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ATTORNEY GENERAL OPINION NO. 81-251

Honorable David L. Webb
State Representative
Box 163
Stilwell, Kansas 66085

Re: Personal and Real Property--Real Estate Brokers
and Salesmen--Educational Requirements

Synopsis: The provisions of K.S.A. 1980 Supp. 58-3046(g), whereby certain licensees are exempted from compliance with the continuing education requirements imposed by the Real Estate Brokers' and Salespersons' License Act, constitute an unreasonable, arbitrary and capricious classification, and are violative of the equal protection clause of the Federal Constitution. Since said exemption is an inseparable part of the whole scheme and purpose of the educational requirements imposed by the subject act, all such requirements, as set forth in K.S.A. 1980 Supp. 58-3046, are unconstitutional and void. Cited herein: K.S.A. 1980 Supp. 58-3034, 58-3039, 58-3046; L.1978, ch. 219, §1; U.S. Const., Amend. XIV, §1.

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Dear Representative Webb:

You request our opinion as to the constitutionality of subsection (g) of K.S.A. 1980 Supp. 58-3046. Said subsection is part of the "Real Estate Brokers' and Salespersons' License Act," K.S.A. 1980 Supp. 58-3034 et seq., and is a "grandfather" clause which exempts certain licensees from compliance with the "continuing education" requirements imposed by the act. The subsection (which will hereinafter be referred to as "the grandfather clause") provides as follows:

"No person who has been continuously and actively licensed as a real estate broker or salesperson in this state for a period of five (5) or more years immediately prior to July 1, 1980, shall be required to submit evidence of attendance of courses of instruction as provided by this section."

Initially, we would like to note that we have issued previous opinions concerning statutes prescribing continuing education requirements for real estate brokers and salespersons. In Kansas Attorney General Opinion No. 79-314, we opined that the continuing education requirements imposed by L.1978, ch. 219, §1 (now repealed) were proper subjects of state regulation under the police power, and were valid and enforceable. However, it should be noted that L.1978, ch. 219, §1, which was repealed upon enactment of the Real Estate Brokers' and Salespersons' License Act by the 1980 Kansas Legislature, did not include a provision similar to the "grandfather clause."

In Kansas Attorney General Opinion No. 80-189, we construed the provisions of the subject grandfather clause in relation to the requirement of "continuous and active" licensure. However, in said opinion we were not asked to consider the constitutionality of the grandfather clause, nor did we opine relative thereto. Therefore, we now consider said issue for the first time.

"Grandfather clauses" are common in licensing statutes, and the meaning and legal basis for such clauses is discussed at 51 Am.Jur.2d Licenses and Permits, §36:

"The term 'grandfather clause' is sometimes used to describe licensing legislation provisions that extend certain prerogatives to persons who are established in the activities affected by the legislation at the time it is adopted. Such a clause is often inserted in licensing legislation that is concerned with the regulation of a particular activity under the view that persons who have properly carried on the activity for some time, or who are engaged therein as of a specified date, may be presumed to have the qualifications that are needed for carrying on the activity and that must be demonstrated by examination or documentary evidence by those who seek a license after a specified date."
(Footnotes omitted.)

Likewise, in the annotation at 4 A.L.R.2d 662, it is stated that

"the purpose of a grandfather clause is to exempt from the statutory regulations imposed for the first time on a trade or profession those members thereof who are then engaged in the newly regulated field on the theory that they who have acceptably followed such profession or trade for a period of years, or who are engaged therein on a certain date, may be presumed to have the qualifications which subsequent entrants to the field must demonstrate by examination.

. . . .

"Such provisions are generally held to be not such a discrimination as to violate constitutional rights of those seeking to engage in an occupation, profession, or business." 4 A.L.R.2d at 670. (Footnotes omitted.)

In State v. Creditor, 44 Kan. 565 (1890), the Kansas Supreme Court considered the constitutionality of the first Kansas law regulating the practice of dentistry, which law included a "grandfather clause" exempting dentists engaged in practice (at the time of passage of the act) from the requirement of graduation from a dental college. The court held that

"[t]he act cannot be held to unduly discriminate between persons or classes, and unconstitutional because it exempts those engaged in the practice within the state when the law was enacted from the necessity of obtaining a diploma." 44 Kan. at 568.

Although "grandfather clauses" have generally been upheld, they also have been struck down where, under the particular facts, an unreasonable, arbitrary, and capricious classification has been created. See, e.g., Wiggins v. City of Jacksonville, 311 So.2d 406 (Fla., 1975). Thus, the subject grandfather clause, whereby certain real estate brokers and salespersons are exempted from "continuing education" requirements, must be examined to determine whether the provisions thereof are consonant with the equal protection clause of the Federal Constitution.

In determining whether a statute concerning occupational licensing offends the equal protection clause, there is a presumption of constitutionality, and it is the duty of one attacking the statute

to sustain the burden of proof. State ex rel. Schneider v. Liggett, 223 Kan. 610, 616 (1978). The "rational relationship" test is to be employed, Id. at 617, and the validity of the statutory classification depends upon the following factors:

"A classification employed in the exercise of police power cannot be made arbitrarily. Any distinctions inherent in a particular classification must furnish a proper and reasonable basis for such a classification. The concept of equality of all citizens under the law is, of course, basic to our free society. We have stated that classifications may not be created arbitrarily, discriminatorily or unreasonably, or the principle of equality would be violated. There must be some difference in character, condition, or situation, to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert." (Emphasis added.) Id. at 618.

Two classes of real estate brokers and salespersons are created by K.S.A. 1980 Supp. 58-3046, for the purpose of imposing continuing education requirements: brokers and salesperson who have been continuously and actively licensed for a period of five or more years prior to July 1, 1980, and those who have not been so licensed. In accordance with the above-quoted authority, we must consider whether the differences between the two classes bear a "just and proper relation" to the differing continuing education requirements imposed upon each by the statute.

While there are undoubtedly differences between the two classes of real estate brokers and salespersons created by K.S.A. 1980 Supp. 58-3046, we find it difficult to imagine any coherent reason for distinguishing between the two classes in regard to continuing education requirements. The purpose of imposing such requirements is to ensure that real estate brokers and salespersons are cognizant of changes in statutory and case law relating to real estate transactions, and of other contemporary developments in the real estate field. It does not follow that because a real estate broker has been continuously and actively licensed for five or more years that he or she is more diligent in keeping abreast of contemporary real estate developments than brokers who have not been so licensed.

Indeed, the antithesis may, in some cases, be more accurate, i.e., brokers and salespersons who have been licensed a short period of time, having passed the examination required by K.S.A. 1980 Supp. 58-3039, may be more knowledgeable concerning contemporary real estate practices than those who have held licenses for a longer period of time.

In our judgment, there is no rational basis for imposing continuing education requirements, as a precondition to license renewal, upon one group of licensees, and not imposing such requirements upon another group of licensees. In the language of the Liggett case, supra, the classification is "forced and unreal," and "greater burdens are imposed upon some than others of the same desert." Therefore, it is our opinion that the provisions of K.S.A. 1980 Supp. 58-3046(g), whereby certain licensees are exempted from compliance with the continuing education requirements imposed by the Real Estate Brokers' and Salespersons' License Act, constitute an unreasonable, arbitrary and capricious classification, and are violative of the equal protection clause of the Federal Constitution.

Having reached the above conclusion, we believe that it is appropriate to consider the validity of the continuing education requirements set forth in K.S.A. 1980 Supp. 58-3046, upon excision of the invalid grandfather clause. The Real Estate Brokers' and Salespersons' License Act contains a "severability clause," K.S.A. 1980 Supp. 58-3075, which provides as follows:

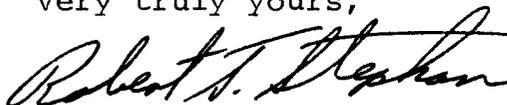
"If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

The Kansas Supreme Court has upheld the legislative intent expressed in severability clauses, subject to the qualification that where the void and valid parts of a statute are so interconnected that they cannot be separated without doing violence to the legislative intent, the statute as a whole must fall. State, ex rel. v. City of Overland Park, 215 Kan. 700, 711 (1974); State v. Next Door Cinema Corp., 225 Kan. 112 (1978). The court has refused to find objectionable provisions of an act severable where the elimination of such provisions would change the scope of the act and make it applicable to persons who the legislature expressly declared were not to be included. Boyer v. Ferguson, 192 Kan. 607, 616 (1964); State, ex rel., v. Consumers Warehouse Market, 185 Kan. 363, 372 (1959). In such circumstances, it has been held that the invalid provisions are such an integral and inseparable part of the whole scheme and purpose of the law that they may not be severed, despite the inclusion of a severability clause. Boyer v. Ferguson, supra at 615.

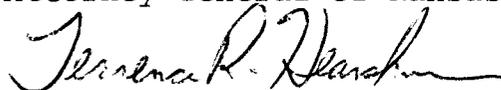
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Applying the above stated principles to the matters considered herein, it must be recognized that the application of the continuing education requirements, in the absence of the unconstitutional grandfather clause, would change the scope of the subject act, in that brokers and salespersons continuously and actively licensed for a period of five or more years prior to July 1, 1980, would be subject to the requirements, whereas the legislature expressly declared that they were to be exempted. In view of this fact, and in accordance with the above-cited cases, it is our opinion that the unconstitutional grandfather clause is an inseparable part of the whole scheme and purpose of the educational requirements imposed by the Real Estate Brokers' and Salespersons' License Act, and that such clause is not severable. Therefore, in our judgment, all educational requirements imposed by K.S.A. 1980 Supp. 58-3046 are unconstitutional and void.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



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RTS:BJS:TRH:jm