

TACIR

The Tennessee Advisory Commission
on Intergovernmental Relations



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**MINUTES OF THE
TENNESSEE ADVISORY COMMISSION
ON INTERGOVERNMENTAL RELATIONS
12 September 2012**

Meeting Called to Order

The Tennessee Advisory Commission on Intergovernmental Relations met in room 30 of the Legislative Plaza at 1:06 p.m., Vice Chairman Tom Rowland presiding.

Present 20	Absent 5
Mayor Troy Beets	Mr. Charles Cardwell
Mayor Tommy Bragg	County Mayor Jeff Huffman
County Mayor Ernest Burgess	Senator Mark Norris
Mr. Rozelle Criner	Representative Gary Odom
Ms. Paula Davis	Senator Jim Tracy
Representative Vince Dean	
Mayor Brent Greer	
Representative Curtis Halford	
Senator Douglas Henry	
Senator Jim Kyle	
County Mayor Kenny McBride	
Mr. Iliff McMahan	
Senator Randy McNally	
Speaker Emeritus Jimmy Naifeh	
Mayor Tom Rowland	
Representative Charles Sargent	
Mayor Pro Tem Kay Senter	
Mr. Tommy Schumpert	
County Mayor Larry Waters	
Comptroller Justin Wilson ¹	

¹ Phillip Doss represented Comptroller Wilson.

Call to Order and Approval of the Minutes

Vice Chairman ROWLAND called the meeting to order at 1:06 p.m. and requested approval of the minutes. A motion to adopt the minutes was made by Mayor BRAGG, seconded by Mayor Pro Tem SENTER, and passed unanimously.

1. Commission Updates

Ms. ROEHRICH-PATRICK welcomed Mayor BEETS to the commission and presented highlights of his accomplishments as described in Tab 2 of the docket book. She recognized Mayor WATERS for his reappointment to the commission.

2. Resolutions

Vice Chairman ROWLAND requested approval of the resolutions listed in Tab 3 of the docket book. Representative DEAN made a motion to adopt the resolutions; Mr. MCMAHAN seconded. The motion passed unanimously. Vice Chairman ROWLAND asked whether Mayor MCDONALD or Dr. GREEN had comments. Mayor MCDONALD commented on the time spent with TACIR and complemented the staff and commission regarding the work accomplished. Dr. GREEN commented on Mayor MCDONALD and his contribution to the commission. Dr. GREEN expounded on the creation of the commission and thanked the commission for the honor. The resolutions were presented by Vice Chairman ROWLAND.

4. Panel Discussion on Eminent Domain: Issues and Alternatives

Vice Chairman ROWLAND introduced Mr. Roger HORNER of the Tennessee Municipal League and Tennessee County Services Association as well as the Attorney for the City of Brentwood; Mr. Alvin NANCE of the Tennessee Association of Housing and Redevelopment Authorities and Knoxville Community Development Corporation (KCDC); Mr. Nathan RIDLEY, a municipal utilities attorney with Bradley Arant Boult Cummings LLP; Ms. Rhedona ROSE of the Tennessee Farm Bureau Federation (TFBF); and eminent domain attorneys and mediators Mr. William FARMER of Jones Hawkins & Farmer, PLC and Mr. Douglas BERRY of Hubbard Berry & Harris, PLLC.

Mr. HORNER commented that over the last five years Brentwood has acquired property from private owners 199 times, usually for easements. Of those 199 cases, the city's condemnation powers were used 26 times, and only one went all the way to trial. In 25 years, only two condemnation lawsuits have gone to trial. For the most part, they settle through informal negotiations but sometimes go to mediation. He noted that the court system in Tennessee actively encourages parties to resolve their disputes outside of court. In Williamson County, the judges require the parties in most civil lawsuits to use mediation before they will consider hearing a trial. Mr. Horner also mentioned the jury of view process as an option that operates, in effect, as another alternative dispute resolution (ADR) technique. He has never used arbitration in a condemnation value dispute and does not know anyone who has.

Mr. NANCE commented that KCDC utilizes eminent domain authority selectively, and the majority of cases concern vacant or blighted property. Over the last six years, 75 percent of land acquisitions were negotiated purchases, and the remaining 25 percent were condemnations. Ninety percent of those condemnations were to clear title. Ten percent were for value.

Mr. RIDLEY noted that every electric utility system, public or private, has the right of eminent domain. He further observed that the power of eminent domain flows from a restriction on the power of the government, the Fifth Amendment and Article 1, Section 21 of the Tennessee Constitution, which says the government has the power to take property but has to pay just compensation to the property owner. He said that the issue in eminent domain cases is consistently not the power to take but valuation. NES considers eminent domain a last resort and has had two recent experiences with it. The first was a substation in Forest Hills for property that was on the market but the owners preferred NES to condemn the property to clear the title. The second was underground utility lines to the Music City Convention Center.

Ms. ROSE said that TFBF thinks eminent domain should be extremely difficult to use and only in situations where there is no other way to benefit the public good. TFBF supports Senate Bill 1566 because it provides both a transparent and streamlined process for determining just compensation and another alternative to land owners if they do not like the alternatives already available to them. Five points are important to them: First, we have to always remain cautious and not take a heavy-handed approach where eminent domain is used. Second, as a percentage, farmers are affected by eminent domain more often than many other property owners because they own half the property in the state. Third, when individuals are affected by eminent domain, we need to determine a fair price as easily, swiftly, and economically as possible. Fourth, assigning value to working farmland is not as clear cut as assigning value to residential property. Finally, we have to help property owners know and understand the process better. Property owners are generally unfamiliar with and scared by the eminent domain process, often not even know where to turn for advice.

Mr. FARMER said he sees two factors that cause concern in condemnation cases: time and money. Costs in a condemnation case are primarily the attorney fees and appraiser fees. The bill's concept of mandatory arbitration throws in the cost of an arbitrator. He has never heard of a condemnation case that has gone to arbitration and opined that that is because it is too expensive. Tennessee's Rule 31 provision seeks to deal with the problem of time and money. Under Rule 31 a landowner can request mediation and the courts will generally accommodate that request. This rule provides, at little or no cost to the landowner, a way to effectively deal with disputes without having to go to court. He would never advise a client to agree to binding arbitration because there is no appeal from the decision, it is expensive, and you do not know what the result will be.

Mr. BERRY explained that he has been a Rule 31 mediator since 2001. He observed that in the last four or five years, probably because the State has started to suggest mediation of their cases, a large part of his mediation practice has been the mediation of eminent domain cases

involving the State, electrical utilities, most of the electric co-ops, utility districts, cities like Brentwood, and Austin-Peay State University. He finds that mediation works as well in eminent domain cases as it does in other cases and estimates that 80 percent of the cases settle either the day of mediation or within a month. He has also used the "jury of view" process discussed by Mr. Horner. Mr. Berry explained that under this process a jury of realtors, surveyors, appraisers, and the like is empaneled to issue an advisory verdict on value. While not binding, the advisory verdict allows the attorney to present a number to the government, and in Mr. BERRY's experience, they have accepted the jury of view's verdict in almost every case. He does not think arbitration would be useful in eminent domain cases. If the case is complicated at all, the attorneys are going to prepare in exactly the same amount of time because it's binding. Perhaps in the smallest cases that might be useful, but in those cases a city is going to settle.

Vice Chairman ROWLAND asked what the average turnaround time is for arbitration. Mr. BERRY said, depending on the complexity of the issues, it can take months. Mediation typically lasts one to two days. A jury of view usually lasts half a day.

Speaker NAIFEH asked how many cases are settled through mediation. Mr. RIDLEY estimated that it would be 80 percent from his own experience.

Speaker NAIFEH asked Ms. ROSE for her thoughts on Rule 31 and the success rate of valuation mediation. Ms. ROSE responded that the farmers she hears from the most are the ones that are not finding a solution. She offered an example of a dairy farmer whose case has been in court for seven years.

Mayor ROWLAND inquired whether mediation or litigation is more time consuming and costlier. Mr. FARMER responded that litigation is costlier and more time consuming by far because of all the steps involved.

Mayor ROWLAND asked whether mediation gives less value to the property owner than litigation. Mr. FARMER responded that it's hard to say, but usually a jury's award is between the two appraisals; on some occasions the jury may go with the high or low appraisal, but that rarely happens in mediation.

Mayor WATERS asked whether there was another way besides arbitration to lessen the cost to the property owner and speed up the process. Mr. BERRY responded that the speedy trial act lessens the cost and speeds the process up. It puts the onus on the judge to keep the case moving along.

Mayor BRAGG requested that the bill's sponsors, Senator KETRON and Representative CARR, address the Committee on the intent of the bill. Senator KETRON discussed the case of former Representative Mike LILES whose property was condemned by Rutherford County. The case took more than five years to settle. Senator KETRON stated that the intent of the bill is to expedite the process for the landowner. Representative CARR said that the intent of the

bill was to address the process for valuing property. If mediation is no longer working, the bill would allow property owners to go to arbitration. He said the bill stipulates both the length of time and costs associated with arbitration. He believes, in many cases, the reason mediation is used is because the property owner cannot afford litigation.

Senator KETRON agreed with Mr. MCMAHAN that, for rural landowners, this would likely be their first experience with the legal process. Representative CARR acknowledged that one intent of the bill was to help both sides understand the process better, including how long it would take and what it would cost. Senator KETRON agreed and further stated that he did not send the bill to summer committee in an effort to kill the bill.

Mayor BEETS asked about the timeframe for arbitration. Representative CARR responded that the timeframes were to be set by the American Arbitration Association and generally would be settled in six months. Mayor BEETS asked about putting a timeframe on mediation. Representative CARR said that they did not think it was necessary because the property owner could determine when mediation had broken down and proceed with litigation or arbitration. Mayor BEETS inquired what would happen if the property owner thought arbitration was no longer fruitful. Representative CARR responded that, at that point, they do not have a choice and that is the point. He said they'll know that on the front end.

Senator KYLE commented that cases are simply a battle of experts whether in mediation, arbitration, or litigation. He pointed out that mediation is the only method that gives the landowner control over how much money he will get. You give that control up in arbitration and in litigation.

Mr. BERRY commented that the first delay in the condemnation process occurs when the landowner wants to contest the condemnation and has to get their own appraisal. Mr. NANCE also commented that urban renewal condemnations are much different from condemnations on agricultural properties. He said he was concerned that a bill could protect the agricultural side while being detrimental to the urban side.

Mayor ROWLAND asked about the difference between arbitration and mediation. Mr. BERRY responded that arbitration is almost always binding while mediation is non-binding by definition. Mr. FARMER added that arbitration is more like a trial, with witnesses and evidence, while mediation is simply discussion without the need for an appraisal. Mr. BERRY added that, in mediation, a neutral third party helps the parties achieve their own resolution. Mr. RIDLEY postulated that one way to think of it is everything is ADR if you don't go to court. If you go to court, that's traditional resolution. Rule 31 sets up alternatives for dispute resolution. Mr. FARMER added that non-binding alternative dispute resolution processes can be effective.

Mayor ROWLAND asked whether an administrative law judge would handle arbitration. Mr. BERRY said no, the arbitrator would be from the AAA panel, usually a lawyer, but could be

someone from another profession depending on the context, such as an engineer for a construction case.

Representative HALFORD asked Representative CARR about Senator KYLE's statement that arbitration wasn't going to work because it is going to take a certain amount of time because it all depends on experts. Representative CARR said property owners want to have somebody advocating for them in a fair and expedited matter and that was what the sponsors of the bill were trying to do.

Dr. DOSS asked whether the value of ongoing or relocating a business on the property is considered in determining its value. Mr. BERRY replied that the landowner is entitled to the value of the property taken and incidental damages to the remainder.

Mayor WATERS asked to hear from Mr. LILES. Mr. LILES said that one issue that had not been touched on was the fact that once the condemnor decides to take the property, it's taken. He said he lost rental income on the property from the day it was condemned. He also urged them to consider the fact that the former property owner is spending money to defend his position.

Representative SARGENT asked Mr. LILES whether he had to wait so long to go to court or whether he could have gone to court when he first got the condemnation notice. Mr. LILES said no, he was told that the county commission voted to take his building, that the check would be in the clerk's office, and that he needed to go to court in order to get the check from the clerk's office. He said that they then sat down with the county attorney to decide on preparations for court. He said they were one day away from going to court five years later when they settled. Representative SARGENT asked what caused the five-year delay. Mr. LILES said he did not cause the delay. He said he was ready to go to court the next day. He said that appraisals had to be redone, expert witnesses interviewed, and depositions taken. He said that he did not think there was a stalling technique. He noted that the Rutherford County court system is busy, and it was a scheduling problem for the court system. He stated that he did not know how long the average case takes to go to court but that he thought that his case not far from average.

Mayor BRAGG asked about the effect of condemnation on the capital gains tax. Mr. LILES said that you have three years to re-invest the proceeds to eliminate having to pay taxes. (According to Internal Revenue Code Section 1033, the period is generally 2 years, 3 years if the converted property is real estate that is held for productive use in a trade or business or for investment, and 4 years if the converted property is the taxpayer's principal residence and was destroyed by a federally declared disaster. The basis of the condemned property becomes the basis of the qualified property purchased with the proceeds of the condemnation sale so that taxes any capital gain from the condemnation are effectively postponed until the newly purchased property is later sold.)

Mayor BRAGG asked what effect a significant change in the current statutes might have on settled case law interpreting them, noting the necessity of going through the process of getting some cases through the appellate courts and the supreme court so that the law is once again settled. He said he presumed that most of the eminent domain statutes have been on the books long enough to get some settlement of current law. Mr. RIDLEY agreed that every time the legislature acts it takes a while for the new law to settle through the court system. He added that current law treats each entity with eminent domain power the same and, noting that the law is well established, expressed his hope that that consistency would stay in place.

Mayor MCBRIDE asked Mr. LILES whether he was given a chance to go before the Rutherford County Commission and protest the taking. Mr. LILES said he went before the county commission, as well as the committees that were holding hearings on property acquisition, and told them he thought the value was inadequate.

Mayor ROWLAND noted that staff would have a draft report at the November meeting.

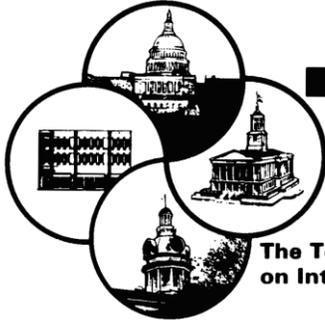
3. Presentation by Dr. Cliff LIPPARD, Deputy Executive Director, TACIR, on Biennial Report

Dr. LIPPARD presented highlights from the Commission's report, *Intergovernmental Challenges and Achievements: Biennial Report Fiscal Years 2011 and 2012*, provided in Tab 5 of the docket book.

Mr. MCMAHAN made a motion to adopt the report; Representative DEAN seconded. The motion passed.

Other Matters

Vice Chairman ROWLAND adjourned the meeting at 2:50 p.m.



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**MINUTES OF THE
TENNESSEE ADVISORY COMMISSION
ON INTERGOVERNMENTAL RELATIONS
13 September 2012**

Meeting Called to Order

The Tennessee Advisory Commission on Intergovernmental Relations met in room 30 of the Legislative Plaza at 8:34 a.m., Chairman Mark Norris presiding.

Present 20	Absent 5
Mayor Troy Beets	Mr. Charles Cardwell
Mayor Tommy Bragg	Ms. Paula Davis
County Mayor Ernest Burgess	Senator Randy McNally
Mr. Rozelle Criner	Representative Gary Odom
Representative Vince Dean	Representative Charles Sargent
Mayor Brent Greer	
Representative Curtis Halford	
Senator Douglas Henry	
County Executive Jeff Huffman	
Senator Jim Kyle	
County Mayor Kenny McBride	
Mr. Iliff McMahan	
Speaker Emeritus Jimmy Naifeh	
Senator Mark Norris	
Mayor Tom Rowland	
Mr. Tommy Schumpert	
Mayor Pro Tem Kay Senter	
Senator Jim Tracy	
County Mayor Larry Waters	
Comptroller Justin Wilson ²	

² Phillip Doss represented Comptroller Wilson.

1. Presentation by Mr. Bill TERRY, Senior Research Consultant, TACIR, on the Blight Report Update

Mr. TERRY provided an update on the blight report and requested comments from the members. The preliminary conclusion of staff is that the current laws give local governments sufficient tools to deal with blight. Mr. TERRY gave examples of cities successfully combating blight and further discussed the adequacy of current laws and the various remedies they provide. He stated that the biggest problem with fighting blight is money.

Senator HENRY expressed concern for individual property owners who would be affected by condemnations. Mr. TERRY said that when a municipality enforces local property standards codes, property owners are notified by the municipality if their property is considered blighted. Property owners have the option to fix the property within a certain period or have it torn down. There was some discussion on urban renewal, blighted properties, and the use of eminent domain. Senator HENRY said this is an area of interest for the Commission to consider. He does not believe property owners should be run out because their homes aren't up to codes. Chairman NORRIS said that some of Senator HENRY's concerns were the same as those mentioned in the General Assembly and may have to be addressed in different forms in the next session.

Director ROEHRICH-PATRICK observed that the Neighborhood Preservation Act is limited to Shelby and Davidson counties only and another law, the Residential Rental Inspection program, is limited to Metro Nashville and Oak Ridge. She added that these laws have some options that might be made available to other jurisdictions as well. Mayor Pro Tem Senter expressed interest in seeing those laws expanded so more cities could use them.

There was further discussion about blight and its effects on property values in neighborhoods. A few members noted the difference between blight issues in urban and rural areas and stated that the laws should be addressed accordingly.

The final draft report will be submitted at the November meeting.

2. Presentation by Ms. Reem ABDELRAZEK, Senior Research Associate, TACIR, on the Fire Service Study Update

Ms. ABDELRAZEK provided an update on the fire service study and requested comments from the members. House Joint Resolution 204 (2011) by Senator Haynes asked TACIR to study the collection methods used by local governments to fund fire service, the overall impact on local governments when not protected by a fully funded fire department, and the impact of making fire service an essential service. Ms. ABDELRAZEK highlighted five basic funding methods and described staff's interpretation of "fully funded" and "essential service." Ms. ROEHRICH-PATRICK explained the difficulty of answering the questions posed in the resolution without clear definitions of those terms. Mayor WATERS asked whether this legislation would require

counties to publicly fund fire service at a certain level; Ms. ABDELRAZEK clarified this is just a study bill.

Mayor BEETS asked about fire tax districts and whether residents of cities that provide fire service are double-taxed if their county uses fire tax districts. Ms. ABDELRAZEK said they should not be and explained that the law allows counties to create fire tax districts, and that residents of each fire tax district pay only for their share of fire service.

Chairman NORRIS said any cost-effective way for counties and cities to fund fire service is worth considering.

A draft report will be submitted for Commission review and comment at the November meeting.

3. Presentation by Dr. Stan CHERVIN and Dr. Reuben KYLE, Senior Research Consultants, TACIR on the Economic Update

Dr. KYLE presented data on various aspects of the Tennessee economy, including GDP, employment growth, unemployment claims, and changes in the housing market. He said that GDP has been growing, but at a slow rate. Likewise, employment has been increasing for the last 23 months, but it is weak. He also provided county-level examples of data from the Center for Business and Economic Research's TACIR-sponsored website, which tracks Tennessee's economic recovery.

Dr. CHERVIN discussed sales and property tax collections, saying that this recession, unlike the 2000 recession, has caused sales and property tax collections to shrink for some years. He emphasized that five of the 10 counties that reappraised their property in 2012 had either zero or negative growth. The other five had only small growth. Dr. CHERVIN predicts that as many as two thirds of counties reappraising in 2013 will have zero or negative growth.

4. Other Business

Ms. ROEHRICH-PATRICK informed the commission that a sunset hearing would be held before a subcommittee of the Joint Government Operations Committee in early October. Copies of the sunset hearing questions and answers were distributed to commission members.

5. Next meeting

The Commission set the meeting for November 28th and 29th.

Chairman NORRIS adjourned the meeting at 10:19 a.m.