Planning and Zoning

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

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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Planning and Zoning

Reference Number: MTAS-213

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Annexation

Reference Number: MTAS-222

Annexation Options

Tennessee Code Annotated, Title 6, Chapter 51, Part 1 sets forth two approaches to annex territory. Municipalities can annex territory using either a (1) "Resolution for Annexation by Referendum" or a (2) "Resolution for Annexation by Owner Consent." Municipalities are no longer permitted to annex territory, with or without an owner's consent, through the passage of an ordinance. With either of the two resolution options, two threshold requirements must be satisfied:

- The territory must be contiguous to the municipality's corporate limits (an exception is made as discussed below in *Non-contiguous Annexations*); and
- The territory must be within the municipality's urban growth boundaries, unless a referendum is held pursuant to T.C.A.§ 6-58-111(c)(2) or all three of the following are met: (1) the tract is contiguous to a tract of land that has the same owner and has already been annexed by the municipality; (2) the tract is being provided water and sewer services; and (3) the owner, by notarized petition, consents to being included in the municipality's urban growth boundaries. T.C.A. § 6-58-118.

Non-contiguous Annexations

Municipalities are authorized to annex territory that is not contiguous to the corporate limits. In order to do so, consent of the owner is required and the territory to be annexed must be located entirely within the urban growth boundary of the municipality. Additionally, the territory must either have an intended use for industrial, commercial, or future residential development or be owned by a governmental entity. The ownership requirement can be any governmental entity, and is not limited to the municipality proposing annexation. A plan of services must be prepared (as is required for every annexation), but for a non-contiguous annexation, the plan must be prepared by the municipality in cooperation with the county. An interlocal agreement is required to address the provision of emergency services to interceding properties (between the municipality and the territory to be annexed) and road and bridge maintenance from the municipality to the territory being annexed. T.C.A. § 6-51-104.

Public Notification Requirements Prior to Annexation

Three separate notification steps are required for any annexation:

1. U.S. Mail —- A resolution describing the territory proposed for annexation, including the plan of services, must be "promptly" sent by first class mail to the last known address listed in the office of the property assessor for each property owner of record within the territory proposed for annexation a minimum of fourteen (14) calendar days before a public hearing on the proposed annexation.
2. Posting —— Three (3) copies of the resolution must be posted both in the territory that is proposed for annexation and in a like number of places within the municipality proposing the annexation.
3. Published Newspaper Notice —- Notice of the proposed annexation must be published "at about the same time" that it is posted in a newspaper of general circulation, if there is one, in such territory and municipality. In no event shall the notice be published less than seven (7) days in advance of the public hearing. The notice must include a map that includes a general delineation of the area to be annexed by use of official road names or numbers, or both, and other identifiable landmarks, as appropriate. T.C.A. § 6-51-104.

In addition, a published notice is required in advance of a public hearing on the plan of services for the territory to be annexed:

Published Newspaper Notice for Plan of Services - A notice of a public hearing on the plan of services for the territory under consideration must be published in a newspaper of general circulation not less than fifteen (15) days before the hearing date and time. The notice must indicate the time, place, and purpose of the hearing; as well as the location(s) where the proposed plan of services is available for public viewing (three copies must be available for public inspection during normal business hours). T.C.A. § 6-51-102.

The plan of services is also required to be sent to the county mayor upon adoption. T.C.A. § 6-51-102.

The newspaper publication requirements set forth above may be incorporated into a single notice provided the timing requirements of each are satisfied.

Property Used Primarily for Agricultural Purposes

Property used primarily for agricultural purposes can only be annexed by owner consent. T.C.A. § 6-51-104. However, there is no definition provided for *agriculture* in Tennessee Code Annotated, Title 6, Chapter 51, Part 1. T.C.A. § 1-3-105(2)(A) defines *agriculture* to mean:

(i) The land, buildings and machinery used in the commercial production of farm products and nursery stock;

(ii) The activity carried on in connection with the commercial production of farm products and nursery stock;

(iii) Recreational and educational activities on land used for the commercial production of farm products and nursery stock; and

(iv) Entertainment activities conducted in conjunction with, but secondary to, commercial production of farm products and nursery stock, when such activities occur on land used for the commercial production of farm products and nursery stock.

As used in this definition, "farm products" means forage and sod crops; grains and feed crops; dairy and dairy products; poultry and poultry products; livestock, including breeding and grazing; fruits; vegetables; flowers; seeds; grasses; forestry products; fish and other aquatic animals used for food; bees; equine; and all other plants and animals that produce food, feed, fiber or fur. ‘Nursery stock" means all trees, shrubs, or other plants, or parts of such trees, shrubs or other plants, grown or kept for, or capable of, propagation, distribution or sale on a commercial basis.

So while the definition above is a good starting point for land that could be considered as agricultural, a court could otherwise interpret the word going forward.

Additionally, the word *primarily* is not defined anywhere in the Tennessee Code. It is however, used in statutes, and the standard dictionary definition of *indicating the main purpose of something or for the most part* would likely be applied by a court, but that is not guaranteed. Property with greenbelt status would meet this requirement, but the definition most certainly goes further than that. When determining territory to be included in a referendum, the municipality must use its best judgment, on a parcel-by-parcel basis, as to whether a parcel is used primarily for agricultural purposes. If determined so, then that parcel can only be annexed by owner consent.

Actions Required Following Annexation

Following any annexation, several notifications are required of the municipality:

1. A revised map of the voting precincts must be sent to the Office of Local Government in the Comptroller's office. T.C.A. § 2-3-102.
2. The election certification must be sent to the county mayor. The certification should be sent ir-respective of the outcome of the election. T.C.A. § 6-51-105.
3. The annexation resolution should be sent to the utility district or municipal utility board serving the area, if the municipality is desirous of purchasing the utility system in the annexed area. T.C.A. § 6-51-111.
4. The Tennessee Department of Revenue should be notified for the purpose of tax administration. T.C.A. § 6-51-115.

5. The annexation resolution, as well as the portion of the plan of services related to emergency services and a detailed map of the annexed territory must be sent to any affected emergency communication district. T.C.A. § 6-51-119.
6. The annexation resolution must be recorded with the register of deeds. T.C.A. § 6-51-121.
7. The annexation resolution must be sent to the Tennessee Comptroller of the Treasury, as well as to the property assessor in each county affected. T.C.A. § 6-51-121.

Contested Annexations

A property owner or municipality is authorized to file a complaint with the Tennessee Secretary of State's office when there is a dispute whether property was annexed by the municipality, requesting the state to determine when the individual's property was properly annexed. The burden is placed on the municipality, by a preponderance of the evidence, to show that the property was properly annexed. An administrative law judge is required to be appointed within ten days of the complaint being filed, with the case to be heard within 90 days thereafter. The state is authorized to issue a final order, following the issuance of the initial order by the administrative law judge, for purposes of appeal. The municipality must file all annexation ordinances/resolutions, as well as the results of annexation referendums, specific to the contested annexation within 20 days of the complaint being filed. The municipality is required to reimburse any property taxes paid, with interest, if the final order includes a finding that the property was not annexed. Tennessee Code Annotated, Title 8, Chapter 3, Part 1.

Annexation Option A: Resolution for Annexation by Referendum

A municipality may, upon its own initiative, pass a resolution proposing annexation via referendum. Since land used primarily for agricultural purposes cannot be annexed except with written consent of the owner, a referendum to consider annexing territory which includes land being used primarily for agricultural purposes is not an option.

This process calls for the adoption of a minimum of two resolutions by the governing body. The adoption of a third resolution is recommended as a best practice as discussed below.

The first resolution (which is optional, but the recommended best practice) indicates an intent of the governing body to seriously explore the annexation and to initiate the review and decision process. This resolution is referred to herein as 'exploratory annexation by referendum' resolution (Resolution A). The second resolution, which is referred to herein as 'proposed annexation by referendum' resolution (Resolution B), calls for a public hearing on the proposed annexation and plan of services. The adoption of such a resolution by the governing body is mandatory. The third resolution, referred to herein as 'annexation by referendum' resolution (Resolution C), formally calls for a referendum election to be held, describing therein the territory to be annexed and the plan of services to support it. The adoption of such a resolution is also required of the governing body.

Election Process

Between 30 and 60 days after the 'annexation by referendum' resolution (Resolution C) describing the territory to be annexed, approving the plan of services, and calling for a referendum is posted and published, a referendum of the voters who live in the area proposed for annexation is held by the county election commission. Only qualified registered voters residing in the territory proposed for annexation are entitled to vote in the annexation referendum. The ballot questions are "*for annexation"* and "*against annexation*." A simple majority of votes decides the question. T.C.A. § 6-51-105.

At its own option, the municipality may also have the referendum include all voters within the existing municipality. If two elections are held, a majority of voters in both the area proposed for annexation and the municipality proposing it must vote to approve the annexation. If only one of the election votes passes, the measure fails and the annexation is unsuccessful. A successful annexation becomes effective thirty (30) days following certification of the election(s). Elections are held at the municipality's expense and the referendum process can be abandoned by the municipality at any time. T.C.A. § 6-51-105.

Resolution for Annexation by Referendum: Step-by-Step including Best Practices (BP)

The following procedural steps, including best practices, should be followed when proceeding with an annexation by referendum:

1. Identify the territory to be annexed (tax parcels, property legal descriptions, or both).

2. Prepare an annexation report and a proposed plan of services. While the statute does not require an annexation report be prepared, by doing a cost-benefit study, the municipality will better understand the impact of the annexation on existing city services and funding. This will assist the governing body in determining if the annexation is warranted. (BP).
3. Review the annexation report and proposed plan of services with the governing body.
4. Adopt an 'exploratory annexation by referendum' resolution (Resolution A) indicating governing body support to further investigate the annexation prospect, and directing the planning commission, if there is one, to review and make recommendation on the proposed plan of services. (BP). Alternatively, this can be accomplished by simple majority vote of the governing body without the formal use of a resolution.
5. Following return of a recommendation from the planning commission (which must be rendered within ninety days after submission unless by resolution a longer period is allowed), adopt a 'proposed annexation by referendum' resolution (Resolution B). This resolution sets forth the territory proposed to be annexed and includes the plan of services.
6. Following adoption of the 'proposed annexation by referendum' resolution, post it in three (3) public places in the territory proposed to be annexed and in three (3) public places within the municipality.
7. Publish a public hearing notice of the proposed annexation in a newspaper of general circulation, if there is one, in such territory and municipality "at about the same time" that the resolution is posted (see step 6), but in no event, less than seven (7) days in advance of the public hearing. The notice must include a map that includes a general delineation of the area to be annexed by use of official road names or numbers, or both, and other identifiable landmarks, as appropriate.
8. Publish a public hearing notice on the plan of services in a newspaper of general circulation a minimum of fifteen (15) days prior to the hearing. The notice must indicate the time, place, and purpose of the hearing; as well as the location(s) where the proposed plan of services is available for public viewing. The publication requirements in step 7 and step 8 can be combined into a single notice provided both are published a minimum of fifteen (15) days in advance of the public hearings.
9. Mail to property owners in the territory proposed for annexation a copy of the 'proposed annexation by referendum' resolution, including the plan of services, a minimum of fourteen (14) calendar days prior to the public hearing on the proposed annexation.
10. If the municipality does not maintain a separate municipal school system, provide written notice to the affected county school systems as soon as practicable, but in no event less than thirty (30) days before the public hearing. This is mandatory. If the municipality maintains a municipal school system, send notice as soon as practicable. (BP).
11. Conduct public hearings on the annexation and plan of services as advertised.
12. Adopt an 'annexation by referendum' resolution (Resolution C) describing the territory to be annexed, approving the plan of services, and calling for a referendum election. If the governing body decides to hold a second election for city voters, this should also be included in the same resolution.
13. Send the adopted 'annexation by referendum' resolution, as well as the plan of services, to the county mayor.
14. The county election commission conducts the election within 30 to 60 days.
15. With a successful referendum vote, the territory becomes annexed thirty (30) days following certification of the election.
16. Commence the ordinance process to zone the territory newly annexed into the corporate limits. (BP).
17. Commence the process to place the territory in the appropriate 'districts' (if any), as may be required (i.e. council wards, school district wards, package liquor store areas, etc.).
18. Send a welcome letter to annexed property owners with other general information about municipal services. Although not statutorily required, this is a best practice in reaching out to your new municipal residents. (BP).

19. Send the revised voting precinct maps to the Office of Local Government in the Comptroller's Office.
20. Send the election certification to the mayor of the county where the annexed territory lies. The certification should be sent irrespective of the outcome of the election.
21. Send the ‘annexation by referendum’ resolution, to the utility district or municipal utility board serving the area, if the municipality is desirous of purchasing the utility system in the annexed area.
22. Notify the Tennessee Department of Revenue for the purpose of tax administration.
23. Send the ‘annexation by referendum’ resolution, as well as the portion of the plan of services related to emergency services and a detailed map of the annexed territory, to any affected emergency communication district.
24. Record the ‘annexation by referendum’ resolution with the register of deeds.
25. Send the ‘annexation by referendum’ resolution to the Tennessee Comptroller of the Treasury, as well as to the property assessor in each county affected.
26. Commence the provision of day-to-day city services (police, fire, code enforcement, etc.) to the annexed area immediately following the 30th day following the election certification.
27. Commence the process of satisfying the plan of service requirements and commitments that will take longer to complete (sewer extension, street lighting, etc.).
28. As appropriate, complete census of annexed area.
29. The annexed property is placed on the municipality’s tax roll on January 1 after the effective date of the annexation.

Annexation Option B - Resolution for Annexation by Owner Consent

The annexation of property with owner consent follows a similar process as annexation requiring a referendum election, with the major exception, of course, that the question to annex is not placed on a ballot.

As indicated in its name, this process requires written consent of each property owner in the territory proposed to be annexed or written consent of 2/3 of the legal owners of record in the territory proposed to be annexed, when the property owned by those who consent totals more than ½ of the territory proposed for annexation, and 9 or fewer parcels are being proposed for annexation.

Two resolutions are adopted by the governing body using this process. The first calls for a public hearing on the proposed annexation and plan of services, referred to herein as ‘proposed annexation by owner consent’ resolution (Resolution D). The second resolution formally annexes the territory and adopts the plan of services, referred to herein as ‘annexation by owner consent’ resolution (Resolution E). The annexation becomes immediately effective with passage of the second resolution.

Resolution for Annexation by Owner Consent: Step-by-Step including Best Practices (BP)

The following procedural steps, including best practices, should be followed when proceeding with an annexation by owner consent:

1. Receive a written letter seeking annexation signed by all legal owners of record or 2/3 of the legal owners of record in the territory proposed to be annexed, when the property owned by those who consent totals more than ½ of the territory proposed for annexation, and 9 or fewer parcels are being proposed for annexation.
2. If the municipality is interested in pursuing annexation, prepare annexation report and plan of services. While the statute does not require an annexation report be prepared, by doing a cost-benefit study the municipality will better understand the impact of the annexation on existing municipal services and funding. This will assist the governing body in determining if the annexation is warranted (BP).
3. Review the annexation report and plan of services with governing body and attain approval to proceed.
4. If approval is received, submit plan of services to the planning commission, if there is one, for review and recommendation.

5. Following return of a recommendation from the planning commission (which must be rendered within ninety days after submission unless by resolution a longer period is allowed), adopt a ‘proposed annexation by owner consent’ resolution (Resolution D). This resolution sets forth the territory proposed to be annexed and includes the plan of services.
6. Following adoption, post the ‘proposed annexation by owner consent’ resolution in three (3) public places in the territory proposed to be annexed and in three (3) public places within the municipality.
7. Publish a public hearing notice on the plan of services in a newspaper of general circulation a minimum of fifteen (15) days prior to the hearing. The notice must indicate the time, place, and purpose of the hearing; as well as the location(s) where the proposed plan of services is available for public viewing.
8. Publish a public hearing notice on the proposed annexation in a newspaper of general circulation, if there is one, in such territory and municipality “at about the same time” that the resolution is posted (see step 6), but in no event less than seven (7) days in advance of the public hearing. The notice must include a map that includes a general delineation of the area to be annexed by use of official road names or numbers, or both, and other identifiable landmarks, as appropriate. The publication requirements in step 7 and step 8 can be combined into a single notice provided both are published a minimum of fifteen (15) days in advance of the public hearings.
9. If the municipality does not maintain a separate municipal school system, provide written notice to the affected county school systems as soon as practicable, but in no event less than thirty (30) days before the public hearing. This is mandatory. If the municipality maintains a municipal school system, send notice as soon as practicable (BP).
10. Mail to property owners in the area being proposed for annexation a copy of the ‘proposed annexation by owner consent’ resolution, including the plan of services, a minimum of fourteen (14) calendar days prior to the public hearing on the proposed annexation.
11. Conduct public hearings on the annexation and plan of services as advertised.
12. Following the public hearings, adopt an ‘annexation by owner consent’ resolution (Resolution E) approving the annexation and plan of services.
13. The territory is immediately annexed upon adoption of the ‘annexation by owner consent’ resolution.
14. Send the adopted ‘annexation by owner consent’ resolution, as well as the plan of services, to the county mayor.
15. Commence the ordinance process to zone the territory newly annexed into the corporate limits. (BP)
16. Commence the process to place the territory in the appropriate ‘districts’ as may be required by charter or code (i.e. council wards, school district wards, package liquor store areas, etc.).
17. Send a welcome letter to annexed property owners with other general information about municipal services. Although not statutorily required, this is a best practice in reaching out to your new municipal residents (BP).
18. Send the revised voting precinct maps to the Office of Local Government in the Comptroller's Office.
19. Send the election certification to the mayor of the county where the annexed territory lies. The certification should be sent irrespective of the outcome of the election.
20. Send the ‘annexation by owner consent’ resolution to the utility district or municipal utility board serving the area, if the municipality is desirous of purchasing the utility system in the annexed area.
21. Notify the Tennessee Department of Revenue for the purpose of tax administration.
22. Send the ‘annexation by owner consent’ resolution, as well as the portion of the plan of services related to emergency services and a detailed map of the annexed territory, to any affected emergency communication district.
23. Record the ‘annexation by owner consent’ resolution with the register of deeds.

24. Send the ‘annexation by owner consent’ resolution to the Tennessee Comptroller of the Treasury, as well as to the property assessor in each county affected.
25. Commence the process of satisfying the plan of service requirements and commitments that will take longer to complete (sewer extension, street lighting, etc.).
26. As appropriate, complete census of annexed area.
27. The annexed property is placed on the municipality’s tax roll on January 1 after the effective date of the annexation.

An additional resource entitled "A Step-by-Step Animated Adventure Guide on How to Navigate Annexation" is available at https://kate.tennessee.edu/mtas/docs/courses_2018/annexation18/story_htm... [1].

Resolution A - Exploratory Annexation by Referendum

Reference Number: MTAS-2109

Resolution A

A Resolution Requesting the Planning Commission to Review a Plan of Services for Territory under Consideration to be Annexed into the City of _____ by Referendum

(*insert brief address etc. of property***)**

WHEREAS, the City of_____, upon its own initiative, is examining the extension of its corporate limits by the potential annexation of certain territory adjoining its existing boundaries and within its urban growth boundaries by referendum, to wit:

(*Describe territory in general or insert legal description*)

; and

WHEREAS, a Plan of Services addressing the services and timing of services as required in Tennessee Code Annotated § 6-51-102, has been drafted and requires review and recommendation by the planning commission; and

NOW, THEREFORE, BE IT RESOLVED by the City of _____Tennessee that the _____ Planning Commission is hereby requested to review the Plan of Services for the subject territory, and return a recommendation to the governing body, following completion of its study and review.

WHEREUPON, the Mayor declared the Resolution adopted, affixed a signature and the date thereto, and directed that the same be recorded.

Mayor_____

Date: _____

_____

City Recorder

Approved as to Form and Legality this ____ day of _____, 20__

_____

City Attorney

Resolution B - Proposed Annexation by Referendum

Reference Number:

MTAS-2110

Resolution B

A Resolution Calling for a Public Hearing on the Proposed Annexation of Territory into the City of _____ by Referendum and a Plan of Services

(*i*nsert brief address etc. of property**)**

WHEREAS, the City of_____, upon its own initiative, proposes the extension of its corporate limits by the annexation of certain territory adjoining its existing boundaries and within its urban growth boundaries by referendum; and

WHEREAS, a Plan of Services for the territory proposed for annexation by referendum has been reviewed by the _____ Planning Commission; and

WHEREAS, the governing body desires to conduct a public hearing on the proposed annexation and plan of services;

NOW THEREFORE BE IT RESOLVED by the City of _____ Tennessee as follows:

A. That a public hearing is hereby scheduled for ___:00 *am/pm* on [*month and day*], 20__ at [*location*], on the proposed annexation of territory by referendum, and Plan of Services, to wit:

[*Insert General Description of Legal Description*]

B. That a copy of this Resolution, describing the territory proposed for annexation, along with the Plan of Services, shall be promptly sent to the last known address listed in the office of the property assessor for each property owner of record within the territory proposed for annexation, with such being sent by first class mail and mailed no later than fourteen (14) calendar days prior to the scheduled date of the hearing on the proposed annexation.

C. That a copy of this Resolution shall also be published by posting copies of it in at least three (3) public places in the territory proposed for annexation and in a like number of public places in the City of _____, and by publishing notice of the Resolution at or about the same time in the _____, a newspaper of general circulation in such territory and the City of _____.

D. That notice of the time, place and purpose of a public hearing on the proposed annexation by referendum and the Plan of Services shall be published in a newspaper of general circulation in the City of _____ not less than fifteen (15) days before the hearing, which notice included the locations of a minimum of three (3) copies of the Plan of Services for public inspection during all business hours from the date of notice until the public hearing.

E. APPLICABLE TO MUNICIPALITIES NOT MAINTAINING ITS OWN SCHOOL SYSTEM – That written notice of the proposed annexation by referendum shall be sent to the affected school system as soon as possible, but in no event less than thirty (30) days before the public hearing.

WHEREUPON, the Mayor declared the Resolution adopted, affixed a signature and the date thereto, and directed that the same be recorded.

Mayor_____

Date: _____

_____

City Recorder

Approved as to Form and Legality this ____ day of _____, 20__.

_____

City Attorney

Resolution C - Annexation by Referendum

Reference Number: MTAS-2111

Resolution C

A Resolution Calling for a Referendum to Annex Certain Territory and to

Incorporate the same within the Boundaries of the City of _____Tennessee, and to Approve a Plan of Services

(*insert brief address etc. of property***)**

WHEREAS, the City of_____, upon its own initiative, proposes the extension of its corporate limits by the annexation of certain territory adjoining its existing boundaries and within its urban growth boundaries by referendum; and

WHEREAS, the statutory posting and publication requirements for the proposed annexation of territory by referendum and the plan of services, including review and recommendation by the _____Planning Commission, have been fully met; and

WHEREAS, a public hearing on the proposed annexation and plan of services was held by this governing body on _____, 20__; and

WHEREAS, a plan of services for the area proposed for annexation is attached as *Exhibit A* hereto, which plan of services addresses the same services and timing of services as required in Tennessee Code Annotated § 6-51-102; and

NOW, THEREFORE, BE IT RESOLVED by the City of _____Tennessee as follows:

A. That the _____ County Election Commission is hereby requested to conduct a referendum election for the annexation of territory into the boundaries of the City of _____, for qualified voters within the subject territory, to wit:

[Legal description of property]

B. *OPTIONAL* – That the _____ County Election Commission is also requested to conduct a second election regarding the annexation for qualified voters of the City of _____.

C. That the plan of services for this territory which is attached as *Exhibit A* hereto is approved and the same is hereby adopted, becoming operative thirty (30) days following certification by the election commission that the annexation was approved.

D. (NOT APPLICABLE TO ALL MUNICIPALITIES) That this territory shall be included in the _____District, becoming operative thirty (30) days following certification by the election commission that the annexation was approved.

E. That the *Mayor/City Manager/Recorder* shall cause a copy of this resolution, as well as the adopted plan of services, to be forwarded to the Mayor of _____ County.

F. That a copy of the election certification shall be sent to the mayor of _____ County upon receipt from the election commission.

G. That a copy of this resolution shall be recorded with the _____ County Register of Deeds, and a copy shall also be sent to the Tennessee Comptroller of the Treasury and the _____ County Assessor of Property, following certification by the election commission that the annexation was approved.

H. That a copy of this resolution, as well as the portion of the plan of services related to emergency services and a detailed map of the annexed area, shall be sent to any affected emergency communication district, following certification by the election commission that the annexation was approved.

I. That a revised map of the voting precincts shall be sent to the office of local government and to the office of management information services for the Tennessee General Assembly, following certification by the election commission that the annexation was approved.

J. That the Tennessee Department of Revenue shall be notified, for the purpose of tax administration, that the annexation took place.

WHEREUPON, the Mayor declared the Resolution adopted, affixed a signature and the date thereto, and directed that the same be recorded.

Mayor_____

Date: _____

_____

City Recorder

Approved as to Form and Legality this ____ day of _____, 20__.

_____

City Attorney

Resolution D - Proposed Annexation By Owner Consent

Reference Number: MTAS-2112

Resolution D

A Resolution Calling for a Public Hearing on the Proposed Annexation of Territory into the City of _____ by Owner Consent and Approving a Plan of Services

(*insert brief address etc. of property***)**

WHEREAS, the City of_____, having been petitioned by interested persons, proposes the extension of its corporate limits by the annexation of certain territory adjoining its existing boundaries and within its urban growth boundaries by owner consent; and

WHEREAS, a plan of services for the territory proposed for annexation by owner consent has been reviewed by the _____ Planning Commission; and

WHEREAS, the governing body desires to conduct a public hearing on the proposed annexation and plan of services;

NOW THEREFORE BE IT RESOLVED by the City of _____ Tennessee as follows:

A. That a public hearing is hereby scheduled for ___:00 *am/pm* on [*month and day*], 20__ at [*location*], on the proposed annexation of territory by owner consent, and Plan of Services, to wit:

[*Insert General Description of Legal Description*]

B. That a copy of this resolution, describing the territory proposed for annexation by owner consent, along with the plan of services, shall be promptly sent to the last known address listed in the office of the _____ county property assessor for each property owner of record within the territory proposed for annexation, with such being sent by first class mail and mailed no later than fourteen (14) calendar days prior to the scheduled date of the hearing on the proposed annexation.

C. That a copy of this resolution shall also be published by posting copies of it in at least three (3) public places in the territory proposed for annexation and in a like number of public places in the City of _____, and by publishing notice of the resolution at or about the same time in the _____, a newspaper of general circulation in such territory and the City of _____.

D. That notice of the time, place and purpose of a public hearing on the proposed annexation by owner consent and the plan of services shall be published in a newspaper of general circulation in the City of _____ not less than fifteen (15) days before the hearing, which notice included the locations of a minimum of three (3) copies of the plan of services for public inspection during all business hours from the date of notice until the public hearing.

E. APPLICABLE TO MUNICIPALITIES NOT MAINTAINING ITS OWN SCHOOL SYSTEM – That written notice of the proposed annexation shall be sent to the affected school system as soon as possible, but in no event less than thirty (30) days before the public hearing.

WHEREUPON, the Mayor declared the Resolution adopted, affixed a signature and the date thereto, and directed that the same be recorded.

Mayor_____

Date:

_____

_____

City Recorder

Approved as to Form and Legality this ____ day of _____, 20__

_____

City Attorney

Resolution E - Annexation By Owner Consent

Reference Number: MTAS-2113

Resolution E

A Resolution to Annex Certain Territory Upon Written Consent of the Owners

and to Incorporate the Same within the Boundaries of the City of _____Tennessee

(*insert brief address etc. of property***)**

WHEREAS, the City of_____, having been petitioned by interested persons, proposes the extension of its corporate limits by the annexation of certain territory into the city limits; and

WHEREAS, **[select the option that applies]** the owners of all property within the territory proposed for annexation have given their written consent by notarized petition so that a referendum is not required **or** 2/3 of the property owners in the territory consent to the annexation in writing, the total area of the property owned by the owners who consent is more than ½ of the territory proposed for annexation, and the annexation consists of 9 or fewer parcels; and

WHEREAS, a copy of this resolution, describing the territory proposed for annexation, was promptly sent by the City of _____ to the last known address listed in the office of the property assessor for each property owner of record within the territory proposed for annexation, with such being sent by first class mail and mailed no later than fourteen (14) calendar days prior to the scheduled date of the hearing on the proposed annexation by owner consent; and

WHEREAS, this resolution was also published by posting copies of it in at least three (3) public places in the territory proposed for annexation and in a like number of public places in the City of _____, and by publishing notice of the resolution at or about the same time in the _____, a newspaper of general circulation in such territory and the City of _____; and

WHEREAS, a plan of services for the area proposed for annexation is attached as *Exhibit A* hereto, which plan of services addresses the same services and timing of services as required in Tennessee Code Annotated § 6-51-102; and

WHEREAS, the proposed annexation and plan of services were submitted to the _____ Planning Commission for study, and it has recommended the same; and

WHEREAS, notice of the time, place and purpose of a public hearing on the proposed annexation and the plan of services was published in a newspaper of general circulation in the City of _____ not less than fifteen (15) days before the hearing, which notice included the locations of a minimum of three (3) copies of the plan of services for public inspection during all business hours from the date of notice until the public hearing; and

WHEREAS, a public hearing on the proposed annexation and plan of services was held by the governing body on _____, 20__.

NOW, THEREFORE, BE IT RESOLVED by the City of _____Tennessee as follows:

A. That the following territory is hereby annexed and incorporated into boundaries of the City of _____, to be effective as of _____, 20__, to wit:

[Legal description of property]

B. That the plan of services for this territory which is attached as *Exhibit A* hereto is approved and the same is hereby adopted.

C. That this territory shall be included in the _____Ward/District (NOT APPLICABLE TO ALL MUNICIPALITIES).

D. That the *Mayor/City Manager/Recorder* shall cause a copy of this resolution, as well as the adopted plan or services, to be forwarded to the Mayor of ____County.

E. That a copy of the election certification shall be sent to the mayor of ____County upon receipt from the election commission.

F. That a copy of this resolution shall be recorded with the _____County Register of Deeds, and a copy shall also be sent to the Tennessee Comptroller of the Treasury and the ____County Assessor of Property, following certification by the election commission that the annexation was approved.

G. That a copy of this resolution, as well as the portion of the plan of services related to emergency services and a detailed map of the annexed area, shall be sen to any affected emergency communication district, following certification by the election commission that the annexation was approved.

H. That a revised map of the voting precincts shall be sent to the office of local government and to the office of management information services for the Tennessee General Assembly, following certification by the election commission that the annexation was approved.

I. That the Tennessee Department of Revenue shall be notified, for the purpose of tax administration, that the annexation took place.

WHEREUPON, the Mayor declared the resolution adopted, affixed a signature and the date thereto, and directed that the same be recorded.

Mayor _____

Date:

_____

_____

City Recorder

Approved as to Form and Legality this ____ day of _____, 20__

_____

City Attorney

County Functions Related to Cities

Reference Number: MTAS-617

Click on the topics listed below in this section for more information.

Intergovernmental Agreements

Reference Number: MTAS-618

There is broad authority in the statutes for cities and counties to jointly exercise powers and for contractual agreements between the two.

Any powers, privileges, or authority of a public agency in Tennessee may be exercised and enjoyed jointly with any other public agency of Tennessee, of any other state, or of the United States, providing (in the case of cities and counties) that this authority "shall apply only to such powers, privileges, or authority vested in their governing bodies." T.C.A. § 12-9-104.

Agencies of political subdivisions that have governing boards separate from the governing body (such as municipal utility boards) may enter into interlocal agreements for joint or cooperative action with other similar agencies and other public agencies. Governing bodies of political subdivisions must approve agreements made by their agencies before they take effect. T.C.A. § 12-9-104(a).

Governing bodies likewise may enter into contracts "with any one or more public agencies to perform any governmental service, activity, or undertaking that each public agency entering into the contract is authorized by law to perform." T.C.A. § 12-9-108.

Urban-Type Public Facilities and Functions

Reference Number: MTAS-619

Counties are authorized to construct and operate "urban-type public facilities." This term means:

…sanitary and storm sewer lines and facilities, plants for the collection, treatment, and disposal of sewage and waste matter, facilities and plants for the incineration or other disposal of garbage, trash, ashes, and other waste matter, and/or water supply and distribution lines, facilities, and plants, chemical pipelines and docks, and fire protection and emergency medical services. T.C.A. § 5-16-101.

Counties may operate these facilities directly through a county department, or they may create a board of public utilities. T.C.A. §§ 5-16-102–103. Cooperative undertakings with other governmental units, including "municipalities, towns, utility districts, and improvement districts within the county" are specifically authorized when "mutually advantageous." T.C.A. § 5-16-107.

All project plans must be submitted to a regional planning commission or, in the absence of such a commission, the planning commission of the largest city in the county. The planning commission receives the plans "for study and a written report" within 90 days or an extended period fixed by the county governing body. T.C.A. § 5-16-112.

Following the planning commission review, if a facility is to be located within five miles of any part of a city’s boundary, a resolution petitioning the city to provide the facility, together with a full report of the county’s plans (engineering and financial feasibility reports, etc.), must be presented to the city. The county may proceed if the city fails "to take appropriate action to provide a specified public facility or facilities in a specified area or areas" within 90 days. T.C.A. § 5-16-111.

Provision is made for transferring to a city rights, duties, property, assets, or liabilities in conjunction with such facilities in the event of annexation, including arbitration for disagreements. The statutory language is the same as that in T.C.A. § 6-51-111, T.C.A. § 5-16-110.

Building Codes

Reference Number:

MTAS-823

Any municipality may adopt by reference any code or portion of any compilation of "rules and regulations that have been prepared by various technical trade associations and shall include specifically, but not be limited to, building codes; plumbing codes; electrical wiring codes;" and others, without setting forth such codes in full. T.C.A. §§ 6-54-501, 502. At least one (1) copy of the code must be kept on file in the office of the clerk or recorder and be available for public use, inspection, and examination. The code must be filed with the clerk or recorder at least fifteen (15) days prior to its adoption. T.C.A.§ 6-54-502.
Except when a municipal governing body by a vote of at least two thirds of its total membership elects not to incorporate by reference any specific change or amendment, the municipal governing body shall incorporate by reference all such subsequent changes and amendments thereof, properly identified as to date and source, as may be adopted by the agency or association that promulgated the code (such as the International Code Council for the I-Codes). This requirement may be satisfied by having the designated municipal code administrative official adopt administrative regulations that incorporate by reference such subsequent changes and amendments thereof, properly identified as to date and source, as may be adopted by the agency or association that promulgated the code. All such amendment must be filed with the clerk or recorder 15 days before becoming effective. T.C.A. § 6-54-502.

Any administrative regulations that incorporate building code amendments by reference shall become effective upon the expiration of ninety (90) calendar days or after the second official meeting of the municipal governing body following the publication of the regulations, whichever is later, unless within that period of time a resolution disapproving such administrative regulation has been adopted by the municipal governing body. T.C.A. §§ 6-54-502, 503.

A county that has adopted building codes under T.C.A. §§ 5-20-101 *et seq.,* is authorized to enforce said codes in cities "which do not elect, now or hereafter, to adopt their own codes regulating the same subject areas." T.C.A. § 5-20-106.

County Zoning

Reference Number: MTAS-824

Pursuant to T.C.A. § 13-7-101, a county may exercise zoning powers outside municipalties following adoption of a zoning ordinance and map.

The county legislative body is required to set up a county board of zoning appeals with three, five, seven, or nine members, except for counties with a population of less than 600,000 (1980 federal census or any subsequent census) adopting a charter form of government, which must establish a board of zoning appeals comprised of five, seven, or nine members. T.C.A. § 13-7-106. The board is to (1) "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by the county building commissioner or any other administrative official in the carrying out or enforcement of any ordinance enacted pursuant to this part; (2) hear and decide, in accordance with the provisions of any such ordinance, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such board is authorized by any such ordinance to pass; and (3) where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the regulation or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under such sections would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship; provided, that such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinances." T.C.A. § 13-7-109.

The position of county building commissioner, with power to issue or withhold building permits, may be established by a county legislative body to enforce its zoning regulations. T. C. A. § 13-7-110.

Eminent Domain

Reference Number: MTAS-1263

IMPORTANT NOTE TO THE READER: The Tennessee General Assembly often has bills pending that affect eminent domain powers of local authorities. Please be sure to check recent legislation to determine if pending or recently enacted blls have superseded or amended citations in this Eminent Domain section.

Scope of the Power of Eminent Domain

Reference Number: MTAS-1264

Eminent domain is the right or power of the sovereign to take private property for the public use; to take ownership and possession thereof upon payment of just compensation to the owner of the property. [1] It is an inherent power of a sovereign, which is without limitation or restriction, except for the constitutional limitations that private property must be taken for a public use, [2] and the owner of such property must be paid just compensation for the property. [3] The legislature has adopted a definition of "public use" codified in T.C.A. § 29-17-102 that precludes private use or benefit or the indirect public benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and employment opportunities. The statute then provides these exceptions: (1) acquisition of land for transportation projects, (2) acquisition of land necessary to the function of a utility, (3) acquisition of property by a housing authority or community development agency for redevelopment in blighted areas, (4) private uses merely incidental to public use, and (5) acquisition of property for an industrial park under T.C.A. Title 13, Chapter 16, Part 2. The General Assembly enacted these restrictions and exceptions in response to the U.S. Supreme Court case of *Kelo v. City of New London*, 126 S. Ct. 326 (2005). Although the power of eminent domain is an inherent power of the sovereign, it lies dormant until the legislature declares the purpose for which it may be exercised and the agencies that may use the power. [4] The power of eminent domain may be exercised directly by the legislature by the adoption of a statute identifying the particular property to be acquired for a public use, or it may be delegated to agents who may exercise the power in the manner prescribed in the enabling statute. [5]

The power of eminent domain has been delegated to counties, (T.C.A. §§ 29-17-101; 29-17-201), [6] and municipalities. T.C.A. §§ 29-17-101; 29-17-301. [7] It has been generally delegated to any person or corporation authorized by law to construct railroads, turnpikes, canals, toll bridges, roads, causeways, or other work of internal improvement. T.C.A. § 29-16-101. [8] The General Assembly has also delegated the power of eminent domain to the following: [9]

- Airport authorities (T.C.A. §§ 42-3-108; 42-3-109; 42-3-204.)
- Beech River Watershed Development Authority (T.C.A. § 64-1-102.)
- Carrol County Watershed Authority (T.C.A. § 64-1-805.)
- Coast and Geodetic Surveys (T.C.A. § 29-17-602.)
- Counties—Airports (T.C.A. § 42-5-108.)
- Counties—Electric plants (T.C.A. § 7-52-105.)
- Counties—Controlled access highways (T.C.A. § 54-16-104.)
- Counties—Industrial parks (T.C.A. § 13-16-203.)
- Counties—Levees (T.C.A. § 69-5-209.)
- Counties—Public transportation systems (T.C.A. § 7-56-106.)
- Counties—Public works projects (T.C.A. § 9-21-107.)
- Counties—Railroad systems (T.C.A. § 7-56-207.)
- Counties—Recreational land (T.C.A. § 11-24-102.)

- Counties—Roads (T.C.A. § 54-10-205.)
- Counties—Schools (T.C.A. §§ 49-6-2001 *et seq.*)
- Counties—Solid waste sites (T.C.A. § 68-211-919.)
- Counties— for the West Tennessee River Basin Authority (T.C.A. § 64-1-1103(14).)
- Drainage and levee districts (T.C.A. § 69-5-201 *et seq.*)
- Hospitals (T.C.A. § 29-16-126.) (Limited applicability)
- Housing authorities (T.C.A. §§ 13-20-104; 13-20-108 - 109; 13-20-212; 29-17-501 *et seq.*)
- Light, power , and heat companies (T.C.A. § 65-22-101.)
- Metropolitan governments - Energy production facilities (T.C.A. § 7-54-103.)
- Metropolitan governments - Port authorities (T.C.A. § 7-5-108.)
- Metropolitan hospital authorities (T.C.A. § 7-57-305.)
- Mill Creek Flood Control Authority (T.C.A. § 64-3-104.)
- Municipalities—Airports (T.C.A. § 42-5-108.)
- Municipalities—City Manager - Commission (T.C.A. § 6-19-101.)
- Municipalities—Controlled access highways (T.C.A. § 54-16-104.)
- Municipalities—Drainage ditches (T.C.A. § 7-35-101.)
- Municipalities—Electric plants (T.C.A. § 7-52-105.)
- Municipalities—Enery acquisition systems (T.C.A. § 7-39-303.)
- Municipalities—Industrial parks (T.C.A. § 13-16-203.)
- Municipalities—Mayor - Aldermanic (T.C.A. § 6-2-201.)
- Municipalities—Modified City Manager (T.C.A. § 6-33-101.)
- Municipalities—Parks (T.C.A. §§ 7-31-107 *et seq.*)
- Municipalities—Public transportation systems (T.C.A. § 7-56-106.)
- Municipalities—Public works projects (T.C.A. § 9-21-107.)
- Municipalities—Railroad systems (T.C.A. § 7-56-207.)
- Municipalities—Recreational systems (T.C.A. § 11-24-102.)
- Municipalities—Schools (T.C.A. §§ 49-6-2001 *et seq.*)
- Municipalities—Sewers (T.C.A. § 7-35-101.)
- Municipalities—Slum clearance (T.C.A. §§ 13-21-204 - 206.)
- Municipalities—Solid waste sites (T.C.A. § 68-211-919.)
- Municipalities—Streets (T.C.A. §§ 7-31-107 *et seq.*)
- Municipalities—Utilities (T.C.A. § 7-35-101.)
- Municipalities—Water systems (T.C.A. § 7-35-101.)
- Municipalities— For the West Tennessee River Basin Authority (T.C.A. § 64-1-1103(14).)
- North Central Tennessee Railroad Authority (T.C.A. § 64-2-507.)
- Pipeline companies (T.C.A. § 65-28-101.)
- Private roads (T.C.A. § 54-14-102)
- Railroads (T.C.A. §§ 65-6-109; 65-6-123.)
- Railroads—Branch lines (T.C.A. § 65-6-126 *et seq.*)
- Road improvement districts (T.C.A. § 54-12-152.)
- Solid waste authorities (T.C.A. § 68-211-908.)

- State Department of Environment and Conservation (T.C.A. §§ 11-1-105; 11-3-105; 11-14-110; 59-8-215.)
- State Department of Transportation (T.C.A. § 54-5-104; 54-5-208; 54-16-104.)
- State military affairs (T.C.A. §§ 58-1-501 *et seq.*)
- State water and sewer facilities (T.C.A. § 12-1-109.)
- Telegraph companies (T.C.A. § 65-21-204.)
- Telephone companies (T.C.A. § 65-21-204.)
- Telephone cooperatives (T.C.A. § 65-29-125.)
- Tri-County Railroad Authority (T.C.A. § 64-2-307.)
- University of Tennessee (T.C.A. § 29-17-401.)
- Utility districts (T.C.A. § 7-82-305.)
- Water companies (T.C.A. §§ 65-27-101 *et seq.*)
- Water and wastewater authorities (T.C.A. § 68-221-610.)

Such grants of the power of eminent domain are in derogation of private property rights and will be strictly construed against the condemners and liberally in favor of the property owners. [10] The General Assembly in T.C.A. § 29-17-101 expresses its intent that the power of eminent domain be used sparingly and that the laws permitting this exercise of the power be narrowly construed. The condemner's right to take property will be denied if the condemner has failed to follow the procedures set forth in the statutes that authorize exercise of the power of eminent domain. [11] Also, the condemner will be precluded from acquiring a greater interest in property than is authorized by statute. [12]

T.C.A. § 68-211-122 prohibits the use by a municipality of the power of eminent domain to establish a solid waste landfill outside its corporate boundaries unless this is approved by the governing body of the area in which the landfill is to be located. This approval must be given by a majority vote at two (2) consecutive regularly scheduled meetings.

Notes:

[1] *City of Maryville v. Edmondson*, 931 S.W.2d 932 (Tenn. App. 1996); *Harper v. Trenton Housing Authority*, 274 S.W.2d 635 (Tenn. App. 1954); *City of Knoxville v. Heth*, 186 Tenn. 321, 210 S.W.2d 326 (1948).

[2] See section on Public Use.

[3] *Edwards v. Hallsdale-Powell Utility District*, 115 S.W.3d 461 (Tenn. 2003); *Rivergate Wine and Liquors, Inc. v. City of Goodlettsville*, 647 S.W.2d 631 (Tenn. 1983); *Southern Railway Co. v. City of Memphis*, 126 Tenn. 267, 148 S.W. 662 (1912); *Allen v. Farnsworth*, 13 Tenn. 189 (1833); *County Highway Commission of Rutherford County v. Smith*, 61 Tenn. App. 292, 454 S.W. 2d 124 (1969).

[4] *Trustees of New Pulaski Cemetery v. Ballentine*, 151 Tenn. 622, 271 S.W. 38 (1924); *County Highway Commission of Rutherford County v. Smith, supra*.

[5] *State ex rel. v. Oliver*, 162 Tenn. 100, 35 S.W.2d 396 (1931); *Anderson v. Turberville*, 46 Tenn. 150 (1868).

[6] *Claiborne County v. Jennings*, 199 Tenn. 161, 285 S.W.2d 132 (1955); *Knox County v. Kennedy*, 92 Tenn. 1, 20 S.W. 311 (1892); *Shelby County v. Armour*, 495 S.W.2d 816 (Tenn. Ct. App. 1971).

[7] *Rivergate Wine and Liquors Inc. v. City of Goodlettsville, supra*; *Duck River Electric Membership Corp. v. City of Manchester*, 529 S.W. 2d 202 (Tenn. 1975); *City of Knoxville v. Heth, supra*; *Zirkle v. City of Kingston*, 217 Tenn. 210, 396 S.W.2d 356 (1965); *City of Memphis v. Wright*, 14 Tenn. 497 (1834).

[8] Provided that these improvements will be put to a public use. *Webb v. Knox County Transmission Co.*, 143 Tenn. 423, 225 S.W. 1046 (1920); *Tennessee Coal, Iron and Railroad Co. v. Paint Rock Flume & Transportation Co.*, 128 Tenn. 277, 160 S.W. 522 (1913); *Alfred Phosphate Co. v. Duck River Phosphate Co.*, 120 Tenn. 260, 113 S.W. 410 (1907); *Ryan v. Louisville & Nashville Terminal Co.*, 102 Tenn. 111, 50 S.W. 744 (1899).

[9] Instances where the power of eminent domain was delegated by private act of the General Assembly are not included.

[10] *American Telephone & Telegraph Co. v. Proffitt*, 903 S.W.2d 309 (Tenn. App. 1995); *Claiborne County v. Jennings, supra*; *Clouse v. Garfinkle*, 190 Tenn. 677, 231 S.W.2d 345 (1950); *Vinson v. Nashville, Chattanooga & St. Louis Railway*, 45 Tenn. App. 161, 321 S.W.2d 841 (1958); *Rogers v. City of Knoxville*, 40 Tenn. App. 170. 289 S.W.2d 868 (1955).

[11] *Alcoa Development and Housing Authority v. Monday*, Docket No 196; 1991 W L 12291. (Tenn. App. 1991).

[12] *Clouse v. Garfinkle, supra*; *Tennessee Power Co. v. Rust*, 8 Tenn. Civ. App. 368 (1918).

Eminent Domain vs. Police Power

Reference Number: MTAS-1265

The power of eminent domain, or the power to acquire private property for a public use, can generally be distinguished from the police power, which is the power to adopt regulations to promote the public health, safety, and welfare of a community, even though the exercise of either power may impair the fair market value of private property. [13] Where the impairment of value results from the exercise of the police power, courts traditionally find that the loss is not subject to the just compensation requirements of the United States and Tennessee Constitutions. [14] Thus, claims for compensation have been denied where the value of property has been impaired as the result of the imposition of housing regulations; [15] the imposition of zoning regulations; [16] the imposition of utility rate regulations; [17] the change in streets abutting property from two-way streets to one-way streets; [18] or inconvenience, noise, and dirt from construction of a public improvement that interfered with the use of property; [19] and in an annexation in which a city annexed the service area of private trash haulers. [20]

This theoretical distinction becomes blurred when the police power regulation impairs the value or use of private property to such an extent that no beneficial use of the property remains. [21] These instances have become more common as local governments have imposed land use regulations upon private property instead of using limited public funds to acquire private property for public use. This problem was first addressed in *Pennsylvania Coal Co. v. Mahon*, [22] where Justice Holmes held that “while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking...(as)... a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”

This holding has been applied in Tennessee to a zoning regulation that deprived the owner of the beneficial use of the property. [23] Where such a “regulatory taking” occurs, the property owner is entitled to recover “just compensation” for the taking, not just the invalidation of the regulation that resulted in the taking. [24]

Notes:

[13] *City of Clarksville v. Moore*, 688 S.W.2d 428 (Tenn. 1985); *Nashville Housing Authority v. City of Nashville*, 192 Tenn. 103, 237 S.W.2d 946 (1951); *Illinois Central Railroad Co. v. Moriarity*, 135 Tenn. 446, 186 S.W. 1053 (1916); Sackman and Rohan, 1 Nichols' The Law of Eminent Domain, § 1.42 (3d Ed. 1992).

[14] *City of Clarksville v. Moore*, *supra*; *Draper v. Haynes*, 567 S.W. 2d 462 (Tenn. 1978); *City of Memphis v. Hood*, 208 Tenn. 319, 345 S.W.2d 887 (1961); *Ambrose v. City of Knoxville*, 728 S.W.2d 338 (Tenn. Ct. App. 1986); Sackman and Rohan, 1 Nichols' The Law of Eminent Domain, § 1.42 [3] (3d. Ed. 1992).

[15] *City of Clarksville v. Moore*, *supra*.

[16] *Draper v. Haynes*, *supra*.

[17] In re Billing and Collection Tariffs of South Central Bell, 779 S.W.2d 375 (Tenn. Ct. App. 1989).

[18] *City of Memphis v. Hood*, *supra*; *Ambrose v. City of Knoxville*, *supra*.

[19] *Ledbetter v. Beach*, 220 Tenn. 623, 421 S.W.2d 814 (1967); *Hadden v. City of Gatlinburg*, Docket No. 97 (Tenn. Ct. App. W.S. at Knoxville, August 28, 1985).

[20] *Hudgins v. Metropolitan Government of Nashville & Davidson County*, 885 S.W.2d 74 (Tenn. App. 1994).

[21] Griffith and Stokes, Eminent Domain in Tennessee, p.2 (Rev. Ed. July 1979).

[22] 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

[23] *Bayside Warehouse Co. v. City of Memphis*, 63 Tenn. App. 268, 470 S.W. 2d 375 (1971).

[24] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed.2d 250 (1987).

Eminent Domain vs Accidental/Negligent Acts

Reference Number: MTAS-1266

A governmental defendant must perform a purposeful or intentional act for a taking to exist, and a taking will not result from unavoidable incidents or negligent acts.[25] See T.C.A. § 29-16-201.

Note:
[25] *Edwards v. Hallsdale-Powell Utility District*, 115 S.W.3d 461 (Tenn. 2003).

Eminent Domain for Industrial Parks

Reference Number: MTAS-1267

A municipality may exercise the power of eminent domain to develop an industrial park with respect to property located within the municipality or within the urban growth boundary. A municipality or county, or both, operating a joint park may exercise the power of eminent domain for development of the park within the boundaries of the county and within an urban growth boundary and a planned growth area. A municipality must obtain a certificate of public purpose and necessity from the Department of Economic and Community Development for the exercise of the power of eminent domain even if no funds will be borrowed. The certificate must be based upon a finding that the municipality was unable to acquire the property through good faith negotiations or to acquire any alternative property of comparable suitability. Good faith negotiations are established if the municipality made an offer to purchase the property for an amount equal to or greater than the fair market value determined by the average of at least two appraisals by independent qualified appraisers. T.C.A. § 13-16-207(f).

Condemnation Procedures

Reference Number: MTAS-1268

There are a variety of condemnation procedures that have been established for municipalities and counties,[1] but those used most commonly are the traditional “jury of view” procedure, (T.C.A. §§ 29-16-101 *et seq*.) and the supplementary procedure. T.C.A. §§ 29-17-901 *et seq*. These statutory provisions normally permit the condemner to select the procedure of its choice from the available options. [2] This manual will discuss only the traditional “jury of view” procedure and the supplementary procedure, since the same principles generally are applicable to the other procedural schemes available to counties and municipalities.

T.C.A. § 6-54-122 establishes special procedures to be followed by a municipality in taking unincorporated property in any county in which the municipality was not located before May 1, 1995. The municipality must notify the county in writing, and the county must approve the taking. The county’s disapproval may not be arbitrary or capricious and may be reviewed by statutory writ of certiorari. These provisions do not apply to takings necessary to provide utility service, certain takings by metropolitan governments, or takings relative to airports or projects sponsored jointly by a municipality and a county.

The condemner seeking to acquire an interest under the power of eminent domain must first file a lawsuit to accomplish this objective. In the lawsuit, the court will be presented with two issues: (1) whether the condemner has the right to take the property, [3] and (2) the amount of just compensation to which the property owner is entitled. [4]

Under the “jury of view” and the supplementary procedures, the condemnation action must be filed in the circuit court in which the property is located. T.C.A. §§ 29-16-104; 29-17-902. Thus, the circuit court has exclusive jurisdiction over eminent domain proceedings. [5] Once condemnation proceedings have been filed in the circuit court, the court may resolve matters that are incidental to the condemnation case, such as contract [6] or boundary [7] disputes involving the condemned property. The only exception to this rule involves cases that were properly brought in chancery court to obtain injunctions or other equitable relief. [8] The chancery court has been found to have jurisdiction to award appropriate relief under the eminent domain statutes in cases that were initially brought to obtain injunctive relief, [9] to void a contract, [10] or to reform a deed. [11]

Notes:

[1] For example, special procedures have been provided for the acquisition of property for certain municipal projects (§ 7-31-107 *et seq.*), for municipal housing authorities (§ 29-17-501 *et seq.*), for the opening, changing or closing of county roads (§ 54-10-201 *et seq.*) and for municipal or county schools (§ 49-6-2001 *et seq.*).

[2] *Williams v. McMinn County*, 209 Tenn. 236, 352 S.W. 2d 430 (1961); *Ragland v. Davidson County Board of Education*, 203 Tenn. 317, 312 S.W.2d 855 (1958); *City of Knoxville v. Heth*, 186 Tenn. 321, 210 S.W.2d 326 (1948); *Town of Cookeville v. Farley*, 171 Tenn. 260, 102 S.W.2d 56 (1937); *Derryberry v. Beck*,153 Tenn. 220, 280 S.W. 1014 (1925); *City of Chattanooga v. State*, 151 Tenn. 691, 272 S.W. 432 (1924); *Department of Highways and Public Works v. Gamble*, 18 Tenn. App. 95, 73 S.W.2d 175 (1934). But see *Baker v. Nashville Housing Authority*, 219 Tenn. 201, 408 S.W.2d 651 (1966) (municipal housing authority may not utilize "bulldozer/quick take" procedure).

[3] See section The Right to Take.

[4] See section Just Compensation.

[5] *Cox v. State*, 217 Tenn. 644, 399 S.W.2d 776 (1965); *Hombra v. Smith*, 159 Tenn. 308, 17 S.W.2d 921 (1929); *Scruggs v. Town of Sweetwater*, 29 Tenn. App. 357, 196 S.W.2d 717 (1946).

[6] *E.R. & R.I. Dixon v. Louisville & Nashville Railroad Co.*, 115 Tenn. 362, 89 S.W. 322 (1905).

[7] *City of Maryville v. Waters*, 207 Tenn. 213, 338 S.W.2d. 608 (1907).

[8] *H.J.L., L.P. v. Nashville & Eastern R.R. Corp.*, 1999 WL 499 744 (Tenn. App. 1999); *Knox County v. Moncier*, 224 Tenn. 361, 455 S.W.2d. 153 (1970); *Evans v. Wheeler*, 209 Tenn. 40, 348 S.W.2d 500 (1961); *Chambers v. Chattanooga Union Railway Co.*, 130 Tenn. 459, 171 S.W. 84 (1914); *McLain v. State*, 59 Tenn. App. 529, 442 S.W.2d 637 (1968).

[9] *Knox County v. Moncier*, *supra*; *Evans v. Wheeler*, *supra*.

[10] *Chambers v. Chattanooga Union Railroad Co.*, *supra*.

[11] *McLain v. State*, *supra*.

Jury of View Procedure

Reference Number: MTAS-1269

The jury of view procedure requires the condemner to initiate the condemnation action by filing a petition for condemnation in the circuit court and giving the property owner 30 days notice of the proceedings. T.C.A. §§ 29-16-104 and 105; 29-17-104. The circuit court then appoints a jury of view to examine the property to be condemned and determine the amount of just compensation to which the property owner is entitled. T.C.A §§ 29-16-108 thru 113. The jury of view will then file its report with the court. The report may be confirmed or it may be excepted to and/or appealed by one or both parties that have objections to the report. T.C.A. § 29-16-115 thru 118.

If the report is confirmed, an order will be entered conveying the property to the condemner upon payment to the property owner of the amount of just compensation set by the jury of view. T.C.A. § 29-16-116. If an exception is filed, the court may, upon a showing of good cause, appoint a new jury of view. T.C.A. § 29-16-117. If an appeal is filed to the report, the circuit court conducts a trial de novo before a petit jury. T.C.A. § 29-16-118.

Petition for Condemnation

Reference Number: MTAS-1270

Petition for Condemnation (Jury of View Procedure)

The petition for condemnation must be filed in the county in which the property is located. T.C.A. § 29-16-104. The petition must name as defendants all parties having any interest in any way in the property being acquired. T.C.A. § 29-16-106. All parties must be named as defendants for the condemnation proceedings to bind the parties, with the exception of unborn remaindermen, who are bound if all living parties in interest are parties. T.C.A. § 29-16-106. [12] Thus, to obtain clear title to the property, the condemner should name as defendants the spouse of the property owner, [13] any person owning a life estate or reversionary or remainder interest in the property, [14] any lessee of the property, [15] any holder of a recorded mortgage, [16] and any holder of any other interest in the property, including a purchase contract of which the condemner is aware. [17] The name and residence addresses of all defendants, if known, should be listed in the petition, and if the name or address is unknown, that fact should be stated in the petition. T.C.A. § 29-16-104.

The body of the petition for condemnation should set forth the statute, private act, or charter provision giving the condemner the general power to acquire property by eminent domain and should cite the jury of view statutes as the specific statutory procedure being used by the condemner to acquire the property in question. [18] The petition should also identify the specific ordinance or resolution of the county or municipal legislative body authorizing the acquisition of the property under the power of eminent domain.

The nature of the project for which the property is being acquired should be described. T.C.A. § 29-16-104. The petition should recite that the project is for a public use, is in the public interest, and that the acquisition of the property is necessary to complete the project. [19] The particular interest in the property, either a fee interest or an easement, should be identified. T.C.A. § 29-16-104. An accurate legal description of the property should be included, along with a corresponding map or plat attached as an exhibit if available. T.C.A. § 29-16-104. [20] Also, any known encumbrances upon the property should be specified. Finally, the petition should contain a prayer that a copy of the petition be served on the defendants and a suitable portion of the land or the rights of the defendants be awarded to the condemner. T.C.A. § 29-16-104.

Notes:

[12] *Sanford v. Louisville & Nashville Railroad Co.*, 225 Tenn. 350, 469 S.W.2d 363 (1971).

[13] *Brady v. Correll*, 20 Tenn. App. 224, 97 S.W.2d 448 (1936).

[14] *Colcough v. Nashville and Northwestern Railroad Co.*, 39 Tenn. 171 (1858).

[15] *Union Railway Co. v. Hunton*, 114 Tenn. 609, 88 S.W. 182 (1905); *Lamar Advertising of Tennessee, Inc. v. Metropolitan Development and Housing Authority*, 803 S.W.2d 686 (Tenn. Ct. App. 1990); *City of Morristown v. Sauls*, 61 Tenn. App. 666, 457 S.W.2d 601 (1969).

[16] *State v. Holland*, 51 Tenn. App. 344, 367 S.W.2d 791 (1962).

[17] *Cheatham v. Carter County, Tennessee*, 363 F.2d 582 (6th Cir. 1966).

[18] *Middle Tennessee Electric Membership Corp. v. Batey*, Docket No. 89-233-II (Tenn. Ct. App. M.S. January 31, 1990).

[19] *Noell v. Tennessee Eastern Power Co.*, 130 Tenn. 245, 169 S.W. 1169 (1914); Griffith and Stokes, Eminent Domain in Tennessee, p. 22 (Rev. Ed. July 1979).

[20] *State ex rel. Shaw v. Shofner*, 573 S.W.2d 169 (Tenn. Ct. App. 1978).

Deposit and Appraisal

Reference Number: MTAS-1271

Deposit and Appraisal (Jury of View Procedure)

The condemner using the jury of view procedure must deposit with the clerk of the court at the time the petition is filed the amount determined by its appraisal as the amount the property owner is entitled to for the property being acquired. T.C.A. § 29-17-801. The appraisal must value the property considering its 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. The appraiser must be a Member of the Appraisal Institute (MAI) or an otherwise licensed and qualified appraiser. T.C.A. § 29-17-1004. The statute requires interest to be paid only on the amount of an award exceeding the deposit at the rate of 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. T.C.A. § 29-17-913. Thus, the statute provides the condemner with a mechanism to avoid the payment of interest on the amount deposited. [21]

The condemner should make a good faith estimate of the damages and expenses the property owner will likely incur when it determines the amount to deposit. [22] The amount of the deposit should be specified in the condemnation petition. The amount of the deposit is not relevant to the trial, [23] and the condemner can offer proof that the property is of lesser value. [24]

Notes:

[21] *Clinton Livestock Auction Co. v. City of Knoxville*, 52 Tenn. App. 614, 376 S.W.2d 743 (1963).

[22] *State ex rel. Smith v. Overstreet*, 533 S.W.2d 283 (1976).

[23] *Smith County v. Eatherly*, 820 S.W.2d 366 (Tenn. Ct. App. 1991).

[24] *Kennedy v. City of Chattanooga*, 56 Tenn. App. 198, 405 S.W.2d 653 (1966); *Clinton Livestock Auction Co. v. City of Knoxville*, supra.

Notice

Reference Number: MTAS-1272

Notice (Jury of View Procedure)

Notice of the filing of the condemnation petition must be given to each respondent at least 30 days before the taking of any additional steps. T.C.A. § 29-17-104. If the defendant's name or address is unknown, or if he or she is not a resident of the state, notice should be given as for suits in chancery court. T.C.A. § 29-17-104. [25] Although notice by publication is also authorized for non-residents of the state, the due process clause of the Fourteenth Amendment to the United States Constitution requires more than notice by publication when the name and address of a non-resident defendant are known or very easily ascertainable. [26] The notice should advise the defendant of the filing of the petition and the date scheduled for presenting the petition to the court for issuance of the writ of inquiry. [27]

The notice of the filing of the petition is in lieu of the summons that is normally issued in civil actions. [28] The manner of service of the notice is not specified in the applicable statutes; however, Rule 71 of the Tennessee Rules of Civil Procedure provides that those rules will be applicable to the extent they are not in conflict with or do not contradict or contravene the provisions of the applicable statutes. Therefore, service of the notice, accompanied by a copy of the petition for condemnation, can be accomplished in any manner authorized by Rule 4 of the Tennessee Rules of Civil Procedure. A return of the notice, like a return of a summons, should be completed in compliance with Rule 4.03 of the Tennessee Rules of Civil Procedure.

If the right to take has not been challenged within 30 days after the giving of notice, the condemner may take possession of the property. If the right to take is challenged, the court must promptly determine as a matter of law whether there is a right to take. If the court determines there is a right to take, it must issue a writ of possessions if necessary. T.C.A. § 29-17-104.

Notes:
[25] The due process clause of the Fourteenth Amendment to the United States Constitution does not permit service by publication where the defendant's name is known or is very easily ascertainable. *Love v. First National Bank of Clarksville*, 646 S.W.2d 163 (Tenn. Ct. App. 1982).

[26] *Baggett v. Baggett*, 541 S.W.2d 407 (Tenn. 1976).

[27] *Griffith and Stokes, supra*, at p. 23.

[28] *Johnson v. Roane County*, 212 Tenn. 433, 370 S.W.2d 496 (1963).

Writ of Inquiry

Reference Number: MTAS-1273

Writ of Inquiry (Jury of View Procedure)
At the time the petition is presented to the court for the issuance of the writ of inquiry, which cannot occur until 30 days after the defendant has been given notice of the filing of the petition, the condemner should submit a motion to sustain the condemner's right to take the property under the power of eminent domain. This motion asks the court to issue the writ of inquiry and fix a time and place for the inquest. Any challenge to the condemner's right to take must be asserted at this stage of the proceedings. [29]

If no challenge to the condemner's right to take is made, the court will sustain the condemnation proceedings and order the issuance of the writ of inquiry of damages. T.C.A. § 29-16-202. This order should recite that:

- The petition for condemnation has been properly filed and notice given to the defendants;
- The condemner has the right to acquire the property as disclosed in the order;
- The clerk should issue a writ of inquiry to appear on a fixed date and place and that no further notice will be given;
- Upon selection of the jury of view the jury will proceed to the property, examine it, and hear testimony of witnesses, but no argument of counsel, and will set apart by metes and bounds the property to be condemned and assess the damages as required by law; and
- That the jury of view will reduce its report to writing and deliver it to the sheriff, who will return it to the court. [30]

If the defendant challenges the condemner's right to take, the court must first resolve this challenge before it may order issuance of the writ of inquiry. T.C.A. § 29-16-202. [31] If the court finds that the condemner has the right to take the property, it will sustain the condemnation proceedings and order issuance of the writ of inquiry of damages. T.C.A. § 29-16-202. The order directing the issuance of the writ of inquiry is not a final order and, therefore, is not appealable. [32]

The writ of inquiry is issued by the clerk and directed to the sheriff, commanding him to summon a panel of jurors to appear on a fixed date and place. T.C.A. § 29-16-202. [33] The sheriff thereafter summons a panel from 12 to 15 potential jurors from which the jury of view will be selected. The sheriff should return the writ to the clerk of court, specifying the names of the persons on whom the writ of inquiry was served. [34]

Notes:
[29] Wilkerson, The Institution and Prosecution of Condemnation Proceedings, 26 Tenn. L. Rev. 325 (1959); Griffith and Stokes, supra, at p. 23.[

[30] *Wilkerson, supra*, at p. 328.

[31] The right to take is considered in detail in The Right to Take [2].

[32] *Tennessee Central Railroad Co. v. Campbell*, 109 Tenn. 655, 73 S.W. 112 (1903); *Camp v. Coal Creek & Winter's Gap Railroad Co.*, 79 Tenn. 705 (1883).

[33] As an alternative, the parties may agree on the persons who will serve on the jury of view, or the judge will select the jurors and the names of these jurors will be specified in the order directing the writ of inquiry. T.C.A. § 29-16-109. The sheriff will thereafter serve the writ of inquiry on the agreed-upon jurors.

[34] *Wilkerson, supra*, at p. 328.

Selection of the Jury of View

Reference Number: MTAS-1274

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

View and Report

Reference Number: MTAS-1275

View and Report (Jury of View Procedure)

If the date has not been set by the court, the sheriff must give the parties three days' notice of the time and place of the inquiry. T.C.A. § 29-16-111. [35] On the date and time specified, the jury will be selected (if the names of the jurors are not specified by the court or the parties) and sworn to fairly and impartially, without favor or affectation, and will lay off by metes and bounds the property required for the proposed improvement to assess the damages to the landowner. T.C.A. § 29-16-112.

The jury may then receive brief instructions from the court on its duties, which are to go onto the property, to examine it, to hear testimony of witnesses but no arguments of counsel, to assess the damages, and to prepare a report in writing and deliver it to the sheriff. [36] The jury of view will then be placed in the charge of the sheriff and will proceed to examine the property. T.C.A. § 29-16-113. The parties and their counsel may accompany the jury of view to the property and put on evidence as to its value, but counsel are not permitted to make arguments to the jury of view. T.C.A. § 29-16-113. [37] After the investigation of the property and the testimony have been completed, the jury of view must identify by metes and bounds the property required for the proposed project and must assess damages to the landowner according to the principles discussed in chapter four. T.C.A. § 29-16-113. The decision of the jury of view may be a majority instead of a unanimous decision. T.C.A. § 29-16-115. [38] The decision should be reduced to writing, and the report must include a legal description of the property and the amount of the award and be signed by a majority of the jurors. [39]

The report should be delivered to the sheriff who returns the report to the court. T.C.A. § 29-16-115. If the parties do not object to the report, it is confirmed by the court upon motion by the condemner. [40] The court then enters an order confirming the report. T.C.A. § 29-16-116. This order should incorporate the report of the jury of view, should order that the property be divested from defendants and vested in the condemner, and further order that the condemner pay the defendants the amount specified in the report. [41] The order should also specifically provide for the issuance of a writ of possession to put the condemner in possession, if necessary. [42]

If there is no dispute as to the proper distribution of the funds to defendants, the order should specify this distribution; otherwise, the court must retain jurisdiction to permit the defendants to present proof on their respective interests and the proper disposition of the award. [43] This order should also adjudge the costs of the case (normally against condemner) and provide for payment of the members of the jury of view. [44] The maximum amount of this payment is specified at T.C.A. § 29-16-125.

Notes:
[35] Although the statute does not require notice to be given to parties or agents who are not residents of the county, such notice would be required by the Fourteenth Amendment to the United States Constitution. *Bryant v. Edwards*, 707 S.W.2d 868 (Tenn. 1986).

[36] *Wilkerson, supra*, at p. 328.

[37] As an alternative, the presentation of testimony may occur at a different location after the jury of view has had an opportunity to inspect the property.

[38] *Mississippi Railway Co. v. McDonald*, 59 Tenn. 54 (1873).

[39] The attorney for condemners normally prepares the report leaving a blank for the jury of view to fill in the amount of the award. *Wilkerson, supra*, at p. 329.

[40] *Wilkerson, supra*, at p. 330.

[41] *Wilkerson, supra*, at p. 330.

[42] *Wilkerson, supra*, at p. 330.

[43] *Wilkerson, supra*, at p. 330.

[44] *Wilkerson, supra*, at p. 330.

Exception and Appeal

Reference Number: MTAS-1276

Exceptions and Appeals (Jury of View Procedure)
Either party may file exceptions to the report of the jury of view, and for good cause shown, the court may set aside the report of the jury of view and issue a new writ of inquiry for a new jury of view. T.C.A. § 29-16-117. Exceptions to the report of the jury of view should be directed toward some irregularity in the proceedings, misconduct of the jury of view, or where the report is founded on erroneous principles. [45] The court considers the exceptions based on the proof in the record; therefore, an exception on the grounds of inadequacy of the damages would normally be insufficient. [46] Although no time period is specified for filing exceptions, the appeal from the report of the jury of view must follow the disposition of the exceptions, [47] and such an appeal must be filed within 45 days of the confirmation of the report of the jury of view. T.C.A. § 29-16-118. It is therefore conceivable that a court would find that exceptions must be filed and disposed of prior to the expiration of the 45-day period.

An appeal is the proper remedy if a party objects to the amount of damages awarded by the jury of view. [48] The remedies of exception and appeal are cumulative and successive. [49] A party may file an appeal regardless of whether exceptions have been filed. [50] Either party may file an appeal within 45 days of the entry of the order confirming the report of the jury of view, and upon giving security for costs obtain a trial de novo before a jury as in any civil case. T.C.A. § 29-16-118.

The condemner who obtained possession under the order confirming the report of the jury of view [51] may continue in possession upon filing of an appeal by posting a bond, payable to defendants, in double the amount of the award of the jury of view, conditioned upon the condemner's compliance with the final judgment in the case. T.C.A. §§ 29-16-120; 29-16-122. [52] Costs on appeal must be paid by the appealing party in all cases where the petit jury affirms the award of the jury of view or is more unfavorable to the appealing party. T.C.A. § 29-17-119. In all other cases the court may award costs as in other chancery cases. T.C.A. § 29-16-119.

Notes:
[45] *Officer v. East Tennessee Natural Gas Co.*, 192 Tenn. 184, 239 S.W.2d 999 (1951); Pound v. Fowler, 175 Tenn. 220, 133 S.W.2d 486 (1939).

[46] *Pound v. Fowler, supra*; *Overton County Railroad Co. v. Eldridge*, 118 Tenn. 79, 98 S.W. 1051 (1906).

[47] *Pound v. Fowler, supra*.

[48] *Pound v. Fowler, supra*.

[49] *Baker v. Rose*, 165 Tenn. 543, 56 S.W.2d 732 (1932).

[50] *State ex rel. v. Oliver*, 167 Tenn. 155, 67 S.W.2d 146 (1933).

[51] See The Right to Take [2] on the effect of such possession on the finality of the court's determination of the condemner's right to take the property.

[52] Counties (and arguably municipalities) are not required to post this bond to obtain possession pending appeal. *Claiborne County v. Jennings*, 199 Tenn. 161, 285 S.W.2d 132 (1955).

Nonsuit

Reference Number: MTAS-1277

Nonsuit (Jury of View Procedure)

The condemner may take a voluntary nonsuit under Rule 41.01 of the Tennessee Rules of Civil Procedure in a condemnation case. [53] A nonsuit cannot be taken after the condemner has taken possession of the property following confirmation of the report of the jury of view, leaving nothing to be determined except the amount of compensation due the defendant. [54]

Notes:

[53] *Montgomery County v. Nichols*, 10 S.W.3d 258 (Tenn. App. 1999); *Anderson v. Smith*, 521 S.W.2d 787 (Tenn. 1975); *Cunningham v. Memphis Railroad Terminal Co.*, 126 Tenn. 343, 149 S.W. 103 (1912); *Williams v. McMinn County, supra*.

[54] *Anderson v. Smith, supra*; *Cunningham v. Memphis Railroad Terminal Co*., supra; *Department of Highways and Public Works v. Gamble*, 18 Tenn. App. 95, 73 S.W.2d 175 (1934).

Supplementary Procedure

Reference Number: MTAS-1278

The supplementary condemnation procedure set out in T.C.A. §§ 29-17-901 *et seq*., can be used by the state of Tennessee to acquire such right-of-way, land, material, easements, and rights as are necessary, suitable, or desirable for the construction, reconstruction, maintenance, repair, drainage, or protection of any street, road, freeway, or parkway. In addition to these purposes, municipalities and counties can use the supplementary procedure for any municipal or county purpose for which condemnation is otherwise authorized by any act of the Tennessee General Assembly, unless expressly stated to the contrary. T.C.A. § 29-17-901. Levee and drainage districts in certain counties also may use the supplementary procedure. T.C.A. § 29-17-901. The supplementary procedure may not be used by housing authorities since they are not counties or municipalities. [55]

The supplementary procedure is a cumulative procedure for the exercise of eminent domain and should be construed in pari materia with the other eminent domain statutes. [56] This supplementary procedure was designed to protect the property owner by having the amount the condemner believes the property owner is entitled to deposited in court, and when that money has been deposited, to give the condemner the almost immediate right of possession. [57] This purpose, however, has been largely negated by statutory amendments requiring 30 days notice of filing the condemnation petitions in all eminent domain cases.

The supplementary procedure, like the jury of view procedure, requires the condemner to initiate the condemnation action by filing a petition for condemnation in the circuit court, accompanied by a deposit for the amount of damages the condemner believes the property owner is entitled to, and giving the property owner notice of the proceedings. T.C.A. §§ 29-17-902; 29-17-903. If the condemner is a municipality or county, any defendant may elect to use the jury of view procedure by filing a statement to that effect within five days of service upon the defendant. T.C.A. § 29-17-901. [58]

If the condemner's right to take is not questioned [59], the condemner may take possession of the property 30 days after the notice has been given. T.C.A. § 29-17-903. [60] If the property owner is satisfied with the amount of the deposit, he or she may withdraw that amount from the court by filing a sworn statement stating that he or she is the owner of the property or property interests described in the petition for condemnation and that he or she accepts the deposit in full settlement for the taking of the property and all damages occasioned to the remainder thereof. T.C.A. § 29-17-904. The court will then enter an order divesting the property owner of title and vesting it in the condemner. T.C.A. § 29-17-904. If the property owner is dissatisfied with the deposit, he or she may file an exception to the amount deposited by the condemner, and a trial before a petit jury may be held on the amount of just compensation due the property owner. T.C.A. § 29-17-905.

Notes:
[55] *Baker v. Nashville Housing Authority, supra*.

[56] *Catlett v. State*, 207 Tenn. 1, 336 S.W.2d 8 (1960).

[57] *Kennedy v. City of Chattanooga, supra. v. Thornton*, 57 Tenn. App. 127, 415 S.W.2d 884 (1967).

[59] If the right to take is challenged, the condemner has no right to possession until that issue is resolved. *Shelby County v. Armour*, 495 S.W.2d 816 (Tenn. Ct. App. 1975). See The Right to Take [2] for more information.

[60] In some counties, the court may require the condemner and property owners to appear on a date certain after the expiration of the 30-day period to obtain an order awarding possession to the condemner.

Petition for Condemnation (Supplementary)

Reference Number: MTAS-1279

Petition for Condemnation (Supplementary Procedure)
Although the interests of the defendants need not be specified, the condemner may specify the interests of different defendants. [61]

If any person who is a proper party defendant is omitted from the petition for condemnation, the condemner may file amendments to add them. T.C.A. § 29-17-909.

Note:
[61] *State ex rel. Moulton v. Burkhart*, 212 Tenn. 352, 370 S.W.2d 411 (1963).

Notice (Supplementary)

Reference Number: MTAS-1280

Notice (Supplementary Procedure)
As with the jury of view procedure, notice of the filing of the condemnation proceeding must be given to all defendants. T.C.A. § 29-17-903. This notice must be given at least 30 days before any additional steps are taken in the case by the condemner. T.C.A. § 29-17-903. The constitutional limitations on service by publication that were discussed under the jury of view procedure apply to the supplementary procedure. Service of the notice, accompanied by a copy of the petition for condemnation, can be accomplished in any manner authorized by the *Tennessee Rules of Civil Procedure*.

Deposit and Appraisal (Supplementary)

Reference Number: MTAS-1281

Deposit and Appraisal (Supplementary Procedure)

The condemner must determine what it deems to be the amount due the property owner and deposit that amount when it files the petition for condemnation[62]. This deposit should be a good faith estimate of damages and expenses the defendant will likely incur as the result of the condemnation. [63] Evidence of the amount deposited is irrelevant, however, if the condemnation goes to trial on the amount of damages. [63A]

The amount deposited must be based upon an appraisal. The appraisal must value the property considering its highest and best use, its use at the time of the taking, and any other use to which the property is legally adaptable at the time of the taking. The appraiser must be an MAI or an otherwise licensed and qualified appraiser. T.C.A. § 29-17-1004.

Notes:

[62] The specification of the amount of damages the condemner believes the property owner is entitled to is not an admission, *Kennedy v. City of Chattanooga*, supra, and is not relevant at trial. *Smith County v. Eatherly, supra*.

[63] *State ex rel. Smith v. Overstreet, supra*.

[63A] *Smith County v. Eatherly*, 820 S.W.2d 366 (Tenn. App. 1991).

Default (Supplementary)

Reference Number: MTAS-1282

Default (Supplementary Procedure)

If the property owner does not appear and accept the amount of the deposit or take exception to the amount of the deposit, the court can enter a default judgment against the property owner. The court will then hold a hearing upon the record and, in the absence of the property owner, determine the amount of just compensation to which the property owner is entitled. T.C.A. § 29-17-907.

Acceptance (Supplementary)

Reference Number: MTAS-1283

Acceptance (Supplementary Procedure)

If the defendant is satisfied with the amount of the damages, he or she may file a sworn statement verifying that he or she is the owner of the property or property rights being condemned and that he or she accepts the deposit as a full settlement for the taking of the property and any incidental damages to the remainder of the property of the defendant. T.C.A. § 29-17-904. The court will thereafter enter a final judgment divesting the property owner of title and vesting title in the condemner. T.C.A. § 29-17-904. If the condemner identifies the amount of the deposit that should be allocated to the various defendants, a defendant may accept that amount in full settlement of his or her interest. [64]

Note:

[64] *State ex rel. Moulton v. Burkhart, supra*.

Exception and Trial (Supplementary)

Reference Number: MTAS-1284

Exception and Trial (Supplementary Procedure)

If the property owner is dissatisfied with the amount deposited, he or she may file an exception or answer on or before 30 days from the date of notice of filing the petition. T.C.A. §§ 29-17-905 and 29-17-105. The answer must be filed within 30 days of service of the notice. T.C.A. § 29-17-105.

If the property owner files an exception or answer to the amount deposited by the condemner, a trial may be held before the petit jury as in other civil cases. T.C.A. §§ 29-17-905 and 29-17-105. To obtain such a jury trial, the property owner should make a demand for a jury under Rule 38.02 of the Tennessee Rules of Civil Procedure, or file a motion for a jury trial under Rule 39.02 of the Tennessee Rules of Civil Procedure. [65] The trial will be limited to determining the amount of compensation to be paid to the defendant for the property or property rights taken. When adverse claims by multiple defendants are made for compensation, the court and jury must also resolve those claims. T.C.A. § 29-17-908.

The defendant who has filed an exception is entitled to withdraw, prior to trial, the amount deposited by the condemner without prejudice to the rights of either party. T.C.A. § 29-17-906. [66] To withdraw the deposit, the defendant must make a written request to the clerk in which he or she agrees to refund the difference between the amount of the deposit and the final award if the final award is less than the amount of the deposit. T.C.A. § 29-17-906.

If the final award is less than or equal to the amount of the deposit, the defendant must pay the costs of the trial. T.C.A. § 29-17-912. Rule 54.04 of the Tennessee Rules of Civil Procedure governs the taxing of any additional costs. In other cases, the condemner is responsible for paying the costs. T.C.A. § 29-17-912.

Note:

[65] If the parties do not demand a jury under Rule 38.02 or file a motion for a jury trial under Rule 39.02, the court may not impanel a jury on its own motion. *Smith v. Williams*, 575 S.W.2d 503 (Tenn. Ct. App. 1978).

[66] *State ex rel. Moulton v. Burkhart, supra*; *West Wilson Utility District v. Ligon*, 768 S.W.2d 681 (Tenn. Ct. App. 1988).

Nonsuit (Supplementary)

Reference Number: MTAS-1285

Nonsuit (Supplementary Procedure)

As with the jury of view procedure, the condemner may take a voluntary nonsuit prior to obtaining possession of the defendant's property. [67] However, if the condemner abandons the proceedings, the court may order the condemner to pay defendants for all reasonable costs, including reasonable attorney, appraisal, and engineering fees actually incurred because of the condemnation proceedings. T.C.A. §§ 29-17-912 and 29-17-106. An abandonment occurs when the condemner voluntarily gives up the intended condemnation or declines to carry the condemnation proceedings through to a conclusion. [68]

Note:

[67] *Anderson v. Smith, supra*.

[68] *Metropolitan Government of Nashville and Davidson County v. Denson*, Docket No. 01-A-01-9005-CV-00174, 1990 WL 154646 (Tenn. Ct. App. M.S. October 17, 1990), *app. denied* (January 28, 1991).

The Right to Take

Reference Number: MTAS-1286

Condemnation cases are of a dual nature, the first part involving the determination of the condemner's right to take the property, and the second part involving the amount of damages to which the property owner is entitled, provided the right to take exists. [1]

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

Note:
[1] *Town of Collierville v. Norfolk & Southern Railway*, 1 S.W.3d 68 (Tenn. App. 1998); *Harper v. Trenton Housing Authority*, 197 Tenn. 257, 271 S.W.2d 185 (1954); *City of Nashville v. Dad's Auto Accessories*, 154 Tenn. 194, 285 S.W. 52 (1926); *Tennessee Central Railroad Co. v. Campbell*, 109 Tenn. 640, 75 S.W. 1012 (1902); *Shelby County v. Armour*, 495 S.W.2d 816 (Tenn. Ct. App. 1971); *Morgan County v. Jones*, 12 Tenn. App. 197 (1930).

Authority

Reference Number: MTAS-1287

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

The municipal or county condemner normally authorizes the acquisition of property under the power of eminent domain through adoption of an ordinance or resolution that authorizes the acquisition of certain parcels of property for a specified municipal or county project. [2] If an ordinance is required, a resolution will not suffice. [2A] Such an ordinance or resolution should set out the nature of the project being undertaken, recite that the taking is for public use and in the public interest, and state that acquisition of the particular properties identified is necessary for that purpose. [3] The ordinance or resolution should specifically authorize the filing of condemnation proceedings to acquire the properties identified. [4]

There must be strict compliance with all applicable charter provisions, statutes, and private acts regarding the adoption of ordinances or resolutions. Failure to comply will result in the condemner lacking the authority to condemn the property identified in the ordinance or resolution. [5] Also, if the applicable statutory provisions impose pre-conditions to the filing of condemnation proceedings, such as publication of notices, the pre-conditions must be met for the condemner to have the authority to institute condemnation proceedings. [6]

A copy of the ordinance or resolution may be attached to the petition for condemnation [7] or referenced by ordinance number in the body of the petition. If the right to take is challenged, a certified copy of the ordinance or resolution may be introduced into evidence to establish that the condemner has the authority to take the property in question.

Notes:
[2] *Hawkins County v. Mallory*, Docket No. 91 (Tenn. Ct. App. E.S. January 17, 1985).

[2A] *City of Johnson City v. Campbell*, 2001 WL 112311 (Tenn. App. 2001).

[3] Wilkerson, The Institution and Prosecution of Condemnation Proceedings, 26 Tenn. L. Rev. 325 (1959).

[4] Wilkerson, supra, at p. 326.

[5] *Brumley v. Town of Greeneville*, 38 Tenn. App. 322, 274 S.W.2d 12 (1954).

[6] *Alcoa Development and Housing Authority v. Monday*, Docket No. 196; 1991 WL 12291 (Tenn. Ct. App. E.S. February 7, 1991).

[7] Wilkerson, supra, at p. 326.

Public Use

Reference Number: MTAS-1288

The term “public use” does not have a precise and universally acceptable definition. [8] The determination of whether a proposed use constitutes a public use must be based on the facts of each case because the term must remain elastic to meet the growing needs of a complex society. [9]

The General Assembly adopted a restrictive definition of “public use” that is codified in T.C.A. § 29-17-102. Generally, the definition precludes the use of eminent domain for private benefit and makes exceptions for certain well-recognized public uses that normally have incidental private benefits.

As noted above, the legislative body makes the initial determination that the taking of private property is for a public use. If the property owner challenges the condemner’s right to take on the grounds that the property will not be put to a public use, the court has the right and the duty to determine whether the proposed use is a public use. [10] The determination by the legislative body that the proposed use is a public use is entitled to a strong presumption of correctness, [11] but it is not conclusive on the court. [12] When the court finds that the proposed use has no significant relationship to the public benefit, it must find that the condemner lacks the right to take private property under the power of eminent domain. [13]

Notes:

[8] *Johnson City v. Cloninger*, 213 Tenn. 71, 372 S.W.2d 281 (1963); *City of Knoxville v. Heth*, 186 Tenn. 321, 210 S.W.2d 326 (1948); *Sackman and Rohan*, 2A Nichols' The Law of Eminent Domain, § 7.02 (Rev. 3d Ed. 1990).

[9] *City of Knoxville v. Heth*, supra; *Knoxville Housing Authority v. City of Knoxville*, 174 Tenn. 76, 123 S.W.2d 1085 (1939); *Ryan v. Louisville & Nashville Terminal Co.*, 102 Tenn. 111, 50 S.W. 744 (1899).

[10] *Duck River Electric Membership Corp. v. City of Manchester*, 529 S.W.2d 202 (Tenn. 1975); *Justus v. McMahan*, 189 Tenn. 470, 226 S.W.2d 84 (1949); *City of Knoxville v. Heth*, supra; *Department of Highways v. Stepp*, 150 Tenn. 682, 226 S.W. 776 (1924); *Southern Railway Co. v. City of Memphis*, 126 Tenn. 267, 148 S.W. 662 (1912); *Anderson v. Turberville*, 46 Tenn. 150 (1868); *County Highway Commission of Rutherford County v. Smith*, 61 Tenn. App. 292, 454 S.W.2d 124 (1969).

[11] *City of Knoxville v. Heth*, supra; *Stroud v. State*, 38 Tenn. App. 654, 279 S.W.2d 82 (1955).

[12] *City of Knoxville v. Heth*, supra; *Ryan v. Louisville & Nashville Terminal Co.*, supra.

[13] *Trustees of New Pulaski Cemetery v. Ballentine*, 151 Tenn. 622, 271 S.W. 38 (1924); *Alfred Phosphate Co. v. Duck River Phosphate Co.*, 120 Tenn. 260, 113 S.W. 410 (1907).

Narrow vs. Broad View

Reference Number: MTAS-1289

Various decisions by the courts on whether a proposed use is a public use have been categorized into two groups: (1) cases in which the courts used a narrow view of the scope of public uses, and (2) cases in which courts used a broad view of the scope of public uses. [14] Courts using the narrow view require that the public must be entitled as of right to directly use or enjoy the property taken. [15] Under the broad view, the condemnation of the property need be only for the public benefit or common good. [16] Under either view, it is not essential that the entire community directly enjoy or participate in the proposed use for the court to find a public use. [17] Thus, the extension of utility service to serve a single customer who has the right to service from the utility may constitute a public use that justifies the condemnation of easements necessary to construct the utility line. [18]

Under the federal Constitution's public use requirement, a public entity may take private property for transfer to another private party for economic development. [18A] Since Tennessee does not have statutes authorizing this except for blight removal and industrial development, however, it is unlikely that the state constitution's public use clause would be interpreted to embrace Kelo takings. Further, the General Assembly passed legislation in response to the Kelo case, generally codified in T.C.A. §§ 29-17-101 *et seq.*, that attempts to ensure that there will be no Kelo takings in Tennessee.

Notes:
[14] *Sackman and Rohan*, supra, at § 7.02.

[15] *Alfred Phosphate Co. v. Duck River Phosphate Co.*, supra; *Memphis Freight Co. v. Mayor & Aldermen of Memphis*, 44 Tenn. 419 (1867).

[16] *City of Knoxville v. Heth*, supra; *Knoxville Housing Authority v. City of Knoxville*, supra; *Knoxville's Community Development Corp. v. Wright*, 600 S.W. 2d 745 (Tenn. Ct. App. 1980).

[17] *Webb v. Knox County Transmission Co.*, 143 Tenn. 423, 225 S.W.1046 (1920); *Middle Tennessee Electric Membership Corp. v. Batey*, Docket No. 89-233-II (Tenn. Ct. App. M.S. January 31, 1990).

[18] *Middle Tennessee Electric Membership Corp. v. Batey*, supra.18A *Kelo v. City of New London*, Conn., 125 S. Ct. 2655 (2005).

Public vs. Private Condemner

Reference Number: MTAS-1290

In determining whether a proposed use constitutes a public use, the courts also consider whether the condemner is a public or private entity. For the purpose of this analysis courts have recognized that there are at least three categories of condemners: governmental entities, public service corporations regulated by the state, and private individuals or corporations, and that the standards for public use will differ for each category. [19]

If the condemner is a governmental entity, the courts determine whether the public would be entitled to receive and enjoy the benefits of the proposed use. [20] The general public need not have access to the property to satisfy this requirement. [21] Acquiring property as part of a redevelopment plan under which the property will subsequently be resold to a private developer does not result in the property being acquired for a private purpose when the public receives a benefit from the complete implementation of the redevelopment plan. [22]

Where the condemner is a public service corporation regulated by the state, the court must determine whether the public will be given an opportunity to make use of the service provided by the public service corporation at reasonable rates and without discrimination. [23] The proposed use must satisfy a public demand for facilities for travel or transportation of intelligence or commodities, and the general public, under reasonable regulations, must have a definite and fixed use of the services of the condemner independent of the will of the condemner. [24]

If the condemner is a private corporation or individual, the courts will rarely find that the proposed use is a public use. If the proposed use is absolutely necessary to permit the private individual or corporation to discharge duties owed to the public, a public use may be found. [25] Otherwise the court will require the condemner to establish that the general public will be entitled to make a fixed and definite use of the property being condemned, independent of the will of the condemner. [26]

The following have been found to constitute public uses when the condemner was a governmental entity:

- Municipal streets; [27]
- Street lights; [28]
- County roads; [29]
- Bridges; [30]
- Sewers; [31]
- Utility facilities and office buildings; [32]
- Waterworks; [33]
- Cemeteries; [34]
- Golf courses; [35]
- Parks; [36]
- Greenbelts; [37]
- Slum clearance projects; [38]
- Redevelopment projects; [39]
- Easements across railroad rights of way; [40] and
- Schools. [40A]

The following have been found to constitute public uses when the condemner was not a governmental entity:

- Railroad tracks and terminal facilities; [41]
- Telephone lines and underground fiber optic cables; [42]
- Grist mills; [43]
- Iron works; [44]
- Electric power facilities; [45]
- Privately owned turnpikes; [46]
- Flumes; [47]
- Telegraph lines and poles; [48]
- Private water lines; [49] and
- Microwave relay towers. [50]

Notes:

[19] *Johnson City v. Cloninger*, supra. See also *Sackman and Rohan*, supra, at § 7.18.

[20] *Johnson City v. Cloninger*, supra; *City of Knoxville v. Heth*, supra; *Knoxville Housing Authority v. City of Knoxville*, supra; *Knoxville's Community Development Corp. v. Wright*, supra.

[21] *Johnson City v. Cloninger*, supra.

[22] *Knoxville's Community Development Corp. v. Wright*, supra.

[23] *Webb v. Knox County Transmission Co.*, supra; *Tennessee Coal, Iron & Railroad Co. v. Paint Rock Flume & Transportation Co.*, 128 Tenn. 277, 160 S.W. 522 (1913); *Sackman and Rohan*, supra, at § 7.18 [2].

[24] *Ryan v. Louisville & Nashville Terminal Co.*, supra.

[25] *Derryberry v. Beck*, 153 Tenn. 220, 280 S.W. 1014 (1925); *Bashor v. Bowman*, 133 Tenn. 269, 180 S.W. 326 (1915) (where a landlocked property owner condemned an access road to a public road).

[26] *Memphis Freight Co. v. Mayor & Aldermen of Memphis*, supra.

[27] *City of Chattanooga v. State*, 151 Tenn. 691, 272 S.W. 432 (1925); *Town of Clarksville v. Fairley*, 171 Tenn. 260, 102 S.W.2d 56 (1937).

[28] *Johnson v. City of Chattanooga*, 183 Tenn. 123, 191 S.W.2d 175 (1945).

[29] *Knox County v. Kennedy*, 92 Tenn. 1, 20 S.W. 311 (1892).

[30] *Woodard v. City of Nashville*, 108 Tenn. 353, 67 S.W. 801 (1902).

[31] *Zirkle v. City of Kingston*, 217 Tenn. 210, 396 S.W.2d 356 (1965).

[32] *City of Knoxville v. Heth*, supra.

[33] *Beadle v. Town of Crossville*, 157 Tenn. 249, 7 S.W.2d 992 (1927).

[34] *Town of Pulaski v. Ballentine*, 153 Tenn. 393, 284 S.W. 370 (1925).

[35] *Johnson City v. Cloninger*, supra.

[36] *Shelby County v. Armour*, supra.

[37] *Shelby County v. Armour*, supra.

[38] *Nashville Housing Authority v. City of Nashville*, 192 Tenn. 103, 237 S.W.2d 946 (1950); *Knoxville Housing Authority v. City of Knoxville*, supra.

[39] *Knoxville's Community Development Corp. v. Wright*, supra.

[40] *Town of Collierville v. Norfolk & Southern Railway*, 1 S.W.3d 68 (Tenn. App. 1998).

[40A] *Pickler v. Parr*, 138 S.W. 3d 210 (Tenn. App. 2003).

[41] *Collier v. Union Railway Co.*, 113 Tenn. 96, 83 S.W. 155 (1904); *Ryan v. Louisville & Nashville Terminal Co.*, supra.

[42] *American Telephone & Telegraph v. Proffitt*, 903 S.W.2d 309 (Tenn. App. 1995); *Doty v. American Telephone & Telegraph Co.*, 123 Tenn. 329, 130 S.W. 1053 (1910).

[43] *Harding v. Goodlett*, 11 Tenn. 41 (1832).

[44] *Tipton v. Miller*, 11 Tenn. 423 (1832).

[45] *Webb v. Knox County Transmission Co.*, supra; *Great Falls Power Co. v. Webb*, 123 Tenn. 584, 133 S.W. 1105 (1910).

[46] *Hadley v. Harpeth Turnpike Co.*, 21 Tenn. 555 (1841).

[47] *Tennessee Coal, Iron & Railroad Co. v. Paint Rock Flume & Transportation Co.*, supra.

[48] *Western Union Telegraph Co. v. Nashville, Chattanooga & St. Louis Railway Co.*, 133 Tenn. 691, 182 S.W. 254 (1915); *Mobile & Ohio Railroad Co. v. Postal Telegraph Cable Co.*, 101 Tenn. 62, 46 S.W. 371 (1898).

[49] *Shinkle v. Nashville Improvement Co.*, 172 Tenn. 555, 113 S.W.2d 404 (1938).

[50] *Brannan v. American Telephone and Telegraph Co.*, 210 Tenn. 697, 362 S.W.2d 236 (1962).

Property Devoted to Public Use

Reference Number: MTAS-1291

Property that is devoted to a public use cannot be condemned for another public use [51] in the absence of legislative authority permitting the condemner to take property already devoted to a public use. [52] The regulation of land uses under the police power, however, does not result in the property being devoted to a public use that would preclude condemnation. [53]

Notes:
[51] *Southern Railway Co. v. City of Memphis*, supra; *Memphis State Line Railroad Co. v. Forest Hill Cemetery Co.*, 116 Tenn. 400, 94 S.W.69 (1906).

[52] *Town of Dandridge v. Patterson*, 827 S.W.2d 797 (Tenn. App. 1991); *Duck River Electric Membership Corp. v. City of Manchester*, supra; *Williamson County v. Franklin & Spring Hill Turnpike Co.*, 143 Tenn. 628, 228 S.W. 714 (1920); *Mobile & Ohio Railroad Co. v. Mayor and Aldermen of Union City*, 137 Tenn. 491, 194 S.W. 572 (1917).

[53] *Metropolitan Government of Nashville and Davidson County v. Denson*, Docket No. 01-A-01-9005-CV-00174 (Tenn. Ct. App. M.S. October 17, 1990), app. denied, (January 28, 1991).

Necessity

Reference Number: MTAS-1292

Unlike the review of the legislative body's determination of public use, the court has only a limited review of the necessity to take any particular parcel of property. The legislative body's determination of necessity is conclusive upon the courts in the absence of a showing of fraudulent or arbitrary and capricious action by the condemner. [54]

Arbitrary and capricious actions are willful and unreasonable actions taken without consideration for or in disregard of the facts existing at the time the condemnation was decided upon or within the foreseeable future. [55] An action is not arbitrary and capricious when exercised honestly and upon due consideration where there is room for two opinions, even if the court believes that the condemner erred in basing its decision on one of the two opinions. [56]

Thus, the property owner cannot ask the court to substitute its judgment for that of the condemner on what is in the best interest of the public. [57] The court cannot substitute its judgment on the proper parcel of property to be taken, as distinguished from similar property in the same area, or determine the suitability of a particular parcel of property for the proposed use, or decide the quantity of property required by the condemner for the proposed use. [58]

Notes:
[54] *First Utility District of Knox County v. Jarnigan-Bodden*, 40 S.W.3d 60 (Tenn. App. 2000); *City of Maryville v. Edmondson*, 931 S.W.2d 932 (Tenn. App. 1996); *Duck River Electric Membership Corp. v. City of Manchester*, supra; *Justus v. McMahan*, supra; *City of Knoxville v. Heth*, supra; *Department of Highways v. Stepp*, supra; *Southern Railway Co. v. City of Memphis*, supra; *Metropolitan Government of Nashville and Davidson County v. Huntington Park Associates*, Docket No. 88-144-II (Tenn. Ct. App. M.S. October 26, 1988), app. denied (March 9, 1989); *County Highway Commission of Rutherford County v. Smith*, supra; *Harper v. Trenton Housing Authority*, 38 Tenn. App. 396, 274 S.W.2d 635 (1954).

[55] *Metropolitan Government of Nashville and Davidson County v. Denson*, supra; *Metropolitan Government of Nashville and Davidson County v. Huntington Park Associates, supra*.

[56] *Metropolitan Government of Nashville and Davidson County v. Huntington Park Associates, supra*; *Harper v. Trenton Housing Authority, supra*.

[57] *Justus v. McMahan, supra*.

[58] *Pickler v. Parr*, 138 S.W. 3d 210 (Tenn. App. 2003); *City of Knoxville v. Heth, supra*; *Department of Highways v. Stepp, supra*; *Southern Railway Co. v. City of Memphis, supra*; *Metropolitan Government of Nashville and Davidson County v. Huntington Park Associates, supra*; *Harper v. Trenton Housing Authority, supra*.

Condemnation for Future Needs

Reference Number: MTAS-1293

The propriety of the condemner acquiring property for expected future needs has never been addressed by a Tennessee court, but other courts have found that the time of the taking, like the location and extent of the property to be acquired, is a question for the legislative branch that will not be disturbed by the courts absent fraud or arbitrary and capricious action. [59] As long as the future need for the property can be fairly anticipated by the condemner, the courts will not interfere with the condemner's determination of necessity. [60] Since the condemner in Tennessee is not barred from the exercise of common sense or good business judgment in the operation or construction of public facilities, [61] it is likely that Tennessee courts would permit the condemnation of property the condemner fairly expects will be needed to satisfy the condemner's future needs.

Notes:
[59] *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 43 S.Ct. 689, 67 L. Ed. 1186 (1922); *United States ex rel. Tennessee Valley Authority v. Dugger*, 89 F. Supp. 877 (E.D. Tenn. 1948); *Commonwealth, Department of Highways v. Burchett*, 367 S.W.2d 262 (Ky. Ct. App. 1963). See also Sackman and Rohan 1A Nichols' The Law of Eminent Domain, § 4.11 [2] (Rev. 3d Ed. 1990).

[60] *Rindge Co. v. County of Los Angeles, supra*.

[61] *City of Knoxville v. Heth, supra*.

Procedural Issues (Right to Take)

Reference Number: MTAS-1294

Since condemnation cases have the dual nature mentioned above, challenges to the condemner's right to take normally are resolved as a preliminary matter before the determination of the amount of just compensation to which the property owner is entitled. [62] The condemner has the burden of proof of establishing the right to take. [63] The determination of the right to take is a matter for the court and not the jury. [64] If the court finds that the condemner has the right to take, and the condemner posts the bond required by statute and takes possession of the property, the judgment on the right to take issue becomes final and must be appealed at that time. [65] Thus, there may be two final judgments in any condemnation action. [66]

Notes:
[62] *Harper v. Trenton Housing Authority, supra*; *Lebanon and Nashville Turnpike Co. v. Creveling*, 159 Tenn. 147, 17 S.W.2d 22 (1929); *City of Nashville v. Dad's Auto Accessories, Inc., supra*; *Department of Highways v. Stepp, supra*; *Cunningham v. Memphis Railroad Terminal Co*., 126 Tenn. 343, 149 S.W. 103 (1912); *Tennessee Central Railroad Co. v. Campbell*, 109 Tenn. 655, 73 S.W. 112 (1902) (Campbell II); *Shelby County v. Armour*, *supra*; *Morgan County v. Jones, supra*.

[63] *Alloway v. City of Nashville*, 88 Tenn. 510, 13 S.W. 123 (1890); *Morgan County v. Jones*, *supra*.

[64] *Department of Highways v. Stepp, supra*; *Tennessee Central Railroad Co. v. Campbell, supra (Campbell II)*.

[65] *Georgia Industrial Realty Co. v. City of Chattanooga*, 163 Tenn. 435, 43 S.W.2d 490 (1931); *Cunningham v. Memphis Railroad Terminal Co., supra*; *Tennessee Central Railroad Co. v. Campbell, supra (Campbell I)*.

[66] *Tennessee Central Railroad Co. v. Campbell, supra (Campbell I)*.

Just Compensation

Reference Number: MTAS-1295

The constitution requires that private property not be taken for public use without payment of just compensation to the property owner [1] by the payment of the fair cash value [2] or the fair market value of the property on the date of the taking for public use. [3] The “fair market value“ of the land is the price that a reasonable buyer would give if he or she were willing to but did not have to purchase and that a willing seller would take if he or she were willing to but did not have to sell the property in question. [4] The amount of just compensation to which the property owner is entitled is a question for the jury or court acting as the trier of the facts, [5] and the parties have the right to a trial by jury. [6] After the condemner’s right to take has been established, the burden of proof shifts to the property owner to show the amount of just compensation to which he or she is entitled for the taking. [7]

Notes:

[1] Tennessee Constitution, Article 1, Section 21.

[2] *Southern Railway Co. v. City of Memphis*, 126 Tenn. 267, 148 S.W. 662 (1912); *Paducah and Memphis Railroad Co. v. Stovall*, 59 Tenn. 1 (1873); *City of Memphis v. Bolton*, 56 Tenn. 508 (1872); *Woodfolk v. Nashville & Chattanooga Railroad Co.*, 32 Tenn. 422 (1852).

[3] *Sevier County v. Waters*, 126 S.W. 3d 913 (Tenn. App. 2003); *Nashville Housing Authority v. Cohen*, 541 S.W.2d 947 (Tenn. 1976); *Alloway v. City of Nashville*, 88 Tenn. 510, 13 S.W. 123 (1890).

[4] *State ex rel. Shaw v. Gorman*, 596 S.W.2d 796 (Tenn. 1980); *Nashville Housing Authority v. Cohen*, supra; *Davidson County Board of Education v. First American National Bank*, 202 Tenn. 9, 301 S.W.2d 905 (1957); *Lewisburg & Northern Railroad Co. v. Hinds*, 134 Tenn. 293, 183 S.W. 985 (1915); *Southern Railway Co.v. City of Memphis*, supra; *Alloway v. City of Nashville*, supra; *Shelby County v. Mid-South Title Co.*, 615 S.W.2d 677 (Tenn. Ct. App. 1980); *Memphis Housing Authority v. Mid-South Title Co.*, 59 Tenn. App. 654, 443 S.W.2d 492 (1968); *Brookside Mills, Inc. v. Moulton*, 55 Tenn. App. 643, 404 S.W.2d 258 (1965).

[5] *Strasser v. City of Nashville*, 207 Tenn. 24, 336 S.W.2d 16 (1960); *Davidson County Board of Education v. First American National Bank*, supra; *State ex rel. Pack v. Hill*, 56 Tenn. App. 410, 408 S.W.2d 213 (1965).

[6] *City of Lafayette v. Hammock*, 1999 WL 346217 (Tenn. App. 1999); *Shook & Fletcher Supply Co. v. City of Nashville*, 47 Tenn. App. 339, 338 S.W.2d 237 (1960).

[7] *Catlett v. State*, 207 Tenn. 1, 336 S.W.2d 8 (1960); *Town of Erin v. Brooks*, 190 Tenn. 407, 230 S.W.2d 397 (1950); *Lebanon and Nashville Turnpike Co. v. Creveling*, 159 Tenn. 147, 17 S.W.2d 22 (1929); *Memphis Housing Authority v. Ryan*, 54 Tenn. App. 557, 393 S.W.2d 3 (1964); *Morgan County v. Jones*, 12 Tenn. App. 197 (1930); *City of Lebanon v. Merryman*, Docket No. 01-A-01-9005-CV-00157 (Tenn. Ct. App. M.S. November 16, 1990). See also T.C.A. § 29-16-118 on the right to open and close the argument before the court and jury.

Establishing Fair Market Value

Reference Number: MTAS-1296

The fair market value of the property taken by the condemner must be established as of the date of the taking. [8] Therefore, 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 may not be considered by the jury. [9] This problem usually is encountered when a public improvement is constructed in stages or is enlarged so as to require additional property. If the property increases in value due to its proximity to the construction of the public improvement, and at a later date the condemner decides to acquire additional land for the expansion of the public improvement, the condemner is required to pay for the enhanced value of the property. [10]

If, on the other hand, the public project from the beginning contemplated the acquisition of several parcels of property but only one was acquired initially, the owners of the remaining tracts are not entitled to benefit from any appreciation in value resulting from construction of the project. [11] This is known as the “scope of the project” rule. The condemner has the burden of proof in establishing that the property in question was within the scope of the project. [12] The condemner need not show that the property was actually specified in the original plans for the project so long as it can be established that during the course of the planning or original construction of the project, it became evident that the property in question would be needed for the project. [13] To determine whether the appreciation in value resulted from the proposed public improvement, the trial court must make a preliminary determination on the scope of the project, which will serve as the basis for the admissibility of comparable sales that might reflect the appreciation. [14]

In establishing the fair market value of the property being taken, the jury may not consider prices previously offered by prospective buyers of the property. [15] The price actually paid several years before the condemnation may also be excluded. [15A] The prices at which the property was previously offered for sale also cannot be considered in determining the fair market value of the property. [16]

Evidence of environmental contamination, as well as the reasonable cost of remediation, is relevant to the issue of valuation and erroneous exclusion of this evidence warrants a new trial. [16A]

All capabilities of the property and all legitimate uses for which it is available and reasonably adapted must be considered in determining the fair market value of the property. [17] See also T.C.A. § 29-17-1004. Therefore the probable imminent rezoning of the property may be considered in determining the capabilities and uses for the property. [18] Present zoning is only one of several factors to be considered in valuing land that is taken. Zoning is not dispositive because zoning changes may be made to reflect the changing needs and circumstances of the community. This same rule applies to deed restrictions. [18A] Also, the capability of the property to be developed for one or more particular uses may be shown so long as the proposed uses are not unfeasible or remote in likelihood or in time given the circumstances and location of the property, and so long as these uses are not overemphasized. [19]

Speculative value of property in the hands of a future owner cannot be considered. [20] The rental value of the property taken may be considered in estimating the fair market value of the property. [21] Ordinarily, the profits of a business located on the property are not relevant to establish the fair market value of the property, but there are exceptions to this rule in circumstances where the property has special value to the owner and there is no other evidence upon which to establish the fair market value of the property. [22]

The particular use for which the land is most valuable or to which it is presently adapted may be considered by the jury in determining the fair market value of the property, but it may not be the sole basis for that determination. [23] Thus, a witness may not base his or her estimate of the value of the property on its value for a single use such as the “highest and best use.” [24] See also T.C.A. § 29-17-1004. A witness may testify that the property has a fair market value of a certain amount and may explain on direct and cross examination the particular qualities of the property and the specific uses to which the property may be adapted, but the witness cannot testify that the property has a value of a certain amount for “building lot purposes“ or “for the best use.“ [25] This rule is designed to avoid overvaluation of the property by preventing the jury from giving excessive weight to the value of the property to the condemner. [26]

The value of the land to the owner is not ordinarily relevant if there is a market value for the land. [27] A partial exception to this rule may exist when the property has a special value to the owner, without possible like value to others who may acquire it. [28] Such a special or peculiar value to the owner may be taken into consideration in determining the fair market value of the property. [29]

When title to an entire tax parcel is condemned in fee, the total amount of damages may not be less than the latest valuation used by the assessor of property prior to the taking, less any decrease in value since then. The assessor’s valuation may be introduced and admitted into evidence. T.C.A. § 29-16-203(a)(2).

Notes:

[8] *Love v. Smith*, 566 S.W.2d 876 (Tenn. 1978); *Nashville Housing Authority v. Cohen, supra*; *State v. Rascoe*, 181 Tenn. 43, 178 S.W.2d 392 (1944); *Southern Railway Co. v. Michaels*, 126 Tenn. 702, 151 S.W. 53 (1912); *State ex rel. Department of Transportation Bureau of Highways v. Brevard*, 545 S.W.2d 431 (Tenn. Ct. App. 1976); *Memphis Housing Authority v. Mid-South Title Co.*, supra; *State v. Chumbley*, 27 Tenn. App. 377, 181 S.W.2d 382 (1944).
[9] *Layne v. Speight*, 529 S.W.2d 209 (Tenn. 1975); *State, Department of Highways v. Urban Estates, Inc.*, 225 Tenn. 193, 465 S.W.2d 357 (1971); *City of Memphis v. Bolton, supra*; *Woodfolk v. Nashville & Chattanooga Railroad Co., supra*; *State ex rel. Commissioner, Department of Transportation v. Veglio*, 786 S.W.2d 944 (Tenn. Ct. App. 1989); *State ex rel. Department of Transportation v. Harvey*, 680 S.W.2d 792 (Tenn. Ct. App. 1983); *Memphis Housing Authority v. Newton*, 484 S.W.2d 896 (Tenn. Ct. App. 1972); *State, Department of Highways v. Jennings*, 58 Tenn. App. 594, 435 S.W.2d 481 (1968).
[10] *Metropolitan Government of Nashville & Davidson County v. Overnite Transportation Co.*, 919 S.W.2d 598 (Tenn. App. 1995); *Layne v. Speight, supra*; *State ex rel. Commissioner, Department of Transportation v. Veglio, supra*; *State v. Hodges*, 552 S.W.2d 400 (Tenn. Ct. App. 1977).

[11] *Layne v. Speight, supra*; *State ex rel. Department of Transportation v. Harvey, supra*; *State v. Hodges, supra*.

[12] *Metro. Govt. of Nashville & Davidson Co. v. Overnite Transportation Co., supra*; *Layne v. Speight, supra*.

[13] *Metro. Govt. of Nashville & Davidson Co. v. Overnite Transportation Co., supra*; *State v. Hodges, supra*.

[14] *Layne v. Speight, supra*; *State ex rel. Commissioner, Department of Transportation v. Veglio, supra*.

[15] *Vaulx v. Tennessee Central Railroad Co.*, 120 Tenn. 316, 108 S.W. 1142 (1907); *Board of Mayor and Aldermen, Town of Milan v. Thomas*, 27 Tenn. App. 166, 178 S.W.2d 772 (1943).

[15A] *City of Pigeon Forge v. Loveday*, 2003 WL 358704 (Tenn. App. 2003).

[16] *Lewisburg & Northern Railroad Co. v. Hinds, supra*.

[16A] *State v. Brandon*, 898 S.W.2d 224 (Tenn. App. 1994).

[17] *Love v. Smith, supra*; *Nashville Housing Authority v. Cohen, supra*; *Davidson County Board of Education v. First American National Bank, supra*; *McKinney v. City of Nashville*, 102 Tenn. 131, 52 S.W. 781 (1899); *Alloway v. City of Nashville, supra*; *State ex rel. Commissioner, Department of Transportation v. Headrick*, 667 S.W.2d 70 (Tenn. Ct. App. 1983); *State v. Parkes*, 557 S.W.2d 504 (Tenn. Ct. App. 1977); *State ex rel. Department of Transportation, Bureau of Highways v. Brevard, supra*; *Memphis Housing Authority v. Mid-South Title Co., supra*; *Stroud v. State*, 38 Tenn. App. 654, 279 S.W.2d 82 (1955).

[18] *Nashville Housing Authority v. Cohen, supra*; *State ex rel. Commissioner, Department of Transportation v. Veglio, supra*; *Shelby County v. Mid-South Title Co., supra*.

[18A] *State ex rel. Commissioner of DOT v. Williams*, 828 S.W.2d 397 (Tenn. App. 1991); *State ex rel. Commissioner of DOT v. Cox*, 840 S.W.2d 357 (Tenn. App. 1991).

[19] *State ex rel. Commissioner, Department of Transportation v. Veglio, supra*; *Burchfield v. State*, 774 S.W.2d 178 (Tenn. Ct. App. 1988); *State v. Parkes, supra*.

[20] *Southern Railway Co. v. City of Memphis, supra*.

[21] *Union Railway Co. v. Hunton*, 114 Tenn. 609, 88 S.W. 182 (1905); *McKinney v. City of Nashville, supra*; *State v. Parkes, supra*; *State, Department of Highways and Public Works v. Texaco Inc.*, 49 Tenn. App. 278, 354 S.W.2d 792 (1961).

[22] *Shelby County v. Barden*, 527 S.W.2d 124 (Tenn. 1974); *Lebanon and Nashville Turnpike Co. v. Creveling, supra*. See also *County of Greene v. Cooper*, Docket No. 130 (Tenn. Ct. App. E.S. February 12, 1990).

[23] *State ex rel. Commissioner of DOT v. Cox*, 840 S.W.2d 357 (Tenn. App. 1991); *Love v. Smith, supra*; *State v. Parkes, supra*; *State ex rel. Department of Transportation, Bureau of Highways v. Brevard, supra*; *Stroud v. State, supra*.

[24] *Layne v. Speight, supra*; *Davidson County Board of Education v. First American National Bank, supra*; *Alloway v. City of Nashville, supra*; *Memphis Housing Authority v. Mid-South Title Co., supra*.

[25] *City of Cookeville, Tennessee v. Stiles*, 1995 WL 571851 (Tenn. App. 1995); *Davidson County Board of Education v. First American National Bank, supra*; *Memphis Housing Authority v. Mid-South Title Co., supra*.

[26] *Davidson County Board of Education v. First American National Bank, supra*; *Memphis Housing Authority v. Mid-South Title Co., supra*.

[27] *State ex rel. Smith v. Livingston Limestone Co., Inc.*, 547 S.W.2d 942 (Tenn. 1977).

[28] *Evans v. Wheeler*, 209 Tenn. 40, 348 S.W.2d 500 (1961); *Lebanon and Nashville Turnpike Co. v. Creveling, supra*; *Southern Railway Co. v. City of Memphis, supra*.

[29] *Lebanon and Nashville Turnpike Co. v. Creveling, supra*; *Southern Railway Co. v. City of Memphis, supra*; *State ex rel. Department of Transportation, Bureau of Highways v. Brevard, supra*; *County of Greene v. Cooper, supra*.

Comparable Sales

Reference Number: MTAS-1297

One method of establishing the fair market value of the property being taken is the introduction of sales of similar properties. [30] Whether a sale is sufficiently comparable to be admissible is a preliminary question for the trial court. [31] However, the trial court's discretion is not unlimited, and the appellate courts will reverse the decision of the trial court in the appropriate circumstances. [32]

For a sale to be sufficiently comparable to be admissible, it must have been a voluntary sale, or an arm's length transaction, and cannot have been the result of a compromise. [33] Therefore sales to a condemner, [34] or under the threat of condemnation, [35] are inadmissible, as are sales of property upon which are placed unusually stringent restrictions on the use of the property. [36] Sales that have been affected or influenced by the public project for which the property is being acquired will also be inadmissible. [37]

If the sale was an arm's length transaction, the trial court must next consider whether the properties are similar in nature and near the same location and that the time of the sale was at or about the time of the taking. If the sale was an arm's length transaction, the trial court must next consider whether the properties are similar in nature and near the same location and that the time of the sale was at or about the time of the taking. [38] In making this determination, the trial court will consider the size, [39] the time of the sale, [40] changes in conditions since the time of the sale, [41] the current zoning or any imminent rezoning, [42] the location [43] and vicinity, proximity to existing improvements, improvements existing on the properties, terrain or other geographic features, and all available uses to which the properties are adapted. [44] The sales do not have to be exactly comparable in every respect, and there is no general rule on the degree of similarity required. [45]

After the trial court determines that a sale is comparable and may be admitted into evidence, the weight to be given to the sale is a question for the jury. [46] If a particular sale was made under exceptional circumstances, these circumstances can be shown and the jury can determine the probative force of the sale. [47]

Notes:

[30] *Memphis Housing Authority v. Peabody Garage Co.*, 505 S.W.2d 719 (Tenn. 1974); *Lewisburg & Northern Railroad Co. v. Hinds, supra*; *Union Railway Co. v. Hunton, supra*; *Memphis Housing Authority v. Newton, supra*; *Edgington v. Kansas City, Memphis & Birmingham Railroad Co.*, 10 Tenn. App. 685 (1929).

[31] *Layne v. Speight, supra*; *Memphis Housing Authority v. Peabody Garage Co., supra*; *Lewisburg & Northern Railroad Co. v. Hinds, supra*; *Smith County v. Eatherly*, 820 S.W.2d 366 (Tenn. Ct. App. 1991); *State ex rel. Commissioner, Department of Transportation v. Veglio, supra*; *Shelby County v. Stallcup*, 594 S.W.2d 392 (Tenn. Ct. App. 1979); *Memphis Housing Authority v. Newton, supra*; *Maryville Housing Authority v. Ramsey*, 484 S.W.2d 73 (Tenn. Ct. App. 1972); *Memphis Housing Authority v. Ryan, supra*.

[32] *Memphis Housing Authority v. Peabody Garage Co., supra*; *Lewisburg & Northern Railroad Co. v. Hinds, supra*; *Union Railway Co. v. Hunton, supra*; *Maryville Housing Authority v. Ramsey, supra*.

[33] *Memphis Housing Authority v. Peabody Garage Co., supra*; *Lewisburg & Northern Railroad Co. v. Hinds, supra*; *Croate v. Memphis Railroad Terminal Co.*, 120 Tenn. 525, 111 S.W. 923 (1908); *Memphis Housing Authority v. Newton, supra*; *Memphis Housing Authority v. Ryan, supra*.

[34] *Croate v. Memphis Railroad Terminal Co., supra*.

[35] *Memphis Housing Authority v. Newton, supra*.

[36] *Memphis Housing Authority v. Ryan, supra*.
[37] *Layne v. Speight, supra*; *Memphis Housing Authority v. Newton, supra*; *State, Department of Highways v. Jennings, supra*.

[38] *Lewisburg & Northern Railroad Co. v. Hinds, supra*; *Union Railway Co. v. Hunton, supra*; *Memphis Housing Authority v. Newton, supra*; *Maryville Housing Authority v. Ramsey, supra*; *Memphis Housing Authority v. Ryan, supra*; *Edgington v. Kansas City, Memphis & Birmingham Railroad Co., supra*.

[39] *Memphis Housing Authority v. Ryan, supra*.

[40] *Maryville Housing Authority v. Ramsey, supra*; *Edgington v. Kansas City, Memphis & Birmingham Railroad Co., supra*.

[41] *Lewisburg & Northern Railroad Co. v. Hinds, supra*.

[42] *Shelby County v. Mid-South Title Co., Inc., supra*.

[43] *Memphis Housing Authority v. Mid-South Title Co., supra*.

[44] Sackman and Rohan, 5 Nichols' The Law of Eminent Domain, § 21.31 (Rev. 3d Ed. 1991).

[45] *Maryville Housing Authority v. Ramsey, supra*; *Memphis Housing Authority v. Ryan, supra*.

[46] *Shelby County v. Mid-South Title Co., Inc., supra*; *Memphis Housing Authority v. Newton, supra*.

[47] *Union Railway Co. v. Hunton, supra*; *Memphis Housing Authority v. Newton, supra*.

Options as to Value

Reference Number: MTAS-1298

In addition to using comparable sales to determine the fair market value of the property taken by the condemner, and any incidental damages and incidental benefits to the remainder of the property, lay[48] and expert witnesses [49] can give opinion evidence on the value of the property being taken. Thus, the owner can give an opinion as to the fair market value of the property, but that opinion will be given little weight when founded on pure speculation. [50]

The trial court has wide discretion in the admission of expert testimony on the value of real property. [51] Nevertheless, the court cannot permit an expert to give an opinion as to the value of real property for a particular purpose, but should require the expert to base his or her opinion on the fair market value for all legitimate uses for which the property is available and reasonably adapted. [52]

The expert witness may state his or her opinion as to the value of the property and the basis on which he or she arrived at that opinion. [53] The answers given by the expert on cross examination may be considered by the court and jury in evaluating the opinion of the expert witness. [54]

Neither the court nor the jury is bound by the opinion of the expert witness. [55]

Notes:
[48] *State ex rel. Smith v. Livingston Limestone Co., supra*; *Airline Construction, Inc. v. Barr*, 807 S.W.2d 247 (Tenn. Ct. App. 1990); *Hill v. U.S. Life Title Insurance Co. of New York*, 731 S.W.2d 910 (Tenn. Ct. App. 1986); *State ex rel. Moulton v. Blake*, 49 Tenn. App. 624, 357 S.W.2d 836 (1961).

[49] *Memphis Housing Authority v. Mid-South Title Co., supra*.

[50] *Airline Construction, Inc. v. Barr, supra*.

[51] *Smith County v. Eatherly*, 820 S.W.2d 366 (Tenn. App. 1991); *State v. Rascoe, supra*; *State ex rel. Commissioner, Department of Transportation v. Veglio, supra*; *State ex rel. Moulton v. Blake, supra*.

[52] *Love v. Smith supra*; *Davidson County Board of Education v. First American National Bank, supra*; *Alloway v. City of Nashville, supra*; *Memphis Housing Authority v. Mid-South Title Co., supra*.

[53] *State ex rel. Department of Transportation v. Brevard, supra*.

[54] *State ex rel. Department of Transportation v. Brevard, supra*.

[55] *State ex rel. Department of Transportation v. Brevard, supra*; *State ex rel. Moulton v. Blake, supra*.

Incidental Damages

Reference Number: MTAS-1299

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 [3] 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).

Incidental Benefits

Reference Number: MTAS-1300

The condemner is entitled to have the amount of incidental damages reduced by the amount of incidental benefits that accrue to the remainder as the result of the construction of the public improvement. T.C.A. §§ 29-16-203; 29-17-910. Like incidental damages, incidental benefits are determined independently of the just compensation required by the Tennessee Constitution. [72] Therefore, incidental benefits cannot be considered in determining the amount of just compensation to which the property owner is entitled for the portion of the property taken by the condemner. [73]

Incidental benefits include only those benefits special to the remainder of the property owner's property as opposed to the general benefits of a public improvement shared by the public at large. [74] However, incidental benefits are not prevented from being special by the fact that other properties abutting the public improvement are similarly benefitted where those benefits are not common to all the properties in the vicinity. [75] Thus, increased accessibility to the property [76] or easy access parking [77] may still constitute incidental benefits even though property owners on the same street have also gained better access or parking. On the other hand, a general increase in property value experienced by all area residents as a result of street improvements does not constitute an incidental benefit that may be set off against incidental damages. [78]

Notes:

[72] *Wray v. Knoxville, LaFollette & Jellico Railroad Co., supra*; *Paducah and Memphis Railroad Co. v. Stovall, supra*; *East Tennessee and Virginia Railroad Co. v. Love*, 40 Tenn. 63 (1859).

[73] *Wray v. Knoxville, LaFollette & Jellico Railroad Co., supra*; *City of Memphis v. Bolton, supra*.

[74] *Evans v. Wheeler, supra*; *Newberry v. Hamblen County*, 157 Tenn. 491, 9 S.W.2d 700 (1928); *Faulkner v. City of Nashville*, 154 Tenn. 145, 285 S.W. 39 (1926); *Maryville Housing Authority v. Williams*, 63 Tenn. App. 673, 478 S.W.2d 66 (1971); *Department of Highways & Public Works v. Templeton*, 5 Tenn. App. 485 (1927).

[75] *Newberry v. Hamblen County, supra*; *Faulkner v. City of Nashville, supra*; *Brookside Mills, Inc. v. Moulton, supra*; *Maryville Housing Authority v. Williams, supra*; *Department of Highways & Public Works v. Templeton, supra*.

[76] *Newberry v. Hamblen County, supra*; *Faulkner v. City of Nashville, supra*; *Brookside Mills, Inc. v. Moulton, supra*; *Department of Highways & Public Works v. Templeton, supra*.

[77] *Maryville Housing Authority v. Williams, supra*.

[78] *City of Knoxville v. Barton*, 128 Tenn. 177, 159 S.W. 837 (1913); *Paducah and Memphis Railroad Co. v. Stovall, supra*.

Procedural Issues (Just Compensation)

Reference Number: MTAS-1301

Procedural Issues (Just Compensation)

The general rule is that incidental damages and incidental benefits are to be estimated as of the date of the taking. [79] However, since incidental damages and incidental benefits are premised on the impact to the remainder of the property resulting from construction of the public improvement, proof showing the damage or benefits occurring after the taking has been permitted in instances where the trial occurs long after the public improvement has been completed[80]. Property owners whose property is being acquired for street, road, highway, freeway, or parkway purposes are entitled to obtain a continuance of the condemnation case until the public improvement is completed to eliminate uncertainty as to the incidental damages or incidental benefits that may occur as the result of the construction. T.C.A. § 29-17-1001. If the condemnation case is tried before the project is completed, maps, drawings, and photographs of the land may be introduced at trial as long as the evidence would not be misleading. T.C.A. § 29-17-1002.

Notes:

[79] *State v. Rascoe, supra*; But see *City of Parsons v. Goff*, (Tenn. Ct. App. W.S. August 4, 1982); *Smith, Commissioner v. Paducah*, (Tenn. Ct. App. W.S. August 20 1976).

[80] *State v. Rascoe, supra*; *City of Parsons v. Goff, supra*; *Smith, Commissioner v. Paducah, supra*.

Interest (Just Compensation)

Reference Number: MTAS-1302

Interest at two percentage points greater than the prime loan rate established, as of the date of the taking, by the Federal Reserve System of the United States must be paid by the condemner on any judgment obtained by the property owner. T.C.A. § 29-17-913. This interest is allowed from the date of the taking on the amount in excess of the amount deposited with the clerk of the court. [81] Post-judgment interest accrues at the rate of 10 percent per year. [82]

Notes:

[81] *State, Department of Highways v. Urban Estates, Inc., supra*; *Sullivan County v. Pope*, 223 Tenn. 575, 448 S.W.2d 666 (1969); *Snowden v. Shelby County*, 118 Tenn. 725, 102 S.W. 90 (1907); *State v. Harr*, 24 Tenn. App. 298, 143 S.W.2d 893 (1940).

[82] *Sevier Co. v. Waters*, 126 S.W. 3d 913 (Tenn. App. 2003).

Inverse Condemnation

Reference Number: MTAS-1303

As noted in a previous section, the Tennessee Constitution's Article I, Section 21, prohibits the taking of private property for public use without the payment of just compensation. A property owner whose property is taken for a public use without the payment of just compensation has a remedy for the taking in a "reverse condemnation" or "inverse condemnation" action. T.C.A. § 29-16-123. [1] But, this statute does not provide authority to file suit for inverse condemnation in a state court against the state. [1A] The property owner also may bring an action for trespass in a proper case and is not limited to proceeding by the statutory method prescribed for inverse condemnation actions. The property owner who sues for damages in a trespass action may also recover punitive damages in an appropriate case. [2]

Inverse condemnation claims have been classified by the courts into two general categories: (1) physical takings, and (2) regulatory takings. [3] Physical takings occur where property in addition to that

previously condemned in formal proceedings is taken by the condemner without paying just compensation to the property owner, [4] or where an entity with the power of eminent domain appropriates private property for public use without instituting formal condemnation proceedings. [5] Regulatory takings occur when a regulation adopted under the police power denies an owner economically viable use of his or her property. [6]

Federal takings cases had included the test of whether a regulation substantially advances a legitimate state interest to determine if a taking had occurred, but this test has been abrogated. [7]

Notes:

[1] *Johnson City v. Greeneville*, 222 Tenn. 260, 435 S.W.2d 476 (1968). For application of class action provisions to inverse condemnation actions, see *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632 (Tenn. 1996).

[1A] *Hise v. State*, 968 S.W.2d 852 (Tenn. App. 1997).

[2] *Meighan v. U.S. Sprint Communications Co., supra*; See also *Johnson v. City of Mt. Pleasant*, 713 S.W.2d 659 (Tenn. Ct. App. 1985).

[3] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

[4] *Morgan County v. Neff*, 36 Tenn. App. 407, 256 S.W.2d 61 (1952); *Carter County v. Street*, 36 Tenn. App. 166, 252 S.W.2d 803 (1952); *Knox County v. Lemarr*, 20 Tenn. App. 258, 97 S.W.2d 659 (1936); *Shelby County v. Dodson*, 13 Tenn. App. 392 (1930).

[5] *Pleasant View Utility District v. Vradenburg*, 545 S.W.2d 733 (Tenn. 1977); *Knox County v. Moncier*, 224 Tenn. 361, 455 S.W.2d 153 (1970); *Johnson City v. Greeneville, supra*; *Burchfield v. State*, 774 S.W.2d 179 (Tenn. Ct. App. 1988); *Jones v. Cocke County, supra*; *Osborne Enterprises, Inc. v. City of Chattanooga*, 561 S.W.2d 160 (Tenn. Ct. App. 1977).

[6] *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Agins v. City of Tiburon, supra*; *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); In *Re Billing and Collection Tariffs of South Central Bell*, 779 S.W.2d 375 (Tenn. Ct. App. 1989); *Bayside Warehouse Co. v. City of Memphis*, 63 Tenn. App. 268, 470 S.W.2d 375 (1971).

[7] *Lingle v. Chevron U.S.A.*, 125 S. Ct. 2074 (2005).

Physical Takings

Reference Number: MTAS-1304

One of the most difficult questions presented in any takings case is whether the damages that have occurred to private property are sufficient to constitute a taking for which just compensation must be paid. Courts have held that the action of any entity with the power of eminent domain in carrying out the purposes for which it was created may constitute a taking when it destroys, interrupts, or interferes with the common and necessary use of real property of another, even if there is no actual entry upon the property. [8]

Not every action by an entity with the power of eminent domain that damages or interferes with the use of private property, however, will constitute a taking. [9] Whether a taking has occurred is a fact-specific determination based on the nature, extent, and duration of the intrusion onto the private property. [10]

Thus, as noted in the preceding chapter on incidental damages, a property owner whose land is not formally condemned for a public improvement may not, as a general rule, recover for the consequential damages resulting from the construction or operation of a public improvement located near, but not on, his or her property. [11] These non-recoverable damages include all injuries naturally and unavoidably resulting from the proper, non-negligent construction or operation of a public improvement that are shared generally by property owners whose properties lie within the range of the inconveniences necessarily incident to the improvement. [12]

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

Courts have found that a taking has occurred when the proper non-negligent construction of a public improvement directly invades or peculiarly affects private property and creates substantial and continual interference with the practical use and enjoyment of the land. Thus, takings have been found where the entity with the power of eminent domain failed to acquire drainage easements or flowage easements sufficient to handle storm water runoff or other discharges necessarily incidental to public improvements, [13] or diverted a stream to another property as the result of the construction of a public improvement, [14] or denied access to a highway as the result of construction on the highway. [15] Takings have also been found where the entity with the power of eminent domain failed to acquire adequate slope easements for highways, resulting in the encroachment of the highway on private property, [16] or failed to acquire aircraft over-flight easements across property located adjacent to airports, [17] or failed to acquire interests on property affected by non-natural electric conditions produced by an electric street railroad company. [18] In each of these cases the courts found that the nature, extent, and duration of the intrusion on, or interference with, private property resulted in the taking.

Mere proof, however, that the construction or maintenance of a public improvement has resulted in a loss of profits from a business operated on property located adjacent to the public improvement [19] or in a decrease in property value [20] will be insufficient to establish a taking. A decrease in business, however, may require compensation. [20A]

Another problem that must be confronted when determining whether or not an injury to private property constitutes a taking is the distinction between a nuisance and a taking. [21] Courts have defined a nuisance as anything that annoys or disturbs the free use of one's property or that renders its ordinary use or physical occupation uncomfortable. [22] A temporary nuisance is a nuisance that can be corrected by the expenditure of labor or money. [23] Courts usually classify as nuisance injuries to private property that result from the improper, negligent construction or operation of a public improvement or that are temporary in nature and permit successive recoveries by the property owner until the nuisance is abated. [24] Conversely, courts usually classify as takings injuries to property of a permanent nature resulting from the proper, non-negligent construction or operation of a public improvement and permit only a single recovery. [25]

Whether a particular activity sufficiently interferes with the use of private property to constitute a compensable taking is a matter of degree. The conceptual difficulty inherent in classifying a particular activity may be simplified by visualizing, on a continuum, consequential damages, nuisance damages, and damages recoverable for a taking. At one extreme may be placed consequential damages which, as noted above, would include all injuries naturally and unavoidably resulting from the proper, non-negligent construction or operation of a public improvement that do not directly invade or peculiarly affect the plaintiff's private property, but rather are shared by the public generally. Consequential damages are thus analogous to damages caused by a public nuisance for which a private property owner cannot recover without establishing damages attributable to the private nuisance. At the center of the continuum may be placed nuisance damages resulting from the improper, negligent construction or operation of a public improvement that substantially interferes with the practical use and enjoyment of the private property and that peculiarly affects the property. These damages are recoverable only under a theory of temporary private nuisance and are actionable until the nuisance is finally abated.

At the other extreme are damages recoverable for a taking, which include those resulting from the proper, non-negligent construction or operation of a public improvement that directly invades or peculiarly affects the private property and creates a substantial and continuing interference with its practical use and enjoyment. Thus, damages for a taking in this sense closely approximate and may, in a practical sense, be virtually indistinguishable from those recoverable for a permanent private nuisance. Since this discussion reveals that the finding of a taking is a fact-specific inquiry, it is helpful to review the circumstances under which courts have found a physical taking.

Notes:

[8] *Pleasant View Utility District v. Vradenburg, supra*; *Graham v. Hamilton County*, 224 Tenn. 82, 450 S.W.2d 571 (1969); *Hollers v. Campbell County*, 192 Tenn. 442, 241 S.W.2d 523 (1951); *Lea v. Louisville & Nashville Railroad Co.*, 135 Tenn. 560, 188 S.W. 215 (1915); *Jones v. Cocke County, supra*; *Jones v. Hamilton County*, 56 Tenn. App. 240, 405 S.W.2d 775 (1965).

[9] *Hayes v. City of Maryville*, 747 S.W.2d 346 (Tenn. Ct. App. 1987); *Williams v. Southern Railway Co.*, 57 Tenn. App. 215, 417 S.W.2d 573 (1966); *Donohue v. East Tennessee Natural Gas Co.*, 39 Tenn. App. 438, 284 S.W.2d 692 (1955).

[10] *Burchfield v. State, supra*.

[11] *Ledbetter v. Beach*, 220 Tenn. 623, 421 S.W.2d 814 (1967); *Lewisburg & Northern Railroad Co. v. Hinds*, 134 Tenn. 293, 183 S.W.985 (1915); *Outdoor Advertising Association of Tennessee, Inc. v. Shaw*, 598 S.W.2d 783 (Tenn. Ct. App. 1979).

[12] *Ledbetter v. Beach, supra*; *Lewisburg & Northern Railroad Co. v. Hinds, supra*; *Outdoor Advertising Association of Tennessee, Inc. v. Shaw, supra*.

[13] *Pleasant View Utility District v. Vradenburg, supra*; *Knox County v. Moncier, supra*; *Monday v. Knox County*, 220 Tenn. 313, 417 S.W.2d 536 (1967); *Murphy v. Raleigh Utility District of Shelby County*, 213 Tenn. 228, 373 S.W.2d 455 (1963); *Hollers v. Campbell County, supra*; *Barron v. City of Memphis*, 113 Tenn. 89, 80 S.W. 832 (1904); *Burchfield v. State, supra*; *Jones v. Cocke County, supra*; *Jones v. Hamilton County, supra*.

[14] *Evans v. Wheeler*, 209 Tenn. 40, 348 S.W.2d 500 (1961).

[15] *Illinois Central Railroad Co. v. Moriarity*, 135 Tenn. 446, 186 S.W.2d 1053 (1916); *Morgan County v. Neff, supra*; *Knox County v. Lemarr, supra*; *Shelby County v. Dodson, supra*.

[16] *Carter County v. Street*, 36 Tenn. App. 166, 252 S.W.2d 803 (1952).

[17] *Johnson v. City of Greeneville, supra*; *Osborne Enterprises, Inc. v. City of Chattanooga, supra*.

[18] *Cumberland Telegraph and Telephone Co. v. United Electric Railroad Co.*, 92 Tenn. 492, 129 S.W. 104 (1894).

[19] *Hydes Ferry Turnpike Co. v. Davidson County*, 91 Tenn. 291 (1892).

[20] *Ledbetter v. Beach, supra*; *Outdoor Advertising Association of Tennessee, Inc. v. Shaw, supra*.

[20A] *State ex rel. Commissioner of DOT v. Goodwin, supra*.

[21] See *Hayes v. City of Maryville, supra*.

[22] *Pate v. City of Martin*, 614 S.W.2d 46 (Tenn. 1981); *Oakely v. Simmons*, 799 S.W.2d 699 (Tenn. Ct. App. 1990); *Hayes v. City of Maryville, supra*; *Anthony v. Construction Products, Inc.*, 677 S.W.2d 4 (Tenn. Ct. App. 1984).

[23] *Pate v. City of Martin, supra*; *Hayes v. City of Maryville, supra*; *Anthony v. Construction Products, Inc., supra*.

[24] *Robertson v. Cincinnati, New Orleans & Texas Pacific Railroad Co.*, 207 Tenn. 272, 339 S.W.2d 6 (1960); *Louisville & Nashville Terminal Co. v. Lellyett*, 114 Tenn. 368, 85 S.W. 881 (1898); *Hayes v. City of Maryville, supra*.

[25] *Robertson v. Cincinnati, New Orleans & Texas Pacific Railroad Co., supra*; *Louisville & Nashville Terminal Co. v. Lellyett, supra*.

Impairment of Easements of Access and Way

Reference Number: MTAS-1305

Courts in Tennessee have recognized that a property owner has an easement of access between his or her land and the abutting street, which extends to the center of the abutting street, absent any evidence to the contrary. [26] Although as noted in the preceding chapter some courts have found that an impairment of a property owner's easement of access can constitute incidental damages to the remainder of property when a portion of the property is taken in a condemnation action, other courts have held that any impairment of this right of ingress and egress constitutes a taking for which the owner may recover just compensation in an inverse condemnation action. [27] Thus property owners have been allowed to recover just compensation where the owner's access was destroyed by a change in the grade of a street or highway, [28] or by the construction of a fence, [29] or by the construction of a drainage ditch alongside a highway. [30] Incidental damages were allowed when curbing impaired full access from the abutting street. [30A]

In addition to an easement of access, a private property owner whose property abuts a public street or road has an easement of way, or right of passage, in the street abutting his or her property. [31] This easement of way is a private property right that exists in addition to the right to use the street in common with the general public. [32] This easement extends along any street or alley upon which the owner's property abuts, in either direction, to the next intersecting street. [33] This right usually is impaired by the closing of public streets or roads. [34] No recovery has been allowed when a two-way street abutting an owner's property has been changed to a one-way street, as this constitutes a valid exercise of the police power for which the payment of just compensation is required only in unusual circumstances. [35]

Notes:

[26] *Blevins v. Johnson County*, 746 S.W.2d 678 (Tenn. 1988); *Knierim v. Leatherwood,* 542 S.W.2d 806 (Tenn. 1976); *City of Memphis v. Hood*, 208 Tenn. 319, 345 S.W.2d 887 (1961); *Illinois Central Railroad Co. v. Moriarity, supra*; *Hamilton County v. Rape*, 101 Tenn. 222, 47 S.W. 416 (1898); *Knox County v. Lemarr, supra*; *Shelby County v. Dodson, supra*.

[27] *Illinois Central Railroad Co. v. Moriarity, supra*; *Hamilton County v. Rape, supra*; *Knox County v. Lemarr, supra*; *Shelby County v. Dodson, supra*.

[28] *Illinois Central Railroad Co. v. Moriarity, supra*; *Hamilton County v. Rape, supra*; *Knox County v. Lemarr, supra*; *Shelby County v. Dodson, supra*.

[29] *Spence v. Cocke County*, 61 Tenn. App. 607, 457 S.W.2d 270 (1969).

[30] *Morgan County v. Neff, supra*.

[30A] *City of Sevierville v. Green*, 125 S.W.3d 419 (Tenn. App. 2002).

[31] *Shelby County v. Barden*, 527 S.W. 2d 124 (Tenn. 1975); *Sweetwater Valley Memorial Park, Inc. v. City of Sweetwater*, 213 Tenn. 1, 372 S.W.2d 168 (1963); *Illinois Central Railroad Co. v. Moriarity, supra*; *Tate v. County of Monroe*, 578 S.W.2d 642 (Tenn. Ct. App. 1978); *East Park United Methodist Church v. Washington County*, 567 S.W.2d 768 (Tenn. Ct. App. 1977).

[32] *Shelby County v. Barden, supra*; *Illinois Central Railroad Co. v. Moriarity, supra*; *East Park United Methodist Church v. Washington County, supra*.

[33] *Illinois Central Railroad Co. v. Moriarity, supra*; *East Park United Methodist Church v. Washington County, supra*.

[34] *Shelby County v. Barden, supra*; *Graham v. Hamilton County, supra*; *Sweetwater Valley Memorial Park v. City of Sweetwater, supra*; *East Park United Methodist Church v. Washington County, supra*.

[35] *City of Memphis v. Hood*, 208 Tenn. 319, 345 S.W.2d 887 (1961); *Ambrose v. City of Knoxville*, 728 S.W.2d 338 (Tenn. Ct. App. 1987) See also *Tate v. County of Monroe, supra*.

Water Damage

Reference Number: MTAS-1306

Takings have been found where the construction or operation of a public improvement resulted in recurring flooding of private property [36] or increased the amount of storm water runoff that caused erosion. [37] A taking has also been found where water was regularly discharged from water treatment facilities across adjoining private property, [38] where a public improvement altered the flow of a stream and caused erosion, [39] and where the construction of a public improvement diverted a stream that previously flowed across private property. [40]

Notes:
[36] *Knox County v. Moncier, supra*; *Monday v. Knox County, supra*; *Burchfield v. State, supra*; *Jones v. Cocke County, supra*; *Jones v. Hamilton County, supra*.

[37] *Hollers v. Campbell County, supra*.

[38] *Pleasant View Utility District v. Vradenburg, supra*; *Murphy v. Raleigh Utility District of Shelby County, supra*.

[39] *Barron v. City of Memphis, supra*.

[40] *Evans v. Wheeler, supra*; *Piercy v. Johnson City*, 130 Tenn. 231, 169 S.W. 765 (1914).

Aircraft Overflights

Reference Number: MTAS-1307

A taking of airspace above private property may result from frequent low flights of aircraft that substantially interfere with the practical use and enjoyment of the property. [41] Noise, vibrations, and airplane pollutants unaccompanied by an actual physical invasion of the airspace immediately over the property owner's land may also constitute a taking. Direct overflight is not required. [42]

A taking has also been found when trees were cut on private property in an airport approach zone established by a municipal ordinance. [43] The court found that removing the trees and limiting the height of buildings in the airport approach zone constituted a taking. [44]

Notes:
[41] *Osborne Enterprises, Inc. v. City of Chattanooga, supra*.

[42] *Jackson v. Metropolitan Knoxville Airport Authority*, 922 S.W.2d 860 (Tenn. 1996).

[43] *Osborne Enterprises, Inc. v. City of Chattanooga, supra*.

[44] *Osborne Enterprises, Inc. v. City of Chattanooga, supra*.

Takings Prior to Condemnation

Reference Number: MTAS-1308

Where a condemner appropriates private property prior to instituting formal condemnation proceedings, a taking obviously occurs. Thus, a taking occurred where electric transmission lines were constructed before a condemnation proceeding was filed [45]. In that situation the appropriation is illegal until just compensation is paid to the property owner, and the condemner acquires only a possessory right that is not transferable. [46] Takings have also been found where a condemner filed condemnation proceedings but nonsuited the proceedings before paying just compensation to the property owner, [47] where a municipality annexed a subdivision and asserted ownership over the water and sewer system

serving it without paying just compensation to its owners, [48] where the condemner failed to acquire the interest of the lessee of property conveyed to the condemner by the lessor, [49] and where the condemner failed to acquire the property interests in certain restrictive covenants from the residents of a subdivision before constructing a public improvement in violation of those covenants. [50] The property owner's sole remedy for these takings is an inverse condemnation action, as the courts have specifically rejected attempts to enjoin [51] or eject [52] the condemner who has taken the property without instituting condemnation proceedings.

Notes:

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

[46] *Rogers v. City of Knoxville, supra*.

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

[48] *Zirkle v. City of Kingston*, 217 Tenn. 210, 396 S.W.2d 356 (1965).

[49] *Hopper v. Davidson County*, 206 Tenn. 393, 333 S.W. 2d 917 (1960).

[50] *City of Shelbyville v. Kilpatrick*, 204 Tenn. 484, 322 S.W.2d 203 (1959).

[51] *Pleasant View Utility District v. Vradenburg, supra*; *Zirkle v. City of Kingston, supra*; *Sweetwater Valley Memorial Park, Inc. v. City of Sweetwater, supra*; *Armstrong v. Illinois Central Railroad Co.*, 153 Tenn. 283, 282 S.W. 382 (1926); *Rogers v. City of Knoxville*, supra.

[52] *Emory v. City of Knoxville*, 214 Tenn. 228, 379 S.W.2d 753 (1964); *Tennessee Coal, Iron & Railroad Co. v. Paint Rock Flume & Transportation Co.*, 128 Tenn. 227, 160 S.W. 522 (1913); *Doty v. American Telephone & Telegraph Co.*, 123 Tenn. 329, 130 S.W. 1053 (1910); *Rogers v. City of Knoxville, supra*.

Additional Takings

Reference Number: MTAS-1309

A significant issue presented in any case where a property owner seeks to recover just compensation for the taking of private property in addition to that previously acquired by the condemner is whether the property owner is estopped by the prior condemnation award or deed to the condemner from recovering additional compensation. [53] The condemnation award encompasses all damages, present and future, that the property owner knew or should have known would result from the proper construction or operation of the public improvement. [54] The burden of proof of showing an estoppel is on the condemner, unless the language of the condemnation decree or deed is unambiguous. [55]

An exception to this rule applies for losses or damage that could not reasonably have been anticipated by either party or, if alleged by the property owner in the condemnation proceeding, would have been rejected as speculative or conjectural. [56] Under this exception, recovery has been permitted for landslides onto private property that resulted from cuts made during the construction of a highway, [57] for damage to a dam caused by excessive blasting during the construction of a pipeline, [58] and for damage to a wall caused by blasting for electric transmission lines. [59] Recovery has been denied when the property owner knew or should have known that curbs limiting access to his property would be constructed as part of a highway project [60] and where the fill from a street that was elevated by the condemner spread onto adjoining property since the owner knew or should have known that the fill would have encroached upon his property when he conveyed a portion of the property to the condemner. [61]

Notes:

[53] *Blevins v. Johnson County, supra*; *Hawkins v. Dawn*, 208 Tenn. 544, 347 S.W.2d 480 (1961); *Hord v. Holston River Railroad Co.*, 122 Tenn. 399, 123 S.W. 637 (1909); *Williams v. Southern Railway Co., supra*; *East Tennessee Natural Gas Co. v. Peltz*, 38 Tenn. App. 100, 270 S.W.2d 591 (1954); *Carter County v. Street*, 36 Tenn. App. 166, 252 S.W.2d 803 (1952); *Jones v. Oman*, 28 Tenn. App. 1, 184 S.W.2d 568 (1944); *Fuller v. City of Chattanooga*, 22 Tenn. App. 110, 118 S.W.2d 886 (1938).

[54] *Blevins v. Johnson County, supra*; *Hawkins v. Dawn, supra*; *Hord v. Holston River Railroad Co., supra*; *Williams v. Southern Railway Co., supra*; *Fuller v. City of Chattanooga, supra*.

[55] *Blevins v. Johnson County, supra*; *Carter County v. Street, supra*.

[56] *East Tennessee Natural Gas Co. v. Peltz, supra*; *Carter County v. Street, supra*; *Jones v. Oman, supra*; *Fuller v. City of Chattanooga, supra*.

[57] *Carter County v. Street, supra*.

[58] *East Tennessee Natural Gas Co. v. Peltz, supra*.

[59] *Jones v. Oman, supra*.

[60] *Blevins v. Johnson County, supra*.

[61] *Fuller v. City of Chattanooga, supra*.

Regulatory Takings

Reference Number: MTAS-1310

The United States Supreme Court revolutionized the law of regulatory takings in 1987 when it held that a local government must pay just compensation for temporary regulatory takings. [62] In that same year the U.S. Supreme Court decided two other cases that dealt with regulatory takings. [63] Since those decisions, regulatory taking cases have flooded the courts as property owners seek to recover for the diminution in the value of their property resulting from the enforcement of police power regulations affecting private property. Not surprisingly, most of these cases involve land use regulations adopted by local governments.

Although the inverse condemnation statute would not appear to be applicable by its terms to a regulatory taking of private property where no physical invasion or interference is involved, the U.S. Supreme Court [64] and a Tennessee court [65] have held that an inverse condemnation action could be maintained based on unreasonable restrictions placed on the use of property by a regulation adopted under the police power.

A regulation adopted under the police power can result in a taking of private property for which the payment of just compensation is required if the regulation denies the owner economically viable use of his or her property. [66] Temporary moratoria on development are not subject to a per se taking rule and may withstand a taking claim. The standards set out in *Penn Central Transportation Co. v. New York City* apply in these cases. [67] A Unreasonable denials of proposals for development, however, may engender liability under 42 U.S.C. 1983, and a jury trial is available to determine these claims. [67B]

The taking test requires an inquiry into whether the regulation denies the property owner the economically viable use of his or her property. [68] This is a highly fact-specific inquiry that is not subject to a set formula. [69] Whether a taking has occurred is a question of degree and cannot be determined by general propositions. [70] The courts have used ad hoc factual inquiries, relying on factors such as the character of the governmental action, the economic impact of the regulation on the property owner, the interference with reasonable investment-backed expectations, and the nature and extent of the interference with the rights in the property as a whole. [71] Where a state regulation prohibits all economically beneficial use of land, to be imposed without necessity of compensation, it must do no more than duplicate what could otherwise be done under the state's nuisance laws. [71A]

In considering the economic impact of the regulation on private property, the courts recognize that the mere diminution of property value, or the substantial reduction of the attractiveness of the property to potential purchasers, or the denial of the ability to exploit a property right the owner previously believed was available, will not suffice to establish a taking. [72] The inquiry must instead focus on the value of the remaining uses to which the property may be put [73] and a comparison of the owner's investment or basis with the market value of the property subject to the regulation. [74] When considering whether the regulation interferes with the owner's investment-backed expectations, the court must determine that the expectations were reasonable, or at least consistent with the law in force at the time the expectation was formed. [75] The purchase price is only one of the factors that should be considered in determining whether a regulation interferes with reasonable investment-backed expectations. [76]

Courts applying these factors have found takings in instances where there was no value for the uses remaining for the property after the adoption of the regulation [77] and where there was a loss of 96 percent of the possible rate of return on an investment. [78] Courts have rejected takings claims where valuable uses of the property remained after the imposition of the regulation, even if those uses were not the most valuable uses. [79]

Notes:

[62] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987).

[63] *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 129 L. Ed. 2d 304 (1994). *Keystone Bituminous Coal Association v. DeBenedictis, supra*.

[64] *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[65] *Davis v. Metropolitan Government of Nashville and Davidson County*, 620 S.W.2d 532 (Tenn. Ct. App. 1981). *Phillips v. Montgomery County*, 442 S.W.3d 233 (Tenn. 2014).

[66] *Lucas v. South Carolina Coastal Council, supra*; *Keystone Bituminous Coal Association v. DeBenedictis, supra*; *Agins v. City of Tiburon, supra*; In re *Billing and Collection Tariffs of South Central Bell, supra*.; *Phillips v. Montgomery County, supra.*

[67A] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

[67B] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

[68] *Lucas v. South Carolina Coastal Council, supra*; *Keystone Bituminous Coal Association v. DeBenedictis, supra*; *Agins v. City of Tiburon, supra*.

[69] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); *Penn Central Transportation Co. v. City of New York, supra*.

[70] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

[71] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, supra*; *Keystone Bituminous Coal Association v. DeBenedictis, supra*; *Penn Central Transportation Co. v. City of New York, supra*; *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 105 S.Ct. 1018, 89 L.Ed.2d 166 (1986).

[71A] *Lucas v. South Carolina Coastal Council, supra*.

[72] *Penn Central Transportation Co. v. City of New York, supra*; *Kirby Forest Industries, Inc. v. United States*, 467 U.S.1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991); *Esposito v. South Carolina Coastal Council, supra*; *Moore v. City of Costa Mesa*, 886 F.2d 260 (9th Cir. 1989); *Baytree of Inverrary Realty Partners, v. City of Lauderhill*, 873 F.2d 1407 (11th Cir. 1989); *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986).

[73] *Allied–General Nuclear Services Inc. v. United States*, 12 Cl. Ct. 372 (Cl. Ct. 1987); *Deltona Corp. v. United States*, 228 Ct. Cl. 476, 657 F.2d 1184 (Cl. Ct. 1981).

[74] *Florida Rock Industries, Inc. v. United States, supra*.

[75] *Cienega Gardens v. U.S.*, 331 F.3d 1314 (CA. Fed., 2003); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984); *Furey v. City of Sacramento*, 592 F. Supp. 463 (E.D. Calif. 1984); *Ciampitti v. United States*, 22 Cl. Ct. 310 (Cl. Ct. 1991); *Deltona Corp. v. United States, supra*.

[76] *Florida Rock Industries, Inc. v. United States, supra*; *Furey v. City of Sacramento, supra*.

[77] *Florida Rock Industries, Inc. v. United States*, 21 Cl.Ct. 161 (Cl.Ct. 1990).

[78] *Cienega Gardens v. U.S., supra*.

[79] *MC Properties v. City of Chattanooga*, 994 S.W. 2d 132 (Tenn. App. 1999); *Keystone Bituminous Coal Association v. DeBenedictis, supra*; *Penn Central Transportation Co. v. City of New York, supra*; *Midnight Sessions Ltd. v. City of Philadelphia, supra*; *Esposito v. South Carolina Coastal Council, supra*; *Baytree of Inverrary Realty Partners v. City of Lauderhill, supra*; *Moore v. City of Costa Mesa, supra*; *Ciampitti v. United States, supra*.

Exactions

Reference Number: MTAS-1311

Municipalities often use exactions to require developers and property owners to provide needed public amenities. A developer or property owner must be compensated for the exaction if there is no nexus between the exaction and a public purpose. [80]

Courts have found that requiring a property owner to grant a public easement along a beach as a condition to construct a house on a beach constituted a taking since the exaction did not protect the public's ability to see the beach [81] and that requiring a dedication of land for a greenway and bicycle/ pedestrian pathway did not bear the necessary relationship to problems created by a commercial development to avoid a taking. [81A] In addition the regulation must be reasonably related to the public need or burden that a property owner's use of his or her property creates or to which it contributes. [82] Therefore, regulations that impose land dedication requirements to develop property may constitute a taking if the property owner is required to dedicate property in excess of the amount that is necessary to offset the additional burdens on the public interest resulting from the use of his or her property. [83] The cost to the landowner must be "roughly proportional" to the additional public burden caused by the development. [84A]

A Tennessee case upheld the rezoning of property on the condition that the landowner dedicate a 12-foot right-of-way for future road expansion. The court applied a "fairly debatable" rule to the rezoning and dedication requirement. It should be noted, however, that a statute specifically authorized conditional zoning in the city. [84B]

Notes:
[80] *Dolan v. City of Tigard, supra*; *Nollan v. California Coastal Commission, supra*.

[81] *Nollan v. California Coastal Commission, supra*.

[81A] *Dolan v. City of Tigard, supra*.

[82] *Dolan v. City of Tigard, supra*; *Nollan v. California Coastal Commission, supra*; *William J. (Jack) Jones Insurance Trust v. City of Fort Smith*, Arkansas, 731 F.Supp. 912 (W.D. Ark. 1990).

[83] *Dolan v. City of Tigard, supra*; *Nollan v. California Coastal Commission, supra*; *William J. (Jack) Jones Insurance Trust v. City of Fort Smith, Arkansas, supra*.

[84A] *Dolan v. City of Tigard, supra*.

[84B] *Copeland v. City of Chattanooga*, 866 S.W. 2d 565 (Tenn. App. 1993).

Ripeness

Reference Number:

MTAS-1312

Since the determination of whether a particular regulation has resulted in a taking of private property depends upon the economic impact of the regulation, a takings claim is not ripe, and cannot be considered by a court, until the property owner has obtained a final decision from the appropriate governmental agency on the application of the regulation to the particular parcel of property. [85] In the zoning context this final decision requirement forces the property owner to obtain two decisions from the governmental entity: (1) a rejected development plan, and (2) a denial of a variance. [86] Until the property owner has obtained a final decision, it is not possible to determine the actual economic impact of a regulation on the property in question. [87]

For taking claims brought in federal courts there is a second ripeness requirement—the property owner must first have sought just compensation in state courts before bringing a takings claim in federal courts. [88] Thus, a property owner in Tennessee must first bring an inverse condemnation action in the state courts before filing suit in the federal courts to recover just compensation for a regulatory taking.

Notes:
[85] *MacDonald, Sommers & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra*.
[86] *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra*.

[87] *MacDonald, Sommers & Frates v. Yolo County, supra*; *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra*.
[88] *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra*; *United States v. Confederate Acres Sanitary Sewage and Drainage System, Inc.*, 935 F.2d 796 (6th Cir. 1991).

Measure of Damages

Reference Number: MTAS-1313

The normal measure of damages in an inverse condemnation case is the same as in any other condemnation case. [89] Where a permanent regulatory taking has occurred, the measure of damages is as previously discussed. Where a temporary taking occurs, the property owner is entitled to the value of the use of the property during the time of the temporary taking. [90] The value of the temporary use of property normally is measured by the difference in rental value resulting from the imposition of the regulation. [91] Some courts, however, have permitted the property owner to recover in excess of the rental value of the property based on the fair market value of the right to develop the property. [92]

Notes:
[89] *McKinney v. Smith County*, 1999 WL 1000887 (Tenn. App. 1999); *Shelby County v. Barden, supra*.

[90] *City of Tampa v. Ridner*, 852 So.2d 270 (Fla. App. 2003); *First English Evangelical Lutheran Church v. County of Los Angeles, supra*; *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577 (Fed Cir. 1990); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir. 1990) (Wheeler IV); *Wheeler v. City of Mt. Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987) (Wheeler III); *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985); *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal*, 749 F.Supp. 1439 (W.D. Va. 1990).

[91] *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S. Ct. 1434, 93 L.Ed. 1765 (1949); *Yuba Natural Resources, Inc. v. United States, supra*; *Front Royal and Warren County Industrial Park Corp v. Town of Front Royal, supra*.

[92] *Wheeler v. City of Pleasant Grove, supra*, (Wheeler IV); *Nemmers v. City of Dubuque, supra*. See also *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513 (1986) (discussing a variety of measures of damages for temporary takings).

Statute of Limitations

Reference Number: MTAS-1314

Inverse condemnation suits must be commenced within one year after the land has been actually taken possession of and the work of the proposed internal improvement begun. T.C.A. § 29-16-124. [93] In establishing the date the taking occurred, which commences the running of the statute of limitations, the courts consider the date of the actual injury to the property or the date the owner had reasonable notice or knowledge of the injury. [94]

These general rules are somewhat difficult to apply where the private property is taken due to a public improvement located on adjacent property or is due to a regulatory taking. The statute of limitations was found not to bar a suit filed five years after a public improvement was completed on adjacent property but filed within one year of the date flooding occurred on the private property. [95] In a case involving a taking of airspace due to aircraft overflights, the court found that the operative date for the purposes of the statute of limitations was the date that direct overflights of low-flying aircraft commenced over private property, instead of the date the property for the airport was condemned or the date the construction of the airport was completed. [96]

The statute of limitations does not commence until the landowner knows or should have known that the injury to his or her property was permanent in nature. [97] Thus, where a property owner received repeated assurances from the condemner over a two-year period that flooding caused by highway construction would be corrected, the court held that the statute of limitations did not bar the suit since the court found that the suit was filed within one year of the date the property owner discovered that the condemner had failed to correct the problem. [98]

A similar result was obtained in a case involving a municipal ordinance that limited the height of buildings that could be constructed in an airport glide path. [99] The court rejected the municipality's argument that the passage of the ordinance commenced the running of the statute of limitations, holding instead that the statute began to run only when the owner's property was injured by the taking and not when he or she had notice of the taking. [100]

In instances where the condemner nonsuits a condemnation case after commencing construction of a public improvement, the statute of limitations began to run on the date the nonsuit was entered rather than the date construction was commenced. [101]

Notes:

[93] *Vowell Ventures v. City of Martin*, 47 S.W.3d 434 (Tenn. App. 2000); *Pleasant View Utility District v. Vradenburg, supra*; *Shelby County v. Barden, supra*; *Knox County v. Moncier, supra*; *Armistead v. Clarksville- Montgomery County School System, supra*; *Murphy v. Raleigh Utility District of Shelby County, supra*; *Doty v. American Telephone & Telegraph Co., supra*; *Burchfield v. State, supra*; *Osborne Enterprises, Inc. v. City of Chattanooga, supra*; *Jones v. Cocke County, supra*; *Morgan County v. Neff, supra*.

[94] *Knox County v. Moncier, supra*; *Osborne Enterprises, Inc. v. City of Chattanooga, supra*; *Jones v. Cocke County, supra*; *Davidson County v. Beauchesn*, 39 Tenn. App. 90, 281 S.W.2d 266 (1955); *Morgan County v. Neff, supra*. *Guerra v. State*, 2005 WL 3369187 (Tenn. App. 2005).

[95] *Jones v. Cocke County, supra*.

[96] *Johnson v. City of Greeneville, supra*.

[97] *Knox County v. Moncier, supra*. *Guerra v. State*, 2005 WL 3369187 (Tenn. App. 2005) .

[98] *Knox County v. Moncier, supra*. See also *Leonard v. Knox County*, 146 S.W. 3d 589 (Tenn. App. 2004).

[99] *Osborne Enterprises, Inc. v. City of Chattanooga, supra*.

[100] *Osborne Enterprises, Inc. v. City of Chattanooga, supra*.

[101] *Armistead v. Clarksville-Montgomery County School System, supra*.

Attorney, Engineer and Appraisal Fees

Reference Number: MTAS-1315

If a property owner prevails in an inverse condemnation case, he or she is entitled to recover from the condemner his or her reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the proceedings. T.C.A. § 29-16-123. The trial court must award these fees to the property owner if a demand is made by the property owner, although the court has the discretion to determine the reasonableness of those fees. [102}

Note:
[102] *City of Memphis v. Duncan*, (Tenn. Ct. App. W.S. June 6, 1984); *Hunter v. Jackson County*, (Tenn. Ct. App. M.S. December 28, 1979).

Leasehold Damages

Reference Number: MTAS-1316

It has been held that a leasehold constitutes a compensable property interest under the law of eminent domain. [1] This interest has been characterized as the right of the lessee to remain in undisturbed possession of the leased premise until the expiration of his term. [2] A lessee's entitlement to damages is not limited to cases where the leasehold property is actually taken or destroyed, but extends even to cases where impairment of access to the leasehold property can be shown. [3] A tenant also is entitled to recover compensation where the condemnation of a part of the leased premises destroys the value of the leasehold. [4]

Notes:
[1] *City of Johnson City v. Outdoor West, Inc.*, 947 S.W.2d 855 (Tenn. App. 1996); *Shelby County v. Barden*, 527 S.W.2d 124 (Tenn. 1975); *Mason v. City of Nashville*, 155 Tenn. 256, 291 S.W. 1074 (1927); *Colcough v. Nashville and Northwestern Railroad Co.*, 39 Tenn. 171 (1858); *Lamar Advertising of Tennessee, Inc. v. Metropolitan Development and Housing Authority*, 803 S.W.2d 686 (Tenn. Ct. App. 1990); *Gallatin Housing Authority v. Chambers*, 50 Tenn. App. 411, 362 S.W.2d 270 (1962).

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

[3] *Shelby County v. Barden, supra*.

[4] *Mason v. City of Nashville, supra*; *Gallatin Housing Authority v. Chambers, supra*.

Valuation of The Leasehold

Reference Number: MTAS-1317

The lessee is entitled to any excess in value of his or her unexpired leasehold over and above the rentals that would be due for the unexpired term. [5] In other words, he or she is entitled to recover the fair market value of his or her leasehold interest less the rents he or she must pay to the landlord. [6] While evidence of a property owner's business profit normally is not allowed in condemnation cases, it may be admissible under the peculiar facts of a case to show the fair market value of the lessee's interest. [7] In the event of a partial taking of the leasehold, the lessee is entitled to recover the difference in value of the lease before the taking and the value of the lease after the taking. [8]

By statute, incidental damages to the leasehold include the lessee's moving expenses, [9] T.C.A. § 29-16-203, and where only a portion of the leasehold is acquired, any damage to the remainder of the leasehold. [10]

Where a partial taking of property subject to a leasehold occurs, the jury must first determine the total amount of just compensation for the taking, including the fair, reasonable cash market value of the property taken on the date of the taking, and incidental damages, if any, to that portion of the property remaining. [11] In determining the total fair market value of the fee, the jury should consider the leasehold as one element of the total fair market value of the property, as the leasehold indicates one available use of the property. [12] The total compensation is to include all losses suffered by all parties having an interest in the property affected and cannot exceed the value of the fee, unencumbered by the lease on the date of taking. [13] The jury then apportions the total compensation between the landlord and tenant. [14]

Notes:

[5] *State ex rel. Commissioner, Department of Transportation v. Teasley*, 913 S.W.2d 175 (Tenn. App. 1995); *City of Johnson City v. Outdoor West, Inc., supra*; *Shelby County v. Barden, supra*; *Moulton v. George*, 208 Tenn. 586, 348 S.W.2d 129 (1961); *Mason v. City of Nashville, supra*; *State, Department of Highways and Public Works v. Texaco, Inc.*, 49 Tenn. App. 278, 354 S.W.2d 792 (1961).

[6] *Gallatin Housing Authority v. Chambers, supra*; *City of Nashville v. Mason, supra*.

[7] *Shelby County v. Barden, supra*; *Lebanon & Nashville Turnpike Co. v. Creveling*, 159 Tenn. 147, 17 S.W.2d 22 (1928); *State, Department of Highways and Public Works v. Texaco, Inc., supra*.

[8] *State ex rel Smith v. Hoganson*, 588 S.W.2d 863 (Tenn. 1979).

[9] *Nashville Housing Authority v. Hill*, 497 S.W.2d 917 (Tenn. Ct. App. 1972).

[10] *Gallatin Housing Authority v. Chambers, supra*.

[11] *State ex rel. Smith v. Hoganson, supra*; *Moulton v. George, supra*.

[12] *State, Department of Highways and Public Works v. Texaco, Inc., supra*.

[13] *State ex rel. Smith v. Hoganson, supra*.

[14] *State ex rel. Smith v. Hoganson, supra*; *Shelby County v. Barden, supra*; *Moulton v. George, supra*.

Apportionment

Reference Number: MTAS-1318

In the typical condemnation case involving leased premises, the property owner and lessee are joined as parties, and the lessee is awarded a portion of the damages assessed as the value of the total property condemned. As noted above, the total compensation awarded to the owner and lessee may not exceed the value of the unencumbered fee, and this value, once established, may not be further increased because of the existence of an unexpired lease at the time of condemnation. [15] In other words, the value of the leasehold is considered to be an integral part of the total value of the unencumbered tract of land. [16]

The jury should then apportion the total compensation (fair market value plus incidental damages) between lessor and lessee by determining the lessee's interest, which is the fair market value of the leasehold on the property minus rent actually called for in the lease plus incidental damages to the leasehold, with the remainder of the property's fair market value going to the lessor. [17] This formula for apportionment is applicable regardless of whether a long-term or short-term lease is involved. [18]

The condemner may specify in the condemnation petition the various interests of the lessor and lessee, apportion the amount deposited with the court, and settle the case with either the lessor or the lessee. [19] If the condemner follows this procedure, the lessee or lessor may then withdraw its amount in full satisfaction of its claim. [20]

Notes:
[15] *State ex rel. Smith v. Hoganson, supra*; *State ex rel. Shaw v. Shofner*, 573 S.W.2d 169 (Tenn. Ct. App. 1978); *State ex rel. Department of Transportation, Bureau of Highways v. Gee*, 565 S.W.2d 498 (Tenn. Ct. App. 1977).
[16] *State, Department of Highways and Public Works v. Texaco, Inc., supra*.

[17] *State ex rel. Smith v. Hoganson, supra*; *Shelby County v. Barden, supra*; *Moulton v. George, supra*; *Mason v. City of Nashville, supra*; *State, Department of Transportation, Bureau of Highways v. Gee, supra*; *Gallatin Housing Authority v. Chambers, supra*; *State, Department of Highways and Public Works v. Texaco, Inc. supra*; *City of Nashville v. Mason, supra*.
[18] *State ex rel. Department of Transportation, Bureau of Highways v. Gee, supra*.

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

[20] *State ex rel. Moulton v. Burkhart, supra*.

Appeal

Reference Number: MTAS-1319

Both the property owner and the lessee have an independent right to appeal the amount of damages awarded; joinder of parties is not necessary. [21] On appeal, the court may increase the award to the appellant as long as it determines that the initial award did not accurately reflect the fair market value of the unencumbered fee [22] or did not reflect the total aggregate amount of incidental damages. [23] Thus, any relief granted on appeal must be through an increase of the total award rather than a reallocation of the lower court's award. [24]

Notes:
[21] *State ex rel. Shaw v. Shofner, supra*; *State, Department of Highways v. Hurt*, 63 Tenn. App. 689, 478 S.W.2d 775 (1972).

[22] *State, Department of Highways v. Hurt, supra*.

[23] *State ex rel. Shaw v. Shofner, supra*.

[24] *State ex rel. Shaw v. Shofner, supra*; *State, Department of Highways v. Hurt, supra*.

Uniform Relocation Assistance & Real Property Acquisition Acts

Reference Number: MTAS-1325

The Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 [1] was enacted for the purpose of providing fair and equitable treatment of persons displaced as a result of federal and federally assisted programs, [2] as well as consistent treatment of owners during the actual land acquisition. [3] The provisions of the act are mandatory and apply to any public agency that administers programs supported at least in part by federal funds. The act consists of three subchapters: (1) General Provisions, which defines terms used in the act; [4] (2) Uniform Relocation Assistance, which is concerned with moving and related expenses, replacement housing payments, relocation assistance advisory services, and the federal share of the cost of such payments and services; [5] and (3) Uniform Real Property Acquisition Policy, which sets out the procedures to be followed in acquiring real property. [6]

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

Land acquisition procedures are of considerable importance to attorneys representing condemners or condemnees. The federal government has promulgated government wide regulations for real property

acquisition, [7] which have been adopted by reference by such agencies as the Tennessee Valley Authority, [8] the Environmental Protection Agency, [9] and the Department of Housing and Urban Development. [10]

Notes:
[1] 42 U.S.C. §§ 4601 *et seq.*

[2] 42 U.S.C. § 4621.

[3] 42 U.S.C. § 4651.

[4] 42 U.S.C. §§ 4601 through 4604.

[5] 42 U.S.C. §§ 4621 through 4638.

[6] 42 U.S.C. §§ 4651 through 4655.

[7] 49 CFR §§ 24.101 *et seq.*

[8] 18 CFR §§ 1306 *et seq.*

[9] 40 CFR § 4.1.

[10] 24 CFR § 42.1.

Appraisal Procedure

Reference Number: MTAS-1326

Before the acquisition of any tract of property by a public agency subject to the federal and/or state relocation acts, a full appraisal of the tract must be made. The regulations generally require that:

- The property be appraised before the initiation of any negotiations with the property owner;
- The owner or his designated representative be given an opportunity to accompany the appraiser during his inspection of the property;
- The acquiring agency establish the amount it believes to be just compensation before initiating any negotiations with the property owner; and
- The acquiring agency make a written offer to the property owner for the full amount believed to be the just compensation. The written offer must be accompanied by a written summary statement of the offer explaining the amount of the offer, the description of the property being acquired, and an identification of any improvements being acquired. [11]

The agency must make reasonable efforts to contact the owner to discuss the offer and explain the basis for the offer and the acquisition policies of the agency. The owner must be given a reasonable opportunity to consider the offer and present material the owner believes is relevant to determining the amount of just compensation to which the owner is entitled. The agency must consider the owner's presentation and must update its appraisal if the owner's information or any material change in the character or the condition of the property indicates the need for a new appraisal or if there has been a significant delay since the time the appraisal was completed. The agency cannot advance the time of condemnation or take any other coercive action to induce a settlement by the owner. [12]

The type of appraisal that must be obtained by the agency is determined by the complexity of the appraisal problem. [13] The appraisal must conform to minimum standards set by each agency and with commonly accepted appraisal practice if the appraisal does not require an in-depth analysis. [14] If an in-depth analysis is required, a detailed appraisal must be performed that conforms to nationally recognized appraisal standards, including, if appropriate, the Uniform Acquisition Standards for Federal Land Acquisition. [15] At a minimum a detailed appraisal must include: [16]

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

- An accurate description of the physical characteristics of the property (and any remainder if a partial taking will occur), a statement of known and observed encumbrances, if any, title information, location, zoning, present use, an analysis of highest and best use, and at least a five-year sales history of the property;
- A description of all relevant and reliable approaches to value used consistent with commonly accepted appraisal practice (market data, income, or replacement cost). If more than one approach is used, there must be an analysis and reconciliation of approaches to value;
- A description of comparable sales, including the parties to the transaction, source and method of financing, and verification by the parties involved;
- A statement of the value of the real property to be acquired, and if a partial taking is proposed, a statement of the damages and benefits, if any, to the remainder; and
- The effective date of the appraisal, signature, and certification of the appraiser.

The appraiser is required, to the extent permitted by applicable law, to disregard any decrease or increase in the fair market value of the property caused by the project for which the property is being acquired or by the likelihood that the property would be acquired for the project, other than due to physical deterioration within the reasonable control of the owner. [17]

Once the appraisal is completed, the agency must have the appraisal reviewed by a review appraiser. [18] The review appraiser must examine the appraisal to assure that it meets all applicable requirements, and must seek any necessary corrections. The review appraiser then either approves the appraisal or develops a new appraisal consistent with the above requirements.

Before the agency can require the owner to surrender possession of the real property, the owner must be paid the agreed upon purchase price, or if no agreement has been reached, deposit with the court an amount not less than the approved appraisal for the fair market value of the property or the amount of the court's award of compensation in the condemnation action. In exceptional circumstances the agency can obtain a right-of-entry for construction purposes prior to making the payment available to the owner. [19]

Although the public agency may not pay less than the approved purchase price, as determined by its review appraiser, it may, under certain circumstances, make an offer of settlement in excess of that amount. In arriving at a determination to make an administrative settlement, the agency should take the following factors into consideration: [20]

- The appraiser's opinion of value;
- Any recent court awards for similar type property;
- The estimated trial costs; and
- Valuation problems with the property in question.

The agency is required to reimburse property owners for recording fees, transfer taxes, and similar costs incidental to conveying real property; penalty costs for pre-payment of any pre-existing recorded mortgage, entered into in good faith, encumbering the property; and the pro rata portion of real property taxes paid by the owner that are allocable to a period subsequent to the date of title vesting with the agency or the effective date of possession of the property by the agency, whichever is earlier. [21]

The owner is also entitled to be reimbursed for his reasonable expenses, including attorney, appraisal, and engineering fees actually incurred because of a condemnation proceeding if:

- The court determines that the agency cannot acquire the property in question;
- The condemnation case is abandoned by the agency other than under an agreed upon settlement; or
- The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation case or the agency settles such a case. [22]

Notes:
[11] 49 CFR § 24.102.

[12] 49 CFR § 24.102.

[13] 49 CFR § 24.103.

[14] 49 CFR § 24.103.

[15] 49 CFR § 24.103.

[16] 49 CFR § 24.103.

[17] 49 CFR § 24.103.

[18] 49 CFR § 24.104.

[19] 49 CFR § 24.102.

[20] 49 CFR § 24.102.

[21] 49 CFR § 24.106.

[22] 49 CFR § 24.107. See T.C.A. §§ 29-16-123(b) and 29-17-812(b) for similar provisions under Tennessee law.

Eminent Domain Forms

Reference Number: MTAS-1327

Click on the topics listed below in this section for more information.

Form 1 - Petition for Condemnation

Reference Number: MTAS-1328

PETITION FOR CONDEMNATION

Petitioner _____ respectfully states as follows:

1. Petitioner is a municipality and public corporation of the state of Tennessee and has the power of condemnation and eminent domain for public purposes when public convenience requires it pursuant to _____ (*insert charter or private act section*). This petition is filed pursuant to Tennessee Code Annotated, Sections 29-17-901 *et seq.*, (*or 29-16-101 et seq., if jury of view procedure is used*) to acquire certain property rights for the completion of _____ (*identify project*) with specific authority as set out in _____ (*identify ordinance or resolution authorizing condemnation for project*).

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

[*Insert description*]

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

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

[*List encumbrances*]

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

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

WHEREFORE, premises considered, petitioner prays:

1. That a hearing be had in this matter on an early date and at the hearing, petitioner receive the right to possession and, if necessary, a writ of possession issue to the Sheriff of _____ County to put the petitioner in possession, and

[*or if jury of view procedure is requested*]

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

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

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

4. That petitioner have any and all additional relief to which it is entitled including the assessment of costs as provided by Tennessee Code Annotated § 29-17-912.

Respectfully submitted,

_____
Counsel for Petitioner,
City/Town of _____

Cost Bond

(Requirements for cost bond language vary by jurisdiction.)

Form 2A - Service by Sheriff

Reference Number: MTAS-1329

SERVICE BY SHERIFF

To (*identify name and address of respondents*)

NOTICE

Take NOTICE that on the _____ day of _____, 20___, Petitioner _____ filed a petition in this court against you, praying for the condemnation of property rights in the real estate fully described in the petition, a copy of which accompanies this NOTICE. You are further notified that the petition will be presented to the court for hearing at 9 a.m. on the _____ day of _____, 20___, in the Circuit Court, to determine whether petitioner should be granted an order of possession, entitling it to immediate possession of the property rights described in the petition.

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

(*Include following two paragraphs if using supplementary procedure*)

You are further notified, pursuant to Tennessee Code Annotated § 29-17-903, that after the expiration of thirty days from the date of giving of this NOTICE, if the petitioner's right to condemn and acquire the property rights described in the petition is not questioned or contested by written formal objection filed with the clerk of this court and served upon the petitioner's attorney, the petitioner may take possession of the property rights sought. If necessary to place the petitioner in possession, the court shall issue a Writ of Possession to the Sheriff of _____ County to put the petitioner in possession of the property rights.

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

This _____ day of _____, 20___.

Circuit Court Clerk

_____

By _____
Deputy Clerk

OFFICER'S RETURN

I certify that I served this NOTICE with a copy of the Petition for Condemnation, upon serving the above-named respondent(s), by personally delivering a copy to the respondent(s), this _____ day of _____, 20___.

SHERIFF OF _____ COUNTY, TENNESSEE

BY _____

Form 2B - Service by Mail

Reference Number: MTAS-1330

SERVICE BY MAIL

To (*identify name and address of respondents*)

NOTICE

Take NOTICE that on the _____ day of _____, 20___, Petitioner _____ filed a petition in this court against you, praying for the condemnation of property rights in the real estate fully described in the petition, a copy of which accompanies this NOTICE. You are further notified that the petition will be presented to the court for a hearing at 9 a.m. on the _____ day of _____, 20___, in the Circuit Court, to determine whether petitioner should be granted an order of possession, entitling it to immediate possession of the property rights described in the petition.

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

(*Include the following two paragraphs if using supplementary procedure*)

You are further notified, pursuant to Tennessee Code Annotated § 29-17-903, that after the expiration of thirty days from the date of the giving of this NOTICE, if the petitioner's right to condemn and acquire the property rights described in the petition is not questioned or contested by written formal objection filed with the clerk of this court and served upon the petitioner's attorney, the petitioner may take possession of the property rights sought. If necessary to place the petitioner in possession, the court shall issue a Writ of Possession to the Sheriff of _____ County to put the petitioner in possession of his property rights.

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

This _____ day of _____, 20___.

Circuit Court Clerk

_____

By _____
Deputy Clerk

CERTIFICATE OF SERVICE

This is to certify that this NOTICE and a copy of the Petition for Condemnation has been mailed to all respondents, by U.S. Certified Mail, this _____ day of _____, 20___.

_____
Attorney for Petitioner

Form 3 - Motion for Notice by Publication

Reference Number: MTAS-1331

MOTION FOR NOTICE BY PUBLICATION

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

Respectfully submitted,

_____
Attorney for Petitioner

Form 4 - Affidavit of City Attorney

Reference Number: MTAS-1332

AFFIDAVIT OF _____ (CITY ATTORNEY)

State of Tennessee
County of _____

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

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

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

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

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

FURTHER, AFFIANT SAITH NOT.

_____

Sworn to and subscribed before me a Notary Public, this _____ day of _____, 20___.

_____
Notary Public

My Commission Expires _____

Form 5 - Order of Publication

Reference Number: MTAS-1333

ORDER OF PUBLICATION

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

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

_____
Circuit Court Judge

Approved for Entry

_____
Attorney for Petitioner

Form 6 - Order of Possession

Reference Number: MTAS-1334

ORDER OF POSSESSION

This cause was heard on the _____ day of _____, 20___, to determine whether the petitioner should be granted possession of the respondents' property. Based upon the pleadings, exhibits, as well as the entire record,

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

[*insert legal description of property being acquired*]

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

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

ALL FURTHER MATTERS ARE RESERVED.

ENTERED this _____ day of _____, 20___.

_____
Circuit Court Judge

Approved for Entry

_____
Attorney for Petitioner

Form 7 - Order Sustaining Petition

Reference Number: MTAS-1335

ORDER SUSTAINING PETITION FOR CONDEMNATION AND ORDERING WRIT OF INQUIRY

This cause came on to be heard on the _____ day of _____, 20___, before the Honorable _____, Judge of the _____ Circuit Court of _____ County, Tennessee, upon the Petition for Condemnation and Notice to respondents. It appearing to the court that the petition and notice have been served, or publication made, as required by law, and that the cause is before the court on application to sustain a petition and for a writ of inquiry of damages and the appointment of a jury of view; and it further appearing that the respondents are before the court and that petitioner has the legal power and authority to acquire [insert the interest sought to be condemned] under the eminent domain laws of the state of Tennessee to the following described property located in _____ County, Tennessee:

[*insert a description of the property*]

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

IT IS ORDERED, ADJUDGED, and DECREED:

1. That the Petition for Condemnation of the property described above is sustained.

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

1.
2.
3.
4.
5.
Alternate:

3. That the clerk shall issue a writ of inquiry to the sheriff commanding him to summons the Jury of View to appear in open court on the _____ day of _____, 20___, at _____, and no other notice need be given, there to be impaneled and sworn, after which they will proceed immediately to the property sought to be condemned and examine it, hear testimony of witnesses, but no argument of counsel, and set apart by metes and bounds the land to be condemned, and assess damages as required by law, reduce their report to writing and deliver it to the sheriff, who will make his return to the court.

This _____ day of _____, 20___.

_____
Circuit Court Judge

Approved for Entry

_____
Attorney for Petitioner

Form 8 - Writ of Inquiry

Reference Number: MTAS-1336

WRIT OF INQUIRY

State of Tennessee
County of _____

TO THE SHERIFF OF _____ COUNTY, TENNESSEE

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

Now, therefore, as provided by the eminent domain laws of the state of Tennessee, you are commanded to summon the following to act as a Jury of View and to appear on the _____ day of _____, 20___, at _____ o'clock in open court in the Circuit Court of _____ County, Tennessee, at [*insert the place where the court sits*]:

1.
2.
3.
4.
5.

Alternative:

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

IN WITNESS WHEREOF, I have hereunto set my hand and seal of this court on the _____ day of _____, 20___.

_____

[*insert herein the name of the clerk of court*]

By _____

(Clerk or Deputy Clerk)

Form 9 - Report of the Jury of View

Reference Number: MTAS-1337

REPORT OF THE JURY OF VIEW

We, the Jury of View, summoned, appointed, and sworn, as provided by the laws of the state of Tennessee, and by orders of the court made and entered in this proceeding were directed to lay off by metes and bounds the property interests condemned, and to inquire and assess damages to the property interest taken by Petitioner _____. We report as follows:

We went upon the property condemned on the _____ day of _____, 20___, and examined this property by personal inspection and heard evidence, but no argument of counsel, of the value of the property interests to be condemned, and we allot and set apart to the petitioner, property situated in _____ County, Tennessee, and described as follows:

[*insert a description of the property taken*]

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

_____ Fair market value of land taken
_____ Incidental damages

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

Dates _____

This _____ day of _____, 20___.

_____
_____
_____
_____
_____

Members of the Jury of View

Received from the Jury of View and returned to the clerk of the court this _____ day of _____, 20___.

Sheriff of _____ County

_____
BY Deputy Sheriff

Form 10 - Order Confirming Report of the Jury of View

Reference Number: MTAS-1338

ORDER CONFIRMING REPORT OF THE JURY OF VIEW

It appearing to the court that the Jury of View having met and reported to the court that the fair cash value of the property rights condemned is (*Optional: including incidental damages to the residue of $*_____,) and having deposited with the clerk of this court the sum of .

It is therefore ORDERED, ADJUDGED, and DECREED:

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

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

and that the property rights thus acquired and possession is divested out of respondents and vested in petitioner, _____, and any other liens or encumbrances for taxes or the claim of any party are transferred to the funds deposited or secured.

2. That respondents [insert the name or names of all respondents], have and recover of petitioner the sum of the same being the fair cash value of the property rights taken, for which petitioner has paid into this court the sum of .

3. That respondents are entitled to interest at the rate of two percent (2%) above prime on the amount of , that being the difference between the , deposited as tender and the Jury of View award, from the date of taking, [insert the date of taking], until the sum is paid into court.

4. That the members of the Jury of View be paid the sum of each for their services in this cause, the total sum to be paid to the clerk of this court by petitioner as part of the costs in this cause and that the clerk shall distribute the sum to the members of the jury.

5. That this cause be referred to the clerk for a determination of the taxes that constitute a lien on the property in accordance with Tennessee Code Annotated § 26-5-108(b).

This the _____ day of _____, 20___.

_____
Circuit Court Judge

Approved for Entry
_____Attorney for Petitioner

Form 11 - Appeal From Finding of the Jury of View

Reference Number: MTAS-1339

APPEAL FROM FINDING OF THE JURY OF VIEW

Petitioner, _____, excepts to the finding and report of the Jury of View with regard to the fair cash value of the property rights condemned, and appeals this finding and requests a trial before a jury in the usual way, pursuant to *Tennessee Code Annotated* § 29-16-118.

By _____
Attorney for Petitioner

I am surety for costs not to exceed _____.

By _____
Attorney for Petitioner

Form 12 - Notice of Dismissal

Reference Number: MTAS-1340

NOTICE OF DISMISSAL

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

Respectfully submitted,

_____
Attorney for Petitioner

Form 13 - Order of Dismissal

Reference Number: MTAS-1341

ORDER OF DISMISSAL

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

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

Entered this _____ day of _____, 20___.

_____
Circuit Court Judge

APPROVED FOR ENTRY

_____
Attorney for Petitioner

Form 14 - Agreed Final Order

Reference Number: MTAS-1342

AGREED FINAL ORDER

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

It is ORDERED, ADJUDGED, and DECREED by the court that the Respondents have and recover the sum of the same being the fair cash market value of the property described below, Petitioner having paid into court at the time of filing the Petition for Condemnation.

It is further ORDERED, ADJUDGED, and DECREED by the court that all of the title to the property described below be divested out of Respondents and all other persons claiming any adverse interest in it and is vested in Petitioner _____ in fee simple, the property being more particularly described as follows:

[*description of the property*]

It further appearing to the court that this property may be subject to lien for taxes due, interest and penalty, if any, owing to _____ (county and/or municipality in which property located) and in accordance with *Tennessee Code Annotated* § 26-5-108(b), the clerk of the court, prior to the payment of any part of the judgment to Respondents, shall ascertain whether there are any taxes due and unpaid that are lien upon the property, and shall issue to each of the officials charged with the collection of any taxes that might be a lien on the property a statement, giving the style and number of this cause, a description of the property, and the name of the party out of whom title is divested; whereupon each of these officials shall certify to the clerk an itemized statement of taxes, interest and penalty, if any, that were a lien upon the land as of the date of entry of this Agreed Final Order.

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

It is further ORDERED by the court that the costs in this cause be taxed against the Petitioner for which execution may issue if necessary.

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

Entered this _____ day of _____, 20___.

_____
Circuit Court Judge

Approved for Entry

_____
Attorney for Petitioner

_____
Attorney for Respondents

Pre-Trial Checklist

Reference Number: MTAS-1344

PRE-TRIAL CHECK LIST (Eminent Domain)

Make sure procedures required under Relocation Act have been complied with.

Bring title information up to date.

Check to see which civil district property is located.

Check whether taxes due require naming taxing authority as party defendant.

Check whether tenants must be named as parties defendant.

Obtain aerial photograph of subject property.

Obtain planning commission plat of subject property.

Obtain engineer’s drawing showing area of taking.

Arrange for appraisal.

Establish tentative date of taking and arrange with appraisers and photographer for pre-trial conference at site of property on date of taking.

Obtain project description for use in petition.

Draft petition.

Draft notice and, if necessary, order of publication and supporting affidavit.

Draft order of condemnation and appropriation.

Proofread all pleadings.

File petition, make deposit, and arrange for service.

Obtain deposit receipt.

Pre-hearing, check on service of process.

Hearing to obtain order of condemnation and appropriation.

Signing and entry of order of condemnation and appropriation.

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

Pre-trial conference at site of property with appraiser; obtain photographs of subject property, immediately surrounding property, and comparable sales; locate comparable sales on planning commission map.

Request copies of adversary appraisals.

Summarize for trial use all appraisals.

Explore settlement possibilities with adversary counsel.

Take any necessary depositions and file them with clerk.

Prepare pre-trial brief as required or desired and requests for special instructions.

Prepare all exhibits for use at trial.

Pre-trial conference with engineering witness, if any.

Pre-trial conference with judge and adversary counsel.

Post-Trial Check List

Reference Number: MTAS-1345

POST-TRIAL CHECK LIST (Eminent Domain)

Draft final judgment.

Proofread final judgment.

Submit draft final judgment for description check.

Obtain signatures to final judgment and see to entry.

Obtain billing statements from appraisers, court reporters, suppliers of exhibits, and photographers.

Approve billing statements and submit for payment.

Obtain, review, and approve bill of costs.

Obtain instructions regarding appeal.

Obtain certified copy of final judgment.

Obtain parcel number for final judgment.

See to registration for final judgment.

Advance cost of registration of final judgment and obtain receipt.

Forward certified copy of final judgment to appropriate official(s).

Pay judgment and obtain receipt.

Pay costs and obtain receipt.

Prepare billing statement for services.

Public Works Projects

Reference Number: MTAS-482

After a municipal planning commission adopts a comprehensive plan, no public works (public parks, buildings, structures, or public utilities) may be "constructed or authorized" unless the governing body or board (including the governing body or board of the state’s political subdivisions, such as county

commissions) first asks for the planning commission's approval of the public work's location. If the planning commission disapproves, the commission must communicate its reasons to the governing body, board, or official having jurisdiction over the project. The governing body, board, or official may overrule the planning commission and construct the public work. T.C.A. § 13-4-104.

When constructing or providing maintenance on a public works project, a municipality is not required to have the architecture, engineering or landscape architecture plans, specifications and estimates made by a registered architect, registered engineer or registered landscape architect, if the "contemplated expenditure for the completed project does not exceed fifty thousand dollars ($50,000), and the work does not alter the structural, mechanical or electrical system of the project." T.C.A. § 62-2-107.

Subdivision Regulation

Reference Number: MTAS-483

Subdivision plats must be submitted to the planning commission by the owner of the property, the holder of a written option or contract to purchase, or the attorney or authorized representative of any of these. T.C.A. § 13-3-402(a), T.C.A. § 13-4-302(a). "Subdivision" means:

- dividing a tract or parcel into two or more lots, sites, or other divisions requiring new street or utility construction; or
- any division of five or fewer acres for sale or building development.

The term "utility construction" does not include the extension of individual service pipes or lines to connect a single site to an existing utility main. T.C.A. § 13-3-401, T.C.A. § 13-4-301.

T.C.A. § 13-4-302 prohibits county registers from recording an amendment, modification, or correction to a subdivision plat without the approval of the planning commission. This statute also provides, however, that an easement or survey attached to an easement granted to the state, a county, a municipality, or metropolitan government, or any of their entities is not an amendment, modification, or correction to the plat.

Except in Davidson, Hamilton, and Knox counties, curbs, gutters or sidewalks may not be required in a subdivision outside the limits of a municipality in an area governed by a regional planning commission unless public water and sewage systems are available within 18 months after a subdivider requests plan approval. T.C.A. § 13-7-301.

Plats submitted to a regional planning commission may be approved by the commission's secretary if the subdivision has only two lots and meets all subdivision requirements, and provided further that no request for a variance has been requested. T.C.A. § 13-3-402.

In an area governed by a regional planning commission, it is a Class C misdemeanor for owners or their agents to sell or transfer land by reference to an unapproved subdivision or plat. The county attorney or other official designated by the county commission may file an injunction against such a transfer. T.C.A. § 13-3-410.

Gated Communities

The developer or owner of a proposed gated community must obtain a permit from the planning commission and board of zoning appeals, or the municipal governing body if neither of these exists, before installing or replacing a security gate or barrier. The municipal building or codes inspector must inspect the security gate or barrier. Gates and barriers must be equipped with a radio-operated receiver/controller capable of receiving signals from police, fire, utility and emergency medical services radio transceivers serving the facility.

These requirements apply in multi-family residential, commercial, and industrial gated communities and facilities with a gate or barrier to block entrance to the facility or community from a public street. Additionally, these requirements are applicable only where the driveway or access road leading to the gate is 24 feet or more in width. T.C.A. §§ 13-8-101 *et seq.*

Subdivision Plat Approval

Reference Number:

MTAS-1430

T.C.A. §§ 13-3-401 and 13-4-301 define a subdivision as:

- Dividing any tract or parcel into two or more lots, site, or other divisions requiring new street or utility construction; or
- Any division less than five acres for sale of building development.

Hence, any development meeting this definition will be subject to municipal or regional planning commission subdivision regulations.

T.C.A. § 13-4-304(a) provides that a subdivision plat shall be approved or disapproved by the planning commission within sixty (60) days after initial consideration by the commission (with extensions for city celebrated holidays). Failure to act within 60 days shall be deemed an approval of the plat. The plat is required to be placed on the agenda of the planning commission within 30 days of its filing or at the next regularly scheduled meeting after the thirty-day period. The applicant may waive the time frame requirement for the appearance of the plat on the agenda.

As the subdivision of residential property is of inherently local character, the legislature has long granted authority to regulate this process to local governments. The powers granted to municipal planning commissions are found in T.C.A. Title 13, Chapter 4. Under these provisions planning commission regulations may:

…provide for the harmonious development of the municipality and its environs, for the coordination of streets within subdivisions with other existing or planned streets or with the plan of the municipality or of the region in which the municipality is located, for adequate open spaces for traffic, recreation, light and air, and for a distribution of population and traffic which will tend to create conditions favorable to health, safety, convenience and prosperity. T.C.A. § 13-4-303 (a).

The statute also provides that subdivision regulations may extend to the streets and utilities servicing a subdivision. Hence, municipal planning commissions have initial approval of almost every aspect of a subdivision's development and may regulate according to the aforementioned factors.

As state law is not very specific as to the procedures required for plat approval, the practices among local jurisdictions vary. Generally, however, the process is as follows:

Once a potential developer determines the jurisdiction and zoning classification of the property to be subdivided, he or she then locates all easements and restrictions upon the property in question. Next, the developer, usually in conjunction with a registered land surveyor, prepares a subdivision plat, which is submitted to the municipal planning department for review. Subdivision plats must be submitted to the planning commission by the owner of the property, or a governmental entity. Owner is defined as the legal owner, the holder of a written option or contract to purchase, or the attorney or agent of any of these persons. T.C.A. § 13-4-302 (b). In the case of a two lot development, plats submitted to a regional planning commission may be approved by the commission's secretary if the subdivision meets all subdivision requirements. T.C.A. § 13-3-402.

Often, especially with larger subdivision developments, the first plat submitted to the local planning commission is called a preliminary plat. It is this preliminary plat that receives initial consideration. Developers may begin work on a subdivision pursuant to a tentative approval of the preliminary plat by the planning commission. In most cases a bond will be required prior to final approval of the plat to ensure the completion of infrastructure improvements. T.C.A. §13-4-303. Once a subdivision plat has been properly filed, any amendment, modification, or correction to the plat requires planning commission approval. T.C.A. § 13-4-302.

T.C.A. § 13-4-304(a) states:

"The commission shall approve or disapprove a plat within sixty (60) days after the initial consideration of the plat by the commission meeting in a regularly scheduled session, unless at the end of the sixty-day period there is a holiday or an unexpected interceding event that would close municipal or county offices and thus affect the normal computation of the sixty-day period, in which case the plat shall be approved or disapproved after the interrupted sixty-day period at the next regularly scheduled meeting of the commission; otherwise, the plat shall be deemed approved and a certificate to that effect shall be issued by the commission on demand. The applicant for the commission's approval may waive the time requirement set in this subsection (a) and consent to an extension or extensions of the applicable time period. When a plat has been filed with the appropriate officials of the planning commission, the plat shall be placed on the agenda of the planning commission within thirty (30) days of

the filing or the next regularly scheduled planning commission meeting after the thirty-day period. The applicant may waive the time frame requirement for the appearance of the plat on the agenda."

During the period when the hearing is being scheduled, interested parties must be notified of the hearing, pursuant to T.C.A. §13-4-304(c) which states:

"Any plat submitted to the commission shall contain the name and address of a person to whom notice of hearing shall be sent; and no plat shall be acted upon by the commission without affording a hearing thereon, notice of the time and place of which shall be sent by mail to such address not less than five (5) days before the date fixed for such hearing."

If the planning commission disapproves the plat, the grounds must be stated upon the record. T.C.A. §13-4-304(b).

So long as a quorum is present, only by a majority of the planning commission members present and voting need to approve a plat is required. Tenn. Op. Atty. Gen. No. 08-135 (August 15, 2008).

The approval of a plat shall not be deemed to constitute or effect an acceptance by the municipality, county or public of the dedication of any street or other ground shown upon the plat. T.C.A. § 13-4-305.

In addition to plat approval, subdivision regulations place additional restrictions on property within a municipality and can often drastically affect the character of the surrounding lands. It is therefore necessary to give citizens an opportunity to comment on the proposed regulations in a public hearing before approval y the planning commission. T.C.A. § 13-4-303(c).

Once the plat has been approved, it may be recorded. T.C.A. § 13-4-306. *Thompson v. Department of Codes Admin., Metropolitan Government of Nashville and Davidson County*, 20 S.W.3d 654, (1999). Just because the plat is recorded does not mean the municipality accepted the dedication of any street or other ground shown upon the plat, however. T.C.A. § 13-4-305.

Alas, some developers may, by malice or negligence, attempt to skirt local subdivision regulations. Within the jurisdiction of a municipal planning commission, if an owner or his agents sells, transfers, or agrees to sell or transfer land without plat approval and recordation, he or she is guilty of a Class C misdemeanor. The municipality, via its city attorney or other designated official, may file an injunction to stop an illegal transfer. T.C.A. § 13-4-306. Likewise, in an area governed by a regional planning commission, it is a Class C misdemeanor for owners or their agents to sell or transfer land by reference to an unapproved subdivision or plat. The county attorney or other official designated by the county commission may file an injunction against such a transfer. T.C.A. § 13-3-410.

The subdivision plat approval process is an integral part of responsible local development. And as plat approval is an area where municipalities have broad leeway, extra precaution should be taken to make decisions that fairly balance the competing needs of developers, neighboring property owners, and future buyers.

Types of Planning Commissions

Reference Number: MTAS-223

Planning commissions may be structured as municipal planning commissions (T.C.A. §§ 13-4-101 - 105) or as regional planning commissions (T.C.A. §§ 13-3-101 - 105). The department of economic and community development may create community planning commissions for unincorporated communities (T.C.A. §§ 13-3-201–203)

Municipal Planning Commissions

Reference Number: MTAS-224

A municipal planning commission is to be composed of five to ten members determined by the chief legislative body (i.e., board of mayor and aldermen, city council, board of commissioners). One member is to be the mayor or someone designated by the mayor, and one is to be a member of the governing body and selected by that body. The remaining members are to be appointed by the mayor. The terms of appointed members must be arranged so that the term of one member expires each year. The legislative body determines whether and in what amount to compensate members. The mayor has

authority to remove any appointed member "at his pleasure." T.C.A. § 13-4-101. A municipal planning commission must elect a chair from among its members and, if no existing charter provision exists, adopt rules for the transaction of its business. T.C.A. § 13-4-102.

If no charter provision exists to the contrary, the chief executive officer of the municipality has the authority to appoint and fix the compensation of a planning director within funds appropriated by the governing body. T.C.A. § 13-4-102.

This legislation is supplemental to and does not supersede private acts. T.C.A. § 13-4-105.

A planning commission may:

- Make reports and recommendations to the governing body about community development. T.C.A. § 13-4-103.
- Recommend building and financing programs for public improvements. T.C.A. § 13-4-103.
- Require public officials to furnish requested information. T.C.A. § 13-4-103.
- Adopt an official general plan for the municipality's physical development. T.C.A. §§ 13-4-201–203.
- Before construction, approve the location and extent of streets, parks, public spaces, public buildings and structures, and public and private utilities, T.C.A. § 13-4-104.
- Adopt and administer subdivision regulations. T.C.A. §§ 13-4-301–310.
- Certify a zoning plan (both text and map) to the governing body. T.C.A. § 13-7-202.

Planning commissions and zoning boards must review all plans for installation or replacement of a security gate or barrier at a gated community or facility. T.C.A. § 13-8-103.

Regional Planning Commissions

Reference Number: MTAS-225

Single or Multi-County Regional Planning Commissions

The Tennessee Department of Economic and Community Development, with approval of the local government planning advisory committee (LGPAC), may create and define the boundaries of planning regions. If a municipality elects to be included in a planning region, the Commissioner of the Department of Economic and Community Development shall appoint a regional planning commission of not fewer than five or more than 15 members from nominations by the chief elected officials of the county and the municipality. T.C.A. § 13-3-101

Members of the county and municipal legislative bodies may serve on the commission, but their number must be less than a majority. Such members serve during their respective elected terms, and other citizen members are appointed for staggered four-year terms. Commission members may be removed only for cause and only after a due process hearing. County and municipal governing bodies participating in this type of regional planning commission may establish the compensation for each member nominated by that local government. T.C.A. § 13-3-101.

Such a commission functions as a planning and advisory body for counties and cities within the region. A municipality's legislative body may designate the regional planning commission to act as the municipal planning commission. A prime mission of the regional planning commission is to prepare and maintain a regional plan. Any parts of such a plan adopted by a regional planning commission designated as a municipal planning commission have the same force and effect as a plan prepared by a municipal planning commission. T.C.A. § 13-3-301.

Municipal Regional Planning Commissions

At the request of a municipality, the Department of Economic and Community Development may, with approval of the local government planning advisory committee (LGPAC), establish a planning region composed of a municipality that has created a planning commission and a territory no more than five miles beyond the municipality, but no farther than the municipality's urban growth boundary. It may designate the municipal planning commission a regional planning commission. At least one (1) member of a municipal planning commission composed of five (5) members, and two (2) members of a municipal planning commission composed of more than five (5) members but less than eleven (11) members must reside within the regional area outside of the municipal boundaries served by the

regional planning commission; provided, that, if the regional area outside of the municipal boundaries is less than fifty percent (50%) of the entire regional area, then only one (1) member of the municipal planning commission shall be appointed from the regional area outside the municipal boundaries regardless of the number of members on the municipal planning commission, or, in the alternative, the municipal planning commission may be increased in size by the number of members who are appointed from the regional area outside the municipal boundaries. T.C.A. § 13-3-102.

Design Review Commissions

T.C.A. § 6-2-201(33), part of the general law mayor-aldermanic charter, allows municipalities incorporated under that charter to establish a design review commission. This commission would develop general guidelines for the exterior appearance of non-residential property, multi-family residential property, and entrances to non-residential developments. A property owner may appeal this commission's decisions to the planning commission or, if there is not one, to the governing body.

T.C.A. § 6-54-133 provides similar authority for other municipalities to establish design review commissions, as well as an appeal process for property owners. Under this section, the municipal governing body may designate the planning commission as the design review commission. If the municipality creates a separate commission, the mayor appoints members from municipal residents and must try to include persons with architectural or engineering knowledge and persons with experience in non-residential building.

Training for Members of Planning Commissions

Reference Number: MTAS-481

Training for Members of Planning Commissions, Boards of Zoning Appeals, and Staff

Members of planning commissions and boards of zoning appeals must attend a minimum of four hours of training in planning and zoning subjects within one year of their initial appointment and in each calendar year afterward. For members of regional planning commissions, at least one hour of training must concentrate on the rights of private property owners and the relationship of those rights to the public planning process. Full-time or contract professional planners, building commissioners, and administrators must attend eight hours of planning and zoning training each calendar year. However, a professional planner who is a member of the American Institute of Certified Planners (AICP) is exempt from this training requirement. A municipality may, by ordinance, opt out of these training requirements. T.C.A. § 13-3-101, T.C.A. § 13-4-101, T.C.A. § 13-7-205.

Zoning

Reference Number: MTAS-228

A municipality's "chief legislative body" is empowered to adopt and amend a zoning ordinance. The adoption process requires a public hearing preceded by a newspaper notice of at least 15 days. T.C.A. § 13-7-203.

Pursuant to T.C.A. §13-7-201, the zoning ordinance may "regulate the location, height, bulk, number of stories, and size of buildings and other structures; the percentage of the lot that may be occupied; the sizes of yards, courts, and other open spaces; the density of population; and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, and other purposes ..." and establish special districts or zones "subject to seasonal or periodic flooding ... and such regulations may be applied therein as will minimize danger to life and property." Zoning regulations may provide for the transfer of development rights under procedures and restrictions set out in T.C.A. § 13-7-201(a)(2).

The municipal planning commission is responsible for certifying to the governing body a zoning plan, the text of a zoning ordinance, and zoning maps. Any change in the ordinance, including the zoning map, must be referred to the planning commission for approval. The planning commission's disapproval may be overridden by a majority vote of the entire legislative body. The same procedure applies to any zoning ordinance text amendment. T.C.A. §§ 13-7-201–204.

The chief legislative body may create a board of zoning appeals of three, five, seven, or nine members; or it may designate the municipal planning commission to act in this capacity. The board is authorized to

grant exceptions to the zoning ordinance, in such matters set forth in the ordinance, that are "in harmony with [the] general purpose and intent" of the zoning ordinance and "to interpret the zoning maps and pass upon disputed questions of lot lines or district boundary lines or similar questions as they arise in the administration of the zoning regulations." Appeals to the board of appeals may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any grant or refusal of a building permit or other act or decision of the building commissioner of the municipality or other administrative official based in whole or part upon the provisions of this ordinance T.C.A. §§ 13-7-205 - 207.

These general law provisions supplement, but do not supplant or modify, any private acts for a particular city. General law provisions regarding zoning powers and procedures apply to the extent that they are not in conflict with such private acts. The most restrictive regulations control any conflict with respect to width or size of yards, courts, or other open spaces; height and number of stories or buildings; and density. T.C.A. § 13-7-209.

Under T.C.A. § 68-221-415, advanced treatment systems for the treatment and disposal of sewage under a pilot project study conducted by the state are subject to zoning requirements established by the municipality for the parcel of property.

Condominium Ownership

A zoning or land use ordinance may not prohibit the condominium form of ownership or impose any requirement on a condominium that it would not impose on a physically identical development under a different form of ownership. T.C.A. § 66-27-206.

Zoning and Subdivision Regulation Outside City Limits

If a municipal planning commission has been designated as a regional planning commission, the city may exercise zoning powers beyond its boundaries up to and including its growth boundary if the county is not exercising such zoning power. The state code specifies procedural requirements for public hearings and notice to the county of its intent to exercise zoning authority outside its corporate limits. City zoning is nullified when the county exercises its zoning powers. T.C.A. §§ 13-7-302–306.

Several sections of Public Acts 1998, Chapter 1101, affect municipal zoning and subdivision authority outside municipal limits. T.C.A. § 13-3-102 and T.C.A. § 13-3-401(2), which are part of the statute that governs the authority of regional planning commissions, when read together appear to limit the jurisdiction of regional planning commissions outside municipal limits to the territory within the urban growth boundary (when one has been established by adoption of the growth plan). Another is codified in T.C.A. § 6-58-106(d), and provides that

Notwithstanding the extraterritorial planning jurisdiction authorized for municipal planning commissions designated as regional planning commissions in Title 13, Chapter 3, nothing in this chapter shall be construed to authorize municipal planning commission jurisdiction beyond an urban growth boundary; provided, that in a county without county zoning, a municipality may provide extraterritorial zoning and subdivision regulation beyond its corporate limits with the approval of the county legislative body.

Disagreement exists on the effect the last clause in T.C.A. § 6-58-106(d) has on the authority of municipal planning commissions designated as regional planning commissions to adopt zoning and subdivision regulations outside their municipal limits but within the urban growth boundary, absent the approval of the county legislative body.

Prohibition of Rent Control and Long-term Affordable or Workforce Housing

Rent control - A local government is prohibited from enacting or enforcing any ordinance or resolution that has "the effect of controlling the amount of rent charged for leasing private residential or commercial property." T.C.A. § 66-35-102(a).
Long-term affordable or workforce housing - "A local governmental unit shall not enact, maintain, or enforce any zoning regulation, requirement, or condition of development imposed by land use or zoning ordinances, resolutions, or regulations or pursuant to any special permit, special exception, or subdivision plan that requires the direct or indirect allocation of a percentage of existing or newly constructed private residential or commercial rental units for long-term retention as affordable or workforce housing." However, a local government is not precluded from creating or implementing "an incentive-based program designed to increase the construction and rehabilitation of moderate or lower-cost private residential or commercial rental units." T.C.A. § 66-35-102(b) and (c).

Temporary Family Healthcare Structure.

A zoning ordinance may consider a temporary family healthcare structure as a permitted accessory use in any single-family residential zoning district on lots zoned for single-family detached dwellings when the structures are being used by a caregiver in providing care for a mentally or physically impaired person and the structure is on property owned or occupied by the caregiver and his/her residence. A temporary family healthcare structure is defined as a "transportable healthcare environment that is specifically designed with environmental controls, biometric and other remote monitoring technology, sensors, and communication systems to support extended home-based medical care, rehabilitation, and the provision of home- and community-based support and assistance for an older adult or person with a disability on the property where family members or unpaid caregivers who participate in the person's care reside." The structure is (1) primarily assembled as a location other than the site of installation; (2) is limited to one occupant who shall be the older adult or person with a disability; (3) meets the accessibility guidelines of the federal Americans with Disabilities Act; (4) has no more than 500 gross square feet; and (5) complies with applicable provisions of title 68, chapter 120, part 1. The placement of a temporary family healthcare structure on a permanent foundation is neither required or permitted. T.C.A. § 13-7-501.

All temporary family healthcare structures must comply with all requirements for accessory dwelling structures of this type and all setback requirements that apply to the primary structure. Only one structure may be placed on a parcel. The structure must also comply with any applicable requirements of the department of health and any local codes and ordinances related to connecting to any water, sewer and electric utilities serving the the primary residence on the property. T.C.A. §§ 13-7-502, 503.

A permit to install a temporary family healthcare structure must be obtained from the local government and a fee of no more than $100 may be charged. The permit cannot be withheld if the applicant provides sufficient proof of compliance with the act. Ongoing proof of compliance can be required by the local government on an annual basis as long as the structure remains on the property and may involve the inspection of the structure at various times convenience to the caregiver. T.C.A. § 13-7-502. The structure must be removed within 30 days from which the mentally or physically impaired person is no longer receiving or is no longer in need of assistance. T.C.A. § 13-7-505.

Limits on Zoning Authority

Reference Number: MTAS-229

Group Homes for Handicapped

T.C.A. §§ 13-24-101, *et seq.*, takes precedence over any provision in any zoning law or ordinance to the contrary. It provides that a home for up to eight persons with disabilities, and three additional people as support staff or guardians, may be maintained in any area zoned for single family residence use. Such homes "operated on a commercial basis" are excluded. A "person with a disability" does not include persons who have a mental illness and, because of such mental illness, pose a likelihood of serious harm, or who have been convicted of serious criminal conduct related to such mental illness.

Factory-constructed Homes

A dwelling may not be excluded from a residential zone solely because it was partially or completely constructed in a manufacturing facility. This provision does not apply to "factory-manufactured mobile homes constructed as single, self-contained units and mounted on a single chassis" and as further defined in T.C.A. § 68-126-202. T.C.A. § 13-24-201.

Telephone Facilities

T.C.A. §§ 13-24-301 thru 303 states:

No municipal, county, or regional planning commission or any municipal or county legislative body shall by ordinance or otherwise exclude the location or relocation of any facility used to provide telephone or telegraph services to the public .... Such facilities shall include those essential to the provision of telephone and telegraph services, such as central office exchanges and microwave towers that require a specific location in order to provide the most efficient service to the public. ... The exclusion of location from local regulation shall not preclude the exercise of reasonable municipal and county police powers

including but not limited to permit requirements, landscaping, off-street parking, or setback lines as an exercise of police powers.

In addition, a municipality "that has adopted planning and zoning regulations may plan for and regulate the siting of wireless telecommunications support structures in accordance with locally adopted planning or zoning regulations." T.C.A. § 13-24-304.

SEE wireless cell towers below.

Feedlots, Dairy Farms, and Egg Production Houses

T.C.A. § 44-18-104(c)(4) exempts feedlots, dairy farms, and egg production houses from zoning restrictions or other regulations that take effect after they commenced operations and prior to their being annexed by a city.

Historic Zoning

A county or municipality may create a special historic zoning commission of five to nine members to have jurisdiction over historic sites and buildings. The state code also provides a mechanism for creating a regional historic zoning commission. T.C.A. §§ 13-7-401–410. As part of their historic zoning regulations, municipalities may enact ordinances that prohibit a property owner from allowing a building within a historic zone to deteriorate to the extent that it suffers "demolition by neglect." T.C.A. § 13-7-407.

Conservation Easements

Cities may designate and purchase conservation easements over property listed on the National Register of Historic Places or the Tennessee Register. T.C.A. § 66-9-305.

Sport Shooting Ranges

The right to operate a sport shooting range may not be terminated or restricted because of changing use of adjacent or surrounding properties when the range was issued permission to operate by an entity having zoning authority. T.C.A. § 39-17-316.

Continuation of Non-conforming Business Uses

T.C.A. § 13-7-208(b)-(d) allows the continuation, expansion, and reconstruction of business, commercial, and industrial establishments that existed legally before a zoning enactment made them non-conforming. This grandfathering protection for these uses ends if the establishment ceases operation for 30 continuous months. The burden is on the municipality to show that the property owner intentionally and voluntarily abandoned the non-conforming use.

Any structure rebuilt on the site of the non-conforming use must conform to existing zoning requirements for setbacks, height, bulk, and physical location of a structure.

This statute also places limits on the expansion of non-conforming off-site signs. An off-site sign, however, does not preclude any new or additional conforming use on the property on which the sign is located or on adjacent property under the same ownership.

Provisions in the statute establishing the 30-month abandonment period that ends grandfathering protection, that require rebuilt structures to conform to existing zoning restrictions, and that limit expansion of off-site signs do not apply to home rule cities, but they may opt into them.

Wireless Cell Towers

State law recognizes the ability of municipalities that have adopted planning and zoning regulations to regulate the siting of wireless cell towers, but prohibits: (1) regulating the placement of an antenna or related equipment on an existing tower unless this would require an extension that would require lighting or exceed the municipality’s height limitation, (2) considering a co-location an expansion and imposing additional costs or operating restrictions in a co-location unless the tower is owned by the municipality, or (3) requiring an applicant to provide any justification for radio frequency need T.C.A. §§ 13-24-304 - 305. The Competitive Wireless Broadband Investment, Deployment and Safety Act of 2018 significantly limits the authority of cities to regulate the location and placement of "small wireless facilities" or small cell antenna. T.C.A. §§ 13-24-401 thru 412.

Development Rights

T.C.A. §§ 13-7-101 and 201 authorize a city to purchase or accept the donation of development rights to real property.

Urban Forestry

Reference Number: MTAS-1346

Urban forestry is the art, science, and technology of managing trees, forests, and natural systems in and around cities, suburbs, and towns for the health and well being of all people. Urban forestry has become a critical emerging local government function for communities across Tennessee. Urban forestry transcends public works, parks, storm water and public safety.

On Jan. 4, 1872, J. Sterling Morton first proposed a tree-planting holiday to be called Arbor Day at a meeting of the Nebraska State Board of Agriculture. The date was set for April 10, 1872. Prizes were offered to counties and individuals for planting properly the largest number of trees on that day. It was estimated that more than 1 million trees were planted in Nebraska on the first Arbor Day.

Arbor Day was officially proclaimed [4] by the young state's governor, Robert W. Furnas, on March 12, 1874, and the day itself was observed April 10, 1874. In 1885, Arbor Day was named a legal holiday in Nebraska, and April 22, Morton's birthday, was selected as the date for its permanent observance.

Today in Tennessee, there are six communities that meet the four elements of the U.S. Department of Agriculture’s national allocation model for federal funding. It is a goal of the workshops to increase that number to more than 20. This will provide more grant funding opportunities from the federal government to the state of Tennessee. In addition, there currently are 36 Tennessee cities that meet the Tree City U.S.A. designation. Another goal of these workshops is to increase that total to 50 Tree City U.S.A designations.

This Urban Forestry workshop course provides an overview of the purpose and importance of a municipal urban forestry program. Topics covered include the economic and environmental benefits of urban forestry, how to start an urban forestry program for your community, roles of tree boards and staff, identifying potential community stakeholders, technical assistance providers, and best management practices in urban forestry.

Definition of Urban Forestry

Reference Number: MTAS-1347

Urban forestry is the management of trees for their contribution to the physiological, sociological and economic well-being of the urban society. Urban forestry deals with woodlands, groups of trees, individual trees, and where people live, urban tree areas include a great variety of habitats (streets, parks, derelict corners, etc.) where trees bestow numerous benefits and present numerous problems (Grey and Deneke, 1986).

Urban forestry is the art, science, and technology of managing trees, forests, and natural systems in and around cities, suburbs, and towns for the health and well being of all people.

Trees are major capital assets for communities. Just as streets, sidewalks, sewers, public buildings and recreational facilities are part of a community’s infrastructure, so are publicly owned trees. Trees, and collectively, the urban forest, are important assets that require the same care and maintenance as other public property.

It is very important to have a comprehensive urban forestry program that includes the following steps for successful implementation:
1. Select a program or standards.
2. Establish a tree board.
3. Adopt a tree/landscape ordinance.
4. Establish a budget.
5. Staff the program.
6. Develop an Urban Forestry Management Plan.

Environmental & Economic Benefits

Reference Number:

MTAS-1349

Urban Forestry Benefits — Environment:

- Trees improve air quality by trapping and holding dust particles that can damage lungs. Tree leaves absorb carbon dioxide and other poisonous gases and, in turn, replenish the atmosphere with oxygen for us to breathe. One acre of trees provides oxygen for 18 people and will absorb the amount of carbon dioxide each year equivalent to that produced by a car driven 26,000 miles. Trees act as a carbon sink by removing the carbon from CO2 and storing it as cellulous in the trunk.
- Trees reduce noise pollution by absorbing unpleasant sounds from the urban environment.
- Trees improve water quality by mitigating the impact of raindrops resulting in less surface runoff of water from storms and reduced soil erosion. This allows more recharging of the ground water supply, which is significantly reduced by paving. Wooded areas help prevent the transport of sediment and chemicals into streams.
- Trees reduce wind erosion of soil by providing a shield from heavy winds.
- Trees create wildlife diversity by providing a local ecosystem. Trees provide a suitable habitat for animals and birds that would otherwise be absent from urban areas.

Urban Forestry Benefits — Economy:

- Trees create a favorable first impression of a community to visitors.
- Trees enhance community economic stability by attracting businesses and tourists.
- People spend more because they tend to linger and shop along tree-lined streets.
- Trees make better employees. When businesses lease office space in wooded developments they find that their workers are more productive and absenteeism is reduced.
- Higher occupancy rates are found in apartments and offices in wooded areas, and tenants stay longer.
- Higher property values result from well landscaped properties that are more desirable. Studies have shown that property value can increase by 15 percent. Larger specimens equal higher values.

Energy & Health Benefits

Reference Number: MTAS-1350

Benefits — Energy:

- Trees save energy by providing cooling in the hotter months and serving as a windbreak in winter. As a result, less fossil fuel is burned for heating and cooling. Trees properly placed around buildings can reduce air conditioning needs by 30 percent. Trees strategically placed for windbreak protection can save 20 to 50 percent in energy used for heating.
- Trees reduce glare on sunny days.

Benefits — Health:

- Trees create feelings of relaxation and well-being when people live and work within urban forests.
- Trees provide privacy and sense of solitude and security.
- Trees shorten post-operative hospital stays when patients are placed in rooms with a view of trees and open spaces.

Elements and Steps of an Urban Forestry Program

Reference Number:

MTAS-1351

Major Elements and/or Steps:

- Select a program or standards.
- Establish a tree board.
- Adopt a model tree ordinance/landscape ordinance.
- Establish a program budget.
- Staff the program.
- Develop a management plan/inventory.

Each of these steps is detailed in the sections below:

Step 1 - Select a Program or Standards

Reference Number: MTAS-1352

The two most popular options for urban forestry programs or standards are the National Arbor Foundation and the National Allocation Method.

A. National Arbor Foundation-USA Program standards

To qualify for Tree City USA, a city must meet four standards established by the Arbor Day Foundation and the National Association of State Foresters. These standards were established to ensure that every qualifying community would have a viable tree management plan and program. The standards include the following:

1. Tree board or department

Someone must be legally responsible for the care and management of the community's trees. This may be a professional forester or arborist, an entire forestry department, or a volunteer tree board. Often, both a professional staff and an advisory tree board are present, which is a good goal for most communities. A tree board, or commission, is a group of concerned volunteer citizens directed by ordinance with developing and administering a comprehensive tree management program. Balanced, broad-based community involvement is encouraged. Boards function best if not composed entirely of tree-related professionals such as professors, nursery operators, arborists, etc. Fresh ideas and different perspectives are added by citizens with an interest in trees that is entirely vocational. Limited, staggered terms of service will prevent stagnation or burnout, while at the same assuring continuity.

2. Tree care ordinance

The tree ordinance must establish a tree board or urban forestry department and give this body the responsibility for writing and implementing an annual community forestry work plan along with authority over all publicly owned lands. Beyond that, the ordinance shall be flexible enough to fit the needs and circumstances of the particular community. A tree ordinance provides an opportunity to set good policy and back it with the force of law when necessary. Ideally, it will provide clear guidance for planting, maintaining and removing trees from streets, parks and other public places.

3. Community forestry program with an annual budget of at least $2 per capita

Evidence is required that the community has established a community forestry program that is supported by an annual budget of at least $2 per capita. At first, this may seem like an impossible barrier to some communities. However, a little investigation usually reveals that more than this amount is already spent by the municipality on its trees. If not, this may signal serious neglect that will cost far more in the long run. In such a case, working toward Tree City USA recognition can be used to reexamine the community's budget priorities and redirect funds to properly care for its tree resource before it is too late. Ideally, this standard will be met by focusing funding on an annual work plan developed after an inventory is completed and a report is approved by the city council. Such a plan will address species diversity, planting needs, hazardous trees, insect and disease problems, and a pattern of regular care such as pruning and watering.

4. An Arbor Day observance and proclamation
This is the least challenging and probably the most enjoyable standard to accomplish. An Arbor Day celebration can be simple and brief or an all-day or all-week observation. It can be a simple tree planting event or an award ceremony that honors leading tree planters. For children, Arbor Day may be their only exposure to the green world or a springboard to discussions about the complex issue of environmental quality. The benefits of Arbor Day go far beyond the shade and beauty of new trees for the next generation. Arbor Day is a golden opportunity for publicity and to educate homeowners about proper tree care. Utility companies can join in to promote planting small trees beneath power lines or being careful when digging. Smokey Bear's fire prevention messages can be worked into the event as can conservation education about soil erosion or the need to protect wildlife habitat. Still another way to develop Arbor Day is to link it with a tree-related festival. Some that are currently celebrated include dogwood festivals, locust bloom festivals and Macon, Georgia's Cherry Blossom Festival that annually brings more than $ 4.25 million into the local economy. In meeting the four standards, help is available. The urban and community forestry coordinator in your state forester's office will work with communities to take these first steps toward better community forestry.

B. National Allocation method
This model, governed by the Department of Agriculture, Division of Forestry, stresses the need for a community to meet the following four urban forestry elements:

- Tree board;
- Tree ordinance;
- Staffing; and
- Inventory/management plan.

Step 2 - Establish a Tree Board

Reference Number: MTAS-1353

Usually, the first step after initial educational efforts is to establish a legally constituted board, commission or committee to act as an advisory group to city government. This can be accomplished through an ordinance or charter procedure. Tree boards in larger cities may perform in broad planning, policy making, advisory and coordinating roles. In smaller towns, a tree board will be more involved in developing budgets, creating specific forestry plans and annual work plans, and perhaps even in helping carry out program operations.

Tree board members may be elected or appointed and may or may not be given policy-making powers. The board may be financially independent, an incorporated entity or a budgeted agency of city government.

A broad representation on the board from various agencies and interest groups will increase the board's credibility to balance the needs of different segments of the community.

A tree board ordinance is sometimes a stand-alone ordinance or part of a broader overall tree ordinance providing for care of urban trees. However constituted, the following elements should be included:

- Statement of creation and establishment;
- Number of members;
- Qualifications of members;
- Term of office, succession, and provision for staggered terms;
- Provision for vacancies;
- Compensation, if any;
- Board duties and responsibilities;
- Scope of responsibility; and
- Operational provisions, rules, recordkeeping, etc.

Step 3 - Adopt a Tree Ordinance/Landscape Ordinance

Reference Number: MTAS-1354

The next step is to develop a tree ordinance. The purpose of most ordinances is to protect and maintain existing trees while providing for new ones. Ordinances providing for the overall care of the urban forest vary greatly. The ordinance should provide for and facilitate adequate management of your urban forest. To do so, your ordinance should do three things: 1) provide authority to conduct forestry programs; 2) define responsibility - who is responsible for certain parts of the urban forest - particularly important in cases of street side or other easement areas; and 3) set forth minimum standards for management to provide for public safety, health, convenience, and general welfare.

To ensure the above, city tree ordinances generally include the following elements:

- Purpose and intent;
- Definitions;
- Establishment of a tree board (may be a separate ordinance);
- Clarification of title to and responsibility for trees on city property;
- Designation of city forester or other official with responsibility and authority;
- Planting requirements for trees on municipal property or easements;
- Maintenance responsibilities and clarification of responsibilities of adjacent property owners in cases of street sides or other easements;
- Removal requirements and specifications;
- Condemnation of trees on private property;
- Requirements of private arborists and landscape contractors (licensing, bonding, insurance);
- Preservation or protection of heritage and historic trees and other vegetation;
- Prohibition of interference with forestry officials; and
- Violations, penalties and appeals.

A comprehensive tree ordinance addresses the following three key components: 1) tree protection; 2) landscape architecture standards; and 3) street tree requirements.

Establishing a Tree Board Ordinance

Reference Number: MTAS-1355

This document is designed to assist communities in preparing tree ordinances. It is intended to supplement, not replace, the expertise of the community's legal resources.

Note: Discussions and explanations are in ***bold, italic***. Ordinance sections are in regular type and should be double spaced to allow for insertions appropriate for the individual community.

The purpose of this tree ordinance is to provide a mechanism for the management of trees and woody vegetation in the City/Town of _____. Since adoption of an ordinance is one of the requirements for Tree City USA recognition, the City/Town of _____ hereby adopts this ordinance in order to establish guidelines for tree planting, cutting and care in the City/Town of _____.

Article I. Definitions

The following definitions may be considered for inclusion in a city tree ordinance.

1. Tree — a woody plant with a single trunk or multiple trunks capable of growing to a height of 15 feet or more.
2. Shrub — a woody plant with a multiple stem capable of growing to a height of up to 15 feet.
3. Small Tree — a tree that grows up to 25 feet in height.
4. Medium Tree — a tree that grows between 25 and 45 feet in height.
5. Large Tree — a tree that grows greater than 45 feet in height.
6. Public Tree — a tree growing in an area owned by the community, including parks, public buildings,

schools, hospitals and other areas to which the public has free access.
7. Private Tree — a tree growing in an area owned by a private individual, business or commercial establishment, company, industry, private institution or other area not owned by government entities.
8. Street Tree — a tree growing within a public right of way along a street, in a median or in a similar area in which the public right of way borders areas owned by private individuals.
9. Public Utility — that section of local government in charge of electrical, water, sewer, natural gas, telephone or cable television distribution in the community and having responsibility for keeping distribution lines free of hazards, including trees.
10. Private Utility — an entity similar to above that is a private for-profit corporation.
11. City Forester — a city employee responsible for the city's tree program. He or she also may be titled urban forester, city arborist, municipal forester or tree warden.
12. Pruning — selective removal and thinning of the upper portions of the tree, taking into account the shape and natural structure of the tree.
13. Topping — arbitrary removal of various portions of the tree, thereby leaving stubs, with no regard for the natural structure of the tree.
14. Crownspread — the distance from the ends of branches on one side of the tree, through the trunk, to the ends of the branches on the other side.
15. Line Clearance — removal of limbs and branches growing within a set distance of electrical distribution lines.
16. Tree Density Factor — a number derived from the combination of the density of trees remaining on a site and the density of additional trees to be planted.
17. Other definitions may be required by a particular city's unique situation.

Article II. Tree Board

Section 1 — Creation of a Tree Board
There is hereby created a Tree Board for the City/Town of _____, which shall consist of five (5) members (more or less if the city chooses) who are citizens and residents of the city. Members shall be appointed by the mayor and approved by the governing body.

(Note: Depending on expertise available, this section may specify that one or more members of the board be representatives of institutions that deal with trees and have expertise in the area of forestry, such as colleges, government agencies, etc.)

Section 2 — Term of Office
Members shall serve three (3) year terms, except the first board, which will have two (2) members appointed for one year and three (3) members appointed for two years. Members may serve successive terms. Vacancies are filled by appointment by the Mayor until the end of the term.

Section 3 — Operation
The board shall choose its own officers, make its own administrative rules and regulations, and keep a record of its proceedings. Copies of the minutes shall be available to the governing body after each Tree Board meeting. Meetings shall be held quarterly, or more often if called by the chairman of the board. A majority of the members shall constitute a quorum for transaction of business.

Section 4 — Duties and Responsibilities
The duties of the Tree Board shall include, but not be limited to the following:

- Prepare a tree plan for the community
- Coordinate tree-related activities
- Conduct an Arbor Day ceremony
- Provide tree information to the community
- Maintain a recommended tree list for the community
- Recognize groups and individuals completing tree projects
- Coordinate publicity concerning trees and tree programs
- Coordinate donations of trees or money to purchase trees
- Adopt rules and regulations pertaining to the tree program
- Perform other tree-related duties and opportunities that arise from time to time

The Tree Board may consult with arborists, foresters and others with specific expertise in the subject area when performing their duties and responsibilities. Any compensation or contracts for services performed by such experts or professionals shall be approved by the governing body.

Section 5 — Compensation
Members of the board shall serve without compensation.

(Note: Most cities do not pay their tree board members.)

Article III A. Tree Planting Option 1

The following sections provide only a general statement about tree planting. This option should be used if the city Tree Board will adopt rules and regulations governing planting.

Section 1 — Tree planting shall be undertaken by the City/Town on all public areas in a systematic manner to assure diversity of age classes and species. Areas to be planted, density, appropriate species, and other aspects of the planting function shall be determined by the Tree Board and contained in rules and regulations adopted by the board.

Section 2 — Planting of trees on private property is encouraged, especially in areas where the public may have an extraordinary interest. The Tree Board will provide information about species, planting techniques, and placement guidelines when requested by residents.

Article III B. Tree Planting Option 2

The following sections provide a detailed outline of planting requirements as an alternative to rules and regulations adopted by the Tree Board.

Section 1 — Size
All trees in public areas capable of reaching a mature height of more than 30 feet shall be at least 1-1/4" diameter (at 6" height) and 8 to 10 feet tall at time of planting. Small maturing trees, between 15 feet and 30 feet at maturity, shall be 5 feet to 6 feet tall at planting.

Section 2 — Grade
Trees to be planted shall be free of insects, diseases, and mechanical injuries and have reasonably straight trunks with a strong leader branch. Balled and burlapped trees shall be required where bare root trees cannot be handled and stored properly prior to planting.

Section 3 — Spacing
Large trees capable of achieving more than 45 feet in height should be spaced at least 40 feet apart. Medium trees capable of achieving 30 to 45 feet in height should be spaced 30 feet apart. Small trees capable of achieving 15 to 30 feet in height should be spaced at 20-foot intervals. Exceptions may be granted by the Tree Board when a valid landscape plan is followed or when larger or smaller spacings are needed to achieve a desired effect.

Section 4 — Planting near existing objects
Only small trees are permitted to be planted within 10 feet of utility lines. In street plantings, no tree may be planted closer than 10 feet from a fire hydrant, utility pole or street light, 15 feet from a driveway or street intersection, or 30 feet from a street or street intersections. When planting between sidewalks and curbs, 6 feet between curb and sidewalk is the minimum distance required for small trees, 8 feet for medium trees, and 10 feet for large trees.

Section 5 — Planting Techniques
Holes shall be dug to give adequate room for the root system. The diameter of the hole should be at least 12 inches larger than the diameter of the root ball or root system. The depth of planting should be at the same level as the tree had grown previously. Backfill should be the same material that was removed from the hole, with no additives except low nitrogen fertilizer, which may be added if the Tree Board deems it necessary. Holes dug by power augers must have their sides chipped by a hand shovel to break glazing affected by the auger. Trees may be guyed in windy areas or in other areas where support is determined necessary by the Tree Board. All guy wires shall be removed within 18 months.

Article IV A. Tree Care Option 1

Ordinances generally have one or more sections dealing with tree care and maintenance. As in Article III, there is the option of including a broad statement about tree care, to be supplemented later by rules and regulations adopted by the tree board. The following sections are general and should be supplemented by the board's rules and regulations.

Section 1 — Tree maintenance rules and regulations may address pruning, fertilizing, watering, insect and disease control or other tree care activities. The city/town shall take responsibility for maintenance activities needed to keep the public trees reasonably healthy and minimize the risk of hazard trees could cause to residents and visitors of the city/town. Determination of maintenance needs will be made by the Tree Board. Tree care may be accomplished by city/town personnel or by contract with commercial tree care companies.

Section 2 — Care and maintenance of private trees are encouraged to minimize safety hazards to people and the health risk to other trees in the community. The Tree Board will provide information in a timely manner to residents about all aspects of tree care, including the latest techniques and procedures currently being practiced.

Section 3 — The practice of tree topping is prohibited on all public trees and is strongly discouraged as a tree care practice for private trees. Proper pruning with branch removal at branch or trunk junctures is the best practice for limb removal.

Article IV B. Tree Care and Protection Option 2

A number of other options also may be included in a tree care section. For instance, certain specifications about pruning, fertilizing, or specific insect or disease problems may be included as an alternative to the prior section, which leaves such determinations to the tree board.

Section 1 — Trees growing along side streets and sidewalks must be pruned free of limbs to a height of 8 feet for sidewalks and 12 feet for streets.

Section 2 — The standard tree pruning method will be branch collar pruning as opposed to stubs or flush cuts. Large limbs and branches will be precut to prevent excessive peeling of the bark, followed by cutting the remaining stub.

Section 3 — Fertilization of trees will be accomplished when the Tree Board determines a tree is deficient in nutrients. Determination is made by leaf color or size, twig growth, soil test or other diagnostic methods. Fertilizer will be applied on the soil surface at the appropriate time of year.

Section 4 — Because of the special significance of the dogwood tree (this also could apply to oak, elm, crabapple or any species of tree) to the city/town, the Tree Board will inspect trees for dogwood borer (or other insect or disease problems) and effect treatment, where infestation has occurred, at the appropriate time of year. The Tree Board also shall give notice to owners of private infested trees and encourage said private owners to effect treatment of affected trees growing on their property.

Section 5 — Extensive root system damage to public trees is prohibited. Grade changes and trenching within the crown spread (ends of branches) is prohibited without permission of the Tree Board. Private owners of trees are encouraged to consult the Tree Board before proceeding with these activities.

Article V. Tree Removal

Section 1 — Dead trees and dying trees on public property that pose a safety or health risk to residents or to other trees will be removed. Upon inspection by the Tree Board, trees on public property found to be dead and those found to be dying that pose a safety or health risk to residents or other trees shall be removed in a timely manner.

Section 2 — Upon finding dead or dying trees on private property, the Tree Board shall notify the landowner of such condition in writing, by mail, and encourage the landowner to remove said tree.

Section 3. — Stump removal to below ground level is considered part of the tree removal process.

Article VI. Special Considerations

Section 1 — Tree topping of all public trees is prohibited, and topping of private trees is strongly discouraged. The Tree Board shall promote the use of proper pruning procedures.

Section 2 — Tree pruning in the vicinity of public power lines shall be undertaken by the public utility (or private utility, if applicable) to assure the supply of electricity to its customers. Drop crotch pruning and pruning to laterals are the required methods. Where possible, the utility shall undertake a program of replacing large trees with small maturing ornamental trees of the kind recommended by the Tree Board.

Article VII. Protection from Construction, Development and Land Use Changes

The city/town maintains that it is in the best interest of all concerned to save as many existing trees as practical. In this interest, as it pertains to commercial and residential development, the city/town may adopt regulations requiring developers and builders to create tree impact plans prior to removing any tree from project sites. Regulations adopted by the city/town may further require minimum tree densities for different classes or types of developments, and developers/builders may be required to plant trees to meet such density requirements. The Tree Board will assist the city/town in drafting the regulations to be adopted or will provide recommendations for regulations that should be adopted. Regulations adopted by the city/town may be incorporated into subdivision regulations to be enforced by the Planning Commission or may be incorporated into the city/town zoning ordinance to be enforced by the board or official having authority over zoning issues.

Requiring City Forester Ordinance

Reference Number: MTAS-1356

This document is designed to assist communities in preparing tree ordinances. It is intended to supplement, not replace, the expertise of the community's legal resources.

Note: *Discussions and explanations are in* bold, italic*.. Ordinance sections should be double spaced to allow for insertions appropriate for the individual community.*

The purpose of this tree ordinance is to provide a mechanism for the management of trees and woody vegetation in the City/Town of _____. Since adopting an ordinance is one of the requirements for Tree City USA recognition, the City/Town of _____ hereby adopts this ordinance in order to establish guidelines for tree planting, cutting and care in the City/Town of _____.

Article I. Definitions

The following definitions may be considered for inclusion in a city tree ordinance.

1. Tree — a woody plant with a single trunk or multiple trunks capable of growing to a height of 15 feet or more.
2. Shrub — a woody plant with a multiple stem capable of growing to a height of up to 15 feet.
3. Small Tree — a tree that grows up to 25 feet in height.
4. Medium Tree — a tree that grows between 25 and 45 feet in height.
5. Large Tree — a tree that grows greater than 45 feet in height.
6. Public Tree — a tree growing in an area owned by the community, including parks, public buildings, schools, hospitals, and other areas to which the public has free access.
7. Private Tree — a tree growing in an area owned by a private individual, business or commercial establishment, company, or industry, private institution, or other area not owned by government entities.
8. Street Tree — a tree growing within a public right of way along a street, in a median or in a similar area in which the public right of way borders areas owned by private individuals.
9. Public Utility — that section of local government in charge of electrical, water, sewer, natural gas, telephone or cable television distribution in the community and having responsibility for keeping distribution lines free of hazards, including trees.
10. Private Utility — an entity similar to above that is a private for-profit corporation.
11. City Forester — a city employee responsible for the city's tree program. He or she may also be titled urban forester, city arborist, municipal forester, or tree warden.
12. Pruning — selective removal and thinning of the upper portions of the tree, taking into account the shape and natural structure of the tree.
13. Topping — arbitrary removal of various portions of the tree, thereby leaving stubs, with no regard for the natural structure of the tree.
14. Crownspread — the distance from the ends of branches on one side of the tree, through the trunk, to the ends of the branches on the other side
15. Line Clearance — removal of limbs and branches growing within a set distance of electrical distribution lines.
16. Tree Density Factor — a number derived from the combination of the density of trees remaining on a site and the density of additional trees to be planted.
17. Other definitions may be required by a particular city's unique situation.

Article II. City Forester

Section 1 — Appointment

The City Forester shall be appointed by the governing body after completing a competitive review process. The governing body shall determine whether the City Forester shall be a contractor, performing duties for the city/town in accordance with terms specified in a contract, or shall be a municipal employee subject to all the rules, regulations and terms of employment pertaining to municipal employees. The City Forester shall, through education and experience, be skilled and trained in the art and science of municipal arboriculture.

Section 2 — Compensation

If the governing body determines that the City Forester shall be a municipal employee, he or she shall receive a salary commensurate with training and experience, plus any other benefits that municipal employees at that position level may receive. If the governing body determines that the City Forester shall be a contractor, the compensation and any benefits that may be made available to the City Forester shall be specified in the contract.

Section 3 — Duties

The duties of the City Forester shall include but not be limited to the following:

a. Plant, maintain and remove trees under his jurisdiction
b. Coordinate all tree activities with other agencies, organizations and groups in the city
c. Provide information and public relations to citizens and groups in the city regarding trees
d. Maintain a recommended tree species list
e. Gather information and publish reports as needed about the city tree resource
f. Respond to complaints about tree problems
g. Prepare long-range and annual plans for city trees
h. Perform other tree-related duties

The City Forester shall further provide recommendations to the governing body regarding rules and regulations to be adopted governing the planting, care and maintenance and removal of trees in the city/town.

Article III A. Tree Planting Option 1

Ordinances generally contain guidelines governing tree planting. One ordinance option is to broadly state planting requirements and leave details to rules and regulations to be adopted by the city/town at a later date. in all options, it is recommended that lists of tree species NOT be incorporated into the ordinance. lists should be formulated by the city Forester where flexibility for updating is greatest.

Section 1 — Tree planting shall be undertaken by the city on all public areas in a systematic manner to assure diversity of age classes and species. Areas to be planted, density, appropriate species, and other aspects of the planting function shall be determined by the governing body, in consultation with the City Forester.

Section 2 — Planting of trees on private property is encouraged, especially in areas where the public may have an extraordinary interest. The City Forester will provide information about species, planting techniques, and placement guidelines when requested by residents.

Article III B. Tree planting Option 2

The following sections provide a detailed outline of planting requirements. if they are not included in the ordinance, they should be adopted as rules and regulations at a later date.

Section 1 — Size

All trees in public areas capable of reaching a mature height of more than 30 feet shall be at least 1-1/4” diameter (at 6” height) and 8 to 10 feet tall at time of planting. Small maturing trees, between 15 feet and 30 feet at maturity, shall be 5 feet to 6 feet tall at planting.

Section 2 — Grade

Trees to be planted shall be free of insects, diseases and mechanical injuries and have reasonably straight trunks with a strong leader branch. Balled and burlapped trees shall be required where bare root trees cannot be handled and stored properly prior to planting.

Section 3 — Spacing
Large trees capable of achieving more than 45 feet in height should be spaced at least 40 feet apart. Medium trees capable of achieving 30 to 45 feet in height should be spaced 30 feet apart. Small trees capable of achieving 15 to 30 feet in height should be spaced at 20 feet intervals. Exceptions may be granted by the City Forester when a valid landscape plan is followed, or when larger or smaller spacings are needed to achieve a desired effect.

Section 4 — Planting near existing objects
Only small trees are permitted to be planted within 10 feet of utility lines. In street plantings, no tree may be planted closer than 10 feet from a fire hydrant, utility pole or street light, 15 feet from a driveway or street intersection, or 30 feet from a street or street intersections. When planting between sidewalks and curbs, 6 feet between curb and sidewalk is the minimum distance required for small trees, 8 feet for medium trees, and 10 feet for large trees.

Section 5 — Planting Techniques
Holes shall be dug to give adequate room for the root system. The diameter of the hole should be at least 12 inches larger than the diameter of the root ball or root system. The depth of planting should be at the same level as the tree had grown previously. Backfill should be the same material that was removed from the hole with no additives except low nitrogen fertilizer, which may be added if the City Forester deems it necessary. Holes dug by power augers must have their sides chipped by a hand shovel to break glazing affected by the auger. Trees may be guyed in windy areas or in other areas where support is determined necessary by the City Forester. All guy wires shall be removed within 18 months.

Article IV A. Tree Care Option 1

Ordinances generally have one or more sections dealing with tree care and maintenance. As in Article iii, there is the option of including a broad statement about tree care or outlining detailed sections about maintenance. The following section is broad and should be supplemented later by rules and regulations to be adopted by the governing body.

Section 1 — Tree maintenance may include pruning, fertilizing, watering, insect and disease control or other tree care activities. The city/town shall take responsibility for maintenance activities needed to keep the public trees reasonably healthy and to minimize the risk hazard trees could cause to residents and visitors of the city/town. Determination of maintenance needs will be made by the City Forester. Tree care may be accomplished by city personnel, by the City Forester or by contract with commercial tree care companies.

Section 2 — Care and maintenance of private trees are encouraged to minimize safety hazards to people and the health risk to other trees in the community. The City Forester will provide information in a timely manner to residents about all aspects of tree care, including the latest techniques and procedures currently being practiced.

Section 3 — The practice of tree topping is prohibited on all public trees and is strongly discouraged as a tree care practice for private trees. Proper pruning with branch removal at branch or trunk junctures is the best practice for limb removal.

Article IV B. Tree Care and Protection Option 2

A number of other options also may be included in a tree care section. For instance, certain specifications about pruning, fertilizing, or specific insect or disease problems may be included.

The following provisions apply to trees growing on public property and on public right-of-ways and easements.

Section 1 — Trees growing along side streets and sidewalks must be pruned free of limbs to a height of 8 feet for sidewalks and 12 feet for streets.

Section 2 — The standard tree pruning method will be branch collar pruning as opposed to stubs or flush cuts. Large limbs and branches will be precut to prevent excessive peeling of the bark, followed by cutting the remaining stub.

Section 3 — Fertilization of trees will be accomplished when the City Forester determines a tree is deficient in nutrients. Determination is made by leaf color or size, twig growth, soil test, or other diagnostic methods. Fertilizer will be applied on the soil surface at the appropriate time of year.

Section 4 — Because of the special significance of the dogwood tree (this also could apply to oak, elm, crabapple or any species of tree) to the city/town, the City Forester will inspect trees for dogwood borer (or other insect or disease problems) and effect treatment, where infestation has occurred, at the appropriate time of year. The City Forester shall also give notice to owners of private infested trees and encourage said private property owners to effect treatment of affected trees growing on their property.

Section 5 — Extensive root system damage to public trees is prohibited. Grade changes and trenching within the crown spread (ends of branches) is prohibited without permission of the City Forester. Owners of private trees are encouraged to consult the City Forester before proceeding with these activities.

Article V. Tree Removal

Section 1 — Dead trees and dying trees on public property that pose a safety or health risk to residents or to other trees will be removed. Upon inspection by the City Forester, trees on public property found to be dead and those found to be dying that pose a safety or health risk to residents or other trees shall be removed in a timely manner.

Section 2 — Upon finding dead or dying trees on private property, the City Forester shall notify the landowner of such condition in writing, by mail, and encourage the landowner to remove said tree.

Section 3 — Stump removal to below ground level is considered part of the tree removal process.

Article VI. Special Considerations

Section 1 — Tree topping of all public trees is prohibited, and topping of private trees is strongly discouraged. The City Forester shall promote the use of proper pruning procedures.

Section 2 — Tree pruning in the vicinity of power lines shall be undertaken by the public utility (or private utility, if applicable) to assure the supply of electricity to its customers. Drop crotch pruning and pruning to laterals are the required methods. Where possible, the utility shall undertake a program of replacing large trees with small maturing ornamental trees of the kind recommended by the City Forester.

Article VII. Protection from Construction, Developments and Land Use Changes

The city/town maintains that it is in the best interest of all concerned to save as many existing trees as practical. In this interest, as it pertains to commercial and residential development, the city/town may adopt regulations requiring developers and builders to create tree impact plans prior to removing any tree from project sites. The regulations adopted by the city/town may further require minimum tree densities for different classes or types of developments, and developers/builders may be required to plant trees to meet such density requirements. The City Forester will assist the city/town in drafting the regulations to be adopted, or by providing recommendations for regulations which should be adopted. Regulations adopted by the city/town may be incorporated into subdivision regulations to be enforced by the Planning Commission or may be incorporated into the city/town zoning ordinance to be enforced by the board or official having authority over zoning issues.

Step 4 - Develop a Program Budget

Reference Number: MTAS-1357

For any program to be successful there must be a budget. To qualify for Tree City USA a city must establish an annual budget of at least $2 per capita.

Step 5 - Staff the Program

Reference Number: MTAS-1358

A good way to ensure adequate staffing is to cross train your employees in public works to take care of trees. City arborists should be certified. Work plans should indicate how the jobs will be accomplished. There are several possibilities depending on each municipality’s situation and preference for getting work done. A few options include the use of in-house (city or county) crews, outside contracts, volunteer or contractual labor, or any combination of these.

The decision on whether to use municipal workers and equipment or contractors, or both, to perform community forestry activities depends on many variables. Following are some of the more common ones:

- The size of the municipality and its urban forest dictate, to a degree, the community's degree of flexibility in the mix of resources used. Larger municipalities have a portion of their work done by in-house crews because it assures that crews are available for emergencies and provides for more flexibility,
- Local policies and regulations relating to municipal work forces and purchasing and contracting for services may determine use of in-house resources instead of contracting.
- Cost effectiveness of in-house services is certainly a consideration. Some activities may be done more effectively by contractors. While this may not be the overriding factor, it should be part of the overall consideration.
- Periodic or seasonal characteristics of some jobs may lend themselves to contracted services, and this may appeal to some decision makers. Because there is no long-term commitment in financing contract operations, as opposed to establishing a municipal work force and purchasing equipment, funds for the use of contractor services may be easier to secure for certain activities.
- Employees involved in urban forestry should have accompanying job descriptions and employers should provide ample training and development opportunities.

Tips for Selecting an Arborist

Reference Number: MTAS-1359

Hiring a tree care provider deserves careful consideration and caution. A mistake can be expensive and long lasting, while the right choice can assure health, beauty and longer life for your trees and landscape. The following suggestions will help a board select an arborist:

- Look for professional membership affiliations.
- Request that the arborist or tree worker be certified through a program of the International Society of Arboriculture (ISA). This program is the standard of performance for appropriate training, experience and knowledge about tree care. Additionally, it is best to use an arborist who is familiar with native trees.
- Require certificate insurance.
- Ask for local references.
- A good arborist will offer a wide range of services, including removal, pruning, fertilizing, pest control, etc.
- A good arborist will not recommend topping.
- A knowledgeable arborist will not use climbing spikes if the tree is to remain in the landscape.

Tips for Working with Volunteers

Reference Number: MTAS-1360

Sustainable urban forestry requires far more than a single department or organization responsible for a community's trees. It requires a partnership of all interested people, young and old, professional and non-professional. Volunteers can fill this need. Some of the benefits when using volunteers include:

1. **Obtaining skills that may not be on staff.** Volunteers typically include a cross section of the community: lawyers, landscapers, writers, artists, business people, teachers and many others. Their talents and contacts can add depth and power to any forestry program.

2. **New ideas.** An array of vocational and cultural backgrounds is sure to bring ideas. Some may not be workable, but others can lead to great new projects or the success of old ones.

3. **Public support.** Volunteers can serve as a conduit between urban foresters and their constituents. They can speak up for funding, defend management decisions, challenge politicians or special interests, and serve as a link with broad segments of the community.

4. **Extra hands, more work.** Whether it is pruning young trees, planting, or staffing exhibits and educational programs, volunteers expand the urban forestry work force. More can be accomplished, benefiting the tree resource, citizens of the community, and the volunteers themselves.

According to the National Arbor Day Foundation, there are five important tips to working well with volunteers:

1. **Work with existing volunteer groups when possible instead of creating yet another organization.** Or, if you are involved in the leadership of a group, aggressively recruit members. Of course, be open to all who are interested, but also personally ask people to join who you know would add strength, balance, diversity and the kind of talent needed to accomplish your goals.

2. **Provide direction.** Most volunteers want guidance and do not want their time wasted. Use an agenda at meetings, assign specific doable tasks complete with deadlines and a clear idea about the expected outcome or product. For specific positions (secretary, treasurer, etc.) develop job descriptions just like those for paid positions.

3. **Provide orientation and training.** Orientation can be a presentation or at least a manual. The manual should include the history, mission and goals of your organization; policies; a directory of who's who; and basic information about tree care and urban forestry.

4. **Supervise.** An important part of successful volunteer management is trust and delegation of duties. Train and explain, then step back and let the volunteers do their jobs. However, provide helpful feedback as needed and plenty of positive reinforcement.

5. **Thank!** Virtually everyone likes to be recognized for the good works they perform, especially volunteers. Often, this is the only pay they receive. Express appreciation often and sincerely, including written notes, formal letters, plaques or other tokens of appreciation.

Step 6 - Develop a Management Plan

Reference Number: MTAS-1361

In order to prepare an up-to-date, comprehensive management plan, it is essential to follow a three-tiered model including

- tree inventory
- assessment and
- urban forestry management plan.

Tree Inventory Plan

Reference Number: MTAS-1362

[The following text in this Tree Inventory Section was prepared by State Forester Bruce Webster.]

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Tree Inventory Plan

The simplest form of inventory is a tree count. It is the quickest, easiest, cheapest inventory, and it can be done by anyone who can count. The results would be useful to someone who might want to know the number of trees on a given property or within a certain area, but a simple tree count has major limitations. Almost immediately questions such as "What kinds of trees are there?" or "How big are they?" are asked.

It is of the utmost importance to ask these types of questions before an inventory is conducted. A manager or owner must decide what information he or she needs and how that information will be used. Is knowing the tree species important? How much detail about tree location is required? Gathering

information about trees is expensive and time consuming. Collecting more information than is needed is wasteful, but gathering too little information would necessitate redoing the inventory.

Why is an inventory of trees so important? There are several reasons. First, trees are a community resource. They produce shade, absorb air pollutants and mitigate storm water runoff. They have a direct, measurable positive economic benefit to a community. Second, trees provide psychological and aesthetic benefits. Third, trees are long lived, and as such, need to be considered part of the capital assets of the community. Fourth, trees need periodic maintenance. Because they are long lived, they cannot be ignored without adverse consequences to the community. And finally, they are large organisms and can create conflicts with and cause damage to homes, cars and other community assets.

Repeating the Inventory

Because trees are biological organisms, they create a dynamic environment. The forest or landscape is not static; it is constantly changing. Therefore, while data from the first inventory is used to guide development of the tree management, maintenance, or planting plan, the trees are changing, creating the need to repeat the inventory after a period of years.

The second inventory can be more valuable than the first because an inventory is a picture of the trees when data are collected. The second picture not only provides the basis for the revised management plan, it can be compared with the first and reveal the changes and trends that are occurring. To accurately capture these trends and changes, the same area must be inventoried the second time, whether or not it is the same plots or landscaped areas.

Inventory Techniques

Reference Number: MTAS-1363

The task of developing an inventory of a forest can be daunting. For instance, how does one go about getting information about a plot of forestland that is 200 to 300 acres in size? It would be impossible to measure and record every tree.

Foresters collect data from sample plots from the forest. The plot may be a quarter-acre in size, and they might take data from 25 to 30 plots. Within each plot the species; tree sizes, usually diameter and log length; conditions, especially of the trunks; and locations are recorded. The location includes the plot location within the forest, and many times the locations of individual trees within the plot.

The data from all the plots are then summarized, and a process called developing an assessment of the woods is completed. This leads to the development of a plan for the forest.

When inventorying urban and landscape trees, the system may employ a plot sampling or a complete inventory. For public trees, a complete inventory typically is undertaken. The argument for this is that since it is not a natural forest, sampling would not give statistically valid data, and the information gathered may be applied directly to management needs for an individual tree. Again, data from all the trees are summarized in an assessment then used to develop a management plan. If other aspects of the urban forest, such as private property or wooded areas, need to be inventoried, a sampling technique may be employed.

What technique should be used in a greenway where there is a mix of landscape trees and forestland? It may require both techniques and two inventories. The landscape tree inventory may be used for landscape trees in mowed areas, while a sampling may be used in wooded areas.

Because greenways may be long narrow strips of land, a special plot system may be employed that takes a cross section of the greenway at periodic intervals.

An aerial imagery inventory has its own unique set of uses and has a completely different approach with its unique data set of information collected.

Data Collection

Reference Number: MTAS-1364

Generally there are four pieces of information collected on each tree during an inventory: species, size, condition and location. Many inventories include work needed as a fifth piece of information, but here it will be considered a subset of the condition determination. The reasoning is that a poor condition rating often can be attributed to a lack of maintenance, and completing tree maintenance often improves the condition rating. Tennessee's inventory system also includes a target classification, which is a component of evaluating whether a tree is hazardous.

A Note About Planting

In addition to recording information about trees, an inventory often samples tree spaces so that managers can have an indication of planting needs. Obviously, species, size and condition data cannot be collected on a tree that isn't there, but the potential location of a tree is important in developing the long-term management plan.

Species

Reference Number: MTAS-1365

Knowing what trees are growing in the park, greenway, or other forested area is vital. The types and frequencies of trees can provide a significant amount of information. For instance, an area dominated by one species can indicate the potential for insect and disease problems. (Dutch elm disease taught us that a monoculture of American elms along city streets is an invitation to disaster.) Also, knowing the species mix present can be a guide to developing diversity by planting less common species of trees.

Information on species typically is recorded by species name. Either the common or the scientific name can be used. Some inventory systems use a species code. This is useful to speed data recording, but it requires familiarity with the codes. Unless an individual is doing an extensive inventory, memorizing codes is not practical.

Occasionally inventories will record variety or cultivar, if known. Because cultivars and varieties are so similar to the species, collecting this information typically is not recommended unless there is a specific use for this data. An inventory will sometimes record only genus information, such as oak, elm or hickory, but species specific information is preferred.

Size

Reference Number: MTAS-1366

There are three components that make up tree size. They are diameter or circumference of the trunk, height or crown height, and crown spread (canopy cover).

Measurements of forest trees include diameter or circumference and a trunk height. These dimensions give the volume of wood in a tree that then can be converted to lumber.

Urban and landscape trees may be measured in any number of ways. The most common is to measure diameter because of the speed and convenience of collecting data while giving an indication of size. This data can be used to make general conclusions about age of a population. (Species frequency may skew any age conclusions if the tree population includes a significant number of small maturing trees. Also, any direct correlation between size and age for an individual tree cannot be determined.)

Other size measurements may be taken if specialized data is needed. This relates back to the real purpose of doing an inventory. For instance, crown spread and crown height may be measured to give data on total canopy cover and crown volume over the landscape, which can be plugged into formulas that calculate the amount of solar or rainfall interception (heat island effect, storm water impact). Another size measurement combination could be trunk diameter and trunk height that would give information about urban tree biomass (biomass energy potential).

Some tree inventory systems record the actual tree size, while others use a size class. The advantage to record the actual trunk diameter in 2” diameter classes is that detailed information is gathered but can be categorized into size classes. Commonly used size classes are 0-6”, 7-12”, 13-18”, 19-24”, 25-30”, and 31” and up.

Condition

Reference Number: MTAS-1367

The purpose of recording condition is to get a general idea of the health and potential hazard of the tree. Condition looks at insect and disease problems, structure of the tree’s limbs, crown balance, foliage color (if available), trunk decay and missing bark, trunk flare wounds, estimate of life expectancy, growth (twig), dieback and other potential problems.

Assessment: Condition is usually converted to a numeric code relating to the factors mentioned. A common condition class system uses a 1 through 5 condition rating, with 1 being excellent condition. Other systems may use 1 through 10.

If the purpose of the inventory is to implement maintenance on the tree population, then recording the work needed is required. Work needed may include removal, light or extensive pruning, insect or disease treatment, or other intervention. If the purpose of the inventory is to evaluate tree hazard, then potential failure and potential target are subsets of the condition class that should be recorded.

Location

Reference Number: MTAS-1368

Location data is driven primarily by the amount of detail needed. If the purpose of the inventory is to have a general idea about the tree population within a park or certain area of a community, identifying that tree within the park or community may be sufficient. The location usually is identified sufficiently so that an individual tree may be found by another person. This detail can be provided by GPS coordinates or through construction of a map when the inventory is completed or with other detailed location methods. A detailed location must be recorded if follow-up evaluation or maintenance of an individual tree is one of the purposes of conducting the inventory.

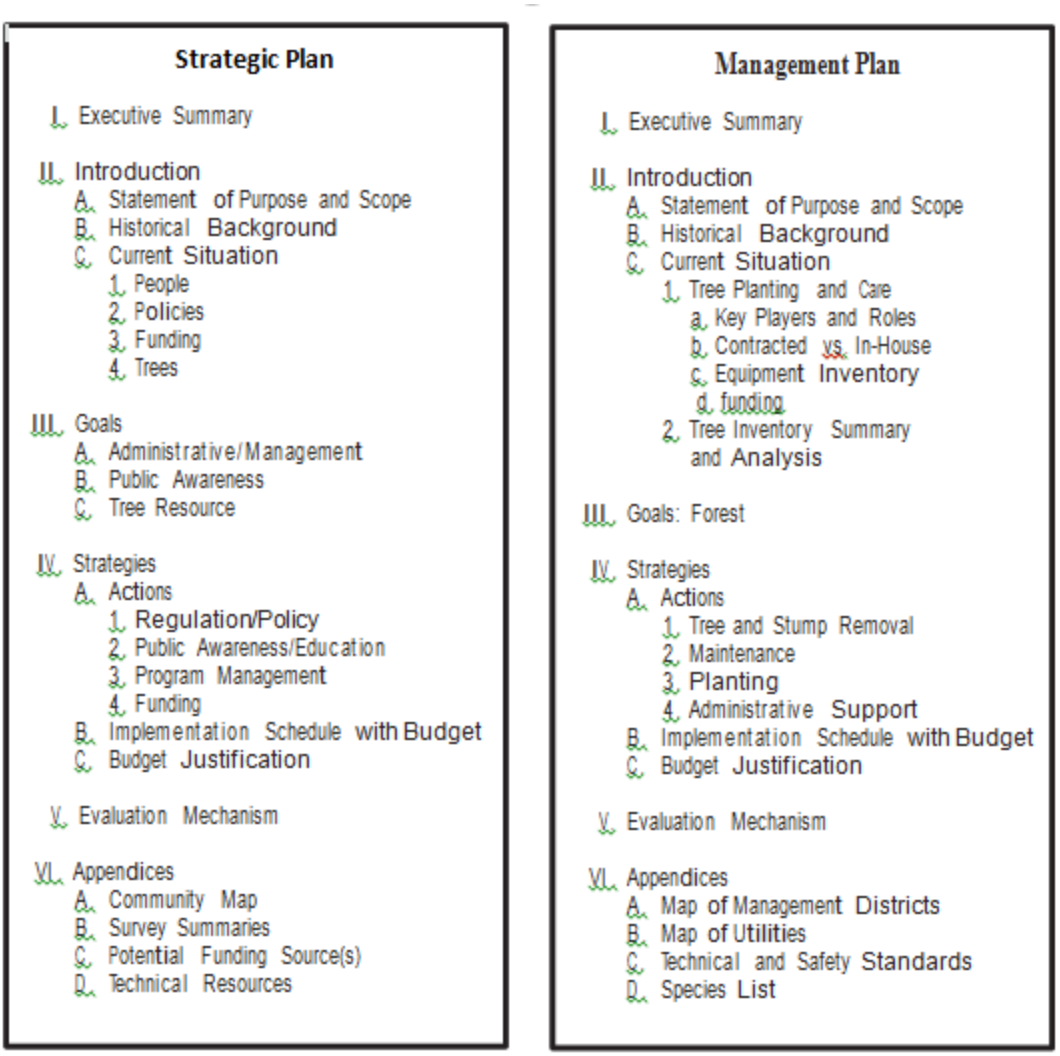
Urban Forestry Management Planning

Reference Number: MTAS-1369

Urban forestry planning occurs on several levels. At the broadest level, strategic plans establish the overall goals and objectives of the organization's urban forestry efforts. Ideally, strategic planning is one of the first tasks undertaken in establishing a community forestry program. Also called long- range, comprehensive or master plans, strategic plans create a blueprint for administering and managing a community tree program. Strategic plans include input from local citizens, organizations, businesses, municipal staff and elected officials. They are integrated with other comprehensive community plans.

Urban forest management plans are specific to field operations of the community tree program. Typically based on a detailed tree inventory, management plans identify and prioritize site-specific tree planting, maintenance and removal activities within a multiyear time frame.

Urban forestry planning also takes on a variety of other forms. Land use plans, greenway plans, site development plans, public landscape design and maintenance plans and similar planning efforts require input from those involved with public tree care.



Strategic Plan

I. Executive Summary

II. Introduction
- A. Statement of Purpose and Scope
- B. Historical Background
- C. Current Situation
  1. People
  2. Policies
  3. Funding
  4. Trees

III. Goals
- A. Administrative/Management
- B. Public Awareness
- C. Tree Resource

IV. Strategies
- A. Actions
  1. Regulation/Policy
  2. Public Awareness/Education
  3. Program Management
  4. Funding
- B. Implementation Schedule with Budget
- C. Budget Justification

V. Evaluation Mechanism

VI. Appendices
- A. Community Map
- B. Survey Summaries
- C. Potential Funding Source(s)
- D. Technical Resources

Management Plan

I. Executive Summary

II. Introduction
- A. Statement of Purpose and Scope
- B. Historical Background
- C. Current Situation
  1. Tree Planting and Care
     - a. Key Players and Roles
     - b. Contracted vs. In-House
     - c. Equipment Inventory
     - d. funding
  2. Tree Inventory Summary and Analysis

III. Goals: Forest

IV. Strategies
- A. Actions
  1. Tree and Stump Removal
  2. Maintenance
  3. Planting
  4. Administrative Support
- B. Implementation Schedule with Budget
- C. Budget Justification

V. Evaluation Mechanism

VI. Appendices
- A. Map of Management Districts
- B. Map of Utilities
- C. Technical and Safety Standards
- D. Species List

Role of Tree Boards

Reference Number: MTAS-1370

To help prevent potential crisis situations that trees create periodically, a community should establish a tree board. This board is charged with looking ahead to the needs and potential problems of the community's tree resource. Doing so can save the community money and create a more aesthetically pleasing city or town.

Roles of tree board members may include any or all of the following:

- Policy formulation;
- Advising;
- Administration;
- Management;
- Representation; and
- Advocacy.

Roles
In addition to the long-term look at their trees, a community tree board may be responsible for accomplishing some or all of the following:

1. Planting trees;
2. Coordinating with other groups that might plant trees;
3. Preparing a plan of tree activities for the community;
4. Planning the Arbor Day ceremony;
5. Providing tree information to other groups;
6. Selecting species for various planting projects;
7. Arranging for donations of trees or money for trees;
8. Pruning young trees;
9. Collecting data on trees or arranging for a tree inventory to be accomplished;
10. Making safety inspections of public trees;
11. Advising municipal departments on tree problems and removal needs;
12. Setting up memorial tree planting programs;
13. Arranging for publicity about trees;
14. Establishing a local awards program to recognize individuals and groups for their tree efforts;
15. Handling complaints about tree problems;
16. Serving as a body of expertise about trees for the local government and its local citizens, especially when there is no city forester; and
17. Advising the local government on ordinance needs and revisions.

Tree Board Member Job Description

Reference Number: MTAS-1371

Responsibilities: Develop, keep current, and help facilitate a plan to develop, conserve and care for the urban forest resources of the city.

Qualifications: Resident of the city with an interest in and knowledge of trees and related resources and their relationship to the human and physical environment of the city.

Activities:

- Develop and/or review annually and update as necessary a comprehensive community forestry plan.
- Assess the community urban forest situation using some type of inventory to determine short- and long-range program goals and objectives.
- Review, in cooperation with the city forester, annual plans for the city's urban forestry program.
- Advise the mayor, city council, and various departments on matters concerning trees and related resources.
- Inform residents on matters concerning the betterment of trees and related resources in cooperation with the city forester.
- Coordinate or conduct special projects for the betterment of the urban forest. Such projects should be included in annual plans.
- Keep abreast of current trends and issues in urban forestry through appropriate training and developmeny.

Examples of tasks, roles and responsibilities for a tree board member:

- Strategic planning: SWOT Analysis — What are the strengths, weaknesses, opportunities and threats to the city's urban forestry programs? This external scan will provide a snapshot of the city's current urban forestry condition and can be used as a catalyst to provide a long- range plan.
- Adopting an urban forestry management plan.
- Requesting appropriations from city council to fund urban forestry projects.
- Hiring an arborist.

Arborist (Staff) Job Description

Reference Number: MTAS-1372

Responsibilities: Manages and supervises the urban forestry program, including planting, maintenance and removal activities. This position is responsible for maintaining trees and woody plants to ensure their healthy, safe, and attractive condition, including chemical applications, repairing, cabling, fertilizing, watering, pruning, and removing any dead, diseased or declining trees or other woody plants.

Supervision received: Receives general direction from the Public Works Director.

Essential functions may include, but are not limited to, the following:

- Supervises the activities of crews involved in the planting, maintenance and removal of city trees; hires, trains, evaluates and manages subordinate personnel.
- Reviews and evaluates tree maintenance needs by reviewing complaints and observing problems or upon direction from supervisor, and determines work priorities and assigns work to subordinates.
- Receives and responds to a variety of complaints concerning status of city trees; provides procedural and policy information regarding tree trimming and removal. Schedules emergency action based on complaints; provides advice on proper care of trees and possible remedies for disease and pest problems; prepares tree damage and claim reports.
- Prepares, maintains, updates and reviews street tree master plan; prepares written and oral reports regarding tree planting and tree removal to city commissions and committees.
- Manages annual budget for Forestry Section, prepares specifications for and monitors contractual tree maintenance operations; completes necessary requisitions and reports to maintain the operations of the Forestry Section.
- Keeps accurate records of the tree board’s actions and maintains the computerized Tree Keeper program of all maintenance activity and tree inventory changes.

Qualifications: Knowledge of local tree and plant species and arboricultural practices in streets and parks; knowledge of insects and diseases that infect trees and plants in the southern region and the actions necessary to correct problems; knowledge of tree maintenance methods and equipment; knowledge of principles of supervision and people management skills; and knowledge of computer software applications to manage the urban forest. Ability to communicate effectively and concisely, both orally and in writing; ability to establish and maintain effective working relationships with city staff, contractors, citizen groups, and the public; and skill in directing, supervising, training and evaluating staff.

Training and Experience: Any combination of experience and training that would likely provide the required knowledge and abilities to perform the essential functions of the position.

Best Management Practices

Reference Number: MTAS-1373

The following cities are representative of best management practices of urban forestry:

1. Chattanooga, Tenn. — Tree maintenance program
2. Walla Walla, Wash. — Urban forestry management plan
3. Palo Alto, Calif. — Tree manual
4. Athens-Clarke County, Ga. — Tree program
5. Seattle, Wash. — Street plan

Detailed information on each of these practices is found in the following sections.

Chattanooga, Tennessee

Reference Number: MTAS-1374

Chattanooga Tree Maintenance

The city of Chattanooga spent more than 7,000 hours in 2002 pruning and maintaining nearly 4,500 trees. The city was on a mission to add technology to Chattanooga's tree maintenance process as part of an effort to document maintenance costs for the city's urban forest. They are now using GPS and GIS to map tree locations and track the size and type of every tree along Chattanooga's city streets and downtown parks.

It took four months to inventory the trees in Chattanooga's expanded central business district, an area that covers about 200 square blocks. Members of the city forester's team hiked through downtown carrying backpack GPS units, entering data on each tree's location, species and size of the planting pit. They also noted whether or not the tree was irrigated. Since the data was collected, the Chattanooga Urban Forestry Division created five categories based on the tree diameter and assigned each tree to its appropriate category. Classifying the trees in this way helped determine the number of pruning hours required to maintain them.

In addition to maintenance projections, the GIS tree inventory map helps the city in other ways. Because the map has the power of a database behind it, Urban Forestry personnel can query by tree height, condition, pests, maintenance needs — whatever information is in the database. For example, overloading on one tree species could be disastrous should a pathogen, insect or disease attack that species, so experts suggest that cities have no more than 5 percent of one species in their overall mix. (Source: J. Brown, Saving the Urban Forest, Government Technology, 9/23/2003.)

Walla Walla, Washington

Reference Number: MTAS-1375

Walla Walla, Washington- Urban Forestry Management Plan

In 1982 a citizen group, calling itself ReLeaf Walla Walla, formed with the purpose of addressing Walla Walla's street trees and to determine what could be done to prevent the loss of so many old trees and preserve the priceless canopy they provided. This group began to inventory all the trees in an effort to record them and to introduce ordinances protecting street trees. The ad hoc tree committee drafted a street tree ordinance, which was adopted by the city council in July 2000. The ordinance provided for the creation of an Urban Forestry Advisory Commission (UFAC) with membership comprising volunteer citizens. In addition the UFAC wrote an ordinance pertaining to heritage trees on both public and private property. This has been an effective means for private homeowners to protect their special trees from topping and otherwise detrimental practices. The UFAC also was given the task of producing an urban forest management plan (UFMP) to govern the urban forest under the jurisdiction of the city of Walla Walla. The UFMP presented the following program goals:

- Maintain, preserve, conserve, and improve existing urban canopy in Walla Walla;

- Remain a “Tree City USA”;
- Preserve and protect native, significant and historical treescapes; and
- Coordinate all construction activities related to trees with the urban forestry program.

The UFMP also contained management and maintenance recommendations that addressed the urban forestry funding program; reduction of high risk trees and community outreach/education.

Palo Alto, California

Reference Number: MTAS-1376

Palo Alto, California - Tree Technical Manual

The Palo Alto Tree Technical Manual is a separately published document issued by the city manager through the departments of Planning and Community Environment and Public Works to establish specific technical regulations, standards and specifications necessary to implement the tree protection ordinance and to achieve the city’s tree preservation goals. These goals are intended to provide consistent care and serve as benchmark indicators to measure achievement in the following areas:

- Ensure and promote preservation of the existing tree canopy cover with the city limits;
- Provide standards of maintenance required for protected and city-owned trees;
- Provide a standardized content for tree reports required by the city;
- Establish criteria for determining when a tree is unsafe and a possible threat to the public health, safety and welfare;
- Provide standards for replacing trees that are permitted to be removed; and
- Increase the survivability of trees during and after construction events by providing protection standards and best management practices.

Athens-Clark County, Georgia

Reference Number: MTAS-1377

Athens-Clarke County, Georgia - Community Tree Program

The Landscape Management Division (LMD) of the Athens-Clarke County Central Services Department administers the Community Tree Program. The community forester (CF), a tree care professional working in the LMD, is responsible for coordinating the Community Tree Program, including public tree maintenance. There are many other departments and individuals who are involved in community tree management and are considered fundamental to the success of the Community Tree Program. The Community Tree Council and the Planning Department are two such partners who have a primary role in tree conservation and management.

The Community Tree Council is an active group of citizen volunteers who meet regularly. The LMD provides support services to the Community Tree Council and the community forester fills the role of council secretary. Each year the LMD develops a Community Tree Program annual work plan and budget based on that plan. The LMD also maintains a current inventory of public street trees that is used in the planning and budgeting processes.

The Community Tree Program also produced a best management practices guide for tree selection and placement, tree care and tree species selection.

Seattle Washington

Reference Number: MTAS-1378

Seattle Washington - Master Street Tree Plan

The City of Seattle Street Tree Master Plan is a comprehensive three-phase study that recommends priorities, provides a list of appropriate plantings for Seattle's arterial streets, and explores new concepts for street tree plantings to connect existing open spaces and green areas in the Seattle. The Street Tree Master Plan serves as a mechanism to prioritize areas for tree plantings and identifies tree species for planting and removal.

Phase I inventoried the location, type and condition of trees planted along all improved city streets. From 1991 to 1992, nearly 84,000 trees were assessed for a wide range of factors, including age, species, health, site features, planting strip width and relationship to power lines.

Phase II developed criteria for deciding priorities for planting street trees and designated arterial streets for tree plantings. It also quantified the planting and maintenance needs of Seattle's street trees and created a comprehensive list of old and diseased trees for removal.

Phase III identified goals for urban forestry growth for the city of Seattle and presented new ideas to increase the quantity and quality of green spaces within the city limits. Goals include a 13 percent increase in Seattle's tree canopy, to a total of 40 percent. Fresh ideas and new partnerships are now being made among the public, private, commercial and nonprofit sectors to reach the goals for a green Seattle.

Vested Property Rights

Reference Number: MTAS-1990

Public Chapter No. 686 Vested Property Rights Act of 2014

The Tennessee General Assembly enacted Public Chapter No. 686, the "Vested Property Rights Act of 2014" which amends Title 13, Chapters 3 and 4 regarding the powers of regional planning commissions and municipal planning commissions.

As enacted, far-reaching statutory requirements were established relative to development standards and vested property rights for landowners and developers that affect the ability of cities to establish and update contemporary development standards to guide land use and growth following its passage. The act became effective January 1, 2015.

The act specifically amends T.C.A. § 13-3-413 for regional planning commissions and T.C.A. § 13-4-310 for municipal planning commissions.

The following summary sections are applicable to both regional planning commissions and municipal planning commissions. The full text of the act should be consulted.

Definitions of Vested Property Rights

Reference Number: MTAS-1991

"*Applicant*" means a landowner or developer or any party, representative, agent, successor, or heirs of the landowner of developer.

"*Construction*" means the erection of construction materials in a permanent manner, and includes excavation, demolition, or removal of an existing building.

"*Development plan*" means both a preliminary development plan and a final development plan.

"*Development standards*" means all locally adopted or enforced standards applicable to the development of property including, but not limited to planning: storm water requirements; layout; design; local infrastructure construction standards, off-site improvements, lot size, configuration, and dimensions. NOT included are standards required by federal or state law, or building construction safety codes.

"*Final development plan*" means a plan approved by the local government describing with reasonable certainty the use of property. Such plan may be in the form of, but not limited to, a planned unit development plan; subdivision plat; general development plan; subdivision infrastructure construction plan; final engineered site plan; or any other land-use approval designation utilized. UNLESS otherwise expressly provided by the city, such a plan shall include the boundaries of the site; significant

topographical features affecting the development of the site; locations of improvements; building dimensions; and the location of all existing and proposed infrastructure on the site. Neither a sketch plan or other document that fails to describe with reasonable certainty the use and development scheme may constitute a final development plan.

"*Preliminary development plan*" means a plan submitted to facilitate initial public feedback, and secure preliminary approvals from local government. It serves as a guide for all future improvements.

"*Site preparation*" means excavation, grading, demolition, drainage, and physical improvements such as water and sewer lines, footings, and foundations.

Vesting Rights and Periods

Reference Number: MTAS-1992

Vested property rights are established for any preliminary development plan, final development plan (where no preliminary development plan is required), or building permit issued to allow construction of a building to commence where there is no local requirement for prior approval of a preliminary development plan.

During the vesting period, the locally adopted development standards in effect on the date of approval remain the development standards applicable to that property or building during the vesting period as follows:

- **Building permit projects (no preliminary plan approval)** - The vesting period commences on the date of building permit issuance and remains in effect for the period authorized by the building permit.
- **Development plan project** - The vesting period applicable to a development plan is three years, beginning on the date of approval of the preliminary development plan; provided the applicant obtains final development plan approval, secure permits, and commences site preparation within the three-year vesting period.
- If the applicant obtains approval of a final development plan, secures permits, and commences site preparation within the three-year vesting period, then the vesting period is extended an additional two years (to a total of five years) to commence construction from the date of preliminary plan approval. During the two year period, the applicant shall commence construction and maintain any necessary permits to remain vested.
- If construction commences within the five-year vesting period following preliminary development plan approval, the development standards in effect on the date of approval remain in effect until final completion of the project, provided however, that the vesting period shall not exceed 10 years unless the city grants an extension through an ordinance or resolution; and provided further that the applicant maintain all necessary permits during the 10-year period.
- **Multi-phase projects** – A separate vesting period applies for projects proceeding in two or more sections or phases (as set forth in the development plan). The development standards in effect on the date of approval of the preliminary development plan for the first section or phase remain in effect for all subsequent sections or phases; provided the total vesting period does not exceed 15 years unless the city grants an extension through an ordinance or resolution; and provided that the applicant maintain all necessary permits during the 15-year period.

Type of Project	Effective Date	Vesting Period	Total Vesting Period to Maintain Vested Rights	Required Actions
Building Permit (No development plan required)	Date of Issuance of Building Permit	Period authorized by the building permit	Period authorized by the building permit	Complete construction within period authorized by the building permit
Development Plan				
Preliminary Development Plan	Date of Issue	3 Years	3 Years	Obtain Final Development Plan approval; secure permits; and commence site preparation
Final Development Plan	3 years from date of Preliminary Plan approval	2 Years	5 Years	Commence construction, maintain permits
	5 years from date of Preliminary Plan approval	5 Years	10 Years	Complete construction; maintain permits
Multi-phase or sections	Date of Issue of Preliminary Development Plan	Separate vesting period for each phase or section	15 Years	Complete construction for each phase; maintain permits

A vested property right attaches to and runs with the applicable property and confers upon the applicant the right to undertake and complete the development and use such property under the terms and conditions of a development plan, including any amendments thereto or under the terms and conditions of any building permit that has been issued with respect to the property.

Adoption of Local Ordinances

Reference Number: MTAS-1994

Adoption of Local Ordinances Regarding Vested Property Rights

A city may, by ordinance or resolution, specifically identify the type or types of development plans that will cause property rights to vest; provided, that regardless of nomenclature used in the ordinance or resolution to describe a development plan, a plan which contains any of the information for a preliminary development plan or final development plan shall be considered a development plan that will cause property rights to vest. Although the law states a city may adopt a local ordinance or resolution, it must be in the form of an ordinance if an existing code previously enacted by ordinance (such as a zoning ordinance) will be amended. T.C.A. § 13-3-413(e); T.C.A. § 13-4-310(e).

Any such ordinance or resolution shall also specify what constitutes approval of a development plan. If a city has not adopted an ordinance or resolution pursuant to this section specifying what constitutes a development plan that would trigger a vested property right, then rights shall vest upon the approval of any plan, plat, drawing, or sketch, however denominated, that is substantially similar to any plan, plat, drawing, or sketch approved as a preliminary development plan or final development plan.

Termination of Vesting Rights

Reference Number: MTAS-1995

During the vesting period, the locally adopted development standards which are in effect on the date of approval of a preliminary development plan or the issuance of a building permit, whichever applies, remain the development standards applicable to the property described in such preliminary development plan or permit, except such vested property rights terminate upon a written determination by the city under the following circumstances:

- When the applicant violates the terms and conditions specified in the approved development plan or building permit; provided, the applicant is given ninety (90) days from the date of notification to cure the violation; provided further, that the city may, upon a determination that such is in the best interest of the community, grant, in writing, an additional time period to cure the violation;
- When the applicant violates any of the terms and conditions specified in the local ordinance or resolution; provided, the applicant is given 90 days from the date of notification to cure the violation; provided further, that the city may, upon a determination that such is in the best interest of the community, grant, in writing, an additional time period to cure the violation;
- Upon a finding by the city that the applicant intentionally supplied inaccurate information or knowingly made misrepresentations material to the issuance of a building permit or the approval of a development plan or intentionally and knowingly did not construct the development in accordance with the issued building permit or the approved development plan or an approved amendment for the building permit or the development plan; or
- Upon the enactment or promulgation of a state or federal law, regulation, rule, policy, corrective action or other governance, regardless of nomenclature, that is required to be enforced by the city and that precludes development as contemplated in the approved development plan or building permit, unless modifications to the development plan or building permit can be made by the applicant, within 90 days of notification of the new requirement, which will allow the applicant to comply with the new requirement.

A city may allow a property right to remain vested despite such a determined occurrence when a written determination is made that such continuation is in the best interest of the community by the city. T.C.A. § 13-3-413(f)(1) and (2); T.C.A. § 13-4-310(f)(1) and (2).

Development Standards Enforcement

Reference Number: MTAS-1996

A vested development standard shall not preclude city enforcement of any development standard when:

- The city obtains the written consent of the applicant or owner;
- The city determines, in writing, that a compelling, countervailing interest exists relating specifically to the development plan or property which is the subject of the building permit that seriously threatens the public health, safety or welfare of the community and the threat cannot be mitigated within a reasonable period of time, as specified in writing by the city, by the applicant using vested property rights;
- Upon the written determination by the city of the existence of a natural or man-made hazard on or in the immediate vicinity of the subject property, not identified in the development plan or building permit, and which hazard, if uncorrected, would pose a serious threat to the public health, safety, or welfare and the threat cannot be mitigated within a reasonable period of time, as specified in writing by the local government, by the applicant using vested property rights;
- A development standard is required by federal or state law, rule, regulation, policy, corrective action, order, or other type of governance that is required to be enforced by the city, regardless of nomenclature; or
- A city is undertaking an action initiated or measure instituted in order to comply with a newly enacted federal or state law, rule, regulation, policy, corrective action, permit, order, or other type of governance, regardless of nomenclature. T.C.A.§ 13-4-310(g)(1); T.C.A. § 13-3-413(g)(1).

Development Plan Amendment

Reference Number: MTAS-1997

An amendment to an approved development plan by the applicant must be approved by the city to retain the protections of the vested property right. An amendment may be denied based upon a written finding by the city that the amendment:

- Alters the proposed use;
- Increases the overall area of the development;
- Alters the size of any nonresidential structures included in the development plan;
- Increases the density of the development so as to affect traffic, noise or other environmental impacts; or
- Increases any local government expenditure necessary to implement or sustain the proposed use.

If an amendment is denied by the city based upon such a written finding, then the applicant may either proceed under the prior approved plan with the associated vested property right or, alternatively, allow the vested property right to terminate and submit a new application. Notwithstanding the foregoing, a vested property right shall not terminate if the city determines, in writing, that it is in the best interest of the community to allow the development to proceed under the amended plan without terminating the vested property right. T.C.A. § 13-4-310(h)(1) and (2); T.C.A. § 13-3-413(h)(1) and (2).

Waiver Rights Prohibited

Reference Number: MTAS-1998

A city may not require an applicant to waive the applicant's vested rights as a condition of approval, or as a consideration of approval, of a development plan or the issuance of a building permit. T.C.A. § 13-4-310(i); T.C.A. § 13-3-413(i).

Extension of Rights

Reference Number: MTAS-1999

The vesting period for an approved construction project may be extended as deemed advisable by the city.

Zoning with Vested Property Rights

Reference Number: MTAS-2000

A vested property right, once established, precludes the effect of any zoning action by a city which would change, alter, impair, prevent, diminish, or otherwise delay the development of the property, while vested, as described in an approved development plan or building permit. With said exception, nothing shall preclude, change, amend, alter or impair the authority of a city to exercise its zoning authority. T.C.A. § 13-4-310(g)(3); T.C.A. § 13-3-413(g)(3).

Development Moratorium

Reference Number: MTAS-2001

In the event a city enacts a moratorium on development or construction, the vesting period established by this act shall be tolled during the moratorium period. T.C.A. § 13-4-310(g)(4); T.C.A. § 13-3-413(g)(4).

Eminent Domain with Vested Property Rights

Reference Number: MTAS-2002

A vested property right does not preclude, change, amend, alter or impair the authority of a city to exercise its eminent domain powers as provided by law. T.C.A. § 13-4-310(g)(2); T.C.A. § 13-3-413(g)(2).

Next Steps for Vested Property Rights

Reference Number: MTAS-2003

The adoption of an ordinance to amend local development codes to comport city requirements to the Vested Property Rights Act of 2014 should be considered. Such an ordinance will provide clarity going forward as to the newfound vesting rights that are afforded to landowners and developers as of January 1, 2015.

Due to the unique nature and style of various development codes, requirements, and terminology used by cities across the state, the development of a model ordinance would be too general to be of use. Such ordinances must rather be tailored to fit each city's plan for development and growth.

Summary of the Short-Term Rental Unit Act

Reference Number: MTAS-3002

Public Chapter 972, Acts of 2018, became effective May 17, 2018. The legislation, known as the "Short-Term Rental Unit Act" provides some guidance on the manner in which municipalities can regulate short-term rental units. The following is a summary of the legislation.

Section 1 adds several new parts to the Tennessee Code. The first substantive part added, T.C.A. § 13-7-602, includes a number of definitions for phrases used throughout the public chapter.

Grandfather Clause
T.C.A. § 13-7-603(a) provides that any ordinance, resolution, regulation, rule, or other requirement of any type that prohibits, effectively prohibits, or otherwise regulates the use of property as a short-term rental unit **does not apply to property that was being used as a short-term rental unit prior to the enactment of the ordinance, resolution, regulation, rule or other requirement by the local governing body.** This section also provides that the law in place at the time that the property was being used as a short-term rental unit is the law that governs the use of the short-term rental unit until the property is sold, transferred, ceases being used as a short-term rental unit for a period of 30 continuous months, or has been in violation of generally applicable local laws 3 or more separate times as provided by T.C.A. § 13-7-604. **It is important to note that the phrase being "used as a short-term rental unit" is a defined term and it means:**

> the property was held out to the public for use as a short-term rental unit, and:
>
> > (A) For property that began being held out to the public for use as a short-term rental unit within the jurisdiction of a local governing body that required a permit to be issued or an application to be approved pursuant to an ordinance specifically governing short-term rental units prior to using the property as a short-term rental unit, a permit was issued or an application was approved by the local governing body for the property; or
> >
> > (B) For property that began being held out to the public for use as a short-term rental unit within the jurisdiction of a local governing body that did not require a permit to be issued or an application to be approved pursuant to an ordinance specifically governing short-term rental units, the provider remitted taxes due on renting the unit pursuant to title 67, chapter 6, part 5 for filing periods that cover at least six (6) months within the twelve-month period immediately preceding the later of: (i) The effective date of this act; or (ii) The effective date of an ordinance, resolution, regulation, rule, or other requirement by a local governing body having jurisdiction over the property requiring a permit or an application to be approved pursuant to an ordinance specifically governing short-term rental units.

So, to the extent that (1) a property was held out to the public as a short-term rental unit, (2) the municipality in which the property is located had a permit or application process in place in order to operate as a short-term rental unit provider, and (3) the provider obtained a permit or had an application approved, the provider is grandfathered in. In addition, short-term rental units are grandfathered in if the governmental entity had not adopted a permitting or application process pursuant to an ordinance specifically governing short-term rental units, but the provider remitted taxes due on renting the unit under Tennessee Code Annotated, Title 67, Chapter 6, Part 5, for the filing period that covers at least 6 of the 12 months immediately preceding the effective date of this Act or the effective date of any regulation adopted by the municipality requiring an application to be approved or a permit to be obtained pursuant to an ordinance, in order to operate as a short-term rental unit provider. Consequently, a grandfathered provider may continue to operate under the regulations that the municipality had in place at the time that the property began being used as a short-term rental unit, until the property is sold, transferred, ceases being used as a short-term rental unit for a period of 30 continuous months, or has been in violation of generally applicable local laws 3 or more separate times as provided by T.C.A. § 13-7-604.

Brentwood Exception
T.C.A. § 13-7-603(b), which only applies to the City of Brentwood, provides that any ordinance, resolution, regulation, or other requirement of any type enacted prior to January 1, 2014, that expressly limits the period of time a residential dwelling may be rented and prohibits or effectively prohibits the use of property as a short-term rental unit may apply to any property within the municipality, regardless of the property's current use.

Prohibition for Violation
If the unit has been in violation of a generally applicable local law 3 or more separate times and the provider has no appeal rights remaining, T.C.A. § 13-7-604 provides that a municipality may prohibit the continued use of a short-term rental unit. The burden of proving that a generally applicable local law was violated is on the local governing body. "Generally applicable local law" is defined as:

> an ordinance, resolution, regulation, rule, or other requirement of any type other than zoning enacted, maintained, or enforced by a local governing body that applies to all property or use of all property and does not apply only to property used as a short-term rental unit.

Permits and Applications
Additionally, T.C.A. § 13-7-604 authorizes the municipal governing body to put in place a permitting or application process for short-term rental units. It provides that when a local governing body authorizes the use of short-term rental units through a permitting or application process, the use of a short-term rental unit may be suspended during the time that a unit does not maintain a permit or approved application if the permitting and application process requirements are reasonable. However, the language also provides that **nothing** extinguishes a provider's right to the continued use of the property as a short-term rental unit in accordance with T.C.A. § 13-7-603(a) unless the property is sold, transferred, ceases being used as a short-term rental unit for a period of 30 continuous months, or has been in violation of generally applicable local laws 3 or more separate times as provided by T.C.A. § 13-7-604. To the extent a municipality is contemplating requiring short-term rental providers to obtain a permit or complete an application in order to operate, it is imperative that any requirements for receiving a permit or having an application accepted be reasonable and relatively easy to comply with so as to not put an existing provider who has the right to operate under T.C.A. § 13-7-603(a), out of business.

The language in this section also provides that if the municipality allows for public complaints to be filed through the permit or application process, the municipality must notify a complainant that any false complaint made against a unit is punishable as perjury under T.C.A. § 39-16-702.

Finally, this section also provides that if a municipality prohibits or effectively prohibits the operation of a short-term rental unit that is authorized to operate under T.C.A. § 13-7-603(a), the provider may challenge the prohibition, regulation, suspension or regulation as in conflict with this Act, through a civil action or appeal in chancery or circuit court.

Restricting the Use of Property as Short-Term Rental Units
T.C.A. § 13-7-605 authorizes a condominium, co-op, homeowners association or other similar entity to prohibit or otherwise restrict the use of property as short-term rental units within the entity's jurisdiction and allows the same for a lessor, through the terms of a lease agreement, and property owners through use of a restrictive covenant.

Preemption
T.C.A. § 13-7-606 provides that the language in this Act supersedes any ordinance, resolution, rule or other requirement enacted, maintained, or enforced by a municipality that is in conflict with this Act.

Conclusion
Aside from the language in this public chapter, the General Assembly has not provided any other frame work for regulating short-term rental units. However, if you are in a municipality that is contemplating regulating short-term rental units, we again suggest that the regulations be reasonable and obtainable, so that they may withstand any legal challenge.

In an effort to assist cities in better understanding the new legislation, MTAS staff developed a video on the Short-Term Rental Unit Act that can be found at https://youtu.be/5XZzzoZnNkY [5].

Links:
[1] https://kate.tennessee.edu/mtas/docs/courses_2018/annexation18/story_html5.html?lms=1
[2] https://www.mtas.tennessee.edu/reference/right-take
[3] https://www.mtas.tennessee.edu/reference/inverse-condemnation
[4] http://www.nebraskahistory.org/lib-arch/research/treasures/j_sterling_morton.htm
[5] https://youtu.be/5XZzzoZnNkY