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NM Supreme Court rules against compensation for losses from COVID-related restrictions on businesses

SANTA FE – There is no constitutional or statutory requirement to compensate businesses for financial losses and expenses from restrictions imposed by public health emergency orders during the COVID-19 pandemic, the state Supreme Court ruled today.

In a unanimous opinion, the state's highest court concluded the public health orders "cannot support a claim for a regulatory taking requiring compensation" under the New Mexico Constitution. The Court also held that the Public Health Emergency Response Act (PHERA) does not provide for compensation for a loss of revenue and costs incurred because of the state's COVID-related limits on occupancy and closures of businesses.

About 20 lawsuits were filed in district courts across New Mexico last year seeking compensation from the state because of its public health orders (PHOs). In response, Gov. Michelle Lujan Grisham asked the Supreme Court to resolve the underlying legal question of whether the public health orders constituted a taking of private property that entitled the businesses to compensation. The law recognizes physical takings, such as a condemnation of land, as well as regulatory takings, which may happen through the effects of a government regulation that adversely affects the use and value of property.

In issuing today's ruling, the Court directed district judges to follow its legal conclusions in resolving the cases.

The Court concluded that the current public health orders "are a reasonable exercise of the police power to protect the public health."

"Occupancy limits and closure of certain categories of businesses, while certainly harsh in their economic effects, are directly tied to the reasonable purpose of limiting the public's exposure to the potentially life-threatening and communicable disease, and thus can be deemed 'reasonably necessary,'" the Court wrote in an opinion by Justice C. Shannon Bacon.

Based on legal precedents established by previous federal and state court decisions, the justices determined that the COVID-related restrictions on business operations do not represent a taking of property that requires compensation from the government under Article II, Section 20 of the state constitution.

State law – the PHERA – does provide for compensation to the owners of "health care supplies, a health facility or any other property that is lawfully taken or appropriated" by the state during a public health emergency. In analyzing the statute, the Court rejected a broad interpretation of the phrase "any other property" as businesses advocated in seeking compensation for closures and COVID-related restrictions.

The Court concluded that the phrase "any other property" was "legislatively intended to be a catch-all limited within the category of physical property that is directly taken or appropriated by the State and used for, or in connection with, a public health emergency."

The terms "health care supplies" and "health facility" are defined in the PHERA. Adopting a broad interpretation of the compensation provision as argued by the plaintiff businesses – known as the "real parties in interest" – "would lead to an absurdity: unlimited liability authorized by the Legislature," the Court reasoned.

"Because a public health emergency can affect the entire population, anyone and everyone could be a potential claimant under the Real Parties' interpretation, even under far less restrictive measures than the PHOs. It is simply not credible that the Legislature in enacting the PHERA intended for such a potential raid on the public wealth while simultaneously granting broad powers to protect the public health," the Court wrote.

Before individuals or businesses can bring a lawsuit concerning compensation, the Court held, they must first follow the administrative claims process outlined in the PHERA. That procedure initially requires a determination by the attorney general's office of whether compensation is due. That determination can be appealed to a hearing officer appointed by the attorney general and then a further appeal would go to a district court.

The governor's office had argued that if the justices ruled in favor of the businesses on the compensation issue, the lawsuits pending in district courts should be dismissed because the businesses failed to follow the administrative claims procedures before bringing their legal challenges.

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To read the decision in *State v. Wilson*, No. S-1-SC-38510, please visit the New Mexico Compilation Commission's website using the following link:

<https://nmonesource.com/nmos/nmsc/en/item/498164/index.do>