

Gordon, Justin

From: Gordon, Justin
Sent: Wednesday, May 20, 2020 5:23 PM
To: Vassar, Ryan
Subject: DPS Drafts
Attachments: Ruling Draft - ID# 828822 - Closed Litigation Version.docx; Ruling Draft - ID# 828822 - Pour Out Version.docx

Ryan, I have attached the two drafts you requested. The first draft is a general pour out for both the DPS and FBI arguments.

The second draft declines to rule based on the pending litigation filed against DPS by the requestor. This second draft includes a note that the determination would run up against the formal decision we issued in ORD 687.

Link to ORD 687: <https://www.texasattorneygeneral.gov/sites/default/files/ord-files/ord/2020/ord20110687.pdf>

For additional background, here is a link to the State Securities Board ruling involving the same FBI investigation. <https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2019/pdf/or201933291.pdf>

In that ruling we also received FBI comments and concluded that the FBI may withhold the information it provided SSB under FOIA exception 552(b)(5). The ruling also includes a reference to the 5th Circuit case involving the judicial process for accessing sealed orders.

Let me know if you have any questions, and I will check back in on this tomorrow.

Justin



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 1, 2020

Honorable Bryan Hughes
Texas Senate
P.O. Box 12068
Capitol Station
Austin, TX 78711

Dear Senator Hughes,

You ask whether local governmental bodies have authority to limit in-person attendance at a judicial or non-judicial foreclosure sale to 10 persons or fewer. Your question concerns local emergency orders restricting or delaying such sales during the current COVID-19 pandemic. We conclude that a foreclosure sale of residential or commercial real property that is conducted outdoors is subject to the limitation on outdoor gatherings in excess of 10 persons imposed by Executive Order GA-28. Accordingly, an outdoor foreclosure sale may not proceed with more than 10 persons in attendance unless approved by the mayor in whose jurisdiction the sale occurs, or if in an unincorporated area, the county judge. However, to the extent a sale is so limited, and willing bidders who wish to attend are not allowed to do so as a result, the sale should not proceed as it may not constitute a "public sale" as required by the Texas Property Code.

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.¹ A judicial foreclosure begins with a lawsuit to establish the debt and fix the lien.² The judgment in a foreclosure lawsuit generally provides that an order of sale issue to any sheriff or constable directing them to seize the property and sell it under execution in satisfaction of the judgment.³ After the sale is completed, the sheriff or other officer must provide to the new buyer possession of the property within 30 days.⁴

¹ *Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ).

² *Id.* at 21.

³ 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.

⁴ TEX. R. CIV. P. 310.

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A non-judicial foreclosure, in turn, must be expressly authorized in a deed of trust.⁵ The Property Code prescribes the minimum requirements for a non-judicial sale of real property under a power of sale conferred by a deed of trust or other contract lien.⁶ 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.⁷ The deed of trust or other loan document 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.⁸

We understand that many foreclosure sales in Texas, both judicial and non-judicial, are held outdoors. Frequently, such sales occur on the steps of a courthouse.

With this background in mind, we address your question concerning attendance limitations. 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.”⁹ This general limitation, however, is subject to several exceptions. One such exception is found in paragraph five of the order, which limits outdoor gatherings to 10 persons or fewer without approval by the mayor or, in the case of unincorporated territory, the county judge in whose jurisdiction the gathering occurs.¹⁰ Accordingly, to the extent a foreclosure sale occurs outdoors, attendance at the sale is limited to 10 persons or fewer unless greater attendance is approved by the relevant mayor or county judge.

While certain services are exempt from the outdoor gathering limitation in Executive Order GA-28, we do not conclude that foreclosure sales are included within them. Executive Order GA-28 exempts from its limitations on outdoor gatherings services described in paragraphs 1, 2, and 4 of the order. Relevant here, paragraph 1 exempts from capacity limitations, *inter alia*, “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

⁵ See TEX. PROP. CODE § 51.002.

⁶ See *id.* § 51.002.

⁷ *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).

⁸ See *Bonilla*, 918 S.W.2d at 21.

⁹ Gov. Greg Abbott Exec. Order GA-28.

¹⁰ *Id.* at 3 (as amended by Gov. Greg Abbott Proc. of July 2, 2020).

¹¹ *Id.* at 2.

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 A periodic foreclosure auction conducted at a courthouse—whether by an officer of the court, an attorney, an auction professional, or another person serving as trustee¹⁶—does not constitute the type of dedicated real estate service work contemplated by the CISA Guidance. Accordingly, we conclude that outdoor foreclosure sales are not exempted from the 10-person attendance limitation imposed by paragraph 5 of Executive Order GA-28.

If a foreclosure sale is subject to, and not exempted from, the 10-person attendance limit imposed in Executive Order GA-28, it should not proceed if one or more willing bidders are unable to participate because of the attendance limit. “[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.”¹⁷ The purpose of the public sale requirement is to “secure the attendance of purchasers and obtain a fair price for the property.”¹⁸ Strict compliance with the Property Code is required for a trustee to properly make a foreclosure sale.¹⁹ If an attendance limit precludes the conduct of a public sale for the purpose of securing sufficient bidders to obtain a fair price, the propriety of a foreclosure auction may be called into question. Accordingly, to the extent attendance at a foreclosure sale is limited to ten or fewer persons, and that limit precludes the attendance of one or more willing bidders who otherwise would have appeared in person, the sale should not go forward as it likely would not comport with the Property Code requirement that the sale be a “public sale.”

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.

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 The Texas Property Code does not set forth specific professional requirements for a foreclosure trustee, providing only that “[o]ne or more persons may be authorized to exercise the power of sale under a security instrument.” TEX. PROP. CODE § 51.007(a).

¹⁷ TEX. PROP. CODE § 51.002(a) (emphasis added).

¹⁸ *Reisenberg v. Hankins*, 258 S.W. 904, 910 (Tex. Civ. App.—Amarillo 1924, writ dismissed w.o.j.).

¹⁹ *Myrad Props. v. LaSalle Bank Nat’l Assoc.*, 252 S.W.3d 605, 615 (Tex. App.—Austin 2008), *rev’d on other grounds*, 300 S.W.3d 746 (Tex. 2009).

We trust this letter provides you with the advice you were seeking. Please note this letter is not a formal Attorney General opinion under section 402.042 of the Texas Government Code; rather, it is intended only to convey informal legal guidance.

Sincerely,

Ryan Bangert
Deputy First Assistant Attorney General

WITHHOLD GOVERNMENT CODE

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ONGOING INVESTIGATION

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