



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 22, 1998

The Honorable Clyde Alexander
Chair, Transportation Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-092

Re: Whether the Texas Department of Housing and Community Affairs may enforce a standard operating procedure against persons outside the Department if the standard was not adopted in accordance with Government Code chapter 2001, and related question (RQ-1119)

Dear Representative Alexander:

Section 9(e) of the Manufactured Housing Standards Act¹ ("act") requires the executive director ("director") of the Texas Department of Housing and Community Affairs ("Department") to adopt all rules in accordance with Government Code chapter 2001 ("Administrative Procedure Act" or "APA"), as well as with section 9 requirements. We understand you to ask about the legal effect of a standard of procedure ("SOP") that the director did not adopt in accordance with the APA (or, we assume, any relevant section 9 requirements). We conclude that only an SOP that the director adopted using the rulemaking procedures in the APA and section 9 of the act may be applied to or enforced against persons outside the Department, including licensees and consumers. If the director adopts an SOP without complying with the Administrative Procedure Act and any relevant section 9 requirements, the SOP may not be applied to or enforced against persons outside the Department. Although it appears to us that the SOPs we have received in conjunction with this request are internal management operating procedures that need not be adopted in accordance with the rulemaking requirements, the Department must make its own determination on the matter.

We further understand you to question whether the director must adhere to the Administrative Procedure Act to revise existing standards of procedure. Again, we conclude that only an SOP that has been revised in accordance with the APA (and applicable provisions of section 9 of the act) may be applied to and enforced against persons outside the Department.

We begin by discussing the SOPs about which you ask. The Department describes its SOPs as standards that "specify the internal duties of employees and the manner, persons, and timing by which such duties will be performed." Currently, the Department explains, the Manufactured Housing Division has adopted forty-one SOPs. Among those SOPs of which we have been sent copies, we find SOPs entitled, for example, "Ethics," "Employee Contact with the Media,"

¹V.T.C.S. art. 5221f; *see id.* § 1 (naming act).

“Workload Trends,” “Consumer Complaint Handling,” and “Processing a Quick Title Application.” Each SOP is arranged in the same manner:

Each SOP begins with a section entitled “Policy,” which states generally that the division will support the provisions of the applicable laws governing the subject of the SOP; the second section, entitled “General,” states the law and rules applicable to the subject matter; the third section, “Responsibilities,” sets out which employees are responsible for which duties; and the fourth and final section, entitled “Procedures,” goes into much more detail about exactly how the division staff will accomplish what needs to be done. For example, in the SOP concerning Installation Inspection Process (620.03), this fourth section contains a provision that the Senior Inspector within each field operation will review all Form T[]s (installation reports) and determine which homes will be inspected; another provision states that if the home is skirted without access, the Installation Inspector will request permission to remove a section of the skirting for inspection purposes.

The Department informs us that since September 1, 1997, the effective date of the current definition of “rule” in section 9 of the act, it has revised all SOPs “in one way or another.” The Department apparently has not followed the procedures set forth in Government Code chapter 2001, as the APA itself and section 9(e) of the act require, because in the Department’s view, “the present SOPs restate statutory provisions and rules that have been approved in accordance with [the Administrative Procedure Act], but they do not set forth any additional provisions that affect the rights or procedures of license holders or consumers.”

We look next at the two laws involved in the issue you raise: the act and the Administrative Procedure Act. The act empowers the director and the Department, for consumer-protection purposes,² to enact rules pertaining to manufactured housing.³ The term “rule” is defined in section 9(d) of the act to mean

a standard, requirement, regulation, order, and statement of general applicability that implements, interprets, or prescribes law or policy or that describes the procedures or practices of the department. Internal management operating procedures that affect the private rights or procedures of license holders or consumers, including requirements for the use of a particular form, are also rules. An administrative order that is not of general applicability but

²See *id.* § 3(6) (defining “consumer”).

³See *id.* §§ 4, 9(b), (c). For purposes of article 5221f, “manufactured housing,” or “manufactured home” “means a HUD-code manufactured home or a mobile home.” See *id.* § 3(15); see also *id.* §§ 3(9), (17) (defining “HUD-code manufactured home” and “mobile home,” respectively), 3A (stating that section 3’s definitions of “mobile home,” “HUD-code manufactured home,” and “manufactured housing” bind all persons and agencies as a matter of law, including local political subdivisions and home-rule municipalities).

that is directed to a specific license holder relating to warranties, the correction of defects, or compliance with the law and regulations is not a rule.

Section 4 of the act, for example, requires the director to adopt, as necessary to protect occupants' and the public's health, safety, and welfare, "standards and requirements" for installing and constructing manufactured housing.⁴ Similarly, section 9(b) of the act requires the director to adopt rules to "assure compliance with" the act's intent and purpose and to ensure that the act and the Texas Manufactured Housing Standards Code⁵ are uniformly enforced. Additionally, section 9(c) requires the director to adopt rules as necessary to comply with and enforce federal law.⁶

The director may adopt a rule applicable to a person outside the Department only if the director follows the procedure set forth in the APA and section 9 of the act.⁷ Section 9(f) of the act requires the Department to publish notice of a "proposed rule, amendment to a rule, or repeal of a rule" in the Texas Register and to hold a public hearing on the proposal. Section 9(g) requires the Department to notify the public that a proposal has been finally adopted.

⁴*Id.* § 4(a); *see also id.* § 4(d) (requiring director to adopt standards and requirements for installing manufactured housing that are necessary to protect citizens). The standards and requirements the director adopts under section 4(a) are compiled as the Texas Manufactured Housing Code. *See id.* § 4(a). Standards and requirements applicable to HUD-code manufactured homes must be adopted in compliance with "federal standards and requirements established under the National Manufactured Home Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401 - 5426. *See* V.T.C.S. art. 5221f, § 4(c).

⁵*See* 10 T.A.C. § 80.65 (adopting as state code federal manufactured housing standards established under Title VI of the Housing and Community Development Act of 1974).

⁶As an example of applicable federal law, section 9(c) of the act lists the national Manufactured Home Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401 - 5470, and standards of the United States Department of Housing and Urban Development, *see, e.g.*, 24 C.F.R. pt. 3280 (Manufactured Home Construction and Safety Standards); 24 C.F.R. § 203.43f (installation, structural, and site requirements); 24 C.F.R. § 200.926d(e) (energy performance requirements).

⁷*See* V.T.C.S. art. 5221f, § 9(e); *see also id.* § 4(h). In 1997, the legislature amended section 9 to define "rule" and to explicitly require in subsection (e) that the director adopt rules in accordance with the Administrative Procedure Act. *See* Act of May 21, 1997, 75th, R.S., ch. 791, § 9, 1997 Tex. Gen. Laws 2581, 2588. The legislative history of the amendments to section 9 suggests that the director had not been complying with the APA when adopting standards that the Department intended to apply to and enforce against persons outside the Department:

The rule adoption requirements imposed on TDHCA are no different from the procedures to be followed by any other regulatory agency. TDHCA has not been in full compliance with the Administrative Procedures Act; this provision would require full compliance.

The APA⁸ provides minimum standards of uniform practice and procedure for state agencies⁹ generally and provides for public participation in agencies' rulemaking¹⁰ processes.¹¹ With respect to rulemaking specifically, the APA requires an agency to permit interested persons to petition the agency to adopt a rule.¹² The APA also permits or requires, depending upon the circumstances, an agency to ascertain the local employment impact or environmental impact of a proposed rule.¹³ The APA requires an agency to, via publication in the Texas Register, notify the public of a proposed rule at least thirty days before the agency adopts the rule¹⁴ and to accept public comment on the proposal. The APA requires an agency to include certain statements in an order adopting a rule.¹⁵ Finally, the APA permits an agency to adopt an emergency rule without prior notice or hearing or with an abbreviated notice and hearing in certain circumstances.¹⁶

Under either the act or the APA, an action, however denominated, of the director that implements, interprets, or prescribes law or policy or that describes departmental policies or procedures must be adopted under the APA (and applicable requirements of section 9 of the act) if it is to be applied to and enforced against any person outside the Department.¹⁷ An action that is not adopted in accordance with the APA and section 9 of the act may not be applied to or enforced against a person outside the Department, including a licensee and or a consumer.¹⁸ It is appropriate for the director to adopt, without following the procedure the APA and section 9 of the act maps out,

⁸See Gov't Code § 2001.002.

⁹See *id.* § 2001.003(7) (defining "state agency").

¹⁰See *id.* § 2001.003(6) (defining "rule").

¹¹See *id.* § 2001.001(1), (2).

¹²See *id.* § 2001.021.

¹³See *id.* §§ 2001.022, .0225.

¹⁴See *id.* § 2001.023. Government Code section 2001.024 instructs an agency as to what the notice of a proposed rule or proposed amendment to a rule must contain.

¹⁵See *id.* § 2001.033.

¹⁶See *id.* § 2001.034.

¹⁷See V.T.C.S. art. 5221f, § 9(d); Gov't Code § 2001.003(6). *But see Southwest Airlines Co. v. Bullock*, 784 S.W.2d 563, 567 (Tex. App.--Austin 1990, no writ) (suggesting that agency policies that are not adopted as rules under APA may, nevertheless, be applied generally if they are available to public in "regular, organized fashion," e.g., by indexing).

¹⁸A rule may be applied and enforced generally if it describes in general terms the class of persons to which it applies and in such a way that new members may be added. See *Citizens for Sensible Zoning, Inc. v. Department of Nat. Res.*, 280 N.W.2d 702, 707-08 (Wis. 1979); *Railroad Comm'n v. ARCO Oil & Gas Co.*, 876 S.W.2d 473, 486 n.7 (Tex. App.--Austin 1994, writ denied) (citing *Citizens for Sensible Zoning, Inc.*, 280 N.W.2d at 707-08 (1979)); see also *Simpson Tacoma Kraft Co. v. Department of Ecology*, 835 P.2d 1030, 1035 (Wash. 1992) (en banc) (cited in *Railroad Comm'n*, 876 S.W.2d at 486 n.7).

an internal management operating procedure that will not affect the private rights of any person outside the Department nor pertain to the procedures with which a licensee or consumer must comply.¹⁹ Similarly, it is appropriate for the director to issue, without complying with APA and section 9 procedures, an administrative order that applies only to a specific licensee and not to licensees generally.²⁰

We have examined the SOPs we have received in connection with this request, and we believe that many of them are internal management operating procedures that neither affect the private rights of persons outside the Department nor pertain to procedures with which a licensee or consumer must comply. But whether the SOPs are in fact internal management operating procedures is a question of fact for the Department to decide in the first instance.

In response to your second question, we similarly conclude that the director must revise existing SOPs in accordance with the procedures set out in section 9 of the act and the APA if the director intends the revised standards to be applied to or enforced against persons outside the Department, including licensees and consumers. We find nothing in either statute excepting revisions from the procedural requirements. We further note that the APA's definition of "rule" explicitly includes "the amendment or repeal of a prior rule."²¹ Of course, to the extent that an SOP is an internal management operating procedure that simply reiterates, for the convenience of employees, information contained in a properly adopted rule, *e.g.*, costs the Department will charge an individual who requests public information under Government Code chapter 552,²² we do not believe the Department must subject the SOP to the adoption procedure required by section 9 of the act and the APA.

¹⁹See V.T.C.S. art. 5221f, § 9(d); Gov't Code §§ 2001.003(6)(C), .222.

²⁰See V.T.C.S. art. 5221f, § 9(d); *cf.* Gov't Code § 2001.003(1) (defining "contested case").

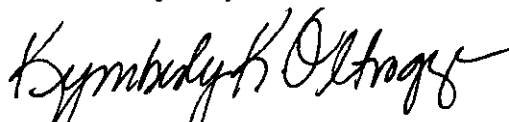
²¹Gov't Code § 2001.003(6)(B).

²²See TEXAS DEP'T OF HOUSING & COMMUNITY AFFAIRS, MANUFACTURED HOUSING DIV., STANDARD OPERATING PROCEDURE 115.02 (PUBLIC INFORMATION REQUESTS) ¶ 2.4 (1998).

S U M M A R Y

The Texas Department of Housing and Community Affairs must adopt all rules and revisions of rules in accordance with the Administrative Procedures Act, Government Code chapter 2001 and section 9 of the Manufactured Housing Standards Act, V.T.C.S. article 5221f. This procedural requirement does not apply, however, to purely internal management operating procedures that do not affect the private rights of license holders or consumers.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kimberly K. Oltrogge", written in a cursive style.

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee