

Appellate Court Rejects NJ Property Owners' Claim of Temporary Taking and Upholds Trial Court Ruling

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In *Berardi v. Township of Pemberton*, decided on July 25, 2013, the New Jersey Superior Court Appellate Division affirmed summary judgment dismissing the property owners' claim of a temporary taking of their property.

The Township had previously commenced a condemnation action to acquire the property, but did not file and record a Declaration of Taking. The Township subsequently abandoned the condemnation action pursuant to the abandonment provision of New Jersey's Eminent Domain Act. The property owners filed suit, seeking to recover attorney's fees and costs incurred in the condemnation as provided by the statutory abandonment provision. Additionally, the owners alleged a temporary taking of the property by reason of the condemnation action and sought damages for lost rental income, business opportunity and opportunity to expand during the pendency of the condemnation action. The owners recovered the attorney fees and costs as a result of the abandonment, but the trial court rejected their claim of a temporary taking, under both the Act and the Constitution.

In affirming the trial court's ruling, the Appellate Division relied on its decision in *Hoagland v. City of Long Branch*, wherein the Court had concluded that the filing of a complaint in condemnation does not effect a taking; instead, under the Eminent Domain Act, the taking does not occur until the condemner files and records the Declaration of Taking. As the municipality did not file and record the Declaration of Taking in the condemnation action in the *Berardi* matter, the Court concluded there was no taking.

The Court also rejected the owners' argument that entry of the Order for judgment of proper exercise of eminent domain and appointing commissioners effected a taking. The Court characterized the Order as "finaliz[ing] the description of what will be taken by the condemner following subsequent steps" but not effecting a taking.

Lastly, the Court's unpublished opinion rejected the temporary taking claim on constitutional grounds. In order to prevail on the constitutional claim, the Court indicated that a property owner would have needed to prove that "the government deprived the owner of 'all beneficial use of the land for a significant period of time.'" Notwithstanding that the condemnation action adversely impacted the property, the Court found that the municipality was exercising its legal right and the adverse impact did not satisfy the threshold of a constitutional taking.