

Public Health Emergency Law

A Foundational Course for
Front-Line Practitioners

Management of Property

*Based on the Course Developed by
U.S. Centers for Disease Control and Prevention*

Disclaimer

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Objectives

By the end of this unit, participants will be able to:

1. Identify legal options available to manage contaminated private property in emergencies
2. Understand key legal issues regarding control of supplies and equipment
3. Identify legal options available to use private facilities in emergencies

Objective 1

Identify Legal Options Available to
Manage Private Property in
Emergencies

Legal Foundations

- U.S. Constitution, 5th Amendment:
 - “. . . nor shall private property be taken for public use, without just compensation”
- Connecticut Constitution, Article First, Sec. 11
 - The property of no person shall be taken for public use, without just compensation therefor.
- Connecticut Case – Catalyst for national debate
 - Kelo v. New London, U.S. Supreme Court, 2005
 - Public/private use distinction – states enacted limitations
 - Process is an important consideration – Connecticut created ombudsman procedure to assist persons in takings cases

Perspective

This can be a sensitive topic:

Obtaining consent for managing the use of property is almost always superior to exercise of extraordinary emergency powers over property (Q: how do we promote consent?)

Even *discussion* about government's taking of property can be sensitive when there is *no* current emergency (Q: how do we educate?)

Advantages of Consent: Management of Property

- Principle: *Our nation is built on respect for private management of property*
 - Seizure of property is controversial and reserved for cases of true need
- Management:
 - The more complex the facility, the more difficult is operation without active cooperation of private managers
- Leverage Social Cohesion:
 - Cooperation is critical in emergencies
 - Volunteers want to help & social cohesion

Property Measures: Legal Dichotomy

Access Control vs. Use

- Property management considerations relevant to public health emergencies in two basic ways:
 - **Access Control:** Government may need to close, confiscate, deny access to, evacuate people from, prevent sale or use of real or personal property because unsafe, or for police activity
 - **Use:** Government may need to use private property in order to respond to emergency
- The law treats **access control** measures to protect public health and safety very differently than **use** measures

Property Measures: Legal Tension

- **Access Control:** Government is empowered under police power doctrine to regulate private use of private property to protect public from unsafe conditions
- **Use:** Government must pay for the property that it uses (permanent/temporary) for a public purpose
- **Conn:** statutory process in place for unilateral governmental use of real estate and personal property, valuation and dispute resolution including temporary and permanent use payments, property return and disposition.

Do Legal Hurdles Exist?

- Potential hurdles to voluntary citizen cooperation in state use of private property (real and personal property):
 - Personal risk of exposure to disease or danger;
 - Separation from family for facility operators;
 - Adverse financial impacts (short/long term);
 - Uncertainty of process or standards for compensation
 - Query: are those who cooperate in making property available without objection disadvantaged or barred from receiving compensation?
- The more certain equitable treatment by the state for the public good, the more likely the level of cooperation

Management of Property: Closing Facilities

The state or local health department can close a facility or impound contaminated property by:

- Issuing administrative public health orders
 - To close restaurants for unsanitary conditions
- Using general legal powers to control epidemics or determination that there is a public nuisance
 - Same powers used to condemn a property as unsafe after fire, earthquake, storm damage

Until the public health investigation is concluded and the problem or exposure is resolved

Temporary Closure of Facilities: Police Power Doctrine

In addition to “public health” powers, state and local law enforcement can require temporary closure of facilities:

- As unsafe, for as long as the facility may endanger the public
- For purposes of criminal investigation

Temporary Closure of Facilities: Property Rights Under Police Powers

- Compensation is generally **not** provided to close property under police power
- Owner can challenge the closing in court
 - Damages to property owner could be awarded if the closing is shown to be unjustifiable

Management of Private Property: Closing Part of a Facility

Closure or condemnation may be for only part of the business or facility's operations or supplies

- *Public health is required to monitor the facility for safe operations during the public health order*

Reopening a Facility Closed for Public Health Purposes

- Agency that issued the closure order:
 - Determines the facility no longer poses a threat to public health and determines the situation is “safe” or “acceptable”
 - Issues an administrative order rescinding the closure order
- Note: multiple agencies may have role
 - U.S. or State DEP in case of certain contaminants
 - Responsibility for decontamination?

State Management Contaminated/Infectious/Dangerous Property

Normal, “non-emergency” state and local powers remain available:

- Adulteration of foodstuffs
- Safety of agricultural products
- Drug safety
- Agricultural control
- Chemicals and toxic substances
- Abatement of nuisances at common law

Management of Private Property: Impounding Unsafe Foods

- Connecticut Examples:

“Whenever [the Commissioner of Consumer Protection] “finds in any room, building, vehicle of transportation, or other structure, any meat, seafood, poultry, vegetable, fruit or other perishable article which is unsound, or contains any filthy, decomposed or putrid substance, or that may be poisonous or deleterious to health or otherwise unsafe, [he] shall condemn or destroy the same, or in any other manner render the same unsalable as a human food.” CGS 21a-96(j).

Federal Powers

- Protection of Food Stuffs
 - FDA: *Federal Food, Drug and Cosmetic Act*
 - USDA: *Federal Meat Inspection Act; Animal Health Act*
 - EPA: *Federal Insecticide, Fungicide, and Rodenticide Act*
 - HHS/CDC: *Public Health Service Act*
 - DHS: *Food and Agricultural Coordinating Council*
- Environmental Remediation Laws
 - Superfund powers (CERCLA) for clean-up of contaminated sites
 - Anthrax cleanup from Hart Senate Office Building in 2001 is an example

Compensation for Impounded Damaged or Destroyed Facilities

- In most epidemic control operations, condemnation of contaminated property (e.g., food) does not result in compensation
- Cooperation of property owner can frequently be obtained, such as well-publicized cases of recalls of:
 - Tylenol
 - Contaminated ground beef
- Bad publicity associated with non-cooperation is a greater commercial liability than is loss of property through voluntary action

Emergency Use of Health Care Facilities: Connecticut Example

Some states have specific provisions covering use of health care facilities in emergencies; in contrast, Connecticut law enumerates broad powers that cover health care facilities along with other real and personal property.

- *The Governor may “...take possession (1) of any land or buildings, machinery or equipment...for the better protection of the welfare of the state or its inhabitants...”*
- *The Governor “may use and employ all property of which possession is taken for such times and in such manner as he deems for the best interests of the state or its inhabitants...”*

Emergency Use of Personal Property Connecticut Example

Connecticut law covers any materials required during an emergency

- *The Governor may “take possession ...*
 - (2) of any horses, vehicles, motor vehicles, aircraft, ships, boats, or any other means of conveyance...*
 - (3) of any antitoxins, pharmaceutical products, vaccines or other biological products and*
 - (4)...or any provisions for persons or beast, and any fuel, gasoline...for the better protection of the state or its inhabitants...*

Emergency Use of Private Facilities: Government Roles

- In situations of mass trauma, illness or prophylaxis, government role could include:
 - Designating existing facilities for alternative functions
 - Identifying/supplying new, temporary facilities using outside, emergency supplies and staff
 - Identifying and certifying volunteer staff, e.g., nurses and doctors
 - Suspending selected existing regulations
- Could require executive orders by Governor or other emergency powers

Objective 2

Understand Key Legal Issues
Regarding Control of Supplies
and Equipment

Emergency Reallocation of Resources

State Powers

All states have powers to reallocate resources in emergencies. The Governor in Connecticut may declare a supply emergency. Key issues with respect to controlling supplies include:

- Is an emergency declaration needed?
- Are executive orders by the Governor required?
- Are provisions required for alternate, new supplies from the manufacturer or suppliers?
- How does the government identify the location of such supplies?

Management of Private Facilities

Key Issues: Other Federal Powers:

Defense Production Act (DPA):

- Government can require private companies to execute “priority” contracts for materials, services & facilities
- May redirect/reallocate medical supplies, equipment and pharmaceuticals held in private sector
 - Even where subject to existing contractual commitments
- Requires findings that the contract is “necessary for the national defense, including ‘emergency preparedness’”

Rarely used historically, other than DoD contracting

Emergency Re-allocation of Resources

Federal Powers

- CDC traditionally **requests** re-allocation of resources such as vaccines, medications, ventilators to protect public health across the country
 - Voluntary re-routing of flu vaccine in Fall 2004
- HHS also can reallocate *government-owned* supplies such as:
 - Vaccines
 - Strategic National Stockpile (SNS)

Objective 3

Identify Legal Options Available to Use
Private Facilities in Emergencies

Emergency Use of Private Facilities: Legal Powers

- Legal authorities empower government to use property in an emergency
 - Permit action where cannot negotiate use of private property
 - Provide leverage in negotiations
- Exercise of these powers should be avoided if possible
 - Litigation rarely the best way to resolve issues of compensation, depreciation, cost allocation, etc.

Emergency Use of Private Facilities: Availability of Temporary Facilities

An alternative to using existing facilities:

- CT has a mobile field hospital
 - -Fully operational
 - -100 bed capacity
 - -can be broken down into separate units
- Explore temporary facilities available from SNS, Defense Department, or contractors
 - E.g., additional Mobile field hospitals
- Explore temporary facilities with cooperating partners

Emergency Use of Private Facilities

State Law Acquisition Power- CT Example

For condemnation under eminent domain:

The state may “take land...for the site, or any addition to the site, of any state institution...”

For the power to take property during the existence of a Title 28 civil preparedness, or Title 19a public health, declared emergency:

“The governor may, in the event of shortage or disaster making such action necessary for the protection of the public, take possession (1) of any land or buildings, machinery or equipment...”

Evacuations

- Analogous to closing a facility to prevent public access – ordering that the public evacuate from a facility/area – examples:
 - *CT shoreline towns as hurricane approaches*
 - *Area around chemical tank car after train crash*
 - *Area around burning chemical plant*
 - *Area downstream of dam about to collapse*
- State/locality may exercise this fundamental police power to protect public health and safety

Evacuation Example - Connecticut

State disaster statutes have specific provisions to order evacuation in “declared” emergencies – Connecticut General Statutes sec. 28-9:

In a (state-) declared emergency, Governor may:

- (f) Order the evacuation of all or part of the population of stricken or threatened areas ...*
- (d) Designate such vehicles and persons as shall be permitted to move and the routes that they shall follow;*
- (g) Take such other steps as are reasonably necessary to protect the health, safety and welfare of the people of the state...*

Questions for Evacuation Planning

When ordering an evacuation, the following issues must be considered:

- Will evacuation be mandatory or voluntary?
- If mandatory, how enforced?
- How to protect property in evacuated areas?
- How to precisely identify areas to be evacuated?
- How to provide food, medical care and shelter to the displaced?
 - Including persons with special needs

Evacuation Issues: Re-entry

If evacuation is based on finding that area was unsafe:

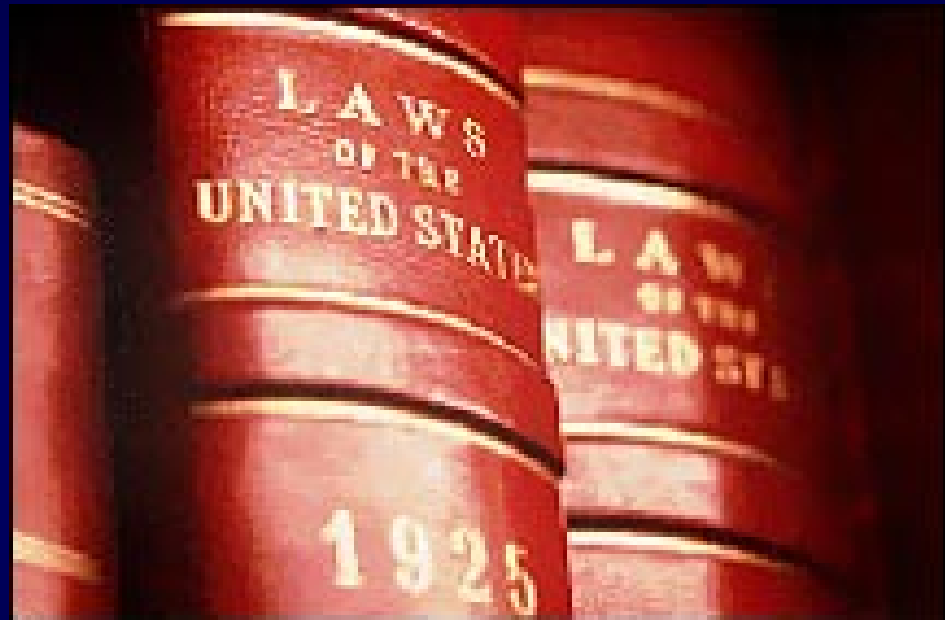
- What standard is required to determine area is safe for return?
 - Condition causing evacuation was safely resolved, or
 - Compliant with all appropriate environmental and health standards?
- Who decides?
 - The authority ordering the evacuation?
 - A different government body?

Key Takeaways - Summary

- Each level of government has general powers to deny access to or take control of virtually any facility or property if such action is necessary to protect the public health
- Cooperation of and agreement with property owners is far superior to exercising emergency powers

End: Unit 4

For additional
information on
public health law
visit the *CDC
Public Health
Law Program*



www.cdc.gov/phlp

Next Segment