

## THE POWER OF EMINENT DOMAIN BY PIPELINE CORPORATIONS IN TENNESSEE

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### **Tennessee Statutory Authority**

Tennessee Code Annotated (“T.C.A.”) § 29-16-101 provides that: [a]ny person or corporation authorized by law to construct any railroad, turnpike, canal, toll bridge, road, causeway, or *other work of internal improvement to which the like privilege is conceded*, may take the real estate of individuals, not exceeding the amount prescribed by law, or by the charter under which the person or corporation acts, in the manner and upon the terms herein provided [Emphasis added].

The Tennessee Supreme Court has held that the installation of a pipeline by a pipeline corporation is a work of internal improvement. *Shinkle v. Nashville Improvement Co. et al.*, 172 Tenn. 555, 562, 113 S.W.2d 404 (1938).

The Tennessee General Assembly has enacted specific statutes to empower certain corporations to condemn land and easements for purposes of internal improvement including T.C.A. § 65-22-101 which provides that the taking shall proceed and the damages or compensation to be paid shall be assessed in the manner provided by T.C.A. § 29-16-101, *et seq.*

The Tennessee General Assembly has also enacted a statute that specifically grants a pipeline corporation the right to appropriate easements in “lands necessary for its pipelines.” T.C.A §65-28-101 provides in pertinent part as follows:

A pipeline corporation has the right, in pursuance of the general laws authorizing condemnation of private property for works of internal improvement, to appropriate as an easement of right-of-way of lands necessary for its pipelines; . . .

The Natural Gas Act, 15 U.S.C. §§ 717-717w, does not preempt the state condemnation procedures codified at T.C.A. §§ 29-16-101 to 29-16-127. See *Midwestern Gas Transmission Company vs. Baker*, 2006 WL 461042 (Tenn.Ct.App).

### **The Condemnation Proceedings**

#### **Prior to Commencement of Condemnation**

#### **Appraisal Requirement**

T.C.A. § 29-17-1004. Appraisal required in any condemnation proceeding.

Notwithstanding any provision of law to the contrary, in any condemnation proceeding in this state, an appraisal of the property must be obtained. The appraisal shall value the property considering its highest and best use, its use at the time of the taking, and any other uses to which the property is legally adaptable at the time of the taking. Any appraiser making an appraisal must possess the designation Member of the Appraisal Institute (MAI), or be an otherwise licensed and qualified appraiser under title 62, chapter 39.

### **Pre-Filing Entry**

T.C.A. § 29-16-121 permits a condemning authority and its agents to enter upon private property for the purpose of preliminary surveys necessary for the proposed public project, subject to liability for any actual injury done to the property. T.C.A. § 29-16-121 states as follows:

T. C. A. § 29-16-121. Preliminary surveys.

A person or company actually intending to make application for the privileges herein contemplated, and entering upon the land of another for the purpose of making the requisite examinations and surveys, and doing no unnecessary injury, is liable only for the actual damage done, and, if sued in such case, the plaintiff shall recover only as much costs as damages.

### **Proceedings pursuant to T.C.A. §§ 29-16-101, *et seq.* – Jury of View**

The petition should identify the nature of the project for which the property is being acquired, that the project is for a public use, and the particular interest in the property, either a fee interest or an easement, should be identified. T.C.A. § 29-16-104. An accurate legal description of the property should be included, along with a corresponding map or plat attached as an exhibit if available. T.C.A. § 29-16-104. The petition should contain a prayer that a copy of the petition be served on the defendants and a suitable portion of the land or the rights of the defendants be awarded to the condemner. T.C.A. § 29-16-104.

Notice of the filing of the condemnation petition must be given to each respondent at least 30 days before the taking of any additional steps. T.C.A. § 29-17-104. If the defendant's name or address is unknown, or if he or she is not a resident of the state, notice should be given by publication. T.C.A. § 29-17-104. The notice should advise the defendant of the filing of the petition and the date scheduled for presenting the petition to the court for issuance of the writ of inquiry. The notice of the filing of the petition is in lieu of the summons that is normally issued in civil actions. Service of the notice, accompanied by a copy of the petition for condemnation, can be accomplished in any manner authorized by TRCP Rule 4. A return of the notice, like a return of a summons, should be completed in compliance with TRCP Rule 4.03. If the right to take has not been challenged within 30 days after the giving of notice, the condemner may take possession of the property. If the right to take is challenged, the court must promptly determine as a matter of law whether there is a right to take. If the court determines there is a right to take, it must issue a writ of possession if necessary. T.C.A. § 29-17-104.

After 30 day notice to defendant of the filing of the petition and if no challenge to the condemnation has been made, the court shall issue a writ of inquiry of damages to the sheriff commanding the sheriff to summon a jury to assess the damages. The condemner would normally submit a motion to sustain the its right to take the property under the power of eminent domain and for the court to issue the writ of inquiry and fix a time and place for the inquest. Any challenge to the condemner's right to take must be asserted at this stage of the proceedings. T.C.A. § 29-16-107.

If the defendant challenges the condemner's right to take, the court must first resolve this challenge before ordering the issuance of the writ of inquiry. T.C.A. § 29-16-107. If a writ of inquiry is ordered by the court, the sheriff will thereafter summon a panel of potential jurors from which the jury of view will be selected. The jury of view will consist of five persons, unless the parties agree to a different number. T.C.A. § 29-16-108.

If the date has not been set by the court, the sheriff must give the parties three days notice of the time and place of the inquiry. T.C.A. § 29-16-111. On the date and time specified, the jury will be selected (if the names of the jurors are not specified by the court or the parties) and sworn to fairly and impartially, without favor or affectation, and will lay off by metes and bounds the property required for the proposed improvement to assess the damages to the landowner. T.C.A. § 29-16-112. The jury may then receive brief instructions from the court on its duties, which are to go onto the property, to examine it, to hear testimony of witnesses but no arguments of counsel, to assess the damages, and to prepare a report in writing and deliver it to the sheriff. The jury of view will then be placed in the charge of the sheriff and will proceed to examine the property. T.C.A. § 29-16-113.

The parties and their counsel may accompany the jury of view to the property and put on evidence as to its value, but counsel are not permitted to make arguments to the jury of view. T.C.A. § 29-16-113. After the investigation of the property and the testimony have been completed, the jury of view must identify by metes and bounds the property required for the proposed project and must assess damages to the landowner in accordance with T.C.A. § 29-16-114. T.C.A. § 29-16-113. The decision of the jury of view may be a majority instead of a unanimous decision. T.C.A. § 29-16-115. The decision should be reduced to writing, and the report must include a legal description of the property and the amount of the award and be signed by a majority of the jurors. The report should be delivered to the sheriff who returns the report to the court. T.C.A. § 29-16-115. If the parties do not object to the report, it is confirmed by the court and the land decreed to the petitioner, upon payment of the assessed damages to the landowners with costs. T.C.A. § 29-16-116. An order should be entered incorporating the report of the jury of view, that the property be divested from defendants and vested in the condemner, and that the condemner pay the defendants the amount specified in the report. The order should also specifically provide for the issuance of a writ of possession to put the condemner in possession, if necessary.

Either party may file exceptions to the report of the jury of view, and for good cause shown; the court may set aside the report of the jury of view and issue a new writ of inquiry for a new jury of view. T.C.A. § 29-16-117. Although no time period is specified for filing exceptions, the appeal from the report of the jury of view must follow the disposition of the exceptions and such an appeal must be filed within

45 days of the confirmation of the report of the jury of view. T.C.A. § 29-16-118. It is therefore arguable that a court would find that exceptions must be filed and disposed of prior to the expiration of the 45-day period. A party may file an appeal regardless of whether exceptions have been filed. Either party may file an appeal within 45 days of the entry of the order confirming the report of the jury of view, and upon giving security for costs obtain a trial de novo before a jury as in any civil case. T.C.A. § 29-16-118.

The condemner who obtained possession under the order confirming the report of the jury of view may continue in possession upon filing of an appeal by posting a bond, payable to defendants, in double the amount of the award of the jury of view, conditioned upon the condemner's compliance with the final judgment in the case. T.C.A. §§ 29-16-120; 29-16-122. Costs on appeal must be paid by the appealing party in all cases where the petit jury affirms the award of the jury of view or is more unfavorable to the appealing party. T.C.A. § 29-16-119. In all other cases, the court may award costs as in chancery cases. T.C.A. § 29-16-119.

### **Compensation in Condemnation Cases**

#### **Compensation for the Taking**

Article 1, Section 21, of the Tennessee Constitution's requirement that private property cannot be taken for public use without just compensation requires the award of the fair market value of the property actually taken to the property owner. Fair market value of the property taken is to be established as of the date of taking. The date of taking is the date of possession. Fair cash market value means the amount of money that a willing buyer would pay for the property and that a willing seller would accept, when the owner is not compelled to buy and the landowner is not compelled to sell.

#### **Incidental/Severance Damages**

Additional compensation is provided to landowners in condemnation proceedings under Tennessee statutes such as T.C.A. § 29-16-114:

1. The value of the land or rights taken without deduction.
2. Any incidental damages, if any, to the remaining property of the landowner, subject to deduction for incidental benefits which may result to the owner by the reason of the proposed improvement.

#### **Relocation Expenses**

To the extent that the condemnation of any parcel of real property requires the removal of furniture, household belongings, fixtures, equipment, machinery or stock in trade of any person in rightful possession, regardless of whether such person has a legal interest in said property, T.C.A. § 29-16-114 requires that the reasonable expense of the removal of such property shall be considered in the assessment of incidental damages. The reasonable expense of the removal of such property shall be construed as including the cost of any necessary disconnection, dismantling or disassembling, the loading

and drayage to another location not more than fifty (50) miles distant and the reassembling, reconnecting and installing on such location.

**Attorney, Appraisal and Engineering Fees**

Owners of property are entitled to recover reasonable expenses, including attorney, appraisal and engineering fees, incurred in an eminent domain proceeding from a condemning authority if:

- (1) The final judgment is that the acquiring party cannot acquire the real property by condemnation; or
- (2) The proceeding is abandoned by the acquiring party. T.C.A. § 29-17-106

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.