



## EMINENT DOMAIN

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April, 2006

### OVERVIEW

The United States Constitution provides for the power of eminent domain:

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.

### FIFTH AMENDMENT

This power has been described as an awesome power in that it allows a public entity to take private real estate against an owner's will. This expansive and influential power is somewhat counterbalanced by the body of case law which has fittingly developed to constrain this awesome power. Condemnation statutes must be strictly construed so as to guard against unauthorized use of the power to condemn. Avery v. Com., 276 A.2d 843 (Pa. Cmwlth 1971).

This awesome power has been determined to present the need to subject the activities of public authorities to judicial scrutiny. Public authorities exercise public powers and must act strictly within their legislative mandates. They stand in a fiduciary relationship to the public which they are obligated to serve and their conduct must be guided by good faith and sound judgment. Schwartz v. Urban Redevelopment Auth., 192 A.2d 371 (Pa. 1963); Helig v. Ros. Co., Inc. v. Kahlner, 76 A.2d 613 (Pa. 1950). The growth in number of such authorities at all levels of government and the frequent complaints that such bodies act in a manner in violation of existing law, dictate that a “check reign” be kept on them. Schwartz; Keystone Raceway Corp. v. State Harness Racing Comm., 173 A.2d 97 (Pa. 1961); Price v. Philadelphia Parking Authority, 221 A.2d 138 (Pa. 1966). These constraints on the use of eminent domain impose significant responsibilities on government officials contemplating the use of this awesome power. The Pennsylvania use of eminent domain is governed by the eminent domain code, 26 Purdon’s Statutes, Section 1-101 to 1-903, 26 P.S. §1-101 thru 1-903.

The conveyance of the eminent domain power to First Class Townships is specifically described in the First Class Township Code at 53 P.S. §56901-56953. Relevant sections of the First Class Township Code include:

- Streets and Highways 53 P.S. §57001-57096
- Boundary Roads and Streets 53 P.S. §57101-57130
- Bridges and viaducts 57 P.S. §57201-57225
- Sidewalks 53 P.S. §57301-57304
- Sewers and drains 53 P.S. §57401-57405
- Collection by installment  
of the cost of street, curb,  
sidewalk, and sewer  
improvements 57 P.S. §57501-57507
- Revolving fund for street and  
sewer improvements 53 P.S. §57601-57602
- Water supply and waterworks 57 P.S. §57701-57712
- Manufacturing sale of electricity 53 P.S. §57751-57756
- Public buildings 53 P.S. §57801-57806
- Licenses and license fees 57 P.S. §57901-57902
- Parks, recreation centers,  
Shade trees and forests 53 P.S. §58001-58048

The Second Class Township Code specifically provides for the power of eminent domain. Article XXXIV is titled “Eminent Domain; Assessment of Damages of Benefits”. It is found at 53 P.S. §68401-68407. The initial provision provides that eminent domain proceedings shall conform to the Eminent Domain Code:

SECTION 68401 – SCOPE OF ARTICLE

SECTION 68402 - RESTRICTIONS AS TO CERTAIN PROPERTIES

SECTION 68403 - VALUE OF LAND OR PROPERTY NOT TO BE ASSESSED AS BENEFITS

SECTION 68404 - TITLE REQUIRED

SECTION 68405 - ASSESSMENT OF DAMAGES AND BENEFITS

SECTION 68406 - ASSESSMENT OF AWARDS

SECTION 68407 - ASSESSMENT TO BEAR INTEREST

A U.S. government taking would proceed via federal law which is very similar to the Pennsylvania Eminent Domain Code.

**PROJECT PLANNING**

Public officials serving the public good are often faced with the question of what is the public good. The diversity of our human nature provides for many opinions of what is the public good. Some township meetings have demonstrated that the number of opinions of the best public good may correspond roughly to the population of the township. Good government attempts to progress through this thicket to effectuate the public good which may regrettably have adverse individual consequences. This is the nature of our eminent domain rights. At times the effort to serve the overall public good results in the taking of private real estate. Payment of just compensation is the corresponding right of the property owner.

That right to compensation may be viewed as minimal and not just compensation by an individual whose heart, soul and ancestry are wrapped up in a piece of real estate. A condemnee may well feel victimized by the power of eminent domain, or just the threat of eminent domain. Such individuals have been known to mount extensive efforts against government and governmental officials as a result of the threat of the use of that awesome power.

Nevertheless public officials, simply put, serve the population by serving the overall public good. At times that service at the public good is through the use of eminent domain. Government may act to facilitate our co-existence via facilitating the public needs related to such items as transportation, roads, sewer and water. Diligent public servants make use of the power of eminent domain, when needed, to serve the public interest.

The common controversies surrounding the use of eminent domain power suggests that government officials regularly look first to purchase property without having to resort to the use of eminent domain. Government may be very wise, in the

long run to acquire property for public purposes via purchase. Such purchases might be wise to proceed, even at an above-fair market value price, so as to avoid the challenges, controversy and costs of eminent domain takings of property.

When the eminent domain tool is used by government, this should only occur after careful consideration and planning. Public needs should be evaluated with a review of alternatives to projects which require eminent domain. When such alternatives are not feasible, the eminent domain power should be used in a way to minimize the disruption to the community and to the private land owners. Entry to land for studies surveys, tests, and appraisals is allowed per 26 P.S. §1-409.

Township officials should anticipate the question as to what alternatives were considered prior to the decision to use eminent domain power. We recognize that the efforts to serve the public needs in such areas of transportation and water often involve extensive study and research. Transportation planners, engineers, and environmental scientists, represent a small sample of the professionals who often are involved in the proper planning which might culminate in use of the eminent domain power. Environmental impact studies are common.

If sound research directs the use of eminent domain, that information could best be shared with the public to facilitate some support for project planning. Typically, public meetings may be held to facilitate the opportunity to be heard, which may be the primary concern for some citizens. A savvy public relations perspective may be much more effective than the authoritarian approach of “the railroad must go through”. Condemnees commonly complain of the loss of control via the eminent domain process. Government is well served by the facilitation of public input into thorough project planning. An ordinance or resolution would then authorize a taking 26 P. S. § 1-402(b)(3).

### DECLARATION OF TAKING

A declaration of taking is the written document by which a condemnor obtains property from the condemnee, via a filing of a declaration of taking in court.

A governmental entity processing with the use of eminent domain should carefully prepare the document for clear compliance with the specific technical requirements as stated in the Eminent Domain Code. Recall that eminent domain statutes are strictly construed. Accordingly, items which appear to be minor variations from the requirements may result in valid, costly challenges to a declaration of taking.

Per the Eminent Domain Code, 26 P.S. §1-402 (d), provides:

**Condemnation; passage of title; Declaration of Taking**

(a) Condemnation, under the power of condemnation given by law to a condemnor, which shall not be enlarged or diminished hereby, shall be effected only by the filing in court of a declaration of taking, with such security as may be required under section 403(a), and thereupon the title which the condemnor acquires in the property condemned shall pass to the condemnor on the date of such filing, and the condemnor shall be entitled to possession as provided in section 407.

(b) The declaration of taking shall be in writing and executed by the condemnor, shall be captioned as a proceeding in rem, and shall contain the following:

- (1) The name and address of the condemnor.
- (2) A specific reference to the statute, article and section thereof 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 such action was taken, and the place where the record thereof may be examined.
- (4) A brief description of the purpose of the condemnation.
- (5) A description of the property condemned sufficient for the identification thereof, specifying the city, borough, township, or town and the county or counties wherein 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 such county in accordance with section 404 of this Act.

- (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.

Furthermore, subsection (c) provides for some specifications of the use of the declaration of taking as follows:

(c) The condemnor may include in one declaration of taking any or all of the properties specified in the action by which the declaration of taking was authorized. The Prothonotary shall charge one fee for filing each declaration of taking, which shall be the same regardless of the number of properties or condemnees included therein.

(d) The condemnor shall file within one year of the action authorizing the declaration of taking, a declaration or declarations of taking covering all properties included in such authorization not otherwise acquired by the condemnor within such time.

The filing in court of declaration of taking with the security as may be required, results in the transfer of title of the land passing as of the date of the filing of the declaration of taking.

The required security may be avoided per P.S. §1-402 (d)(8) when a condemnor, with taxing power, states in the declaration of taking that it has taxing power which is security for just compensation. When a condemnor does not have taxing power, it must file a bond with the declaration of taking and state in the declaration of taking that just compensation is secured by a bond. 26 P.S. §1-402 (C).

Possession does not pass to the condemnor with the filing of the declaration of taking. Possession will be dealt with as a distinct topic later in this chapter.

## NOTICE OF CONDEMNATION

The notice of condemnation is a written notice which must be filed concurrent with the declaration of taking, or within 30 days of the filing of the declaration of taking. This is the separate, distinct document which is required to effectuate a proper taking of the property per the Pennsylvania Eminent Domain Code.

The requirements of the notice of condemnation are spelled out in the Code at P.S. §1-405, Notice to Condemnee.

(a) Within thirty days after the filing of the declaration of taking, the condemnor shall give written notice of the filing to the condemnee.

(b) The notice shall be served within or without the Commonwealth, by any competent adult, in the same manner as a complaint or writ of summons in assumpsit, or by certified or registered mail, to the last known address of the condemnee. If service cannot be made in the manner as provided, 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) (8), one time each in one newspaper of general circulation and the legal journal, if any, published in the county.

(c) 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 thereof.
- (3) The name of the condemnee or condemnees to whom it is directed.
- (4) The name and address of the condemnor.
- (5) A specific reference to the statute, article and section thereof 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 such action was taken, and the place where the record thereof 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 thereof in the case of a total taking and, in the case of a partial taking, a plat plan showing the condemnee's entire property and the area taken.
- (9) A statement of the nature of the title acquired.
- (10) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.
- (11) A statement of how just compensation has been made or secured.
- (12) 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, he shall file preliminary objections within thirty days after being served with notice of condemnation.

(d) Service of a copy of the declaration of taking, together with the information and notice required by subsections (c)(2), (c)(8) and (c)(12) hereof, shall constitute compliance with the notice requirements of this section.

(e) The condemnor shall file proof of service of said notice.

The common practice would be to concurrently file and issue the Declaration of Taking and the Notice of Condemnation together.

## POSSESSION OF PROPERTY

The proper filing of a declaration of taking and a notice of condemnation may end up being the start of a taking, rather than the end of a taking. A condemnee may challenge a declaration of taking within thirty days after being served with the notice of condemnation by filing preliminary objections to the declaration of taking. 26 P.S. §1-406. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objection shall constitute a waiver thereof per 26 P.S. §1-406.

Preliminary objections shall state specifically the grounds relied upon. 26 P.S. §1-406 (d). All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent. 26 P.S. §1-406 (c). The condemnee shall serve a copy of the preliminary objections on the condemnor within seventy-two hours after filing the same. 26 P.S. §1-406 (d). The court shall determine promptly all preliminary objections. 26 P.S. §1-406(e).

After expiration of the thirty days allowed for preliminary objections, the condemnee shall be entitled to possession or right of entry upon payment of, or written offer to pay, the amount of just compensation as estimated by the condemnor. 26 P.S. §1-407. If within sixty days after the filing of the declaration of taking, the condemnor had not paid just compensation, condemnee may tender possession or right of entry in writing. The condemnor shall thereupon make payment on the just compensation. 26 P.S. §1-407(d).

The payment of this estimated just compensation is not binding as the ultimate determination of just compensation. Rather, it is considered only as payments towards, or "pro tanto" of, the just compensation as finally determined. 26 P.S. §1-407(c).

Project planning needs to allocate adequate time for property acquisition prior to construction. Contractors usually seek complete clear title of all of the properties prior to initiation of construction. Project planning seeks to effectuate smooth acquisition of property via careful use of eminent domain, but project progress could be halted for a significant delay as a result of preliminary objections.

## ESTIMATED JUST COMPENSATION

The just compensation language of the Fifth Amendment to the United States Constitution is reiterated in the “just compensation” requirements of the Pennsylvania Eminent Domain Code at 26 P.S. §1-601. As noted above, the condemnor must make an estimate of this just compensation and pay those funds as part of the acquisition of the property. The term estimate accurately conveys the subjectivity of the determination of fair market value of real estate. The use of fair market value terminology might be thought to narrowly define a range of appropriate values.

However, opinions of fair market value, particularly with partial condemnations, vary widely. A Condemnor’s opinion of fair market value may be only a fraction of an opinion of fair market value per a real estate appraiser hired by the condemnee. This variation and the subjectivity makes planning rather difficult to determine the ultimate costs of the use of eminent domain power. Condemnors must recognize that a condemnee might be able to negotiate or obtain “just compensation” much higher than the governmental entity might preliminarily estimate.

Use of the proper measure of damages is critical. This measure is explained at 26 P.S. §1-602, Measure of Damages.

(a) 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 thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages are provided in this code.

This before and after evaluation is at the heart of most eminent domain contests. Careful planning often eliminates significant challenges to the actual taking of property. The fight between the condemnor and condemnee might often play out with a battle of experts as to what are the correct before and after values.

Public officials for the condemnor would be wise to carefully scrutinize qualifications of potential appraisers and attorneys. Expertise in the use of before and after methodology may be very significant in an ultimate determination of eminent domain damages.

## PROPERTY INTEREST

The taking of real property rights in the use of eminent domain is often thought of in terms of taking a fee simple interest and/or an easement. A fee simple taking takes the entire bundle of property rights. The taking of an easement, such as a slope easement, describes the taking of a right to use for the particular, specified purpose.

However, a condemner should realize that Pennsylvania law recognizes three separate property rights. The “surface estate” and “right to support” are property rights universally recognized across various states in the United States. Pennsylvania’s unique history and geology has led this State to specifically identify the separate property interest of a “coal/mineral estate”. Machipongo Land and Coal Company, Inc. v. Department of Environmental Resources, 719 A.2d 19 (Pa. Cmwlth. 1998). While Pennsylvania law recognizes these three distinct property interests, the law concerning valuation of property rights emphasizes the valuation of the entire property interest before, compared to the entire property interest after.

A condemner needs to be mindful that a lessee or a mortgagor may have proprietary rights taken by condemnation 26 P.S. §1-506. Leases often describe a lessee waiver of eminent domain rights.

### **TEMPORARY TAKINGS**

Recall that the Eminent Domain Code requires the specification of the nature of the title acquired. 26 P.S. §1-402 (d)(6). Typically, the acquired title is defined in terms such as: fee simple, easement and/or temporary construction easement. Note that takings may be permanent or temporary. Temporary construction easements often allow for construction usage and narrowing the take down to the area of required for permanent usage. Limiting the permanent take area via use of temporary construction easement may significantly help to reduce costs. Temporary construction easements are often valued via a rental analysis, with perhaps a year of estimated usage.

### **OTHER DAMAGES**

As previously discussed, just compensation is the basic definition of damages under the Eminent Domain Code. This primary damage analysis is the before and after the value of the real estate as described at 26 P.S. §1-602. This basic analysis encompasses individual described harms to the property and encompasses harm to the remainder property after the taking. Appraisers typically might review various aspects of harm to the property to result in the opinion of the before value minus the after value, leading to property damages.

The Code also provides for “Limited reimbursement of appraisal, attorney and engineering fees”. This limited reimbursement shall not exceed \$500.00 towards reasonable expenses actually incurred. 26 P.S. §1-610.

The Code provides for “Delay compensation”, per 26 P.S. §1-611. Such delay damages are calculated from and are described by the Code as being at the rate of 6% per year. Courts have recognized that the 6% figure may not be fair, depending on the economic environment. Recognized Pennsylvania law now approves the use of prevailing commercial loan rates in calculating delay damages. Marx Stationary & Printing Co., v. Redevelopment Authority of City of Philadelphia, 675 A.2d 769 (Pa. Cmwlth. 1996).

The Code also allows for: “Payment on account of increased mortgage costs” 26 P.S. §1-610.1.

“Consequential damages” are also valid damage considerations per 26 P.S. §1-612. The language of this section provides that condemnor shall be liable for damages to property: “...abutting the area of an improvement resulting from the change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property was taken.” An example is seen when a municipality is found liable for landscaping or grading work done outside the boundaries of the road right of way. Fulmer v. White Oak Borough, 606 A.2d 589 (Pa. Cmwlth. 1992). “Reasonable Alternative Access” to a public road must be provided for the purposes for which the property had previously been employed. However, simply requiring a more circuitous route of access is not generally of taking. Com., Dept. of Transp. V. Elser, 628 A.2d 67 (Pa. Cmwlth. 1993).

The Code provides for reimbursement of: “Expenses incidental to transfer of title”. 26 P.S. §1-608.

The Code also provides for: “Moving and related expenses of displaced persons”. 26 P.S. §1-609 A. Actual, reasonable expenses are reimbursed, but capped. 26 P.S. §1-601 A (b)(2) described a \$10,000.00 replacement of costs. Subsection (5) goes on to provide a \$20,000.00 cap that is sometimes applied to business relocation damages.

“Replacement housing for homeowners” is provided for in 26 P.S. §1-602 A.

The Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act has been adopted into Pennsylvania law. Martinez v. Department of Housing and Urban Development, 347 F. Supp. 903 (Ed. Pa. 1972).

## **BOARD OF VIEW - SITE VIEW**

The initial trial level to determine damages in Pennsylvania is a board of view. A common pleas judge will generally appoint three persons to serve as a board of view. The board is usually comprised of a local attorney and two other local individuals who are knowledgeable in real estate values. That board would then generally schedule a site view and a hearing. Small cases may involve a site view to be followed immediately thereafter by a hearing. The condemnor shall furnish the viewers, at or before the site view, with the plan showing the entire property interest involved. 26 P.S. §1-509.

The site view is often the introduction of the property, and the issues, to the individuals with the ultimate assessment of value. The initial presentation is significant in setting the tone and direction of the analysis of value. The site view would typically allow condemnor and condemnee, in no specified order, to point out relevant factors of the property. The view might emphasize conditions of: neighboring land, slope, drainage, access and conditions of buildings or fixtures. A board or jury, upon physical inspection of the property, may disagree with testimony of both sides of the litigation and come to their own fair conclusions of the damages. Peters v. Volant, 23 Law. L.J. 75 (1966).

## **BOARD OF VIEW - HEARING**

A Viewer's hearing provides that:

The viewers may hear such testimony, receive such evidence, and make such independent investigation as they deem appropriate without being bound by the formal rules of evidence. 26 P.S. §1-701.

The condemnee or officer of a corporate condemnee, without further qualification, may testify as to just compensation. 26 P.S. §1-704. The condemnor shall present expert testimony in the amount of damages at a hearing. 26 P.S. §1-702. A condemnor which fails to present expert testimony in the amount of damages at a board of view hearing, may be precluded from presenting such testimony in the later proceedings such as a trial in a court of common pleas. Harris v. Urban Redevelopment Authority of Pittsburgh, 243 A.2d 167 (Pa. Super. 1968). Purchase price may be considered in arriving at the market value before the taking. Buehler v. Com., 18 A.2d 898 (Pa. Super. 1962). The viewer shall file their report within 30 days of their final hearing or within 30 days of the filing of the transcript of stenographic notes of testimony. Ten days before the filing of the report,

viewers shall mail a copy to all parties. Thirty days are allowed for an appeal. 26 P.S. §1-513.

### JURY TRIAL

Appeals to the determination of a board of view progress to a county court of common pleas. This new proceeding would generally progress in similar fashion with a site view and presentation of evidence. The report of the viewers with the amount of the award shall not be admissible as evidence. 26 P.S. §1-703.

Such trials are not particularly common and an experienced eminent domain litigator may well be able to “direct” the judge and control the proceeding. Usage of arguments based on the correct property rights and the appraisal terms of art may be quite convincing. Such trials are, again, typically battles of the experts. The expert’s qualifications, accuracy, and expertise may be critical in the ultimate determination of value opinions which vary widely. Complex matters involving environmental issues or complexity such as the assembled economic unit doctrine demand experienced appraisers. The assembled economic unit doctrine concerns the valuation of machinery which was so integrated into the buildings that it could not be moved without expenditure of funds exceeding the value. Benkovitz v. Urban Redevelopment Authority of City of Pittsburgh, 425 A.2d 1178 (Pa. 1981).

Testimony at trial may well involve wide range of opinions of value as in Tinicum Real Estate Holding Corp. v. Com. Dept. of Transp., 389 A.2d 1034 (Pa. Supp. 1978) wherein the condemnee expert testified to \$1,564,000.00 in damages and the condemnor’s expert described damages of \$209,000.00. A jury might tend towards the middle of such a range, but in this instance, found damages of \$384,300.00. A trial court’s determination of value will not be interfered with unless a verdict is so excessive or inadequate that the refusal of the court to grant a new trial was a clear and manifest abuse of discretion or was unconscionable and shocking to the court’s justice. Noble v. West Penn Power Co., 388 A.2d 781 (Pa. Cmwlt. 1978).

### DE FACTO TAKING

A de facto taking, sometimes called an inverse condemnation, occurs when a governmental action amounts to destruction, injury or damage to private property without the filing of a declaration of taking. Interference with a right of ownership that substantially deprives the owner of the beneficial use of the property may be a de facto taking. Visco v. Com. Dept. of Transp., 498 A.2d 984 (Pa. Cmwlt. 1985). For example,

low flying airplanes may constitute a de facto taking. Griggs v. Allegheny County, 398 U.S. 84, 82 S. Ct. 531 (1982).

However, the property owner has a difficult burden to prove a de facto taking. A condemnee must prove exceptional circumstances which have substantially deprived the owner of the use and enjoyment of his property. The damages must be immediate, necessary, and unavoidable consequences of action. Jacobs Appeal, 55 Pa. Cmwlth. 142 (1980). A property owner failed with his allegation that maintenance work substantially altered the flow of water from the highway, causing periodic flooding of farmland leaving it useless for farming. The court found that the de facto taking was not established because the property owner presented no evidence that the condition of the land was substantially changed, or that the customary use of land had been prevented, except for short periods of time. In re: Condemnation by Com. Dept. of Transp. Oxford, 506 A.2d 1990 (Pa. Cmwlth. 1986).

### REGULATORY TAKING

Eminent domain implications are considered when a regulation, ordinance, or law may harm some property right. The analysis must begin with the recognition that the eminent domain rights flow from the previously cited Fifth Amendment to the United States Constitution. That Amendment was made applicable to the States through the Fourteenth Amendment of the United States Constitution. That right is specified in Pennsylvania Eminent Domain Code. 26 P.S. §1-502 (e).

The analysis of regulatory taking recognizes the distinction between eminent domain power and police power. Eminent domain power is the power to take property for public use with compensation paid to the property owner for what was taken or destroyed. By contrast, police power is a regulation of property to promote health, safety and general welfare. The government entity serves the interest of the public generally by means that are reasonably necessary and not unduly oppressive upon individuals. Lawton v. Steele, 152 U.S. 133 (1894). Recent courts have recognized several factors of particular significance, emphasizing the economic impact of the regulation on a property owner and the extent to which the regulation has interfered with distinct investment - backed expectations. Penn Central Transportation Company v. New York City, 438 U.S. 104, 98 S. Ct. 2646 (1978). Compensation is payable when regulation compelled a property owner to permit a physical invasion of property or regulation denied all economically beneficial or productive use of land. Lucas v. South Carolina Coastal Counsel, 505 U. S. 1003, 112 S. Ct. 2886.

Zoning restrictions might be challenged as a regulatory taking. Certain zoning restrictions were found not, per se, unreasonable as long as the restrictions are enacted to

advance the health, safety, and general welfare of the community. Centre Lime and Stone, Co., Inc. v. Spring Township Board of Supervisors, 787 A.2d 1105 (2001).

A regulatory taking did not occur when property was rezoned from residential to conservation use, severely restricting the use. Reilly v. Dept. of Environmental Resources, 37 Pa. Cmwlth. Ct. 608 (1978).

### **REDEVELOPMENT TAKING**

A growing United States issue is the use of eminent domain for development projects which may have both public and private benefit. One recent study documented that between 1998 and 2002 there were over 10,000 filed, or threatened, condemnations involving private to private transfers of property. Berliner, Public Power; Private Gain; Five Year, State-By-State Report Examining the Abuse of Eminent Domain (2003). In Pennsylvania, our law has recognized that eminent domain power may be exercised in furtherance of both public and private purposes. Although an incidental benefit to a private party may be valid, without invalidating a taking, a power of eminent domain may not be employed unless the public is to be the primary and paramount beneficiary to its exercise. Price v. Philadelphia Parking Authority, 221 A.2d 138 (Pa. 1996). Our neighboring, more densely populated New Jersey, is experiencing an explosion of litigation involving challenges to redevelopment taking.

### **KELO**

Suzette Kelo, et. al. v. City of New London, et. al., 125 S. Ct. 2655 (2005) is the most significant eminent domain case in decades. The case determined that “public use” may include economic development which takes private property or other, more economically productive, private use. Private, not blighted, homes were condemned for a large redevelopment project which included significant benefit to a large pharmaceutical company, Pfizer, Inc.

A quotation from the case captures the severity of the economically distressed city and the scope of the potential economic rejuvenation:

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a “distressed municipality.” In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort

Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a \$5.35 million bond issue to support the NLDC's planning activities and a \$10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a \$300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation.

125 S.C. 2658-2659.

### **KELO AFTERMATH**

Kelo generated outrage, particularly the thought that a middle income home could be condemned for a public use/private use which appeared to be heavily weighted to private use. That outrage has resulted in at least two states already enacting anti-Kelo statutes. Those statutes effectively preclude taking such as that of Kelo by enacting provisions which prohibit public funding of takings for private use. All, or nearly all, states are considering eminent domain laws which are considered anti-Kelo statutes. Federal legislation is also under consideration.

Current Pennsylvania law in regards to such public/private takings continue to be governed by Price v. Philadelphia Parking Authority, 221 A.2d 138 (PA 1996). The power of eminent domain may not be employed unless the public is to be the primary and paramount beneficiary to its exercise. Many economic development projects could be debated as to whether or not they provide for the public to be the primary and paramount beneficiary. Any current economic development proposals which contemplate use of eminent domain should be heavily weighted to a public benefit, rather than a private benefit, to be publicly accepted in the face of the anti-Kelo outrage.

Such Kelo economic development plans in Pennsylvania may soon be a thing of the past given legislative proposals in Pennsylvania. Pennsylvania has been recognized as being at the forefront of insightful eminent domain proposals following Kelo. A House proposal and more recently Senate Bill 881 of Session of 2005 reflect the strong momentum for eminent domain reform in Pennsylvania. The Senate bill proposal of December 7, 2005 would specifically prohibit the use eminent domain for private business. We should anticipate Pennsylvania eminent domain reform very soon. The

reform is anticipated to prevent the takings for private purposes, while allowing for removal of blighted properties in certain specified circumstances.

### **SIGNIFICANT RECENT PENNSYLVANIA CASES**

**Middletown Twp. v Lands of Josef Seegar Stone**, PICS Case No. 05-1497 (Pa. Commw. Sept 15, 2005) Simpson, J.; Colins, P.J., dissenting, September 26, 2005. A condemnation by Middletown Township, a Second Class Township, of a 175 acre farm in Bucks County was upheld. A property owner argued that the “recreational” purpose was a ruse in that the true evidence demonstrated the purpose being to prevent economic development of the land. The condemnee argued that the Open Space Lands Act, 32 P.S. Section 5008 prohibited the Township to acquire land for open spaces to prohibit development. Preliminary objections were defeated with the reasoning that the recreational purpose was valid.

In contrast, a similar taking, based on different wording, was defeated. **IN RE: Condemnation Proceedings by Lower Macungie Twp.**, PICS Case No. 05-1343 (C.P. Lehigh June 147, 2005) Johnson, J., August 22, 2005, found that township officials exceeded their authority under the Second Class Township Code by the Declaration of Taking. The taking was found to violate the Open Space Lands Act in the condemning of nearly 104 acres to preserve open space. The “open space” condemnation is allowed by the Open Space Lands Act for the condemnation by counties, not townships. The purpose for “open space” is not authorized by the recreational purposes allowed for in the Second Class Township Code.

If Lower Macungie had used the recreation purposes language, instead of the open space language, the identical condemnation may well have passed muster. The lesson provided is in the careful use of the significant power of eminent domain via careful use of the authorizing statutes.

### **STRATEGIES AND OPPORTUNITIES**

The conference theme of Strategies and Opportunities leads to a suggestion of a few possible strategies and opportunities involving eminent domain. The first strategy or opportunity is not new, but may deserve some renewed attention for potential use. As previously described, the First Class Township Code and the Second Class Township Code both provide for the potential use of eminent domain for “recreational” purposes. As townships develop and land becomes more scarce, the provision for recreational land deserves some forethought. Such recreational land may be a significant attraction for residents and businesses, while promoting a quality of life in a particular township. Such recreational purposes could be traditional uses such as baseball fields and picnic areas. Other valid recreational purposes might include hiking trails and bird watching. A valid

recreation purpose does not have to entail intensive physical development of a township park. Accordingly, a township might consider use of eminent domain to obtain land for valid recreation purposes and thereby protect that land from future private development. As noted in the above cases, the approach to the taking and the language used in the taking must be carefully planned. A township might thus acquire undeveloped land at a reasonable price prior to significant jumps in value corresponding to private development.

Another possible strategy or possibility is the use of eminent domain as part of an effort to save funds. In some circumstances, the use of eminent domain, with the obligation to pay just compensation, may result in a less expensive outcome than the prior status quo. For example, a township may carry the burden of significant expense related to three fire halls at locations spread out in a township. Two of those fire halls might be consolidated into one with considerable savings, but neither single fire hall has enough land to provide the adequate service. The use of eminent domain might acquire an adjoining parcel of land allowing for the size of the parcel to accommodate the consolidation of two fire stations. The eminent domain cost of acquiring the land may be small in comparison to operating the prior number of fire halls. Obviously, such possibility would need to take into account the availability of fire protection throughout the township. Here, eminent domain is presented as one tool that might facilitate an overall cost savings strategy.

Additional strategic use of eminent domain may be to facilitate access. A township may desire access between two areas such as a residential development and an existing public park or between a business district and a residential area. Eminent domain might possibly be used to condemn a relatively small or narrow area of land so as to facilitate travel or commerce. Such taking of access ways may be inexpensive ways to overcome boundaries. Such access ways would need to be condemned via a valid public purpose as previously referenced.

In conclusion, eminent domain should be recognized as a powerful tool for townships to serve any number of valid public purposes. The powerful tool should be used with wisdom and care.