

MEMORANDUM

TO: Woodrow Johansen
Interior District Engineer
Fairbanks

Attn: Harold Cameron
District R/W Agent

FROM: Jack T. Bodine *JB*
Right of Way Director
Juneau

DATE : July 7, 1976

SUBJECT: Incidental Business
Damage - R/W Acquisition
23-2900

Attached is a copy of a memorandum from the Department of Law, Highway
Section for your information.

	DIST. ENGR.	
<input checked="" type="checkbox"/>	PRE-CONST. ENGR.	
	DESIGN ENGR.	
	MATERIALS ENGR.	
	PLAN & PROGRAM ENGR.	
<input checked="" type="checkbox"/>	RIGHT-OF-WAY	<i>JB</i>
	TRAFFIC ENGR.	
	UTILITIES ENGR.	
	ADMIN. OFFICER	
	FINANCE	
	PERSONNEL	
	SUPPLY	
	CONST. ENGINEER	<i>SM</i>
	MAINT. ENGINEER	
	MAINT. SUPERVISOR	
	EQUIPMENT MANAGER	
	<i>Arnold</i>	<i>get</i>
	<i>Walt</i>	
	RETURN TO MAIN FILE	

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MEMORANDUM

State of Alaska

1	Deputy				
2	C & SC Area				
3	I & W Area				
4	SP & SE Area				
5	Appraisal				
	R/W Admin.				
	File				
C	I	SE	SC	W	Fed.

TO Jack T. Bodine
 Director - Right-of-Way
 Department of Highways
 Box 589
 Douglas, Alaska 99824

DATE: June 29, 1976

FILE NO:

TELEPHONE NO. 279-4568

FROM Richard P. Kerns, AAG
 Chief, Highway Section
 Anchorage AGO

SUBJECT: Incidental Business
 R/W Acquisition

As a result of "Kito's Kave" -- Alaska Supreme Court Opinion No. 1268, May 24, 1976, -- temporary loss of profits by a business during relocation as a direct result of a taking of property are compensable.

Initially, the adoption of what was formally a minority view as the law gives rise to much wailing and moaning and gnashing of teeth...and much speculation as to the extent of its application... with a tendency to predict the worst.

The purpose of this memo is to urge calm and restraint. Kito is no authority for including every possible injury to a business, real or imagined, in the State's appraisals of a property for acquisition. Nor is it authority for the proposition that every detrimental effect that a new highway, or change in an existing one, may have on a business will give rise to a good cause of action.

It should be borne in mind that business losses are compensable only as a damage incidental to a direct taking of property to which the business was directly associated. Compensation for loss of profits should only be paid upon the best proof available, to wit; and audit of the books showing a history of profit. As an exception to the general rule in condemnation that neither party has the burden of proof, the owner has the burden of proving the extent of his lost profits. Also, the owner would be expected to make reasonable efforts to keep his losses to minimum. Obviously, the more time he has to locate and prepare a new location the longer he can keep his business open. In this connection, businesses should be given priority in the acquisition process. Negotiators particularly should be alert to the hazard on the primrose path and urged to submit the parcel promptly for condemnation since that action starts the legal clock ticking. I would suggest as a general rule of thumb that negotiations prior to legal action be limited to 60 days unless there is a firm, binding agreement leading to settlement by then.

The owner should also mitigate his damages by utilizing the administrative procedures for the relief available to him under the Relocation Assistance Act.

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RIGHT OF WAY DIVISION

Jack T. Bodine
Re: Incidental Business Change -
R/W Acquisition

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I would recommend this procedure:

1. Continue to have appraisals made as you have in the past; that is, without regard to possible business damage.
2. Consider the matter of loss of profits due to temporary disruption after the length of the disruption is known or can be reasonably estimated, and only when the owner can show proof of such loss.
3. Consider no other incidental business losses except the type of loss specifically allowed in Kito. If Kito is to be enlarged it should be on a case by case basis by the Supreme Court, not by State employees trying to out-distance the Court.

RPK/smk

cc: Ray C. Preston
Ross Kopperud
Jack Cookman
Donald E. Beitinger