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## EMINENT DOMAIN AND CONDEMNATION LAW

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### Sources of Eminent Domain Power and the History of Eminent Domain Power

Our United States and Pennsylvania property rights are readily traced to concepts of English law:

No constable or other of our bailiffs shall take corn of other chattels of any man without immediate payment unless the seller voluntarily consents to postpoverment of payment....

#### **Magna Carta, Chapter 28 (1215).**

The **Pennsylvania Constitution** of 1776 confirmed the rights to acquire and protect property: "All men....have certain, natural, inherent, and inalienable rights, among which are, the enjoyment and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."

The **Fifth Amendment** to the United States Constitution firmly established the power of eminent domain in these United States in stating that no person shall be: "...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The **Fourteenth Amendment** of the United States Constitution explicated, in 1868, that no state could: "...deprive any person of life, liberty, or property, without due process of law."

## Kelo v. City of New London

Perhaps the most significant case in United States Eminent Domain Law was decided in 2005 by the United States Supreme Court in the case of Kelo v. City of New London, U.S. 125 S.C.T. 2655 (2005). Pfizer Corporation, a large pharmaceutical manufacturer, planned a \$300,000,000 research facility in New London, Connecticut, as part of a Ford Trumbull Redevelopment Project. The City had fallen upon hard economic times and the redevelopment project was planned to provide an economic boost which should result in jobs and tax revenues to revitalize the community with a resulting “public use”. The Supreme Court issued a 5-4 decision in favor of the City’s economic plan allowing middle-class homes to be condemned in favor of a redeveloper’s economic advantage. The Court reviewed a line of cases which provided a broad interpretation of the asserted “public use”. Outrage resulted at the thought of anyone’s home being at the risk of eminent domain for the benefit which was directly for the for-profit corporation and theoretically for the public use of tax revenues.

The public and State legislators were appalled at the thought of the taking of respectable homes to be replaced with a corporate facility. Pennsylvania actively and effectively responded with law changes which included anti-Kelo provisions. Essentially, Federal Law approved such public use as long as such use was not constrained by State Law. Approximately eighty percent (80%) of the States have now progressed to revising State Eminent Domain Law to create anti-Kelo laws to prevent the perceived abuse of eminent domain power in Kelo. The laws severely limit the opportunity to take private property for private use. Pennsylvania passed the Property Rights Protection Act as Act 35 of 2006. Concurrently, the Pennsylvania Legislature essentially updated the **Eminent Domain Code** in Act 34 of 2006, effective September 1, 2006. 26 Pa. C.S.A. Section 101-1106.

## **Selected 2006 Amendments to the Pennsylvania Eminent Domain Code**

**1. Business Dislocation Damages** - The maximum payment for a substantial loss of profits increased from \$20,000 to \$60,000. The minimum increased from \$1,000 to \$3,000. This benefit is "in addition to" other dislocation payments, rather than in place of those payments.

**2. Business reestablishment expenses** - Increased the maximum payment for actual, reasonable expenses necessary to reestablish a displaced farm, non-profit organization or small business to \$12,000 from \$10,000. The loss of overall income due to approaching condemnation is now compensable up to \$30,000.

**3. Replacement housing for homeowners** - Increased the maximum payment for the acquisition of the replacement dwelling by a home owner to \$27,000 from \$22,500.

**4. Housing of last resort** - When sufficient housing replacement is not available in the community, payment is allowed for replacement housing greater than the \$27,000 amount allowed for replacement housing per section 903 of the code.

**5. Replacement housing for Tenants and others** - Increased the rental acquisition payments for replacement dwelling by a non-homeowner to \$6,300 from \$5,250.

**6. Housing of last resort – Tenant**- Where sufficient replacement housing is not available in the community section 905 provides for payments greater than the \$6,300 usually provided.

**7. Litigation expense** - Increase the reimbursement for appraisal, engineering and attorney fees to \$4,000 from \$500.

**8. Delayed Compensation** - Changed the rate of interest from a statutory 6% to the annual rate equal to the prime rate as listed in the 1st edition for the Wall Street Journal published in the year, plus 1%, not compounded.

**9. Right of Possession** - A court may issue a writ of possession prior to an appellate court decision on preliminary objections to a taking.

## **Eminent Domain Defined**

The Pennsylvania Eminent Domain Code provides the clean definition of eminent domain as the power of the Commonwealth to take private property for public use in return for just compensation. 26 Pa. C.S.A. Section 103. The Pennsylvania Eminent Domain Code is found at 26 Pa. C.S.A. Section 101-1106.

## **TYPES OF TAKINGS (Three)**

### **1. Taking by Law/Condemnation/Declaration of Taking.**

The common taking of property in Pennsylvania proceeds with a Declaration of Taking per the Pennsylvania Eminent Domain Code, 26 Pa. C.S.A. Section 302 Declaration of Taking.

#### **(a) Condemnation and passage of title.-**

(1) Condemnation under the power of condemnation given by law to a condemnor shall be effected only by the filing in court of a declaration of taking with the security required under section 303(a) (relating to security required).

(2) The title which the condemnor acquires in the property condemned shall pass to the condemnor on the date of the filing, and the condemnor shall be entitled to possession under section 307 (relating to possession, right of entry and payment of compensation).

(b) **Contents** – The declaration of taking shall be in writing and executed by the condemnor and shall be captioned as a proceeding in REM and contain the following:

(1) The name and address of the condemnor.

(2) A specific reference to the statute and section under which the condemnation is authorized.

(3) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when the action was taken and the place where the record may be examined.

(4) A brief description of the purpose of the condemnation.

(5) A description of the property condemned, sufficient for identification, specifying the municipal corporation and the county or counties where the property taken is located, a reference to the place of recording in the office of the recorder of deeds of plans showing the property condemned or a statement that plans showing the property condemned are on the same day being lodged for record or filed in the office of the recorder of deeds in the county in accordance with section 304 (relating to recording notice of condemnation).

- (6) A statement of the nature of the title acquired, if any.
- (7) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.
- (8) A statement of how just compensation has been made or secured.

Additionally, notice to the condemnee is required:

### **Section 305. Notice to Condemnee**

**(a) Written notice.-** Within 30 days after filing of the declaration of taking, the condemnor shall give written notice of the filing to the condemnee, to any mortgagee of record and to any lienholder of record.

### **(b) Service.-**

- (1) The notice shall be served, within or without this Commonwealth, by any competent adult in the same manner as in a civil action or by registered mail to the last known address of the person being served.
- (2) If service cannot be made in the manner set forth under paragraph (1), then service shall be made by posting a copy of the notice upon the most public part of the property and by publication of a copy of the notice, omitting the plot plan required by subsection (c)(9), one time each in one newspaper of general circulation and the legal journal, if any, published in the county.

### **(c) Contents.-** The notice to be given the condemnee shall state:

- (1) The caption of the case.
- (2) The date of filing of the declaration of taking and the court term and number.
- (3) The name of the condemnee to whom it is directed.
- (4) The name and address of the condemnor.
- (5) A specific reference to the statute and section under which the condemnation action is authorized.
- (6) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when the action was taken and the place where the record may be examined.
- (7) A brief description of the purpose of the condemnation.
- (8) A statement that the condemnee's property has been condemned and a reasonable identification of the property.
- (9) In the case of a partial taking, a plot plan showing the condemnee's entire property and the area taken.
- (10) A statement of the nature of the title acquired.
- (11) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.
- (12) A statement of how just compensation has been made or secured.
- (13) A statement that, if the condemnee wishes to challenge the power or the right of the condemnor to appropriate the condemned property, the sufficiency of the security, the procedure followed by the condemnor or the declaration of taking, the condemnee must file preliminary objections within 30 days after being served with notice of condemnation.

**(d) Compliance.**-Service of a copy of the declaration of taking, together with the information and notice required by subsection (c)(2), (8), (9) and (13), shall constitute compliance with the notice requirements of this section.

**(e) Proof of service.**-The condemnor shall file proof of service of the notice.

A property owner may challenge a Declaration of Taking via the filing of preliminary objections. 26 Pa. C.S.A. Section 306.

**(a) Filing and exclusive method of challenging certain matters.-**

(1) Within 30 days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking.

(2) The court upon cause shown may extend the time for filing preliminary objections.

(3) Preliminary objections shall be limited to and shall be the exclusive method of challenging:

(i) The power or right of the condemnor to appropriate the condemned property unless it has been previously adjudicated.

(ii) The sufficiency of the security.

(iii) The declaration of taking.

(iv) Any other procedure followed by the condemnor.

**(b) Waiver.**-Failure to raise by preliminary objections the issues listed in subsection (a) shall constitute a waiver. Issues of compensation may not be raised by preliminary objections.

**(c) Grounds to be stated.**- Preliminary objections shall state specifically the grounds relied on.

**(d) When raised.**-All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.

**(e) Service.** -The condemnee shall serve a copy of the preliminary objections on the condemnor within 72 hours after filing them.

**(f) Disposition-**

(1) The court shall determine promptly all preliminary objections and make preliminary and final orders and decrees as justice shall require, including the reversioning of title.

(2) If an issue of fact is raised, the court shall take evidence by depositions or otherwise.

(3) The court may allow amendment or direct the filing of a more specific declaration of taking.

**(g) Costs and expenses-**

(1) If preliminary objections which have the effect of terminating the condemnation are sustained, the condemnor shall reimburse the condemnee for reasonable appraisal, attorney and engineering fees and

other costs and expenses actually incurred because of the condemnation proceedings.

- (2) The court shall assess costs and expenses under this subsection.

## **2. De Facto Taking.**

This is a taking of real estate which is a taking in fact, rather than a taking by law. The Eminent Domain Code, Pa. C.S.A. Section 502(c) Petition for Appointment of Viewers provides a remedy when government action amounts to taking of property.

### **(c) Condemnation where no declaration of taking has been filed.-**

- (1) An owner of a property interest who asserts that the owner's property interest has been condemned without the filing of a declaration of taking may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) setting forth the factual basis of the petition.
- (2) The court shall determine whether a condemnation has occurred, and, if the court determines that a condemnation has occurred, the court shall determine the condemnation date and the extent and nature of any property interest condemned.
- (3) The court shall enter an order specifying any property interest which has been condemned and the date of the condemnation.
- (4) A copy of the order and any modification shall be filed by the condemnor in the office of the recorder of deeds of the county in which the property is located and shall be indexed in the deed indices showing the condemnee as grantor and the condemnor as grantee.

The property owner/condemnee carries a heavy burden of proof to prove a de facto taking. A property owner must prove the condemnor has the power of eminent domain, that exceptional circumstances have substantially deprived the use and enjoyment of the property and the damages sustained were the immediate, necessary and unavoidable consequences of the exercise of eminent domain power. In Re: Condemnation by Commonwealth Dept. of Transp. of Certain Property in Borough of Bellevue, 827 A.2d 544 (Pa. Commwlth. 2003), appeal denied, 848 A.2d 930 (Pa.)

## **3. Regulatory Taking.**

A regulatory taking occurs when a government entity acts by regulation or otherwise so as to deny a property owner the economically viable use of property. More specifically stated, the United States Supreme Court defined regulatory taking as the taking of property when a

regulation either failed to substantially advance a legitimate State interest or denied the owner economically viable use of property. Agin v. City of Tiburon, 447 U.S. 255 (1980).

Some recent federal cases have described circumstances of regulation taking property. In Vulcan Materials Company v. City of Tehuacana, 369 F.3d 882 (5<sup>th</sup> Cir. 2004) the plaintiff owned a land lease which allowed the company to mine limestone. The City banned limestone mining. The appellate court held that the City had taken away the company's property interest of mining limestone.

In Huntleigh USA Corporation v. United States, 63 Fed. Cl. 440 (2005) a private security company had contracted to provide screening services for airlines at airports. Congress federalized such security activities under the Transportation Security Administration, taking away Huntleigh's business. The court scoffed at the government's strange idea that the company could continue doing passenger and luggage screening as long as it did it outside of the airport property. A regulatory taking had occurred.

**A. PARTICIPATING IN THE CONDEMNATION PROCESS**

**1. Public Need.**

Public need has often been interpreted broadly to facilitate the government use of eminent domain. For example, a condemnation does not lose its public character merely because the project may involve some private gain. If the public good is enhanced, the private benefit does not destroy public need. Appeal of Heim, 617 A.2d 74 (Pa. Commwlth. 1992), appeal denied, 629 A.2d 1385 (Pa.)

Also, the Court has no power to substitute its discretion for that of the Secretary of the Highway Department, nor to correct mistaken judgment in respect to condemnation of land. In Re: Legislative Route 62214, Section 1-A, 229 A.2d 1 (Pa. 1967).

**2. Amount of Land Needed.**

A condemnor may not acquire a greater amount of property than is reasonable required for the contemplated purpose. The quantity of land to be acquired is, within reasonable



limitations, a matter for the condemnor's discretion. Appeal of Waite, 641 A.2d 25 (Pa. Commwlth. 1994), appeal denied, 651 A.2d 543 (Pa.) However, an attempted condemnation of land before PennDOT had definitely chosen the land for highway improvement was invalid. Acquiring property before imminent reversion would not avoid wasting public funds and PennDOT failed to allege the development of the land was imminent or that the land had been selected as the preferred or recommended alignment of a proposed highway. Pennsylvania Department of Transp. v. Montgomery Tp., 655 A.2d 1086 (Pa. Commwlth. 1995), appeal denied, 666 A.2d 1059 (Pa.).

### **3. When is the Need?**

A condemnor may acquire land for future expansion, even if it cannot presently use the land for purposes in the Declaration of Taking, so long as the land will be necessary, in good faith for future use, within a reasonable time. Appeal of Waite, 641 A.2d 25 (Pa. Commwlth. 1994), appeal denied, 651 A.2d 543 (Pa.)

### **4. Construction Plans**

The construction planning process in eminent domain differs from other planning because of the required need for property. Land which is not needed for the asserted public purpose may not be condemned. Inclusion of property rights for acquisition, if that land is not needed, could lead to preliminary objections to the efforts to take the land. Of course, a government entity may proceed to properly purchase land which it might not be able to acquire via legitimate use of eminent domain power. Such purchases might be constrained by other law or fiduciary duty of government officials.

### **5. Unity of Use**

26 Pa. C.S.A. Section 706 Contiguous tracts and unity of use.

Where all or a part of several contiguous tracts in substantially identical ownership is condemned or a part of several noncontiguous tracts in substantially identical ownership which are used together for a unified purpose is condemned, damages shall be assessed as if the tracts were one parcel.

Where separate parcels of land were being used by distinct legal entities, the parcels could not be considered as a single unit for condemnation purposes. Sams v. Redevelopment Authority of City of New Kensington, 244 A.2d 779 (Pa. 1968).

**6. Right-of-Way Plans.**

During the construction planning process, an assessment proceeds as to what property is needed for the project, from whom. A condemnor must be careful to only condemn the needed property rights. The rights acquired may vary. For example, a condemnor may need a 48 foot wide strip for road construction and might condemn the fee simple interest for that area while condemning some easements outside of that area. Perhaps a slope easement would be needed at one hilly section while a drainage easement or temporary construction easement is needed in another area. If the public need may be accomplished via the acquisition of an easement, rather than a fee simple acquisition, that lesser interest is mandated via the widely accepted eminent domain requirement of only taking what is needed for the public use.

**7. Plot Plan/Viewer's Plan.**

The Eminent Domain Code requires a Viewer's Plan per 26 Pa. C.S.A. Section 509.

26 Pa. Section 509 Furnishing of Plans to Viewers

**(a) Duty of condemnor.-**The condemnor shall provide the viewers at or before the view with a plan showing the entire property involved, the improvements, the extent and nature of the condemnation and any other physical data, including grades, as may be necessary for the proper determination of just compensation.

**(b) Supplemental plans.-** If, in the opinion of the viewers, the plans are insufficient, the viewers may require the submission of supplemental plans.

**(c) Copies to condemnee.-** Copies of the plans shall be furnished at the same time, without cost, to the condemnee upon written request.

**(d) Condemnor to pay for condemnee cost.-** If the condemnor does not furnish a plan or the condemnor's plans are insufficient, the court, on application of the condemnee, may charge to the condemnor, as cost, reasonable expenses for plans furnished by the condemnee.

In the case of a taking of part of a parcel, the condemnor is required to produce an accurate plot plan showing the condemnee's entire property and the area taken. 26 Pa. C.S.A. Section 305(c)(9). When a record holder of an easement can be identified through investigation

of land and tax records, any notice short of notice to that easement holder and the dominant is insufficient. Curtis v. Redevelopment Authority of City of Philadelphia, 393 A.2d 377 (Pa. 1978). A full, accurate description and plot plan may be interpreted to require the exact specifications of all the meets and bounds so as to sufficiently define the property. A partial taking essentially results in two distinct properties which should be fully and specifically defined. The full legal description may avoid future boundary disputes and help with the specification of ownership and/or value.

#### **8. Agricultural Property.**

Agricultural property has been provided additional protection from eminent domain power. 26 Pa. C.S.A. Section 207 Eminent domain of agricultural property.

**(a) Approval required.**-Notwithstanding any provision of law to the contrary, approval by the Agricultural Lands Condemnation Approval Board shall be required prior to the exercise of eminent domain authority by any agency of the Commonwealth or political subdivision or municipal authority on agricultural property under section 204(b)(3) (relating to eminent domain for private business prohibited) or 205 (relating to blight). Approval shall be obtained in accordance with section 13 of the act of June 30, 1981 (P.L. 128, No. 43)<sup>1</sup>, known as the Agricultural Area Security Law.

**(b) Determination of blight.**-The exercise of eminent domain powers based on a condition of the agricultural property shall not be authorized under section 205 unless the Agricultural Lands Condemnation Approval Board determines the exercise is necessary to protect the health and safety of the community.

**(c) Disapproval.**-The Agricultural Lands Condemnation Approval Board shall disapprove the proposed condemnation if the board determines the condemnor is not authorized under this chapter to take the agricultural property by eminent domain.

#### **APPEALING A CONDEMNATION DECISION**

The condemnation of property necessarily involves the payment of just compensation. The law has essentially split the process whereby a court filing or judicial ruling first determines what, if anything, has been condemned. Only later will the question of the amount of just compensation be considered. The condemnor must be careful in the filing of the Declaration of Taking and providing notice so as to avoid preliminary objections. As previously reviewed,

preliminary objections to a taking may be filed within 30 days of notice of the taking. They may challenge the right or power to condemn, the sufficiency of the security, the Declaration of Taking or other procedure followed by the condemnor. 26 Pa. C.S.A. Section 306(a). Preliminary objections are the sole method by which a condemnee may challenge a Declaration of Taking. Middletown Tp. v. Lands of Stone, 882 A.2d 1066 (Pa. Commwlth. 2006), appeal granted in part, 897 A.2d 1167 (Pa.).

Preliminary objections in eminent domain matters are intended as a procedure to resolve expeditiously the factual and legal challenges to a Declaration of Taking before the parties proceed to determine damages. In Re: Condemnation Proceeding by South Whitehall Tp., 822 A.2d 142 (Pa. Commwlth. 2003). An evidentiary hearing may be required to resolve disputed issues of facts. Appeal of McKonly, 618 A.2d 1169 (Pa. 1992). Preliminary objections carry a heavy burden whereby the condemnee must prove the condemnor acted with fraud, collusion, bad faith or abuse of discretion. In Re: A Condemnation Proceeding by South Whitehall Tp., 822 A.2d 142 (Pa. Commwlth. 2003). A Common Pleas Court ruling on preliminary objections may be appealed to the Pennsylvania Commonwealth Court and potentially to the Pennsylvania Supreme Court. Federal law challenges could progress like Kelo to the United States Supreme Court.

Once a final determination is made as to the property rights acquired, the proceeding would progress to a second phase which is an analysis of the amount of just compensation.

## **26. P.S.A. SECTION 702 MEASURE OF DAMAGES**

**(a) Just compensation.**-Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected by the condemnation and the fair market value of the property interest remaining immediately after the condemnation and as affected by the condemnation.

When the parties do not agree on damages, the Common Pleas Court will appoint a Board of View to assess damages.

## **BOARD OF VIEW**

The appointed Board shall conduct views of the property and hearings as necessary to determine damages. 26 Pa. C.S.A. Section 504.

Either party may appeal a decision of a Board of View. The right of appeal is a right and does not require any error of law. 26 Pa. C.S.A. Section 516. An appeal may demand a jury trial. 26 Pa C.S.A. Section 517. A decision of the Common Pleas Judge or jury may be appealed on the basis of error. Appeal of Redevelopment Authority of City of Scranton, 627 A.2d 292 (Pa. Commwlth. 1993), appeal denied, 631 A.2d 591 (Pa.) A Commonwealth Court's determination may progress to the Supreme Court if a question of whether or not the Court below committed error of law or abused its discretion. Vector v. Redevelopment Authority of Luzerne County, 444 A.2d 800 (Pa. Commwlth. 1982).