

Pa. Supreme Court Continues to Clarify Property Right Protections; Land Use & Planning

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Body

The Pennsylvania Supreme Court recently rendered a decision in *Reading Area Water Authority v. Schuylkill River Greenway Association*, 100 A.3d 572 (Pa. 2014), further narrowing the definition of what constitutes a "public purpose" for a taking by eminent domain in Pennsylvania. The Reading opinion is significant, as it constitutes yet another Pennsylvania decision favoring the protection of private property rights from seizure by the government. The decision is particularly noteworthy in the context of the U.S. Supreme Court's controversial expansive view of the eminent domain power in *Kelo v. City of New London*, 454 U.S. 469, from 2005.

Kelo involved a city's use of its eminent domain power to take privately owned property to enable its redevelopment by a private developer, who proposed a higher-yielding economic use for the property. In *Kelo*, the Supreme Court held in a divided 5-4 opinion that such economic development projects can qualify as a "public purpose" under the "public use" provision of the takings clause of the Fifth Amendment of the U.S. Constitution, even where private enterprise drives the development-state and local governments can, for the purpose of improving the community, seize private property via eminent domain to enable private development.

In the wake of the *Kelo* decision, several states, including Pennsylvania, passed legislation restricting the use of eminent domain for private business. Specifically, on May 4, 2006, the Pennsylvania General Assembly enacted the Property Rights Protection Act, which amended Title 26 (eminent domain) of the Pennsylvania Consolidated Statutes by adding a new Chapter 2, titled "Limitations on Use of Eminent Domain." In pertinent part, Section 204(a) of the Property Rights Protection Act expressly prohibits, with only a few limited exceptions, state and local governments from condemning private property for use by private entities.

Now, almost nine years after the enactment of the Property Rights Protection Act, Pennsylvania courts are still defining the parameters of the act's restriction on state and local governments' power to condemn private property for use by private entities.

Most recently, in *Reading*, the state Supreme Court concluded that a municipal authority could not exercise its eminent domain powers to condemn an easement over privately owned land where the sole

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purpose of the easement was to allow a private developer to install sewer and stormwater facilities necessary for a proposed private residential development.

At issue in *Reading* was a strip of property located in Bern Township along the banks of the Schuylkill River and owned by the Schuylkill River Greenway Association. Greenway intended to partner with Bern Township to build a public walking/recreational trail on the land, which was adjacent to the 58-acre tract of land where the private developer proposed to construct a 219-unit residential development. In order to build the development, however, the private developer needed to obtain access to a clean water supply and sanitary and stormwater sewer facilities. The developer identified a potential water main connection under the Schuylkill River and worked with the Reading Area Water Authority (RAWA), a municipal authority created by the city of Reading, to obtain a utility easement across the Greenway property to reach it. The proposed 50-foot-wide easement would allow the developer to run water, sewer and stormwater conduits from the developer's property to the Schuylkill River.

Private negotiations with Greenway, however, failed. As a result, RAWA adopted a resolution authorizing the use of its eminent domain power to condemn the utility easement. RAWA's resolution reflected that: (1) the easement was to be condemned at the developer's request; (2) the easement would be used to construct, maintain and operate utility lines and appurtenances of a water main to be placed under the Schuylkill River for water, sewer and stormwater facilities necessary for the construction of the proposed development; (3) the developer would be responsible for initiating the eminent domain proceedings in conjunction with RAWA's solicitor; and (4) the developer would be responsible for all costs associated with the eminent domain proceedings, including just compensation to Greenway.

Next, the city of Reading passed a resolution authorizing RAWA to undertake the portions of the project unrelated to water works-the sewer and stormwater portions. Shortly thereafter, RAWA filed a declaration of taking complaint requesting a decree condemning the 50-foot-wide utility easement across Greenway's property.

In response, Greenway filed preliminary objections, alleging that: (1) RAWA's taking for sewer/stormwater drainage purposes was invalid under the Property Rights Protection Act because it was accomplished solely for the benefit of private enterprise-the developer's proposed residential development; and (2) the proposed utility easement was wider than necessary to accommodate the water connection, which was the only proposed service that fell legitimately within RAWA's function.

After hearing testimony from the Bern Township manager concerning the degree to which the easement would interfere with Greenway's proposed walking trail, the trial court sustained Greenway's preliminary objections. The trial court specifically noted that the sewage and stormwater management facilities would be privately owned by the developer and the primary beneficiary of the condemnation would be the developer, not the general public. The Commonwealth Court, however, reversed, explaining that RAWA may exercise eminent domain for the stated purpose-the installation of a water main and sewer and stormwater lines-because it obtained permission from the city of Reading to engage in a project that exceeds water supply works to include sewer and stormwater services. The Commonwealth Court also explained that the fact that RAWA's exercise of eminent domain incidentally makes the developer's homes more valuable does not, on its own, negate the project's public purpose-providing water, sewer and stormwater services to citizens located within RAWA's service area.

The Supreme Court granted Greenway's petition for allowance of appeal, in which Greenway contended that neither the Pennsylvania Constitution nor the Eminent Domain Code authorizes RAWA's

condemnation, and that the Property Rights Protection Act affirmatively prohibited RAWA from taking Greenway's property for the developer's private use. Agreeing with Greenway, the Supreme Court concluded that RAWA's condemnation fell within Section 204(a) of the Property Rights Protection Act's prohibitive scope. In doing so, the Supreme Court acknowledged that this case involved a mix of public and private purposes working in conjunction with one another and that RAWA is authorized, as a municipal authority, to exercise the power of eminent domain to provide the public with water and, possibly, sewer and stormwater services.

However, the Supreme Court also noted that it is well settled in Pennsylvania that "land may only be taken without the owner's consent if it is taken for a public use," otherwise such a taking will "be overturned as excessive." Applying this well settled principle to the facts of the case, the Supreme Court explained that RAWA did not purport to condemn the easement across Greenway's property so that it could, itself, provide the public with water, sewer and stormwater services (i.e., RAWA did not condemn the property for a public use). Rather, RAWA only sought to condemn Greenway's property to provide a utility easement to the developer, which would finance the project and acquire exclusive use of the drainage easement to install, operate and maintain private stormwater and sewage discharge facilities, thus enabling it to construct a private residential development.

Although the Reading decision is significant because it evidences a continuing trend in Pennsylvania to favor the protection of private property rights from seizure by the government via eminent domain, the scope of the decision is not without limitations.

For example, the Pennsylvania Supreme Court declined to analyze the taking at issue in Reading under the Fifth Amendment. Rather, the Supreme Court relied solely upon an analysis under Pennsylvania's Eminent Domain Code, specifically Section 204(a) of the Property Rights Protection Act. Thus, despite the Supreme Court's guidance in Reading, property owners and governments throughout the state will likely continue to face a multitude of challenges in connection with condemnation via eminent domain, particularly with respect to which takings constitute a taking for public purpose or public use. At this juncture, all that can be gleaned with certainty from the post- Kelo decisions handed down in Pennsylvania is that the type of taking that constitutes a public purpose or public use is highly fact-dependent.

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