



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 8, 2020

The Honorable Dade Phelan  
Chair, Committee on State Affairs  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

**Opinion No. KP-0308**

Re: Whether a local governmental entity under an emergency declaration has the authority to prevent an owner of a second home from occupying that property or limiting occupancy of housing based on length of the occupancy's term (RQ-0352-KP)

Dear Representative Phelan:

You ask two questions related to local governmental entities' authority to regulate occupancy during emergency declarations.<sup>1</sup> Certain provisions within the Government Code provide governmental entities with additional authority during times of disaster to address emergency situations. *See* TEX. GOV'T CODE §§ 418.001–.261. 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. *Id.* § 418.108(a); *see id.* § 418.004(6). Once a local state of disaster has been declared, the “county judge or the mayor of a municipality may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor and control the movement of persons and the occupancy of premises in that area.” *Id.* § 418.108(g). They may also “order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the county judge or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.” *Id.* § 418.108(f). In addition to these general emergency powers, chapter 81 of the Health and Safety Code authorizes local health authorities to impose temporary communicable disease control measures, including, among other actions, restriction, isolation, and quarantine. TEX. HEALTH & SAFETY CODE § 81.082(a)–(b), (f).

Claiming authority under these emergency powers, some counties and municipalities in Texas have declared local disasters due to the spread of the disease COVID-19 and issued orders

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<sup>1</sup>*See* Letter from Honorable Dade Phelan, Chair, House Comm. on State Affairs, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (rec’d Apr. 24, 2020) (“Request Letter”), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0352KP.pdf>.

restricting the occupancy of certain residential properties. While you do not ask about any specific local order, your questions address the extent of local authority in this regard during a declared disaster. In particular, you ask whether a local governmental entity operating under an emergency declaration may “prevent an owner of a second home from occupying their property” or “limit occupancy of housing based on length of the occupancy’s term.” Request Letter at 1.

Your first question involves fundamental rights protected by the United States and Texas Constitutions. “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.* at 476. And the right “to lease property is a fundamental privilege of property ownership.” *See 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 also Zaatari 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).

The Texas Constitution provides: “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities . . . except by the due course of the law of the land.” TEX. CONST. art. I, § 19. Similarly, the United States Constitution provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States,” U.S. CONST. art. IV, § 2, cl. 1, and “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” *id.* amend. XIV, § 1.<sup>2</sup> These provisions ensure that both Texans and residents of other states can equally use and enjoy property for lawful purposes; they further protect property owners against arbitrary interference by the government.<sup>3</sup> *See Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (recognizing federal Privileges and Immunities Clause prohibits discriminating legislation against non-residents, gives non-residents free ingress into and egress from other States, and ensures non-residents are treated equally under the law among State residents, including when acquiring or using property (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869))); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) (noting Texas due-course clause requires both procedural and substantive due course). When a governmental entity infringes upon a fundamental right protected by the Due Process Clause, courts will “examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.” *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 71 (1981).

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<sup>2</sup>While the Texas and federal Constitutions differ in that Texas refers to “due course” rather than “due process,” Texas courts regard these terms as without substantive distinction unless and until a party demonstrates otherwise. *See University of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (citing *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252–53 (1887)).

<sup>3</sup>In addition to due process concerns, a local order restricting occupancy only for owners of second homes or property owners utilizing their homes for short-term rentals raises significant Equal Protection concerns. However, such questions are currently the subject of pending litigation and are therefore not appropriate for the opinion process. *See Bryan v. Cano*, No. 4:20-cv-00025-DC-DF (W.D. Tex. filed Apr. 10, 2020); *see also* Tex. Att’y Gen. Op. No. KP-0118 (2016) at 2 (declining to opinion on a question subject to pending litigation).

Here, both the Texas and United States Constitutions prohibit government action that unlawfully discriminates on the basis of residence. Yet government action may prevent a property owner from occupying property so long as that restriction has some real or “substantial relation” to the exercise of the State’s police power and is not “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (quotation marks omitted) (recognizing state authority to implement emergency measures during a public health disaster only if those “measures have at least some ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law’” (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905))); *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921) (requiring preservation of public health, safety, comfort, or welfare to be “the real object and purpose” of government action depriving a person of property, lest such action be “a clear and direct invasion of the right of property”). Thus, limited circumstances may exist that create a state interest sufficient to warrant restricting occupancy of private property due to a disaster, or property owners’ ability to lease their property to another. Whether a certain regulation violates due process is a question that a court must decide after determining the relevant facts. Tex. Att’y Gen. Op. No. GA-0526 (2007) at 6.

However, in addition to due process concerns, the Governor’s Executive Orders issued pursuant to the COVID-19 disaster declaration are relevant to addressing your questions. The Governor declared a state of disaster in Texas due to COVID-19 on March 13, 2020.<sup>4</sup> The Legislature authorized the Governor, upon declaring a disaster, “to issue executive orders, proclamations, and regulations and amend or rescind them.” TEX. GOV’T CODE § 418.012. The Governor’s executive orders, proclamations, and regulations have the force and effect of law. *Id.* Pursuant to that authority, the Governor has issued multiple executive orders, proclamations, and other statements, relating to the COVID-19 disaster declaration, including Executive Order GA-21,<sup>5</sup> which addresses the provision of essential and reopened services.

Executive Order GA-21 provides that it supersedes “any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts essential services or reopened services allowed by this executive order . . .”. Exec. Order GA-21 at 6. Executive Order GA-21 adopts as essential “everything listed by the U.S. Department of Homeland Security (DHS) in its Guidance on the Essential Critical Infrastructure Workforce.” *Id.* at 3. That DHS Guidance includes as essential “residential/shelter facilities and services,” which encompasses the “the leasing of residential properties to provide individuals and families with ready access to available housing.”<sup>6</sup>

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<sup>4</sup>See Governor of the State of Texas, Disaster Proclamation (Mar. 13, 2020), [https://gov.texas.gov/uploads/files/press/DISASTER\\_covid19\\_disaster\\_proclamation\\_IMAGE\\_03-13-2020.pdf](https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf). The Governor extended the disaster declaration on April 12, 2020. See Governor of the State of Texas, Disaster Proclamation (Apr. 12, 2020), <https://gov.texas.gov/news/post/governor-abbott-extends-disaster-declaration-for-covid-192>.

<sup>5</sup>Exec. Order GA-21 (May 5, 2020), <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-21.pdf>.

<sup>6</sup>U.S. Dep’t of Homeland Security, Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (Apr. 17, 2020), [https://www.cisa.gov/sites/default/files/publications/Version\\_3.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_4.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_4.pdf).

To the extent a local order restricts essential services allowed by Executive Order GA-21, the Governor's executive order supersedes those restrictions. Exec. Order GA-21 at 6. Thus, Executive Order GA-21 prohibits a local governmental entity, acting under the authority of its emergency powers, from issuing an order that limits occupancy of housing based on length of the occupancy's term.

**S U M M A R Y**

The Texas and United States Constitutions prohibit government action that unlawfully discriminates on the basis of residence. They also ensure citizens receive due process and that the government does not act arbitrarily. To the extent a local ordinance restricting access to or limiting occupancy of private property exceeds these boundaries, it is unconstitutional.

In addition, the Governor declared a state of disaster in Texas due to COVID-19 on March 13, 2020 and issued executive orders related to the provision of essential services. Executive Order GA-21 supersedes any conflicting order issued by local officials in response to the COVID-19 disaster to the extent that such a local order restricts essential services, such as obtaining residential housing. GA-21 therefore prohibits a local governmental entity, acting under the authority of its emergency powers, from issuing an order that limits occupancy of housing based on length of the occupancy's term.

Very truly yours,

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

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