MICHIGAN'S CONSTITUTION PROTECTS BUSINESS OWNERS WHO RELOCATE DUE TO TAKINGS BY EMINENT DOMAIN

by H. Adam Cohen and Peter H. Webster***

Introduction

In *Michigan Dep't of Transportation v Gilling,*[1] the Michigan Court of Appeals decided an issue of first impression under Michigan's law of eminent domain. The *Gilling* court clarified the historically murky relationship between the statutory administrative schemes that establish "caps" on reimbursement for business relocation costs that result from takings, and the broad constitutional right to seek just compensation for those same relocation costs. The principal issue before the court was whether the administrative schemes constituted an exclusive, or supplemental, remedy for condemned business owners seeking recovery of their business relocation costs. In deciding that the administrative recovery schemes supplement, rather than supplant, an owner's right to seek constitutional just compensation for relocation costs, the Court of Appeals answered that question, but also generated new ones.

Background Facts of *Michigan Dep't of Transportation v Gilling*

In *Gilling,* the Michigan Department of Transportation ("MDOT") exercised the State's power of eminent domain to take property owned by Gilling's Nursery & Landscaping, Inc., a family-owned business, to widen Lapeer Road (M-24). The Gillings owned five acres of land fronting on Lapeer Road where they operated their wholesale and retail nursery and landscape design business. The Gilling family's business was well-known and something of a landmark in the Lapeer community. It was famous for palm trees that lined Lapeer Road, an unusual sight in Michigan.

In 2002, MDOT first told the Gillings that it intended to take their property for the road-widening project, but offered no timeline as to when the taking might actually occur. That uncertainty created significant difficulty for the Gillings, whose business was seasonal and could not be easily moved on short notice. To guard against the risk of a sudden order to move, and the attendant danger of losing an entire season's business, the Gillings rented an inexpensive location to function as a temporary relocation site as they waited–ultimately for three years–for MDOT's taking. Once MDOT took possession of their property, the Gillings moved to their interim location, and then moved again to a permanent site while the condemnation case was still pending. The two relocations proved time-consuming and expensive. Accordingly, in addition to reimbursement for the property taken, the

1 289 Mich App 219; 796 NW2d 476 (2010).

** H. Adam Cohen is a shareholder with the Birmingham, Michigan law firm Steinhardt Pesick & Cohen, Professional Corporation, where he specializes in representing property owners in eminent domain actions and property tax appeals. Mr. Cohen can be reached at (248) 646-0888, or by email at hacohen@spclaw.com.*

*** Peter H. Webster is a member of Dickinson Wright PLLC. Mr. Webster has represented both condemning authorities and property owners in eminent domain and related takings cases throughout Michigan and the United States. Mr. Webster can be reached at (248) 433-7513 or pwebster@dickinsonwright.com.*

The authors thank John E. Scheibelhut for his valuable assistance on this article.

Gillings sought just compensation from MDOT for the relocation costs that they incurred in effectuating both moves, among other expenses.[2]

In the trial court, the Gillings sought "just compensation" under the Michigan Constitution[3] for both the value of their real estate and business interruption damages, including their moving and relocation costs. MDOT argued that the Gillings could not recover such relocation costs in the condemnation action because they were limited to an "exclusive administrative remedy." MDOT claimed that the administrative process outlined in Michigan and federal legislation capped the available relocation reimbursements. The Gillings argued that the administrative scheme merely supplemented, but did not preclude, a property owner's constitutional right to receive just compensation. The trial court agreed with the Gillings, permitting them to seek just compensation for their business interruption damages, including relocation costs, at trial.

Before trial, the parties agreed to a partial just compensation award for the value of the Gillings' building, fixtures, and other site improvements of approximately $736,000. The remaining contested claims went to verdict, and the jury awarded $585,000 for the Gillings' land and $519,550 for business interruption damages, including relocation costs.

The Court of Appeals Decision

MDOT only appealed the jury verdict relating to the relocation expenses, arguing that the administrative scheme created under the Federal Uniform Relocation and Real Property Acquisition Act of 1970[4] (the "Uniform Act"), and its Michigan counterparts,[5] established an exclusive remedy by which a condemned business owner could seek reimbursement for moving and relocation costs. While MDOT claimed that the Uniform Act's administrative scheme established various "caps" on the amount of reimbursement that a business owner is entitled to receive, the Gillings argued that those caps often did not even approximate the full damage sustained by a business due to a taking. No Michigan case previously addressed this interplay between the statutory administrative scheme and a property owner's constitutional right to receive just compensation for business-related damages.

The Administrative Scheme Supplements, Rather than Supplants, the Property Owner's Constitutional Right to Just Compensation

In arguing that the administrative scheme was an exclusive, rather than a supplemental, remedy, MDOT noted that each of Michigan's statutes stated that the financial assistance and reimbursement for relocation costs provided therein "shall not be the subject of consideration in a condemnation proceeding."[6] MDOT argued that the legislature's inclusion of this language clearly meant that a property owner was not permitted to seek reimbursement of relocation costs as part of just compensation at trial. The Gillings, conversely, argued that MDOT's theory misconstrued the relationship between constitutional just compensation and the statutory administrative provisions. They contended that the statutory admonition precluded reference to administrative reimbursements, not relocation costs, at trial.

The Court of Appeals affirmed the trial court's ruling that the statutory administrative remedies supplement a Michigan business owner's constitutional right to receive just compensation for relocation costs. In so holding, the court noted that "no act of the Legislature can take away what the Constitution has given."[7] Therefore, the *Gilling* court held that the language in the statutory scheme, providing that relocation and moving allowances "shall not be the subject of consideration in condemnation

2 In addition to such relocation costs, the Gillings sought damages for their loss of the condemned property's capped taxable value, damages for costs incurred at their interim location, reestablishment costs, and other business damages.

3 Const 1963, art 10, § 2.

4 42 USC 61. The Uniform Act was adopted to standardize federal legislation regarding relocation assistance. It provides benefits on a reimbursement basis for persons displaced as a direct result of programs or projects undertaken by a federal agency or with federal financial assistance. While the project at issue in *Gilling* was a state MDOT project, compliance with the Uniform Act was triggered by MDOT's use of federal funds for the acquisition.

5 Relocation Assistance for Persons Displaced by Acquisition of Property for Highways Act, MCL 252.143; Relocation Assistance Act, MCL 213.328(1); and Allowances for Moving Personal Property from Acquired Real Property Act, MCL 213.355. These provisions were enacted by the state of Michigan in the late 1960s and early 1970s as Michigan's counterpart to the Uniform Act.

6 *See* MCL 252.143.

7 *Gilling*, 796 NW2d at 488 (quoting *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 374; 663 NW2d 436 (2006)).

proceedings," simply serves to prohibit a business owner who receives reimbursement under these provisions from seeking duplicative payments at trial.

The *Gilling* court's ruling on the "exclusive administrative remedy" issue resolved an important question in Michigan condemnation jurisprudence. Juries, not the governmental agencies charged with acquiring and paying for business owners' properties, are the ultimate arbiters of the amount of compensation to be paid for business relocation costs.

The court concluded that, in this instance, there was no real danger of duplicative payments. It expressed significant concern about statutorily limiting a class of damages long recognized as an element of constitutional just compensation, where the goal is to put the landowner in the same position as it would have been had the taking not occurred.[8]

The Court Determines that Inventory Relocation Costs are "Lost Profits"

Having decided that the administrative scheme for relocation reimbursement is not an exclusive remedy, the *Gilling* court also addressed what was an allowable relocation expense. At trial, the Gillings successfully argued that *all* of their relocation costs (which included the costs of relocating their inventory) were properly compensable just compensation. Notably, MDOT did not argue at trial, or on appeal, that the costs of relocating inventory *specifically* were non-compensable. Rather, MDOT argued generally that all relocation costs were subject to an exclusive administrative remedy, and that relocation costs were tantamount to "lost profits," which are non-compensable in eminent domain.[9]

The Court of Appeals, however, considered whether the trial court properly ruled that the Gillings had a right to recover costs to move their inventory as part of the just compensation award. In its analysis, the court noted that Michigan case law holds that costs associated with the relocation of "trade fixtures" are properly compensable as part of just compensation.[10] Case law distinguishes "trade fixtures" from "movable" personal property, which can be transported from place to place without impairing its value,[11] and which are not compensable in eminent domain. The court observed that "trade fixtures" can include items not physically annexed to the property, as well as other items specially adapted to the full enjoyment of the property.[12] For example, certain categories of property, such as those essential to operating the property owner's business, can be considered "constructively annexed" to the property, thus entitling the property owner to compensation for expenses associated with the relocation of such items that might otherwise appear to be mere personalty.[13]

The *Gilling* court then framed the issue as a question of whether the Gillings' inventory of trees, plants, and the like constituted trade fixtures. If trade fixtures, the court reasoned, the associated relocation costs could be compensable, but if personal property, then the relocation costs would not be compensable because the removal would not cause damage to the property and the costs of removal were more akin to lost profits. The court observed that, unlike the nursery's equipment, which included water pumps, chemical fertilizers and fertilizing equipment used to maintain the business, the Gillings' inventory constituted the "products" of the business and were specifically intended to be sold and removed from the property.

Based on this reasoning, the court held that the Gillings' inventory was more akin to personal property than

8 *Id* at 481(citing *MDOT v Frankenlust Lutheran Congregation*, 269 Mich App 570, 576; 711 NW2d 45 (2006)).

9 Michigan courts have held that damages for lost profits are not recoverable in an eminent domain case. *See In re Slum Clearance*, 332 Mich 485, 486; 52 NW2d 195 (1952) (the loss of a profit is not an interruption of business and is not an element of just compensation); *Detroit / Wayne County Stadium Authority v Drinkwater, Taylor & Merrill, Inc.*, 267 Mich App 625, 658; 705 NW2d 549 (2005).

10 *See In re Slum Clearance*, *supra* note 9.

11 *See Detroit Trust Co v City of Detroit*, 262 Mich 14; 247 NW 76 (1933) (holding that items such as horses, wagons, trucks, automobiles, office furniture and equipment, and other movable property "are of such a character that they can be transported from place to place without impairing their value[]").

12 *Id* (holding that chemical solutions and molten metal used in an electroplating business could be considered "constructively annexed" to the property since their relocation was "essential to [the property owner's] business").

13 *Id*; *see also* Jason C. Long, *Casenote: Eminent Domain - Fixture Qualification - Property Is A Fixture In Condemnation If It Satisfies The Three-Step Analysis, And The Condemnee May Elect To Receive The Value-In-Place Or The Detach/Reattachment Costs For The Fixtures*: Wayne County v. William G., *563 N.W.2d 674 (Mich. 1997)*, 75 U. Det. Mercy L. Rev. 717, 723 (1998).

trade fixtures,[14] and therefore "any losses arising from the movement of the nursery products fall within the category of non-compensable lost profits."[15] Consequently, the court held that, while the Gillings were entitled to just compensation for business interruption damages that could be proven with a reasonable degree of certainty, they were not entitled to reimbursement for the particular cost to relocate their inventory.[16]

The Court's Lost Profits Discussion Departs From Precedent

The *Gilling* court also discussed the "lost profits" prohibition as it relates to condemnation law. Michigan case law holds that damages for lost profits are not recoverable in a condemnation action,[17] but the court misapplied that rule to the facts in *Gilling*. The court's previous application of the "lost profits" rule was limited to situations where property owners sought to recover damages stemming from a *decrease in profit margin* as a result of relocating a business after a governmental taking. For example, in *Detroit/Wayne County Stadium Authority v Drinkwater Taylor & Merrill*,[18] a displaced taxi and delivery business sought damages for increased labor and vehicle costs as a result of its vehicles traveling to and from a new business location that was farther away from the owner's then-existing clients. The court held that such damages amounted to a claim for decreased profitability and were therefore non-compensable under the "lost profits" rule. Similarly, in *City of Detroit v Larned Associates*,[19] the condemned property owner claimed that the taking caused it to incur a steady decline in sales revenue. The court held that the property owner's inability to reach its former level of profitability amounted to non-compensable damages under the "lost profits" rule.

The situation in *Gilling*, however, was fundamentally different: the Gillings were not seeking damages for any decrease in profit margin as a result of the taking. Rather, they were seeking to recover the cost to move their inventory from point A to point B. The fact that inventory is naturally "sold" as the means of sustaining a retail or wholesale business does not mean that the cost to move that inventory to a new location--a move necessitated by the government's total taking of the original business location--is somehow a claim for "lost profits." On this score, the *Gilling* court's analysis was factually and legally incorrect.

Irrespective of the *Gilling* court's analysis, which incorrectly characterized the cost of moving inventory as "lost profits," the Michigan Supreme Court will likely reexamine the principle that lost profits are non-compensable in eminent domain proceedings. Business owners' counsel would argue that there is no sound reason to afford such owners fewer rights in the context of eminent domain than that which litigants possess in ordinary contractual and "business tort" commercial litigation in Michigan.[20]

Conclusion

In *Gilling*, the Court of Appeals provided valuable guidance and certainty by adopting a clear rule that the Uniform Acts regulating reimbursement of business relocation costs merely supplement, and do not supplant, a business owner's right to seek relocation reimbursement in the form of constitutional just compensation. On the other hand, the *Gilling* court incorrectly analogized the costs to relocate inventory as a claim for "lost profits," casting additional uncertainty on an area of condemnation law already in need of repair.

14 "This moveable inventory does not fall within the definition of a "trade fixture" under any of the aforementioned cases . . ." *Gilling*,796 NW2d at 486.

15 *See id*.

16 The court also remanded part of the case on an evidentiary issue that is not germane to this article.

17 *See In re Slum Clearance, supra* note 9.

18 *Detroit/Wayne County Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625; 705 NW2d 549 (2005).

19 *City of Detroit v Larned Assocs*, 199 Mich App 36; 501 NW2d 189 (1993).

20 In breach of contract cases, lost profits are a recoverable measure of damages, provided that the litigant can prove damages with a reasonable degree of certainty. *See Lawrence v Will Darrah & Assocs*, 445 Mich 1; 516 NW2d 43 (1994); *see also The Vogue v Shopping Centers, Inc*, 402 Mich 546; 266 NW2d 148 (1978). Likewise, in commercial tort cases, lost profits are a proper measure of damages provided that the profits lost as a result of the injury can be shown with a reasonable degree of certainty. *See Couyoumjian v Brimage*, 322 Mich 191; 33 NW2d 755 (1948). Business owners' counsel will argue that the same "reasonable degree of certainty" test should be applied to condemnation cases, rather than an absolute exclusion for lost profits.