THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT

Patsy Spaw

AUG 04 2023

CLERK OF THE COURT

IN THE MATTER OF
WARREN KENNETH PAXTON, JR.

ATTORNEY GENERAL WARREN KENNETH PAXTON JR.'S
MOTION TO DISMISS ARTICLE II

In their haste to impeach the Attorney General, the House could not even be bothered to understand the facts or the law. They chose their objective—overturn the will of millions of Texas voters in an anti-democratic attempt to defeat Ken Paxton through impeachment when they could not defeat him at the polls—and they have made clear that they will use any means necessary to achieve it. Prudent Representatives with fidelity to constitutional principles would have conducted their proceedings in public and scrutinized the facts and law with close attention to detail. Instead, the House conducted its investigation in secret, ambushed its Representatives with never-before-seen Articles of Impeachment, and never worried about getting it right. It is no surprise, then, that the House made error after error.

The House Managers must prove the offenses they have charged. They cannot do so with Article II. Article II charges the Attorney General with "misus[ing] his official power to issue written legal opinions" under Chapter 402 of the Texas Government Code. But this allegation is fatally flawed. The "written legal opinion" to which it refers was not issued under Chapter 402—indeed, it was not a formal opinion at all. Rather, it was informal guidance that the Office of Attorney General issued during the COVID-19 pandemic.

What's more, the Attorney General did not misuse *any* official power in issuing that guidance, under Chapter 402 or otherwise. Like every other informal guidance document issued by the Office of Attorney General, the issuance of this informal guidance was well within the Attorney General's authority as the chief legal officer of the State. It was also demonstrably legally correct. Its recommendations were wholly consistent with Governor Abbott's executive orders, and it mirrored orders issued across Texas and the nation from government officials as varied as Austin Mayor Steve Adler to Florida Governor Ron DeSantis to President Donald J. Trump. Each of these flaws is a sufficient basis to dismiss Article II, and this Court should do so.

STANDARD

Impeachment is reserved only for the gravest wrongs as historically understood in English and early American practice "by an examination of the Constitution, legal treatises, the common law[,] and parliamentary precedents." *Ferguson v. Maddox*, 263 S.W. 888, 892 (1924). It is an extraordinary remedy used to protect the State from only the most serious offenses. As a Court of Impeachment, the Senate "must determine whether or not the articles presented by the House set forth impeachable offenses." *Id.* at 893. "Impeachment is used only in extreme cases," *Ferguson v. Wilcox*, 28 S.W.2d 526, 533 (Tex. 1930), consistent with "such official delinquencies, wrongs, or malfeasances as justified impeachment according to" the 500 years of English and American practice preceding the framing of our Constitution. *Ferguson*, 263 S.W. at 892. This Court decides whether an Article as alleged rises to the historical level of an impeachable offense as a matter of law. *Id.* at 893. This Court may dismiss an Article outright—either for failing to rise to that level, or for any other legal defect. *Id.*; *see also* S. Journal, 88th Cong., 1st Sess. at 40–52 (2023).

ARGUMENT

I. Article II Fails as a Matter of Law.

Article II charges the Attorney General with having "misused his official power to issue written legal opinions under Subchapter C, Chapter 402, Government Code." But the "legal opinion" at issue is *not* such a legal opinion. *See* Transcript of Public Hearing at 59:6-8, *In re Paxton*. The document at issue explicitly states it is "informal guidance" and "is *not* a formal Attorney General opinion under section 402.042 of the Texas Government Code."[1] The House even appeared to understand the difference occasionally. Transcript at 59:6-8 (describing the

[1] Ryan Bangert, *Informal Guidance Concerning Foreclosure Sales*, ATTORNEY GENERAL OF TEXAS (Aug. 2020), https://www.texasattorneygeneral.gov/news/releases/informal-guidance-concerning-foreclosure-sales (emphasis added) (attached as Exhibit 1).

informal guidance concerning foreclosure sales as an "informal opinion letter"); *id.* at 72:20-21 (describing the informal guidance as an "[i]nformal attorney general opinion letter"). But they never bothered to correct Article II.

Because the informal guidance was not a legal opinion, Article II charges the Attorney General with a legal impossibility—so he is entitled to acquittal as a matter of law. *See Chambers v. State*, 580 S.W.3d 149, 157 (Tex. Crim. App. 2019) (holding that a legal impossibility cannot support a conviction); *see also Bien v. State*, 550 S.W. 3d 180, 187 (Tex. Crim. App. 2018) (recognizing "the common-law defense of legal impossibility is a valid defense"). The differences between informal legal guidance and a formal legal opinion are significant. For example, formal legal opinions, governed by Texas Government Code section 402.042, require an authorized requestor. Tex. Gov't Code § 402.042(b). Informal guidance does not. Formal legal opinions may only resolve "a question affecting the public interest or concerning the official duties of the requesting person," Tex. Gov't Code § 402.042(a), but informal legal guidance may be on any topic the Attorney General sees fit. And once the Attorney General receives a request from an authorized requestor—for example, the Governor or a committee of either chamber of the Legislature, Tex. Gov't Code § 402.042(b)—he must "(1) acknowledge receipt of the request not later than the 15th day after the date it is received; and (2) issue the opinion not later than the 180th day after the date that it is received." Tex. Gov't Code § 402.042(c). Informal guidance may be to anyone and on any schedule the Attorney General sees fit.

The Attorney General has used these two distinct avenues of providing legal advice in different ways for years. For example, the Office of Attorney General has had a regular practice of issuing informal guidance on subjects as far-ranging as the applicability of a nationwide injunction

affecting schools in Texas to the effect of Governor Abbott's COVID-19 executive orders.[2] Like the informal guidance concerning foreclosure sales at issue in Article II, these informal guidance documents are made publicly available on the Office of the Attorney General's website. Like the informal guidance concerning foreclosure sales at issue in Article II, many of these informal guidance documents were signed by the Deputy Attorney General for Legal Counsel—in this case, Ryan Bangert. And like the informal guidance concerning foreclosure sales at issue in Article II, the Deputy Attorney General for Legal Counsel noted in each that the letters were not "official opinion[s] of the Office of the Attorney General issued under section 402.042 of the Texas Government Code," but instead were "informal letter[s] of legal advice offered for the purpose of general guidance."[3]

In the throes of COVID-19, the Attorney General repeatedly issued informal guidance—often multiple times per day and on weekends, working almost around the clock—while Texans navigated Governor Abbott's executive orders and the changing conditions surrounding the pandemic. One month after Governor Abbott issued his COVID-19 disaster proclamation,[4] the Office of Attorney General issued multiple informal guidance documents to state representatives.[5] The Attorney General also issued joint guidance with Governor Abbott regarding the effect of Governor Abbott's Executive Order GA-14 on houses of worship.[6] These informal guidance

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[2] *Re: "Significant guidance" regarding Title IX and intimate facilities in schools*, ATTORNEY GENERAL OF TEXAS (Aug. 25, 2016), https://tinyurl.com/injcn; *see also, e.g., Re: Whether golf courses may remain open*, ATTORNEY GENERAL OF TEXAS (Apr. 11, 2020), https://tinyurl.com/frankltr; *Voting by Mail*, ATTORNEY GENERAL OF TEXAS (Apr. 14, 2020), https://tinyurl.com/klickltr; *To Religious Private Schools in Texas*, ATTORNEY GENERAL OF TEXAS (July 17, 2020), https://tinyurl.com/rlgsschls.

[3] *See, e.g.*, *id.*

[4] Proclamation by the Governor of the State of Texas (Mar. 13, 2020), https://tinyurl.com/dstrproc.

[5] *See* Bangert, *supra* note 1; *see also e.g., Re: Whether golf courses may remain open*, ATTORNEY GENERAL OF TEXAS (Apr. 11, 2020), https://tinyurl.com/frankltr; *Voting by Mail*, ATTORNEY GENERAL OF TEXAS (Apr. 14, 2020), https://tinyurl.com/klickltr.

[6] *Guidance for Houses of Worship During the COVID-19 Crisis*, ATTORNEY GENERAL OF TEXAS (Apr. 1, 2020), https://tinyurl.com/jointguid.

documents, like the informal guidance concerning foreclosure sales, were publicly available online and expressly disavowed themselves as legal opinions.

Hence why Article II is fatally flawed. It expressly charges the Attorney General with violating Chapter 402—which does not apply on its own terms. For example, the House contends the Attorney General "solicit[ed] the chair of a senate committee to serve as straw requestor." Art. II. (Of course, this practice does not violate Chapter 402 in any way; it is perfectly lawful for the Attorney General to have conversations with authorized requestors about prospective opinion requests.) But unlike written legal opinions issued under Chapter 402, the law imposes no mandatory prerequisite in the form of a request from an authorized person to the Attorney General's authority to issue informal guidance. Likewise, the House makes much about the lack of a "tracking number . . . from the original request to the final opinion" and the absence of the signature of the opinion committee chair. Transcript at 65:1-16. Once again, the House conflates legal opinions issued under the Government Code with informal guidance. These formal requirements do not apply to the guidance at issue in Article II.

For these reasons, Article II fails on its face and must be dismissed. The House Managers must prove the offense they have charged: here, a violation of the written legal opinion process under Chapter 402. *Woodard v. State*, 322 S.W.3d 648, 656–57 (Tex. Crim. App. 2010) ("[A] defendant cannot be held to answer a charge not contained in the indictment brought against him."); *see also The Hoppet*, 11 U.S. 389, 394 (1813) ("The rule that a man shall not be charged with one crime and convicted of another . . . is essential to the preservation of innocence."). The House Investigators belatedly acknowledge that the informal guidance was *not* a written legal opinion. Transcript at 72:20-21 (describing the informal guidance concerning foreclosure sales as an "[i]nformal attorney general opinion letter"). Article II does not identify or describe a "written

legal opinion[] under Subchapter C, Chapter 402, Government Code" sufficient to sustain the charge against the Attorney General. *See Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011) ("A [material] variance . . . is actually a failure of proof because the indictment sets out one distinct offense, but the proof shows an entirely different offense"). Accordingly, Article II must be dismissed.

II. The Office of Attorney General Properly Issued the Informal Guidance Concerning Foreclosure Sales.

Even if Article II were not facially defective (and it is), Article II should nevertheless be dismissed because the Attorney General acted within his legal authority, and the informal guidance concerning foreclosure sales was consistent with local, state, and federal orders.

The informal guidance concerning foreclosure sales was issued on August 1, 2020, following Governor Abbott's declaration of a state of disaster for all of Texas.[7] The guidance was issued in response to a request to clarify "whether local governmental bodies have authority to limit in-person attendance at a judicial or non-judicial foreclosure sale to 10 persons or fewer."[8] At the time, both state and local orders restricted public gatherings: most significantly, Governor Abbott's Executive Order GA-28 expressly prohibited "any outdoor gathering in excess of 10 people . . . unless the mayor of the city in which the gathering is held . . . approves of the gathering."[9] A violation of this prohibition was punishable as an offense under Texas Government Code § 418.173.[10] Mirroring the terms of Governor Abbott's Executive Order, the informal guidance concluded 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

[7] *Supra* note 4.
[8] Bangert, *supra* note 1, at 1.
[9] Exec. Order GA-28 (June 26, 2020), https://tinyurl.com/TXGA-28, as amended by Exec. Order GA-28 (July 2, 2020), https://tinyurl.com/Amended28.
[10] *Id.*

imposed by Executive Order GA-28," and that if that restriction prevented bidders from participating in a foreclosure sale, the sale could not proceed.[11]

The agency's conclusion was supported not only by the plain language of Governor Abbott's Executive Order but also by contemporaneous local orders. In Harris County, Judge Lina Hidalgo issued an order prohibiting "[o]utdoor gatherings estimated to be in excess of 10 people, consistent with amended Executive Order GA-28."[12] Judge Hidalgo specifically extended that prohibition to foreclosure sales: "This prohibition includes the gathering of people for sales of real property pursuant to Section 51.002 of the Texas Property Code, Section 34.01 of the Texas Property Tax Code, [and] Section 34.041 of the Texas Civil Practice and Remedies Code."[13] Similarly, following Governor Abbott's issuance of GA-28, Austin Mayor Steve Adler issued an order "pursuant to the Governor's Order [GA-28] and the advice of the local Health Authority" prohibiting "gatherings or presence at any outdoor area, event, or establishment of more than 10 people."[14] While Mayor Adler's Order included certain exceptions to this "outdoor gathering ban," foreclosure sales were not one of them.

The agency's informal guidance was also consistent with other states' orders. Democrat and Republican governors across the country issued orders prohibiting foreclosure actions. In Florida, Governor DeSantis issued an executive order "suspend[ing] and toll[ing] any statute providing for a mortgage foreclosure cause of action."[15] In Wisconsin, Democrat Governor Tony Evers prohibited mortgagees "from commencing a civil action to foreclose upon real estate" and prohibited sheriffs from "act[ing] on any order of foreclosure or execut[ing] any writ of assistance

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[11] Bangert, *supra* note 1, at 3.
[12] Judge Lina Hidalgo, Outdoor Gatherings Order (July 3, 2020), https://tinyurl.com/HidalgoOrder.
[13] *Id.*
[14] Order No. 20200815-019, https://tinyurl.com/ATXOrd.
[15] Exec. Order No. 20-94 (Apr. 2, 2020), https://tinyurl.com/RDFLOrd.

related to foreclosure." [16] Kansas Democrat Governor Laura Kelly also prohibited "the initiation of any mortgage foreclosure efforts or judicial proceedings and any commercial or residential eviction efforts."[17] Likewise, in New Hampshire, Republican Governor Chris Sununu prohibited "[a]ll judicial and non-judicial foreclosure actions . . . during the State of Emergency."[18]

State policies mirrored the national approach. In August 2020, President Trump issued an executive order stipulating that his Administration would "take all lawful measures to prevent residential evictions and foreclosures."[19] And just weeks after the Office of Attorney General published the informal guidance, President Trump issued a press release echoing the conclusions of the Attorney General's informal guidance, commenting, "I want to make it unmistakably clear that I'm protecting people from evictions."[20] Following President Trump's executive order, the Department of Housing and Urban Development extended the moratorium on foreclosures multiple times, well into 2021.[21] Clearly, the informal guidance's conclusion was not unusual.

The Attorney General was well within his authority to promulgate the informal guidance assessing the impact of Governor Abbott's Executive Order on foreclosure sales. When Governor Abbott issued executive orders in response to a statewide disaster, questions about their application were appropriately directed to the Attorney General. Under the Texas Constitution, the Attorney General is the chief legal officer of the state. *Terrazas v. Ramirez*, 829 S.W.2d 712, 721 (Tex. 1991)

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[16] Exec. Order No. 15 (March 27, 2020), https://tinyurl.com/WIOrd.
[17] Exec. Order No. 20-06 (March 17, 2020), https://tinyurl.com/KSGovORd.
[18] Exec. Order No. 4 (March 17, 2020), https://tinyurl.com/NHGovOrd.
[19] 85 Fed. Reg. 49,936.
[20] *President Donald J. Trump Is Working to Stop Evictions and Protect Americans' Homes During the COVID-19 Pandemic*, Trump White House (Sept. 1, 2020), https://tinyurl.com/TrumpStmt.
[21] *Extension of Foreclosure and Eviction Moratorium*, U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT (May 14, 2020), https://tinyurl.com/HUDMay; *Extension of the Foreclosure and Eviction Moratorium*, U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT (June 25, 2021), https://tinyurl.com/HUDJun; *see also FFHA Extends COVID-19 Forbearance Period and Foreclosure and REO Eviction Moratoriums*, FEDERAL HOUSING FINANCE AGENCY (Feb. 25, 2021), https://tinyurl.com/ffhaevic.

(citing Tex. Const. art. IV, § 22; Tex. Gov't Code § 402.021). The Attorney General "has broad discretionary power in conducting his legal duty and responsibility to represent the State." *Id.* Moreover, the informal guidance was not legally binding. Rather, it only "convey[ed] informal legal guidance" insufficient to "alter the pre-existing legal obligations of state agencies or private citizens." *In re Abbott*, 645 S.W.3d 276, 281 (Tex. 2022).

The Office of Attorney General's conclusion that foreclosure sales were subject to GA-28's 10-person limit was both consistent with the terms of the Executive Order and well within the similar restrictions imposed across the country at the local, state, and federal levels. The agency's legal advice was not unlawful—it was commonplace. Article II must therefore be dismissed.

III. Article II Does Not Describe an Impeachable Offense.

Article II's several other fatal flaws aside, it must also be dismissed because the issuance of such informal guidance does not rise to the level of an impeachable offense.

This conclusion is bolstered by historical precedent. "When the Constitution of Texas was adopted, it was done in the light of, and with a full knowledge and understanding of, the principles of impeachment as theretofore established in English and American parliamentary procedure. The [Texas] Constitution in this matter of impeachment created nothing new. By it, something existing and well understood was simply adopted." *Ferguson*, 263 S.W. at 892. Accordingly, it is appropriate to consider federal impeachment standards in assessing what acts rise to the level of an impeachable offense in Texas. *See* U.S. Const. art. II, § 4.

Impeachment is reserved for an offense so dangerous it threatens the public order. *See* Charles L. Black, Jr., *Impeachment: A Handbook*, *in* IMPEACHMENT: A HANDBOOK, NEW EDITION at 35 (Charles L. Black, Jr. & Philip Bobbit, 2018). Indeed, "[t]he primary purpose of an impeachment is to protect the state, not to punish the offender." *Ferguson*, 263 S.W. at 892. At the

1787 Constitutional Convention, the Framers expressly rejected "maladministration" as a ground for impeachment. Black at 26–27. James Madison noted that "[s]o vague a term w[ould] be equivalent to a tenure during pleasure of the Senate." *Id.* at 26. In its place, the Framers substituted "high Crimes and Misdemeanors," signaling that they believed offenses must "hav[e] about them some flavor of criminality." *Id.* at 27–28.

An act of that magnitude has not been alleged here. Indeed, Article II fails to so much as claim that the Attorney General knowingly violated Texas law—let alone that he did so, for example, out of direct financial self-interest. When the Texas House preferred twenty-five articles of impeachment against Land Commissioner McGaughey, it charged that McGaughey's sale of certain properties violated the land laws—but not that McGaughey did so out of a personal financial interest. This Court concluded that was not enough, and it conclusively rejected every charge.[22] Here, there can be but one conclusion: the State was not threatened, harmed, or wronged by the issuance of non-binding legal guidance whose conclusion reiterated the terms of Governor Abbott's executive orders—let alone in a way that amounts to a "grave official wrong." *Ferguson*, 263 S.W. at 892.

CONCLUSION AND RELIEF REQUESTED

Article II fails both as a matter of law and to allege an impeachable offense. Attorney General Paxton respectfully requests the Court grant his Motion to Dismiss Article II.

[22] *See* State of Tex. Senate, Rec. of the High Ct. of Impeachment on the Trial of W.L. McGaughey, Land Comm'r, S. 23, Reg. Sess. at 169-78 (1893).

Respectfully submitted.

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CERTIFICATE OF SERVICE

This motion was served via email on the Senate, the Lieutenant Governor, and the House Board of Managers through their counsel, Rusty Hardin and Dick DeGuerin, on August 4, 2023.

/s/ Amy S. Hilton
Amy S. Hilton

EXHIBIT 1

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]

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[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.

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 trustee[16]—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."

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[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