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Part 2: Can the Government Do That? – But I Own that Beach and It Is My Backyard!

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Over the past month, our vocabularies have expanded to include new terms like: "COVID-19," "coronavirus," "epidemiologist," "stay at home," and "shelter in place." Now, private landowners are reintroducing governments to terms like "due process," "private property rights," and "just compensation." More than 20 owners of the Gulf of Mexico private beach-front property are reminding Walton County, Florida, of those terms as they challenge the constitutional validity of the county's COVID-19 order that prohibits "any person" using "the beaches within Walton County."

In a prior post, we explored a lawsuit challenging Pennsylvania's COVID-19 shut-down order as an unconstitutional government taking, and asked the questions: "Why can't I open my business?" and "Where is my due process?" While the public health risks of COVID-19 are real, the Fifth and Fourteenth Amendments to the Constitution are also real and protect private property rights. The new Walton County COVID-19 lawsuit asks if those amendments protect homeowners and commercial property owners who are being prevented from using their private land as prime beach season approaches on the beautiful coasts of the Gulf of Mexico, southern Atlantic Ocean, and beyond. These forced closures will diminish real estate values and result in business losses with implications for private residences, vacation rentals, and commercial properties.

In the new Walton County lawsuit, *Dodero, et al. vs. Walton County, Florida, et al.*, more than 20 plaintiffs challenge the county's April 2, 2020, ordinance closing any and all access – public or private – to all beaches – whether publicly or privately owned – in response to COVID-19.

To challenge Walton County's ordinance, the plaintiffs argue that the Fifth Amendment's "Takings Clause" prohibits the taking of private property for public use, without a payment of just compensation. The plaintiffs claim county officials are "patrolling and occupying their private properties" "on a daily basis" and have "physically prevented Plaintiffs from being able to use or even set foot in their own backyards." To add insult to their injury, the plaintiffs allege they have been threatened with jail time and monetary fines if they use their own private property.

The plaintiffs address the anticipated police power defense head-on. The plaintiffs argue the county's actions are "arbitrary and capricious" and violate the Fourteenth Amendment's prohibition from taking "life, liberty, or property, without due process of law." In support for this position, the plaintiffs proclaim they always "followed the CDC guidelines and never had a group of more than 10 people together," and were otherwise "social distancing." Thus, the plaintiffs claim the county's public health concerns did not justify closing private beaches.

Finally, the plaintiffs argue the county unreasonably seized their private property rights and violated the U.S. Constitution's Fourth Amendment. Supporting this claim, the plaintiffs argue, "The chances of a family or landowner catching or spreading COVID-19 is far less in his or her own private backyard . . . than traveling to the grocery store or hardware store or other essential business" or being forced "into a confined space within a house."

Will the plaintiffs in this lawsuit succeed? Will owners of private residences or commercial properties that front public beaches file broader challenges of orders shutting down public beaches, as their losses from these orders mount in prime beach season? Only time will tell.

However, this case is an important reminder on at least two fronts: First, all governmental entities must narrowly tailor their restrictions on private property rights. Those restrictions must be narrowly tailored to balance the very legitimate need to limit the spread of COVID-19 versus interference with constitutionally protected private property rights. Second, this lawsuit yet again illustrates the litigation risk caused by hastily drafted and issued orders and ordinances. Ultimately, many interested parties will be waiting to see how the courts balance police powers with private property rights of due process and just compensation in this unprecedented pandemic.

Please contact us if you believe the government has unfairly taken your private property rights without just compensation through a "stay at home" or similar order. Our attorneys are experienced in eminent domain, constitutional law, real estate, and other relevant areas of litigation. We can help you protect your business interests while we all try to protect each other from the spread of COVID-19.

For more information specific to this topic, please contact [Stephen Pudner](#) or [Ivy Cadle](#). You may also visit the Firm's [Eminent Domain page](#) and [Coronavirus \(COVID-19\): What you Need to Know information page](#).