



# New Mexico Regulation and Licensing Department

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Home Inspector Board

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Re: Construction Industries Division written comments to propose rulemaking of the Home Inspector Board.

The Construction Industries Division (“CID”) appreciates the Home Inspector Board’s notification of their rule making and for allowing CID to have open discussions with the board as to issues foreseeable due to drafting of its rules. The board has allowed CID to make suggestions to clarify the relationship between the division and the board. This interaction clarifies issues based on problems that have arisen with Home Inspectors making determinations that result in Home Inspectors (“HI”) reaching beyond their responsibilities into the responsibilities solely within the authority of CID and other agencies.

Our goal as a sister agency is to assist the HI and the public to understand the objectives of the HI and to eliminate any confusion regarding their authority and therefore reduce the possibility of the HI crossing the line into CID’s authority. CID’s function and authority is the regulation of the constructing, altering, and the repairing buildings and installing and servicing plumbing/mechanical and electrical systems within those buildings. As such, CID is responsible for code compliance and for ensuring that all individuals involved in these activities are qualified and duly licensed and certified to perform the work. CID acknowledges the Home Inspector Act includes the statement capitalized as to **“THE HOME INSPECTOR DID NOT DETERMINE AND THIS REPORT DOES NOT CONTAIN A DETERMINATION OF WHETHER THE HOME OR COMPONENTS AND/OR SYSTEMS OF THE HOME THAT HAVE BEEN INSPECTED CONFORM TO LOCAL OR STATE BUILDING CODE REQUIREMENTS.”** Based on many comments made and the vagueness of some topic areas, we feel there is not sufficient emphasis ensuring that HI fully understand the gravity of making determinations, including code interpretations, when that authority is not provided for in the Act and is specifically granted to CID approved licensees and certified building inspectors. Charles Smith, the board’s rules expert, recommended several additions to the rules, which CID supported. A thorough review of the proposed rules submitted for enactment reveals that very few of Mr. Smith’s recommendations were included. Mr. Smith’s recommendations provided needed clarity and should be included to assist HI’s in defining their responsibilities. Not including Mr. Smith’s recommendations makes it confusing for HIs, the HI industry and the public. The lack of such explanation could potentially subject the HI to discipline

by CID including criminal prosecution as well as discipline from HI board. This could be very embarrassing considering we are sister agencies within RLD. We recommend including language in a few places that would help clarify the HI/CID relationship.

The following are issues we would ask the board to consider in enactment of its rules.

1. This definition of “generally established practice” appears to be unique to New Mexico and does not follow either the National Association of Certified Home Inspectors (“NACHI”) or the American Society of Home Inspectors (“ASHI”) standards as neither has this definition and in fact, the definition contradicts certain sections of each HI national standard. NACHI indicates that the HI responsibility is inspecting and reporting on the condition which is defined as “the visible and conspicuous state of being of an object” and not analyzing code (installation methods) and making code interpretations. ASHI 13.2 A 8 states that a HI is not required to determine compliance of systems and components with past and present requirements and guidelines (codes, regulations, laws, ordinances, specifications, installation and maintenance instructions, use and care guides, etc.). This statement indicates recognition that this determination is beyond the scope and expertise of the HI and possibly includes past and present code determinations. We recommend deleting this definition entirely as well as its use in 16.66.7.25 A, due to it being beyond the scope and expertise of the HI and utilizing instead the definition of “home inspection report” from NACHI 1.3.

Mr. Smith, the HI rules specialist, in response to CID’s initial comments, stated, “**The fact that a home inspector is not a ‘licensed contractor’ does not preclude the knowledge of methods of installation, assembly, operation or use. In fact, the required training provides that knowledge and without it we would not be able to ‘inspect’**”. This is not accurate as this knowledge is not critical. What the HI is supposed to be inspecting is “condition”. “Condition” is defined in your proposed rules and is the same as the national standard. The HI is not inspecting based on the historical method of construction and installation. While it might be beneficial for a HI to have knowledge of the methods of installation, assembly, operation or use, it is quite a different matter for the HI to attempt to make determinations based on that knowledge without being duly certified by CID. For example, building codes established at different time-periods and alterations completed at different time-periods bring into play specific codes and code determinations which by law can only be addressed by a CID approved and certified inspector.

Mr. Smith highly recommended that the definition of “qualified” be included in the board rules and in fact noted that the definition somehow “fell out” and should be restored to definitions.” While recommended by Mr. Smith, and agreed to by CID, such was not included in the current proposed rules.

2. CID acknowledges that the board removed the definition of “grandfathering” after discussion with CID personnel.

3. Mr. Smith, in his response states, HI “**emphasize that there is no requirement that older homes be upgraded to meet current standards**”. This is not accurate as such a requirement is based on the Existing Building Code and the level of alteration completed, dilapidation and safety.

4. 16.66.1.7 Definition “recreational facilities. Due to questions as to whether such facilities include just residential and/or commercial facilities, it was suggested, and Mr. Smith agreed, that the definition should include “residential” for clarity. Such was not included in the proposed rules.

5. 16.66.1.7 Definition “structural component”. Except for the first sentence, this does not conform to the definitions in NACHI and ASHI.

6. 16.66.1.7 Definition [no 7 Smith] Wall Cladding Exterior Insulation and finish system (EIFS). Acknowledging Mr. Smith’s response as to EIFS potentially used in both residential and commercial construction, this system requires building code expertise.

There are issues that reveal the recognition of the fine line at times between HI responsibilities and the authority of CID licensees and when a license is required. Due to the nature of the relationship and responsibilities, we recommend adding language to 16.66.6, Code of Ethics, and 16.66.8, Disciplinary proceedings, to clarify the scope of work of the home inspector and emphasize where there are limitations relative to the Construction Industries Licensing Act.

We propose the following:

1. Code of Ethics 16.66.6.9. As CID and the board are sister agencies within RLD and due to the relationship between the two, it is highly recommended that the following be included: **“A licensee shall comply with all applicable federal, state, and local laws and regulations, including, but not limited to the Home Inspector Licensing Act and abiding by the limitations to their actions explicit in the Construction Industries Licensing Act.”**

2. 16.66.8.8. F. There must be language included that clearly states if work/repair requires a CID license, a license must be obtained from CID to bid, contract or perform the work.

3. “16.66.8.8 F. Performance or offer to perform for an additional fee any repair to a structure on which the home inspector or the home inspector's company has prepared a report at any time during the twelve months immediately prior to the repair or offer to repair, except that a home inspection company that is affiliated with or that retains a home inspector does not violate this paragraph if the home inspection company performs repairs pursuant to a claim made pursuant to the terms of a home inspection contract;”. It is necessary to add for clarification, “provided that should a CID license be required to complete the repair, a license must be obtained from CID or the repair is in violation of the Act and these rules.”

4. 16.66.8.8 F. New proposed H. “Performance or inclusion in a report as to a building code determination” noting that this could result in discipline from both the board and the Construction Industries Division.

### **Issues regarding 16.66.7 Standards of Practice**

1. Mr. Smith recommends the inclusion of the following in the proposed rules for both 16.66.7.9 and 16.66.8.8 F stating these items are appropriate for definitions and Standards of Practice. While these provisions, other than the “further evaluation” definition were not included in the proposed draft, CID agrees with your rulemaking expert that these additions will clarify and distinguish HI responsibilities.

**“The decision to repair, further evaluate, or obtain cost estimates of the Adverse Condition observed and described in the inspection report is left to the parties to the contract for the sale or purchase of the home.**

**All repairs, evaluations, and cost estimates should be by a qualified licensed contractor, may include tests, measurements, and adjustments, and may lead to the discovery of additional Adverse Conditions, which may involve additional repair costs that may not have been obvious to the inspector.**

**Anyone engaged in construction-related contracting in New Mexico must be licensed.**

#### **Definition**

**Y. “Further evaluation” means examination and analysis by a qualified professional, tradesman, or service technician beyond that provided by a home inspection. Further evaluation may provide additional clarification, provide needed repairs, or discover additional adverse conditions that need modifications or repairs for the component or system to perform its normally intended function or operation;**

#### **Should Add Definition**

**Qualified: Having the training, skills, knowledge, expertise, experience, competence and any special tools or equipment necessary to address Adverse Conditions and Routine Maintenance conditions and, where applicable, holding all required licenses and meeting all applicable industry standards and all governmental and statutory requirements.”**

2. As mentioned above the current definition of “Home Inspection Report” as defined in 16.66.7.25 A is not consistent with either national standard and revolves around “generally established practices” which we discussed above and recommend for deletion. NACHI 1.3 defines “Home Inspection Report” to “identify, in written format, defects within specific systems and components defined by these standards that are both observed and deemed material by the inspector. Inspection reports may include additional comments and recommendations.” In CID’s opinion this definition appears to be a clear statement as to what a home inspection report is intended to be. The report is not intended to make determinations as to whether the home or inspected components and/or systems conforms to local or state building code requirements which the current definition would allow.

3. We acknowledge the board’s consideration and inclusion of explanatory language in 16.66.7.9 titled “Home Inspections do not determine conformity with state and local building code requirements”.

4. 16.66.7.9 titled “Inspection Reports”. As we have already explained, the inclusion of “generally accepted practices” should be deleted. If not, at a minimum we would respectfully request consideration of deletion in the report of “the historically or conventionally applied and acknowledged methods of installation, assembly, and operation or use.” CID’s issue with this included language is that it allows a HI to make a code determination which previously was always made by a building inspector official, at the time of construction or installation. Mr. Smith states that a home inspector would not be able to “inspect” if this were not included. I would respectfully disagree as the home inspector is inspecting for condition and systems not performing within their normally intended functions, and not making a determination as to the installation or assembly of the system itself.

We recognize that the board has tried to base its rules on national standards for HI. Other than a few minor limitations in NACHI 2.1, there exist no prohibitions in NACHI, ASHI or in the proposed NM rules against infringement into any other agency’s authority or to making certain

unqualified legal opinions or determinations. Nor is there any recognition of any professional or trade license requirements or special training, certification or expertise required to make certain determinations. Activities relative to the above referenced limitations are grouped under the headings “not required to”. The issue that must be addressed, however, is the reality that indicating that a HI is “not required to” inspect or include in a report does not prohibit the HI from including these “not required to” items in his inspection and report.

CID proposes that it would clarify the responsibilities of the HI and establish their authority and where necessary limitations by grouping the tasks in SOP under headings as follows: “shall inspect”, “not required to inspect unless included in a pre-inspection agreement” and “shall not inspect”. This will prevent infringement into other agencies’ authority and will prevent the execution of certain tasks that require special training, expertise and licensing/certification. The CID trade bureaus have determined that some tasks currently listed under “not required to” fall into scopes of work that require training, specialized knowledge and experience, and statewide licensure to make determinations including those that have code implications. Mr. Smith rejected this idea as unnecessary because no other national standards used this idea. He also indicated that a “shall not” subtopic would be a setup for legal action if the HI performed a shall-not task such as lighting a pilot. A review of the items indicated below eliciting code determinations, or other actions requiring different licensure, are the true “setups” for legal action. We still recommend the above noted categories which, if clearly set out in rule and in pre-inspection agreements, should prevent legal action. Why not let New Mexico set the standard and be the leader, not the follower.

Currently there exist no such limitations or prohibitions even in the Code of Ethics or the Disciplinary Proceedings sections. This was brought home by the discussion during the board’s most recent public meeting wherein CID raised concerns regarding HI’s making code determinations. During the meeting, a participant asked the following question. “Can this statement be used on a report to avoid using the term code?” The statement he wanted included was, “as per local jurisdiction”. This question and proposed wording exemplifies the reality that some home inspectors have been and may attempt in the future to make code determinations and attempt to mask their action by the inclusion of “as per local jurisdiction”. There are several cases, another just received, wherein we are faced with this exact problem. “[A]s per local jurisdictions” cannot be utilized allowing a HI to bypass the prohibition against making code determinations as local jurisdictions are mandated to comply with and apply the Construction Industries Licensing Act, its rules, codes and standards. Therefore, a local jurisdiction would have to have certified building construction inspectors in order to make those code determinations. A HI does not have that authority.

The following are the areas where it appears due to “not required” that an inspector could perform such services resulting in violations of law including making code determinations. We recommend that all should be in the “shall not” category.

- 16.66.7.12 Site Characteristics and Exterior
  - C 6 - adequacy of retaining walls; either an engineering or code interpretation determination
- 16.66.7.13 Structural Components
  - C 1 – providing engineering or architectural services or analysis; clearly an engineering/architectural determination requiring a licensed engineer/architect.

- C 2 – offer opinion about the adequacy of structural systems and components; a code interpretation determination or analysis by a qualified professional
- 16.66.7.14 Roofing
  - C 1 perform a water test; if perform water test and made determination based on the test, this would be a code interpretation determination.
  - C 2 warrant or certify the roof or predict the service life expectancy; a home inspector cannot warrant/certify the life expectancy; the service life expectancy is based on code issues at the time the roof is installed.
  - C 5 confirm proper fastening or installation of any roof-covering material; code interpretation determination including following manufacturers required instructions, which HI would not potentially have.
- 16.66.7.15 Plumbing
  - C 3 septic; requires a license from Dept. of Environment.
  - C 4 wells, water storage, pumps – responsibility of CID, State Engineer
  - C 5 on-site, well, water supply – building code interpretation determination and State Engineer.
  - C 7 Solar, geothermal and renewable energy; building code interpretation determination and licensee expertise required.
  - C 8 Fire extinguishing and sprinkler system; building and fire code interpretation determination.
  - C 9 landscape irrigation; building code and CID licensing requirements.
  - D 1 light or ignite pilot flames; only gas or qualified licensees should light or ignite other than for a stove.
  - D 5 inspect/test for gas or fuel leaks; only gas or qualified licensees should inspect/test for such leaks.
  - E 2 adequacy of combustion air components; code interpretation determination or licensee expertise.
  - E 5 effectiveness of anti-siphon device [back flow prevention] code interpretation determination.
- 16.66.7.16 Electrical
  - A 1 Service drop; under the exclusive control of the serving electric utility company who regularly inspects; requires clarity as to exactly what is included in report.
  - A 3 Service equipment and main disconnects; of the service equipment, the service entrance cables creates a potential issue as such cables can only be de-energized by the electric utility. Suggested language should include that such be opened only when the service is de-energized and/or it shall not be opened but the HI shall report indicating locations of equipment and disconnects.
  - A 4 Service and system grounding; it is recommended that the report indicate the type of grounding system that is present (cold water, concrete encased, ground ring etc.)
  - A 5 Interior components of service distribution panel boards and secondary panel boards by removing the panelboards deadfront cover; As the risk of electrical shock and arc flash resulting in electrocution or fire is high and OSHA mandates that access to energized equipment be limited, CID recommends that access should only be permitted when electrical equipment is de-energized.
  - A 6 Conductors (wiring); CID recommends the method used to identify wiring be set in rule for clarity for the HI.

- A 7 Overcurrent protection devices; CID recommends that a checklist of reporting criteria be included in rule for clarity for the HI.
- A 9 Ground Fault circuit interrupter (“GFCI”) protection components and A 10 Arc Fault circuit interrupter (“AFCI”); CID recommends “components” be changed to “devices”.
- B 1 Amperage and voltage rating of the service; CID recommends that the methods of reporting these items be specified in rule to standardize the method for the HI and avoid violation of D 3.
- B 2 location and main service entry; should include whether overhead or underground service.
- B 3 Predominant branch circuit wiring methods; CID recommends inclusion of a standardize procedure to comply with this requirement.
- Due to recent innovations in residential construction, CID recommends that a report note the presence of the following systems: Utility interactive system (ie, solar or wind turbine systems and electric vehicle charging systems.
- D 1 Test overcurrent protection devices except ground fault and arc fault interrupters; CID recommends that methods to test GFCI and AFCI be specified in rule so such may be standard for all HI.
- 16.66.7.17 Heating
  - D 2 heat exchangers; any dismantling of the system involves licensing and code interpretation determination.
  - D 6 heating systems; other than strictly a visual inspection involves the mechanical and plumbing building codes interpretation determination and qualified licensed/certified persons.
  - D 7 heat recovery and mechanical ventilation systems; other than strictly a visual inspection involves the mechanical and plumbing building codes interpretation determination and qualified licensed/certified persons.
  - D 8 fuel tanks or concealed fuel supply systems; installation, maintenance and repair requires CID license.
  - F 1 uniformity, temperature, flow, balance, distribution, size, capacity, BTU, or supply adequacy of heating system; code issues regarding commissioning.
  - F2 adequacy of combustion air components; strictly code interpretation determinations.
- 16.66.7.18 Cooling and Air Conditioning
  - D 6 determine uniformity, temperature, flow, balance, distribution, size, capacity, BTU, or supply adequacy of the cooling system; strictly code interpretation determination or licensee expertise.
- 16.66.7.20 Garages
  - C 5 Burners, burner ignition devices or heating elements, switches and thermostats that are not a minimum of eighteen inches above the lowest garage floor elevation; other than notation as to 18-inch requirement would be code interpretation determination.
- 16.66.7.22 Fireplaces and fuel burning appliances
  - A suggestion: “The licensee shall inspect “the condition of”.
  - A 3; suggestion: “Chimneys and vent systems “connections only”.
  - C 5 adequacy of combustion air components; code interpretation determination.
  - C 6 heat distribution assists; code interpretation determination.

- D 3 Determine the adequacy of drafts or draft characteristics; code interpretation determination.
- D 4 move fireplace inserts, stoves or firebox contents; requires a CID license.
- 16.66.7.24 Limitations and Exclusions
  - B1 underground items including lawn irrigation systems, underground storage tanks etc.; strictly code interpretation determination and licensee expertise.
  - C 1 ignite or extinguish fires, pilots lights, burners, and other open flames; other than lighting a pilot light for a stove; all issues are code interpretation determinations and safety related.
  - C 2 dismantle systems and components; dismantling of systems requires CID license.
  - D 1 legality...compliance with regulations, flood...; code and regulation legal determination.
  - D 2 permits required; CID and AHJs determine whether permits are required.
  - D 3 grandfathering as to condition in a system; code interpretation determination. Since this definition was removed, it is suggested that this be removed also.
  - D 5 strength, adequacy, effectiveness and efficiency of systems and components; commissioning and code interpretation determination.
  - D 7 methods, materials, and costs of corrections; code interpretation determination, licensee requirements and CID approved products.
  - D 11 whether items, materials, conditions, and components are subject to recall, controversy, litigation, product liability, and other adverse claims/conditions; includes CID approved products and potential litigation.

While we observe numerous other areas that may concern other agencies, we have attempted to limit ourselves to CID concerns as to licensure and code.

We thank you for considering the comments and suggestions hopefully, including all ideas for better rule enactment.

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