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LICENSING AND REGULATION: Real Estate and Residential Builders
- Judicial review upon denial, suspension or revocation.

A person may appeal to circuit court under the provisions of the administrative procedures act a denial, suspension or revocation by the Department of Licensing and Regulation of a license to engage in the business of residential builder or contractor.

A person may appeal to circuit court under the provisions of the administrative procedures act a denial, suspension or revocation by the Department of Licensing and Regulation of a license to engage in the business of real estate broker or salesman.

Opinion No. 4128

February 15, 1973.

Charles E. Harmon, Director
Department of Licensing and Regulation
1033 South Washington Avenue
Lansing, Michigan 48926

You have requested my opinion regarding the following questions:

1. May a person appeal to the circuit court under the administrative procedures act a decision of the Department of Licensing and Regulation denying, suspending or revoking a license to engage in the business of a real estate broker or salesman as authorized by 1919 PA 306?¹

2. May a person appeal to the circuit court under the administrative procedures act a decision of the residential builders board denying, suspending or revoking a license to engage in the business of a residential builder or residential maintenance and alteration contractor as authorized by 1965 PA 383?²

In light of Const 1963, art 6, § 28, the issues presented by both questions are substantially identical and may be considered together.

The Michigan constitution provides:

"All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial and quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . ." Const 1963, art 6, § 28

This constitutional mandate affords judicial review of certain acts of administrative bodies which are quasi-judicial and affect private rights or

¹ MCLA 451.201 *et seq*; MSA 19.791 *et seq*.

² MCLA 338.1501 *et seq*; MSA 18.86(101) *et seq*.

licenses. In the area of licensing the Michigan Court of Appeals has stated in *Detroit v Mashlakjian*, 15 Mich App 236 (1968) that:

"It is now well established that a licensing authority issuing occupational licenses may not refuse, revoke or suspend a license without informing the applicant or licensee of the reasons for the proposed negative action and giving him an opportunity to be heard thereon. Thus, whether called a renewal or a new application, Mashlakjian was entitled to notice and to an opportunity to be heard before denial of his application. This was his right both as a matter of constitutional principle and under provisions of city of Detroit ordinances." (p 239)

Another decision requiring a fair hearing prior to denial of an occupational license is *Bennett v Arizona State Board of Public Welfare*, 95 Ariz 170, 388 P2d 166 (1963), which dealt with the denial of a child care nursery license. The Arizona Supreme Court said:

"We observe, as did the United States Supreme Court, that the multiplication of administrative agencies and the expansion of their functions to include adjudications which have serious impact on prior rights has been one of the dramatic legal developments of the past one-half century. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616. While a state may bestow upon an administrative officer or administrative agencies the duty to protect the public health, safety and welfare by examining into the fitness of an individual to engage in an occupation, it cannot exclude such person from any occupation in a manner or for reasons that contravene the due process clause of the 14th Amendment. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 792.

"It is too well settled, to permit any argument to the contrary, that procedural due process requires petitioner be given an opportunity to be heard upon the matters which the Board of Welfare acted in denying a license. See *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494. Petitioner must be given notice of time and place of hearing, a reasonable definite statement of the grounds for denial of her application, the right to produce witnesses in her own behalf, the right to examine witnesses who testify against her and a full consideration and a fair determination according to the evidence by the body before whom the hearing is had. *Forman v. Creighton School District*, 87 Ariz. 329, 351 P.2d 165." (pp 167-168)

The United States Supreme Court, in construing the Tennessee statute dealing with the licensing of real estate brokers and salesmen which contained virtually identical language to section 8 of the present Michigan statute allowing the department to require and procure proof of the qualifications of the applicant, stated in *Bratton v Chandler*, 260 US 110, 43 S Ct 43, 67 L Ed 157 (1922):

"In conclusion, we may say, that if the word 'procure' is more than a tautological repetition of the word 'require', it was only to confer the power of affirmative direction upon the Commission, necessarily to be

exercised in supplement to the action of the applicant and with the same publicity and opportunity of the applicant to meet adverse evidence. And the act, construed as we construe it, will take no power from the Commission necessary to the performance of its duties, and will leave no power with it that it can exercise to the detriment of any right assured to an applicant for a license by the Constitution of the United States." (pp 114-115) (emphasis added)

The new administrative procedures act, 1969 PA 306,³ sets forth the procedure for judicial review of final decisions or orders by administrative agencies. Section 101 of the administrative procedures act provides when a person may seek judicial review and in substance requires that the administrative remedies available be exhausted before the agency prior to seeking judicial review.

Section 102 indicates the type of judicial review available to a person aggrieved by a final decision or order of an administrative agency and states that judicial review:

" . . . shall be by any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105." MCLA 24.302; MSA 3.560(202)

Turning our attention to the real estate license law and residential builders, maintenance and alteration contractors licensing act, *supra*, we find that both acts provide specifically for judicial review of a final decision or order of suspension or revocation under the auspices of 1952 PA 197,⁴ the predecessor act to the new administrative procedures act. The real estate license law states:

"Sec. 14. . . . Any licensee aggrieved by the decision of the commission shall be entitled to judicial review of the commission's decision, and appeal to the supreme court in the manner provided in Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948." MCLA 451.214; MSA 19.804

The residential builders act states:

"Sec. 10. . . . All procedures and judicial review shall be in accordance with Act No. 197 of the Public Acts of 1952, as amended." MCLA 338.1510. MSA 18.86(110)⁵

The residential builders act further provides:

"Sec. 4. (4) No applicant shall be refused a license without an opportunity for a hearing before the commission. . . ." MCLA 338.1504; MSA 18.86(104)

³ MCLA 24.201 *et seq.*; MSA 3.560(101) *et seq.*

⁴ MCLA 24.101 *et seq.*; MSA 3.560(21.1) *et seq.*

⁵ This is now a reference to 1969 PA 306, by virtue of Sec. 112 thereof. MCLA 24.312; MSA 3.560(212).

Thus, it is apparent that judicial review of suspension, revocation and, in the case of the builders act, license denials is available as provided for in the administrative procedures act.

Section 103 of the administrative procedures act tells us that:

"(1) A petition for review shall be filed in the circuit court of the county where petitioner resides or has his principal place of business in this state, or in the circuit court for Ingham county.

"(2) A petition for review shall contain a concise statement of:

"(a) The nature of the proceedings as to which review is sought.

"(b) The facts on which venue is based.

"(c) The grounds on which relief is sought.

"(d) The relief sought.

"(3) The petitioner shall attach to the petition, as an exhibit, a copy of the agency decision or order of which review is sought." MCLA 24.303; MSA 3.560(203)

In the situation where the Department of Licensing and Regulation wishes to deny an application for licensure under the real estate license law, the legislature did not specifically provide for judicial review of that action.

The act provides:

"Sec. 8. ***The commission shall have the right to prescribe the form of application for all licenses. The commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, business experience, competence and reputation of any applicant for a real estate broker's or salesman's license or of any of the officers or members of any such applicant, prior to the issuance of any such license. The commission is expressly vested with the power and authority to make, prescribe and enforce, after having been approved by the attorney general and recorded by the secretary of state, as required under Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.82 of the Compiled Laws of 1948, any and all such rules and regulations connected with the application, for any license, and the issuing of the same as shall be deemed necessary to administer and enforce the provisions of this act, and the issuance or refusal of a license shall be discretionary with the commission. . . ." MCLA 451.208; MSA 19.798

The department saw fit, pursuant to section 8, to promulgate rule 451.402 of the administrative code, which contains the following proviso:

"b. The commission may after investigation deny the application of any person for license under this act by mailing written notice of its decision to the address appearing on the application: Provided, however, That within 10 days from the date of such notice, applicant may make written request for hearing on such decision. Upon receipt of request for hearing, notice of time and place thereof will be given forthwith by the commission." 1954 AC R451.402

In summation, it is my opinion that each of your questions must be answered in the affirmative, and an appeal may be taken to circuit court in the circumstances you have outlined, provided any available administrative remedies have been exhausted.

FRANK J. KELLEY,
Attorney General.

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CONSTITUTIONAL LAW: Limitation on power of the legislature.

SCHOOL DISTRICTS: Power of board of education to levy income tax or other excise taxes.

TAXATION: Income tax and excise taxes.

A board of education of a school district is without authority, constitutional or statutory, to levy an income tax or other excise taxes.

Opinion No. 4763

February 15, 1973.

Hon. Harry A. DeMaso
State Senator
The Capitol
Lansing, Michigan

You have requested my opinion on the following questions:

- "1. Does a school district, through its school board, have the authority to levy an income tax or other excise taxes upon the people of a school district under the present constitution?"
- "2. If so, what is the constitutional provision which grants such authority?"

An examination of the provisions of the Michigan Constitution of 1963 indicates that the people have not conferred express authority therein upon a board of education of a school district to levy an income tax or other excise taxes. Failure of the people to so provide is not dispositive of your question since the law is well settled that the Constitution is a limitation upon the otherwise plenary power of the legislature. *Toy, ex rel. Elliott v Voelker*, 273 Mich 205 (1935).

The power of cities to levy income taxes is not dependent upon a constitutional grant. The Michigan Supreme Court has ruled in *Dooley v City of Detroit*, 370 Mich 194 (1963), that the legislative grant of power to cities to lay and collect excises was legally sufficient to support the levy of an income tax. Subsequent to this decision the legislature has expressly permitted the levy of a city income tax pursuant to 1964 PA 284, MCLA 141.501 et seq; MSA 5.3194(1) et seq.

The legislature has not conferred authority upon a board of education of a school district to levy either an income tax or other excise taxes. Any grant of authority to a board of education of a school district to levy an income tax would be subject to the constitutional limitation imposed by the