670821.1

CIVIL RIGHTS: Pre-emption by Civil Rights Commission.
CITIES: Ordinances providing criminal sanctions for discriminatory housing practices.

Civil enforcement of civil rights by a local human relations commissioner such as by means of injunction and cease and desist orders is pre-empted by the State Civil Rights Commission under Article V, Sec. 29 of Michigan Constitution.

The provisions of Michigan Constitution Article V, Sec. 29, establishing a civil rights commission and granting to it certain powers do not inhibit municipalities from enacting fair housing ordinances or imposing criminal penalties for violations thereof.

No. 4585 August 21, 1967.

Hon. Garland Lane
State Representative
The State Capitol
Lansing, Michigan

In your letter of March 17, 1967, you have requested an opinion of this office relative to a question *which we have rephrased* as follows:

> In light of Opinions Nos. 4161, 4195, and 4211 of the Attorney General, may a city enact an ordinance imposing criminal sanctions for violation of a citizen's civil right to equal opportunity in housing?

Opinion No. 4161 (July 22, 1963), O.A.G. 1963-64, p. 2, states that "the Civil Rights Commission has authority to enforce civil rights to purchase, mortgage, lease or rent private housing," and that the Civil Rights Commission, established by Article V, Sec. 29 of the Revised Constitution "has plenary power in its sphere of authority."

Opinion No. 4195 (October 3, 1963), O.A.G. 1963-64, p. 196, states that the City of Detroit does not have the power to enact two specific ordinances described in that opinion as the "Open-Occupancy Ordinance" and the "Property Owners' Rights Ordinance."

Opinion No. 4211 (November 18, 1963), O.A.G. 1963-64, p. 229, states that municipal ordinances could create human relations commissions with functions of education, conciliation, mediation, and investigation, but that such commissions could not *enforce* civil rights.

We have recently (March 2, 1967) written a letter to the City Attorney of Flint in which we wrote that municipalities may enact ordinances imposing criminal sanctions for discriminatory housing practices.

Your letter quotes at some length Opinion No. 4195 relative to the power of municipalities to enforce civil rights. The language of that opinion should be read in light of the kinds of ordinances discussed in that opinion.

The so-called Home Owners' Ordinance would have permitted discrimination in violation of state law and, therefore, was in conflict with state law.

The so-called Open Occupancy Ordinance, as proposed, provided in Sections 4 and 7 for enforcement by means of injunctive or other civil relief through the auspices of the Detroit Commission on Community

Relations. This is the same type of relief which the State Civil Rights Commission has authority to grant pursuant to a broad and extensive constitutional mandate. The Civil Rights Commission completely occupies the field of administrative-type enforcement—that is, enforcement by means of injunctions or cease and desist orders. In the area of that authority, it preempts the field.

The case of *Miller v. Fabius Township Board,* 366 Mich. 250 (1962), discusses at some length the questions of pre-emption. The Supreme Court held that a *township* ordinance was supportable by broad township police powers and that the ordinance did not invade a field completely occupied by state law or conflict with state law.

Cities also have broad powers to legislate for the public peace, health, welfare and safety. The breadth of this police power is set forth in the Michigan Constitution:

> "Under * * * general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. * * * Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section." (Article VII, Section 22)

The Constitutional Convention commented as follows on that section:

> "This is a revision of Sec. 21, Article VIII, of the present constitution and reflects Michigan's successful experience with home rule. The new language is a more positive statement of municipal powers, giving home rule cities and villages full power over their own property and government, subject to this constitution and law."

Article VII, Section 34 of the 1963 Constitution reads as follows:

> "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

The Constitutional Convention commented as follows on that section:

> "This is a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments. Home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes."

The legislature has also provided for broad police powers for cities:

> "Each city may in its charter provide . . .

"(9) For the enforcement of all such local police, sanitary and other regulations as are not in conflict with the general laws."

Home Rule City Act, Act 279 of 1909, as amended (Section 4i) (M.S.A. § 5.2082).

Section 4j of that same act provides that a charter of a home rule city may provide:

"(3) For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state." (M.S.A. § 5.2083)

Recent cases of the Michigan Supreme Court indicate the liberal construction given to the powers of local legislative bodies and to the presumption that an ordinance is presumed to be constitutional unless it clearly appears otherwise. *Miller v. Fabius Township Board, supra; Watnick v. City of Detroit,* 365 Mich. 600 (1962).

There is also authority from other jurisdictions supporting the proposition that under their "police power," cities may pass ordinances to protect nondiscriminatory opportunities to obtain housing. *District of Columbia v. Thompson Co.,* 346 U.S. 100 (1953); *Marshall v. Kansas City,* 355 S.W. 2d 877 (Sup. Ct. of Missouri, 1962). Also see *Porter v. City of Oberlin,* 1 Ohio St. 2d 143, 205 N.E. 2d 363 (1965), in which the Supreme Court of Ohio held as follows:

"In our opinion, such determination, which the Oberlin council is presumed to have made by its exercise of the police power in the enactment of this ordinance, is not clearly erroneous, and the ordinance does not appear to be either unreasonable or arbitrary. Whether legislation of this kind should be adopted will depend largely on local conditions and community needs. The following statement in the syllabus in *Allion v. City of Toledo* (1919), 99 Ohio St. 416, 124 N.E. 237, is particularly applicable in the instant case:

" 'Unless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative discretion. Local authorities are presumed to be familiar with local conditions and to know the needs of the community.'

"We conclude, therefore, that the police power clearly includes the power to prohibit the owner of property from discriminating, in its sale or rental or in the terms, conditions and privileges of such sale or rental, against any person purely because of race, creed or color."

See also *Stanton Land Company, et al. v. City of Pittsburg, et al.* (Court of Common Pleas of Allegheny County, Pennsylvania), 8 Race Relations Law Reporter 1580 (1963); *Chicago Real Estate Board et al. v. City of Chicago et al.* (Circuit Court of Cook County, Illinois), 11 Race Relations Law Reporter 386 (1965); *Annotation,* power of municipal corporation to enact civil rights ordinance, 93 A.L.R. 2d 1028 (1964).

There is also authority in other jurisdictions which supports the proposition that civil rights ordinances may stand side by side with state-wide civil rights laws. See *City of New York v. Claflington, Inc.*, 243 N.Y.S. 2d 437 (1963); Opinion of the Attorney General of New York, January 13, 1967; Opinion 59a-32 of the Attorney General of Minnesota, 11 Race Relations Law Reporter 2199.

Therefore, while it is the opinion of this office that ordinances attempting to give civil enforcement powers, by injunctions and otherwise, to local human relations commissions are pre-empted in Michigan by a definitive constitutional grant of those powers to the State Civil Rights Commission, it is also the opinion of this office that because the imposition of criminal sanctions is not within the sphere of authority of the Civil Rights Commission, that the broad underlying power of a municipality to pass civil rights ordinances imposing criminal sanctions is *not* pre-empted by the existence of the Civil Rights Commission.

Opinion No. 4161 ruled that the pre-emption of the Civil Rights Commission extends only to its sphere of authority, that is, civil rights. At pages 145 and 146, Report of the Attorney General 1963-64, certain rights referred to as "civil rights" and secured to citizens by statutes other than civil rights statutes, such as the Michigan Public Accommodations Act and the constitutional and statutory provisions guaranteeing equal rights in public education to all resident children, are cited. At page 151 it is noted that such rights can continue to be enforced by such remedies as are provided by such statutes, without conflict with the pre-empted sphere of the Civil Rights Commission. Thus, for example, I have recently advised the Wayne County Civil Service Commission that the pre-emption of the Civil Service Commission is not applicable to the Wayne County Civil Service Act (Act 370, P.A. 1941, as amended), C.L. 1948 §§ 38.401 et seq.; M.S.A. §§ 5.1191(1) et seq., because the—

> "* * * act establishing the county civil service commission was not framed for the sole purpose of securing 'equal protection of civil rights without * * * discrimination' (Michigan Constitution of 1963, Article V, Section 29), but rather for the principal purpose of increasing the efficiency of county government and improving personnel administration. Such increase * * * can best be achieved by selecting personnel of the highest caliber and without regard to such irrelevant factors as 'political, racial, or religious opinions or affiliations * * *.' Thus, since the basic purposes of enforcing the county civil service act differ from the basic purposes of enforcing state anti-discrimination statutes and since there is no conflict between the two, there is no pre-emption of the field which would inhibit the county civil service commission from fully exercising the investigative and remedial powers granted to it by Act 370, Public Acts of 1941, supra * * *."

This construction gives effect to the language of Article V, Section 29 of the Michigan Constitution of 1963, requiring that the section be construed so as not "to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state."

The opinions set forth herein are consistent with and in the spirit of two circuit court opinions in this state which have not been appealed.

In the case of *People of the City of Ann Arbor v. Frank Hubble* (Washtenaw County Circuit Court No. CR-373, decided July 30, 1965), the Washtenaw County Circuit Court upheld the power of the City of Ann Arbor to enact a fair housing ordinance. The ordinance in question provided criminal penalties. In the case of *Staunton M. Elsea, et al. v. John D. Watts, Judge of Recorders Court* (Wayne County Circuit Court No. 27865, decided June 7, 1965), the Wayne County Circuit Court held that a fair neighborhood practices ordinance enacted by the City of Detroit was valid. This ordinance also provided for criminal sanctions.

Of course, an ordinance providing criminal sanctions, like any other ordinance, must not conflict with state policy and law. It may not prohibit what is permitted or required by state law, nor permit what is forbidden by state law. *National Amusement Co. v. Johnson,* 270 Mich. 613 (1935); *Builders Association v. City of Detroit,* 295 Mich. 272 (1940).

In summary, civil enforcement of civil rights by a local human relations commission, by means of injunction and cease and desist orders, etc., is pre-empted because of the provision of the Constitution granting broad and detailed enforcement powers by those methods to the Civil Rights Commission. Criminal sanctions to enforce equal opportunity in housing, not being within the sphere of authority of the Civil Rights Commission, may be invoked by municipalities, providing the ordinance creating such sanctions does not conflict with state law.

FRANK J. KELLEY,
Attorney General.

670830.2

COSMETOLOGY: Subject to licensing by municipality.
MUNICIPALITY: Licensing of occupation – cosmetology.
ORDINANCE: Ordinance existing concurrently with general law.

Although there is a comprehensive Michigan statute controlling the licensing and regulation of the practice of cosmetology, a municipality may also, under its police power, license and regulate cosmetologists as long as its ordinance does not conflict with the state law.

Local authorities are without power to enforce the sanitation provisions of Act 279, P.A. 1909.

No. 4581 August 30, 1967.

Hon. Charles N. Youngblood, Jr.
The Senate
Lansing, Michigan

You have requested my opinion as to the validity of a proposed Grosse Pointe Woods ordinance requiring cosmetologists to obtain a license to practice their occupation in that city. Since Act 176, P.A. 1931, as amended (M.S.A. 18.131, et seq.), provides for the licensing, regulation, inspection and general policing of the practice of cosmetology by state authorities, you question whether a municipality may also license, regulate, inspect and police the same occupation.