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Inverse Condemnation

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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).
