

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
CONSTRUCTION INDUSTRY LICENSING BOARD**

In re: ROBERT J KONING'S PETITION
FOR DECLARATORY STATEMENT
ON A DIVISION 1 CONTRACTOR'S
AUTHORITY TO CONDUCT MOLD
REMEDICATION AND ASSESSMENT
ACTIVITIES OR SERVICES.

PETITION FOR DECLARATORY STATEMENT

Petitioner, Robert J. Koning, pursuant to Section 120.565, Florida Statutes, and Chapter 28-105, Fla. Admin. Code, hereby petitions the Department of Business and Professional Regulation, Construction Industry Licensing Board ("Board") for a declaratory statement, and states:

Introduction

Petitioner, Robert Koning, maintains licensure as a Certified Division 1 contractor under Chapter 489.105(3) Florida Statutes. Petitioner's address is 8301 Joliet Street, Hudson, Florida 34667; telephone (727) 863-5147.

The statutory provisions at issue are Part XVI of Chapter 468, Florida Statutes, and Sections 468.841 and, 468.8411 Florida Statutes.

The issues to be determined by declaratory statement are:

- 1) Whether mold remediation activities defined at ¹468.8411(5) and (6) are within the scope of licensure of a Certified Division 1 Contractor when performing such activities on construction projects within the scope of their respective license categories and performing such services for existing or potential clientele - provided they are not representing themselves as a person or entity who specializes as a "Mold Remediator".

- 2) Whether mold assessment activities defined at ²468.8411(3) and (4) are within the scope of licensure of a Certified Division 1 Contractor when performing such activities on construction projects within the scope of their respective license categories and performing such services for existing or potential clientele - provided they are not representing themselves as a person or entity who specializes as a "Mold Assessor".

Discussion

- 3) Historically, Division 1 Contractors have always performed assessment and remediation services on construction projects for their clientele. These assessments, remediation, prevention techniques, strategies and containment protocols have involved a variety of contaminants, vermin and infestations such as: dust and dust management, lead paint and lead based products, asbestos and asbestos containing materials, formaldehydes, volatile organic compounds, radon, termites, sewage, graywater waste, algae, and include the common appearance, identification and removal of mold and moisture contaminated products. These contractor provided services have been on-going since the inception of contractor licensing itself and involve not only assessment and remediation - but the prevention of moisture by best construction practices and details. Contractors have shared these developed strategies and protocols with other industries through the years.
- 4) In recent past years, a cottage industry of unlicensed persons and entities began to flourish. These unregulated entities specialized in the assessment and remediation of mold outside the confines of licensed contractors. This eventually led the legislature to believe it necessary to regulate these unregulated activities.

- 5) Since these activities themselves represent a small specialty segment of the construction industry, requiring that applicants for mold related services meet the same requirements as qualifying for a Division 1 Contractor under Florida Statute 489 would prevent many who had been practicing these specialty services from attaining licensure since they could not meet the rigorous requirements. In light of the foregoing, Florida Statute 468 – Part XVI – Mold Related Services - was created for licensing and regulation of persons specializing in these specialty segment activities.
- 6) Florida Statute 468 – Part XVI - Mold Related Services - is self evident by way of its structure in its intent to limit the scope of those who attain licensure under its provision to work scopes that do not include any of the professional services required to be performed by licensed contractors pursuant to Florida Statute 489 to wit; *(emphasis added by author)*

468.8411 – Definitions...

(5) “Mold remediation” means the removal, cleaning, sanitizing, demolition, or other treatment, including preventive activities, of mold or mold-contaminated matter of greater than 10 square feet that was not purposely grown at that location; however, such removal, cleaning, sanitizing, demolition, or other treatment, including preventive activities, may not be work that requires a license under chapter 489 unless performed by a person who is licensed under that chapter or the work complies with that chapter.

(6) “Mold remediator” means any person who performs mold remediation. A mold remediator may not perform any work that requires a license under chapter 489 unless the mold remediator is also licensed under that chapter or complies with that chapter.

- 7) This strict limitation effectively limits the scope of one licensed under FS 468 as a Mold Remediator to mold remediation activities that do not involve construction elements. This allows mold remediation of; furnishings, draperies, floor coverings and certain drywall areas provided the drywall removal or alteration does not involve any; plumbing appurtenance, cabinets that contain plumbing fixtures, electrical device, structural component, fenestration unit or assemblage, air-conditioning unit, ductwork, safety pan, ventilation, sheet metal, roofing,

roofing, wall or stucco flashing, or any other component that is regulated by Florida Statute 489 whatsoever.

- 8) Therefore, pursuant to FS 468 – Part XVI - Mold Related Services - whenever mold remediation or assessment requires work that has a scope which falls under any category listed under Florida statute 489, that work must be undertaken by a licensed Division 1 (or in certain cases) a Division 2 Contractor. This necessitates the Division 1 contractor to either perform these services him or herself or subcontracting the specific mold remediation or assessment portion that falls outside the requirements of FS 489 (rugs, furniture, cabinetry, cleaning, etc...) to one regulated under Florida Statute 468.

- 9) Since most fungal contamination in occupied or unoccupied structures is usually caused by a building system or component malfunction or related to more serious storm source damage - rarely is building remediation work scopes limited to simple wall coverings, floor coverings, furnishings or drywall that is not integrated with Mechanical, Electrical, Plumbing, Structural, Fenestration or Cladding Components - all which necessitate the requirement for a licensed Division 1 Contractor. Therefore the requirement for a Division 1 Contractor to perform the mold remediation and/or assessment in a building or structure is the rule rather than the exception.

- 10) Furthermore, Florida Statute 468 – Part XVI - Mold Related Services - specifically exempts several categories from its statutory requirements regarding both mold assessment and mold remediation. Specifically; *(emphasis added by Petitioner)*

468.841 Exemptions.—

(1) The following persons are not required to comply with any provisions of this part relating to mold assessment:

(d) Persons or business organizations acting within the scope of the respective licenses required under chapter 471, part I of chapter 481, chapter 482, chapter 489, or part XV of this chapter, are acting on behalf of an insurer under part VI of chapter 626, or are persons in the manufactured housing industry who are licensed under chapter 320, except when any such persons or business organizations hold themselves out for hire to the public as a “certified mold assessor,” “registered mold assessor,” “licensed mold assessor,” “mold assessor,” “professional mold assessor,” or any combination thereof stating or implying licensure under this part

(2) The following persons are not required to comply with any provisions of this part relating to mold remediation:

(d) Persons or business organizations that are acting within the scope of the respective licenses required under chapter 471, part I of chapter 481, chapter 482, chapter 489, or part XV of this chapter, are acting on behalf of an insurer under part VI of chapter 626, or are persons in the manufactured housing industry who are licensed under chapter 320, except when any such persons or business organizations hold themselves out for hire to the public as a “certified mold remediator,” “registered mold remediator,” “licensed mold remediator,” “mold remediator,” “professional mold remediator,” or any combination thereof stating or implying licensure under this part.

11) It is the position of the Petitioner that this statement “acting within the scope of the respective licenses” (under chapter 489) is patently clear for *both* mold assessment services and mold remediation services; it means when the work scope to be performed requires a licensed contractor under FS 489 (*work which involves; repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure - infra*) the contractor is exempt from the mold assessor or Remediator licensure requirements of FS 468 – Part XVI – Mold Related Services; i.e., a Division 1 Contractor is not subject to the licensure requirements of FS 468 – Part XVI – Mold Related Services - if the work scope requires licensure pursuant to FS 489. This exemption is provisional upon the Division 1 Contractor *not* otherwise holding him/her self out as a “Mold Remediator” or “Mold Assessor” licensed pursuant to FS 468 – Part XVI.

12) FS 489.105 (3) defines a “contractor” as one who; (*emphasis added by petitioner*)

(3) “Contractor” means the person who is qualified for, and shall only be responsible for, the project contracted for and means, except as exempted in this part, the person who, for compensation, undertakes to, submits a bid to, or does himself or herself or by others construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others; and whose job scope is substantially similar to the job scope described in one of the subsequent paragraphs of this subsection....

13) The petitioner contends that mold related services certainly falls into the broad based brush of the above captioned text. However, the petitioner acknowledges that the term "mold related services" is not specifically stated within the confines of Florida statute 489 for a Division 1 Contractor (or Division II). This however would be expected since the scope of construction services listed in 489 is not exhaustive or detailed. For instance a Division 1 Contractor’s eligible scope of services include; stucco, brick masonry, block masonry, painting, tile setting, structural carpentry, trim carpentry, fenestration, excavation, concrete, drywall, etc. yet none of these services are specifically delineated in 489 as specific scopes of work allowed. The statute is a broad in its overall conceptual description for construction and reconstruction work, *supra*. Such work is allowed to be performed by a licensed Division 1 Contractor unless it is required to be performed by a Division 2 Contractor pursuant to the specific list codified at 489.113.

Specifically;

489.113 Qualifications for practice; restrictions.—

(3) A contractor shall subcontract all electrical, mechanical, plumbing, roofing, sheet metal, swimming pool, and air-conditioning work, unless such contractor holds a state certificate or registration in the respective trade category, however:...

14) The scope and detail of Mold Assessment services is specific under statute 468 – Part XVI. From the Statute; *(Petitioner added emphasis)*

468.8411 Definitions

(3) "Mold assessment" means a process performed by a mold assessor that includes the physical sampling and detailed evaluation of data obtained from a building history and inspection to formulate an initial hypothesis about the origin, identity, location, and extent of amplification of mold growth of greater than 10 square feet.

(4) "Mold assessor" means any person who performs or directly supervises a mold assessment.

15) A common "physical" sampling protocol is simply sampling of surfaces by way of clear "scotch" tape lifts placed on microscope slides and/or air volumes by way of small air pumps which impinge or capture calibrated quantities of air. Samples are then evaluated by an accredited laboratory (or certified microscopist) for mold or fungal contamination. Lastly the statute allows assessors to "inspect" (visually observation of mold or a defective condition such as a roof leak) and to "evaluate building history data in order to formulate an initial hypothesis"... This scope is notably limited and cannot extend or include the dismantling, disassembly, re-assembly, pressure testing, adjusting or servicing construction components and systems which is often times necessary to properly assess the origin and extent of moisture or bulk water movement and accompanying mold or fungal contamination. Such diagnostic scopes would require licensure under Florida statute 489. It is the position of the petitioner that herein lies the necessity for the exemption found at 468.841(d) *supra*.

Conclusion

- 16) Mold related services are intrinsically intertwined with the construction services and scopes contained within Florida statute 489. The mold related services statute recognizes this and specifically limits or precludes persons licensed under its guise from performing activities reserved and required by those licensed pursuant to Florida statute 489 by providing exemption for both mold remediation and mold assessment pursuant to 468.841(1)(d) and (2)(d) *supra*.
- 17) Additionally, homeowners and building owners alike depend upon the relationship between themselves and licensed contractors under Florida statute 489. Most homeowners and building owners seek a relationship with one contractor to identify their problems, provide them with competitive pricing for repair or reconstruction services thereby minimizing the trauma oftentimes associated with construction processes involving multiple prime contractors. If homeowners or building owners are forced to contract with multiple contractors when mold is an issue – the result will surely be added expense along with the increased possibility of litigation due to multiple parties working simultaneously without privity to a common General Contractor.
- 18) Petitioner is an affected person in need of a declaratory statement. As a certified Division 1 Contractor, petitioner should be allowed under Florida law to conduct mold related services activities, including, but not limited to, bidding and performing mold related services for its clientele by way of industry requirements and the exemptions for contractors found at 468.841(1)(d) and (2)(d).

19) NOW WHEREFORE, Petitioner respectfully requests the Board to issue a declaratory statement finding that mold related services including assessment and remediation services are within the scope of a properly licensed Division 1 Contractor pursuant to FS 489 provided the Division 1 Contractor does not hold himself out for hire specifically as a “Mold Remediator or “Mold Assessor” licensed under Florida Statute 468 – Part XVI.

Respectfully Submitted,

Robert J. Koning

8301 Joliet Street

Hudson, Florida 34667

727-863-5147

Petitioner

¹ 468.8411 Definitions.—As used in this part, the term:

(5) “Mold remediation” means the removal, cleaning, sanitizing, demolition, or other treatment, including preventive activities, of mold or mold-contaminated matter of greater than 10 square feet that was not purposely grown at that location; however, such removal, cleaning, sanitizing, demolition, or other treatment, including preventive activities, may not be work that requires a license under chapter 489 unless performed by a person who is licensed under that chapter or the work complies with that chapter.

(6) “Mold remediator” means any person who performs mold remediation. A mold remediator may not perform any work that requires a license under chapter 489 unless the mold remediator is also licensed under that chapter or complies with that chapter.

History.—s. 3, ch. 2007-235.

² 468.8411 Definitions.—As used in this part, the term:

(3) “Mold assessment” means a process performed by a mold assessor that includes the physical sampling and detailed evaluation of data obtained from a building history and inspection to formulate an initial hypothesis about the origin, identity, location, and extent of amplification of mold growth of greater than 10 square feet.

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