



DENNIS J. HERRERA
City Attorney

KRISTEN A. JENSEN
Deputy City Attorney

Direct Dial: (415) 554-4615
Email: kristen.jensen@sfcityatty.org

MEMORANDUM

TO: Mayor London N. Breed
Members, Board of Supervisors
Grant Colfax, M.D., Director of Health
Tomás Aragón, M.D., DrPH, County Health Officer
Members, Health Commission
Mary Ellen Carroll, Executive Director, Department of Emergency Management
Trent Rhorer, Executive Director, Human Services Agency

FROM: Kristen A. Jensen
Brian F. Crossman
Deputy City Attorneys

DATE: April 13, 2020

RE: City Power to Commandeer Private Property for COVID-19 Emergency Purposes

INTRODUCTION

We have received questions about the City's authority to commandeer property, and the process for doing so, in connection with the City's efforts to secure housing for people who need it during the COVID-19 emergency. Those people include first responders, individuals who need to self-quarantine or self-isolate, and individuals experiencing homelessness. At the request of some of you to summarize our advice publicly to increase transparency about the extraordinary process of commandeering property in an emergency, we address here the following questions:

1. What City officials have authority to "commandeer" privately owned real property in an emergency?
2. How much must the City pay for commandeered property?
3. What are the substantive and procedural requirements for commandeering private property?
4. What enforcement mechanisms are available for violation of an order to commandeer property?

SUMMARY

1. While both the Mayor and the Board of Supervisors (the "Board") have authority to take actions to address public emergencies, the Charter vests the Mayor, and not the Board, with authority to commandeer property. Also, because the Health Officer has declared a local health emergency, the Health Officer may, apart from the Mayor or the Board, take any measure necessary to prevent the spread of an infectious disease. Such a measure may include the power

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to commandeer to address the COVID-19 emergency, provided the property is needed to care for people who are affected by the emergency.

While the Board does not have the power under the Charter to adopt emergency legislation requiring City departments to commandeer property, the Mayor's authority to commandeer is subject to the Board's concurrence. If the Health Officer exercises the authority to commandeer property, the Health Officer is not required to seek or obtain the Board's concurrence.

2. The City's payment for commandeered property occurs after the property is commandeered, and must compensate the owner for the "fair value" of the property. The Commandeer order may, but is not required to, set forth the amount of payment to be made for the property. Property owners may recover fair value of the property after the property is commandeered by filing claims through the City's claims process.

3. Before the Mayor or the Health Officer exercises the authority to commandeer property, the City must have adequate justification for its acts and must narrowly tailor those acts to the particular circumstances. Here, the City must establish the immediate necessity to commandeer the particular property or properties at issue, document the emergency conditions leading to the need to commandeer the property and the lack of suitable alternatives. The Commandeer Order must provide notice to the affected property owners, and an opportunity for those owners to object.

4. Whether a Commandeer Order is issued by the Mayor or the Health Officer, violation of the order is a misdemeanor punishable by fines of up to \$1,000 for each day the violation continues, by imprisonment or both.

DISCUSSION

I. What City officials have authority to "commandeer" privately owned real property in an emergency?**A. The Mayor's Authority**

Both the Mayor and the Board have authority to take actions to address public emergencies, but the Charter vests only the Mayor, and not the Board, with authority to commandeer property. State law permits the governing body of a local jurisdiction, or an official designated by ordinance, to declare a local emergency. (Gov. Code, § 8630(a).) State law also authorizes the Board and Mayor (through the Charter authority) to issue "orders and regulations necessary to provide for the protections of life and property." (Gov. Code, § 8634.) San Francisco has exercised this power in Charter Section 3.100(14) and Administrative Code Sections 7.1 and 7.6, which vest in the Mayor the power to declare local emergencies. Charter Section 3.100(14) provides that "[i]n the case of an emergency threatening the lives, property or welfare of the City and County or its citizens," among other things, "the Mayor may ... do whatever else the Mayor may deem necessary to meet the emergency." Administrative Code Section 7.6(b)(2) specifically authorizes the Mayor "[t]o obtain vital supplies, equipment and such other properties found lacking and needed for the protection of life and property and to bind the City and County for the fair value thereof *and, if required immediately, to commandeer the same for public use.*" (Emphasis added.)

The Charter requires that the Mayor seek the concurrence of the Board in actions taken to meet a declared emergency "as soon as reasonably possible." (Charter § 3.100(14).) Also, the

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Charter gives the Board separate emergency authority. Specifically, Charter Section 2.107 authorizes the Board to adopt an emergency ordinance “in cases of public emergency affecting life, health, property.” But the Charter limits the Board’s authority, and states that an emergency ordinance by the Board “may not ... buy, sell, or lease land.” (See our March 24, 2020 public opinion regarding the Process for Board of Supervisors Action on Emergency Orders at <https://www.sfcityattorney.org/wp-content/uploads/2020/03/Public-Memorandum-Legal-Authority-of-the-Mayor-Health-Officer-and-Board-of-Supervisors-in-an-Emergency.pdf>.) Because an ordinance requiring the City to commandeer real property effectively requires the City to buy or lease real property interests, the Board may not adopt such an emergency ordinance under Section 2.107.

B. Health Officer’s Authority

Under state law, a local Health Officer may declare a local emergency whenever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease, chemical agent, noncommunicable biologic agent, toxin, or radioactive agent. (Health & Safety Code, § 101080.) Upon declaring a local health emergency, a local Health Officer may take a number of specific steps, including but not limited to, gathering technical information relating to the local emergency as necessary to protect the public health and taking any preventive measure that may be necessary to protect and preserve the public health from any public health hazard during the local emergency. (*Id.*, §§ 101040, 101085.) Also, California Health and Safety Code Section 120175 provides that in the event of a “contagious, infectious or communicable disease” within the Health Officer’s jurisdiction, a local Health Officer “shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.” The Governor’s March 12th Executive Order N-25-20 also orders that “[a]ll residents are to heed any orders and guidance of ... local public health officials ... to control the spread of COVID-19.” (Executive Order N-25-20, cl.1.)

Although the Board must ratify the Health Officer’s initial declaration of emergency, the Board is not required to ratify the Health Officer’s orders during an emergency. In contrast to the Board’s role in reviewing the Mayor’s emergency orders, the Board does not have authority to approve or reject each of the Health Officer’s orders, which may remain in effect for the duration of the emergency, or for a shorter period as determined by the Health Officer. (See our public opinion, the Process for Board of Supervisors Action on Emergency Orders, <https://www.sfcityattorney.org/wp-content/uploads/2020/03/Public-Memorandum-Legal-Authority-of-the-Mayor-Health-Officer-and-Board-of-Supervisors-in-an-Emergency.pdf>.)

II. How much must the City pay for commandeered property?

The City must pay “fair value” for commandeered property. The Charter does not provide a specific procedure for determining the fair value. The City may, but is not required to, set forth the amount of payment to be made for the property at the time it commandeers the property. Payment for commandeered property occurs after the property is commandeered. Property owners may recover fair value of the property after the property is commandeered by filing claims through the City’s claims process as set forth in Article 10 of the Administrative Code.

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III. What are the substantive and procedural requirements for commandeering private property?

To commandeer property, the City must issue a written order to commandeer (the “Commandeer Order”), and provide notice to the affected property owners. If the Mayor exercises the authority, then the Commandeer Order is subject to concurrence by the Board; if the Health Officer issues the order it is not. The Commandeer Order must present the City’s justification for its acts and must narrowly tailor those acts to the particular circumstances. Specifically, in the Commandeer Order the City must establish the immediate necessity to commandeer the particular property or properties at issue, document the emergency conditions leading to the need to commandeer the property and the lack of suitable alternatives. Also, under federal, state, and local law, the City must pay the fair value for its temporary use of the commandeered property, as summarized in Section II above.

The Charter’s emergency provision “grants broad powers to the mayor only under unusual circumstances calling for *immediate action*,” but that power is always “subject to judicial review.” (*Verreos v. City & Cty. of San Francisco*, 63 Cal. App. 3d 86, 97 (Ct. App. 1976) [emphasis added].) Moreover, the Administrative Code provides that the Mayor’s authority to commandeer is permitted if “properties found lacking and needed for the protection of life and property ... [are] *required immediately*.” (S.F. Admin. Code, § 7.6(b)(2) [emphasis added].) Recognizing that the Mayor can act immediately indicates that this emergency authority is self-executing. While judicial review is available as a mechanism to check that power after the fact, the Mayor need not obtain a judicial order prior to exercising the power to commandeer property to address a declared emergency. (see *San Francisco Fire Fighters Local 798 v. City & Cty. of San Francisco*, 38 Cal. 4th 653, 669 (2006) [“In [] cases involving the exercise of emergency powers by the City’s mayor, courts have found the exercise legitimate *after scrutinizing the record*” (emphasis added)].)

If the City exercises the power to commandeer property, it must provide adequate notice to the affected property owner and an opportunity for the owner to object to the Commandeer Order. These procedures must be sufficient to satisfy due process requirements.

IV. What enforcement mechanisms are available for violation of an order to commandeer property?

Whether a Commandeer Order is issued by the Mayor or the Health Officer, violation of the order is a misdemeanor punishable by fines of up to \$1,000, imprisonment or both. (Cal. Gov. Code § 8665; Health and Safety Code § 120295; S.F. Admin. Code § 7.17.) Each day the violation continues is a separate offense under state law.

CONCLUSION

Under state and local law, both the Mayor and the Health Officer have authority to issue a Commandeer Order in response to the COVID-19 emergency. That authority is self-executing, but requires the City to make certain findings in the Commandeer Order, and to pay compensation for the property after it is commandeered. Our office remains available to provide any further legal assistance you require to consider, prepare or implement Commandeer Orders if any become necessary under the circumstances of this emergency.