

MEMORANDUM RE: TEXAS FORECLOSURE RESTRICTION

July 23, 2020

Texas's initial approach to foreclosures in light of the coronavirus was "ad hoc" and the decision whether to halt foreclosures was left to the various counties in which the sales were conducted. However, Texas has seen a significant rise in the number of daily coronavirus cases which has worried state and local officials, especially in Texas's largest metropolitan areas.

In response to this rise, Gov. Greg Abbott issued Executive Order 29¹ and a Proclamation Amending Executive Order 28² reinstating health and safety limitations in the state of Texas. By way of these orders, public gatherings of more than 10 persons are now, with some exceptions, prohibited throughout the state. This prohibition would seemingly affect foreclosure sales, which typically draw large crowds that can number in the hundreds. Absent consent of the local county judge or mayor, however, these sales would arguably violate Gov. Abbot's July 2, 2020 Executive Order and Proclamation. Because neither of Gov. Abbott's orders specifically addresses foreclosure, the decision to continue with or suspend foreclosure Tuesday apparently devolves to local government.

The decision to deal with foreclosures in light of COVID-19 in Texas remains with local government, although that may not have been the original intent of Gov. Abbott's most recent executive order. Because Texas has not issued any statewide orders governing foreclosure proceedings, many creditors are proceeding with caution but have not stopped this outright, except in counties where they have issued Orders.³

Texas is generally considered to be the most lender-friendly state, as foreclosures can be completed in as little as 21 days. The protection for owners against such lender-friendly and expeditious foreclosure is the assurance that foreclosures will only be conducted when there is strict compliance with Texas Property Code Section 51.002. Executive Order 29 which prohibits gatherings of more than 10 persons is in direct contradiction with the requirement for a "public sale" under Texas Property Code Section 51.002(a) ("a sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month.")

In light of the foregoing, several counties have recognized the forgoing issue through local executive orders halting both judicial and non-judicial foreclosure sales. However, the inconsistent application of the effect of Executive Order 29 and the statutory requirement for a "public sale" in order to proceed with a foreclosure under Texas Property Code Section 51.002(a), place citizens in the State of Texas in unequal and unfair positions regarding their statutory rights under the Texas Property Code and the effect of the Statewide Executive Order.

As a practical matter, the requirement for a public sale under the Texas Property Code ensures that owners subject to foreclosure in the most lender friendly state are given the opportunity to garner the highest possible price at such foreclosure through the bidding competition created by a public sale. This bidding competition is a crucial and necessary safeguard to an otherwise aggressive approach to foreclosure of real property.

Further complicating issues, local governments have issued moratoriums on evictions. Such moratoriums effectively insulate tenants from the ramifications of non-payment of rent, stripping owners of real estate

¹ https://www.financialservicesperspectives.com/wp-content/uploads/sites/6/2020/07/Sup-Materials.Blog_FSP_-use-of-face-coverings-during-COVID-19.-DSmith-GAlonso-MGutierrez-MMiller.-July-2020.pdf

² https://www.financialservicesperspectives.com/wp-content/uploads/sites/6/2020/07/Sup-Materials.Blog_FSP_-use-of-face-coverings-during-COVID-19.-DSmith-GAlonso-MGutierrez-MMiller.-July-2020.pdf

³ <https://www.lexology.com/library/detail.aspx?g=40c6f33e-1c5a-41be-8f4e-069b4405a112>

their contractual rights, and leaving real estate owners the obligation to make mortgage payments to prevent foreclosure, while having reduced or compromised rental revenue.

By way of example of the inequitable results due to the above, we look to Travis County:

- Travis County Tax Office has halted all tax foreclosures through September (“July and August tax sales are canceled.”)⁴
- Travis County Judge Order No. 2020-15 relating to Notices to Vacate, Eviction Proceedings in response to COVID-19, prevents the eviction of tenants through September 30, 2020⁵
- Travis County Non-Judicial Foreclosures are allowed to be posted for mortgage foreclosures⁶

By way of further example, we look to Harris and Bexar Counties, who have recognized the conflict created between Executive Order 29 and the requirements of the Texas Property Code for a public sale.

Harris County

A Harris County order issued July 3 limiting gatherings of 10 people or more also suspended county foreclosure auctions. *"This prohibition includes the gathering of people for sales of real property... at the Bayou City Event Center," according to the order. The Bayou City Event Center is where the county's foreclosure auctions are held.*

Bexar County

Bexar County Executive Order directed that *“the upcoming foreclosure sale scheduled for July 7, 2020 be postponed. The sale may be rescheduled on August 4, 2020 if public health officials determine that a foreclosure sale with a large crowd will not result in a threat to the health and safety of those in attendance to an increased risk of transmission of COVID-19.*

Summary

In summary, it is necessary for Texas to issue a statewide moratorium on foreclosure sales so long as shelter in place mandates remain in place, in order that the statutory requirements of the Texas Property Code Section 51.002 be uniformly applied across the state.

⁴ <https://tax-office.traviscountytexas.gov/properties/foreclosed>

⁵ <https://www.traviscountytexas.gov/images/docs/200314-gathering-order.pdf>

⁶ <https://countyclerk.traviscountytexas.gov/recording/search-for-recorded-documents-online.html>