

IN THE SUPREME COURT OF MISSOURI

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CITY OF WASHINGTON, MISSOURI,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. SC84791
	)	
DANIEL BARNHART,	)	
	)	
Respondent.	)	

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Appeal from the Circuit Court of Franklin County  
Twentieth Judicial Circuit  
Division 6  
Honorable Joseph M. Ladd, Judge

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**RESPONDENT'S SUBSTITUTE BRIEF**

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### **Jurisdictional Statement**

Appellant, the City of Washington, Missouri (hereinafter the “City”), is a duly incorporated city of the third class in the State of Missouri. Respondent, Daniel Barnhart (hereinafter “Barnhart”), is a citizen of the State of Missouri engaged in the vocation of real estate salesperson. On September 28, 2001, the trial court entered its Judgment of Dismissal of the complaint and information filed against Barnhart by the City and discharged Barnhart. (L.F. 101.) (Appendix A-1.)

The City’s Notice of Appeal was filed in the Court of Appeals, Eastern District of Missouri, on October 9, 2001. On July 16, 2002, the Court of Appeals issued its opinion affirming the Judgment of Dismissal. The City’s Application for Transfer and Motion for Rehearing were presented to the Court of Appeals on July 31, 2002, and were subsequently denied on August 29, 2002. The City filed its Application for Transfer in this Court which was granted on October 22, 2002.

This Court’s jurisdiction hinges upon the right of the City to appeal the Judgment of Dismissal of a criminal complaint and information, as found in Mo. Rev. Stat. §547.200.2 (2000). This statute authorizes that the prosecution shall be allowed an appeal in any criminal action “except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant.” Mo. Rev. Stat. §547.200.2 (2000). Because the trial court’s dismissal of the City’s complaint and information acted as a determination of the Barnhart’s innocence or guilt, consideration of this appeal by this Court constitutes double jeopardy. As this appeal places the Barnhart in

double jeopardy, this Court lacks jurisdiction to hear such appeal.

If jeopardy did not attach, jurisdiction is therefore proper in this Court. Mo. Const. Art. V, Section 10, Rule 83.04 and 83.05.

### **Supplemental Legal File**

Barnhart filed a Supplemental Legal File in the Missouri Court of Appeals, pursuant to Rule 81.12(c). Appellant's Legal File did not contain the depositions filed with the trial court, which the trial court considered in dismissing the information and complaint. All references to the Supplemental Legal File are "S.L.F."

### **Statement of Facts**

Appellant, the City of Washington, Missouri (hereinafter “City”), is a duly incorporated city of the third class located in Franklin County, Missouri. (L.F. 10.)

Respondent, Daniel Barnhart (hereinafter “Barnhart”), is a Missouri licensed real estate salesperson as defined by Mo. Rev. Stat. §339.010.2 (2000). (L.F. 12.) Barnhart is not a real estate broker, as defined by Mo. Rev. Stat. §339.010.1 (2000). (L.F. 16.)

Barnhart operates as a salesperson out of an office owned by Gary McClelland, Re/Max First Realty, his real estate broker, located at 1380 High Street, Washington, Missouri.

(L.F. 16.) Barnhart’s salesperson license is held by his broker, as required by 4 C.S.R.

250-4.050(2). (L.F. 16.) On or about August 25, 2000, the City filed an information

and complaint charging Barnhart with a violation of City ordinance Section 605.010<sup>1</sup>,

Business License Violation. (L.F. 10.)

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<sup>1</sup>Section 605.010: LICENSE REQUIRED. It shall be unlawful for any person, either directly or indirectly, to conduct any business, trade, location, calling or occupation in whole or in part for which a license or permit is required by this Code without the license or permit so required having been first procured and thereafter kept in effect after all such times as required by this Code or Chapter. (Ord. No. 4562 §1, 5-19-75)

The entire text of Section 605 of the Code of Ordinances of the City of Washington is set forth in the Appendix at A-2.

Barnhart filed a Motion to Dismiss (L.F. 5, 12) alleging that, as a Missouri licensed real estate salesperson, he could not be required to obtain a City business license because, as a real estate salesperson, he is prohibited from maintaining an office to conduct business pursuant to the Code of State Regulations.

The parties fully briefed the Motion to Dismiss (L.F. 15, 30, 39) and the trial court heard oral argument on Barnhart's Motion to Dismiss. (L.F. 5, 29.)

On September 28, 2001, the trial court entered its Judgment of Dismissal and discharged Barnhart stating, "as a matter of law the City cannot require Defendant to have a business license or impose a license tax upon him, because Defendant does not and cannot maintain a business office within the City," citing Mo. Rev. Stat. §71.620 (2000), 4 C.S.R. 250-4.050(2) and 4 C.S.R. 250-8.010(1). (L.F. 101.) (Appendix A-1.)

The City has appealed the trial court's Judgment of Dismissal. The Missouri Court of Appeals, Eastern District, affirmed the decision of the trial court on July 16, 2002. There has been no trial in this case and Barnhart has not waived his right to a jury trial.

**Point Relied On and Respondent's Additional Argument**

**Point Relied On**

**THE TRIAL COURT DID NOT ERR IN DETERMINING THAT, AS A MATTER OF LAW, THE CITY CANNOT REQUIRE BARNHART, AS A REAL ESTATE SALESPERSON, TO HAVE A BUSINESS LICENSE OR IMPOSE A LICENSE TAX UPON HIM BECAUSE THE CITY IS NOT AUTHORIZED BY MO. REV. STAT. §§94.110 AND 71.620 (2000) TO LICENSE REAL ESTATE SALESPERSONS AND IMPOSE A LICENSE TAX UPON THEM.**

*Beal v. Industrial Commission*, 535 S.W.2d 450 (Mo.App. W.D. 1975)

*St. Paul Fire & Marine v. Wedgewood Realty*, 639 S.W.2d 833 (Mo.App. E.D. 1982)

*Anderson v. City of Olivette*, 518 S.W.2d 34 (Mo. banc 1975)

*Eads v. Kinstler Agency, Inc.*, 929 S.W.2d 289 (Mo.App. W.D. 1996)

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Mo. Rev. Stat §339.010.2 (2000)

Mo. Rev. Stat §288.034.5 (2000)

4 C.S.R. 250-4.050

4 C.S.R. 250-8.010

4 C.S.R. 250-8.120

4 C.S.R. 250-8.090

4 C.S.R. 250-8.020

4 C.S.R. 250-8.030

4 C.S.R. 250-8.070

Black's Law Dictionary 965 (7th ed. 1999)

**Respondent's Additional Argument**

**THIS COURT LACKS JURISDICTION BECAUSE CONSIDERATION OF  
THE CITY'S APPEAL OF THE JUDGMENT OF DISMISSAL WOULD  
CONSTITUTE DOUBLE JEOPARDY.**

*State v. Morton*, 971 S.W.2d 335 (Mo.App. E.D. 1998)

*State v. Coor*, 740 S.W.2d 350 (Mo.App. S.D. 1987)

*State v. Reed*, 770 S.W.2d 517 (Mo.App. E.D. 1989)

U.S. Const. amend. V.

Mo. Const. art. I, §19

Mo. Rev. Stat. §547.200 (2000)

## Argument

**THE TRIAL COURT DID NOT ERR IN DETERMINING THAT, AS A MATTER OF LAW, THE CITY CANNOT REQUIRE BARNHART, AS A REAL ESTATE SALESPERSON, TO HAVE A BUSINESS LICENSE OR IMPOSE A LICENSE TAX UPON HIM BECAUSE THE CITY IS NOT AUTHORIZED BY MO. REV. STAT. §§94.110 AND 71.620 (2000) TO LICENSE REAL ESTATE SALESPERSONS AND IMPOSE A LICENSE TAX UPON THEM.**

I. Licensed Real Estate Salespersons are Prohibited from Maintaining an Office.

Barnhart is prohibited by the Code of State Regulations from maintaining a business office of his own. 4 C.S.R. 250-4.050(2) and 4 C.S.R. 250-8.010(1)<sup>2</sup>. The trial court did not err as a matter of law in entering its Judgment of Dismissal because the City cannot require Barnhart, a licensed real estate salesperson, to have a business license or impose a license tax upon him. The City of Washington is a city of the third class and derives its authority to require a business license from Mo. Rev. Stat. §94.110 (2000)<sup>3</sup>, which provides, in part:

The council shall have power and authority to levy and collect a license tax on wholesale houses, auctioneers, architects, druggists, grocers,

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<sup>2</sup>Full text of all Code of State Regulations cited are set forth in the Appendix at A-7.

<sup>3</sup>All references herein are to Mo. Rev. Stat. 2000, unless indicated otherwise. Full text of all statutes cited are set forth in the Appendix at A-15.

banks, **brokers**, wholesale merchants, merchants of all kinds, confectioners, delivery trucks, ice trucks, transfer trucks, laundry wagons, milk wagons, merchant delivery companies, cigar and tobacco stands, hay scales, wood dealers, coal dealers, lumber dealers, **real estate agents**, loan companies, abstracters, abstract agencies, loan agents, collection agencies, undertakers, public buildings, office buildings, public halls, public grounds, concerts, photographers in office or upon the streets, canvassers, artists, drummers, patent right dealers, automobile agents and dealers, automobile accessory dealers, insurance companies, insurance agents, taverns, hotels, rooming houses, boardinghouses, health schools, telephone companies, street contractors, paper hanger contractors, painting contractors, plastering contractors, and all subcontractors, flour mills, express company agencies, wagons, buggies, carriages, tanners, barbers, barbershops, hair dressers, hair dressing shops, whether conducted in connection with other business or separate beauty parlors, tailors, florists, nursery stock agents, book binders, monument dealers and agencies, manufacturing agents, shoe cobbler shops, storage warehouses, shoe shining parlors, newspaper offices, job printing plants, ready-to-wear clothing agencies, tailor-made clothing agencies, sewing machine agents, piano and organ dealers and agents, foreign coffee and tea dealers and agents, and all other vocations whatsoever, . . . (Emphasis

added.)

The statute further provides that a city of the third class can also “levy and collect a license tax and regulate” certain industries, as well as “levy and collect a license tax, regulate, restrain, prohibit and suppress” certain other occupations or vocations. Mo. Rev. Stat. §94.110. This limited grant of authority is further restricted by Mo. Rev. Stat. §71.620.2, which provides:

2. **No person following for a livelihood the profession of insurance agent or broker, veterinarian, architect, professional engineer, land surveyor, auctioneer, or real estate broker or salesman in this state, shall be taxed or made liable to pay any municipal or other corporation tax or license fee for the privilege of following or carrying on his profession by a municipality unless that person maintains a business office within that municipality.** (Emphasis added.)

The City argues that since Barnhart works out of the Re/Max office located in the City of Washington, that he thereby falls under the guise of Mo. Rev. Stat §71.620.2, “maintaining” an office, and that the City can thereby impose a license fee upon him. This argument misconstrues the meaning of what is required by “maintaining” an office. Courts, when construing a statute, take words in their plain and ordinary sense, as found in the dictionary, unless the legislature provides a different definition. *Lincoln Industrial Inc. v. Director of Revenue*, 51 S.W.3d 462 (Mo. banc

2001). Further, every word is used for a purpose and the legislature is not presumed to enact a meaningless provision. *Zimmerman v. Missouri Bluffs Golf Joint Venture*, 50 S.W.3d 907 (Mo.App. E.D. 2001). Following this line of cases, we can look to Black's Law Dictionary and find that the word "maintain" has several definitions:

**Maintain:** *vb.* **1.** to continue (something). **2.** to continue in possession of (property, etc.). **3.** to assert (a position or an opinion); to uphold (a position or opinion) in argument. **4. to care for (property) for purposes of operation productivity or appearance; to engage in general repair and upkeep.** **5.** to support (someone) financially; esp., to pay alimony to. **6.** (Of a third party to a lawsuit) to assist a litigant in prosecuting or defending a lawsuit; to meddle in someone else's litigation. Black's Law Dictionary 965 (7th ed. 1999). (Emphasis added.)

Following this definition, it becomes clear that Barnhart does not maintain the Re/Max office in Washington, but such office is maintained by his licensed real estate broker, Gary McClelland, Re/Max First Realty. 4 C.S.R. 250-8.010(1) (Broker required to maintain office).

Barnhart is a licensed real estate salesperson as defined by Mo. Rev. Stat. §339.010.2, and his activities are strictly controlled by the Code of State Regulations.

4 C.S.R. §250-4.050(2) states:

A . . . **salesperson** license shall be issued only to a person who is

**associated** with a licensed broker. The license of each . . . **salesperson** shall be mailed to the broker. A . . . **salesperson** cannot be licensed with more than one (1) broker during the same period of time. (Emphasis added.)

In conformity with these regulations, Barnhart's salesperson license is held by his broker, Gary McClelland, Re/Max First Realty, at Re/Max's office located at 1380 High Street, Washington, Missouri. (L.F. 16.) The Code of State Regulations expressly requires licensed brokers to maintain offices. 4 C.S.R. §250-8.010(1) states that:

Every resident broker, except those who have placed their licenses on inactive status or those not actively engaged in real estate business, shall **maintain** a regularly established place of business in this state, which shall be open to the public during usual business hours or at regular stated intervals. No **salesperson** may be associated with a broker not **maintaining** a regularly established place of business or a broker not actively engaged in the real estate business. This rule does not apply to a broker salesperson or to broker partners, broker associates or broker officers of a firm which maintains a regular place of business. (Emphasis added.)

When read together, Mo. Rev. Stat. §§71.620.2; 94.110; 4 C.S.R. §250-4.050(2); and 4 C.S.R. §250-8.010 make clear that a real estate salesperson cannot maintain an office independent of a real estate broker. This point was confirmed by the

trial court's finding that, "Defendant does not and cannot maintain a business office with[in] the city." (L.F. 101.) (Appendix A-1.) This Court must affirm the order of dismissal if any grounds support the motion. *W.B. v. M.G.R.*, 905 S.W.2d 134, 136 (Mo.App. E.D. 1995).

Although it has been overruled on grounds unrelated to the issue of whether or not a real estate salesperson can maintain an office, the case of *Beal v. Industrial Commission*, 535 S.W.2d 450 (Mo.App. W.D. 1975) helps illustrate that real estate salespersons cannot and do not maintain offices. The facts in *Beal* are that Tom E. Beal, a real estate broker, maintained offices in Kansas City and Clayton, Missouri. 535 S.W.2d at 453. Beal "engaged clerical office workers, commission telephone solicitors, and **commission real estate salesmen in his business.**" *Id.* The court also stated that another broker, Roy Willey, Inc., "maintained an office in Columbia, Missouri," and in the conduct of his business, Willey "made available desks and telephones for the convenience of **its salesmen** in addition to other desks and telephones for the use of its nonsales persons and officers." *Id.* Further, the court stated that the legislature, "obviously intended (by §339.010.2) that real estate salesmen must be associated, either directly or indirectly, with a broker and cannot receive a commission or other valuable consideration from any person other than a licensed broker." 535 S.W.2d at 461 (Parenthetical added). Thus, while a commissioned real estate salesperson "may be economically or financially and otherwise independent of a real estate broker by absence of 'controls'," should a real estate salesperson "wish also

to perform services and enjoy remuneration for them as a commission real estate salesman, he is not independent because he can do so only through association with a real estate broker or brokers.” 535 S.W.2d at 461. Missouri regulations will not let a licensed real estate salesperson maintain an office.

While the ultimate holding in *Beal* has been overruled [that licensed real estate salesmen who received commissions through a real estate broker were in the broker’s employment within the meaning of the Missouri Employment Security Law, Mo. Rev. Stat. §288.034.5 (1969) by a change in the statute now found at Mo. Rev. Stat. §288.034], *dicta* in *Beal* asserting that (1) only real estate brokers can maintain offices; (2) the broker’s offices and desks were made available to the salespersons in

order to engage in real estate business; and (3) a real estate salesperson must be associated with a broker, are still valid and relevant in the instant case.

Under Missouri law, there is a large distinction between a broker and a real estate salesperson. In order to be licensed by the State of Missouri, a real estate salesperson **must** be associated with a broker either as an independent contractor or an employee. Mo. Rev. Stat. §339.010.2. Each salesperson's license is actually held by his or her broker. 4 C.S.R. §250-4.050(2). A real estate broker is required under Missouri law to maintain a business office. 4 C.S.R. §250-8.010. Barnhart cannot be paid a commission except through his broker. 4 C.S.R. §250-8.120(1) and (2).

Further support for Barnhart's position can be found in other state regulations that "tie" salespersons to their brokers.

4 C.S.R. §250-8.090 provides:

(1) A licensee (salesperson licensee) **shall not advertise** or place a sign upon any property offering it for sale or lease to prospective customers **unless the broker** holds a currently effective written listing agreement or other written authorization signed by all owners. (Emphasis added.) (Parenthetical added.)

(i.e. Barnhart cannot sign a listing agreement. Any listing agreement must be signed by his broker, Gary McClelland, of Re/Max First.)

(2) A licensee (salesperson licensee) **shall not show residential property unless a broker** holds a currently effective written seller's/lessor's agency agreement, seller's/lessor's transaction brokerage agreement, or other written authorization to show. (Emphasis added.) (Parenthetical added.)

4 C.S.R. §250-8.120(1) provides that **a salesperson licensee cannot maintain any escrow money and all monies received** by a salesperson licensee must be **placed into an escrow or trust account maintained by the broker**. (i.e. Barnhart cannot keep escrow money. It must be held by his broker.)

4 C.S.R. §250-8.120(2) states “a licensee (salesperson licensee) shall immediately deliver to the broker with whom affiliated all money received in connection with a real estate transaction in which the licensee is engaged.” (Parenthetical added.) (i.e. Barnhart cannot get a commission for selling real estate. The commission must be paid to the broker, who then in turn pays the salesperson.)

Therefore, it is impossible for Barnhart, a real estate salesperson licensee, to “maintain” a business office of his own under Missouri law. To do so would subject Barnhart's salesperson license to suspension. (L.F. 27.) As such, Barnhart asserts that the City may not impose a business license fee on licensed real estate salespersons because the same is prohibited by statute and the Code of State Regulations. The

City's business license fee may only be imposed on real estate brokers who are required to maintain an office under Missouri law.

II. Real Estate Salespersons are not Real Estate Agents.

Barnhart agrees the City can require a business license from brokers or real estate agents pursuant to Mo. Rev. Stat. §94.110. However, a real estate salesperson is not a real estate agent. The City unsuccessfully dedicates a significant part of its brief attempting to portray real estate **salespersons** and real estate **agents** as synonyms. However, many of the very cases cited by the City actually support Barnhart's argument.

The City first cites *Black Law Dictionary* which defines a "real estate agent" as a "[p]erson whose business it is to sell, or offer for sale, real estate for others . . .".

The City then relies on the case *St. Paul Fire & Marine v. Wedgewood Realty*, 639 S.W.2d 233 (Mo.App. E.D. 1982) and argues a real estate agent includes brokers and salespersons. This is not the case. A careful reading of the *St. Paul Fire* case shows that the court, when seeking to find a definition of a real estate agent, went right to the definition of a **broker** in Mo. Rev. Stat. §339.010.1 (1978). The court held a real estate **agent** was encompassed in the definition of a real estate **broker**. However, the court never equivocated a real estate salesperson with a real estate agent. *Id.* at 234, 235. The *St. Paul* case confirms "Missouri has no licensing provision for real estate agents." *St. Paul* at 235, footnote #1.

The City then cites *Eads v. Kinstler Agency, Inc.*, 929 S.W.2d 289 (Mo.App. W.D. 1996) to again try to correlate real estate agent with real estate salesperson. The

*Eads* court did not hold a real estate agent and a real estate salesperson were synonymous. The *Eads*' court correctly stated "[b]rokers and salespersons have separate licenses, and different roles. See Mo. Rev. Stat. §339.010 to §339.170 (1986), supra". *Eads* at 292

By applying basic tenants of agency law, it follows that only a real estate agent can bind his principal. Under Missouri real estate law, only a broker can bind a principal. A real estate salesperson cannot bind a principal. "Section 339.010 has been held to contemplate an agency relationship where the **broker** acts for someone else." *St. Paul Fire & Marine v. Wedgewood Realty*, 629 S.W.2d 233, 235 (Mo.App. E.D. 1982) citing *White v. Miriam Realty Co.*, 547 S.W.2d 184 (Mo.App. E.D. 1977).

A salesperson such as Barnhart cannot sign listing agreements, cannot be paid a commission, cannot bind an owner of property; only a broker can do these things.

While the term real estate agent may be synonymous with real estate broker, it is not synonymous with real estate salesperson.

The City also relies on this Court's opinion in *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. banc 1975), to support its case. This Court should be aware that *Anderson v. City of Olivette* was decided as a regulatory case, not a licensing case (i.e. whether brokers had to give fair housing notices). Further, *Anderson v. City of Olivette* only talked *in dicta* about cities of the third-class and their power to license real estate **agents** and **brokers**. However, nowhere in that case does this Court mention licensing real estate **salespersons**. *Id.* at 39. *Anderson* was brought by real estate **brokers**, not

salespersons. Little weight should be given to *dicta* that was ancillary to the actual issue addressed in *Anderson*.

III. Third Class City Cannot Require a Business License Unless Expressly Permitted by Mo. Rev. Stat. §94.110.

In *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. banc 1975), this Court wrote:

A municipal corporation such as appellant is a creature of the legislature, possessing only those powers expressly granted or those necessarily or fairly implied in or incidental to express grants, or those essential to the declared objects of the municipality. *City of St. Louis v. Kaime*, 180 Mo. 309, 79 S.W. 140, 143 (1904). Any reasonable doubt as to whether a power has been delegated to a municipality is resolved in favor of nondelegation. *Tietjens v. City of St. Louis, supra* (222 S.W.2d 70 (banc 1949)). *Id.* at 39. (Parenthetical added.)

It follows then that just because a real estate salesman is referenced in Mo. Rev. Stat. §71.620.2, **the same is prohibited to be licensed by a third-class city because real estate salesman is not specifically listed in Mo. Rev. Stat. §94.110.** “Brokers” and “real estate agents” are listed in Mo. Rev. Stat. §94.110. However, Barnhart is licensed as a real estate salesperson, not a “broker” or “real estate agent” under Missouri law. Barnhart asserts that under the current licensing structure, third class cities can only do that which is specifically allowed under Missouri law. Since Mo.

Rev. Stat. §94.110 does not explicitly authorize the licensing of a real estate “salesperson,” no such ability on behalf of the City exists because, if there is any reasonable doubt to whether a power has been delegated to a city, it is resolved in favor of nondelegation. *Anderson* at 39.

Further, under Mo. Rev. Stat. §71.620.2, it is interesting to note the businesses of professional engineer, veterinarian, and land surveyor are also listed along with real estate salesman; however, as those businesses are not specifically listed in Mo. Rev. Stat. §94.110, the City is prohibited from requiring a business license for those professions also. Therefore, just because a profession is listed in Mo. Rev. Stat. §71.620.2, it does not automatically give a city of the third class the ability to license such businesses unless such business is specifically listed in Mo. Rev. Stat. §94.110. Real estate salespersons are not mentioned in Mo. Rev. Stat. §94.110 and, therefore, real estate salespersons cannot be licensed by a third class city even if mentioned in Mo. Rev. Stat. §71.620.2.

IV. Salespersons Cannot Maintain Offices Independent From The Broker.

Missouri Code of State Regulations specifically require that the broker have an oversight and supervisory role over all of the actions of its salespersons. 4 C.S.R. §250-8.020(1) and (2). 4 C.S.R. §250-8.020(2) requires:

A broker shall not permit licensed and unlicensed persons affiliated with the broker to –

- (A) Establish and carry on real estate brokerage business for their own benefit, directly or indirectly, where the broker's primary interest is the receipt of a fee or other valuable consideration for the use of the broker's license by others; or
- (B) Where the broker has no control or only nominal control of the business affairs conducted under the broker's license or is only nominally associated with the business.

In other words, the broker must retain a supervisory role over the salesperson and is responsible for the activities of the salesperson.

Barnhart, by holding a salesperson's license, may not maintain a physical business office location different from the physical location of the supervising broker. It is this oversight and review by the broker who holds Barnhart's salesperson license that supports Barnhart's position that Barnhart cannot maintain a business office on his own. Only a broker can maintain an office. 4 C.S.R. §250-8.010.

4 C.S.R. §250-8.030 provides that if a broker opens a branch office, said branch

office must be under the direct supervision of either a licensed **broker** or a **broker-salesperson**. A salesperson cannot work in a branch office without direct supervision from a broker.

A salesperson must mention the broker in all advertisement. 4 C.S.R. §250-8.070(4) requires:

**Every advertisement of real estate by a licensee** (salesperson licensee) where the licensee has no interest in the real estate **shall be made under the direct supervision and in the name of the broker or firm who holds the licensee’s license**. If the licensee’s name or telephone number, or both, is used in any advertisement, the advertisement also shall include the name and telephone number of the broker or firm who holds the licensee’s license. (Emphasis added.) (Parenthetical added.)

These regulations all tie the salesperson to a broker. A Missouri licensed real estate salesperson cannot maintain an office alone or independent of a broker and, therefore, should not be required to procure a separate business license from the City. The trial court was correct to dismiss the complaint because Barnhart could not “maintain an office.” Further, even if Barnhart were found to maintain an office, a real estate salesperson is not eligible to be licensed under §94.110. For the foregoing reasons, the decision of the trial court should be affirmed.

## Respondent's Additional Argument

### **THIS COURT LACKS JURISDICTION BECAUSE CONSIDERATION OF THE CITY'S APPEAL OF THE JUDGMENT OF DISMISSAL WOULD CONSTITUTE DOUBLE JEOPARDY.**

This Court lacks appellate jurisdiction because jeopardy attached at the trial court level in pretrial proceedings. The trial court's consideration of extrinsic evidence outside the information amounted to an adjudication of Barnhart's guilt or innocence. *State v. Morton*, 971 S.W.2d 335 (Mo.App. E.D. 1998), *State v. Reed*, 770 S.W.2d 517 (Mo.App. E.D. 1989). While it is true that jeopardy does not attach simply because an indictment or an information was dismissed based on extrinsic evidence, additional inquiry is needed. *See State v. Coor*, 740 S.W.2d 350 (Mo.App. S.D. 1987), *State v. Casaretto*, 818 S.W.2d 313 (Mo.App. E.D. 1991).

In *State v. Reed*, 770 S.W.2d 517 (Mo. App. E.D. 1989), the court said there were several possibilities on why the indictment in the case was dismissed. 770 S.W.2d at 520. One possibility was that in ruling on the facial validity of the indictments, the facts before the trial court were those contained in the indictment itself. The trial court could have seen that the indictment failed to charge an offense and, therefore, dismissed the same. *Id.* The court went on to say, “[i]f this was the substance of the trial court’s ruling, then there would be no need to address the issue of whether this appeal subjects defendant to double jeopardy. Jeopardy did not attach when the indictment was dismissed and State has the right to retry defendant.” *State v. Reed*, 770 S.W.2d 517,

520 (Mo. App. E.D. 1989). However, the second possibility is that the trial court's order was a dismissal of the indictment on defendant's pretrial motion which . . .

was based upon **evidence extrinsic to the indictment**. This type of ruling is appealable, if at all, under §547.200.2. If the trial court considered matters extraneous to the indictment, this Court would then have to determine, pursuant to §547.200.2, if the appeal by State is barred because the possible outcome of the appeal would be contrary to the prohibition against double jeopardy. The general rule, as enunciated in *Coor*, is that a defendant may raise defenses or objections before trial which are capable of determination without the trial of the general issue. *Citation omitted*. As long as the question of the defendant's guilt was not determined by the trial court, jeopardy did not attach and the potential result of a subsequent appeal would not place the defendant in double jeopardy. *State v. Reed*, 770 S.W.2d 517, 520 (Mo.App. E.D. 1989).

(Emphasis added.)

Therefore, the question of whether jeopardy attaches is not simply a question of whether the trial court considered extrinsic evidence, but whether in considering such

extrinsic evidence the trial court actually determined the question of the defendant's guilt or innocence.

This line of reasoning was again followed in *State v. Morton*, 971 S.W.2d 335 (Mo.App. E.D. 1998). In that case, the court said, “[i]n pretrial proceedings, jeopardy does not attach when an indictment [or information] is dismissed so long as the dismissal **was not** an adjudication of defendant's guilt or innocence **based on extrinsic evidence outside** the indictment or information such as stipulated facts or evidentiary facts submitted to the court for its review.” *Morton* at 339, citing *Reed*, 770 S.W.2d at 518-520, *State v. Coor*, 740 S.W.2d 350, 354. (Emphasis added.)

The trial court in the instant case did not just dismiss the complaint and information based on a failure contained on the face thereof, but rather dismissed the complaint and information based on consideration of “extrinsic evidence” (i.e. memoranda, affidavits and depositions, L.F. 27, 101, and S.L.F. 1-121) and discharged Barnhart. (L.F. 101.) (Appendix A-1.) Therefore, in doing so, the trial court reached a determination of Barnhart's guilt or innocence. Jeopardy **did** attach and consideration of the appeal by this Court would constitute double jeopardy under the line of reasoning in the above cases.

Therefore, because the Judgment of Dismissal was, in fact, a determination of Barnhart's guilt or innocence, jeopardy attached at the trial court level and this Court is barred by the prohibition of double jeopardy from hearing the appeal or remanding this matter back to the trial court. Accord, U.S. Const. amend. V. and Mo. Const. art. I, §19.

For the foregoing reasons, Barnhart requests this Court conclude that jeopardy has attached, that this appeal be dismissed and that Barnhart be discharged.

**Conclusion**

Because consideration of the City's appeal by this Court would place the Barnhart in double jeopardy, Barnhart respectfully requests this Court recognize that it fails to have jurisdiction to hear the present appeal by the City and dismiss the same. Further, if the Court determines that it does have jurisdiction to hear the appeal, Barnhart respectfully requests that this Court affirm the trial court's dismissal of the complaint and information because Barnhart cannot and does not maintain an office, as required by Mo. Rev. Stat. §71.620.2, to allow the City to impose a business license fee upon him. Further, since the right of third class cities to license salespersons is not specifically listed in Mo. Rev. Stat. §94.110, it is, therefore, denied the City.

Respectfully submitted,

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Attorney for Barnhart

**Certificate of Compliance with Rule 84.06(b)**

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THIS IS TO CERTIFY that Respondent's Substitute Brief complies with the limitations in Rule 84.06(b) and it contains 5,845 words.

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Kurt A. Voss

IN THE SUPREME COURT OF MISSOURI

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CITY OF WASHINGTON, MISSOURI,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. SC84791
	)	
DANIEL BARNHART,	)	
	)	
Respondent.	)	

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**Certificate of Service - Respondent's Substitute Brief**

THIS IS TO CERTIFY that Respondent's Substitute Brief contains 5,845 words, was scanned for viruses, and that two (2) true and correct copies of Respondent's Brief were mailed, postage prepaid, this 19th day of December, 2002, to Mark C. Piontek, Attorney for Appellant, 1200 Jefferson Street, P.O. Box 1040, Washington, Missouri 63090.

\_\_\_\_\_  
Kurt A. Voss

Subscribed and sworn to before me, a notary public, this 19th day of December, 2002.

My Commission Expires:  
December 26, 2005.

\_\_\_\_\_  
Sandra C. Dixon  
Notary Public, State of Missouri  
Commissioned in Warren County

Appendix

- Trial Court's Judgment of Dismissal . . . . . A-1
- Section 605 of the Code of Ordinances of Washington, Missouri . . . A-2
- Code of State Regulations . . . . . A-7
- State Statutes . . . . . A-15