tures for such necessary repairs may only come out of the fund specified in 1956 PA 40, § 196.

FRANK J. KELLEY,
Attorney General.

760811.1

OFFICERS AND EMPLOYEES: Scope of authority.

LICENSES: Lack of authority to grant.

RESIDENTIAL BUILDERS AND MAINTENANCE AND ALTERATION CONTRACTORS: Applicant's experience as alternative to written examination.

Public officers may only exercise powers conferred upon them by law and persons dealing with them are charged with knowledge of the extent of their authority.

Where a statute permitted an applicant for licensure as a residential maintenance and alteration contractor to submit proof of having been engaged in the business of contracting for building and alteration work for 5 years as an alternative to a written examination, experience acquired in the state in violation of the act may not be considered.

Opinion No. 5069 August 11, 1976.

Beverly J. Clark, Director
Department of Licensing and Regulation
1033 S. Washington Avenue
Lansing, Michigan 48926

You have requested my opinion as to whether the doctrine of equitable estoppel would prevent action by the Department of Licensing and Regulation to revoke Residential Builders and Maintenance and Alteration Contractors' licenses improperly issued under 1965 PA 383; MCLA 338.1501 *et seq;* MSA 18.86(101) *et seq.* You are specifically concerned with instances in which persons were issued a license without examination and without filing proof of five years experience gained prior to the effective date of the act.[1]

The general rule is that estoppel does not lie against the state. As stated at 1 ALR 2d 340:

> "The doctrine of equitable estoppel, or, as it is otherwise called, estoppel in pais, has no application to the government of the United States, a state, a municipal corporation or other governmental agencies."

And at 1 ALR 2d 360 it is stated:

> "The doctrine of estoppel will not be applied against any governmental agency such as a commission or a board acting in its public capacity."

[1] 1965 PA 383, § 4(4). The provision exempting persons with five years experience from taking a written examination was deleted from the act by 1975 PA 250.

This rule, however, is not absolute and, in Michigan, the general rule has not been adopted literally. In certain sets of facts, estoppel has been granted against the state and its component agencies.

In *Sittler* v *Board of Control of the Michigan College of Mining & Technology*, 333 Mich 681, 687; 53 NW2d 681 (1952), the Court cited with approval the following language:

> " 'The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority.' *Township of Lake* v. *Millar*, 257 Mich 135, 142.
>
> "See, also, *Vincent* v. *Mecosta County Supervisors*, 52 Mich 340; *Schneider* v. *City of Ann Arbor*, 195 Mich 599.
>
> "In *Roxborough* v. *Unemployment Compensation Commission*, 309 Mich 505, we quoted with approval the following from 59 CJ, pp 172, 173:
>
> " ' "Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution. * * * Nor is a State bound by an implied contract made by a State officer where such officer had no authority to make an express one. * * *
>
> " ' "The powers of State officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred."
>
> " 'Persons dealing with a municipal corporation through its officers must at their peril take notice of the authority of the particular officer to bind the corporation, and, if his act is beyond the limits of his authority, the municipality is not bound.' *Rens* v. *City of Grand Rapids* (syllabus), 73 Mich 237.
>
> " 'But the law holds those dealing with a municipal corporation to a knowledge of the extent of the authority conferred, and of the mode of its exercise, and of all illegalities committed by its agents in not pursuing the authority in the manner pointed out, and visits upon them the consequences of violating the law by refusing to enforce such contract at their instance.' *McBrian* v. *City of Grand Rapids*, 56 Mich 95, 108."

In *Oliphant v Frazho*, 381 Mich 630, 635; 167 NW2d 280 (1969), the Court allowed an estoppel to run against the state, stating:

> "There can be no doubt that a controlling question as to the claimed estoppel is whether the State acts, by its officers and agents, were of a kind so authorized as to be binding on the State . . ."

In *Oliphant*, the Court went on to find that the acts of the state officials were within the authorized scope of authority.

It may be concluded, therefore, that when a Court finds that a state

official is specifically authorized and has a duty to act and by the official's act does something that results in an unconscionable result, the state will be estopped. As I observed in my investigation report of March 4, 1975, your department did not have the authority under 1965 PA 383, § 4(4) of the builders' act, *supra,* to issue a license without examination when the applicant failed to present proof of five years experience before the effective date of the act. One must examine the statute to determine whether the conduct of state officers and agents is of such a nature as to be binding on the state.

The "grandfather clause" provision contained in 1965 PA 383, § 4(4) of the builders' act, *supra,* read:

> ". . . Satisfactory proof of having been engaged in the business of contracting for the erection, construction, alteration, repair, addition to, subtraction from, improvement, movement of, wrecking of or demolition of residential or combination of residential and commercial structures for a period of 5 years shall be prima facie proof of the applicant's fitness to carry on the business, and shall not be required to take the examination, and upon compliance with all the provisions of this act, a license shall be granted forthwith . . ."

In addition, the Residential Builders' Board in the exercise of its rule-making authority promulgated rule 23, which provides in pertinent part:

> "(1). An applicant for a license shall take a written examination except as follows:
>
> "(a) An applicant furnishing satisfactory proof of having been engaged in the business of building or contracting for a period of 5 years or more."
>
> "* * *

Both the statutory language and the rule are silent as to when the five-year period of experience shall run. Therefore, it is necessary to determine whether the five years of experience should be construed to mean experience prior to the effective date of the statute, September 1, 1966, or whether the five-year period should include experience after the effective date of the act, but without licensure.[2] While our courts have not been called upon to construe this issue, it has been litigated in several other jurisdictions.

An early Ohio case, *Wert* v *Clutter,* 37 Ohio St 347 (1881), interpreting the ten-year period specified in that state's medical practice statute held

[2] For the purpose of responding to your request, this opinion considers only those applicants who claim experience based on services performed in this state. There appears to be no prohibition in the statute which would preclude an applicant from gaining the requisite five years of experience in another jurisdiction providing the experience was accrued while ". . . engaged in the business of contracting for the erection, construction, alteration, repair, addition to, subtraction from, improvement, movement of, wrecking of or demolition of residential or combination of residential and commercial structures." In the case of an applicant claiming licensure based on experience gained in a foreign jurisdiction, the experience could be gained after the effective date of the statute but the application would have to be filed before the effective date of 1975 PA 250 which eliminated Section 4(4).

the period of time to qualify to mean before or after the passage of the statute. However, in *State ex rel Eberts* v *Ohio State Medical Board,* 60 Ohio St 21; 53 NE 298 (1899), the *Wert* decision was disapproved.

Kentucky resolved the issue in two early decisions. *Driscoll* v *Commonwealth,* 93 Ky 393; 20 SW 431 (1892), and *Hargan v Purdy,* 93 Ky 424; 20 SW 432 (1892), wherein the Court held that "grandfather clause" language in the medical practice statute related to the time prior to the effective date of the act. The Court advanced the state's police power argument in that the statute was enacted to protect the public health and welfare. Therefore, the *Driscoll* Court stated:

> "It is an unreasonable construction to hold that one can become qualified to practice by the mere lapse of time after the law has been enacted, when he is violating its letter and spirit every day that he fails to comply with its provisions." (p. 400)

In *State v Wilson,* 61 Kan 791, 60 P 1054 (1900), again dealing with a medical practice statute, the Court held that the ten-year certificate of qualification applies only to those individuals who had been in practice prior to the passage of the act. Colorado followed suit in *Higgins* v *State Medical Examiners,* 46 Colo 476, 104 P 953 (1909). The clear weight of authority, therefore, holds that the experience period to qualify under a "grandfather clause" applies only to experience obtained prior to passage of a licensing statute and not to experience obtained after the effective date of the act in violation of the law.

It is clear that the Michigan Residential Builders' Act, *supra,* was enacted to ". . . safeguard and protect homeowners and persons undertaking to become homeowners," as noted in *Tracer* v *Bushre,* 381 Mich 282; 160 NW2d 898 (1968). Further, the legislature declared in Section 1 of the act, *supra,* that it is unlawful conduct for any person to ". . . engage in the business of or to act in the capacity of a residential builder or a residential maintenance and alteration contractor and/or salesman in this state without having a license. . . ."

Thus, since the department, its officers and agents did not have the authority to issue licenses in derogation of the statute, the department will not be estopped from revoking the licenses. As a matter of equity, the department has, by providing an opportunity to the affected licensees to take an examination before instituting revocation proceedings, allowed the licensee to avoid the potential harm of revocation.

FRANK J. KELLY,
Attorney General.