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CLERK OF COURT

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

BYHALIA PIPELINE LLC, Petitioner v. SCOTTIE LINDA WASHINGTON FITZGERALD, et al. Respondents, and MEMPHIS COMMUNITY AGAINST POLLUTION, INC. Intervenor.	)	Case No. CT-5335-20 Division 1 Tract No. TN-SH-046.50 and TN-SH-0.60.025 Parcel ID: 082047 00014 Parcel ID: 082047 00013 Tax Map Page 2140 **JURY OF VIEW DEMANDED**

BYHALIA PIPELINE LLC, Petitioner, CLYDE ROBINSON, et al., Respondents, and MEMPHIS COMMUNITY AGAINST POLLUTION, INC. Intervenor.	)	Docket No. CT-4260-20 Division 1 Tract No. TN-SH-019.000 Parcel ID: 082003 00070 Tax Map Page: 184J **JURY OF VIEW DEMANDED**

RESPONDENTS SCOTTIE LINDA WASHINGTON FITZGERALD (CT-5335-20) AND CLYDE ROBINSON'S (CT-4260-20) JOINT MEMORANDUM OF LAW IN OPPOSITION TO BYHALIA PIPELINE, LLC'S RIGHT TO TAKE

COME NOW Respondents Scottie Linda Washington Fitzgerald in Case No. CT-5335-20 ("Ms. Fitzgerald"), and Clyde Robinson ("Mr. Robinson") in Case No. CT-4260-20 (collectively "Respondents"),[1] by and through undersigned counsel, and submit this *Memorandum of Law in Opposition to Byhalia Pipeline LLC's ("Byhalia") Right to Take*. In support thereof, Respondents state as follows.[2]

INTRODUCTION

Before this Court is a singular, narrow question—whether a private, for-profit corporation intending to build a 24-inch diameter high pressure crude oil pipeline has been delegated the authority by the Tennessee Legislature to take the private property of individual citizens of this State.[3] After Respondents declined to grant an easement to Byhalia to place a portion of the pipeline through their respective properties, Byhalia sued them for the right to permanently place (and very likely, one day, abandon) a pipeline so that Byhalia (a joint venture between Plains All American, L.P. and Valero Energy Corporation) may transport crude oil across Respondents' land, which sit in the historic Boxtown neighborhood in Southwest Memphis across the Memphis Sand Aquifer, the main drinking water source for over one million residents of the region.

[1] For purposes of this brief, Respondents Fitzgerald and Robinson file a joint brief since all positions of fact and law are common.

[2] Although not relevant to this briefing, Respondents also object to the Petitioner's statement that Respondents have conceded that Byhalia has "taken all steps necessary at the federal and state levels to obtain authorization to build its pipeline." (Pet'r's Br. at p. 6 n.2). A statement that MCAP does not intend to explicitly challenge an issue in one proceeding in this venue does not constitute a concession of the issue by that party or these Respondents. Respondents continue to seek to determine whether Petitioner has obtained the necessary federal, state, and/or local permits to construct its project. At this time, Respondents are unconvinced that they have. Respondents are not aware of Petitioner having obtained any necessary local permits, and there are currently pending challenges to the use of the federal Nationwide Permit 12 and the validity of the state Aquatic Resource Alteration Permit (ARAP), neither of which considered the pipeline's effect on groundwater. Moreover, a pending ordinance before the Memphis City Council and a pending zoning amendment before the Shelby County Commission may affect the validity of this project. Respondents respectfully reserve the right to raise the issue of mootness with the Court if a time comes, if ever, where Petitioner has been denied or failed to obtain a necessary permit to begin construction.

[3] The second question—whether such a taking would constitute a public use—remains in dispute. The Court has indicated that it will take up this secondary question for consideration only if it first determines that Byhalia has the power to exercise a taking.

Before considering whether Byhalia's pipeline qualifies as a "public use" or whether the amount of compensation proposed in exchange for the taking is "just," the Court must first consider whether Byhalia has the statutory right to take. *See Pickler v. Parr*, 138 S.W.3d 210, 213 (Tenn. Ct. App. 2003). The Tennessee Constitution prohibits the taking of private property for private purposes. Tenn. Const. art. I, § 21. The United States Constitution declares that "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. In limited circumstances, a private entity may take private property for a public use only if the government has delegated such authority. *See* Tenn. Code Ann. § 29-17-101, *et seq.*

For context to answer the present question, the Court must first look at Chapter 863 of the Public Acts of 2006, which applies to all eminent domain and condemnation proceedings initiated on or after July 1, 2006. *See* Tenn. Code Ann. § 29-17-101; 2006 Pub. Acts, ch. 863 § 25. Tennessee's condemnation statutes "strongly protect private property rights by stating that the power of eminent domain should be used sparingly." *Phillips v. Montgomery Cty.*, 442 S.W.3d 233 (Tenn. 2014) (considering a regulatory taking by a governmental entity).

It is no coincidence that Tennessee eminent domain law was restricted in this way in 2006. In 2005, the United States Supreme Court issued its ruling in *Kelo v. City of New London*, 545 U.S. 469 (2005), which held that a taking by a private company is permissible under the Public Use Clause of Article V of the Constitution when the taking is rationally related to a conceivable public purpose. *Id.* at 483-90. Justice Stevens, in his majority opinion in *Kelo*, expressly invited states to place further restrictions on the exercise of the takings power. *Kelo*, 545 U.S. at 489 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. . . . [T]he necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate."). Tennessee did just

that. This Court need to look no further than guidance from the Tennessee Supreme Court to confirm this analysis. In *Phillips*, in considering a regulatory taking by a governmental entity, the Court emphasized the 2006 law's explicit limitations on the delegation of the power of eminent domain in Tennessee:

> In response to the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), the General Assembly passed Public Act 863, providing that "the power of eminent domain shall be used sparingly, and that laws permitting the use of eminent domain **shall be narrowly construed as not to enlarge, by inference or inadvertently, the power of eminent domain.**" The Act also provided that "public use" shall not include either private use or benefit or the indirect public benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity," with listed exceptions such as public transportation, public utilities, urban renewal, and industrial parks.

442 S.W.3d at 243 n.13 (citing Act of May 25, 2006, ch. 863, § 1, 2006 Tenn. Pub. Acts 2143, 2144 (amending Tenn. Code Ann. § 29-17-101 (2005)); Scott Griswald, *Property Rights v. Public Use: Analyzing Tennessee's Response to Kelo Eminent Domain Ruling*, 43 Tenn. B.J. 14 (2007)) (emphasis added).[4]

> "Eminent domain" under Tennessee law is defined as:
>
> the authority conferred upon the government, and those entities **to whom the government delegates such authority**, to condemn and take, in whole or in part, the private property of another, so long as the property is taken for a legitimate public use in accordance with the fifth and fourteenth amendments to the United States Constitution, the Constitution of Tennessee, Art. I, § 21, and chapter 863 of the Public Acts of 2006.

Tenn. Code Ann. § 29-17-102(1) (emphasis added).

More simply stated, since the passage of the 2006 Public Acts, where the Tennessee General Assembly has not explicitly conferred the power of eminent domain, this Court cannot

[4] Mr. Griswald published a similar article with the Tennessee Journal of Business Law in 2007. *See* Scott Griswald, *Changing with the Times: Eminent Domain Practice in Light of Tennessee Public Act 863*, 9 Tenn. J. of Bus. L. 179 (2007). In light of the Tennessee Supreme Court's reliance on Mr. Griswald's analysis, Respondents attach a copy of this Article for the Court's reference as Exhibit A.

infer that such authority exists. *See* Tenn. Code Ann. §§ 29-17-101, 29-17-102(1), 29-17-103. Chapter 863 of the Public Acts of 2006 also expressly preempted any other statutes granting the authority to exercise eminent domain that conflict with that part, noting that "this part shall control and shall be construed to protect the private property rights of individuals and businesses." Tenn. Code Ann. § 29-17-103. Each Tennessee statute that conveys the power of eminent domain passed prior to 2006 (and legal opinions that apply those statutes), must now be evaluated in light of the 2006 laws.

Consequently, there is no general authority for a private entity to take private property in Tennessee. Since 2006, such authority is defined only by statute as delegated by the General Assembly, so long as it does not conflict with Title 29, Chapter 17 of the Tennessee Code.

ARGUMENT

Because the Tennessee legislature has not expressly delegated authority to a private, for-profit crude oil pipeline corporation to exercise the power of eminent domain, Byhalia does not possess the right to take and judgment should be granted in favor of Respondents.

I. Since 2006, Tennessee has narrowly interpreted the scope of actors that can exercise eminent domain power.

As discussed, Tennessee restructured its laws governing takings in direct response to *Kelo*. *See* Griswald, Ex. A at 179-80 (noting that Justice Stevens in *Kelo* explicitly recognized and invited states to place further restrictions on exercise of the takings power) (quoting *Kelo*, 545 U.S. at 489). Petitioner has cited to no authority subsequent to the 2006 Public Acts that discusses conferring the authority it purports to possess to a private, for-profit crude oil pipeline corporation. Consequently, this Court must determine, as a matter of first impression, whether there is any statute that expressly grants Byhalia the power to exercise eminent domain, in light of the directive in Tennessee Code Annotated § 29-17-101 that the power of eminent domain should be used

"sparingly" and be "narrowly construed so as not to enlarge, by inference or inadvertently, the power of eminent domain." No inference may be made to twist Byhalia and crude oil into an existing delegation of authority to take. *See* Tenn. Code Ann. § 28-17-101.

II. The Tennessee Legislature has not delegated the power of eminent domain to Byhalia.

The power of eminent domain in Tennessee is not available to all private entities, but only "certain private entities, such as railroad, telephone and electricity providers, by the authority of the legislature." *Windrow v. Middle Tenn. Elec. Membership Corp.*, 376 S.W.3d 733, 737 (Tenn. Ct. App. 2012). Byhalia possesses the burden of establishing its right to take property. *See, e.g. Lebanon & Nashville Turnpike Co. v. Creveling*, 17 S.W.2d 22, 24 (Tenn. 1929). Any doubt as to whether Byhalia possesses the right to take must be resolved against it. *See* Tenn. Code Ann. § 29-17-101. Byhalia, who purports to build a 24-inch diameter high pressure crude oil pipeline, simply is not one of the "certain" private entities that are given this limited authority.

In its Petition, Byhalia alleged a list of varying purported sources of its authority to take private property for its purposes of building a crude oil pipeline:

> [Byhalia], in accordance with the Constitution of the State of Tennessee and all Public Acts of Tennessee, and all acts amendatory thereof and supplementary thereto, particularly T.C.A. §29-16-101, et. seq. and/or §65-22-101, and/or §65-26-101, et seq., and/or §29-17-102(2)(B), and/or §65-28-101 and/or T.C.A. §29-16-121, has the right to exercise the power of eminent domain under the laws of the state of Tennessee for the proposed pipeline project.

Petition for Condemnation ¶ 3. In its brief in support of its right to take, Byhalia has now narrowed its position to three statutes: Tennessee Code Annotated Section 29-16-101, Section 65-22-101, and Section 65-28-101. A careful reading of these three provisions reveals the narrow and limited circumstances in which the State of Tennessee delegates its authority to take. Indeed, because none of the three are applicable to a private, for-profit, crude oil pipeline, Byhalia does not possess the right to take. Respondents take each of these purported sources of authority in turn.

A. Tennessee Code Annotated § 29-16-101 does not confer any power to take, and, even if it did, the Byhalia Pipeline is not a work of "internal improvement."

Tennessee Code Annotated § 29-16-101 provides that any "corporation authorized by law to construct . . . work of internal improvement . . . may take the real estate of individuals . . . in the manner and upon the terms herein provided." Tenn. Code Ann. § 29-16-101 (emphasis added). This provision "is primarily procedural in nature . . . [and] merely prescribes procedures for the exercise of this power by entities on whom the General Assembly has otherwise conferred it." *Midwestern Transmission Co. v. Baker*, 2006 WL 461042, at *5 (Tenn. Ct. App. Feb. 24, 2006). Given that the Tennessee General Assembly has not explicitly conferred the power to take to an interstate crude oil pipeline, Tennessee Code Annotated § 29-16-101, being procedural in nature cannot, and does not, confer substantive rights upon Byhalia. This is confirmed even by Byhalia's own cited authority—the 2001 Attorney General Opinion that Byhalia relies on references Section 29-16-101 as a procedural framework initially, then moves through the "specific statutes" passed by the Tennessee General Assembly that "empower certain corporations to condemn land and easements for purposes of internal improvement." (*See* Ex. C to Pet'r's Br., Tenn. Op. Att'y Gen. No. 01-171 (Dec. 12, 2001)). Section 29-16-101 (which is contained in a Title of the Tennessee Code for Remedies and Special Proceedings) is not listed as a "specific statute[]" conferring a substantive right.

Further, even if Section 29-16-101 conveyed substantive rights, authority cited by Byhalia -- *Shinkle v. Nashville Improvement Co.*, 113 S.W.2d 404, 405 (Tenn. 1938) -- does not stand for the proposition, as asserted by Byhalia, that <u>all</u> pipelines are works of "internal improvement" under that Section. While *Shinkle* did involve exercising eminent domain for construction of a pipeline, the "pipeline" at issue was a 6-inch water main in downtown Nashville that was used to transport water from the City of Nashville to residents who paid for the "privilege of tapping said

line." 113 S.W.2d at 405. The Court held that that "[t]he installation of **this** pipe line was a work of internal improvement." *Id.* (emphasis added). The Court did not, at any point in the opinion, state that ***any*** pipeline constitutes a work of internal improvement under the Tennessee Code. Nor does the Court in *Shinkle* otherwise define the meaning of "internal improvement" under Section 29-16-101 (or, as later discussed, Section 65-28-101).

Shinkle is the only purported authority Byhalia relies on to support that its pipeline may be a work of internal improvement, and Byhalia fails to provide any support for the proposition that a 24-inch interstate high-pressure crude oil pipeline is akin to a 6-inch water main used for tapping into a water source in 1938. The latter plainly provides "internal improvement" to residents of Tennessee by the provision of an essential utility – water – but the court in that case in no way implied that crude oil should be that same category. The Tennessee General Assembly has dictated that no conveyance of the power to take should be made by implication. Byhalia urges this Court to, in effect, adopt a meaning of "internal improvement" that would define all pipelines, regardless of size, location, necessity, or what it was transporting as being an "internal improvement." This is contrary to the plain language of the statutes, which connect the use of the land to be taken in defining the right to take. *(See* Ex. C to Pet'r's Br., Tenn. Op. Att'y Gen. No. 01-171 (Dec. 12, 2001)) (considering, in great detail, the nature of the product to be transported by a pipeline in considering whether a pipeline corporation has the right to condemn an easement). Adopting Byhalia's position would require the Court to issue a rule that is directly contrary to the directive by the Tennessee General Assembly to construe narrowly the power of eminent domain in Tennessee. Byhalia's use here is neither internal (because it is an interstate pipeline with no access or use by Tennesseans), nor is it an improvement.

B. Tennessee Code Annotated § 65-22-101 is not applicable here.

Petitioner also relies on Section 65-22-101 as support that it holds the power to exercise eminent domain, citing to a combination of certain portions of that provision along with definitions from other chapters of the Code to pinhole itself within the scope of that chapter's delegated powers. Last modified in 1932, Chapter 22 of Title 65 is titled "Light, Heat and Power Companies." *See* Tenn. Code Ann., Tit. 65, Ch. 22. As the plain language of the statute, read in its entirety, makes clear, it applies only to the exercise of eminent domain to construct pipelines that provide transport "natural or artificial gas or oil . . . for sale to the public generally or to utility corporations for resale to the public generally." Tenn. Code Ann. § 65-22-101. Read in its context in this statute, oil is related to the creation of light, heat and power, not crude oil.

Byhalia recognizes that "the purpose of the transportation must be 'for sale to the public generally or to utility corporations for resale to the public generally.'" (Pet'r's Br. at 7 (citing Tenn. Code Ann. § 65-22-101)). Byhalia then purports, by citation to a self-serving Declaration by its Vice President for Engineering, that it fulfills this purpose. (*See* Pet'r's Br. at 8). That reference is misleading, however. Byhalia, in its own Declaration, states only that "[t]he Byhalia Connection Pipeline will further enhance the ability of **oil producers** to provide crude oil to facilities throughout the region, which in turn enables **refiners** to provide the area with gasoline, diesel, jet fuels . . . and other useful products and resources." (Ex. B to Pet'r's Br. at ¶ 6) (emphasis added). Oil producers and refiners are not "the public generally." Oil producers and refiners are not providers of utilities for resale to the public. The interstate transport of crude oil (which is a raw material, not a "petroleum product" or a "petroleum commodity") is not a substance or a use that is for sale to the public generally or to a utility corporation.

Moreover, if the Tennessee legislature had intended for all pipeline projects to possess the power of eminent domain under this Chapter, it would not have limited its applicability to pipelines in painstaking detail. *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) (Courts may "presume that the General Assembly used every word deliberately and that each word has a specific meaning and purpose."). To infer otherwise would unlawfully expand the power of eminent domain in Tennessee. This is, in fact, confirmed by the Attorney General Opinion cited by Byhalia. (Ex. C. to Pet'r's Br., Tenn. Op. Att'y Gen. No. 01-171 (Dec. 12, 2001))

This 2001 Tennessee Attorney General Opinion interpreted the subject statute to provide that a pipeline corporation has the right to condemn private property for pipelines used for the "transportation and distribution" of a defined and specific lists of materials or products; "liquid *petroleum products* such as gasoline, kerosene, home heating oil, and jet fuel." (Ex. C. to Pet'r's Br., Tenn. Op. Att'y Gen. No. 01-171 (Dec. 12, 2001)) (emphasis added). Crude oil is not a "petroleum product." *See id.* It is a naturally occurring raw material not sold to the public generally. Without further processing, crude oil does not provide consumers with light, heat, or power. In fact, the Attorney General recognizes exactly this point. (*See* Ex. C. to Pet'r's Br., Tenn. Op. Att'y Gen. No. 01-171 (Dec. 12, 2001)). That Opinion defines "oil," as "crude petroleum that was originally in an oil phase in the reservoir," a separate type of product not listed in its definition of what is a "liquid petroleum product." The Opinion concludes that the Tennessee Legislature has contemplated that liquid petroleum products would pass through pipelines, but does not state or imply that other products, like crude oil, are allowed. (*See* Ex. C. to Pet'r's Br., Tenn. Op. Att'y Gen. No. 01-171 (Dec. 12, 2001)).[5] Byhalia's only other legal support that it is a

[5] Even if the Court interpreted the opinion as somehow including crude oil, as the Court is well-aware, an Attorney General Opinion is not controlling, particularly in light of the intervening law. *See Whaley v. Holly Hills Memorial Park, Inc.*, 490 S.W.2d 532, 533 (Tenn. 1972) ("It must be noted that an opinion of the attorney general may be persuasive but is in no way binding authority. Such opinions do not have the import or effect of court decisions.").

common carrier[6] likewise involves a pipeline corporation that transports refined petroleum products, not crude oil. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 832 (Tenn. 2008) ("Plaintiff is an interstate common carrier and transporter of refined petroleum commodities, such as heating oil, diesel fuel, kerosene, jet fuel, and gasoline . . . .").

Byhalia simply does not possess the power to take as a common carrier under Section 65-22-101 for the interstate transportation of crude oil.

C. Tennessee Code Annotated § 65-28-101 only applies to "gas companies," not crude oil pipelines.

The full text of Section 65-28-101 reads 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 or right-of-way of lands necessary for its pipelines; and also land, and rights in land **for the development, construction and operation of underground storage reservoirs for natural gas**; and also land for pump stations and terminal facilities over any land of any person or corporation through which a pipeline may be located; provided, that no one of the streets, alleys, squares or highways within the corporate limits of any municipality in the state shall be entered upon or used by any corporation for laying pipelines and conductors, or otherwise, until the consent of the municipal authorities shall have been obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done.

Id. (emphasis added). The General Assembly defined the "pipeline systems" covered by this part as "new and existing pipeline rights-of-way and any pipeline, equipment facility, and building, used by a public utility in the transportation and distribution of *gas* or the treatment of *gas* during the course of transportation and distribution . . . ." Tenn. Code Ann. § 65-28-104 (emphasis added)

Once again, the delegation of the Government's power to appropriate private property is modified by two limitations—one, that the condemnation be "for works of internal improvement,"

[6] Further, Byhalia did not assert in its Petition in either case that it is a common carrier.

and two, that the project be "for the development, construction and operation of underground storage reservoirs for *natural gas*." Tenn. Code Ann. § 65-28-101 (emphasis added). For the purported conclusion that a pipeline is itself a work of internal improvement, regardless of its location, the need for the pipeline, or what it is transporting, Petitioner cites to a non-binding attorney general opinion, relying only on the 1938 Tennessee Supreme Court decision in *Shinkle*, 113 S.W.2d 404. As previously discussed *supra*, the Court in *Shinkle* does not, at any point in its opinion, state as a general matter that all pipelines are works of internal improvement. Even so, Byhalia misstates the analysis of the Attorney General Opinion. It does not conclude that Section 65-28-101 "speaks broadly" to include oil pipelines, as argued by Petitioner. (Pet'r Br. at 10). Rather, the Attorney General makes explicitly clear that what is transported by a pipeline is determinative of whether there has been a delegation of the power of eminent domain. (*See* Ex. C. to Pet'r's Br., Tenn. Op. Att'y Gen. No. 01-171 (Dec. 12, 2001)) (distinguishing "oil," defined as "crude petroleum that was originally in an oil phase in the reservoir," from "petroleum products" (internal citations omitted)).

Further, the Tennessee legislature has made clear, by virtue of its definitions within this Chapter, that the covered "pipeline systems" are transporters of gas or utility providers. Byhalia does not meet this definition. Again, Tennessee eminent domain statutes cannot be construed to "enlarge, by inference or inadvertently, the power of eminent domain." Tenn. Code Ann. § 29-17-101.

Even if the Court considers that Section 65-28-101 does delegate authority to an private, for-profit, interstate crude oil pipeline, Byhalia has made no showing that it has complied with the latter part of the provision—requiring the consent of the authorities of the City of Memphis for traversing city streets and alleys and an ordinance prescribing the terms for the same. Byhalia has

not alleged any compliance with this, and, in fact, has repeatedly claimed publicly that it does not require approval from the Memphis City Council. It is inapposite to rely on this provision as authority to condemn while avoiding its provisions elsewhere.

CONCLUSION

Based on the foregoing, Respondents submit that Byhalia has failed to meet its burden of establishing that it possesses the legal right to take, a power that must be explicitly delegated by the State of Tennessee and must be narrowly construed. Respondents respectfully request that the Court enter judgment in their favor and determine as a matter of law that Byhalia cannot acquire property rights from the respective properties of Respondents. Further, in accordance with Tenn. Code Ann. § 29-17-106(a)(1)(C) and (b), Respondents request that all costs be taxed to Petitioner and that Respondents shall recover their reasonable expenses, including reasonable attorney fees, should the court conclude that Petitioner cannot acquire the property rights by condemnation. *See* Tenn. Code Ann. § 29-17-106.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that, on the 16th day of April, 2021, a true and correct copy of the foregoing was provided via electronic and U.S. Mail to:

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EXHIBIT A

43-FEB Tenn. B.J. 14

Tennessee Bar Journal
February 2007

Article

Cover Story
Scott Griswold [a1]

PROPERTY RIGHTS vs. PUBLIC USE

Analyzing Tennessee's response to Kelo eminent domain ruling

***15** In the recent controversial eminent domain case, *Kelo v. City of New London*, [1] Justice John Paul Stevens said that "nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power." In response to this invitation from the Supreme Court, the Tennessee General Assembly enacted Public Act 865.

The changes to the eminent domain laws in Tennessee can be summarized into four categories: 1) establishing a clear legislative intent concerning when the government is permitted to use eminent domain; 2) defining certain elements of this area of law; 3) changing condemnation procedures, including eliminating the "quick take" procedure; and 4) removing eminent domain power from certain agencies, subdivisions, etc. Moreover, the legislation addressed obsolete areas of the law, such as abolishing provisions for public mills. The undertaking garnered broad partisan support from rural and urban lawmakers, and the result, hopefully, will be a more concise and predictable takings jurisprudence in our state.

***The Catalyst: Kelo v. City of New London*.** In June 2005, the United States Supreme Court issued its decision in *Kelo v. City of New London*. In an effort to reduce the federal military budget, the Department of Defense closed the Naval Undersea Warfare Center, which is located in the Fort Trumbull area of New London, Connecticut, and laid off approximately 1,500 civilians. The center's closing exacerbated the city's decadelong economic decline and led state and local leaders to declare this a "distressed area," targeted for economic revitalization. The city, the New London Development Corporation (NLDC), and the state developed a plan to reinvigorate the area by renovating Fort Trumbull into a state park. Shortly after this plan was announced, the pharmaceutical giant, Pfizer Inc. unveiled its plans to build a new $300 million research and development complex adjacent to the new state park. Unfortunately for Susette Kelo, her quaint pink cottage was situated in an area destined to become a parking lot. The city proposed to seize her cottage through the exercise of the power of eminent domain. The NLDC did not assert that her

property was blighted or otherwise in poor condition, and sought it only because "[it] happened to be located in the development area."[2]

In an effort to save her home, Kelo (along with eight of her neighbors) challenged the NLDC's condemnation and claimed that the proposed taking of her property was a violation of the "public use" clause of the Fifth Amendment to the United States Constitution. While the litigation was pending before the trial court, the NLDC leased the parcels to private developers for long-term leases in exchange for their agreement to develop the land in accordance with the revitalization plan.[3] After a bench trial, the trial court issued a permanent restraining order that prohibited some of the takings, but approved other condemnation plans that directly supported the new state park. On appeal, the Connecticut Supreme Court overturned the trial court's permanent injunction and found that under existing state law the takings were authorized.[4]

The United States Supreme Court granted Ms. Kelo's petition for certiorari to determine "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[5] In his majority opinion, Justice Stevens opined that "[w]ithout exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in [the takings] field."[6] Justice Stevens emphasized that the states are free to place additional restrictions on the exercise of the takings power. He noted that some states already have provisions — either from their state constitutions or eminent domain laws — that would prevent a similar taking. As such, the majority asserted that the wisdom of using eminent domain for economic development properly remains within the confines of the state's elected representatives.

***Tennessee's Response: Public Act 865*:** On June 6, 2006, Tennessee's Gov. Phil Bredesen signed Public Act 865 into law, thus concluding over a year's worth of legislative wrangling in this contentious area. The act begins with a preamble that Tennessee's Constitution, in conjunction with the Fifth Amendment of the Federal Constitution, protects the right of an individual to own property and to be free from capricious and arbitrary takings of that property by the government.

The initial statutory addition is the proclamation that the intent of the lawmakers is that "the power of eminent domain shall be used sparingly, and that laws permitting the use of eminent domain shall be narrowly construed so as not to enlarge by inference or inadvertently the power of eminent domain."[7] One of the primary shortcomings of Tennessee's prior takings jurisprudence was the lack of a statutory definition of what was "eminent domain" and "public use." As a result, the legislation defines "eminent domain" and allows the government to delegate its eminent domain power to other entities, such as housing authorities or development corporations.[8]

The general assembly also gave a specific meaning to "public use" by creating a negative definition: public use "shall not include either private use or benefit or the indirect public ***16** benefits resulting from private economic development and private commercial enterprise,

including tax revenue and increased employment opportunity."[9] Essentially, the general assembly turned takings jurisprudence on its head and attempted to preempt a *Kelo* condemnation in Tennessee. Under the old and extremely broad grant of power, counties could use eminent domain "for any county purpose."[10]

As a result, it appears now that those vested with condemnation powers in Tennessee can only use them in five discreet areas. First, a government may condemn land for the most obvious purpose of eminent domain: pure public use. The government may seize an interest in real property for the construction of roads, highways, bridges, facilities, or other forms of public transportation.[11] Even the most stalwart strict constitutional constructionists would have a difficult time arguing that building a road was not "for public use."[12]

The second area is comprised of the "common carrier" takings. Here, the government may acquire an interest in land necessary for the functioning of a public or private utility, including a governmental or quasi-governmental utility, a common carrier, or entities holding the eminent domain authority.[13] Generally, these takings are justified on the premise that the public is the primary beneficiary. For illustration, the local power company, generally, has the ability to exact an easement from a property owner in order to run a power cable across the land.

Third, housing authorities or community development agencies may invoke condemnation proceedings to cure blighted areas as part of an urban renewal or redevelopment plan as authorized by statute.[14] In addition to defining "eminent domain" and "public use," the general assembly attempted to clearly delineate what constitutes a "blighted area." Prior to the changes, Tennessee law defined "blighted areas" as "areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, lack of ventilation, light and sanitary facilities, deleterious land use, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community."[15] The general assembly defined "welfare of the community" so as to explicitly preclude a decrease in property value or an increase in tax revenues as the sole reasons for condemning land as blighted.[16] Moreover, the legislature empathically stated that land used predominately for agricultural purposes could not be considered as blighted under any circumstances.[17]

Fourth, a government can seize property even if a private individual receives an incidental benefit.[18] However, the government cannot invoke condemnation proceedings if the taking is "primarily for the purpose of conveying or permitting such incidental private use[.]"[19] For example, the local airport authority can seize lands to build an airport and inside the airport it can lease space to a private individual to operate a food court. The food court vendor is only an incident beneficiary to the airport being built; whereas, the flier is the primary beneficiary.

Lastly, counties, cities, and towns may acquire property through eminent domain for an industrial park, assuming the park is authorized by the Industrial Parks Act (IPA), codified at *Tenn. Code Ann*. section 13-16-201 *et. seq*. Generally, the IPA allows municipalities to condemn property to build industrial parks. [20] However, before the government moves forward with the industrial park, it must acquire a certificate of public purpose and necessity. In order to obtain the certificate, the Department of Economic and Community Development must investigate and review the proposed industrial park. The Act adds a new subsection to the IPA that limits the government's eminent domain powers to the area within its jurisdictional boundaries or within an urban growth boundary. [21]

While these changes do add clarity and limitations, it remains to be seen how effective these new definitions will be in protecting property owners. For example, under the new definition of "blighted areas" it is still possible to have a *Kelo*-type taking in Tennessee because of the vagueness of what exactly is a blighted area. A city could argue that an inner city block, which is riddled with crime and poverty, is "detrimental to the safety, health, morals, or welfare of the community" and, as such, should be condemned and transferred to a developer who can increase the safety of the area by building a new upscale residential village. The developer and city are not relying on decreased property values or increased tax revenues, but merely gains in safety. A similar analogy could be supported under the new "welfare of the community" definition. Considering that poorer neighborhoods are often-times the least ***17** politically influential, it is not too far of a stretch to recognize the shortcomings in the act. While the act takes a step in the right direction in addressing some of the deficiencies in this area of the law, until more is done many could view it as nothing more than a "feel good" political ploy that, in reality, does very little to protect property owners in Tennessee.

Another primary set of changes was the procedural mechanisms to condemn property. In a new section of the *Tennessee Code Annotated*, any government entity that holds the power to condemn and seeks to condemn property must provide the property owner at least 30 days' notice before taking any additional steps. [22] Under the old regime, condemners could effectuate a taking in as little as five days. In this most critical enlargement of rights, the property owner has a significantly longer time-frame to weigh the options and answer the petition. Moreover, if the property owner is unknown, a non-resident, or cannot be found, the government may give notice by publication in the same manner as is customarily done in the chancery court. [23] If the property owner fails to challenge the taking, the government has the right of possession of the property. [24] On the other hand, if the property owner challenges the taking within thirty days, the chancery court must determine, as a threshold matter, whether the government has the right to seize the property. [25] If the government does have the right to possession and the property owner refuses to comply with the condemnation proceedings, the court is empowered to issue a writ of possession to the local sheriff to put the government in possession. The writ of possession can be issued before a trial to fix the amount of compensation due. [26]

Other procedural changes include mandating that if a property is completely condemned; the total damages shall not be less than the property assessor's valuation immediately before the condemnation "less any decrease in value for any changes in such parcel occurring since the valuation was made, such as the removal or destruction of a building, flooding, waste, or removal of trees." [27] In addition to the immediately past property assessor valuation, the parties must obtain an appraisal of the property. [28] The appraisal report must include the property's best and highest use, the current value of the property at the time of the proceeding, and a description of any other legal use of the property at the time of the taking. A potential shortcoming of the new laws is that utilities may be forced to acquire a "full blown" appraisal, even when they are merely seeking a partial taking. The new statutory scheme will likely be a boon to appraisers and significantly increase the costs of less than fee simple takings for utilities.

Furthermore, under the previous statutory scheme, a government entity seeking condemnation of property had the option of depositing funds with the court clerk that it reasonably believed the property owner was entitled to as a result of the taking. [29] Once these funds were deposited, the property owner could petition to withdraw these funds without prejudice so long as he agreed to refund any shortfall between the amount withdrawn and the amount awarded at a damages hearing. [30] The new statutory provisions require the government to deposit funds equal to the value of the appraisal with the court's clerk at the time the condemnation petition is filed. [31] Furthermore, the payment made to the clerk shall not limit or fix the amount of damages that could be found in subsequent proceedings. [32]

The final area of significant change made to Tennessee's eminent domain laws was to eliminate that power from certain regional authorities and other political and administrative subdivisions. In addition, the general assembly abolished the provisions creating public mills and their ability to condemn property. [33] Lastly, the general assembly abolished the counties' ability to seize natural lakes or land to construct lakes [34] and to condemn land for creating ferries. [35]

As with most shifts in public policy, there will be disagreements over the scope and interpretation of the act. Property owners and governments will likely ask the courts to ascertain the boundaries of the act and what is "welfare of the community," "blight," "for public use," etc. Moreover, the courts may be asked to decide:

> whether a telephone company has to incur the expense of appraising an entire parcel of property or merely the decrease in value resulting from a telephone line being run across its boundaries;

> or can a city hide behind crime and poverty to take a down-trodden area of town when the condemnation will incidentally result in greater tax ***27** revenue and upscale developments?
>
> can a Susette Kelo still lose her quaint pink cottage under the act?
>
> or by stating that the act was to be construed narrowly, will courts be capable of carving out exceptions or finding takings that otherwise would not have existed under the prior law?

These and an unforeseeable number of questions will present themselves to the courts as Tennessee enjoys unprecedented growth.

Conclusion. The General Assembly used the *Kelo* decision as a catalyst to spur a great many changes in how Tennessee's governments interact with property owners. As with all legislative undertakings, the new laws are not perfect and the courts will be called upon to settle many upcoming disputes, but in the end these new laws will go a long way in clarifying, limiting and bringing attention to the government's ability to seize a citizen's property.

Footnotes

a1 **Scott Griswold is a member of the Class of 2007 at the University of Tennessee College of Law. He is a contributing author to *Tennessee Zoning and Land Use*, an upcoming publication of *Transactions: The Tennessee Journal of Business Law* and the Clayton Center for Entrepreneurial Law at the University of Tennessee College of Law. Special thanks to Professor George Kuney at the College of Law and James C. Cope of Cope, Hudson, Scarlett, Reed and McCreary PLLC, for their many insightful comments.**

1 *Kelo v. City of New London*, 125 S. Ct. 2655 (2005)

2 *Kelo*, 125 S. Ct. at 2658-59.

3 *Kelo*, 125 S. Ct. at 2660, fn. 4.

4 *Kelo*, 125 S. Ct. at 2660.

5 *Kelo*, 125 S. Ct. at 2660-61.

6 *Kelo*, 125 S. Ct. at 2663; *citing generally* *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

7 2006 Tenn. Pub. Acts 865, sec. 1 (amending *Tenn. Code Ann*. §29-17-101 (2005)).

8 2006 Tenn. Pub. Acts 865, sec. 1 (amending *Tenn. Code Ann*. §29-17-102(a)(b)(1)-(5) (2005)).

9 2006 Tenn. Pub. Acts 865, sec. 1 (amending *Tenn. Code Ann*. §29-17-102(b) (2005)).

10 2006 Tenn. Pub. Acts 865, sec. 1 (amending *Tenn. Code Ann*. §29-17-101 (2005)).

11 2006 Tenn. Pub. Acts 865, sec. 1 (amending *Tenn. Code Ann*. §29-17-102(b)(1) (2005)).

12 For a lively discussion of strict interpretation of "for public use" see J. Thomas's *Kelo* dissent.

13 2006 Tenn. Pub. Acts 865, sec. 1 (amending *Tenn. Code Ann*. §29-17-102(b)(2) (2005)).

14 2006 Tenn. Pub. Acts 865, sec. 1 (amending *Tenn. Code Ann*. §29-17-102(b)(3) (2005)).

15 2006 Tenn. Pub. Acts 865, sec. 2. (amending *Tenn. Code Ann*. §13-20-201 (2005)).

16 *Id*.

17 *Id*.

18 2006 Tenn. Pub. Acts 865, sec. 1 (amending *Tenn. Code Ann*. §29-17-102(b)(4) (2005)).

19 *Id*.

20 *Tenn. Code Ann*. §13-16-203(1) (2005).

21 *See* *Tenn. Code Ann*. §6-58-101 (2005) *et seq*. (outlining comprehensive growth plans).

22 2006 Tenn. Pub. Acts 865, sec. 15(a).

23 *Id*.

24 2006 Tenn. Pub. Acts 865, sec. 15(b)(1).

25 2006 Tenn. Pub. Acts 865, sec. 15(b)(2).

26 *Id*.

27 2006 Tenn. Pub. Acts 865, sec. 19 (amending *Tenn. Code Ann.* §29-16-114(a)(2) (2005)).

28 2006 Tenn. Pub. Acts 865, sec. 20 (amending *Tenn. Code Ann.* tit. 29, ch. 17, part 12 (2005)).

29 2006 Tenn. Pub. Acts 865, sec. 21 (amending *Tenn. Code Ann.* §29-17-701(a) (2005)).

30 2006 Tenn. Pub. Acts 865, sec. 21 (amending *Tenn. Code Ann.* §29-17-701(a) (2005)).

31 2006 Tenn. Pub. Acts 865, sec. 21 (amending *Tenn. Code Ann.* §29-17-701(a) (2005)).

32 2006 Tenn. Pub. Acts 865, sec. 21 (amending *Tenn. Code Ann.* §29-17-701(b) (2005)).

33 *See Tenn. Code Ann.* §43-22-101 (2005) *et seq.*

34 2006 Tenn. Pub. Acts 865, sec. 10 (amending *Tenn. Code Ann.* §11-22-101 (2005)).

35 2006 Tenn. Pub. Acts 865, sec. 9 (amending *Tenn. Code Ann.* §54-11-302 (2005)).

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