



TACIR

The Tennessee Advisory Commission
on Intergovernmental Relations



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MEMORANDUM

TO: Commission Members

FROM: Lynnise Roehrich-Patrick
Executive Director

DATE: 12 September 2012

SUBJECT: Eminent Domain: Issues and Alternatives

Two bills related to eminent domain were referred to the Commission for study by the 107th General Assembly:

Senate Bill 1566 (Ketron) [House Bill 1576 (Carr)] was referred by the General Subcommittee of the Senate Finance, Ways and Means Committee. This bill would authorize a property owner to require that the issue of just compensation be resolved through binding arbitration in the case of condemnations by local governments. Local governments would not have the opportunity to object to the use of binding arbitration.

House Bill 2877 (Gotto) [Senate Bill 2745 (Johnson)] was referred by the House State and Local Government Subcommittee. This bill eliminates the power of housing authorities to exercise eminent domain and grants to governing bodies the authority to institute eminent domain proceedings on behalf of housing authorities.

Senate Bill 0548 (McNally), House Bill 0952 (Dunn), which was not referred for study, is also being considered by staff. That bill would grant property owners a right of first refusal to repurchase property if the condemning entity does not use it for the purpose it was condemned or if it is sold within ten years.

A panel representing various interests, including the Tennessee Association of Housing and Redevelopment Authorities, the Tennessee Farm Bureau Federation, the Tennessee Municipal League, Tennessee County Services Association, and attorneys with alternative dispute resolution experience, will speak to these issues at the meeting, focusing on Senate Bill 1566 as requested by Senator Ketron.

Resolving Property Value Issues in Eminent Domain Cases

There are several methods in Tennessee for resolving valuation disputes when property is taken by condemnation, some involving litigation and others using alternative dispute resolution methods. Some kind of jury or panel determines the value when litigation is used. Alternative methods allow for agreement by the parties, determination of value by an arbitrator, or some less cumbersome method.

Litigation Methods

The two main litigation methods are the jury of view method, which is available to any entity with the power to condemn, and the "supplementary" method, which is restricted to counties, cities, certain special districts, and the state and is the most commonly used method. The remaining statutory methods are restricted to certain types of property acquisitions.

Jury of View Method

The jury of view method of eminent domain is laid out in Tennessee Code Annotated Title 29, Chapter 16. This method requires the condemner to file a petition for condemnation in the circuit court and give the property owner 30 days' notice before proceeding further. Once the right to take issue is resolved, a writ of inquiry is directed to the sheriff, commanding him to summon a panel of jurors. The jury of view consists of five persons who assess the compensation to be paid for the property. Either party can file an appeal if they object to the amount of damages awarded by the jury.

Supplementary Method

This method may be used by counties and cities, by utility, levee, and drainage districts, and by the State of Tennessee to acquire rights-of-way, land, material, easements, and rights as are necessary, suitable, or desirable for the construction, reconstruction, maintenance, repair, drainage, or protection of any street, road, freeway, or parkway. The supplementary method is laid out in Tennessee Code Annotated Title 29, Chapter 17, Part 9. This method also requires the condemner to file a petition for condemnation in circuit court, accompanied by a deposit for the amount of compensation the condemner believes the property owner is entitled to. If the property owner is satisfied with the amount of the compensation, the condemnee may accept the deposit in full settlement for the taking of the property. The court will then enter an order divesting the property owner of title and vesting it in the condemner. The condemner may take possession of the property 30 days after notice has been given to the property owner.

If the property owner is dissatisfied with the deposit, he or she may file an exception to the amount deposited by the condemner and proceed to trial. The property owner may request payment of the amount deposited but must agree to refund the difference if the award is less. If the award is more, the condemner must pay court costs; if not, the property owner contesting the value must pay court costs. Other costs actually incurred, including attorney, appraisal, and engineering fees, may be awarded to the owner if the proceeding is abandoned by the

condemner or in the case of a final judgment that the acquiring party cannot acquire the property by condemnation. And interest must be paid on any judgments against the condemner.

Other Litigation-based Methods

State law also provides methods of condemnation for use by specific types of entities or acquisitions, each with its own valuation method. Municipalities may condemn for roads, parks, sewer and water lines under Tennessee Code Annotated §§ 7-31-107 to 7-31-111, 7-35-102, in which case just compensation is determined by a condemnation commission of not less than seven freeholders. Counties can condemn for the opening or changing of roads under Tennessee Code Annotated §§ 54-10-201-54 to 10-211, in which case just compensation is determined by a three member jury of view. And property may be condemned for public schools under Tennessee Code Annotated §§ 49-6-2001 to 49-6-2002, in which case just compensation is determined by not less than seven freeholders.

Alternatives to Litigation

A number of methods for settling disputes outside the courtroom, commonly referred to as alternative dispute resolution, are available in Tennessee. They may be used by agreement of the parties, by contract or otherwise, or they may be ordered by a court under Tennessee Court Rule 31. In addition, arbitration may proceed under the Tennessee Uniform Arbitration Act (Tennessee Code Annotated Title 29, Chapter 5, Part 3). Arbitration and mediation are the most common alternatives to litigation used in eminent domain cases. In mediation, a neutral third party helps the parties negotiate a settlement. According to several people interviewed for this study, mediation has been successfully used to resolve property value disputes in eminent domain cases; in fact, it is required by rule in most civil cases by the 3rd Judicial District of Tennessee. It is also required, though not by rule, in the 21st Judicial District. There is no generally applicable statute governing mediation in Tennessee.

Courts in Tennessee, pursuant to Tennessee Supreme Court Rule 31, may order the parties in a civil action to participate in certain alternative dispute resolution proceedings. A summary of Rule 31 is attached. Six alternative dispute resolution processes are available under the rule:

- **Nonbinding Arbitration**—a process in which a neutral arbitrator or an arbitration panel considers the facts and arguments presented by the parties and renders a decision that is non-binding.
- **Mediation**—an informal process in which a neutral person conducts discussions among the disputing parties. It is designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.
- **Judicial Settlement Conference**—mediation conducted by a judicial officer.

- **Case Evaluation**—a process in which a neutral evaluator or three-person evaluation panel, after receiving brief presentations by the parties summarizing their positions, identifies the central issues in dispute, as well as areas of agreement, provides the parties with an assessment of the relative strengths and weaknesses of their case, and may offer an evaluation of the case.
- **Mini-trial**—a settlement process in which each side presents an abbreviated summary of its case to the parties or representatives of the parties who are authorized to settle the case. A neutral person may preside over the proceeding. Following the presentation, the parties or their representatives seek a negotiated settlement of the dispute.
- **Summary Jury Trial**—an abbreviated trial with a jury in which litigants present their evidence in an expedited fashion. The litigants and the jury are guided by a presiding neutral person. After an advisory verdict from the jury, the presiding neutral person may assist the litigants in a negotiated settlement of their controversy.

Related Provisions in Other States

How Value is Decided

Oregon law authorizes the owner to request that the issue of compensation be determined by binding arbitration if the total amount of compensation claimed by either party does not exceed \$20,000. Alabama and California statutes specifically authorize arbitration by agreement of the parties to determine the issue of property value. In Alaska, Georgia and Connecticut, a special master determines the compensation. In Georgia and South Carolina, a property owner may choose to have an appraisal panel determine land value.

Who Pays Legal and Court Fees

Some states require that the costs be split between the condemner and condemnee. Other states require the condemner to pay all costs in arbitration, mediation, and administrative proceedings to determine just compensation in eminent domain cases. For example, Alaska and Connecticut require that the special master fees are split between the parties. In Indiana, the condemnor pays the costs of mediation.

Twenty-two states have fee-shifting statutes requiring governments to pay property owners' attorney fees in eminent domain cases. States use various approaches to reimbursing property owners for litigation expenses, including a judicial interpretation of whether the reimbursement meets the state's constitutionally required just compensation, statutes requiring an award of expenses where certain conditions are met, allowing judges to decide where reimbursement is appropriate based on statutorily defined guidelines, and a statute providing fees up to a certain dollar limit.

Assistance to Property Owners—Ombudsman

Utah has an Office of Property Rights Ombudsman to help parties resolve disputes in eminent domain cases.

Exercise of Eminent Domain by Housing Authorities

House Bill 2877 eliminates the power of housing authorities to exercise eminent domain and, instead, requires governing bodies to institute eminent domain proceedings on behalf of housing authorities. Current law allows housing authorities to acquire property by eminent domain for housing projects, broadly defined to include acquisition or construction of “buildings and improvements, stores, offices, lands for farming and gardening, and community facilities” (Tennessee Code Annotated §§ 13-20-101 et seq.), and for urban renewal/redevelopment projects (Tennessee Code Annotated § 13-20-201 et seq.). Acquisition of property for urban renewal or redevelopment requires approval of a redevelopment plan by the applicable governing body or agency designated by it (Tennessee Code Annotated § 13-20-203). Staff will seek an interpretation of the meaning of “or agency designated by it.”

Related Provisions in Other States

Connecticut and Georgia both require condemnations by housing authorities to be approved by the local governing body.

Right of First Refusal

The right of first refusal gives the condemnee the right to repurchase the condemned property if the condemnor decides to sell it. This issue came up often in interviews with stakeholders. Tennessee Code Annotated § 12-2-112 gives property owners the right of first of refusal if the state condemns their property. The state must offer the former property owner the opportunity to buy the property before offering it to other potential buyers. This right of first refusal exists for 10 years after the state acquires the property. The property owner may repurchase the property at fair market value.

Related Provisions in Other States

Ten other states have enacted right of first refusal laws.¹ Louisiana’s constitution provides a right of first refusal for owners of condemned property. Most state’s provisions apply to condemnations by both state and local governments. A number of these states, including Alabama, Florida, Kentucky, Minnesota, and North Carolina, require that the property be offered to the property owner at the price the condemnor paid for the property. Other states, including Ohio and Louisiana, stipulate that the property owner may repurchase the property at fair market value.

¹ They are Alabama, Connecticut, Florida, Kentucky, Minnesota, North Carolina, Ohio, Oregon, South Dakota and Utah.

Summary of Rule 31

Application

Under Rule 31, a court may order parties to an eligible civil action² to participate in certain alternative dispute resolution (ADR) proceedings. The standards and procedures provided apply only to Rule 31 ADR proceedings and only to dispute resolution neutrals serving pursuant to the rule.

Initiation

Rule 31 ADR proceedings may be initiated by the entry of an order of reference. Upon motion of either party, or upon its own initiative, a court, by order of reference, may order the parties to an eligible civil action to participate in a judicial settlement conference or mediation. With the consent of the parties, trial courts are also authorized to order the parties to participate in a case evaluation.

Any order of reference made on the court's own initiative shall be subject to review on motion by any party and shall be vacated should the court determine in its sound discretion that the referred case is not appropriate for ADR or is not likely to benefit from submission to ADR. Pending disposition of any such motion, the ADR proceeding shall be stayed without the need for a court order.

Upon motion of a party, or upon its own initiative and with the consent of all parties, a court, by order of reference, may order the parties to participate in nonbinding arbitration, a mini-trial, a summary jury trial, or other appropriate alternative dispute resolution proceedings.

The order of reference shall direct that all Rule 31 ADR proceedings be concluded as efficiently and expeditiously as possible given the circumstances of the case.

Selection

Within 15 days of the date of an order of reference, the parties must notify the court of the Rule 31 neutral(s) agreed to by the parties or of their inability to agree. In the event the parties cannot agree, the court shall nominate a neutral or neutrals in accordance with the following procedure:

- (1) In the case of mediations, mini-trials, nonbinding arbitrations, case evaluations, and any other appropriate alternative dispute resolution proceeding in which a single Rule 31 Neutral will serve, the court shall designate three Rule 31 neutrals

² Eligible Civil Actions include all civil actions except forfeitures of seized property, civil commitments, adoption proceedings, habeas corpus and extraordinary writs, or juvenile delinquency cases. The term "extraordinary writs" does not encompass claims or applications for injunctive relief.

- from the appropriate list or having the appropriate qualifications as set forth in the rule and one additional Rule 31 neutral for each additional party over two.
- (2) In the matter of a case evaluation or nonbinding arbitration before a panel of three or more Rule 31 neutrals, the court shall designate three Rule 31 neutrals, meeting the necessary qualifications for each seat on the panel and one additional Rule 31 neutral for each seat on the panel for each additional party over two.
 - (3) After receiving the court's nominations, each party shall strike one name for each neutral being selected from the court's nominations. The court then shall appoint the remaining Rule 31 neutral(s) unless a valid and timely objection is made and upheld. In the event the designated Rule 31 neutral cannot serve, the process will be repeated to the extent necessary.
 - (4) The court's nomination of Rule 31 neutrals shall be random unless the matter requires particular expertise not possessed by all Rule 31 neutrals.

The clerks for each judicial district shall maintain and make available to the public, upon request, a list of Rule 31 Mediators listed by the ADRC, the date of their approval, and their qualifications and experience.

Report Filing Requirement

The order of reference shall require the Rule 31 neutral to file a final report, pursuant to Rule 5.06 of the Tennessee Rules of Civil Procedure, with the court at the conclusion of the Rule 31 ADR proceeding. The final report shall state only: (i) which parties appeared and participated in the Rule 31 ADR proceeding, (ii) whether the case was completely or partially settled, and (iii) whether the Rule 31 neutral requests that the costs of the neutral's services be charged as court costs.

The report shall be filed within the time specified by the court in the order of reference. In the event the order of reference does not specify a deadline, the final report shall be filed within 60 days of the initial meeting with the parties.

Unless otherwise directed by the order of reference, the Rule 31 neutral shall file status reports with the court every 30 days until the Rule 31 ADR proceeding is concluded. For an eligible civil action mediated by a Rule 31 mediator, a final report shall also be filed.