



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 1, 2020

Dear Senator Hughes,

You asked what authority, if any, local governmental bodies have to limit in-person attendance at a judicial or non-judicial foreclosure sale to 10 persons or fewer. Your question is premised on local emergency orders restricting or delaying such sales during the current pandemic. We conclude that a foreclosure sale of residential or commercial real property constitutes a service to which no occupancy limit applies under Executive Order GA-28, and local governmental bodies therefore lack authority to restrict in-person attendance at these sales. Organizers are encouraged, however, to follow the health and safety protocols published by the Department of State Health Services and the Centers for Disease Control and Prevention.¹

When a mortgage loan is in default, a mortgagee may elect to institute either a judicial foreclosure or, when permitted by the deed of trust, a non-judicial foreclosure.² A judicial foreclosure begins with a lawsuit to establish the debt and fix the lien.³ The judgment in a foreclosure lawsuit generally provides that an order of sale issues to any sheriff or constable directing them to seize the property and sell it under execution in satisfaction of the judgment.⁴ After the sale is completed, the sheriff or other officer must provide to the new buyer possession of the property within 30 days.⁵

A non-judicial foreclosure, in turn, must be expressly authorized in a deed of trust.⁶ The Property Code prescribes the minimum requirements for a non-judicial sale of

¹ See Ctr. for Disease Control, Communities, Schools, Workplaces, and Events (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/index.html>; Tex. Dep't of State Health Servs., Prevention of COVID-19 (July 28, 2020), <https://www.dshs.texas.gov/coronavirus/#prevent>.

² *Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ).

³ *Bonilla*, 918 S.W.2d at 21.

⁴ Tex. R. Civ. P. 309; *but see id.* (excepting judgments against executors, administrators, and guardians from orders of sale). The procedures for the sale under judicial foreclosure generally follow the same procedures as sales under non-judicial foreclosures. *Compare id.* 646a–648 *with* Tex. Prop. Code § 51.002.

⁵ Tex. R. Civ. P. 310.

⁶ See Tex. Prop. Code § 51.002.





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real property under a power of sale conferred by a deed of trust or other contract lien.⁷ The Code requires that a sale under a non-judicial foreclosure be “a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month,” unless that day is January 1 or July 4, in which cases the sale must be held on the first Wednesday of the month.⁸ The deed of trust or other loan documents can establish additional requirements, and if such requirements are established, those requirements must likewise be satisfied in order for there to be a valid foreclosure sale.⁹

With this background in mind, we address your question considering the ongoing COVID-19 crisis. Governor Abbott ordered in Executive Order GA-28 that “every business in Texas shall operate at no more than 50 percent of the total listed occupancy of the establishment.”¹⁰ That limitation does not apply, however, to “any services listed by the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Workforce, Version 3.1 or any subsequent version.”¹¹ (CISA Guidance). Among the services listed in version 3.1 of the CISA Guidance are “[r]esidential and commercial real estate services, including settlement services.”¹² A court’s main objective in construing the law is to give effect to the intent of its provisions.¹³ And there is no better indication of that intent than the words that are chosen.¹⁴ One dictionary defines a “service” as “[w]ork that is done for others as an occupation or business.”¹⁵ “Real estate” is defined as “[l]and . . . and the buildings and permanent fixtures attached to it.”¹⁶ Thus, “real estate services” includes services performed for others as an occupation or business that pertain to land or the buildings and

⁷ See *id.* § 51.002.

⁸ *Id.* §§ 51.002(a), (a-1); see also *id.* § 51.002(h) (requiring a sale to be held on or after the 90th day after the date the commissioners court records a designation of a sale at an area other than an area at the county courthouse).

⁹ See *Bonilla*, 918 S.W.2d at 21.

¹⁰ Gov. Greg Abbott Exec. Order GA-28.

¹¹ *Id.* at 2.

¹² See Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response, at 16, available at https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers.pdf; see also *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 440–41 (Tex. 2009) (observing “including” is a term of enlargement, not restriction).

¹³ See *Summers*, 282 S.W.3d at 437.

¹⁴ See *id.* (“Where text is clear, text is determinative of that intent.”).

¹⁵ Am. Heritage Dictionary (5th ed. 2020), available at <https://www.ahdictionary.com/word/search.html?q=service>; see also *Greater Houston P’ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015) (applying an undefined term’s ordinary meaning, unless the context of the law in which the term appears suggests a different or more precise definition).

¹⁶ Am. Heritage Dictionary (5th ed. 2020), available at <https://www.ahdictionary.com/word/search.html?q=real+estate>.



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permanent fixtures attached to the land. Insofar as the performance of auction or foreclosure-sale services relates to commercial or residential real property, such services are one specific iteration of “residential and commercial real estate services.”

Furthermore, GA-28 provides that it supersedes “any conflicting order issued by local officials in response to the COVID-19 disaster ... to the extent that such a local order restricts services allowed by this executive order.”¹⁷ Accordingly, to the extent a local official sought to restrict in-person attendance at a commercial or residential real estate foreclosure sale, that order would conflict with GA-28, and would be preempted.

¹⁷ Exec. Order GA-28 at 4.