Published on *MTAS* (https://www.mtas.tennessee.edu) November 18, 2019

Physical Takings

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,

The University of Tennessee
Municipal Technical Advisory Service
1610 University Avenue
Knoxville, TN 37921-6741
865-974-0411 phone
865-974-0423 fax
www.mtas.tennessee.edu

Table of Contents

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*.