

RETAIL PROPERTIES

Quarterly

Law

Legal limits: Shutdowns, rent issues & distancing

Even before the advent of the COVID-19 pandemic, the retail sector was struggling nationwide, presenting myriad challenges for the commercial real estate sector. Now, the pandemic has accelerated trends toward online shopping and social distancing measures have all but halted physical retail sales. These impacts have been buttressed by government-enacted emergency measures that have forced “nonessential” businesses to shut down, prohibited gatherings of moderate size and even contemplated compulsory rent abatements.

These public health orders at all levels of government have undoubtedly saved lives, yet they come at the expense of business profits, which have dipped or dried up. Consequentially, millions of Americans have been laid off and many are or will be unable to pay rent.

In response, some business owners have called for the end of shutdown orders, while others are advocating government-mandated rent forgiveness on the empty spaces they now cannot utilize. Yet even in a pandemic, all government action still must adhere to certain legal limitations, including those of the Constitution. Even a public health emergency does not create additional powers for government. The legal ramifications of government action taken today likely will echo for many years to come.

■ **Shutdown orders and emergency powers.** The core powers of state and local government include what is commonly called the “police power,” that is, protecting the public health, safety and general welfare. Included



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among these powers is the power to license businesses, but also to declare public emergencies and to shut down those businesses. For example, the Denver municipal code allows the executive director of public health to declare public emergencies and to shut down busi-

nesses. To satisfy legal scrutiny, public health regulations such as these must be rationally related to legitimate governmental interests. In a pandemic, government measures preventing public gatherings in movie theaters, bars or the like generally further the legitimate goal of limiting human-to-human contact that spreads the disease. For this reason, legal challenges to shutdown orders are unlikely to be successful.

However, there are at least two limitations on the government’s ability to liberally regulate in the name of public health. First, once there is no longer an emergency or threat of one, then a shutdown order would likely no longer be rationally related to public health, safety and welfare. Similarly, a shutdown order singling out a protected group, such as a racial minority or a religious organization, likely would fail constitutional scrutiny.

■ **Rent forgiveness: A host of constitutional problems.** While the government is afforded great deference in responding to emergencies, when



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fundamental constitutional rights are involved, that deference dwindles. This statement is no truer than with respect to the right guaranteed by the Fifth Amendment that, where the government takes private property for public use, the owner is entitled to compensation.

Under this provision, a state- or city-enacted rent holiday – where the government limits tenants’ obligations to pay rent required under a lease – so-called “takings” law likely would obligate the government to compensate landlords. Such a measure essentially forces the landowner to permit another party to occupy his or her property without compensation, potentially requiring the government entity that enacts the rent holiday to compensate the landowner for the deprivation in value.

What’s more, rent payment is an obligation in all commercial leases, which in turn are contracts between private parties. A federal constitutional provision known as the “Contracts Clause” provides, “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” The Contracts Clause precludes states from enacting laws that substantially impair a private party’s rights under an existing contract. A contract is “impaired” when a law releases a contractual obligation or renders it invalid. In order to survive legal

review, such an impairment must serve a significant and legitimate public purpose, with means reasonably related to achieving that purpose.

A law releasing tenants from contractual obligations to pay rent would implicate the Contracts Clause, likely substantially. While the preservation of public health is likely a legitimate public purpose, it is questionable whether a rent holiday would be related to that goal. That said, the police power may, at times, justify the impairment of contract rights. Individual leases would need to be examined to determine whether specific lease provisions impact this analysis.

■ **Freedom of assembly: Can we gather?** Another legal principle likely affected by government shutdown orders is the right under the First Amendment to assemble or associate with others. Early challenges to shutdown orders on these grounds have been initiated by religious organizations. Courts have rebuffed these challenges on the grounds that shutdown orders and social distancing further the compelling governmental interests of protecting public health. Thus, it is unlikely that the First Amendment will bar these measures.

Constitutional protections are at their greatest importance during emergency situations. While public health issues are of utmost importance today, landowners should be sure to understand the limitations on the government’s infringement of property rights. ▲