



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 8, 2020

The Honorable Dan Flynn
Chair, House Committee on Defense & Veterans' Affairs
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0306

Re: Authority of a county judge to issue emergency orders regulating the business of pawnshops during a declared disaster (RQ-0347-KP)

Dear Representative Flynn:

You ask whether the Dallas County Judge has authority to issue emergency orders regulating the business of pawnshops during a declared disaster.¹ As background, the Governor declared a state of disaster in Texas due to COVID-19 on March 13, 2020.² *See* TEX. GOV'T CODE § 418.014(a) (authorizing the Governor to declare a state of disaster). Under a declared disaster, "the governor may issue executive orders, proclamations, and regulations and amend or rescind them." *Id.* § 418.012. The Governor's executive orders "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 disaster declaration, including Executive Order GA-21, which addresses the provision of essential services.³

In addition to the Governor's orders, many counties and cities have issued local orders restricting businesses and activities. *See id.* § 418.108(a), (g) (authorizing the presiding officer of the governing body of a political subdivision to declare a local state of disaster and granting certain

¹*See* Letter from Honorable Dan Flynn, Chair, House Comm. on Defense and Veterans' Affairs, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Apr. 20, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0347KP.pdf> ("Request Letter").

²*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>.

³Governor of the State of Texas, Executive Order GA-21 (May 5, 2020), <https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-to-expand-openings-of-certain-businesses-and-activities>.

powers once a disaster has been declared). You ask specifically about an order issued in Dallas County that imposes “new restrictions on Dallas County pawnshops.” Request Letter at 1. On April 6, 2020, the Dallas County Judge issued an order imposing significant restrictions on essential businesses and activities within Dallas County.⁴ Relevant to your question, the Dallas County Order imposes specific restrictions on the operation of pawnshops, in addition to the general restrictions it imposes on essential businesses. The restrictions on pawnshops include changes to pawn service fees and the minimum length of time a pawnshop must hold pledged goods, as well as a restriction on the number of customers permitted on the premises of a pawnshop at one time:

Interest and Fees. Interest on a loan of money extended pursuant to a pawn transaction shall not exceed 15% per annum of the total amount of the advance, provided that total fees associated with the loan do not exceed \$75, regardless of the name or type of charge. A pawnshop may charge only those charges expressly authorized in this Order in connection with a pawnshop loan.

Minimum Term Length. A pawnshop shall hold the goods pledged as collateral for at least 120 days after the end of the Emergency Declaration issued by Judge Jenkins or the end of the Emergency Declaration issued by Governor Abbott, whichever is later.

Safety Rules. All pawnshops must follow the requirements set forth in the rules below: . . .

d) Employers shall restrict the number of customers so that only one customer is physically present in the store at a time;

Dallas County Order at 17. The order further provides enforcement measures for a violation of its terms:

Enforcement. A violation of this Order is a misdemeanor punishable by a fine not to exceed \$1,000 and/or confinement in jail for a term not to exceed 180 days. Additionally, any financial institution who fails to strictly comply with these rules can be removed from the essential business list and prohibited from operating in Dallas County.

Dallas County Order at 18. You ask whether a county judge or municipality possesses authority to mandate and enforce these requirements. Request Letter at 2.

⁴Dallas County, Amended Order of County Judge Clay Jenkins, Safer at Home (Apr. 6, 2020), *available at* <https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/040620-AmendedOrder.pdf>. The Dallas County Judge amended this order on April 23, 2020, but the relevant language remains the same. Dallas County, Amended Order of County Judge Clay Jenkins, Safer at home (Apr. 23, 2020) (“Dallas County Order”).

The Dallas County Order addresses an area of the law over which the Legislature has exclusive authority. Chapter 371 of the Finance Code, titled the “Texas Pawnshop Act,” governs the operation of pawnshops. *See generally* TEX. FIN. CODE §§ 371.001–.306. Section 371.159 places limitations on the amount a pawnbroker may charge as a pawn service fee, depending on the total amount financed. *Id.* § 371.159(c). And section 371.169 establishes a minimum period of time during which a pawnbroker must hold the pledged goods—30 days. *Id.* § 371.169(a). Furthermore, the Legislature limited local authority to regulate pawnshops with unmistakable clarity. Section 371.005 provides: “The legislature has exclusive authority regarding the operation of pawnshops, except for a matter delegated by this chapter to the [consumer credit commissioner].” *Id.* §§ 371.003(2), .005. As this office recognized in Opinion KP-0293, through this provision, the Legislature unmistakably expressed its preemptive intent over the operation of pawnshops. Tex. Att’y Gen. Op. No. KP-0293 (2020) at 2. Thus, a political subdivision has no authority to create its own procedures regarding the operation of pawnshops. *Id.* at 5. Despite clear legislative preemption and without reference to the Finance Code, the Dallas County Order attempts to create its own local rules regulating pawn service fees and the hold period for pledged goods. Dallas County Order at 17. While local officials possess certain limited emergency powers, those powers do not authorize a county judge to amend state law that the Legislature has expressly removed from local control. To the extent that the Dallas County Order attempts to do so, a court would likely find it invalid and unenforceable.

We next address the provision in the Dallas County Order limiting pawnshops to only one customer at a time. *See* Dallas County Order at 17. 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.” Exec. Order GA-21 at 3. That DHS Guidance includes as essential “financial services,” including services provided by “workers who are needed to provide . . . access to bank and non-bank financial services and lending services”⁵ While the federal guidance does not expressly include “pawnshops,” such businesses provide access to lending services. *See* TEX. FIN. CODE § 371.003(6) (defining “pawnbroker” as a person engaged in the business of “lending money on the security of pledged goods”); *see also* NEW OXFORD AM. DICTIONARY 1658 (3d edition 2010) (defining “pawnbroker” as “a person who lends money at interest on the security of an article pawned”). Dallas County itself recognizes pawnshops as an essential business. Dallas County Order at 5. Thus, pawnshops provide an essential service, and under GA-21, the Governor’s order supersedes a conflicting order issued by a local official that restricts essential services. Exec. Order GA-21 at 6.

Executive Order GA-21 incorporates minimum standard health protocols for the provision of essential services:

⁵U.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.

In providing or obtaining essential services or reopened services, all persons (including individuals, businesses and other organizations and any other legal entity) should use good-faith efforts and available resources to follow the minimum standard health protocols recommended by DSHS, found at www.dshs.texas.gov/coronavirus. All persons should also follow, to the extent not inconsistent with DSHS minimum standards, the Guidelines from the President and the CDC, as well as other CDC recommendations.⁶

Exec. Order GA-21 at 5.

A local order adopted pursuant to lawful authority requiring compliance with CDC-recommended social distancing guidelines that are consistent with the DSHS recommendations is permitted under Executive Order GA-21 and therefore not superseded. Whether a local order that limits occupancy of a business is consistent with CDC- or DSHS-recommended guidelines will likely involve fact questions that cannot be resolved through the opinion process. Tex. Att’y Gen. Op. No. KP-0088 (2016) at 1 (explaining that resolving fact questions is beyond the scope of an attorney general opinion). Notwithstanding, a local order that restricts all businesses of a certain type to “only one customer . . . physically present in the store at a time,” without regard to the size of the premises, is likely not tied to specific social distancing recommendations. To the extent that pawnshops can operate in the county with more than one customer at a time on the premises and still comply with the DSHS guidelines and consistent CDC recommendations, the Dallas County order conflicts with Executive Order GA-21 by impermissibly restricting essential services and is, therefore, superseded by the Governor’s order.

⁶Guidelines from the Centers for Disease Control and Prevention (“CDC”) recommend “establishing policies and practices for social distancing,” meaning “maintaining distance (approximately 6 feet or 2 meters) from others when possible.” https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?utm_content=CDC%20website&utm_campaign=Today’s%20Update%20From%20the%20CDC%3A%20Guidance%20for%20Businesses%20and%20Employers%20to%20Plan%20and%20Respond%20to%20Coronavirus&utm_source=ocn_story&utm_medium=website.

S U M M A R Y

Section 371.005 of the Finance Code provides that the Legislature has exclusive authority regarding the operation of pawnshops. A local official lacks authority to rewrite state law that the Legislature has expressly removed from local control. A court would likely find that the portions of Dallas County's order purporting to regulate pawnshops by limiting the fees those businesses can charge and changing the length of time they must hold pledged goods are invalid and unenforceable.

After declaring a state of disaster in Texas due to COVID-19, the Governor issued Executive Order GA-21, which "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" under the executive order. Operating a pawnshop provides essential lending services. Thus, Executive Order GA-21 prohibits a political subdivision from issuing a conflicting local order that restricts the operation of pawnshops. Whether a local order may limit the number of customers inside the premises of a pawnshop is a fact question. However, to the extent a pawnshop can operate under DSHS guidelines and consistent CDC recommendations with more than one customer on the premises at a time, a local order that purports to limit the occupancy of the premises to only one customer at a time, without regard to the size of the premises, conflicts with Executive Order GA-21 and, therefore, is superseded.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is fluid and cursive, with the first letters of "Ken" and "Paxton" being capitalized and prominent.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

RYAN M. VASSAR
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee