



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 7, 2020

The Honorable Matthew A. Mills
Hood County Attorney
1200 West Pearl Street
Granbury, Texas 76048

Opinion No. KP-0304

Re: Whether, when operating under a local disaster declaration, local governments may commandeer private property under Government Code section 418.108 (RQ-0342-KP)

Dear Mr. Mills:

Chapter 418 of the Government Code, titled “Emergency Management,” grants special emergency powers to both the Governor and certain local officials to address a declared disaster. *See, e.g.*, TEX. GOV’T CODE §§ 418.016 (“Suspension of Certain Laws and Rules”), 418.018 (“Movement of People”), 418.108 (“Declaration of Local Disaster”). The Governor declared a state of disaster in Texas due to COVID-19 on March 13, 2020.¹ The Governor has issued multiple executive orders, proclamations, and other statements relating to the disaster since that time, and you observe that “many counties and cities have issued more far-reaching orders” as well.² You question the legality of such local orders and ask whether section 418.108 of the Government Code authorizes local governments to commandeer private property. Request Letter at 1.³

¹*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. 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>.

²*See* Letter from Honorable Matthew A. Mills, Hood Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Mar. 30, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0342KP.pdf> (“Request Letter”).

³You ask additional questions regarding the legality of the orders issued by state and local authorities; however, as explained in our April 2, 2020 letter to you, those issues are the subject of pending litigation. *See* Letter from Virginia K. Hoelscher, Chair, Op. Comm., Office of the Att’y Gen. of Tex., to Honorable Matthew A. Mills, Hood Cty. Att’y at 1 (Apr. 2, 2020) (on file with the Op. Comm.). Because this office has a long-standing policy of

Subsection 418.108(a) authorizes the presiding officer of the governing body of a political subdivision to declare a local state of disaster. TEX. GOV'T CODE § 418.108(a).⁴ Once a disaster has been declared, subsection 418.108(f) authorizes the county judge or mayor of a municipality to “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 “necessary for the preservation of life or other disaster mitigation, response, or recovery.” *Id.* § 418.108(f). In addition, the county judge or mayor “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).

However, nothing in the language of section 418.108 authorizes county judges, mayors of municipalities, or any other local government officials to commandeer private property. *See id.* § 418.108. In contrast, under subsection 418.017(c), the Legislature gave the Governor express authority to “commandeer or use any private property” upon determining that it is necessary to cope with a disaster. *Id.* § 418.017(c).⁵ The Legislature expressly conferred some, but not all, of the extraordinary emergency powers given to the Governor to local government authorities. “When the Legislature uses a word or phrase in one portion of a statute but excludes it from another, the term should not be implied where it has been excluded.” *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011). Without an express grant of authority to commandeer private property in section 418.108, we cannot conclude that section impliedly grants local government officials authority to commandeer property.⁶

generally refraining from addressing issues involved in pending litigation, we decline to opine on your other questions and defer to the court’s hearing those issues at this time. *See* Tex. Att’y Gen. Op. No. GA-0609 (2008) at 4 (“This office generally does not address matters that are the subject of pending litigation.”).

⁴“A declaration of local disaster may not be continued or renewed for a period of more than seven days except with the consent of the governing body of the political subdivision or the joint board as provided by Subsection (e), as applicable.” TEX. GOV'T CODE § 418.108(b).

⁵Section 418.152 of the Government Code recognizes that compensation may be available when property is “commandeered or otherwise used in coping with a disaster and its use or destruction was ordered by the governor or a member of the disaster forces of this state.” TEX. GOV'T CODE § 418.152(c).

⁶Our conclusion does not foreclose the possibility that local government officials could possess authority to commandeer private property in certain limited circumstances when serving as the Governor’s designated agent to respond to local disasters. The Governor, through the disaster declaration, could authorize the designated “emergency management director,” which is the presiding officer of the governing body of an incorporated city or a county, to “commandeer or use any private property” upon determining that it is necessary to cope with the disaster subject to the compensation requirements. *Id.* §§ 418.017(c), .1015(a)–(b), .152. In considering a predecessor statute to chapter 418, this office concluded that a specific executive order activated the Governor’s emergency powers for local officials such that a county judge could use county equipment on private land if he reasonably deemed it necessary to meet or prevent a locally declared disaster. *See* Tex. Att’y Gen. Op. No. MW-140 (1980) at 3. Whether and to what extent local officials possessed the authority to commandeer private property would be decided on a case-by-case basis, considering the language of any relevant executive orders as well as the circumstances surrounding the disaster in question.

S U M M A R Y

Section 418.108 of the Government Code authorizes the presiding officer of the governing body of a political subdivision to declare a local state of disaster and grants local authorities certain powers to respond to the disaster. Section 418.108 does not authorize a county judge, a mayor of a municipality, or any other local government official to commandeer private property to respond to a disaster.

Very truly yours,

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

KEN PAXTON
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