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March 16, 2020

The Honorable Poncho Nevárez
Chair, Committee on Homeland Security and
Public Safety
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0294

Re: Whether a real estate inspector is
authorized to perform inspections of sewer lines
by camera (RQ-0307-KP)

Dear Representative Nevárez:

You ask whether a real estate inspector is authorized to perform an inspection of sewer lines by camera.¹ You tell us that licensed plumbers are authorized to perform “sewer scope inspections.” *See* Request Letter at 1; *see also* 22 TEX. ADMIN. CODE § 361.1(a)(37)(B) (Tex. State Bd. of Plumbing Exam’rs, “Definitions”) (defining “service” to include “performing a camera inspection through a code-approved existing opening”). You state that a licensed real estate inspector’s broad authority to provide an “opinion as to the condition of improvements to real property, including . . . plumbing systems” could include the authority to inspect plumbing systems. Request Letter at 1–2 (quoting Texas Occupations Code section 1102.001(9) defining “real estate inspection”). However, you advise that the Texas Real Estate Commission “has taken the position in two postings on its website . . . that a home inspector may not perform a sewer scope inspection *unless* the inspector is also a licensed plumber.” *Id.* at 2.

“[T]he scope of practice between regulated professions sometimes overlaps.” Tex. Att’y Gen. Op. No. KP-0266 (2019) at 1. Here, we consider the respective scopes of practice of licensed plumbers and licensed real estate inspectors. To address your question, we examine two chapters from the Occupations Code: chapter 1102, governing real estate inspectors; and chapter 1301, governing plumbers. *See* TEX. OCC. CODE §§ 1102.001–.408 (“Real Estate Inspectors”), 1301.001–.713 (“Plumbers”).

Relevant to your question, Occupations Code chapter 1102 defines a “real estate inspection” as a “written or oral opinion as to the condition of the improvements to real property, including structural items, electrical items, mechanical systems, *plumbing systems*, or equipment.” *Id.* § 1102.001(9) (emphasis added). The chapter does not, however, define “plumbing systems” for purposes of the chapter or provide further detail about the requirements for an inspection. *See generally id.* §§ 1102.001 (“Definitions”), 1102.001–.408. By rule, the Texas Real Estate

¹*See* Letter from Honorable Poncho Nevárez, Chair, House Comm. on Homeland Sec. & Pub. Safety, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 16, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

Commission (“Commission”) has provided minimum inspection requirements for plumbing systems. 22 TEX. ADMIN. CODE § 535.231(a) (Tex. Real Estate Comm’n, “Minimum Inspection Requirements for Plumbing Systems”). Those minimum inspection requirements require an inspector to operate plumbing fixtures, test for drain performance, and report deficiencies in water supply pipes and waste pipes. *See id.* They do not require an inspector to use specialized equipment or inspect for defects and deficiencies that are buried, hidden, latent, or concealed. *Id.* § 535.227(a)(3)(C)(i) (Tex. Real Estate Comm’n, “General Provisions”) (stating that a real estate inspection does not require the use of specialized equipment), (d)(1)(D) (providing that a real estate inspector is not required to inspect “anything buried, hidden, latent, or concealed”). You assert, and the Commission acknowledges,² that the minimum inspection requirements for plumbing systems do not prohibit an inspector from providing “a higher level of inspection performance than required.” Request Letter at 2; *see also* 22 TEX. ADMIN. CODE § 535.227(a)(4) (Tex. Real Estate Comm’n, “General Provisions”). The Legislature’s provision that a real estate inspection may include an opinion on the condition of plumbing systems is broad and does not, by itself, preclude a camera inspection by a professional real estate inspector. Thus, we examine Occupations Code chapter 1301, governing licensed plumbers, for any limitation. *Cf. Tex. State Bd. of Exam’rs of Marriage & Family Therapists v. Tex. Med. Ass’n*, 511 S.W.3d 28, 34 (Tex. 2017) (examining the overlapping jurisdiction of medical doctors and family therapists and determining that the therapists’ behavior at issue was permitted because it was authorized by the Therapists Act and not negated by the Medical Practice Act).

Chapter 1301 requires a person to have a license before engaging in plumbing.³ *See* TEX. OCC. CODE § 1301.351. In chapter 1301, the Legislature defined “plumbing” as the “installation, repair, service, or maintenance of” one of various types of fixtures, appurtenances, appliances, or piping. *Id.* § 1301.002(7)(D); *see also id.* § 1301.002(7)(A)–(C). Pertinent to your request, chapter 1301 does not further define installation, repair, service, or maintenance. *See generally id.* § 1301.002. Yet, the Texas State Board of Plumbing Examiners (“Plumbing Board”) defined “service” to include “performing a camera inspection through a code-approved existing opening.” 22 TEX. ADMIN. CODE § 361.1(a)(37)(B) (Tex. State Bd. of Plumbing Exam’rs, “Definitions”) (defining “service”); *see also* TEX. OCC. CODE § 1301.002(7)(D) (defining plumbing as the “installation, repair, *service*, or maintenance” (emphasis added)); *id.* § 1301.251(2) (authorizing the Board to “adopt and enforce rules necessary to administer” chapter 1301). Applying Rule 361.1(a)(37)(B), a person, including a licensed real estate inspector, who conducts a camera inspection through a code-approved existing opening is engaged in an activity that constitutes plumbing and therefore must have a plumbing license under chapter 1301. *Cf. Tex. Ass’n of Acupuncture & Oriental Med. v. Tex. Bd. of Chiropractic Exam’rs*, 524 S.W.3d 734, 736 (Tex. App.—Austin 2017, no pet.). You question the validity of Rule 361.1(a)(37)(B), and we therefore

²*See* Letter from Chelsea Buchholtz, Gen. Counsel, Tex. Real Estate Comm’n, to Virginia K. Hoelscher, Chair, Op. Comm. at 2 (Oct. 18, 2019) (on file with the Op. Comm.).

³Like chapter 1102, chapter 1301 provides for different types of licenses for different types of plumbers. *See* TEX. OCC. CODE §§ 1301.002(4) (defining “journeyman plumber”), 1301.002(5) (defining “master plumber”), 1301.002(6) (defining “plumbers apprentice”).

consider whether the Plumbing Board exceeded its authority in adopting Rule 361.1(a)(37)(B). See Request Letter at 1, n.1.⁴

An administrative agency has only those powers expressly conferred by the Legislature or implied as reasonably necessary to carry out the agency's statutory duties. *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 33 (Tex. 2017). Courts will presume an agency's rule is valid and require a challenging party to bear the burden of proving a rule's invalidity by showing that the rule contravenes specific statutory language, is counter to the statute's general objectives, or "imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions." *Id.* Courts will consider whether the rule's provisions are "in harmony" with the general objectives of the statute, as those objectives are determined from the plain text of the statutes that grant or limit the agency's authority. *Id.*

An administrative agency can define terms that are undefined in its governing statute.⁵ See *Sw. Bell Tel. Co. v. Pub. Util. Comm'n of Tex.*, 745 S.W.2d 918, 923–24 (Tex. App.—Austin 1988, writ denied) (recognizing agency's discretion to assign meaning to an undefined term). But it cannot construe a defined term to enlarge its authority. See *Tex. Att'y Gen. Op. No. JC-0441* (2001) at 2–3 (discussing Board of Podiatric Medical Examiner's rule defining "tibia" such that it extended the practice of podiatry beyond the foot).

The common understanding of the term "service" is "to perform services for: meet the needs of . . . to repair or provide maintenance for." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (2002). This definition suggests service of a plumbing system requires an affirmative act performed on the plumbing system to improve its condition or functionality.⁶ Insofar as the Plumbing Board's rule expands the definition of service beyond the term's common understanding to include merely "performing a camera inspection" of the plumbing system, it

⁴You also suggest that Rule 361.1 "appears to be invalid and thus voidable" under the reasoned justification requirement in the Texas Administrative Procedure Act. Request Letter at 1; see TEX. GOV'T CODE § 2001.035(a) (providing that a "rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.034"); see also *id.* § 2001.033(a)(1) (requiring, among other things, "a reasoned justification"). We leave to the courts the question whether the rule is voidable for failure to substantially comply with procedural requirements. See *id.* § 2001.040 (providing that a court finding an agency has not substantially complied with one or more procedural requirements "may remand the rule, or a portion of the rule, to the agency and . . . shall provide a reasonable time for the agency to either revise or readopt the rule through established procedure").

⁵The Plumbing Board has not defined the terms "installation," "repair," or "maintenance." See 22 TEX. ADMIN. CODE § 361.1(a) (Tex. State Bd. of Plumbing Exam'rs, "Definitions").

⁶The *noscitur a sociis* canon of construction provides that "words grouped in a list should be given related meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) (quoting *Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312, 322 (1977)). Because the Legislature included "service" in a list of other actions that require physical manipulation or control of plumbing, a court would likely conclude that the application of that term must likewise be limited to activities involving those characteristics. See TEX. OCC. CODE § 1301.002(7)(D).

unnecessarily enlarges the definition of plumbing, and hence the practice of plumbing, in a way that is inconsistent with the common understanding of undefined terms used in the statute.⁷

In addition, the Legislature codified chapters 1102 and 1301 in the same bill so the Legislature can be presumed to intend both chapters to operate harmoniously in the governance of their respective licensed occupations. See Act of May 22, 2001, 77th Leg., R.S., ch. 1421, § 2 (Chapter 1102), § 3 (Chapter 1301), 2001 Tex. Gen. Laws 4570, 4689, 4783. Thus, a court would likely conclude that the Legislature intended its definition of plumbing in chapter 1301 to coexist with the real estate inspectors' authority to inspect "plumbing systems" in chapter 1102.

Construed broadly, Rule 361.1(a)(37)(B) excludes a method of inspecting plumbing systems that a real estate inspector can use to conduct a statutorily authorized real estate inspection. The rule's implicit requirement that a real estate inspector must obtain a plumbing license in order to conduct a camera inspection, an action within his or her authority under chapter 1102, would thus impermissibly impose an additional burden, limit, or condition on the real estate inspector. See *State v. Exiga*, 71 S.W.3d 429, 433 (Tex. App.—Corpus Christi 2002, no pet.) ("The rulemaking power of administrative agencies does not permit the enactment of regulations which are inconsistent with the expression of the lawmakers' intent in statutes other than those under which the regulations are issued."), citing *State v. Jackson*, 376 S.W.2d 341, 345 (Tex. 1964). Such a construction of the rule would be inconsistent with the relevant statutes, and a court would have a basis to conclude that the rule is facially invalid.

⁷Rule 361.1(a)(37)(B)'s definition of "service" appears to focus on certain drain-cleaning activities. 22 TEX. ADMIN. CODE § 361.1(a)(37)(B) (defining "service" as including "cleaning a drain or sewer line using a cable or pressurized fluid, or performing a camera inspection through a code-approved existing opening" (emphases added)); see also *id.* § 361.1(a)(13) (defining "code-approved existing opening" as "[f]or the purposes of drain cleaning activities described in § 1301.002(3) of the Plumbing License Law, a code-approved existing opening is any existing cleanout fitting, inlet of any p-trap or fixture, or vent terminating into the atmosphere that has been approved and installed in accordance with the adopted plumbing code" (emphasis added)). Because both examples identified in Rule 361.1(a)(37)(B) involve cleaning activities, a court could conclude that Rule 361.1(a)(37)(B)'s application to camera inspections applies only when the inspection is performed in connection with drain-cleaning activities or other plumbing activities regulated by the Plumbing License Law.

S U M M A R Y

Occupations Code chapter 1102's express authorization for a real estate inspector to provide an opinion on real estate's "plumbing systems" likely includes a camera inspection. Occupations Code chapter 1301 requires a person to have a license to engage in activities that constitute plumbing. The Texas State Board of Plumbing Examiners has by rule defined the "service" of plumbing to include performing a camera inspection. To the extent this rule requires a real estate inspector to get a plumber's license to do a job within the scope of his or her real estate inspector's license, the rule impermissibly imposes an additional burden, limit, or condition in addition to what the Legislature has required. Accordingly, a court would have a basis to conclude that the rule is invalid, as applied to camera inspections performed by real estate inspectors.

Very truly yours,



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