The Senate of The State of Texas

Senator Leticia Van de Putte, R. Ph.
District 26

RQ-1106-GA

January 29, 2013

The Honorable Greg Abbott
Attorney General of Texas
209 W. 14th Street
Austin, TX 78701

Dear General Abbott:

As chair of the Senate Committee on Veteran Affairs and Military Installations Committee, I respectfully request a formal opinion on whether provisions of the Qualified Allocation Plan (QAP) adopted by the Texas Department of Housing and Community Affairs conform to the statutory requirements of Texas Government Code §2306.6710. The provision of the QAP in question is section 11.9 (d) (3).

Introduction. Pursuant to section 42 of the Internal Revenue Code, 26 U.S.C. § 42, the federal government makes available federal income tax credits to stimulate private developers to invest in and construct low-income housing. *See* 26 U.S.C. § 42 (2000). These federal tax credits are allocated between the states and awarded at the state level by a designated housing credit agency. *See* 26 U.S.C. § 42(h), (m). Pursuant to the Low Income Housing Tax Credit Program, the Texas Department of Housing and Community Affairs (the Department) is responsible for annually allocating significant federal tax credits to developers of low-income housing. *See* 26 U.S.C.A. § 42 (West 2002 & Supp. 2005); TEX. GOV'T CODE ANN. §§ 2306.001–.083, .6701–.6734 (West 2000 & Supp.2005); 10 TEX. ADMIN. CODE §§ 50.1–.24 (2005); *see also* TEX. GOV'T CODE ANN. § 2306.053(10) (Vernon 2000) (authorizing the Department to "administer federal housing, community affairs, or community development programs, including the low income housing tax-

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credit program"). Housing authorities have participated in tax-credit projects by contracting with a development partner through a competitive process. Developers compete for these credits by submitting development proposals ("applications") to the agency's Board. The Board evaluates the applications pursuant to the QAP, which sets forth a variety of criteria to be used in scoring the applications with a point system. Pursuant to Government Code § 2306.6710(b)(E), the application for tax credits received points under the Department's scoring system for funding by the housing authority as a unit of local government. *See* TEX. GOV'T CODE ANN. § 2306.6710(b)(E).

Statutory mandate. The Department is directed by Government Code §2306.6710(b) to score and rank tax credit applications using a point system that prioritizes certain factors in the order given in the statute. Texas Attorney General Opinion GA-0208 states that this is a mandatory provision. *See* Op. Tex. Att'y Gen. No. GA-0208 at 6 (2004). Section 2306.6710(b)(E) requires consideration of ***"the commitment of development funding by local political subdivisions"*** as the fifth criterion for evaluating tax credit applications. TEX. GOV'T CODE ANN. § 2306.6710(b)(E). The Department has allocated thirteen (13) points to this factor, making it of considerable importance in the award of tax credits.

Sections 2306.607022 and 2306.6724(a)-(c) require the Department to annually adopt a QAP. In its 2013 QAP, which was adopted by the Governor on December 1, 2012, with no recommended changes, the Department has adopted a QAP provision that does not recognize funding by a housing authority when the authority is a participant in the project. Rather than a straight forward application of the statute by giving points to applications with a commitment of funding by a local political subdivision, the Department has added additional criteria in QAP § 11.9(d)(3). The result is that funding by a housing authority will not qualify for points when the authority is a participant in the project.

The QAP provision first deviates from the statutory mandate by changing *"funding by local political subdivisions"* to funding by a *"Unit of General Local Government."* QAP § 11.9(d)(3). A unit of general local government is defined as one "with the authority to assess and collect local taxes and to provide general local governmental services." 10 TEX. ADMIN. CODE § 5.2(66). However, the Department has previously considered funding by a housing authority as eligible for the points awarded under this preference.

The purpose of QAP § 11.9(d)(3) is to make development funding by a housing authority ineligible for points in a project where the housing authority is a participant. The motivation for this change is the belief of the Department's staff that the statutory requirement for a preference in applications with funding by local political subdivisions *"is not and should not be to provide a distinct and exclusive advantage to certain instrumentalities* [of housing authorities] *that engage in funding housing development that they develop and own." See* "Multifamily Finance Division Board Action Request November 13, 2012," http://www.tdhca.state.tx.us/asset-management/docs/121113-amendments-121026.pdf **No such distinction is made by the**

statute. The new section 11.9(d)(3) makes housing authorities ineligible for the points awarded by local political subdivisions by stating that such funding may not be from a Related Party to the Applicant.

Analysis. The Austin Court of Appeals succinctly stated the rules of statutory construction:

> When we construe administrative rules and statutes, our primary objective is to give effect to the intent of the issuing agency and legislature, "which, when possible, we discern from the plain meaning of the words chosen." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (addressing statutory construction); *see Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999) (addressing rule construction). We consider statutes and rules as a whole rather than their isolated provisions. *TGS–NOPEC*, 340 S.W.3d at 438-39. We presume that the legislature chooses a statute's language with care, purposefully choosing each word it includes, while purposefully omitting words not chosen. *Id.* The meaning of a statute's language may be informed by factors that include the law's objective. TEX. GOV'T CODE ANN. § 311.023(1)(West 2005); *see also Shumake*, 199 S.W.3d at 284.
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> We will look first to the plain language of the relevant statute and rules to determine whether they are ambiguous; if they are not, we will apply their words according to their common meaning. *Railroad Com'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011). To the extent that they are ambiguous, we will defer to the agency's interpretation if it is reasonable unless it is "plainly erroneous or inconsistent with the language of the statute, regulation, or rule." *TGS–NOPEC*, 340 S.W.3d at 438.

See, Heritage on San Gabriel Homeowners Ass'n v. Texas Commission on Environmental Quality, --- S.W.3d ----, 2012 WL 3155755, *4 (Tex. App.--Austin, July 31, 2012).

One of the principles of statutory construction is that statutes are to be construed according to their plain language. *See, In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001). The language of the statute directing the Department to score and rank tax credit applications is clear and unambiguous: Section 2306.6710(b)(E) requires the Department to use a point system that prioritizes in descending order certain criteria, including ***"(E) the commitment of development funding by local political subdivisions"***. TEX. GOV'T CODE ANN. §2306.6710(b)(E). Construction of a statute in agency rules by the administrative agency charged with the statute's enforcement "is entitled to 'serious consideration,' so long as the construction is reasonable and does not contradict the plain language of the statute." *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993) (quoting *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944)).

However, the plan may be invalid despite the Department's attempt to perform its statutory duties if the plan exceeds the Department's statutory authority. *See R.R. Comm'n v. Arco Oil & Gas Co.*, 876 S.W.2d 473, 477 (Tex.App.--Austin 1994, writ denied). In deciding whether an administrative agency has exceeded its rulemaking powers, the determinative factor is whether the rule's provisions are "in harmony" with the general objectives of the statute. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 750 (Tex. 1995); *Gerst v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex. 1968). In determining whether a rule is in harmony with a statute's general objectives, courts look to "all applicable provisions" of the act, rather than only one particular section. *Gerst*, 432 S.W.2d at 706. Courts have upheld detailed administrative rules where the legislature has given a broad grant of regulatory authority. *See, e.g., Chrysler Motors Corp. v. Texas Motor Vehicle Comm'n*, 846 S.W.2d 139, 141-142 (Tex.App.--Austin 1993, no writ). In the instant matter, the Department was not given a similar grant of authority to formulate the QAP. The statute gives the specific criteria to be considered and the order by which to rank them. The statute does not give the Department the authority or discretion to choose which local political subdivisions are eligible to receive points for their funding.

Two of the statutory construction principles listed by the Austin Court are especially important here:

1. "[T]o give effect to the intent of the issuing agency and legislature, 'which, when possible, we discern from the plain meaning of the words chosen.'" and

2. We presume that the legislature chooses a statute's language with care, purposefully choosing each word it includes, while purposefully omitting words not chosen.

Heritage on the San Gabriel Homeowners Ass'n, at *4 (internal citations omitted).

The legislature chose words of plain, unambiguous meaning in Texas Government Code §2306.6710(b)(E). Similar words have been given broad, inclusive meaning:

> "Local government" means a county, municipality, special district, school district, junior college district, regional planning commission, or other political subdivision of the state.

TEX. LOC. GOV'T CODE ANN. §271.101(2).

The Attorney General has previously held that the priority system mandated by Government Code §2306.6710(b) *"is a mandatory provision that requires the 2004 QAP to rank applications for low income housing tax credits by a point system that gives the greatest points, in descending order, to the nine factors listed."* Op. Tex. Att'y Gen. No. GA-0208 at 6 (2004). By adopting QAP §11.9(d)(3), the Department has changed the statutory scheme for preferences required by Government Code §2306.6710(b)(E). Funding by a housing authority, although it qualifies for a preference under the statute as funding by a local political subdivision, is excluded by the method under which the Department has chosen to implement the preference. Thus the

regulation significantly alters the statute rather than implementing its plain and unambiguous meaning.

Conclusion. The provisions of the QAP must comport with the authority granted to the Department by statute. *See R.R. Comm'n v. Arco Oil & Gas Co.*, 876 S.W.2d 473, 477 (Tex. App.--Austin 1994, writ denied). QAP §11.9(d)(3) exceeds the Department's authority to the extent that it is inconsistent with section 2306.6710.

Thank you for your consideration of this matter. If you have any questions, please contact Servando Esparza in my office at 512-463-0126. I look forward to your response.

Sincerely,

Leticia Van de Putte, R. Ph.

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