



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 7, 2020

The Honorable Brandon Creighton
Chair, Senate Committee on Higher
Education
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0324

Re: Authority of local governmental entities operating under local emergency declarations, to delay, prohibit, or restrict eviction procedures established by the Legislature in chapter 24 of the Property Code (RQ-0362-KP)

Dear Senator Creighton:

You question the validity of orders adopted by local governmental entities, operating under local emergency declarations, to delay, prohibit, or restrict the eviction process under chapter 24 of the Property Code.¹ As background, due to the COVID-19 pandemic, the Governor declared a state of disaster on March 13, 2020.² *See* TEX. GOV'T CODE § 418.014(a) (authorizing the Governor to declare a state of emergency). Additionally, many counties and cities declared a local state of disaster. *See id.* § 418.108(a), (f), (g) (authorizing the presiding officer of a governing body of a political subdivision to declare a local state of disaster and granting powers once a disaster has been declared). As you note, many political subdivisions then halted evictions with orders adopted under those local disaster

¹*See* Letter from Honorable Brandon Creighton, Chair, Senate Comm. on Higher Education, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (June 25, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0362KP.pdf> ("Request Letter").

²*See* OFFICE OF THE TEXAS GOVERNOR, DISASTER PROCLAMATION (Mar. 13, 2020), https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf. The Governor has subsequently extended the disaster proclamation every thirty days. *See* https://gov.texas.gov/uploads/files/press/DISASTER_renewing_covid19_disaster_proclamation_IMAGE_07-10-2020.pdf.

declarations.³ See Request Letter at 1. You question whether these local officials have authority to enact such orders as they pertain to chapter 24 of the Property Code.⁴ See *id.*

Chapter 24 establishes statewide procedures for forcible entry and detainer actions, otherwise known as evictions. See TEX. PROP. CODE §§ 24.001–.011. Under chapter 24, if a tenant defaults or holds over beyond the end of the rental term or renewal period, generally the landlord must provide “at least three days’ written notice to vacate the premises before the landlord files a forcible detainer suit.” *Id.* § 24.005(a)–(b). Following that notice period, the landlord may file suit for eviction in justice court. *Id.*; see also *id.* § 24.004(a); TEX. CIV. PRAC. & REM. CODE § 15.084 (providing for jurisdiction of justice courts over forcible entry and detainer suits). Once filed, a sheriff or constable serves the tenant with notice of a hearing. See TEX. PROP. CODE § 24.0051(a). A court hearing will generally occur between six and ten days after the tenant receives notice of the hearing. See TEX. R. CIV. PROC. 510.4(a)–(c), 510.7(a). Trials for eviction are usually heard within twenty-one days of filing suit.⁵ See *id.* 510.4(a)(10). “A landlord who prevails in an eviction suit is entitled to a judgment for possession of the premises and a writ of possession.” TEX. PROP. CODE § 24.0061(a). A writ of possession generally “may not be issued before the sixth day after the date on which the judgment for possession is rendered.” *Id.* § 24.0061(b). Thus, from beginning to end, the eviction process can take a month or more under normal circumstances.

³As one example, an order issued by the Travis County Judge generally prohibits, until September 30, 2020, among other things issuances of notices to vacate the premises under section 24.005 of the Government Code, effectively prohibiting evictions during that time. See, e.g., Travis County, Tex., County Judge Order No. 2020-15 Relating to Notices to Vacate, Eviction Proceedings in Response to COVID-19 (July 22, 2020), <https://www.traviscountytexas.gov/images/docs/200314-gathering-order.pdf>. Other jurisdictions, including Brazoria County, halted eviction proceedings beyond July 24, 2020. See <https://www.brazoriacountytexas.gov/home/showdocument?id=11815> (Mar. 19, 2020) (cancelling all civil hearings, including evictions, until the State of Disaster is lifted).

⁴“Private property ownership is a fundamental right in the United States.” *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012). The “right of property” includes the “right to use and enjoy” the property “in a lawful manner and for a lawful purpose.” *Id.* (quotation marks omitted). And the right to lease property is a fundamental privilege of property ownership. *Terrace v. Thompson*, 263 U.S. 197, 215 (1923) (noting that “essential attributes of property” include “the right to use, lease and dispose of it for lawful purposes”); see *Zaatar v. City of Austin*, No. 03-17-00812-CV, 2019 WL 6336186, at *10 (Tex. App.—Austin Nov. 27, 2019, no pet.) (holding city ordinance banning short-term rentals of single-family residences not owner occupied was unconstitutional infringement on property rights); Tex. Att’y Gen. Op. No. KP-0308 (2020) at 2. You do not ask about, and we do not address, any property-related constitutional issues implicated by these local orders. See generally *Sappington Garden, L.L.C. v. United States of America*, No. 4:20-CV-00658-P (N.D. Tex. June 24, 2020) (challenging the constitutionality of, among others, section 4024 of the CARES Act).

⁵In addition to the Texas Rules of Civil Procedure that pertain to eviction proceedings, the justices of the peace may issue local procedural rules that establish more specific timelines. See generally TEX. R. CIV. PROC. 510.1–510.13 (applying to Justice Court eviction procedures). So long as those rules do not conflict with state law, the justices have some discretion in managing the timeline of an eviction procedure.

Under a declared disaster pursuant to chapter 418 of the Government Code, the Governor “may issue executive orders, proclamations, and regulations and amend or rescind them.” TEX. GOV’T CODE § 418.012. During a declared disaster, the Governor also has authority to “suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business . . . if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.” *Id.* § 418.016(a). The Governor’s executive orders, proclamations, and regulations “have the force and effect of law.” *Id.* § 418.012. Pursuant to that authority, the Governor has issued multiple executive orders, proclamations, and other statements, relating to the disaster declaration, including Executive Order GA-28, which expanded the provision of essential services and reopened businesses.⁶

In addition to the Governor’s orders and as noted above, many counties and cities have issued local orders restricting businesses and activities. *See id.* § 418.108(a), (f), (g) (authorizing the presiding officer of the governing body of a political subdivision to declare a local state of disaster and granting certain powers once a disaster has been declared). Certain provisions within Government Code chapter 418 provide governmental entities with additional authority during times of disaster to address emergency situations. *See id.* §§ 418.001–.261; *but see* Tex. Att’y Gen. Op. No. KP-0304 (2020) at 3 (“The Legislature expressly conferred some, but not all, of the extraordinary powers given to the Governor to local government authorities.”). Related to your question, the Legislature authorized the presiding officer of a governing body of a municipality or county to declare a local state of disaster. TEX. GOV’T CODE § 418.108(a); *see also id.* § 418.004(6). Section 418.1015 of the Government Code provides that the “presiding officer of the governing body of an incorporated city or a county or the chief administrative officer of a joint board is designated as the emergency management director for the officer’s political subdivision.” *Id.* § 418.1015(a). That official “serves as the governor’s designated agent” and “may exercise the powers granted to the governor under [chapter 418] *on an appropriate local scale*” during a disaster declaration. *Id.* § 418.1015(b) (emphasis added). But unlike the Governor who has express powers to suspend certain state laws under chapter 418, the presiding officer of the governing body of an incorporated city or county has no similar emergency power to suspend state statutes. *Compare id.* § 418.016(a), (e) (authorizing the Governor to suspend certain statutes), *with id.* § 418.108(a), (g) (authorizing local officials to declare a local state of disaster and control ingress and egress), *and id.* § 418.1075 (authorizing suspension of deadlines imposed by local law in certain circumstances).

The aspects of the orders about which you ask attempt to rewrite broadly applicable state law governing eviction procedures and replace them with a patchwork of local orders that are inconsistent across the State. While local officials do possess certain emergency powers, efforts to amend the statutorily prescribed, statewide eviction procedures far exceed

⁶*See* OFFICE OF THE TEXAS GOVERNOR, EXEC. ORDER GA-28 (June 26, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-28_targeted_response_to_reopening_COVID-19.pdf.

the requirement that those powers be exercised “on an appropriate local scale.” *Id.* § 418.1015(b). Thus, chapter 418 of the Government Code does not authorize local governmental entities operating under a declared disaster to independently rewrite state law as it applies to their jurisdiction to prohibit, delay, or restrict the issuance of a notice to vacate.⁷

⁷We note, however, that section 4024 of the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (to be codified in various titles of the U.S.C.), placed a 120-day moratorium on evictions for properties covered by the CARES Act, beginning March 27, 2020, and extending through July 24, 2020. *See* CARES Act § 4024(b). Covered properties include those properties receiving a low-income-housing tax credit, single-family and multifamily properties backed by federal loans, and federally-subsidized rental housing properties. *Id.* § 4024(a). During the moratorium period, lessors of covered properties could not issue a notice to vacate until after July 24, 2020. *See id.* § 4024(b) (providing for 120-day moratorium from enactment of the CARES Act on March 27, 2020). Thus, while local governmental entities do not possess authority to rewrite state law by changing eviction procedure notifications, federal law at one time imposed the restrictions about which you ask for many properties nationwide.

Additionally, on March 19, 2020, the Texas Supreme Court issued an order temporarily staying certain eviction procedures. *See* TEX. SUP. COURT, FOURTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER, MISC. DOCKET 20-9045 (Mar. 19, 2020), <https://www.txcourts.gov/media/1446203/209045.pdf>. That order was extended through May 18, 2020, but beginning on May 19, 2020, eviction proceedings could resume. *See* TEX. SUP. COURT, FIFTEENTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER, MISC. DOCKET 20-9066 (May 14, 2020), <https://www.txcourts.gov/media/1447307/misc-docket-20-9066-15th-emergency-order-regarding-covid-19-state-of-disaster.pdf> (“Beginning May 19, 2020, eviction proceedings may resume, and deadlines are no longer tolled, and beginning May 26, 2020, warnings may be posted and writs of possession may be executed.”). However, for all Texas evictions occurring from March 27, 2020, through August 4, 2020, the lessor initiating an eviction proceeding must file a sworn affidavit stating that the premises are not subject to the moratorium on evictions imposed by the CARES Act. *See* TEX. SUP. COURT, TWENTIETH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER, MISC. DOCKET 20-9086 (July 21, 2020), <https://www.txcourts.gov/media/1449329/209086.pdf> (requiring certain statements regarding applicability of the CARES Act).

S U M M A R Y

Chapter 418 of the Government Code grants emergency powers to the Governor and local officials operating under a disaster declaration. Yet, it does not authorize local governmental entities operating under a declared disaster to independently rewrite state law such as Property Code chapter 24 governing evictions.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style with a large initial "K".

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