

# Can Governments Commandeer Your Property During COVID-19? California Says Yes

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**Alexandra D. Blye**



**David A. Karp**



**Johanna B. Talcott**



**Henry S. Wulf**

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California this month became the first state to declare a right to commandeer private property to combat the spread of COVID-19. Other states and localities are considering similar emergency measures to take over hospital beds, and even hotel rooms, to quarantine or treat COVID-19 patients, and house vulnerable populations, including the homeless.

Can governments do this? And if so, must they fairly compensate businesses for taking over their private property to benefit the public or prevent public harm?

There are no simple legal answers, but the public health crisis does not necessarily set up a conflict between government and private property owners in every instance. Already, governments and businesses are negotiating agreements to use private property in this crisis without imposing undue economic burdens on businesses. Governments want to not only stop the spread of COVID-19 but also dampen any economic hardship the virus may cause.

Litigation to stop such emergency measures under the states' police powers would be an uphill battle. Courts have long recognized a "public necessity" exception to the Takings Clause in the U.S. Constitution, leaving no recourse for owners whose property is damaged or destroyed for the public use in a time of urgent necessity. Supreme Court precedent requires "an actual emergency with immediate and impending danger" to support a necessity defense. *See TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1379 (Fed. Cir. 2013).

But even if an emergency measure survives constitutional scrutiny, many states, including California and Florida, have passed statutes or constitutional provisions to require governments to pay for taking private property during an emergency.

Consider California's executive order N-25-20, issued by Gov. Gavin Newsom on March 12, 2020. The executive order allows the state to use its "power to commandeer property" to make hotels, medical facilities, and other temporary residences available to quarantine and treat people who test positive for COVID-19, have had a high-risk exposure to the virus, or may be in the incubation period. The emergency powers vested in Gov. Newsom under California Government Code section 8572 require California to "pay the reasonable value" for commandeering or using private property during an emergency.

Other states have similar statutes. For example, Connecticut law allows the governor to take possession of any land or building during a public health emergency, although the owner of the taken property must receive "just compensation" in many circumstances. *See Conn. Gen. Stat. Ann. § 28-11*. Similarly, Florida law requires compensation for property takings "if the property was commandeered" or used to cope with an emergency under an order from the governor or other member of the state's emergency forces; provided the "claimant may not be deemed to have volunteered her or his ... property without compensation and only to the extent that such taking exceeds the legal responsibility of a claimant to ... make such property so available." *See Fla. Stat. § 252.43(1), (3)*. Such compensation is calculated in the same manner as compensation under Florida's condemnation laws. *See Fla. Stat. § 252.43(5)*; *see also Fla. Const. art. X, § 6*.

But such laws do not guarantee compensation in emergency cases. Some courts have interpreted state laws to apply only to “takings” outside the exercise of the state’s police powers. California’s Sixth District Court of Appeal found that insurers were not entitled to compensation under the “reasonable value” provision of the Emergency Services Act for paint damage to thousands of automobiles caused by California’s widespread aerial spraying to eradicate Mediterranean fruit flies. See *Farmers Ins. Exchange v. State of Cal.*, 221 Cal. Rptr. 225, 229 (Cal. Ct. App. 1985). The court also found that the state was immune to suit under theories such as trespass and nuisance.

Even where state law mandates compensation for a taking, a private property owner may face a lengthy legal battle to obtain and enforce such an award. After Florida destroyed thousands of citrus trees in an effort to curb the spread of citrus canker in the early 2000s, it took citrus tree owners years to obtain judgments awarding them millions of dollars in compensation for the loss of their healthy trees. Enforcement of those judgments took several more years of complex litigation until citrus tree owners finally began collecting compensation in 2019 — 18 years after the last canker crisis began.

Where property owners and state governments can reach an agreement for compensation, the outcome may ultimately benefit both parties. California’s recent executive order amid the COVID-19 outbreak allows the state to enter into agreements to pay property owners for the use of their private property for emergency purposes. Shortly after executive order N-25-20 was issued, the state also sought approval from a federal bankruptcy court to enter into agreements with Verity Health System of California Inc. to use shuttering hospital facilities to isolate and treat COVID-19 patients. See *In re Verity Health Sys. of Cal., Inc.*, No. 2:18-bk-20151 (C.D. Cal. Mar. 19, 2020). The state will pay more than \$5 million monthly to ensure space for COVID-19 patents at Seton Medical Center in Daly City and \$2.6 million monthly to lease and reopen St. Vincent Medical Center in Los Angeles, which previously closed. The agreement also provides funds for operational expenses and monthly losses.

Potentially, hotel owners, whose rooms were vacant well before Gov. Newsom issued the executive order, could benefit too. They may be able to negotiate agreements for the state to pay to use empty hotel rooms to house people under quarantine orders.

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