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March 30, 2020

RQ-0342-KP

FILE# ML-48751-20

I.D.# 48751

The Honorable Ken Paxton
Texas Attorney General
300 W. 15th Street
Austin, TX 78701

Dear General Paxton,

This letter serves as a formal request for your opinion regarding the legality of state and local emergency orders enacted under Texas Government Code 418. In the wake of the Covid-19 virus, Governor Greg Abbott issued an executive order on March 19, 2020, and many counties and cities have issued more far-reaching orders since that time. The question is whether the contents of such orders are legal under the statute, Texas Constitution, and United States Constitution. An order from Hood County, dated March 25, 2020, is attached as Exhibit A. It is substantially similar to other orders issued in counties such as Tarrant, Dallas, Travis, Bexar, and Harris.

Question #1: May local governments commandeer private property under GC 418.108, when this authority is only vested in the governor under GC 418.017(c)?

Question #2: May the state or local governments determine whether certain businesses may be open or closed for lengthy periods of time, based on their authority to control ingress, egress, and occupancy of certain disaster areas under GC 418.018(c) and 418.108(g)? Is this a deprivation of private property without the due course of law under the Fourteenth Amendment to the U.S. Constitution and Section 19 of the Texas Bill of Rights? In particular, was this power contemplated by HB 3111 in 2005, which gave local governments new powers under GC 418.108(f)-(h), with the stated intent to increase their ability to deal with hurricane damage? (See Exhibit B.)

Question #3: Are the state and local executive orders unconstitutional under the Texas and United States Constitutions? The various executive orders ban certain social gatherings, worship services, travel, and health care, among other things. Do these run afoul of the First Amendment

to the U.S. Constitution, Sections 6 and 27 of the Texas Bill of Rights, and Civil Practice and Remedies Code 110.003? Do these infringements of fundamental rights trigger a strict scrutiny review? See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Are the executive orders 1) justified by a compelling government interest, 2) narrowly tailored to meet that interest, and 3) the least restrictive means for meeting that interest? See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

Considering the widespread and devastating impact of these orders on the lives of nearly 30 million Texans, I respectfully request your office issue an expedited opinion on these matters, as you recently did in KP-0296.

Thank you for your opinion in this matter. I look forward to your response.

Sincerely,



Matthew A. Mills
Hood County Attorney

Exhibit A

**EXECUTIVE ORDER OF
HOOD COUNTY JUDGE RON MASSINGILL**

WHEREAS, pursuant to Texas Government Code § 418.108, Hood County Judge issued a Declaration of Local Disaster due to Public Health Emergency on March 19, 2020 due to imminent threat of widespread illness from COVID-19; and

WHEREAS, the County Judge has determined that extraordinary measures must be taken to mitigate the effects of this public health emergency and to facilitate the efficient, rapid, and cooperative response to the emergency; and

WHEREAS, the County Judge issued a Declaration of Local Disaster due to Public Health Emergency on March 19, 2020, and as amended by County Judge Revised Declaration of Local State of Disaster due to Public Health Emergency on March 20, 2020.

WHEREAS, to remain consistent with the declaration of the Texas Department of State Health Services and the executive order issued by Governor Greg Abbott as of March 19, 2020, and to harmonize to the extent possible, the executive orders of Governor Greg Abbott, the Hood County Judge and any mandates contained in the declaration of the Mayors of the cities and towns of Hood County, the Hood County Judge issues this Executive Order.

THEREFORE, Pursuant to Texas Government Code Chapter 418, Be It Proclaimed and Ordered by the Hood County Judge that:

That a state of disaster and public health emergency is hereby declared for Hood County, pursuant to § 418.108(a) of the Texas Government Code.

1. That this Executive Order of a local state of disaster and public health emergency shall be given prompt and general publicity and shall be filed promptly with the County Clerk, pursuant to § 418.108(c) of the Texas Government Code.
2. That the Hood County Emergency Operations Plan is activated and implemented, pursuant to § 418.108(d) of the Texas Government Code.
3. That the County is authorized to commandeer or use any private property, temporarily acquire, by lease or other means, sites required for temporary housing units or emergency shelters for evacuees, subject to compensation requirements, pursuant to § 418.020(c) of the Texas Government Code.
4. That this Executive Order authorizes the County to take any actions necessary to promote health and suppress disease, including quarantine, evacuation, regulating ingress and egress from a disaster area and controlling the movement of persons and the occupancy of premises, pursuant to § 418.108(f), (g) of the Texas Government Code.
5. All persons currently residing within Hood County shall stay at their place of residence, except as allowed by this Order. All persons may leave their residences only for Essential Travel and Essential Activities, to work in Essential Businesses, Government Service, or Essential Critical Infrastructure, or to perform Minimum Basic Operations, as defined below.
To the extent individuals are using shared or outdoor spaces, they must at all times as reasonably as possible maintain Social Distancing, as defined below.

6. All businesses operating in Hood County, except Essential Businesses as defined below, are required to close to the public. Non-essential businesses may continue Minimum Basic Operations consisting exclusively of the following as long as Social Distancing is maintained between all employees and contractors during the activities:
 - a. Operations necessary to maintain security, upkeep, and maintenance of premises, equipment or inventory, including but not limited to the care and maintenance of livestock or animals;
 - b. IT or other operations that facilitate employees working from home;
 - c. Facilitate online or call-in sales performed by employees in a store or facility closed to the public;
 - d. In-store repair services performed by employees in a store or facility closed to the public.
7. It is ordered that a restaurant with or without drive-in or drive-through services; drive-in restaurant; drive-through restaurant; liquor stores; or microbrewery, micro-distillery, or winery may only provide take out, delivery, or drive-in or drive-through services as allowed by law. Social Distancing is required.
8. All public or private gatherings of any number of people occurring outside a single household are prohibited, except as otherwise provided herein. Nothing in this Executive Order prohibits the gathering of members of a household or living unit.
9. All elective medical, surgical, and dental procedures are prohibited anywhere in Hood County. Hospitals, ambulatory surgery centers, dental offices, and other medical facilities are directed to identify procedures that are deemed "elective" by assessing which procedures can be postponed or cancelled based on patient risk considering the emergency need for redirection of resources to COVID-19 response.
10. If someone in a household has tested positive for COVID-19, the household is ordered to isolate at home. Members of the household cannot go to work, school or any other community function until cleared by a medical professional but may seek medical services as needed from medical personnel and facilities.
11. Nursing homes, retirement, and long-term care facilities are to prohibit non-essential visitors from accessing their facilities unless to provide critical assistance or for end-of-life visitation.
12. Individuals experiencing homelessness are strongly urged to obtain shelter and maintain social distancing of 6 feet when feasible. If a homeless person is sheltered and exhibits symptoms or is diagnosed, the shelter's isolation center shall be deemed the residence of the homeless person solely for the purpose of complying with the requirements of this Executive Order. Medical personnel shall make the decision whether any other shelter residents shall be required to isolate based on potential exposure. Available shelters, to the maximum extent practicable, must use COVID-19 risk mitigation practices in their operations.
13. That no person shall sell any of the following goods or services for more than the price the person charged for the goods or services on March 19, 2020, and continuing during the pendency of this Executive Order:
 - a. groceries, beverages toilet articles, ice;
 - b. restaurant, cafeteria, and boarding-house meals; and
 - c. medicine, pharmaceutical and medical equipment and supplies.
14. Definitions:
 - a. Social Distancing means maintaining at least 6 feet distance from other individuals, frequently washing hands with soap and water for at least 20 seconds, using hand sanitizer, covering

coughs or sneezes (into the sleeve or elbow, not the hands), regularly disinfecting high touch surfaces, and not shaking hands.

- b. Minimum Basic Operations include the following, provided that employees comply with Social Distancing:
 - i. The minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or for related functions.
 - ii. The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.
- c. Essential Activities includes any of the following:
 - i. To engage in activities or perform tasks essential to their health and safety, or to the health and safety of their family or household members (for example, obtaining medical supplies or medication, visiting a health care professional, or obtaining supplies need to work from home).
 - ii. To obtain necessary services or supplies for themselves and their family or household members, or to deliver those services or supplies to others (for example, food, pet and livestock supplies, and any other household consumer products, and products necessary to maintain the safety, sanitation, and essential operation of residences). It is strongly recommended that households, to the greatest extent possible, send only one person to businesses for the purpose of picking up food or other essential items.
 - iii. To engage in outdoor activity, provided the individuals comply with social distancing requirements of 6 feet (for example, walking, biking, hiking, golfing, or running).
 - iv. To perform work providing essential products and services at an Essential Business or to otherwise carry out activities specifically permitted in this Executive Order.
 - v. To care for a family member or pet in another household.
- d. Essential Businesses means:
 - i. Essential Health Care Services: Healthcare operations, including hospitals, clinics, doctors, dentists, pharmacies, pharmaceutical and biotechnology companies, other healthcare facilities, healthcare suppliers, home healthcare services providers, mental health providers, substance abuse providers, blood banks, medical research, or any related and/or ancillary healthcare services, veterinary care provided to animals. Home-based care for seniors, adults, or children. Residential facilities and shelters for seniors, adults, and children. Healthcare operations do not include fitness and exercise gyms and similar facilities. Healthcare operations do not include elective medical, surgical, and dental procedures as established in accordance with this Executive Order.
 - ii. Essential Government Functions: All services provided by local, state and federal governments needed to ensure the continuing operation of the government agencies to provide for the health, safety and welfare of the public. All Essential Government Functions shall be performed in compliance with social distancing requirements of 6 feet, to the extent possible.
 - iii. Essential Critical Infrastructure: Work necessary to the operations and maintenance of the 16 critical infrastructure sectors as identified by the National Cybersecurity and Infrastructure Agency (CISA) including public works construction, residential and commercial construction, airport operations, water, sewer, gas, electrical, oil refining, roads and highways, public transportation and other transportation network companies, and ride-

sharing services that provide transportation services necessary for the performance of essential activities, essential businesses, essential infrastructure, and essential government function, solid waste collection and removal, internet, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services), financial institutions, defense and national security-related operations, essential manufacturing operations.

- iv. Essential Retail: Food service providers, including grocery stores, warehouse stores, liquor stores, bodegas, gas stations, convenience stores, and farmers' markets and other retail stores that sell food products and household staples, pet and feed stores. Businesses not open to the public that ship or deliver groceries, food, goods or services directly to residences. Restaurants and other facilities that prepare and serve food, but only for delivery, take out, drive-in, drive-through or carry out. Schools and other entities that typically provide free services to students or members of the public on a pick-up and take-away basis only. The restriction of delivery or carry out does not apply to cafes and restaurants located within hospital and medical facilities. Laundromats, dry cleaners, and laundry service providers. Businesses that provide for the delivery of, or preparation of vehicles. Businesses that supply products needed for people to work from home, including businesses providing mail and shipping and post office box. Businesses that supply products necessary for essential repairs and maintenance of a home or business. Hotel, motels, and shared rental units, except that all bars, cafes, or restaurants in hotels, motels, and shared rental units are closed except for pick up and room service.
- v. Providers of Basic Necessities to Economically Disadvantaged Populations. Social services and charitable organizations that provide food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals; that provide food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise vulnerable individuals.
- vi. Essential Services Necessary to Maintain Essential Operations of Residences or Other Essential Businesses. Trash and recycling collection, processing and disposal, mail and shipping services, building cleaning and maintenance, auto repair, warehouse/distribution and fulfillment, and storage for essential businesses. Plumbers, pool services, security services, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operations of residences, Essential Activities, and Essential Businesses. Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities.
- vii. News Media. Newspapers, television, radio, and other media services.
- viii. Financial Institutions. Banks and related financial institutions, consumer lenders, alternative financial services companies, sales and finance lenders, credit unions, appraisers, and title companies. As much business as possible shall be conducted with web-based technology to limit in-person contact.
- ix. Real Estate Transactions: Services related to current real estate transactions. As much business as possible shall be conducted with web-based technology to limit in-person contact.

- x. Childcare Services. Childcare facilities providing services that enable employees who perform Essential Activities or work for an Essential Business to work as permitted.
 - xi. Animal Shelters, Zoos, and Other Businesses that Maintain Live Animals. Businesses that maintain and care for live animals are not permitted to allow any visitors or patrons but may continue to operate to the extent necessary to provide the necessary care for the animals. Nothing in this section shall prohibit a non-employee from entering the premises to perform a health care services or another Essential Business service.
 - xii. Construction. Construction under a valid permit issued by a governmental entity.
 - xiii. Funeral Services. Funeral homes, crematoriums and cemeteries may operate but no more than ten non-employees may be present at the same time. Social Distancing is required.
 - xiv. Wedding Services. Weddings may be held, but not more than ten persons may be present at any one time. Social Distancing is required. Weddings may not be held inside a County building.
 - xv. Worship Services. Services should be conducted on line or by social media broadcast or in a single household residence. Needed staff can attend to produce audio/video or conduct services for transmission. All churches are closed for in person services.
 - xvi. Moving Services and Supply. Businesses that provide residential and/or commercial moving services and necessary moving supplies.
- e. Essential Travel. For the purposes of this Executive Order, Essential Travel includes travel for any of the following purposes.
- i. Any travel related to the provision of or access to Essential Activities, Essential Governmental Functions, and Essential Businesses Essential Critical Infrastructure, Minimum Basic Operation;
 - ii. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons;
 - iii. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services;
 - iv. Travel to return to a place of residence from outside the jurisdiction;
 - v. Travel required by law enforcement or court order;
 - vi. Travel by church staff or clergy for the purpose of production of remote delivery of religious services and other ministries requiring travel;
 - vii. Travel related to attending a funeral service; or
 - viii. Travel required for non-residents to return to their place of residence outside the County. Individuals are strongly encouraged to verify that their transportation out of the County remains available and functional prior to commencing such travel.
15. That any certified peace officer or other person with lawful authority is hereby authorized to enforce the provisions of this Executive Order in accordance with the authority granted under the Texas Disaster Act of 1975. Any person who violates this Executive Order may be subject to a fine not exceeding \$1,000 or confinement for a period not exceeding 180 days.
16. This Executive Order closes all bars, restaurants, food courts, gyms, massage parlors, barbershops, hair salons, nail salons, tanning salons, wellness and beauty spas; provided, however, that the use of drive-thru, pick up or delivery options is allowed and highly encouraged throughout the duration of this Executive Order for restaurants.

17. That this Executive Order incorporates the attached table, Disaster Restrictions, as if set forth verbatim herein.
18. The sections, paragraphs, sentences, clauses and phrases of this Executive Order are severable and if any phrase, clause, sentence, paragraph or section of this Executive Order should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences paragraphs and sections that can be given effect without the invalid provision, and to this end, the provisions of this Executive Order are severable.
19. This Executive Order is issued in accordance with and incorporates by reference any declaration of disaster previously issued and adopted by Hood County. In the event of a conflict between this Executive Order and a prior declaration or order pertaining to COVID-19, this Executive Order prevails.
20. This Executive Order shall take effect at 11:59 pm on the 25th day of March 2020 and shall remain in effect until April 7, 2020, unless terminated or modified by a subsequent Order.

ORDERED this the 25th day of March 2020.

Ron Massingill, Hood County Judge

Exhibit B

BILL ANALYSIS

Senate Research Center

☛H.B. 3111☛By: Corte (Janek)
Transportation & Homeland Security
5/19/2005
Engrossed**AUTHOR'S/SPONSOR'S STATEMENT OF INTENT**

This past year, several deadly and damaging hurricanes struck both Florida and the Gulf of Mexico. These storms led Governor Perry to direct the Texas Office of Homeland Security to evaluate the state's hurricane preparedness and assess Texas' ability to respond to catastrophic hurricanes.

Currently, Section 418.018, Government Code, allows for local presiding officers to declare a local State of Disaster. However, one key recommendation by the Office of Homeland Security is to clarify local officials' authority with regards to evacuation mandates.

☛H.B. 3111☛ gives the county judge or mayor of a municipality the authority to order an evacuation in an emergency and allows those officials to control ingress to and egress from a disaster area.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 418.108, Government Code, by adding Subsections (f), (g), and (h), as follows:

(f) Authorizes the county judge or the 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 or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.

(g) Authorizes the county judge or the mayor of a municipality to 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.

(h) Provides that for the purposes of Subsections (f) and (g), the jurisdiction and authority of the county judge includes the incorporated and unincorporated areas of the county and to the extent of a conflict between decisions of the county judge and the mayor, the decision of the county judge prevails.

SECTION 2. Effective date: upon passage or September 1, 2005.