October 5, 2004

Mr. David Gliko
Great Falls City Attorney
P.O. Box 5021
Great Falls, MT 59403-5021

Dear Mr. Gliko:

You have requested an opinion of the Attorney General on the following question:

> Does the Great Falls Housing Authority violate the age discrimination in housing provisions of Mont. Code Ann. § 49-2-305 if it adopts a policy under which it refuses to lease or otherwise contract with minors who are not emancipated with regard to the right to live independently and to enter into contracts as provided in Mont. Code Ann. § 41-1-105?

Your letter states that the Great Falls Housing Authority ("the Authority") rents housing to persons meeting certain low-income requirements. The Authority proposes to adopt a policy under which it would decline to rent to persons under the age of 18 who are not emancipated, citing concerns about the ability of such minors to receive the benefits of the housing provided in the rental agreement and then disaffirm the contract under Mont. Code Ann. § 41-1-304, which provides in pertinent part: "[T]he contract of a minor may, upon restoring the consideration to the party from whom it was received, be disaffirmed by the minor . . . ." Since your request implicates issues that are within the primary adjudicative jurisdiction of the Montana Human Rights Commission ("HRC"), it has been determined that a letter of advice rather than a formal opinion of the Attorney General is appropriate in responding to your question.

1. Montana law authorizes the creation of municipal housing authorities to address community housing needs with special emphasis on the needs of low income persons and families. Mont. Code Ann. §§ 7-15-4401 et seq. Housing authorities are authorized to acquire residential property and to rent or lease that property for residential purposes.

Mont. Code Ann. § 7-15-4454. In doing so, a housing authority is required to comply strictly with the laws of the State. Mont. Code Ann. § 7-15-4453.

Housing authorities have the power to make bylaws and rules and to do those things that are "necessary and convenient to carry out the powers expressly given," Mont. Code Ann. § 7-15-4451. While there is no regulation in state law similar to the federal HUD statute requiring "sound management practices, " 42 U.S.C. § 1437(c)(4)(B), such practices certainly would be within the Authority's discretionary power to do those things it deemed "necessary and convenient." Such language confers on the Authority the discretion to adopt policies that, in its judgment, advance the Authority's objectives of securing safe, sanitary, and affordable housing for low income persons, subject only to the requirement that the policies be reasonably related to the Authority's granted powers and, of course, not in violation of other controlling legal provisions such as the constitution or the Human Rights Act ("HRA"). Brookes v. Tri-County Metro. Transp. Dist., 526 P.2d 590, 593-94 (Or. App. 1974).

2. The HRA provides broad protection against discrimination in housing based on, among other factors, age. Mont. Code Ann. § 49-2-305(1) makes it an unlawful discriminatory practice for a property owner, among other things, to refuse to rent to a person based on the person's age, to discriminate against a person based on the person's age with respect to any term, condition, or privilege relating to housing, or to inquire as to the age of a person seeking to rent. However, the HRA also recognizes that "Age or mental disability may represent a legitimate discriminatory criterion in credit transactions only as it relates to a person's capacity to make or be bound by contracts or other obligations." Mont. Code Ann. § 49-2-403(2).

The HRA defines "credit" to include "the right granted by a creditor to a person to . . . purchase . . . services and defer payment," Mont. Code Ann. § 49-2-101(5). The HRC has adopted an implementing rule, Admin. R. Mont. § 24.9.1503(2), applicable to complaints brought prior to July 1, 1997, that appears to recognize that in that class of claims rental of housing may be a "credit transaction" to which the exception provided in Mont. Code Ann. § 49-2-403(2) applies. It provides: "Lawful age or disability discrimination in housing under 49-2-403, MCA based upon capacity to make or be bound by contracts or other obligations must be legally justified by current legal standards regarding capacity to make or be bound by contracts." No administrative rule extends a similar analysis to complaints brought on or after July 1, 1997, but neither is that argument foreclosed by any rule.

3. Your inquiry arises from the intersection of these discrimination statutes with laws providing specific protections for minors with respect to contracts. Minors generally have the power to enter contracts on the same basis as adults. Mont. Code Ann. § 41-1-302. However, in recognition of their diminished legal responsibility, the law allows a minor to disaffirm a contract made during minority. Mont. Code Ann. § 41-1-304(1) provides:

> **When minors may disaffirm**. (1) Except as provided in subsection (2), in all cases other than those specified by 41-1-303, 41-1-305, and 41-1-306, the contract of a minor may, upon restoring the consideration to the party from whom it was received, be disaffirmed by the minor, either before the minor reaches majority or within a reasonable time afterwards, or, in case of the minor's death within that period, by the minor's heirs or personal representatives.

Sections 41-1-303 and 41-1-306 provide exceptions to the right to disaffirm certain contracts that are not pertinent to your inquiry. Section 41-1-305, however, provides that the right to disaffirm does not extend to "a contact, otherwise valid, to pay the reasonable value of things necessary for his support . . . entered into by him when not under the care of a parent or guardian . . . ."

(a) While Mont. Code Ann. § 41-1-304(1) requires a minor seeking to disaffirm a contract to "restor[e] the consideration to the party from whom it was received," the Montana Supreme Court has interpreted this language in a manner that, generally speaking, frees a minor from any obligation to "restore consideration" that consists of services rather than property or money. In Downey v. Northern Pacific Ry. Co., 72 Mont. 166, 232 P. 531 (1924), the Montana Supreme Court interpreted the predecessor to Mont. Code Ann. § 41-1-304(1) in a case involving a contract between a minor and an attorney for the provision of legal services. The Court held that the minor could disaffirm the contract under the statute without restoring any consideration to the attorneys because the consideration consisted of services that the minor could not return: "[W[here, by the very nature or character of the consideration received by a minor, it cannot be returned by him, his right to disaffirm a contract will not be defeated by his inability to return it." 72 Mont. at 185.

I agree with your analysis that, for purposes of Mont. Code Ann. § 41-1-304(1), housing services provided through a rental contract between the housing authority and a minor are indistinguishable from the legal services at issue in Downey. In both cases, the services do not involve delivery of money or tangible property that can be restored to the other

party if the minor disaffirms the contract. Rather, the services are consumed when they are received such that there remains nothing for the minor to restore. Downey's analysis requires the conclusion that a minor need not return any consideration to a landlord as a condition of his right to disaffirm a residential rental contract.

(b) A second issue arises from the question of whether a contract for housing provides a "thing necessary for [the minor's] support" such that the right to disaffirm would not attach. The Montana Supreme Court has not been called upon to interpret this language. Cf. Downey, 72 Mont. at 183-84 (declining to reach the issue of whether legal services were "necessary"). However, courts in other jurisdictions have been asked in a few cases to determine whether housing was "necessary" in the context of a review of housing authority policies similar to the one contemplated here. In these cases, the courts have unanimously held that, while a contract for housing may be "necessary" in some contexts, the question is one of fact that will vary from minor applicant to minor applicant. The courts have accordingly concluded that, at least in the context of housing projects to which federal HUD regulations apply, it is not unreasonable under federal law for a housing authority to adopt a policy excluding minors from the list of eligible renters unless the minor can show proof of judicial emancipation.

Rivera v. Reading Housing Authority, 819 F. Supp. 1323 (E.D. Pa. 1993), aff'd sub nom. Rodriguez v. Reading Housing Authority, 8 F.3d 961 (3rd Cir. 1993), considered this issue. In that case, the federal district court reviewed a housing authority policy similar in all significant respects to the one proposed here. The court first noted that a policy aimed at ensuring that the authority could legally enforce contracts for housing was consistent with the overall policy promoting "sound and efficient management programs and practices to assure rental collection." 819 F. Supp. at 1329, citing 42 U.S.C. § 1437(c)(4)(B). The court discussed the governing HUD regulations that allowed housing authorities to adopt minimum age policies "to avoid entering leases which would not be valid or enforceable under applicable law." Id. at 1331.

The court then addressed the question of whether a rental contract with an unemancipated minor would be "valid and enforceable" under Pennsylvania law. Pennsylvania, like Montana, follows the general rule that a minor's contracts are voidable, but that contracts for "necessaries" were valid and enforceable. The court observed that a contract for housing could be a "necessary" or not, depending on "the minor's standard of living and particular circumstances, as well as the ability and willingness of the minor's parent or guardian, if one exists, to supply the needed services." Id. at 1332.

Rivera holds that a contract for housing is not per se a necessity. The case further holds that it is not unreasonable for a housing authority to resort to a per se rule against

contracting with unemancipated minors. The court recognized that while a housing authority could conduct some kind of factual inquiry in advance of renting to a minor to try to find facts from which it could determine whether housing was a "necessary" for a particular minor, such an inquiry would not be effective in resolving the issue, since a court, in an action brought to enforce against the minor, would be free to disagree with the authority's determination after the fact, leaving the authority with no recourse. 819 F. Supp. at 1333-34 ("To assume the risks of entering into unenforceable contracts would be to jeopardize sound fiscal policy as well as fair allocation of scarce housing resources").

The federal district court's decision in Rivera was affirmed in all pertinent respects by the Court of Appeals for the Third Circuit, Rodriguez v. Reading Housing Authority, 8 F.3d 961 (3rd Cir. 1993). It was followed by what appears to be the only other reported case on the point. Marshall v. Housing Authority of City of Taylor, 866 F. Supp. 999, 1004-06 (W.D. Tex. 1994), aff'd, 51 F.3d 1045 (5th Cir. 1995). However, these decisions under federal law are not necessarily persuasive regarding the application of the HRA. The HRC has not adopted rules importing federal law principles into its consideration of claims of housing discrimination under the HRA. Cf. Admin. R. Mont. §§ 24.9.1407, 24.9.1408, 24.9.1409, 24.9.1410, 24.9.1412 (explicitly adopting EEOC guidelines as authoritative in consideration for employment discrimination claims under HRA).

4. Montana law provides a procedure for emancipation of minors under certain circumstances. Mont. Code Ann. § 41-1-501; see Rivera, 819 F. Supp. at 1333 n.16 (noting Montana emancipation statute). The right to disaffirm under Mont. Code Ann. § 41-1-304 is not available to minors who have been granted court-ordered emancipation with respect to the right to live independently and make contracts. Mont. Code Ann. § 41-1-306; see Mont. Code Ann. § 41-1-501(3)(a), (b), (d) (authorizing court to order emancipation with respect to the right to live independently and make contracts). Since minors who are granted emancipation with respect to these rights could not avoid their contractual obligations with the Authority by relying on Mont. Code Ann. § 41-1-304, it would not appear that the exception provided in Mont. Code Ann. § 49-2-403(2) could be applicable to such emancipated minors.

I hope the above discussion is of some assistance to you. The HRA is quite explicit in granting to the HRC the authority to decide complaints of illegal discrimination. Mont. Code Ann. § 49-2-205. It would be inappropriate for the Attorney General to issue an opinion with the controlling legal effect provided in Mont. Code Ann. § 2-15-501(7) that would in effect dictate the legal analysis of the HRC on the issue of whether your proposed ordinance would violate the HRA. The above letter of advice is for your

assistance in considering the proposed ordinance, but it may not be cited as a formal opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Counsel

cdt/jym
c: Marieke Beck, Legal Counsel, Dep't of Labor and Industry