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Does the Coronavirus Shutdown Trigger a Regulatory Taking? - Nossaman

With the recent government mandates surrounding COVID-19, many businesses are completely shut down and are legally unable to open their doors to the public. Are those businesses — movie theaters, gyms, retail stores, etc. — entitled to compensation for a regulatory taking? Similarly, landlords are experiencing massive losses as those tenants are unable to make rental payments; are those losses compensable? Should governments worry about liability when issuing orders requiring the closure of businesses?

While compensation arguably should be paid from a decency and “good of the community” standpoint, legally, property owners and businesses are likely not entitled to compensation for a taking due to the shutdown. If you’re interested in a fantastic write-up on the legal implications and liability issues under the Takings Clause, I suggest you read Ilya Somin’s article, [Does the Takings Clause Require Compensation for Coronavirus Shutdowns?](#) You can also review Robert Thomas’ summary on [inversecondemnation.com](#) related to [emergency takings and compensation for commandeered property](#).

In summary, under existing legal precedent, the government’s broad exercise of its “police power” — its ability to protect public health and safety — does not qualify as a taking. From a policy standpoint, Ilya Somin points out that

“no judge will want to be seen as impeding an effort to save large numbers of lives in the midst of a grave menace to public health;” and

“the urgency of the crisis combined with the enormous scale of the compensation that would be required make it more likely that an adverse judicial ruling really would impede the government’s policy—potentially even shutting down the shutdown, so to speak.”

On the flipside, from a moral policy perspective, the Fifth Amendment Takings Clause has been meant to ensure that the government does not force some people alone to bear the burdens that should be borne by the public as a whole. And yet that is closely what is happening here, as certain businesses and property owners are bearing a disproportionate share of the burden of protecting the population as a whole.

Perhaps some of these businesses will receive relieve through the government’s stimulus bill, but many may not. Time will tell whether the government continues to look for other economic measures of compensation to assist these businesses and landlords being forced to shut down.

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