



# Exposing Overreach: Tarrant County

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## Key Points

- Chapter 418 of the Texas Government Code grants state and local authorities temporary emergency powers to protect public health and safety.
- In some cases, these emergency powers have given rise to government overreach, as was evidenced with Tarrant County's executive order allowing it to seize private property.
- Eminent domain authorizes governmental entities to take private property through due process and requisite compensation.

In the wake of the COVID-19 virus outbreak, the broad authority granted under [Texas Government Code Chapter 418](#) has been used to impose a variety of rules and restrictions on Texans as they engage in common activities. Some of these new requirements, such as Governor Greg Abbott's executive order ([Exec. Order No. GA-08, 2020](#)) implementing certain social distancing guidelines, are grounded in reason and advance a meaningful public health objective. Other public constraints, however, have been less reasonable and even cumbersome. In some cases, these official actions have even tipped over into the realm of unlawfulness and unconstitutionality.

By and large, the most egregious instances of government overreach have occurred at the local level, set in motion by well-intentioned but misguided county judges and mayors. One concerning example took place in Tarrant County, Texas.

On March 24, 2020, the Tarrant County Judge issued an executive order ([Exec. Order of County Judge B. Glen Whitley, 2020](#)) prohibiting and restricting travel, business activity, public gatherings, medical procedures, and more. Most of Tarrant County's new requirements covered familiar ground, but one provision was unlike any other in Texas. The clause read:

*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. ([p. 1](#))*

This provision raises a serious legal question: Does the law allow the presiding officer of a political subdivision to commandeer private property during a disaster?

## A Look at the Law During Normal Times

In ordinary times, local government officials may seize your property under certain circumstances and using particular processes. However, this authority is tempered by certain checks and balances fashioned under federal and state laws. During these extraordinary times, local governments may have additional, though limited, emergency powers. These powers do not include the authority to commandeer private property. For reasons that will be laid out here, even Tarrant County's initial executive order lacked the safeguards provided under state law, the Texas Constitution, and the United States Constitution.

Property rights are considered fundamental in the United States with protections in the United States Constitution as well as the Texas Constitution. However, both federal and state laws allow governmental entities, such as a political subdivision, to take your property using certain processes, like eminent domain

or civil asset forfeiture (Tex. Local Govt. Code Sec. 251.001; Tex. Local Govt. Code, Sec. 261).

Property rights are protected under the [Fifth Amendment to the United States Constitution](#), which states that “no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The Texas Constitution provides a similar provision, but Texas law also provides more detailed provisions relating to private property protections. [Article I, Section 17 of the Texas Constitution](#) states: “No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.”

Both constitutional provisions incorporate specific procedures that serve as safeguards for the protection of property owners. These safeguards include due process, the requirement of public use, and adequate or just compensation for the property. While those protections are evident in the provisions, not all of these safeguards were included in Tarrant County’s executive order. The order neither satisfied the requirement for due process nor did it specify that the commandeered property must be used in the furtherance of a public purpose. As such, the commandeering provision likely ran afoul of basic constitutional protections.

### Local Government Emergency Powers in Extraordinary Times

During these extraordinary times, state and local officials are operating under and relying on the Texas Disaster Act of 1975, [Texas Government Code Chapter 418](#), in order to best respond to the COVID-19 crisis. The Act grants special emergency powers to both the governor and local officials during a declared disaster in order to protect the health and safety of the public. But even under such emergency powers, local government power remains limited.

In the context of [Texas Government Code Chapter 418](#) as a whole, it is likely that a county does not have the authority to commandeer or use private property under its emergency management powers alone.

[Texas Government Code, Section 418.108](#) details the authority of local governments during states of emergency, which is similar to some of the governor’s authority. Subsection 418.108(a) allows the presiding officer of the governing body of a political subdivision, such as a county judge or mayor, to declare a local state of disaster. Pursuant to Section 418.108, once a local disaster is declared, the presiding officer has the authority to control the movement of people in the disaster area and even order the evacuation of persons from a disaster area in order to protect life and further disaster mitigation.

However, there is no language in Section 418.108 that authorizes any local presiding officer or local official to commandeer private property for temporary housing, emergency shelter, or otherwise.

In fact, [Texas Government Code, Section 418.020](#) outlines the governor’s authority to arrange for temporary housing and emergency shelters as well as the governor’s ability to aid political subdivisions with acquiring such temporary and emergency sites.

A recent opinion issued by Texas Attorney General Ken Paxton addresses this emergency power issue and confirms that local governments do not have the authority under emergency powers to commandeer private property. Opinion No. KP-0304 emphasizes that the “Legislature expressly conferred some, but not all, of the extraordinary emergency powers given to the Governor to local government authorities” ([Atty. Gen. Opinion No. KP-0304, 2020, p. 2](#)).

[Texas Government Code, Section 418.017\(c\)](#), explicitly states that “the governor may commandeer or use any private property if the governor finds it necessary to cope with a disaster, subject to the compensation requirements of this chapter.” However, nowhere in the rest of Chapter 418 does state law explicitly or implicitly authorize a political subdivision to commandeer private property for temporary or emergency housing.

Examining these sections together, it appears that there may be legislative intent for excluding a political subdivision’s blanket and express authority to commandeer private property during an emergency. Accordingly, *R.R. Comm’n of Tex. v. Tex. Citizens for a Sage Future & Clean Water* emphasizes that “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” ([2011](#)). Therefore, provided the express authority vested in the governor and no mention of such authority to local officials, it is likely that Tarrant County’s executive order claiming authority to commandeer or use private property for emergency purposes may be invalid.

Attorney general opinions are not binding, and, in this case, some doubt still remains as to whether a local government can commandeer or use private property. Although this authority is not expressly granted in statute, one possibility is that a local government official may have more authority if they are serving as the governor’s designated agent to respond to local disasters.

Under a disaster declaration, the presiding officer of a city or county’s governing body is the designated emergency management director (Tex. Gov’t Code § 418.1015(a)). The

governor may authorize a designated emergency director to have broader authority, including the power to commandeer private property. It is important to note that, while the Texas governor may authorize this, Governor Abbott has not done so.

Subsection 418.1015(b) further states that “an emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.” The Attorney General’s Opinion No. KP-0304 concludes that it does not believe local officials have the authority to commandeer private property, but it does not eliminate the possibility that a local official serving as a designated emergency management director may commandeer private property in certain limited circumstances ([Atty. Gen. Opinion No. KP-0304, 2020](#)).

The opinion further clarifies that whether this authority does exist to any extent would be determined on a case-by-case basis, taking into consideration the situation, the circumstances of the disaster, and the language of any relevant executive order ([Atty. Gen. Opinion No. KP-0304, 2020](#)).

In the case of Tarrant County’s provision, it is likely that it would still not be valid after review. The language of the executive order, as presented above, is a blanket claim of authority to commandeer property. The county judge did not cite any provision relating to his status as a designated emergency director, nor did he cite any grant of such authority by the governor.

## Policy Recommendation

In times of crisis, state and local authorities are granted certain special powers to protect public health and safety. But while circumstances may warrant their use, emergency

powers are not unlimited, nor are authorities allowed to create their own extrajudicial concepts. Americans enjoy certain fundamental protections, even during disasters.

Some of these protections appear to have been jeopardized by Tarrant County’s original executive order, which granted local officials the authority to commandeer private property without having to meet due process requirements or other criteria. While that troubling provision was removed from future iterations of the executive order, its initial inclusion proves worrisome.

Due to these concerns, it is important that the Texas Legislature take certain actions to uphold the rule of law and strengthen civil liberties. One way to do so is to require political subdivisions, acting under a disaster declaration, to cite every particular statute that authorizes a potentially coercive or hostile action. As one commentator put it: “Any government document that says, ‘I can take your stuff,’ should reference a specific law where that authority is claimed, particularly when a single elected official claims such power” ([Norred, 2020](#)). Without a specific statute granting authority, a political subdivision’s claim of authority is just a statement, not a fact backed by law.

Provided the continued questionable nature of this issue, it may also be in the best interest of the state for the Texas Legislature to address similar issues of state and local authority during times of disaster. This issue, along with others that have emerged during these extraordinary times, warrants the review and amendment of Texas Government Code Chapter 418 in the upcoming legislative session so that this confusion may be avoided in future situations. ★

## References

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