



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 8, 1997

The Honorable Fred Hill
Chair, Committee on Urban Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No 97-046

Re: Whether a city has violated the Plumbing License Law, V.T.C.S. art. 6243-101, or misappropriated public funds by providing certain services to city residents (ID# 39397)

Dear Representative Hill:

On behalf of another legislator, you ask us about a city's provision of certain services to city residents. Although we have no specific information about the nature of the services at issue, your letter suggests that city employees who are not licensed plumbers have performed drain services for city residents on private property. You ask whether the city's alleged practice violates the Plumbing License Law, V.T.C.S. art. 6243-101 (the "act"), or constitutes a misappropriation of public funds.

The Plumbing License Law prohibits a person from engaging in the business of plumbing without a license unless the person is exempted from licensure under the act. *Id.* § 14(a). A violation of this prohibition is a class C misdemeanor. *Id.* § 14(c). The act defines the term "plumbing" as follows:

(A) All piping, fixtures, appurtenances and appliances for supply or recirculation of water, gas, liquids, and drainage or elimination of sewage, including disposal systems or any combination thereof, for all personal or domestic purposes in and about buildings where a person or persons live, work or assemble; all piping, fixtures, appurtenances and appliances outside a building connecting the building with the source of water, gas, or other liquid supply, or combinations thereof, on the premises, or the main in the street, alley or at the curb; all piping, fixtures, appurtenances, appliances, drain or waste pipes carrying waste water or sewage from or within a building to the sewer service lateral at the curb or in the street or alley or other disposal or septic terminal holding private or domestic sewage; or

(B) the installation, repair, service, and maintenance of all piping, fixtures, appurtenances and appliances in and about buildings where a person or persons live, work or assemble, for a supply of gas, water, liquids, or any combination thereof, or disposal of waste water or sewage.

Id. § 2(1). Even if the services provided by the city constitute plumbing work, the act may permit such work to be performed by a person who is not licensed. Although most of the act's licensure exemptions are not relevant here,¹ one exemption might apply to the conduct of employees of a public utility² in certain circumstances. Section 3(c) of the act provides in part that the following conduct is permitted without a license:

plumbing work done by persons engaged by any public service company in the laying, maintenance and operation of its service mains or lines to the point of measurement and the installation, alteration, adjustment, repair, removal and renovation of all types of appurtenances, equipment and appliances, including doing all that is necessary to render the appliances useable or serviceable

Given that we have not been provided with specific information regarding the services at issue, we are unable to discuss the extent to which the act's definition of "plumbing" or the foregoing exemption may apply to those services. Moreover, a definitive determination whether certain conduct constitutes plumbing work under the act's definition and whether it is exempted from licensure under this or any other exemption would involve fact questions³ and is therefore beyond the scope of the opinion process.⁴

You also ask whether the city's practice of providing these services to city residents constitutes a misappropriation of public funds. We assume you are concerned that the practice might run afoul of article III, section 52(a) of the Texas Constitution, which prohibits a city from granting

¹*See, e.g.*, V.T.C.S. art. 6243-101, §§ 3(a) (plumbing work done by property owner), (b) (plumbing work done outside municipal limits or within municipal limits of city with population less than 5,000), (c) (plumbing work done by maintenance worker, railroad worker, appliance installation and service worker, or water treatment worker), (d) (plumbing work done by licensed irrigator), (e) (plumbing work done by gas installer under Natural Resources Code, ch. 113), 14 (plumbing work supervised and controlled by licensed plumber).

²Local Government Code section 402.001 authorizes a municipality to operate water and sewer systems as utilities.

³Attorney General Opinions DM-383 (1996) at 2 (questions of fact are inappropriate for the opinion process), DM-98 (1992) at 3 (questions of fact cannot be resolved in opinion process), H-56 (1973) at 3 (improper for attorney general to pass judgment on matter that would be question for jury determination), M-187 (1968) at 3 (attorney general cannot make factual findings).

⁴We note that in 1948, this office opined that the operator of an electric sewer cleaner that did not require the removal, installation or repair of any fixtures, pipes, or plumbing appliances was not engaged in the business of plumbing. *See* Attorney General Opinion V-481 (1948). Since 1948, the definition of "plumbing" has been amended to include the "installation, repair, *service*, and maintenance of all piping, fixtures, appurtenances and appliances." *See* Act of June 1, 1981, 67th Leg., R.S., ch. 788, § 1, 1981 Tex. Gen. Laws 3000, 3000 (emphasis added). Given that amendment adding the term "service," we do not believe that the prior opinion is germane.

public money or a thing of value to an individual. Article III, section 52(a) does not preclude a city from engaging in activities that may incidentally benefit private individuals in certain circumstances:

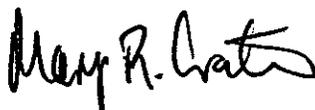
The clear purpose of this constitutional provision is to prevent the gratuitous application of funds to private use. *Byrd v. City of Dallas*, 118 Tex. 28, 6 S.W.2d 738, 740 (1928); *Harris County v. Dowlearn*, 489 S.W.2d 140, 144 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). The Constitution does not, however, invalidate an expenditure which incidentally benefits a private interest if it is made for the direct accomplishment of a legitimate public purpose.

Brazoria County v. Perry, 537 S.W.2d 89, 90-91 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). If the city performs the services at issue for the direct accomplishment of a legitimate public purpose, such as the service and maintenance of the city's water and sewer system, and city residents are only incidentally benefited, then the city's activities will not violate article III, section 52(a). The determination whether the provision of services is made for the direct accomplishment of a legitimate public purpose and whether city residents are only incidentally benefited is for the city to make in the first instance.⁵

S U M M A R Y

City employees are precluded from performing plumbing work unless they are licensed under the Plumbing License Law or exempt from licensure under that act. Article III, section 52(a) of the Texas Constitution does not preclude a city from performing services that are necessary for the direct accomplishment of a legitimate public purpose and only incidentally benefit private interests.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

⁵A letter from the city attorney of the city at issue states as follows:

It is not the policy or practice of the City . . . to make service calls for private service lines or provide private plumbing services. The City does respond to complaints about sewer and water problems involving City sewer and water lines and allegations of clogged City lines causing backups. In the process of investigating and clearing these problems on City lines, private lines may benefit incidentally from such work.