

4. Southern Ry. Co. v. City of Memphis, 126 Tenn. 267, 148 S.W. 662 (1912); County Highway Commission of Rutherford County v. Smith, supra, n. 2.

5. Trustees of New Pulaski Cemetery v. Ballentine, supra, n. 3; County Highway Commission of Rutherford County v. Smith, supra, n. 2.

6. Rogers v. City of Knoxville, 40 Tenn. App. 170, 289 S.W.2d 868 (1956).

7. Clouse v. Garfinkle, 190 Tenn. 677, 231 S.W.2d 345 (1950); Vinson v. Nashville C. & St. L. Ry., 45 Tenn. App. 161, 321 S.W.2d 841 (1959).

8. Anderson v. Turbeville, 6 Cold. 150, 46 Tenn. 150 (1868); State ex rel. v. Oliver, 162 Tenn. 100, 35 S.W.2d 396 (1930).

9. Knox County v. Kennedy, 92 Tenn. 1, 20 S.W. 311 (1892); Claiborne County v. Jennings, 199 Tenn. 161, 285 S.W.2d 132 (1955).

10. City of Memphis v. Wright, 14 Tenn. (6 Yerg.) 497 (1834); City of Knoxville v. Heth, supra, n. 1; Duck River Elec. Membership Corp. v. City of Manchester, 529 S.W.2d 202 (Tenn. 1975).

11. Ryan v. L & N Terminal Co., 102 Tenn. 111, 50 S.W. 744 (1899); Great Falls Power Co. v. Webb, 123 Tenn. 584, 133 S.W. 1105 (1911).

12. Alfred Phosphate Co. v. Duck River Phosphate Co., 120 Tenn. 260, 113 S.W. 410 (1907).

13. Sorrell v. Wood, 8 Tenn. App. 84 (1928); Draper v. Webb, 57 Tenn. App. 394, 418 S.W.2d 775 (1967).

14. Southern Ry. Co. v. City of Memphis, supra, n. 4; County Highway Commission of Rutherford County v. Smith, supra, n. 2.

15. 1 Nichols on Eminent Domain §1.42 (3rd ed. 1950).

16. Illinois Central R. Co. v. Moriarity, 135 Tenn. 446, 186 S.W. 1053 (1916).

17. Note, "Eminent Domain in Tennessee: Public Use, Just Compensation and the Landowner," 3 Memphis St. L.R. 65 (1972-73).

18. Ledbetter v. Beach, 220 Tenn. 623, 421 S.W.2d 814 (1967).

19. City of Memphis v. Hood, 208 Tenn. 319, 345 S.W.2d 887 (1961).

20. Illinois Central R. Co. v. Moriarity, supra, n. 16.

21. Bayside Warehouse Co. v. City of Memphis, 63 Tenn. App. 268, 470 S.W.2d 375 (Tenn. Ct. App. (1971)).

22. See Chapter Five. (Inverse Condemnation), infra.

CHAPTER TWO:
PUBLIC USE

In General

It has been generally acknowledged that the term "public use" is incapable of an exact and universally applicable definition.[1] What constitutes a public use for purposes of eminent domain may vary with changing conditions, and the cases recognize that the term must remain elastic in order to meet the growing needs of a more complex social order.[2] Thus, public use must be interpreted within a given social, economic and governmental context on a case by case basis.[3]

Judicial vs. Legislative Determination

The cases and authorities usually draw a distinction between the proper roles of the judiciary and the legislature in regard to the determination of public use. The established rule is that questions as to what actually constitutes a public use are for the courts to decide,[4] while questions regarding the necessity and expediency of a particular taking are legislative in nature and nonreviewable by the courts in the absence of fraud.[5] Although the legislature, by statute, makes an initial determination of public use (which is entitled to a strong presumption of correctness),[6] the legislative determination is not absolutely conclusive on the courts.[7] It is important to note, however, that where the doctrine of separation of powers is given proper recognition, the question for the courts should not be whether the use for which property is taken is public, but rather whether the legislature might reasonably consider it public.[8]

Narrow vs. Broad View

Some authorities attempt to analyze the different court holdings on the concept of public use by categorizing them as either narrow or broad. The narrow view holds that to be for the public use, the public must be entitled as of right to directly use or enjoy the property taken.[9] The broad view is that the condemnation and later use of the property need only be for the public benefit or common good in order to be a public use.[10] Under both views, however, it is not essential that the entire community directly enjoy or participate in any improvement in order to constitute a public use.[11]

Classes of Condemners

While the courts unquestionably have judicial review over the question of public use, and while some courts tend to give public use a broader construction than others, the degree of actual judicial review exercised in each case seem to depend most heavily on the type of condemner involved. The courts have recognized that there are at least three classes of eminent domain cases to which different standards of public use are applied: (1) condemnation by the State or municipality, (2) condemnation by a public service corporation regulated by the State, and (3) condemnation by or for the use of a private corporation or individual.[12]

Generally, the more closely a condemner is affiliated with the government, the less the courts will interfere with a prior determination of public use. Thus, where the government itself is the condemner, the courts will usually defer to the legislature's judgment unless a palpable abuse of power can be shown. The test normally applied in these cases is whether the public would be entitled to receive and enjoy the benefits of the use to which the property is to be applied.[13] The general public need not have physical access to the property sought to be condemned; use of the property by public officers and agents is sufficient to fulfill the requirement.[14] In condemnation cases involving a public service corporation subject to some form of government regulation, less deference is shown and a correspondingly narrower standard of public use is applied. The strictest standard of public use, however, is applied in cases where condemnation is sought by a purely private corporation or individual unaffiliated with the government. The test applied in these situations is whether the general public would be entitled to make a "fixed and definite use" of the property independent of the will of the condemner.[15] The use must directly benefit the public, and incidental benefit or convenience to the public is not sufficient to justify a taking.[16] While in theory, the power of eminent domain can legitimately be delegated to such a private corporation or individual, in practice the courts have rarely upheld such takings.

The following have been held to constitute uses sufficiently public to justify takings by governmental agencies: municipal streets;[17] street poles and lights;[18]

county turnpikes;[19] bridges;[20] sewers;[21] utility system facilities,[22] waterworks;[23] cemeteries;[24] golf courses;[25] parks[26] and "greenbelts";[27] office buildings;[28] and slum clearance projects.[29]

The following are purposes for which land has been appropriated by non-governmental condemners (including public service corporations): railroad tracks[30] and terminal facilities,[31] telephone lines,[32] grist mills,[33] iron works,[34] electric power facilities,[35] privately-owned turnpikes,[36] ferry landings[37] flumes,[38] telegraph lines[39] and poles,[40] pipelines from a city's water main to a subdivision,[41] and radio microwave relay towers.[42]

Future Use

Although the Tennessee courts have not yet decided the question of whether land can be condemned in advance of actual need, this issue has been the source of much litigation in other jurisdictions. In such cases, most courts have treated the question of time of taking as part of the broader, political question of necessity. Consequently, they have tended to defer to the legislature's judgment in these situations unless it could be shown that its action was "clearly . . . fraudulent or unreasonable."[43] Courts seem to have applied this standard rather liberally, recognizing that they are in no better position to determine the needs of a community than are municipal officials and that "a correspondingly wide latitude for differences of judgment must be allowed by courts before they brand a judgment as clearly unreasonable."[44]

More specifically, the test applied by the courts in these cases has been whether the land to be condemned is necessary to provide for the present and reasonably-to-be-anticipated needs of the reasonably immediate future.[45] In this context, "necessary" does not mean "absolute or indispensable or immediate need, but rather its meaning . . . embraces the right of the public to expect and demand services and facilities to be provided by proposed acquisition or improvement."[46] Moreover, the condemner need not have "money on hand, plans and specifications prepared, and all other preparations necessary for immediate construction before it can determine the necessity for taking private property for a public purpose."[47] As a limitation on this, however, land may not be condemned for contemplated but undetermined future use or for speculative purposes.[48]

While the Tennessee courts have not yet ruled directly on this issue it is important to note that in a federal case decided under Tennessee law, the district court recognized that the time of taking is a legislative, not judicial, question.[49] This recognition, combined with the trend established in other jurisdictions, suggests that Tennessee courts, when presented with this question, will probably allow condemners to appropriate land for future use.

FOOTNOTES

1. City of Knoxville v. Heth, 186 Tenn. 321, 210 S.W.2d 326 (1948); 2A Nichols on Eminent Domain §7.2 (3rd ed. 1950).

2. Ryan v. L & N Terminal Co., 102 Tenn. 111, 50 S.W. 744 (1899).

3. City of Knoxville v. Heth, supra, n. 1.

4. Id.

5. Justus v. McMahan, 189 Tenn. 470, 226 S.W.2d 84 (1949); Duck River Elec. Membership Corp. v. City of Manchester, 529 S.W.2d 202 (1975).

6. City of Knoxville v. Heth, supra, n. 1; Stroud v. State, 38 Tenn. App. 654, 279 S.W.2d 82 (1955).

7. Ryan v. L & N Terminal Co., supra, n. 2; City of Knoxville v. Heth, supra, n. 1.

8. 2A Nichols on Eminent Domain §7.4 (3rd ed. 1950).

9. See Memphis Freight Co. v. Mayor and Aldermen of the City of Memphis, 44 Tenn. 419 (1867); Alfred Phosphate Co. v. Duck River Phosphate Co., 120 Tenn. 260, 113 S.W. 410 (1907).

10. Knoxville Housing Authority v. City of Knoxville, 174 Tenn. 76, 123 S.W.2d 1085 (1939).

11. Webb v. Knox County Transmission Co., 143 Tenn. 423, 225 S.W. 1046 (1920).

12. Johnson City v. Cloninger, 213 Tenn. 71, 372 S.W.2d 281 (1963) (citing 2 Nichols on Eminent Domain §7.5 (3rd ed. 1950)).

13. City of Knoxville v. Heth, supra, n. 1.

14. Johnson City v. Cloninger, supra, n. 12.

15. Alfred Phosphate Co. v. Duck River Phosphate Co., supra, n. 9.

16. Memphis Freight Co. v. Mayor and Aldermen of the City of Memphis, supra, n. 9.

17. City of Chattanooga v. State, 151 Tenn. 691, 272 S.W. 432 (1925); Town of Cookeville v. Farley, 171 Tenn. 260, 102 S.W.2d 56 (1937).

18. Johnson v. City of Chattanooga, 183 Tenn. 123, 191 S.W.2d 175 (1945).

19. Knox County v. Kennedy, 92 Tenn. 1, 20 S.W. 311 (1892).

20. Woodard v. City of Nashville, 108 Tenn. 353, 67 S.W. 801 (1902).

21. Zirkle v. City of Kingston, 217 Tenn. 210, 396 S.W.2d 356 (1965).

22. City of Knoxville v. Heth, supra, n. 1.

23. Beadle v. Town of Crossville, 157 Tenn. 249, 7 S.W.2d 992 (1927).

24. Town of Pulaski v. Ballentine, 153 Tenn. 393, 284 S.W. 370 (1925).

25. Johnson City v. Cloninger, supra, n. 12.

26. Memphis v. Hastings, 113 Tenn. 142, 86 S.W. 609 (1904); State ex rel. v. Oliver, 162 Tenn. 100, 35 S.W.2d 396 (1930).

27. Shelby County v. Armour, 495 S.W.2d 816 (1971).

28. City of Knoxville v. Heth, supra, n. 1.

29. Nashville Housing Authority v. City of Nashville, 192 Tenn. 103, 237 S.W.2d 946 (1950).

30. Collier v. Railroad, 113 Tenn. 96, 83 S.W. 155 (1904); Ryan v. L & N Terminal Co., supra, n. 7.

31. Ryan v. L & N Terminal Co., supra, n. 7.

32. Doty v. Am. Tel. & Tel. Co., 123 Tenn. 329, 130 S.W. 1053 (1910).

33. Harding v. Goodlett, 11 Tenn. 41 (1832).

34. Tipton v. Miller, 11 Tenn. 423 (1832).

35. Great Falls Power Co. v. Webb, 123 Tenn. 584, 133 S.W. 1105 (1911); Webb v. Knox County Transmission Co., supra, n. 11.

36. Hadley v. Harpeth Tpke. Co., 21 Tenn 555 (1841).

37. Moses v. Sanford, 79 Tenn. 731 (1883).

38. Tennessee Coal, Iron & R. Co. v. Paint Rock Flume and Transportation Co., 128 Tenn. 277, 160 S.W. 522 (1913).

39. Mobile & O.R. Co. v. Postal Tel. Cable Co., 101 Tenn. 62, 46 S.W. 571 (1898).

40. Western Union Telegraph v. Nashville Ry. Co., 133 Tenn. 691, 182 S.W. 254 (1915).

41. Shinkle v. Nashville Improvement Co., 172 Tenn. 555, 113 S.W.2d 404 (1938).

42. Brannon v. American Tel & Tel. Co., 210 Tenn. 697, 362 S.W.2d 236 (1962).

43. City & County of Denver v. Board of County Commissioners, 156 P.2d 101 (1945).

44. Id.

45. Id.

46. City of Tacoma v. Welcker, 65 Wash.2d 662, 399 P.2d 330, 335 (1965).

47. Carlos Co. Inc. v. City of Miami, 62 So.2d 897 (1953).

48. Id.

49. U.S. ex rel, T.V.A. v. Dugger, 80 F.Supp. 877 (E.D. Tenn. 1948).

CHAPTER THREE: COMPENSATION

FAIR MARKET VALUE

In General

It has been generally held that the constitutional requirement of "just compensation"[1] in condemnation cases is satisfied by the payment of the fair cash value[2] or, more commonly stated, the fair market value of the property actually taken.[3] A jury question, fair market value is the price which would be agreed upon by a willing buyer and a willing seller in an arm's length transaction for that particular quantity of land at the place and in the form taken.[4] Therefore, such factors as enhancement or depreciation of the property occurring before the taking as a result of the expected taking are not to be considered.[5] Similarly, the jury may not consider prices previously offered by prospective buyers for the property in question[6] or prices at which the owner has previously offered it for sale.[7]

All Available Uses

The jury must determine fair market value in view of all capabilities of the property as well as all legitimate uses for which it is available and reasonably adapted.[8] In this regard, the rental value of the land taken may be considered in estimating fair market value.[9] The profits of a business located on the land, however, generally may not be considered by the jury, although there have been exceptions to this rule based on the peculiar circumstances of a given case.[10] Further, it is improper for the jury to consider the speculative value of the property in the hands of a future owner.[11]

The particular use for which the land is most valuable or to which it is presently adapted may be <u>considered</u> by the jury as one element of the property's value, but it may not be the <u>test</u> of value in condemnation proceedings.[12] Consequently, a witness may not restrict his estimate of value to value for a single use.[13] More specifically, a witness may testify that the property has a fair market value of $10,000, and he may explain his estimate by describing the particular qualities

of the property in question and the specific uses to which it may be adapted, but he may not, for example, testify that the property has a value of $10,000 for business use. The purpose of this rule is to avoid overvaluation by preventing the jury from giving excessive weight to the value of the property to the condemner.[14]

In a very early case, the Tennessee Supreme Court recognized an exception to the "all available uses" rule for situations in which the property taken could be shown to have value peculiar to the owner which would be sacrificed if placed on the general market.[15] In these situations, the Court held, the owner was entitled to receive the value of the land for this particular use.[16] Although this exception has been frequently cited in subsequent opinions, no other Tennessee case has been found in which a court allowed property to be valued solely on the basis of value peculiar to the owner. The vitality of this exception has been further diminished by a recent Supreme Court ruling which, without expressly overruling the exception, stated that value peculiar to the owner is entitled to some consideration by the jury in its determination of fair market value, but only as just another element of value.[17]

Comparable Sales

Generally, evidence of sales of property similar to that being condemned is admissible for valuation purposes.[18] Such evidence, however, merely constitutes another element of value to be considered in determining the fair market value of the property condemned and should not be viewed as an "unerring standard."[19] Whether a given sale is sufficiently comparable to be admissible is a preliminary question for the trial judge[20] and although he is allowed much discretion in this regard, his decision will, in proper cases, be reviewed by the appellate court.[21]

For a sale to be considered comparable, the judge must first determine that it constituted an arm's length transaction, that is, the sale must have been voluntary and not in the nature of a compromise.[22] Sales made either to a condemner[23] or under threat of condemnation[24] are thus generally inadmissible, as are offers to buy otherwise similar property.[25] Likewise, a judge will not rule as comparable any sale affected or influenced by the public project pursuant to which the property to be valued is being taken.[26]

If an arm's length transaction is found to have existed, the judge must next determine that the properties are not only similar in nature and near the same location, but also that the time of the sale was at or about the time at the taking.[27] In determining whether a specific sale meets these standards, a judge will usually consider such factors as size, vicinity, proximity to existing improvements, improvements already existing on the properties, terrain or other geographic features, zoning restrictions, and all available uses to which the properties are adapted.[28] A sale need not be exactly comparable in every respect, however, and no general rule can be laid down as to the degree of similarity required.[29]

Once the judge rules a sale to be comparable and thus admissible, the weight to be given such a sale is for the jury to decide.[30] If a particular sale has been made under exceptional circumstances, that fact can be shown, and the jury can determine its probative force.[31]

Enhancement

It is well settled in Tennessee that, for valuation purposes, a landowner is not entitled to enhancement resulting from the public improvement for which his land is taken.[32] A problem is encountered, however, in cases where a public improvement project is subsequently enlarged, necessitating further condemnation of land. The question in these cases is whether the condemnee is entitled to have the jury consider, as an element of value, the enhancement of his land resulting from the original improvement project.

In dealing with this issue, Tennessee has adopted the rule first articulated by the United States Supreme Court in U.S. v. Miller:

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts would not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

> The question then is whether the respondent's lands were probably within the scope of the project from the time the Government was committed to do it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government activities.[33]

In a case decided since the adoption of the Miller rule, the Court of Appeals of Tennessee, Eastern Section, recently indicated that this rule would be construed broadly in favor of the condemner.[34] The Court held that although the condemner must carry the burden of proof in these cases, it is not required to show that the land ultimately taken was actually specified in the original plans for the project. Rather, the condemner need only show that during the course of the planning or original construction, it became evident that the land in question would be needed.[35]

INCIDENTAL DAMAGES

While the payment of fair market value is limited to the value of the land actually taken, additional compensation in the form of incidental damages may be provided to the owner in cases where there has been injury done to the residue of a tract as a result of a partial taking. Incidental damages are not specifically required by the Constitution but rather are provided by statute.[36] They are traditionally measured by the depreciation in the market value of the residue and are recoverable on the theory that such a loss in value in effect constitutes a compensable taking.[37]

More specifically, the award of incidental damages is limited to property owners whose land is actually taken.[38] Adjacent property owners whose land, though not condemned, is nonetheless adversely affected by the taking, may not qualify under these statutes.[39] In order to collect incidental damages, a landowner must show some specific injury to his property, or to its value, which is a direct result of the taking.[40] The injury must be more than an inconvenience generally shared by all members of the public. Rather, it must be shown to specifically affect the property of the condemnee.[41] This does not mean, however, that an injury becomes noncompensable merely because other landowners are similarly affected.[42] If exceptional circumstan-

ces are shown, a court may allow recovery of incidental damages even though the injury is common to all landowners in the community.[43]

The traditional concept of incidental damages as compensation for diminution in value of the residue was broadened considerably in a 1971 Supreme Court case, Memphis Housing Authority v. Memphis Steam Laundry-Cleaning, Inc.[44] Enforcing the provisions of T.C.A. §23-1414, the Court held that a condemnee is entitled to recover as incidental damages the reasonable cost of moving or replacing (whichever is less) personalty and fixtures not specifically set out in the condemnation petition. In so holding, the Court quoted with approval the following excerpt from Nichols on Eminent Domain:

> Nevertheless, a recent decision (Jacksonville Expressway Authority v. Henry G. DuPree Co. (Fla.) 108 So. 2d 289) emphasizes the fact that although market value is a useful tool in determining just compensation, the just compensation which is constitutionally required is not synonymous with market value and that the owner must be made pecuniarily whole so far as possible and practicable. Conceding that in other jurisdictions the cost of moving personal property has no bearing on the fair market value, the Court asserted that where an owner is constitutionally guaranteed full and just compensation, the theory and spirit of such a guarantee requires a practical attempt to make the owner whole. The Court said that a person who is put to expense through no desire or fault of his own can only be made whole when his reasonable expenses are included in the compensation. This concept is a genuine departure from the long-accepted market value doctrine. More importantly, however, it predicates some degree of damage upon the fact that the property is taken from the owner against his will. In other words, the sovereign must now pay something for the right to exercise an inherent, sovereign, prerogative power.[45]

Similar rulings in subsequent cases suggest that incidental damages may now be said to include whatever elements of compensation the legislature chooses to make recoverable.[46]

Incidental damages now specifically allowed by statute include reasonable expenses incurred for removing, relocating and reinstalling "furniture, household belongings, fixtures, equipment, machinery or stock in trade" at a site not more than fifty (50) miles distant;[47] recording fees, transfer taxes and other similar expenses incidental to conveying the property taken to the condemner;[48] mortgage prepayment penalties;[49] and prorations of real property taxes.[50]

Although not specifically set out by statute, the following have also been held compensable as incidental damages: noise, soot and inconvenience created by the operation of a railroad;[51] obstruction of view by a highway embankment;[52] change of grade in a municipal street;[53] reasonable apprehension of danger from the improvement itself;[54] drainage from sewers constructed as a part of the improvement;[55] and loss of access to an abutting street.[56]

INCIDENTAL BENEFITS

Once the incidental damages are assessed for a particular tract, the condemner is entitled to have this amount reduced by the value of any incidental benefits accruing to the same tract as a result of the improvement. Like incidental damages, incidental benefits are a creature of statute[57] and are determined independently of the "just compensation" required by the Constitution.[58]

Incidental benefits include only those benefits special to the condemnee's property as opposed to those general benefits of the improvement shared by the public at large.[59] A condemner is not prevented from having a special benefit set off, however, merely because there are other landowners who are similarly benefited.[60] Thus, better access to property as a result of street improvements does not cease to be an incidental benefit merely because other landowners on that street have likewise gained better access.[61] On the other hand, a general increase in property value experienced by all area residents as a result of street improvements does not constitute an incidental benefit to be set off against incidental damages.[62]

FOOTNOTES

1. Tenn. Const. Art. 1 §21.

2. Paducah & M.R. Co. v. Stovall, 59 Tenn. 1 (1873).

3. Alloway v. City of Nashville, 88 Tenn. 510, 13 S.W. 123 (1890); Nashville Housing Authority v. Cohen, 541 S.W.2d 947 (Tenn. 1976).

4. Id.

5. Woodfolk v. Nashville & C.R. Co., 32 Tenn. 422 (1852); State Dept. of Highways v. Urban Estates, Inc., 225 Tenn. 193, 465 S.W.2d 357 (1971).

6. Vaulx v. Tenn. Cent. R. Co., 120 Tenn. 316, 108 S.W. 1142 (1908); Mayor & Aldermen of Milan v. Thomas, 27 Tenn. App. 166, 178 S.W.2d 772 (1944).

7. Lewisburg & N.R. Co. v. Hinds, 134 Tenn. 293, 183 S.W. 985 (1916).

8. McKinney v. City of Nashville, 102 Tenn. 131, 52 S.W. 781 (1899); Nashville Housing Authority v. Cohen, supra, n. 3; Love v. Smith, 566 S.W.2d 876 (Tenn. 1978).

9. Union Ry. Co. v. Hunton, 114 Tenn. 609, 88 S.W. 182 (1905); State Dept. of Highways and Public Works v. Texaco, Inc., 49 Tenn. App. 278, 354 S.W.2d 792 (1962); State v. Parkes, 557 S.W.2d 504 (Tenn. 1977).

10. State Dept. of Highways and Public Works v. Texaco, Inc., supra, n. 9.

11. Southern Ry. Co. v. City of Memphis, 126 Tenn. 267, 148 S.W. 662 (1912).

12. Stroud v. State, 38 Tenn. App. 654, 279 S.W.2d 82 (1955); State ex rel. Dept. of Transportation v. Brevard, 545 S.W.2d 431 (1976).

13. Davidson County Bd. of Educ. v. First Am. Nat'l. Bank, 202 Tenn. 9, 301 S.W.2d 905 (1957).

14. Id., (citing 1 Orgel, Valuation under the Law of Eminent Domain 149 (1953)).

15. Southern Ry. Co. v. City of Memphis, supra, n. 11.

16. Id.

17. State ex rel. Dept. of Transportation v. Brevard, supra, n. 12.

18. Union Ry. Co. v. Hunton, supra, n. 9.

19. Id.

20. Layne v. Speight, 529 S.W.2d 209 (Tenn. 1975).

21. Lewisburg & N.R. Co. v. Hinds, supra, n. 7; Memphis Housing Authority v. Peabody Garage Co., 505 S.W.2d 719 (Tenn. 1974).

22. Id.

23. Coate v. Memphis R. Terminal Co., 120 Tenn. 525, 111 S.W. 923 (1908).

24. Speight v. Berkeley (Ct. App. W.S. filed Sept. 4, 1970).

25. Vaulx v. Tenn. Cent. R. Co., supra, n. 6.

26. State Dept. of Highways v. Jennings, 58 Tenn. App. 594, 435 S.W.2d 481 (1968); Memphis Housing Authority v. Newton, 484 S.W.2d 896 (Tenn. 1972).

27. Union Ry. Co. v. Hunton, supra, n. 9.

28. 5 Nichols on Eminent Domain §21.31 (3d. ed. 1950).

29. Memphis Housing Authority v. Ryan, 54 Tenn. App. 557, 393 S.W.2d 3 (1964); Maryville Housing Authority v. Ramsey, 484 S.W.2d 73 (Tenn. 1972).

30. Memphis Housing Authority v. Newton, supra, n. 26.

31. Union Ry. Co. v. Hunton, supra, n. 9; Memphis Housing Authority v. Newton, supra, n. 26.

32. State Dept. of Highways v. Jennings, supra, n. 26.

33. U.S. v. Miller, 317 U.S. 369 (1943), quoted in Layne v. Speight, supra, n. 20.

34. State v. Hodges, 552 S.W.2d 400 (Tenn. 1977).

35. Id. (citing U.S. v. Reynolds, 397 U.S. 14 (1970)).

36. T.C.A. §§23-1414, 23-1537.

37. Lewisburg & N.R. Co. v. Hinds, supra, n. 7.

38. Id.

39. Id.

40. Id.

41. Id.

42. Lewisburg & N.R. Co. v. Dudley, 161 Tenn. 546, 30 S.W.2d 278 (1929).

43. Id.

44. 225 Tenn. 46, 463 S.W.2d 677 (1971). Where condemnation is sought pursuant to a federal or federally-assisted program, the condemnee may qualify for additional relief under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. See Chapter Seven for further discussion.

45. Id. (quoting with approval 4A Nichols on Eminent Domain §14.2471[1] (3d ed. 1950)).

46. See, e.g., Nashville Housing Authority v. Hill, 497 S.W.2d 917 (Tenn. 1973).

47. T.C.A. §23-1414.

48. Id.

49. Id.

50. Id.

51. Lewisburg & N.R. Co. v. Hinds, supra, n. 7. But see Lewisburg & N.R. Co. v. Dudley, supra, n. 42.

52. Pack v. Boyer, 59 Tenn. App. 141, 438 S.W.2d 754 (1968).

53. Mayor and Aldermen of Chattanooga v. Geiler, 81 Tenn. 611 (1884).

54. Alloway v. City of Nashville, supra, n. 3; State v. Rascoe, 181 Tenn. 43, 178 S.W.2d 392 (1944).

55. State v. Rascoe, supra, n. 54.

56. State v. Rascoe, supra, n. 54; Brookside Mills, Inc. v. Moulton, 55 Tenn. App. 643, 404 S.W.2d 258 (1965).

57. T.C.A. §§23-1414, 23-1537.

58. Wray v. Knoxville, L.F. & J.R. Co., 113 Tenn. 544, 82 S.W. 471 (1904).

59. Faulkner v. City of Nashville, 154 Tenn. 145, 285 S.W. 39 (1926).

60. Id.

61. Id.

62. Paducah & M.R. Co. v. Stovall, supra, n. 2.

CHAPTER FOUR:
JURISDICTION AND PROCEDURE

JURISDICTION

By statute, circuit courts have exclusive jurisdiction over suits in eminent domain.[1] Moreover, once eminent domain proceedings have been initiated, the circuit court may retain jurisdiction to determine matters incidental to the proceedings, such as contract[2] and boundary[3] disputes involving the condemned property.

Conversely, although chancery courts normally have no jurisdiction over condemnation proceedings, exceptions have been made in cases initially brought as suits in equity. In such cases, chancery may retain jurisdiction in order to grant appropriate relief under the eminent domain statutes.[4] Thus, it has been held proper for a Chancellor to assess condemnation damages in suits initially brought to void a contract[5] or reform a deed.[6]

PROCEDURE

The eminent domain statutes offer two basic procedures for government condemners to follow: 1) the traditional jury of view procedure (T.C.A. Title 23, Chapter 14), which gives the condemner title and possession only after a specially empaneled jury has viewed the land in question and assessed damages[7]; and 2) the more recent "bulldozer" procedure (T.C.A. Title 23, Chapter 15), which gives the condemner almost immediate title and possession upon the filing of a declaration of taking.[8] Counties[9] and municipalities[10] may proceed under the provisions of either Chapter 14 or 15, and if the Chapter 15 procedure is chosen, the condemnee may then elect to proceed under Chapter 14 by filing a request within five (5) days of the service or publication of the original petition.[11] The state, however, has no similar option and must proceed under the provisions of Chapter 15.[12]

JURY OF VIEW PROCEDURE

In General

Under the provisions of Chapter 14 (T.C.A. §§23-1401, et seq.), the condemner initiates the proceedings by filing a petition for condemnation and giving notice thereof to the landowner. A jury of view is then appointed to examine the land in question and assess appropriate damages. The jury's report may either be confirmed, if no objection to it is made by the parties, or it may be excepted to and/or appealed from by one or both of the parties. If the report is confirmed, the land will be decreed to the condemner upon payment to the landowner of the assessed damages. If the report is excepted to, the court may, upon a showing of good cause, appoint a new jury of view. If the report is appealed from, a trial de novo before a petit jury will follow.

Petition[13]

The petition for condemnation must be filed in the circuit court of the county in which the property is located.[14] The petition should name as defendants all persons who have or may have an interest in or lien upon the property or property rights to be condemned.[15] This is important since eminent domain proceedings are binding only upon those actually made parties to the action;[16] unborn remainderman, however, are bound by proceedings to which all living persons in interest are parties.[17]

The body of the petition should set forth the charter or statute giving the petitioner general powers of eminent domain as well as the specific statute giving the petitioner authority to condemn land for the specific project in question. The nature of the project for which the property will be used should be described,[18] and the petition should recite that the project is in the public interest and that acquisition of the defendants' property is necessary for completion of the project. The petition should then state the names and residences of all defendants, if known; if unknown, that fact should be stated.[19] It is not necessary, however, to specify the interests or claims of the different defendants.[20] An accurate legal description of the property should follow[21] and a corresponding plat or map may be attached as an exhibit.

Further, any encumbrances upon the property should be specified. For proceedings instituted under Chapter 15, the petition must also state the amount of damages the condemner has determined the defendants are entitled to.[22] Finally, the petition should pray that a copy of the petition and notice of its filing be served upon the defendants, and that the property be condemned and decreed to the petitioner.[23]

Notice

Notice of the condemnation petition along with a copy of the petition must be given to the defendants or, if nonresidents of the county, to their agents at least five (5) days before the petition is presented to the court.[24] For defendants who are nonresidents or unknown to the petitioner, notice must be given by publication as provided in chancery proceedings.[25] The notice should advise the defendants of the filing of the petition and of the date scheduled for its presentation to the court.

Writ of Inquiry

At the time the condemnation petition is presented to the court, the condemner should submit a motion to sustain the condemnation proceeding. This motion asks the court to award a writ of inquiry and to fix the time and place of the inquest. Any challenge by the defendants to the condemner's right to take must be asserted at this stage of the proceedings.

If no challenge is made, the court will sustain the condemnation petition and order the writ of inquiry and inquest.[26] This order essentially recognizes the right of the condemner to acquire the property and instructs the clerk to issue a writ of inquiry directing the sheriff to summon a jury of view. It has been held that an order directing the writ to be issued is not a final judgment and is thus not appealable.[27]

Selection of the Jury

The jury of view is traditionally composed of five (5) persons, but this number may be changed by consent of the parties.[28] Juror qualifications are the same as required in civil cases with the additional qualification that no member of the jury of view may have an interest in a similar matter.[29] As in other civil cases, jurors may be challenged peremptorily or for cause.[30]

In theory, the method of selection may vary from county to county since, by statute, jurors may be nominated by the court, selected by consent of the parties, or summoned by the sheriff.[31] The actual practice in most Tennessee counties, however, is for the judge to either select the jurors himself or to allow the parties to select jurors from a preliminary list he has already compiled. If any juror named by the court is unable to attend when summoned, a replacement is selected by the sheriff.[32]

View and Report

If a date has not been set by the court, the sheriff must give the parties or their agents, if residents of the county, three (3) days notice of the time and place of the inquest.[33] On the day of the inquest, the jury, after being sworn and placed under the charge of the sheriff,[34] may then proceed to examine the premises.[35] It may hear testimony of witnesses, but no argument of counsel.[36] After the investigation has been completed, the jury is required to set apart, by metes and bounds, the land required for the intended project[37] and to assess damages according to the principles outlined in Chapter Three of this book.[38]

The report of the jury of view, which includes a legal description of the property and the amount of the award, must be signed by a majority of the jurors and returned into court through the sheriff.[39] If no objection is made, the report is then confirmed by the court, usually upon motion by the condemner, and the land is decreed to the condemner upon payment of the assessed damages either to the defendants or to the clerk of court for the defendants' use.[40]

Exception and Appeal

Exceptions to the report of the jury of view may be filed by either party[41] and, upon a showing of good cause, the court may set aside the jury's report and award a new writ of inquiry.[42] Generally, exceptions should be directed to some "irregularity in the proceedings, misconduct of the jury, or when the report is founded upon erroneous principles."[43] Although no time limit is specified by statute, it has been held that exceptions must be filed during the present or succeeding term of court.[44]

If a party's only objection is to the amount of the award, an appeal is the proper remedy rather than the filing of exceptions.[45] It has been held, however, that a trial judge may properly act upon an exception based solely on inadequacy of damages if no challenge to the exception has been made by the condemner.[46] Either party may file an appeal within forty-five (45) days of the entry of an order confirming the report of the jury of view, and upon giving security for costs, a trial de novo before a petit jury will follow.[47] A condemner need not suspend operations on the land, however, merely because an appeal has been taken.[48] Operations may continue if the condemner gives bond, payable to the defendants, in double the amount of the jury of view's award, and upon the condition that the condemner abide by the final judgment in the case.[49] Costs on appeal must be paid by the appellant in all cases where the petit jury's verdict either affirms or is more unfavorable to the appellant than the finding of the jury of view.[50] In all other cases, the court may award costs as in chancery proceedings.[51]

The remedies of exception and appeal are cumulative and successive.[52] An appeal may be taken regardless of whether exceptions are filed to the report of the jury of view.[53] If exceptions are filed, however, an appeal may only be taken after the exceptions have been ruled upon.[54] In addition, an appeal may be taken from an order overruling a party's exception to the jury of view's report.[55]

BULLDOZER PROCEDURE

In General

Under the provisions of Chapter 15 (T.C.A. §§23-1528 through 23-1541), the condemner initiates the proceedings by depositing into court the amount of damages it determines the condemnee is entitled to. A petition for condemnation is then filed and notice thereof given to the condemnee. In cases where the right to take is not challenged, the condemner may take possession of the property five (5) days after notice has been given. If the condemnee is satisfied with the amount of damages deposited into court, it may withdraw that amount and the court will divest title. If the condemnee is dissatisfied with the amount deposited, it may except and a petit jury trial on the sole issue of appropriate compensation will follow.

Petition

See the requirements outlined under Jury of View Procedure, supra.

Notice

Notice of the filing of the condemnation petition must be given to the condemnee at least five (5) days before any additional steps are taken in the case by the condemner.[56] If the condemnee is a nonresident of the state or unknown, notice must be given by publication as provided in chancery proceedings.[57]

In cases where the right to take is not challenged within the five (5) days following the giving of notice (or four (4) weeks if the condemnee is a nonresident or unknown), the condemner may take possession of the property or property rights sought to be condemned.[58] When necessary, a writ of possession will be issued by the court.[59]

Deposit

At the time the petition is filed, the condemner must determine the amount of damages it believes the condemnee is entitled to and must deposit this amount into court.[60]

Acceptance. If the condemnee is satisfied with the amount deposited, it may end the proceedings by filing a sworn statement that it is the owner of the property or property rights condemned and that it accepts that amount in full settlement.[61] A decree divesting title will then be entered during the next term of court.[62]

Exception. If the condemnee is dissatisfied with the amount deposited, it may file an exception on or before the second day of the next regular term of court.[63] A petit jury trial, limited to the issue of appropriate compensation will follow.[64] It should be noted that the amount deposited by the condemner is inadmissible at trial for the purpose of showing or rebutting either party's assessment of fair market value.[65]

Notwithstanding the filing of an exception, the condemnee is entitled to be paid, pending trial, the amount originally deposited by the condemner without prejudice to the rights of either party.[66] The condemnee must agree, however, to refund any overpayment in case the final award is less than the amount deposited.[67] If the final award is greater than the amount originally deposited, the government condemner must pay the condemnee six percent (6%) interest on the excess amount awarded.[68]

Costs of trial must be paid by the condemnee in all cases where the final award is less than or equal to the amount originally assessed and deposited into court by the condemner.[69] In cases where the final award exceeds the amount deposited, costs must be paid by the condemner.[70] In addition, the court may order the condemner to reimburse the condemnee for all reasonable costs actually incurred because of the condemnation proceedings in cases where: 1) the final judgment is that the petitioner cannot acquire the property by condemnation; or, 2) the proceeding is abandoned by the petitioner.[71]

Default. If the condemnee fails to appear, either to accept the amount deposited or to file an exception, the condemnation petition will be taken as confessed.[72] A hearing upon the record and in the absence of the condemnee will follow.[73]

FOOTNOTES

1. T.C.A. §23-1404.

2. Dixon v. Louisville & N.R. Co., 115 Tenn. 362, 89 S.W. 322 (1905).

3. Maryville v. Waters, 207 Tenn. 213, 338 S.W.2d 608 (1967).

4. Chambers v. Chattanooga R.R. Co., 130 Tenn. 459, 171 S.W. 84 (1914); Evans v. Wheeler, 209 Tenn. 141, 348 S.W.2d 500 (1960).

5. Chambers v. Chattanooga, supra, n. 4.

6. McLain v. State, 59 Tenn. App. 529, 442 S.W.2d 637 (1968).

7. T.C.A. §§23-1401, et seq.

8. T.C.A. §§23-1528 through 23-1541.

9. T.C.A. §23-1528.

10. Id.

11. Id.

12. State Dept. of Highways v. Thornton, 57 Tenn. App. 127, 415 S.W.2d 884 (1967).

13. The statutory requirements for condemnation petitions under the jury of view procedure and the bulldozer procedure are very similar and have been combined here for the purpose of simplicity.

14. T.C.A. §23-1404.

15. T.C.A. §§23-1406, 23-1530.

16. T.C.A. §23-1406.

17. Id.

18. T.C.A. §§23-1404, 23-1530.

19. Id.

20. T.C.A. §23-1530.

21. T.C.A. §§23-1404, 23-1530.

22. T.C.A. §23-1530.

23. T.C.A. §§23-1404, 23-1530.

24. T.C.A. §23-1405.

25. Id.

26. T.C.A. §23-1407.

27. Camp v. Coal Creek & Winter's Gap T. Co., 79 Tenn. 705 (1883).

28. T.C.A. §23-1408.

29. T.C.A. §23-1409.

30. T.C.A. §23-1408.

31. T.C.A. §23-1409.

32. T.C.A. §23-1410.

33. T.C.A. §23-1411.

34. T.C.A. §23-1412.

35. T.C.A. §23-1413.

36. Id.

37. Id.

38. T.C.A. §23-1414.

39. T.C.A. §23-1415.

40. T.C.A. §23-1416.

41. T.C.A. §23-1417.

42. Id.

43. Pound v. Fowler, 175 Tenn. 220, 133 S.W.2d 486, 488 (1939).

44. Officer v. E. Tenn. Natural Gas Co., 192 Tenn. 184, 239 S.W.2d 999 (1951).

45. Pound v. Fowler, supra, n. 43.

46. Id.

47. T.C.A. §23-1418.

48. T.C.A. §23-1420.

49. Id.

50. T.C.A. §23-1419.

51. Id.

52. Baker v. Rose, 165 Tenn. 543, 56 S.W.2d 732 (1932).

53. State ex rel. v. Oliver, 167 Tenn. 155, 67 S.W.2d 146 (1933).

54. Pound v. Fowler, supra, n. 43.

55. Id.

56. T.C.A. §23-1530.

57. Id.

58. Id.

59. Id.

60. T.C.A. §23-1529.

61. T.C.A. §23-1531.

62. Id.

63. T.C.A. §23-1532.

64. T.C.A. §§23-1532, 23-1535.

65. Kennedy v. Chattanooga, 56 Tenn. App. 198, 405 S.W.2d 653 (1966).

66. T.C.A. §23-1533.

67. Id.

68. T.C.A. §23-1540.

69. T.C.A. §23-1539.

70. Id.

71. Id.

72. T.C.A. §23-1534.

73. Id.

CHAPTER FIVE:
INVERSE CONDEMNATION

In General

Inverse condemnation suits arise most often under one of the following sets of circumstances: 1) where governmental activity interferes with the practical use and enjoyment of a plaintiff's land to such a degree as to constitute a taking for which compensation is due under the inverse condemnation statutes;[1] 2) where property in addition to that previously condemned in formal proceedings is taken by the condemnor without further compensating the owner; and, 3) where a public or private entity possessing the power of eminent domain appropriates property without the institution of formal condemnation proceedings. The first circumstance raises the sometimes difficult question of what constitutes a compensable taking of property for purposes of the inverse condemnation statutes. The second raises the question of whether a grantor or condemnee is estopped by the terms of the grant or prior condemnation award from recovering additional compensation. The third circumstance raises the question of what, if any, title or right is acquired by a condemnor who appropriates property without instituting formal proceedings. All three circumstances raise the question of when the statute of limitations begins to run as to an owner suing under the inverse condemnation statutes.

What Constitutes Taking

One of the most confusing questions which may arise in an inverse condemnation suit of the first type described above is whether the damage allegedly done to a plaintiff's property is sufficient to constitute a compensable taking. It has generally been held that any destruction, restriction, or interruption of the common and necessary use of an owner's property may constitute a taking.[2] Actual physical entry upon the land is not necessary and the owner need not be entirely deprived of the use of his property in order to bring an action under the inverse condemnation statutes.[3]

However, as noted in the discussion of incidental damages (Chapter Three), a property owner whose land is not formally condemned may not, as a general rule, recover for mere consequential damages resulting from the construction or operation of a public improvement near, but not on, his property.[4] Such nonrecoverable

consequential damages include all injuries naturally and unavoidably resulting from the proper, non-negligent construction or operation of a particular improvement which are shared generally by owners whose lands lie within the range of the inconveniences necessarily incident to the improvement.[5] Thus, a strange twist in the law of eminent domain dictates that the rights of one whose land is formally condemned in part will differ from the rights of one whose land is not formally condemned but who nonetheless suffers actual damage from the construction or operation of an improvement nearby. The difference is that while the former may recover for a decrease in the market value of the residue (the portion of his land not condemned) resulting from damages only reasonably expected to accrue, the latter may be denied recovery for the same type of injury even though it has actually occurred.

An exception to this general rule on consequential damages is made in cases where a plaintiff whose land has not been formally condemned is able to show that his property has been directly invaded or peculiarly affected by the public improvement in a way not shared by other similarly situated owners or by the public generally, and that this invasion or peculiar effect has proximately caused the fair market value of his property to decrease.[6] In this situation, a taking will be deemed to have occurred for purposes of recovering damage in inverse condemnation. It is important to note that a mere showing of decreased market value is insufficient to establish a compensable taking without a further showing that the loss was proximately caused by a direct invasion of, or injury peculiar to, the plaintiff's property.[7] Thus, recovery was denied for a decrease in property value caused by the proximity of an interstate highway where there was no showing of some direct physical invasion, the court's rationale being that any loss in value resulting from the construction of the interstate was shared generally by all owners in the vicinity and was not peculiar to the plaintiff's property.[8]

Another problem frequently encountered in the area of the law is the practical distinction between nuisance and inverse condemnation for purposes of defining a compensable taking. The courts usually define a nuisance to include recurrent damage done to a plaintiff's property by the improper, negligent construction or operation of a public improvement for which successive recoveries are allowed until the nuisance is abated.[9] Conversely, inverse condemnation is usually defined to include permanent damage done to a plaintiff's property by the proper, non-negligent construction or operation of a public improvement for which only a single recovery is allowed.[10]

Whether a particular activity sufficiently interferes with the use of a plaintiff's property to constitute a compensable taking will finally be seen to be a matter of degree.[11] The conceptual difficulty inherent in classifying a particular activity may be simplified by visualizing, on a continuum, consequential damages, nuisance damages, and damages recoverable for a taking. At one extreme may be placed consequential damages which, as noted above, would include all injuries naturally and unavoidably resulting from the proper, non-negligent construction or operation of a public improvement which do not directly invade or peculiarly affect the plaintiff's land, but rather are shared by the public generally. Consequential damages are thus analogous to damages caused by a public nuisance for which a private owner cannot recover without establishing damages attributable to a private nuisance as well. At the center of the continuum may be placed nuisance damages resulting from the improper, negligent construction or operation of a public improvement which substantially interferes with the practical use and enjoyment of the plaintiff's land and which affect his land peculiarly. Such damages are recoverable under a theory of temporary private nuisance, and are actionable until the nuisance is finally abated. At the other extreme may be placed damages recoverable for a taking, which include those resulting from the proper, non-negligent construction or operation of a public improvement which directly invades or peculiarly affects the plaintiff's property and which creates a substantial and continuing interference with the practical use and enjoyment thereof. Thus, damages for a taking in this sense closely approximate and may, in a practical sense, be virtually indistinguishable from those recoverable for a permanent private nuisance.

More specific court determinations of what constitutes a taking under the theory of inverse condemnation are discussed as follows.

Easements of Access and Way

It has generally been held that a property owner has an easement of access between his land and the abutting street which, absent evidence to the contrary, extends to the center line of the abutting street.[12] Any impairment of this right of ingress and egress constitutes a taking for which the owner may recover compensation under the inverse condemnation statutes.[13] Thus, recovery has been allowed where an owner's access to the abutting street has been destroyed by a change in grade[14] or construction of a fence.[15]

In addition to an easement of access, an owner also has an easement of way, that is, a right of passage, in the street abutting his property.[16] This easement of way is a private property right which exists in addition to the right to use the street in common with the public generally.[17] It has been held that the easement extends along any street or alley upon which the owner's property abuts, in either direction, to the next intersecting street.[18] Impairment of this right leading to recovery in inverse condemnation is typically found in cases of street closings.[19] No recovery has been allowed however where a two-way street abutting an owner's property has been changed to a one-way street, such action being considered a valid exercise of police power.[20]

Water Damage

The construction or operation of a public improvement which proximately results in water damage to a plaintiff's property similarly constitutes a compensable taking for purposes of the inverse condemnation statutes. An owner's right to recover has thus been recognized for flooding caused by highway construction[21] or improvements,[22] erosion caused by the continual release of water onto plaintiff's property,[23] and erosion caused by the diversion of a stream incident to the construction of a pier.[24]

Adverse Effects due to Proximity of Public Improvement

As noted above, consequential damages for noise, inconvenience, etc. resulting from the construction or operation of a public improvement are generally not recoverable by an owner whose land has not been formally condemned for that purpose. Specifically, recovery has been denied for noise, smoke, inconvenience and the adverse effect on market value of land in the vicinity of a railroad[25] and, more recently, for the loss in value occasioned by the construction of an interstate highway adjacent to a plaintiff's property.[26] However, in an apparent radical departure from such decisions, the Tennessee Supreme Court expanded the traditional concept of taking in Johnson v. City of Greeneville[27] to afford recovery in inverse condemnation for some types of government activities which would ordinarily be classified as noncompensatory public nuisances. Here, the Court ruled that the noise, vibrations and fear caused to the plaintiffs by frequent low flights over their land from an adjacent municipal airport so substantially interfered with the practical use and enjoyment of their land as to constitute a compensable taking of an air easement under the inverse condemnation statutes.[28] It is unclear, however, whether the Court would have reached the same conclusion had there been no direct overflights. Many courts have routinely rejected

inverse condemnation claims based on nearby flights rather than overflights, and the state of the law in general concerning this issue is, at best, confusing.[29]

Additional Taking

In an inverse condemnation suit of the second type initially described, that is, where a plaintiff seeks to recover damages for property allegedly taken in addition to that previously condemned or granted, the major question raised is whether the plaintiff is estopped by the prior condemnation award or the terms of the grant from recovering further compensation. While the burden of proof in such a case is technically on the condemner,[30] as the party asserting the defense of estoppel, generally the courts have ruled that damages for a taking are recoverable only once and that a condemnation award will be held to embrace all damages, present and future, resulting from the proper construction or operation of an improvement.[31] The grantor or condemnee will be presumed to have contemplated all damages to which he would have been entitled in a condemnation proceeding.[32]

An exception to this general rule is made, however, in cases where the particular loss or damage alleged by the plaintiff could not reasonably have been anticipated by either party or, if alleged by the plaintiff during the condemnation proceeding, would have been rejected as speculative or conjectural.[33] Recovery for an additional taking has thus been allowed for landslides on a plaintiff's property proximately resulting from cuts made during the construction of a railroad[34] or a highway.[35] However, recovery was denied in a case where the condemnor raised the grade of a street, allowing fill to spread beyond the boundaries of the easement originally conveyed for the street's construction, on the grounds that the owner knew or should have known that such a change in grade might reasonably be necessary.[36]

Illegal Taking

In the third circumstance initially described, that is, where a condemner appropriates property without the institution of formal proceedings, the rule is that such an appropriation is illegal until compliance with the statute is secured or until just compensation is paid.[37] In this situation, the condemner acquires only a possessory right which is not transmissible; any subsequent conveyance of the property by the condemner will be held void.[38] A property owner's remedy for such an illegal taking lies solely in inverse condemnation, and the courts have specifically rejected attempts by landowners to enjoin[39] or eject[40] the illegal taker.

Statute of Limitations

T.C.A. §23-1424 provides that suits in inverse condemnation must be commenced within one year "after the land has been actually taken possession of, and the work of the proposed internal improvements begun." In order for the statute to operate as a bar to an inverse condemnation action, it is first necessary to establish that there has been a taking, and many of the cases turn on this exact question.[41] The problem typically arises under the following set of circumstances: A files suit within three years from the date his property was allegedly injured by B, but after the one year statute of limitations for an inverse condemnation suit has run. As an affirmative defense, B claims the suit is barred by the statute. In response, A asserts that his action lies for injury to property, bringing it within the three year statute of limitations. B must then establish that the alleged injury amounted to a taking in order to succeed with his defense.

In determining what amounts to a taking and when the taking is sufficiently complete to begin the running of the statute of limitations, the courts take into consideration all the facts in the particular case.[42] It is generally held that the date of taking is determined by the date of actual injury to the property, or the date when the owner had reasonable notice or knowledge of the injury.[43] This determination may become somewhat difficult in cases where an owner's property is injured by governmental activities conducted on adjacent land, since the date when the government took possession, began construction, or even completed construction may not be the date when the owner's property is actually injured.

The courts have tended to give landowners great leeway in this area of the law, holding, for instance, that the statute of limitations did not bar a suit filed five years after the completion of a highway, but within one year of the date plaintiff's property was flooded as a result of a change in natural drainage.[44] Similarly, where a plaintiff sued in inverse condemnation for damages caused by low flying aircraft from a nearby airport, it was held that the operative date for purposes of the running of the statute was the date such overflights began, rather than the date when property for the construction of the airport was purchased or even when construction was completed.[45] A more difficult issue is presented where the landowner is aware of the injury to his property, but believes it to be only temporary in nature. Here, also, the doubt has been resolved in favor of the landowner. Thus, in a case where, over a two year period, a landowner was assured by the State that the flooding of his land caused

by highway construction would be alleviated, the Supreme Court held that the owner's action was not barred by the statute, explaining that the landowner should have one year to commence his action after the injury to his property reasonably appears to him to be permanent.[46] This generally broad construction of the statute has been reinforced in a recent decision by the Court of Appeals, Eastern Section.[47] In that case, a city ordinance had been passed lowering the approach zone from an extended airport runway and consequently limiting the height to which a corporation could build on its property. The Court rejected the city's argument that the passage of the ordinance gave the corporation notice of the taking and thus started the running of the statute of limitations, holding that the statute begins to run "when the landowner's property is injured by the taking, not when the landowner has notice of the taking."[48]

In cases where a condemner takes a non-suit after beginning construction of an improvement, it has been held that the statute of limitations for purposes of inverse condemnation begins to run when the non-suit was taken rather than the date construction began.[49]

FOOTNOTES

1. T.C.A. §§23-1423, 1424.

2. Lea v. Lewisburg & N.R. Co., 135 Tenn. 560, 188 S.W. 215 (1916); Jones v. Cocke County, 57 Tenn. App. 496, 420 S.W.2d 587 (1967).

3. Jones v. Cocke County, supra, n. 2.

4. Lewisburg & N.R. Co. v. Hinds, 134 Tenn. 293, 183 S.W. 985 (1916).

5. Id.

6. Illinois Central R. Co. v. Moriarity, 135 Tenn. 446, 186 S.W. 1053 (1916); Johnson v. City of Greeneville, 222 Tenn. 260, 435 S.W.2d 476 (1968).

7. Ledbetter v. Beach, 220 Tenn. 623, 421 S.W.2d 814 (1967).

8. Id.

9. L & N Terminal Co. v. Lellyett, 114 Tenn. 368, 85 S.W. 881 (1898); Robertson v. Cincinnati, New Orleans & Texas Pacific R. Co., 207 Tenn. 272, 339 S.W.2d 6 (1960).

10. Id.

11. Johnson v. City of Greeneville, supra, n. 6, quoting Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962).

12. Hamilton County v. Rape, 101 Tenn. 222, 47 S.W. 416 (1898).

13. Id.

14. Id. See also, e.g. Knox County v. Lemarr, 20 Tenn. App. 258, 97 S.W.2d 659 (1936).

15. Spence v. Cocke County, 61 Tenn. App. 607, 457 S.W.2d 270 (1969).

16. Illinois Central R. Co. v. Moriarity, supra, n. 6; East Park United Methodist Church v. Washington County, 567 S.W.2d 768 (Tenn. 1978).

17. Id.

18. Id.

19. Id. See also, e.g., Graham v. Hamilton County, 224 Tenn. 82, 450 S.W.2d 571 (1969); Shelby County v. Barden, 527 S.W.2d 124 (Tenn. 1975).

20. City of Memphis v. Hood, 208 Tenn. 319, 345 S.W.2d 887 (1960).

21. Unicoi County v. Barnett, 181 Tenn. 565, 182 S.W.2d 865 (1944); Jones v. Hamilton County, 56 Tenn. App. 240, 405 S.W.2d 775 (1965).

22. Hollers v. Campbell County, 192 Tenn. 442, 241 S.W.2d 523 (1951); Jones v. Cocke County, supra, n. 2.

23. Murphy v. Raleigh Utility District of Shelby County, 213 Tenn. 228, 373 S.W.2d 455 (1963).

24. Barron v. City of Memphis, 113 Tenn. 89, 80 S.W. 832 (1904).

25. See Lewisburg & N.R. Co. v. Hinds, supra, n. 4.

26. Ledbetter v. Beach, supra, n. 7.

27. 222 Tenn. 260, 435 S.W.2d 476 (1968).

28. Id. See also U.S. v. Causby, 328 U.S. 256 (1946).

29. See W. H. Rogers, Handbook on Environmental Law, §5.5 (1977).

30. Carter County v. Street, 36 Tenn. App. 166, 252 S.W.2d 803 (1952).

31. Fuller v. City of Chattanooga, 22 Tenn. App. 110, 118 S.W.2d 886 (1938); Hawkins v. Dawn, 208 Tenn. 544, 347 S.W.2d 480 (1961).

32. Id.

33. Carter County v. Street, supra, n. 30; Williams v. Southern Ry. Co., 57 Tenn. App. 215, 417 S.W.2d 573 (1966).

34. Williams v. Southern Ry. Co., supra, n. 33.

35. Carter County v. Street, supra, n. 30.

36. Fuller v. City of Chattanooga, supra, n. 31.

37. Rogers v. City of Knoxville, 40 Tenn. App. 170, 289 S.W.2d 868 (1955).

38. Id.

39. Pleasant View Utility District v. Vradenburg, 545 S.W.2d 733 (Tenn. 1977).

40. Doty v. American Tel. & Tel. Co., 123 Tenn. 329, 130 S.W. 1053 (1910).

41. See, e.g., Donohue v. E. Tenn. Natural Gas Co., 39 Tenn. App. 438, 284 S.W.2d 692 (1955); Robertson v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 207 Tenn. 272, 339 S.W.2d 6 (1960).

42. Davidson County v. Beauchesne, 39 Tenn. App. 90, 281 S.W.2d 266 (1955); Knox County v. Moncier, 224 Tenn. 361, 455 S.W.2d 153 (1970).

43. Morgan County v. Neff, 36 Tenn. App. 407, 256 S.W.2d 61 (1966); Knox County v. Moncier, supra, n. 42.

44. Jones v. Cocke County, supra, n. 2.

45. Johnson v. City of Greeneville, supra, n. 6.

46. Knox County v. Moncier, supra, n. 42.

47. Osborne Enterprises, Inc. v. City of Chattanooga, 561 S.W.2d 160 (Tenn. 1978).

48. Id. at 166.

49. Armistead v. Clarksville - Montgomery County School System, 222 Tenn. 486, 437 S.W.2d 527 (1969).

CHAPTER SIX:
LEASEHOLD DAMAGES

In General

It has long been held that a leasehold constitutes a compensable property interest under the laws of eminent domain.[1] This interest has been characterized as the right of the lessee to remain in undisturbed possession of the leased premises until the expiration of his term.[2] A lessee's entitlement to damages is not limited to cases where the leasehold property is actually taken or destroyed, but extends even to cases where mere impairment of access to the leasehold property can be shown.[3]

Apportionment

In the typical condemnation case involving leased premises, the property owner and lessee are joined as parties and the lessee is awarded a portion of the damages assessed as the value of the total property condemned. A general rule is that the total compensation awarded to the owner and lessee may not exceed the value of the unincumbered fee and that this value, once established, may not be further increased because of the existence of an unexpired lease at the time of condemnation;[4] refusal to so instruct the jury has been held to be reversible error.[5] In other words, the value of the leasehold is considered to be an integral part of the total value of the unincumbered tract of land.[6]

Thus, the jury should be instructed to first determine the fair market value of the unincumbered fee and the incidental damages thereto.[7] The jury may, at this point, consider the value of the leasehold as one element of the total fair market value of the fee, the rationale being that the existence of the leasehold indicates one available use of the property.[8] The jury should then be instructed to apportion its total damage assessment (fair market value plus incidental damages) between the property owner and the lessee by deducting from this total the amount it establishes as the value of the leasehold plus the incidental damages to the leasehold.[9] The amount deducted is then awarded to the lessee with the remainder going to the property owner.[10] It was recently held that this formula for apportionment is applicable regardless of whether a short-term or long-term lease is involved.[11]

Where entirely separate interests are involved, the condemner may settle with the lessee out of court and subsequently specify apportionment when it makes a deposit into court.[12] If the condemner elects this course of action, the lessee may then withdraw its amount in full satisfaction of its claim.[13]

Valuation of the Leasehold

For purposes of apportioning damages, the value of the leasehold interest is its fair market value less the rent that would actually have been paid by the lessee during its unexpired term.[14] While evidence of profits is generally not allowed in condemnation cases, the peculiar facts of a case may make such evidence admissible to show the fair market value of the lessee's interest.[15]

Incidental damages to the leasehold include two different measures. First, as specifically set out by statute,[16] the lessee may recover moving expenses as incidental damages.[17] Second, in cases where only a portion of the leasehold is actually taken, the lessee may recover, as traditional incidental damages, any damage to the remainder of his leasehold.[18] In such cases, it is very possible that the damage to the remainder will be considerably greater than the damage to the part actually taken, and it has been held that the fair market value of the entire tract actually condemned is not an upper limit on the amount of incidental damages a lessee can recover.[19]

Appeal

Both the property owner and lessee have an independent right to appeal the amount of damages awarded; joinder of parties is not necessary.[20] On appeal, the court may increase the award to either or both parties as long as it determines that the initial award did not accurately reflect the fair market value of the unincumbered fee.[21] Thus, any relief granted on appeal must be through an increase of the total award rather than a reallocation of the lower court's award.[22]

FOOTNOTES

1. Colcough v. Nashville & Northwestern R. Co., 39 Tenn. 171 (1858); Gallatin Housing Authority v. Chambers, 50 Tenn. App. 441, 362 S.W.2d 270 (1962).

2. City of Nashville v. Mason, 11 Tenn. App. 344 (1930).

3. See Shelby County v. Barden, 527 S.W.2d 124 (Tenn. 1975), where the lessee recovered the decrease in value of his leasehold due to the closing of a street abutting the leasehold premises.

4. Mason v. City of Nashville, 155 Tenn. 256, 291 S.W. 1074 (1927); State v. Texaco, Inc., 49 Tenn. App. 278, 354 S.W.2d 792 (1962).

5. State v. Texaco, Inc., supra, n. 4.

6. Id.

7. Moulton v. George, 208 Tenn. 586, 348 S.W.2d 129 (1961).

8. See State v. Texaco, supra, n. 4, and cases cited therein.

9. Moulton v. George, supra, n. 7.

10. Id.

11. State ex rel. Dept. of Transportation, etc. v. Gee, 565 S.W.2d 498 (Tenn. 1978).

12. State ex rel. Moulton v. Burkhart, 212 Tenn. 352, 370 S.W.2d 411 (1963).

13. Id. It should be noted, however, that such action by the condemner may be unwise in cases where the value of the leasehold exceeds that of the reversion, making the lessee, in effect, the real party in interest. In cases where the owner introduces evidence of rental value to establish the fair market value of the total fee, the possibility arises of double payment by the condemner. While the general rule is that the jury may not add the respective values of the leasehold and reversion, this may, as a practical matter, occur where the lessee is not a party to the suit and in the absence of careful jury instruction.

14. Gallatin Housing Authority v. Chambers, supra, n. 1.

15. State v. Texaco, Inc., supra, n. 4.

16. T.C.A. §23-1414.

17. Nashville Housing Authority v. Hill, 497 S.W.2d 917 (Tenn. 1973).

18. Gallatin Housing Authority v. Chambers, supra, n. 1.

19. Id.

20. State Dept. of Highways v. Hurt, 63 Tenn. App. 689, 478 S.W.2d 775 (1972).

21. Id.

22. Id.

CHAPTER SEVEN:
THE UNIFORM RELOCATION ASSISTANCE ACTS

In General

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970[1] was enacted for the purpose of providing fair and equitable treatment of persons displaced as a result of federal and federally-assisted programs[2] as well as consistent treatment of owners during the actual land acquisition process.[3] The provisions of the Act are mandatory and apply to any public agency that administers programs supported, at least in part, by federal funds. The Act consists of three subchapters: 1) General Provisions, which defines terms used in the Act; 2) Uniform Relocation Assistance, which is concerned with moving and related expenses, replacement housing payments, relocation assistance advisory services, and the federal share of the cost of such payments and services; and, 3) Uniform Real Property Acquisition Policy, which sets out the procedures to be followed in acquiring real property.

In 1972, Tennessee enacted the Uniform Relocation Assistance Act,[4] which generally follows the provisions of the federal act and has the effect of making such relocation assistance and land acquisition procedures mandatory for any projects supported, at least in part, by state funds.

The focus of this chapter is on land acquisition procedures, these being of primary interest to attorneys. The implementing regulations for such procedures vary considerably among agencies at both the federal and state levels. For example, the Department of Transportation and the Department of Housing and Urban Development have issued separate regulations. For purposes of this chapter we shall describe the general procedures required by the Federal Aviation Administration for the Department of Transportation because we feel these result in substantial conformity with the requirements of both the state and the federal act. It is recommended that the regulations of the specific agency involved be consulted before proceeding with the acquisition of real property for a particular project.

Appraisal Procedure

Prior to the acquisition of any tract of property by a public agency subject to the federal and/or state relocation acts, a full appraisal of the tract must be made.

Regulations concerning such appraisals generally require that:

1) the property be appraised before the initiation of any negotiations with the property owner;

2) the owner, or his designated representative, be given an opportunity to accompany the appraiser during his inspection of the property;

3) the acquiring agency establish the amount it believes to be just compensation before the initiation of any negotiations with the property owner;

4) any increase or decrease in the fair market value of the property prior to the appraisal caused by the public improvement for which the property is being acquired be disregarded in determining the amount of just compensation to be offered; and,

5) the appraiser not take into consideration any relocation assistance benefits when making the appraisal.[5]

As a general rule, an appraiser should use one or more of the three basic approaches to value followed by the American Institute of Real Estate Appraisers, depending on the extent each is applicable to the particular tract of property. These three approaches are the market data approach, the income approach, and the cost approach. The public agency involved should obtain at least one appraisal for each tract being acquired or damaged. Two appraisals should be obtained if the tract is of a complex or unusual nature or if its appraised value is expected to exceed $50,000.[6]

Appraisal Report

As a minimum, an appraisal report should set out:

1) the purpose of the appraisal, including a statement of value and the rights or interests being appraised; and,

2) a description of the property being appraised, including:

a) the parcel number as it relates to the acquiring agency's property maps;

b) the names of the owners of each interest being valued;

c) the location of the property;

d) the total area of the property in acres or square feet;

e) the area, in acres or square feet, of each interest in property being acquired;

f) a minimum of five years delineation of title;

g) the property's present use and zoning, if any;

h) the utilities available to the tract and those utilities actually being used; and,

i) the type and condition of improvements and/or special features which may increase or decrease the value of the property.[7]

In addition to these items, the appraisal report should describe each approach to value followed for the particular tract (i.e., market data, income, or cost). If the income approach is used, the report should include a complete evaluation of any special conditions that might differentiate the tract being acquired from others. Any special damages or benefits should be noted since Tennessee allows these to offset each other. Further, the report should contain a list of the comparable sales used for the appraisal, including, for each comparable, its sales price, date of acquisition, and its differences, if any, from the tract being acquired.[8]

Appraisal Review

Once appraisals of the property in question have been made, a review appraiser must be retained to evaluate the appraisals and to establish the property's fair market value. The review appraiser may be either an independent appraiser hired by the public agency or a qualified member of the agency's staff.[10] It is suggested that any staff member used as a review appraiser be pre-qualified by the federal or state agency from which the grant is to be received.

Before making the determination of fair market value, the review appraiser should not only consider the appraisals already made, but should also personally view both the property being acquired and the comparable sales used by the initial appraisers.[11] Once fair market value has been established, the owner of the property should be notified in writing that this amount is being offered for the acquisition of the property rights in question.[12]

Acquisition

The general procedure established for acquiring real property is as follows:

1) the agency should make every reasonable effort to acquire the property through negotiated purchase;

2) the agency must not take action coercive in nature in order to compel agreement on price;

3) the agency must make a prompt written offer to purchase the property for the full amount of the determined fair market value, and the agency must furnish to the owner a written summary statement of the basis for the amount established as fair market value which summary may, but is not required to, include the actual appraisals;

4) when negotiations are initiated, the owner must be provided a written statement concerning the proposed acquisition;

5) if improvements or fixtures considered realty are being separately acquired under state law and the owner of the land involved disclaims any interest in improvements of the tenant, a separate written offer must be provided to the tenant;

6) the full amount of the approved fair market value must either be paid to the property owner or made available to him by deposit in court prior to the agency's taking physical possession of the property or requiring that the property be vacated by the owner; and,

7) as soon as practicable after the date of payment of the purchase price or the date of deposit in court of the funds to satisfy an award of compensation in a condemnation proceeding, the agency must reimburse the owner for expenses necessarily incurred for:

a) recording fees, transfer taxes, and similar costs incidental to conveying real property;

b) penalty costs for prepayment of any pre-existing recording mortgage, entered into in good faith, encumbering the property; and,

c) the pro rata portion of real property taxes paid by the owner which are allocable to a period subsequent to the date of vesting title with the agency or the effective date of possession of the property by the agency, whichever is earlier.

These expenses should be set out in a closing statement and given to the owner.[13]

Although the public agency may not pay less than the approved purchase price, as determined by its review appraiser, it may, under certain circumstances, make an offer of settlement in excess of that amount. In arriving at a determination to make such an administrative settlement, the agency should take the following factors into consideration:

1) the appraiser's opinion of value;

2) the amount of fair market value recommended by the review appraiser;

3) any recent court awards for similar type property;

4) if a negotiator has been used, the negotiator's recorded information;

5) the estimated trial cost; and,

6) the opinion of legal counsel as to whether the award is reasonable under the circumstances.[14]

When a settlement is made in excess of the established fair market value, the attorney's file should contain the following supporting information:

1) a signed statement by the attorney setting out his reasons for the settlement, with supporting data, as appropriate; and,

2) a signed statement by the chief administrative officer of the public agency indicating his concurrence with the settlement in whole or in part, and, if in part, his reasons therefor.[15]

In conclusion it should be noted that the acquiring agency may reimburse the owner for his reasonable costs, disbursements and expenses (including reasonable attorney's fees, appraisal and engineering fees):

1) if the acquiring agency starts a condemnation action but the court decides that the agency does not have legal authority to acquire the property by condemnation;[16]

2) if the acquiring agency starts a condemnation action and abandons it;[17] and,

3) if the owner successfully concludes, by judgment award or by settlement, an inverse condemnation suit or similar proceeding. There is no obligation for the acquiring agency to reimburse the property owner for expenses when condemnation action is consummated in its favor.[18]

FOOTNOTES

1. 42 U.S.C. §§4601 *et seq.*

2. 42 U.S.C. §4621.

3. 42 U.S.C. §4651.

4. T.C.A. §§13-1901 *et seq.*

5. U.S. Department of Transportation, Federal Aviation Administration, Advisory Circular: Land Acquisition and Relocation Assistance Under the Airport Development Aid Program, p. 9.

6. *Id.*, p. 10.

7. *Id.*

8. *Id.*, p. 9.

9. *Id.*

10. *Id.*, p. 12.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*, p. 23.

15. *Id.*

16. *Id.*, p. 24; T.C.A. 23-1539.

17. *Id.*

18. U.S. Department of Transportation, *supra*, n. 16; T.C.A. 23-1423.

APPENDIX A:

FORMS

PRE-TRIAL CHECK LIST

_____ Open office file
_____ Make sure procedures required under Relocation Act have been complied with
_____ Bring title information up to date
_____ Check to see which civil district property is located in
_____ Check whether taxes due require naming taxing authority as party defendant
_____ Check whether tenants must be named as parties defendant
_____ Obtain aerial photograph of subject property
_____ Obtain planning commission plat of subject property
_____ Obtain engineer's drawing showing area of taking
_____ Establish tentative date of taking and arrange with appraisers and photographer for pre-trial conference at site of property on date of taking
_____ Obtain project description for use in petition
_____ Draft petition
_____ Draft notice and, if necessary, order of publication and supporting affidavit
_____ Draft order of condemnation and appropriation
_____ Proofread all pleadings
_____ File petition and arrange for service
_____ Obtain deposit receipt
_____ Pre-hearing check on service of process
_____ Hearing to obtain order of condemnation and appropriation
_____ See to signing and entry of order of condemnation and appropriation
_____ Furnish copy of order of condemnation and appropriation to adversary counsel
_____ Pre-trial conference at site of property with appraisers; obtain photographs of subject property, immediately surrounding property, and comparable sales; locate comparable sales on planning commission map
_____ Request copies of adversary appraisals
_____ Summarize for trial use all appraisals
_____ Explore settlement possibilities with adversary counsel
_____ Take any necessary depositions and file them with Clerk
_____ Prepare pre-trial Brief as required or desired and requests for special instructions
_____ Prepare all exhibits for use at trial
_____ Pre-trial conference with engineering witness, if any
_____ Pre-trial conference with judge and adversary counsel

POST-TRIAL CHECK LIST

_____ Draft final judgment
_____ Proofread final judgment
_____ Submit draft final judgment for description check
_____ Obtain signatures to final judgment and see to entry
_____ Obtain statements from appraisers, court reporters, suppliers of exhibits, and photographers
_____ Approve statements and submit for payment
_____ Obtain, review and approve bill of costs
_____ Obtain instructions regarding appeal
_____ Obtain certified copy of final judgment
_____ Obtain parcel number for final judgment
_____ See to registration of final judgment
_____ Advance cost of registration of final judgment and obtain receipt
_____ Forward certified copy of final judgment to appropriate official
_____ Pay judgment and obtain receipt
_____ Pay costs and obtain receipt
_____ Prepare statement for services
_____ Close office file

Style

PETITION FOR CONDEMNATION

I.

Under the provisions of [insert herein the applicable charter or statute which authorizes the general exercise of the power of eminent domain by Petitioner: e.g., the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee], Petitioner is expressly vested with the power to provide for the taking and appropriation of real property within the area [insert herein the geographic area within which Petitioner is authorized to take] for a public purpose, when public convenience and necessity so require.

(Optional: Furthermore, Tennessee Code Annotated, Sections 23-1528 et. seq. authorize and empower the State of Tennessee, its counties and municipalities to acquire by the exercise of the power of eminent domain "such right-of-way, land, material, easements and rights as may be deemed necessary, suitable or desirable for the construction, reconstruction, maintenance, repair, drainage or protection of any street, road, highway, freeway or parkway by the official charged by law with the construction or maintenance of same.")

[Where applicable, insert herein the specific statutory authority which empowers Petitioner to appropriate property for the particular use for which Respondent's land is being condemned.]

The foregoing, together with [insert herein the ordinance, resolution or statute authorizing the taking] which specifically declares the taking of the property hereinafter described to be necessary and in the public interest, and which authorizes the acquisition of said property, furnishes the authority for the taking of Petitioner's property.

II.

It is necessary, for the public welfare, and in the public interest, that [insert herein the nature of the interest being condemned] to the property hereinafter described located in _____ County, Tennessee, be acquired for the implementation of Project No. _____. The property hereinafter described is to be used for the purpose of [insert herein a description of the use to which the property is to be applied] for the aforesaid Project No.

_____, and has been chosen by Petitioner as that property most suitable for the above stated purposes. Petitioner and Respondents have been unable to agree as to the value of the property interests herein condemned.

III.

Petitioner is advised that title to the property which is located in the [insert herein the Civil District wherein the property is located] of _____ County, Tennessee, is in Respondents, [insert herein the names of all persons who have or may have an interest in the property], who reside at [insert herein the residence of each of the aforesaid owners if known, and if unknown, this should be stated], respectively, by [deeds, wills, etc.] as of record in Book _____, Page _____, Register's Office for _____County, Tennessee.

The property which Petitioner seeks to condemn for the aforesaid purposes is more particularly described as follows:

[insert herein a property description]

IV.

Petitioner is advised and believes, and therefore avers that the only encumbrances upon the property which it seeks to condemn are [insert herein the names and residences if known, or if unknown, such fact should be stated, of persons owning encumberances on the property].

V.

In accordance with the applicable provisions of T.C.A. §23-1401 et seq., this Petition is filed for the purpose of obtaining the issuance of a writ of inquiry of damages and the appointment of a jury of view.

or

In accordance with applicable provisions of T.C.A. §§23-1528-1541, Petitioner has determined that the amount of damages to which the owner(s) of the hereinabove described realty will be entitled by reason of Petitioner's exercise of its right of eminent domain is [insert herein the amount of damages to which Respondent is entitled], which amount has been deposited with the Clerk of this Court.

VI.

PREMISES CONSIDERED, PETITIONER PRAYS:

1. That a copy of this Petition be served upon the above named Respondents, that all proceedings necessary hereunder be had for the condemnation of [insert herein the interest sought to be condemned] in the hereinabove described property and that said [insert herein the interest sought to be condemned] be decreed to Petitioner as provided by the applicable statutes of the State of Tennessee.

2. That upon the presentation of this Petition this Court issue a writ of inquiry of damages and appoint a jury of view.

or

2. That, upon depositing the amount of $ _____, the estimated value of [insert herein the interest sought to be condemned] in the property sought to be condemned, in accordance with the relevant provisions of T. C. A. §§23-1528—1541, Petitioner be authorized by Order of this Court to take possession of the said property, and if necessary, to place Petitioner in possession thereof, that the Court issue a writ of possession to the Sheriff of _____ County, Tennessee, to so place Petitioner in possession.

3. That your Petitioner have a decree of this Court granting [insert herein the interest sought to be condemned] to the hereinabove described property to Petitioner, its successors and assigns, in the manner and to the extent provided by law.

4. That costs in this proceeding be assessed in the manner provided by T. C. A. §23-1539.

5. That your Petitioner have such other, further and general relief to which it may be entitled under the facts and law of this case.

By _____
Attorney for Petitioner

Style

IN THE CIRCUIT COURT OF _____ COUNTY, TENNESSEE

[insert herein condemnor's title],	)	
Petitioner,	)	
v.	)	No._____
[insert herein the names of all persons known to own an interest in the property or property rights to be condemned],	)	
Respondents.	)	

NOTICE

TO: [insert herein the name and residence of the respondent being notified]

Take notice that on the _____ day of _____, 19____, [insert herein condemner's name], filed a petition against you in this Court, praying for the condemnation of [insert herein the property interest being condemned] in a tract of land belonging to you, as fully described in the Petition for Condemnation, a copy of which accompanies this Notice. You are further notified that said petition will be presented to the Court for hearing, and for all proper orders to which Petitioner is entitled under said petition, on the _____ day of _____, 19___, at _____.

_____
Clerk

This _____ day of _____, 19___.

TO THE SHERIFF OF _____ COUNTY, TENNESSEE:

You are hereby commanded to serve the above notice and accompanying Petition for Condemnation upon the above named Respondent, and to make your return.

WITNESS MY HAND AND SEAL, this _____ day of _____, 19____, at _____.

[insert herein the name of the Circuit Court Clerk]

Circuit Court Clerk

By _____
Deputy Clerk

Style

AFFIDAVIT FOR PUBLICATION

_____, Attorney for Petitioner in the above styled cause, makes oath that in spite of diligent search and inquiry, (he/she) was unable to locate _____, Respondents in said cause, and (he/she) therefore prays that publication be made to bring said Respondents before the Court.

By _____

STATE OF TENNESSEE

COUNTY OF _____

Sworn to and subscribed before
me this _____ day of _____,
19____.

_____
Notary Public

My Commission Expires:

Style

ORDER FOR PUBLICATION

It appearing to the Court that Petitioner in the above styled cause has filed a petition to condemn Respondent's interest in property located at [insert herein a description of the location of the property sought to be condemned] in [insert herein the city and county wherein the property is located], Tennessee, and that a hearing on said petition has been set for the _____ day of _____, 19____; and

It further appearing that Respondent [insert herein a statement setting forth the facts and circumstances which render service impossible] and, therefore, that ordinary process of law cannot be served upon said Respondent,

It is, therefore, ORDERED, ADJUDGED, and DECREED that said Respondent enter (his/her) appearance herein at the _____ term of the Circuit Court of _____ County, Tennessee, to be held at the County Courthouse in [insert herein the city where the Courts sits], Tennessee, on the _____ day of _____, 19____, it being a rule day in this Court, and answer said petition, or it will be taken for confessed as to (him/her).

It is further ORDERED that a copy of this Order by published for four (4) weeks in succession in a local newspaper published in [insert herein the city and county wherein publication is to be made], Tennessee.

_____
Judge

Style

FINAL ORDER

This cause came on further to be heard on the _____ day of _____, 19____, before the Honorable _____, Judge of the _____ Circuit Court of _____ County, Tennessee, and a jury as provided by law. After testimony of witnesses, argument of counsel, and the charge of the Court, the jury retired to deliberate on their verdict and returned into open Court and stated under oath, that they had found that Respondents were entitled to recover of Petitioner the sum of $_____ for [insert herein a description of the property or property rights taken, e.g. land and improvements therein]. (Optional: Upon inquiry of the Court, each juror acknowledged that he was in agreement that the fair cash market value of the [insert herein a description of property or property rights taken, as immediately above] as of [insert herein the date of taking] was $_____.)

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the Respondents, [insert herein the names of all Respondents entitled to share in the award] have and recover of Petitioner the sum of $_____, the same being the fair cash market value of [insert herein a description of the property or property rights condemned, e.g., land and improvements thereon] of which Petitioner has heretofore paid into Court the sum of $_____, at the time of the filing of the petition;

It is further ORDERED, ADJUDGED and DECREED by the Court that Respondents shall be entitled to interest at the rate of six per cent (6%) per annum on $_____, the same being the difference between the sum of $_____ placed on tender into Court and the jury award, from the date of taking until said sum is paid into Court;

It is further ORDERED, ADJUDGED and DECREED by the Court that all of the title to the property (or property rights) described hereinbelow be, and the same is hereby divested out of Respondents and is vested in [insert herein the title of the condemning authority] as [insert herein the property right taken, e.g., an indefeasible inheritance in fee simple forever], said property (or property rights) being more particularly described as follows:

[insert herein a description of the property condemned]

It further appearing to the Court that the property hereinabove described may be subject to a lien for taxes due, interest and penalty, if any, owing to _____, and in accordance with Tennessee Code Annotated, Sections 26-711 and 26-712, the Clerk of the Court, prior to the payment of any part of the judgment to Respondents, shall ascertain whether there are any taxes due and unpaid which are a lien upon said real estate, and shall issue to each of the officials charged with the collection of any tax which might be a lien on said property a statement, giving the style and number of this cause, a description of the property, and the name of the party or parties out of whom title is divested; whereupon each of said officials shall certify to the Clerk an itemized statement of any taxes, interest and penalty, if any which were a lien upon said land as of [date of taking];

It is therefore, ORDERED, ADJUDGED and DECREED that the Clerk is directed to pay out of the money deposited by Petitioner all unpaid taxes that may be determined to be owing by the above references, and the Clerk shall pay any remaining funds over to Respondents, [insert herein the names of those Respondents entitled to share in the award].

(Optional: It is further ORDERED, ADJUDGED and DECREED that the members of the Jury of View, being composed of the following:

1.

2.

3.

4.

5.

shall receive $_____ each for their services in this cause.)

It is further ORDERED, ADJUDGED and DECREED by the Court that the costs in this cause be and the same are hereby taxed against Petitioner, for which execution may issue, if necessary.

Entered this _____ day of _____, 19___.

_____
Judge

Style

ORDER SUSTAINING PETITION FOR CONDEMNATION AND ORDERING WRIT OF INQUIRY

This case came on to be heard on the _____ day of _____, 19____, before the Honorable _____, Judge of the _____ Circuit Court of [insert herein the county in which the Court sits] County, Tennessee, upon the Petition for Condemnation and Notice thereof to Respondents. It appearing to the Court that said Petition and Notice have properly been served, or publication made, as required by law, and that said cause is before the Court on application to sustain a Petition and for a writ of inquiry of damages and the appointment of a jury of view; and it further appearing that the Respondents are before the Court and that Petitioner has the legal power and authority to acquire [insert herein the interest sought to be condemned] under the eminent domain laws of the State of Tennessee to the following described property located in [insert herein the county wherein the land lies] County, Tennessee:

[insert herein a description of the property]

Respondents' right of trial by petit jury to determine the amount of compensation to which they are entitled for this taking is not affected by the transfer of title to Petitioner.

IT IS ORDERED, ADJUDGED, and DECREED:

1. That the Petition for Condemnation of the hereinabove described property be and the same is hereby sustained.

2. That the following persons are nominated and appointed to act as a Jury of View as provided by the eminent domain laws of Tennessee:

1.

2.

3.

4.

5.

Alternate:

3. That the Clerk issue a writ of inquiry to the Sheriff commanding him to summons said Jury of View to appear in open Court on the _____ day of _____, 19____, at _____, and no other or further notice thereof need be given, there to be impaneled and sworn, after which it will proceed immediately to the property sought to be condemned and examine it, hear testimony of witnesses, but no argument of counsel, and set apart by metes and bounds the land to be condemned, and assess damages as required by law, reduce their report to writing and deliver the same to the Sheriff, who shall make his return thereof to the Court.

This _____ day of _____, 19___.

_____
Judge

Style

WRIT OF INQUIRY

STATE OF TENNESSEE
COUNTY OF _____

TO THE SHERIFF OF _____ COUNTY, TENNESSEE

GREETING:

A petition has been filed in the Circuit Court of _____ County, Tennessee, for the condemnation of certain property rights described fully in said petition.

Now, therefore, as provided by the eminent domain laws of the State of Tennessee, you are hereby commanded to summon the following to act as a Jury of View and to appear on the _____ day of _____, 19____, at _____ in open Court in the _____ Circuit Court of _____ County, Tennessee, at [insert herein the place where the Court sits]:

1.

2.

3.

4.

5.

Alternate:

The Jury of View will be sworn and instructed, and will go immediately to the premises, hear the testimony of witnesses, but no argument of counsel, and set apart by metes and bounds the property to be condemned, and inquire and assess the damages resulting from this taking, and report its findings in writing signed by each member of the Jury of View or a majority of them, which report shall be delivered to you and by you returned to this Court.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of this Court on the _____ day of _____, 19____.

[insert herein the name of the Clerk of the Court]

By _____
(Clerk or Deputy Clerk)

Style

REPORT OF THE JURY OF VIEW

We, the Jury of View, summoned, appointed and sworn, as provided by the laws of the State of Tennessee, and by orders of the Court heretofore made and entered in this proceeding were directed to lay off by metes and bounds the property interests herein condemned, and to inquire and assess damages to the property interests taken by [insert herein the condemner's title] of _____ County, Tennessee. We hereby report as follows:

We went upon the property condemned herein on the _____ day of _____, 19____, and examined said property by personal inspection and heard evidence, but no argument of counsel, of the value of the property interests to be condemned, and we do hereby allot and set apart to the [insert herein the condemner's title], property situated in _____ County, Tennessee, and described as follows:

[insert herein a description of the property taken]

And we do find the fair cash value of the property herein condemned as being $_____, and that this sum consists of the following amounts:

_____ Fair market value of land taken

_____ Incidental Damages

The members of the Jury of View met on the following dates and respectfully request a fee for each.

Dates: _____

_____

_____

_____

This _____ day of _____, 19____.

_____

_____

_____

_____

_____
Members of Jury of View

Received from the Jury of View and returned to the Clerk of the Court this _____ day of _____, 19____.

Style

ORDER CONFIRMING REPORT OF JURY OF VIEW

It appearing that the Jury of View in the above styled cause having met and reported to the Court that the fair cash value of the property rights condemned herein is $_____, (Optional: including incidental damages to the residue of $_____,) and Petitioner having deposited with the Clerk of this Court the sum of $_____;

It is therefore ORDERED, ADJUDGED, and DECREED:

1. That the report of the Jury of View is confirmed both as to the appropriation of the property rights condemned and the award of damages resulting from the taking, and that Petitioner, upon payment to the Clerk for the use of Respondents the amount of damages assessed by the Jury of View and all costs of this cause, is adjudged to have acquired the following described property:

[insert herein a description of the property rights being condemned]

and that the property rights thus acquired and possession thereof is hereby divested out of Respondents and vested in Petitioner, and any and all other liens and encumbrances for taxes or the claim of any party hereto are transferred to the funds herein deposited or secured.

2. That Respondents [insert herein the name or names of all Respondents], have and recover of Petitioner the sum of $_____, the same being the fair cash value of the property rights taken, of which Petitioner has heretofore paid into this Court the sum of $_____.

3. That Respondents are entitled to interest at the rate of six per cent (6%) per annum on the amount of $_____, the same being the difference between the $_____ deposited as tender and the Jury of View award, from the date of taking, [insert herein the date of taking], until said sum is paid into Court.

4. That the members of the Jury of View be paid the sum of $_____ each for their services in this cause, the same to be paid to the Clerk of this Court by Petitioner as part of the costs in this cause and that the Clerk shall distribute same to the members of the Jury.

5. That this cause be referred to the Clerk for a determination of the taxes which constitute a lien on said property in accordance with Tennessee Code Annotated, Section 26-711, 26-712 and 26-713.

This the _____ day of _____, 19____.

_____
Judge

Style

APPEAL FROM FINDING OF THE JURY OF VIEW

Petitioner [insert herein the title of the condemner], excepts to the finding and report of the Jury of View that the fair cash value of the property rights condemned herein is $_____, and hereby appeals such finding and requests a trial before a petit jury in the usual way, pursuant to Tennessee Code Annotated, Section 23-1418.

By _____

I am surety for costs not to exceed $_____.

By _____

APPENDIX B:
TENNESSEE CODE ANNOTATED

CHAPTER 14
EMINENT DOMAIN

23-1401. Power for internal improvements. Any person or corporation authorized by law to construct any railroad, turnpike, canal, toll bridge, road, causeway, or other work of internal improvement to which the like privilege is conceded, may take the real estate of individuals, not exceeding the amount prescribed by law, or by the charter under which the person or corporation acts, in the manner and upon the terms herein provided.

23-1402. Incorporation of chapter into other laws. This chapter shall be deemed, unless expressly stated to the contrary, and without incorporation or reference, to be a part of every section, or legislative act, present or future, which grants the power of such condemnation. The making of compensation for such a taking, as therein set forth, shall also be so implied.

23-1403. Property of corporations. The operation of this chapter is extended so that the same shall apply to and include the condemnation and taking of property, privileges, rights, or easements of private corporations for public purposes or internal improvements.

23-1404. Petition. The person seeking to appropriate such land shall file a petition in the circuit court of the county in which the land lies, setting forth, in substance: (1) The parcel of land or rights therein or incident thereto a portion of which is wanted, and the extent wanted; (2) the name of the owner of such land or rights, or, if unknown, stating the fact; (3) the object for which the land, etc., is wanted; (4) a prayer that a suitable portion of land or rights may be decreed to the petitioner, and set apart by metes and bounds, or other proper mode.

23-1405. Notice of petition. Notice of this petition, together with a copy thereof, shall be given to the owner of the land or rights, or, if a nonresident of the county, to his agent, at least five (5) days before its presentation. If the owner is a nonresident of the state or unknown, notice shall be given by publication, as provided in this Code in similar cases in chancery.

23-1406. Parties defendant. All parties having any interest in any way in such land or rights may be made defendants, and the proceedings shall only cover and

affect the interest of those who are actually made parties, unborn remaindermen being, however, bound by proceedings to which all living persons in interest are parties.

23-1407. Writ of inquiry of damages. After the requisite notice has been given, if no sufficient cause to the contrary is shown, the court shall issue a writ of inquiry of damages to the sheriff, commanding him to summon a jury to inquire and assess the damages. By consent of parties, or on application of the plaintiff, unless objection is made by the defendant, the writ of inquiry may be issued by the clerk, as of course, after service of notice, on which the sheriff will summon the jury.

23-1408. Constitution of jury. The jury will consist of five (5) persons, unless the parties agree upon a different number, and either party may challenge, for cause or peremptorily, as in other civil cases.

23-1409. Qualifications of jurors. The jurors shall not be interested in the same or a similar question, and shall possess the qualifications of other jurors, and may be nominated by the court, selected by consent of parties, or summoned by the sheriff.

23-1410. Substitution of jurors. If named by the court, and the persons named are unable to attend when summoned, the place of such persons shall be supplied by the sheriff.

23-1411. Notice of inquest. The sheriff shall give the parties or their agents, if residents of the county, three (3) days' notice of the time and place of taking the inquest, unless the time has been fixed by the order of court.

23-1412. Swearing of jury. The jury, before proceeding to act, shall be sworn by the sheriff, fairly and impartially, without favor or affection, to lay off, by metes and bounds, the land required for the proposed improvement, and to inquire and assess the damages.

23-1413. Investigation by jury. The jury will then proceed to examine the ground, and may hear testimony, but no argument of counsel, and set apart, by metes and bounds, a sufficient quantity of land for the purposes intended, and assess the damages occasioned to the owner thereby.

In condemning rights of way for telegraph and telephone companies, or riparian rights, the juries shall not be required to lay off the property, privileges, rights, or easements included in the petition, or sought to be condemned, by metes and bounds; and, in such cases, it shall be discretionary with said juries whether they will view the premises or not.

23-1414. Elements of damages. (a) In estimating the damages, the jury shall give the value of the land or rights taken without deduction, but incidental benefits which may result to the owner by reason of the proposed improvement may be taken into consideration in estimating the incidental damages. Whenever any person, agency, or other entity acquires interest in any parcel of real property and such acquisition requires the removal of furniture, household belongings, fixtures, equipment, machinery, or stock in trade of any person in rightful possession, regardless of whether such person has a legal interest in said property, the reasonable expense of the removal shall be considered in assessing incidental damages. The reasonable expense of the removal of such chattels shall be construed as including the cost of: any necessary disconnection, dismantling, or disassembling the loading, and drayage to another location not more than fifty (50) miles distant, and the reassembling, reconnecting, and installing on such new location.

(b) Notwithstanding any other provision of law, if any person, agency, or other entity acquires any interest in real property pursuant to the execution of the power of eminent domain, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put.

(c) (1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (b) of this Section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such

building, structure, or improvement for removal from the real property, whichever is the greater shall be paid to the tenant therefor.

(2) Payment under this subsection shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release to the acquiring party all his right, title, and interest in and to such improvements. Nothing in this subsection shall be construed to deprive the tenant of any rights to reject payment under this subsection and to obtain payment for such property interests in accordance with applicable law, other than this subsection.

(d) Any person, agency or other entity acquiring real property pursuant to the exercise of eminent domain shall as soon as practicable after the date of payment of the purchase price or the date of deposit into court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is earlier, reimburse the owner, to the extent that such acquiring party deems fair and reasonable for expenses he necessarily incurred for:

(1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the acquiring party;

(2) penalty costs for repayment of any pre-existing recorded mortgage entered into in good faith encumbering such real property; and

(3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the acquiring party, or the effective date of possession by the acquiring party, whichever is earlier.

23-1415. Return of jury's report. The report of the jury shall be reduced to writing, signed by a majority of the jurors, delivered to the sheriff, and by him returned into court.

23-1416. Confirmation of report. If no objection is made to the report, it is confirmed by the court, and the land decreed to the petitioner, upon payment to the defendants, or to the clerk for their use, of the damages assessed, with costs.

23-1417. Setting aside report. Either party may object to the report of the jury, and the same may, on good cause shown, be set aside, and a new writ of inquiry awarded.

23-1418. Appeal. Either party may also appeal from the finding of the jury, and, on giving security for the costs, have a trial anew, before a jury in the usual way. In all cases where the right to condemn is not contested and the sole question before the jury is that of damages the property owner shall be entitled to open and close the argument before the court and jury. The time within which either party may appeal from the finding of the jury of view shall be forty-five (45) days from the date of the entry of the court's order confirming the report of the jury of view.

23-1419. Costs on appeal. If the verdict of the jury, upon the trial, affirms the finding of the jury of inquest, or is more unfavorable to the appellant than the finding of such jury, the costs shall be adjudged against such appellant; otherwise the court may award costs as in chancery cases.

23-1420. Operations pending appeal. The taking of an appeal does not suspend the operations of the petitioner on the land, provided such petitioner will give bond with good security, to be approved by the clerk, in double the amount of the assessment of the jury of inquest, payable to the defendants, and conditioned to abide by and perform the final judgment in the premises.

23-1421. Preliminary surveys. A person or company actually intending to make application for the privileges herein contemplated, and entering upon the land of another for the purpose of making the requisite examinations and surveys, and doing no unnecessary injury, is liable only for the actual damage done, and, if sued in such case, the plaintiff shall recover only as much costs as damages.

23-1422. Prerequisites to occupation. No person or company shall, however, enter upon such land for the purpose of actually occupying the right of way, until the damages assessed by the jury of inquest and the costs have been actually paid; or if an appeal has been taken, until the bond has been given to abide by the final judgment as provided in §23-1420.

23-1423. Action initiated by owner. If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal

improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.

Additionally, the court rendering a judgment for the plaintiff in a proceeding brought under paragraph one of this section, arising out of a cause of action identical to a cause of action that can be brought against the United States under section 1346(a)(2) or 1491 of Title 28, United States Code, or the attorney general or chief legal officer of a political subdivision of the state effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement such sum as will in the opinion of the court, or the attorney general or chief legal officer of a political subdivision of the state reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

23-1424. Limitation of owner's actions. The owners of land shall, in such cases, commence proceedings within twelve (12) months after the land has been actually taken possession of, and the work of the proposed internal improvement begun; saving, however, to unknown owners and nonresidents, twelve (12) months after actual knowledge of such occupation, not exceeding three (3) years, and saving to persons under the disabilities of infancy and unsoundness of mind, twelve (12) months after such disability is removed, but not exceeding ten (10) years.

23-1425. Compensation of jurors. The courts having jurisdiction of eminent domain proceedings are hereby authorized and empowered to fix the per diem of jurors who serve as members of juries of view in an amount not exceeding ten dollars ($10.00) per day, and the courts shall have no power or authority to fix an additional amount of remuneration for such jurors, provided, however, that the provisions of this section relating to compensation shall not repeal or apply to jurors in any county or counties wherein the per diem of jurors of view is fixed in an amount less than ten dollars ($10.00) per day by any private act or acts heretofore or hereafter passed;

provided, however, that no person shall be compelled to serve as a member of a jury of view more often than once every two (2) years.

Provided, however, that in counties of this state having a population of not less than two hundred thousand (200,000) according to the federal population census of 1960 or any subsequent federal population census, the amount shall not exceed twenty-five dollars ($25.00) per day.

23-1426. Hospitals--eminent domain powers. In any counties of this state having a population of not less than 100,000 nor more than 150,000 according to the federal census of 1960 or any subsequent federal census, any hospital incorporated as a general welfare corporation under the laws of the state of Tennessee shall have the power of eminent domain and shall have the right and authority to condemn such lands, property, property rights, privileges and easements of others as may in the judgment of its board of directors, together with the concurrence of two thirds (2/3) of the members of the governing body of the municipality in which such hospital is located or in the event said hospital is located outside the boundaries of an incorporated municipality then together with the concurrence of two thirds (2/3) of the quarterly county court of the county of location, be deemed necessary or proper for the purpose of providing buildings and other facilities, including any extension, enlargement or improvement for hospital purposes only. Provided further however, the land or property sought to be condemned must be adjacent and contiguous to the property upon which said hospital is presently located and not across any street.

CHAPTER 15
EMINENT DOMAIN BY PUBLIC AGENCIES

23-1501. County purposes. Counties are empowered to condemn and take the property, buildings, privileges, rights, and easements of individuals and private corporations for any county purpose.

23-1502. County bridges. All counties authorized to construct bridges are empowered to take and condemn the lands, property, buildings, and riparian and property rights, privileges, and easements of individuals and private corporations for approaches to said bridges and for bridge purposes, or which may be necessary for the construction or use of said bridges.

23-1503. Taking bridge property pending litigation. Pending the assessment of damages or any litigation in regard thereto, in any case of authorized taking and condemnation, the counties may give bond, with good and sufficient security payable to the owner or owners of said lands, property, buildings, riparian, or property rights, privileges, or easements, to pay promptly to the owner or owners any amount of damages which may be assessed by the jury as provided for in §23-1502; and, upon executing and filing such bond, may thereupon take such lands, property, buildings, riparian and property rights and privileges and easements.

23-1504. Powers of municipalities. All municipal corporations are empowered to take and condemn lands, property, property rights, privileges and easements of others for the purpose of constructing, laying, repairing, or extending sewers, water pipes, natural gas mains and pipes, or drainage ditches, both within and beyond the corporate limits of such cities, and of acquiring ingress and egress in the construction, repairing or maintenance thereof, and in making connection thereto.

23-1505. Procedure by municipalities. The compensation for damages in taking of such lands, property, property rights, privileges, and easements shall be paid by said municipalities, and same shall be condemned and determined in the mode and manner provided by §§6-1008 - 6-1011, and the rights and powers contained in said sections are extended to and conferred upon all of the municipal corporations.

23-1506. University of Tennessee. The University of Tennessee shall have the power to condemn and appropriate such lands, property, property rights, privileges and easements of others as in the judgment of its board of trustees, or the executive committee thereof, may be necessary or proper for the purpose of providing buildings and other facilities, building sites, campus grounds, commons, streets, walkways, rights-of-way for utilities and other improvements, and for any extension, enlargement or improvement thereof, for the use and operation of said university and its various units and branches throughout the state. The compensation for damages in taking of such lands, property, property rights, privileges, and easements shall be paid by said university, and the same shall be condemned and determined in the mode and manner provided in chapter 14 of this title.

23-1507. Housing authorities--Declaration of taking. At any time on or after the filing of a petition by a housing authority, created pursuant to the Housing Authorities Law (compiled in chapters 8 to 11, inclusive, of title 13 of this Code) or any other law of this state, for condemnation of property, and before the entry of final judgment, a housing authority may file with the clerk of the court in which the petition is filed, a declaration of taking signed by the duly authorized officer or agent of the housing authority declaring that all or any part of the property described in the petition is being taken for the use of the housing authority. The said declaration of taking shall be sufficient if it sets forth: (1) a description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof; (2) a statement of the estate or interest in said property being taken; (3) a statement of the sum of money estimated by the housing authority to be just compensation for the property taken, which sum shall be not less than the last assessed valuation for tax purposes of the estate or interest in the property to be taken.

23-1508. Withdrawal of petition. At any time prior to the vesting of title to property in the housing authority, said authority may withdraw or dismiss its petition with respect to any and all of the property therein described.

23-1509. Vesting of title—Surrender of possession. From the filing of the said declaration of taking and the deposit in court to the use of the persons entitled thereto of the amount of the estimated compensation stated in said declaration, title to the property described as being taken by said declaration shall vest in the housing authority, free from the right, title, interest or lien of all parties to the cause, and

said property shall be deemed to be condemned and taken for the use of the housing authority, and the right to just compensation for the same shall vest in the persons entitled thereto. Upon the filing of the declaration of taking, the court shall designate a day, not exceeding twenty (20) days after such filing, except upon good cause shown, on which the persons in possession shall be required to surrender possession to the authority.

23-1510. Determination and payment of compensation. The ultimate amount of compensation shall be determined pursuant to chapter 14 of this title. In the event a housing authority files a declaration of taking and pays into court an amount estimated to be fair compensation for said property as provided in §23-1507 and §23-1509, the property owner shall have the right to make written request to the clerk of the court wherein said funds have been deposited, to pay to said property owner without prejudice to any of his rights, said sum so deposited with the clerk, and the clerk shall pay to the said owner the sum so deposited, provided the owner agrees to refund the difference between said sum and the final award in the case if the final award be less than the sum so paid into court or that a judgment may be entered against him in said case for the difference. Such payment to the property owner or into court shall in no wise limit or fix the amount to be allowed under subsequent proceedings in said case and any further or additional sum that may be finally awarded in any subsequent proceedings shall bear interest from the date of taking possession of the property or property rights condemned by the condemner, provided, however, that no interest shall be allowed on the amount deposited with said clerk. The clerk shall be authorized to disburse said deficiency to the defendants as their interests may appear. In the event the housing authority shall not obtain possession of the property on the date of vesting of title, the ultimate amount of compensation, including any interest paid on said deficiency award, if any, shall be subject to abatement for use, income, rents, or profits derived from such property by the owner thereof subsequent to the vesting of title in the housing authority and any funds disbursed shall be less the amount of abatement.

23-1511. Coast and geodetic survey. Any person employed under an act of congress of the United States, passed on August 6, 1947, and of the supplements thereto, or under the direction of congress, to provide charts and related information for the safe navigation of marine and air commerce and for other purposes, may enter upon lands within this state for the purpose of exploring, triangulating, leveling, surveying, and of doing any other act which may be necessary to carry out the objects of said laws, and may erect any works, stations, buildings, and appendages requisite for that purpose, doing no unnecessary injury thereby.

23-1512. Damages payable by geodetic survey. If the person over whose lands the survey has been made, or upon whose lands monuments, stations, or buildings have been erected, or who has in any way sustained damage by such survey, cannot agree with the officer of the survey as to the damage sustained, the amount of such damage may be ascertained in the manner provided for the taking of private property for public uses.

23-1513. Action in rem--Title uncertain. Whenever the state of Tennessee or any county therein or the United States of America shall desire to take or damage private property in pursuance of any law so authorizing, and shall find or believe that the title of the apparent or presumptive owner of such property is defective, doubtful, incomplete or in controversy; or that there are or may be persons unknown or non-residents who have or may have some claim or demand thereon, or some actual or contingent interest or estate therein; or that there are minors or persons under disability who are or may be interested therein; or that there are taxes due or that should be paid thereon; or shall, for any reason, conclude that it is desirable to have a judicial ascertainment of any question connected with the matter; the state, county or the United States as the condemnor, through any authorized representative, either in term time or vacation, may petition the circuit court of the county having jurisdiction, for a judgment in rem against said property, condemning the same to the use of the petitioner upon payment of just and adequate compensation therefor to the person or persons entitled to such payment. After the expiration of ten (10) days from the date the petition for condemnation is filed in the circuit court, the petitioner shall have the right to thereupon enter upon and take possession of the land sought to be condemned, and if necessary to place such petitioner in possession thereof, the clerk of the circuit court in which the petition is filed shall issue to the petitioner, upon his request, a writ of possession directed to the sheriff of the county to put the petitioner into possession of said land.

23-1514. Contents of petition. The petition shall set forth the facts showing the right to condemn; the property to be taken or damaged, a full description of which shall be filed as exhibit to the petition; the names and residences of the persons whose property or rights are to be taken or otherwise affected, so far as known; shall describe the persons or classes of persons unknown, whose rights therein are to be excluded or otherwise affected; shall set forth such other facts as are necessary for a full understanding of the cause; and shall pray for such judgment of condemnation as may be proper and desired. If any of the persons referred to are minors or under disability, the facts shall be stated.

23-1515. Notice of hearing. The presiding judge may thereupon make an order requiring all persons concerned to appear at a time and place therein named, and make known their objections, if any, their rights, if any, their claims as to the value of the property or of their interest therein, and any other matters material to their respective rights, upon a day certain, not later than thirty (30) days after the issuance of process, which day shall be as early as may be convenient, having due regard to the necessities of notice, and shall in said order give appropriate directions for such notice and the service thereof. Said process shall be returned within twenty (20) days after its issuance. No service of a copy of the petition shall be necessary. Upon the return of process by the sheriff, if it shall appear that any of the defendants cannot be found or that they are nonresidents of the state, publication shall be made for them in the same manner as provided in §§21-212 - 21-218 for publications for nonresidents and parties unknown in chancery suits.

23-1516. Parties bound. All parties having any interest or rights in such lands may be made defendants and proceedings shall only cover and affect the interest of those who are actually made parties, the unborn remaindermen being, however, bound by the proceedings to which all living persons in interest are parties. If it shall appear that any of the parties defendant are minors or otherwise under disability, the presiding judge shall appoint a guardian ad litem to represent them, whose compensation shall be fixed by the court and taxed as a part of the costs.

23-1517. Trial by jury. If no objection be made to the acquisition of the land, or in case there is an agreed price between the petitioner and the presumptive or apparent owners of the property, the trial may be had before a jury at the first term of court after the return date; and in the discretion of the presiding judge all questions of title may be tried by the same jury at the same time.

23-1518. Jury of view. In case any party to the suit shall demand the appointment of a jury of view, the presiding judge shall appoint a jury of view as provided for in §§23-1407 - 23-1410. The order appointing the jury of view shall fix the date when they shall go upon the land; and in case no date is fixed, the sheriff shall give the parties or their agents, if residents of the county, three (3) days' notice of the time and place of going upon the land. The method of conduct and procedure after the appointment of the jury of view shall comply with §§23-1412 - 23-1419.

23-1519. Procedure after demand for jury of view. On the day named in the rule, or at any other time to which the hearing may be continued, the court, having

first passed on and adjudged all questions touching service and notice, shall, after hearing from all persons responding and desiring to be heard, make such order as to the appointment of a jury of view as provided in §23-1518 and give all persons interested equal rights in the selection thereof. If, by reason of conflicting interests or otherwise, such equality of right cannot be preserved, the judge presiding shall himself make such order on the subject as shall secure a fair and impartial assessment, or may, in his discretion, order the issue tried in the first instance by a jury. In any event, it shall be within the power of the court to hear said cause as speedily as may be consistent with justice and due process of law, and, if necessary, at the term at which it is filed, or the first term after filing.

23-1520. Payment of taxes. It shall be the duty of any trustee or other officer charged with the collection of taxes, notified as required in §23-1515, to make known to the court in writing the taxes due on the property, and the court shall give such direction as will satisfy the same and discharge the lien thereof.

23-1521. Court control of proceedings. All questions of law arising upon the pleadings or in any other way arising from the cause may be passed on by the presiding judge, who may, from time to time, in term or vacation make such orders and give such directions as are necessary to speed the cause, and as may be consistent with justice and due process of law; but no jury trial shall be had except in open court, except the hearing before the jury of view.

23-1522. Intervention or delayed pleadings. No provision contained in §§23-1513 - 23-1525 in reference to any rule or order, or time for responding thereto, shall be held or construed to exclude any person, as by way of default, from making known his right or claims in the property or in the fund arising therefrom within the time allowed. Any such person claiming any interest or any rights therein may file appropriate pleadings or intervention at any time before verdict or award, and be fully heard thereon. If any person, after judgment of condemnation, shall desire to come into do so within not exceeding thirty (30) days. After condemnation is had and the fund paid into the registry of the court, the petitioner shall not be concerned with or affected by any subsequent proceedings unless upon appeal from the verdict or award as allowed in §23-1518.

23-1523. Award and judgment. The award or verdict, as the case may be, shall have respect, either to the entire and unencumbered fee, or to any separate claim

against the property or interest therein as may be ordered, and may be molded under the direction of the court so as to do complete justice and avoid confusion of interests; and it shall be within the power of the court, upon payment of the award or verdict into the registry of the court, to adjudge a condemnation of the title as sought in the petition, and give such direction as to the disposition of the fund as shall be proper, according to the rights of the several defendants, causing such pleadings to be filed and such issues made up as shall be appropriate for an ascertainment and determination of such rights.

23-1524. Recording of decree. When such condemnation is fully completed, the award, whether made by a jury of view or the verdict of a jury, together with the decree of the court based thereon and a minute description of the property or interest condemned, or a duly certified copy of such award, decree and description, may be filed and recorded in the records of deeds in the office of the register of the county where the land so condemned lies, and if the land lies in more than one (1) county, such filing and recording may be made in each county in which such land lies, and the register shall be entitled to the same fees for such filing and recording as are now, or may hereafter be, allowed by law for the filing and recording of deeds; said fees to be paid by the party in whose favor such condemnation is had.

23-1525. Provisions supplemental. Sections 23-1513 - 23-1525 shall not be construed as repealing any provisions of other statutes prescribing a method of procedure for the condemnation of private property, but as supplementary thereto and cumulative thereof in cases in which the state or any county or the United States is concerned, and is intended to make simpler and more effective the method of condemnation in those cases where conflicting interests or doubtful questions render a judicial supervision of the procedure desirable. In all particulars not otherwise herein specially provided for, the court shall conform its procedure as nearly as may be to the provisions of the said statute and the same shall remain in force.

23-1526. Payments into court at commencement of condemnation proceedings. Whenever the state of Tennessee, its counties or municipalities, institutes a condemnation proceeding in any court, under the provisions of chapters 14 or 15 of title 23, to acquire any property or property rights, such condemner may deposit with the clerk of such court at the time of the filing of the petition such amount as it shall determine that the owner is entitled to and the owner may, if he so desires, make

written request to said clerk to pay to him, without prejudice to any of his rights, said sum so deposited with the clerk, and the clerk shall pay to said owner the sum so deposited, provided the owner agrees to refund the difference between said sum and the final award in the case if the final award be less than the sum so paid into court or that a judgment may be entered against him in said case for the difference. Such payment to the property owner or into court shall in nowise limit or fix the amount to be allowed under subsequent proceedings in said case, and any further or additional sum that may be finally awarded in any subsequent proceedings shall bear interest from the date of the taking of possession of the property or property rights condemned by the condemner provided, however, that no interest shall be allowed on the amount deposited with said clerk.

23-1527. Certain authorities excepted. Section 23-1526 shall apply only to condemnation proceedings instituted by the state of Tennessee, its counties or municipalities, and shall not apply to any housing authority, association, or administration.

23-1528. Power of state, county or municipality to acquire right-of-way, lands or easements for road purposes. The state of Tennessee, its counties or municipalities are hereby authorized and empowered to acquire by the exercise of the power of eminent domain, in the manner hereinafter set out, such right-of-way, land, material, easements and rights as may be deemed necessary, suitable or desirable for the construction, reconstruction, maintenance, repair, drainage or protection of any street, road, highway, freeway or parkway by the official charged by law with the construction or maintenance of the same.

Sections 23-1529 through 23-1541 shall also be deemed, unless expressly stated to the contrary, and without incorporation or reference, to be a part of every section, or legislative act, present or future, which grants the power of condemnation to counties and municipalities for county and municipal purposes respectively, and the making of compensation in the manner therein set forth shall also be so implied; provided, however, that either party, upon filing a statement to that effect within five (5) days of the service or publication of the original petition, may elect to proceed under the provisions of §23-1401 et seq. or §23-1501 et seq.

23-1529. Deposit of amount of damages. When any of the said governmental entities deems it necessary or desirable to condemn any property or property rights as set out in §23-1528, it shall proceed to determine what it deems to be the amount of

damages to which the owner is entitled because of the taking of said property or property rights, and shall deposit said amount with the clerk of the circuit or law court having jurisdiction in the county in which the same or a portion of the same is located, and shall file a petition in said court asking that the same be condemned and decreed to the condemner.

23-1530. Petition for condemnation—Possession of property. Said petition shall name as defendants all persons who have or may have an interest in or lien upon said property or property rights, shall state the residence of each if known and if unknown that fact shall be stated, shall contain a description of the property or property rights sought to be condemned, the civil district in which the same is located, a description of the project to be constructed and the amount of damages to which the condemner has determined that the owner will be entitled, which amount shall be deposited with said clerk, and shall pray that the property be condemned and decreed to the condemner. It shall not be necessary to specify the interest or claim of the several defendants.

Notice of the filing of said petition shall be given the owner of the property or property rights at least five (5) days prior to the taking of any additional steps in the case. If the owner is a nonresident of the state or unknown, notice shall be given by publication as provided by law in similar cases in chancery. After the expiration of five (5) days from the date of the giving of said notice if the right to take is not questioned, the condemner shall have the right to take possession of the property or property rights sought to be condemned and if necessary to place such condemner in possession thereof, the court shall issue a writ of possession to the sheriff of the county to put the condemner in possession.

23-1531. Acceptance by property owner of amount deposited. If the owner is satisfied with the amount deposited by the condemner with the clerk of the court, he may file with said clerk a statement, duly sworn to, stating that he is the owner of the property or property rights described in the petition and that he accepts the amount deposited with the clerk as full settlement for the taking of said property or property rights and all damages occasioned to the residue of his property, and the clerk shall pay to said owner the amount deposited with him, and the court, at its next term, shall enter a decree divesting the title to said property or property rights out of the owner and vesting the same in the condemner.

23-1532. Trial when property owner does not accept deposit. If the owner is not satisfied with the amount assessed by the condemner, he shall, on or before the

second day of the regular term of the court next, after the serving of said notice, appear, except to the amount assessed by the condemner, and thereupon a trial may be had before a petit jury as other civil actions are tried.

23-1533. Payment of amount deposited pending trial. If the owner asks for a trial as provided by §23-1532 he may, if he so desires, make written request to the clerk to pay to him, without prejudice to the rights of either party, said sum so deposited with the clerk, and the clerk shall pay to said owner the sum so deposited, provided the owner agrees to refund the difference between said sum and the final award in the case if the final award be less than the sum so paid to him or that a judgment may be entered against him in said case for the difference.

23-1534. Default of owner—Case set for hearing. If the owner does not appear and accept the amount deposited by the condemner as provided in §23-1531 or does not appear and ask for a trial as provided by §23-1532, then the petition shall be taken as confessed and the case set for hearing upon the record and in the absence of the owner.

23-1535. Issues confined to amount of compensation--Determination of rights and interest of adverse claimants. The only issue or question that shall be tried upon exception shall be the amount of compensation to be paid for the property or property rights taken, but in case of adverse claimants of such compensation, the court may require the adverse claimants to interplead, so as to fully determine the rights and interests of such claimants.

23-1536. Proper party defendant omitted—Amended petition. If any person who is proper party defendant in said petition shall have been omitted from said petition, amendments to the same may be filed, which amendments, from the filing of the same, shall have the same effect as though contained in said petition.

23-1537. Manner of determining damages to which owner is entitled. In all instances the amount which an owner is entitled shall be determined by ascertaining the fair cash market value of the property or property rights taken and adding to the same the amount of incidental damage done to the residue of the owner's property, if any, after deducting from said incidental damages to the residue the value of all special benefits, if any, occasioned said residue by the construction of said street,

road, highway, freeway or parkway including, but not limited to, increased accessibility to the owner's property, greater convenience in the approach with vehicles, the advantages generally of a front on a more desirable roadway, better drainage, or increased attractiveness.

23-1538. Removal or destruction of a building or structure on land. When any building or structure is situated wholly or in part upon the land sought to be acquired, the condemner may remove the same to adjoining land of the owner or may divide the same upon the line between the land sought to be acquired and the adjoining land, or may tear down or otherwise dispose of the same.

23-1539. Costs of trial. If the amount of compensation awarded on the trial shall exceed the amount assessed by the condemner, the condemner shall pay all costs of the case, but if the amount of compensation awarded on the trial is not in excess of the amount assessed by the condemner and deposited with said clerk, the defendant shall pay all costs incident to the trial.

The state court having jurisdiction of a proceeding initiated by any person, agency, or other entity to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of condemnation proceedings, if:

(1) the final judgment is that the acquiring party cannot acquire the real property by condemnation; or

(2) the proceeding is abandoned by the acquiring party.

23-1540. Judgment against governmental entities—Payment. All judgments rendered shall be paid out of the general funds of the municipality, county or state, whichever may be the condemner, together with interest at the rate of six per cent (6%) on any excess of the amount awarded an owner over the amount deposited with the clerk.

23-1541. Provisions supplemental. Sections 23-1528 - 23-1541 are not intended to repeal any existing statute relating to eminent domain, but are intended to be an accumulative or supplementery method of acquiring property by eminent domain proceedings.