CHANGING WITH THE TIMES: EMINENT DOMAIN PRACTICE IN LIGHT OF TENNESSEE PUBLIC ACT 863

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The practice of eminent domain in Tennessee has recently undergone a variety of fundamental changes. The catalyst for these changes was the controversial United States Supreme Court decision of *Kelo v. City of New London*. In response to this landmark decision, the Tennessee legislature revised a number of laws designed to clarify and “shore-up” the state’s takings provisions. This Article will introduce this new legislative scheme to practitioners and provide advice on how to bring and defend condemnation proceedings.

Part I of this Article analyzes the *Kelo* decision and its impact on Tennessee law. Part II highlights the most significant changes from the 2006 legislative session. Part III explores the constitutional requirements, source and scope of eminent domain powers, pleadings’ requirements, condemnation of leasehold estates, the Uniform Relocation Assistance Act, and professional responsibility issues. Part IV provides a practical guide of how to initiate and defend eminent domain proceedings in light of these statutory changes. Part V provides a brief conclusion. Finally, Part VI of this Article provides a series of sample pleadings, pre-trial motions, and lease clauses.

I. THE CATALYST: *Kelo v. City of New London*

In the recent controversial eminent domain case of *Kelo v. City of New London*, Justice Stevens stated, “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.” In response to this invitation from the United States Supreme Court, the Tennessee General Assembly

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3 *Kelo*, 545 U.S. at 489.
enacted Public Act 863 and affected over twenty statutory provisions of Tennessee’s eminent domain laws.4

The changes to the eminent domain laws in Tennessee can be categorized into four major areas: (1) establishing a clear legislative intent concerning when the government is permitted to use eminent domain; (2) defining certain elements of this area of law; (3) changing condemnation procedures; and (4) removing eminent domain power from certain agencies, subdivisions, and other groups. In taking on this comprehensive legislative endeavor, the General Assembly did not merely limit itself to the challenges and questions raised by *Kelo*, but also addressed obsolete areas of the law, such as abolishing provisions for public mills’ takings powers in Tennessee. This legislative effort garnered broad bipartisan support from both rural and urban lawmakers, and the result, hopefully, is a more concise and predictable takings jurisprudence.

A. The Facts

Before analyzing and exploring Tennessee’s new eminent domain laws, it is important to understand what prompted these changes.5 In June of 2005, the United States Supreme Court issued its decision in *Kelo v. City of New London*.6 In an effort to reduce the federal military budget, the Department of Defense closed the Naval Undersea Warfare Center (the “Center”) and laid off approximately 1,500 civilian employees.7 The closing of the Center, located in the Fort Trumbull area of New London, Connecticut (the “City” and “State,” respectively), exacerbated the City’s decade-long economic decline and led State and local leaders to declare it a “distressed municipality.”8 In response, the State and City targeted the Fort Trumbull area for economic revitalization.9 To accomplish its goal, the City reactivated the New London Development Corporation (“NLDC”), a non-profit entity previously established to assist the City in economic revitalization.10

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5 *Kelo*, 545 U.S. at 469.
6 Id.
7 Id. at 473.
8 Id.
9 Id.
10 Id.
conjunction with the NLDC and the State, the City developed a plan to reinvigorate the area by turning Fort Trumbull into a state park.\textsuperscript{11} Shortly after this plan was announced, Pfizer, Inc. unveiled its plans to build a new $300 million research and development complex adjacent to the newly designated state park.\textsuperscript{12} The NLDC devised a revitalization plan to capitalize on Pfizer’s announced plan, and various local and state leaders approved the NLDC’s plan.\textsuperscript{13}

The Fort Trumbull revitalization plan divided the targeted area into seven parcels.\textsuperscript{14} A new “waterfront conference hotel at the center of a ‘small urban village’” would be constructed on the first three parcels.\textsuperscript{15} Parcel 4, which encompassed Ms. Kelo’s property, was subdivided into two sections; Parcel 4A would either serve as a parking lot or as building space for retail shops, and Parcel 4B would have a new marina and part of the riverwalk erected on it.\textsuperscript{16} Additional office sites, retail building sites, and parking would be constructed on Parcels 5, 6, and 7.\textsuperscript{17} The overarching goal of the revitalization plan was to use the land more effectively to create jobs, increase tax revenues, “make the City more attractive[,] and to create leisure and recreational opportunities on the waterfront and in the park.”\textsuperscript{18} The City approved the final plan in January of 2000 and designated the NLDC as the development agent in charge of implementation.\textsuperscript{19} The City also delegated its

\textsuperscript{11} Id.

\textsuperscript{12} Id. Pfizer, Inc. is a large and well-known pharmaceutical company. Id.

\textsuperscript{13} Id. at 473-74.

\textsuperscript{14} Id. at 474.

\textsuperscript{15} Id. According to the NLDC’s plan, the “small urban village” would be comprised of restaurants and shopping areas, public and commercial marinas, a riverwalk, residences, a museum, and office space. Id.

\textsuperscript{16} Id. The proposed retail shops would capitalize upon the foot traffic attracted by either the proposed park or the marina.

\textsuperscript{17} Id.

\textsuperscript{18} Id. at 474-75.

\textsuperscript{19} Id. at 475.
eminent domain powers to the NLDC, which successfully acquired most of the necessary property.\textsuperscript{20}

Susette Kelo purchased her quaint pink cottage in 1997 and refused to sell to the NLDC.\textsuperscript{21} In all, nine property owners who owned fifteen properties in the development area refused to sell their properties to the NLDC.\textsuperscript{22} The NLDC did not assert that these properties were “blighted or otherwise in poor condition,” but sought them solely because “they happen[ed] to be located in the development area.”\textsuperscript{23} Ms. Kelo and her neighbors challenged the NLDC’s condemnation of their homes in New London Superior Court claiming that the proposed taking of their properties violated the Public Use Clause of the Fifth Amendment to the United States Constitution.\textsuperscript{24} While litigation was pending before the trial court, the NLDC agreed to long term leases “of the parcels with private developers in exchange for their agreement to develop the land [in accordance with] the revitalization plan.”\textsuperscript{25}

After a seven-day bench trial, the New London Superior Court issued a permanent restraining order prohibiting the Parcel 4A takings but allowing the condemnation of Parcel 3.\textsuperscript{26} Both parties appealed.\textsuperscript{27} The Connecticut Supreme Court concluded that the takings were authorized under existing state law and overturned the trial court’s permanent injunction.\textsuperscript{28} The court relied upon a statute, that read: “the taking of land, even developed land, as part of an economic development project is a ‘public use’ and in the ‘public interest.’”\textsuperscript{29} To further

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id. at 476 n.4.

\textsuperscript{26} Id. at 475-76.

\textsuperscript{27} Id. at 476.

\textsuperscript{28} Id.

\textsuperscript{29} Id. (citing Kelo v. City of New London, 843 A.2d 500, 515-521 (2004)).
bolster its decision, the court relied upon the United States Supreme Court’s decisions in *Hawaii Housing Authority v. Midkiff* and *Berman v. Parker* for the proposition “that such economic development qualified as a valid public use under both the Federal and State Constitutions.” The United States Supreme Court granted Ms. Kelo’s petition for certiorari to determine “whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.”

### B. The Majority’s Decision

Justice Stevens authored the majority’s decision and began by laying out what this case did not involve. He explained that it is well-settled that a state may not seize A’s property for the sole purpose of giving it to B, even though A is justly compensated. In addition, it is axiomatic that a state may take property from A and transfer it to B if future “use by the public” is the purpose of the condemnation, such as condemning land for a common carrier railroad. Moreover, the *Kelo* case does not exemplify a state seizing land to make it open to the public. Accordingly, Justice Stevens reasoned that this case must be analyzed under the previously adopted theory that “public use” means “public purpose.” The majority opined that “[w]ithout exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in [the takings] field.”

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32 *Kelo*, 545 U.S. at 476 (citing *Kelo*, 843 A.2d at 527).

33 *Id.* at 477.

34 *Id.*

35 *Id.*

36 *Id.* at 478.

37 *Id.* at 480.

38 *Id.*
Justice Stevens began his analysis of “public purpose” by reviewing the Berman v. Parker decision. In Berman, the United States Supreme Court upheld a Washington, D.C. redevelopment plan that called for the condemnation of a large blighted area. Under the plan, the majority of the condemned land would be used for building streets, schools, and public facilities; the remainder would be sold to private developers for redevelopment, including development of low-income housing. The owner of a non-blighted business located within the redevelopment area challenged the plan and argued that the “creation of a ‘better balanced, more attractive community’ was not a valid public use.” In rejecting the owner’s claim, the Court deferred to the legislature and refused to address each property on an ad hoc basis. The Berman Court stated that:

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Next, the majority analyzed its decision in Hawaii Housing Authority v. Midkiff. In Midkiff, the State of Hawaii had a stagnate land market resulting from a small number of landowners owning a majority of Hawaii’s private lands. The Hawaii legislature concluded that this land oligopoly was “skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare,” so the legislature enacted a redistribution plan whereby land was taken

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39 Id. (discussing Berman v. Parker, 348 U.S. 26 (1954)).

40 Kelo, 545 U.S. at 480 (citing Berman, 348 U.S. 26).

41 Id.

42 Id. at 481 (quoting Berman, 348 U.S. at 31).

43 Id.

44 Berman, 348 U.S. 26, at 31-33.

45 Kelo, 545 U.S. at 482 (discussing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)).

46 Id. at 499 (O’Connor, J., dissenting).
from the land barons and sold on the open market. Reaffirming Berman’s deference to the legislature, the Midkiff Court held that Hawaii’s goal of eradicating the “social and economic evils of a land oligopoly” qualified as a valid public use.”

Moreover, the Midkiff majority explained that the State’s immediate transfer of land from one private individual to another did not lessen the “public purpose.” Instead, courts should focus on the purpose of the takings, rather than their mechanics.

In a subtle reversal of roles, the Kelo Supreme Court’s more liberal bloc opined that it had “wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.” Justice Stevens observed that the City’s determination that the Fort Trumbull area needed to be economically revitalized was entitled to judicial deference, despite the fact that it was not a blighted area. The City responded to a legitimate threat in a calculated and deliberate manner. It enacted its revitalization plan in accordance with a specific grant of legislative authority to use eminent domain to achieve its goal. Given the Supreme Court’s long history of legislative deference in takings jurisprudence, the majority found that the City’s redevelopment plan and its subsequent takings served a constitutionally appropriate “public purpose.”

Lastly, Justice Stevens emphasized that the states are free to place additional restrictions on the exercise of takings power. He noted that some states already

47 Id. (quoting Midkiff, 467 U.S. at 232).
48 Id. at 482 (majority opinion) (quoting Midkiff, 467 U.S. at 241-42).
49 Id.
50 Id. (citing Midkiff, 467 U.S. at 232).
51 Id. at 483.
52 Id.
53 Id.
54 Id. at 483-84.
55 Id. at 484.
56 Id. at 489.
have provisions—either in their state constitutions or eminent domain laws—that would prevent a similar taking. Ultimately, however, the Supreme Court determined that its authority extended only so far as to decide whether the City’s redevelopment plan fit within the ambit of the Fifth Amendment. As such, the wisdom of using eminent domain for economic development properly remains within the confines of the elected representatives.

C. Justice Kennedy’s Concurrence

Justice Kennedy is emerging as an important swing vote whose opinions have become increasingly important as his support becomes critical for parties to prevail in certain instances. Takings jurisprudence may be one of those instances. While Justice Kennedy joined in the majority’s overall conclusion, he offered insight as to the situations in which he would find a taking for economic development unconstitutional:

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

Justice Kennedy observed that the trial court thoroughly reviewed the City’s purpose for condemning Ms. Kelo’s property and determined that the City did not condemn her property to benefit any particular person. Specifically, the trial court found that the City executed the taking to benefit from Pfizer’s presence, not to benefit Pfizer.

57 Id.
58 Id. at 489-90.
59 Id. at 489.
60 Id. at 491 (Kennedy, J., concurring).
61 Id. at 492.
62 Id.
Ms. Kelo argued that takings justified by economic development should be "per se invalid or, at least presumptively invalid." Justice Kennedy responded that such a strong rule was unnecessary in most instances and would render too many valid takings unconstitutional. While he disagreed with the property owners' argument in this particular instance, he believed that an instance where per se or presumptive invalidity should attach could occur. Justice Kennedy conjectured that "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." Unfortunately for Ms. Kelo and the other property owners, Justice Kennedy found that "[w]hile there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case."

D. Justice O'Connor's Dissent

Justice O'Connor dissented, arguing that the majority's opinion erodes the protections of the Public Use Clause to such a miniscule level as to essentially eviscerate that Clause from the Fifth Amendment. The crux of Justice O'Connor's dissent is that the government "cannot take [petitioners'] property for the private use of other owners simply because the new owners may make more productive use of the property." Justice O'Connor began by recognizing that the Fifth Amendment places two distinct restraints on the government before it can seize private property: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." Taken in tandem, these clauses "ensure stable property ownership by

63 Id.
64 Id.
65 Id. at 493.
66 Id.
67 Id.
68 Id. at 494 (O'Connor, J. dissenting).
69 Id. at 496.
70 Id. (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 231-32 (2003)).
providing safeguards against excessive, unpredictable, or unfair use of the government’s eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority’s will.”

Justice O’Connor reminded the majority that fairness and security underlie the Takings Clause.

In breaking with the majority’s central premise that the Supreme Court should give deference to the legislature, Justice O’Connor opined that legislatures are not the “sole arbiters of the public-private distinction.” As such, courts must serve as a check on the powers of the legislature to protect the ability of the Public Use Clause to limit the government’s eminent domain powers. Furthermore, to protect the bedrock principle that a state cannot seize property from one citizen merely to transfer it to a second citizen, the Supreme Court has consistently reserved “a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use . . . .” In reexamining Berman and Midkiff, Justice O’Connor looked to the evils that the District of Columbia and Hawaii evaluated. In both of those decisions, the legislatures reacted to affirmative harm—blight and land oligopolies—and determined that the most effective cure was to take the extraordinary step of seizing land from one property owner and transferring it to another. In contrast to Ms. Kelo’s situation, the elimination of the affirmative harm in Berman and Midkiff was the public purpose.

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71 Id.
73 Id. at 497.
74 Id.
75 Id. at 500 (quoting Haw. Hous. Auth. V. Midkiff, 467 U.S. 229, 240 (1984)).
76 J. O’Connor authored the Midkiff majority opinion. Midkiff, 467 U.S. at 231.
77 Kelo, 545 U.S. at 500 (O’Connor, J. dissenting).
78 Id.
79 Id.
E. Justice Thomas’ Dissent

Staying true to his originalism theory of constitutional interpretation, Justice Thomas dissented and bemoaned yet another example of the Supreme Court moving farther away from the Framers’ original intent. Under Justice Thomas’ reading of the Public Use Clause, the government may seize property “only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.” In reviewing the constitutional text’s history, Justice Thomas argued that “the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.” Since the Public Use Clause is a restraint, not a grant, of power, the government “may take property only when necessary and proper to the exercise of an expressly enumerated power.” Justice Thomas called for a reconsideration of the Supreme Court’s rote reliance on decisions, specifically Berman and Midkiff, that detract from the Constitution’s original meaning.

II. The Response: Tennessee Public Act 863

In response to Kelo, on June 6, 2006, Governor Phil Bredesen signed Public Act 863 (the “Act”) to conclude more than a year of legislative wrangling in the area of eminent domain. The Act begins with a reaffirmation that Tennessee’s Constitution, in conjunction with the Fifth Amendment of the Federal Constitution, protects the right of an individual to own property and to be free from capricious and arbitrary takings of that property by the government. The remainder of Part II of this Article highlights the significant changes in Tennessee law resulting from the Act.

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80 Id. at 506 (Thomas, J. dissenting).
81 Id. at 508.
82 Id. at 510.
83 Id. at 511.
84 Id. at 519-21.
86 Id.
A. Preamble

After reaffirming its belief in the rights of the individual to own property, the legislature restricted the powers of the State and its political and administrative subdivisions to condemn property only when the condemnation was performed in harmony with the Federal and State Constitutions, the Act, and other eminent domain laws.\textsuperscript{87} The initial statutory addition proclaims the lawmakers’ intent that “the power of eminent domain shall be used sparingly, and that laws permitting the use of eminent domain shall be narrowly construed so as not to enlarge by inference or inadvertently the power of eminent domain.”\textsuperscript{88} This new preamble requires that courts applying this statute do not liberally construe the eminent domain powers to allow a taking that is beyond the narrowly vested powers of the government.

B. Definitional Changes

The next significant change was the legislature’s attempt to “shore–up” definitions to ensure that a \textit{Kelo}-type taking could not occur in Tennessee. One of the primary shortcomings of Tennessee’s takings jurisprudence was the lack of statutory definitions for “eminent domain” and “public use.” In addressing these concerns, the General Assembly responded by defining “eminent domain” as:

\begin{quote}
the authority conferred upon the government, and those entities to whom the government delegates such authority, to condemn and take, in whole or in part, the private property of another so long as such property is taken for a legitimate public use in accordance with the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 21 of the Tennessee Constitution, and the provisions of this [A]ct.\textsuperscript{89}
\end{quote}

This definition allows the government to delegate its eminent domain power to other entities, such as housing authorities or development corporations.

The General Assembly negatively defined “public use” by stating that “public use’ shall not include either private use or benefit or the indirect public benefits resulting from private economic development and private commercial

\textsuperscript{87} Id.

\textsuperscript{88} Id. § 1 (amending TENN. CODE ANN. § 29-17-101 (2005)).

\textsuperscript{89} Id. (amending TENN. CODE ANN. § 29-17-102(a) (2005)).
enterprise, including tax revenue and increased employment opportunity . . . .”90
Essentially, the General Assembly turned takings jurisprudence on its head and
effectively foreclosed the possibility of an outright Kelo condemnation in Tennessee.
The statute does allow condemnation powers in Tennessee to be used in five discreet
areas,91 in which takings have traditionally been upheld both by the United States
Supreme Court and the Tennessee Supreme Court.

First, a government may condemn land for the most obvious purpose of
eminent domain—pure public use.92 The government may seize an interest in real
property for the construction of roads, highways, bridges, public facilities, or other
forms of public transportation.93 This area of eminent domain jurisprudence is fairly
well settled, and even the most stalwart strict constitutional constructionists would
have difficulty arguing that building a road is not for “public use.”

Second, condemnation is allowed in “common carrier” takings. Here, the
government may acquire “any interest in land necessary to the function of a public or
private utility, a governmental or quasi-governmental utility, a common carrier, or
[entities holding the eminent domain authority].”94 Generally, these takings are
justified on the premise that the public is the primary beneficiary. For example, the
local power company generally has the ability to exact an easement from a property
owner to run a power cable across the land.

Third, housing authorities or community development agencies may invoke
condemnation proceedings to cure blighted areas as part of an urban renewal or
redevelopment plan as authorized by statute.95 Such was the case in Knoxville’s
Community Development Corp. v. Wright.96 In Wright, the City of Knoxville, through its
agent Knoxville’s Community Development Corporation (“KCDC”) and pursuant
to a redevelopment plan, authorized the condemnation of certain blighted areas near

90 Id. (amending TENN. CODE ANN. § 29-17-102(b)).
91 Id. (amending TENN. CODE ANN. § 29-17-102(b)(1)-(5)).
92 Id. (amending TENN. CODE ANN. § 29-17-102(b)(1)).
93 Id.
94 Id. (amending TENN. CODE ANN. § 29-17-102(b)(2) (2005)).
95 Id. (amending TENN. CODE ANN. § 29-17-102(b)(3) (2005)).
the Fort Sanders community. The plan called for KCDC to acquire blighted land either through purchase or condemnation with just compensation. After the land was developed, it was to be sold for fair market value to a local developer for further commercial development. However, the property owners refused to sell, and KCDC filed condemnation proceedings. The property owners argued, inter alia, that the condemnation was unconstitutional because the private developer was the primary beneficiary. The court of appeals rejected the property owners’ argument and found that under the approved redevelopment plan, private, yet blighted, property could be condemned and resold to a private individual to develop the condemned land in accordance with a redevelopment plan.

Fourth, a government may seize property even if a private individual receives an incidental benefit. However, the government cannot invoke condemnation proceedings if the taking is “primarily for the purpose of conveying or permitting such incidental private use.” For example, the local airport authority may seize lands to build an airport and lease space inside the airport to a private individual to operate a food court. Because the airport authority’s primary purpose was to build an airport and not benefit the food court operator, the food court operator’s beneficial private use is merely incidental and permitted.

Lastly, counties, cities, and towns may acquire property through eminent domain for an industrial park authorized by the Industrial Parks Act (“IPA”). The Act adds a new subsection to the IPA limiting the government’s exercise of its

97 Id. at 746-47. The City of Knoxville proposed the revitalization plan in preparation for the 1982 Knoxville International Energy Exposition. Id.

98 Id. at 747.

99 Id. at 749.

100 Id. at 747.

101 Id. at 749.

102 Id.


104 Id. (amending TENN. CODE ANN. § 29-17-102(b)(4) (2005)).

eminent domain powers to within its jurisdictional boundaries or within an urban growth boundary. Additionally, the government may not invoke the power of eminent domain unless it was unable to obtain the property, or any comparable alternative property, after undertaking “good faith negotiations.”

In addition to defining “eminent domain” and “public use,” the General Assembly also responded to a strong Tennessee Farm Bureau Federation lobbying campaign to clearly delineate what constituted a “blighted area.” Prior to the Act, “blighted areas” were defined as:

areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

To clarify and limit this grant of power, the General Assembly defined “welfare of the community” to exclude a decrease in property value to surrounding properties or the need for increased tax revenues as the sole reasons for condemning land as blighted. Moreover, the legislature emphatically stated that land used predominately for agricultural purposes could not be considered as blighted under any circumstances.

While these new definitions add clarity and limitations, it remains to be seen how effective they will be in protecting property owners. For example, the new definition of “blighted areas” remains vague enough to allow a *Kelo*-type taking in

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107 2006 Tenn. Pub. Acts 863 § 3 (amending TENN. CODE ANN. § 13-16-207(e)(2) (2005) (current version at TENN. CODE ANN. § 13-16-207(f)(2) (2007)). “Good faith negotiations shall be established, if the city or county has made an offer to purchase the property for an amount equal to or in excess of the fair market value, determined by the average of at least two (2) appraisals by independent, qualified appraisers.” TENN. CODE ANN. § 13-16-207(f)(2).


110 Id. (amending TENN. CODE ANN. § 13-20-201(a) (2005)).
Tennessee. A city could argue that an inner-city block riddled with crime and poverty is “detrimental to the safety, health, morals, or welfare of the community” and should be condemned and transferred to a developer who can build an upscale residential village in the area, thereby increasing safety. The developer and city rely on increased safety rather than decreased property values or increased tax revenues. Furthermore, under the new definition for “welfare of the community,” decreased property values or increased tax revenues cannot be the sole reason for the taking, but they may be a reason. Considering that poverty stricken neighborhoods are often the least politically influential, it is not difficult to recognize the shortcomings of the Act. While the Act addresses some of the deficiencies in this area of law, it may be viewed as a minor step and as nothing more than a “feel good” political ploy that does little to protect property owners in Tennessee.

C. Procedural Changes

In addition to changes in the Public Use Clause and definitional sections, the Act also changed the procedural mechanism to condemn property. A new section of the Tennessee Code Annotated provides that any government holding the power to condemn and seeking to condemn property must provide the property owner at least thirty days notice before undergoing any additional steps. Moreover, if the property owner is unknown, a non-resident, or cannot be found, then the government may give notice by publication in the same manner as is customarily done in chancery court. If the property owner fails to challenge the taking, the government shall have the right of possession of the property or property rights being sought. On the other hand, if the property owner challenges the taking within thirty days, the trial court shall determine, as a matter of law, whether the government has the right to seize the property. If the government prevails, it shall then have the right to take possession. Lastly, if the government does have the right to possession and the property owner refuses to comply with the condemnation proceedings, the court must issue a writ of possession to the local


112 Id.

113 Id. at § 15(a).

114 Id. at § 15(b)(1).

115 Id. at §15(b)(2).

116 Id.
sheriff to put the government in possession.\textsuperscript{117} The writ of possession can be issued before a trial on the damages.\textsuperscript{118}

The Act now mandates the calculation of total damages for completely condemned property.\textsuperscript{119} This figure shall not be less than the property assessor’s valuation immediately before the condemnation “less any decrease in value for any changes in such parcel occurring since the valuation was made, such as the removal or destruction of a building, flooding, waste, or removal of trees.”\textsuperscript{120} In addition to the immediately past property assessor valuation, the parties must obtain an appraisal of the property.\textsuperscript{121} The appraisal report must include the property’s best and highest use, the current use of the property at the time of the proceeding, and a description of “any other use to which the property is legally adaptable at the time of the taking.”\textsuperscript{122} The appraiser must be designated a Member of the Appraisal Institute or be licensed and qualified under the State Licensing and Certified Real Estate Appraisers Law.\textsuperscript{123}

Similarly to the definition changes, the General Assembly began correcting some of the problems with calculating damages in eminent domain proceedings; however, it failed to see the changes through to fruition. Because of the difference of opinions and benchmarks used by property assessors, the new procedural requirements for property assessments may lead to more laborious litigation over the appropriate value of the property. In addition, utility companies may be forced to acquire a “full blown” appraisal even when they are seeking only a partial taking. The new statutory scheme will likely be a boon to appraisers and significantly increase the costs of partial takings for utilities. Given the disparate interests, the lack of clarity from the legislature has the potential to spawn additional acrimony among the litigants.

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} at § 19 (amending TENN. CODE ANN. § 29-16-114(a)(2) (2005)).

\textsuperscript{120} \textit{Id.} The parties may enter the valuation of the property into evidence at trial. \textit{Id.}

\textsuperscript{121} \textit{Id.} at § 20.

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.; see also TENN. CODE ANN. § 62-39-101.}
Finally, the General Assembly attempted to clarify how courts should tax costs to the parties. The clerk shall tax the government with the costs in three circumstances: (1) “[t]he amount of damages awarded at trial exceeds the amount assessed by the condemnor and deposited with the clerk;” (2) “[t]he condemnation is abandoned by the condemnor;” or (3) “[t]he final judgment is that the condemnor cannot acquire the property or property rights by condemnation.”124 On the other hand, the costs are levied against the property owner “if the amount of damages awarded at trial does not exceed the amount assessed by the condemnor and deposited with the clerk.”125 If the government fails at the condemnation proceeding, either because it abandons the eminent domain action or is adjudged to be unable to condemn the property, the court shall require that the government reimburse the property owner for his reasonable expenses, including reasonable attorney, appraisal, and engineering fees.126

D. Eliminating Eminent Domain Powers

Finally, the Act eliminated power from certain regional authorities and other political and administrative subdivisions. Under the amended laws, the Sequatchie Valley Planning and Development Agency,127 the Tennessee River Four County Port Authority,128 the Tennessee Duck River Development Agency,129 the Chickasaw Basin Authority,130 public mills,131 and incline railroad corporations132 can no longer use eminent domain to acquire land.133 In addition, the General Assembly abolished

125 Id. at § 24(a)(2).
126 Id. at § 24(b).
127 Id. at § 7 (amending TENN. CODE ANN. § 64-1-503(14) (2005)).
128 Id. at § 8 (amending TENN. CODE ANN. § 64-4-106 (2005)).
129 Id. at § 5 (amending TENN. CODE ANN. § 64-1-603(3) (2005)).
130 Id. at § 6 (amending TENN. CODE ANN. § 64-1-204(15) (2005)).
131 Id. at § 11 (amending TENN. CODE ANN. § 69-6-118(a)(9) (2005)).
132 Id. at § 13 (repealing TENN. CODE ANN. § 65-18-101 (2005)).
133 Id. at §§ 5-8, 11, 13.
the counties’ authority to seize natural lakes or land to construct lakes\textsuperscript{134} and to condemn land for creating ferries.\textsuperscript{135}

E. Summary

The General Assembly used the \textit{Kelo} decision as a catalyst to change how the Tennessee government interacts with property owners. This legislative endeavor united lawmakers from both political parties with a common goal of protecting property owners from arbitrary and capricious condemnation of a citizen’s most precious rights. As with all legislative undertakings, the new laws are not perfect, and the courts will be called upon to settle many upcoming disputes. However, these new laws will significantly clarify and limit the government’s ability to seize a citizen’s property.

III. Scope and Source of Eminent Domain in Tennessee

Eminent domain is the right or power to take private property for public use; the right of the sovereign, or of those to whom the power has been delegated, to condemn private property for public use, and to appropriate the ownership and possession thereof for such use upon paying the owner a due compensation.\textsuperscript{136}

This inherent right remains subject to two significant limitations: (1) the taking of property must be “for public use,” and (2) it can only be invoked upon payment of “just compensation.”\textsuperscript{137} The subtleties of this jurisprudence have been a source of conflict between property owners and the government since the early days of the republic. The conflict draws into contrast two fundamental principles of democratic government: the right of the property owner to be secure in his possessions and the right of the government to ensure the tranquility and efficient operations of the community. Since these two competing principles must survive within the confines of our communities, it is imperative that attorneys understand the delicacies of eminent domain and how to balance the needs of the individual with those of the community.

\begin{itemize}
\item \textsuperscript{134} \textit{Id.} at § 10 (amending \textsc{Tenn. Code Ann.} § 11-22-101 (2005)).
\item \textsuperscript{135} \textit{Id.} at § 9 (repealing \textsc{Tenn. Code Ann.} § 54-11-302 (2005)).
\item \textsuperscript{136} \textit{City of Knoxville v. Heth}, 210 S.W.2d 326, 328 (Tenn. 1948) (quoting 29 C.J.S. \textit{Eminent Domain} § 1); \textit{accord} \textit{Jackson v. Metro. Knoxville Airport Auth.}, 922 S.W.2d 860, 861 (Tenn. 1996).
\item \textsuperscript{137} \textit{Heth}, 210 S.W.2d at 328.
\end{itemize}
The power of eminent domain is predicated upon the belief that “[t]he possibility that one’s property may be taken for public purposes is a limitation upon every citizen’s ownership of his property.” It is a power of practical necessity that must work in harmony with the ideals of organized society and serve as a means to accelerate an escheat back to the State. The Takings Clause of the Fifth Amendment of the United States Constitution embodies this theory and attempts to balance it with the right of private ownership by mandating that “nor shall private property be taken for public use, without just compensation.” These twin restrictions of public use and just compensation are incorporated to the states through the 14th Amendment. Similarly, article 1, section 21 of the Tennessee Constitution requires “[t]hat no man’s particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor.” Thus, if the government condemned a person’s property, regardless of its character, for a non-public use or without just compensation, the property owner would be deprived of due process of law and his or her fundamental constitutional rights.

The power of eminent domain is a dormant right which can only be exercised by a state with legislative action. Upon confronting a situation in which eminent domain may be needed, the General Assembly must declare the purpose for invoking the condemnation powers and who is empowered to wield it. The legislature has the option of either enacting a provision that specifically identifies the property to be condemned and the compensation to be paid or passing an enabling statute that delegates the eminent domain powers to an agent.


140 Palazzolo, 533 U.S. at 617 (citing Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897)).

141 TENN CONST. art. 1, § 21; see also Harper, 274 S.W.2d at 641.

142 Duck River Elec. Membership Corp. v. City of Manchester, 529 S.W.2d 202 (Tenn. 1975) (stating that “constitutional prohibitions against taking private property without just compensation applies [sic] with full force and validity to personal property” just as they do to real property); see also Betty v. Metro. Gov’t of Nashville & Davidson County, 835 S.W.2d 1, 6 (Tenn. 1992).


144 Rivergate Wine & Liquors, Inc. v. City of Goodlettsville, 647 S.W.2d 631, 633 (Tenn. 1983); State v. Oliver, 35 S.W.2d 396, 399 (Tenn. 1931); Am. Tel. & Tel. Co. v. Proffitt, 903 S.W.2d 309, 314 (Tenn. Ct. App. 1995).
Assembly transfers its powers of eminent domain to an agent, the agent has broad discretion “in determining what property is necessary for public purpose, with respect to the particular route, line, or location of the proposed work or improvement, and . . . the courts will not disturb their action in the absence of fraud, bad faith, or gross abuse of discretion.”

Since the use of eminent domain is in derogation of private property rights, the agent’s actions will be scrutinized to ensure the agent does not act beyond the scope of the enabling statute. Likewise, the enabling statutes will be construed liberally in favor of property owners’ rights. In the preamble to the eminent domain laws, the General Assembly emphasized its desire for strict construction of eminent domain statutes. Accordingly, courts should ensure that when property is seized in the public’s name, the seizure was for a “public use” and upon the payment of “just compensation.” However, courts should also remember that the “possibility that one’s property may be taken for public purposes is a limitation upon every citizen’s ownership of his property.”

While eminent domain protects the individuals’ right to compensation when the government takes his property, not all governmental impairment of value is compensable. Under a state’s general police powers, the state has the power to adopt regulations or ordinances to promote the public health, safety, and welfare. The police powers have “generally not been considered to amount to a taking under the power of eminent domain . . . .” Thus, when an act of police power, as

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145 Am. Tel. & Tel. Co., 903 S.W.2d at 311-12 (quoting 26 AM. JUR. Eminent Domain § 113); see also Williamson County v. Franklin & Springhill Tpk. Co., 228 S.W. 714, 719 (Tenn. 1921) (stating that it is well settled that “in the absence of a clear and palpable abuse of power, the determination of the necessity for the taking and what property shall be taken is not a question for the judiciary, but for the legislature or the body to whom the right of eminent domain is delegated by it”).

146 Am. Tel. & Tel. Co., 903 S.W.2d at 312.

147 Id.


151 Draper v. Haynes, 567 S.W.2d 462 (Tenn. 1978).
opposed to eminent domain, causes the impairment, the decrease in value is not compensable.\textsuperscript{152} For example, the courts have deemed “the imposition of housing regulations, the imposition of zoning regulations, the imposition of utility rate regulations; the changes in streets abutting property from two-way streets to one-way streets; inconvenience, noise, and dirt from construction of a public improvement which interfered with the use of property;” and an annexation by a city that interfered with a private contract non-compensable.\textsuperscript{153}

The distinction between decreases in value from police powers and from eminent domain is a murky and controversial topic within takings jurisprudence. This is especially true in light of the increasing prevalence of municipalities which have “imposed land use regulations upon private property instead of using limited public funds to acquire private property for public use.”\textsuperscript{154} The United States Supreme Court first addressed this issue in \textit{Pennsylvania Coal Co. v. Mahon}.\textsuperscript{155} In this seminal case, Justice Holmes enunciated the standard for establishing a “regulatory taking” when he wrote that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”\textsuperscript{156} The Tennessee Supreme Court has yet to formally adopt the \textit{Pennsylvania Coal Co.} test; however, the court of


\textsuperscript{153} Id.; see also City of Clarksville v. Moore, 688 S.W.2d 428, 430 (Tenn. 1985) (finding enforcement of housing code not compensable); \textit{Draper}, 567 S.W.2d at 465 (finding a zoning ordinance an exercise of police powers and not a constitutional violation); Ledbetter v. Beach, 421 S.W.2d 814, 814, 819 (Tenn. 1967) (concluding that noise, creation of dirt and dust, and “general impairment of private use” of property caused by construction is not compensable); City of Memphis v. Hood, 345 S.W.2d 887, 894 (Tenn. 1961) (concluding that changes in traffic and street is not compensable); Hudgins v. Metro Gov’t of Nashville & Davidson County, 885 S.W.2d 74, 76-77 (Tenn. Ct. App. 1994) (finding that providing services for free which another party was under contract to provide its customers was not a taking); \textit{In re Billing & Collection Tariffs of S. Cent. Bell}, 779 S.W.2d 375, 381 (Tenn. Ct. App. 1989) (finding that regulation of rates by utility company is not unconstitutional); Ambrose v. City of Knoxville, 728 S.W.2d 338, 340 (Tenn. Ct. App. 1987) (finding that lawful diversion of traffic is not an illegal taking).

\textsuperscript{154} MURPHY, supra note 152, at 3.

\textsuperscript{155} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

\textsuperscript{156} Id. at 415.
appeals has employed its rationale numerous times. The intricacies and scope of regulatory takings are beyond the scope of this article.

III. LIMITATIONS UNDER TENNESSEE LAW

A. “Public Use”

The first constitutional limitation on the sovereign’s right to seize private property is that the taking must be “for public use.” While at first glance this may appear plain and unambiguous, this limitation has become one of the most litigated questions in eminent domain jurisprudence. The Tennessee Constitution states “[t]hat no man’s particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.” Whether a taking constitutes a public use is “a judicial question, confided by the people to their courts, to insure a practical enforcement of this constitutional guaranty to the citizen.” However, courts have given significant weight to the state’s, or the state’s agent’s, determinations of public use because those determinations relate to matters that “should and must have been known by the legislative branch.”

In City of Knoxville v. Heth, the Tennessee Supreme Court was forced to ascertain whether the City of Knoxville’s condemnation of a building was a public use when it was acting in its proprietary capacity rather than its governmental capacity. The Heth Court looked at the distinction between private and public corporations and noted that “[t]he test of public use is not based upon the function or capacity in which, or by which, the use is furnished. The right of the public to receive and enjoy the benefit of the use is the determining factor whether the use is public or private.” Accordingly, the Tennessee Supreme Court found that the condemnation satisfied


158 TENN. CONST. art. 1, § 21 (emphasis added).

159 City of Knoxville v. Heth, 210 S.W.2d 326, 328 (Tenn. 1948).

160 Id.

161 Id. at 329.

162 Id. (quoting Light v. City of Danville, 190 S.E. 276, 286 (Va. 1937)).
the “public use” requirement because the public would enjoy the benefits of the building through increased efficiency and it was essential to the city to have the additional building.\footnote{Id. at 330.} Moreover, the Tennessee Supreme Court expressly stated that it adopted a “practical view of the meaning of ‘public use.’”\footnote{Id.}

The scope of the phrase “public use” is incapable of precise delineation and must remain elastic to keep pace in a changing society.\footnote{Id.} The Tennessee Supreme Court has opined that:

Moreover, views as to what constitutes a public use necessarily vary with changing conceptions of the scope and functions of government, so that to-day [sic] there are familiar examples of such use which formerly would not have been so considered. As governmental activities increase with the growing complexity and integration of society, the concept of “public use” naturally expends in proportion.\footnote{Id. (quoting Dornan v. Philadelphia Hous. Auth., 200 A.2d 834, 840 (Pa. 1938)).}

\section*{B. “Just Compensation”}

Although the government must have a legitimate public use for seizing a citizen’s property, it must also pay the property owner just compensation for the property.\footnote{TENN. CONST. art. I, § 21.} Tennessee courts have consistently held that the government may satisfy this requirement by paying the property owner the fair market value on the date of the taking.\footnote{Nashville Hous. Auth. v. Cohen, 541 S.W.2d 947, 950 (Tenn. 1976); State \textit{ex rel. Comm’r of the Dept. of Transp.} v. Williams, 828 S.W.2d 397, 400 (Tenn. Ct. App. 1991).} Additionally, the General Assembly has decreed that “[i]n all instances the amount to which an owner is entitled shall be determined by ascertaining the fair cash market value of the property or property rights taken and adding to the same the amount of incidental damages . . . .”\footnote{TENN. CODE ANN. § 29-17-910 (2007); State \textit{ex rel. Comm’r of the Dept. of Transp.} v. Brandon, 898 S.W.2d 224, 226 (Tenn. Ct. App. 1994).} Fair market value “is that value which
might be derived if a party is willing to sell but does not have to sell, a piece of property, and a party who is willing to buy, but he does not have to . . . buy the property.”

The amount of damages awarded for just compensation is a question of fact, and the parties are entitled to a trial by jury. If the condemnor is entitled to condemn the property, the property owner carries the burden of establishing the fair market value of the seized property or property rights.

1. Fair Market Value

The trier of fact must determine the value of the property at the time of the taking and cannot consider evidence of “the enhancement in value or depreciation in value of the property that occurred before the taking in anticipation of the completion of the public improvement . . . .” In Layne v. Speight, the Tennessee Supreme Court adopted the United States Supreme Court’s description of this “scope of the project” rule:

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

170 Davidson County Bd. of Educ. v. First Am. Nat’l Bank, 301 S.W.2d 905, 907 (Tenn. 1957); accord Brandon, 898 S.W.2d at 226; Alloway v. City of Nashville, 13 S.W. 123, 124 (Tenn. 1890).

171 Strasser v. City of Nashville, 336 S.W.2d 16, 19 (Tenn. 1960); see also Davidson County Bd. of Educ., 301 S.W.2d at 911; State ex rel. Pack v. Hill, 408 S.W.2d 213, 223 (Tenn. Ct. App. 1965).


173 Williams, 828 S.W.2d at 402; Memphis Hous. Auth. v. Ryan, 393 S.W.2d 3, 6 (Tenn. Ct. App. 1964).

174 MURPHY, supra note 152, at 16 (citing Layne v. Speight, 529 S.W.2d 209, 212 (Tenn. 1975)).
immediately taken increased in value due to the projected improvement. ¹⁷⁵

This type of situation generally arises when a large scale government improvement project is subdivided into multiple smaller projects. If the property increases in value because of the improvement and the government later decides to seize additional property, then the property owner is entitled to the enhanced value unless the “lands were probably within the scope of the project from the time the [g]overnment was committed to do it.”¹⁷⁶ “The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use.”¹⁷⁷ When confronted with this situation, the trial court must determine, as a threshold matter, the probable scope of the project “which will serve as the basis for the admissibility of comparable sales that might reflect the appreciation.”¹⁷⁸

In addition to excluding enhancement values, the trier of fact cannot consider either previous asking prices by the owner¹⁷⁹ or offers by potential buyers¹⁸⁰ in ascertaining the targeted property’s fair market value. The Tennessee Supreme Court reasoned that “[i]f persons could prove the value of their lands [by introducing previous offers or potential offers], nothing would be easier than to prepare for the controversy by having offers made through friendly parties having no real purpose to buy.”¹⁸¹ Even if the property owners could establish that the offers were bona fide,

¹⁷⁵ Layne, 529 S.W.2d at 212 (quoting United States v. Miller, 317 U.S. 369, 376-77 (1943)).

¹⁷⁶ Id. (quoting Miller, 317 U.S. at 377); see also State ex rel. Dept. of Transp. v. Harvey, 680 S.W.2d 792, 794 (Tenn. Ct. App. 1984).

¹⁷⁷ Layne, 529 S.W.2d at 213 (citing United States v. Reynolds, 397 U.S. 14, 21 (1970)).

¹⁷⁸ MURPHY, supra note 152, at 16 (citing Layne, 529 S.W.2d 209; State ex rel. Comm’r of Dept. of Transp. v. Veglio, 786 S.W.2d 944 (Tenn. Ct. App. 1989)).

¹⁷⁹ Lewisburg & N. R.R. Co. v. Hinds, 183 S.W. 985, 996 (Tenn. 1916); Vaulx v. Tenn. Cent. R.R. Co., 108 S.W. 1142, 1148 (Tenn. 1908); see also Town of Milan v. Thomas, 178 S.W.2d 772, 775 (Tenn. Ct. App. 1943) (reaffirming the rule in Vaulx, but finding that the admission of previous offers was harmless error considering that previous offer was consistent with other testimony concerning the value of the condemned land).

¹⁸⁰ Vaulx, 108 S.W. at 1148.

¹⁸¹ Id.
the court believed that such evidence and the incumbent questions surrounding the
good faith nature of the offers would be “disastrous to the sound administration of
justice in cases of this character.”

Moreover, the trier of fact may neither consider speculative values to new
owners in assessing fair market value, nor may it base an award solely on the
targeted property’s “highest and best use.” In Layne, the state supreme court
stated that Tennessee adheres to the majority rule “that just compensation must be
measured by the fair market value of the land in view of its value for all available uses
as distinguished from its value for the best use.” The General Assembly appeared to
codify this rationale in a new provision to the eminent domain laws requiring that the
condemning authority obtain an appraisal of the targeted property. Under this
 provision, the appraiser must consider the targeted property’s “highest and best use,
its use at the time of the taking, and any other uses to which the property is legally
adaptable at the time of the taking.” Accordingly, the property owner will not be
allowed to introduce evidence of the value or loss of value of the targeted property
for a specific purpose. The rationale for this prohibition was to prevent property
owners from overemphasizing one particular use of the targeted property.

182 Id.


184 Layne v. Speight, 529 S.W.2d 209, 214 (Tenn. 1975).

185 Id. (emphasis added); see also Conness v. Commonwealth, 69 N.E. 314, 314 (Mass. 1904);


187 Id.

Sept. 29, 1995) (citing Davidson County Bd. of Educ. v. First Am. Nat’l Bank Tr., 301 S.W.2d 905
(Tenn. 1957)); see also Love v. Smith, 566 S.W.2d 876, 878 (Tenn. 1978) (holding that highest and best
use are one of many factors to consider in assessing fair market value, but it cannot be the sole
factor); cf. Nashville Hous. Auth. v. Cohen, 541 S.W.2d 947 (Tenn. 1976) (allowing admission of
evidence as to uses which are currently illegal as long as jury is cautioned to not value the property as
if rezoning has already occurred but instead as a factor upon the value of the land on the date of
taking); State ex rel. Comm’r Dept. of Transp. v. Cox, 840 S.W.2d 357, 363-64 (Tenn. Ct. App. 1991)
(allowing introduction of evidence as to commercial use even though currently zoned for residential
use only when commercial use was not found “to be infeasible or remote in likelihood or time”).

However, courts may consider the rental value of the seized property in ascertaining its fair market value.\textsuperscript{190}

While the courts generally exclude evidence related to a business’s lost profits, this evidence may be admissible if the property owner can establish that the targeted property has special value to the owner and there is no other evidence evincing a fair market value of the property.\textsuperscript{191} In \textit{Shelby County v. Barden}, the Tennessee Supreme Court held that a trial court did not abuse its discretion by admitting limited evidence of profits and losses.\textsuperscript{192} The \textit{Barden} Court stated that even though this evidence was not controlling, it could be one of many factors considered by the trier of fact to determine the fair market value of the targeted property.\textsuperscript{193} Furthermore, the special circumstances exception may allow evidence to be admitted related to the value of the targeted property to the property owner.\textsuperscript{194} When examining these special circumstances, the Tennessee Supreme Court has opined that:

\begin{quote}
If there is a market for the land, the market value is the fact to be found. Only in the special situation where, because of crop failure, financial panic, or similar abnormal conditions, there is no market for property which in ordinary times has value, is the owner permitted to show the value of the property to him.\textsuperscript{195}
\end{quote}

Courts should consider the impact of pollution and remediation efforts when calculating the fair market value of property.\textsuperscript{196} In \textit{State v. Brandon}, the Tennessee

\textsuperscript{190} Union Ry. Co. v. Hunton, 88 S.W. 182, 187 (Tenn. 1905); \textit{see also} State v. Parkes, 557 S.W.2d 504, 509 (Tenn. Ct. App. 1977) (stating that “there is no absolute prohibition against admitting evidence of rental value, at least where it is presented and interpreted by an expert as a criterion in his assessment of the property's fair market value”).

\textsuperscript{191} \textit{Shelby County v. Barden}, 527 S.W.2d 124, 132-33 (Tenn. 1975).

\textsuperscript{192} \textit{Id.} at 133.

\textsuperscript{193} \textit{Id.} (quoting Lebanon & Nashville Tpk. Co. v. Creveling, 17 S.W.2d 22, 26 (Tenn. 1929) (“[N]et income, present or prospective, is not controlling, evidence thereof is altogether competent; the weight to be given such evidence as may be adduced being for the jury, in connection with all other material evidence.”).

\textsuperscript{194} \textit{State ex rel. Smith v. Livingston Limestone Co.}, 547 S.W.2d 942, 943 (Tenn. 1977).

\textsuperscript{195} \textit{Id.} at 944 (citing \textit{Creveling}, 17 S.W.2d 22).

\textsuperscript{196} \textit{State v. Brandon}, 898 S.W.2d 224, 228 (Tenn. Ct. App. 1994).
Court of Appeals found that contamination directly impacted the willing buyer/willing seller standard of the fair market value analysis. Therefore, if a trial court excluded relevant evidence of contamination and remediation efforts, the appealing party would be entitled to a new trial on damages. In deciding this issue, the Brandon Court approvingly quoted the Florida Supreme Court and asserted that: “any factor, including public fear, which impacts . . . the market value of land taken for a public purpose may be considered to explain the basis for an expert’s evaluation opinion. Whether this fear is objectively reasonable is irrelevant to the issue of full compensation in an eminent domain proceeding.”

Since courts must consider all legitimate uses for which the property is reasonably adaptable, courts should also take into account the targeted property’s present zoning and imminent rezoning. While the traditional standard only considers the targeted property’s fair market value at the time of the taking, this current zoning is not dispositive because “zoning changes may be made reflecting the changing needs and circumstances of the community.” Accordingly, in Nashville Housing Authority v. Cohen, the Tennessee Supreme Court found that:

[I]t is generally recognized that a use which is presently illegal may be considered, along with all presently available uses, in determining the value of property, if the restrictive law is Malum prohibitum rather than Malum in se, and, if there is a reasonable probability that the presently illegal use will be made legal in the future.

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197 Id.
198 Id.
199 Id. (quoting Florida Power & Light Co. v. Jennings, 518 So.2d 895, 899 (Fla. 1987)).
200 Love v. Smith, 566 S.W.2d 876, 878 (Tenn. 1978).
201 State ex rel. Comm’r of Dept. of Transp. v. Williams, 828 S.W.2d 397, 400 (Tenn. Ct. App. 1991) (citing Shelby County v. Mid-South Title Co., 615 S.W.2d 677, 680 (Tenn. Ct. App. 1980)).
203 Williams, 828 S.W.2d at 400.
204 Cohen, 541 S.W.2d at 950 (citing 4 Nichols, The Law of Eminent Domain, §§ 12.3143(2), 12.322 (3d ed. 1975)).
In *Cohen*, the housing authority petitioned to seize the respondent’s property, zoned as a single residence parcel, as part of a new housing development in Nashville. Commercially zoned property surrounded the targeted property and the housing authority intended to rezone the targeted property to multi-family housing. The property owner offered a jury instruction that allowed the jury to consider the possible rezoning of the targeted property in its determination of the fair market value if the jury found reasonable probability that the rezoning would occur. However, the trial court rejected this instruction and told the jury that it could only consider the value of the property at the time of the taking. In affirming the court of appeals’ reversal, the Tennessee Supreme Court held that:

> It is the effect, if any, upon the fair market value on the date of taking which makes relevant the evidence of a possible rezoning of the property. A prospect of rezoning, no matter how imminent, is irrelevant if it has no effect upon such fair market value; and, on the other hand, a prospect of rezoning which may appear to be somewhat remote should, nevertheless, be considered by the court if it affects the fair market value of the property on the date of taking. It is this standard of relevance and materiality which the trial judge should employ in exercising his discretion to admit or exclude evidence offered to show a possible zoning change.

Therefore, in Tennessee, the trial court should allow property owners to admit evidence of rezoning only to the extent that the evidence impacts the fair market value of the targeted property.

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205 Id. at 949.

206 Id.

207 Id.

208 Id. at 950.

209 Id. at 952 (internal citations omitted). However, the *Cohen* Court also cautioned that the jury “must not evaluate the property as though the possible rezoning were already an accomplished fact, but, that in considering value they may take into account the effect, if any, which the possibility of rezoning has already had upon the fair market value of the property on the date of taking.” Id.

2. Establishing Fair Market Value

Property owners predominately rely on two forms of evidence to establish a fair market value of the targeted property: comparable sales and opinions as to value. As a preliminary matter, a trial court must decide whether to introduce evidence of comparable sales. This is a question of law, which the appellate courts review for an abuse of discretion. A sufficiently comparable sale requires that (1) the sale must be voluntary or an arm's length transaction and (2) the sales are not the result of a compromise. The Tennessee Supreme Court has held that “voluntary” is akin to the “willing buyer/willing seller” standard that guides fair market value analysis. Thus, the property owner may not introduce evidence of sales to the condemning authority, sales made under the threat or influence of condemnation, or sales involving property with unusually stringent restrictions on the property’s use.

If the trial court finds that the sales are at an arm’s length, then the trial court must look to the circumstances of the sales and determine whether the properties are similar in nature, location, and time of sale. While a general rule does not exist,

211 Layne v. Speight, 529 S.W.2d 209, 211 (Tenn. 1975).


213 Id. (quoting State ex rel. State Highway Comm’n v. Kimmel, 435 S.W.2d 354, 357 (Mo. 1968)).

214 Coate v. Memphis R.R. Terminal Co., 111 S.W. 923, 924 (Tenn. 1908) (not allowing sales that are the result of a compromise); MURPHY, supra note 152, at 17.

215 Peabody Garage Co., 505 S.W.2d at 722 (quoting Kimmel, 435 S.W.2d at 357).

216 Memphis Hous. Auth. v. Newton, 484 S.W.2d 896, 897-98 (Tenn. Ct. App. 1972) (“Sales affected and influenced by the public project pursuant to which the property to be valued is taken are inadmissible to prove the value of the property to be taken.”); Coate, 111 S.W. at 924 (quoting 2 JAMES LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 447 (2nd ed. 1900)) (stating that what the party condemning the land has paid for other property is incompetent evidence, because “[s]uch sales are not a fair criterion of value, for the reason that they are in the nature of a compromise”); see also MURPHY, supra note 152, at 17.

217 See sources cited supra note 216.

218 MURPHY, supra note 152, at 17-18 (citing Memphis Hous. Auth. v. Ryan, 393 S.W.2d 3 (Tenn. Ct. App. 1964)).

219 Id. at 18 (citing Ryan, 393 S.W.2d at 11; Lewisburg & N. R.R. Co. v. Hinds, 183 S.W. 985, 997 (Tenn. 1916); Union Ry. Co. v. Hunton, 88 S.W. 182, 186 (Tenn. 1905)).
the trial court should consider the following factors in deciding whether the sales are sufficiently comparable: size of the properties, timing of the sales, changes in conditions of the properties since being sold, current zoning, imminent rezoning, location, proximity to existing improvements, improvements to the properties, geographic features, and all available uses to which the properties are adaptable. If the trial court determines the sales are sufficiently comparable, the jury will decide the weight of these comparable sales in determining the targeted property’s fair market value.

Property owners may also present opinions from lay and expert witnesses to establish fair market value. Similar to the majority of jurisdictions, in

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221 *Murphy*, supra note 152, at 18 (citing *Ryan*, 393 S.W.2d at 13).

222 *Id.* (citing *Ramsey*, 484 S.W.2d at 76).

223 *Id.* (citing *Hinds*, 183 S.W. at 996-97).

224 *Id.* (citing *Shelby County v. Mid-South Title Co.*, 615 S.W.2d 677, 680 (Tenn. Ct. App. 1980)).

225 *Id.* (citing *Mid-South Title Co.*, 615 S.W.2d at 680).

226 *Id.* (citing *Memphis Hous. Auth. v. Mid-South Title Co.*, 443 S.W.2d 492, 499, 501 (Tenn. Ct. App. 1968)); see also *Mid-South Title Co.*, 615 S.W.2d at 680.

227 *Murphy*, supra note 152, at 18 (citing *Sackman & Rohan, 5 Nichols' The Law of Eminent Domain*, § 21.31 (Rev. 3d ed. 1991)).

228 *Id.* (citing *Sackman & Rohan, supra note 227*, at § 21.31).

229 *Id.* (citing *Sackman & Rohan, supra note 227*, at § 21.31).

230 *Id.* (citing *Sackman & Rohan, supra note 227*, at § 21.31).

231 *Id.* (citing *Shelby County v. Mid-South Title Co., Inc.*, 615 S.W.2d 677, 680 (Tenn. Ct. App. 1980)).

232 *Id.* (citing *State ex rel. Smith v. Livingston Limestone Co.*, 547 S.W.2d 942, 943 (Tenn. 1977)).

233 *Id.* (citing *Memphis Hous. Auth. v. Mid-South Title Co.*, 443 S.W.2d 492, 501 (Tenn. Ct. App. 1968)); see also *Shelby County v. Mid-South Title Co., Inc.*, 615 S.W.2d 677, 680 (Tenn. Ct. App. 1980); *Livingston Limestone Co.*, 547 S.W.2d at 943.
Tennessee, “the owner of real property is held to be qualified, by reason of his ownership alone, to give an opinion in evidence of the value of his land.”

Likewise, in condemnations involving corporate property owners, the trial court must allow the managing officer to present value testimony regarding the corporation’s real property holdings. However, the trier of fact should give little weight to this evidence when the property owner merely speculates. Expert witnesses possess different qualifications from the property owners and must base their opinions on facts and knowledge of the market. The trial court is given broad discretion in admitting the expert’s testimony into evidence, and the trier of fact is given wide latitude in weighing the credibility of the expert. Moreover, the expert is not disqualified from offering his opinion if he used “criteria . . . which is not altogether standard among appraisers.”

Because of the recent changes to the eminent domain laws, experts are assured involvement in condemnation actions. When a condemnor initiates an eminent domain proceeding, “it shall deposit the amount determined by the required appraisal with the clerk of the court . . . .” The required appraisal mandates that the appraiser consider the property’s “highest and best use, its use at the time of the taking, and any other uses to which the property is legally adaptable at the time of the taking.” Such a requirement may be a windfall to appraisers and cause an

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234 Livingston Limestone Co., 547 S.W.2d at 943.

235 Id.

236 MURPHY, supra note 152, at 18 (citing Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 257 (Tenn. Ct. App. 1990) (stating that “the owner’s opinion will be given little weight when founded on pure speculation” and concluding that “[t]here must be some evidence, apart from mere ownership, that this ‘value’ is a product of reasoned analysis”)).

237 Id. (citing Love v. Smith, 566 S.W.2d 876, 878 (Tenn. 1978)).


239 Id. (citing State ex rel. Comm’r Dept. of Transp. v. Brevard, 545 S.W.2d 431, 436 (Tenn. Ct. App. 1976)).

240 Brevard, 545 S.W.2d at 436.


242 Id. at § 29-17-1004.
increase in litigation surrounding the just compensation issue. However, the trier of fact is not bound by the experts’ opinions.\(^{243}\)

**C. Incidental Damages and Special Benefits**

The Tennessee Constitution only requires that property owners be compensated for the loss of their property, but it does not provide property owners with a cause of action for incidental damages.\(^ {244}\) However, the General Assembly expressly provided that in addition to the fair market value of the targeted property, the condemnee is entitled to the “amount of incidental damage done to the residue of the owner’s property, if any, after deducting from the incidental damages to the residue the value of all special benefits.”\(^ {245}\) Thus, this provision mandates that incidental damages are netted against any incidental benefits. Incidental damages are measured by the decline in value resulting from the taking.\(^ {246}\) Moreover, the amount of incidental damages lies within the province of the jury and will not be disturbed on appeal “unless the [award is] shown to be . . . wholly unfair and unreasonable.”\(^ {247}\) The types of compensable incidental damages are a question of law for the trial court.\(^ {248}\)

Although a jury may award incidental damages to actual condemnees,\(^ {249}\) it may not award such damages to adjacent property owners.\(^ {250}\) Similarly, the property owner of condemned property cannot be compensated for the incidental damages.

\(^{243}\) *Murphy*, *supra* note 152, at 18 (citing Brevard, 545 S.W.2d at 436).

\(^{244}\) *Lewisburg & N. R.R. Co. v. Hinds*, 183 S.W. 985, 989 (Tenn. 1916).


\(^{246}\) *City of Memphis v. Hood*, 345 S.W.2d 887, 891 (Tenn. 1961); *Shelby County v. Kingsway Greens of Am., Inc.*, 706 S.W.2d 634, 638 (Tenn. Ct. App. 1985).

\(^{247}\) *Davidson County Bd. of Educ. v. First Am. Nat'l Bank*, 301 S.W.2d 905, 911 (Tenn. 1957).


\(^{249}\) *Murphy*, *supra* note 152, at 18 (citing Ledbetter v. Beach, 421 S.W.2d 814, 817 (Tenn. 1967); *State v. Rascoe*, 178 S.W.2d 392, 395 (Tenn. 1944)).

\(^{250}\) *Id.* at 18-19 (citing *Ledbetter*, 421 S.W.2d at 817; *Rascoe*, 178 S.W.2d at 395); *see also* *Tenn. Code Ann.* § 29-17-910 (stating that and “owner” is entitled to damages to the “property or property rights taken” and does not provide for compensation to anyone other than the owner).
that are not a direct result of the taking.\textsuperscript{251} Incidental damages that should be taken into account include the reasonable expenses of any necessary disassembling, loading, transporting to a new location not more than 50 miles from the condemned property, and reassembling of personal property at the new location.\textsuperscript{252} In addition, the condemnor should compensate the property owner for any recording fees, transfer taxes,\textsuperscript{253} penalties for early repayment of pre-existing mortgages on the condemned property,\textsuperscript{254} and the pro rata portion of real estate taxes paid that are allocable to the earlier of either the date of title vesting in the condemnor or the effective date of possession by the condemnor.\textsuperscript{255}

The eminent domain statutes require that the jury subtract the amount of any special benefits that will accrue to the remaining property by the condemnation from the incidental damages.\textsuperscript{256} The jury should generally consider only special benefits that have accrued at the time of the taking; however, the court may allow the property owner to establish special benefits after the taking to properly account for the project’s impact on the condemned property.\textsuperscript{257} Furthermore, the General Assembly allows property owners whose property has been seized to build or improve roads or highways, to continue a damages trial until the condemning entity completes the project.\textsuperscript{258} Examples of special benefits include greater accessibility to

\begin{thebibliography}{9}
\bibitem{251} MURPHY, supra note 152, at 19 (citing Ledbetter, 421 S.W.2d at 817).
\bibitem{252} TENN. CODE ANN. § 29-16-114(a)(1) (2007).
\bibitem{253} Id. at § 29-16-114(d)(1).
\bibitem{254} Id. at § 29-16-114(d)(2).
\bibitem{255} Id. at § 29-16-114(d)(3).
\bibitem{256} Id. at §§ 29-16-114(a)(1); 29-17-910.
\bibitem{257} MURPHY, supra note 152, at 20 (citing State v. Rascoe, 178 S.W.2d 392, 394 (Tenn. 1944)).
\bibitem{258} TENN. CODE ANN. § 29-17-1001 (2007); MURPHY, supra note 152, at 20.
\end{thebibliography}
the residue\textsuperscript{259} and improved parking,\textsuperscript{260} however, general increases in fair market value, which other property owners may enjoy, are not considered.\textsuperscript{261}

Lastly, the condemnor must pay the property owner interest on any judgment awarded.\textsuperscript{262} The interest rate is “two percentage points (2\%) greater than the prime loan rate established, as of the date of the taking, by the federal reserve system of the United States on any excess of the amount awarded an owner over the amount deposited with the clerk.”\textsuperscript{263}

1. Leasehold Estates

When a condemning authority seizes property that has a lease attached, the tenant is entitled to just compensation for the fair market value of the lease.\textsuperscript{264} The rationale is that “[t]he right of which a tenant is deprived and for which he is entitled to full compensation is the right to remain in undisturbed possession to the end of the term; and the loss resulting from a deprivation of this right is what he is entitled to recover.”\textsuperscript{265} This right to compensation applies to actual takings of the underlying property and to impairments to the access of the property.\textsuperscript{266} Additionally, the tenant is entitled to compensation when the condemning authority effectuates a partial taking that impairs the fair market value of the total lease.\textsuperscript{267} The fair market

\textsuperscript{259} MURPHY, supra note 152, at 20 (citing Newberry v. Hamblen County, 9 S.W.2d 700, 701 (Tenn. 1928)).

\textsuperscript{260} Id. at 20 (citing Maryville Hous. Auth. v. Williams, 478 S.W.2d 66, 68 (Tenn. Ct. App. 1971)).

\textsuperscript{261} Id. at 20 (citing City of Knoxville v. Barton, 159 S.W. 837, 837 (Tenn. 1913)).

\textsuperscript{262} MURPHY, supra note 152, at 20.

\textsuperscript{263} TENN. CODE ANN. § 29-17-913(a) (2007).


\textsuperscript{266} Barden, 527 S.W.2d at 128 (quoting Stokely v. S. Ry. Co., 418 S.W.2d 255, 260 (Tenn. 1967)).

\textsuperscript{267} Gallatin Hous. Auth. v. Chambers, 362 S.W.2d 270, 275 (Tenn. 1962).
value of the lease is the value of the unexpired lease less any rents owed to the landlord.\footnote{268} If the acquired property had improvements, the jury may be called upon to decide whether the improvements are permanent and belong to the land owner or whether the improvements are temporary and removable and therefore owned by the lessee.\footnote{269} Generally, the lease provisions determine the ownership of improvements.\footnote{270} If the lessee had a right to remove any improvements prior to or before the lease expired, the lessee is entitled to just compensation for the improvements.\footnote{271} However, if the removal of the improvements would severely damage the value of the property, then the improvements are considered part of the property and any compensation would be paid to the property owner.\footnote{272} The lease should expressly state who owns any improvements and the apportionment of any just compensation award.

A complete taking of the property extinguishes the lease as a matter of law.\footnote{273} However, whether a partial taking extinguishes the lease depends on whether the parties addressed such a situation in the lease.\footnote{274} The Restatement (Second) of Property provides a default rule that a partial taking terminates the lease if the partial taking “significantly interferes with the use contemplated by the parties.”\footnote{275} If the partial taking does not significantly interfere with the use, then there is no taking and the lessee is entitled to rent abatement.\footnote{276} To prevent the default rule from

\footnote{268} Barden, 527 S.W.2d at 129; Moulton v. George, 348 S.W.2d 129, 130 (Tenn. 1961); State ex rel. Comm’r Dept. of Transp. v. Teasley, 913 S.W.2d 175, 179 (Tenn. Ct. App. 1995) (quoting State ex rel. Dept. of Transp. v. Gee, 565 S.W.2d 498, 506 (Tenn. Ct. App. 1977)).

\footnote{269} Barden, 527 S.W.2d at 131; GEORGE A. DEAN & J. KEVIN WALSH, LAND USE PLANNING & EMINENT DOMAIN IN TENNESSEE 96 (NAT’L BUS. INST. 2005).

\footnote{270} DEAN & WALSH, supra note 269, at 96.

\footnote{271} Id.

\footnote{272} Id.


\footnote{274} See id. at § 8.1(2).

\footnote{275} Id. at § 8.1(2)(a)

\footnote{276} Id. at § 8.1(2)(b).
controlling the situation, the parties should include language in the lease that specifically addresses partial takings and inverse condemnation proceedings.

2. **Relocation Assistance Acts**

Condemnees may also face moving expenses. The federal government enacted the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (‘‘URA”)

277 to provide “fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a [f]ederal agency or with [f]ederal financial assistance.”

278 Congress sought to minimize the impact of displacement and ensure that such persons did not suffer “disproportionate injuries” caused by a project that was designed to benefit the public at large.

279 Similarly, Tennessee’s General Assembly enacted the Uniform Relocation Assistance Act of 1972 (‘‘URAA”)

280 to effectuate the same protections and public policies as the federal government.

281 The provisions of both acts are mandatory and apply to any condemning authority using either federal or state funds.

282 This section focuses on Tennessee’s URAA and its procedures.

The URAA contains a definition section along with provisions for assisting displaced persons with finding and financing replacement homes and business

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278 Id. at § 4621(b) (stating the public policy of the URA).

279 42 U.S.C. § 4621(b) (“The primary purpose of this subchapter is to ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons.”).


281 Id. at § 13-11-102 (defining the purpose of the URAA and tracking the language of the federal counterpart).


284 TENN. CODE ANN. § 13-11-103.
In addition, the URAA requires the public body to provide advisory services to assist displaced persons with locating suitable replacement property, planning for the move, and supplying information about other available federal and state assistance programs. A “displaced person” is generally defined to include any person who loses his or her property to a state agency or local public body for the development of a public project and includes both residential and commercial property owners. However, a “displaced person” does not include unlawful occupants or any person “who occupies such property on a rental basis for a short term or a period subject to termination when the property is needed for the program or project.” A displaced person who qualifies as a residential displacee is entitled to payments for relocation and moving expenses and may also be entitled to additional costs for replacement property.

The residential displacee may elect to receive either actual moving expenses or a payment based upon a schedule determined by the governor’s designee. If the residential displacee elects to receive actual moving expenses, those expenses must be reasonable and evidenced by paid receipts. Moreover, the residential displacee may request that any commercial movers bill the State directly.

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285 Id. at § 13-11-105.

286 Id. at § 13-11-108.

287 Id. at § 13-11-103(3)(A); Tenn. Comp. R. & Regs. 1680-6-2-.03(8)(a) (2007) (defining “displaced persons” for the Tennessee Department of Transportation).


291 Id. at § 13-11-106; Tenn. Comp. R. & Regs. 1680-6-2-.13(3)(a).


293 Tenn. Code Ann. §§ 13-11-105(a), -113(2); Tenn. Comp. R. & Regs. 1680-6-2-.09(2), -.10(1).

294 Tenn. Comp. R. & Regs. 1680-6-2-.10(2).
displacee may seek reimbursement for the following reasonable expenses: moving expenses within a 50-mile radius of acquired property;\textsuperscript{295} transportation costs to the new location, limited to either a standard mileage rate determined by the State or reasonable and actual fees incurred if a commercial mover is employed;\textsuperscript{296} if approved in advance and upon a showing of need, actual meals and lodging expenses;\textsuperscript{297} “packing, crating, unpacking, and uncrating of personal property”;\textsuperscript{298} disconnecting, disassembling, removing, reassembling appliances and other personal property;\textsuperscript{299} “the cost of insurance for the replacement value of personal property moved or stored in connection with the replacement”;\textsuperscript{300} “the reasonable replacement value of property lost, stolen, or damaged” during the move that was not caused by the residential displacee or otherwise covered by insurance;\textsuperscript{301} and storage costs for up to 12-months with prior approval.\textsuperscript{302}

If the residential displacee does not wish to keep track of the actual expenses, he may elect to receive a fixed expense and dislocation allowance.\textsuperscript{303} This payment is determined according to a schedule provided by the Federal Highway Administration.\textsuperscript{304} For example, according to the schedule, a Tennessee residential displacee with a furnished eight-room dwelling would be entitled to approximately $1,900.\textsuperscript{305} Generally, if the residential displacee elects this option, the State will not

\textsuperscript{295} Id. at 1680-6-2-.10(1)(a).

\textsuperscript{296} Id. at 1680-6-2-.10(1)(a)(1).

\textsuperscript{297} Id. at 1680-6-2-.10(1)(a)(3).

\textsuperscript{298} Id. at 1680-6-2-.10(1)(b).

\textsuperscript{299} Id. at 1680-6-2-.10(1)(c).

\textsuperscript{300} Id. at 1680-6-2-.10(1)(e).

\textsuperscript{301} Id.

\textsuperscript{302} Id. at 1680-6-2-.10(1)(d).

\textsuperscript{303} TENN. CODE ANN. § 13-11-105(b) (2007); TENN. COMP. R. & REGS. 1680-6-2-.10(3)(a).

\textsuperscript{304} TENN. COMP. R. & REGS. 1680-6-2-.10(3)(b); see also TENN. CODE ANN. § 13-11-105(b) (stating that the schedule “established by the governor or the governor’s designee”); U.S. Dept. of Transp., Fed. Highway Admin., \textit{Fixed Residential Moving Cost Schedule}, (June 15, 2005), http://www.fhwa.dot.gov/realestate/fixsch96.htm.

\textsuperscript{305} U.S. Dept. of Transp., Fed. Highway Admin., \textit{supra} note 304.
pay additional claims for moving expenses. As such, if the residential displacee anticipates unusual moving expenses, a fixed allowance may not be the most beneficial option for him.

In addition to receiving moving expenses, the residential displacee may be eligible for replacement housing payments. These payments come in three basic forms: purchase supplement, rental supplement, and down payment supplement. The eligibility for these payments depends on whether the residential displacee is an owner or tenant as well as the length of occupancy in the acquired property. There are two occupancy time period classifications that determine the type of payment available: 180-day owner and 90-day owner/tenant.

A 180-day owner is one who occupied the property for more than 180 days. A 90-day owner/tenant is either an owner or a tenant who occupied the property between 90 and 179 days. Under the URRAA, a 180-day owner may be eligible for a purchase supplement not to exceed $22,500 or a rental supplement not to exceed $5,250. On the other hand, a 90-day owner/tenant may be eligible for a rental supplement not to exceed $5,250.

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306 TENN. CODE ANN. § 13-11-105(b) (stating that the expense and dislocation allowance is “in lieu of” the actual reasonable expenses incurred); TENN. COMP. R. & REGS. 1680-6-2-.10(3)(a) (stating that the expense and dislocation allowance is “an alternative to payment for actual moving and related expenses”).

307 TENN. CODE ANN. §§ 13-11-106, -107; TENN. COMP. R. & REGS. 1680-6-2-.13(1)-(2).


310 TENN. CODE ANN. §§ 13-11-106(a), -107(a); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(a), - .13(2)(a).

311 TENN. CODE ANN. § 13-11-106(a); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(a)(1).

312 TENN. CODE ANN. § 13-11-107(a)(1); TENN. COMP. R. & REGS. 1680-6-2-.13(2)(a)(1),

313 TENN. CODE ANN. § 13-11-106(a); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(b).

314 TENN. COMP. R. & REGS. 1680-6-2-.13(1)(6).

315 TENN. CODE ANN. § 13-11-107(a)(2); TENN. COMP. R. & REGS. 1680-6-2-.13(2)(a)-(b).
The purchase supplement for a 180-day owner has three components: price differential, increased interest costs, and incidental expenses. The price differential is the amount that a replacement dwelling exceeds the acquisition price of the acquired dwelling. Additional interest costs may be reimbursed if the interest rate on a new mortgage is higher than the interest rate on a mortgage on the residential displacee’s current dwelling. Incidental expenses associated with the purchase of the new home, such as recording fees, title searches, and other closing costs are also reimbursable by the State. However, the total of these three amounts cannot exceed $22,500.

In addition to the purchase supplement, the State offers 180-day owners and 90-day owner/tenants a rental supplement that allows residential displacees to rent a comparable replacement dwelling for up to 42 months. The State will calculate the amount of the rental supplement based on the difference between the rent currently paid by the residential displacee and the rent for a comparable property, but this amount cannot exceed $5,250. The displacing agency may disburse the rental supplement in a lump sum payment or through installments. A 180-day residential

316 TENN. CODE ANN. § 13-11-106(a)(1); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(e).

317 TENN. CODE ANN. § 13-11-106(a)(2); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(d).

318 TENN. CODE ANN. § 13-11-106(a)(3); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(e).

319 TENN. CODE ANN. § 13-11-106(a)(1); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(b)(1). For example: a 180-day owner occupant would receive $5,000 in price differential payment if the value of the current home is $10,000 and the State finds a comparable home for $15,000.

320 TENN. CODE ANN. § 13-11-106(a)(2); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(d)(1).

321 TENN. CODE ANN. § 13-11-106(a)(3); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(e).

322 TENN. CODE ANN. § 13-11-106(a); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(b).

323 TENN. CODE ANN. § 13-11-107(a)(2); TENN. COMP. R. & REGS. 1680-6-2-.13(1)(f), -13(b)(1).

324 TENN. COMP. R. & REGS. 1680-6-2-.13(1)(f), -13(b)(1). For example: If the current rent for a residential displacee is $150 per month and the State finds a comparable property for $200 per month the maximum rental supplement would be $2,100 ($200 replacement rent - $150 current rent x 42 months = $2,100).

325 TENN. CODE ANN. § 13-11-107(a)(2); TENN. COMP. R. & REGS. 1680-6-2-.13(2)(b)(3).
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A displacee may elect to forgo his entitlement to a purchase supplement and receive the rental supplement instead.\(^{326}\)

The final category of supplements reflects the long-standing public policy of encouraging home ownership by making 90-day owner/tenants eligible to receive a down payment supplement in lieu of the rental supplement.\(^{327}\) The down payment supplement cannot exceed $5,250 and is limited to the combined costs of the down payment and any reasonable incidental expenses incurred in the purchase of a replacement dwelling.\(^{328}\) Similarly to the purchase supplement, the incidental expenses associated with the down payment supplement include title searches, recording fees, transfer taxes, etc.\(^{329}\)

When calculating the costs of comparable replacement dwellings for the residential displacee, the State must consider the asking price of at least three comparable dwellings, if available.\(^{330}\) The comparison dwellings should be those “most nearly representative of, and equal to or better than, the displacement dwelling.”\(^{331}\) The State may adjust the cost estimate based on local market data.\(^{332}\)

Before entering into a sales contract or a rental agreement, the State must inspect the replacement dwelling to ensure that it is a “decent, safe, and sanitary dwelling.”\(^{333}\) The 180-day owner-occupant who is displaced must purchase a replacement dwelling within one year from the later of: (1) the date the residential displacee received the final payment for the acquired dwelling or, in the case of an

\(^{326}\) Tenn. Comp. R. & Regs. 1680-6-2-.13(1)(f).

\(^{327}\) Tenn. Code Ann. § 13-11-107(b); Tenn. Comp. R. & Regs. 1680-6-2-.13(2)(c). A 180-day owner who is eligible to receive a replacement housing payment is not eligible for the down payment supplement. Tenn. Comp. R. & Regs. 1680-6-2-.13(2)(c)(1).

\(^{328}\) Tenn. Code Ann. § 13-11-107(b); Tenn. Comp. R. & Regs. 1680-6-2-.13(2)(c)(2)-(3).

\(^{329}\) Tenn. Comp. R. & Regs. 1680-6-2-.13(1)(c), .13(2)(c)(3).

\(^{330}\) Tenn. Comp. R. & Regs. 1680-6-2-.13(3)(a)(1).

\(^{331}\) Id.

\(^{332}\) Id. (“An adjustment shall be made to the asking price of any dwelling to the extent justified by local market data. An obviously overpriced dwelling may be ignored.”).

\(^{333}\) Id. at 1680-6-2-.13(3)(b); see also id. at 1680-6-2-.03(6) (defining “decent, safe, and sanitary dwelling”).
eminent domain action, the date the requisite deposit was made to the court or (2) the date the State makes a comparable replacement dwelling available pursuant to the URAA prior to displacement. A residential displacee satisfies the one year requirement if he purchases either a “decent, safe, and sanitary dwelling” or, with some limitations, does any of the following: purchases and renovates a substandard housing; relocates the dwelling to a new location; builds a “decent, safe, and sanitary dwelling” on land owned or purchased by the displacee; contracts for the purchase or construction with a builder or occupies a previously owned dwelling. A 90-day occupant must rent or purchase and occupy “a decent, safe, and sanitary replacement dwelling” within one year. If the 90-day occupant is a tenant, the one year begins on the date the person moves from the displaced property. If the 90-day occupant is an owner-occupant, the one year begins on the later of (1) the date the residential displacee received the final payment for the acquired dwelling or, in the case of an eminent domain action, the date the requisite deposit was made to the court, or (2) the date the person moves from the displaced property.

Aside from the financial assistance, the URRA requires the State to provide Relocation Advisory Services to explain the relocation process, assist with planning, and make replacement dwellings available. A relocation agent will interview each

334 Id. at 1680-6-2-13(1)(a)(2)(i).
335 Id. at 1680-6-2-07(5), -13(1)(a)(2)(ii).
336 Id. at 1680-6-2-13(3)(e)(1).
337 Id. at 1680-6-2-13(3)(e)(2).
338 Id. at 1680-6-2-13(3)(e)(3).
339 Id. at 1680-6-2-13(3)(e)(4).
340 Id. at 1680-6-2-13(3)(e)(4)(5).
341 Id. at 1680-6-2-13(3)(e)(6).
342 Id. at 1680-6-2-13(2)(a)(2).
343 Id. at 1680-6-2-13(2)(a)(2)(i).
344 Id. at 1680-6-2-13(2)(a)(2)(ii).
345 TENN. CODE ANN. § 13-11-108(c); TENN. COMP. R. & REGS. 1680-6-2-07(4).
residential displacee and strive to minimize the impact of the relocation.\(^{346}\) Furthermore, the relocation agent must assure the residential displacee that he cannot be forced to relocate without a minimum of 90 days notice\(^{347}\) and the State provides at least one comparable property.\(^{348}\)

In addition to assisting residential displacees, the URAA requires the State to assist business owners and farmers when their property is acquired for a public project.\(^{349}\) The commercial displacee regulations generally mirror those for residential displacees.\(^{350}\) Commercial displacees may be reimbursed for actual and reasonable moving expenses performed either by themselves or by commercial movers.\(^{351}\) Moreover, commercial displacees may receive a reestablishment payment, not to exceed $10,000, for actual and reasonable expenses incurred in relocating and reestablishing small businesses, farms, or non-profit organizations at a new location.\(^{352}\) Commercial displacees may elect to receive a fixed payment, not less than $1,000 or greater than $20,000, in lieu of actual moving and reestablishment expenses.\(^{353}\) To be eligible for the fixed payment, the State must determine whether the commercial displacee must be moved as a result of the displacement and does so vacate or move;\(^{354}\) cannot be relocated without a substantial loss of existing business;\(^{355}\) is not part of an enterprise with more than three other establishments under the same ownership and engaged in the same or similar activity and not being acquired;\(^{356}\) the business is not being operated for the sole purpose of renting the

\(^{346}\) Tenn. Code Ann. § 13-11-108(c)(1)-(2); Tenn. Comp. R. & Regs. 1680-6-2-.07(4)(a).

\(^{347}\) Tenn. Code Ann. § 13-11-108(c)(3); Tenn. Comp. R. & Regs. 1680-6-2-.06(1)(c).

\(^{348}\) Tenn. Comp. R. & Regs. 1680-6-2-.06(1)(c), -.07(4)(b), -.07(5)(a).


\(^{350}\) See generally Tenn. Comp. R. & Regs. 1680-6-2-.11.

\(^{351}\) Id. at 1680-6-2-.11(1)-(2).

\(^{352}\) Id. at 1680-6-2-.11(4)(a).

\(^{353}\) Id. at 1680-6-2-.11(5)(a)(2).

\(^{354}\) Id. at 1680-6-2-.11(5)(a)(1)(i).

\(^{355}\) Id. at 1680-6-2-.11(5)(a)(1)(ii).

\(^{356}\) Id. at 1680-6-2-.11(5)(a)(1)(iii).
property to others;\textsuperscript{357} and that “[t]he business contributed materially to the income of the displaced person during the two taxable years prior to displacement.”\textsuperscript{358} The fixed payment is determined by the State based upon the average annual net earnings of the business during the two prior tax years.\textsuperscript{359}

Both residential and commercial displacees who are unsatisfied with either the determination of eligibility or the amount of relocation benefits may appeal the decision within the agency.\textsuperscript{360} The displacee should notify his relocation agent in writing of his intent to appeal.\textsuperscript{361} The displacee has 60 days after receiving written notice of the displacing agency action to file an appeal unless the agency has expressly extended the time for appeal.\textsuperscript{362} During the appeal, the displacee may present evidence and be represented by counsel.\textsuperscript{363} The agency must render a decision within 30 days, and this decision is not subject to judicial review, except as the law may provide under common law writs of certiorari.\textsuperscript{364}

3. \textbf{Professional Responsibility}

According to the Tennessee Rules of Professional Conduct, a lawyer assumes many roles when representing clients.\textsuperscript{365} By representing condemnors or property owners, an eminent domain practitioner may be called upon to serve as an advisor, advocate, negotiator, intermediary, and evaluator.\textsuperscript{366} When representing condemning

\textsuperscript{357} \textit{Id.} at 1680-6-2-.11(5)(a)(1)(iv)-(v).

\textsuperscript{358} \textit{Id.} at 1680-6-2-.11(5)(a)(1)(vi).

\textsuperscript{359} \textit{Id.} at 1680-6-2-.11(5)(c)(1). For example: if a business reported a net earnings of $8,000 in 2005 and $10,000 in 2006, the commercial displacee would be entitled to a fixed payment of $9,000.

\textsuperscript{360} \textsc{Tenn. Code Ann.} § 13-11-113(3) (2007); \textsc{Tenn. Comp. R. & Regs.} 1680-6-2-.16(1).

\textsuperscript{361} \textsc{Tenn. Comp. R. & Regs.} 1680-6-2-.16(2)(a).

\textsuperscript{362} \textit{Id.} at 1680-6-2-.16(2)(b).

\textsuperscript{363} \textit{Id.} at 1680-6-2-.16(5).

\textsuperscript{364} \textit{Id.} at 1680-6-2-.16(6)-(7).

\textsuperscript{365} \textsc{Tenn. Sup. Ct. R. 8, Rules of Prof’l Conduct R. pmbl. ¶ 3} (2007).

\textsuperscript{366} \textit{Id.}
authorities, lawyers must decide whether the government has met all the statutory and regulatory requirements, give advice about which legal avenue is most advantageous to effectuate the taking, negotiate with property owners, and, if necessary, advocate as to why the taking is necessary. Similarly, lawyers who represent property owners must ensure that the government pays just compensation to the property owners and does not overstep its statutory authority. Therefore, each of these roles raises many ethical considerations for eminent domain practitioners.

An attorney who represents a property owner in an eminent domain action will most likely begin his representation by negotiating with the condemning authority. As such, the attorney should disclose to the administrative agency that he is serving in a representative capacity for the property owner. Furthermore, when negotiating with the condemning authority, the attorney has the responsibility to “not knowingly make a false statement of material fact or law . . . .” Interestingly, the comments to Rule 4.1 of the Rules of Professional Conduct make it clear that when an attorney makes statements about the value of the targeted property during negotiations, those statements are not material statements of fact.

If there are several interested owners, such as partners, tenants, landlords, and mortgagees, an attorney may represent multiple parties in the condemnation. Although the conflict of interest rules generally prohibit one lawyer from representing multiple parties whose interests may be adverse to one another, Rule 1.7(a) provides an exception. A lawyer may represent multiple parties if “(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents in writing after consultation.” As a practical matter, it may be problematic for one lawyer to represent a landlord and the landlord’s tenants because the eminent domain award will be apportioned among the parties. If the joint representation fails, then the lawyer generally will have to withdraw from the transactions altogether.

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367 Id. at R. 3.9.
368 Id. at R. 4.1(a).
369 Id. at R. 4.1 cmt. 2.
370 Id. at R. 1.7(a).
371 Id. at R. 1.7(a).
372 Id. at R. 1.7 cmt. 20.
Eminent domain actions are often an expensive “battle of the experts,” and clients may call upon their lawyers to advance the costs of these experts as part of the employment agreement. The general rule espoused by the Rules of Professional Conduct prohibits lawyers from providing financial assistance to a client in anticipation of litigation.373 However, a lawyer may advance litigation expenses, “the repayment of which may be contingent on the outcome of the matter.”374 This exception allows greater access to the justice system and ensures that property owner’s rights are protected. Although each of these are important considerations, this section only touches the tip of the iceberg concerning ethical considerations that lawyers should consider in representing either condemning authorities or property owners.

IV. Representing Clients in Eminent Domain Proceedings

Two chapters within Title 29 of the Tennessee Code Annotated primarily govern the procedures for bringing and defending eminent domain actions in Tennessee. First, chapter 16 details the procedures for filing the petition, the procedures for providing notice to affected parties to be named as defendants, what constitutes damages, how to select the jury of view, and how to appeal either the use of eminent domain or the damages assessed.375 Second, chapter 17 relates to eminent domain by public agencies and addresses the more policy-oriented issues, such as expressing the legislative intent, defining “public use,” and delegating the power of eminent domain to various public agencies.376 These two chapters work in tandem to guide public agencies and practitioners through the condemnation process and should be strictly followed and narrowly construed to effectuate the General Assembly’s desired results.

A. Necessity

Before a condemnor can file an eminent domain petition to seize private property, certain steps should be followed to avoid challenges and possible reversals by the appellate courts. After a condemnor has selected which parcel or interest of property it wishes to seize, it should investigate whether this particular parcel or

373 Id. at R. 1.8(e).
374 Id. at R. 1.8(e)(1).
376 See id. at §§ 29-17-101 to -1004 (2007).
interest is necessary to achieve its goal. The Tennessee Supreme Court has ruled that absent a showing of “fraudulent, arbitrary, or capricious action” by the condemnor, a condemnor’s determination of necessity is conclusive upon the courts. Arbitrary and capricious actions are “willful and unreasonable action[s] without consideration or in disregard of facts or without determining principle.” Conversely, actions are not arbitrary and capricious when “exercised honestly and upon due consideration, where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached.” The courts have consistently noted that, “[s]electing the property to be taken, as contradistinguished from similar property in the same locality, determining its suitableness for the use to which it is proposed to put it, as well as deciding the quantity required, are all political questions, which inhere in and constitute the chief value of the power to take.” Therefore, private property owners cannot ask a court to supplant its own opinion regarding the necessity of the project for that of the condemning authority.

B. Authority

Next, the condemnor must establish that it has the authority to seize the private property. The General Assembly has empowered a number of public and private agencies with the power of eminent domain. Pursuant to this power, the

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377 City of Knoxville v. Heth, 210 S.W.2d 326, 331 (Tenn. 1948); MURPHY, supra note 152, at 12 (stating that the private property must be “necessary for the accomplishment of the public use”).

378 Heth, 210 S.W.2d at 331; MURPHY, supra note 152, at 14.


380 Denson, 1990 WL 154646, at *6 (quoting In re Persons Employed at St. Paul & Tacoma Lumber Co., 110 P.2d 877, 883 (Wash. 1941)).


382 Justus v. McMahan, 226 S.W.2d 84, 85 (Tenn. 1949).

383 MURPHY, supra note 152, at 12.

384 Id. at 1-2.
condemnor authorizes the condemnation by enacting either an ordinance or a resolution. However, if the enabling statute requires the condemnor to enact an ordinance, then a resolution is insufficient. The resolution or ordinance should recite the nature of the project, that the property is being condemned for the public’s use and interest, that the identified parcel or property interest is necessary to accomplish the public use, and specifically authorize the institution of condemnation proceedings. After the condemnor’s legislative body has passed the resolution or ordinance, counsel should attach a copy of the resolution or ordinance to the petition or incorporate it by reference.

C. Notice

Once the legislative body has addressed the public policy of the condemnation, the condemnor may proceed with the actual taking of the parcel or interest. However, unlike most civil proceedings which begin with a traditional summons, eminent domain actions are initiated by serving notice of the filing on the defendants. At least five days before the petition is presented to the court, the condemnor must provide a copy of the petition to owners of the land or interest. The notice should advise the owner of the proceedings and the date the petition will be filed. If the owner is not a resident of the county in which the property is located, the condemnor should give notice to the owner’s agent.

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386 Id. (citing City of Johnson City v. Campbell, No. E2000-01345-COA-R3-CV, 2001 WL 112311, at *6, 7 (Tenn. Ct. App. Feb. 9, 2001) (noting that “[a] resolution is a mere expression of the opinion of the mind of the City Council concerning some matter of administration coming within its official cognizance”; whereas, “[o]rdinances are rules or regulations adopted by municipal corporations in pursuance of powers granted by the law of the land”) (internal citations omitted)).

387 Id. (citing Will A. Wilkerson, The Institution and Prosecution of Condemnation Proceedings, 26 TENN. L. REV. 325, 325-26 (1959)).

388 Id.

389 Johnson v. Roane County, 370 S.W.2d 496, 498-99 (Tenn. 1963); Wilkerson, supra note 387, at 326.


391 MURPHY, supra note 152, at 6 (citing GRIFFIN & STOKES, EMINENT DOMAIN IN TENNESSEE 23 (rev. ed. Jul. 1979)).

392 TENN. CODE ANN. § 29-16-105(a).
non-resident of Tennessee or is unknown, the condemnor may provide notice through publication in a manner similar to chancery cases.\textsuperscript{393} However, if the name or address of a non-resident owner is known or readily ascertainable, the Due Process Clause of the 14th Amendment requires that the condemnor provide more than notice by publication.\textsuperscript{394}

While Tennessee statutes are silent as to the exact manner of service, Rule 71 of the Tennessee Rules of Civil Procedure states that the Rules of Civil Procedure should be followed to the extent they are consistent with the eminent domain statutes.\textsuperscript{395} Thus, the condemnor may provide service in any manner consistent with Rule 4 of the Tennessee Rules of Civil Procedure.\textsuperscript{396} Similarly, the owner should return notice of service consistent with Rule 4.03 of the Tennessee Rules of Civil Procedure.\textsuperscript{397}

D. Petition

When providing notice, the condemnor must include a copy of the eminent domain petition.\textsuperscript{398} The condemnor must file the petition in the circuit court of the county in which the land is located.\textsuperscript{399} The petition must state the following four elements: (1) the precise parcel or interest of the property wanted by the condemnor;\textsuperscript{400} (2) either the name of the owner or that the owner is unknown;\textsuperscript{401} (3) the reasons the parcel or interest is wanted;\textsuperscript{402} and (4) request that the parcel or

\begin{footnotesize}
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  \item[393] Id. at § 29-16-105(b); see also TENN. CODE ANN. § 21-1-204 (providing for service by publication for cases in chancery).
  \item[394] MURPHY, supra note 152, at 6 (citing Baggett v. Baggett, 541 S.W.2d 407, 411 (Tenn. 1976)).
  \item[395] TENN. R. CIV. P. 71(2007); MURPHY, supra note 152, at 6.
  \item[396] MURPHY, supra note 152, at 6.
  \item[397] MURPHY, supra note 152, at 6; see also TENN. R. CIV. P. 4.03.
  \item[398] TENN. CODE ANN. § 29-16-105(a) (2007).
  \item[399] Id. at § 29-16-104; MURPHY, supra note 152, at 5.
  \item[400] TENN. CODE ANN. § 29-16-104(1).
  \item[401] Id. at § 29-16-104(2).
  \item[402] Id. at § 29-16-104(3).
\end{itemize}
\end{footnotesize}
interest be decreed to the condemnor and “set apart by metes and bounds, or other proper mode.” The petition should name “all parties having any interest in any way in such land or rights.” If the condemnor omits an owner from the petition, then the proceeding shall not cover or affect his interest.

E. Jury of View

After the condemnor has provided the requisite notice, it should move the court to issue a writ of inquiry of damages to the sheriff commanding him to summon a jury of view. The jury will ascertain the amount the owner is entitled to receive. At this stage in the litigation process, the owner may challenge the proposed taking. The owner may do so by attacking the alleged public use, the enabling statute, or the necessity of the taking. These issues involve questions of law that the court must determine before the case proceeds to the jury of view for a determination of damages. If the owner fails to show sufficient cause to prevent the taking, the court must issue the writ. After notice of service to the sheriff, the parties may agree or the condemnor may apply for the writ to be issued by the clerk of the court. This efficiency measure at the threshold stage moves the proceedings

403 Id. at § 29-16-104(4).

404 Id. at § 29-16-106.

405 Id. Furthermore, unborn remaindermen are bound by the proceedings if all living persons in interest are parties. Id.

406 The jury of view is compensated according to the population of the county. TENN. CODE ANN. § 29-16-125. Additionally, a person cannot be compelled to serve on a jury of view more than once every two years. Id. at § 29-16-125(c).

407 Id. at § 29-16-107(a).

408 TENN. CODE ANN. § 29-16-107(a); MURPHY, supra note 152, at 6 (citing Wilkerson, supra note 387, at 327).

409 MURPHY, supra note 152, at 7.

410 Id.

411 TENN. CODE ANN. § 29-16-107(a); MURPHY, supra note 152, at 7.

412 TENN. CODE ANN. § 29-16-107(b).
Along without court intervention. However, the owner may object and bring the motion to issue the writ of inquiry before the court.\footnote{Id. at § 29-16-107; \textit{MURPHY}, supra note 152, at 7.}

After the writ is issued, the case proceeds to the selection of a jury of view.\footnote{Id. at § 29-16-107; \textit{MURPHY}, supra note 152, at 7.} The jury of view consists of five members of the general public who have no interest in the targeted property and possess the same qualifications as other civil litigation jurors.\footnote{TENN. CODE ANN. §§ 29-16-108, -109; \textit{MURPHY}, supra note 152, at 7.} The parties may agree on a different number of jurors and may also challenge the jurors for cause through peremptorily challenges.\footnote{TENN. CODE ANN. § 29-16-108; \textit{MURPHY}, supra note 152, at 7.} The jurors may be nominated by the court, selected by the parties, or summoned by the sheriff for service.\footnote{TENN. CODE ANN. § 29-16-109.} Unless the court decides otherwise, the sheriff must provide the prospective jurors with at least three days notice of the time and place of the hearing.\footnote{Id. at § 29-16-111; \textit{MURPHY}, supra note 152, at 7.}

Once the court empanels the jury, members are sworn to act fairly and impartially, to describe the targeted property by metes and bounds, and to investigate and determine the amount of damages owed to the property owner.\footnote{TENN. CODE ANN. § 29-16-112; \textit{MURPHY}, supra note 152, at 7.} During the investigation, the jury may visit the targeted property and hear testimony—but not argument from counsel—about the property.\footnote{TENN. CODE ANN. § 29-16-113; \textit{MURPHY}, supra note 152, at 7.} After viewing the targeted property and hearing the testimony, the jury will decide what portion of the land is needed to meet the public use and determine the amount of damages owed to the property owner.\footnote{TENN. CODE ANN. § 29-16-113; \textit{MURPHY}, supra note 152, at 7.}

After reaching its decision about the amount of property to transfer to the condemnor and the amount of compensation owed to the property owner, the jury
must reduce its finding to a writing signed by a majority of the jurors.\textsuperscript{422} The jurors deliver the report to the sheriff who then delivers it to the court.\textsuperscript{423} Either party may object to the report, and, upon a showing of good cause, the court may set aside the report and order a new writ of inquiry.\textsuperscript{424} However, if neither party objects, the court will confirm the report and transfer the ownership rights to the condemnor once the condemnor either pays the property owner or deposits the funds with the clerk of the court.\textsuperscript{425}

F. Appeal

If a party objects to the jury’s report, the party may appeal and “have a trial anew before a jury in the usual way.”\textsuperscript{426} The parties must appeal within 45 days from the court’s order confirming the jury of view’s report.\textsuperscript{427} If the property owner does not challenge the right to condemn and limits his appeal to damages, “the property owner [is] entitled to open and close the argument before the court and jury.”\textsuperscript{428} The property owner’s appeal does not suspend the condemnor’s operations on the newly acquired property.\textsuperscript{429} However, to continue operations during the challenge, the condemnor must provide a bond for double the amount of the jury’s award payable to the property owners and approved by the clerk.\textsuperscript{430} Additionally, the condemnor must agree “to abide by and perform the final judgment in the premises.”\textsuperscript{431} If the trial jury’s verdict affirms the jury of view’s findings or is more unfavorable to the

\textsuperscript{422} TENN. CODE ANN. § 29-16-115; MURPHY, supra note 152, at 7.

\textsuperscript{423} TENN. CODE ANN. § 29-16-115; MURPHY, supra note 152, at 7.

\textsuperscript{424} TENN. CODE ANN. § 29-16-117; MURPHY, supra note 152, at 8.

\textsuperscript{425} TENN. CODE ANN. § 29-16-116; MURPHY, supra note 152, at 7-8.

\textsuperscript{426} TENN. CODE ANN. § 29-16-118(a). The appealing party must also give security for the costs of the trial. Id.

\textsuperscript{427} TENN. CODE ANN. § 29-16-118(c); MURPHY, supra note 152, at 8.

\textsuperscript{428} TENN. CODE ANN. § 29-16-118(b). However, the statute is silent as to whether the condemnor may make opening or closing statements to the trier of fact.

\textsuperscript{429} TENN. CODE ANN. § 29-16-120; MURPHY, supra note 152, at 8.

\textsuperscript{430} TENN. CODE ANN. § 29-16-120; MURPHY, supra note 152, at 8.

\textsuperscript{431} TENN. CODE ANN. § 29-16-120; MURPHY, supra note 152, at 8.
appellant than the original award, the costs of the appeal will be taxed to the appellant; “otherwise the court may award costs as in chancery cases.”

Finally, Rule 41.01 of the Tennessee Rules of Civil Procedure allows the condemnor to take a voluntary nonsuit in the condemnation proceeding. However, once the court has confirmed the jury of view’s report, the condemnor cannot voluntarily nonsuit an eminent domain petition.

G. Tactics and Strategies

In all eminent domain actions, the condemning authority must provide notice of the proposed taking. As a result, the condemning authorities will generally attempt to save litigation expenses and prevent delays by negotiating with the property owner before initiating any condemnation proceedings. If the condemning authority makes an offer to buy the property, owner’s counsel should carefully review the offer and ensure that his client’s rights are protected. This includes verifying that the offer accurately describes by metes and bounds the property being acquired. Furthermore, the attorney will want to ascertain whether the offer encompasses all of the elements of just compensation, incidental awards, and assistance under the URRAA. The attorney may protect these rights by coordinating an independent appraisal of the targeted property or reviewing the government’s appraisal with the property owner to guarantee that he understands which rights are being relinquished as part of the settlement.

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432 TENN. CODE ANN. § 29-16-119; MURPHY, supra note 152, at 8.

433 MURPHY, supra note 152, at 8 (citing Anderson v. Smith, 521 S.W.2d 787, 791 (Tenn. 1975)). The Anderson Court reasoned that case law and Rule 41.01 provide:

that the condemnor has the right to take a nonsuit at any time prior to the case being submitted to the trier of fact for decision, unless the condemnor has taken possession of the property under court order issued under circumstances leaving nothing to be decided by the court except the compensation to be paid the owner for the land taken.

Anderson, 521 S.W.2d at 791.

434 See sources cited supra note 433.

435 TENN. CODE ANN. §§ 29-16-105(a), 29-17-903(c); MURPHY, supra note 152, at 10.
In the event of a partial taking, the offer should carefully delineate the property rights the condemning authority is acquiring and the rights remaining with the property owners. Early attention to detail will assist in limiting the scope of the taking and protecting the property owner if the condemning authority’s plan changes and it attempts to take more rights than originally purchased. If a governing body must approve the acceptance of the offer, the property owner should insist on a time limit to add finality and predictability to the process. Moreover, the property owner should insist that any sales contract must specifically state that the sale occurred under the threat of condemnation for tax purposes. Taxpayers may defer the recognition of capital gains from the sale of property if it was an involuntary conversion and the just compensation award was used to purchase replacement housing. Additionally, the property owner may be able to take advantage of other capital gains deferrals under the “like kind exchange” rules found in section 1031 of the Internal Revenue Code.

The property owner may challenge either the condemning authority’s right to take the property or the amount of the just compensation offer in court. The government’s eminent domain powers are very broad, and courts have traditionally allowed great deference to the government in condemnation actions; therefore, the majority of property owner challenges have concentrated on the amount of just compensation owed. In a challenge to the amount of just compensation, the proceedings are likely to become a battle of the experts with value being the most important and most highly contested aspect. Generally, the most vital expert is the property appraiser. Consequently, the appraiser should be highly qualified and have experience not only in real estate appraisals, but also in appraising the particular type of property being seized and making evaluations in the geographic area.


437 See generally I.R.C. § 1031 (providing the rules applicable to like kind exchanges); see also INTERNAL REVENUE SERVICE, supra note 436, at 5-10 (discussing tax consequences of involuntary sales).

438 MURPHY, supra note 152, at 12.


440 Id. at 40.

441 Id.
appraiser must be either designated as a Member of the Appraisal Institute or licensed by the State.\footnote{442}{TENN. CODE ANN. § 29-17-1004 (2007).}

Furthermore, the property owner may need to hire other experts, such as architects, planners, economists, geologists, biologists, and engineers, to establish a fair market value of the targeted property.\footnote{443}{COPE & MURPHY, supra note 439, at 39.} Although the complexity of the case will determine the number of experts required, the attorney should coordinate the evaluation process to prevent duplicity of services and unnecessary costs to the client. The expert may be called upon to testify before a jury; therefore, the attorney should select experts who have professional demeanors and are able to explain the elements of their analysis succinctly and in layman’s terms. Experts should provide not only written reports, but also photographs, plats, maps, charts, before and after comparisons, and the condemning authority’s plans in their testimony.

A client may seek to settle disputes through alternative dispute resolution to avoid incurring the expense of hiring experts. Given the continuous increase in costs and delays in litigation, more parties are turning to mediation, judicial settlement conferences, mini-trials, and arbitrations to resolve their differences. These alternative avenues have many advantages aside from reduced costs, including speedier results, client empowerment, and realistic evaluation of the case by a neutral intermediary. Alternative dispute resolution avenues remove some of the unpredictability associated with judges and juries and may save both parties significant expense and time. If the parties settle outside of court, the settlement agreement should mirror a final judgment order, properly identifying the parties, the details of the property, rights acquired, and the just compensation paid.

V. CONCLUSION

In conclusion, eminent domain practice is a mainstay of legal business in Tennessee and practitioners should be prepared to protect the rights of property owner and the public in condemnation actions. Given Tennessee’s explosive growth over the past decade, it will be imperative that government and private property owners work together to effectively manage that growth while protecting the rights of its citizens.
VI. SAMPLE PLEADINGS, PRE-TRIAL MOTIONS, AND LEASE CLAUSES

SAMPLE LEASE CLAUSE

__ CONDEMNATION. Rights and duties in the event of condemnation [are] as follows:

(a) If the whole of the leased premises shall be taken or condemned by any competent authority for any public or quasi-public use or purpose, this Lease shall cease and terminate as of the date on which title shall vest thereby in that authority, and the rent reserved hereunder shall be apportioned and paid up to that date.

(b) If only a portion of the leased premises shall be taken or condemned, this Lease and the term hereof shall not cease or terminate, but the rent payable after the date on which the LESSEE shall be required to surrender possession of such portion shall be reduced in proportion to the decreased use suffered by the LESSEE as the parties may agree or as shall be determined by arbitration.

(c) In the event of any taking or condemnation in whole or in part, the entire resulting award of consequential damages shall be negotiated separately by LESSOR and LESSEE with the taking entity for their respective losses.

(d) In case of any governmental action resulting in the taking or condemnation of any portion of the leased premises but creating a right to compensation therefor, or if less than a fee title to all or any portion of the leased premises shall be taken or condemned by any governmental authority for temporary use or occupancy, this Lease shall continue in full force and effect without reduction or abatement of rent, and the rights of the parties shall be unaffected by the other provisions of this section, but shall be governed by applicable law.

IN THE CIRCUIT COURT FOR [insert county], TENNESSEE

AT [insert city/town]

[Insert condemning authority]

Petitioner,

v. No. _________

[Insert all persons owning an interest in the target property],

Respondents.

NOTICE

Please take notice that on [insert date], Petitioner [specify condemning authority] filed an eminent domain petition against you pursuant to Tennessee Code Annotated section [specify provisions] seeking to condemn property rights you own in [specify property], which is fully described in the petition, a copy of which accompanies this notice.

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

You are further notified that after the expiration of thirty (30) days from the date of the giving of this notice, if you do not challenge the petitioner’s right to condemn the property rights described in the petition in accordance with the applicable Tennessee law, the petitioner shall have the right to take possession of the property rights sought to be condemned; and if necessary to place the petitioner in

445 This sample Notice was adapted from COPE & MURPHY, supra note 439, at 48-49 and MURPHY, supra note 152, at 37.
possession of those sought after rights, the Court shall issue a Writ of Possession to the Sheriff of the County to the petitioner in possession. Furthermore, the Court shall enter an Order of Taking granting the petitioner possession of the sought after property rights.

This the ____ day of ____________, [year].

CIRCUIT COURT CLERK

BY: __________________________

OFFICER'S RETURN

I certify that I served this Notice along with a copy of the petition for condemnation, upon the above named respondent(s), by personally delivering a copy to him or her this ___ day of ____________, [year].

BY: __________________________
SAMPLE MOTION FOR NOTICE BY PUBLICATION

IN THE CIRCUIT COURT FOR [insert county], TENNESSEE

AT [insert city/town]

[Insert condemning authority]

Petitioner,

v. No. ___________

[Insert all persons owning an interest in the target property]

Respondents.

MOTION FOR NOTICE BY PUBLICATION

Comes now the Petitioner, by and through counsel, and respectfully moves this Court pursuant to Rule 4.05 of the Tennessee Rules of Civil Procedure and Tennessee Code Annotated sections 29-16-105 and 21-1-103, for an Order that notice of condemnation petition filed with this Court upon respondents [specify all property owners], 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, [insert counsel], filed with this motion in support of same.

446 This sample Motion for Notice by Publication was adapted from MURPHY, supra note 152, at 41.
Respectfully submitted,

____________________
Counsel for Petitioner
[insert contact information]

SAMPLE CONDEMNATION PETITION\textsuperscript{447}

IN THE CIRCUIT COURT FOR [insert county], TENNESSEE

AT [insert city/town]

[Insert condemning authority] )

Petitioner,

v. ) No. _________

[Insert all persons owning an interest in the target property]

Respondents.

PETITION

\textsuperscript{447} This sample Condemnation Petition was adapted from COPE & MURPHY, supra note 439, at 50-53 and MURPHY, supra note 152, at 35-36.
Petitioner, [insert condemning authority] respectfully shows to the Court as follows:

1. [Identify condemning authority, including its character and function]

2. [Specify condemnation enabling statute or provision, which expressly grants the condemning authority the power of eminent domain]

3. [Name all the defendant property owners and identify the appropriate civil district where the targeted property is located, the sought after property rights, and the legal description of the targeted property. Indicate that property map has been attached as an exhibit]

4. [List any encumbrances, if any]

5. [Specify the public use or purpose for which the targeted property will be used]

6. [Specify that the condemnation is essential and necessary and that the condemning authority should be allowed to enter the property to effectuate the public use or purpose]

7. [Indicate the amount the condemning authority has deposited with the clerk of the court and specify that the condemning authority has acquired the requisite appraisal]

8. [If the jury of view method is sought, indicate that the condemning authority has filed the petition for the purpose of obtaining the issuance of a writ of inquiry of damages and the appointment of a jury of view]

9. [Averment that condemning authority is entitled to the targeted property or right sought]

PREMISED CONSIDERED, Petitioner prays:

1. That a copy of this petition issue and be served upon the defendants and that they be required to answer same as provided by law, but their oath to answer is specifically waived.

2. That pursuant to law, after thirty (30) days from service of Notice, if defendants do not contest the petitioner’s right to condemn the sought after property or property rights, that
an Order by granted granting the petitioner the right of possession of the property
described within this petition.

3. That the Court grant all necessary Orders, including a Writ of Possession as may be required.

4. That all proper proceedings be had hereunder which are necessary for the condemnation and appropriation of the property described within this petition.

5. That the previously mentioned deposit be distributed according to the law.

6. That all necessary and proper proceedings be had hereunder and that the same be decreed to the petitioner at the final hearing.

7. That petitioner have a jury of twelve to try this case.

8. That the petitioner have such other, further and general relief as it may be entitled to under the facts and law of this case.

Respectfully submitted,

[Law firm]

BY: __________________________
[Attorney]
Counsel for Petitioner
[Address]

COST BOND

(Requirements vary by jurisdiction.)

CERTIFICATE OF SERVICE
SAMPLE TENDER

IN THE CIRCUIT COURT FOR [insert county], TENNESSEE

AT [insert city/town]

[Insert condemning authority]  )

Petitioner,  )

v.  )

No. _________

[Insert all persons owning an interest in the target property]  )

Respondents.  )

TENDER

Petitioner has filed a petition to condemn certain rights in the Circuit Court of this County.

Pursuant to law, petitioner tenders to the Clerk of the Circuit Court that amount of [indicated amount deposited], which has been determined by the petitioner as the damages to which the defendants are entitled to after obtaining the requisite appraisal.

This ___ day of ___________, [year].

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448 This sample Tender was adapted from COPE & MURPHY, supra note 439, at 54.
Respectfully submitted,

[Law firm]

BY: __________________________
[Attorney]
Counsel for Petitioner
[Address]

SAMPLE ANSWER

IN THE CIRCUIT COURT FOR [insert county], TENNESSEE

AT [insert city/town]

[Insert condemning authority]

Petitioner,

v.

No. __________

[Insert all persons owning an interest in the target property]

Respondents.

ANSWER

Comes now the defendant property owners, [insert name], and states:

[Answer each paragraph as necessary]

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449 This sample Answer was adapted from COPE & MURPHY, supra note 439, at 56-57.
Respectfully submitted,

[Law firm]

BY: __________________________
[Attorney]
Counsel for Petitioner
[Address]

CERTIFICATE OF SERVICE

SAMPLE INTERROGATORIES

IN THE CIRCUIT COURT FOR [insert county], TENNESSEE

AT [insert city/town]

[Insert condemning authority]

Petitioner,

v.

No. __________

[Insert all persons owning an interest in the target property]

Respondents.

PETITIONER'S FIRST SET OF INTERROGATORIES

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450 This sample Interrogatories was adapted from COPE & MURPHY, supra note 439, at 59-76.
Petitioner, [insert condemning authority], pursuant to Rules 26 and 34 of the Tennessee Rules of Civil Procedure, submits the following First Set of Interrogatories to the Defendants, [insert property owner defendants], as follows:

**INSTRUCTIONS**

[Include traditional instructions]

**DEFINITIONS**

[Include traditional definitions]

“Petition” means the Petition filed herein and any amendments or supplements thereto.

“Property” means real estate and all related improvements, fixtures, etc.

“Subject property” refers to the entire parcel of land and all improvements in which the defendants claim an interest and from which the petitioner seeks to condemn through the power of eminent domain.

“Residue” means any portion of the Subject Property remaining, if any, after the petitioner takes possession of the Property it seeks to condemn in this petition.

“Property taken” refers to the portion of the Subject Property sought to be condemned in this petition.

“Improvement” refers to any fixtures, chattel, structure, or other thing found attached to the Property, which may be considered to have value.

“Incidental damages” means any claims of compensation beyond the claim for payment for the Property taken.
INTERROGATORIES

[Include traditional background interrogatories]

Possible topics for discovery include:

- How did the property owners become familiar with the subject property and any improvements?

- Have the property owners identify all the uses, which they have used or known the property to be used?

- Have the property owner identify any previous owners or other who may own an interest in the subject property, including interest owned, dates owned, selling prices, and contact information?

- Identify any discussions or communications about selling the subject property, including the parties involved, dates, times, locations, nature of the discussion, prices, etc.

- What is the subject property’s best and highest use, including any basis for the answer?

- If the property owner was not putting the subject property to its best or highest use, discover why not, including justifications.

- Has there been any prior appraisals performed on the property? If so, identify who performed it, when was it performed, what was the determination, and how to contact the appraiser?

- Has the subject property ever been surveyed? If so, identify the surveyor, when it was performed, where is the survey, and how to contact the surveyor?

- Will the condemnation cause any adverse effects to the residue? If so, what is the basis for that conclusion?

- Have the property owner identify what he or she believes is the fair market value of the subject property and why.
Respectfully submitted,

[Law firm]

BY: __________________________

[Attorney]
Counsel for Petitioner
[Address]

CERTIFICATE OF SERVICE