

Seizures, Shutdowns and Social Distancing - What are the Limits of the Government's Powers?

By Anthony F. DellaPelle, Esq.

Emergency declarations and executive orders have been entered during the COVID-19 pandemic by the President, many Governors, and others at local and regional levels of government. Of the many Executive Orders issued by Governor Murphy, the ones that likely will have the greatest impact upon the real estate and construction industries include:

Executive Order #103 – activates emergency power “commandeer and utilize” private property

Executive Order #107 – directs all “non-essential” businesses to close and work remotely

Executive Order #113 – activates power to take personal services and/or real or personal property

Executive Order #122 – directs all “non-essential” construction to cease as of 4/10/2020

These orders interfere with property rights and liberties in ways that we have not experienced in our country's history, except perhaps in times of war. Any true emergency may empower government to undertake action(s) that would not be authorized in non-emergent situations. But emergencies do not create government power, nor do they diminish limitations on that power.

Faced with the prospect of more emergency actions and orders in the future, and a possible prolonged state of emergency, how can our citizens measure whether these governmental actions and mandates are, in fact, lawful? To answer this question, we must remind ourselves that *all* government power in our country emanates from

the United States Constitution, *which was written during a state of emergency and because of that state of emergency*. It purposefully established (a) a system of checks and balances with three branches of government, (b) the principal of federalism, which creates and recognizes two sovereign powers, the federal and state governments, and (c) the Bill of Rights which specifies the limitations of the government's powers. The U.S. Constitution imposes these limits by dividing government against itself.

In recognition that laws are made by the legislative branch of government and administered by the executive branch, how can an executive like the President, Governor, regional or county leader, or mayor, therefore sign an “executive order” which authorizes the government to seize or “commandeer” private property, or to “shut down” certain businesses and liberties and not others? The order needs to be authorized by legislation to be lawful. President Trump's March 12 emergency declaration refers to the powers created by Congress in 1988 legislation known as the Stafford Act, and his declaration administers those powers, mainly through the Federal Emergency Management Agency. Similarly, Governor Murphy's executive orders authorize emergency seizures based upon existing legislation – the N.J. Civil Defense and Disaster Control Act, *N.J.S.A. App. A:9:51*.

But when does an executive order, apparently authorized by legislation, go too far? How can a Governor decide which businesses are “non-essential”?

When do the government's actions, presumably undertaken under its police powers to protect the health and safety of its citizens, rise to the level of a compensable taking of private property, entitling the owner to just compensation which is guaranteed by the Constitution? While shutdown orders on properties such as golf courses and beaches have already been upheld by courts in Pennsylvania and Florida, a federal lawsuit challenging Mississippi's shut down of a church's “drive through” religious services has caused the U.S. Justice Department to intervene, suggesting that restriction on the First Amendment rights of the congregants may have gone too far. Ultimately, courts will be asked to weigh the relative harm caused by the orders against the public health and safety benefits provided.

The limits of executive power or legislative power *are supposed to be* reviewed by our courts. While courts generally give deference to government actions, and are likely to give greater deference to government actions undertaken during emergencies, if the actions violate other Constitutionally-guaranteed rights, the checks and balances should provide Americans with some assurance that the violation of their rights, even during our state of emergency, can be reviewed by our courts. And although individual rights may be deprived during the state of emergency, hopefully that deprivation will not be lengthy, will not cause irreparable harm, and where the deprivation is unlawful, the deprived party can seek protection from our judiciary in order to determine whether it is entitled to a viable remedy at law or in equity.

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