

[Alerts and Updates]

In New Jersey, a Property Owner May Recover Consequential Business Losses for a Temporary Taking

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On August 27, 2009, the New Jersey Appellate Division, in *State of New Jersey, by the Commissioner of Transportation v. Arifee, et al.*,¹ upheld a trial court decision, dismissing the condemnation complaint of the Commissioner of Transportation, for failure to conduct bona fide negotiations. The dismissal of the complaint was upheld because the State of New Jersey, in making its statutorily required offer of just compensation, did not consider the consequential business losses to the property owner that resulted from the temporary easement the state was seeking to acquire. Though the appellate court's opinion is yet unpublished, it is likely to open the door for many business owners in New Jersey who are or will be impacted by a temporary taking to recover business losses that result from the taking.

Where private property is taken for public use, the owner is guaranteed just compensation by both the federal and state constitutions, and by New Jersey's Eminent Domain Act.² Ordinarily, in permanent takings, compensation does not include payment for such incidental losses as "destruction of good will, expense of moving to a new location, profits lost because of business interruption, or inability to relocate."³ The judicial justification for the denial of such incidental losses is ordinarily based on the presumption that these losses "are too difficult, remote and uncertain to measure accurately and their allowance might well result in unfounded and exaggerated awards which could exceed the constitutionally established norm."⁴ For that reason, in permanent takings, just compensation is limited to fair market value of the property.⁵

The appellate court, in making its decision, relied heavily on the U.S. Supreme Court's decision in *Kimball Laundry Co. v. United States*.⁶ After a thorough analysis of the *Kimball* decision, the appellate court found that different factors may be considered when determining just compensation in a temporary-taking situation. Namely, in a total taking, the property owner can presumably relocate its business and preserve or recover some of its going-concern value. In a temporary taking, however, the business operations are suspended for a finite period of time. Thus, the owner realistically cannot relocate as his "investment remain[s] bound up in the reversion of the property."⁷

In *Arifee*,⁸ the state was seeking to condemn a temporary easement, which would have closed the property owners' driveway to all commercial traffic for a period of at least nine months. The property owners argued that, as a result of the temporary taking, their car wash would be shut down for at least nine months. During this period, the owners would continue to incur debt and expenses would accrue, and they would have no income to offset the losses. Furthermore, the taking denied the property owners use of their commercial property while eliminating the possibility of relocating, since the state would eventually return the property to them.

Both the trial court and appellate court found it necessary for the state to consider the consequential loss of business for a finite period as an element of the compensation offer. In this case, the state's failure to consider the consequential business losses that were likely to result from the taking was a failure to offer the property owners full value before the lawsuit was instituted. This was contrary to the state's statutorily required offer of just compensation and bona fide negotiations.

The decision in *Arifee*, though unpublished at this time, is likely to be significant for business owners whose properties are or may be subject to a temporary taking. Previously, New Jersey courts appeared reluctant to consider consequential business losses, even

in light of the U.S. Supreme Court decision in *Kimball*. Now, property owners have a New Jersey Appellate Division decision to assist them in seeking just compensation.

For Further Information

If you have any questions about this Alert or would like more information, please contact [George J. Kroculich](#), any of the [attorneys](#) in the [Real Estate Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. *State of New Jersey, by the Comm'r of Transp., v. Mohammed Arifee; Jawed Arifee a/k/a Ahmad Arifee; Bubble Bath Car Wash, Inc., n/k/a Palace Car Wash, Inc., a N.J. Corp.*, No. A-5633-07T1 (N.J. Super. Ct. App. Div. Aug. 27, 2009) (per curiam).
2. U.S. Const. amend. V; N.J. Const. art. I, para. 20 (1947); Eminent Domain Act, N.J.S.A. 20:3-1 to 50.
3. *State by State Highway Comm'r v. Gallant*, 42 N.J. 583, 587 (1964).
4. *Ibid.*
5. *State by Comm'r of Transp. v. Silver*, 92 N.J. 507, 513 (1983).
6. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 9–10 (1949) (holding that "an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property").
7. *Kimball, supra*, 338 U.S. at 14.
8. *Arifee, supra*.