

N.D.A.G. Letter to Koland (May 5, 1987)

May 5, 1987

Honorable Dave Koland
State Representative
P. O. Box 1486
Minot, North Dakota 58702

Dear Representative Koland:

Thank you for your letter of April 15, 1987, concerning an opinion I issued on September 23, 1986, regarding real estate licensure of resident managers of apartment buildings or trailer courts.

Your first question is whether this opinion has the full force and effect of law. The opinions of the Attorney General do not have the force and effect of law. The North Dakota Supreme Court has stated that although the opinions of the Attorney General are not binding upon the courts, the opinions are entitled to consideration and will have an important bearing upon the interpretation of a statute. State v. Reich, 298 N.W.2d 468 (N.D. 1980).

The North Dakota Supreme Court has also stated that opinions of the Attorney General govern the actions of public officials until such time as the question presented is decided by the courts. State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1945). In Haugland v. Meier, 339 N.W.2d 100 (N.D. 1983), the court reminded public officials that their actions in compliance with an Attorney General's opinion will protect them even if the opinion is later held to be erroneous. However, if they do not follow the opinion, they will be derelict in their duty and will act at their own peril.

Your second question is whether resident managers need to hold a real estate license. In my letter of September 23, 1986, I indicated that the real estate licensure provisions of North Dakota law, as found at N.D.C.C. § 43-2306.1(5), (6), include all types of real estate activity including the listing, selling, exchanging, leasing, or purchasing of real estate for another. Persons engaging in such activities must be licensed by the North Dakota Real Estate Commission. N.D.C.C. § 43-23-05.

An exception to this licensing requirement is found at N.D.C.C. § 43-23-07. Subsection 1 of this statute exempts from the licensure requirements any person, or their regular employees, who lists, sells, exchanges, leases, or purchases property owned or leased by them. This exemption applies "where such acts are performed in the regular course of or as an incident to the management of such property and the investment therein."

As discussed in my opinion, the term "regular employees," as interpreted by courts of other jurisdiction, includes those persons who are employed on behalf of an owner of

property to manage that property who do not undertake similar employment for others. Thus, a person who manages an apartment complex or a trailer court facility on behalf of the owner of the property who may receive compensation or a reduction in their rent for such services would be exempt from any licensing requirements as a "regular employee" of the owner. However, if the person involved was also employed by other owners of property for similar purposes, they would appear not to be considered as "regular employees" and would not be exempt from any licensing requirements.

Thus, the answer to your question depends upon the facts of each case. In your letter, you mention an elderly lady who applied for the position of resident manager of a trailer court who was later denied the job because she did not have a real estate license. Assuming that the lady would have managed that trailer court only and did not hold herself out as available for the management of other facilities for other owners, there was no requirement for her to have a real estate license in order to be the resident manager of that trailer court. This situation would be covered by the exemption described on page 5 of my 1986 letter. On the other hand, if the facts indicate that the lady was applying as a resident manager of the trailer court and was also a resident manager of other facilities, she probably was correctly denied the job on the basis that she apparently lacked the appropriate license.

Up to this point, my discussion as to this issue and the 1986 opinion has been based upon current law. On July 21, 1987, House Bill No. 1450 will take effect. This law, which was introduced so as to overrule the conclusion reached in the September 23, 1986, letter, expands the exemptions contained in N.D.C.C. § 43-23-07(1) so as to include anyone who markets leasehold interests in residential property. Thus, after House Bill No. 1450 becomes effective, my opinion of September 23, 1986, will no longer be valid and any person who markets residential leasehold interests will be exempt from licensure by the North Dakota Real Estate Commission.

Sincerely,

Nicholas J. Spaeth

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