

September 18, 2020

Via Email & Certified Mail Return Receipt Requested

Hon. Kate Brown
Office of the Governor
State of Oregon
State Capitol Building
900 Court Street NE
Salem, Oregon 97301
Email: kate.brown@oregon.gov
Assistant: genevieve.j.ziebell@oregon.gov

Katy Coba
State Chief Operating Officer and DAS Director
Department of Administrative Services
Executive Building
155 Cottage Street NE
Salem, OR 97301
Email: katy.coba@oregon.gov

Re: *Oregon Rule of Civil Procedure 32H Notice of Class Action and Demand for Correction regarding taking of property by operation of Executive Order 20-12 and Notice of Tort Claim*

Dear Governor Brown and Director Coba:

I represent North Bend Lanes, Inc., Blush Salon & Spa, Inc., and Wilsonville Family Fun Center, LLP who are among the categories of businesses listed on pg. 2 of this letter which were closed by operation of Section 2 of your Executive Order 20-12 and which have suffered such extensive losses that they either closed or require their owners to supply significant additional capital to continue in business as a consequence of your actions.

Many of these once vibrant enterprises which provided employment to many Oregonians and paid taxes to various units of government are now on the verge of economic collapse. As potential class representatives, my clients hereby provide 30 days' notice of their intent to file a class action against you and the State of Oregon for compensation due them (and all others similarly situated) pursuant to ORS 401.192(3).

We are mindful that as Governor, you had hard choices to make at the onset of the COVID-19 crisis. On March 8, 2020, your Executive Order 20-03 set forth many of your reasons underlying your Declaration of Emergency and made clear that the choices you were to make thereafter were for the purpose of insuring that the state was fully prepared to address the emergency – in other words, for a public purpose. The Executive Order also made clear that you were not exercising your authority under Article X-A of the Constitution, but rather, pursuant to ORS Chapter 401. You thereupon followed up with a number of additional executive orders in furtherance of that authority.

One of those orders, Executive Order 20-12 (the “Stay at Home Order”), was issued on March 23, 2020 and required individuals, to the maximum extent possible, to stay at home and refrain from patronizing businesses which were closed pursuant to Section 2 of that order. The Order required social distancing when frequenting other types of businesses like grocery stores, healthcare, pharmacies, and businesses not referenced in Section 2.

Although many other types of businesses were permitted to remain open, subject to social distancing guidelines, those businesses specified categorically in Section 2 were closed summarily with no opportunity to illustrate how they could safely operate under similar conditions imposed on other types of business enterprises. The types of businesses which my clients represent and which were forced to shut down summarily include:

- Amusement Parks
- Aquariums
- Arcades
- Art galleries
- Barber shops and hair salons
- Bowling alleys
- Cosmetic stores
- Dance studios
- Esthetician practices
- Fraternal organization facilities
- Furniture stores
- Gyms and fitness studios
- Hookah Bars
- Indoor and Outdoor Malls
- Indoor party places
- Jewelry shops and boutiques
- Medical spas
- Facial spas
- Day spas
- Non-Medical massage therapy services

- Museums
- Nail and tanning salons
- Non-tribal card rooms
- Skating rinks
- Senior activity centers
- Ski resorts
- Social and private clubs
- Tattoo/piercing parlors
- Tennis clubs
- Theaters
- Yoga studios and
- Youth clubs

Most of these are businesses regulated (and in many cases licensed) by various state boards and commissions which are in possession of their mailing addresses and are therefore especially amenable to class certification.

As a result of your orders, my clients and many other businesses like theirs closed as ordered and thousands of workers found themselves without employment. The state has addressed the unemployment created as a consequence of your orders by, at least theoretically, providing unemployment compensation to most displaced workers. And although your Executive Order 20-08 closed public schools, you were careful to require the schools to maintain paychecks for their public employees in Section 4(e) of that Executive Order. As for state workers, you have never exercised your allotment authority pursuant to ORS 291.232 et seq. and they continue to benefit from their compensation packages notwithstanding absence from their workplaces. For each of these categories of persons who have been affected by your orders, you have taken care to provide for at least some level of compensation for the disruptions to their livelihoods.

Unfortunately, that has not been the case for the owners of the thousands of local business enterprises you closed down pursuant to Section 2 of the Stay at Home Order. These small business persons were left to fend for themselves. Although some were able to avail themselves of temporary federal assistance, many lost business goodwill and value of their enterprises. For them, the effect of the Stay at Home Order deprived them of their property for a public purpose.

For the reasons that follow, you must provide a plan to compensate them for their losses.

Section 2 of the Stay at Home Order is based, in part, on ORS 401.188(1) to (3). ORS 401.192(3) addresses the right to compensation in cases like this where the Governor's authority is derived from ORS 401.188.

401.192 Effect of rules and orders during emergency; scope; effect; termination.

(1) All rules and orders issued under authority conferred by ORS 401.165 to 401.236 shall have the full force and effect of law both during and after the declaration of a state of emergency. All existing laws, ordinances, rules and orders inconsistent with ORS 401.165 to 401.236 shall be inoperative during the period of time and to the extent such inconsistencies exist.

(2) The authority exercised under ORS 401.165 to 401.236 may be exercised with respect to the entire territory over which the Governor has jurisdiction, or to any specified part thereof.

(3) When real or personal property is taken under power granted by ORS 401.188, the owner of the property shall be entitled to reasonable compensation from the state.

(4) The powers granted to the Governor by ORS 401.165 to 401.236 shall continue until termination of the state of emergency. The powers granted to the Governor by ORS 401.185 may continue beyond the termination of the state of emergency and shall be terminated by proclamation of the Governor or by joint resolution of the Legislative Assembly. [Emphasis added]

As you are aware, the Oregon Supreme Court recently confirmed your authority to take many of the actions noted above. *Elkhorn Baptist Church v. Brown*, 366 Or 506 (2020). In the course of doing so, the Supreme Court acknowledged that the restrictions imposed by your orders have had “substantial consequences for individuals and entire economies.” 366 Or at 509. The Court further noted that you, as Governor, issued the Orders pursuant to ORS Ch. 401. *Id* at 511. The Court held that you issued Executive Order 20-03 pursuant to ORS 401.165 which allowed you to declare a state of emergency, *Id* at 512, and that your powers included those mentioned in ORS 401.168 through 401.198. *Id* at 513.

The Court agreed that “the restrictions imposed by the Governor’s executive orders have had undeniable cost. Businesses have been shuttered and jobs have been lost.” *Id* at 515.

At issue in the *Elkhorn* case was the interplay between Ch. 401 and Ch. 433. The Court resolved those issues by examining text, context, related statutes and the statutory framework within which the statute was enacted and then any relevant legislative history, *id* at 522 et seq, and said “[w]hen multiple statutory provisions are at issue in a case, this court, if possible, must construe those statutes in a manner that will give effect to all of them ... We are to avoid a construction that creates a conflict or renders one statute ineffective.” *Id* at 523.

We believe that as a consequence, ORS 401.192(3) requiring compensation for Emergency Orders that take real or personal property must be construed so as to mean something more than a general restatement of the Constitutional protections which apply to general takings outside the circumstances of public emergencies. The legislative history of the compensation statute dates back to the Cold War and shows that legislators, at the time of adoption, made a purposeful election to require the state to compensate private parties for loss of real or personal property which they might suffer as a result of the Governor exercising this executive authority even in time of war. This is notable since general takings jurisprudence often carves an exception for emergency actions. No such exception is provided here.

Finally, “ORS 401.188(2) authorizes you to ‘issue, amend and enforce rules and orders’ to ‘[p]rescribe and direct activities in connection with the use***of materials, services and facilities, including***health and medical care[,]***education[,]***and other essential civil needs.” [ellipses in quote]. *Id* at 525. This is the statute that you reference as authority for Executive Order 20-12 and that triggers ORS 401.192(3) if its exercise results in taking personal or real property. Also, “ORS 401.192(1) provides, ‘All existing laws, ordinances, rules and orders inconsistent with ORS 401.165 to 401.236 shall be inoperative during the period of time and to the extent such inconsistencies exist.’” *Id* at 527. It is therefore apparent that ORS 401.192(3) requires the state to establish a system of compensation for my clients and the proposed class members they represent.

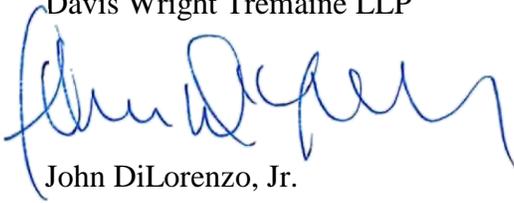
Pursuant to ORCP 32H(1)(b)¹, we therefore demand that the State correct these wrongs and make available reasonable compensation for the loss of property which these business owners and all others similarly situated throughout the state have suffered as a consequence of your Orders. We wish to make clear that we do not challenge your statutory right to have issued your Executive Orders, nor do we wish to second guess whether doing so was an appropriate response to the COVID-19 crisis. We do wish to point out that whereas you have taken care to provide some level of financial compensation to many affected Oregonians, you have failed to do so for the small business community which we consider to be the backbone of our state’s economy. We invite you to contact us concerning your plans to provide my clients (and the class of claimants they represent) with the relief to which they are entitled and are willing to constructively collaborate if you are of a mind to attempt to address this issue without resort to litigation.

¹ My clients do not consider your failure to provide compensation to be tantamount to a “tort.” However, as a precaution, please also consider this letter as formal notice of their (and the proposed class members) potential tort claims pursuant to ORS 30.275(4) which is provided to you within 180 days of the alleged injury. For the purposes of ORS 30.275(4)(c) the mailing address to which correspondence concerning the claims may be sent is Suite 2400, 1300 SW Fifth Avenue, Portland, Oregon, 97201.

Gov. Kate Brown
Dir. Katy Coba
September 18, 2020
Page 6

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in blue ink, appearing to read "John DiLorenzo, Jr.", written in a cursive style.

John DiLorenzo, Jr.

JAD/mq
cc: Clients
Interested Parties