GSRM LAW

GULLETT SANFORD
ROBINSON & MARTIN PLLC

150 THIRD AVENUE SOUTH, SUITE 1700
NASHVILLE, TN 37201

M 615.244.4994
F 615.256.6339
W GSRM.COM

August 22, 2016

Via Electronic Mail and Hand Delivery
Board of Mayor and Aldermen
City of Franklin
City Hall
109 Third Avenue South
Franklin, Tennessee 37064

Re: Lewisburg Pike Access Issues

Dear Board of Mayor and Aldermen:

This firm represents Ms. Susan Harlan, who owns a National Register of Historic Places property known as "Walnut Winds," which is located outside of the Franklin city limits in Williamson County, at 1312 Lewisburg Pike. As you know, the agenda for the Board of Mayor and Alderman work session to be held tomorrow includes issues related to a parcel also located outside the City limits in Williamson County owned by Mr. and Mrs. John Philips.

The Phillips purchased their property, located at 1308 Lewisburg Pike, in January of 2015. Immediately across the street, construction of a large, mixed-use development project, known as Berry Farms, was already well underway. In conjunction with the Berry Farms project, a median was installed on Lewisburg Pike based on plans approved in 2006, which blocked the Phillips' ability to make a left turn out of their driveway onto Lewisburg Pike. As discussed further below, months after the Phillips identified this issue, Mr. Phillips approached Ms. Harlan regarding the possibility of a private easement to move his driveway across her property and into her driveway, so that he could exit at a break in the median. When Ms. Harlan declined given the historic significance of her property and the fact that a large and very old tree line would be destroyed under the proposal, Mr. Phillips began urging the City of Franklin to condemn Ms. Harlan's property to remedy this inconvenience. In response to Mr. Phillips' concerns, the City Engineer has prepared a report containing four potential options, one of which is for the City to take no action (Option 1). The City Engineer declined to make a recommendation in his report, and is now seeking input from the Board on how to proceed.

One of these options, identified as Option 2, would require the City's taking of a portion of Walnut Winds by eminent domain. However, eminent domain is not available under these facts. The City may not take Ms. Harlan's land, which is located in the County, for the purpose proposed. A key element of the exercise of eminent domain is that the property sought to be acquired must be for a "public purpose." "[I]t has generally been held that the state does not have power to authorize the taking of the property of an individual without his consent *for the private use of another*, even on the payment of full compensation." *Cross v. McCurry*, 859 S.W.2d 349, 353 (Tenn. Ct. App. 1993) (emphasis added). *See also, e.g., Montgomery v. Carter County*, 226 F.3d 758, 771 (6th Cir. 2000) ("If a taking had to be considered one for a public use simply by virtue of the fact that it benefits at least one other person . . . there would be little left to the prohibition against private-use takings.") Benefit to a single person has consistently been held to be wholly insufficient to constitute a public purpose necessary to take another's property.

The Tennessee Legislature concurs. In response to the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), Tenn. Code Ann. § 29-17-101 was amended to emphasize 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 interference or inadvertently, the power of eminent domain." The Public Act amending Tenn. Code Ann. § 29-17-101 further provided that the definition of "public use" "shall not include either private use or benefit . . . ." 2006 Tenn. Pub. Acts 2143, 2144. Franklin's own municipal Charter, enumerating the City's powers, states that property may only be condemned "for present or future *public use for any municipal purpose*." Franklin Municipal Code, Charter, Part I.1, Art. II, Section I (6) (emphasis added).[1]

The proposed taking at issue is for a purely private purpose on property not even located in the City—to allow Mr. and Mrs. Phillips to avoid the inconvenience of not being able to turn left out of their driveway. However inconvenient this may be for them, it simply does not rise to the level of a "public purpose" as required by the Tennessee and Federal Constitutions. For this reason alone, the City is not permitted by law to take Ms. Harlan's land as proposed in Option 2.

In the event Mr. and Mrs. Philips did not have *any* access to their property, Tennessee law would allow them to privately condemn access—without involving the City whatsoever. In fact, prior to involving the City, Mr. Phillips approached Ms. Harlan to ask her to grant him a private easement across her property. When Ms. Harlan declined, Mr. Phillips contacted the City in an effort to convince the City to improperly condemn Ms. Harlan's property for his private convenience.

If Mr. and Mrs. Phillips had truly believed that they were entitled to a private taking, they could have filed suit under the appropriate statute and need not have involved the City at all. Mr.

[1] Considering the language of the City's Charter requiring its condemnation power to be used for a "municipal purpose," it is unclear whether the Board would even have jurisdiction over this issue. Option 2 involves access to a State road, proposes taking of a County property, and at its root involves a purely private purpose—all of which necessarily begs the question of whether there should be any City involvement at all. The City Attorney's office has confirmed that they could not even file such an action seeking condemnation and, instead, the City would have to seek the assistance of outside counsel to address the issue.

and Mrs. Phillips' claims, however, do not rise to the level needed to effectuate a private taking. *See* Tenn. Code Ann. § 54-14-101. "The existing statutes governing the condemnation of private property are thus designed to provide a remedy for *landlocked* property owners while protecting, to the extent possible, the interests of the servient estate owner." *Barge v. Sadler*, 70 S.W.3d 683, 687 (Tenn. 2002). To entitle a party to condemnation of a right-of-way, it must appear that the right-of-way is required as "a matter of necessity." *Towater v. Darby*, 15 Tenn. App. 53, 60 (Tenn. Ct. App. 1932). The statute conferring the power of eminent domain upon one private person to take another's property does not apply where such party already has adequate ingress and egress. *Vinson v. Nashville, C. & S. L. Ry.*, 321 S.W.2d 841, 843 (Tenn. Ct. App. 1958). *Vinson* specifically held that the statute does not warrant condemnation "as a mere matter of convenience." *Id.*

Mr. and Mrs. Phillips are not landlocked, nor is a right-of-way required as a necessity, which is why they have resorted to requesting that the City condemn as a remedy to the alleged inconvenience caused by loss of the ability to make a left turn. Mr. Phillips has even admitted in conversations with counsel for Ms. Harlan that there is no safety concern with entering or exiting his driveway. Rather, Mr. Phillips admitted his concern is the inconvenience that came with losing the ability to turn left out of his driveway—nothing more. That inconvenience cannot be shifted to another private owner of property—here, Ms. Harlan. In other words, a government entity may not remove an inconvenience to one property owner by taking the rights of another.

Clearly, the purely-private benefit proposed to be conferred upon Mr. and Mrs. Phillips, as set forth in Option 2, does not come close to the public purpose required to take Ms. Harlan's property. Other arguments advanced to justify a taking under Option 2 are also wholly without merit. First, it has been suggested that Option 1 will prevent Franklin Fire Department trucks from being able to directly access Mr. and Mrs. Phillips' property and will delay fire response times in the event an emergency should arise. It has been alleged that City fire trucks will be unable to make a U-turn on Lewisburg Pike in order to reach the Phillips' property. These allegations are made without any citation or basis.

First, the property is located in the County and has been serviced by Williamson County Fire Station 14. Contrary to the City's arguments, in an interview on July 26, 2016, a firefighter of Williamson County Fire Department Station 14 directly contradicted the argument that Option 1 would impede life safety access to the Phillips' home. The firefighter stated that Station 14 has been servicing 1308 Lewisburg Pike. To enter into the Phillips' property, the fire trucks currently turn right into the driveway. Thus, there is no need to even address the median under the current situation. In approximately two months, however, a new county fire station on Goose Creek Bypass will be opened. This station, which will be known as Station 24, will then service 1308 Lewisburg Pike. The firefighter confirmed that there would be no meandering, alternate route to get to 1308 Lewisburg Pike from Station 24 due to the median. Instead, he advised that a fire truck would simply make a U-turn on the North side of the median and would return South on Lewisburg Pike back to the house. He said that the firetruck would have no problem making a U-turn at that particular median and that this process would not add even one minute to the response time. He further stated that the fire truck could also choose to cross over to the other side of the median into oncoming traffic to turn into 1308 Lewisburg Pike. He advised that fire trucks regularly do this in the normal course without any problem whatsoever. Again, neither

alternative would require any alternate, meandering route or add any significant response time in servicing 1308 Lewisburg Pike. Therefore, there is no legitimate safety concern associated with Option 1.

Additionally, although 1308 Lewisburg Pike is located in unincorporated Williamson County and therefore would be served by the Williamson County Fire Department, a witness familiar with the operation of fire trucks in the City of Franklin opined on July 31, 2016, that a fire truck should be able to turn into the driveway entrance for 1308 Lewisburg Pike without any difficulty. Further, the witness stated that, if the firefighter felt for whatever reason he could not make the turn into the drive, the firefighter could simply drive over the median from the opposite side of the road. The witness saw no issues with access to 1308 Lewisburg Pike with the road and median as they are now, further showing that there is no legitimate safety issue with Option 1.

Further to safety issues, no one has argued that making a right turn out of the Phillips' property creates any safety issue that could arguably be a public purpose to justify a taking. In fact, Mr. Phillips has admitted there is no safety concern with making a right turn out of his driveway. Instead, he argues that because the median blocks a *left* turn out of the driveway, Option 1 will result in them being required to make a U-turn at an intersection—not in front of their property—further down Lewisburg Pike, each time they wish to travel North on Lewisburg Pike. Mr. Phillips indicates that he believes this U-turn would be unsafe altogether, or at minimum less safe than a left turn out of his driveway. Of course, thousands of Tennessee homeowners cannot make a left turn out of their properties due to medians or traffic volumes and have to find alternate routes in the event they wish to proceed in that direction. That is not a basis to take thousands of neighbors' property to create an untold number of private access drives paved and maintained in perpetuity by taxpayers' dollars. The issue is whether the Phillips have safe ingress and egress onto a public roadway. They do—via a right turn. How they handle routes and safety once on the public road cannot be the basis for a taking here.

What the Phillips want this Board to use as a public safety purpose related to the property at issue is inappropriate and is a red herring. They inappropriately focus on this proposed U-turn down the road from their property. Even if a U-turn at that intersection is determined to be unsafe, it is not a safety hazard for the Phillips related to their property. As licensed drivers, they are charged with choosing a safe route of travel. U-turns are widely permitted in the City of Franklin. The Tennessee Department of Transportation will determine whether the intersection at issue is safe for a U-turn. If not, it will clearly mark that no U-turn is permitted. If such a U-turn is deemed unsafe or the Phillips simply feel unsafe making such a turn, then they should not make such a turn and instead should proceed via another route to safely return to the North. For example, the Phillips have the option of turning right out of their driveway and then left into the Berry Farms subdivision, where they will have ample room to turn around and exit back onto Lewisburg Pike via a right turn. Again, simply because the Phillips may *prefer* not to make a U-turn or take a different, alternate route does not make this a public safety issue for their property.

Instead, this all really relates to the loss of a convenience by the Phillips due to the installation of the median in connection with the Berry Farms development, as Mr. Phillips has admitted. The proper means for the Phillips to address this loss—due to plans previously blessed

and approved by TDEC and the City as safe—is not to attempt to take their neighbor's property. Rather, they or their predecessors-in-interest should have challenged the placement of the median when its construction was first proposed. Had the Phillips or their predecessors-in-interest felt the taking of their ability to make a left turn devalued their property or was a safety risk, they should have challenged the alleged taking at that time. If they had done so and had not prevailed, then they certainly could have asserted their rights—either in a condemnation proceeding filed by the government or via an inverse condemnation action if no condemnation proceeding was instituted—to seek compensation for the diminution of value to their property based on losing their ability to make a left turn. They cannot now seek to shift the burden of any taking of their rights to Ms. Harlan, simply because they failed to pursue their rights against the government.

Further, another of the options presented is designed to eliminate the alleged safety concerns argued by Mr. Phillips that would not seek to unconstitutionally take any of the County residents' properties. This option—Option 4—would involve removing the median in front of 1308 Lewisburg Pike altogether. None of the homeowners' rights would be adversely affected under this option. In fact, it would provide further safety in the area generally by removing any possibility of vegetation in a median that impedes the line of sight for neighbors turning left onto Lewisburg Pike from their homes. Mr. Phillips' alleged concerns over the loss of a left-hand turn would no longer be an issue. Moreover, while it has been suggested that this option may be the most expensive, that is not the case. Other than taking no action, this would be the most cost-effective solution, avoiding the other alternatives involving long and extensive legal challenges to unconstitutional attempts to condemn that—even if successful—would require compensating one or more homeowners for highly-valuable and historic land located in the County.

Finally, in closing, Ms. Harlan's home, which was originally built in the 1840s, is listed on the National Register of Historic Places. Her property is bordered by a stand of extremely-mature trees and landscaping that will not be able to be replaced by way of maturity and screening in our lifetime. If the City decides to attempt to take her property to complete the throughway proposed by Option 2, these trees would be demolished, greatly diminishing the historical value, site and setting of Walnut Winds. Ms. Harlan considers herself a steward of this property, and her primary goal is to ensure its protection and preservation. She is currently in discussions with the Heritage Foundation of Franklin and Williamson County regarding placing the property into a conservation easement. She has no intent to develop this property and wishes to see it preserved for generations to come. Walnut Winds is a valuable piece of Williamson County's history and its Civil War story. The Phillips' proposals would permanently scar Walnut Winds, simply to abate an inconvenience. That is no basis for a taking.

Accordingly, Ms. Harlan respectfully requests that the Board reject Option 2, as it would be an unconstitutional taking of Ms. Harlan's land.

Sincerely,

Joshua R. Denton

cc: Mr. Eric Stuckey
Kristen Corn, Esq.