## Chapter One
## Scope of the Power of Eminent Domain

### Introduction

Eminent domain is the right or power of the sovereign to take private property for the public use; to take ownership and possession thereof upon payment of just compensation to the owner of the property.[1] It is an inherent power of a sovereign, which is without limitation or restriction, except for the constitutional limitations that private property must be taken for a public use,[2] and the owner of such property must be paid just compensation for the property.[3] Although the power of eminent domain is an inherent power of the sovereign, it lies dormant until the legislature declares the purpose for which it may be exercised, and the agencies that may utilize the power.[4] The power of eminent domain may be exercised directly by the legislature by the adoption of a statute identifying the particular property to be acquired for a public use, or it may be delegated to agents who may exercise the power in the manner prescribed in the enabling statute.[5]

The power of eminent domain has been delegated to counties (*Tennessee Code Annotated (T.C.A.)* 29-17-101; 29-17-801)[6] and municipalities (*T.C.A.* 29-17-201; 29-17-801)[7]. The power of eminent domain has been generally delegated to any person or corporation authorized by law to construct railroads, turnpikes, canals, toll bridges, roads, causeways, or other work of internal improvement (*T.C.A.* 29-16-101).[8] The General Assembly has also delegated the power of eminent domain to the following:[9]

Airport authorities (*T.C.A.* 42-3-108--42-3-109; 42-3-204)
Beech River Watershed Development Authority (*T.C.A.* 64-1-102)
Bridge companies (*T.C.A.* 54-13-208)
Carrol County Watershed Authority (*T.C.A.* 64-1-805)
Chickasaw Basin Authority (*T.C.A.* 64-1-204)
Coast and geodetic surveys (*T.C.A.* 29-17-501)
Counties - Airports (*T.C.A.* 42-5-103)
Counties - Electric plants (*T.C.A.* 7-52-105)
Counties - Controlled access highways (*T.C.A.* 54-16-104)
Counties - Ferries (*T.C.A.* 54-11-302)
Counties - Industrial parks (*T.C.A.* 13-16-203)
Counties - Levees (*T.C.A.* 69-5-105)
Counties - Public transportation systems (*T.C.A.* 7-56-106)
Counties - Public works projects (*T.C.A.* 9-21-107)
Counties - Railroad systems (*T.C.A.* 7-56-207)
Counties - Recreational land (*T.C.A.* 11-24-102)
Counties - Roads (*T.C.A.* 29-17-801 *et seq*.; 54-10-205)
Counties - Schools (*T.C.A.* 49-6-2001 *et seq*.)
Counties - Solid waste sites (*T.C.A.* 68-31-919)
Drainage and levee districts (*T.C.A.* 29-17-801 *et seq*.; 69-6-201 *et seq*.)
Electric power districts (*T.C.A.* 7-83-303; 7-83-305)
Hospitals (*T.C.A.* 29-16-126) (*T.C.A.* in certain counties)
Housing authorities (*T.C.A.* 13-20-104; 13-20-108--13-20-109; 13-20-212; 29-17-401 *et*

*seq*.)
Light, power and heat companies (*T.C.A.* 65-22-101)
Metropolitan governments - Energy production facilities (*T.C.A.* 7-54-103)
Metropolitan governments - Port authorities (*T.C.A.* 7-5-108)
Metropolitan hospital authorities (*T.C.A.* 7-57-305)
Mill Creek Flood Control Authority (*T.C.A.* 64-3-104)
Municipalities - Airports (*T.C.A.* 42-5-103)
Municipalities - City Manager - Commission (*T.C.A.* 6-19-101)
Municipalities - Controlled access highways (*T.C.A.* 54-16-104)
Municipalities - Drainage ditches (*T.C.A.* 7-35-101)
Municipalities - Electric plants (*T.C.A.* 7-52-105)
Municipalities - Gas systems (*T.C.A.* 7-39-303)
Municipalities - Industrial parks (*T.C.A.* 13-16-203)
Municipalities - Mayor - Aldermanic (*T.C.A.* 6-2-201)
Municipalities - Modified City Manager (*T.C.A.* 6-33-101)
Municipalities - Parks (*T.C.A.* 7-31-107 *et seq*.)
Municipalities - Public transportation systems (*T.C.A.* 7-56-106)
Municipalities - Public works projects (*T.C.A.* 9-21-107)
Municipalities - Railroad systems (*T.C.A.* 7-56-207)
Municipalities - Recreational systems (*T.C.A.* 11-24-102)
Municipalities - Schools (*T.C.A.* 49-6-2001 *et seq*.)
Municipalities - Sewers (*T.C.A.* 7-35-101)
Municipalities - Slum clearance (*T.C.A.* 13-21-204; 13-21-206) (*T.C.A.* in certain counties)
Municipalities - Streets (*T.C.A.* 7-31-107 *et seq*.)
Municipalities - Utilities (*T.C.A.* 7-34-101)
Municipalities - Water systems (*T.C.A.* 7-35-101)
Nashville and Eastern Railroad Authority (*T.C.A.* 64-2-407)
North Central Tennessee Railroad Authority (*T.C.A.* 64-2-507)
North West Tennessee Railroad Authority (*T.C.A.* 64-2-107)
Obion-Forked Deer Basin Authority (*T.C.A.* 64-1-403)
Pipeline companies (*T.C.A.* 65-28-101)
Private roads (*T.C.A.* 54-14-101 *et. seq*.)
Public gristmills (*T.C.A.* 43-23-103 *et seq*.)
Railroads (*T.C.A.* 65-6-109; 65-6-123)
Railroads - Branch lines (*T.C.A.* 65-6-126 *et seq*.)
Railroads - Incline railroads (*T.C.A.* 65-18-101)
Railroads - Interurban railroads (*T.C.A.* 65-16-119)
Road improvement districts (*T.C.A.* 54-12-152)
Solid waste authorities (*T.C.A.* 68-13-908)
State Department of Environment and Conservation (*T.C.A.* 11-1-105; 11-3-105; 11-14-110; 59-8-215)
State Department of Transportation (*T.C.A.* 29-17-801 *et seq*.; 54-5-104; 54-5-208; 54-16-104)
State Military affairs (*T.C.A.* 58-1-501 *et seq*.)
State - Water and sewer facilities (*T.C.A.* 12-1-109)

Telegraph companies (*T.C.A.* 65-21-204)
Telephone companies (*T.C.A.* 65-21-204)
Telephone cooperatives (*T.C.A.* 65-29-104; 65-29-125)
Tennessee Tollway Authority (*T.C.A.* 54-15-120)
Tri-County Railroad Authority (*T.C.A.* 64-2-307)
University of Tennessee (*T.C.A.* 29-17-301)
Utility districts (*T.C.A.* 7-82-305)
Water companies (*T.C.A.* 65-27-101 *et seq*.)
Watershed districts (*T.C.A.* 69-7-118)
Water treatment authorities (*T.C.A.* 68-13-610)

Such grants of the power of eminent domain are in derogation of private property rights and will be strictly construed against the condemners and liberally in favor of the rights of property owners.[10] Thus the condemner's right to take property will be denied if the condemner has failed to follow the procedures set forth in the statutes that authorize exercise of the power of eminent domain.[11] Also the condemner will be precluded from acquiring a greater interest in property than is authorized by statute.[12]

**Eminent Domain vs. Police Power**

The power of eminent domain, or the power to acquire private property for a public use, can generally be distinguished from the police power, which is the power to adopt regulations to promote the public health, safety and welfare of a community, even though the exercise of either power may impair the fair market value of private property.[13] Where the impairment of value resulted from the exercise of the police power, courts have traditionally found that such loss is not subject to the just compensation requirements of the United States and Tennessee Constitutions.[14] Thus, claims for compensation have been denied where the value of property has been impaired as the result of: the imposition of housing regulations;[15] the imposition of zoning regulations;[16] the imposition of utility rate regulations;[17] the change in streets abutting property from two-way streets to one-way streets;[18] or inconvenience, noise and dirt from construction of a public improvement which interfered with the use of property.[19]

This theoretical distinction becomes blurred when the police power regulation impairs the value or use of private property to such an extent that no beneficial use of the property remains.[20] Such instances have become more common as local governments have imposed land use regulations upon private property in lieu of utilizing limited public funds to acquire private property for public use. This problem was first addressed in *Pennsylvania Coal Co. v. Mahon*,[21] where Mr. Justice Holmes held that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking...(as)... a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."
This holding has been applied in Tennessee to a zoning regulation that deprived the owner of the beneficial use of its property.[22] Where such a "regulatory taking" occurs, the property owner is entitled to recover "just compensation" for such taking, not just the invalidation of the regulation which resulted in the taking.[23] These issues will be discussed in further detail in Chapter Five.

## Chapter Two
## Condemnation Procedures

### Introduction

There are a variety of condemnation procedures which have been established for municipalities and counties,[24] but the most commonly utilized are the traditional "jury of view" procedure (*T.C.A.* 29-16-101 *et seq*.) and the "bulldozer/quick take" procedure (*T.C.A.* 29-17-801 *et seq*.). These statutory provisions normally permit the condemner to select the procedure of its choice from the available options.[25] This manual will only discuss the traditional "jury of view" procedure and the "bulldozer/quick take" procedure, since the same principles are generally applicable to the other procedural schemes which are available to counties and municipalities.

The condemner seeking to acquire an interest pursuant to the power of eminent domain must first file a lawsuit in order to accomplish this objective. In such a lawsuit, the court will be presented with two issues: (1) whether the condemner has the right to take the property;[26] and (2) the amount of just compensation to which the property owner is entitled.[27]

Under the "jury of view" and the "bulldozer/quick take" procedures, the condemnation action must be filed in the circuit court in which the property is located (*T.C.A.* 29-16-104; 29-17-802). Thus, the circuit court has exclusive jurisdiction over eminent domain proceedings.[28] Once condemnation proceedings have been filed in the circuit court, the court may resolve matters which are incidental to the condemnation case, such as contract[29] or boundary[30] disputes involving the condemned property. The only exception to this rule involves cases which were properly brought in chancery court to obtain injunctions or other equitable relief.[31] The chancery court has been found to have jurisdiction to award appropriate relief under the eminent domain statutes in cases which were initially brought to obtain injunctive relief,[32] or to void a contract[33] or to reform a deed.[34]

### Jury of View Procedure

The jury of view procedure requires the condemner to initiate the condemnation action by filing a petition for condemnation in the circuit court and giving the property owner notice of the proceedings (*T.C.A.* 29-16-104 -- 29-16-105). The circuit court then appoints a jury of view to examine the property which is to be condemned and determine the amount of just compensation to which the property owner is entitled (*T.C.A.* 29-16-107 -- 29-16-113). The jury of view will then file its report with the court, and the report may be confirmed or it may be excepted to and/or appealed from by one or both the parties that have objections to the report (*T.C.A.* 29-16-115--29-16-118).

If the report is confirmed, an order will be entered conveying the property to the condemner upon payment to the property owner the amount of just compensation set by the jury of view (*T.C.A.* 29-16-116). If an exception is filed, the court may upon a showing of good cause appoint a new jury of view (*T.C.A.* 29-16-117). If an appeal is filed to the report, the circuit

court conducts a trial *de novo* before a petit jury (*T.C.A.* 29-16-118).

**Petition for Condemnation**

The petition for condemnation must be filed in the county in which the property is located (*T.C.A.* 29-16-104). The petition must name as defendants all parties having any interest in any way in the property being acquired (*T.C.A.* 29-16-106). All parties must be named as defendants in order for the condemnation proceedings to bind the parties, with the exception of unborn remaindermen, who are bound if all living parties in interest are parties (*T.C.A.* 29-16-106). [35] Thus, to obtain clear title to the property, the condemner should name as defendants the spouse of the property owner, [36] any person owning a life estate, or reversionary or remainder interest in the property, [37] any lessee of the property, [38] any holder of a recorded mortgage [39] and any holder of any other interest in the property, including a purchase contract of which the condemner is aware. [40] The name and residence addresses of all defendants, if known, should be listed in the petition and if the name or address is unknown, that fact should be stated in the petition (*T.C.A.* 29-16-104).

The body of the petition for condemnation should set forth the statute, private act or charter provision giving the condemner the general power to acquire property by emi-nent domain and should cite the "jury of view" statutes as the specific statutory procedure being utilized by the con-demner to acquire the property in question.[41] The petition should also identify the specific ordinance or resolution of the county or municipal legislative body authorizing the acquisition of the property pursuant to the power of eminent domain.

The nature of the project for which the property is being acquired should be described (*T.C.A.* 29-16-104). The petition should recite that the project is for a public use, is in the public interest and that the acquisition of the defendant's property is necessary for the completion of the project.[42] The particular interest in the property, either a fee interest or an easement, should be identified (*T.C.A.* 29-16-104). An accurate legal description of the property should be included, along with a corresponding map or plat attached as an exhibit if available (*T.C.A.* 29-16-104).[43] Also any known encumbrances upon the property should be specified. Finally the petition should contain a prayer that a copy of the petition be served on defendants and a suitable portion of the land or the rights of the defendants be awarded to the condemner (*T.C.A.* 29-16-104).

**Deposit**

The condemner utilizing the "jury of view" procedure has the option of depositing with the clerk of the court at the time the petition is filed the amount it determines the property owner is entitled to for the property being acquired (*T.C.A.* 29-17-701). The property owner may, upon written notice to the clerk of the court, withdraw this amount upon agreeing to refund any difference if the final award is less than the deposit (*T.C.A.* 29-17-701). Upon making a deposit, the condemner is relieved from paying interest to the property owner on the amount deposited from the date of the taking until the date of the ultimate award to the property owner (*T.C.A.* 29-17-701). Thus, the statute provides the condemner with a mechanism to avoid the payment of interest on the amount deposited while permitting the property owner to immediately obtain the

amount deposited in order to replace the property taken by the condemner.[44]

The condemner should make a good faith estimate of the damages and expenses the property owner will likely incur when it determines the amount to deposit.[45] The amount of the deposit should be specified in the condemnation petition. The amount of the deposit is not relevant to the trial[46] and the condemner can offer proof that the property is of lesser value.[47]

**Notice**

Notice of the filing of the condemnation petition must be given to all defendants, or if the defendant is a nonresident of the county, to the defendant's agent, at least five (5) days before the petition for condemnation is presented to the court for issuance of the writ of inquiry (*T.C.A.* 29-16-105). If the defendant's name or address is unknown and not readily ascertainable, notice should be given by publication as provided in T.C.A. § 21-1-204 for suits in chancery court (*T.C.A.* 29-16-105).[48] Although notice by publication is also authorized for nonresidents of the state, the due process clause of the Fourteenth Amendment to the United States Constitution requires more than notice by publication when the name and address of a nonresident defendant is known or very easily ascertainable.[49] The notice should advise the defendant of the filing of the petition and the date scheduled for the presentation of the petition to the court for issuance of the writ of inquiry.[50]

The notice of the filing of the petition is in lieu of the summons which is normally issued in civil actions.[51] The manner of service of the notice is not specified in the applicable statutes; however, Rule 71 of the Tennessee Rules of Civil Procedure provides that those rules will be applicable to the extent they are not in conflict with or do not contradict or contravene the provisions of the applicable statutes. Therefore, service of the notice, accompanied by a copy of the petition for condemnation, can be accomplished in any manner authorized by Rule 4 of the Tennessee Rules of Civil Procedure. A return of the notice, like a return of a summons, should be completed in compliance with Rule 4.03 of the Tennessee Rules of Civil Procedure.

**Writ of Inquiry**

At the time of the presentation of the petition to the court for the issuance of the writ of inquiry, which cannot occur until five (5) days after the defendant has been given notice of the filing of the petition, the condemner should submit a motion to sustain the condemner's right to take the property pursuant to the power of eminent domain. This motion asks the court to issue the writ of inquiry and fix a time and place for the inquest. Any challenge to the condemner's right to take must be asserted at this stage of the proceedings.[52]

If no challenge to the condemner's right to take is made, the court will sustain the condemnation proceedings and order the issuance of the writ of inquiry of damages (*T.C.A.*

29-16-107). This order should recite that: the petition for condemnation has been properly filed and notice given to the defendants; the condemner has the right to acquire the property as disclosed in the order; the clerk should issue a writ of inquiry to appear on a fixed date and place and that no further notice will be given; upon selection of the jury of view the jury will proceed to the property, examine the same and hear testimony of witnesses, but no argument of counsel, and will set apart by metes and bounds the property to be condemned and assess the damages as required by law; and that the jury of view will reduce its report to writing and deliver the same for the sheriff, who will return it to the court.[53] If the defendant challenges the condemner's right to take, the court must first resolve this challenge before it may order issuance of the writ of inquiry (*T.C.A.* 29-16-107).[54] If the court finds that the condemner has the right to take the property, it will sustain the condemnation proceedings and order issuance of the writ of inquiry of damages (*T.C.A.* 29-16-107). The order directing the issuance of the writ of inquiry is not a final order and therefore is not appealable.[55]

The writ of inquiry is issued by the clerk and directed to the sheriff, commanding him to summon a panel of jurors to appear on a fixed date and place (*T.C.A.* 29-16-107).[56] The sheriff thereafter summons a panel of twelve to fifteen potential jurors from which the jury of view will be selected. The sheriff should return the writ to the clerk of court, specifying the names of the persons on whom the writ of inquiry was served.[57]

**Selection of the Jury of View**

The jury of view will consist of five (5) persons, unless the parties agree to a different number (*T.C.A.* 29-16-108). The jurors must possess the same qualifications as jurors in other civil cases, with the additional qualification that no members of the jury of view may have an interest in a similar case (*T.C.A.* 29-16-109). The jurors may be challenged for cause or peremptorily as in any other civil case (*T.C.A.* 29-16-108). In the instance where the name of the juror is selected by the court, and the juror is unable to attend, the sheriff will select a replacement (*T.C.A.* 29-16-110).

**View and Report**

If the date has not been set by the court, the sheriff must give the parties three (3) days notice of the time and place of the inquiry (*T.C.A.* 29-19-111).[59] On the date and time specified, the jury will be selected (if the names of the jurors are not specified by the court or the parties) and sworn to fairly and impartially, without favor or affectation, lay off by metes and bounds the property required for the proposed improvement and to assess the damages to the landowner (*T.C.A.* 29-16-112).

The jury may then receive brief instructions from the court on their duties, which are to go onto the property, examine the same, to hear testimony of witnesses but no arguments of counsel, to assess the damages and prepare a report in writing and deliver it to the sheriff.[60] The jury of view will then be placed in the charge of the sheriff and will proceed to examine the property

(*T.C.A.* 29-16-113). The parties and their counsel may accompany the jury of view to the property and put on evidence as to its value, but counsel are not permitted to make arguments to the jury of view (*T.C.A.* 29-16-113).[61] After the investigation of the property and the testimony has been completed, the jury of view must identify by metes and bounds the property required for the proposed project and must assess damages to the landowner according to the principles discussed in Chapter Four (*T.C.A.* 29-16-113). The decision of the jury of view may be a majority instead of a unanimous decision (*T.C.A.* 29-16-115).[62] The decision should be reduced to writing and the report must include a legal description of the property and the amount of the award, and be signed by a majority of the jurors.[63]

The report should be delivered to the sheriff who returns the report to the court (*T.C.A.* 29-16-115). If the parties do not object to the report, it is confirmed by the court upon motion by the condemner.[64] The court thereafter enters an order confirming the report (*T.C.A.* 29-16-116). This order should incorporate the report of the jury of view, should order that the property be divested from defendants and vested in the condemner, and further order that the condemner pay the defendants the amount specified in the report.[65] The order should also specifically provide for the issuance of a writ of possession to put the condemner in possession, if necessary.[66]

If there is no dispute as to the proper distribution of the funds to defendants, the order should specify such distribution, otherwise the court must retain jurisdiction to permit the defendants to present proof on their respective interests and the proper disposition of the award.[67] This order should also adjudge the costs of the case (normally against condemner) and provide for payment of the members of the jury of view.[68] The maximum amount of such payment is specified at T.C.A. § 29-16-125.

**Exceptions and Appeal**

Either party may file exceptions to the report of the jury of view, and for good cause shown, the court may set aside the report of the jury of view and issue a new writ of inquiry for a new jury of view (*T.C.A.* 29-16-117). Exceptions to the report of the jury of view should be directed toward some irregularity in the proceedings, misconduct of the jury of view or where the report is founded on erroneous principles.[69] The court considers the exceptions based on the proof in the record, and therefore an exception on the grounds of inadequacy of the damages would normally be insufficient.[70] Although no time period is specified for the filing of the exceptions, the appeal from the report of the jury of view must follow the disposition of such exceptions,[71] and such an appeal must be filed within forty-five (45) days of the confirmation of the report of the jury of view (*T.C.A.* 29-16-118). It is therefore conceivable that a court would find that exceptions must be filed and disposed of prior to the expiration of the forty-five (45) day period.

An appeal is the proper remedy if a party objects to the amount of damages awarded by the jury of view.[72] The remedies of exception and appeal are cumulative and successive.[73] A party may file an appeal regardless of whether exceptions have been filed.[74] Either party may file an appeal within forty-five (45) days of the entry of the order confirming the report of the jury of view, and upon giving security for costs, and obtain a trial *de novo* before a jury as in any civil case (*T.C.A.* 29-16-118).

The condemner who obtained possession pursuant to the order confirming the report of the jury of view[75] may continue in possession upon filing of an appeal by posting a bond, payable to defendants, in double the amount of the award of the jury of view, conditioned upon the condemner's compliance with the final judgment in the case (*T.C.A.* 29-16-120; 29-16-122).[76] Costs on appeal must be paid by the appealing party in all cases where the petit jury affirms the award of the jury of view or is more unfavorable to the appealing party (*T.C.A.* 29-17-119). In all other cases the court may award costs as in other chancery cases (*T.C.A.* 29-16-119).

**Nonsuit**

The condemner may take a voluntary nonsuit pursuant to Rule 41.01 of the Tennessee Rules of Civil Procedure in a condemnation case.[77] A nonsuit cannot be taken after the condemner has taken possession of the property after the confirmation of the report of the jury of view, leaving nothing to be determined except the amount of compen-sation due the defendant.[78]

**Bulldozer/Quick Take Procedure**

The bulldozer/quick take procedure can be utilized by the State of Tennessee for acquisition of such right-of-way, land, material, easements and rights as are necessary, suitable or desirable for the construction, reconstruction, maintenance, repair, drainage or protection of any street, road, freeway or parkway (*T.C.A.* 29-17-801). In addition to these purposes, municipalities and counties can utilize the bulldozer/quick take procedure for any municipal or county purpose for which condemnation is otherwise authorized by any act of the Tennessee General Assembly, unless expressly stated to the contrary (*T.C.A.* 29-17-801). Levee and drainage districts in certain counties may also utilize the bulldozer/quick take procedure (*T.C.A.* 29-17-801). The bulldozer/quick take procedure may not be utilized by housing authorities as they are not counties or municipalities.[79]

The bulldozer/quick take procedure is a cumulative and supplementary procedure for the exercise of eminent domain and should be construed *in par materia* with the other eminent domain statutes.[80] This supplementary procedure was designed to protect the property owner by having the amount the condemner believes the property owner is entitled to deposit in court, and when that money has been deposited, to give the condemner the almost immediate right of possession.[81]

The bulldozer/quick take procedure, like the jury of view procedure, requires the condemner to initiate the condemnation action by filing a petition for condemnation in the circuit court, accompanied by a deposit for the amount of damages the condemner believes the property owner is entitled to, and giving the property owner notice of the proceedings (*T.C.A.* 29-17-802; 29-17-803). If the condemner is a municipality or county, any defendant may elect to utilize the jury of view procedure by filing a statement to that effect within five (5) days of service upon the defendant (*T.C.A.* 29-17-801).[82]

If the condemner's right to take is not questioned,[83] the condemner may take possession of the

property five (5) days after the notice has been given (*T.C.A.* 29-17-803).[84] If the property owner is satisfied with the amount of the deposit, he or she may withdraw that amount from the court by filing a sworn statement stating that he or she is the owner of the property or property interests described in the petition for the condemnation and that he or she accepts the deposit in full settlement for the taking of the property and all damages occasioned to the remainder thereof (*T.C.A.* 29-17-804). The court will thereafter enter an order divesting the property owner of title and vesting the same in the condemner (*T.C.A.* 29-17-804). If the property owner is dissatisfied with the deposit, he or she may file an exception to the amount deposited by the condemner, and thereafter a trial before a petit jury may be held on the amount of just compensation due the property owner (*T.C.A.* 29-17-805).

**Petition for Condemnation**

In addition to the requirements for the petition for condemnation discussed under the jury of view procedure, the petition for condemnation under the bulldozer/quick take procedure must identify the civil district in which the property is located, a description of the project to be constructed and the amount of damages to which the condemner has determined that the landowner will be entitled (*T.C.A.* 29-17-803). Although the interests of the defendants need not be specified (*T.C.A.* 29-17-803), the condemner may specify the interests of different defendants.[85]

If any person who is a proper party defendant is omitted from the petition for condemnation, the condemner may file amendments to add them (*T.C.A.* 29-17-809).

**Notice**

As with the jury of view procedure, notice of the filing of the condemnation proceeding must be given to all defendants (*T.C.A.* 29-17-803). This notice must be given at least five (5) days before any additional steps are taken in the case by the condemner (*T.C.A.* 29-17-803). The constitutional limitations on service by publication which were discussed under the jury of view procedure apply to the bulldozer/quick take procedure. Service of the notice, accompanied by a copy of the petition for condemnation, can be accomplished in any manner authorized by the Tennessee Rules of Civil Procedure.

**Deposit**

The condemner must determine what it deems to be the amount due the property owner and deposit that amount when it files the petition for condemnation.[86] This deposit should be a good faith estimate of damages and expenses that the defendant will likely incur as the result of the condemnation.[87]

**Default**

If the property owner does not appear and accept the amount of the deposit or take exception to the amount of the deposit, the court can enter a default judgment against the property owner. The court will thereafter hold a hearing upon the record and, in the absence of the property owner, determine the amount of just compensation to which the property owner is entitled (*T.C.A.* 29-17-807).

**Acceptance**

If the defendant is satisfied with the amount of the damages, he or she may file a sworn statement verifying that he or she is the owner of the property or property rights being condemned and he or she accepts the deposit as a full settlement for the taking of the property sought to be acquired by the condemner and any incidental damages to the remainder of the property of the defendant (*T.C.A.* 29-17-804). The court will thereafter enter a final judg-ment divesting the property owner of title and vesting title in the condemner (*T.C.A.* 29-17-804). If the condemner identifies the amount of the deposit which should be allocated to the various defendants, a defendant may accept that amount in full settlement of his or her interest.[88]

**Exception and Trial**

If the property owner is dissatisfied with the amount deposited, he or she may file an exception (*T.C.A.* 29-17-805). The statute requires the filing of the exception on or before the second day of the next term of court (*T.C.A.* 29-17-805), but terms of court have been abolished in Tennessee (*T.C.A.* 16-2-510). Rule 71 of the Tennessee Rules of Civil Procedure may permit the filing of such an exception in the same manner as an answer in any civil case, which must be filed within thirty (30) days of service of the notice pursuant to Rule 12.01 of the Tennessee Rules of Civil Procedure.

If the property owner files an exception to the amount deposited by the condemner, a trial may be held before the petit jury as in other civil cases (*T.C.A.* 29-17-805). In order to obtain such a jury trial, the property owner should make a demand for a jury pursuant to Rule 38.02 of the Tennessee Rules of Civil Procedure, or file a motion for a jury trial pursuant to Rule 39.02 of the Tennessee Rules of Civil Procedure.[89] The trial will be limited to the deter-mination of the amount of compensation to be paid to the defendant for the property or property rights taken. When adverse claims by multiple defendants are made for such compensation, the court and jury must also resolve such claims (*T.C.A.* 29-17-808).

The defendant who has filed an exception is entitled to withdraw, prior to trial, the amount deposited by the condemner without prejudice to the rights of either party (*T.C.A.* 29-17-808).[90] In order to withdraw the deposit, the defendant must make a written request to the clerk in which he or she agrees to refund the difference between the amount of the deposit and the final award if the final award is less than the amount of the deposit (*T.C.A.* 29-17-806).

If the final award is less than or equal to the amount of the deposit, the defendant must pay the

costs of the trial (*T.C.A.* 29-17-812). In other cases, the condemner is responsible for the payment of costs (*T.C.A.* 29-17-812).

**Nonsuit**

As with the jury of view procedure, the condemner may take a voluntary nonsuit prior to obtaining possession to the property of the defendant.[91] However, if the condemner abandons the proceedings, the court may order the condemner to pay defendants for all reasonable costs, including reasonable attorney, appraisal and engineering fees actually incurred because of the condemnation proceedings (*T.C.A.* 29-17-812). An abandonment occurs when the condemner voluntarily gives up the intended condemnation or declines to carry the condemnation proceedings through to a conclusion.[92]

## Chapter Three
## The Right To Take

### Introduction

Condemnation cases are of a dual nature, the first part involving the determination of the condemner's right to take the property, and the second part involving the amount of damages to which the property owner is entitled, provided the right to take exists.[93]

Each condemner must satisfy a three-part test in order to have the right to take private property pursuant to the power of eminent domain. The first part of the test is the authority of the condemner to utilize the power of eminent domain. The second part of the test is whether the private property being taken will be put to a public use by the condemner. The third part is whether the private property is necessary for the accomplishment of the public use.

### Authority

As noted in Chapter One, the Tennessee General Assembly has by statute or private act authorized the exercise of the power of eminent domain by a wide variety of governmental agencies and public service corporations. However, in order for the condemner to have the right to take a specific piece of property, the entity with the power of eminent domain must determine that the particular property being taken will be put to a public use and that the particular property is necessary for that use. Such action by the entity is essential not only to show that the condemnation proceedings are properly authorized, but as discussed further below, to eliminate any challenge by the property owner regarding the necessity for the taking of his or her property.

The municipal or county condemner normally authorizes the acquisition of property pursuant to the power of eminent domain through the adoption of an ordinance or resolution which authorizes the acquisition of certain parcels of property for a specified municipal or county project.[94] Such an ordinance or resolution should: set out the nature of the project being undertaken; recite that the taking is for public use and in the public interest; and state that the acquisition of the particular properties identified is necessary for such purpose.[95] The ordinance or resolution should specifically authorize the filing of condemnation proceedings to acquire the properties identified.[96]

Strict compliance with all applicable charter provisions, statutes or private acts regarding the adoption of ordinances or resolutions must be had, because failure to comply will result in the condemner lacking the authority to condemn the property identified in the ordinance or resolution.[97] Also if the applicable statutory provisions impose preconditions to the filing of condemnation proceedings, such as the publication of notices, the preconditions must be met in order for the condemner to have the authority to institute condemnation proceedings.[98]

A copy of the ordinance or resolution may be attached to the petition for condemnation,[99] or

referenced by ordinance number in the body of the petition. If the right to take is challenged, a certified copy of the ordinance or resolution may be introduced into evidence to establish that the condemner has the authority to take the property in question.

**Public Use**

The term "public use" is incapable of a precise and universally acceptable definition.[100] The determination of whether a proposed use constitutes a public use must be based on the facts of each case, because the term must remain elastic in order to meet the growing needs of a complex society.[101]

As noted above, the legislative body makes the initial determination that the taking of private property is for a public use. If the property owner challenges the condemner's right to take on the grounds that the property will not be put to a public use, the court has the right and the duty to determine whether the proposed use is a public use.[102] The determination by the legislative body that the proposed use is a public use is entitled to a strong presumption of correctness,[103] but it is not conclusive on the court.[104] When the court finds that the proposed use has no significant relationship to the public benefit, it must find that the condemner lacks the right to take private property pursuant to the power of eminent domain.[105]

**Narrow vs. Broad View**

The various decisions by the courts on whether a proposed use is a public use have been categorized into two (2) categories: cases in which the courts utilized a narrow view of the scope of public uses; and cases in which courts utilized a broad view of the scope of public uses.[106] Courts utilizing the narrow view require that the public must be entitled as of right to directly use or enjoy the property taken.[107] Under the broad view, the condemnation of the property need only be for the public benefit or common good.[108] Under either view, it is not essential that the entire community directly enjoy or participate in the proposed use in order for the court to find a public use.[109] Thus the extension of utility service to serve a single customer who has the right to service from the utility may constitute a public use so as to justify the condemnation of easements necessary for the construction of the utility line.[110]

**Public vs. Private Condemner**

In determining whether a proposed use constitutes a public use, the courts also consider whether the condemner is a public or private entity. For the purpose of this analysis courts have recognized that there are at least three categories of condemners: governmental entities; public service corporations regulated by the state; and private individuals or corporations, and the standards for public use will differ for each category.[111]

If the condemner is a governmental entity, the courts determine whether or not the public would be entitled to receive and enjoy the benefits of the proposed use.[112] The general public need not

have access to the property in order to satisfy the requirement.[113] Also the fact that the property was acquired as a part of a redevelopment plan which contemplated that the property would be subse-quently resold to a private developer would not result in the property being acquired for a private purpose, since the public received a benefit from the complete implementation of the redevelopment plan.[114]

Where the condemner is a public service corporation regulated by the state, the court must determine whether the public will be given an opportunity to make use of the service provided by the public service corporation at reasonable rates and without discrimination.[115] The proposed use must satisfy a public demand for facilities for travel or transportation of intelligence or commodities, and the general public, under reasonable regulations, must have a definite and fixed use of the services of the condemner independent of the will of the condemner.[116]

If the condemner is a private corporation or individual, the courts will rarely find that the proposed use is a public use. If the proposed use is absolutely necessary to permit the private individual or corporation to discharge duties owed to the public, a public use may be found.[117] Otherwise the court will require the condemner to establish that the general public will be entitled to make a fixed and definite use of the property being condemned, independent of the will of the condemner.[118]

The following have been found to constitute public uses when the condemner was a governmental entity: municipal streets,[119] street lights,[120] county roads,[121] bridges,[122] sewers,[123] utility facilities and office buildings,[124] water-works,[125] cemeteries,[126] golf courses,[127] parks,[128] greenbelts,[129] slum clearance projects[130] and redevelopment projects.[131]

The following have been found to constitute public uses when the condemner was not a governmental entity: rail-road tracks and terminal facilities,[132] telephone lines,[133] grist mills,[134] iron works,[135] electric power facilities,[136] privately owned turnpikes,[137] flumes,[138] telegraph lines and poles,[139] private water lines[140] and microwave relay towers.[141]

**Property Devoted to Public Use**

Property which is devoted to a public use cannot be condemned for another public use[142] in the absence of legislative authority permitting the condemner to take property already devoted to a public use.[143] However, the regulation of land uses pursuant to the police power does not result in the property being devoted to a public use which would preclude condemnation.[144]

**Necessity**

Unlike the review of the legislative body's determination of public use, the court provides only a limited review of the necessity or expendency of the taking of any particular parcel of property. The legislative body's determination of necessity is conclusive upon the courts in the absence of a showing of fraudulent or arbitrary and capricious action by the condemner.[145]

Arbitrary and capricious actions are willful and unreasonable actions taken without consideration or in disregard of the facts existing at the time the condemnation was decided upon or within the foreseeable future.[146] An action is not arbitrary and capricious when exercised honestly and upon due consideration, where there is room for two opinions, even if the court believes that the condemner erred in basing its decision on one of the two opinions.[147]

Thus, the property owner cannot ask the court to substitute its judgment for that of the condemner on what is in the best interest of the public.[148] The court cannot substitute its judgment on the proper parcel of property to be taken, as distinguished from similar property in the same area, or determine the suitability of a particular parcel of property for the proposed use, or decide the quantity of property required by the condemner for the proposed use.[149]

**Condemnation for Future Needs**

The propriety of the condemner acquiring property for anticipated future needs has never been addressed by a Tennessee court, but other courts have found that the time of the taking, like the location and extent of the property to be acquired, is a question for the legislative branch which will not be disturbed by the courts absent fraud or arbitrary and capricious action.[150] As long as the future need for the property can be fairly anticipated by the condemner, the courts will not interfere with the condemner's deter-mination of necessity.[151] Since the condemner in Tennessee is not barred from the exercise of common sense or good business judgment in the operation or construction of public facilities,[152] it is likely that Tennessee courts would permit the condemnation of property which the condemner fairly anticipates will be needed to satisfy the condemner's future needs.

**Procedural Issues**

Since condemnation cases have the dual nature mentioned above, challenges to the condemner's right to take are normally resolved as a preliminary matter prior to the determination of the amount of just compensation to which the property owner is entitled.[153] The condemner has the burden of proof of establishing the right to take.[154] The determination of the right to take is a matter for the court and not the jury.[155] If the court finds that the condemner has the right to take and the condemner posts the bond required by statute and takes possession of the property, the judgment on the right to take issue becomes final and must be appealed at that time.[156] Thus there may be two final judgments in any condemnation action.[157]

## Chapter Four
## Just Compensation

### Introduction

The constitutional requirement that private property not be taken for public use without payment of just compensation to the property owner[158] is satisfied by the payment of the fair cash value[159] or the fair market value of the property on the date of the taking for public use.[160] The "fair market value" of the land is the price that a reasonable buyer would give if he or she was willing to but did not have to purchase and that a willing seller would take if he or she was willing to but did not have to sell the property in question.[161] The amount of just compensation to which the property owner is entitled is a question for the jury or court acting as the trier of the facts,[162] and the parties have the right to a trial by jury.[163] After the condemner's right to take has been established, the burden of proof shifts to the property owner to show the amount of just compensation to which he or she is entitled to receive for the taking.[164]

### Establishing Fair Market Value

The fair market value of the property taken by the condemner must be established as of the date of the taking.[165] Therefore the enhancement in value or depreciation in value of the property which occurred before the taking in anticipation of the completion of the public improvement may not be considered by the jury.[166] This problem is usually encountered when a public improvement is constructed in stages, or is enlarged so as to require additional property. If the property increases in value due to its proximity to the construction of the public improvement, and at a later date the condemner decides to acquire additional land for the expansion of the public improvement, the condemner is required to pay for the enhanced value of the property.[167]

If, on the other hand, the public project from the beginning contemplated the acquisition of several parcels of property, but only one was initially acquired, the owners of the remaining tracts are not entitled to benefit from any appreciation in value resulting from the construction of the project.[168] The condemner has the burden of proof in establishing that the property in question was within the scope of the project.[169] The condemner need not show that the property was actually specified in the original plans for the project so long as it can be established that during the course of the planning or original construction of the project, it becomes evident that the property in question would be needed for the project.[170] In order to determine whether the appreciation in value resulted from the proposed public improvement, the trial court must make a preliminary determination on the scope of the project which will serve as the basis for the admissibility of comparable sales which might reflect such appreciation.[171]

In establishing the fair market value of the property being taken, the jury may not consider prices previously offered by prospective buyers of the property.[172] The prices at which the property was previously offered for the sale also cannot be considered in determining the fair market value of the property.[173] All capabilities of the property and all legitimate uses for which it is available and reasonably adapted must be considered in determining the fair market value of the property.[174] Therefore the probable imminent rezoning of the property may be considered in

determining the capabilities and uses for the property.[175] Also the capability of the property to be developed for one or more particular uses may be shown so long as the proposed uses are not unfeasible or remote in likelihood or in time, given the circumstances and location of the property, and so long as these uses are not overemphasized.[176]

Speculative value of property in the hands of a future owner cannot be considered.[177] The rental value of the property taken may be considered in estimating the fair market value of the property.[178] Ordinarily the profits of a business located on the property are not relevant to establish the fair market value of the property, but there are exceptions to this rule in circumstances where the property has special value to the owner and there is no other evidence upon which to establish the fair market value of the property.[179]

The particular use for which the land is most valuable or to which it is presently adapted may be considered by the jury in determining the fair market value of the property, but it may not be the sole basis for that determination.[180] Thus a witness may not base his or her estimate of the value of the property on its value for a single use such as the "highest and best use."[181] A witness may testify that the property has a fair market value of a certain amount and may explain on direct and cross examination the particular qualities of the property and the specific uses to which the property may be adapted, but the witness cannot testify that the property has a value of a certain amount for "building lot purposes" or "for the best use."[182] This rule is designed to avoid overvaluation of the property by preventing the jury from giving excessive weight to the value of the property to the condemner.[183]

The value of the land to the owner is not ordinarily relevant if there is a market value for the land.[184] A partial exception to this rule may exist when the property has a special value to the owner, without possible like value to others who may acquire it.[185] Such a special or peculiar value to the owner may be taken into consideration in determining the fair market value of the property.[186]

**Comparable Sales**

One method of establishing the fair market value of the property being taken is the introduction of sales of similar properties.[187] Whether a sale is sufficiently comparable to be admissible is a preliminary question for the trial court.[188] However, the trial court's discretion is not unlimited and the appellate courts will reverse the decision of the trial court in the appropriate circumstances.[189]

For a sale to be sufficiently comparable to be admissible, it must have been a voluntary sale, or an arm's length transaction, and cannot have been the result of a compromise.[190] Therefore sales to a condemner,[191] or under the threat of condemnation[192] are inadmissible, as are sales of property upon which are placed unusually stringent restrictions on the use of the property.[193] Also sales which have been affected or influenced by the public project for which the property is being acquired will also be inadmissible.[194]

If the sale was an arm's length transaction, the trial court must next consider whether the

properties are similar in nature and near the same location and that the time of the sale was at or about the time of the taking.[195] In making this determination, the trial court will consider the size,[196] the time of the sale,[197] changes in conditions since the time of the sale,[198] the current zoning or any imminent rezoning,[199] the location[200] and also the vicinity, proximity to existing improvements, improvements existing on the properties, terrain or other geographic features and all available uses to which the properties are adapted.[201] The sales do not have to be exactly comparable in every respect and there is no general rule on the degree of similarity required.[202]

After the trial court determines that a sale is comparable and may be admitted into evidence, the weight to be given to such a sale is a question for the jury.[203] If a particular sale was made under exceptional circumstances, these circumstances can be shown and the jury can determine the probative force of such a sale.[204]

**Opinions As To Value**

In addition to utilizing comparable sales to determine the fair market value of the property taken by the condemner, and any incidental damages and incidental benefits to the remainder of the property, lay[205] and expert witnesses[206] can give opinion evidence on the value of the property being taken. Thus the owner can give an opinion as to the fair market value of the property, but that opinion will be given little weight when founded on pure speculation.[207]

The trial court has wide discretion in the admission of expert testimony on the value of real property.[208] Neverthe-less the court cannot permit an expert to give an opinion as to the value of real property for a particular purpose, but should require the expert to base his or her opinion on the fair market value for all legitimate uses for which the property is available and reasonably adapted.[209]

The expert witness may state his or her opinion as to the value of the property and the basis on which he or she arrived at that opinion.[210] The answers given by the expert on cross examination may be considered by the court and jury in evaluating the opinion of the expert witness.[211]

The court and the jury are not bound by the opinion of the expert witness.[212]

**Incidental Damages**

When the condemner takes a part but not all of a parcel of property, the condemnation statutes permit the property owner to recover incidental damages for any injury to the remainder resulting from the taking (*T.C.A.* 29-16-114; 29-17-810). The payment of incidental damages is not required by the Tennessee Constitution, but rather is provided by statute.56[213] Incidental damages are properly measured by the decline in the fair market value of the remainder of the property by virtue of the taking.[214]

The award of incidental damages is limited to those property owners whose property is actually taken by the condemner.[215] Adjacent property owners whose land is not condemned but is

nevertheless adversely affected by the construction of the public improvement cannot recover incidental damages under these statutes.[216]

Where a portion of the property has been taken, the property owner may recover incidental damages only upon a showing of some specific injury to the remainder, or its value, which is the direct result of the taking.[217] The injury must be more than an inconvenience shared by all members of the public; rather, it must specifically affect the remainder of the property which was taken.[218] This does not result in an injury becoming noncompensable merely because other property owners are similarly affected.[219] If the property owner can establish that exceptional circumstances attend the taking and use of the property by the condemner which result in a special injury to the remainder of the property, the property owner may recover incidental damages even if the special injury is common to all property in the area.[220]

In addition to the diminution in the fair market value of the remainder, the condemnation statutes include as incidental damages: the reasonable expenses incurred for removing, relocating and reinstalling of furniture, household belongings, fixtures, equipment, machinery or stock in trade to another location not more than fifty (50) miles distant; the costs of any necessary disconnection, dismounting or disassembling and loading and drayage of such chattels; the recording fees, transfer taxes and other similar expenses incidental to conveying the property to the condemner; mortgage prepayment penalties; and the proration of real property taxes (*T.C.A.* 29-16-114).

The property owner can only recover moving expenses which have been actually incurred at the date of trial or which can be shown to be reasonably necessary in the future and can be accurately estimated by witnesses.[221] Such incidental damages cannot be recovered if the chattels to be moved are destroyed by fire prior to the moving of these chattels.[222] Also such moving or relocation expenses cannot be recovered for the removal of equipment, fixtures or other chattels which were not located on the land taken by the condemner.[223]

Although not specifically set out by statute, the following have also been found to constitute incidental damages to the extent they reduced the fair market value of the remainder of the property: noise, soot and inconvenience created by the operation of a railroad;[224] obstruction of view by a highway embankment;[225] reasonable apprehension of danger from the public improvement;[226] changes in the drainage;[227] and loss of access to an abutting street.[228]

**Incidental Benefits**

The condemner is entitled to have the amount of incidental damages reduced by the amount of incidental benefits which accrue to the remainder as the result of the construction of the public improvement (*T.C.A.* 29-16-114; 29-17-810). Like incidental damages, incidental benefits are determined independently of the just compensation required by the Tennessee Constitution.[229] Therefore incidental benefits cannot be considered in determining the amount of just compensation to which the property owner is entitled for the portion of the property taken by the condemner.[230]

Incidental benefits include only those benefits special to the remainder of the property owner's property as opposed to those general benefits of a public improvement shared by the public at large.[231] However, incidental benefits are not prevented from being special by the fact that other properties abutting the public improvement are similarly benefitted where those benefits are not common to all the properties in the vicinity.[232] Thus, increased accessibility to the property,[233] or easy access parking[234] may still constitute incidental benefits even though property owners on the same street have also gained better access or parking. 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 which may be set off against incidental damages.[235]

**Procedural Issues**

The general rule is that the incidental damages and incidental benefits are to be estimated as of the date of the taking.[236] However, since incidental damages and incidental benefits are premised on the impact to the remainder of the property resulting from the construction of the public improvement, proof showing the damage or benefits occurring after the taking has been permitted in instances where the trial occurs long after the public improvement has been completed.[237] Property owners whose property is being acquired for street, road, highway, freeway or parkway purposes are entitled to obtain a continuance of the condemnation case until the public improvement is completed in order to eliminate the uncertainty as to the incidental damages or incidental benefits which may occur as the result of the construction of the public improvement (*T.C.A.* 29-17-1201). If the condemnation case is tried before the project is completed, maps, drawings or photographs of the land may be introduced at trial as long as such evidence would not be misleading (*T.C.A.* 29-17-1202).

**Interest**

Interest at the rate of ten percent (10%) per annum must be paid by the condemner on any judgment obtained by the property owner (*T.C.A.* 29-17-813). This interest is allowed from the date of the takings on the amount in excess of the amount deposited with the clerk of the court.[238]

## Chapter Five
## Inverse Condemnation

### Introduction

As noted in Chapter One, Article I, Section 21 of the Tennessee Constitution prohibits the taking of private property for public use without the payment of just compensation. Property owners whose property is taken for a public use without the payment of just compensation have a remedy for such a taking in a "reverse condemnation" or "inverse condemnation" action (*T.C.A.* 29-16-123).[239] That remedy is the exclusive means by which a property owner may recover his or her property taken by an entity with the power of eminent domain.[240]

Inverse condemnation claims have been classified by the courts into two general categories: physical takings and regulatory takings.[241] Physical takings occur where property in addition to that previously condemned in formal proceedings is taken by the condemner without payment of just compensation to the property owner,[242] or where an entity with the power of eminent domain appropriates private property for public use without the institution of formal condemnation proceedings.[243] Regulatory takings occur when a regulation adopted pursuant to the police power fails to substantially advance a legitimate state interest,[244] or denies an owner economically viable use of his or her property.[245]

### Physical Takings

One of the most difficult questions presented in any takings case is whether the damages which have occurred to private property are sufficient to constitute a taking for which just compensation must be paid pursuant to the Tennessee Constitution. Courts have held that the action of any entity with the power of eminent domain in carrying out the purposes for which it was created may constitute a taking when it destroys, interrupts or interferes with the common and necessary use of real property of another, even if there is no actual entry upon the property.[246]

However, not every action by an entity with the power of eminent domain which damages or interferes in the use of private property will constitute a taking.[247] Whether a taking has occurred is a fact specific determination based on the nature, extent and duration of the intrusion onto the private property.[248]

Thus, as noted in the preceding chapter on incidental damages, a property owner whose land is not formally condemned for a public improvement may not, as a general rule, recover for the consequential damages resulting from the construction or operation of a public improvement located near, but not on, his or her property.[249] Such nonrecoverable damages include all injuries naturally and unavoidably resulting from the proper, non-negligent construction or operation of a public improvement which are shared generally by property owners whose properties lie within the range of the inconveniences necessarily incident to the improvement.[250]

Thus, the owner whose property is formally condemned in part for the construction of a public improvement will be entitled to recover incidental damages while the owner whose land is not formally condemned but nonetheless suffers actual damages from the construction or operation of a public improvement nearby will not be entitled to recover for such damages. This distinction results from the eminent domain statutes permitting incidental damages to be recovered where a portion of a larger tract of property is taken for a public improvement, while the inverse condemnation remedy is only available to owners of property which is taken, and not just damaged, by an entity with the power of eminent domain.

Courts have found that a taking has occurred when the proper non-negligent construction of a public improvement directly invades or peculiarly affects private property and creates substantial and continual interference with the practical use and enjoyment of the land. Thus, takings have been found where the entity with the power of eminent domain failed to acquire drainage easements or flowage easements which were sufficient to handle the storm water runoff or other discharges which were necessarily incidental to public improvements,[251] or diverted a stream to another property as the result of the construction of a public improvement,[252] or denied access to a highway as the result of the construction on the highway.[253] Takings have also been found where the entity with the power of eminent domain failed to acquire adequate slope easements for highways which resulted in the encroachment of the highway on private property,[254] or failed to acquire aircraft over-flight easements across property located adjacent to airports,[255] or failed to acquire interests on property which was affected by non-natural electric conditions produced by an electric street railroad company.[256] In each of these cases the courts found that the nature, extent and duration of the intrusion on, or interference with, private property resulted in the taking.

However, mere proof that the construction or maintenance of a public improvement has resulted in a loss of profits from a business operated on property located adjacent to the public improvement,[257] or has resulted in a decrease in property value,[258] will be insufficient to establish a taking.

Another problem that must be confronted in determining whether or not an injury to private property constitutes a taking is the distinction between a nuisance and a taking.[259] Courts have defined a nuisance as anything that annoys or disturbs the free use of one's property, or that renders its ordinary use or physical occupation uncomfortable.[260] A temporary nuisance is a nuisance which can be corrected by the expenditure of labor or money.[261] Courts usually classify as a nuisance injuries to private property which result from the improper, negligent construction or operation of a public improvement or which are temporary in nature and permit successive recoveries by the property owner until the nuisance is abated.[262] Conversely, courts usually classify as takings injuries to property of a permanent nature resulting from the proper, non-negligent construction or operation of a public improvement and permit only a single recovery for such takings.[263]

Whether a particular activity sufficiently interferes with the use of private property so as to constitute a compensable taking will be seen to be a matter of degree. 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 private property, but rather are shared by the public generally. Consequential damages are thus analogous to damages caused by a public nuisance for which a private property owner cannot recover without establishing damages attributable to the private nuisance. 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 private property and which peculiarly affect the property. Such damages are only 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 private 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. Since this discussion reveals that the finding of a taking is a fact specific inquiry, it is helpful to review the circumstances where courts have found a physical taking.

**Impairment of Easements of Access and Way**

Courts in Tennessee have recognized that a property owner has an easement of access between his land and the abutting street, which extends to the center of the abutting street, absent any evidence to the contrary.[264] Although as noted in the preceding chapter some courts have found that an impairment of a property owner's easement of access can constitute incidental damages to the remainder of property when a portion of the property is taken in a condemnation action, other courts have held that any impairment of this right of ingress and egress constitutes a taking for which the owner may recover just compensation in an inverse condemnation action.[265] Thus property owners have been allowed to recover just compensation where the owners' access was destroyed by a change in the grade of a street or highway,[266] or by the construction of a fence[267] or by the construction of a drainage ditch alongside a highway.[268]

In addition to an easement of access, a private property owner whose property abuts a public street or road has an easement of way, or right of passage, in the street abutting his or her property.[269] This easement of way is a private property right which exists in addition to the right to use the street in common with the general public.[270] This easement extends along any street or alley upon which the owner's property abuts, in either direction, to the next intersecting street.[271] This right is usually impaired by the closing of public streets or roads.[272] No recovery has been allowed when a two-way street abutting an owner's property has been changed to a one-way street, as such action constitutes a valid exercise of the police power for which the payment of just compensation is only required in unusual circumstances.[273]

**Water Damage**

Takings have been found where the construction or operation of a public improvement resulted in recurring flooding of private property,[274] or increased the amount of storm water runoff which caused erosion.[275] A taking has also been found where water was regularly discharged from water treatment facilities across adjoining private property,[276] or where a public improvement altered the flow of a stream so as to cause erosion,[277] or where the con-struction of a public improvement diverted a stream which previously flowed across private property.[278]

**Aircraft Overflights**

A taking of airspace above private property may result from frequent low flights of aircraft which substantially interfere with the practical use and enjoyment of the property.[279] Tennessee courts have yet to address whether noise, vibrations and fear of aircrafts unaccompanied by an actual physical invasion of the airspace immediately over the property owner's land would constitute a taking.[280] However, some of the language in *Johnson v. City of Greeneville* would indicate that Tennessee courts would not require an actual physical invasion of airspace to find a taking.

A taking has also been found when trees were cut on private property in an airport approach zone established by a municipal ordinance.[281] The court found that the removal of the trees and the limiting of the height of buildings in the airport approach zone would constitute a taking.[282]

**Takings Prior to Condemnation**

Where a condemner appropriates private property prior to the institution of formal condemnation proceedings, a taking obviously occurs. Thus, a taking was found where electric transmission lines were constructed before a condemnation proceeding was filed.[283] In that situation the appropriation is illegal until just compensation is paid to the property owner, and the condemner acquires only a possessory right which is not transferable.[284] Takings have also been found where a condemner filed condemnation proceedings but nonsuited such proceedings before paying just compensation to the property owner,[285] where a municipality annexed a subdivision and asserted ownership over the water and sewer system therein without paying just compensation to the owners of the water and sewer system,[286] where the condemner failed to acquire the interest of the lessee of property conveyed to the condemner by the lessor,[287] or where the condemner failed to acquire the property interests in certain restrictive covenants from the residents of a subdivision prior to constructing a public improvement in violation of those covenants.[288] The property owner's sole remedy for such takings is an inverse condemnation action, as the courts have specifically rejected attempts to enjoin,[289] or eject[290] the condemner who has taken the property without instituting condemnation proceedings.

**Additional Takings**
**284**
A significant issue presented in any case where a property owner seeks to recover just compensation for the taking of private property in addition to that previously acquired by the

condemner is whether the property owner is estopped by the prior condemnation award or deed to the con-demner from recovering additional compensation.[291] The condemnation award encompasses all damages, present and future, of which the property owner knew or should have known would result from the proper construction or operation of the public improvement.[292] The burden of proof of showing such an estoppel is on the condemner, unless the language of the condemnation decree or deed is unambiguous.[293]

An exception to this rule is applicable for losses or damage which could not reasonably have been anticipated by either party, or if alleged by the property owner in the condemnation proceeding, would have been rejected as speculative or conjectural.[294] Under this exception recovery has been permitted for landslides onto private property which resulted from cuts made during the construction of a highway,[295] for damage to a dam caused by excessive blasting during the construction of a pipeline,[296] for damage to a wall caused by blasting for electric transmission lines[297] or for damage to a dam resulting from the break in a sewage line.[298] Recovery has been denied when the property owner knew or should have known that the curbs limiting access to his property would be constructed as part of a highway project[299] or where the fill from a street which was elevated by the condemner spread onto adjoining property since the owner knew or should have known that such fill would have encroached upon his property when he conveyed a portion of the property to the condemner for the street improvement project.[300]

**Regulatory Takings**

The United States Supreme Court revolutionized the law of regulatory takings in 1987 when it held that a local government must pay just compensation for temporary regulatory takings.[301] Also in that same year the United States Supreme Court decided two other cases which dealt with regulatory takings.[302] Since those decisions, regulatory taking cases have flooded the courts as property owners seek to recover for the diminution in the value of their property resulting from the enforcement of police power regulations affecting private property. Not surprisingly, most of these cases involve land use regulations adopted by local governments.

Although the inverse condemnation statute would not appear to be applicable by its terms to a regulatory taking of private property where no physical invasion or interference is involved, the United States Supreme Court[303] and a Tennessee court[304] have held that an inverse condemnation action could be maintained based on unreasonable restrictions placed on the use of property by a regulation adopted pursuant to the police power.

A regulation adopted pursuant to the police power can result in a taking of private property for which the payment of just compensation is required if the regulation fails to substantially advance a legitimate state interest,[305] or denies the owner economically viable use of his or her property.[306] The first part of this two-pronged test requires the court to determine whether the governmental entity has a legitimate state interest which prompted the adoption of the regulation.[307] A broad range of governmental purposes will satisfy this requirement including insuring proper residential development,[308] prohibiting barriers to public access to beach areas,[309] protecting beaches from erosion,[310] protecting residential neighborhoods from noise, littering

and vandalism associated with transient use of residential property[311] and controlling the rate or character of residential growth.[312]

If a legitimate state interest is present the court must determine whether the regulation substantially advances that interest.[313] The government is entitled to a presumption that the regulation does advance the public interest;[314] however, a property owner can overcome this presumption by showing the lack of a nexus between the effect of the regulation and its original purpose.[315] Thus, courts have found that requiring a property owner to grant a public easement along a beach as a condition to construct a house on a beach does not substantially advance the public interest in protecting the public's ability to see the beach.[316] In addition the regulation must be reasonably related to the public need or burden that a property owner's use of his or her property creates or to which it contributes.[317] Therefore regulations that impose land dedication requirements in order to develop property may constitute a taking if the property owner is required to dedicate property in excess of the amount which is necessary to offset the additional burdens on the public interest resulting from the use of his or her property.[318]

The second prong of the taking test requires an inquiry into whether the regulation denies the property owner the economically viable use of his or her property.[319] This is a highly fact-specific inquiry which is not subject to a set formula.[320] Whether a taking has occurred is a question of degree and cannot be determined by general propositions.[321] The courts have utilized ad hoc factual inquiries relying on factors such as the character of the governmental action, the economic impact of the regulation on the property owner, the interference with reasonable investment-backed expectations, and the nature and extent of the interference with the rights in the property as a whole.[322]

In considering the economic impact of the regulation on private property, the courts recognize that the mere diminution of property value, or the substantial reduction of the attractiveness of the property to potential purchasers, or the denial of the ability to exploit a property right the owner previously believed was available, will not suffice to establish a taking.[323] The inquiry must instead focus on the value of the remaining uses to which the property may be put,[324] and a comparison of the owner's investment or basis with the market value of the property subject to the regulation.[325] When considering whether the regulation inter-feres with the owner's investment-backed expectations, the court must determine that the expectations were reason-able, or at least consistent with the law in force at the time of the formation of the expectation.[326] The purchase price is only one of the factors that should be considered in determining whether a regulation interferes with reasonable investment-backed expectations.[327]

Courts applying these factors have found takings in instances where there was no value for the uses remaining for the property after the adoption of the regulation,[328] or where the value of the property decreased 99% after the imposition of a regulation.[329] Courts have rejected takings claims where valuable uses of the property remained after the imposition of the regulation, even if those uses were not the most valuable uses.[330]

**Ripeness**

Since the determination of whether or not a particular regulation has resulted in a taking of private property depends upon the economic impact of the regulation, a takings claim is not ripe, and cannot be considered by a court, until the property owner has obtained a final decision from the appropriate governmental agency on the application of the regulation to the particular parcel of property.[331] In the zoning context this final decision requirement forces the property owner to obtain two decisions from the governmental entity, a rejected development plan and a denial of a variance.[332] Until such time as the property owner has obtained such a final decision, it is not possible to determine the actual economic impact of a regulation on the property in question.[333]

For taking claims brought in federal courts there is a second ripeness requirement: the property owner must first have sought just compensation in the state courts in order to bring a takings claim in the federal courts.[334] Thus a property owner in Tennessee must first bring an inverse condemnation action in the state courts before filing suit in the federal courts to recover just compensation for a regulatory taking.

**Measure of Damages**

The normal measure of damages in an inverse condemnation case is the same as in any condemnation case.[335] Thus where a permanent regulatory taking has occurred the measure of damages is as discussed in Chapter Four. Where a temporary taking occurs, the property owner is entitled to the value of the use of the property during the time of the temporary taking.[336] The value of the temporary use of property is normally measured by the difference in rental value resulting from the imposition of the regulation.[337] However, some courts have permitted the property owner to recover in excess of the rental value of the property based on the fair market value of the right to develop the property.[338]

**Statute of Limitations**

Inverse condemnation suits must be commenced within one year after the land has been actually taken possession of, and the work of the proposed internal improvement begun (*T.C.A.* 29-16-124).[339] In establishing the date the taking occurred, which commences the running of the statute of limitations, the courts consider the date of the actual injury to the property, or the date the owner had reasonable notice or knowledge of the injury.[340]

These general rules are somewhat difficult to apply where the private property is taken due to a public improvement located on adjacent property, or due to a regulatory taking. Thus, the statute of limitations was found not to bar a suit filed five years after a public improvement was completed on adjacent property but filed within one year of the date flooding occurred on the private property.[341] In a case involving a taking of airspace due to aircraft overflights, the court found that the operative date for the purposes of the statute of limitations was the date that direct overflights of low-flying aircraft commenced over private property, instead of the date the property for the airport was condemned or the date the construction of the airport was completed.[342]

The statute of limitations does not commence to run until the landowner knows or should have known that the injury to his or her property was permanent in nature.[343] Thus, where a property owner received repeated assurances from the condemner over a two-year period that flooding caused by highway construction would be corrected, the court held that the statute of limitations did not bar the suit since the court found that the suit was filed within one year of the date the property owner discovered that the condemner had failed to correct the problem.[344]

A similar result was obtained in a case involving a municipal ordinance which limited the height of buildings which could be constructed in an airport glide path.[345] The court rejected the municipality's argument that the passage of the ordinance commenced the running of the statute of limitations, holding instead that the statute began to run only when the owner's property was injured by the taking and not when he or she had notice of the taking.[346]

In instances where the condemner nonsuits a condemnation case after commencing construction of a public improve-ment, the statute of limitations began to run on the date the nonsuit is entered rather than the date construction was commenced.[347]

**Attorney's, Engineer's and Appraiser's Fees**

If a property owner prevails in an inverse condemnation case, he or she is entitled to recover from the condemner his or her reasonable costs, disbursements and expenses including reasonable attorney, appraisal, and engineering fees actually incurred because of the proceedings (*T.C.A.* 29-16-123). The trial court must award such fees to the property owner if a demand is made by the property owner, although the court has the discretion to determine the reasonableness of those fees.[348]

## Chapter Six
## Leasehold Damages

### Introduction

It has been held that a leasehold constitutes a compensable property interest under the law of eminent domain.[349] This interest has been characterized as the right of the lessee to remain in undisturbed possession of the leased premise until the expiration of his term.[350] 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 impairment of access to the leasehold property can be shown.[351] Also a tenant is entitled to recover compensation where the condemnation of a part of the leased premises destroys the value of the leasehold.[352]

### Valuation of the Leasehold

The lessee is entitled to any excess in value of his or her unexpired leasehold over and above the rentals which would be due for the unexpired term,[353] or in other words he or she is entitled to recover the fair market value of his or her leasehold interest less the rents he or she must pay to the landlord.[354] While evidence of a property owner's business profit is normally not allowed in condemnation cases, such may be admissible under the peculiar facts of a case to show the fair market value of the lessee's interest.[355] In the event of a partial taking of the leasehold, the lessee is entitled to recover the difference in value of the lease before the taking and the value of the lease after the taking.[356]

Incidental damages to the leasehold include, by statute, the lessee's moving expenses[357] (*T.C.A.* 29-16-114), and where only a portion of the leasehold is acquired, any damage to the remainder of the leasehold.[358]

Where a partial taking of property subject to a leasehold occurs, the jury must first determine the total amount of just compensation for the taking, including the fair, reasonable cash market value of the property taken, on the date of the taking, and incidental damages, if any, to that portion of the property remaining.[359] In determining the total fair market value of the fee, the jury should consider the lease- hold as one element of the total fair market value of the property, as the leasehold indicates one available use of the property.[360] The total compensation is to include all losses suffered by all parties having an interest in the property affected and cannot exceed the value of the fee, unencum-bered by the lease on the date of taking.[361] The jury then apportions the total compensation between the landlord and tenant.[362]

### 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. As noted above, the total compensation awarded to the owner and

lessee may not exceed the value of the unencumbered fee and this value, once established, may not be further increased because of the existence of an unexpired lease at the time of condemnation.[363] In other words, the value of the leasehold is considered to be an integral part of the total value of the unencumbered tract of land.[364]

The jury should then apportion the total compensation (fair market value plus incidental damages) between lessor and lessee by determining the lessee's interest, which is the fair market value of the leasehold on the property minus rent actually called for in the lease plus the incidental damages to the leasehold, with the remainder of the property's fair market value going to the lessor.[365] This formula for apportionment is applicable regardless of whether a long term or short term lease is involved.[366]

The condemner may specify in the condemnation petition the various interests of the lessor and lessee, apportion the amount deposited with the court and settle the case with either the lessor or the lessee.[367] If the condemner follows this procedure, the lessee or lessor may then withdraw its amount in full satisfaction of its claim.[368]

**Appeal**

Both the property owner and lessee have an independent right to appeal the amount of damages awarded: joinder of parties is not necessary.[369] On appeal, the court may increase the award to the appellant as long as it determines that the initial award did not accurately reflect the fair market value of the unencumbered fee,[370] or did not reflect the total aggregate amount of incidental damages.[371] 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.[372]

## Chapter Seven
## The Uniform Relocation Assistance And Real Property Acquisition Acts

### Introduction

The Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970[373] was enacted for the purpose of providing fair and equitable treatment of persons displaced as a result of federal and federally assisted programs,[374] as well as consistent treatment of owners during the actual land acquisition process.[375] 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;[376] 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;[377] and 3) Uniform Real Property Acquisition Policy, which sets out the procedures to be followed in acquiring real property.[378]

In 1972, Tennessee enacted the Uniform Relocation Assistance Act of 1972, which generally followed the provisions of the federal Act and had the effect of making such relocation assistance and land acquisition procedures mandatory for any projects conducted by state agencies or supported by state financial assistance (*T.C.A.* 13-11-101 *et seq*.). The Tennessee Act was amended in 1980 to also include any projects by a municipality or a county which received federal or state financial assistance.

The focus of this chapter will be on the land acquisition procedures, since these are of considerable importance to attorneys representing condemners or condemnees. The federal government has now promulgated government-wide regulations for real property acquisition,[379] which have been adopted by reference by such agencies as the Tennessee Valley Authority,[380] the Environmental Protection Agency[381] and the Department of Housing and Urban Development.[382]

### 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. The regulations 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; and 4) the acquiring agency make a written offer to the property owner for the full amount believed to be the just compensation. The written offer must be accompanied by a written summary statement of the offer explaining the amount of the offer, the description of the property being acquired and an identification of any improvements being acquired.[383]

The agency must make reasonable efforts to contact the owner and discuss the offer, and explain the basis for the offer and the acquisition policies of the agency. The owner must be given a reasonable opportunity to consider the offer and present material the owner believes is relevant in determining the amount of just compensation to which the owner is entitled. The agency must consider the owner's presentation. The agency must update its appraisal if the owner's information or any material change in the character or the condition of the property indicates the need for a new appraisal, or if there has been a significant delay since the time the appraisal was completed. The agency cannot advance the time of condemnation or take any other coercive action in order to induce a settlement by the owner.[384]

The type of appraisal which must be obtained by the agency is determined by the complexity of the appraisal problem.[385] The appraisal must conform to minimum standards set by each agency and with commonly accepted appraisal practice if the appraisal does not require an in-depth analysis.[386] If an in-depth analysis is required, a detailed appraisal must be performed which conforms to nationally recognized appraisal standards including, if appropriate, the Uniform Acquisition Standards for Federal Land Acquisition.[387] At a minimum a detailed appraisal must include:[388]

1. The purpose and/or function of the appraisal, a description of the estate being appraised, and a statement of the assumptions and limiting conditions affecting the appraisal;

2. An accurate description of the physical characteristics of the property (and any remainder if a partial taking will occur), a statement of known and observed encum-brances, if any, title information, location, zoning, present use, an analysis of highest and best use and at least a five (5) year sales history of the property;

3. A description of all relevant and reliable approaches to value utilized consistent with commonly accepted appraisal practice (market data, income or replacement cost). If more than one approach is used, there must be an analysis and reconciliation of approaches to value;

4. A description of comparable sales, including the parties to the transaction, source and method of financing and verification by the parties involved;

5. A statement of the value of the real property to be acquired, and if a partial taking is proposed, a statement of the damages and benefits, if any, to the remainder;

6. The effective date of the appraisal, signature and certification of the appraiser.

The appraiser is required, to the extent permitted by applicable law, to disregard any decrease or increase in the fair market value of the property caused by the project for which the property is being acquired or by the likelihood that the property would be acquired for the project, other than due to physical deterioration within the reasonable control of the owner.[389]

Once the appraisal is completed the agency must have the appraisal reviewed by a review appraiser.[390] The review appraiser must examine the appraisal to assure that it meets all applicable requirements, and must seek any necessary corrections thereto. The review appraiser

then either approves the appraisal or develops a new appraisal consistent with the above requirements.

Before the agency can require the owner to surrender possession of the real property, the owner must be paid the agreed upon purchase price, or if no agreement has been reached, deposit with the court an amount not less than the approved appraisal for the fair market value of the property, or the amount of the court's award of compensation in the condemnation action. In exceptional circum-stances the agency can obtain a right-of-entry for construction purposes prior to making the payment available to the owner.[391]

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 an administrative settlement, the agency should take the following factors into consideration:[392]

1. the appraiser's opinion of value;
2. any recent court awards for similar type property;
3. the estimated trial costs; and
4. valuation problems with the property in question.

The agency is required to reimburse property owners for recording fees, transfer taxes, and similar costs incidental to conveying real property, penalty costs for prepayment of any pre-existing recording mortgage, entered into in good faith, encumbering the property and the pro rata portion of real property taxes paid by the owner which are allocable to a period subsequent to the date of title vesting with the agency or the effective date of possession of the property by the agency, whichever is earlier.[393]

The owner is also entitled to be reimbursed for his reasonable expenses including attorney, appraisal and engineering fees actually incurred because of a condemnation proceeding if: 1) the court determines that the agency cannot acquire the property in question; 2) the condemnation case is abandoned by the agency other than under an agreed upon settlement; or 3) the court having jurisdiction rendering a judgment in favor of the owner in an inverse condemnation case or the agency settles such a case.[394]

## Chapter Eight
## Forms

### Form 1
### Petition For Condemnation

Petitioner _____ respectfully states as follows:

1. Petitioner is a municipality and public corporation of the State of Tennessee and has the power of condemnation and eminent domain for public purposes when public convenience requires it pursuant to _____ (insert charter or private act section). This petition is filed pursuant to *Tennessee Code Annotated,* Section 29-17-801 *et seq.,* (or 29-16-101 *et seq.,* if jury of view procedure is used) to acquire certain property rights for the completion of _____ (identify project) with specific authority as set out in _____ (identify ordinance or resolution authorizing condemnation for project).

2. The property rights sought to be acquired are part of the property rights in real estate located in the _____ (identify civil district) District of _____ County, Tennessee, conveyed to _____ (insert owner's name) from _____ (insert immediate predecessor in title) of record in Book _____, Page _____, Register's Office for _____ County, Tennessee. The aforementioned property being described more particularly as follows:

[Insert description]

All as more particularly shown on the drawing or map attached hereto as Exhibit _____.

3. Petitioner has determined that respondent(s) owns the entire fee simple interest of the above-described real estate, subject to the encumbrances set out below:

[List encumbrances]

4. Petitioner has determined the amount to which the respondent(s) is entitled is $_____, and said amount is deposited with the clerk of the court.

5. [Add if jury of view is used] Petitioner has filed this petition for the purpose of obtaining the issuance of a writ of inquiry of damages and the appointment of a jury of view pursuant to *Tennessee Code Annotated* Section, 29-16-101 *et seq.*

WHEREFORE, premises considered, petitioner prays:

1. That a hearing be had in this matter on an early date and at the hearing, petitioner receive the right to possession and, if necessary, a writ of possession issue to the Sheriff of _____ County to the petitioner in possession, and [or if jury of view procedure is requested]

1. That a hearing be held on this matter on an early date and at that hearing the court issue a writ of inquiry of damages and appoint a jury of view.

2. That an Order of Reference be entered to determine the amount of taxes due petitioner on said property and said amount to be paid to petitioner, and

3. That all additional proceedings be had in this matter and at the final hearing of this cause, petitioner, its successors and assigns, be decreed the property interests set out above,

4. That petitioner have any and all additional relief to which it is entitled including the assessment of costs as provided by *Tennessee Code Annotated,* Section 29-17-812.

Respectfully submitted,

_____

**Form 2A - Service By Sheriff**

To: (identify name and address of respondents)

**NOTICE**

Take NOTICE that on the _____ day of _____, 1992, Petitioner _____ filed a petition in this court against you, praying for the condemnation of property rights in the real estate fully described in the petition, a copy of which accompanies this NOTICE. You are further notified that said petition will be presented to the court for hearing at 9 a.m. on the _____ day of _____, 19 ____, in the Circuit Court, to determine whether petitioner should be granted an order of possession, entitling it to immediate possession of the property rights described in the petition.

You must plead, answer, or except to the petition as provided by law, or a judgment will be taken as confessed against you and the matter proceeded with as provided by law.

(Include following two paragraphs if using bulldozer/quick take procedure)

You are further notified, pursuant to *Tennessee Code Annotated* § 29-17-803, that after the expiration of five days from the date of giving of this NOTICE, if the petitioner's right to condemn and acquire the property rights described in the petition is not questioned or contested by written formal objection filed with the clerk of this court and served upon the petitioner's attorney, the petitioner shall have the right to take possession of the property rights sought. If necessary to place the petitioner in possession thereof, the court shall issue a Writ of Possession to the Sheriff of _____ County to put the petitioner in possession of the property rights.

If you desire to contest the taking by condemnation under the laws of eminent domain, you must appear at the time designated after having filed your written formal objection. If you fail to appear or choose not to appear, an Order of Possession will be entered granted to the petitioner the property rights described. This hearing, however, will not be concerned with the value of your property or your interest therein and will not be concerned with the just compensation to which you are entitled.

This _____ day of _____, 19____.

Circuit Court Clerk

_____

By: _____

Deputy Clerk

**Officer's Return**

I certify that I served this NOTICE with a copy of the Petition for Condemnation, upon serving the above-named respondent(s), by personally delivering a copy to said respondent(s), this _____ day of _____, 19_____.

SHERIFF OF _____ COUNTY, TENNESSEE

BY: _____

**Form 2B - Service By Mail**

To: (identify name and address of respondents)

**NOTICE**

Take NOTICE that on the _____ day of _____, 1992, Petitioner _____ filed a petition in this court against you, praying for the condemnation of property rights in the real estate fully described in the petition, a copy of which accompanies this NOTICE. You are further notified that said petition will be presented to the court for a hearing at 9 a.m. on the _____ day of _____, 19____, in the Circuit Court, to determine whether petitioner should be granted an order of possession, entitling it to immediate possession of the property rights described in the petition.

You must plead, answer, or except to the petition as provided by law, or a judgment will be taken as provided by law.

(Include the following two paragraphs if using bulldozer/quick take procedure)

You are further notified, pursuant to *Tennessee Code Annotated* § 29-17-803, that after the expiration of five days from the date of the giving of this NOTICE, if the petitioner's right to condemn and acquire the property rights described in the petition is not questioned or contested by written formal objection filed with the clerk of this court and served upon the petitioner's attorney, the petitioner shall have the right to take possession of the property rights sought. If necessary to place the petitioner in possession thereof, the court shall issue a Writ of Possession to the Sheriff of _____ County to put the petitioner in possession of his property rights.

If you desire to contest the taking by condemnation under the laws of eminent domain, you must appear at the time designated after having filed your written formal objection. If you fail to appear or choose not to appear, an Order of Possession will be entered granting to the petitioner the property rights described. This hearing, however, will not be concerned with the value of your property or your interest therein and will not be concerned with the just compensation to which you are entitled.

This _____ day of _____, 19____.

Circuit Court Clerk

_____

By: _____

Deputy Clerk

**Certificate Of Service**

This is to certify that this NOTICE and a copy of the Petition for Condemnation has been mailed to all respondents, by U.S. Certified Mail, this _____ day of _____, 19 ___.

_____
Attorney for Petitioner

**Form 3 - Motion For Notice By Publication**

Petitioner _____ pursuant to Rule 4.05 of the Tennessee Rules of Civil Procedure, *Tennessee Code Annotated* §§ 29-16-105 and 21-1-203, respectfully moves for an order that notice of the Petition for Condemnation filed herein upon the respondents, _____, be made by publication and for grounds states that the residence of these respondents is unknown and cannot be ascertained upon diligent inquiry. Petitioner relies on the affidavit of its counsel of record, _____, filed herewith in support of this motion.

Respectfully submitted,

_____

Attorney for Petitioner

_____

Certificate Of Service

**Form 4 - Affidavit Of _____**

State Of Tennessee
County Of _____

I, _____, being first duly sworn, state as follows:

1. Affiant is a properly licensed attorney in the State of Tennessee and is the attorney for the petitioner, _____, in this case.

2. Affidavit states that the property rights sought are part of certain property known as _____ (describe property).

3. Affidavit would state that he has made numerous inquiries and has obtained an extensive title search in attempts to locate the respondent(s), _____. A copy of that title search is attached hereto as Exhibit A.

4. Affidavit would state that he has made a diligent effort to locate the (names/addresses) of the respondent(s) and has been unsuccessful.

FURTHER, AFFIANT SAITH NOT.

_____

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

_____
Notary Public

My Commission Expires: _____

Certificate Of Service

## Form 5 - Order Of Publication

It appearing to the court from the affidavit of _____, attorney for the petitioner, that respondent(s), _____, are (unknown or non-residents of the County of _____ and the State of Tennessee) and ordinary service of process cannot be had upon them;

It is ORDERED, that publication of this order be made for four consecutive weeks in the _____, (specify newspaper) a newspaper published in _____ County, Tennessee, notifying the respondent(s), _____, that they are required to answer to make defense to the Petition for Condemnation in the office of the Circuit Court Clerk of _____ County, Tennessee, within 30 days after the fourth weekly publication of this order and that, upon their failure to do so, the Petition for Condemnation will be taken as admitted by them and the case set for hearing without their presence.

_____

Judge

Approved For Entry:

_____
Attorney for Petitioner

Certificate Of Service

## Form 6 - Order Of Possession

### Order Of Possession

This cause was heard on the _____ day of _____, 19_____, to determine whether the petitioner should be granted possession of the respondents' property. Based upon the pleadings, exhibits, as well as the entire record,

IT IS THEREFORE ORDERED by the court that petitioner have and receive title and possession to the property rights sought to be condemned, and that a Writ of Possession issue, if necessary, in order to put petitioner in possession of said property, being more particularly described as follows:

[insert legal description of property being acquired]

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this matter be referred to the clerk of the court to determine past due and unpaid county/municipal taxes which are a lien upon said property.

The clerk of this court will make out and certify to the petitioner, _____, a copy of this Order of Possession.

ALL FURTHER MATTERS ARE RESERVED.

ENTERED this _____ day of _____, 1992.

_____

Judge

Approved For Entry:

_____
Attorney for Petitioner

Certificate Of Service

**Form 7 - 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 _____ County, Tennessee, upon the Petition for Condemnation and Notice thereof to respondents. It appearing to the court that said petition and notice have 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 _____ 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 shall 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 further notice thereof need be given, there to be impaneled and sworn, after which they will proceed immediately to the property sought to be condemned and examine it, hear testimony of witness, 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 will make his return thereof to the court.

This _____ day of _____, 19____.

_____

Judge

Approved For Entry:

_____

Attorney for Petitioner

Certificate Of Service

**Form 8 - Writ Of Inquiry**

State Of Tennessee
County Of _____

TO THE SHERIFF OF _____ COUNTY, TENNESSEE

A petition has been filed in the Circuit Court of _____ County, Tennessee, for the condemnation of certain 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 _____ o'clock in open court in the Circuit Court of _____ County, Tennessee, at [insert herein the place where the court sits]:

1.
2.
3.
4.
5.
Alternative:

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 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 court]

By: _____
(Clerk or Deputy Clerk)

**Form 9 - 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 interest taken by Petitioner _____. 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 petitioner, 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 the Jury of View

Received from the Jury of View and returned to the clerk of the court this _____ day of _____, 19_____.

Sheriff Of _____ County

_____

BY: Deputy Sheriff

**Form 10 - Order Confirming Report Of The Jury Of View**

It appearing to the court that the Jury of View 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 (Optional: if deposit made by 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 other liens or 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, for which petitioner has heretofore paid into this court the sum of $_____.

3. That respondents are entitled to interest at the rate of 10 percent per annum on the amount of $_____, that 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 26-5-108(b).

This the _____ day of_____ 19____.

_____
Judge

Approved For Entry:

_____
Attorney for Petitioner

Certificate Of Service

**Form 11 - Appeal From Finding Of The Jury Of View**

Petitioner, _____, 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 29-16-118.

By _____
Attorney for Petitioner

I am surety for costs not to exceed $_____

By _____

Certificate Of Service

**Form 12 - Notice Of Dismissal**

Comes to the petitioner, pursuant to Rule 41.01 of the Tennessee Rules of Civil Procedure and files this notice of voluntary dismissal as to the Respondent _____.

Respectfully submitted,

_____
Attorney for Petitioner

Certificate Of Service

**Form 13 - Order Of Dismissal**

Petitioner, _____, having given notice of voluntary dismissal pursuant to Rule 41 of the Tennessee Rules of Civil Procedure against Respondent _____.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case is hereby DISMISSED as against the respondent, _____, and that the moneys heretofore deposited into court shall be refunded to petitioner, minus the court costs.

Entered this _____ day of _____, 19___.

_____
Judge

APPROVED FOR ENTRY:

_____
Attorney for Petitioner

Certificate Of Service

**Form 14 - Agreed Final Order**

This cause having been compromised and settled, as evidenced by the signatures of counsel for petitioner and the signatures of the respondents, and the court being duly and sufficiently advised;

It is hereby ORDERED, ADJUDGED and DECREED by the court that the respondents have and recover the sum of $_____ the same being the fair cash market value of the property described hereinbelow, [included if using bulldozer/quick take procedure] petitioner having heretofore paid into court $_____ at the time of filing the Petition for Condemnation.

It is further ORDERED, ADJUDGED and DECREED by the court that all of the title to the property described hereinbelow be, and the same is hereby divested out of respondents and all other persons claiming any adverse interest therein and hereby is vested in petitioner _____ in fee simple, said property being more particularly described as follows:

[description of the property]

It further appearing to the court that the property hereinabove described may be subject to lien for taxes due, interest and penalty, if any, owing to _____ (county and/or municipality in which property located) and in accordance with *Tennessee Code Annotated,* Section 26-5-108(b), 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 lien upon said property, and shall issue to each of the officials charged with the collection of any taxes 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 out of whom title is divested; whereupon each of said officials shall certify to said clerk an itemized statement of taxes, interest and penalty, if any, which were a lien upon said land as of the date of entry of this Agreed Final Order.

It is therefore ORDERED, ADJUDGED and DECREED that the clerk is directed to pay out of the money deposited by the petitioner any unpaid taxes that may be determined to be owing by the above references, and the clerk shall pay any remaining funds to the respondents.

It is further ORDERED by the court that the costs in this cause be and the same are hereby taxed against the petitioner for which execution may issue if necessary.

The clerk of this court will make out and certify to the petitioner, _____, a copy of this judgment together with a cost bill for the lawful costs of this cause, for payment by the Petitioner _____.

Entered this _____ day of _____, 1992.

_____

Judge

Approved For Entry:

_____

Attorney for Petitioner

Certificate Of Service

# Pretrial 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.

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 pretrial 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 pleading.

File petition and arrange for service.

Obtain deposit receipt.

Prehearing, check on service of process.

Hearing to obtain order of condemnation and appropriation.

Signing and entry of order of condemnation and appropriation.

Furnish copy of order of condemnation and appropriation to adversary counsel.

Pretrial conference at site of property with appraiser; 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 pretrial brief as required or desired and requests for special instructions.

Prepare all exhibits for use at trial.

Pretrial conference with engineering witness, if any.

Pretrial 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 for 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.

## About the Author

James L. Murphy III is staff attorney for the Department of Law in the Metropolitan Government of Nashville and Davidson County. He has held that position since September 1981.