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Can State and Local Government Seize Your Private Property During a Global Pandemic?

Hotels, parking lots, convention centers and sports fields throughout the world are being used as field hospitals and to otherwise house people suffering from the effects of COVID-19. For example, one hotel in Hong Kong has designated entire floors of the hotel for quarantined guests, and at least 11 hotels in South Korea will house quarantined guests. Given the rapid increase in COVID-19 cases in the United States, many state and local governments are weighing similar measures. In San Francisco, city officials have identified more than 8,000 hotel rooms that could possibly be used for individuals who need a place to self-isolate. These state and local governments are considering the use of private property such as hotels, lodges, apartments and other related facilities as makeshift hospitals, quarantine facilities or housing for first responders to cope with the strain on critical infrastructure. This client alert examines the legal issues around such use.

Do State and Local Governments Have the Authority to Use Your Property During a Global Pandemic?

Generally speaking, state and local governments have the authority to regulate matters of local concern to protect the health, safety and welfare of their populations. These powers, known as police powers, are reserved to the states by the 10th Amendment to the United States Constitution. Likewise, state and local governments have the power of eminent domain to take personal property for public use so long as property owners are justly and fairly compensated in accordance with the Takings Clause of the Fifth and 14th Amendments.

Thus, state and local governments' authority to commandeer private property during a global pandemic can be broken down into two interrelated categories: (1) the authority of state and local governments to use their police powers to regulate to prevent the spread of disease, and (2) the authority of state and local governments to use their power of eminent domain to take private property for protection of the public.

In some instances, the authority of states, counties and municipalities to impose regulations to take control of property as part of efforts to contain the spread of epidemic disease is express. For example, in Colorado, the Colorado Department of Public Health and Environment may "exercise . . . physical control over property and the persons of the people within [Colorado] as the department may find necessary for the protection of the public health." C.R.S. § 25-1.5-102(1)(c).

Similarly, in California, the State Department of Health Services may "take measures as are necessary to ascertain the nature of the disease and prevent its spread." Cal. Health & Safety Code § 120140. Even more expressly, under the California Emergency Services Act, the governor is authorized to commandeer or use any private property or personnel deemed necessary in the exercise of emergency powers during a state of war or state of emergency. The state must pay the reasonable value of the private property or personnel commandeered. Cal. Gov. Code §8572.

Therefore, through the exercise of the police powers and the power of eminent domain, state and

local governments do have the authority to use hotels, lodges, apartments, parking lots, convention centers, sports fields and other related facilities as makeshift hospitals, quarantine facilities or housing for first responders during the outbreak of COVID-19.

What Rights Do You Have When Your State or Local Government Takes Your Property?

Even though state and local governments have the authority to use private property as makeshift hospitals, quarantine facilities or housing for first responders, your property rights are protected by the United States Constitution, state constitutions and, in some cases, local governments' municipal codes. The United States Constitution and many state constitutions require state or local governments that take property to pay the property owner just compensation, typically the fair market value of the use of the property. Compensation may be available whether the government takes property permanently or temporarily.

Private property is protected under the Takings Clause of the Fifth Amendment, which applies to the states by the 14th Amendment. The Takings Clause states, "… nor shall private property be taken without just compensation." As a general rule, government need not pay the owner when restricting the public from access to or use of dangerous property, since the property is considered a public nuisance. For example, if a public health agency declared a contaminated meth house a public nuisance, the agency would not have to pay the owner. Similarly, state and local government business shutdowns likely do not trigger the right to compensation under the Takings Clause.

Conversely, government must pay the owner fair market value of the use of the property if the property is seized for public use. Here, in a pandemic scenario, a hotel might be used as a quarantine facility. If the hotel owner can demonstrate lost revenue due to the government's use, the owner may be able to recover the income lost from having no hotel guests during the quarantine.

Consequently, if a state or local government uses your hotel, lodge, apartment, parking lot, convention center, sports field or other related facility as a makeshift hospital, quarantine facility or housing for first responders, the Takings Clause likely serves as a backstop for fair and just compensation for the government's use of your property.

What Should You Consider in This Situation?

Because of the Takings Clause, affected property owners may have leverage in negotiations with state and local governments seeking to use their private property. Given this potential leverage, affected property owners may want to focus on two main areas of consideration: (1) compensation and (2) protection against increased liability.

First, property owners may consider engaging state and local governments in discussions regarding just compensation for the use of the property. Assuming that state or local governments' use of the property will end when the outbreak of COVID-19 ends, compensation should reflect the impact of the state or local governments' use of the property, rather than the value of the entire property. Therefore, any conversations with state or local governments should address the reasonable value of the cost incurred by the landowner in connection with the state or local governments' use of the property. Reimbursement for any out-of-pocket costs associated with the state or local governments' use of the property as a makeshift hospital, quarantine facility or housing for first responders also could be discussed as another form of just compensation.

Second, property owners may consider engaging state and local governments regarding protection against increased liability due to state or local governments' use of the property. This is important because the property owner may remain liable for things that occur on its property during

government use, such as a slip-and-fall, because state and local governments have governmental immunity. Thus, if a member of the public were injured on the property in connection with the governmental purpose, the injury could leave the property owner as the sole defendant in a lawsuit. Additionally, in Colorado, government entities may not legally agree to an open-ended indemnity of private property due to TABOR. Therefore, whether in Colorado or another state, it may be advisable to negotiate with the state or local governments to pay for the cost of additional insurance coverage for the affected properties to ensure that the property owner is not left with the obligation to pay liabilities incurred as a result of the government's use of the property.

In sum, the most important considerations for property owners whose hotels, lodges, apartments or other related facilities are used by state or local governments for makeshift hospitals, quarantine facilities or housing for first responders are: (1) discussing compensation for the reasonable value of the use or reimbursement of out-of-pocket costs, and (2) requiring the state or local governments to cover the cost of additional liability insurance to protect the property owner from increased liability due to the governments' use of the property.

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