

Municipal Eminent Domain

The right to exercise the power of eminent domain must be conferred by the Commonwealth on its political subdivisions. The Pennsylvania Constitution, Article I, Section 10, among other things, makes it clear that “private property [shall not] be taken or applied to public use,¹ without authority of law and without just compensation being first made or secured.” Importantly, “[b]ecause eminent domain is in derogation of private rights, any legislative authority for its use must be strictly construed in favor of the landowner.”² Moreover, municipality’s exercise of eminent domain can only be “called into operation by the legislative” and “exercised within the limitations established by law.”³ Even if a municipality is authorized to take property by eminent domain, the locale in which the power may be exercised may be limited. In fact, but for certain exceptions provided in the Eminent Domain Code, “no political subdivision will exercise eminent domain authority against land that is situated in another political subdivision without the approval by resolution of the governing body of the political subdivision in which the land is situated.”⁴

Whenever property is “taken” by the government, the owner has a right to “just compensation.”⁵ In some instances, “just compensation” may be required from a governmental entity for action other than the physical appropriation of property. Such situations often are characterized as regulatory or “de facto” takings and occur where a law, ordinance or regulation so deprives a property owner of the use or value of their property that the result could properly be deemed a “taking.”⁶ However, not all restrictions on the use of property by a municipality require that compensation be

¹ The constitutional “public use” requirement has been interpreted to mean “public *purpose*” by both federal and Pennsylvania courts, and takings have been upheld even where the public purpose involved conveyances of taken property to private parties for private use. In a controversial decision that prompted nationwide legislative responses, the United States Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005), held that the use of eminent domain to take property and convey it to another private party for the stated public purpose of “economic development” was valid under the public use clause of the Fifth Amendment to the United States Constitution.

² 7 Summ. Pa. Jur. 2d Property §11:1 (2d ed.) (2020)(citations omitted).

³ *Id.*

⁴ 26 Pa.C.S. § 206. Act 34 and Act 35 of 2006 repealed the fre, DGestanding Eminent Domain Code, Act 6, Special Session 1, of 1964, and replaced it with Chapters 1-11 of Title 26 (Eminent Domain) of the Pennsylvania Consolidated Statutes. The Third Class City Code contains specific authority for a city to condemn property outside of its corporate limits for specific purposes subject to the limitations in section 206 of the Eminent Domain Code- (*See* Title 11 (Cities) of the Pennsylvania Consolidated Statutes, §§ 12409, 14201.)

⁵ “Just as the Fifth Amendment, rendered applicable to the states by the 14th Amendment, prohibits the taking of private property for public use without just compensation, the Pennsylvania Constitution provides that no private property will be taken or applied to public use without authority of law and without just compensation being first made or secured.” 7 Summ. Pa. Jur. 2d Property §11:4 (2d ed.) (2020)(citations omitted).

⁶ “A *de facto* taking occurs when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property.” *In re Condemnation by Penn Hills*, 870 A.2d 400, 404 (Pa. Cmwlth. 2005). Ergo, if a regulation “goes too far,” it is a taking. *Id.* at 405. *Cf. Nolen v. Newton Tp.*, 854 A.2d 705 (Pa. Cmwlth. 2004) (A regulation is not a taking merely because it deprives landowner of the most profitable use of property.).

paid. Compensation is not required in all cases wherein a municipality's legitimate exercise of the "police power,"⁷ such as a reasonable zoning restriction, impacts on a landowner's use of property.

. . . a prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense be deemed a taking or an appropriation of property for the public benefit nor will the valid employment of the police power in a reasonable manner to abate a determined public nuisance be found to be an unconstitutional taking.⁸

The procedure by which the power of eminent domain is exercised and damages are recovered is governed by the Eminent Domain Code,⁹ which was consolidated in 2006 within Title 26 of the Pennsylvania Consolidated Statutes, thus replacing, with changes, the prior Eminent Domain Code.¹⁰ The 2006 changes were passed in large part due to the United States Supreme Court decision in *Kelo v. City of New London*,¹¹ in which the Court held that an "economic development" taking that resulted in property being conveyed to a private party was valid under the United States Constitution, subject to any limitations that may be imposed by individual states. While the Eminent Domain Code in its current form still represents primarily a procedural statute and does not contain any substantive delegations of power to exercise the power of eminent domain,¹² the 2006 changes added a chapter entitled "Limitations on Use of Eminent Domain,"¹³ which specifically restricts, subject to exceptions, the use of eminent domain for private purposes and imposes other substantive restrictions on the use of eminent domain by entities granted such power through other statutes. Act 45 of 2018 further limited the use of eminent domain to condemn land subject to a conservation easement.

In summary, the attempted exercise of eminent domain by a municipality or other entity generally involves a two-stage analysis. The initial stage requires an examination of whether the taking itself is legally justified, i.e., whether the entity has been granted the power to condemn, and whether such power may be exercised upon the specific property in question for the specific purpose relied upon by the entity. This stage is typically less rigorous, because the power is usually asserted well within the parameters set forth in the statute applicable to the entity. The second stage, after the condemnation itself has been deemed legal, involves setting just compensation. This stage is typically more complex, and may require the participation of viewers, appraisers or other experts in

⁷ See related *Deskbook* article entitled "Police Power."

⁸ 7 Summ. Pa. Jur. 2d Property § 11:2 (2d ed.) (2020) (citations omitted).

⁹ 26 Pa.C.S. § 101 et seq.

¹⁰ Act 6, Special Session 1, of 1964.

¹¹ 545 U.S. 469 (2005).

¹² The substantive power to exercise eminent domain by political subdivisions, local authorities and other governmental entities is usually delegated within the specific municipal codes or other statutes delineating the purposes, duties and powers of those entities.

¹³ 26 Pa.C.S. § 201 et seq.

order to ascertain any and all factors that bear on the question of the precise “value” of what has been taken, along with, under specific circumstances, other “damages” that result from the taking. The Eminent Domain Code provides the procedural guidelines to be followed by all relevant parties when examining these issues.