

The Right to Take

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

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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).

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