

Pennsylvania Supreme Court Holds That Eminent Domain Power Need Not Be Property-Specific to Invoke Inverse Condemnation Liability

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On November 29, 2021, the Pennsylvania Supreme Court overturned a decision by the Pennsylvania Commonwealth Court, ruling that UGI Storage Company (UGI) could be held liable for taking oil and gas drilling rights in a proposed protective buffer zone around the Meeker natural gas storage field in Tioga County, Pennsylvania. In 2009, UGI, a quasi-public entity with the power of eminent domain, sought from the Federal Energy Regulatory Commission (FERC) a certificate of public convenience and necessity to acquire and operate certain facilities related to the interstate transportation and sale of natural gas owned by UGI Central Penn Gas, Inc. (CPG), including a 1,216-acre underground storage field in Tioga County and an additional 2,980-acre protective buffer zone around the storage field.

FERC granted UGI's application for the storage field but denied its request for the full buffer zone (citing issues with notification and property rights requirements in accordance with applicable federal regulations). The decision resulted in only parts of the buffer zone being certificated. In 2015, certain property owners sought the appointment of a board of viewers to assess damages for de facto condemnation of their properties under section 502(c) of the Eminent Domain Code, 26 Pa. Cons. Stat. § 502. The property owners claimed that although only certain segments of the buffer zone had been certificated, UGI was treating the properties within the uncertificated segments in the same manner as those within the certificated are- as as protection for the integrity and security of the storage field. As such, the property owners alleged that UGI had deprived them of the financial benefits of utilizing natural gas underlying their properties by effectively prohibiting hydraulic fracturing activities, thus resulting in a de facto condemnation. The case moved between the trial and appellate courts over the next few years.

On appeal to the Commonwealth Court of Pennsylvania in 2020, the court applied the three-prong test for determining whether a de facto condemnation had occurred (but disagreed as to whether the owners needed to prove that UGI had proper- ty-specific powers of eminent domain in order to prove same). *See generally Hughes v. UGI Storage Co.*, 243 A.3d 278 (Pa. Commw. Ct. 2020), *vacated and remanded*, 263 A.3d 1144 (Pa. 2021). Under the test, the property owners had to show that (1) the condemnor had the power to condemn the land under eminent domain procedures; (2) the property owner was substantially deprived of the use and enjoyment of the property through exceptional circumstances; and (3) the damages sustained were an immediate, necessary, and unavoidable consequence of the condemnor's exercise of its eminent domain power. *Id.* at 284. A majority of the members of the court concluded that failing to obtain FERC's certification for segments of the buffer zone precluded UGI exercising its eminent domain power. As such, the court found that the property owners could not establish that "that any purported deprivation of the beneficial use and enjoyment of their properties 'is the immediate, necessary and unavoidable consequence of the exercise of the power to condemn,' the third prong necessary to find a *de facto* taking." *Id.* at 289 (quoting *In re Condemnation by Commonwealth*, 805 A.2d 59, 68 (Pa. Commw. Ct. 2002)). The property owners appealed to the Pennsylvania Supreme Court.

In *Hughes v. UGI Storage Co.*, 263 A.3d 1144 (Pa. 2021), the court looked to the text of the Eminent Domain Code, concluding that nothing therein indicated a requirement of a relation- ship between the eminent domain power and a specific property. *Id.* at 1156. Instead, the court reasoned that an actionable taking only required that the condemnor proceeded by authority of law for a public purpose. *Id.* Relying on its interpretation of the Eminent Domain Code and a string of U.S. Supreme Court decisions that found no requirement of a relationship between the eminent domain power and a specific property, the court held that "a public or quasi-public entity need not possess a *property-specific* power of eminent domain in order to implicate inverse condemnation principles." *Id.* at 1158. The court

vacated the commonwealth court's order and remanded to that court for further proceedings consistent with its opinion and to address a waiver issue previously raised at the trial court level.

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