



Incidental Damages

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Incidental Damages

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When the condemner takes a part but not all of a parcel of property, the condemnation statutes permit the property owner to recover incidental damages for any injury to the remainder resulting from the taking. T.C.A. §§ 29-16-203; 29-17-910. The payment of incidental damages is not required by the Tennessee Constitution, but rather is provided by statute. ^[56] Incidental damages are properly measured by the decline in the fair market value of the remainder of the property by virtue of the taking. ^[57] The landowner in an eminent domain proceeding is not entitled to a jury trial on what kinds of damages are to be included in an incidental damages award. ^[57A]

The award of incidental damages is limited to property owners whose property is actually taken by the condemner. ^[58] Adjacent property owners whose land is not condemned but is nevertheless adversely affected by construction of the public improvement cannot recover incidental damages under these statutes. ^[59]

Where a portion of the property has been taken, the property owner may recover incidental damages only upon a showing of some specific injury to the remainder, or its value, which is the direct result of the taking. ^[60] A railroad can recover neither depreciation costs nor damages for increased exposure to liability from additional crossings required by a taking for a street crossing a railroad right of way. ^[60A] The injury must be more than an inconvenience shared by all members of the public; rather, it must specifically affect the remainder of the property that was taken. ^[61] This does not result in an injury becoming non-compensable merely because other property owners are similarly affected. ^[62] If the property owner can establish that exceptional circumstances attend the taking and use of the property by the condemner that result in a special injury to the remainder of the property, the property owner may recover incidental damages even if the special injury is common to all property in the area. ^[63]

Whether flooding to the remainder of a land owner's property due to road construction was incidental damage and whether the land owner was stopped from recovering for inverse condemnation under a deed provision stating that compensation paid by the city included "payment for any and all incidental damages to the remainder compensable under eminent domain" was an issue for the jury. ^[63A]

In addition to diminution in the fair market value of the remainder, the condemnation statutes include as incidental damages:

- Reasonable expenses incurred for removing, relocating, and reinstalling furniture, household belongings, fixtures, equipment, machinery, or stock in trade to another location not more than 50 miles distant;
- The costs of any necessary disconnection, dismounting, or disassembling and loading and drayage of the chattels;
- Recording fees, transfer taxes, and other similar expenses incidental to conveying the property to the condemner;
- Mortgage pre-payment penalties; and
- The proration of real property taxes. T.C.A. § 29-16-203.

The property owner can recover only moving expenses that have been actually incurred at the date of trial or that can be shown to be reasonably necessary in the future and can be accurately estimated by witnesses. ^[64] The landowner is entitled to an average hourly wage for labor costs related to relocation but not the "burden rate" added for the cost of utilities, health insurance, and retirement. ^[64A] These incidental damages cannot be recovered if the chattels to be moved are destroyed by fire before moving. ^[65] Also, moving or relocation expenses cannot be recovered for the removal of equipment, fixtures, or other chattels that were not located on the land taken by the condemner. ^[66]

Although not specifically set out by statute, the following have also been found to constitute incidental damages to the extent they reduced the fair market value of the remainder of the property:

- Noise, soot, and inconvenience created by the operation of a railroad; ^[67]
- Obstruction of view by a highway embankment; ^[68]
- Reasonable apprehension of danger from the public improvement; ^[69]
- Changes in drainage; ^[70]
- Loss of access to an abutting street; ^[71] and
- A decrease in business. ^[71A]

Notes:

[56] *Lewisburg & Northern Railroad Co. v. Hinds*, *supra*; *Vaulx v. Tennessee Central Railroad*, *supra*; *Wray v. Knoxville, LaFollette & Jellico Railroad Co.*, 113 Tenn. 544, 82 S.W. 471 (1904); *Paducah and Memphis Railroad Co. v. Stovall*, *supra*; *Woodfolk v. Nashville & Chattanooga Railroad Co.*, *supra*; *Knoxville Housing Authority, Inc. v. Bush*, 56 Tenn. App. 464, 408 S.W.2d 408 (1966).

[57] *Tennessee Dept. of Transportation v. Wheeler*, 2002 WL 31302889 (Tenn. App. 2002); *City of Memphis v. Hood*, 208 Tenn. 319, 345 S.W.2d 887 (1961); *Shelby County v. Kingsway Greens of America, Inc.*, 706 S.W.2d 634 (Tenn. Ct. App. 1985); *State v. Parkes*, *supra*.

[57A] *Metropolitan Development and Housing Agency v. Trinity Marine Nashville, Inc.*, 40 S.W.3d 73 (Tenn. App. 2000).

[58] *Ledbetter v. Beach*, 220 Tenn. 623, 421 S.W.2d 814 (1967); *State v. Rascoe*, *supra*; *Lewisburg & Northern Railroad Co. v. Hinds*, *supra*.

[59] *Ledbetter v. Beach*, *supra*; *State v. Rascoe*, *supra*; *Lewisburg & Northern Railroad Co. v. Hinds*, *supra*.

[60] *Ledbetter v. Beach*, *supra*; *State v. Rascoe*, *supra*; *Lewisburg & Northern Railroad v. Hinds*, *supra*.

[60A] *Town of Collierville v. Norfolk Southern Railway Co.*, 2003 WL 21026936 (Tenn. App. 2003).

[61] *State v. Rascoe*, *supra*; *Lewisburg & Northern Railroad Co. v. Dudley*, 161 Tenn. 546, 30 S.W.2d 278 (1930); *Lewisburg & Northern Railroad Co. v. Hinds*, *supra*.

[62] *State v. Rascoe*, *supra*; *Lewisburg & Northern Railroad Co. v. Dudley*, *supra*.

[63] *State v. Rascoe*, *supra*; *Lewisburg & Northern Railroad Co. v. Dudley*, *supra*; *Illinois Central Railroad Co. v. Moriarity*, 135 Tenn. 446, 186 S.W. 1053 (1916); *Alloway v. City of Nashville*, *supra*.

[63A] *Leonard v. Knox County*, 146 S.W. 3d 589 (Tenn. App. 2004).

[64] *State ex rel. Smith v. Overstreet*, 533 S.W.2d 283 (Tenn. 1976); *Memphis Housing Authority v. Memphis Steam Laundry-Cleaner, Inc.*, 225 Tenn. 46, 463 S.W.2d 677 (1971).

[64A] *Metropolitan Development and Housing Agency v. Trinity Marine Nashville, Inc.*, 40 S.W.3d 73 (Tenn. App. 2000).

[65] *State ex rel. Commissioner of Transportation v. Edmonds*, 614 S.W.2d 381 (Tenn. Ct. App. 1981).

[66] *Commissioner of Department of Transportation v. Ben Lomand Telephone Co-Op, Inc.*, 617 S.W.2d 146 (Tenn. Ct. App. 1981).

[67] *Lewisburg & Northern Railroad Co. v. Hinds*, *supra*; But see *Lewisburg & Northern Railroad Co. v. Dudley*, *supra*.

[68] *State ex rel. Commissioner, Department of Transportation v. Veglio*, *supra*; *Pack v. Boyer*, 59 Tenn. App. 141, 438 S.W.2d 754 (1968).

[69] *State v. Rascoe*, *supra*; *Alloway v. City of Nashville*, *supra*.

[70] *State v. Rascoe*, *supra*.

[71] *State v. Rascoe*, *supra*; *Lewisburg & Northern Railroad Co. v. Hinds*, *supra*; *Vaulx v. Tennessee Central Railroad Co.*, *supra*; *Union Railway Co. v. Raine*, 114 Tenn. 569, 86 S.W. 857 (1905); *Shelby County v. Kingsway Greens of America, Inc.*, *supra*; *Speight v. Lockhart*, 524 S.W.2d 249 (Tenn. Ct. App. 1975); *Speight v. Gibbs*, 486 S.W.2d 922 (Tenn. Ct. App. 1972). See Inverse Condemnation [1] on loss of access as a taking as opposed to merely incidental damages.

[71A] *State ex rel. Commissioner of the DOT v. Goodwin*, 2003 WL 21026937 (Tenn. App. 2003).

Links:

[1] <http://www.mtas.tennessee.edu/reference/inverse-condemnation>

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