

THE EMINENT DOMAIN PROCESS (CONDEMNING AUTHORITY VS. LANDOWNER PERSPECTIVE)



J. Stephen Feinour, Esq.
NAUMAN, SMITH, SHISSLER & HALL, LLP
200 North Third Street, 18th Floor
P.O. Box 840
Harrisburg, PA 17108-0840
(717) 236-3010

The Different Types of Condemnation Processes

Federal Condemnation Procedures

There are two statutory methods for exercising the power of eminent domain under federal condemnation law.

- The first method is called “straight condemnation.” The action usually proceeds to a determination of just compensation and final judgment before the condemnor takes possession. Declaration of Taking Act, 40 U.S.C. § 3113.
- The second method is often referred to as “quick-take.” The government may take possession of the condemned property at the beginning of the case. Declaration of Taking Act, 40 U.S.C. § 3114.



The Different Types of Condemnation Processes Cont.



Pennsylvania Condemnation Procedures

- Pennsylvania Eminent Domain Code of 2006. 26 Pa.C.S.A. § 101 *et seq*
- State “Quick Take” Condemnation. 15 Pa.C.S.A. § 1511.



A Walk Through the Condemnation Processes - From Notification to Final Resolution

- Declaration of Taking, Security, Recording Notice of Condemnation, Notice to Condemnee
- Preliminary Objections
- Possession, Right of Entry and Payment of Compensation
- Determining Damages

Ensuring Procedures are Compliant - Statutory Review

The procedures for condemnations under Pennsylvania law are currently found in Chapter 3 of the Eminent Domain Code, 2006, May 4, P.L., 112 N. 34, codified at 26 Pa. C.S.A. §§ 301-310.



Ensuring Procedures are Compliant - Statutory Review Cont.

The Condemnor's Actions:

- Declaration of Taking
- Security
- Recording Notice of Condemnation
- Notice to Condemnee

Condemnor's Actions Cont.

Declaration of Taking:

- Condemnation is effected only by filing in court a declaration of taking (“DT”) with the required security. 26 Pa. C.S.A. § 302(a)(1).
 - Title which the condemnor acquires passes to condemnor on the date of the filing of the “DT.”
 - Required contents of the “DT” are set forth in Section 302(b).



Condemnor's Actions Cont.

Declaration of Taking – 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.

Condemnor's Actions Cont.

Declaration of Taking – Contents:

- (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.

Condemnor's Actions Cont.

Security:

Condemnor must give security to effect the condemnation by filing with the declaration of taking its bond, without surety, to the Commonwealth for the use of the owner of the property interests condemned, the condition of which shall be that the condemnor shall pay the damages determined by law. 26 Pa.C.S.A. § 303(a).



Condemnor's Actions Cont.

Recording Notice of Condemnation:

After filing its declaration of taking, the condemnor must, on the same day, “lodge for record a notice of the declaration in the office of the recorder of deeds of the county in which the property is located.” 26 Pa.C.S.A. § 304(a)(1).



Recorder of
Deeds

Condemnor's Actions Cont.

Notice to Condemnee:

Within 30 days after the filing of the declaration of taking, the condemnor must give written notice of the filing to the condemnee, to any mortgagee and to any lienholder of record. 26 Pa.C.S.A. § 305(a).



Condemnor's Actions Cont.

Notice and recording requirements. 26 Pa.C.S.A. § 304(b):

The notice shall specify:

- The court term and number of the declaration of taking.
- The date it was filed.
- A description or plan of the property condemned sufficient for identification.
- The names of the owners of the property interests condemned, as reasonably known to the condemnor.

Condemnor's Actions Cont.

Notice and recording requirements. 26 Pa.C.S.A. § 304(b):

- The notices shall be indexed in the deed indices showing the condemnee set forth in the notice as grantor and the condemnor as grantee.
- If plans are to be recorded as part of the notice, they shall be submitted on standard legal size paper. If plans are to be filed as part of the notice, they shall be in legible scale and filed in a condemnation book or file or microfilmed, with a notation as to the condemnation book and page number, file number or microfilm number to be made by the recorder on the margin of the notice.
- Upon the notice being assigned a book and page number by the record of deeds, the condemnor shall file with the prothonotary under the caption of the declaration of taking a memorandum of the book and page number in which the notice is recorded.

Condemnor's Actions Cont.

The title that the condemnor acquires in the condemned property passes to the condemnor on the date of the filing. The condemnor is entitled to possession as provided for under section 307 (relating to possession, right of entry and payment of compensation). 26 Pa.C.S.A. § 302(a)(2).



The Condemnee's Actions: Preliminary Objections

Preliminary objections are the sole method by which a condemnee may challenge the declaration of taking filed pursuant to section 301 of the Eminent Domain Code. *In re Condemnation Proceedings by S. Whitehall Twp. Auth.*, 940 A.2d 624, 628, fn. 2 (Pa. Commw. Ct. 2008).

The Condemnee's Actions: Preliminary Objections Cont.

Section 306 simplifies and clarifies the procedure for challenging a condemnation effectuated by a declaration of taking by providing an exclusive method which must be utilized within the prescribed time. Comment to 26 Pa. C.S.A. § 306.

- Existing law was unclear as to whether the condemnee who wishes to challenge the condemnation must sue in equity or raise the question in viewers' proceedings. Comment to 26 Pa. C.S.A. § 306.
- The matters which the condemnee may raise by preliminary objections should be disposed of as soon as possible after the condemnations. Comment to 26 Pa. C.S.A. § 306.
- Preferable to have these matters raised in the condemnation proceeding rather than in a separate suit. Comment to 26 Pa. C.S.A. § 306.

The Condemnee's Actions: Preliminary Objections Cont.

Within 30 days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. 26 Pa. C.S.A. § 306(a)(1).

Note: Court may extend time upon showing of cause.

The Condemnee's Actions: Preliminary Objections Cont.

Preliminary objections are limited to and are the exclusive method of challenging:

- The power or right to the condemnor to appropriate the condemned property unless it has been previously adjudicated;
- The sufficiency of the security;
- The declaration of taking; and
- Any other procedure followed by the condemnor. 26 Pa. C.S.A. § 306(a)(3).

The Condemnee's Actions: Preliminary Objections Cont.

- Failure to raise by preliminary objections the issues listed in subsection (a) constitutes a waiver. 26 Pa. C.S.A. § 306(b).
- Issues of compensation may not be raised by preliminary objections. 26 Pa. C.S.A. § 306(b).
- The court may require the condemnor to give bond and security as the court deems proper if it appears to the court that the bond of the condemnor is insufficient security. 26 Pa. C.S.A. § 303(c).

Determining Damages

The procedures for determining damages under Pennsylvania law are currently found in Chapter 5 of the Eminent Domain Code, 2006, May 4, P.L., 112, N. 34, codified at 26 Pa. C.S.A. §§ 501-522.



Determining Damages Cont.

A condemnee, condemnor or a displaced person may file a petition requesting the appointment of viewers. 26 Pa. C.S.A. § 501(a).

An owner of a property who claims that his or her property has been condemned without a filing of a declaration of taking may file a petition for the appointment of viewers. 26 Pa. C.S.A. § 501(c)(1).

Determining Damages Cont.

- The court will make the determination as to whether a condemnation has occurred, and if so when and to what extent. 26 Pa. C.S.A. § 502(c)(2).
- If it decides a condemnation has occurred, the court will enter an order specifying what property interest has been condemned. 26 Pa. C.S.A. § 502(c)(3).
- A copy of the order must be filed in the office of the recorder of deeds in the county where the property is located. 26 Pa. C.S.A. § 502(c)(4).

Determining Damages Cont.

Once the petition for the appointment of viewers has been filed, the court will appoint the three viewers, unless preliminary objections are pending.
26 Pa. C.S.A. § 504(a)(1).

Determining Damages Cont.

Petitioners must promptly send to all other parties by registered mail, return receipt requested, a certified true copy of the petition for the appointment of viewers and a copy of the court order granted such; this shall also be mailed to all mortgagees and other lienholders of record. 26 Pa. C.S.A. § 504(b).



Determining Damages Cont.

The viewers must give notice as to the time and place of all views and hearings no less than 30 days written notice by registered mail, return receipt requested. 26 Pa. C.S.A. § 504(c).



Determining Damages Cont.

Preliminary objections may be raised to object to the appointment of viewers within 30 days after receiving notice of the appointment of viewers. 26 Pa.C.S.A. § 504(d)(1).

Determining Damages Cont.

Notice of the view and hearing must be served to the last known address of the condemnee and condemnor; if service cannot be achieved by this manner, then notice shall be posted on the property and once in a general circulation newspaper and in a legal publication. 26 Pa.C.S.A. § 505(a)-(b).

Determining Damages Cont.

Condemnor must provide viewers with a plan showing the entire property including the improvements, the extent and nature of the condemnation, and other physical data that may be necessary for proper determination of just compensation. 26 Pa. C.S.A. § 509(a).



Determining Damages Cont.

- The viewers must file a report specifying, among other things, a schedule and amount of damages awarded and their rulings on any written request for findings of fact and conclusions of law submitted to them. 26 Pa. C.S.A. § 512(1)-(10).
- A report must be filed by the viewers within 30 days of their final hearing. 26 Pa. C.S.A. § 514(a).
- Any party aggrieved by the viewers' decision may appeal it to court. 26 Pa. C.S.A. § 516(a)(1).

Advising the Condemning Authority on Condemnation

Appraisal – Obtain appraisal prior to making offer.

- The property must be appraised and the appraisal must be in writing.
- The appraisal must be reviewed by an independent appraiser and the recommended amount of Estimated Just Compensation must be the basis of the offer.
- The property owner (or the owner's designated representative) must be given the opportunity to accompany the appraiser during the inspection of the property. This gives the owner the opportunity to advise the appraiser of features of the property which might impact the valuation of the property and allow the disclosure of features that might not be obvious to the appraiser.



Advising the Condemning Authority on Condemnation Cont.

Making the Offer:

- The best practice is to make all offers in writing and based on a written appraisal.
- Inform all claimants of their rights under the law.
- Provide a written offer to purchase and a written summary statement of the Basis of Estimated Just Compensation.
- Every reasonable effort should be made to contact all claimants in person. Explain the acquisition process, including the owner's right to accompany the appraiser during inspection of the property.
- Give the property owner an opportunity to consider the offer.
- Provide at least 90 days written notice prior to requiring vacation of any dwelling or business.
- Provide the property owner with reasonable opportunity to accompany the real estate appraiser.

Advising the Condemning Authority on Condemnation Cont.

Taking Possession:

- Pay the agreed purchase price before requiring the property owner to surrender possession of the property being acquired.
- Payment of EJC into Court if condemnee refuses to accept offer.



Access to Real Estate Prior to Condemnation

The condemnor, after the expiration of the time for filing preliminary objections by the condemnee to the declaration of taking, is entitled to possession or right of entry upon payment of or a written offer to pay to the condemnee the amount of just compensation as estimated by the condemnor. 26 Pa.C.S.A. § 307(a)(1)(i).

Access to Real Estate Prior to Condemnation Cont.

If a condemnee or any other person then refuses to deliver possession or permit right of entry, the prothonotary upon praecipe of the condemnor shall issue a rule, returnable in five days after service upon the condemnee or the other person, to show cause why a writ of possession should not issue. 26 Pa. C.S.A. § 307(a)(1)(iii).

Access to Real Estate Prior to Condemnation Cont.

The court, unless preliminary objections warranting delay are pending, may issue a writ of possession conditioned except as provided in this subsection upon payment to the condemnee or into court of the estimated just compensation and on any other terms as the court may direct. 26 Pa. C.S.A. § 307(a)(2)(i).

Access to Real Estate Prior to Condemnation Cont.

Additionally, prior to the filing of the declaration of taking, condemnor or its employees or agents has the right to enter upon any property in order to make studies, surveys, tests, soundings and appraisals. 26 Pa. C.S.A. § 309(a).

Negotiation for the Acquisition of Property Interests

1. Make all reasonable efforts to personally contact each real property owner or the owner's designated representative and schedule an appointment at a convenient time and place.
2. Make a prompt written offer to the property owner after the amount of just compensation has been determined.

Negotiation for the Acquisition of Property Interests Cont.

3. Give the property owner a reasonable opportunity to consider the offer.
 - Three contacts should be made prior to initiating condemnation proceedings.
 - Condemnation proceedings should only be initiated after every reasonable effort is made for an amicable settlement and irreconcilable differences remain.
 - Condemnor may be required to reimburse owner for reasonable expenses actually incurred for appraisal, attorney and engineering fees; and for residential relocation expenses. 26 Pa.C.S.A. § 710.

“Quick Take” Condemnations

Section 1511(g) of the Business Corporation Law (BCL) contains an exception to the otherwise exclusive condemnation procedures found in Pennsylvania Eminent Domain Code. 15 Pa. C.S.A. § 1511(g) empowers a public utility to exercise what is commonly known as a “quick-take” condemnation. This exception permits the condemnor to obtain an easement prior to the litigation of the condemnee’s defenses upon Court approval of the filing of a condemnation bond.

“Quick Take” Condemnations Cont.

If the corporation and any interested party cannot agree on the amount of damages sustained, or if any interested party is an unincorporated association, or is absent, unknown, not of full age or otherwise incompetent or unavailable to contract with the corporation, or in the case of disputed, doubtful or defective title, **the corporation may make a verified application to the appropriate court for an order directing the filing of a bond to the Commonwealth, in an amount and with security to be approved by the court, for the use of the person or persons who may be found to be entitled to the damages sustained.** The application shall be accompanied by the bond and a certified copy of the resolution of condemnation. The resolution shall describe the nature and extent of the taking. Section 1511(g)(2)(i).

Upon entry by the court of an order approving the bond and directing that it be filed, the title that the corporation acquires in the right-of-way or easement described in the resolution of condemnation shall pass to the corporation and the corporation shall be entitled to possession. Section 1511(g)(2)(iii).

“Quick Take” Condemnations Cont.

Preliminary objections are not available to challenge the validity or scope of the condemnation in proceedings under the statute. Amended Committee Comments to 15 Pa. C.S.A. § 1511(g).

Due process, however, requires that the condemnees be permitted to challenge the validity of the taking in some forum. Id.

“Quick Take” Condemnations Cont.

Therefore, the only procedure available to challenge the scope and validity of the taking would be to file a separate action in equity, which could be instituted at any time including after the condemnor's bond is filed with the court of common pleas. (See *Redding v. Atlantic City Electric Company*, 440 Pa. 53, 269 a.2d 680, 684 (Pa. 1970)). Amended Committee Comments to 15 Pa. C.S.A. § 1511(g). If the condemnation is finally determined to be invalid, the condemnee may recover damages and is entitled to such equitable relief as is appropriate in the circumstances. Id.

Entities Entitled to Use Quick-Take Condemnation Procedures Under Section 1511(g) of the BCL

A new issue has arisen due to the explosion of the natural gas industry in the Marcellus Shale region. Entities that construct natural gas pipelines may not be able to use quick-take condemnation procedures, depending on the entities status as a public utility corporation.

Section 1103 of the BCL defines a “public utility corporation” as “[a]ny domestic or foreign corporation for profit that: (1) is subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or agency of the United States.” 15 Pa. C.S.A. § 1103(a).

Entities Entitled to Use Quick-Take Condemnation Procedures Under Section 1511(g) of the BCL Cont.

An entity regulated by the Federal Energy Regulatory Commission (FERC) as a common carrier engaged in the transportation of oil or natural gas by pipeline pursuant to 49 U.S.C. §1 (1988) is not a public utility corporation entitled to condemn property under Section 1511 of the BCL. See *Sunoco Pipeline, L.P. v. Loper et al.*, Docket No. 2013-SU-4518-05 (York County Com.Pl., February 5, 2014); *reaffirmed on reconsideration* (March 25, 2014).

An entity regulated by FERC as a public utility under the Natural Gas Act, 15 U.S.C. § 717 can condemn property pursuant to the eminent domain law. See *National Fuel Gas Supply Corporation v. Kovalchick Corporation*, 2005 WL 3675408, 74 Pa. D. & C. 4th 22 (Pa.Com.Pl. 2005).

Challenging the Right to Take: Case Law and Recent Issues



DISPUTES OVER LAND VALUATION



Lower Makefield Twp. v. Lands of Chester Dalgewicz, --- A.3d ----, 2013 WL 2322471 (Pa. 2013). A dispute arose over the value of the condemned land, a 166 acre farm in Lower Makefield Township, which was to be turned into a public golf course.



Disputes Over Land Valuation

“There is no bright-line rule prohibiting testimony of bona fide offers into evidence, especially, as in the present case, when a contract has been signed and the offer is used to show that contract's reasonableness.” Whether an offer is *bona fide* and whether it should be admitted are questions best left to the trial court as the gatekeeper of the evidence.

Disputes Over Land Valuation Cont.

Lehigh-Northampton Airport Auth. v. Fuller, 862 A.2d 159 (Pa. Commw. Ct. 2004).



Disputes Over Land Valuation Cont.

The “Unit Rule” prohibits valuations where the individual lots or units are given a value and then, in order to determine the value of the entire property, the values of the individual lots/ units are simply added together. *See Department of Transportation v. Becker*, 546 A.2d 1282 (Pa. Commw. Ct. 1988).

Disputes Over Land Valuation Cont.

The Commonwealth Court approved the “Development Approach” as a means “to value multiple unimproved lots in a subdivision or potential subdivision as a unit.” *Lehigh-Northampton Airport Auth. v. Fuller*, 862 A.2d 159, 167 (Pa. Commw. Ct. 2004) (citing *Penn's Grant Associates*, 733 A.2d at 28).

- It reasoned by using this approach to find the true market value, the expected sales prices of the lots are considered as well as the direct and indirect development and marketing cost.”
- Agreed with the trial court’s findings that this approach “virtually eliminated conjecture and placed approval and development of the land squarely within the realm of a reasonable certainty[.]”

Condemnation of Blighted Property

The removal of blighted areas constitutes a proper public purpose to exercise eminent domain under the authority of the Urban Redevelopment Law. See 35 P.S. §§ 1701 to 1719.2. Once the determination is made, the city redevelopment authority can exercise its eminent domain powers to remedy the situation.



Condemnation of Blighted Property Cont.

In *Matter of Condemnation by Urban Redevelopment Authority of Pittsburgh*, 594 A.2d 1375 (Pa. 1991), the Supreme Court of Pennsylvania affirmed the Commonwealth Court's order that by following procedures established in Redevelopment Law, the Eminent Domain Code, and case law, property owners Due Process was adequately provided for.

“[A] certification of blight does not, in and of itself, have a *legal* effect on property rights.” *Matter of Condemnation by Urban Redevelopment Auth. of Pittsburgh*, 594 A.2d at 1378.



Property Takings for Private Third Parties/Redevelopment

1. *Kelo v. City of New Longer*, 545 U.S. 469, 125 S.Ct. 2655 (2005).
2. *In re Redevelopment Authority of City of Philadelphia*, 938 A.2d 341 (Pa. 2007).

The subsequent sale of the Property to a private developer, even a developer who is a religious entity, does not constitute ‘entanglement’ that would somehow make the taking unconstitutional.” *In re Redevelopment Auth. of City of Philadelphia*, 595 Pa. 241, 253, 938 A.2d 341, 348 (2007).

Challenges to “Public Use” Takings

- *In re. Condemnation of Certain Properties and Property Interests for Use as Public Golf Course*, 822 A.2d 846 (Pa. Commw. Ct. 2001). It was ruled that the taking and use of condemnee’s property for a municipal golf course was appropriate as a “public use” and was suitable for an eminent domain proceedings.
- *Middletown Tp. v. Lands of Stone*, 939 A.2d 331 (2007).
A second-class township’s use of its eminent domain powers for recreational use was invalid because the true purpose for taking a 175-acre farm was to prevent development and conserve open spaces; as such, the township lacked the authority to condemn the farm.

Temporary Takings

- Section 714 of the Eminent Domain Code does not provide recovery for consequential damages arising from temporary interference with access.
- A property owner who claims condemnation damages for temporary interference with access must prove a de facto taking.

Temporary Takings Cont.

Truck Terminal Realty v. Department of Transportation, 387 A.2d 153 (Pa. Commw. Ct. 1978) aff'd, 403 A.2d 986 (Pa. 1979).

Supreme Court agreed, holding “a temporary interference with road access . . . [is a] non-compensable exercise of the police power necessary to effectuate public improvement unless the alleged interference [is] accomplished in an arbitrary or unreasonable manner.”

Temporary Takings Cont.

Sienkiewicz v. Department of Transportation, 890 A.2d 1043 (Pa. 2005).

Despite the fact that the owner faced declining income during the construction that ultimately forced him to cease operations, it was still insufficient “without evidence of unreasonable or arbitrary conduct by the government amounting to the extraordinary circumstances required by *Truck Terminal Realty*.” William Cressler, *Contributions of the Commonwealth Court to Condemnation Law Since 1970*, 20 Widener L.J. 193, 225 (2010)(citing *Sienkiewicz v. Dep’t of Transp.*, 890 A.2d 1043, 1044 (Pa. 2005)).

Temporary Takings Cont.

Thomas A. McElwee & Son, Inc. v. SEPTA, 948 A.2d 762(Pa. 2008).

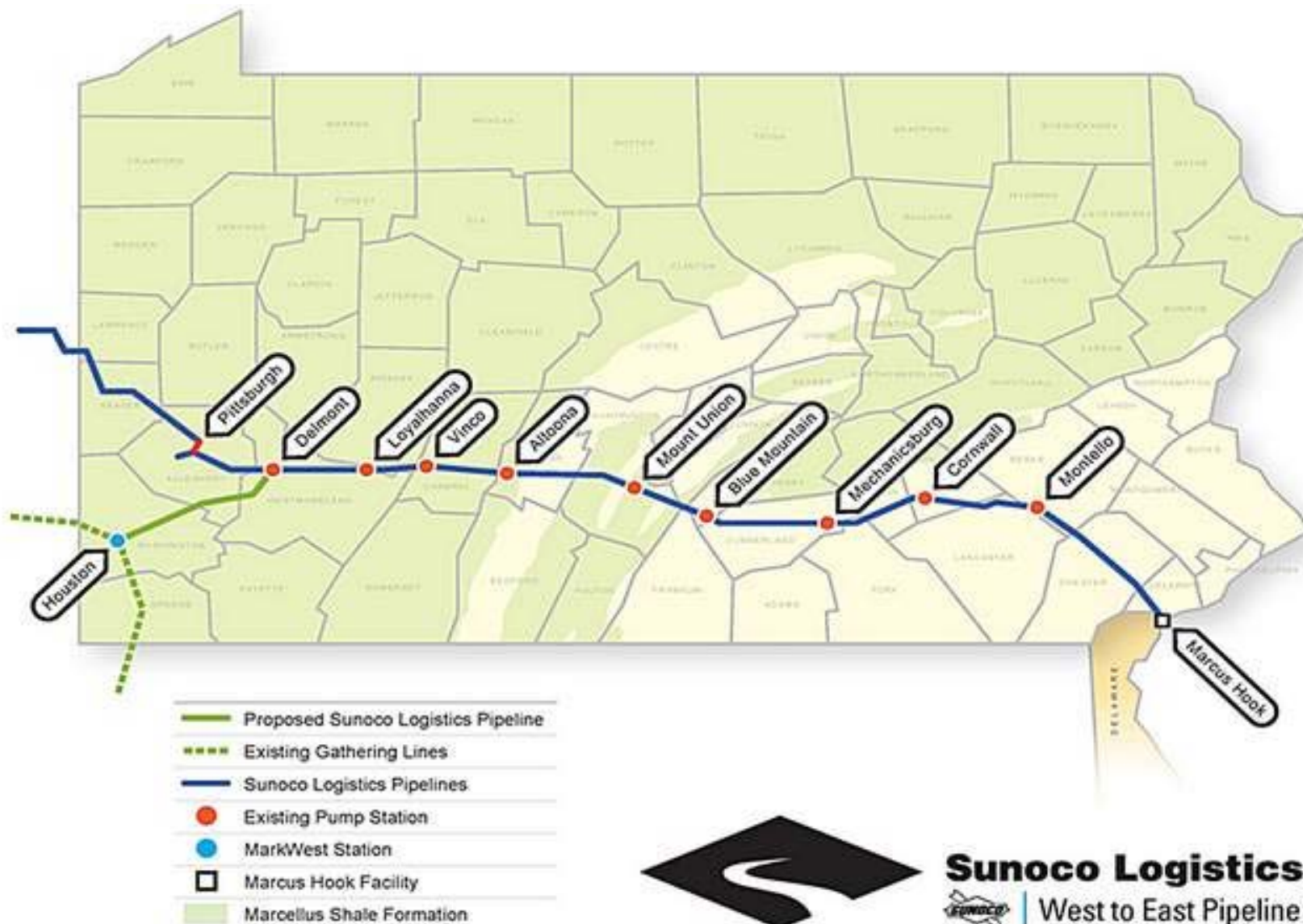
Established that the proper inquiry into whether a temporary infringement or obstruction of ingress and egress became permanent on “reasonable access becomes unduly prolonged or is otherwise accomplished in an arbitrary or unreasonable manner.” *Id.* at 777.

Inverse Condemnation

Inverse condemnation occurs “where an owner seeks just compensation when a governmental agency, by its conduct, impinges on property by physical invasion or otherwise, even though no form condemnation proceedings have begun.” William Cressler, *Contributions of the Commonwealth Court to Condemnation Law Since 1970*, 20 Widener L.J. 193, 203 (2010) citing *Stein v. City of Phila.*, 557 A2d 1137, 1138 (Pa. Commw. Ct. 1989). Inverse condemnations are also referred to as de facto or constructive takings. *Id.* at 204. A de facto taking occurs “when an entity clothed with the power of eminent domain ... deprive[s] an owner of the beneficial use and enjoyment of property.” *Id.* citing *In re Petition of Borough of Boyertown*, 466 A.2d 239, 245 (Pa. Commw. Ct. 1983).

Inverse Condemnation Cont.

- Property owner “must show that exceptional circumstances exist which substantially deprive them of the [beneficial] use [and enjoyment] of their property.
- Must also show that deprivation was occasioned by actions of an entity clothed with the power of eminent domain, resulted from the exercise of that power, and that the damages sustained were “the immediate, necessary, and unavoidable consequence of that exercise.” See, *Thomas A. McElwee & Son, Inc. v. SEPTA*, 948 A.2d 762, 771 (Pa. 2008).



Sunoco Logistics
West to East Pipeline