

MUNICIPAL LAW

BY JEFFREY D. FRIEDLANDER

New York City's Emergency Powers

In this month marking the third anniversary of the attacks on the World Trade Center, it seems appropriate to review the tools the law provides for city officials to prepare for and respond to emergencies, how these tools have been used and the litigation that has arisen from their use. The Law Department, of course, is not a first responder in case of a public emergency in New York City. New Yorkers are fortunate to be able to rely on the Police and Fire departments and the other emergency services to provide for the public safety, preserve order and perform necessary rescue operations. However, when an emergency occurs — be it the horrific events of Sept. 11, 2001, or a blackout, hurricane or transit strike — it is vital that the mayor respond promptly with executive orders and other actions necessary to protect the public health and safety. The New York City Law Department provides legal advice and assistance in the preparation of executive orders and other administrative actions, defends against challenges to the exercise of emergency powers, and assists city agencies in preparing for and responding to any disruptions resulting from a public emergency.



hibition and control of pedestrian and vehicular traffic; regulation and closing of places of amusement and assembly; and the establishment or designation of emergency shelters and medical shelters. Under Executive Law §25, the mayor, upon the threat or occurrence of a disaster, may use "all facilities, equipment, supplies, personnel and other resources" of city government as necessary to cope with the disaster and resulting emergency. Violation of a mayoral emergency order constitutes a Class B misdemeanor.

Under exigent circumstances, Executive Law §24 authorizes the mayor to go further and suspend certain local laws and regulations during a local emergency.¹ This

extraordinary power is strictly limited by the Legislature as to its extent, the circumstances in which it can be exercised and the time of its duration. Prior to ordering the suspension of local laws, the mayor must request emergency assistance from the governor, or the governor must declare a state disaster emergency. The suspension must be the minimum necessary to safeguard the health and welfare of the public, and it must be reasonably necessary to the disaster effort. Only those local laws may be suspended "which may prevent, hinder or delay necessary action in coping with a disaster," and the suspension is further subject to federal and state constitutional, statutory and regulatory limitations.

A mayoral order proclaiming or responding to a state of emergency (including one which suspends local laws or regulations) may remain in effect only for so long as is necessary to address the emergency. Such suspension expires five days after its issuance. If the mayor determines that it must remain in effect, it may be renewed for additional five-day periods.

Commissioners

In addition to the mayor's emergency powers under the Executive Law, a number of provisions in the New York City Charter allow the commissioners of city agencies to act in emergencies. For example, the commissioner of environmental protection may implement and order responsible persons to undertake response measures necessary to protect the public health or welfare or the environment from a release or threatened release of hazardous substances into the environment;² the police commissioner may suspend traffic rules in an emergency;³ the commissioner of buildings may declare a dangerous building a public nuisance and order that it be "removed, sealed, abated, suspended, altered or otherwise improved or purified;"⁴ the Department of Health and Mental Hygiene may order the removal of food products and other materials within the city which are unfit for human consumption or use or which are infected in any manner likely to communicate disease;⁵ the commissioner of health and mental hygiene, subject to provisions of the Health Code and other applicable law, may "take such action as may become necessary to assure the maintenance of public health, the prevention of disease, or the safety of the City and its residents;"⁶ and the commissioner of transportation may close streets where travel is deemed to be dangerous to life.⁷

Power to Act

The city's emergency powers arise from both common law and statute. The New York Court of Appeals has cited the principle of *salus populi est suprema lex* ("the welfare of the people is the supreme law") in describing government's power to act in emergencies:

In cases of actual necessity, as that of preventing the spread of fire, the ravages of a pestilence, the advance of a hostile army, or any other great calamity, the private property of any individual may be lawfully taken, used or destroyed for the general good, without subjecting the actors to personal responsibility. In such cases, the rights of private property must be made subservient to the public welfare; and it is the imminent danger and the actual necessity which furnish the justification. *Salus populi suprema lex.*

In the Matter of the Petition of Charles A. Cheesebrough, 78 NY 232, 237 (1879).

New York State Executive Law §24 gives the mayor authority to act quickly in taking steps necessary to respond to a local state of emergency. Pursuant to Section 24, the mayor may proclaim a state of emergency within all or parts of the city upon finding that the public safety is imperiled by an emergency, or the "immediate danger" of emergency, resulting from "disaster, rioting, catastrophe, or similar public emergency." After proclaiming a state of emergency, the mayor may promulgate "local emergency orders to protect life and property or to bring the emergency under control." Such orders may include the establishment of curfews; pro-

Jeffrey D. Friedlander is first assistant corporation counsel of the City of New York. Martha Mann Alfaro, deputy chief of the Legal Counsel Division of the Law Department, assisted in the preparation of this article.

Continued from page 3

The City Charter sets forth detailed requirements for procurement of goods and services and for rule making by city agencies. However, to address the need to obtain goods and services and promulgate rules necessary to respond to an emergency, the charter also provides streamlined procedures for emergency procurement and rule making. Charter §315 provides that, notwithstanding competitive bidding and other procurement requirements, "in the case of an unforeseen danger to life, safety, property or a necessary service, an emergency procurement may be made[.] Any such procurement requires the prior approval of the comptroller and corporation counsel. The charter also provides that an emergency procurement be made "with such competition as is practicable under the circumstances[.]" Similarly, the charter sets forth a uniform procedure for rule making by city agencies, known as the City Administrative Procedure Act. That procedure provides, in the normal course, that city agencies provide prior public notice of their proposed rules, that a public hearing be held on each proposed rule, and that a specified waiting period elapse before a final rule takes effect. Charter §1043(h) allows city agencies, with the approval of the mayor, to adopt emergency rules without these prior notice and comment procedures, "if the immediate effectiveness of such rule is necessary to address an imminent threat to health, safety, property or a necessary service." A rule promulgated on an emergency basis expires after 60 days, but may be re-promulgated within that period by normal rule making procedures.

Uses of Emergency Powers

On Sept. 11, 2001, Mayor Rudolph Giuliani declared a state of emergency and issued orders prohibiting pedestrian and vehicular traffic occupancy and occupancy of buildings in areas of Manhattan south of 14th Street (the "frozen zone"), and authorizing the police, fire and health commissioners and the director of emergency management "to take whatever steps are necessary to preserve the public safety and to render all required and available assistance to protect the security, well-being

and health of the residents of the City." For a number of months after the attacks, the emergency order was renewed every five days, with modifications gradually reducing the restrictions as the city's recovery progressed.

Mayors have also exercised emergency powers in emergencies of smaller, but still serious, consequence. To protect public safety in the face of strikes in 2002 which directly affected bus service for 120,000 passengers in Queens, and indirectly affected countless other individuals and businesses, Mayor Michael R. Bloomberg issued a series of emergency orders authorizing for hire vehicles and commuter vans to pick up passengers without prearrangement, and authorizing commuter vans to operate outside of their normally authorized areas for as long as the emergency continued.⁹ The union representing striking employees challenged this exercise of emergency power in *Citizen Action of New York v. Bloomberg*. Its application for a temporary restraining order was granted by the Supreme Court, New York County, but the city filed a notice of appeal in the Appellate Division, First Department, which automatically stayed the order pursuant to CPLR 5519(a)1. The case, defended by our Administrative Law and Appeals divisions, was dismissed as moot when the strikers settled.⁹

Litigation

There has been relatively little litigation testing the mayor's emergency powers. Recently, however, the Law Department's Environmental Law Division has been involved in defending against challenges to various security measures. In *Wall Street Garage Parking Corp. v. Lower Manhattan Development Corp.* and *Wall Street Garage Parking Corp. v. New York Stock Exchange, Inc.*, the division's attorneys were active in supporting defendants' opposition to plaintiff's motion for a preliminary injunction to enjoin certain check points and street closings in the area surrounding the New York Stock Exchange. In the second of these cases, the state lower court held that the exclusion of traffic from the vicinity of the stock exchange constituted a public nuisance, and enjoined the practice. In a unanimous decision dated Aug. 5,

the First Department reversed the lower court's holding.¹⁰ Similarly, in *Chatham Towers v. Bloomberg*, Index No. 107761/04 (Sup. Ct., N.Y. Co. 2004), the division is representing the Police Department in a challenge, based primarily on environmental grounds, to barricades and street closings in the vicinity of One Police Plaza. Petitioners allege that the city's environmental assessment of the Police Plaza security measures is inadequate. Petitioners' motion for a preliminary injunction has been fully briefed in the New York State Supreme Court, New York County, and is awaiting a decision there.

The mayor's emergency powers are vital to the protection of the city and its residents. They must be used when necessary, but with great care and sensitivity to the limitations placed on the exercise of these extraordinary powers. The Law Department plays an important part in executing and defending their implementation. In the event of an emergency, we are prepared to act immediately to assist the mayor, the director of emergency management and other city officials and agencies in promulgating orders to preserve public safety and welfare.

1. The governor is authorized to suspend local laws and rules as well as statutes during a state disaster emergency, after consulting with the State's Disaster Preparedness Commission. Exec. L. §29-a.

2. Charter §1403(h).

3. Charter §2903(a)(1).

4. Ad. Code §26-127(a).

5. Ad. Code §17-165(b).

6. 24 RCNY §3.01.

7. Ad. Code §19-107.

8. Exec. Order No. 3, Jan. 7, 2002; Exec. Order No. 7, Feb. 26, 2002; Exec. Order No. 9, March 16, 2002; Exec. Order No. 11, April 29, 2002; Exec. Order No. 13, June 10, 2002; Exec. Order No. 14, June 17, 2002; Exec. Order No. 16, June 22, 2002; Exec. Order No. 17, June 27, 2002; Exec. Order No. 18, July 2, 2002; Exec. Order No. 20, July 7, 2002; Exec. Order No. 21, July 12, 2002; Exec. Order No. 22, July 17, 2002; Exec. Order No. 23, July 22, 2002; Exec. Order No. 24, July 27, 2002; Exec. Order No. 25, Aug. 1, 2002; Exec. Order No. 26, Aug. 6, 2002.

9. *Citizen Action of New York v. Bloomberg*, Index No. 115277/02 (Sup. Ct. NY Co. Oct. 18, 2002).

10. *New York Law Journal*, Aug. 12, 2004, p. 18.

Daily columns in the *Law Journal* report developments in laws affecting medical malpractice, immigration, equal employment opportunity, pensions, personal-injury claims, communications and many other areas.