

# Eminent Domain and Conserved Land In Pennsylvania



*This guide provides a basic review of the eminent domain law of Pennsylvania and the United States as it applies to conserved land and conservation easements.*

What is eminent domain? .....	1
Is a conservation easement a property interest? .....	1
What rights and protections do owners have against eminent domain? .....	2
How does Act 45 affect condemnation involving conservation easements? .....	2
Does the Agricultural Area Security Law offer protections? .....	3
Does the Pennsylvania Constitution offer protections? .....	3
If property is taken, what is just compensation? .....	4
What legal proceedings are involved in a condemnation? .....	4
Are remedies available beyond just compensation? .....	6
What does the U.S. Supreme Court say about eminent domain? .....	7
What was the response to Kelo? .....	7
How does a court's interpretation of a conservation easement impact a condemnation proceeding? .....	8

## **“...nor shall private property be taken for public use, without just compensation.”**

—The Takings Clause of the Fifth Amendment of the Constitution of the United States of America

## **“...nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.”**

—Article 1, Section 10 of the Constitution of the Commonwealth of Pennsylvania

<sup>1</sup> While eminent domain powers are held by each of the federal and state legislatures, each federal and state legislature may delegate these powers to certain entities. Regardless of the entity engaged in the taking, the property must be sought for a public purpose. The Pennsylvania Supreme Court has noted that “the body to which the power is entrusted has no authority beyond

## What is eminent domain?

Eminent domain is the power of government<sup>1</sup> to take private property for public use. The use of the power of eminent domain is called a *taking*. When the taking involves real estate, it is also known as *condemnation*. The real estate is *condemned* by the government, which is the *condemnor*. The property owner and any party with a property interest are the *condemnees*.

## Is a conservation easement a property interest?

Yes. A conservation easement is itself a distinct property interest in real estate, separate from the property interest in the underlying land. Consider a typical situation where a conservation easement is granted by a landowner to a third party, such as a conservancy or the government, while the landowner retains ownership of the underlying land. In such a case, the landowner has an interest in the real estate, or real property. But, importantly, the owner of the conservation easement also has a property interest in the real property.

The Pennsylvania Eminent Domain Code<sup>2</sup> specifically defines a “conservation easement,” in part, as a “nonpossessory interest of a holder in real property.”<sup>3</sup> Because the owner of the conservation easement does not own the land itself, its ownership interest is considered less

that legislatively granted.” *Interstate Cemetery Co. Appeal*, 222 A.2d 906, 909 (Pa. 1966) (citation omitted).

<sup>2</sup> Eminent Domain Code, 26 Pa.C.S. §§ 101-1106.

<sup>3</sup> 26 Pa.C.S. § 202 (incorporating definition from Conservation and Preservation Easements Act, 32 P.S. § 5053).

than absolute, but nevertheless the owner of a conservation easement is still entitled to just compensation in a condemnation proceeding for its interest. Where a condemnor intends to condemn and develop land subject to a conservation easement, the condemnor will be bound by the conservation easement unless it also condemns the conservation easement itself. Often, the value of those development rights restricted by the conservation easement are worth significantly more than the underlying land.

## What rights and protections do owners have against eminent domain?

The Fifth Amendment to the U.S. Constitution includes what is called the *Takings Clause* (quoted above), which is made applicable to state and local government by operation of the U.S. Constitution's Fourteenth Amendment. This clause requires that private landowners receive just compensation when the government takes their property. Landowners also have the right to contest the taking itself by challenging the sufficiency of the government's action, including whether the action is truly for a public purpose.

In addition to those protections afforded by federal law, landowners and owners of conservation easements should also be aware of their rights under state law. For instance, not only does Pennsylvania have a counterpart to the federal Takings Clause in its state constitution (quoted above), it also has certain statutory and other protections that may apply, depending on the nature of the case.

## How does Act 45 affect condemnation involving conservation easements?

### Court determination is required

By Act 45 of 2018, Pennsylvania added Section 208 to its Eminent Domain Code.<sup>4</sup> Section 208 provides that, subject to the exceptions listed below, a condemnation

cannot commence on land subject to a conservation easement unless a court first determines there is *no reasonable and prudent alternative* to the utilization of the land subject to the conservation easement.

### Exceptions in Section 208

Pursuant to Section 208 of the Eminent Domain Code, the initial court approval is *not* required in the following scenarios:

- An underground public utility facility that does not permanently impact the open space benefits protected by the conservation easement.
- Condemnation for any necessary public utility facility or other project that is subject to approval by a Federal agency.
- Emergency projects where, at the discretion of the condemning entity, the taking is reasonably necessary for the protection of life or property.
- Condemnations by a Commonwealth agency for any purpose.

### Orphans' court determination

Act 45 specifically requires that the orphans' court division<sup>5</sup> of the county court of common pleas make the determination as to whether there is no reasonable and prudent alternative to the utilization of the land subject to the conservation easement.

*Remember* that state eminent domain law such as Act 45 applies only to those condemnors acting on behalf of the state; where a condemnor is granted its eminent domain power by the federal government, it would be subject only to federal law.

### Notification

Section 208 requires the condemnor to notify the orphans' court at least 30 days prior to commencing the proposed condemnation, at which time the condemnor is also responsible (under the Orphans' Court Rules) for

<sup>4</sup> 26 Pa.C.S. § 208.

<sup>5</sup> Each county has an orphans' court division of its court; historically, orphans' courts have jurisdiction to hear cases involving such matters as trusts, fiduciaries, estates, and guardianships.

providing notice to all interested parties of their right to participate in the proceeding.

## Attorney General

Additionally, Section 208 empowers the orphans' court to request the Pennsylvania Attorney General to bring an action to enjoin a condemnor from violating Section 208.

## Procedures and protections are additional

Act 45 creates new protections for the owners of the conservation easements and the underlying land; its procedures are a *precursor and in addition to* those procedures that must be followed in all other condemnation proceedings, which are explained in greater detail below.

## Does the Agricultural Area Security Law offer protections?

Agricultural Security Areas (ASAs)<sup>6</sup> offer a way to protect farmland from non-agricultural use. Farm owners can submit a petition to their municipality's governing body to create an ASA or to participate in an ASA that has already been established. ASAs offer protection for farms against local ordinances and nuisance lawsuits related to farming activity. Land participating in an ASA can also be subject to a conservation easement (although the existence of an ASA or a conservation easement does not require the presence of the other).

Where the government seeks to take land in an ASA, the proposed condemnation is reviewed by the Agricultural Lands Condemnation Approval Board. The Board is comprised of representatives from the Pennsylvania Department of Agriculture, Department of Environmental Protection and Department of Transportation, as well as two farmers and a representative of the Governor's Office. Within 60 days of receiving notice of an eminent domain request, the Board must hold a public hearing on the issue of whether to approve the request. Owners of the land,

the party requesting the condemnation, and the local government must be given written notice of this hearing. The notice must also be posted at five public places in the surrounding areas and be published in the local newspaper.

The Agricultural Area Security Law provides the Board with specific guidelines for making a decision.<sup>7</sup> The Board can only approve the eminent domain action if these conditions apply:

- The proposed condemnation would not have an “unreasonably adverse,” or a negative effect, on the following:
  - The preservation and enhancement of agriculture or municipal resources within the area
  - The environmental and comprehensive plans, goals, policies, or objectives of the county, municipality and the state
- There is no “reasonable and prudent alternative” to the use of the agricultural security area for the proposed project.

## Does the Pennsylvania Constitution offer protections?

Unlike the U.S. Constitution, the Pennsylvania Constitution includes an Environmental Rights Amendment. Ratified in 1971 by the Pennsylvania electorate, the Environmental Rights Amendment appears at Article I, Section 27 of the Pennsylvania Constitution and reads as follows:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

<sup>6</sup> See 3 P.S. § 901 *et seq.* (Pennsylvania's Agricultural Area Security Law).

<sup>7</sup> 3 P.S. § 913.

The Environmental Rights Amendment does not expressly mention conservation easements; however, no court in Pennsylvania has yet had to consider to what extent the Commonwealth is obligated under the Amendment to protect conservation easements as public natural resources.<sup>8</sup> For that reason, parties contesting the condemnation of conservation easements should keep apprised of the developing body of case law in this area and be aware of opportunities to include arguments founded upon the Environmental Rights Amendment.<sup>9</sup>

## If property is taken, what is just compensation?

Even if only part of the property is taken, the government must provide *just compensation*. Even if the government's use of the property does not greatly affect the owner's economic interest, the owner is still entitled to just compensation.<sup>10</sup>

Just compensation is based on the fair market value of the property. It is defined as "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."<sup>11</sup>

Where a conservation easement has reduced the fair market value of otherwise developable land, a condemnation that includes the conservation easement must value the conservation easement as the difference between the value of the land when considered with and without the easement.

Note that once just compensation is determined, the terms of the easement or other contract between the owner of the land and the holder of the conservation easement may specify how the just compensation is to be divided between the owner of the land and the holder of the conservation easement, respectively. In the absence of contractual terms to the contrary, the landowner would be entitled to the fair market value of the restricted land, and the holder of the conservation easement would be entitled to the fair market value of the development rights restricted by the conservation easement.

## What legal proceedings are involved in a condemnation?

The nature of the legal proceedings will depend on whether the condemnation is filed in federal or state

<sup>8</sup> In *Robinson Twp. v. Commonwealth*, a plurality of the Pennsylvania Supreme Court found, "At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property." 83 A.3d 901, 955 (Pa. 2013) (plurality) (citations omitted). Were a court to determine that conservation easements are protected under the Environmental Rights Amendment as public natural resources, the Commonwealth would be obligated to guard them with the same diligence as a trustee of a trust, per the Supreme Court's decision in *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 916 (Pa. 2017).

<sup>9</sup> "Pennsylvania's environmental trust thus imposes two basic duties on the Commonwealth as the trustee. First, the Commonwealth has a duty to prohibit the degradation, diminution,

and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. *Robinson Twp.*, 83 A.3d at 957. Second, the Commonwealth must act affirmatively via legislative action to protect the environment. *Id.* at 958," *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 at 933 (2017).

<sup>10</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>11</sup> 26 Pa.C.S. § 702(a).

In Pennsylvania, a proceeding before a county court requires a party petition for the appointment of a board of viewers to determine just compensation. 26 Pa.C.S. § 502. The board consists of three individuals, at least one of whom must be an attorney. This attorney acts as the board's chairperson. The chairperson and at least one additional board member must view the property prior to making a decision. *Id.* § 503

court. While the proceedings are similar,<sup>12</sup> this guide is focused primarily on cases that commence in Pennsylvania courts and involve a condemnor granted eminent domain power by Pennsylvania law, as opposed to a condemnor empowered by the federal government.

Before a condemnation action can be commenced on land subject to a conservation easement, the proposed condemnation must first be reviewed, pursuant to Act 45, by the orphans' court division of the county court of common pleas, and the proposed condemnation may also require review pursuant to the Agricultural Area Security Law. Act 45 and the Agricultural Area Security Law are addressed in their respective sections, above.

In Pennsylvania, a condemnation is commenced in a county court of common pleas, and the initial filing is called a *declaration of taking*.<sup>13</sup> Below are a few key parts of the condemnation proceedings:

## Venue

The declaration of taking is filed in court in the county where the property is located. Where a property is located in multiple counties, the action may proceed in any of those counties.<sup>14</sup> **Immediately** upon filing of the declaration of taking with the court, together with the payment of such security as required by law, the property title transfers to the condemnor (the government entity acquiring the property).<sup>15</sup>

<sup>12</sup> Federal takings are governed by 40 U.S.C. §§ 3111-3118 and FED. R. CIV. P. 71.1.

<sup>13</sup> In instances where it is alleged that government activity has resulted in a taking, even though no formal declaration of taking has been filed, there may be what is called a "constructive" or "*de facto*" taking entitling the condemnee to relief. *See* 26 Pa.C.S. § 502(c). The procedure outlined above is intended to serve as a guide only where a declaration of taking is filed.

<sup>14</sup> 26 Pa.C.S. § 301.

<sup>15</sup> 26 Pa.C.S. § 302. Note: In 2017, the United States Supreme Court reinforced that property owners have an immediate right to just compensation once their land is condemned by the government. *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019). The

## Notice requirements

On the day the declaration of taking is filed, the condemnor must file notice of the declaration in the office of the recorder of deeds of the county in which the property is located.

Within thirty days after filing the declaration of taking, the condemnor must give written notice to (1) any condemnees, (2) any mortgagee of record, and (3) any lienholder of record. This notice must be served by any competent adult: either in-person or through registered mail to the parties' last known addresses.<sup>16</sup>

## Objecting to the taking

Within *30 days* after being served with the notice of condemnation, any condemnees may file what are called preliminary objections.

Objections must be limited to challenging:

- The power or right of the condemnor to take the property (unless this has already been determined in court).
- The sufficiency of the security to be paid.
- The declaration of taking.
- Any other procedure followed by the condemnor.<sup>17</sup>

Supreme Court held in *Knick* that landowners are not required to contest eminent domain actions in state court before bringing actions alleging violation of the Takings Clause in federal court; however, note that at least two lower courts have not interpreted the *Knick* holding to mean that state eminent domain actions automatically involve federal claims. *Providence City v. Thompson*, No. 1:19-cv-88 (D. Utah Oct. 7, 2019); *City of Jam. Beach v. Williams*, No. 3:20-cv-241 (S.D. Tex. Oct. 14, 2020) (order adopting magistrate judge's memorandum and recommendation). *See also Fore Stars v. City of Las Vegas*, 488 F. Supp. 3d 982 (D. Nev. Sept. 23, 2020).

<sup>16</sup> 26 Pa.C.S. § 302.

<sup>17</sup> 26 Pa.C.S. § 306.



## Time for challenging just compensation

Regardless of whether a property owner objects to the taking, a challenge to the amount of just compensation must be made, under Pennsylvania law, within *six years* from the date on which the condemnor made the first payment (where payment is required by law). If payment is not required by law, then the landowner must file a petition within *six years* of the declaration of taking being filed.<sup>18</sup>

## Entering the property prior to the taking

Prior to the filing of the declaration of taking, the condemnor or its employees or agents have the right to enter any land or improvement in order to make studies, surveys, tests, soundings and appraisals.

The owner of the land or the party in whose name the property is assessed must be notified ten days prior to entry on the property.<sup>19</sup>

## Taking possession

The condemnor may take possession after the time for making preliminary objections has passed AND after the condemnor has either paid, or made a written offer to pay, just compensation.<sup>20</sup>

<sup>18</sup> 42 Pa.C.S.A. § 5527(a).

<sup>19</sup> 26 Pa.C.S. § 309.

<sup>20</sup> 26 Pa.C.S. § 307(a).

<sup>21</sup> 26 Pa.C.S. § 710(a).

<sup>22</sup> 26 Pa.C.S. § 306(g)(1).

<sup>23</sup> Regardless of any other proceeding, including preliminary objections, a condemnor may determine within two years from the filing of the declaration of taking that it wishes to relinquish the condemned property. In that case, title reverts in the condemnee (as of the date of the filing of the declaration of taking) upon the filing by the condemnor of a “declaration of relinquishment.” However, a condemnor may only file a declaration of relinquishment as to that part of the condemned property it

## Are remedies available beyond just compensation?

In Pennsylvania, the Eminent Domain Code provides for additional remedies, which depend on the nature of the proceeding and may include things such as:

- Reimbursement of up to \$ 4,000 for each owner of a property interest as a payment toward reasonable expenses actually incurred for appraisal, attorney, and engineering fees (except where the taking is for an easement related to underground piping for water or sewer infrastructure, in which case the reimbursement is limited to \$ 1,000).<sup>21</sup>
- Where preliminary objections have the effect of terminating the condemnation, the condemnor must reimburse any condemnees for reasonable appraisal, attorney, and engineering fees, and other costs and expenses actually incurred because of the condemnation proceedings.<sup>22</sup>
- Where condemned property is relinquished,<sup>23</sup> any condemnees shall be reimbursed by the condemnor for certain reasonable costs and expenses.<sup>24</sup>

Additionally, the owners of the conservation easement and the underlying land should each look to the language in the conservation easement itself, as it may include specific remedies in the event the land is condemned.

has not taken actual possession of and so long as (1) the condemnor has not yet made payments for possession, right of entry, or compensation or (2) the condemnee has not yet tendered possession of the condemned property as provided by law. 26 Pa.C.S. § 308(a). Note that, in the event of relinquishment, not only does the title revert in the condemnee, but the mortgages and other liens that existed (and that have not otherwise been discharged) are reinstated. 26 Pa.C.S. § 308(a)(2). Additionally, pursuant to 26 Pa.C.S. § 308(e), the condemnor and the condemnee can agree—even without the filing of a declaration of relinquishment—to revert title in the condemnee. Presumably, if the parties agree to revert title, they would also agree to the treatment of such other things as whether there should be reimbursement of certain expenses.

<sup>24</sup> 26 Pa.C.S. § 308(d).

## What does the U.S. Supreme Court say about eminent domain?

The most significant eminent domain decision of the U.S. Supreme Court in recent years is the 2005 case, *Kelo v. City of New London*.<sup>25</sup> In *Kelo*, the city of New London was declared a “distressed municipality” after its main industry relocated. The city approved a redevelopment plan, which included condemning individuals’ homes and redistributing the land to private developers. Nine individuals sued, claiming that the takings were unconstitutional because they did not serve a public use. The city claimed that the takings served the public purpose of creating new jobs and bringing more tax revenue to the area. The Supreme Court held that a state may use its eminent domain powers to condemn private property and redistribute the property to other private individuals, so long as the property will serve a “public use.” The use must be “rationally” related to a “conceivable” public purpose. In this case, the government’s use of eminent domain served the public purpose of revitalizing the local community’s economy.<sup>26</sup>

<sup>25</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>26</sup> *Kelo* itself builds on two prior landmark cases: *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

In *Berman v. Parker*, a government agency sought to take property in a blighted area of Washington, D.C., and redistribute it to private developers for redevelopment. Two of the property owners sued, claiming that the exercise of eminent domain was for private, as opposed to public, use. The court ruled that the details of redevelopment projects, along with whether they serve a public purpose, should be decided by the legislative branch. The legislature determined that these “blighted areas” were “injurious to the public health, safety, morals, and welfare.” Therefore, the property was constitutionally taken for a public use.

## What was the response to *Kelo*?

### Nationwide response

The 2005 *Kelo* decision was met with widespread backlash. Forty-four states changed their laws and eleven changed their constitutions in response to the decision. These changes provide private landowners with more protection from takings for private use.<sup>27</sup> States added definitions for terms such as “private use” that were previously vague.

### Pennsylvania response

One year after the *Kelo* decision, Pennsylvania added “Limitations on Use of Eminent Domain” to the state constitution. This update prohibited the taking of private property “in order to use it for private enterprise.”<sup>28</sup> “Private enterprise” is defined as “a for-profit or not-for-profit entity or organization.”<sup>29</sup> This change provided landowners with new protections against eminent domain actions. Now, the state cannot take private land and redistribute that land for a private use.

In *Hawaii Housing Authority v. Midkiff*, the Hawaii legislature discovered that seventy-two private individuals owned almost fifty percent of the land in Hawaii. In response, the legislature passed the Land Reform Act of 1967, which used the state’s eminent domain power to take this land and redistribute it among the general population. A private landowner sued, claiming that the Act violated the Taking Clause’s public use requirement. The court held that the state’s redistribution of private land to prevent inflation and a state of limited competition qualifies as a public use. Therefore, this taking was constitutional.

<sup>27</sup> Dana Berliner, Looking Back Ten Years After *Kelo*, 125 Yale L.J. F. 82 (2015).

<sup>28</sup> 26 Pa.C.S. § 204.

<sup>29</sup> Id.

## How does a court's interpretation of a conservation easement impact a condemnation proceeding?

In condemnation proceedings, courts are charged with determining the parties' respective interests. Whether a conservation easement includes certain rights is important, not only for determining the necessity of the taking, but also for determining how the fair market value is allocated between the conservation easement and the underlying land. Pennsylvania courts interpret the legal instruments that grant the conservation easement property interest as contracts, which means that judges analyze the "plain language" of the document. This means that the text of the easement document is key (and thus should be prepared by an attorney with conservation easement experience).

Assisting the judiciary in its review of conservation easements is Pennsylvania's 2001 [Conservation and Preservation Easements Act](#),<sup>30</sup> which changed the way that courts review conservation easements. The act instructs courts to interpret any restrictive language in favor of the easement's conservation purposes. The act is described in more detail in the [Guide to the Conservation and Preservation Easements Act: Pennsylvania Act 29 of 2001](#).



The latest version of this guide and related resources are posted at [WeConservePA.org](http://WeConservePA.org).

WeConservePA produced this guide with support from the Colcom Foundation, the William Penn Foundation, and the Community Conservation Partnerships Program, Environmental Stewardship Fund, under the administration of the Pennsylvania Department of Conservation and Natural Resources, Bureau of Recreation and Conservation.

This guide was authored by Steven J. Schiffman, Esq., Bret P. Shaffer, Esq., and Shannon Smith, J.D., of Schiffman, Sheridan & Brown, P.C., in Harrisburg, Pennsylvania. It was edited by Andrew M. Loza.

Nothing contained in this document is intended to be relied upon as legal advice or to create an attorney-client relationship. The material presented is generally provided in the context of Pennsylvania law and, depending on the subject, may have more or less applicability elsewhere. There is no guarantee that it is up to date or error free.

© 2021 WeConservePA

Text may be excerpted and reproduced with acknowledgement of WeConservePA.

v. 7/1/2021

---

<sup>30</sup> Conservation and Preservation Easements Act, 32 P.S. §§ 5051-5059.