

Navigating Recovery of Damages for the Business Owner in a Condemnation

Christian F. Torgrimson

Pursley Friese Torgrimson, LLP

1230 Peachtree Street, Suite 1200

Atlanta, Georgia 30309

(404) 876-4880

ctorgrimson@pftlegal.com

www.pftlegal.com



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When private property is condemned by a governing authority for a public project, such as a road, school or power line, the real estate is not the only element to consider in the recovery of compensation. The Georgia Constitution provides that “[p]rivate property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid.” GA. Const. 1983, Art. I, § III, ¶ I. All private property, and any interest therein, is subject to being condemned for a public use so long as just and adequate compensation is first paid by the condemning authority. Woodside v. City of Atlanta, 214 Ga. 75 (1958). In a condemnation, the term “property” encompasses not only the real estate, but also the buildings and improvements, tenant leaseholds, trade fixtures and equipment, billboards and other signage, cell towers, access rights, air rights, easements, contract rights, and businesses.

A. Business Damages As A Separate Element of Compensation

When an operating business is impacted or damaged by a public project, Georgia law provides for recovery of just and adequate compensation that is separate and apart from the real estate and other elements. Bowers v. Fulton County, 221 Ga. 731 (1966). All manner of commercial business from a small business operation to a multinational corporation with numerous locations or large operations can be damaged by and seek recovery of compensation in a condemnation. A business owner or operator can recover business damages if (1) it operates a business on the subject property as of the date of taking; (2) if the loss caused by the taking is not remote or speculative; (3) and if the property is unique. Carroll County Water Authority v. L.J.S. Grease & Tallow, Inc., 274 Ga. 353 (2005). Business damages are recoverable when the taking completely destroys

the business because the real estate is condemned in full or the impact to the real estate prevent continued operation of the business; and when the business incurs damages but continues to operate.

B. Business Damages for the Landowner vs. the Tenant

The right to pursue a claim for business damages belongs to both the landowner who also operates the business and the tenant who leases the property and operates the business. However, different standards apply that can limit recovery when a business is completely taken and when the business is damaged but continues to operate on the property after the taking. DOT v. Dixie Hwy. Bottle Shop, 245 Ga. 314 (1980). A tenant operating the business may recover for either a total loss of or partial damage to a business that continues to operate. Id. Where the property owner operates the business, however, a total loss or destruction of the business at that location must be proven in order to recover business damages separately. Id. Georgia law considers the interests of the owner-operator in the land and in the business to be one property right and therefore business losses are not separately recoverable. DOT v. George, 202 Ga. App. 270 (1991). Any partial loss or damage to the business is merely one factor to be considered in determining the fair market value of the remaining property. DOT v. Kendricks, 148 Ga. App. 242 (1978). Where a partial taking of the property renders operation of the business on the remainder impossible, the business may be considered a total loss and damages may be recovered. DeKalb County v. Fulton Nat'l Bank, 156 Ga. App. 253 (1980). Thus, if a taking results in the total destruction of the business either physically or from an operational standpoint, both the owner-operator and the tenant can recover business damages as a separate element. Whereas the tenant can separately recover partial damages if the business is only partially damaged, the owner-

operator is limited to using such business damages to show and recover only for a reduction in value of the remaining real estate.

C. Initial Requirements for a Business Damages Claim

A condemnor is not required to consider or include business damages in the initial estimate of just and adequate compensation that is either offered to the owner during the acquisition phase, or deposited into the court registry when a condemnation is filed. Lil Champ Food Stores, Inc. v. DOT, 230 Ga. App. 715 (1998). Instead, a business owner has the burden of asserting a claim and proving business damages occurred as a result of the taking, including that an operating business existed on the property as of the date of taking. Georgia Power v. Jones, 277 Ga. App. 332 (2006). But see, DOT v. Acree Oil Co., 266 Ga. 336 (1996) (holding that the absence of a business in operation on the property on the date of taking did not necessarily preclude evidence of business loss). See also Carroll County Water Authority v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353 (2005) (holding that closure of business more than a year prior to date of taking did not preclude claim for business loss where closure was due to pending condemnation).

An owner is not required to specifically and separately plead a claim for business damages in the initial answer to a condemnation, referred to as a notice of appeal. DOT V. Camvic Corp., 284 Ga. App. 321 (2007), distinguishing Bill Ledford Motors, Inc. v. DOT, 225 Ga. App. 548 (1997). A notice of appeal is a short, concise statement disputing the condemnor's estimate of just and adequate compensation and seeking a determination by jury trial. It must be filed within thirty days of service of process of the condemnation papers, or else the owner loses the right to pursue additional compensation. The failure to file a timely appeal creates a jurisdictional defect that

waives the right to dispute the award. Cann v. MARTA, 196 Ga. App. 495 (1990). The time for filing an appeal cannot be extended by agreement of the parties or by court order or by an estoppel based on a party's representation as to the appeal period. Cedartown North Partnership, LLC v. DOT, 296 Ga. App. 54 (2009).

D. Establishing A Claim for and Recovery of Business Damages

The burden of proving business damages is squarely on the owner. Recovery of business damages requires a showing of uniqueness between the property and the business under any one of three tests for uniqueness. DOT v. 2.734 Acres of Land, 168 Ga. App. 541 (1983). Uniqueness in the condemnation context does not include the dictionary definition of unusual or one of a kind. Rather, it refers to the relationship between the land and the business such that the business depends on the property to survive.

Uniqueness is measured by three tests under Georgia law. The first test is the "relocation" test in which the business depends upon the location for its operation (or survival) and no substantially comparable site exists within the area for relocation of the business. This is the most commonly used test to establish uniqueness and centers around the specific elements of the subject property, such as certain access, traffic flow, signage, improvements, etc., which support the successful operation of the business. The second test is the "value to the owner" test in which the property's particular value to the owner cannot be passed to a third party. This test typically applies to a business that provides certain benefits to the operator that may be contractual and therefore not transferrable to a new owner. The final test is the "no market value" test in which the property is a type not generally bought and sold in the market and thus fair market value does not afford just and adequate compensation. Carroll County Water Authority

v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353; ABM Realty Co. v. Board of Regents, 296 Ga. App. 658 (2009).

In addition, evidence of business loss cannot be remote or speculative and the damage must be permanent, not temporary. Venable v. State Hwy Dep't, 138 Ga. App. 788 (1976); DOT v. Dent, 142 Ga. App. 94 (1977). Anticipated losses resulting from a planned business on the property are not compensable. Coastal Water & Sewerage Co. v. Effingham County Indus. Dev. Auth., 288 Ga. App. 422 (2007). Evidence of a potential operation, projected profits or even renovation costs to the property in anticipation of a new business do not support a claim for business damages. Georgia Power v. Jones, 277 Ga. 332 (2006). Likewise, anticipated profits from a planned, future upgrade to a business cannot support recovery for business damages. Davis Co. v. DOT, 262 Ga. App. 138 (2003).

A business owner is not required to prove profitability or positive net earnings before the date of taking in order to recover damages, so long as a difference in fair market value is shown. DOT v. Hillside, 192 Ga. App. 637 (1989). Georgia courts uphold the principal referred to as “the right not to lose any more money” in determining business damages. Id. However, evidence of “temporary” business loss caused by a temporary taking is admissible only for purposes of determining consequential damages to remaining property after a taking. Buck's Service Station, Inc. v. DOT, 259 Ga. 825 (1990).

A claim for business damages typically is presented in the course of discovery and supported by a valuation expert. The measure of business damages is not the amount of lost revenue or profits suffered by the business on a dollar for dollar basis, but rather the reduction in fair market value of the business before and after the taking that may be

caused by such losses. City of Atlanta v. Landmark Environmental Industries, Inc., 272 Ga. App. 732 (2005). Lost profits and other factors, such as loss of customers, loss of income opportunity or a decrease in the earning capacity of the business, can be considered in determining the decrease in value of the business. Id.