

---

Volume 80  
Issue 3 *Dickinson Law Review* - Volume 80,  
1975-1976

---

3-1-1976

## **Inverse Condemnation Under the Pennsylvania Eminent Domain Code: Substantive Developments and Procedural Shortcomings**

John A. Rodgers

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### **Recommended Citation**

John A. Rodgers, *Inverse Condemnation Under the Pennsylvania Eminent Domain Code: Substantive Developments and Procedural Shortcomings*, 80 DICK. L. REV. 547 (1976).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol80/iss3/7>

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

# Inverse Condemnation Under the Pennsylvania Eminent Domain Code : Substantive Developments and Procedural Shortcomings

## I. Introduction

Eminent domain is the power to condemn. In Pennsylvania a condemnation is the taking, injury, or destruction of private property for a public purpose.<sup>1</sup> The Commonwealth has an inherent power of eminent domain<sup>2</sup> and the constitution authorizes delegation of this power to municipal<sup>3</sup> and private corporations.<sup>4</sup> A constitutional limitation restricts eminent domain powers by establishing Commonwealth liability for property "taken" and requiring municipal and other corporations to make just compensation for property "taken, injured or destroyed."<sup>5</sup> Among the property interests protected by these provisions are leaseholds,<sup>6</sup> easements,<sup>7</sup> life tenancies and remaindermen's interests,<sup>8</sup> and fees simple.<sup>9</sup>

---

1. According to the Eminent Domain Code, "'Condemn' means to take, injure or destroy private property by authority of law for a public purpose." PA. STAT. ANN. tit. 26, § 1-201(1) (Supp. 1975). As indicated in the official comment to this section, the quoted provision was drafted in accordance with article X, § 4 of the Pennsylvania constitution.

2. *Lazarus v. Morris*, 212 Pa. 128, 130, 61 A. 815, 816 (1905).

3. PA. STAT. ANN. tit. 53, §§ 306, 314 (1974).

4. *Id.* tit. 15, § 1322 (Supp. 1975).

5. Regarding the Commonwealth the constitution provides, "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. art. I, § 10. Similarly, "[m]unicipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed." *Id.* art. X, § 4. Note that the Commonwealth is liable only for property "taken," but municipal and other corporations must make just compensation for property "taken, injured or destroyed."

6. *Hoffman v. Commonwealth*, 422 Pa. 144, 221 A.2d 315 (1966).

7. *E.g.*, *Wolf v. Commonwealth, Dep't of Highways*, 422 Pa. 34, 220 A.2d 868 (1966); *Schuster v. Pennsylvania Turnpike Comm'n*, 395 Pa. 441, 149 A.2d 447 (1959); *Cox's Inc. v. Snodgrass*, 372 Pa. 148, 92 A.2d 540 (1952).

8. *Philadelphia & Reading R.R. v. Getz*, 113 Pa. 214, 6 A. 356 (1886); *Harrisburg Borough v. Crangle*, 3 W. & S. 460 (Pa. 1842).

9. The Code includes holders of these interests in its definition of condemnees, but explicitly excludes mortgagees, judgment creditors, and other lienholders because their interests are not of the magnitude demanding protection. PA. STAT. ANN. tit. 26, § 1-201(2), Comment (Supp. 1975).

Procedure in eminent domain cases, as outlined in the Eminent Domain Code of 1964,<sup>10</sup> calls for two determinations: (1) whether a condemnation has occurred; and (2) if there has been a condemnation, what compensation must be made. Statutory provisions require the condemnor to file a declaration of taking<sup>11</sup> with sufficient security.<sup>12</sup> Notice of the condemnation must be given to the local recorder of deeds<sup>13</sup> and the condemnee,<sup>14</sup> who can then file preliminary objections challenging the proceedings<sup>15</sup> or petition the court for the appointment of viewers.<sup>16</sup> When a condemnation is compensable, just compensation must be made to the condemnee.<sup>17</sup> Section 602 of the Code<sup>18</sup> defines just compensation as the difference between the fair market value of the property before and after the condemnation.

Courts also recognize a condemnation when a condemnor takes, injures, or destroys a property interest without the filing of a declaration of taking.<sup>19</sup> Such a condemnation is said to be inverse or de facto because the burden is upon the condemnee to initiate the judicial proceedings. Section 502(e) of the Code<sup>20</sup> gives the landowner in a de facto condemnation the right to petition for the appointment of a board of viewers to assess his just compensation. While the claimant is permitted to assert his right to damages, he has no right to a determination of the propriety of the condemnation. This is in marked contrast to condemnations in which a formal declaration of taking has been filed. In those situations the con-

---

10. Act of June 22, 1964, P.L. 84, No. 6 (compiled at PA. STAT. ANN. tit. 26 §§ 1-101 to -903 (Supp. 1975)).

11. PA. STAT. ANN. tit. 26, § 1-402 (Supp. 1975).

12. *Id.* § 1-403.

13. *Id.* § 1-404.

14. *Id.* § 1-405.

15. *Id.* § 1-406.

16. *Id.* § 1-502(a).

17. "The condemnee shall be entitled to just compensation for the taking, injury or destruction of his property." *Id.* § 1-601. A comprehensive discussion of the issues involved in this phase of the proceedings is provided by Comment, *Eminent Domain: Just Compensation When the Condemnor Enters Before Instituting Proceedings*, 75 DICK. L. REV. 303 (1970).

18. Just compensation shall consist of the difference between the fair market value of condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this code.

PA. STAT. ANN. tit. 26, § 1-602(a) (Supp. 1975).

19. *Hazleton Redev. Auth. v. Hudock*, 2 Pa. Commonwealth Ct. 670, 281 A.2d 914 (1971).

20. "If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) of this section, setting forth such injury." PA. STAT. ANN. tit. 26, § 1-502(e) (Supp. 1975). The comment to this section indicates that it "is . . . to cover the situation where there is in fact a compensable injury but the condemnor has not filed a declaration of taking with reference thereto."

demnee can question the propriety of the condemnation in his preliminary objections.<sup>21</sup>

Although the Eminent Domain Code has been in effect for over a decade, courts continue to struggle with its application to inverse condemnations. This comment will consider two aspects of inverse condemnation. First, consideration will be given to recent developments in the substantive law of what constitutes a de facto condemnation. Emphasis will be placed upon the characteristics of a taking and consequential damages. Second, the remedies provided by the Code for affected landowners will be analyzed to determine their extent and sufficiency.

## II. The Concept of Taking

### A. *The Protection of Property Rights*

The concept of a taking is central to eminent domain law. A condemnor must provide compensation if it takes private property for a public purpose.<sup>22</sup> An understanding of the elements of a taking is necessary, therefore, to recognize when the right to compensation arises and when an inverse condemnation proceeding can be brought.

In *Griggs v. Allegheny County*<sup>23</sup> the Supreme Court of Pennsylvania determined that "a 'taking' occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property."<sup>24</sup> Courts have loosely quoted this definition with little or no further analysis or development.<sup>25</sup> In applying the test, however, courts should recognize that a landowner may be substantially deprived of the use and enjoyment of his property by action short of a physical appropriation of the land.

The law has long protected the right of an owner of land to enjoy it without the physical interference of others.<sup>26</sup> Only with

---

21. See notes 11-15 and accompanying text *supra*.

22. The Commonwealth is liable for property "taken" for public use and municipal and other corporations are liable for property "taken, injured or destroyed for public use." See notes 48-50 and accompanying text *infra*.

23. 402 Pa. 411, 168 A.2d 123 (1961), *rev'd on other grounds*, 369 U.S. 84 (1962).

24. *Id.* at 414, 168 A.2d at 124 (citations omitted).

25. *E.g.*, *Henry v. County of Allegheny*, 403 Pa. 272, 277, 169 A.2d 874, 876 (1961); *Commonwealth, Dep't of Transp. v. Securda & Co.*, 16 Pa. Commonwealth Ct. 40, 43, 329 A.2d 296, 297 (1974).

26. 11 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 32.26, at 329-30 (rev. 3d ed. F. Ellard 1964).

the benefit of Professor Hohfeld's recognition of the latent ambiguities in the term "property,"<sup>27</sup> however, have the courts come to deal with the elusiveness of the concept in eminent domain proceedings.<sup>28</sup> The proper method of determining whether a taking exists is not to consider property in a physical sense only, but rather to assess the effect of the condemnor's activities on the limited rights of a property holder.<sup>29</sup>

On occasion courts have adopted this analysis. Thus, a taking occurs when the terms of an ordinance effect a condemnation<sup>30</sup> or when a zoning ordinance is overly restrictive.<sup>31</sup> Similarly, in *Sansom Street, Caplan's Appeal*<sup>32</sup> the supreme court found that when thirteen feet of a fifteen-foot-deep lot were condemned for street expansion, the remaining two feet were taken as well. This approach recognizes that one may be deprived of his rights to the use and enjoyment of his land even though there has been no actual entry by another.

The term "taking" focuses on whether the owner's rights have been substantially deprived, not on whether the condemnor has taken property for its own use. The United States Supreme Court in *United States v. General Motors Corp.*<sup>33</sup> recognized this in pointing out that "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."<sup>34</sup> It logically follows that the measure of just compensation is the loss sustained by the condemnee and not the gain of the condemnor.<sup>35</sup>

The importance of Hohfeldian property concepts in inverse condemnation cases is clear: de facto takings can occur even though the condemnor has never entered upon the land if the owner has suffered a substantial loss of use and enjoyment of his property. The concept is especially significant to landowners affected by extensive government planning.

---

27. W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 29 (Cook ed. 1923).

28. Full consideration of the development of this concept is contained in Stoeck, *Condemnation by Nuisance, The Airport Cases in Retrospect and Prospect*, 71 *DICK. L. REV.* 207 (1966).

29. Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition. These rights are not possessed in an absolute degree, but are limited.

1 J. LEWIS, *EMINENT DOMAIN* § 63 (3d ed. 1909).

30. Philadelphia Appeal, 364 Pa. 71, 70 A.2d 847 (1950).

31. E.g., Valley Hills Civic Ass'n v. Board of Adj., 414 Pa. 367, 200 A.2d 408 (1964); Archbishop O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587 (1957); Medinger Appeal, 377 Pa. 217, 104 A.2d 118 (1954).

32. 293 Pa. 483, 143 A. 134 (1928).

33. 323 U.S. 373 (1945).

34. *Id.* at 378.

35. *United States v. Causby*, 328 U.S. 256, 261 (1946); *Garella v. Redevelopment Auth.*, 413 Pa. 181, 189 n.4, 196 A.2d 344, 348 n.4 (1964).

### B. *Planning, Preparation, and Negotiation Without a Taking*

In recent years a line of cases has developed that considers whether urban redevelopment planning can effect a taking of the property to be condemned under the plan before a declaration of taking is filed. To the extent that courts have found that a de facto taking has occurred, they are in conformity with the expanding concept of property. Section 604<sup>36</sup> of the Code provides that when a change in market value of the property is caused by the imminence of condemnation, the change should be disregarded in the award of compensation. In some cases this provision is not adequate. If the planning activities of a condemnor substantially deprive an owner of the use of his land, a de facto taking occurs.

Historically, the mere plotting of a street on a city map did not give an affected landowner an immediate claim for damages.<sup>37</sup> The underlying policy is sound. If a de facto taking occurred every time a landowner's use of his land was inconvenienced by government planning, public bodies would be hesitant to engage in planning.<sup>38</sup> For this reason, the traditional rule has retained considerable vitality. In *Department of Transportation v. Securda & Co.*<sup>39</sup> the commonwealth court found that there had not been a taking although part of Securda's land lay within a right of way on a published plan and all properties totally within the right of way had already been purchased. The rule, however, must be kept in its proper perspective. As originally formulated, it applied only to streets plotted in areas of relatively sparse population, where injury to the landowner's interests would be less than in more developed areas.<sup>40</sup> In *Miller v. Beaver Falls*<sup>41</sup> the supreme court refused to extend the rule to a city's plotting of a park and playground on the city map. When a case does

---

36. "Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation . . . shall be disregarded in determining fair market value." PA. STAT. ANN. tit. 26, § 1-604 (Supp. 1975).

37. Philadelphia Parkway, 250 Pa. 257, 261, 95 A. 429, 430 (1915). See Annot., 37 A.L.R.3d 127 (1971).

38. Allegheny County v. Church of Jesus Christ, 14 Pa. Commonwealth Ct. 510, 515, 322 A.2d 803, 805 (1974).

39. 16 Pa. Commonwealth Ct. 40, 329 A.2d 296 (1974); accord, Allegheny County v. Church of Jesus Christ, 14 Pa. Commonwealth Ct. 510, 322 A.2d 803 (1974); Commonwealth Appeal, 422 Pa. 72, 221 A.2d 289 (1966).

40. Philadelphia Parkway, 250 Pa. 257, 261, 95 A. 429, 430 (1915).

41. 368 Pa. 189, 82 A.2d 34 (1951). In reaching its decision, the court characterized the rule as "[a] principle of questionable constitutionality." *Id.* at 196, 82 A.2d at 37.

not involve the plotting of streets in a sparsely populated area, a different rule should apply.

Some authority that urban planning can effect a taking is found in the "exceptional circumstances"<sup>42</sup> test applied by the courts. The cases using this test deal with factual situations different from those that gave rise to the original rule that planning cannot effect a taking. Two recent cases are illustrative of this point. In *Commonwealth's Crosstown Expressway Appeal*<sup>43</sup> the commonwealth court held that publicity of a proposed condemnation, discouragement of private development, and notice of the condemnation to petitioner's tenants who then refused to renew their leases were tantamount to a taking of petitioner's property because of "exceptional circumstances."<sup>44</sup> A strikingly similar factual situation faced the Supreme Court of Pennsylvania in *Conroy-Prugh Glass Co. v. Commonwealth*.<sup>45</sup> The condemnor over a twelve-year period had publicized its plans to extend a boulevard that would necessarily involve a taking of petitioner's land. As a result of the publicity the glass company lost a number of its lessees, causing such a decrease in income that it was unable to pay its property taxes and risked loss of the premises at tax sale.<sup>46</sup> The court found it to be a de facto taking.

The full impact of these cases is uncertain. It is conceivable that the striking similarity of their facts will cause practitioners and courts to limit their application to losses of rental income. A broader reading of the cases recognizes that de facto takings occur when planning results in a substantial loss of revenue from commercial realty.<sup>47</sup> This reading is justified by both modern property concepts and recognition that urban planning has a greater effect on property interests than does planning in sparsely populated areas.

---

42. The phrase "exceptional circumstances" was originally used to describe a situation in which an owner has been deprived of the use and enjoyment of his land without a physical entry. *Sansom Street, Caplan's Appeal*, 293 Pa. 483, 489, 143 A. 134, 135 (1928). See note 32 and accompanying text *supra*.

43. 3 Pa. Commonwealth Ct. 1, 281 A.2d 909 (1971), noted in 46 TEMP. L.Q. 139 (1972).

44. *Commonwealth's Crosstown Expwy. Appeal*, 3 Pa. Commonwealth Ct. 1, 5, 281 A.2d 909, 912 (1971).

45. 456 Pa. 384, 321 A.2d 598 (1974), *rev'g* 7 Pa. Commonwealth Ct. 66, 298 A.2d 672 (1972).

46. *Conroy-Prugh Glass Co. v. Commonwealth*, 456 Pa. 384, 393 n.2, 321 A.2d 598, 602 n.2 (1974).

47. It was suggested in *Conroy-Prugh* that the distinguishing common fact in both *Crosstown* and *Conroy-Prugh* was "that the publicity about the inevitable condemnation caused a loss of tenants, making the property useless for its highest and best use—commercial property." *Id.* at 389, 321 A.2d at 600 (emphasis added); accord, *Allegheny County v. Church of Jesus Christ*, 14 Pa. Commonwealth Ct. 510, 514, 322 A.2d 803, 805 (1974).

### III. Consequential Damages

Under article I, section 10 of the Pennsylvania constitution, the Commonwealth is liable for the taking of private property.<sup>48</sup> Municipal and other corporations vested with the power of eminent domain are liable for property "taken, injured or destroyed."<sup>49</sup> The constitutional distinction is important: while the Commonwealth is only liable for a taking of property, municipal and other corporations with eminent domain powers are liable for a taking and any injury or destruction of a landowner's property. The term "consequential damages" has been adopted by the courts to refer to those condemnations that do not result from a taking but from the injury or destruction of property. The Commonwealth is liable for consequential damages only to the extent specified by statute.<sup>50</sup> Sections 612<sup>51</sup> and 613<sup>52</sup> of the Code establish Commonwealth liability for injury to abutting property caused by a change of grade, permanent interference with access, or injury to surface support.<sup>53</sup>

Procedurally, consequential damages are a form of inverse condemnation. Although section 402<sup>54</sup> requires a condemnor to file a declaration of taking if its activities will result in either a taking or consequential damages, if no declaration is filed an affected landowner can petition for the appointment of viewers under section 502(e).<sup>55</sup> The condemnee, however, cannot challenge the propriety of the condemnation.

---

48. PA. CONST. art. I, § 10.

49. *Id.* art. X, § 4.

50. *E.g.*, Anderson Appeal, 408 Pa. 179, 182 A.2d 514 (1962); *Brewer v. Commonwealth*, 345 Pa. 144, 27 A.2d 53 (1942); *Heil v. Allegheny County*, 330 Pa. 449, 199 A. 341 (1938).

51. All condemnors, including the Commonwealth of Pennsylvania, shall be liable for damages to property abutting the area of an improvement resulting from a change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken.

PA. STAT. ANN. tit. 26, § 1-612 (Supp. 1975).

52. "Whenever a public road, street or highway is vacated, the affected owners may recover damage for any injuries sustained thereby, even though no land is actually taken." *Id.* § 1-613.

53. Relatively few cases have been brought under § 613 alone; most cases dealing with loss of access due to vacation of a street have alleged as a basis of recovery § 612 and § 613. The result has been that in this class of cases the restriction of recovery to "abutting" landowners in § 612 has been liberalized because the owner's rights are "subsumed under the more general language of section 613." *Hession Condemn. Case*, 430 Pa. 273, 277, 242 A.2d 432, 434 (1968).

54. PA. STAT. ANN. tit. 26, § 1-402, Comment (Supp. 1975).

55. *Id.* § 1-502, Comment.



Substantively, the constitutional distinction between a taking and consequential damages for injury and destruction of property has resulted in a number of artificial and unworkable tests intended to define consequential damages. The definition has two branches. First, a distinction is made between a taking and “[c]onsequential damages [that] arise when property is not actually taken or entered but an injury to it occurs as the natural result of an act lawfully done by another.”<sup>56</sup> Implicit in this distinction is the assumption that a taking involves an actual taking or entry. Because the concept of a taking has assumed a broader meaning in recent years, this is a weakness in the definition of consequential damages. Second, the courts have recognized that the “injured or destroyed” language in the constitution does not abrogate the common-law concept of *damnum absque injuria*.<sup>57</sup> Thus, consequential damages necessitate not only a “proximate, immediate, and substantial”<sup>58</sup> injury caused by the otherwise lawful exercise of the condemnor’s power of eminent domain,<sup>59</sup> but also an injury different in degree and kind from that suffered by all other landowners in the vicinity.<sup>60</sup>

Undue reliance upon these principles has resulted in decisions lacking in conceptual clarity. In *Hession Condemnation Case*,<sup>61</sup> for instance, the supreme court found that although the vacation and relocation of a street originally passing in front of petitioner’s restaurant caused a diversion of traffic and concomitant loss of patronage, the injury was not compensable because it did not differ in kind from that suffered by other landowners in the vicinity.<sup>62</sup> The distinction

---

56. This definition was first formulated in *Soldiers’ & Sailors’ Mem. Bridge*, 308 Pa. 487, 490, 162 A. 309, 310 (1932), although it has been relied upon verbatim in more recent decisions as well. *E.g.*, *Ewalt v. Pennsylvania Turnpike Comm’n*, 382 Pa. 529, 533, 115 A.2d 729, 731 (1955); *Puloka v. Commonwealth*, 323 Pa. 36, 41, 185 A. 801, 803 (1936).

57. *Pennsylvania R.R. v. Marchant*, 119 Pa. 541, 559, 13 A. 690, 697 (1888). Public policy justifies this conclusion. If the constitutional language were interpreted broadly to cover all injuries or destructions, this would result in an undue burden on public improvement planning. 2A NICHOLS’ EMINENT DOMAIN § 6.441[1] (rev. 3d ed. J. Sackman 1975).

58. *Ogontz Ave.*, 225 Pa. 126, 129, 73 A. 1096 (1902); *accord*, *Mitchell Condemn. Case*, 209 Pa. Super. 288, 294, 228 A.2d 53, 56 (1967).

59. To be compensable in an eminent domain proceeding, the consequential damages must result from the exercise of the power of eminent domain and not from the exercise of the police power, *McGrady Case*, 399 Pa. 586, 160 A.2d 715 (1960), or a trespass by, or the negligence of, the condemnor. *See* notes 87-88 and accompanying text *infra*.

60. *E.g.*, *Spang & Co. v. Commonwealth*, 281 Pa. 414, 418, 126 A. 781, 782-83 (1924); *Mitchell Condemn. Case*, 209 Pa. Super. 288, 294, 228 A.2d 53, 56-57 (1967); *Hindes v. Allegheny County*, 123 Pa. Super. 469, 475, 187 A. 219, 222 (1936).

61. 430 Pa. 273, 242 A.2d 432 (1968), *cert. denied*, 393 U.S. 1049 (1969).

62. *Id.* at 281, 242 A.2d at 435; *accord, e.g.*, *Wolf v. Commonwealth, Dep’t of Highways*, 422 Pa. 34, 220 A.2d 868 (1966); *Commonwealth, Dep’t of Transp. v. Nod’s Inc.*, 14 Pa. Commonwealth Ct. 192, 321 A.2d 373 (1974); *Commonwealth, Dep’t of Transp. v. Kastner*, 13 Pa. Commonwealth Ct. 525, 320 A.2d 146 (1974).

fails to recognize the possibility that a taking has occurred even though the disruption of traffic patterns is the same interference suffered by other affected landowners.<sup>63</sup> Although this proposition was rejected by the *Hession* court,<sup>64</sup> it should be noted that the case was decided six years before *Conroy-Prugh Glass Co. v. Commonwealth*.<sup>65</sup> The courts have recognized that when a landowner is faced with exceptional circumstances that deprive him of the use and enjoyment of his land, his property has been taken.<sup>66</sup> If the owner of commercial realty suffers a substantial loss of revenue because of the activities of a condemner, his land is taken and the technical distinctions defining consequential damages are irrelevant.

To eliminate Commonwealth immunity from consequential damages entirely would probably require a constitutional amendment because the immunity is latent in the phraseology of the constitution.<sup>67</sup> With the recent expansion of the definition of taking to include more than actual physical takings, however, it is likely that the Commonwealth's liability will expand. Claims against the Commonwealth previously dismissed because they involved injury and destruction of property will now be subsumed within the definition of taking.

#### IV. Alternative Remedies in Inverse Condemnation

##### A. Preliminary Objections to a Formal Declaration of Taking

Once notice of the filing of a declaration of taking has been served,<sup>68</sup> substantive and procedural challenges to a condemnation can be made only by means of preliminary objections.<sup>69</sup> The ex-

---

63. A thorough treatment and criticism of the failure of the courts to adopt this approach is provided by Comment, *Traffic Oriented Business and Highway Vacations*, 30 U. PITT. L. REV. 671 (1969).

64. *Hession Condemn. Case*, 430 Pa. 273, 281-82, 242 A.2d 432, 436 (1968).

65. 456 Pa. 384, 321 A.2d 598 (1974). It may be further noted that all authorities cited in note 62 *supra* were decided prior to the significant expansion of the concept of a de facto taking recognized by the supreme court in *Conroy-Prugh*.

66. See notes 42-47 and accompanying text *supra*.

67. See *O'Connor v. Pittsburgh*, 18 Pa. 187, 190 (1851). When a constitution uses two distinct descriptions of condemnation, the distinction must be given effect to render the language meaningful. 2 NICHOLS' EMINENT DOMAIN § 6.38[1] (rev. 3d ed. J. Sackman 1975).

68. PA. STAT. ANN. tit. 26, § 1-405 (Supp. 1975).

69. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemner to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemner; or (4) the declaration of taking.

*Id.* § 1-406.

press legislative intent in allowing preliminary objections is to consolidate all challenges to a condemnation into one proceeding and to provide efficient disposition of claims.<sup>70</sup> The proceeding is separate and distinct from any determination of damages and the common pleas order passing upon the validity of the condemnation is final and appealable.<sup>71</sup>

The scope of a challenge to the right or power of the condemning authority is limited. Courts will not substitute their discretion for that of the condemnor absent clear proof of an abuse of discretion.<sup>72</sup> In *Redevelopment Authority v. Owners*<sup>73</sup> preliminary objections were sustained, however, upon proof that the condemnation was purely for the benefit of a private individual.

When a condemnee believes that his property has been de facto condemned, a subsequent filing of a declaration of taking by the condemnor will preclude the condemnee from petitioning for a board of viewers under section 502(e).<sup>74</sup> A remedy under section 502(e) is available only if "no declaration of taking . . . has been filed."<sup>75</sup> This preclusion poses a serious threat to condemnees. Section 402 (a) provides that "[c]ondemnation . . . shall be effected only by the filing in court of a declaration of taking."<sup>76</sup> Because compensation under section 602<sup>77</sup> is fixed by the value of the condemned property at the time of condemnation, this results in an assessment of damages based upon the value of the property on the date of the declaration of taking. Owners whose property depreciates between the date of the de facto condemnation and the declaration of taking receive inadequate compensation for their losses.

The commonwealth court has recognized this dilemma and assured the condemnee a remedy under the Code. In the case of *Nelis v. Redevelopment Authority*<sup>78</sup> the condemnee owned commercial properties in Pittsburgh that had been included in an extensive urban renewal plan as early as 1951, although there were no formal con-

---

70. *Id.* § 1-406, Comment.

71. *Valley Forge Golf Club v. Upper Merion Tp.*, 422 Pa. 227, 221 A.2d 292 (1966); *accord, e.g.*, *Hanni Appeal*, 420 Pa. 289, 216 A.2d 774 (1966); *Faranda Appeal*, 420 Pa. 295, 216 A.2d 769 (1966).

72. *E.g.*, *Washington Park, Inc. Appeal*, 425 Pa. 349, 229 A.2d 1 (1967); *Peters v. Department of Forests & Waters*, 12 Pa. Commonwealth Ct. 330, 314 A.2d 584 (1974); *Simco Stores v. Philadelphia Redev. Auth.*, 8 Pa. Commonwealth Ct. 374, 302 A.2d 907 (1973).

73. 1 Pa. Commonwealth Ct. 378, 274 A.2d 244 (1971); *accord*, *Golden Dawn Shops, Inc. v. Philadelphia Redev. Auth.*, 3 Pa. Commonwealth Ct. 314, 320, 282 A.2d 395, 398 (1971).

74. *Nelis v. Redevelopment Auth.*, 12 Pa. Commonwealth Ct. 338, 341, 315 A.2d 893, 894-95 (1974).

75. PA. STAT. ANN. tit. 26, § 1-502(e) (Supp. 1975).

76. *Id.* § 1-402(a).

77. For the text of this provision *see* note 18 *supra*.

78. 4 Pa. Commonwealth Ct. 533, 287 A.2d 880 (1972).

demnations in the area until 1966. Before a declaration of taking was filed on the Nelis land, a building on it was destroyed by fire. After the condemnor filed a declaration, the viewers made an award excluding compensation for the building. Nelis appealed, alleging a de facto taking prior to the fire. The court held that a condemnee can raise the issue of a prior de facto taking by preliminary objections and that failure to do so at that time constitutes a waiver of the right.<sup>79</sup> The court reasoned,

If upon the date of the filing of a declaration of taking the property owner is of the opinion that prior activities and actions of the condemnor constitute a *de facto* taking, a condemnation as a matter of law has already occurred. In such an event, the condemnor's attempted exercise of that power by the filing of a declaration of taking is in issue, an issue which in our opinion goes to the very heart of its power or right to condemn by formal condemnation proceedings.<sup>80</sup>

A later commonwealth court decision supplemented the *Nelis* holding and fully defined the scope of preliminary objections. In *Ramad Realty Corp. v. Springettsbury Township Sewer Authority*<sup>81</sup> the court held that after a declaration of taking is filed, preliminary objections are the proper method to challenge the validity of a completed de facto condemnation.

The practical effect of these two decisions is to leave an owner of property that has been de facto condemned with two mutually exclusive remedies. Prior to the filing of a declaration of taking, he can petition for an award of compensation. After a declaration of taking has been filed, he can assert both the fact of a prior de facto taking and the impropriety of it. The lack of statutory means to challenge the validity of a de facto condemnation prior to the filing of a declaration of taking results in reliance upon common-law remedies outside the Code.

### *B. Remedies Not Excluded by the Eminent Domain Code*

Section 303<sup>82</sup> states that the Code's purpose is "to provide a complete and exclusive procedure and law to govern all

---

79. Section 406 provides, "Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. . . . Failure to raise these matters by preliminary objections shall constitute a waiver thereof." PA. STAT. ANN. tit. 26, § 1-406(a) (Supp. 1975).

80. 4 Pa. Commonwealth Ct. at 537-38, 287 A.2d at 883.

81. 10 Pa. Commonwealth Ct. 1, 5-6, 309 A.2d 80, 82-83 (1973).

82. PA. STAT. ANN. tit. 26, § 1-303 (Supp. 1975).

condemnations of property for public purposes.” The statute fails to achieve this purpose when there has been a de facto condemnation. A de facto condemnee can petition for the appointment of viewers to award compensation, but he is left without a statutory remedy to challenge the validity of the condemnation. Because of the failure of the Code to provide an adequate remedy, certain common-law actions can still be pursued by a condemnee.

1. *Trespass and Ejectment*.—If a condemnor takes, injures, or destroys private property for a public purpose, even without the filing of a declaration of taking, it is a lawful condemnation and is compensable under section 502(e). A taking, injury, or destruction of private property is unlawful, however, if the condemnor cannot prove that the action was taken for a public purpose.<sup>83</sup> Both trespass and ejectment are available to a landowner whose property rights have been unlawfully abridged by a condemnor.

Prior to the enactment of the Eminent Domain Code, the failure of a condemnor to make or secure compensation prior to its entry gave rise to an action in trespass.<sup>84</sup> When the only issue is the failure to make compensation through condemnation proceedings, however, the Code now provides the landowner an adequate remedy before a board of viewers.<sup>85</sup> On the other hand, an action in trespass can still be brought against a condemnor in two situations. First, trespass is a proper remedy in a situation that technically is not an inverse condemnation—when the injury is not a result of the exercise of the power of eminent domain. If a lawful condemnation results in injury to property, the injury is compensable as consequential damages.<sup>86</sup> When a condemnor causes damage to property not as a result of its exercise of the power of eminent domain, but as a result of its negligence<sup>87</sup> or tortious entry,<sup>88</sup> however, any recovery must be in trespass. Recently, the commonwealth court in *Commonwealth, Department of Transportation v. Castillo*<sup>89</sup> found that when a landowner’s well was polluted by the negligent storage of calcium chloride on adjoining lands, recovery had to be in trespass.

---

83. The meaning and constitutional significance of the public use limitation is discussed in 2A NICHOLS’ EMINENT DOMAIN §§ 7.2, 7.31 (rev. 3d ed. J. Sackman 1975); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

84. *Cochran Coal Co. v. Management Mun. Auth.*, 380 Pa. 397, 110 A.2d 345 (1955).

85. PA. STAT. ANN. tit. 26, § 1-502(e) (Supp. 1975).

86. See note 56 and accompanying text *supra*.

87. *Lizza v. Uniontown City*, 345 Pa. 363, 28 A.2d 916 (1942).

88. *Koontz v. Commonwealth*, 364 Pa. 145, 70 A.2d 308 (1950); *Burkholder v. Commonwealth*, 347 Pa. 478, 32 A.2d 745 (1943); *Culver v. Commonwealth*, 346 Pa. 262, 29 A.2d 531 (1943).

89. 14 Pa. Commonwealth Ct. 22, 321 A.2d 394 (1974).

The second situation in which a trespass action should be permitted is when the condemnation is invalid. Although the Code compensates a condemnee whose property has not been formally condemned, there is no reason to believe that this precludes an action at common law that challenges the validity of the condemnation.<sup>90</sup>

If he institutes such an action, proof of his possession of the premises and the entry of the defendant thereon would make out a prima facie case, and as the defendant . . . would be unable to justify its entry under the statute . . . in accordance with which it purported to act, the plaintiff would necessarily prevail.<sup>91</sup>

Although there are no Pennsylvania cases on point, it is certainly logical that if an entry is not justifiable as an exercise of the power of eminent domain, then it is unlawful.<sup>92</sup> As indicated in *Gardner v. County of Allegheny*,<sup>93</sup> equity courts traditionally have enjoined as continuing trespasses activities of condemnors that cannot be justified as an exercise of the power of eminent domain. Furthermore, trespass has been recognized in other jurisdictions, notably the New England states, as a proper means to challenge the validity of a condemnation.<sup>94</sup>

Prior to the adoption of the Code in 1964, ejectment was also a proper remedy for one whose land had been entered under an invalid claim of eminent domain.<sup>95</sup> As a practical matter, however, a condemnor is likely to file a declaration of taking when either a trespass or an ejectment action has been initiated against it.<sup>96</sup> Determination of the validity of the condemnation will be relegated to the eminent domain proceeding.<sup>97</sup> Because of the equitable nature of an ejectment action, the courts generally will stay the execution of the order in ejectment to allow the condemnor to file formal condemna-

---

90. 6A NICHOLS' EMINENT DOMAIN § 28.3[1] (rev. 3d ed. J. Sackman 1975).

91. *Id.*

92. *Cf.* Commonwealth Appeal, 429 Pa. 254, 259 n.3, 239 A.2d 343, 346 n.3 (1968); Pittsburgh Nat'l Bank v. Equitable Gas Co., 421 Pa. 468, 470, 220 A.2d 12, 14 (1966); Scafetta v. City of Chester, 49 Pa. D. & C.2d 339 (C.P. Del. 1970).

93. 393 Pa. 120, 142 A.2d 187 (1958); *accord, e.g.*, A.H. Reid Creamery & Dairy Supp. Co. v. Philadelphia, 274 Pa. 251, 118 A. 11 (1922); Davis v. Southwest Pa. Pipe Lines, 223 Pa. 56, 72 A. 281 (1909).

94. A discussion of this rule as it developed in Maine, Massachusetts, and New Hampshire is contained in 6 NICHOLS' EMINENT DOMAIN § 25.3[2] (rev. 3d ed. J. Sackman 1975).

95. Titus v. Poland Coal Co., 275 Pa. 431, 119 A. 540 (1923).

96. 11 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 32.129, at 608 (rev. 3d ed. F. Ellard 1964).

97. Ramad Realty Corp. v. Springettsbury Tp. Sewer Auth., 10 Pa. Commonwealth Ct. 1, 5-6, 309 A.2d 80, 82 (1973).

tion proceedings.<sup>98</sup> The failure of the legislature to provide a means to challenge the propriety of a de facto condemnation leaves the condemnee with the alternative of an action for conditional ejectment.<sup>99</sup>

The practical limitations of these actions, however, demand a more workable remedy. First, since both trespass and ejectment are based upon physical interference with property rights, they are not adaptable to the recent trend toward finding takings in planning, negotiations, and acquisition of neighboring lands.<sup>100</sup> Second, since a condemnor can file a declaration of taking after an action in trespass or ejectment has been commenced, it is likely that two proceedings will result. This is particularly important in a trespass action because a later filing of condemnation proceedings will not divest the owner of his cause of action for damages incurred prior to the declaration of taking.<sup>101</sup> Duplication of effort by the courts should be avoided. Furthermore, even if a plaintiff prevails in his action in trespass and proves a permanent injury, his recovery is limited to the decrease in market value caused by the entry.<sup>102</sup> This recovery is less than the amount recoverable in a condemnation proceeding.<sup>103</sup> The landowner in a common-law proceeding cannot recover losses recoverable under the Code, such as removal expenses, business dislocation expenses, moving expenses,<sup>104</sup> and allowances for replacement housing.<sup>105</sup>

Thus, serious limitations on both trespass and ejectment actions exist. All challenges to inverse condemnations should be raised in eminent domain proceedings.<sup>106</sup> Preliminary objections to a declaration of taking are the most efficient method to dispose of these issues. Until the Code is amended to provide the condemnee with a means to challenge the validity of a condemnation that occurs without a declaration of taking, however, he must pursue his common-law remedies.

2. *The Persistence of Equity Jurisdiction.*—Trespass and ejectment are not the only alternatives open to the condemnee. Equity is available to question the validity of a de facto condemnation because the Code fails to provide any method to adjudicate the

---

98. *Rosenblatt v. Pennsylvania Turnpike Comm'n*, 398 Pa. 111, 157 A.2d 182 (1959); *Oliver v. Pittsburgh V. & C. Ry.*, 131 Pa. 408, 19 A. 47 (1890).

99. Commonwealth Appeal, 429 Pa. 254, 259, 239 A.2d 343, 346 (1968).

100. See notes 36-47 and accompanying text *supra*.

101. *Keil v. Chartiers Valley Gas Co.*, 131 Pa. 466, 19 A. 78 (1890); *Shevalier v. Postal Tel. Co.*, 22 Pa. Super. 506 (1903).

102. *Sebree v. Huntingdon Water Supp. Co.*, 267 Pa. 420, 110 A. 142 (1920).

103. See note 18 and accompanying text *supra*.

104. PA. STAT. ANN. tit. 26, § 1-601A (Supp. 1975).

105. *Id.* §§ 1-602A, 1-603A.

106. See notes 68-71 and accompanying text *supra*.

issue. Moreover, the shortcomings of trespass and ejectment make equity the most practical remedy available to a landowner who wishes to stop the condemnation.

In *Ramad Realty Corp. v. Springettsbury Township Sewer Authority*<sup>107</sup> the commonwealth court analyzed this matter more thoroughly than any court since the adoption of the Code. Plaintiff had filed an action in equity to have a sewer line, which defendant had installed without formal condemnation, removed and to receive an award of damages for the unlawful entry. The sewer authority filed both an answer and a declaration of taking. The court held that since eminent domain proceedings were underway, albeit in response to plaintiff's action, the landowner's sole remedy was preliminary objections.<sup>108</sup> The court in dicta, however, addressed the case of the uncompensated condemnee who wishes to challenge a condemnation:

There is . . . the possibility that the landowner does not want damages in a completed *de facto* taking situation but wants to challenge the initial validity of the taking. . . . He does not wish to proceed under § 502(e) and there is no declaration of taking to challenge under § 406 whereby his rights may be protected. In that situation, equity may be invoked in order to force the authority to proceed with proper condemnation proceedings.<sup>109</sup>

In addition to the power to order the institution of formal proceedings, equity also has the power to enjoin an invalid *de facto* condemnation. Prior to the Code equity was a valid forum in which to raise the issue of whether the condemnor had exceeded its power<sup>110</sup> or had exercised bad faith or was unreasonable in its decision<sup>111</sup> to condemn. The absence of any statutory remedy suggests that equity jurisdiction is still available to challenge the validity of an inverse condemnation.

Since shortly before the adoption of the Code, a line of cases has developed that superficially seems to remove eminent domain from equity jurisdiction. Overly conclusive statements, such as those made in *Faranda Appeal*<sup>112</sup> that "the legislature has mandated that prelim-

---

107. 10 Pa. Commonwealth Ct. 1, 309 A.2d 80 (1973).

108. *Id.* at 5-6, 309 A.2d at 82.

109. *Id.* at 6, 309 A.2d at 83 (citations omitted).

110. *Colove v. Robeson Borough*, 364 Pa. 626, 73 A.2d 679 (1950).

111. *Spann v. Joint Bds. of School Dirs.*, 381 Pa. 338, 113 A.2d 281 (1955); *Winger v. Aires*, 371 Pa. 242, 89 A.2d 521 (1952); *Cheltenham Tp. v. Tookany Creek Land Dev. Co.*, 33 Pa. D. & C.2d 662 (C.P. Montg. 1964).

112. 420 Pa. 295, 216 A.2d 769 (1966).



inary objections constitute the exclusive method of challenging the power of the condemnor to take private property,"<sup>113</sup> have given rise to this impression.<sup>114</sup> None of the cases, however, dealt with the problems involved in a de facto condemnation. In *G.C. Murphy Co. v. Redevelopment Authority*,<sup>115</sup> for instance, plaintiff sought to enjoin the institution of condemnation proceedings. This case is of no authority when a de facto condemnation is at issue. The major problem faced by a landowner in a de facto condemnation is that there is no declaration of taking to which he can file preliminary objections. *Schwab v. Pottstown Borough*,<sup>116</sup> which held that equity cannot be invoked to assess damages for a condemnation, is likewise inapposite. A condemnee who seeks only an award of damages has a full remedy before a board of viewers.<sup>117</sup> There is no authority denying equity jurisdiction to consider the validity of a condemnation when the condemnee has no remedy under the Code.

A situation similar to a de facto condemnation exists when rights of way are condemned by gas and electric companies. Prior to the enactment of the Code, such rights of way were condemned under utility legislation<sup>118</sup> and challenges to the validity of the taking were brought in equity. Section 901<sup>119</sup> of the Eminent Domain Code excludes condemnations of rights of way by these utilities companies from the provisions of the Code. The supreme court in *Redding v. Atlantic City Electric Co.*<sup>120</sup> held that since the Code did not provide a means to question the validity of condemnations of rights of way, equity was still a proper forum in which to do so. The similar lack of a statutory remedy for the landowner in a de facto

---

113. *Id.* at 302, 216 A.2d at 772.

114. Justice Roberts in his concurring opinions has repeatedly warned against the conclusive language that the majority has tended to use in holding that equity does not have jurisdiction in certain eminent domain matters. *Valley Forge Golf Club v. Upper Merion Tp.*, 422 Pa. 227, 230-31, 221 A.2d 292, 294 (1966) (concurring opinion); *Cunfer v. Carbon Airport Auth.*, 414 Pa. 408, 411, 200 A.2d 768, 770 (1964) (concurring opinion). Justice Musmanno similarly stated, "To shear equity of its long recognized jurisdiction would require more explicit language than the mere statement that statutory procedures shall be exclusive in the governing of condemnation proceedings . . ." *Mahan v. Lower Merion Tp.*, 418 Pa. 558, 566, 212 A.2d 217, 221 (1965) (dissenting opinion).

115. 458 Pa. 219, 326 A.2d 358 (1974); *accord, e.g.*, *Valley Forge Golf Club v. Upper Merion Tp.*, 422 Pa. 227, 221 A.2d 292 (1966); *Mahan v. Lower Merion Tp.*, 418 Pa. 558, 212 A.2d 217 (1965); *Pittsburgh Rys. v. Port of Allegheny County Auth.*, 415 Pa. 177, 202 A.2d 816 (1964); *Creasy v. Lawler*, 389 Pa. 635, 133 A.2d 178 (1957).

116. 407 Pa. 531, 180 A.2d 921 (1962).

117. PA. STAT. ANN. tit. 26, § 1-502(e) (Supp. 1975).

118. *Natural Gas Companies Act, id.* tit. 15, § 3549 (1967); *Electric Light, Heat & Power Companies Act, id.* § 3272.

119. PA. STAT. ANN. tit. 26, § 1-901 (Supp. 1975).

120. 440 Pa. 533, 269 A.2d 680 (1970); *accord, Philadelphia Elec. Co. v. Carr*, 4 Pa. Commonwealth Ct. 571, 287 A.2d 917 (1972). *Contra, McConnell Appeal*, 428 Pa. 270, 236 A.2d 796 (1968).

condemnation should form a basis for bringing an action in equity for an injunction.

Whether an action is brought to compel the filing of a declaration of taking or to attack the validity of a de facto condemnation directly and request injunctive relief, equity has jurisdiction. It may be more appropriate to seek to compel the filing of a declaration of taking and, thus, bring all condemnation issues within an eminent domain proceeding. If this alternative is followed, however, the condemnee is still involved in two actions, one in equity and one in eminent domain. Whatever alternative is selected, equity jurisdiction can be invoked by a landowner to challenge the validity of a condemnation prior to a declaration of taking.

#### V. A Suggestion for Legislative Reform

The complexity and overlap of remedies available to a condemnee whose property has been condemned without the filing of a declaration of taking is evidence in itself of the need for legislative action. The Eminent Domain Code fails its express legislative purpose "to provide a complete and exclusive procedure and law to govern all condemnations of property."<sup>121</sup>

Adequate protection of the right to just compensation is provided by section 502(e) if the condemnee is willing to admit the legality of the condemnor's activities. A need exists, however, to provide a complementary procedure in which the condemnee can litigate the condemnation's legality. This would not only be logically sound and within the purpose of the Code, but would also avoid the unnecessary and costly multiple litigation likely to result under existing law.<sup>122</sup>

The purpose of such an amendment should be to provide an efficient means to bring a condemnee's challenge before the court in an eminent domain proceeding. This would be a full statutory recognition of the inverse condemnation procedure. Just as the condemnee's right to petition for the appointment of viewers is established in section 502(e) of the Code, the condemnee who wishes to challenge the validity of a condemnation should be empowered to effect the institution of formal condemnation proceedings. Such a provision logically would be inserted in section 402, which deals with

---

121. PA. STAT. ANN. tit. 26, § 1-303 (Supp. 1975).

122. See notes 96-97, 101 and accompanying text *supra*.

the procedures for filing a declaration of taking.<sup>123</sup> Section 502(e) need not be eliminated since it would remain available as a remedy for the condemnee who merely seeks compensation. The following is suggested as a model for an amendment of section 402:

- (e) IN ALL CASES IN WHICH A CONDEMNOR TAKES, INJURES OR DESTROYS PRIVATE PROPERTY WITHOUT THE INSTITUTION OF PROCEEDINGS REQUIRED BY THIS SECTION, THE CONDEMNEE MAY APPLY TO THE COURT OF COMMON PLEAS OF THE COUNTY IN WHICH THE PROPERTY IS SITUATE FOR THE INSTITUTION OF CONDEMNATION PROCEEDINGS IN ACCORDANCE WITH THIS SECTION.

The wording of this proposal has several distinct advantages. First, by adopting the phraseology used in the section 201<sup>124</sup> definition of condemn, "to take, injure, or destroy private property," the amendment would be continually adaptable to the evolving concept of a de facto condemnation. Second, the condemnee would be provided with an opportunity to raise all issues regarding the condemnation in his preliminary objections without resort to admittedly tenuous common-law remedies. Third, the condemnee would enjoy the protection of section 407<sup>125</sup> of the Code, which provides that a writ of possession will not issue until the preliminary objections are disposed of and then only if they are dismissed. Last, the condemnee, if his preliminary objections are sustained, would be entitled to an award under section 406(e)<sup>126</sup> for any damages resulting from the void condemnation. This would eliminate the need for an action in trespass to recover for damages to the land.

## VI. Conclusion

The law of inverse condemnation in Pennsylvania has undergone a period of dynamic growth commencing with the adoption of the Eminent Domain Code in 1964. As the courts have dealt with this area of the law, new lines of liability and marks of deficient statutory provisions have become discernible.

The substantive law of de facto condemnations has experienced marked developments in the past decade. The concept of a taking has assumed an expansive meaning commensurate with modern understanding of property. Similarly, by virtue of the more liberal provisions of the Code, the law of consequential damages has expanded and created new Commonwealth liability.

The procedural law of inverse condemnation, however, is lacking a crucial element. While ample provision is made for the holder

---

123. PA. STAT. ANN. tit. 26, § 1-402 (Supp. 1975).

124. *Id.* § 1-201(a).

125. *Id.* § 1-407(a).

126. *Id.* § 1-406(e).

of a property interest that has been condemned without formal proceedings to seek compensation, he is without statutory means to challenge the validity of the condemnation. Pre-Code remedies are not adequate. An amendment to the Eminent Domain Code is needed to provide a procedure by which a landowner can halt an invalid, de facto condemnation.

JOHN A. RODGERS