Senate Local Govt. Comm.
Exhibit No. 2
Date Feb. 8, 2005
Bill No. SB 289

To: Glenn Oppel, Government Affairs Director, Montana Association of REALTORS®
From: Jaymie Bowditch
Re: Senate Bill 289
Date: February 8, 2005

You have asked me to prepare some comments addressing the necessity of Senate Bill 289 ("SB 289").

In 1982, the Montana Attorney General issued an opinion addressing whether state statutes that exempt certain professions from licensing fees imposed by local governments apply to municipalities with self-government powers. This opinion was requested by the Helena City Attorney in response to a challenge presented by attorneys, practicing within the Helena city limits, to an ordinance adopted by the City of Helena requiring that all businesses in Helena apply for a general business license and pay an annual fee. The ordinance further stated that no individual, firm, association, or corporation could conduct its trade, profession or vocation without the license. The attorneys challenged the ordinance as being in violation of MCA § 37-61-211(3) which provided that "[n]o license tax shall be imposed upon attorneys by a municipality or any other subdivision of the state."

In his opinion, the Attorney General noted that the language of MCA § 37-61-211(3) did not address local governments with self government powers. Therefore, the Attorney General opined that the prohibition in many state statutes that prohibits local governments from licensing certain professions or occupations does not apply to local governments with self-government powers, like the City of Helena, unless the statute was made specifically applicable to a self-governing authority. 39 Op. Att'y Gen. No. 60 (1982).

Dissatisfied with this opinion, the same Helena attorneys filed a complaint in district court. In addition to arguing that MCA § 37-61-211(3) prohibited the Helena ordinance (and that the Attorney General was wrong), the attorneys also argued that the ordinance was unconstitutional. When the district court entered judgment in favor of Helena, the attorneys appealed that decision to the Montana Supreme Court.

In its opinion, the Court concluded that the constitutional issue was dispositive and ruled in favor of the attorneys. *See*, *Harlen v. City of Helena*, 206 Mont. 45, 49, 676 P.2d 191 (1984). Specifically, the Court restated its previous holding that Article VII, Section 2, clause 3 of the Montana Constitution gives the Court exclusive authority to promulgate rules concerning attorneys. *Id.* As a result, the Court found that the ordinance was unlawful pursuant to MCA § 7-1-101 which states that the powers of a self-governing unit may be restricted by the state constitution, state statutes, or local charter provisions. Specifically, the Court stated that the Court's constitutional authority to regulate attorneys is a constitutional restriction on the powers of local government units exercising self-government powers. *Harlen*, 208 Mont. at 51. As a result, the Court held that the Helena ordinance was "invalid with respect to attorneys." *Id.*

The Court's ruling in *Harlen* recognizes the constitutional limitation imposed on the exercise of the powers of self-governing units with respect to attorneys. MCA § 37-51-312 currently restricts the imposition of a license fee by municipalities or other political subdivisions of the state. However, 39 Op. Att'y Gen. No. 60 (1982) clearly states that this language does *not* preclude the imposition of such license fees by municipalities with self-government powers. The Harlen case did not overrule 39 Op. Att'y Gen. No. 60 (1982). Rather, it clarified that in addition to the statutory restrictions that may be imposed on the powers of municipalities with self-government powers (like that proposed in SB 289), there may also be constitutional restrictions imposed on the powers of municipalities with self-government powers. Because there are no constitutional limitations imposed on the powers of municipalities with self-government powers with respect to real estate brokers or salespersons, SB 289 is necessary.