

## **Opinion No. 82-12**

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**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Charlotte Heatherington Roosen, Assistant Attorney General

**TO:** Ms. Juanita Pino, Director, Mobile Housing Division, Commerce & Industry Dept., Bataan Memorial Building, Santa Fe, New Mexico 87503

LICENSES AND LICENSING; PROPERTY LAW; MOTOR VEHICLES; TRADE PRACTICES AND REGULATIONS

Real estate brokers and salespersons who act as agents for mobile homeowners are in the business of selling, buying, leasing, exchanging or offering or attempting to negotiate the sale or exchange of mobile housing units. Such business may only be conducted by persons licensed as mobile home dealers pursuant to the Mobile Housing Act.

### **FACTS**

Resident owners of mobile homes have sought assistance in marketing their homes both from new home dealers licensed under the Mobile Housing Act Section 60-14-1, et seq., NMSA 1978, and from real estate brokers and real estate salespersons who are not licensed under the Mobile Housing Act. Such brokers and salespersons are agents of the home owner and receive a commission or fee for their services, which is derived from the proceeds of the sale of the mobile home. The real estate broker or salesperson uses the same skills and practices that are used when a conventionally built home attached to real property is listed and sold through a licensed real estate broker. The qualifications of licensed real estate brokers and their salesmen are set forth in Section 61-29-9 NMSA 1978 of the Real Estate Brokers and Salesmen Act. That Act regulates the conduct of brokers and salespersons only in respect to real estate transactions.

### **QUESTIONS**

1. May a licensed real estate broker or salesperson serve as an agent for another in the sale of three mobile housing units (not attached to real property) in one calendar year without a mobile home dealer's license required by Section 60-14-17 NMSA 1978 of the Mobile Housing Act?
2. May a licensed real estate broker or salesperson make more than three attempts to serve as an agent in the sale, exchange, purchase or lease of a mobile housing unit (not attached to real property) in one calendar year without a mobile home dealer's license required by Section 60-14-17 NMSA 1978 of the Mobile Housing Act which

requires the licensing of dealers if such activities do not result in the actual sale or lease of more than three mobile homes?

## CONCLUSIONS

1. No.

2. No.

## ANALYSIS

The Mobile Housing Act, in Section 60-14-7A, provides that:

"No person shall engage in business as a mobile housing unit manufacturer, dealer, repairman, installer or salesman unless licensed as provided in the Mobile Housing Act."

## OPINION

The New Mexico Mobile Housing Act also prohibits a person from acting as a manufacturer, dealer or installer without a license in Section 60-14-17, which states that:

"It is unlawful for any person to act in the {295} capacity of a dealer, manufacturer or installer within the meaning of the Mobile Housing Act without a license required by that act, and any person who conspires with any person to violate any provision of that act requiring a dealer, manufacturer or installer to obtain a license and maintain a license in good standing, is guilty of a misdemeanor and upon conviction therefore shall be punished by a fine of not less than five hundred dollars (\$500) or ten percent of the dollar value of the contracted work, whichever is greater, performed while acting in the capacity of a dealer, manufacturer or installer without having been issued a dealer's, manufacturer's or installer's license."

The definition of dealer" is found at Section 60-14-2D:

"Dealer' means any person engaged in the business of selling, exchanging, buying, leasing, offering or attempting to negotiate a sale or exchange of mobile housing units or any person who either sells or exchanges over three mobile units in any one calendar year or who leases over three mobile housing units at any one time[.]"

The legislature has included three types of activities within the definition of dealer: engaging in business, selling more than three units, and leasing more than three units. Whether a person is engaging in business by engaging in a certain activity is ultimately a fact question. **Kaplan v. Gaskill** 187 N.W. 943, 945 (Nebr. 1922). However, the phrase has been construed as ". . . that in which one engages for the purpose of livelihood, profit or the like, and hence is applicable to any particular employment,

occupation, or profession followed as a means of livelihood." 12A C.J.S. **Business**, p. 469-70. In order to be engaged in the business of mobile home dealing, it is not necessary that a person actually sell mobile housing units so long as he offers mobile housing units for sale or attempts to negotiate such sales in pursuit of a livelihood.

Section 60-14-8 of the Act exempts only one category of dealer transactions from the license requirements of Section 60-14-7:

"The provisions of Section 60-14-7 NMSA 1978 shall not apply to licensed real estate brokers or salesmen acting as agents for another person in the sale of real property on which is located one or more mobile housing units whose installation has been approved as provided in regulations of the mobile housing division."

When a real estate broker or salesperson acts as the agent for another person in the sale, exchange, lease or purchase of a mobile housing unit which is not attached to real property he is no longer engaging in the real estate business as defined in the real estate licensing act, Sections 61-29-1 **et seq.** Rather, he is engaged in the business of acting as an agent for another in the sale of a mobile housing unit and is not covered by the exemption of Section 60-14-8. Therefore, a real estate broker or salesperson who offers to sell or list a mobile housing unit or otherwise acts as an agent for another in the sale, exchange, purchase or lease of a mobile housing unit is engaging in the business of a mobile home dealer and must be licensed as a dealer under the Mobile Housing Act.

Since real estate brokers or salespersons are engaging in the business of mobile home dealers when acting as agents in the sale, exchange, purchase or lease of mobile housing units not attached to real estate, such persons must be licensed whether or not they are successful in completing the transaction.

The second type of activity included within the definition of "dealer," which requires a dealer's license if three or more housing units are sold, exchanged in a calendar year, does not apply to real estate brokers or salespersons. The number of mobile housing units sold or exchanged in a year is irrelevant if a real estate broker or salesperson is engaged in the business of a mobile home dealer, as explained above. Similarly, under the third type of activity included in the {296} definition of "dealer", a real estate broker or salesperson must be licensed as a dealer if acting as an agent for another in the lease of any number of mobile housing units at any time.

## **ATTORNEY GENERAL**

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