

**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*.¹ 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.² 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.”³ In response to this invitation from the United States Supreme Court, the Tennessee General Assembly

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¹ *Kelo v. City of New London*, 545 U.S. 469 (2005).

² See 2006 Tenn. Pub. Acts 863.

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 In

⁴ 2006 Tenn. Pub. Acts 863.

⁵ *Kelo*, 545 U.S. at 469.

⁶ *Id.*

⁷ *Id.* at 473.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

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conjunction with the NLDC and the State, the City developed a plan to reinvigorate the area by turning Fort Trumbull into a state park.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.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.¹³

The Fort Trumbull revitalization plan divided the targeted area into seven parcels.¹⁴ A new "waterfront conference hotel at the center of a 'small urban village'" would be constructed on the first three parcels.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.¹⁶ Additional office sites, retail building sites, and parking would be constructed on Parcels 5, 6, and 7.¹⁷ 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."¹⁸ The City approved the final plan in January of 2000 and designated the NLDC as the development agent in charge of implementation.¹⁹ The City also delegated its

¹¹ *Id.*

¹² *Id.* Pfizer, Inc. is a large and well-known pharmaceutical company. *Id.*

¹³ *Id.* at 473-74.

¹⁴ *Id.* at 474.

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.*

¹⁶ *Id.* The proposed retail shops would capitalize upon the foot traffic attracted by either the proposed park or the marina.

¹⁷ *Id.*

¹⁸ *Id.* at 474-75.

¹⁹ *Id.* at 475.

eminent domain powers to the NLDC, which successfully acquired most of the necessary property.²⁰

Susette Kelo purchased her quaint pink cottage in 1997 and refused to sell to the NLDC.²¹ In all, nine property owners who owned fifteen properties in the development area refused to sell their properties to the NLDC.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.”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.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.”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 3.²⁶ Both parties appealed.²⁷ The Connecticut Supreme Court concluded that the takings were authorized under existing state law and overturned the trial court’s permanent injunction.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.’”²⁹ To further

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 476 n.4.

²⁶ *Id.* at 475-76.

²⁷ *Id.* at 476.

²⁸ *Id.*

²⁹ *Id.* (citing *Kelo v. City of New London*, 843 A.2d 500, 515-521 (2004)).

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bolster its decision, the court relied upon the United States Supreme Court's decisions in *Hawaii Housing Authority v. Midkiff*³⁰ and *Berman v. Parker*³¹ for the proposition "that such economic development qualified as a valid public use under both the Federal and State Constitutions."³² 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."³³

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.³⁴ 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.³⁵ Moreover, the *Kelo* case does not exemplify a state seizing land to make it open to the public.³⁶ Accordingly, Justice Stevens reasoned that this case must be analyzed under the previously adopted theory that "public use" means "public purpose."³⁷ 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."³⁸

³⁰ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

³¹ *Berman v. Parker*, 348 U.S. 26 (1954).

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.³⁹ In *Berman*, the United States Supreme Court upheld a Washington, D.C. redevelopment plan that called for the condemnation of a large blighted area.⁴⁰ 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.⁴¹ 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.”⁴² In rejecting the owner’s claim, the Court deferred to the legislature and refused to address each property on an *ad hoc* basis.⁴³ 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.⁴⁴

Next, the majority analyzed its decision in *Hawaii Housing Authority v. Midkiff*.⁴⁵ 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.⁴⁶ 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

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).

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from the land barons and sold on the open market.⁴⁷ 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.⁴⁸ 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."⁴⁹ Instead, courts should focus on the *purpose* of the takings, rather than their mechanics.⁵⁰

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."⁵¹ 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.⁵² The City responded to a legitimate threat in a calculated and deliberate manner.⁵³ It enacted its revitalization plan in accordance with a specific grant of legislative authority to use eminent domain to achieve its goal.⁵⁴ 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."⁵⁵

Lastly, Justice Stevens emphasized that the states are free to place additional restrictions on the exercise of takings power.⁵⁶ 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.⁵⁷ 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.⁵⁸ As such, the wisdom of using eminent domain for economic development properly remains within the confines of the elected representatives.⁵⁹

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.⁶⁰

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.⁶¹ Specifically, the trial court found that the City executed the taking to benefit from Pfizer’s presence, not to benefit Pfizer.⁶²

⁵⁷ *Id.*

⁵⁸ *Id.* at 489-90.

⁵⁹ *Id.* at 489.

⁶⁰ *Id.* at 491 (Kennedy, J., concurring).

⁶¹ *Id.* at 492.

⁶² *Id.*

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Ms. Kelo argued that takings justified by economic development should be “*per se* invalid or, at least presumptively invalid.”⁶³ Justice Kennedy responded that such a strong rule was unnecessary in most instances and would render too many valid takings unconstitutional.⁶⁴ 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.⁶⁵ 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.”⁶⁶ 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.”⁶⁷

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.⁶⁸ 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.”⁶⁹ 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.”⁷⁰ 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.”⁷¹ Justice O'Connor reminded the majority that fairness and security underlie the Takings Clause.⁷²

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.”⁷³ 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.⁷⁴ 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”⁷⁵ In reexamining *Berman* and *Midkiff*,⁷⁶ Justice O'Connor looked to the evils that the District of Columbia and Hawaii evaluated.⁷⁷ 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.⁷⁸ In contrast to Ms. Kelo's situation, the elimination of the affirmative harm in *Berman* and *Midkiff* was the public purpose.⁷⁹

⁷¹ *Id.*

⁷² *Id.* at 497 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002)).

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.⁸⁰ 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."⁸¹ 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."⁸² 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."⁸³ 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.⁸⁴

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.⁸⁵ 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.⁸⁶ The remainder of Part II of this Article highlights the significant changes in Tennessee law resulting from the Act.

⁸⁰ *Id.* at 506 (Thomas, J. dissenting).

⁸¹ *Id.* at 508.

⁸² *Id.* at 510.

⁸³ *Id.* at 511.

⁸⁴ *Id.* at 519-21.

⁸⁵ 2006 Tenn. Pub. Acts 863.

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.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."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 *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:

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.⁸⁹

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

⁸⁷ *Id.*

⁸⁸ *Id.* § 1 (amending TENN. CODE ANN. § 29-17-101 (2005)).

⁸⁹ *Id.* (amending TENN. CODE ANN. § 29-17-102(a) (2005)).

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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)).

⁹⁶ *Knoxville Cmty. Dev. Corp. v. Wright*, 600 S.W.2d 745 (Tenn. Ct. App. 1980).

the Fort Sanders community.⁹⁷ The plan called for KCDC to acquire blighted land either through purchase or condemnation with just compensation.⁹⁸ After the land was developed, it was to be sold for fair market value to a local developer for further commercial development.⁹⁹ However, the property owners refused to sell, and KCDC filed condemnation proceedings.¹⁰⁰ The property owners argued, *inter alia*, that the condemnation was unconstitutional because the private developer was the primary beneficiary.¹⁰¹ 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.¹⁰²

Fourth, a government may seize property even if a private individual receives an incidental benefit.¹⁰³ However, the government cannot invoke condemnation proceedings if the taking is "primarily for the purpose of conveying or permitting such incidental private use."¹⁰⁴ 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").¹⁰⁵ 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.*

¹⁰³ 2006 Tenn. Pub. Acts 863, § 1 (amending TENN. CODE ANN. § 29-17-102(b)(4) (2005)).

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

¹⁰⁵ TENN. CODE ANN. § 13-16-201 (2007); 2006 Tenn. Pub. Acts 863 § 1 (amending TENN. CODE ANN. § 29-17-102(b)(5)(2005)).

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eminent domain powers to within its jurisdictional boundaries or within an urban growth boundary.¹⁰⁶ 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.”¹⁰⁷

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.¹⁰⁸

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.¹⁰⁹ Moreover, the legislature emphatically stated that land used predominately for agricultural purposes could not be considered as blighted under any circumstances.¹¹⁰

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

¹⁰⁶ 2006 Tenn. Pub. Acts 863 § 3 (amending TENN. CODE ANN. § 13-16-207(e) (2005) (current version at TENN. CODE ANN. § 13-16-207(f) (2007)); *see also* TENN. CODE ANN. §§ 6-58-101 to 107 (2005) (outlining comprehensive growth plans).

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).

¹⁰⁸ TENN. CODE ANN. § 13-20-201(a) (2005) *amended by* 2006 Pub. Acts 863, § 2.

¹⁰⁹ 2006 Tenn. Pub. Acts 863, § 14 (amending TENN. CODE ANN. § 13-20-201(a) (2005)).

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”¹¹¹ 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.¹¹² 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.¹¹³ 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.¹¹⁴ 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.¹¹⁵ If the government prevails, it shall then have the right to take possession.¹¹⁶ 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

¹¹¹ TENN. CODE ANN. § 13-20-201(a) (2007)).

¹¹² *Id.*

¹¹³ *Id.* at § 15(a).

¹¹⁴ *Id.* at § 15(b)(1).

¹¹⁵ *Id.* at §15(b)(2).

¹¹⁶ *Id.*

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sheriff to put the government in possession.¹¹⁷ The writ of possession can be issued before a trial on the damages.¹¹⁸

The Act now mandates the calculation of total damages for completely condemned property.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."¹²⁰ In addition to the immediately past property assessor valuation, the parties must obtain an appraisal of the property.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."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.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.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at § 19 (amending TENN. CODE ANN. § 29-16-114(a)(2) (2005)).

¹²⁰ *Id.* The parties may enter the valuation of the property into evidence at trial. *Id.*

¹²¹ *Id.* at § 20.

¹²² *Id.*

¹²³ *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

¹²⁴ 2006 Tenn. Pub. Acts 863, § 24(a)(1)(A)-(C).

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.

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the counties' authority to seize natural lakes or land to construct lakes¹³⁴ and to condemn land for creating ferries.¹³⁵

E. Summary

The General Assembly used the *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.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."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.

¹³⁴ *Id.* at § 10 (amending TENN. CODE ANN. § 11-22-101 (2005)).

¹³⁵ *Id.* at § 9 (repealing TENN. CODE ANN. § 54-11-302 (2005)).

¹³⁶ *City of Knoxville v. Heth*, 210 S.W.2d 326, 328 (Tenn. 1948) (quoting 29 C.J.S. *Eminent Domain* § 1); *accord* *Jackson v. Metro. Knoxville Airport Auth.*, 922 S.W.2d 860, 861 (Tenn. 1996).

¹³⁷ *Heth*, 210 S.W.2d at 328.

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.”¹³⁸ 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.”¹³⁹ These twin restrictions of public use and just compensation are incorporated to the states through the 14th Amendment.¹⁴⁰ 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.”¹⁴¹ Thus, if the government condemned a person’s property, regardless of its character,¹⁴² 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.¹⁴³ 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.¹⁴⁴ If the General

¹³⁸ *Harper v. Trenton Hous. Auth.*, 274 S.W.2d 635, 641 (Tenn. Ct. App. 1954).

¹³⁹ U.S. CONST. amend. V; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

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).

¹⁴³ *County Highway Comm’n of Rutherford County v. Smith*, 454 S.W.2d 124, 126 (Tenn. Ct. App. 1969).

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).

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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.”¹⁴⁵

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.¹⁴⁶ Likewise, the enabling statutes will be construed liberally in favor of property owners’ rights.¹⁴⁷ In the preamble to the eminent domain laws, the General Assembly emphasized its desire for strict construction of eminent domain statutes.¹⁴⁸ 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.”¹⁴⁹

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.¹⁵⁰ The police powers have “generally not been considered to amount to a taking under the power of eminent domain”¹⁵¹ Thus, when an act of police power, as

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.*

¹⁴⁸ TENN. CODE ANN. § 29-17-101 (2007).

¹⁴⁹ *City of Maryville v. Edmondson*, 931 S.W.2d 932, 935 n.2 (Tenn. Ct. App. 1996) (quoting *Harper v. Trenton Hous. Auth.*, 274 S.W.2d 635, 641 (Tenn. Ct. App. 1954)).

¹⁵⁰ *Hoover, Inc. v. Metro. Bd. of Zoning Appeals for Davidson County*, 955 S.W.2d 52, 53 n.2 (Tenn. Ct. App. 1997).

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.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.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.”¹⁵⁴ The United States Supreme Court first addressed this issue in *Pennsylvania Coal Co. v. Mahon*.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.”¹⁵⁶ The Tennessee Supreme Court has yet to formally adopt the *Pennsylvania Coal Co.* test; however, the court of

¹⁵² JAMES L. MURPHY, III, EMINENT DOMAIN IN TENNESSEE . . . AN ATTORNEY’S GUIDE 3 (Dennis Huffer ed., Mun. Technical Advisory Serv. 2004) (1992).

¹⁵³ *Id.*; see also *City of Clarksville v. Moore*, 688 S.W.2d 428, 430 (Tenn. 1985) (finding enforcement of housing code not compensable); *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); *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).

¹⁵⁴ MURPHY, *supra* note 152, at 3.

¹⁵⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹⁵⁶ *Id.* at 415.

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appeals has employed its rationale numerous times.¹⁵⁷ 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.”¹⁵⁸ 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.’”¹⁵⁹ 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.”¹⁶⁰

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.¹⁶¹ 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.*”¹⁶² Accordingly, the Tennessee Supreme Court found that the condemnation satisfied

¹⁵⁷ See *Far Tower Sites, LLC v. Knox County*, 126 S.W.3d 52, 69 (Tenn. Ct. App. 2003); *Rives v. City of Clarksville*, 618 S.W.2d 502, 508 (Tenn. Ct. App. 1981); *Bayside Warehouse Co. v. City of Memphis*, 470 S.W.2d 375, 378 (Tenn. Ct. App. 1971).

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.¹⁶³ Moreover, the Tennessee Supreme Court expressly stated that it adopted a “practical view of the meaning of ‘public use.’”¹⁶⁴

The scope of the phrase “public use” is incapable of precise delineation and must remain elastic to keep pace in a changing society.¹⁶⁵ 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.¹⁶⁶

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.¹⁶⁷ 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.¹⁶⁸ 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”¹⁶⁹ Fair market value “is that value which

¹⁶³ *Id.* at 330.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (quoting *Dornan v. Philadelphia Hous. Auth.*, 200 A.2d 834, 840 (Pa. 1938)).

¹⁶⁷ TENN. CONST. art. I, § 21.

¹⁶⁸ *Nashville Hous. Auth. v. Cohen*, 541 S.W.2d 947, 950 (Tenn. 1976); *State ex rel. Comm’r of the Dept. of Transp. v. Williams*, 828 S.W.2d 397, 400 (Tenn. Ct. App. 1991).

¹⁶⁹ TENN. CODE ANN. § 29-17-910 (2007); *State ex rel. Comm’r of the Dept. of Transp. v. Brandon*, 898 S.W.2d 224, 226 (Tenn. Ct. App. 1994).

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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.”¹⁷⁰ The amount of damages awarded for just compensation is a question of fact,¹⁷¹ and the parties are entitled to a trial by jury.¹⁷² 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.¹⁷³

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”¹⁷⁴ In *Layne v. Speight*, the Tennessee Supreme Court adopted the United States Supreme Court’s description of this “scope of the project” rule:

[I]f 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).

¹⁷² TENN. CODE ANN. § 29-16-107 (2007).

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.*

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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.”¹⁸²

Moreover, the trier of fact may neither consider speculative values to new owners in assessing fair market value,¹⁸³ nor may it base an award solely on the targeted property’s “highest and best use.”¹⁸⁴ 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.*”¹⁸⁵ 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.¹⁸⁶ 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.”¹⁸⁷ 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.¹⁸⁸ The rationale for this prohibition was to prevent property owners from overemphasizing one particular use of the targeted property.¹⁸⁹

¹⁸² *Id.*

¹⁸³ *S. Ry. Co. v. City of Memphis*, 148 S.W. 662, 669 (Tenn. 1912).

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

¹⁸⁵ *Id.* (emphasis added); *see also* *Conness v. Commonwealth*, 69 N.E. 341, 341 (Mass. 1904); *Sacramento S. R.R. Co. v. Heilbron*, 104 P. 979, 981 (Cal. 1909).

¹⁸⁶ TENN. CODE ANN. § 29-17-1004 (2007).

¹⁸⁷ *Id.*

¹⁸⁸ *City of Cookeville v. Stites*, No. 01-A-01-9505-CV00199, 1995 WL 571851, at *2 (Tenn. Ct. App. 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”).

¹⁸⁹ *Stites*, 1995 WL 571851, at *2.

However, courts may consider the rental value of the seized property in ascertaining its fair market value.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.¹⁹¹ In *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.¹⁹² The *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.¹⁹³ Furthermore, the special circumstances exception may allow evidence to be admitted related to the value of the targeted property to the property owner.¹⁹⁴ When examining these special circumstances, the Tennessee Supreme Court has opined that:

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.¹⁹⁵

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

¹⁹⁰ *Union Ry. Co. v. Hunton*, 88 S.W. 182, 187 (Tenn. 1905); *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”).

¹⁹¹ *Shelby County v. Barden*, 527 S.W.2d 124, 132-33 (Tenn. 1975).

¹⁹² *Id.* at 133.

¹⁹³ *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.”)).

¹⁹⁴ *State ex rel. Smith v. Livingston Limestone Co.*, 547 S.W.2d 942, 943 (Tenn. 1977).

¹⁹⁵ *Id.* at 944 (citing *Creveling*, 17 S.W.2d 22).

¹⁹⁶ *State v. Brandon*, 898 S.W.2d 224, 228 (Tenn. Ct. App. 1994).

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Court of Appeals found that contamination directly impacted the willing buyer/willing seller standard of the fair market value analysis.¹⁹⁷ 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.¹⁹⁸ 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.”¹⁹⁹

Since courts must consider all legitimate uses for which the property is reasonably adaptable,²⁰⁰ courts should also take into account the targeted property’s present zoning²⁰¹ and imminent rezoning.²⁰² 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.”²⁰³ 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.²⁰⁴

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)).

²⁰² *Nashville Hous. Auth. v. Cohen*, 541 S.W.2d 947, 952 (Tenn. 1976).

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.²⁰⁵ Commercially zoned property surrounded the targeted property and the housing authority intended to rezone the targeted property to multi-family housing.²⁰⁶ 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.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹

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.²¹⁰

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.*

²¹⁰ This same rationale and rule applies equally to deed restrictions. See *State ex rel. Comm'r of Dept. of Transp. v. Williams*, 828 S.W.2d 397, 400 (Tenn. Ct. App. 1991); *State ex rel. Comm'r Dept. of Transp. v. Cox*, 840 S.W.2d 357, 361 (Tenn. Ct. App. 1991).

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.²¹¹ This is a question of law, which the appellate courts review for an abuse of discretion.²¹² A sufficiently comparable sale requires that (1) the sale must be voluntary or an arm's length transaction²¹³ and (2) the sales are not the result of a compromise.²¹⁴ The Tennessee Supreme Court has held that "voluntary" is akin to the "willing buyer/willing seller" standard that guides fair market value analysis.²¹⁵ Thus, the property owner may not introduce evidence of sales to the condemning authority,²¹⁶ sales made under the threat or influence of condemnation,²¹⁷ or sales involving property with unusually stringent restrictions on the property's use.²¹⁸

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.²¹⁹ While a general rule does not exist,²²⁰

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

²¹² Memphis Hous. Auth. v. Peabody Garage Co., 505 S.W.2d 719, 722 (Tenn. 1974).

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 Kimmell, 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,²²¹ timing of the sales,²²² changes in conditions of the properties since being sold,²²³ current zoning,²²⁴ imminent rezoning,²²⁵ location,²²⁶ proximity to existing improvements,²²⁷ improvements to the properties,²²⁸ geographic features,²²⁹ and all available uses to which the properties are adaptable.²³⁰ 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.²³¹

Property owners may also present opinions from lay²³² and expert witnesses²³³ to establish fair market value. Similar to the majority of jurisdictions, in

²²⁰ *Newton*, 484 S.W.2d at 897; *Maryville Hous. Auth. v. Ramsey*, 484 S.W.2d 73, 76 (Tenn. Ct. App. 1972).

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.

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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.”²³⁴ 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.²³⁵ However, the trier of fact should give little weight to this evidence when the property owner merely speculates.²³⁶ Expert witnesses possess different qualifications from the property owners and must base their opinions on facts and knowledge of the market.²³⁷ The trial court is given broad discretion in admitting the expert’s testimony into evidence,²³⁸ and the trier of fact is given wide latitude in weighing the credibility of the expert.²³⁹ Moreover, the expert is not disqualified from offering his opinion if he used “criteria . . . which is not altogether standard among appraisers.”²⁴⁰

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”²⁴¹ 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.”²⁴² Such a requirement may be a windfall to appraisers and cause an

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)).

²³⁸ *Id.* (citing *Smith County v. Eatherly*, 820 S.W.2d 366, 368 (Tenn. Ct. App. 1991)); *see also State ex rel. Comm’r of Dept. of Transp. v. Veglio*, 786 S.W.2d 944, 948 (Tenn. Ct. App. 1989); *State ex rel. Moulton v. Blake*, 357 S.W.2d 836 (Tenn. Ct. App. 1961).

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.

²⁴¹ TENN. CODE ANN. § 29-17-903(a) (2007) (emphasis added).

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).

²⁴⁵ TENN. CODE ANN. § 29-17-910 (2007).

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).

²⁴⁸ *Metro. Dev. & Hous. Agency v. Trinity Marine Nashville, Inc.*, 40 S.W.3d 73, 77 (Tenn. Ct. App. 2000).

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).

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that are not a direct result of the taking.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.²⁵² In addition, the condemnor should compensate the property owner for any recording fees, transfer taxes,²⁵³ penalties for early repayment of pre-existing mortgages on the condemned property,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.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.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.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.²⁵⁸ Examples of special benefits include greater accessibility to

²⁵¹ MURPHY, *supra* note 152, at 19 (citing *Ledbetter*, 421 S.W.2d at 817).

²⁵² TENN. CODE ANN. § 29-16-114(a)(1) (2007).

²⁵³ *Id.* at § 29-16-114(d)(1).

²⁵⁴ *Id.* at § 29-16-114(d)(2).

²⁵⁵ *Id.* at § 29-16-114(d)(3).

²⁵⁶ *Id.* at §§ 29-16-114(a)(1); 29-17-910.

²⁵⁷ MURPHY, *supra* note 152, at 20 (citing *State v. Rascoe*, 178 S.W.2d 392, 394 (Tenn. 1944)).

²⁵⁸ TENN. CODE ANN. § 29-17-1001 (2007); MURPHY, *supra* note 152, at 20.

the residue²⁵⁹ and improved parking;²⁶⁰ however, general increases in fair market value, which other property owners may enjoy, are not considered.²⁶¹

Lastly, the condemnor must pay the property owner interest on any judgment awarded.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.”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.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.”²⁶⁵ This right to compensation applies to actual takings of the underlying property and to impairments to the access of the property.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.²⁶⁷ The fair market

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

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

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

²⁶² MURPHY, *supra* note 152, at 20.

²⁶³ TENN. CODE ANN. § 29-17-913(a) (2007).

²⁶⁴ *Shelby County v. Barden*, 527 S.W.2d 124, 129 (Tenn. 1975); *City of Johnson City v. Outdoor West, Inc. of Tenn.*, 947 S.W.2d 855, 858 (Tenn. Ct. App. 1996); *Lamar Adver. of Tenn., Inc. v. Metro. Dev. & Hous. Auth.*, 803 S.W.2d 686, 688 (Tenn. Ct. App. 1990).

²⁶⁵ *City of Nashville v. Mason*, 11 Tenn. App. 344, 1930 WL 1650, at *6 (Tenn. Ct. App. Feb. 17, 1930) (citation omitted).

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

²⁶⁷ *Gallatin Hous. Auth. v. Chambers*, 362 S.W.2d 270, 275 (Tenn. 1962).

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value of the lease is the value of the unexpired lease less any rents owed to the landlord.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.²⁶⁹ Generally, the lease provisions determine the ownership of improvements.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.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.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.²⁷³ However, whether a partial taking extinguishes the lease depends on whether the parties addressed such a situation in the lease.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.”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.²⁷⁶ To prevent the default rule from

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)).

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).

²⁷⁰ DEAN & WALSH, *supra* note 269, at 96.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 8.1(1) (2007).

²⁷⁴ *See id.* at § 8.1(2).

²⁷⁵ *Id.* at § 8.1(2)(a)

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.²⁸³

The URAA contains a definition section²⁸⁴ along with provisions for assisting displaced persons with finding and financing replacement homes and business

²⁷⁷ Federal Uniform Relocation Assistance & Real Property Acquisition Policy Act of 1970, 42 U.S.C. §§ 4601-4655 (2007).

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.”).

²⁸⁰ Uniform Relocation Assistance Act of 1972, TENN. CODE ANN. §§ 13-11-101 to -119 (2007).

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

²⁸² *See* 42 U.S.C. § 4621(b); TENN. CODE ANN. § 13-11-102.

²⁸³ For a thorough discussion of the federal URA see U.S. DEPT. OF HOUS. & URBAN DEV., OFFICE OF CMTY. PLANNING & DEV., *When a Public Agency Acquires Your Property*, Mar. 2005, <http://www.hud.gov/utilities/intercept.cfm?/offices/cpd/library/relocation/publications/1041.pdf>; *see also* MURPHY, *supra* note 152, at 31.

²⁸⁴ TENN. CODE ANN. § 13-11-103.

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locations.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷ However, a “displaced person” does not include unlawful occupants²⁸⁸ 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.”²⁸⁹ A displaced person who qualifies as a residential displacee is entitled to payments for relocation and moving expenses²⁹⁰ and may also be entitled to additional costs for replacement property.²⁹¹

The residential displacee may elect to receive either actual moving expenses or a payment based upon a schedule determined by the governor’s designee.²⁹² If the residential displacee elects to receive actual moving expenses, those expenses must be reasonable and evidenced by paid receipts.²⁹³ Moreover, the residential displacee may request that any commercial movers bill the State directly.²⁹⁴ The residential

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).

²⁸⁸ TENN. CODE ANN. § 13-11-103(3)(B)(i); TENN. COMP. R. & REGS. 1680-6-2-.03(8)(b)(8).

²⁸⁹ TENN. CODE ANN. § 13-11-103(3)(B)(ii); TENN. COMP. R. & REGS. 1680-6-2-.03(8)(b)(4).

²⁹⁰ TENN. CODE ANN. § 13-11-105.

²⁹¹ *Id.* at § 13-11-106; TENN. COMP. R. & REGS. 1680-6-2-.13(3)(a).

²⁹² TENN. CODE ANN. § 13-11-105(a)-(b). For a general discussion of Tennessee’s relocation guidelines for displaced persons see Tenn. Dept. of Transp., Right of Way Div., *Information on Relocation Assistance Program*, http://www.tdot.state.tn.us/Chief_Engineer/assistant_engineer_design/row/relocation.pdf (last visited Nov. 25, 2007).

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;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;²⁹⁶ if approved in advance and upon a showing of need, actual meals and lodging expenses;²⁹⁷ “packing, crating, unpacking, and uncrating of personal property”;²⁹⁸ disconnecting, disassembling, removing, reassembling appliances and other personal property;²⁹⁹ “the cost of insurance for the replacement value of personal property moved or stored in connection with the replacement”;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;³⁰¹ and storage costs for up to 12-months with prior approval.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.³⁰³ This payment is determined according to a schedule provided by the Federal Highway Administration.³⁰⁴ For example, according to the schedule, a Tennessee residential displacee with a furnished eight-room dwelling would be entitled to approximately \$1,900.³⁰⁵ Generally, if the residential displacee elects this option, the State will not

²⁹⁵ *Id.* at 1680-6-2-10(1)(a).

²⁹⁶ *Id.* at 1680-6-2-10(1)(a)(1).

²⁹⁷ *Id.* at 1680-6-2-10(1)(a)(3).

²⁹⁸ *Id.* at 1680-6-2-10(1)(b).

²⁹⁹ *Id.* at 1680-6-2-10(1)(c).

³⁰⁰ *Id.* at 1680-6-2-10(1)(e).

³⁰¹ *Id.*

³⁰² *Id.* at 1680-6-2-10(1)(d).

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

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., *Fixed Residential Moving Cost Schedule*, (June 15, 2005), <http://www.fhwa.dot.gov/realestate/fixsch96.htm>.

³⁰⁵ U.S. Dept. of Transp., Fed. Highway Admin., *supra* note 304.

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pay additional claims for moving expenses.³⁰⁶ 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.³⁰⁷ These payments come in three basic forms: purchase supplement, rental supplement, and down payment supplement.³⁰⁸ 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.³⁰⁹ There are two occupancy time period classifications that determine the type of payment available: 180-day owner and 90-day owner/tenant.³¹⁰ A 180-day owner is one who occupied the property for more than 180 days.³¹¹ A 90-day owner/tenant is either an owner or a tenant who occupied the property between 90 and 179 days.³¹² Under the URAA, a 180-day owner may be eligible for a purchase supplement not to exceed \$22,500³¹³ or a rental supplement not to exceed \$5,250.³¹⁴ On the other hand, a 90-day owner/tenant may be eligible for a rental supplement not to exceed \$5,250.³¹⁵

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).

³⁰⁸ TENN. CODE ANN. §§ 13-11-106, -107; TENN. COMP. R. & REGS. 1680-6-2-.13(1)(b), -.13(2)(b)-(c).

³⁰⁹ TENN. CODE ANN. §§ 13-11-106, -107; TENN. COMP. R. & REGS. 1680-6-2-.13.

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)(f).

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,³¹⁶ increased interest costs,³¹⁷ and incidental expenses.³¹⁸ The price differential is the amount that a replacement dwelling exceeds the acquisition price of the acquired dwelling.³¹⁹ 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.³²⁰ 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.³²¹ However, the total of these three amounts cannot exceed \$22,500.³²²

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.³²³ 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 \$5,250.³²⁴ The displacing agency may disburse the rental supplement in a lump sum payment or through installments.³²⁵ A 180-day residential

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

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(2)(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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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)(e), -.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 court³³⁴ or (2) the date the State makes a comparable replacement dwelling available pursuant to the URAA prior to displacement.³³⁵ A residential displacee satisfies the one year requirement if he purchases either a “decent, safe, and sanitary dwelling”³³⁶ or, with some limitations, does any of the following: purchases and renovates a substandard housing;³³⁷ relocates the dwelling to a new location;³³⁸ builds a “decent, safe, and sanitary dwelling” on land owned or purchased by the displacee;³³⁹ contracts for the purchase or construction with a builder;³⁴⁰ or occupies a previously owned dwelling.³⁴¹ A 90-day occupant must rent or purchase and occupy “a decent, safe, and sanitary replacement dwelling” within one year.³⁴² If the 90-day occupant is a tenant, the one year begins on the date the person moves from the displaced property.³⁴³ 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.³⁴⁴

Aside from the financial assistance, the URAA requires the State to provide Relocation Advisory Services to explain the relocation process, assist with planning, and make replacement dwellings available.³⁴⁵ 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).

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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 notice³⁴⁷ 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).

³⁴⁹ TENN. CODE ANN. § 13-11-103(A)(ii); TENN. COMP. R. & REGS. 1680-6-2-.07(4)(d).

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;³⁵⁷ and that “[t]he business contributed materially to the income of the displaced person during the two taxable years prior to displacement.”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.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.³⁶⁰ The displacee should notify his relocation agent in writing of his intent to appeal.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.³⁶² During the appeal, the displacee may present evidence and be represented by counsel.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.³⁶⁴

3. Professional Responsibility

According to the Tennessee Rules of Professional Conduct, a lawyer assumes many roles when representing clients.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.³⁶⁶ When representing condemning

³⁵⁷ *Id.* at 1680-6-2-.11(5)(a)(1)(iv)-(v).

³⁵⁸ *Id.* at 1680-6-2-.11(5)(a)(1)(vi).

³⁵⁹ *Id.* at 1680-6-2-.11(5)(e)(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.

³⁶⁰ TENN. CODE ANN. § 13-11-113(3) (2007); TENN. COMP. R. & REGS. 1680-6-2-.16(1).

³⁶¹ TENN. COMP. R. & REGS. 1680-6-2-.16(2)(a).

³⁶² *Id.* at 1680-6-2-.16(2)(b).

³⁶³ *Id.* at 1680-6-2-.16(5).

³⁶⁴ *Id.* at 1680-6-2-.16(6)-(7).

³⁶⁵ TENN. SUP. CT. R. 8, RULES OF PROF'L CONDUCT R. pmb1. ¶ 3 (2007).

³⁶⁶ *Id.*

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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.³⁶⁷ Furthermore, when negotiating with the condemning authority, the attorney has the responsibility to “not knowingly make a false statement of material fact or law”³⁶⁸ 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.³⁶⁹

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,³⁷⁰ 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.”³⁷¹ 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.³⁷²

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).

³⁷⁵ *See* TENN. CODE ANN. §§ 29-16-101 to -127 (2007).

³⁷⁶ *See id.* at §§ 29-17-101 to -1004 (2007).

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interest is necessary to achieve its goal.³⁷⁷ 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.³⁷⁸ Arbitrary and capricious actions are “willful and unreasonable action[s] without consideration or in disregard of facts or without determining principle.”³⁷⁹ 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.”³⁸⁰ The courts have consistently noted that, “[s]electing the property to be taken, as contradistinguished from similar property in the same locality, determining its suitability 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.”³⁸¹ 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.³⁸²

B. Authority

Next, the condemnor must establish that it has the authority to seize the private property.³⁸³ The General Assembly has empowered a number of public and private agencies with the power of eminent domain.³⁸⁴ Pursuant to this power, the

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.

³⁷⁹ *Metro. Gov’t of Nashville & Davidson County v. Denson*, No. 01-A-01-9005CV00174, 1990 WL 154646, at *6 (Tenn. Ct. App. Oct. 17, 1990) (quoting BLACK’S LAW DICTIONARY 96 (5th ed.)); *accord* *Wagoner v. City of Arlington*, 345 S.W.2d 759, 763 (Tex. App. 1961).

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)).

³⁸¹ *S. Ry. Co. v. City of Memphis*, 148 S.W. 662, 665 (Tenn. 1912); *accord* *Heth*, 210 S.W.2d at 331 (quoting *S. Ry. Co.*, 148 S.W.2d at 665); *First Util. Dist. of Knox County v. Jarnigan-Bodden*, 40 S.W.3d 60, 64 (Tenn. Ct. App. 2000) (quoting *S. Ry. Co.*, 148 S.W.2d at 665); *City of Maryville v. Edmondson*, 931 S.W.2d 932, 934 (Tenn. Ct. App. 1996) (quoting *S. Ry. Co.*, 148 S.W.2d at 665).

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.³⁸⁵ However, if the enabling statute requires the condemnor to enact an ordinance, then a resolution is insufficient.³⁸⁶ 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.³⁸⁷ 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.³⁸⁸

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.³⁸⁹ 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.³⁹⁰ The notice should advise the owner of the proceedings and the date the petition will be filed.³⁹¹ 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.³⁹² If the owner is a

³⁸⁵ MURPHY, *supra* note 152, at 12 (citing Hawkins County v. Mallory, No. C.A. #91, 1985 Tenn. App. LEXIS 2621, at *4 (Tenn. Ct. App. Jan. 17, 1985)).

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.

³⁹⁰ TENN. CODE ANN. § 29-16-105(a) (2007).

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).

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non-resident of Tennessee or is unknown, the condemnor may provide notice through publication in a manner similar to chancery cases.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.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.³⁹⁵ Thus, the condemnor may provide service in any manner consistent with Rule 4 of the Tennessee Rules of Civil Procedure.³⁹⁶ Similarly, the owner should return notice of service consistent with Rule 4.03 of the Tennessee Rules of Civil Procedure.³⁹⁷

D. Petition

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

³⁹³ *Id.* at § 29-16-105(b); *see also* TENN. CODE ANN. § 21-1-204 (providing for service by publication for cases in chancery).

³⁹⁴ MURPHY, *supra* note 152, at 6 (citing *Baggett v. Baggett*, 541 S.W.2d 407, 411 (Tenn. 1976)).

³⁹⁵ TENN. R. CIV. P. 71(2007); MURPHY, *supra* note 152, at 6.

³⁹⁶ MURPHY, *supra* note 152, at 6.

³⁹⁷ MURPHY, *supra* note 152, at 6; *see also* TENN. R. CIV. P. 4.03.

³⁹⁸ TENN. CODE ANN. § 29-16-105(a) (2007).

³⁹⁹ *Id.* at § 29-16-104; MURPHY, *supra* note 152, at 5.

⁴⁰⁰ TENN. CODE ANN. § 29-16-104(1).

⁴⁰¹ *Id.* at § 29-16-104(2).

⁴⁰² *Id.* at § 29-16-104(3).

interest be decreed to the condemnor and “set apart by metes and bounds, or other proper mode.”⁴⁰³ The petition should name “all parties having any interest in any way in such land or rights.”⁴⁰⁴ If the condemnor omits an owner from the petition, then the proceeding shall not cover or affect his interest.⁴⁰⁵

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.⁴⁰⁶ The jury will ascertain the amount the owner is entitled to receive.⁴⁰⁷ At this stage in the litigation process, the owner may challenge the proposed taking.⁴⁰⁸ The owner may do so by attacking the alleged public use, the enabling statute, or the necessity of the taking.⁴⁰⁹ 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.⁴¹⁰ If the owner fails to show sufficient cause to prevent the taking, the court must issue the writ.⁴¹¹ 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.⁴¹² 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).

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along without court intervention. However, the owner may object and bring the motion to issue the writ of inquiry before the court.⁴¹³

After the writ is issued, the case proceeds to the selection of a jury of view.⁴¹⁴ 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.⁴¹⁵ The parties may agree on a different number of jurors and may also challenge the jurors for cause through peremptorily challenges.⁴¹⁶ The jurors may be nominated by the court, selected by the parties, or summoned by the sheriff for service.⁴¹⁷ 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.⁴¹⁸

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.⁴¹⁹ During the investigation, the jury may visit the targeted property and hear testimony—but not argument from counsel—about the property.⁴²⁰ 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.⁴²¹

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

⁴¹³ *Id.*

⁴¹⁴ *Id.* at § 29-16-107; MURPHY, *supra* note 152, at 7.

⁴¹⁵ TENN. CODE ANN. §§ 29-16-108, -109; MURPHY, *supra* note 152, at 7.

⁴¹⁶ TENN. CODE ANN. § 29-16-108; MURPHY, *supra* note 152, at 7.

⁴¹⁷ TENN. CODE ANN. § 29-16-109.

⁴¹⁸ *Id.* at § 29-16-111; MURPHY, *supra* note 152, at 7.

⁴¹⁹ TENN. CODE ANN. § 29-16-112; MURPHY, *supra* note 152, at 7.

⁴²⁰ TENN. CODE ANN. § 29-16-113; MURPHY, *supra* note 152, at 7.

⁴²¹ TENN. CODE ANN. § 29-16-113; MURPHY, *supra* note 152, at 7.

must reduce its finding to a writing signed by a majority of the jurors.⁴²² The jurors deliver the report to the sheriff who then delivers it to the court.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.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.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."⁴²⁶ The parties must appeal within 45 days from the court's order confirming the jury of view's report.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."⁴²⁸ The property owner's appeal does not suspend the condemnor's operations on the newly acquired property.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.⁴³⁰ Additionally, the condemnor must agree "to abide by and perform the final judgment in the premises."⁴³¹ If the trial jury's verdict affirms the jury of view's findings or is more unfavorable to the

⁴²²TENN. CODE ANN. § 29-16-115; MURPHY, *supra* note 152, at 7.

⁴²³ TENN. CODE ANN. § 29-16-115; MURPHY, *supra* note 152, at 7.

⁴²⁴ TENN. CODE ANN. § 29-16-117; MURPHY, *supra* note 152, at 8.

⁴²⁵ TENN. CODE ANN. § 29-16-116; MURPHY, *supra* note 152, at 7-8.

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

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

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.

⁴²⁹ TENN. CODE ANN. § 29-16-120; MURPHY, *supra* note 152, at 8.

⁴³⁰ TENN. CODE ANN. § 29-16-120; MURPHY, *supra* note 152, at 8.

⁴³¹ TENN. CODE ANN. § 29-16-120; MURPHY, *supra* note 152, at 8.

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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.”⁴³²

Finally, Rule 41.01 of the Tennessee Rules of Civil Procedure allows the condemnor to take a voluntary nonsuit in the condemnation proceeding.⁴³³ However, once the court has confirmed the jury of view’s report, the condemnor cannot voluntarily nonsuit an eminent domain petition.⁴³⁴

G. Tactics and Strategies

In all eminent domain actions, the condemning authority must provide notice of the proposed taking.⁴³⁵ 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 URAA. 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.

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.⁴³⁶ 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.⁴³⁷

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.⁴³⁸ 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.⁴³⁹ Generally, the most vital expert is the property appraiser.⁴⁴⁰ 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.⁴⁴¹ The

⁴³⁶ See generally I.R.C. § 1033 (2007) (providing the rules applicable to involuntary conversions); see also INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUBL'N 544: SALES & OTHER DISPOSITIONS OF ASSETS 5-10 (2006), <http://www.irs.gov/pub/irs-pdf/p544.pdf> (discussing tax consequences of involuntary sales).

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.

⁴³⁹ JAMES C. COPE & JAMES L. MURPHY, III, GETTING SUCCESSFUL RESULTS IN TENNESSEE EMINENT DOMAIN ACTIONS 39 (Nat'l Bus. Inst. 2003).

⁴⁴⁰ *Id.* at 40.

⁴⁴¹ *Id.*

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appraiser must be either designated as a Member of the Appraisal Institute or licensed by the State.⁴⁴²

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.⁴⁴³ 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.

⁴⁴² TENN. CODE ANN. § 29-17-1004 (2007).

⁴⁴³ COPE & MURPHY, *supra* note 439, at 39.

VI. SAMPLE PLEADINGS, PRE-TRIAL MOTIONS, AND LEASE CLAUSES**SAMPLE LEASE CLAUSE⁴⁴⁴**

___ *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.

⁴⁴⁴ The sample lease clause that follows was taken from *M & M Prop. v. Maples*, No. 03A01-9705-CH-00171, 1998 WL 29974, at *15-16 (Tenn. Ct. App. Jan. 12, 1998).

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 PUBLICATION⁴⁴⁶

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 PETITION⁴⁴⁷

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

⁴⁴⁷ This sample Condemnation Petition was adapted from COPE & MURPHY, *supra* note 439, at 50-53 and MURPHY, *supra* note 152, at 35-36.

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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 TENDER⁴⁴⁸

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].

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 ANSWER⁴⁴⁹

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]

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 INTERROGATORIES⁴⁵⁰

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

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