

# **COVID-19 Orders Unlikely To Constitute Temporary Takings**

By **Gene Tanaka** and **Emily Chaidez** (July 2, 2020)

The COVID-19 pandemic is an unprecedented modern public health and economic crisis that has resulted in extraordinary governmental responses. Since March, numerous states, cities and counties throughout the nation have issued orders to protect the health and safety of everyone and to slow community spread of the virus. These orders are wide-ranging and broadly encompass many topics, industries and individuals.

Have public agencies' responses crossed the line into temporary takings requiring compensation by the government? Probably not. The high hurdles for temporary takings claims, coupled with the expanded police powers granted governments in public health emergencies, likely protect public agencies from most claims.

## **Local COVID-19 Regulations**

### ***Eviction and Foreclosure Moratoria***

In California, Gov. Gavin Newsom issued Executive Order N-28-20 on March 16, which expands protections against residential eviction and reduces limits on local governments' ability to impose their own substantive limitations on residential or commercial evictions through May 31.



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On March 27, Newsom issued Executive Order N-37-20, imposing a statewide moratorium on evictions, also through May 31.

On May 29, he signed Executive Order N-66-20 extending the protections and limits of Executive Order N-28-20 to July 28. No extension has been issued for Executive Order N-37-20. New York, Connecticut, Washington, Oregon, Michigan, North Carolina, Arizona and many other states issued similar orders.

Many cities imposed their own eviction moratoria that closely mirror the language used in Newsom's orders. Many of these local eviction moratoria were also extended beyond May 31. Some cities also instituted a freeze on annual rent increases, while others prepared procedures to resolve landlord/tenant disputes regarding nonpayment of rent because of the financial hardships from the COVID-19 pandemic.

Typically, these restrictions allow a landlord to recover any unpaid rent within a year of the end of the moratoria. The California Legislature is also in the process of considering numerous bills to codify eviction moratoria and other tenant and homeowner protections.[1]

### ***Regulation of Nonessential Businesses***

States, counties and cities also issued executive orders commonly referred to as the stay-at-home or shelter-in-place orders. Typically, these orders direct residents to stay home until further notice, except for workers in critical essential infrastructure sectors such as gas stations, pharmacies, grocery stores, banks, laundromats and take-out or delivery-only restaurants.

They often close nonessential businesses, including on-site dining for restaurants, indoor malls, shopping centers, flea markets and swap meets, childcare facilities and playgrounds, golf courses, beaches and beach access points, bowling alleys, movie theaters, gyms and fitness centers and more. Some cities also restricted the use or availability of short-term vacation rentals, whether commercial or through services such as Airbnb or VRBO.

Although nonessential businesses have now begun to open on a limited basis in some areas, some public parking lots remain closed, and social distancing orders are still in effect, which limit business.

### **Are the Local COVID-19 Regulations a Government Taking?**

In these difficult times, landlords and certain businesses may claim that the orders constitute a taking of their property by the government without just compensation because they are or were deprived of economically viable use of their property. The following analysis may help cities and counties assess their exposure.

#### ***The Test for Temporary Takings***

When the government adopts a temporary regulation denying all viable economic use of property, the takings consideration is decided by the factors enunciated in *Penn Central Transportation Co. v. City of New York*.<sup>[2]</sup> There is no taking when a temporary restriction simply causes a diminution in value — as opposed to a denial of all viable economic use of the property — because the property will recover value as soon as the prohibition is lifted.<sup>[3]</sup>

When a temporary moratorium or closure denies all viable economic use of the property, the question whether it effects a taking in a particular case requires a careful factual inquiry into the following Penn Central factors:

- The regulation's economic impact on the property owner;
  
- The extent to which the regulation interferes with distinct investment-backed expectations; and
  
- The character of the government action.

In *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, the U.S. Supreme Court held that a 32-month moratorium on development pending the preparation and adoption of a comprehensive land use plan is not a regulatory taking since development could occur at some point.

Under *Tahoe-Sierra*, where a government adopts a temporary regulation denying all viable economic use of property, the takings analysis is to be determined by using the Penn Central factors.<sup>[4]</sup> To determine economic impact, the court compared the value taken from the property with the value that remains in the property.<sup>[5]</sup> As stated by the court, a

property "cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."<sup>[6]</sup>

### **Emergency and Police Power Exception**

Challenges to the COVID-19 regulations must also overcome long-standing case law that recognizes an emergency exception to constitutional claims arising from a public agency's police power. As stated by the U.S. Supreme Court more than 100 years ago in a case concerning compulsory vaccination during a smallpox epidemic:

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.<sup>[7]</sup>

Jacobson has already been applied to the present crisis. In April 2020, the U.S. Court of Appeals for the Fifth Circuit found that the district court erred by declining to apply Jacobson to a COVID-19 health directive restricting certain nonemergency medical procedures and upheld the directive against a due process and equal protection challenge by abortion providers.<sup>[8]</sup>

As stated by the Fifth Circuit:

[I]ndividual rights secured by the Constitution do not disappear during a public health crisis, but the [Jacobson] Court plainly stated that rights could be reasonably restricted during those times" and review of a statute enacted in the name of public health, morals or safety is only available when it "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights.<sup>[9]</sup>

Other courts considering emergency curfews that curtailed constitutional rights have articulated a slightly different, but equally deferential test during emergencies:

[T]he scope of review is ... limited to ... determin[ing] whether [state] actions were taken in good faith and whether there is some factual basis" for them.<sup>[10]</sup>

Here, most of the orders were indisputably issued to further public safety and health pursuant to the government's police powers and the declaration of a state of emergency in response to the COVID-19 pandemic. This will be an important defense to consider should any property owner pursue a takings claim for inverse condemnation pursuant to the orders or their effects.

### **Application of Temporary Takings Jurisprudence to COVID-19 Regulations**

#### ***Landlords and Vacation Rentals***

The economic effect of a temporary eviction moratorium on a landlord is potentially great since it disproportionately burdens the landlord's ability to receive rent payments during the moratorium. However, since many of the eviction and rent increase restrictions only suspend evictions and defer rent obligations, these landlords are not deprived of all economically viable use during the moratorium period. Therefore, this Penn Central factor does not support a takings finding.

Similarly, a property owner will face an uphill battle under Penn Central to show that short-term vacation rental restrictions have deprived the owner of all economically viable use of the property. Although the restrictions may prevent some rentals, they may not prevent all rentals. Also, travel restrictions and the desire of many customers to stay home may be superseding factors.

The last factor, the character of the governmental action, also does not favor a takings finding. While the direct nexus between eviction and rent restrictions and slowing the spread of COVID-19 may be tangential, evictions or rent increases could increase homelessness, which would conflict with efforts to implement self-quarantining and social distancing necessary to slow the spread of COVID-19.

### ***Nonessential Business Interests***

Takings claims by nonessential businesses also face difficult challenges. Restaurants and food facilities that could adjust their business operations to offer delivery, pick-up or drive-thru service have not lost all economically viable use of their property under Penn Central.

On the other hand, many other nonessential businesses, such as dine-in-only restaurants, bars, nightclubs, entertainment venues, gyms, convention centers, and hair and nail salons had to close completely during the period of the applicable orders. These business owners have a stronger argument that the temporary moratorium has denied them all economically viable use of their property. Nevertheless, under Tahoe-Sierra, if some of their business may be recouped after the orders are lifted, they will be hard pressed to prove a temporary takings claim.

As for the character of the governmental action under Penn Central, health expert recommendations and data showing the benefits of social distancing strongly support the nexus between the temporary business closures and preventing infections from COVID-19. Therefore, it is unlikely this factor will support a takings finding.

As discussed above, any temporary takings analysis of COVID-19 orders must consider the context in which they were issued. The unfolding health disaster and economic crises provide strong justification for any COVID-19 orders that might help stem the harm. Case law provides ample legal justification for these measures, and imposes substantial barriers to a temporary takings claim based on those orders.

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[1] (See e.g., SB 939, AB 828, SB 1410, AB 2501 and AB 2406).

[2] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

[3] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002).

[4] Id. at 303.

[5] Id. at 328-29.

[6] Id. at 332.

[7] Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 29 (1905).

[8] In re Abbott, 954 F.3d 772, 783 (5th Cir. 2020).

[9] Id. at 784 (emphasis in original).

[10] Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) (upholding post-hurricane curfew against constitutional challenge and noting that "[i]n an emergency situation, fundamental rights . . . may be temporarily limited or suspended"), abrogated on other grounds by, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93-94 (1998); United States v. Chalk, 441 F.2d 1277, 1281 (4th Cir. 1971) (same, as to riot-induced curfew).