

# Eminent Domain A Property Owner's Guide

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## OVERVIEW

This guide is for property owners and business owners whose property and/or business may be taken from them by government through the power of eminent domain. This guide is intended to introduce you to the law applicable to Pennsylvania eminent domain and the rights to which you are entitled.

The United States Constitution provides the power of eminent domain which may result in extreme consequences for property owners:

“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.”

*United States Constitution, Fifth Amendment*

This guide is intended only as an aid for understanding general eminent domain issues. It does not constitute legal advice and should not be relied upon for that purpose. Laws are subject to change at any time and any such change could render the information contained in this guide obsolete. Legal counsel should be contacted for specific advice regarding specific cases. To do so, simply call, fax, mail or email your question to

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# The Power of Eminent Domain

## Questions:

### 1. **What is eminent domain and when can it be used?**

Eminent domain is the power of government to acquire property for public use so long as the government pays just compensation. Recognized public uses for which the power of eminent domain may be used include: highways, roads, schools, public buildings, and the elimination of blight. The government can exercise the power of eminent domain to acquire property even if the property owner does not wish to sell the property. Government taking of such property is called a condemnation, or a taking.

### 2. **Can I challenge the government's right to acquire my property?**

Yes. The vast majority of government organizations possess the power of eminent domain. However, the law recognizes that this substantial power must be used in accordance with specific, detailed procedures. A common challenge to the right to take is failure of the government to follow the proper procedural requirements. If the government fails to correctly follow the required procedures, a right to take challenge may succeed, stopping the condemnation. The challenge to the right to take is presented to a court via preliminary objections. Limited time is allowed for preliminary objections. Such objections must be carefully prepared and filed with the court within thirty (30) days after the property owner is served with the condemnation document which is called a declaration of taking.

### 3. **May I challenge the public use?**

Yes, but this challenge is difficult to win for the property owner. The Fifth Amendment of the United States Constitution allows private property to be taken by eminent domain only for a public use. A possible challenge to the government's right to take can be raised where the proposed government use is not an adequate public use. The 2006 changes to the Pennsylvania Eminent Domain Code limited the uses which qualify as valid public use. Elimination of blight through redevelopment projects may be a public benefit which may satisfy the public use requirement. A use which provides a minor public benefit and a large private benefit may also be held to be public use.

**4. What if I am successful in challenging the government's right to take my property?**

When a property owner successfully challenges the government's right to acquire property by eminent domain, Pennsylvania law provides that the eminent domain proceeding may end. The property owner may be entitled to recover expenses, including reasonable appraisal, attorney and engineering fees.

**5. If I challenge the right to take and I lose, am I responsible for the government's costs?**

No. When the right to take is challenged and that challenge is unsuccessful, the government may proceed with the acquisition and the property owner is not liable for the government's costs. In this situation, the property owner continues to have the same right to be paid just compensation for the property condemned.

# Eminent Domain Procedures

## Questions:

### 1. **What steps must the government take to acquire my property by eminent domain?**

Multiple, specific steps are required in the condemnation process:

- (1) Approval of some project or plan by a governmental organization with the power of eminent domain.
- (2) Estimation of just compensation.
- (3) The governmental organization will usually attempt to buy the property.
- (4) The offer to buy may be based upon an appraisal which might be performed by a governmental employee or a private appraiser hired by the governmental organization.
- (5) The government takes, or condemns, land by filing a declaration of taking in a court. A valid declaration of taking satisfies a number of specific requirements including:
  - a specific reference to the statute, article or section of law by which the condemnation was authorized by government
  - identification of the place where the record of the authorization may be examined
  - a brief description of the purpose of the condemnation
  - a description of the property condemned sufficient for the identification of that property
  - a statement of the nature of the title acquired
  - a statement specifying where a plan showing the condemned property may be inspected.

**2. Must the government notify the property owner?**

Yes. Within thirty days after the filing of the declaration of taking the condemnor must give written notice of the filing to the condemnee. That written notice must meet detailed specifications of the information required by law.

**3. Am I entitled to a copy of an appraisal report which the government may use to form the basis of the amount of an offer for the purchase of the property?**

No! The government is required to estimate just compensation, but is not required to provide the written report of an appraiser. However, when value of the property is disputed the government and the property owner usually exchange appraisal reports before any court proceeding.

**4. Am I required to accept the amount of the government offer?**

No. The property owner is not required to accept the condemning agency's offer. Instead, the property owner may make a counter-offer and may request a much higher value of the property. A governmental organization, like any organization acquiring property, has an interest in obtaining such property for a relatively low amount.

The value of the property is very subjective. A wide range of values could encompass the figure which is the true just compensation. Property owners, tenants and business owners often receive higher, and in some cases much higher, compensation than the amount of the government's offer. This is not always the case and an experienced eminent domain attorney should be contacted to evaluate each case on its own merits. The property owners rights deserve full review and protection.

**5. When does possession of property transfer from the owner to the government?**

Thirty (30) days after the filing of the declaration of taking the government shall be entitled to possession of the property upon payment of, or offer to pay, the amount of just compensation as estimated by the condemnor.

**6. What if I disagree with the amount of the government's estimation of just compensation?**

The estimate of the dollar amount of just compensation is recognized as a very subjective estimate. An appraiser working on behalf of the government may provide an estimate of a figure which is much lower than what the property owner expects. Such a government estimation might be extremely low when compared to an estimate of value as determined by a real estate appraiser working on behalf of the property owner.

If a property owner believes that the government's estimate of compensation is too low, the property owner may apply to court in order to obtain a higher amount. The property owner may seek greater compensation by a legal filing known as a petition for appointment of viewers. Such a petition would lead a court to appoint a Board of Viewers which would hear evidence of the value of the property.

Experienced eminent domain counsel should be contacted to discuss your specific case. Your case would be handled on a contingency fee basis by which the attorney would receive a percentage of any amount obtained over and above the amount of the government's offer. In other words, the property owner would owe no attorney fee, unless the attorney obtains more money for the property owner.

# Just Compensation

## Questions:

### 1. What is Just Compensation?

Just compensation is the difference between the fair market value of the property owner's entire property interest immediately before the condemnation and the fair market value of the property interest remaining after the condemnation.

### 2. What may be considered in evaluating fair market value?

Fair market value takes into account the present use of the property, the highest and best reasonably available use and also machinery, equipment or fixtures which may form part of the real estate. Other factors may also be considered.

### 3. May the property owner obtain reimbursement for appraisal, attorney or engineering fees?

Yes. As of September 1, 2006 the cap for this recovery was increased to \$4,000.00.

### 4. May a property owner recover interest when payment to the property owner is delayed?

Yes. Delay compensation is provided for in the Pennsylvania Eminent Domain Code.

### 5. What if only part of my property is taken?

Often the government needs only a portion of a particular property such as a strip of land needed for road widening. Just compensation is then properly determined not only by the value of the part taken, but also by the damage to the remaining property. Such "severance damages" may be minimal or very significant. Estimates of severance damages are particularly subjective and subject to a wide range of values. Experienced eminent domain counsel and experienced real estate appraisers are important in evaluating the potential damages of partial takings.

**6. May a property owner be eligible for moving expenses?**

Yes. Any displaced person shall be reimbursed for reasonable expenses incurred in moving himself and his family and for the removal, transportation and reinstallation of personal property.

**7. Is a business eligible for relocation damages?**

Yes, but such damages are capped.

## 2006 CHANGES

Sweeping changes to the Eminent Domain Law in Pennsylvania took effect on September 1, 2006. These changes came about mainly in response to the United States Supreme Court Decision of *Kelo v. The City of New London*. That case allowed the taking of private property for use as a private enterprise. Property rights advocates saw that decision as a misuse of eminent domain and not a proper public use. Pennsylvania and many states reacted with anti-Kelo statutes which severely limit the opportunity to take private property for private use. Senate Bill 881 was passed as Act 35 of 2006. These sections of the new Eminent Domain Code have been called the Property Rights Protection Act. Pennsylvania Government entities are severely restricted in any effort which would take private property to transfer that ownership to a different private entity.

The anti-Kelo fervor facilitated a review of other provisions of the Pennsylvania Eminent Domain Code. Many of the provisions were thought to be outdated and inconsistent with subsequent case law. Thus, on the same day House Bill 2054 was passed as Act 34 of 2006. It revised the Pennsylvania Eminent Domain Code. These extensive changes are also effective September 1, 2006.

### Effective Date

The provisions of the earlier Eminent Domain Code apply to all takings of property prior to September 1, 2006. The 2006 Amendments were signed into law by Governor Rendell on May 4, 2006. These changes took effect on September 1, 2006. A single exception to the applicability dates involves the payment for delayed compensation when the condemnation took place prior to September 1, 2006 and payments are due for some period after September 1, 2006. Then, the new delay compensation provisions of apply to all periods on and after September 1, 2006.

### Significant Law Changes

- 1. Business Dislocation Damages** – The maximum payment for a substantial loss of profits increased from \$20,000 to \$60,000. The minimum increased from \$1,000 to \$3,000. This benefit is “in addition to” other dislocation payments, rather than in place of those payments.
- 2. Business reestablishment expenses** - Increased the maximum payment for actual, reasonable expenses necessary to reestablish a displaced farm, non-profit organization or small business to \$12,000 from \$10,000. The loss of overall income due to approaching condemnation is now compensable up to \$30,000.

- 3. Replacement housing for homeowners** - Increased the maximum payment for the acquisition of the replacement dwelling by a home owner to \$27,000 from \$22,500.
- 4. Housing of last resort** – When sufficient housing replacement is not available in the community, payment is allowed for replacement housing greater than the \$27,000 amount allowed for replacement housing per section 903 of the code.
- 5. Replacement housing for Tenants and others** - Increased the rental acquisition payments for replacement dwelling by a non-homeowner to \$6,300 from \$5,250.
- 6. Housing of last resort - Tenant**  
Where sufficient replacement housing is not available in the community section 905 provides for payments greater than the \$6,300 usually provided.
- 7. Litigation expense** - Increase the reimbursement for appraisal, engineering and attorney fees to \$4,000 from \$500.
- 8. Delayed Compensation** - Changed the rate of interest from a statutory 6% to the annual rate equal to the prime rate as listed in the 1<sup>st</sup> edition for the Wall Street Journal published in the year, plus 1%, not compounded.
- 9. Right of Possession** - A court may issue a writ of possession prior to an appellate court decision on preliminary objections to a taking.

## Legal Services

The law firm of Lavery, Faherty, Young & Patterson, P.C., provides legal services concerning eminent domain law. The Harrisburg law firm provides statewide services on the direction of Attorney Michael F. Faherty.

Attorney Faherty is a senior partner in the law firm and is one of the most experienced in eminent domain attorneys in Pennsylvania. Mr. Faherty is an honors graduate of Lebanon Valley College. He earned a Masters Degree in psychology from the University of Akron. He is a graduate of Rutgers School of Law in Newark. He worked for the Boy Scouts of America in New York City for six years directing training programs and serving as a finance director.

Mr. Faherty eminent domain work began with employment at the Pennsylvania Department of Transportation. He served as an attorney in the right-of-way section of the real property division. He then handled eminent domain issues and cases before various courts. He was then promoted to the position of counsel in charge of the right-of-way section for PennDOT. He then managed the eminent domain litigation of PennDOT.

Mr. Faherty moved into the private practice of law in 1992 and since then has represented property owners throughout the Commonwealth. He recently served as President of the Pennsylvania Defense Institute, the Pennsylvania association of defense attorneys and insurance executives.

Mr. Faherty is available for eminent domain legal services. His representation of property owners is provided on a contingency fee basis by which property owners pay no fee, unless increased funds are obtained for the property owner. Initial, free consultations are available by contacting Mr. Faherty by phone, e-mail, fax, or correspondence.

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