



Center for Agricultural and Shale Law
M. Sean High – Staff Attorney

Property Rights, Right of Ways, and Eminent Domain

March 20, 2019



Center for Agricultural and Shale Law
M. Sean High – Staff Attorney

Overview

- **Property Rights**
- **Right of Ways**
- **Eminent Domain**



Overview

- **Property Rights**
- **Right of Ways**
- **Eminent Domain**



Property Rights **Bundle of Rights**

- **Right to control or use**
- **Right to benefit**
- **Right to destroy**
- **Right to exclude**
- **Right to transfer**



Property Rights
Right to Exclude

- **Generally unlawful to enter another’s real property without consent of owner**
- **Trespasser:**
 - **Enter without consent or privilege**
- **Criminal Trespasser:**
 - **trespass where clearly marked by signs or fence**



Property Rights
Right to Exclude

- **Generally, landowner may exclude**
- **But, may not be “willful, wanton, or reckless”**



Property Rights **Must allow entry (PA)**

- **PA (if authorized to use eminent domain)**
 - **Surveys, test, soundings, and appraisals**
 - **Notification 10 days prior to entry**
 - **Pay for damages**



Overview

- **Property Rights**
- **Right of Ways**
- **Eminent Domain**



Right of Ways **Definition**

- **Right use or control another person's land, or an area above or below it, for a specific limited purpose**
- **Also known as an easement**



Right of Ways **Considerations**

- **Freedom of contract**
- **Clearly indicate location of right-of-way**
- **Maintenance rights?**
- **Damages during installation or maintenance**



Right of Ways **Considerations**

- **Authority to grant**
 - **Already given away?**
- **Surface estate v. mineral estate**
 - **Are the interests split?**



Right of Ways **Considerations**

- **Current leases**
 - **Obligation to agricultural tenant?**
- **Problems with existing conservation plans**
- **Environmental issues**



Right of Ways **Considerations**

- Views
- Price?
 - Value of property
 - Just compensation



Right of Ways **Considerations**

- Effect on soil and yield
- Damage outside of easement area
- Reimbursement of costs
 - Surveys, appraisals, attorneys fees



Right of Ways **Considerations**

- **Contact Person**
- **Violations of agreements settled by courts (PA)**
- **THINK LONG TERM!!!**



Right of Ways **Considerations: Example**

- **2003 major power outage in Northeast U.S.**
- **Transmission Vegetation Management Act**
- **Required standards for utility companies**
 - **Trim tress and bushes or herbicides**
 - **Specify!!!**



Right of Ways **Utility Considerations (PA)**

- **May not negotiate until 5 days after formal notice**
- **May contact prior to notice to determine owner of record or to request survey**



Right of Ways **Limited Reimbursement (PA)**

- **Not forced to accept any offer**
- **If land can be taken by eminent domain**
 - **Generally up to \$4,000 reimbursement**
 - **Actual expense for appraisals, engineers, and attorneys fees (26 Pa.C.S.A. § 710)**



Overview

- **Property Rights**
- **Right of Ways**
- **Eminent Domain**



Eminent Domain Definition

- **Governmental takes private property for public use**
- **Must pay just compensation for the taking**



Eminent Domain
U.S. Const. 5th Amend.

“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.”



Eminent Domain
PA Const. Art. I Sec. 10

“[P]rivate property [shall not] be taken or applied to public use, without authority of law and without just compensation being first made or secured.”



Eminent Domain
Just Compensation (PA)

- Fair market value before condemnation – fair market value after condemnation



Eminent Domain
Fair Market Value (PA)

- Present use
- Highest and best reasonably available use
- Machinery, equipment, and fixtures



Eminent Domain
Legal Standard

- **Does the taking serve the public interest?**



Eminent Domain
Public Use

- **Highways**
- **Schools**
- **Hospitals**
- **Utilities**



Eminent Domain **Public Use**

- ***Kelo v City of New London (2005)***
 - **Suzette Kelo purchased home (1997)**
 - **Pfizer announces plans to develop neighborhood**
 - **Connecticut law gave power of ED to facilitate**



Eminent Domain **Public Use**

- ***Kelo v City of New London (2005)***
 - **U.S. Supreme Court ruled “economic development” satisfied public use**
 - **Majority said 5th Amendment did not require “literal” public use**



Eminent Domain **Kelo Aftermath**

- **44 states have enacted legislation or passed ballot measures**
- **High courts in 3 of 6 have increased protection**
- **Only AR, NY, MA have not**



Eminent Domain **Private Entity (PA)**

- **May not be used to take private land to enhance private enterprise**
 - **Unless exception applies**



Eminent Domain
Authority to Condemn (PA)

- Commonwealth
- Political subdivision
- Public utility
- Private entity



Eminent Domain
Private Entity (PA)

- Power transferred to utility or common carrier
- Eliminate public nuisance
 - Excludes farming operations protected under RTFA
- Blight
- Abandonment
- Urban low income development



Eminent Domain
Power Transferred to Utility (PA)

- **Private company receives Certificate of Public Convenience from Pennsylvania Utility Commission**
- **Company acquires eminent domain authority**



Eminent Domain
Interstate Pipelines

- **Federal Energy Regulatory Commission (FERC)**
- **Regulates interstate transmission of electricity, natural gas, and oil**
- **Authority over construction of interstate pipelines**



Eminent Domain **Interstate Pipelines**

- **Company obtains Certificate of Public Convenience from FERC**
- **Receives authority to use eminent domain**
- **Preempts state or local law**
- **Parties may file in state or federal court**



Eminent Domain **Electric Transmission Lines**

- **States have authority over construction**
- **Often through state public utility commission**



Eminent Domain **Procedure (PA)**

- **Utility company applies to PUC for certificate of condemnation**
 - **Necessary or proper for the service, accommodation, convenience, or safety to the public**



Eminent Domain **Procedure (PA)**

- **Agricultural Area Security**
 - **May not condemn in ASA unless approved by Agricultural Land Condemnation Approval Board**
 - **Does not apply to underground utility facility**



Eminent Domain Procedure (PA)

- PUC will hold a public hearing
- Landowner may participate in hearing and may have legal representation



Eminent Domain Procedure

- PUC will not determine if compensation is just
 - Only issues decided by PUC is whether condemnation serves the public interest
- If certification approved, utility company files condemnation proceeding in court



Eminent Domain **Condemnation Proceeding**

- PA Court of Common Pleas
- Located in county of condemn land
- Right to a jury



Eminent Domain **Condemnation Proceeding**

- Raise challenges
- Just compensation and damages
 - Battle of experts (appraisers)
- Right to appeal



Conclusion

- **Property rights:**
 - May exclude until certification
- **Right of Way:**
 - Contract between parties
- **Eminent Domain:**
 - Power to take with just compensation



Resources

M. Sean High – Staff Attorney
Phone: (814) 865-5017
Email: mzh177@psu.edu

The Center for Agricultural and Shale Law
Web: www.pennstatelaw.psu.edu/casl
Blog: www.pennstateaglaw.com