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OPINION NO. 71

LICENSES - Real estate firms; LICENSES, OCCUPATIONAL AND PROFESSIONAL - City licensing; LICENSES, OCCUPATIONAL AND PROFESSIONAL - Real estate firms; LOCAL GOVERNMENT - Licensing of real estate firms; MUNICIPAL CORPORATIONS - Licensing of real estate firms; REAL ESTATE AGENTS, DEALERS, AND SALESMEN - Licensing by city; REVISED CODES OF MONTANA, 1947 - Sections 11-918; 66-1924(2),(3), 66-1925(4), 66-1934(4).

HELD: The city of Missoula may not require real estate firms to obtain business licenses.

5 October 1977

Mae Nan Ellingson, Esq.
Assistant City Attorney
City of Missoula
Missoula, Montana 59801

Dear Ms. Ellingson:

You have asked my opinion on the following question:

May a city require real estate firms to obtain business licenses?

It is my opinion that cities, at least those with only general government powers, no longer have that authority. An incorporated city with general government powers, such as Missoula, has all powers that are provided or implied by

law. Article XI, section 14(1)(a), 1972 Montana Constitution. Of course those powers may be specifically denied as they have been in this case. As amended by chapter 533, section 13, 1977 Laws of Montana, section 66-1934(4), R.C.M. 1947 provides:

No license fee or tax may be imposed on a real estate broker or salesman by a municipality or any other political subdivision of the state.

The amendment to section 66-1934, when read in the context of the Real Estate License Act of which it is a part, prohibits a municipality's imposition of a license fee on firms as well as brokers and salesmen. The distinction between the licensing of real estate firms and brokers or salesmen is an illusory one. My research has not uncovered any law recognizing that distinction.

The Act makes it "unlawful for a person...to engage in...the business...of a real estate broker or a real estate salesman within this state without a license as a broker or salesman, or otherwise complying with this act." Section 66-1924(2), R.C.M. 1947. The term "person" includes "individuals, partnerships, associations, and corporations, foreign and domestic, except that when referring to a person licensed under this act it means an individual." Section 66-1925(4), R.C.M. 1947 (emphasis added).

The Act directly covers the licensing of individuals, but it indirectly covers the licensing of firms as well, allowing a corporation or partnership to act as a real estate broker "if every corporate officer, and every partner, performing the functions of a 'broker'...is licensed as a broker." Section 66-1924(3), R.C.M. 1947 (emphasis added). When a corporation or partnership acts as a real estate broker in violation of this provision, every officer or member, licensed or unlicensed, also violates the Act. Id.

A previous Attorney General's opinion recognized that the Real Estate License Act controls corporations as well as individuals, holding that "[a] corporation...must comply with the licensing requirements of the Real Estate License Act in order to conduct its operations in Montana." 34 OP. ATT'Y GEN. NO. 23, at 155 (1971).

In construing this section the intent of the Legislature controls. Security Bank and Trust Co. v. Connors, Mont. , 550 P.2d 1313, 1317 (1976). That intent must be ascertained from the statutes as a whole, not just from

the wording of the particular section involved. Vita-Rich Dairy, Inc. v. Department of Business Regulation, Mont. _____, 533 P.2d 980, 984 (1976). The Real Estate License Act as a whole indicates the Legislature intended to regulate real estate firms through regulation of the individuals comprising those firms. It follows, therefore, that the Legislature, in denying municipalities the power to license individuals, meant to deny the power to license firms also.

Opinions concerning other professions have confirmed the power of the Legislature to prohibit municipal licensing of professions regulated by the state, despite section 11-918, R.C.M. 1947, which says:

The city or town council has power to license all industries, pursuits, professions and occupations, and to impose penalties for failure to comply with such license requirements.

See 17 OP. ATT'Y GEN. NO. 83, at 94 (1937) (prohibiting cities and towns from licensing businesses to engage in the operation of certain gambling); 17 OP. ATT'Y GEN. NO. 314, at 380 (1938) (prohibiting cities and towns from collecting license fees from barbers for police regulation); 19 OP. ATT'Y GEN. NO. 50, at 94 (1941) (prohibiting cities and towns from imposing a license upon barbers for the privilege of operating a barber shop within the city or town). The rationale for these provisions, applicable here as well, is that a later enactment which is a specific statute prevails over the general law, above. See, e.g., State ex rel. Browman v. Wood, Mont. _____, 543 P.2d 184, 187 (1975).

You have interpreted Stephens v. Great Falls, 119 Mont. 368, 175 P.2d 408 (1946) as holding that even though cities had no power to license or regulate individuals involved in the sale of alcoholic beverages, the city could limit, restrain or otherwise regulate the businesses. I cannot agree with that interpretation. Stephens did say that a city could "limit or restrict, by ordinance, the number of places where beer may be sold within the city," 119 Mont. at 381, 175 P.2d at 414, but that holding interpreted a statute providing that the Montana Beer Act not be construed to prevent cities and towns from licensing and regulating places of business where beer is sold. Section 2815.44, R.C.M. 1935. No such statute appears in the Real Estate License Act. To

the contrary, as I have explained above, section 66-1934(4) indicates that cities are prevented from licensing real estate businesses.

THEREFORE, IT IS MY OPINION:

The city of Missoula may not require real estate firms to obtain business licenses.

Very truly yours,

MIKE GREELY
Attorney General