STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

ANNUAL REPORT REQUIRED BY

Minnesota Statutes Sections 8.08 and 8.15, Subdivision 4 (2002)

Fiscal Year 2004

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INTRODUCTION

This report is intended to fulfill the requirements of Minnesota Statutes Sections 8.08 and 8.15, Subdivision 4, for Fiscal Year 2004 (FY 04).

The Attorney General's Office (AGO) is organized into four sections under the direction of deputy attorneys general: Government Operations, Government Regulation, Government Services and Solicitor General. This report contains brief summaries of the services provided to state agencies and other AGO clients by these sections.

GOVERNMENT OPERATIONS SECTION

HUMAN RIGHTS/LABOR/CORRECTIONS DIVISION

The Human Rights/Labor/Corrections/Collections Division represents the Departments of Human Rights, Labor and Industry, Economic Security, and Veteran's Affairs as well as the Bureau of Mediation Services, Public Employee Retirement Association, Minnesota State Retirement System, Teacher's Retirement Association, Department of Corrections, Veteran's Home Board, and the Insurance Division of the Department of Employee Relations.

The division's major human rights activity is the handling of cases forwarded by the department following a determination that there is reason to believe illegal discriminatory conduct has occurred. The division participates in mediation regarding these matters and seeks to obtain appropriate monetary and non-monetary relief. The division resolved 71 such cases in FY 04. The division's efforts resulted in Minnesota citizens receiving compensatory and injunctive relief for illegal discriminatory treatment. In FY 04, the division obtained compensatory relief for Minnesota citizens in the amount of approximately $1,446,000.

In addition, the division work included:

- Litigation and appellate work to preserve the resources of State funds and State pension funds for injured workers and disabled public employees. For example, in a matter involving the Special Compensation Fund of the Department of Labor and Industry, the division recovered approximately $132,000 of fraudulently obtained worker's compensation benefits.

- Mediation and litigation to enforce occupational safety and health standards, including cases regarding workplace fatalities. In FY 04, the division resolved 29 OSHA cases and obtained about $70,000 in OSHA fines.

- Participation in bankruptcy proceedings in order to protect the State's interest in collecting reemployment benefits overpayments. In the past fiscal year, the division prevented the discharge in bankruptcy of approximately $258,000 of improperly received benefits.

The division also provides legal services to the Department of Corrections and all state correctional facilities. These legal services include litigation and a variety of client advice matters. The division has successfully handled a high volume of inmate lawsuits.

The division's commercial litigation and debt collection activities included:

- Obtained court judgments for the state, based on debts owed to various state agencies for overpayments, fees, loans, breach of contract, property damage, and fines;

- Protected the State's rights as a creditor in bankruptcies, receiverships, liquidations, and other such actions;

- Trained and worked with State personnel on collection, financial, and bankruptcy matters; and

- Represented the state's interests in probate court in escheat cases.

Examples of the division's work in bankruptcy matters included successful defense against efforts of steel companies to evade liability for taconite production tax assessments of almost $6,500,000 in 2004 and potentially of $20,000,000 to $30,000,000 in the future by obtaining bankruptcy courts' orders affirming that such liability had not been eradicated by bankruptcy court asset sales. The division also represented the Department of Human Services in Chapter 11 bankruptcy cases to enforce the agency's interest in recovering approximately $340,000 in tax revenues. The division also provided legal advice to representatives of the Collections Division of the Minnesota Department of Revenue. Over the past fiscal year, the division's collection work resulted in recoveries and judgments of more than $2,000,000.

HUMAN SERVICES DIVISION

The Human Services Division provides litigation counsel and comprehensive legal services to the Minnesota Department of Human Services ("DHS"). The following describes some of the major areas in which the division provides legal services to DHS.

Public Assistance Programs. Division attorneys advise DHS on the implementation of the Minnesota Family Investment Program (MFIP), General Assistance Program (GA), Minnesota Supplemental Assistance Program (MSA), Food Stamp Program, and Child Support Enforcement Program. During FY 04, the division represented DHS in litigation challenging the agency's implementation of 2003 amendments to the MFIP statutes. The division also worked with the agency to address issues raised by advocacy groups, anticipate possible litigation, and resolve potential claims.

Child Support. Division attorneys provide litigation counsel and legal advice for DHS's Child Support Division. During FY 04, division attorneys defended the agency in litigation challenging the constitutionality of Minnesota child support statutes in Minnesota district and appellate courts. The division also assisted the agency in improving state and federal efforts to collect support from non-custodial parents. During FY 03, the agency collected $572 million in child support, representing a 3-percent increase from 2002.

Licensing. Division attorneys provide advice and litigation counsel to the DHS's Licensing Division, which is the lead agency for investigating alleged maltreatment in programs licensed to provide adult daycare and adult foster care, and programs providing services for mental health, developmental disabilities, and chemical health, as well as personal care provider organizations. Division attorneys represent the Licensing Division in its efforts to seek disqualification of individual health care providers and to pursue licensing enforcement actions in administrative forums and Minnesota courts. Division attorneys represented the agency in 54 licensing proceedings in FY 04.

Health Care. Division attorneys provide litigation counsel and client advice to DHS on a broad range of health care issues and services, including Medical Assistance (Minnesota's Medicaid program), the MinnesotaCare program, and continuing care programs for the elderly and persons with disabilities. Division attorneys also assist the agency in the recovery of payments for healthcare services from estates and from responsible third-parties. Several examples of legal services provided in FY 04 are:

- *ARRM v. Goodno, et. al:* Represented DHS in complex federal court litigation brought by one recipient and an organization of providers of waiver services for persons with mental retardation and related conditions ("MR/RC"). The lawsuit seeks declaratory and injunctive relief and challenges the agency's manner of funding county budgets for MR/RC waiver services.

- *Masterman/ARC v. Goodno, et. al*: Represented DHS in a second large federal court lawsuit, later consolidated with the *ARRM* lawsuit. This lawsuit, brought by several

recipients of MR/RC waiver services, asserts that the State's funding of MR/RC waiver services violates federal law.

- Nursing Homes: Division staff worked with Health Division attorneys in helping ensure the welfare and safety of nursing home residents whose facilities were facing closure or sale because of precarious or failing financial conditions.

- Intervention cases: Division attorneys intervened in a large volume of tort recovery cases in district courts throughout the State. During FY 04, the division assisted in collecting $5,863,317 for DHS in intervention cases.

- Public Assistance appeals: Division attorneys represented DHS or assisted county attorneys in hundreds of public assistance appeals related to eligibility for Minnesota health care and other public benefit programs;

- Estate collections: Division attorneys assisted the agency in collecting $6.9 million for payment of Medical Assistance services during FY 04;

Child Welfare. Division attorneys provide counsel and representation to the agency in its goal of providing prompt and effective services to protect children's safety and welfare through adoption, foster care, guardianship, and other programs.

Mental Health. Division attorneys provide legal advice and representation to DHS under the Civil Commitment and Treatment Act. In FY 04, division attorneys represented the commissioner in 29 cases involving petitions for discharge, transfer, or other relief brought by individuals committed to the Minnesota Sex Offender Program (MSOP) and the Minnesota Security Hospital (MSH). In addition, division attorneys defended the commissioner and agency in a large volume of litigation, including 36 civil lawsuits brought by patients at MSOP, MSH and other state treatment facilities. Division attorneys provide DHS with legal advice in its efforts to provide treatment to mentally ill and developmentally disabled individuals in home and community-based settings. Finally, division attorneys routinely assist county attorneys in pursuing orders in district court for neuroleptic medications to be given to patients residing in DHS facilities.

PUBLIC FINANCE/AGRICULTURE/NATURAL RESOURCES DIVISION

The Public Finance/Agriculture/Natural Resources Division represents the Departments of Administration, Finance, Natural Resources, Agriculture and Employment and Economic Development, as well as the Housing Finance Agency, Iron Range Resources, State Board of Investment, State Auditor, Legislative Auditor, Secretary of State, and many other smaller boards, agencies and commissions. The division also represents the Minnesota State Colleges and Universities System (MnSCU) and other state agencies in contract, lease and other transactional matters.

The division's work during FY 04 regarding various boards, administrative and financial matters included:

- Represented the Governor and Commissioner of Finance in connection with a legal challenge to an unallotment from the Minnesota Minerals 21st Century Fund;

- Represented the Departments of Administration and Public Safety in legal challenges to a five-year drivers' license production contract;

- Represented the Department of Education in a suit for injunctive relief by an unsuccessful bidder on the statewide basic skills test contract;

- Represented the Departments of Human Services, Transportation and Administration in motions for temporary restraining orders in several bid challenges;

- Represented the Campaign Finance and Public Disclosure Board in two cases before the Court of the Appeals and advised the board regarding enforcement of campaign contribution, finance and lobbyist registration laws;

- Facilitated bond issuance by providing legal consultation to involved agencies for over $1.3 billion in general obligation and revenue bonds;

- Provided extensive advice to state clients on intellectual property, data practices, open meeting law, procurement, and other issues related to state government operations;

- Advised the Housing Finance Agency regarding numerous loans to preserve low-income housing, several variable rate bond transactions with interest rate swaps and defended it in a lawsuit brought by a low-income housing owner in which the Eighth Circuit Court of Appeals held the State's tenants notice requirement was preempted and continues to defend against owner's claim that the State is liable for attorney's fees;

- Advised Iron Range Resources regarding operational contracts for Giants Ridge and Ironworld; various economic development loan and equity transactions, including Mesabi Nugget and Superior Edge; various Giants Ridge land sales and development, title registration and easement matters; the proposed motorplex joint powers agreement land acquisition and condemnation, and various mining company issues, including the EVTAC bankruptcy; NSPC settlement of claims; and LTV sales tax rebate issues;

- Represented the Departments of Finance and Administration in sale and leaseback transactions for two office buildings, which involved St. Paul Port Authority revenue bond issues totaling $138 million;

- Advised State agencies in connection with implementation of various communications and technology programs, including MN Link, iSeek, CriMNet, eFolio and Health Match;

- Advised the Department of Human Services in connection with several multi-million dollar software contracts;

- Assisted State agencies in drafting and review of lease agreements, licensing agreements and other contracts;

- Responded to 35 requests for formal legal opinions and a myriad of requests for informal legal guidance from local units of governments;

- Reviewed and resolved two tax increment finance enforcement matters referred by the Office of the State Auditor and engaged in alternative dispute resolution with respect to another;

- Advised numerous small boards and agencies, including the boards of Accountancy, Architecture, Arts, Barbers, Crime Victims, Electricity, Peace Officer Standards and Training, Teaching, and School Administrators and represented those boards in over 30 contested matters;

- Advised and represented the Department of Administration in connection with several municipal boundary adjustment matters, and on issues arising from transfer of the boundary adjustment function to the Department from the Office of Strategic and Long Range Planning;

- Advised and represented the Building Codes division of the Department on a variety of enforcement matters, including issues relating to manufactured (mobile) homes, and the application to the division of statutes relating to the state fire code and regulating the practice of architecture and of engineering;

- Advised the Department of Administration on a number of real estate matters, including transfer of the Red Lake Nursing Home to the Red Lake Band;

- Advised MnSCU and drafted documents for the acquisition of property in Minneapolis for the Minneapolis Community and Technical College; construction of a new press box structure for Winona State University; renovation of pipefitter instruction rooms for St. Paul College; and implementation and financing of energy saving measures for Northwest Technical College and Minnesota State Community and Technical College; and

- Defended the State in a variety of litigation, including a third party worker injury action and Torrens assurance fund claims.

The division's work involving the Department of Natural Resources included:

- Provided ongoing advice and representation to DNR Ecological Services in connection with the aquatic plant management permit program and the endangered and threatened species program.

- Provided general advice to DNR Enforcement regarding numerous matters including the Wetlands Conservation Act; "Level II" law enforcement, tribal sovereignty and jurisdiction, and vehicle and equipment confiscations.

- Provided advice in connection with the 1837 and 1854 Treaties' harvest programs. The division negotiated and drafted conservation easements, provided legal advice in connection with the aquatic farming regulatory program, and provided legal services relating to commercial licensing.

- Assisted DNR Forestry with numerous fire fighting cost recovery cases (pursuant to Minn. Stat. § 88.75) including the collection of costs related to the Carlos Avery fire in the amount of $68,000. The division also advised the DNR with respect to matters involving timber harvest permits, forestry roads and access issues as well as issues regarding trespass and encroachments on state forest land.

- Provided legal services to DNR in a wide variety of Indian law areas. These included: ongoing resource management and harvest issues under the 1837 Treaty (Mille Lacs), continued negotiation of Phase II of the 1854 Treaty case (Fond du Lac) and issues of trespass, tribal sovereignty and state-tribal jurisdiction.

- Provided legal advice to DNR in connection with numerous day-to-day matters including: intellectual property; licensing agreements; various issues involving state-owned lands in the BWCA; trespass; legislation; federal preemption; state and local jurisdiction; agency authority, collection matters, and issuance of licenses, titles, and registrations.

- Provided legal advice to the DNR as it worked with the Army Corps of Engineers to construct the McQuade Road Harbor project, a small craft harbor on Lake Superior, and with respect to the proposed Mississippi Whitewater Park. The division provides ongoing legal advice to DNR regarding park, trail and waterway use, access, trespass and other regulatory matters. The division also continues to monitor restoration activities on a scenic easement on the St. Croix River.

- Assisted DNR with approximately 126 real estate acquisitions totaling over $11.8 million and involving approximately 8,190 acres of land.

- Represented DNR in a number of district court and administrative matters involving real estate transactions and disputes. The division also represented the DNR in condemnation proceedings. The division responded on behalf of DNR to approximately 101 quiet title actions and land registrations. These actions are commenced to resolve real estate title issues on specific parcels of land throughout Minnesota. Most commonly the division responds in order to reserve the State's mineral interests and regulatory rights on navigable waters. In *State v. Hess, et al.*, the division represented DNR in the appeal of a Quiet Title Action in Hubbard County to determine the ownership of the former Burlington Northern Railroad right-of-way, now known as the Paul Bunyan State Trail.

The division represented the DNR on this case before the Minnesota Court of Appeals and the Minnesota Supreme Court. The Minnesota Supreme Court decided that the railroad held a fee simple determinable to title and that the Marketable Title Act extinguished the reversionary rights so that the DNR now owns fee title to the trail property. This decision will eliminate many potential claims of ownership by landowners adjacent to trails built on former railroad rights-of-way. It also prevents the DNR from needing to condemn or purchase various parcels to complete the existing trails.

- Prepared title opinions and drafted deeds with respect to approximately 20 land exchanges.

- Represented DNR Waters in a number of district court and administrative matters regarding the construction, maintenance and repair of drainage ditches, issuance of permits for work in public waters, enforcement of lakeshore zoning regulations and the restoration of waters and wetlands. Other areas in which the division advises DNR Waters include water appropriation, rule promulgation, flood control, flowage easements, use of groundwater and ditch assessments.

- Provided legal services to DNR Wildlife relating to rule promulgation for hunting and fishing, treaty harvest under the 1837 and 1854 Treaties, establishment of several Scientific and Natural Areas, water level management of Bear Lake in Freeborn County and numerous day-to-day issues arising in connection with Wildlife's extensive regulatory programs.

The division also provided a range of legal services to the Department of Agriculture (MDA) including general legal advice, reviewing and drafting of contracts and representation in litigation. In FY 04, the division represented MDA in administrative law matters, arbitration proceedings and farm loan disputes, including a dispute over claims filed after Imogene Elevator, Inc. surrendered its grain buyers and storage license and filed for bankruptcy. The divisions also represented MDA in cases involving the MDA's suspension of a Grade A and manufacturing grade dairy certification based on unsanitary conditions. The division also assisted the Department with several collection matters and obtained over $45,000 as a result of these efforts. The division is defending the commissioner in an action brought against the Minnesota Cultivated Wild Rice Council and the commissioner in which the plaintiff claims that the statutorily mandated check-off fee violates the First Amendment. The division also assisted MDA in obtaining a consent order permanently revoking a food handler's license of a company selling meat door-to-door using fraudulent and deceptive sales practices.

The division also advised and represented the Board of Water and Soil Resources (BWSR). In FY 04, the division assisted BWSR on real estate issues related to conservation easements including reviewing approximately 250 Reinvest in Minnesota easements. The division also aided BWSR in drafting language to be used in agreements for the proposed CREP II program. The division also drafted language for agreements to be used in a three part wetland restoration plan that represents a working relationship between BWSR, a drainage authority and local property owners. The division assisted BWSR in the Wetland Conservation Act program by advising BWSR on rulemaking, interpretation of legal authority, regulatory

appeals, wetland banking and easement transactions and representing both BWSR and the DNR in disputes involving issues relating to implementation of the Wetland Conservation Act.

TELECOMMUNICATIONS & ENERGY DIVISION

The Telecommunications and Energy Division represents the Telecommunications and Energy Divisions of the Minnesota Department of Commerce (Department), including its Weights and Measures Division, before the Minnesota Public Utilities Commission (Commission), Office of Administrative Hearings, federal agencies and state and federal courts. In FY 04, division provided advice and representation to the Department on many matters, such as:

Telecommunications

Wholesale Service Quality Standards. Continued extensive work in connection with Qwest's appeal of the commission's approval of a performance assurance plan regarding its provision of adequate and reliable local wholesale service. Assisted in the drafting of legal briefs to the Minnesota Court of Appeals, which affirmed the Commission's ruling.

Performance Assurance Plan. Continued to assist the Department in its review whether Qwest is satisfying its performance measures for providing wholesale services as ordered by Commissioners.

Wholesale Cost/Prices. Defended a challenge to the Commission's decision in federal district court establishing the wholesale cost that Qwest may charge for leasing its physical plant and network.

Investigation of Anti-Competitive Conduct/Interconnection. Provided legal advice concerning the authority of the commission to enforce terms of interconnection terms that stem from federal law.

Other complaints. Assisted the Department with complaints against local and long distance carriers for illegal pricing.

Unauthorized Provision of Telephone Service. Represented the Department against several companies for providing local telephone service without Commission authorization. One case involved provision of "voice over internet protocol (VOIP)," which is voice transmission via a computer network. The Commission ruled the VOIP carrier was providing local telephone service requiring Commission approval as well as access to emergency 911 services.

Local Service Competition - Network Elements and Resale. Assisted the Department in efforts to investigate and enforcement of federal and state wholesale requirements.

Price Discrimination. Assisted the Department in analyzing whether federal law preempts state restrictions against a carrier charging higher intrastate long distance rates to customers of "RBOCS" than to "independent"carriers" like small rural telephone companies.

Universal Service. Provided legal analysis to the Department regarding federal and state roles in providing universal service, analyses of various FCC orders, and two federal appellate decisions regarding cost models.

Department Investigation into Qwest's Unfiled and Secret Agreements. Assisted the Department in responding to Qwest's challenge to the order before federal district court. In challenge to the commission's decision to impose a $26 million fine against Qwest for failing to make required disclosure of business practices with competitors. The Court upheld the fine.

Energy

Merger Enforcement/Monitoring. Continued to assist the Department in monitoring and enforcing terms of the NSP merger with New Century, now known as Xcel Energy.

Electric Transmission Line Construction. Provided legal advice to the Department regarding matters involving Xcel's approved request to build four high voltage transmission lines in southwestern Minnesota continued periodically before the commission regarding the utility's compliance with terms that tended to encourage local participation in construction of wind turbines. The commission approved the high voltage transmission line request of Great River Energy and Wright-Hennepin Electrical Cooperative to build a transmission line in Plymouth and Maple Grove.

Other New Construction. The division represented the Department in four administrative trial proceedings involving requests to build additional electric generation in Minnesota involving wind generators and natural gas-fired turbines. A request to build approximately 325 MW of gas-fired generation is still pending.

Encumbering Regulated Natural Gas Assets. Lawyers represented the Department in opposition to the "securitization" request of Aquila, Inc. to encumber hundreds of millions of dollars of its regulated natural gas assets in Peoples and Northern Minnesota Utilities to obtain financing. The utility acknowledged that the loan would be used in part to pay for unregulated activities, and the commission denied the request.

Investigation of Xcel's Service Quality Reporting. Advised the Department regarding the commission's investigation stemming from allegations by Xcel employees that the company falsified documents regarding electric outages reported to the commission. The parties reached a settlement involving extensive future service quality requirements as well as significant penalties if the measures are not met.

Conservation Improvement Plan Matters. Provided assistance to the Department in analyzing programs designed to meet statutorily-required utility conservation spending.

TRANSPORTATION DIVISION

The Transportation Division provides legal services to the Minnesota Department of Transportation (MnDOT). A large part of the division's work involves eminent domain litigation.

The transportation division advises both MnDOT and other state agencies involved in construction projects and represents the State when contractors, subcontractors, or third parties sue the State on construction-related matters. The division also protects taxpayers by filing claims against entitles that perform defective work or otherwise fail to comply with contract requirements.

The division represents all non-regulatory state agencies in matters involving compliance with state and federal environmental requirements and when they are involved in environmental litigation. The division advises client agencies on the legal ramifications of proposed activities and development projects, assists state agencies in real estate transactions involving contaminated development projects, and evaluates and attempts to resolve claims before litigation arises.

In FY 04 the division's activities included:

- Litigation related to eminent domain actions and appeals. Hundreds of properties are acquired for roadways and other transportation projects in legal actions. The division also defended MnDOT against claims that its projects have resulted in inverse takings and provided legal assistance in voluntary sales of real estate for transportation projects.

- Provided the Commissioner of Transportation and staff with general counsel legal assistance.

- Represented MnDOT in its statutory prevailing wage enforcement responsibilities, recovering unpaid wages for contractors' employees on MnDOT projects.

- Represented MnDOT in highway advertising regulatory enforcement proceedings before the Commissioner of Transportation. Also, advised the Commissioner in adjudicating contested case decisions in railroad crossings and similar rail regulatory matters.

- Advised MnDOT in its programs and offices such as Equal Employment Opportunity, Aeronautics, Railroads and Waterways, Project Development, State Aid, Research and Investment Management, and Office of Motor Carrier.

- Represented the Minnesota National Guard in its legal matters, which have included data practices litigation, contract review, and prevailing wage Enforcement.

- Represented the Minnesota State College and University Board in litigation over contract delay claims.

- Represented the Commissioner of Transportation in a major takings claim case involving light rail transit.

GOVERNMENT REGULATION SECTION

ENVIRONMENTAL PROTECTION DIVISION

Attorneys in the Environmental Protection Division (EPD) provide legal advice and representation to the Minnesota Pollution Control Agency (MPCA), the Environmental Quality Board, and the Office of Environmental Assistance.

Environmental Law Enforcement

EPD attorneys work with MPCA staff members and provide legal advice regarding available enforcement alternatives. Once MPCA decides on a course of action, EPD attorneys assist in carrying out the action. For most enforcement actions this generally involves MPCA's issuance of an administrative penalty order (APO) that identifies corrective actions for a party in order to come into compliance with environmental laws and the payment of a civil penalty in an amount up to $10,000. The penalty may be forgivable or non-forgivable. If the regulated party disagrees with the order, it may request a contested case hearing before an administrative law judge or petition for review before a district court. In either case, the resulting litigation is handled by an EPD attorney.

For more serious violations, stipulation agreements are negotiated with the regulated party. These agreements generally establish a schedule for taking corrective actions or coming into compliance and the payment of a civil penalty. EPD attorneys are involved in these negotiations to address the legal issues that arise and assist in drafting language that clearly prescribes the roles and responsibilities of the parties. In situations where settlement cannot be reached, the enforcement matter is litigated in district court on behalf of MPCA by EPD attorneys.

In FY 04, MPCA took enforcement actions that included, among other things, 110 APOs and 27 stipulation agreements. The civil penalties imposed totaled $1,235,274. The enforcement actions also included provisions to ensure compliance with environmental laws. Regulated parties also agreed to carry out supplemental environmental improvement projects having an estimated value of $549,039. Enforcement matters handled by EPD attorneys included the following:

- EPD represented the MPCA in negotiating a settlement with Schwartzman Company, Inc., a metal shredding facility in Anoka County, for illegally managing solid and hazardous waste. Under the terms of a consent decree, the company was required to pay a civil penalty of $500,000, build a noise barrier for the City of Anoka and remediate contamination on its property, which valued the settlement at over $1,000,000.

- EPD represented the MPCA in negotiating a stipulation agreement with Bongards' Creameries, Inc. for wastewater effluent violations at a cheese processing plant that discharges into two lakes in Carver County. The stipulation agreement required payment of an $80,000 civil penalty and $140,000 in supplemental environmental projects.

- EPD represented the MPCA in negotiating a stipulation agreement with Safety-Kleen Systems, Inc. for repeat violations involving illegally managing used oil. The stipulation agreement required a $49,000 civil penalty and the forward-looking implementation of waste management procedures.

- EPD represented the MPCA in negotiating a stipulation agreement with American Crystal Sugar, Inc. for numerous air emissions violations involving three of the company's facilities in Minnesota. The stipulation agreement required a $117,000 civil penalty and the implementation of measures to achieve compliance.

Client Advice and Other Litigation

EPD provides legal advice and litigation services to the MPCA on a variety of non-enforcement issues. On average, approximately 200 files are maintained regarding ongoing legal advice. The majority of legal issues on which MPCA seeks legal services involve permitting, rulemaking, and environmental review. For example, in FY 04, the EPD represented the MPCA on numerous environmental review and permitting appeals in district courts, the Office of Administrative Hearings, and the Minnesota Court of Appeals. The most noteworthy of these matters, which are ongoing, include St. Cloud and Owatonna/Faribault wastewater treatment facility permitting matters, as well as Heartland Energy and Blue Heron Bay environmental review and permitting matters.

The EPD also provided legal services to MPCA on a variety of real estate and contract matters in FY 04. For example, EPD attorneys assisted MPCA's Closed Landfill Program with the acquisition of real property at three landfills in Minnesota for a total cost of $421,500. Other areas in which the EPD provided legal advice and services included tank leak cleanup cost recoveries, superfund cleanups, natural resource damages, asbestos removals, bankruptcies, contract disputes, hazardous and solid waste disposal, creation of sewer districts, creation of conservation easements, purchases of easements and real property, groundwater contamination, federal facility superfund cleanups, individual septic treatment systems, administrative inspection orders, storm-water runoff, air toxics, and federal new source review.

Landfill Insurance Recovery Project

In FY 04, EPD continued to work with special attorneys in litigating and settling the State's claims against companies for landfill cleanup costs under the Landfill Cleanup Act and the Minnesota Environmental Response and Liability Act (MERLA). In September 2003 the State filed its third landfill insurance recovery lawsuit in Anoka County District Court against nine insurance carriers for costs related to the East Bethel and Oak Grove Landfills. In the last quarter of FY 04, the State briefed and argued multiple summary judgment motions filed by the carriers in the second lawsuit in Hennepin County, and obtained favorable court rulings on important MERLA and insurance issues. Settlements have been reached with two-thirds of the carriers in the second lawsuit, and with several of the carriers in the third lawsuit. Settlements reached with carriers during FY 04 will result in approximately $6.5 million being deposited in

the state treasury to pay for future environmental remediation. This brings total net recoveries for the project to approximately $57 million.

Legal Services To Other EPD Client Agencies

Environmental Quality Board (EQB). EQB operates as a general interagency coordinating board for environmental quality issues involving the state and its citizens. EQB has two major areas of responsibility (1) as overseer of the environmental review process as carried out by local and state governmental units under the Minnesota Environmental Policy Act and (2) the issuer of permits regarding sites and routes for large energy facilities under the Power Plant Siting Act and other laws.

EPD primarily provides legal advice to the EQB with respect to the implementation of its delegated legal authorities. On occasion EQB will intervene in a matter to ensure that environmental issues are raised and properly considered. During FY 04, for example, EPD submitted a brief to Minnesota Court of Appeals on behalf of the EQB to assist the court in reviewing a matter involving the interpretation of an EQB rule regarding environmental review.

Office of Environmental Assistance (OEA). OEA awards grants for innovative projects to reduce and prevent waste and pollution, improve recycling and composting, conserve resources, conduct resource recovery and provide environmental education. OEA also has responsibility to: assist businesses and local governments in all areas of solid waste matters, coordinate the state-wide household hazardous waste program, approve county solid waste management plans and issue certificates of need for mixed municipal solid waste capacity. In FY 04, the EPD provided a variety of general legal services to OEA, including loan document preparation, contract review and grant terms review.

HEALTH/ANTITRUST DIVISION

Health Matters

The division provides legal advice to the Minnesota Department of Health (MDH) concerning its regulatory responsibilities and represents MDH in all litigation and administrative enforcement actions. MDH regulates and oversees a number of different subject areas, including infectious diseases, food-borne illness outbreaks, health care facilities, environmental health hazards, health maintenance organizations (HMOs) and certain health professionals. The division also advises MDH about legal issues concerning contracts, leases, and other transactions.

Specific examples of the division's work in FY 04 include the following:

- ***Nursing Home Emergency:*** A nursing home informed MDH staff that it was facing a financial crisis and could not make its next payroll. Division attorneys quickly prepared a receivership agreement so that the Commissioner of Health could keep the operation running, thereby avoiding harm to residents. To resolve disputes concerning the use of the receivables, including substantial Medical Assistance payments, division attorneys filed a complaint in District Court seeking a declaratory judgment about the use of the

funds. Ultimately, division attorneys assisted MDH in negotiating a resolution with the creditor whereby the creditor obtained a certain amount of the disputed receivables and the remainder of the funds were returned to the State. The facility was later sold to a new operator.

- ***HMO Violations:*** Division attorneys assisted MDH in issuing a cease-and-desist order to an HMO that failed to contract with pharmacists to serve residents of nursing homes in rural Minnesota. Without these contracts, nursing home residents faced lengthy delays in obtaining necessary prescription medications. The order required the HMO to honor prior contracts for 90 days and to arrange pharmaceutical services for eligible nursing home residents.

- ***Unsafe Asbestos Removal:*** MDH staff determined that an individual was continuing to perform asbestos abatement work even though MDH had revoked his certification and his company's license for past violations. In addition, the individual falsely advertised that his company was licensed by the Department of Health and was "approved" by the U.S. Environmental Protection Agency and the Minnesota Pollution Control Agency. Division attorneys sought a court order permanently enjoining the individual and his companies from doing asbestos-related work without the proper MDH approval. The action also sought to enjoin the defendants from representing to consumers that they were licensed or approved by government agencies. The defendants failed to answer the complaint and division attorneys obtained a default judgment.

As in prior years, a significant amount of the division's work in FY 04 involved defending MDH's determinations that individuals or companies violated the Vulnerable Adults Act by neglecting, abusing or financially exploiting vulnerable adults. In addition, the division defended MDH decisions not to allow certain disqualified individuals to work in direct contact with patients or residents of health care facilities or health care service organizations (such as home care agencies). Examples of these cases include:

- ***Nursing Home Neglect:*** A nurse gave a nursing home resident a dose of insulin that was ten times higher than the dose ordered by the physician. The vulnerable adult was admitted to the hospital and died a few days later. MDH staff investigated the incident and determined the nurse neglected the resident in violation of the Vulnerable Adults Act. The nurse appealed and division attorneys defended MDH's determination. The Commissioner of Health affirmed the finding of neglect.

- ***Nursing Home Neglect:*** An 86-year-old man was admitted to a nursing home and developed a wound on his leg several months later. The resident later died of complications from the wound. MDH staff found that the facility neglected the resident because its staff failed to sufficiently document what was done to treat the wound and because facility staff failed to notify his physician about the wound. The facility appealed and division attorneys defended MDH's position. The facility ultimately withdrew its appeal and MDH's finding of neglect was preserved.

- ***Assisted Living Facility Neglect:*** An elderly woman with diabetes and other ailments was admitted to an assisted living facility. The facility failed to accurately record her need for medications, including insulin, and did not administer her medications as prescribed. One morning, facility staff noticed the resident was lethargic but did not provide any medical attention until mid-afternoon, when a nurse assessed her. The nurse found that the resident's blood glucose level was very high, and told staff that the resident needed to be sent to a hospital emergency room. The nurse then left and the resident was not taken to the hospital for several hours. When the resident finally arrived at the hospital it was determined that she probably had a series of heart attacks during the day. The resident was hospitalized until her death eleven days later. MDH staff concluded the facility and two nurses neglected the resident. One of the nurses appealed. The matter was resolved when, pursuant to a settlement agreement, the nurse withdrew her appeal and the finding of neglect was preserved.

- ***Nursing Home Financial Exploitation:*** A nursing assistant financially exploited a nursing home resident when she obtained the resident's checking account number and made approximately $300 worth of "pay by telephone" transfers to pay her utility bills. MDH determined the nursing assistant financially exploited the resident in violation of the Vulnerable Adults Act. Division attorneys defended MDH's conclusion and a hearing officer ultimately dismissed the appeal after the nursing assistant failed to pursue it.

- ***Nursing Home Abuse:*** A nursing assistant repeatedly swore at a nursing home resident, and then struck the resident on the back of the head and shoved him down onto the bed. Later the same day, the nursing assistant again swore at the resident and pushed him down on the floor. MDH staff concluded the nursing assistant committed physical and verbal abuse in violation of the Vulnerable Adults Act. The nursing assistant appealed and division attorneys defended MDH's determination. The nursing assistant was also prosecuted criminally and he eventually withdrew his MDH appeal. Thus, the finding of abuse prevailed and the nursing assistant is now disqualified from working in direct contact with vulnerable adults.

- ***Disqualification Appeal:*** After a felony drug conviction, an individual was disqualified from working in direct contact with persons receiving certain health care services (nursing home residents, for example). The individual requested a "set aside" that would have allowed her to work in a particular health care facility. MDH denied her request, and she appealed to the Minnesota Court of Appeals. Division attorneys represented MDH and the court ultimately affirmed MDH's decision to deny the set aside.

Antitrust Matters

The division investigates violations of state and federal antitrust laws, and enforces these laws when it uncovers evidence of anticompetitive conduct. The Minnesota Antitrust Act prohibits a number of activities that restrain trade, including price-fixing, bid-rigging, group boycotts, unlawful abuses of monopoly power and anticompetitive mergers. The division

ensures consumers, businesses and government have a competitive environment in which to purchase goods and services. Examples of the division's work in FY 04 include:

- ***Unfair Competition:*** The division was instrumental in resolving a dispute involving allegations that Grand Itasca Hospital was dealing unfairly with independent health care providers in the area. The situation could have had an impact on Grand Itasca's ability to obtain vital federal funding for the construction of a new hospital. Working with the Commissioner of Health, this office reached a resolution with Grand Itasca whereby the facility agreed to changes in the composition of its board of directors (making the board more independent) and to establish a dispute mechanism for independent providers that believe they are being disadvantaged by the facility's actions.

- ***Challenging Pharmaceutical Industry Conduct:*** The division participated in several multi-state settlements with the manufacturers of the popular medications Cardizem, Taxol and BuSpar. The settlements resolved allegations that the manufacturers of those name-brand drugs wrongfully manipulated the patent process to delay entry of lower-priced generic competitors into the marketplace. In addition to these cases, there are several other pharmaceutical manufacturers currently under investigation. The recent settlements were as follows:

  - The Cardizem litigation resulted in more than $25 million being made available to injured consumers nationwide. In addition, the State of Minnesota is expected to receive more than $100,000 in government damages and attorneys fees. Cardizem is a widely-prescribed cardiovascular drug used to treat chest pain and high blood pressure, and to prevent heart attacks.

  - The Taxol litigation resulted in $12.5 million being distributed to injured consumers nationwide. Minnesota consumers were able to file claims for a portion of the settlement and settlement funds are being distributed. The State of Minnesota also received more than $380,000 in damages. Taxol is a cancer drug, typically used in the treatment of ovarian, breast and other cancers.

  - The nationwide BuSpar settlement resulted in roughly $30 million being distributed to consumers nationwide. Minnesota consumers were able to file claims for a portion of the settlement and Minnesota expects to receive more than $150,000 in state damages. BuSpar is a widely prescribed anti-anxiety medication.

- ***Protecting Competition in Public Bidding:*** The office received a complaint from a company that reported it was the low bidder for a school bus contract in rural Minnesota. The complainant asserted that he lost the bid, despite being the low bidder, allegedly due to an understanding between the school board and bus companies that won other portions of the contract. The division conducted interviews and sent letters to school board members, the school superintendent, and bidders on the contract explaining the antitrust laws and the prohibition against bid-rigging and allocation of markets. The school district reopened the bid, and the low bidder on each portion of the contract won.

- ***Challenging Anticompetitive Mergers:*** Earlier this year, Minnesota, along with nine other states and the United States Department of Justice, filed suit in federal court to stop Oracle Corporation's proposed hostile takeover of PeopleSoft Corporation. The lawsuit alleges the proposed merger would harm competition by eliminating one of three competitors in the enterprise software industry. Enterprise software is used by corporations and governments to automate business processes such as human resources, employee benefits, general ledger, accounts payable, and the like. The State of Minnesota, along with numerous other government entities and large businesses in the state, uses PeopleSoft software and, had concerns about whether Oracle would continue to support PeopleSoft products post-merger. The federal district court subsequently approved the merger.

HEALTH LICENSING DIVISION

The Health Licensing Division represents the State's health licensing boards, the Health Professional Services Program, Minnesota Board of Law Examiners and the Continuing Legal Education Board. The Health Licensing Division works in conjunction with the Health Investigations Division. The division provides both general counsel service and advising-attorney services to each of the boards, represents the boards at disciplinary conferences and represents the boards in contested case proceedings and judicial proceedings.

During FY 04 the division provided legal representation to all 16 of the State's health-related licensing boards. These include: Board of Medical Practice, Board of Nursing; Board of Psychology; Board of Chiropractic Examiners; Board of Veterinary Medicine; Board of Optometry; Board of Social Work; Board of Dietetics and Nutrition; Board of Marriage and Family Therapy; Board of Physical Therapy; Board of Behavioral Health and Therapy; Board of Nursing Home Administrators; Board of Dentistry; Board of Podiatry; Board of Pharmacy; and the Emergency Medical Services Board. The legal services are comprehensive and include providing legal advice and assistance during disciplinary committee investigations, conferences with licensees and contested case hearings. During FY 04 the division also initiated civil actions against an unlicensed veterinarian and an unlicensed chiropractor.

In FY 04 the division handled administrative licensing cases involving sexual misconduct, narcotics diversion, competency issues and chemical dependency. The division also drafted legal documents and assisted boards in non-litigation areas by providing legal advice on licensure issues, rulemaking, data practices and the Health Insurance Portability and Accountability Act. Division staff negotiated numerous contested case settlements in FY 04 through the use of pre-litigation mediation and direct negotiation.

The division also assists the Health Professionals Services Program in establishing practice restrictions for impaired physicians, nurses and other licensed health practitioners.

HEALTH LICENSING INVESTIGATIONS DIVISION

The Health Licensing Investigations Division provides investigative services to 16 health licensing boards and two non-health licensing boards. The division works in conjunction with the Health Licensing Division.

Investigations are conducted on behalf of the health licensing boards. Investigations of alleged misconduct have become increasingly complex. Diverse investigative skills and technical knowledge are required to conduct thorough fact finding investigations to ensure maximum public protection. Division staff include investigators with professional expertise in nursing, physician assistance, psychology, dentistry, chiropractic and other disciplines.

Cases submitted for investigation are reviewed using a common point-of-entry procedure. This procedure ensures a coordinated and focused approach from the beginning through completion of the investigation. Investigations of allegations which, if proven, present immediate danger to the public and/or the subject of the investigation are handled on an expedited basis. The division investigators also:

- investigate allegations of sexual misconduct;
- review allegations related to competency and quality of care;
- review billing records involving allegations of billing fraud;
- inspect practice settings for infection-control procedures.

In addition to other investigative techniques, division staff use investigative reporting procedures and case management software to investigate and manage their cases. These tools help investigators in achieving division objectives of conducting thorough investigations in a timely and efficient manner.

RESIDENTIAL UTILITIES DIVISION

The Residential Utilities Division (RUD) is responsible for representing and furthering the interests of residential and small business utility consumers. The RUD works to protect residential and small business consumers' interests in the complex and changing telecommunications, gas and electric industries, particularly where matters involve utility rates, reliability of utility service and quality of service. In fulfilling these responsibilities, the RUD utilizes two distinct functions: consumer mediation and legal advocacy.

The consumer mediation component of the RUD investigates and mediates individual consumer complaints relating to any and all aspects of utility services. During FY 04, the RUD handled approximately 3,000 complaints, resulting in substantial savings and refunds to residential and small business utility consumers and innumerable non-monetary resolutions to consumer utility problems.

RUD consumer mediators also work proactively with utilities to address systematic problems that become apparent through complaints received in the division. For example, in the telecommunications area, the RUD filed a consumer protection lawsuit against AT&T in

response to numerous consumer complaints that AT&T was billing consumers for long distance service they never ordered or received from AT&T. This lawsuit resulted in AT&T providing refunds to almost 33,000 Minnesotans who were improperly billed by AT&T. The RUD also filed a lawsuit against Talk to Me, LLC d/b/a 00 Operator in response to complaints from a number of small businesses that they were being billed for collect calls that they never accepted. The lawsuit resulted in a settlement with the company, providing full refunds to the affected Minnesota small businesses. In the electric area, RUD consumer mediators and attorneys have worked with Xcel Energy over the past year to address specific issues related to instances where Xcel transfers a past customer's account balance to a current customer's account. As a result of those efforts, Xcel has implemented new billing systems in an effort to prevent the problem and will be proposing new tariff language to address the issue. This has benefited both individual customers and landlords alike.

In its legal advocacy role, the RUD advocates on behalf of residential and small business utility consumers before the Minnesota Public Utilities Commission and in state and federal courts. RUD attorneys appear on a wide range of matters that directly or indirectly affect residential and small business utility consumers. For example, the RUD filed a complaint against UKI Communications, a long distance company, alleging that UKI had slammed a number of Minnesotans in violation of Minnesota law. In response to the RUD's complaint, the Commission initiated a formal proceeding to review UKI Communications' conduct.

On the energy side, the RUD convinced the Commission that it should not approve the proposal of several electric utilities to transfer ownership and control of their transmission systems to a new transmission-only company, called TRANSLink, which would not have been subject to the jurisdiction of the State of Minnesota.

The RUD also initiates or becomes involved in proceedings relating directly to customer service. For example, the RUD, along with the Department of Commerce, reached a settlement with Xcel to address problems with Xcel's reporting of its service outages. The settlement is very beneficial to Xcel customers and included: customer refunds, new service quality measures and penalties and increased reliability expenditures. Acting upon information from Xcel employee whistleblowers that power outage restoration durations were being systematically under-reported, the RUD, joined by the Department of Commerce, retained a forensic accountant to review Xcel's records. The accountant found many inaccuracies in Xcel's outage records and outage reporting. The matter was settled. The settlement redressed those customers most affected by delays in power outage restoration and contained terms that will penalize any future records tampering on the part of Xcel.

The RUD recently requested that the Public Utilities Commission order another investigation into Xcel's practices. Inaccurate meter readings and billing errors resulting from the inaccurate programming of the modules used for remote natural gas meter reading have resulted in thousands of Xcel's customers being double-billed for as long as five years. The RUD's request is pending with the Commission.

GOVERNMENT SERVICES SECTION

The Government Services Section is comprised of three divisions that principally handle litigation on behalf of the State and also provide some legal advice to state agencies. The three divisions of the Government Services Section are: Civil Litigation, Medicaid Fraud and Tax Litigation.

The work of the section includes defending the constitutionality of state laws and various principles and doctrines that are essential to the effective operation of state government. The section is also responsible for the legal work for state agencies that oversee the State's educational system, for the State Revenue Department and for the Public Utilities Commission. In addition, the section provides a substantial financial benefit to the State. By collecting debts owed to the State and by successfully defending against claims that would have cost the State money, the section saved the State millions of dollars.

CIVIL LITIGATION DIVISION

The Civil Litigation Division has several separate functions. First, the division provides litigation services to a variety of clients, ranging from constitutional officers to various state agencies. This includes legal advice and litigation defense for agencies and officials in the judicial branch of government. Second, the division provides legal representation to all state agencies and the judicial and legislative branches of the State on a broad range of employment issues and claims. Third, the division investigates, settles and litigates tort claims against the State, its agencies and employees in personal injury, property damage and wrongful death lawsuits. Fourth, the division serves as general counsel to the members of the Public Utilities Commission (PUC) and the PUC's staff.

General civil litigation, including constitutional challenges, handled in the past year has included defending:

- the constitutionality of the Minnesota statutes for funding of shelter and support services for domestic abuse victims;
- the constitutionality of the Minnesota's campaign finance laws;
- the constitutionality of the Minnesota criminal sexual conduct statute;
- application of the Minnesota Government Data Practices Act to tribal financial audits, and
- application of the Minnesota rules on bail-bond forfeiture.

The division provides legal representation to all state agencies and the judicial and legislative branches of the State on a broad range of employment issues and claims, including

claims under the Minnesota Whistleblower statute, Minnesota Human Rights Act, Americans with Disabilities Act ("ADA"), Family Medical Leave Act ("FMLA") and claims of discrimination and harassment under Title VII. In addition, the division has represented MnSCU in several class action lawsuits involving claims of unequal pay. The division represents the State and state officials in actions filed in federal and state court and before administrative tribunals.

In addition to defending the State in employment cases, the division provides day-to-day legal advice. The division assists state agencies in addressing and resolving various employment problems, including: ADA accommodations, investigating of harassment complaints, revising and implementing employment policies, releasing information under the Data Practices Act and state employee conflict of interest issues. The division is committed to employing methods that can prevent lawsuits, such as providing counseling early on in the process when employment problems surface and conducting training sessions for managers, human resources directors and state judges on the recent developments of employment law and providing technical guidance.

The division investigates, settles and litigates tort claims against the State, its agencies and employees, in personal injury and property damage lawsuits. Most commonly, the allegations are of negligence, but they also involve defamation, infliction of emotional distress, excessive use of force, interference with business relations and violations of federal civil rights. Examples include: highway crash cases in which MnDOT is faulted for inadequate design, construction or maintenance of a state highway; suits against the Departments of Human Services and Corrections for deaths occurring in the institutions they operate, and claims against the DNR arising from snowmobile and ATV accidents on state trails.

During the last fiscal year, the division saved the State more than $4.3 million dollars by its resolution of tort claims and an additional several million dollars from its successful defense of employment law claims.

The division advises the PUC on matters before it and represents the PUC in litigation in state and federal courts and before the Federal Communications Commission. The division has seen a continuing high volume of legal work in the telecommunications area, increasingly involving contract interpretation and enforcement of existing interconnection agreements between telecommunications carriers. As an example, the division successfully defended the PUC's decision to assess $26 million in penalties upon Qwest for anticompetitive violations. The PUC's pricing decisions for local telephone service related to matters involving the implementation of the federal Telecommunications Act has also been appealed to federal court. The PUC was the first state commission in the country to apply state law to a "voice over internet" or "VoIP" company. That decision has been appealed to the U.S. Eighth Circuit Court of Appeals. The division has also been involved in the defense in federal district court of new state legislation designed to protect wireless telephone consumers. Other pending telecommunications litigation in state and federal courts involves the scope of PUC jurisdiction and federal preemption issues.

The division also advises the PUC on matters concerning the PUC's regulation of the rates and practices of electric and natural gas utilities providing energy services in the State of

Minnesota. The division provides additional counsel to the PUC on issues related to the implementation of legislative directives, such as the achievement of the renewable energy objective or development of the distributed generation tariff. The division also represents the PUC in proceedings before the Federal Energy Regulatory Commission. The PUC is actively involved in protecting the interests of Minnesota energy consumers when those interests may be adversely affected by decisions made at the federal regulatory level.

Other Litigation

Division attorneys successfully defended the Department of Public Safety in the Court of Appeals in a class action lawsuit challenging the fee charged for parking permits issued to handicapped individuals. The suit alleged that the fee ($5.00 for a six-year permit) violated the Minnesota Human Rights Act. The department eliminated the fee for future permits.

EDUCATION DIVISION

The Education Division represents the State's complex and varied educational system, including the Minnesota Department of Education (MDE) and Minnesota State Colleges and Universities (MnSCU).

Minnesota State Colleges and Universities (MnSCU)

MnSCU is a system of 34 colleges and universities, with 53 campuses, 140,000 students and 16,000 employees. The Chancellor's office in St. Paul has a staff of about 100 employees who coordinate centralized services in academic and student affairs and financial and human resources matters. Attorneys provide legal advice to MnSCU on system-wide issues.

Each college and university is assigned an attorney as a single point of contact for the president and senior staff to provide legal advice, legal input on policy matters, coordination of consistent advice to the colleges and universities and litigation, especially disputes involving students. The division develops a program of preventive law including training programs and materials to meet campus needs.

Minnesota Department of Education (MDE)

MDE administers the State's K-12 education and other children and family programs. Legal services to MDE are coordinated through a division attorney serving as general counsel. The division provides legal advice for MDE's many programs, such as the federal No Child Left Behind Act, grants and loans for school construction, charter schools, graduation standards and testing, distance learning and library development. The division provides legal advice and defends the department in its investigation of and decision-making in school-based maltreatment of minors' cases. The division helps interpret state and federal special education law and defends MDE in special education disputes. The division also provides training to managers and supervisors on a variety of legal issues.

Higher Education Services Office (HESO)

HESO administers federal and state higher education programs, including: student loan and financial aid programs; registration of private and out-of-state public higher education institutions that provide programs in Minnesota; and licensure of private business, trade and correspondence schools. The division provides a full range of legal services for HESO, especially advice on licensing private trade schools and student and private school data practices issues. Attorneys also work with HESO in negotiating contracts for MnLINK, a statewide, computerized library system involving public and private libraries throughout the State.

The Perpich Center for Arts Education (PCAE)

PCAE, the Arts High School, operates as a separate public school with similar responsibilities, plus it is a residential school. The division advises PCAE on student discipline, grade appeals, admissions and residency requirements, data privacy and contracts.

Examples of matters handled by the division include:

MnSCU

- ***Governance Issues.*** Provided advice to the colleges and universities on issues such as Data Practices, Open Meeting Law, and delegation of authority.

- ***Litigation.*** Successfully defended a state university in an appeal of a lawsuit brought by a faculty member challenging the conclusions of an audit, and claiming defamation, due process violations, age discrimination and intentional infliction of emotional distress. Successfully defended a community college in two lawsuits brought by nursing students challenging the remediation requirements of the nursing program. Successfully defended a state university and MnSCU against claim that they are responsible for an alleged libelous article in a student newspaper (on appeal). Defended a state university in a second lawsuit brought by a contractor claiming additional payments for reconstruction following a fire. The $200,000 claim was settled for $10,000. The division also successfully negotiated a resolution of an adverse audit demand by the U.S. Department of Education. The settlement resulted in saving MnSCU $2.8 million in repayment and penalties.

- ***Discrimination and Harassment Issues.*** Worked with the system office and the campuses to develop and implement policies to comply with state and federal anti-discrimination laws. Trained campus investigators and decision-makers who process internal discrimination and harassment complaints. Defended charges of discrimination filed with the Minnesota Human Rights Department, the federal Equal Employment Opportunity Commission, and the Office for Civil Rights of the U.S. Department of Education. Successfully negotiated a resolution of an investigation by the OCR claiming non-compliance with Title IX in the campus' athletic facilities.

- ***Promoting Campus Safety and Integrity.*** Successfully represented MnSCU colleges and universities in a variety of student disciplinary matters. The reasons for disciplinary action included harassment, plagiarism, and threats.

- ***Privacy.*** Advised MnSCU campuses on the privacy and data security requirements of the federal Family Education Rights and Privacy Act and the state Data Practices Act.

- ***Technology and Higher Education.*** Advised MnSCU in its work with new technology. Provided expertise on intellectual property issues, the Internet, data practices, and the negotiation of complex, unique agreements and partnerships, and assisted in drafting computer systems policies including the system's Computer Use Policy - Guidance for campus policies on the use of computers (Internet, e-mail, bulletin boards) by students, faculty and staff.

- ***Planning for the Future - Preventive Strategies.*** Provided approaches to prevent legal problems including training to educate key staff to avoid problems and to respond effectively.

MDE

- ***Charter Schools.*** Provided advice to the Department on issues relating to charter schools including: management accountability, lease aid, real property ownership, state regulation/deregulation and charter school audits.

- ***Litigation.*** Successfully defended MDE in a lawsuit challenging approval of an on-line learning program of a Minnesota school district. Defended MDE in the Court of Appeals in an action challenging an MDE audit of a charter school.

- ***Special Education.*** Successfully defended MDE in numerous lawsuits in Minnesota Federal District Court and in the Eighth Circuit challenging MDE's supervision of local school districts in complying with federal special education law, as well as MDE's due-process hearing systems and MDE's complaint resolution decisions. Currently defending separate lawsuits challenging MDE's rules on special education.

- ***Maltreatment of Minor in Schools.*** Represented MDE in several maltreatment determinations issued by the Department that school workers (such as teachers, assistant teachers, and bus drivers) maltreated a minor in a school.

- ***Graduation Standards.*** Assisted MDE in implementing the federal No Child Left Behind Act. Advised MDE on testing issues related to graduation standards and on transition issues related to the repeal of the Profile of Learning.

- ***Desegregation Issues.*** Assisted MDE in the implementation of the settlement of the public school desegregation litigation in the Twin Cities metropolitan area and application of the department's new desegregation rules.

MEDICAID FRAUD DIVISION

The Medicaid Fraud division is a federally-certified Medicaid Fraud Control Unit with a two-fold mission:

- Review and investigate reports of vulnerable adult abuse and neglect in nursing homes, group homes, foster care homes, hospitals, board and care residences and among home care providers. In FY 04, the division opened 14 abuse and neglect investigations.

- Investigate and prosecute health care providers who commit fraud in delivery of the Medical Assistance program. During FY 04, the division opened 36 fraud investigations and eight patient fund investigations.

The division receives referrals from citizens, police, county adult protection workers and state agencies. The division reviews investigations generated by the two state licensing agencies: the Department of Health, which investigates complaints from hospitals, nursing homes, assisted living and home health agencies, and the Department of Human Services, which investigates facilities and programs for the developmentally disabled, chemically dependent, mentally ill and adult foster care homes. Division attorneys also assist local prosecutors and accept referrals to prosecute these cases around the State of Minnesota.

During FY 04, the division's efforts resulted in the conviction of six individuals for Medicaid fraud, eight individuals for abuse or neglect of vulnerable adults, and two individuals for theft of patient funds. In addition, the division referred individuals for administrative sanctions and program exclusion. These referrals resulted in professionals losing their licenses to practice, nurse aides receiving exclusions from working in federal programs, and agencies losing their ability to receive Medicaid funds. During the past fiscal year, 14 program suspensions and three licensing suspensions and other restrictions were obtained.

One goal of the division is to recover Medicaid funds from providers who fraudulently bill the program for services not provided. In separate cases, the division obtained guilty pleas by a doctor for falsely billing the Department of Human Services for services he did not provide, by a healthcare company for falsely billing personal care services not provided and a non-licensed psychologist billing for services without supervision of a licensed professional. The court ordered over $248,000 in Medicaid restitution from these providers.

During FY 04, the division entered into civil settlements with Medical Assistance providers in the areas of dental, psychological and home care services. The providers agreed to reimburse the Medicaid program over $203,000, representing services that were not provided. The division also participated in national settlements with pharmaceutical companies returning $3,000,000 to the State of Minnesota.

The division was successful in prosecuting several theft and financial exploitation cases. The victims were returned their property and funds as a result of these prosecutions. In addition, a defendant was convicted of sexual contact with a vulnerable adult at a sheltered workshop.

The division won two appeals from cases prosecuted in the prior fiscal year and continues to provide training to social services, law enforcement and provider groups on the vulnerable adult act.

TAX LITIGATION

The Tax Litigation Division represents the Minnesota Department of Revenue in court cases appealing tax assessments, seeking refunds, contesting collection actions, or challenging the validity of the State's tax laws. Division attorneys appear in the Minnesota Tax Court, State District Courts, Federal District and Bankruptcy Courts and in the state and federal appellate courts. In FY 04, the division opened 138 new cases including a number of bankruptcy matters. The bulk of new cases continue to be concentrated in the income tax and sales tax areas. The division continues to experience a large volume of pro se cases, where the opposing party is not represented by an attorney. These include a number of cases filed by tax protestors, persons who contend that the income tax is unconstitutional or that it cannot be applied to income from their wages generally, on grounds that have been universally rejected by the courts. The following describes activities that occupied significant time for the division during FY 04.

- Obtained favorable decisions of the Minnesota Court of Appeals and Minnesota Supreme Court, on state and federal constitutional grounds, that the legislature properly subjected all sales by the vending machine industry to the sales and use tax, even where sales of similar merchandise by other vendors are not always taxed.

- Obtained a favorable decision of the Minnesota Court of Appeals sustaining the dismissal of a suit by two non-filing taxpayers challenging the collection of their delinquent tax liabilities.

- Successfully assisted a county before the Minnesota Supreme Court, as *amicus curiae*, in the reversal of a decision of the Tax Court regarding the proper method for calculating two different forms of property tax relief affecting residential property.

- Obtained a ruling from the Minnesota Court of Appeals sustaining imposition of a fee on cigarettes sold by manufacturers who have not entered into a settlement in prior litigation between the State and tobacco manufacturers or have not voluntarily entered into a similar agreement.

- Obtained a favorable decision in state district court dismissing the bank tax refund claims of approximately 20 banks as untimely filed with the Commissioner of Revenue.

- Obtained a favorable decision in the tax court denying taxpayers' claim that the Michigan Single Business tax paid by their subchapter S corporation was an allowable credit against their Minnesota income tax liability.

- Obtained a favorable decision in the tax court, currently on appeal, denying a corporation's claim to a deduction for dividends paid by a foreign operating corporation, which was also a foreign sales corporation under federal law.

- Obtained a favorable decision in the tax court sustaining the denial of a multi-million dollar capital equipment claim by a telecommunications company on the ground that the claim was not timely filed by the proper party.

- Obtained a favorable decision in the tax court sustaining the denial of a credit card vendor's multi-year tax refund claims because the claims were not timely filed with the Commissioner of Revenue.

- Obtained several favorable decisions of the tax court enforcing the requirement that taxpayers timely serve and file their appeals to have them heard by the court.

- Obtained several favorable decisions in federal district court, state district court, and the tax court rejecting the claims of tax protestors that their income from wages was not subject to the Minnesota income tax or that state tax liens could not be enforced against funds that they had shifted into various other entities which they controlled.

- Appeared in court in approximately 14 bankruptcy cases, in Minnesota and other states. Of these cases, approximately eight involved individual debtors who had not complied with state law by filing their income tax returns before proceeding with a bankruptcy case. In the remaining cases, the division successfully defended many of the State's bankruptcy claims, resulting in court orders to pay those claims.

- Appeared in several quiet title, land registration and foreclosure cases in state and federal court, having received notice of approximately 140 such matters, where the division successfully defended or preserved the priority of state tax liens over the liens and judgments of other claimants.

- Negotiated settlements where appropriate.

Tax litigation has continued to become increasingly complex in recent years. Major issues on the horizon include "nexus" claims, where a corporation does part of its business in the state through so-called "independent contractors" or has a significant economic presence here, including "financial institution" nexus cases involving credit card vendors; passive loss, residency, and jurisdiction to tax in individual tax cases; application of the taconite production tax three-year averaging formula where a mining facility has been transferred to a new producer as the result of a bankruptcy; the proper formula for valuation by the State of centrally-assessed public utility property; the propriety of the use of foreign operating corporations to transfer income outside the reach of Minnesota's corporate franchise tax; the application of the Federal Commerce Clause to the MinnesotaCare tax, as applied to Minnesota health care providers whose customers are largely outside Minnesota, and indirect sales tax audits issued to cash businesses, where a lack of business records has required the reconstruction of the taxpayers' sales through third-party records. It is anticipated that these and other issues will continue to generate significant future litigation.

SOLICITOR GENERAL SECTION

APPEALS DIVISION

The Appeals Division handles felony appeals for the vast majority of the State's 87 counties. The goal of the division is to uphold convictions that are properly obtained and also to shape and develop criminal case law to enhance the protection of Minnesota's citizens.

In FY 04, the Appeals Division handled 152 state criminal appeals. Of these cases, 143 were before the Minnesota Court of Appeals and nine were before the Minnesota Supreme Court. Along with filing briefs and motions on these cases, attorneys in the division represented the State in 50 oral arguments before the Minnesota Court of Appeals and the Minnesota Supreme Court.

The cases handled by the Appeals Division in FY 04 involved, among other crimes: murder, sexual assault, arson, drug distribution and manufacturing, kidnapping, child sexual abuse, and felony assault. The division handled the appeals of murder cases for the following counties: Beltrami, Carver, Cass, Clay, Clearwater, Isanti, Kanabec, Kandiyohi, Mahnomen, Martin, Meeker, Mower, Olmsted, Otter Tail, Steele, Pine, and Waseca.

The most high-profile victory for the Appeals Division this fiscal year was in *State v. Donald Blom*. Blom was convicted of first-degree murder in the death of Katie Poirier. Following a very lengthy jury trial that generated a transcript in excess of 7,000 pages, Blom raised numerous issues in his appeal. He claimed, among other things, that his confession should have been suppressed because it was made in connection with negotiations for a guilty plea, that the trial court should have changed the venue of the trial from northern Minnesota, and that he was denied the effective assistance of counsel at his trial. The Minnesota Supreme Court unanimously affirmed Blom's conviction in an 81-page opinion.

In addition to handling appellate cases, division attorneys assist Attorney General prosecutors by providing legal research and preparing legal memoranda, and assist local prosecutors on legal questions. Attorneys in the division are also responsible for advising the Governor on interstate extraditions, and handling property forfeiture proceedings arising from criminal conduct.

CHARITIES DIVISION

Unlike their for-profit counterparts, nonprofit organizations and charities do not answer to shareholders. Instead, the oversight and regulation of nonprofit organizations and charities in Minnesota is vested in the Attorney General's Office through Minnesota Statutes Chapters 309, 317A and 501B and through common law.

The Charities Division fosters the public accountability of charitable organizations and professional fundraisers through their registration with and reporting to the Attorney General's Office. In the last fiscal year, over $380,000 in registration fees were remitted to the general

fund through the Charities Division. At the end of the fiscal year, the Division had registered and is maintaining public files for 6,300 charitable (soliciting) organizations, 2,483 charitable trusts, and 262 professional fundraisers. The information from these files is made available to the public in their entirety in a public file room and in summary form on the Attorney General's website. The division also distributes literature relating to charitable giving that is accessible to the public through the website or in paper form.

The Charities Division has extensive knowledge of nonprofit and charities laws and provides assistance to citizens and nonprofits who frequently call or write the Attorney General's Office on a wide variety of nonprofit or charities issues.

The Charities Division enforces laws relating to nonprofits, charitable organizations and professional fundraisers. By statute, the office receives notice of certain charitable trust and probate matters filed in the district courts that involve charitable assets or charitable beneficiaries. Through the Charities Division, the office often becomes involved in those matters protecting charitable assets and representing the interests of charitable beneficiaries. Through the enforcement of laws governing nonprofit and charitable organizations, the Charities Division is able to help combat fraudulent charitable solicitations, and hold nonprofit organizations accountable to the public for how they raise, manage and spend charitable assets. Examples of the matters handled by the Charities Division in the past fiscal year include:

- ***National School Fitness Foundation.*** The National School Fitness Foundation (NSFF) is a nonprofit organization that purported to offer "free" physical education equipment to school districts across Minnesota and the nation. School districts entered into lease arrangements with financial institutions for hundreds of thousands of dollars to pay School Fitness Systems, LLC (SFS), a for-profit entity, for the equipment. NSFF entered into agreements with the school districts under which the school districts were to provide NSFF with certain data from the use of the equipment. In turn, the price of the equipment was to be paid back to the school districts on a monthly basis over the course of three years so the equipment would be essentially "free" to the districts at the end of the three years. NSFF claimed that it would raise funds from corporate and private donors and government grants. Over 600 cash-strapped districts entered into such arrangements costing millions of dollars. As a result of an investigation by the Charities Division, in conjunction with the Minnesota Commerce Department and the Minnesota State Auditor's Office, it was discovered that the schools who first purchased the equipment were being paid back by schools that later entered into such arrangements, resulting in a massive nationwide ponzi scheme. The Commerce Department brought an order to show cause against NSFF and SFS for selling unlicensed securities. Before that matter could be decided, the U.S. Attorney's Office brought a civil action against NSFF and SFS freezing their assets because of mail and wire fraud violations. NSFF then filed bankruptcy. In July of 2004, the President of SFS pled guilty to federal criminal charges, as did SFS, and agreed to the payment of restitution monies.

- ***In the Matter of Syvilla M. Turbis Revocable Trust Under Agreement Dated July 1, 1996.*** The Turbis Trust was established in 1996 to fund a number of charities and to gift the remainder of its assets to the University of Minnesota for medical research. Alvin

Gramentz was the trustee for the trust founded by an elderly woman, Syvilla Turbis, and also acted as her financial advisor and power of attorney. Although at one point the trust had over $4 million in assets, as a result of transactions by Mr. Gramentz, specifically the purchase of two $1 million annuities and a $1 million life insurance policy that designate him and his wife as the beneficiaries/owners, an estate tax liability was created that effectively siphoned off the remainder of trust monies to the IRS in gift taxes, with no monies remaining for charity. Mr. Gramentz petitioned the district court to approve his payment of these estate taxes. Pursuant to its common law and statutory authority over charitable trusts, assets and trustees, this office objected to the petition. A preliminary order was entered which, among other things, removed Mr. Gramentz as trustee, ordered the annuity payments to be paid into the court, and imposed a constructive trust over funds held by Mr. Gramentz that came from the trust, which resulted in a payment of funds in excess of $1 million into the court. The claims against Mr. Gramentz include breach of fiduciary duties, self-dealing, and violations of a variety of statutes and regulations.

- ***Metropolitan Achievement Center.*** This mental health organization had significant governance issues including a lack of board independence and inadequate oversight over management, which resulted in a significant financial crisis. After investigation by the Charities Division, the organization entered into an Assurance of Discontinuance with this office to address its governance issues.

- ***In Re Lao Family Community of Minnesota (LFCM).*** The Charities Division investigated this organization's special event fundraisers after concerns were raised about how the revenue from these fundraising events is accounted for and spent. The office entered into an assurance with LFCM requiring LFCM to adopt policies and internal controls and also requiring LFCM to turn over control of the special events to an independent third party.

- ***In Re the Trusts of Richard & Alice French.*** The State became involved in this proceeding when it was alerted that the trustee and attorney fees billed to the trust exceeded $1.6 million dollars, over one-third of the trust's value. The State was allowed to intervene and assisted with getting the trustee removed and new co-trustees appointed. The division also assisted the sole charitable beneficiary in its efforts to recover some of the fees. The trustee pled guilty to mail fraud in connection with this matter, faces 10-16 months in prison, and has agreed to disbarment. The district court handed down a strong ruling, holding that it had the authority to review trustee and attorney fees in trust proceedings and issued a second order finding that some of the attorney fees incurred did not benefit the trust. The law firm in question was ordered to refund over $36,000 to the trust.

- ***In Re Blandin Foundation.*** The office helped resolve the dispute between the Blandin Foundation and members of the Grand Rapids community concerning the amount of grant money the foundation spends in Grand Rapids. When the 2003 annual accounts were submitted to the district court for approval, some members of the community objected, interpreting the language of the 2000 Court Order as requiring the Foundation

to spend at least 50 percent of the foundation's grant dollars in Grand Rapids. Ultimately, as a result of the division's work, a settlement was reached and approved by the court, which appointed a special master to monitor compliance with the stipulation and previous court orders.

CONSUMER ENFORCEMENT AND SERVICES DIVISIONS

The Consumer Enforcement Division seeks to protect Minnesota consumers from unfair and deceptive conduct by taking legal action against violators of Minnesota consumer protection laws. The Consumer Enforcement Division returns restitution dollars to Minnesota consumers and recovers money for the State treasury. The division also obtains injunctions halting the targeted deceptive practices.

Examples of cases handled by the Consumer Enforcement Division during the last fiscal year include the following:

- ***Mortgage and Real Estate Fraud.*** The office filed several actions and completed extensive work combating equity stripping. The office has sued Home Funding Corporation and several related people, Grant Holdings, and HJE Financial for deceptive practices and other violations in the course of equity stripping schemes against homeowners in foreclosure who had equity in their homes. The defendants promised to save the homes of foreclosed homeowners, but instead perpetrated a scheme that transferred the home and its equity to defendants. The State has obtained court-ordered injunctive relief against the defendants, and arranged settlements for homeowners returning or preserving over $1 million in equity and transferring title, often with favorable refinancing, back to homeowners.

  The office sued Genesis Consulting Group and related people for a fraudulent scheme in which the defendants preyed on first-time homebuyers. These defendants promised the prospective homeowners that they could substantially reduce the cost of a new home by providing "sweat equity." After the homeowners spent hundreds of hours and thousands of their own dollars to lay floors, paint and complete other construction tasks, the defendants switched the deal just before closing and made the homeowners rent at a high monthly cost. A settlement of the suit resulted in an arbitration procedure to return money to the would-be homeowners. Defendants were required to make an initial contribution to the arbitration fund of $140,000.

  The office also filed suit against two companies, Barnett and Associates and Golden Turtle, for engaging in fraud by promoting a phony "mortgage elimination" scam.

- ***Protection of the Vulnerable.*** Although many of the actions taken by the division benefit the elderly and other more vulnerable populations, several cases are specifically directed at protecting such citizens. The office brought a suit that included allegations of consumer protection violations against Benchmark Healthcare, which owns and manages Concordia Nursing Home. The suit alleged that Concordia failed to disclose to residents, as well as their family members, guardians and case workers, that it was housing

convicted sex offenders, a practice that resulted in unsafe and insecure conditions for vulnerable residents. The case is pending in Hennepin County District Court. The office also filed suit against a landlord, Marge Allen, who does business as Franconia. Ms. Allen improperly raised the rent of elderly tenants in a building subject to federal rules for low-income elderly housing. Minnesota's immigrant population was the focus of the office's suit against Divine HealthCare. The suit alleges violations of the Immigrant Services Act in charges to home health nurses brought to this country from Africa.

- ***Auto Dealer/Manufacturers.*** The office continued its prosecution of deceptive sales practices by auto dealers. The office settled a lawsuit with a used car seller that will result in $75,000 in restitution to 35 complainants. The company is no longer doing business in Minnesota. The office also reached an agreement with another dealership to pay $250,000 and reform its practices to ensure compliance with operating procedures in the sale of finance and insurance products. Another dealer agreed to pay more than $175,000 in restitution and penalties as part of a multi-state settlement involving deception in early termination of auto leases. Another dealer agreed to pay $250,000 and stop illegal ads in which it posed as the bankruptcy court after illegally obtaining consumer's credit histories.

- ***Abusive Debt Collection and Debt Counseling.*** The office filed suits against JBC and Associates, a California-based law firm engaged in debt collection, and Allied Interstate, a nationwide debt collector with offices in Minnesota. The JBC suit alleges that the firm made false and misleading statements in attempting to collect old, time-barred debt that was often disputed by the consumers whom JBC harassed. The suit against Allied Interstate alleges that the company failed to comply with consumer protection laws when the Minnesota consumer, who it was calling, disputed owing the debt.

- ***Travel Clubs.*** The office brought two actions to enforce the legislation passed by the 2003 Legislature regulating high-cost travel clubs. The office sued Great Escapes for failing to provide the required disclosures and right-to-cancel notice to consumers who paid thousands of dollars as a result of its high-pressure sales program. The office reached a settlement with the company requiring the payment of more than $356,000 in payments to or cancelled obligations of Minnesota consumers. Great Escapes also paid $45,000 to the State. The office more recently filed a suit against Global Vacations and related entities for violating the high-cost travel club law.

- ***Employment Agency Deception.*** The office filed a lawsuit against Professional Marketing Services, doing business as Bernard Haldane. The company charged thousands of dollars to consumers who were deceptively told that Bernard Haldane had access to "hidden' jobs.

- ***Telemarketing Fraud.*** Along with Attorneys General and utility regulators in nine other states, the office reached a settlement with New Access Communications LLC. The states alleged that the company engaged in telemarketing deception as to the price and terms of service, as well as unauthorized charges to the consumers. The settlement resulted in restitution and payments of more than $2 million to the states.

- ***Deceptive Billing and Sales Practices.*** The office continued to pursue numerous cases involving various deceptive billing practices and sales schemes. The office reached a settlement with EchoStar Satellite Corporation regarding its Dish Network satellite television service. The settlement was the result of consumer complaints regarding improper termination fees and other contract cancellation issues, deception in the amount of monthly fees, the condition of the equipment and other matters. The settlement resulted in payment of restitution and penalties of $238,000. The office also filed a suit against ACC of Minnesota, which does business as Cell One. The suit alleges that Cell One systematically billed consumers for charges not owed when the consumers received incoming calls within their home rate coverage area. The office also settled a lawsuit against TruGreen for illegally billing consumers for lawn care visits that the consumers neither ordered nor wanted. TruGreen agreed to reform its sales practices and pay a civil penalty.

The Consumer Services Division assists consumers, businesses and other organizations, and citizens who contact it for advice about their legal rights.

By working to assist citizens and effect voluntary settlements between consumers and other parties, the division often eliminates the need for costly and time-consuming litigation for both sides of the transaction. An incalculable amount of economic loss is prevented by advice given to citizens who contact this office.

COMMERCE DIVISION

The Commerce Division provides advice and representation to the Minnesota Department of Commerce which is charged with regulating financial services industries in Minnesota, including insurance, banks and other financial institutions, securities, mortgage lending, real estate, and building contractors.[1] The division also provides advice and representation to the Petroleum Release Tank Compensation Board (Petrofund), which is administered by the Department of Commerce.

In 2003-2004, the division handled numerous contested cases for Commerce involving disciplinary action against licensees. As a result, the division obtained over $428,250 in civil penalties and settlements. The division also handled 46 district court claims against Commerce's building contractor recovery fund. The Department of Commerce appealed one case to the Minnesota Court of Appeals.

During 2003-2004, the division handled a number of cases for Commerce including the following:

[1] The Commerce Department also regulates telecommunications and energy providers, as a result of the merger between the Commerce Department and the Department of Public Service. The Telecommunications Division handles representation of the Department with respect to telecommunications and energy issues.

- ***Credit Insurance-related Litigation.*** The division handled, and continues to handle, a number of cases against credit insurers and retailers that fraudulently issued credit insurance to Minnesotans. The division also commenced several actions to withdraw approval of credit insurance rates currently in use by a number of companies.

- ***Liquidation of Eagle Fraternal life Insurance Co.*** The division represented the commissioner in District Court proceedings to place this company into receivership and liquidate its assets. The liquidation is in the process of being wound up and dismissed.

- ***Disciplinary Actions Against Mortgage Originators.*** The division commenced contested case proceedings against several mortgage originators who were submitting fraudulent mortgage applications to lenders.

- ***Disciplinary Actions Against Real Estate Salespersons.*** The division commenced contested case proceedings against several real estate salespersons who were engaging in predatory "equity stripping" which resulted in license revocations.

- ***No-Call Law Litigation.*** This division represented the commissioner and Attorney General in district court proceedings regarding a challenge to the constitutionality of the Minnesota No-Call Law. Minn. Stat. § 325E.311, et seq. (2002). The district court granted the division's summary judgment motion upholding the constitutionality of the Minnesota No-Call Law.

- ***Disciplinary Actions and Liquidation of Collection Agencies.*** The division has obtained revocation orders and is also assisting the commissioner in an action to appoint a receiver in instances of fraudulent retention or conversion of client funds.

- ***Disciplinary Actions Against Securities Salespersons.*** The division has taken disciplinary action against securities salespersons for numerous violations including sale of unregistered securities, sale of securities by unlicensed personnel, and "selling away" without the permission of the broker dealer.

- ***Disciplinary Actions Against Residential Building Contractors.*** The division has prosecuted numerous disciplinary actions in the residential building contractor area. Common violations include: unlicensed building contractor activity, failure to satisfy judgments, failure to complete jobs and code violations.

- ***Petroleum Tank Release Compensation Board.*** The division continues to represent the Petro Fund Board in connection with requests for reimbursement with regard to petroleum product releases. The division also provides legal advice to the Petro Fund staff when requested.

- ***Disciplinary Actions Against Insurance Salespersons.*** The division has prosecuted actions against numerous insurance salespersons for activities including sale of fraudulent auto insurance binders, false applications, failure to obtain *insurance* for customers and conversion.

PUBLIC SAFETY/GAMBLING DIVISION

The Public Safety/Gambling Division represents the Commissioner of Public Safety at thousands of implied consent hearings each year in which drivers found to have been drunk and unsafe lose their licenses. The division is responsible for defending actions that resulted in the collection of driver's license reinstatement fees paid to state government over the last fiscal year. The division's litigation of overweight truck violations also resulted in substantial fines paid to the State. Efforts by the division during the last fiscal year to reduce deaths, injuries, and property damage on Minnesota's streets and highways included:

- Handled over 4,200 district court implied consent proceedings challenging the revocations of driving privileges under Minn. Stat. § 169A.50-53.

- Defended the state against numerous constitutional and other challenges to the DWI, implied consent, traffic and other public safety laws.

- Provided satellite teleconference training on DWI procedures and traffic safety laws for law enforcement officers throughout the State of Minnesota.

- Published the Attorney General's 2004 DWI/IC Elements handbook, utilized statewide by prosecutors, judges, defense attorneys and law enforcement professionals.

- Handled over 150 district court challenges to other driver's license cancellations, withdrawals, revocations, suspensions, and license plate impoundments under Minn. Stat. § 171.19.

- Handled appeals to the Minnesota Court of Appeals and the Minnesota Supreme Court resulting from district court appearances involving the revocation, suspension, cancellation, or withdrawal of driving privileges.

The division also provides legal services to the Commissioner of Public Safety and various divisions of the Department of Public Safety including: the State Patrol, Bureau of Criminal Apprehension, State Fire Marshal's Office, Office of Pipeline Safety, Office of Homeland Security and Emergency Management, Office of Justice Programs, Office of Traffic Safety, and the Driver and Vehicle Services Division. Petitions for expungement of criminal records served on the Bureau of Criminal Apprehension are monitored and challenged, where appropriate, by the division. Additionally, regulation of the private detective and security industry is enhanced by the division's representation of the Private Detective and Protective Agent Services Board.

The Public Safety/Gambling Division continues to face a significant challenge from a dramatically increased workload. Driver's license revocations under the implied consent law are being challenged at an increasing rate. For example, in 1993 a mere six percent of all revocations were challenged in court. By 1997, the rate of challenges rose to ten percent. In FY 04, nearly fourteen percent of all drivers' license revocations were challenged in court. Today's challenge rate is the result of the toughening of DWI laws by the legislature over the last

few years including the ability to use an implied consent revocation to impound license plates, forfeit motor vehicles and enhance subsequent criminal offenses to gross misdemeanor and felony violations. Because drivers have more at stake from an alcohol-related license revocation on their driving records, they are more willing to challenge the underlying revocations in our district and appellate courts.

In FY 96, the Public Safety/Gambling Division handled 2,121 implied consent cases in district court. In FY 04, it handled 4,269 implied consent cases, a 105 percent increase from FY 96. Implementation of the new test refusal law and increased license reinstatement fees to fund felony DWI during the next fiscal year continue to increase division caseload. Over time, the division has consistently prevailed in approximately 90% of its cases at the district court level and 95 percent at the appellate level.

The division also provides legal advice and representation to the Gambling Control Board, the Minnesota Racing Commission, the Minnesota State Lottery, and the Alcohol and Gambling Enforcement Division of the Department of Public Safety. These agencies have thousands of licensees and conduct numerous investigations each year. Many of these investigations result in contested case hearings requiring representation from this division. This division provides advice to the Alcohol and Gambling Enforcement Division on issues relating to illegal liquor sales, illegal gambling devices, and Indian gaming. The division also represents that agency in taking action against manufacturers and distributors of liquor and gambling equipment.

With regard to the Racing Commission, this division represents the stewards in appeals of disciplinary action taken against horse owners, trainers, and jockeys. The division also provides representation as it relates to the commission's regulation of the card club at Canterbury Park. The pending license application for the North Metro Harness Racetrack in Anoka County has kept the division busy during the last fiscal year and, if granted, is expected to significantly increase division workload during FY 05. The division provides the State Lottery with a wide range of advice, from internet issues to lottery retailer contract suspensions and represents the client in disciplinary hearings against lottery retailers and other licensees. A committee of the Gambling Control Board meets monthly with a number of licensees to discuss alleged violations of statutes and rules. The division provides representation at these settlement meetings, drafts the appropriate orders and litigates the cases in the Office of Administrative Hearings and the Minnesota Court of Appeals. The division's representation of the Racing Commission, Gambling Control Board, and the Alcohol and Gambling Enforcement Division has resulted in the recovery of fines and costs in excess of $63,000 during FY 04.

TRIAL DIVISION

The Trial Division provides prosecutorial assistance to county attorneys and local law enforcement in the fight against serious, violent, drug and gang-related crimes and handles the civil commitment of dangerous sex offenders. In addition, the division provides training for police officers and prosecutors.

The division prosecutes serious crimes in trial courts throughout Minnesota when requested by a county attorney under Minn. Stat. § 8.01. Representative work during FY 04 included:

- Prosecuting violent and serious crimes throughout the state, including the following:

  Convicted Christopher Earl for ten counts of murder in the first degree for the brutal murder of a mother and her teenage son and daughter at their home in Long Prairie after he and his accomplice burglarized the house and raped the daughter. Both Earl and his previously convicted co-defendant were sentenced to life without release on three counts to be served consecutively to one another.

  Convicted Anthony Palubicki for three counts of murder in the first degree, and Scott Fix for one count of murder in the second degree, for the killing of 90-year-old Lorentz Olson. Palubicki and Fix burglarized Olson's house in the middle of the night and beat Olson to death with a hammer. Palubicki was sentenced to life in prison and Fix was sentenced to 306 months in prison.

  Convicted Morgan Schultz for murder in the first degree in the drug-related strangling of Ricky Buker in Waseca. Schultz was sentenced to life in prison.

  Convicted Roger Garbow and Coleman Weous, each of second-degree murder in the beating death of Melvin Eagle on the Mille Lacs Reservation in Mille Lacs County. Garbow was sentenced to 313 months in prison and Weous was sentenced to 240 months in prison.

  Convicted both Justin Jones and Curtis Korb, of second-degree murder for the death of 15-month-old Mia Powassin in Warroad. Jones was sentenced to 305 months in prison and Korb was sentenced to 165 months in prison.

  Convicted Mark Horn of second-degree murder for the death and disappearance of his wife, Colleen Horn, in Norman County. Horn killed his wife during an argument in the middle of the night, buried her in a shallow grave near Crookston and claimed to police that she had walked out on him after the argument. Horn was sentenced to 240 months in prison.

  Convicted Joseph Schoeberl of manslaughter in the first degree for the death of William Davis in Hubbard County. The court imposed a sentence of 86 months in prison in addition to the sentence Schoeberl was serving for an unrelated offense.

  Convicted Joe Potter of manslaughter in the first degree and criminal sexual conduct in the third degree for the drug overdose death and statutory rape of a 15-year-old girl in Cass Lake on the Leach Lake Reservation. Potter was sentenced to 48 months in prison for the manslaughter conviction and 18 months in prison for the criminal sexual conduct conviction.

Conducted eight grand jury proceedings and obtained murder indictments in counties throughout the State.

- Providing legal advice and prosecution support to the Minnesota Gang Strike Force, including the following gang cases:

  Prosecuted four defendants for the importation and distribution of large quantities of cocaine from Chicago in Wright County and St. Louis County. Obtained a conviction against Aaron Davis, a Gangster Disciple, who was sentenced to 120 months to prison.

  Convicted two defendants involved in a retaliation shooting between members of Minneapolis Surenos and Northfield Latin Locos Surenos at a trailer park in Northfield. The defendants were convicted of first degree assault for the benefit of a gang and second degree assault.

  Assisted in investigation and prosecution following the shooting of a Chicago gang member in Moorhead. Four defendants have been convicted of murder charges, and murder charges are still pending against one defendant.

- Continuing the Attorney General's strong offensive against the expanding problem of methamphetamine labs in outstate Minnesota by prosecuting all methamphetamine cases and other drug cases referred by county attorneys, obtaining 42 convictions for methamphetamine labs and 48 total narcotics convictions in 15 counties in FY 04.

Also, pursuant to Minn. Stat. § 8.01, division attorneys handle civil commitment hearings referred by counties in outstate Minnesota. The number of these commitments and complexity of the cases increased significantly during the latter half of FY 04.

Trial Division attorneys also assist approximately 80 of Minnesota's 87 counties in civil commitment hearings involving dangerous sexual predators, upon the request of the county attorney. When a county attorney decides to proceed with a civil commitment petition, division attorneys are available to assist the county attorney in all aspects of the litigation, including preparation of the commitment petition, handling of pre-trial matters, and litigation of the case at the commitment hearing.

The workload of the Trial Division greatly expanded in FY 04 due to certain actions of the Minnesota Department of Corrections.

First, Minn. Stat. § 244.05, subd. 7 requires the Corrections Department to make a preliminary determination of whether a petition for civil commitment of a sex offender may be appropriate. The statute further requires the Department to make, and to notify the county of, its determination at least one year prior to an offender's release from incarceration. In the past, the Department interviewed sex offenders and rendered an expert preliminary determination to the county of whether a petition for civil commitment may be appropriate. The county was then able to consider this expert opinion in deciding whether good cause existed to file a civil commitment petition. Beginning in late 2003, the Department stopped making such expert preliminary

determinations. As a result, division attorneys were required to establish three two-person panels of psychologists with expertise in civil commitment matters to render an expert opinion to the county on whether a petition for civil commitment is appropriate in a particular case and to testify at any resulting hearing. Upon the request of a county attorney, division attorneys assist the county in petitioning the court for authority to access an offender's records, gathering the offender's voluminous records, and forwarding those records to the expert panel for review.

Second, as noted above, the statutes also require the Department to notify the county of a sex offender's upcoming release from incarceration one year prior the release. The purpose of the one year notice requirement is to ensure that counties have sufficient time to file a petition and have it adjudicated prior to the offender's release from incarceration. The Department has not provided the statutorily-required notice. Indeed, in FY 04 the Department gave counties in some cases just a few weeks or less notice of a sex offender's release from incarceration. Because the Department has not complied with the statute, counties, and the division attorneys who assist them, are subjected to very tight time constraints in handling civil commitment cases. They often must seek emergency hold orders from courts to prevent an offender from being released from incarceration during the pendency of a commitment case. This not only jeopardizes counties' ability to get offenders committed, but it also disrupts the workflow of the courts and shifts the cost of housing the offender during the pendency of the commitment case to the county.

Third, in FY 04, division attorneys assisted counties in apprehending and civilly committing dangerous offenders who the Department improperly released into the community without referring them for civil commitment. Division attorneys obtained emergency apprehend and hold orders for these offenders.

Division attorneys also handled several cases relating to petitions for *habeas corpus* by individuals civilly committed as sexual predators. As the population of committed sexual predators increases, the number of petitions for *habeas corpus* from the Department of Human Services regional treatment centers will likely continue to grow.

The division's Civil Commitment Team also handles administrative hearings required by the Community Notification Act when a registered sex offender challenges the Department of Corrections' assessment of the offender's level of danger upon release from incarceration. Each month, the division handles several such cases, which affect the type of notice given to the community into which the sex offender will be released.

The division provides advice to several state agencies' investigative units, participates in the Environmental Crimes Steering Committee, reviews potential criminal violations of environmental law, and assumes an active role in coordinating law enforcement efforts related to computer-related crimes and fraud.

Additionally, the division trains law enforcement officers and prosecutors throughout the state on such topics as: sex offender commitments, stalking and harassment laws, child exploitation laws, firearms laws, narcotics investigations, search and seizure, suspect

interrogation, evidence, wiretaps and electronic surveillance, working with grand juries, forfeiture, gang investigation and prosecution and trial advocacy.

AG: #1251291-v1

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July 25, 2002

Mr. Richard F. Rosow
GREGERSON, ROSOW, JOHNSON & NILAN, LTD
1600 Park Building
650 Third Avenue South
Minneapolis, Minnesota 55402-4337

Dear Mr. Rosow:

Thank you for your letter dated July 15, 2002.

As you noted in your letter, the Minnesota Clean Indoor Air Act, Minn. Stat. §§ 144.411-144.471 does not preempt the police power of cities to regulate smoking in public restaurants. You state that the City of Eden Prairie is presently considering adoption of an ordinance that would ban smoking in certain public places within the City.[1] In connection with the City's consideration of passage of such an ordinance, Eden Prairie council members have been lobbied by representatives of one or more organizations that have received funding grants from the Minnesota Partnership for Action Against Tobacco (MPAAT). On June 27, 2002, the Ramsey County District Court filed an order and memorandum in the case of *State v. Phillip Morris* (Ramsey Co. Dist. Ct. File No. C1-94-8565). In that decision, the Court commented on MPAAT's use of tobacco settlement funds primarily to promote enactment of local smoking bans. Specifically, the Court's Memorandum stated:

> MPAAT's four year focus on the environmental smoking ordinance smoking prohibition approach, in derogation to providing assistance to individual tobacco users, is without legal or factual justification.

You ask whether the Ramsey County District Court's order affects the authority of the City to regulate smoking in public places.

The District Court's Order and Memorandum does not affect the right of the City to regulate smoking. The Court's analysis, including the language quoted above, addresses the manner in which MPAAT has expended funds. It does not refer to the authority of local governments to regulate smoking. It was MPAAT's "focus" on promoting regulatory ordinances that was found to be without legal basis, not the ordinances themselves.

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[1] You also enclosed a copy of a draft ordinance for illustrative purposes only. In accordance with the scope of this Office's opinion function as discussed in Op. Atty. Gen. 629-a, May 9, 1975, we have not analyzed the draft and express no opinion on it.

As a result, the Court's Order does not affect the authority of the City of Eden Prairie to regulate smoking in public places.

Very truly yours,

Kenneth E. Raschke, Jr.
Assistant Attorney General
State of Minnesota

AG: #698931-v1

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October 15, 2002

John Hultquist
Judicial Appointments Coordinator
State of Minnesota
Office of Governor Jesse Ventura
130 State Capitol
75 Constitution Avenue
Saint Paul, MN 55155

Re: Data Practices Request

Dear Mr. Hultquist:

Thank you for your letter dated September 24, 2002 requesting an opinion from the Attorney General's Office with respect to the matter described below.

BACKGROUND

You have requested an opinion concerning a Data Practices request that has been submitted to the Commission on Judicial Selection. That request, by William Mohrman attorney for the First Judicial District Republican Committee, asks for the names of all applicants for appointments to "district court and appellate offices" in the years 2000,[1] 2001 and 2002 along with their addresses, phone numbers and all "resume and application materials."

LAW AND ANALYSIS

Pursuant to Minn. Const. art. VI, § 8, appointments to fill judicial vacancies are to be made by the Governor "in the manner provided by law."

I. District Court of Appointments

Minn. Stat. § 480B.01 provides that applicants for appointment to district court vacancies shall be evaluated by the Commission on Judicial Selection. The Commission is required to evaluate all applications and to recommend three to five nominees to the Governor who may, but

[1] It is my understanding that the Commission's document retention schedule calls for disposal of application materials after two years. Therefore, it is possible that application materials received before October of 2000 are no longer contained in Commission records.

is not required to, appoint one of these nominees. The names of the nominees must be made public. *See* Minn. Stat. § 480B.01, subd. 11 (2000).

Minn. Stat. § 13.43 of the Minnesota Data Practices Act addresses certain data pertaining to employees and applicants for positions with the State of Minnesota. That section defines "personnel data" as:

> . . . data on individuals collected because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a state agency, statewide system or political subdivision or is a member of or an applicant for an advisory board or commission.

Id., subd. 1.

Pursuant to Minn. Stat. § 13.43, personnel data is private, except for those items expressly defined therein as public. Subdivision 3 of that section provides:

> Except for applicants described in subdivision 5, [undercover law enforcement officers] the following personnel data on current and former applicants for employment by a state agency, statewide system or political subdivision or appointment to an advisory board or commission is public: veteran status; relevant test scores; rank on eligible list; job history; education and training; and work availability. Names of applicants shall be private data except when certified as eligible for appointment to a vacancy or when applicants are considered by the appointing authority to be finalists for a position in public employment. For purposes of this subdivision, "finalist" means an individual who is selected to be interviewed by the appointing authority prior to selection. Names and home addresses of applicants for appointment to and members of an advisory board or commission are public.

The analysis becomes somewhat more complicated since data of the judiciary is exempt from coverage of the Government Data Practices Act and are governed by court rules instead. *See* Minn. Stat. § 13.90. For purposes of that exemption:

> . . . "judiciary" means any office, officer, department, division, board, commission, committee, or agency of the courts of this state, whether or not of record, including but not limited to the board of law examiners, the lawyer's professional responsibility board, the board of judicial standards, the lawyer's trust account board, the state law library, the state court administrator's office, the district court administrator's office, and the office of the court administrator.

Id., subd. 1.

It could be argued that since judges are "employees" in the judicial branch they should not be considered employees or applicants for employment by a "state agency" within the meaning of section 13.43. While judges themselves hold office in the judicial branch, however, they are still considered "employees" of the "state," for many purposes. *See, e.g.*, Minn. Stat. §§ 43A.02, subd. 10, 21, 25, 43A.08, subd. 1 (12). Furthermore, the data in question is collected and retained by the Commission as an executive body[2] assisting in a constitutional function expressly assigned to the executive. Therefore, such data does not appear to be "data of the judiciary." As a result, it appears that data pertaining to applicants for judicial appointments should also be treated as "personnel data" pursuant to Minn. Stat. § 13.45.[3]

Even if it could be maintained that the district court applicant data is technically excluded from Chapter 13 as judiciary data, the same result would be required under the court rules applicable to judicial branch records. *See, Rules of Public Access To Records of the Judicial Branch*, Rule 5, subd. 1, which provides:

> Records on individuals collected because the individual is or was an applicant for employment with the judicial branch, provided, however, that the following information is accessible to the public: veteran status; relevant test scores; rank on eligible lists; job history; education and training; work availability; and, after the applicant has been certified by the appointing authority to be a finalist for a position in public employment, the name of the applicant.

For the above reasons, we believe that, with respect to applicants for district court positions:

(1) Identities of applicants are public only if they have been recommended to the governor as candidates for appointment.
(2) Personal addresses and telephone numbers are not public.
(3) The veteran status, relevant test scores; rank on eligible list; job history; education and training; and work availability of applicants is public but the specific details of such information should be omitted where the identity of a non-finalist could be deduced from those details.
(4) All other applicant data is private.

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[2] The fact that the Commission is not included in the listing of bodies considered part of the judiciary for Data Practices purposes further supports this view.

[3] It is my understanding that this is the same position taken by the Commission in response to a request some years ago from Leslie Davis.

II. Appointments to Workers Compensation Court of Appeals

The Governor also appoints, with Senate approval, judges to the Workers Compensation Court of Appeals ("WCCA"), which is an agency in the executive branch of government. *See* Minn. Stat. § 480B.01, subd. 11.

Minn. Stat. § 480B.01 states that applicants for appointment to the WCCA are to be evaluated by the Commission on Judicial Selection, in the same manner as applicants for appointment to district court vacancies. Based on the provisions of Minn. Stat. § 13.43 discussed above, we believe that data on applicants for appointment to the WCCA is to be treated in the same manner as applicants for appointment to district court positions.

III. Appointments to Minnesota Court of Appeals and Minnesota Supreme Court

There appears to be no statutory provisions which set forth a specific process pursuant to which vacancies on the Minnesota Court of Appeals and Minnesota Supreme Court are filled. Consequently, the general provisions set forth in section 13.43 discussed above apply[4] to an analysis of applicant data, and the following information would be public: veteran status; relevant test scores; rank on eligible list; job history; education and training; and work availability. In addition, the names of persons considered to be finalists by the appointing authority are public.[5] All other applicant data would appear to be private.

Please contact me if you have further questions.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

(651) 297-1141

AG: #736598-v1

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[4] For the reasons discussed with respect to district court appointments, we do not believe that the judiciary's exemption from the coverage of the Minnesota Data Practices Act applies to the appointment data requested.

[5] Note that Section 13.43, subd. 3 defines "finalist" as an individual selected to be interviewed by the appointing authority prior to selection.

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
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October 26, 2002

The Honorable Jesse Ventura
Governor
State of Minesota
130 State Capitol
St. Paul, MN 55155

The Honorable Mary Kiffmeyer
Secretary of State
State of Minnesota
180 State Office Building
St. Paul, MN 55155

Dear Governor Ventura and Secretary Kiffmeyer:

A number of questions have been raised with regard to state election laws in light of the recent death of United States Senator Paul Wellstone. This letter shall respond to some of those questions.

1. Does a vacancy in the nomination for United States Senate in the State of Minnesota exist as a result of Senator Wellstone's death?

Yes. Minn. Stat. § 204B.13, subd. 1(a) states that a vacancy in nomination exists when a major political party candidate who was nominated at a primary dies. Accordingly, a vacancy in nomination for United States Senate exists.

2. How is the vacancy to be filled?

Minn. Stat. § 204B.13, subd. 2(a) states that a vacancy in nomination for partisan office shall be filled in the manner provided in that subdivision. The political party with which the candidate is affiliated has the authority to fill the vacancy by filing a nomination certificate with the Minnesota Secretary of State within seven days after the vacancy in nomination occurs but no later than four days before the general election. Minn. Stat. § 204B.13, subd. 2(b). The general election is scheduled for Tuesday, November 5, 2002. Accordingly, the nomination certificate must be filed by the political party with the Minnesota Secretary of State no later than the close of business on Thursday, October 31, 2002. The chair and secretary of the party must attach an affidavit to the certificate stating, among other things, that the newly-nominated candidate has been selected under the rules of the party.

3. **Must an official supplemental ballot be prepared as a result of the vacancy?**

Yes. Minn. Stat. § 204B.41 provides, in part, that:

> When a vacancy in nomination occurs through the death or catastrophic illness of a candidate after the 16th day before the general election, the officer in charge of preparing the ballots *shall* prepare and distribute a sufficient number of separate paper ballots which shall be headed with the words "OFFICIAL SUPPLEMENTAL BALLOT."

(Emphasis added.) Under Minnesota election law, county auditors or, in counties where there is no county auditor, the principal county officer charged with duties relating to elections, are considered the officers in charge of preparing ballots. *See, e.g.* Minn. Stat. § 204B.28, subd. 2. Accordingly, they are required to prepare an official supplemental ballot[1]. Minn. Stat. § 204B.41 further provides that the title of the office and the names of candidates for that office must be blotted out or stricken from the original ballots by the election judges. The official supplemental ballot shall contain the title of the office for which the vacancy in nomination has been filled and the names of all the candidates nominated for that office. *Id.* Original ballots shall not be changed nor official supplemental ballots prepared during the three calendar days before an election. *Id.*

4. **Must official supplemental ballots be mailed to persons to whom original absentee ballots had previously been mailed?**

No. Minn. Stat. § 204B.41 provides that official supplemental ballots shall not be mailed to absent voters to whom ballots were mailed before the official supplemental ballots were prepared.

5. **May a person who has already cast an absentee ballot for United Senates Senator cast another ballot for that office?**

a. Yes, by appearing in person and voting on election day. Minn. Stat. § 203B.13, subd. 3a. If a person on the absentee voter list appears at the polling place, the election judges are required to notify the election judges of the absentee ballot board, who are to make a notation on the absentee voter list that the voter has voted, and no absentee ballot is to be counted for that voter. Minn. Stat. § 203B.24.

b. Yes, by obtaining an official supplemental absentee ballot in person or through personal delivery. Minn. Stat. § 203B.06, subd. 3(b). As a practical matter, time constraints may

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[1] "Supplemental" is defined in Black's Law Dictionary as "that which is added to a thing to complete it." Black's Law Dictionary, 5th Edition (1979). Accordingly, an official supplemental ballot is an amendment to the original ballot.

limit the applicability of this option. This provision states that when an application for an absentee ballot is accepted and those ballots are available for distribution, the person accepting the application is to mail the ballot, deliver the ballot to the voter or deliver the ballot to an agent for the voter. This process appears to apply to situations where the ballots are available at the time the application for the absentee ballot is made. Minn. Stat. § 203B.06, subd. 3. When ballots are not available at the time an application for an absentee ballot is made, absentee ballots are generally to be mailed. *Id.* As noted above, however, official supplemental ballots are to be mailed only to absent voters who were not previously mailed the regular absentee ballot.

Applications for absentee ballots made by voters may be submitted at any time not less than one day before a general election. Minn. Stat. § 203B.04, subd. 1. Applications for absentee ballots made by an agent for a voter may be submitted not later than six days before a general election. *Id.*

Consistent with the above statutes and analyses, persons in health care facilities who have already voted for United States Senator may obtain an official supplemental ballot upon which they may cast a vote for United States Senate. Minn. Stat. § 203B.11, subd. 4 contains additional provisions applicable to hospital patients and residents of health care facilities.

We do not believe that a person who casts an official supplemental ballot and has already cast an absentee ballot for United States Senator violates the prohibition contained in Minn. Stat. § 204C.14(b), which states that an individual may not vote more than once in the same election. This is because a person who exercises his or her right to cast a vote on an official supplemental ballot is simply amending his or her original vote for the same office. *See* footnote 1.

Finally, a question has been raised as to whether an absentee ballot must be presented in order to obtain an official supplemental ballot. We answer this question in the negative because the official supplemental ballot will only contain the names of candidates for the office of United States Senate, and not the names of candidates for other offices. Minn. Stat. § 204B.41.

6. How are absentee ballots to be counted where an official supplemental ballot has not been cast?

Minn. Stat. § 204B.41 states that absentee ballots that have been mailed prior to preparation of official supplemental ballots shall be counted in the same manner as if the vacancy had not occurred.

7. May the governor make a temporary appointment to fill the present vacancy in the office of United States Senator and, if so, what shall be the duration of the appointment?

Minn. Stat. § 204D.28, subd. 11 states that the governor may make a temporary appointment. Minn. Stat. § 204D.28, subd. 12 states that the winner of the general election shall

succeed and fill the remainder of the term. Thus, the governor's appointee would remain until the winner of the general election for U.S. Senate is certified by the state canvassing board pursuant to Minn. Stat. § 204C.33, subd. 3.

Very truly yours,

Mike Hatch
Attorney General

STATE OF MINNESOTA

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October 29, 2002

Jeanine R. Brand
Assistant County Attorney
Clearwater County Attorney's Office
213 Main Avenue N., Department 301
Bagley MN 56621

Re: Request for Opinion on an Election Law

Dear Ms. Brand:

Thank you for your letter of October 10, 2002.

You state that two people have filed as candidates for election to the office of Clearwater County Sheriff. In addition, a third person is disseminating leaflets soliciting write-in votes for the office. The write-in candidate is not a licensed peace officer and is currently "charged" with a felony. You refer to Minn. Stat. § 387.01 (2002) which provides in part:

> Every person who files as a candidate for county sheriff must be licensed as a peace officer in this state. Every person appointed to the office of sheriff must become licensed as a peace officer before entering upon the duties of the office.[1]

You then ask a number of questions concerning the write-in candidacy.

1. When a person runs for sheriff as a write-in candidate, is the person required to be licensed at the time of running, or upon taking office?

The license requirement of Minn. Stat. § 387.01 would not apply to a write-in candidate, since there is no requirement that a person "file" any document in order to be a write-in candidate for a county office. The lack of such a requirement is underscored by a reference to the statute which regulates state or federal candidates. Minn. Stat. § 204B.09, subd. 3. This statute requires a candidate for "state or federal office" to file a written request in order for write-in votes to be counted for the candidate.

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[1] *See also* Minn. Stat. § 204B.06, subd. 8 (2002), which requires proof of peace officer licensure to be submitted with an affidavit of candidacy for sheriff.

However, in addition to section 387.01, Minn. Stat. § 626.846, subd. 6 (2002), provides:

> Subd. 6. A person *seeking election* to the office of sheriff must be licensed as a peace officer. A person seeking appointment to the office of sheriff, or seeking appointment to the position of chief law enforcement officer, as defined by the rules of the board, after June 30, 1987, must be licensed or eligible to be licensed as a peace officer. The person shall submit proof of peace officer licensure or eligibility as part of the application for office. A person elected or appointed to the office of sheriff or the position of chief law enforcement officer shall be licensed as a peace officer during the person's term of office or employment.

(Emphasis added). Therefore, it is clear that a person is required to be licensed in order to "seek election" as sheriff, and at all times while holding the office. Whether or not a person is actually "seeking election" within the meaning of that section is, however, an issue of fact that this Office is not in a position to resolve. *See*, Op. Atty. Gen. 629a, May 9, 1975.

2. If a person is required to be licensed at the time of running the campaign, what is the remedy or penalty for doing so without being licensed? And, is the County Attorney's Office bound by law to take any action?

Section 626.846, subd. 6 does not prescribe any specific penalty for seeking election while unlicensed, or impose an enforcement duty on the county attorney. While Minn. Stat. §204B.44 (2002) provides a mechanism that can be used to remove an unqualified candidate from the ballot, I am not aware of any comparable process established solely for stopping a write-in effort. However, it is possible that a write-in campaign could be conducted in a manner that would violate other statutes. For example, Minn. Stat. § 211B.06 (2002), prohibits the knowing distribution of false information about a candidate. If the material distributed falsely represents the candidate's objective qualifications for office that could constitute a violation of the section. Pursuant to section 211B.16 (2002), it is the responsibility of the county attorney to investigate and prosecute alleged violations of chapter 211B.

3. Is there any law that prohibits a person charged with or convicted of a felony offense to run for an elected position?

First, I am not aware of any law that prohibits a person from running for or holding elective office on the basis of a mere "charge" of committing a crime.

Second, a person who has been convicted of a felony is not eligible to be elected to or hold any elective office until restored to civil rights. *See*, Minn. Const. art VII § 1, 6; Minn. Stat. §§ 201.014, subd. 2(a), 204B.06, 204B.10, subd. 6, 351.02(5) (2002).

Finally, we are not aware of any direct prohibitions against a felon asking for write-in votes.

I hope this information is helpful to you.

Very truly yours,

KENNETH E. RASCHKE, JR.
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December 18, 2002

Daniel W. Blake, Esq.
BLAKE & BJERKE, P.L.L.P.
330 Main Street South
Pine City, MN 55063

Re: Establishment of Statutory Use Road on Land Owned by an Agricultural Society

Dear Mr. Blake:

Thank you of your letter of July 3, 2002 and your supplemental letter of November 7, 2002 with an attached affidavit.

FACTS

You indicate that a landowner has asserted to the City of Pine City that a certain road has been maintained at public expense for at least six consecutive years under Minn. Stat. § 160.05. The affidavit attached to your most recent letter is signed by the public works superintendent for the City of Pine City and states that the City has plowed snow on the road during the winter and has completed certain maintenance at other times. The superintendent further indicates that members of the public use the road for a variety of purposes. The superintendent does not know whether the road actually touches the property of the landowner who claims that a road has been established by public use. The superintendent states that he has been under the impression that this is a public road and that the City is to maintain it as such.

You have stated that the road is located on property owned by the Pine County Agricultural Society (the "Agricultural Society"), which is adjacent to the land owned by the above-referenced landowner. The Agricultural Society was formed under Minn. Stat. ch. 38. The property owned by the Agricultural Society essentially consists of the Pine County Fairgrounds. You have found no Minnesota case authority that addresses the question of whether a road can be established by statutory use under Minn. Stat. § 160.05 when property is owned by an agricultural society.

QUESTION

Based on the above, you ask whether a road can be established under Minn. Stat. § 160.05 as a statutory use road lying within a municipality if the statutory use road in question is established on land owned by a agricultural society formed under Minn. Stat. ch. 38.

OPINION

We answer your question in the affirmative.

First, Minn. Stat. § 160.05 does not contain a limitation that would prohibit the application of the statute to land owned by an agricultural society. Statutes are to be given their plain meaning. If a statute's meaning is clear, then the plain meaning shall be applied. *See* Minn. Stat. § 645.16; *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001).

Second, subdivision 2 of Minn. Stat. § 160.05 expressly exempts railroad land from the establishment of a public road upon and parallel to the railroad right-of-way. *See* Minn. Stat. § 160.05, subd. 2. If the legislature had intended to exempt agricultural societies and a variety of other entities from the operation of Minn. Stat. § 160.05, then it could have provided a similar statutory exemption. *Cf.* Minn. Stat. § 645.19 (exceptions shall be construed to exclude all others).

Note that this opinion is based on and limited to the facts stated above. If the facts are subject to change or other than as represented, a new opinion should be sought from the Office.

Please contact me if you have any questions.

Sincerely,

MATTHEW B. SELTZER
Assistant Attorney General

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AG: #700430-v2

C

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December 31, 2002

The Honorable Mary J. Kiffmeyer
Secretary of State
180 State Office Building
100 Constitution Avenue
St. Paul, MN 55155

Dear Secretary Kiffmeyer:

Thank you for your inquiry of November 27, 2002, requesting an opinion of the Attorney General's Office with respect to the legal effect of Minnesota Statutes section 200.02, subdivision 7, on the Green Party's status as a major political party.

Background

The Green Party obtained major political party status following the state general election in November 2000. On November 19, 2002, the State Canvassing Board certified the results of the most recent state general election. The Board's report indicates that no Green Party statewide candidate received votes from at least five percent of the total number of individuals who voted in the election.

Law and Analysis

"Major political party" status is governed by Minnesota Statutes section 200.02, subdivision 7, as amended during the 2001 legislative special session. Paragraph (a) defines "major political party" as

> a political party that maintains a party organization in the state, political division or precinct in question and that has presented at least one candidate for election to the office of:
>
> (1) governor and lieutenant governor, secretary of state, state auditor, or attorney general at the last preceding state general election for those offices; or
>
> (2) presidential elector or U.S. senator at the last preceding state general election for presidential electors; and
>
> whose candidate received votes in each county in that election and received votes from not less than five percent of the total number of individuals who voted in that election.

No Green Party candidate received sufficient votes in the 2002 statewide general election to meet the first clause of the statute. However, the Green Party does meet the second clause, as it is a political party that maintains a political organization in the state, that presented at least one

candidate for election to the office of presidential elector or United States senator at the last preceding state general election for presidential electors (which occurred in November 2000), and whose candidate received votes in each county in that election and received votes from not less than five percent of the total number of individuals who voted in that election.

The timing of a party's acquisition and loss of major party status is governed by paragraphs (c) and (d). Pursuant to paragraph (c),

> A political party whose candidate receives a sufficient number of votes at a state general election described in paragraph (a) becomes a major political party as of January 1 following that election and retains its major party status notwithstanding that the party fails to present a candidate who receives the number and percentage of votes required under paragraph (a) at the following state general election.

Minn. Stat. § 200.02, subd. 7(c). This paragraph contains two operative clauses. Under the first, because a Green Party candidate received a sufficient number of votes at one of the state general elections described in paragraph (a), specifically the November 2000 general election, that party became a "major political party" as of January 1, 2001. Under the second, the Green Party retains its major party status notwithstanding that the party failed to present a candidate who received sufficient votes at the following state general election in November 2002.

Paragraph (d) prescribes the termination date of major political party status as follows:

> A major political party whose candidates fail to receive the number and percentage of votes required under paragraph (a) at either state general election described by paragraph (a) loses major party status as of December 31 following the most recent state general election.

Minn. Stat. § 200.02, subd. 7(d). This paragraph is poorly drafted and ambiguous, and bears two alternative constructions. The first construction is that the paragraph substantively requires a major political party to qualify as a major party in each election, *i.e.*, that a party whose candidates fail at either one of the two types of elections to receive sufficient votes loses major party status as of December 31 following the election. The second construction of the paragraph is that it is a procedural provision which refers to the date when the political party loses its major party status, *i.e.*, that a party whose candidates fail to receive sufficient votes loses major party status as of December 31 following the most recent state general election.

The above ambiguity in subdivision 7 is compounded when one considers the provisions of paragraph 7(a) and paragraph 7(c). For instance, paragraph 7(a) clearly states that a political party attains major party status if it qualifies in a state constitutional officer election *or* a presidential election. Similarly, paragraph 7(c) makes it clear that a major political party will *retain* its major party status even if it fails to qualify at the following state general election. If paragraph 7(d) is construed to substantively define the manner in which a political party loses its major party status, the paragraph clearly contradicts the provisions of paragraph 7(a) and

paragraph 7(c). On the other hand, if paragraph 7(d) is construed to be a procedural provision, then it simply refers to the date when the party loses its major party status.

Several principles of statutory construction lead to the conclusion that paragraph 7(d), poorly written as it is, should be read to be a procedural, not substantive, provision.

First, Minn. Stat., § 200.02, subd. 7(d), must be read *in pari materia* so that the Legislature's intention can be gathered from the whole of the statute. *See* Minn. Stat. § 645.16 (codifying the canon of construction that a law should be construed so as to give effect to all of its provisions). Paragraph 7(d) could be read to substantively set forth the requirements to retain major party status, namely that the Green Party must qualify in each election. Under such an analysis, however, there is no reasonable interpretation that can be given to paragraph 7(c). Indeed, paragraph 7(c) would be nullified and without any purpose.

Second, the legislative history makes it clear that the legislative committee that added the paragraph did so in response to a request from Governor Ventura relating to the major party status of the Independence Party. Recognizing that the Independence Party might not have a candidate for president in 2004, Dean Barkley, then-Director of the Department of Planning and former chair of the Independence Party, requested that the statute be amended so that the Independence Party would not lose its status as a major party in 2004 simply because it did not field a presidential candidate. Director Barkley described the legislation as the "04 fix":

> What occurs for the first time, going back 40 years, in 2004, when there will be an alignment of the stars where there will be no constitutional officers or U.S. Senate candidate running statewide, which would be the only office then that would be left to qualify a minor party to major or keeping major party status would be presidential.

Joint House/Senate State Government Finance Working Group, 6/29/01. That same day, on the Senate Floor, Senator Richard Cohen noted that:

> [The] Governor . . . requested the inclusion of two sections that dealt with the third party status of the payment of the public money before the election process, before the election day as what's been called the '04 fix for third parties.

Senate Floor Session, Friday, June 29, 2001, Floor Debate on State Government Finance.

The manner in which an amendment is adopted should be considered in interpreting a statute. *See* Minn. Stat. §§ 645.16, 645.17. These statutes provide that the intention of the legislature may be ascertained by considering the occasion and necessity for the law, the

circumstances under which it was enacted, the mischief sought to be remedied and the object to be obtained. Minn. Stat. § 645.16. The statute provides that the contemporaneous legislative history is relevant to interpreting the meaning of a statute. Minn. Stat. § 645.16. The participation and involvement of the Ventura Administration regarding the major party status of the Independence Party makes it clear that the legislature was attempting to provide a vehicle by which the Independence Party could maintain major political party status even though it might not present a candidate for president in 2004.

Finally, it is presumed that the legislature intends an entire statute to be effective and certain. See Minn. Stat. § 645.17. As noted above, paragraph 7(d) is poorly drafted and ambiguous. The legislative history makes it clear that its language was inserted late in a conference committee of a special session. Most troublesome in paragraph 7(d) is the use of the term "either." "Either" is most appropriately defined as a disjunctive term, meaning that it refers to one of two alternative options. Another, more colloquial or slang use of "either," however, is to use the term as a plural.[1] Such slang use of the term is more often found in the oral, rather than written, use of the word. If the term "either" is read to be plural rather than singular, then paragraph 7(d) becomes procedural in nature, meaning that it simply refers to the termination date for a political party to lose its "major party" status as being December 31 of the most recent state general election.

Conclusion

In light of the language of the statute, the purpose of the bill, and the legislative history, Minnesota Statutes section 200.02 should be construed to provide that a major political party whose candidates fail at both qualifying elections to receive the required number and percentage of votes loses major party status as of December 31 following most recent state general election.

Accordingly, because the Green Party did attain the number and percentage of votes to qualify as a major political party in the 2000 election, it will not lose its major political party status as of December 31, 2002.

Very truly yours,

HILARY LINDELL CALIGIURI
Deputy Attorney General
(651) 296-3257 (Voice)

AG: #780405-v1

[1] *The American Heritage Dictionary, 2nd College Edition*, Houghton Miffin Company, Boston, 1985. E.g., "I doubt that either of the options are acceptable." The more proper use of the term is in the singular, "I doubt that either option is acceptable."

STATE OF MINNESOTA

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February 10, 2003

Bryan F. Brown
City Attorney
City of Duluth
410 City Hall
Duluth, Minnesota 55802-1198

Dear Mr. Brown:

Thank you for your letter of December 17, 2002 requesting an opinion of the Attorney General with respect to the matter described below.

FACTS

One of Duluth's City Council members is proposing an amendment to Duluth's Home Rule Charter to authorize a demonstration project involving an "instant runoff voting system" to be used in the Duluth mayoral primary election to be held September 9, 2003. In an instant runoff voting system, the voter not only votes for the candidate the voter wants to win the office, but also ranks all other candidates for the office in order of preference. When votes for an office are counted, any candidate who has a majority of the first choice votes wins the office. If no candidate has a majority of the first choice votes, the candidate with the fewest first choice votes is dropped from consideration and the votes given to that candidate are recounted to attribute the second choice votes from those ballots to the other candidates. If no candidate has a majority after the recount, the next lowest candidate is dropped from consideration and the recount process is repeated. The recount process is repeated until one candidate has a majority of the votes and wins the office. The proposed charter amendment would contain a sunset provision making it applicable only to the mayoral primary election. The form of the member's proposal is a request to the Duluth Charter Commission to recommend the instant runoff voting charter amendment so that the City Council can adopt it pursuant to Minnesota Statutes, section 410.12, subdivision 7 (2002).

QUESTION

Is the proposed charter amendment for an "instant runoff voting system" valid, assuming it is enacted pursuant to the provisions of Minnesota Statutes, section 410.12 (2002)?

OPINION

The Attorney General's Office is unable to opine on the validity of the proposal as this Office does not generally review proposed charter amendments to evaluate their validity. *See,* Op. Atty. Gen. 629a, May 9, 1975. Further, we are unclear as to how the proposed system would function in the case of a non-partisan primary. According to the facts provided, the purpose of the system is to progressively reduce the field of candidates, until one has a "majority" of the votes. However, in a nonpartisan primary, two or more candidates would normally be chosen for the ballot in the general election, and, only one, at most, could have a majority of the votes.

Notwithstanding these limitations, however, I can offer the following analysis which I hope you will find helpful.

LAW AND ANALYSIS

1. Statutory Authority

First, nothing in the Minnesota election laws expressly authorizes the use of an instant runoff system of the type described. To the contrary, the election laws plainly indicate in several provisions that the candidate receiving the highest number of votes is to be declared the winner in a general election or partisan primary for a single office, and that the two (or more) candidates with the greatest vote totals are nominated in the case of a non-partisan primary. *See, e.g.,* Minn. Stat. §§ 204C.21, 204C.33, subd. 1; 204D.10; 204D.20, subd. 1; 205.065, subd 5; and 208.05 (2002).

Second, cities have been authorized by the legislature to exercise substantial autonomy over the organization and powers of city government through the adoption and amendment of home-rule charters. *See* Minn. Stat. § 410.05 (2002), *et. seq.* In particular, Minn. Stat. § 410.21 provides:

> The provisions of any charter of any such city adopted pursuant to this chapter shall be valid and shall control as to nominations, primary elections, and elections for municipal offices, notwithstanding that such charter provisions may be inconsistent with any general law relating thereto, and such general laws shall apply only in so far as consistent with such charter.

Thus, it could be argued that cities, through home-rule charters have plenary power to employ any system they choose for electing city officials so long as it does not contravene the Constitution or federal law. The legislature has, however, adopted general election laws that preempt local charter provisions in several respects. *See, e.g.,* Op. Atty. Gen. 64f, October 27, 1995. As pointed out in that opinion, Minn. Stat. § 205.02 provides:

> Subdivision 1. **Minnesota Election Law.** Except as provided in this chapter the provisions of the Minnesota Election Law apply to municipal elections, so far as practicable.

> Subd. 2. **City elections.** In all statutory and home rule charter cities, the primary, general and special elections held for choosing city officials and deciding public questions relating to the city shall be held as provided in this chapter, except that sections 205.065, subdivisions 4 to 7; 205.07, subdivision 3; 205.10; 205.121; and 205.17, subdivisions 2 and 3, do not apply to a city whose charter provides the manner of holding its primary, general or special elections.

The exempted provisions of section 205.065 include the following:

> Subd. 5. **Results.** The municipal primary shall be conducted and the returns made in the manner provided for the state primary so far as practicable. Within two days after the primary, the governing body of the municipality shall canvass the returns and *the two candidates for each office who receive the highest number of votes, or a number of candidates equal to twice the number of individuals to be elected to the office, who receive the highest number of votes, shall be the nominees for the office named.* Their names shall be certified to the municipal clerk who shall place them on the municipal general election ballot without partisan designation and without payment of an additional fee.

(Emphasis added). Also exempted is section 205.17, subd. 3, which requires non-partisan primary ballots in cities of the first class to conform to the requirements for general election ballots. Consequently, the apparent legislative intent is to accord charter cities particular latitude in fashioning a process for selection of nominees for election to local offices. In particular, charter cities are not necessarily required to adopt a primary ballot that allows for only one vote for each office or to automatically place on the ballot the names of the candidates with the most votes in every instance. For these reasons, appropriately-crafted charter provisions for an "instant runoff" voting system in connection with the mayoral primary may be permissible under the Minnesota election laws.

The application of such a system to the actual selection of city officials is more questionable. The particular statutory exceptions that provide for the holding of municipal primaries pursuant to charter do not extend to municipal general elections. Rather, those elections are generally subject to the statutory process, which is based upon the principles of a voter casting a single ballot for each office to be filled and the qualified candidate(s) who receive the highest number of votes being elected. *See, e.g.* Minn. Stat. §§ 204B.36, 204C.21, 204C.22, subd. 3, 204C.24, 204C.35, subd. 1, 204D.10, 204D.20, 205.07, subd. 1, 205.185, 209.02 (2002).

This distinction between primary and general election procedure is consistent with that recognized by the Minnesota Supreme Court in *Brown v. Smallwood*, 130 Minn. 492, 153 N.W. 953 (1915). In that case, the Court held unconstitutional a Duluth charter provision which provided for a preferential voting system for city officials in a general municipal election. The court noted, however, that:

> Attention is called to some cases involving primary elections where departures from what seemed to be mandates of the Constitution have been upheld. Usually it will be found that the courts upheld them upon the ground that primary elections are not elections within the Constitution. This is likely true of Adams v. Landsdon, 18 Idaho, 483, 110 Pac. 280, and is certainly true of State v. Nicholas, 50 Wash. 508, 97 Pac. 728, upon which the Idaho case seems to rest. In referring to these two and other cases, the Supreme Court of Tennessee, in Ledgerwood v. Pitts 122 Tenn. 570, 125 S.W. 1036, said that the decisions in such cases were rested upon the proposition that such primaries are not in reality elections, but merely nominating devices.'
>
> Our own court has made a distinction between provisions which might not be fatal in primary statutes which would be fatal in election statutes. In State v. Johnson, 87 Minn. 221, 91 N.W. 604, 840, Mr. Justice Lewis, in referring to a primary election said:
>
> > 'If the election of candidates to the position of nominee is an election within the meaning of article 7 of the Constitution, then the primary law, as above construed, is unconstitutional. It would, in certain cases, deprive the voter of his privilege to exercise the elective franchise.'
>
> And in State v. Erickson, 119 Minn. 152, 137 N.W. 385, Chief Justice Start said that:
>
> > 'Statutory regulations applicable only to primary elections, which might be repugnant to the Constitution if extended to elections, are not necessarily invalid.'

Id. at 500-01, 153 N.W. at 956-57.

2. **Constitutionality**

For the reasons stated in Op. Atty. Gen. 629a, May 9, 1975, this Office does not opine on the constitutionality of statutes or other laws. However, as noted above, the court in *Brown* intimated that preferential voting may be upheld for use in primaries even though its use in a general election may be unconstitutional.

It should be noted that in *Brown*, the court was primarily concerned with the fact that the Duluth charter provision at issue placed voters in a position where they could cast votes that could ultimately harm the cause of their favored candidate. *Brown* at 498, 153 N.W. 956. Under the present proposal, a voter's second or third choice would not be given effect unless the first choice candidate had been eliminated, and could not, therefore contribute to defeat of the voter's first choice. Nonetheless, the contemplated procedure does permit the opponents of one candidate through their second and subsequent choice votes, to marshal their votes against the opponent without being required to provide even plurality support of any one candidate as a first choice. Whether that deviation from the historical understanding of the concept of an "election"

would lead a court to find it invalid upon reasoning similar to that employed in *Brown* is, however, uncertain.

I hope this analysis is helpful to you in advising the City on this matter.

Very truly yours,

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February 12, 2003

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David E. Schauer
Sibley County Attorney
307 North Pleasant
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Re: Purchasing Right or Privilege of Crossing a Judicial Ditch

Gentlemen:

Thank you for your letter dated December 31, 2002. You request an opinion of the Attorney General on a public drainage issue that has arisen in connection with a petition for the repair of Judicial Ditch 1A, which runs through Nicollet and Sibley counties.

FACTS

A request has been made by landowners to replace a timber bridge which is in disrepair and which has been declared unsafe by an engineer in a portion of the Joint Judicial Ditch which lies in Nicollet County. The timber bridge is an 8-ton bridge and is utilized by the landowners to access tillable farm acreage bisected by the ditch. Preliminary estimates for the installation of a new 10-ton bridge to replace the existing timber bridge range from $72,000-$100,000.

The landowners have indicated their potential interest in a land trade which would allow the landowner on the east side to acquire 10-acres of land, and the landowner on the west side to acquire that person's 40-acres of land which would obviate the need for a ditch crossing. The counties have been requested by the landowners to consider "purchasing" from the landowners their right to a bridge crossing in exchange for an amount less than the replacement cost of the bridge.

Based on the above, you ask whether a ditch authority may expend ditch system funds to acquire from a private landowner the "right" or privilege of crossing a judicial ditch, as an exercise of its authority under chapter 103E of Minnesota Statutes (the "Drainage Code"), its authority under the power of eminent domain, or as a public safety or police power function due to the dangerous condition of the existing bridge.

ANALYSIS

In analyzing your question[1], the starting point must be the language of the Drainage Code. Public drainage systems are created by statute, and the powers of a drainage authority are limited by the grant of authority in the Drainage Code. As noted by the Minnesota Supreme Court, "drainage proceedings in this state are purely statutory and their validity depends upon a strict compliance with the provisions of the statute by which they are regulated and controlled." *Hagen v. County of Martin*, 91 N.W.2d 657, 660 (Minn. 1958). There is no express language in the Drainage Code authorizing a payment to the landowners for the removal of the bridge.

The Drainage Code allows work on a private bridge as part of the repair of a drainage system. Minnesota Statutes section 103E.701, subdivision 4(b) (2002) provides that a private bridge may be maintained, repaired, or rebuilt by the drainage authority and that the costs may be paid for as part of the system:

> Private bridges or culverts constructed as a part of a drainage system established by proceedings that began on or after March 25, 1947, must be maintained by the drainage authority as part of the drainage system. Private bridges or culverts constructed as a part of a drainage system established by proceedings that began before March 25, 1947, may be maintained, repaired, or rebuilt and any portion paid for as part of the drainage system by the drainage authority.

The Drainage Code also authorizes the construction of a private road in lieu of a bridge if the private road is more practical or cost effective than repairing the bridge. Minn. Stat. § 103E.701, subd. 5 (2002). The Code does not, however, authorize a drainage authority to pay the landowners in lieu of repairing the bridge. As a result, one presumes that the drainage authority does not have such authority. If the Legislature had intended to allow the option of paying the landowners for the removal of the bridge, the Legislature could have expressly provided this option. *See* Minn. Stat. § 645.19 (2002) (exceptions expressed in a law shall be construed to exclude all others).

---

[1] You ask if there is authority for a ditch authority to acquire from a landowner "the 'right' or privilege of crossing a judicial ditch." The legal rights that the landowners have with respect to the continued presence of the bridge may be very limited. This is because the Drainage Code does not necessarily require the repair or replacement of a bridge. Minnesota Statutes section 103E.701, subdivision 4(b) (2002) provides that the drainage authority "may" repair or replace the bridge if the drainage system was established by proceedings that began before March 25, 1947, but the Drainage Code does not require this action. Even if the drainage system was established by proceedings that began on or after March 25, 1947, maintenance of the bridge is still subject to the limitations on repairs under the Drainage Code. This includes, for example, the requirement that the costs of the repair may not exceed the benefits of the drainage system. *See* Minn. Stat. § 103E.715, subd. 4(a)(2) (2002).

You also raise the issue of whether payment could be made to the landowners under the power of eminent domain or the police power. It is true that legislative authority to enact drainage laws is derived from a variety of sources, including the power of eminent domain and the police power. *See, e.g., Nostdal v. Watonwan County*, 22 N.W.2d 461, 466 (Minn. 1946). However, a drainage authority only has such authority to exercise the power of eminent domain and the police power as is provided by the Legislature. A drainage authority has the power to condemn land, but this must be accomplished under the procedures for the establishment of a drainage system and the assessment of benefits and damages specified in the Drainage Code. *See* Minn. Stat. §§ 103E.212-.341 (2002). A drainage authority does not have the general power of eminent domain to condemn land outside of the terms and conditions of the Drainage Code. *See* Minn. Stat. § 117.011 (2002) (chapter 117 on eminent domain does not apply to taking of property under laws relating to drainage when those laws expressly provide for the taking and prescribe the procedure). Similarly, a drainage authority is authorized by the Drainage Code to take certain actions that could be called an exercise of the police power. *See, e.g.*, Minn. Stat. § 103E.015 (2002) (drainage authority must determine whether drainage work will be of public utility, benefit, or welfare). A drainage authority does not, however, have anything close to a general right to legislate or act for the benefit of the public welfare. *Compare, e.g.*, Minn. Stat. § 412.221, subd. 32 (2002) (power of the city council of a statutory city to adopt ordinances for the general welfare). Because the Legislature has not given a drainage authority the power to pay landowners for the removal of a bridge, no such authority should be implied from the authority to undertake the repair of drainage systems and private bridges established as part of a drainage system.

Finally, it might be possible to remove a private bridge from a drainage system through the redesign of the system in an improvement proceeding. *See generally* Minn. Stat. § 103E.215 (2002) (improvement of drainage system). The benefits and damages of the system is then to be redetermined on the basis of the system as improved. *See* Minn. Stat. § 103E.215, subd. 5 (2002). Under appropriate circumstances, damages may be redetermined to include "the diminished value of a farm due to severing a field by an open ditch." Minn. Stat. § 103E.315, subd. 8(2) (2002). *See generally* Minn. Stat. § 103E.351 (redetermination of benefits and damages). Thus, the combination of an improvement proceeding and a redetermination of benefits and damages might provide a landowner with a measure of compensation for the removal of a bridge. Due to the complexity and hypothetical nature of such an approach, however, this Office cannot speculate whether this option is available in this circumstance. *Cf.* Op. Atty. Gen. 629-a (May 9, 1975) (opinions of Attorney General do not decide hypothetical questions). Numerous questions — both factual and legal — would need to be answered before it could be determined whether this option would be available in your or any other case.

If you have further questions or comments, please contact me.

Sincerely,

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March 3, 2003

Mr. Thomas J. Radio
HINSHAW & CULBERTSON
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Minneapolis, MN 55402

VIA FACSIMILE AND
U.S. MAIL

Re: Afton City Council Vacancy

Dear Mr. Radio:

Thank you for your letter dated February 21, 2003, requesting an Attorney General's opinion with respect to the filling of a possible vacancy on the Afton City Council.

FACTS

With your letter you enclosed copies of three documents which you state were never received by the city from Councilmember Patrick Tierney. The first is a brief signed, handwritten statement dated February 7, 2003, which reads as follows:

> "City of Afton,
> I must resign my seat as councilmember for Ward 1 for personal reasons. Please accept this effective immediately.
> Sincerely,
> Pat Tierney"

The second is a memo to "Afton City Council, Mayor and Staff," dated February 9, 2003, signed by Mr. Tierney stating that, for personal reasons he has decided to "extend [his] leave of absence" for at least 90 days, and asking that the vacancy be filled, pursuant to Minn. Stat. § 412.02, subd. 2b.

The third document is a signed typewritten letter to the "Honorable Mayor Charlie Devine" dated February 11, 2003. In that letter, Mr. Tierney discusses the background of the previous two documents and expresses concern that the citizens of Ward One might be unrepresented if no one was appointed to fill a temporary vacancy. Therefore he states, "I officially resign my position. . . effective today, February 11, 2003." He further requests the Afton City Council to "unanimously endorse Nick Mucciacciaro as my replacement."

You state that the City has received complaints concerning the Mayor, his wife and property they own in Afton, alleging violations of the Afton Zoning Code and Minn. Stat. § 609.43. At a January 2003 Council meeting, the Mayor stepped down from the Council and

argued that the Council should either dismiss the complaint or investigate it on their own time. The Council was deadlocked on how to resolve the matter. The Afton City staff subsequently provided a chronology of their understanding of the events to the Mayor and his wife for a response. Resolution of the outstanding complaints will then be returned to the Council for deliberation and discussion. Based upon these facts you ask:

1. Is there a vacancy on the Afton City Council?

2. If a vacancy exists, when did it occur?

3. How does state law prescribe filling the vacancy?

4. Can the City Council call a special election to provide an elected successor for the position?

5. Is the Mayor prohibited from voting on a replacement in the event of a tie, because of a conflict of interest arising from outstanding complaints against him involving violation of the Afton Zoning Code and Minn. Stat. § 609.43?

Since the answers to these questions depend upon factual determinations outside the scope of opinions of this Office,[1] we are unable to provide definitive answers to these questions. However, I believe that I can provide the following comments, which I hope you will find helpful.

COMMENTS

1. **Existence of Vacancy**

First, the February 7, 2003, request for "extended leave" pursuant to Minn. Stat. § 412.02, subd. 2b has had no effect. The existence of a vacancy under that subdivision is not based solely upon a request by the member, but requires a resolution of the council declaring a vacancy. It does not appear that the Council declared a vacancy after receiving that letter.

Second, Minn. Stat. § 351.02 (2002) provides that an office becomes vacant upon the resignation of the incumbent. With respect to resignations, Minn. Stat. § 351.01 (2002) provides, in part:

> Subdivision 1. **To Whom Made.** Resignations shall be made in writing signed by the resigning officer:

[1] *See*, Op. Atty. Gen. 629a, May 9, 1975.

> (1) By incumbents of elective offices, to the officer authorized by law to fill a vacancy in such office by appointment, or to order a special election to fill the vacancy;
>
> * * *
>
> Subd. 2. **When effective**. Except as provided by subdivision 3 or other express provision of law or charter to the contrary, a resignation is effective when it is received by the officer, body, or board authorized to receive it.

A vacancy in the council of a statutory city is to be filled by appointment of council, pending election of a successor. *See* Minn. Stat. § 412.02, subd. 2a (2002). Thus, Mr. Tierney's written resignation would be effective, and a vacancy would be created, when the resignation is or was received by the Council. Your letter states that the three documents in question were "received by the city." However, it is not clear when each was received, or by whom.[2]

Third, Minnesota law does not require that a written resignation must be "received" by the council during a formal meeting in order to be effective. Contrary to the rule in some other states,[3] no formal action of acceptance or acknowledgement by the council is required for an unconditional resignation to take effect. Thus, there would appear to be no reason for the effect of a city official's resignation to be delayed until the council actually convenes. Especially in communities where the council does not meet often, delaying the effectiveness of a resignation until the council convenes could unnecessarily delay the ability of the resigning member to proceed with plans dependent upon the resignation. This conclusion is consistent with holdings addressing similar issues. *See, State, ex rel. Putnam v. Holm*, 172 Minn. 162, 215 N.W. 200 (1927) (holding that the governor's return of a vetoed bill to the "house of origin" did not have to take place when that house was in actual session); *Seifert v. City of Minneapolis*, 298 Minn. 35, 213 N.W.2d 605 (1973) (notice of tort claim served on council member was sufficient notice to council); and *Roberts v. Village of St. James*, 76 Minn. 456, 79 N.W.2d 519 (1899) (notice of claim against city may be served on clerk when council not in session).

Therefore, it appears that a signed resignation as described in Minn. Stat. § 351.01, would take effect upon delivery to the council or other official authorized by the council to receive documents on its behalf. As noted above, the facts presented do not indicate to whom the resignation letters were delivered, or with what additional directions. Consequently, we are unable to determine with any certainty the precise date upon which the vacancy has occurred.[4]

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[2] The February 11, 2003 letter does bear a stamped date of February 13, 2003, with a handwritten notation "received 3:15 p.m." and a signature which is not legible.

[3] *See, generally*, 56 Am. Jur. 2d, Municipal Corporations, § 260, Op. Atty. Gen. 359a-20, August 17, 1983, Minn. Stat. § 351.01, subd. 2.

[4] The salutations in the February 7 and February 11 letters are to "City of Afton" and "Honorable Mayor Devine," respectively. It would seem, however, that correspondence to the "City" might fairly be considered to be directed to the council, which is the body responsible for overall

(Footnote Continued on Next Page)

2. **The Filling of a Vacancy**

With respect to the process for filling a vacancy in a statutory city office, that process is set forth in Minn. Stat. § 412.02, subd. 2a (2002), which states as follows:

> Subd. 2a. Vacancy. *Except as otherwise provided in subdivision 2b, a vacancy in an office shall be filled by council appointment until an election is held as provided in this subdivision.* In case of a tie vote in the council, the mayor shall make the appointment. If the vacancy occurs before the first day to file affidavits of candidacy for the next regular city election and more than two years remain in the unexpired term, a special election shall be held at or before the next regular city election and the appointed person shall serve until the qualification of a successor elected at a special election to fill the unexpired portion of the term. If the vacancy occurs on or after the fist day to file affidavits of candidacy for the regular city election or when less than two years remain in the unexpired term, there need not be a special election to fill the vacancy and the appointed person shall serve until the qualification of a successor. *The council must specify by ordinance under what circumstances it will hold a special election to fill a vacancy other than a special election held at the same time as the regular city election.*

(Emphasis added).

Based on the above, the City Council is to fill the vacancy until an election is held, if required in accordance with the above provisions and appropriate city ordinances.

3. **The Mayor's Involvement**

With respect to the Mayor's involvement in filling the vacancy, I am not aware of any statutory provision that would prohibit the Mayor from voting on the appointment of a city council member.[5] In the absence of such a statute, Minnesota courts have held that there is no settled rule disqualifying public officials from participating in official proceedings when they have a personal interest in the outcome. *See, Lenz v. Coon Creek Watershed Dist*, 278 Minn.,

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(Footnote Continued From Previous Page)
management and governance of the City. Furthermore, it is clear from it contents that the February 11 letter, at least, is directed to the council.

[5] Minn. Stat. § 10A.07 (2002) does require abstention from voting in certain circumstances by an elected official of a "metropolitan government unit." The City of Afton does not appear to be within that category, however. *See* Minn. Stat. § 10A.01, subd. 24 (2002). Minn. Stat. §§ 412.311 and 471.87 (2002) which address council member's conflicts of interest apply only to contractual transactions.

153 N.W.2d 209 (1967). Rather, each case must be decided on its own facts, taking into account factors such as:

> (1) The nature of the decision being made; (2) the nature of the pecuniary interest; (3) the number of officials making the decision who are interested; (4) the need, if any, to have interested persons make the decision; and (5) the other means available, if any, such as the opportunity for review, that serve to insure that the officials will not act arbitrarily to further their selfish interests.

Id. at 15, 153 N.W.2d at 219. *See, also, E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815 (1985); *Rowell v. Board of Adjustment of City of Moorhead*, 446 N.W.2d 917 (Minn. Ct. App. 1989); Op. Atty. Gen 59a-32, September 11, 1978.

Factual determinations such as these are outside the scope of the opinion function of this Office. If after consideration of these factors, the Mayor does participate in selecting a person to fill the council vacancy, persons aggrieved by that action would presumably have an opportunity to challenge the action in court.

I hope this analysis is helpful to the City in addressing these matters.

Very truly yours,

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April 7, 2003

Representative Dennis Ozment, Chair
Legislative Commission on Minnesota Resources
Minnesota House of Representatives
3275 - 145th Street East
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Dear Representative Ozment:

Thank you for your letter of March 11, 2003, requesting an opinion from the Attorney General concerning the use of money in the Environmental and Natural Resources Trust Fund (the "Trust Fund") established under Minn. Const., art. XI, § 14.

BACKGROUND

Minn. Const., art. XI, § 14 provides:

> Sec. 14. **ENVIRONMENT AND NATURAL RESOURCES FUND.** A permanent environment and natural resources trust fund is established in the state treasury. Loans may be made of up to five percent of the principal of the fund for water system improvements as provided by law. The assets of the fund shall be appropriated by law for the public purpose of protection, conservation, preservation, and enhancement of the state's air, water, land, fish, wildlife, and other natural resources. The amount appropriated each year of a biennium, commencing on July 1 in each odd-numbered year and ending on and including June 30 in the next odd-numbered year, may be up to 5-1/2 percent of the market value of the fund on June 30 one year before the start of the biennium. Not less than 40 percent of the net proceeds from any state-operated lottery must be credited to the fund until the year 2025.

You indicate that bills have been introduced in both the House and Senate[1] which would authorize the use of up to five percent of the Trust Fund principal for loans to upgrade or replace individual private sewage treatment systems. You then ask for the opinion of this Office on the following questions that have been raised in connection with that proposed legislation:

1) Is the constitutional provision authorizing loans of up to five percent of the principal in addition to the 5-1/2 percent of the market value of the Trust Fund that may be appropriated each year, or is the five percent amount included within the 5-1/2 percent appropriation limit?

[1] SF 503 and HF510 (2003).

2) Do water system improvements include individual private sewage treatment systems?

3) Could the five percent of the principal for private sewage treatment loans be viewed as an investment opportunity for the Trust Fund by the State Board of Investment? If so, how does the prudent person principle, in Minn. Stat. § 11A.09, apply to the proposed loans as an investment?

For the reasons set forth in Op. Atty. Gen. 629a, May 9, 1975, this Office is unable to render official opinions on the constitutionality of legislation. The primary reason such opinions are not provided is because this Office must defend the constitutionality of any law that is enacted, and if we have previously opined that the law is unconstitutional, it would be extremely difficult for the Office to argue before a court that the law is constitutional. Further, opinions are typically not rendered with respect to the hypothetical application of proposed legislation since the basis for statutory construction is a determination of legislative intent, and that intent cannot be evaluated before the legislative process is completed.

Notwithstanding these limitations, I can offer the following comments, which I hope you will find helpful.

LAW AND ANALYSIS

History of Minn. Const. Art. XI, § 14.

Minn. Const., art. XI § 14, was originally proposed and adopted by the voters in 1988. *See* 1988 Minn. Laws ch. 690, § 1. It provided:

> Sec. 14. A permanent Minnesota environment and natural resources trust fund is established in the state treasury. The principal of the environment and natural resources trust fund must be perpetual and inviolate forever, except appropriations may be made from up to 25 percent of the annual revenues deposited in the fund until fiscal year 1997 and loans may be made of up to five percent of the principal of the fund for water system improvements as provided by law. This restriction does not prevent the sale of investments at less than the cost to the fund, however, all losses not offset by gains shall be repaid to the fund from the earnings of the fund. The net earnings from the fund shall be appropriated in a manner prescribed by law for the public purpose of protection, conservation, preservation, and enhancement of the state's air, water, land, fish, wildlife, and other natural resources.

The same act contained implementing legislation codified as Minn. Stat. ch. 116P. That legislation provided a mechanism for recommending expenditures of trust fund moneys to the legislature. Any such expenditures were to be made from earnings generated by the fund and specified percentages of state lottery revenues deposited in the fund through FY 1997. Minn. Stat. § 116P.05-116P.11 (1988).

In addition, the act provided separate authority for the Minnesota Future Resources Commission to "set aside up to five percent of the principal of the trust fund for water system improvements" when the principal reached $200 million or more. Minn. Stat. § 116P.12 (1988).

The final legislation was the product of a house/senate conference committee appointed to resolve differences between the house and senate versions of the bill. Prior to conference committee action, the house bill (1988 HF 2182, fifth engrossment) provided for a constitutional amendment that would dedicate one-third of state lottery proceeds to an environmental and natural resources trust fund until the principal reached $1 billion. *Id.* § 1. The proposed amendment further provided:

> Expenditures from the Minnesota environment and natural resources trust must be made for the public purpose of protection, conservation, preservation, and enhancement of the state's air, water, land, fish, wildlife, and other natural and recreational resources.

Id.

Proposed statutory provisions provided that trust fund earnings (and a decreasing percentage of revenue) would be available for such expenditure. *Id.* § 16. In addition, the house bill statutorily authorized setting aside up to five percent of the principal:

> for investment purposes. . . . to offer below market rate interest loans to local units of government for the purposes of water system improvements or emergency environment protection, or both, including wastewater treatment, clean-up, and other programs, consistent with criteria established [elsewhere in the bill].

Id. § 17.

The senate version also proposed a constitutional amendment to establish an environment, natural resources and wild life trust fund. However, it merely provided that "[t]he sources and uses of money in the fund must be established by law." 1988 SF 2000, fourth engrossment, art. 1, § 1.

The senate's proposed statutory provisions provided for appropriations from sources similar to those in the house bill. *Id.* § 11. However, the senate bill authorized a set-aside to a loan account "for investment purposes" of up to five percent of the principal amount *per year* for loans to local governments "for purposes of water system improvements or emergency environmental protection or both, including waste water treatment, cleanup, and other programs consistent with expenditure criteria established [elsewhere in the bill]." *Id.* § 12.

In addressing the bill differences in the conference committee, it was noted that the senate version provided for five percent *each year* for loans because projects such as waste water treatment were far more expensive than drinking water system improvements. However, due to

concerns about excessive depletion of the fund, it was proposed that the loan set-aside be capped at five percent overall and that the loan program be limited to water system improvements only "and not leave it open to the other kinds of things that we already have programs for, like for waste water." House/Senate Conference Committee for HF 2182, April 13, 1988. Tape 4.[2] Ultimately, the provision for using up to five percent of the Trust Fund to provide loans for "water system improvements" was incorporated into the proposed constitutional amendment. However, language authorizing expenditure of fund income for a broader range of purposes was also included in the amendment.

Article XI, section 14 was amended in 1990 to mandate continued deposit of 40 percent of net state lottery proceeds into the fund until 2001. 1990 Minn. Laws, ch. 610, art. 1, § 54.

The section was amended again in 1998 to its present form. 1998 Minn. Laws, ch. 342. Aside from eliminating obsolete language, the proposal extended the dedication of lottery money to 2025 and changed the annual appropriation authority from "net earnings" to 5½ percent of principal. 1998 Minn. Laws, ch. 342. The purpose of that change was to make the amounts available for appropriation more steady and reliable from year to year and to encourage investment of the Trust Fund assets for long-term growth, rather than concentrating on short-term profit. *See Senate Briefly*, March 27, 1998 at p. 4. (Floor update for March 20.)

During senate floor discussions prior to final passage of the 1998 amendments, Senator Doug Johnson asked whether language in the bill would allow fund principal to be used for waste water treatment. In response, Senator Morse, the bill's author, stated that the constitutional language already permitted such activity in that it authorized loans for "water system improvements." Senator Morse later pointed out, however, that Minn. Stat. § 116B.08 specifically prohibited money in the Trust Fund being expended on "municipal water pollution control." Some legislators expressed frustration that monies hadn't been spent for wastewater treatment and felt they had been fooled and tricked. Senator Morse responded that he is a strong advocate for adequate wastewater treatment, but he then read aloud the provisions of Minn. Stat. § 116P.08 that prohibit funds from being spent on "municipal water pollution control." He went on to state:

> ...The law very definitely tells us it can't be used for municipal waste water systems. Now, having said that, I haven't been clear that, and staff tells me even, the loan would fall under this statute. So we would have to change the statute.

Senate floor discussion, March 20, 1998.

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[2] Unfortunately, it appears that a substantial portion of taped and documentary material concerning these bills is missing from Historical Society records.

Appropriation Authority and Loan Authority

It seems clear from both the constitutional language and the legislative history of article XI, section 14, that the five percent loan authority is intended to be separate from the power to appropriate up to 5½ percent annually for projects. The language states that the annual 5½ percent may be *appropriated* from the fund for expenditure pursuant to statutory authority on a wide variety of subjects. However, the five percent is referred to as an amount "of the principal" that may be used for making loans. As noted above, throughout the development of the constitutional program, the two have been discussed and acted upon independently with the annual appropriation being viewed as an expenditure of income, whereas the loan money was generally viewed as an "investment" to remain an asset of the Trust Fund. *See* 1988 HF 2182, fifth engrossment § 17, 1988 SF 2000, fourth engrossment § 12. This point was emphasized in the 1988 conference committee on the original amendment. For example, Representative Bishop asked:

> Mr. Chairman, Sen. Merriam, or Senate Counsel, would that mean that the repayment of those loans would replenish the trust fund principal and by replenishing the trust fund principal, you would enable them to be loaned out again on the same 5% limitation so it affects the same purpose.
>
> The response was "Yes."

Conference Committee, April 15, 1988. Tape 1.

Septic Systems

The history of the section suggests that septic system loans would not likely qualify as "water system improvement" loans within the meaning of the constitutional term. The 1988 conference committee proceedings indicate that the subject of loaning principal for a variety of purposes was discussed and rejected as too costly.[3] Therefore, the loan authority was constitutionally limited to a total of five percent of principal and confined to "water system improvements," while earnings could be expended on a wider variety of projects.

Further, I have not located any authority for the proposition that the term "water system" would normally be construed to include waste treatment or disposal. To the contrary, statutory uses of the term now, and in 1988 as well, all appear to be either expressly distinguished from "sewer" and "waste water" systems, or contextually limited to drinking water supply. *See, e.g.*, Minn. Stat. §§ 40A.05, subd. 2, 298-223, subd. 1, 412-351, 473H.11 (1988-2002).

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[3] It should be noted that, in considering 1998 amendments to article XI, section 14, some senate members clearly favored use of trust fund money for waste water treatment and believed that such use was within existing constitutional authority.

If it were determined that five percent of the principal could be loaned for waste disposal purposes, however, I am aware of no authority that would preclude inclusion of individual privately owned treatment systems. While public funds may only be expended for public purposes, it has long been recognized that the public purpose requirement is satisfied if an expenditure is primarily intended to accomplish a public benefit, even though private interests may benefit as well. Consequently, a number of programs that subsidize acquisitions and improvement of private property have been upheld. *See, e.g. Minnesota Housing Finance Agency v. Hatfield,* 297 Minn. 155, 210 N.W.2d 298 (1973) (low cost housing loans); *City of Pipestone v. Madsen,* 287 Minn. 357, 178 N.W.2d 584 (1970). Given the apparent degree of public concern over the environmental harm caused by failing septic systems, it would be difficult to deny that upgrading such systems will benefit the environment and public at large. Indeed, there is already statutory authority for a municipal loan program to assist that activity. *See* Minn. Stat. § 115.57 (2002).

Fund Investment

As a general matter, the constitution places the responsibility for investment of all state funds in the State Board of Investment (SBI). Minn. Const. art. XI, § 8. In addition, Minn. Stat. § 116P.04 directs that the SBI ensure that the money in the Trust Fund is invested under Minn. Stat. § 11A.24 (2002). Section 11A.24 (2002) lists the particular types of investments that are permitted for state funds. While the details of the proposed loan program are not specified in the materials you have submitted, it does not appear that the program would fit within any of the categories of currently permitted investments. For example, SF 503 and HF 510 (2003) enclosed with your letter, would provide for lending money to counties, for relending to property owners for septic system improvements. *Id.* § 18, Minn. Stat. § 11A.24, subd. 2, does authorize investment in guaranteed or insured evidences of indebtedness of local governments, but only if they are backed by full faith and credit of the issuer or the issuer is rated among the top four quality rating categories. *Id.* Subd. 2. Furthermore, as your question suggests, investment in below-market loans would not appear consistent with the general fiduciary responsibility of the SBI as now defined by Minn. Stat. § 11A.09 (2002).

Thank you again for your letter. I hope the above comments are helpful to you.

Very truly yours,

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June 9, 2003

Mark J. Vierling
ECKBERG, LAMMERS, BRIGGS,
WOLFF & VIERLING, P.L.L.P.
1835 Northwestern Avenue
Stillwater, MN 55082

Re: City of Oak Park Heights - Request for Attorney General's Opinion on Propriety of Municipal Purchase of Playground Equipment for Use on School District Property Located Outside of the Jurisdictional Limits of the City

Dear Mr. Vierling:

Thank you for your letter of May 5, 2003.

You state that the City of Oak Park Heights and other neighboring communities have been approached by the principal of Oak Park Elementary School, (the School) together with a parent group, with a request for city funding for the purchase of playground equipment to be located at the School. The School is operated by Independent School District No. 834 (the District), which provides primary and secondary education in much of Central Washington County, including the City of Oak Park Heights. Due to budgetary constraints, the District has indicated that it does not intend to expend district funds for playground equipment at its elementary schools, including Oak Park Elementary. Although the School is actually located in the City of Stillwater, it serves children from Oak Park Heights as well as from Stillwater and Bayport. Oak Park Heights maintains its own park system, which includes playground equipment, but acknowledges that many of its resident children attend the School and could benefit from having upgraded playground equipment at that facility. You state that under the proposal, the City would not have any ownership interest in the equipment, nor any involvement in its management or use - rather, the City's participation would be limited to providing funds to the District to assist funding acquisition of the equipment.

Based upon these facts, you ask whether the City may provide funds for acquisition by the school district of playground equipment to be located outside City boundaries, as proposed.

While the matter is not free from doubt, we believe that there is statutory authority to support an argument that the City may expend City funds for acquisition of school playground equipment.

LAW AND ANALYSIS

First, local units of government have only such powers as are expressly granted by statute or charter and those that may be implied as reasonable and necessary to exercise the express powers. *See, e.g., Borgelt v. City of Minneapolis*, 271 Minn. 249, 135 N.W.2d 438 (1965). Furthermore, numerous Attorney Generals' opinions have stated that local governments may not donate funds to other entities absent express statutory or charter authority. Ops. Atty. Gen. 1001B, September 22, 1964 (county may not donate to village nursing home); and September 28, 1933 (city may not donate to Boy Scouts). This principle applies even in circumstances where the intended use of the donated funds is one for which the local government itself could spend money. *See, e.g.*, Op. Atty. Gen. 59a-3, January 15, 1959 (city could not give grant to county historical society, but could pay society to perform historic presentation services pursuant to contract).

Second, it is clear that cities may spend money to establish, improve, and maintain their own parks and recreational facilities. *See, e.g.*, Minn. Stat. § 412.49, 471.15 (2002). Cities and school districts are also expressly permitted to act cooperatively with each other and with private nonprofit organizations in operating recreational programs and in acquiring necessary facilities therefor. Minn. Stat. § 471.16, 471.191 (2002). However, those statutes generally contemplate ownership and management of recreational facilities by the local government itself or, at least, ongoing involvement in the recreational activities through a cooperative agreement or contract with other entities. They do not, for the most part, support outright donations of money to other entities for the conduct of their programs. *See, e.g.*, Ops. Atty. Gen. 159-B-1, January 27, 1954 and November 19, 1953.

Third, Minn. Stat. § 471.15(b), however, which was added to the section in 2000,[1] provides:

> A home rule charter or statutory city, a county, or a town may expend funds for the purpose of supporting student academic or extracurricular activities sponsored by the local school district.

This language would appear to authorize the use of city funds to assist in acquisition of school playground equipment to the extent that the equipment is employed in either the school's academic or its "extracurricular" activities.[2] Whether the equipment in question would be so

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[1] 2000 Minn. Laws ch. 489, art. VI, § 38.

[2] Minn. Stat. § 123B.49, subd. 4 (2002) identifies the characteristics of "extracurricular activities:"

(1) they are not offered for school credit nor required for graduation;

(Footnote continued on next page)

used, is a factual determination which is outside the normal scope of Attorney Generals' opinions. *See*, Op. Atty. Gen. 629a, May 9, 1975.

Fourth, Minn. Stat. § 471.85 (2002) provides another source of authority for cities to provide assistance to other local governments. It provides:

> Any county, city, town or school district may transfer its personal property for a nominal or without consideration to another public corporation for public use when duly authorized by its governing body.

Several previous Attorney General Opinions concluded that "personal property" within the meaning of this section did not include money. *See, e.g.*, Op. Atty. Gen. 59-A-22, February 26, 1965, 904, June 27, 1963. That position was modified in Op. Atty. Gen. 1011, December 27, 1968, where it was concluded that authority to transfer "personal property" under section 471.85 could include transfers of public funds. The opinion cautioned, however, that:

> [Section 471.85] is not a license to transfer moneys between public bodies at will without regard for the purposes for which the particular moneys were originally obtained and without regard to other limitations of law on the transferor and transferee governing bodies. Further, the "public use" to which the property is to be put must be one which is directly related to the public purposes of the transferring governing body.

The fund transfer examined in the 1968 opinion was found to be permissible because the city was authorized by other statutes to provide certain financial support for the transferee conservation district. In your case, the City is expressly authorized to participate in financially supporting public school recreational activities. *See, e.g.*, Minn. Stat. §§ 471.15, *et. seq.* Therefore, it could arguably transfer funds to the district for such activities pursuant to section 471.85 (2002) as well.

Fifth, you note that in Op. Atty. Gen. 707a-15, April 28, 1977, the Attorney General concluded that a city could not, pursuant to Minn. Stat. §§ 471.15-471.191, "donate" $15,000 to a private organization in exchange of the organization's agreement to construct an addition to a city recreation building. The opinion determined that the proposal would be contrary to the Uniform Municipal Bidding Act, Minn. Stat. § 471.345 (1976), which at that time required city construction contracts over $5,000 to be let on sealed bids. That opinion, however, would not seem relevant to the city's participation in the proposal you describe. Even if the city's

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(2) they are generally conducted outside school hours, or if partly during school hours, at times agreed by the participants, and approved by school authorities;
(3) the content of the activities is determined primarily by the pupil participants under the guidance of a staff member or other adult.

contribution to the cost of the equipment in question were to exceed the current bidding threshold of $50,000 for cities over 2,500 population,[3] it would be the school district rather than the city, that would be acquiring the equipment.

Finally, the fact that the equipment will be located at the school site outside the City boundary would not necessarily preclude City participation in the proposal. As you have noted, cities are generally authorized to acquire and support recreational facilities outside their borders where the interests of the city and its residents are served thereby. *See, e.g.*, Minn. Stat. § 412.211 (2002), Op. Atty. Gen. 59a-40, February 25, 1985. Furthermore, section 471.15(b) authorizes a city to provide support for activities of "the local school district" but contains no restrictions as to the geographic location of those activities. Nor does section 471.85 appear to limit the place where the transferred property may be used. The City council must, of course, evaluate the benefits that may be expected to accrue to the City and its residents from the proposed expenditure.

For these reasons we believe that a city may, in appropriate circumstances, contribute funds for school playground equipment. For your convenience, I have enclosed copies of the cited Attorney Generals' Opinions.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

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Enclosure

AG: #863372-v1

[3] Minn. Stat. § 471.345 (2002).

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June 26, 2003

James E. Knutson, Esq.
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Mendota Heights, MN 55120

Re: Request for Opinion

Dear Mr. Knutson:

I thank you for your letter of May 20, 2003 requesting an opinion of the Attorney General concerning a severance pay plan for licensed employees of Independent School District No. 481 (the "School District").

Your opinion request concerns the Matching Annuity Program ("MAP") negotiated between the School District and the union representing the District's teachers. You indicate that this program is in addition to a separate severance pay plan. Under the MAP, the District participates in an annuity program qualified under section 403(b) of the federal Internal Revenue Code. If a teacher elects to participate in the annuity program, the District matches employee contributions on a sliding scale up to $2000 depending on the employee's length of service. The teacher owns the annuity contract, with rights vesting in the teacher as soon as the individual makes his or her contributions.

The MAP also provides a cash payment to qualified teachers when they leave employment. The MAP effectively establishes an account for each teacher, a so-called "guaranteed lifetime sum" ($45,000 currently or $43,000 for 2004-05 and thereafter). To be eligible for these payments, the teacher must work in the District for 15 years and be eligible for Teacher Retirement Association ("TRA") or Public Employees Retirement Association ("PERA") retirement benefits. For each employee participating in the annuity program, the guaranteed sum is reduced by the District's total annual matching contributions to the annuity for that employee. For those not participating, a similar amount (the total matching amount that the teacher was eligible to receive) would be subtracted from the lifetime sum. Any balance of the guaranteed sum remaining when the teacher leaves employment is paid to the teacher following separation. For, example, if the District matched $15,000 into a teacher's annuity over the course of the teacher's employment, an eligible teacher would receive $30,000, payable over 5 years following the termination of employment. These payments are reported in subsequent years to the IRS.

You ask a number of questions about the effect of Minn. Stat. § 465.72 on contributions and payments under the MAP. That law limits the amount of severance that public employers can pay to employees on separation. "Severance pay provided for an employee leaving employment may not exceed an amount equivalent to one year of pay." Minn. Stat. § 465.72 (2002). Your first three questions all relate to this cap: (1) Whether the School District's contribution for severance pay plus the maximum amount set forth in the MAP can exceed one year's pay for the teacher at the time he or she leaves employment; (2) Whether the maximum amount of the School District's contribution toward the MAP alone can exceed one year of pay; and (3) Whether an eligible employee can be paid the entire lifetime sum provided in the MAP if the payment exceeds the teacher's salary at the time of leaving employment with the District.

To respond to your questions, it is necessary to separate the two different types of payments under the MAP: 1) the School District's matching payments into the employee's annuity; and 2) the sum paid to the employee following separation. The short answer is that the matching payments would likely not be considered severance, while the payment of the balance would be considered severance subject to statutory limits.

Minn. Stat. § 465.72 provides:

> [A] county, city, township, school district or other governmental subdivision may pay severance pay to its employees and adopt rules for the payment of severance pay to an employee who leaves employment.

Minn. Stat. § 465.72 contains no definition of "severance pay." *See Beaulieu v. I.S.D. No. 624,* 533 N.W.2d 393, 396 n.3 (Minn. 1995). Severance pay is usually understood to mean payments due to an employee on termination. "Severance pay by definition means compensation given to an employee upon the severance of his employment relationship with his employer." *Feola v. Valmont Industries, Inc.,* 304 N.W.2d 377 (Neb. 1981). *Black's Law Dictionary* defines severance pay as "money (apart from back wages or salary) paid by an employer to a dismissed employee .... also termed separation pay; dismissal compensation." *Black's Law Dictionary* (7th ed. 1999). *See also Carlson v. Augsburg College,* 604 N.W.2d 392 (Minn. Ct. App. 2000) (sum of money, usually based on length of employment, for which an employee is eligible on termination; citing *American Heritage Dictionary*).

In answer to your questions, first, the matching payments to an employee's annuity contract do not appear to be severance under Minn. Stat. § 465.72. Minn. Stat. § 356.24 provides specific statutory authority to establish matching annuity programs. Under this section, matching annuity programs are considered supplemental pension programs. These matching payments are made to the teacher's own annuity contract while the teacher is still employed by the district. The teachers own their annuity contracts, and, by law, their rights in the annuities cannot be forfeited. *See* Minn. Stat. § 123B.02, subd. 15 (2002) and § 471.615 (2002). These rights under the annuity program are independent from the employee's termination of employment. These payments, therefore, would not meet the definition of severance.

By contrast, the payment of the balance of the "guaranteed sum" following the termination of employment seems to be "severance" and, therefore, subject to the limits of Minn. Stat. § 465.72 (2002). This payment is made to eligible employees only on their separation from employment. As you describe the program, no rights vest until the teacher leaves employment. These payments seem to fall within the classic definition of severance. *See* Op. Atty. Gen. 175, July 25, 1984.

Further, if the payments on retirement are not considered severance under Minn. Stat. § 465.72, it is questionable whether the School District has authority under any other statute to make the payments. Minn. Stat. § 356.24 prohibits the use of public funds to pay for supplemental pensions or deferred compensation to public employees, unless specifically permitted. The match for the employee's 403(b) annuity contract is a specific exception in § 356.24; payment of a "guaranteed sum," not used as an annuity match, is not included in the list of exceptions to the prohibition under Minn. Stat. § 356.24. Thus, it appears that § 465.72 is the only authority for these payments.

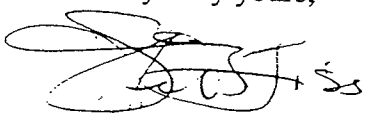
A 1997 opinion from the Office of the Attorney General supports this view. Op. Atty. Gen. 161b-12, August 4, 1997. The opinion reviewed two different retirement programs of a public employer. The opinion first notes that an employer match of up to $2000 per year under a qualified plan would be a permissible supplement pension under Minn. Stat. § 356.24. The opinion then compared a separate deferred compensation that did not qualify under Minn. Stat. § 356.24. The opinion concluded that, if, under this second plan, the rights vested in the employee before termination, the plan would be considered compensation rather than severance pay and, therefore, an impermissible supplemental pension plan barred by Minn. Stat. § 356.24. If, on the other hand, the employee's rights to the deferred compensation would not vest until the employment terminates, the deferred compensation plan might qualify as severance under Minn. Stat. § 465.72. If the deferred compensation plan is severance pay, it would be subject to the limits for Minn. Stat. § 465.72.

In sum, it appears that, for the purposes of the MAP as you describe the plan, the matching payments made to employee annuity contracts would not be considered severance pay under Minn. Stat. § 465.72. By contrast, the payment due on separation of the remaining balance of the guaranteed sum appears to be subject to the limits of Minn. Stat. § 465.72.

Your final questions relate to the interpretation of the MAP itself. This Office is unable to render an opinion as to the interpretation of MAP provisions. The Office has historically declined to interpret contracts, ordinances or resolutions of local government units since we believe that the most appropriate persons to interpret those documents are the attorneys representing the local government units.

Again, thank you for your letter. I hope this analysis is helpful to you in advising the District.

Very truly yours,



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July 1, 2003

John K. Carlson
Pine County Attorney
315 Main Street South, Suite 8
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Dear Mr. Carlson:

Thank you for your letter of April 22, 2003.

BACKGROUND

The Pine County Board of Commissioners (County Board) is planning for construction of a new county courthouse, or renovation of the current courthouse in Pine City, the County Seat. In connection with that planning process, the County Board has requested for clarification of the legal requirements for location of court facilities and various county offices in a county seat. In furtherance of that inquiry, you have sought the opinion of the Attorney General on the following questions:

1. Is the County Board required to furnish a suitable District Court facility at the county seat?

2. Can the County Board close the District Court facility at the County Seat and construct a new facility at another location outside the County Seat if agreed to by the District Court?

3. Can the County Board provide a District Court facility at the County Seat and a second District Court facility at another location outside the County Seat, if agreed to by the District Court?

4. Can the County Board locate a detention facility outside of the County Seat, or can it have such a facility in addition to the county jail, which is required to be at the County Seat?

5. Can the County furnish, and the Sheriff maintain, an office outside of the County Seat or in addition to an office at the County Seat?

6. Can the County provide offices, and may the following officials maintain offices, outside of the county seat as well as the county seat: Auditor, Treasurer, Recorder, Court Administrator of District Court, Assessor and County Attorney.

LAW AND ANALYSIS

First, local units of government, including counties, have only those powers and duties that are prescribed by the legislature or implied as reasonably necessary to carry out those express powers. *See, e.g., Cleveland v. Rice County*, 238 Minn. 180, 56 N.W.2d 641 (1952). In that regard, Minn. Const. Art. VII, § 3 grants the legislature broad authority over the creation of, and granting of powers to, local units of government.

Second, that section also states that:

> A county boundary may not be changed *or county seat transferred* until approved in each county affected by a majority of the voters voting on the question.

(Emphasis added). Minnesota law has historically placed a great deal of importance upon the location of the "county seat."[1] Minn. Stat. ch. 372, sets forth in detail the specific procedures that must be followed in order to move a county seat from one city to another. A county seat is generally considered to be: "A town or city that is the center of government in its county." *The American Heritage Dictionary*, Second College Edition, at p. 33, or "The municipality where a county's principal offices are located." *Black's Law Dictionary* (7th Ed. 1999).

Third, consistent with that proposition, Minnesota Statutes expressly provide that county jails, and offices for most county officials, must be located at the county seat. *See* Minn. Stat. §§ 273.061, subd. 5 (county assessor); 373.05 (courthouse, jail and other necessary buildings); 375.14 (board must provide offices at the county seat for auditor, treasurer, recorder, sheriff and court administrator); 382.04 (auditor, treasurer, county recorder, court administrator, sheriff and court commissioner[2] shall keep office in the county seat.).

Fourth, court facilities are also required to be located at the county seat. Pursuant to Minn. Stat. § 373.05 (2002), the county is required to provide and maintain a "courthouse" at the county seat. By definition, a courthouse is a building which houses courts of law. *See, e.g, American Heritage Dictionary*, Second College Addition, at p. 333. Furthermore, Minn. Stat. § 484.35 (2002) provides that where no fit courthouse is available, the judges may designate a "convenient place at the county seat for temporary use as such." In *Bell v. Jarvis*, 98 Minn. 109, 110, 107 N.W. 547 (1906) the court stated that, at that time:

> [w]e have no statute in this state expressly requiring district courts to sit for the trial of actions or the transaction of other judicial business at the county seat; but

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[1] *See, e.g., Roos v. State*, 6 Minn. 428, Gil 291 (1861) for a historical perspective on the importance of stability in county seat location.

[2] The office of court commissioner was abolished in 1981. *See* Act of June 6, 1981, First Sp. Sess. ch. 4, art. III, § 7, 1981 Minn. Laws 2526, 2527.

> there can be no question that the court is not authorized to hear or determine issues of fact at any other place, except when authorized so to do by statute or consent of the parties. The county seat is the proper place for the transaction of all public.

Minn. Stat. § 487.21, subd. 1 (2002) authorizes county courts by rule to designate several locations within the district where court will be held, but further requires that "regular sessions of the [county] courts shall be held in at least the county seat of each county." Since the district and county courts have been merged into one district court,[3] that requirement would now seem applicable to the district court, at least in those matters within the former "county court" jurisdiction.

Finally, Minn. Stat. § 484.77, which was enacted in 2001, provides in part:

> The county board in each county *shall provide suitable facilities for court purposes at the county seat, or at other locations agreed upon by the district court and the county.* The county shall also be responsible for the costs of renting, maintaining, operating, remodeling, insuring, and renovating those facilities occupied by the court. The county board and the district court must mutually agree upon relocation, renovation, new construction, and remodeling decisions related to court facility needs. The state court administrator shall convene court and county representatives who shall develop written model guidelines for facilities that may be adopted in each county.

(Emphasis added.)

With these principles in mind, we turn to the questions you have presented.

1. In our opinion, the County Board is required to furnish suitable court facilities at the county seat. It has been suggested that Minn. Stat. § 484.77 authorizes a county board, with the concurrence of the district court, to choose to provide district court facilities solely outside the county seat and none within the county seat. We do not agree with that interpretation. As pointed out above, Minn. Stat. §§ 373.05, 484.35, and 487.21 plainly require that court facilities be made available at the county seat. Even if the disjunctive language of section 484.77 could be construed as potentially inconsistent with those other provisions, the rules of statutory constriction require that they be so interpreted that, to the extent possible, all may be given effect, and none be deemed repealed by implication. *See* Minn. Stat. §§ 645.17, 645.26 (2002); *Septran, Inc. v. Ind. Sch. Dist. No. 271,* 555 N.W.2d 915 (Minn. Ct. App. 1996).

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[3] *See*, Minn. Stat. § 487.191 (2002).

It is consistent with all of those sections for the county to provide court facilities at the County Seat whereas to only provide Court facilities outside the County Seat would give no real effect to parts of Minn. Stat. §§ 373.05, 484.35 and 487.21. Therefore, in our view the county is required to furnish suitable court facilities at the County Seat and that court sessions be held there on a regular basis.[4]

2. For the same reason, we answer your second question in the negative.

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[4] We recognize that courts have indicated that they possess "inherent power" to secure the facilities and resources they deem necessary to performance of their judicial functions. *See, e.g., Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973); *In re. Courtroom and Officers of Fifth Branch Circuit Court*, 134 N.W. 490 (Wisc. 1912).

The appropriate circumstances for exercise of such powers is a matter for the courts themselves to determine, and outside the scope of opinions of this Office. However we note that the Minnesota Supreme Court has acknowledged that:

> Inherent judicial power may not be asserted unless constitutional provisions are followed and established and reasonable legislative-administrative procedures are first exhausted. Intergovernmental cooperation remains the best means of resolving financial difficulties in the face of scarce societal resources and differences of opinion regarding judicial procedures.
>
> . . .
>
> When established and reasonable procedures have failed, an inferior court may assert its inherent judicial power by an independent judicial proceeding brought by the judges of such court or other parties aggrieved. Such a proceeding must include a full hearing on the merits in an adversary context before an impartial and disinterested district court
>
> . . . .
>
> The test to be applied in these cases is whether the relief requested by the court or aggrieved party is necessary to the performance of the judicial function as contemplated in our state constitution. The test is not relative needs or judicial wants, but practical necessity in performing the judicial function. The test must be applied with due consideration for equally important executive and legislative functions.

In the Matter of Clerk of Court's Compensation for Lyon County, 308 Minn. 172, 181-82, 241 N.W. 2d, 781, 786 (1976) (footnotes omitted).

3. There is no reason however to conclude that the county seat is the only place in which courts may do their business, and in which court facilities may be located. Whether Minn. Stat. § 484.77 is read conjunctively or disjunctively, it clearly permits counties to provide court facilities at "other locations" approved by the court. In addition, Minn. Stat. § 487.21, expressly authorizes courts to designate multiple locations within the county court district at which regular court sessions may be held. That section provides that, where a city petitions the county board for the holding of court sessions within its own boundaries, the city must agree to provide the facilities therefor at its own expense. In other circumstances, however, it seems implicit that the County may bear that cost. For these reasons, we answer your third question in the affirmative.

4. Pursuant to Minn. Stat. § 373.05, the county board is expressly required to provide a "suitable and sufficient jail" at the county seat. Accordingly, absent some direct contrary or additional statutory authority, the board is not empowered to provide other, or additional, jail facilities.

It should be noted, however, that Minn. Stat. §§ 641.261 - 641.266 (2002) authorizes two or more counties to establish and operate a regional jail in appropriate circumstances. By definition, the regional jail will be outside the county seat of at least one of the cooperating counties. In addition, Minn. Stat. § 641.24 (2002), authorizes a county board to enter into an agreement with the county housing and redevelopment authority or with "any city" within the county whereby the city or authority will construct a jail or other law enforcement facilities for the sheriff and other law enforcement agencies to be leased to the county. Pursuant to that authority, a jail facility potentially could be constructed in a city other than the county seat. Thus, to the extent that the terms of these particular statutory provisions are utilized, we answer your fourth question in the affirmative. Other than these two provisions, however, we have not located any other authority for a county to establish a jail facility outside the county seat.

5. Minn. Stat. § 375.14, requires the county board to provide offices at the county seat for the auditor, treasurer, county recorder, sheriff, and court administrator. Minn. Stat. § 382.04, in turn, unambiguously requires each of the named officers to maintain an office at the county seat. *See State ex rel. Currie v. Weld*, 39 Minn. 426, 40 N.W. 561 (1888) (county register of deeds and auditor were in violation of law by keeping their offices outside county seat). This mandate is consistent with the goal noted above of having a single community in which citizens can transact important county business. It can be argued that these statutes do not prohibit the officials from maintaining additional office facilities elsewhere to provide additional sites where members of the public might choose to deal with county business. However, as noted above, another source of authority would be needed to authorize expenditure of county resources to furnish facilities outside the county seat.

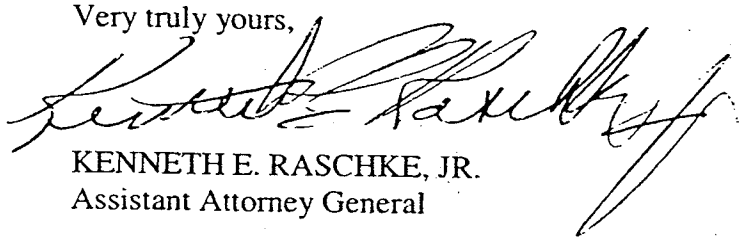
In the case of the sheriff, Minn. Stat. § 641.24 does authorize construction of law enforcement facilities for lease to the county, by any city in the county. Therefore, the sheriff would be permitted to utilize such facilities. We are not aware of any other specific authority for

maintenance of any "office" for the sheriff outside the county seat.[5] Nor are we aware of any provision for the Pine County Court Administrator Auditor, Treasurer, Assessor or Recorder to maintain offices outside the county seat. *Cf.* Op. Atty. Gen. 639-A, September 15, 1952 (no authority for auditors to provide for receipt of absentee ballot applications outside the county seat).

Finally, we have located no law specifying any particular location for offices of the county attorney, or requiring that the county board "provide" such office space. This may be due in part to the fact that, historically, many county attorney positions were part-time, with the county attorney continuing in his or her former private practice while holding public office. The county board is responsible to fix and provide for compensation of the county attorney and for the overall budget of the office. *See* Minn. Stat. § 388.18 (2002). Presumably office space and overhead are matters that are dealt with in the budget process.

I hope these thoughts are helpful to you in advising the County Board.

Very truly yours,



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AG: #869612-v_

[5] It might be noted, however, that many of the duties of the sheriff and deputies must, of necessity, be performed outside the county seat. *See, e.g.*, Minn. Stat. § 375.041 (radio broadcast station and mobile units); 375.46 (road patrols); 387.03 (misc. duties throughout the county). Therefore, in a sense, it could be said that any location throughout the county could potentially be considered a place where the public might interact with the sheriff and his or her personnel.

Counties: Planning and Zoning: Subdivision Regulations: Fees: County may not prevent recording of all land conveyance documents that do not comply with county land use controls and fee requirements. Minn. Stat. §§ 272.12, 272.121, 394.37.

Cass Cty Atty

125a-66

OFFICE OF THE ATTORNEY GENERAL

State of Minnesota

ST. PAUL 55155

MIKE HATCH
ATTORNEY GENERAL

August 12, 2003

Christopher J. Strandlie
Assistant County Attorney
Cass County Attorney's Office
PO Box 3000
303 Minnesota Avenue
Walker, MN 56484-3000

Dear Mr. Strandlie:

Thank you for your correspondence of May 29, 2003.

BACKGROUND

You state that the present practice in Cass County is for a land title document to be submitted for recording to the county auditor/treasurer. The auditor/treasurer determines whether there are delinquent taxes owing and whether the document creates a "split" of an existing parcel. If a parcel split is involved, a "split fee" must also be paid. When current taxes and applicable fees are all paid, the document is referred to the county Environmental Services Department which determines whether the transaction is consistent with Cass County zoning regulations and with state requirements pertaining to sewage treatment systems. If all the foregoing requirements are satisfied, the document is submitted to the county recorder. If the foregoing regulations are not satisfied the document is "rejected" and not recorded. The county board is considering enacting an ordinance that would memorialize the current practice.[1] Members of the local bar have expressed the view that the county has no authority to prevent the recording of a document that is in proper form if taxes have been paid in full. You ask whether the county has authority to prohibit the filing of land title documents in circumstances where county-imposed fees have not been paid or where the transaction represented by the documents is not in compliance with authorized county regulations.

[1] The ordinance would read:

> In addition to the provisions of Minnesota Statutes regulating the subdivision of land and the recording of such subdivision, no subdivision of land within the unincorporated areas of Cass County shall be recorded without compliance with all Cass County ordinances, Board approved procedures, and payment of all Board required fees.

We answer your question in the negative.

LAW AND ANALYSIS

1. HISTORY AND DISCUSSION OF RELEVANT LAWS.

First, it is axiomatic that local units of government, including counties and their officers, have only those powers that are granted by the legislature either expressly or by reasonable implication. *See, e.g., Cleveland v. Rice Co.*, 238 Minn. 180, 56 N.W.2d, 641 (1952).

Second, counties have been delegated substantial authority to impose official controls upon the use and subdivision of land within the county. *See, e.g.,* Minn. Stat. § 394.25 (2002). In addition, state law requires county adoption and enforcement of particular regulations affecting use and subdivisions of property. *See, e.g.*, Minn. Stat. §§ 103F.211-103F.215 (Shore land Development); 115.55 (2002), and Minn. Rules 7080.0305 (regulation of individual sewage treatment systems)."

Counties have also been authorized to employ various mechanisms to enforce compliance with those regulations. *See* Minn. Stat. § 394.37 (2002). Between 1971 and 1974, Minn. Stat. § 394.37, subd. 1 specifically provided that, with certain exceptions, conveyances of property subject to county subdivision regulations could not be filed or recorded absent county approval of any parcel splits that were thereby created. That language stated:

> In a county in which subdivision regulations or controls are in force and have been filed or recorded as provided in section 394.35, no conveyance of land to which the regulations are applicable shall be filed or recorded if the land is described in the conveyance by metes and bounds or by reference to an unapproved registered land survey made after June 4, 1971, or to an unapproved plat made after such regulations have become effective. The foregoing provision does not apply to a conveyance if the land described:
>
> (1) was a separate parcel of record on the date of adoption of subdivision regulations under sections 394.12 to 394-37, or
>
> (2) was the subject of a written agreement to convey entered into prior to such time, or
>
> (3) was a separate parcel of not less than two and one half acres in area and 150 feet in width on June 4, 1971 or is a single parcel of land of not less than five acres and having a width of not less than 300 feet.
>
> In any case in which compliance with the foregoing restrictions will create an unnecessary hardship and failure to comply does not interfere with the purpose of the subdivision regulations, the board may waive such compliance by adoption of

> a resolution to that effect and the conveyance may then be filed or recorded. Any owner or agent of the owner of land who conveys a lot or parcel in violation of the provisions of this subdivision shall forfeit and pay to the county a penalty of not less than $100 for each lot or parcel so conveyed. A county may enjoin such conveyance or may recover such penalty by a civil action in any court of competent jurisdiction.

Minn. Stat. § 394.37, subd. 1 (1971).

That language was, however, deleted in 1974.[2] *See* Act of April 11, 1974, Ch. 571, § 46, 1974 Minn. Laws 1401, 1416.

Following the 1974 amendment, this Office rendered an opinion that, absent the deleted language, counties lacked authority to prevent the filing or recording of land conveyance documents on the basis of non-compliance with county subdivision regulations. *See* Op. Atty. Gen. 125-A-66, December 18, 1974.

In 1977, the legislature added specific language, which is still in place, authorizing counties to require review of conveyance instruments after recording, to determine compliance with county platting and subdivision regulations. That language provides:

> In a county in which subdivision regulations or controls are in force and have been filed or recorded as provided in section 394.35, the board may by ordinance require that a copy of some or all instruments which convey real estate be submitted by the county recorder to the administrative officer as provided in section 394.29, *for review after recording*. The officer shall examine each such instrument to determine whether the proposed conveyance complies with the subdivision and platting regulations of the county. If the conveyance does not comply with regulations, the administrative officer shall give notice by mail of the potential violation to the parties to the conveyance.

Act of May 20, 1977, Ch. 189, , § 1, 1977 Minn. Laws 311. (Emphasis added)

Third, Minnesota law requires certain actions by the county auditor in connection with land title transfers. For example, Minn. Stat. § 272.12 (2002) provides in part:

> When:
>
> (a) a deed or other instrument conveying land,
>
> . . .

[2] A similar provision continues to apply, however, in connection with enforcement of city and town subdivision regulations. *See* Minn. Stat. §§ 462.358, subd. 4b, 272.162 (2002).

> is presented to the county auditor for transfer, the auditor shall ascertain from the records if there be taxes delinquent upon the land described therein, or if it has been sold for taxes.
>
> . . .
>
> If there are taxes delinquent, the auditor shall certify to the same; and *upon payment of such taxes, or in case no taxes are delinquent, shall transfer the land upon the books of the auditor's office, and note upon the instrument, over official signature, the words, "no delinquent taxes and transfer entered,"* or, if the land described has been sold or assigned to an actual purchaser for taxes, the words, "paid by sale of land described within;" and, *unless such statement is made upon such instrument, the county recorder or the registrar of titles shall refuse to receive or record the same.*

(Emphasis added). Minn. Stat. § 272, 121, subd. 1 (2002) provides:

> Except as provided in subdivision 2, if a deed or other instrument conveys a parcel of land that is less than a whole parcel of land as described in the current tax list, the county auditor shall not transfer or divide the land in the auditor's official records, *and the county recorder shall not file and record the instrument, unless the instrument of conveyance contains a certification by the county treasurer that the taxes due in the current tax year for the whole parcel have been paid.* This certification is in addition to the certification for delinquent tax required by section 272.12.

(Emphasis added). Furthermore, Minn. Stat. § 272.16 (2002) provides in part:

> Subdivision 1. **Transfer of specific part**. When any part less than the whole of any parcel of land, as charged in the tax lists, is conveyed, the county auditor shall transfer the same whenever the seller and purchaser agree, in a writing signed by them, or personally appear before the county auditor and agree, upon the amount of the net tax capacity to be transferred therewith. If the seller and purchaser do not so agree, the county auditor shall make a division of the net tax capacity that appears just to the auditor.

Finally, Minn. Stat. § 373.41 (2002) authorizes the county to fix and charge fees not otherwise fixed by law for recording, filing or certification of any document by a county official. As a general matter, government agencies clearly may require the payment of lawful fees prior to or contemporaneously with, the providing of the relevant service. *Cf.* Op. Atty. Gen. 218-R, September 26, 1978 (city determination to allow credit sales at municipal liquor store must be supported by public purposes).

2. ANALYSIS.

As noted above, while counties have substantial authority to impose official controls on land use and subdivision, they do not have unfettered authority in choosing the means of enforcing those regulations. Rather, the several means of enforcement for those controls are expressly set forth in Minn. Stat. § 394.37. Those do not include preventing the recording of documents. To the contrary, the authority to do so was specifically deleted from section 394.37 and replaced with a procedure whereby documents may be examined *after* recording to determine compliance with county land use controls. Where a statute expressly identifies specific objects or circumstances to which it pertains, others are implicitly excluded. *See, e.g., Maytag Co. v. Commissioner of Taxation*, 218 Minn. 460, 17 N.W.2d 37 (1941). Nor do we find any authority in section 272.12 for the county auditor to interfere with filing or recording of documents on the grounds that they do not conform to county land use controls. Section 272.12 states that if the taxes are paid or none are due the auditor "shall transfer the land" on the auditor's books and certify to that fact on the document. Section 272.121 also requires a tax certification regarding any larger parcel from which the new one was separated. Those sections however, contain no authority to withhold the required certifications for reasons unrelated to tax payments. Therefore, in our opinion, the county lacks authority to prevent recording of all land title documents that do not conform to county zoning or subdivision ordinances.

With respect to fees, it is our view that the county may require the payment of permitted fees as a pre-condition of performing services. Where those services are, by statute, required for recording such as the certification of no delinquent taxes on the parcel transferred (Minn. Stat. § 272.12) and on the entire large parcel in the case of transfer of a portion of an existing parcel (Minn. Stat. § 272.121) the county may, in effect preclude filing of documents until such fees have been paid.

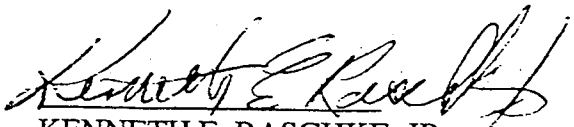
We find no authority, however, for preventing the filing and recording of documents for failure to pay for county services that are not statutorily required as a condition of recording. For example, Minn. Stat. § 272.16 requires a division of net tax capacity among parts of a subdivided parcel, either pursuant to agreement between seller and purchase, or by the county auditor. There appears no statutory requirement that certification of that division be made as a pre-condition for recording. Therefore, while a fee might be imposed for the auditor's services in connection with such apportionment, we do not believe that payment of such a fee may be made a condition of recording.

OPINION

In light of the foregoing, it is our opinion that the proposed ordinance exceeds the authority of the county to prevent recording of land title documents.

Very truly yours,

MIKE HATCH
Attorney General
State of Minnesota



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December 1, 2003

The Honorable Steve Smith
State Representative
Minnesota House of Representatives
2710 Clare Lane
Mound, MN 55364

Dear Representative Smith:

Thank you for your correspondence of October 30, 2003 concerning the legality of certain municipal programs which impose administrative penalties upon persons violating state laws and local ordinances.

FACTS AND BACKGROUND

You provided with your letter examples of city ordinances and explanatory materials from both home-rule and statutory cities describing "administrative offense" procedures established by those cities.

Most of the procedures are similar in several respects:

1. They are intended to provide an "informal, cost-effective and expeditious alternatives" to traditional prosecutions for certain minor offenses.

2. The covered offenses include violations of the state traffic code (Minn. Stat. Ch. 169) and conforming local ordinances, other statutory offenses such as illegal fireworks (Minn. Stat. Ch. 524), disturbing the peace (Minn. Stat. § 609.72) and shoplifting (Minn. Stat. § 609.52), and conduct regulated solely by local ordinances such as curfew violations, failure to mow lawns and alcohol consumption in public parks.

3. They purport to be "voluntary" in that persons charged can elect to be prosecuted under the normal misdemeanor or petty misdemeanor process instead.

4. They include a schedule of monetary penalties for specified offenses. The penalties are often lower than those normally imposed by courts for similar offenses.

5. All money collected as administrative penalties is retained by the city.

6. None apparently provide for reporting any information to other governmental agencies concerning persons "convicted" of, or admitting, violations.

7. Failure to pay the city's administrative penalty results in the city's pursuing a normal misdemeanor or petty misdemeanor prosecution in the courts.

Some of the programs provide alleged offenders a means to challenge the imposition of administrative penalties by way of a hearing conducted by a local official or appointed panel. Others provide that a challenge to the civil penalty will result in the filing of the pertinent misdemeanor or petty misdemeanor charge in court.

You also enclosed information concerning a diversion program employed by one city whereby local peace officers have the option of "holding" citations for certain traffic offenses to give violators an opportunity to complete an eight-hour traffic safety course for which the violator must pay $75. If the violator completes the course within 21 days, the citation is "torn up."

Cities have cited the need for increased revenues, along with frustration over the time and resources required for court prosecutions, and the results achieved thereby, as reasons for creating their own enforcement programs. You note that the State Auditor has recently expressed her views questioning the authority of cities to adopt such procedures.

Based upon this information, you ask the following questions.

1. Is it permissible for a local governmental unit to issue, for an act that would be the equivalent of a misdemeanor, gross misdemeanor, or felony under state law, an administrative citation that provides a penalty substantially below that which would be imposed for a violation of the comparable statute?

2. Does state law preempt county or statutory or home rule charter city ordinances or policies that allow local law enforcement to assess administrative sanctions in lieu of, in addition to, or as an alternative to a citation for a state traffic law violation?

3. Do local administrative procedures and sanctions conflict with state laws intended to punish repeat traffic violators such as Minn. Stat. § 169.89, subd. 1, and § 171.18 (2002)?

4. Does state law preempt county ordinances, statutory city ordinances, or home-rule city ordinances that allow traffic offenders to attend a driver-safety diversion program in lieu of being charged with a petty misdemeanor traffic citation? Are such ordinances or policies in conflict with state law?

5. Do local administrative hearing procedures deny alleged ordinance violators any of their constitutionally protected due process or equal protection rights?

6. Do local administrative hearing procedures violate the principle of separation of powers between the executive branch and the judicial branch by infringing on the district court's original jurisdiction?

Our analysis of these issues is set forth below.

LAW AND ANALYSIS

As a preliminary matter, this Office does not render opinions on hypothetical questions, conduct general reviews of local enactments or proposals to identify possible legal issues or evaluate the constitutionality of legislative enactments. *See* Op. Atty. Gen. 629a, May 9, 1975. Consequently, we are unable to render definitive opinions that fully address the complete range of issues implicit in your questions. We can, however, offer the following comments which we hope will be helpful to the committee in its deliberations.

First, as you probably know, cities, as subdivisions of the state, have only those powers that are expressly granted by statute or charter, or are reasonable and necessary to implementation of such express powers. *See, e.g., County Joe, Inc. v. City of Eagan*, 560 N.W.2d 681 (Minn. 1997).

Second, in the exercise of their general express or implied powers, cities may not establish programs or procedures that are incompatible with state statutes or address areas of the law that have been preempted by state law either expressly or by implication. *See, e.g., LaCrescent Twp v. City of LaCrescent*, 515 N.W.2d 608 (Minn. Ct. app. 1994); *Northwest Residence v. City of Brooklyn Park*, 352 N.W.2d 764 (Minn. Ct. App. 1984). This principle applies notwithstanding the broad powers of self-government generally exercised under home-rule charters. As noted by the Court in *State ex rel. Town of Lowell v. City of Crookston*, 202 Minn. 526, 91 N.W.2d 81 (1958):

> The power conferred upon cities to frame and adopt home rule charters is limited by the provisions that such charter shall always be in harmony with and subject to the constitution and laws of the state.

Id. at 528, 91 N.W.2d at 83.

In general, (a) direct conflict occurs when "the ordinance and the statute contain express or implied terms that are irreconcilable;" (b) more specifically, an ordinance conflicts with state law if it "permits what the statute forbids;" (c) similarly, there is conflict if the ordinance "forbids what the statute *expressly* permits;" and (d) "no conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute."

Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 352, 143 N.W.2d 813, 816-17 (1966) (citations omitted).

In evaluating whether an area of law has been preempted by the legislature, the courts will consider: (1) the subject matter regulated; (2) whether the subject matter is so fully covered by state law that it has become solely a matter of state concern; (3) whether any partial legislation on the subject matter evinces an intent to treat the subject matter as being solely a state concern; and (4) whether the nature of the subject matter is such that local regulation will have an adverse effect on the general state population. *See Mangold Midwest* at 358, 243 N.W.2d 813, 820.

Third, both statutory and charter cities have substantial authority to enact regulatory ordinances, *see, e.g.*, Minn. Stat. § 412.221 (2002), and to fix penalties for violations. *See, e.g.*, Minn. Stat. § 412.231 (2002), which provides:

> The council shall have the power to declare that the violation of any ordinance shall be a penal offense and to prescribe penalties therefore. No such penalty shall exceed a fine of $700 or imprisonment in a city or county jail for a period of 90 days, or both, but in either case the costs of prosecution may be added.

Fourth, the legislature has, however, prescribed in detail the procedures for prosecution of penal offenses. For example, Minn. Stat. § 487.25, subd. 1 (2002) states:

> Subdivision 1. **General**. Except as otherwise provided in sections 487.01 to 487.38 but subject to the provisions of section 480.059 [Supreme Court authorized to promulgate rules governing criminal procedure], pleading, practice, procedure, and forms in actions or proceedings charging violation of a criminal law or a municipal ordinance, charter provision, or rule are governed by the rules of criminal procedure.

(Emphasis added). Subdivision 10 of that section allocates the authority and responsibility for prosecution of various offenses. In general, city ordinance violations, petty misdemeanors, and misdemeanors occurring within a city must be prosecuted by city attorneys, while felonies and most gross misdemeanors must be prosecuted by county attorneys. Minn. Stat. § 487.25, subd. 10 (2002).

With the above principles in mind, we turn your specific questions.

1. Given the extent and detail of legislation addressing statutory criminal offenses and prosecution procedures set forth in Minn. Stat. chs. 169 and 609 through 634, it is clear that the state has preempted the field with respect to the offenses and procedures defined in those statutes. Consequently, while cities are empowered to regulate conduct in areas of local interest and to supplement statutory regulations in many areas, *cf.*, *Hannan v. City of Minneapolis*, 623 N.W.2d 281 (Minn. Ct. App. 2001), they may not, in our view, redefine the nature or level of

criminal offenses as specified by statute or modify statutory procedures for enforcement or penalties for an offense.

Further, as you know, city councils are not normally authorized to direct the conduct of county or state law enforcement officers. It is not consistent with state public policy for a public official to direct or urge that city peace officers not enforce the law of the state to the best of their judgment and ability. In addition, while law enforcement officials and prosecutors exercise substantial discretion in making arrest and charging decisions, those decisions should be made on a case-by-case basis in terms of factors pertaining to the evidence, the culpability of the offender and the nature of the offense rather than, for example, the offender's willingness to make a payment directly to the city.

2. In the specific case of traffic offenses, the legislature has plainly preempted the field of enforcement. Minn. Stat. § 169.022 (2002) provides:

> The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. Local authorities may adopt traffic regulations which are not in conflict with the provisions of this chapter; provided, that when any local ordinance regulating traffic covers the same subject for which a penalty is provided for in this chapter, then the penalty provided for violation of said local ordinance shall be identical with the penalty provided for in this chapter for the same offense.

In *State v. Hoben*, 256 Minn. 436, 98 N.W.2d 813 (1959), the court affirmed the preemptive nature of state statutes in this area follows:

> The fact that the municipality is given authority to adopt such an ordinance does not change the nature and quality of the offense. As we interpret § 169.03, it was the intention of the legislature that the application of its provisions should be uniform throughout the state both as to penalties and procedures, and requires a municipality to utilize state criminal procedure in the prosecution of the act covered by § 169.03. It would be a strange anomaly for the legislature to define a crime, specify punishment therefore, provide that its application shall be uniform throughout the state, and then permit a municipality to prosecute that crime as a civil offense.

Id. at 444, 98 N.W.2d at 819. *See also* Minn. Stat. §§ 169.91 and 169.99 (2002) which specify the procedures to be followed by peace officers in connection with arrest of traffic violators, and the uniform form of traffic ticket, having the effect of a summons and complaint, which must be used by all peace officers. Consequently, while cities are granted specific authority to exercise

certain regulatory control of streets and roads within their boundaries, they are plainly precluded from creating their own enforcement systems inconsistent with those prescribed by statute.

3. Given our response to the second question, it is unnecessary to address whether local administrative enforcement systems conflict with state laws in the particular matter of providing for keeping records of traffic violations. It is likely, however, that the need for uniform and consistent implementation of such programs is one reason for the strong legislative assertion of state preemption in the area of traffic regulation.

4. A number of Minnesota statutes and criminal procedure rules make a provision for pre-trial, or presentencing, "diversion" programs. *See, e.g.* Minn. Stat. §§ 388.24, 401.065 (2002), 628.69, 30.03, Minn. R. Crim. Proc. Rule 27.05. In particular, in the case of a traffic violation, Minn. Stat. § 169.89, subd. 5 authorizes a trial court to require, as part of or in lieu of other penalties, that convicted persons attend a driver improvement clinic. All such programs, however, require that a *trial court* make the determination as to whether attendance at such a clinic is appropriate. We are aware of no express authority for local officials to create a *pretrial* diversion program.

5. For the reasons set forth in Op. Atty. Gen. 629a, May 9, 1975, the Attorney General's Office does not generally address the constitutionality of statutes or governmentally established procedures. Thus, we are unable to determine the constitutional validity of various administrative "hearing procedures" that might be established by cities.

I note, however, based on the materials you submitted, the majority of the local administrative penalty provisions do not appear to provide for any administrative hearing process at all. Rather, they state that persons who contest their liability or refuse to pay the assessed penalty or complete the required training will be charged through the normal judicial channels. It appears that all the programs to which you refer are entirely voluntary in that the accused may withdraw from the process at any time prior to payment of the city penalty. Given the elective nature of these processes, it is likely that the due process rights of the accused are not jeopardized.

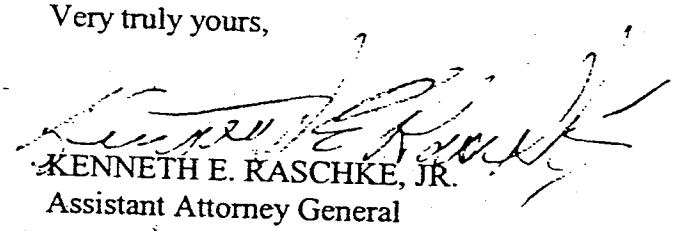
6. Likewise, a completely voluntary process would not appear to offend the separation of powers principles embodied in the constitution or to encroach upon the judicial function. In *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999), the court indicated that evaluation of administrative hearing schemes under the separation of powers doctrine involves consideration of, *inter alia* existence of adequate judicial checks, appealability and voluntariness of entry into the administrative process. *Id.* at 725. Furthermore, as the court pointed out in concluding that the role of the administrative board was not judicial in nature in *Meath v. Harmful Substance Compensation Board*, 550 N.W.2d 275 (1996):

> The claimant makes no election of remedies by bringing a claim to the board; the only purpose of the board's investigation or hearing is to provide the claimant the opportunity to prove eligibility for an award. The board's decision is not only unenforceable but, in fact, decides nothing except whether to make the claimant an offer of compensation. If the board makes no offer or if the claimant considers the offer inadequate, the claimant has the option of turning his or her back on the board's treatment of the claim. The claimant, unencumbered by the board's response, which is inadmissible in a civil action, can then commence a civil action against the person or persons alleged to be responsible for the claimant's injury.

Id. So long as a citizen is not legally bound by the city's action until he or she accepts the city's "offer" by payment of the specified penalty, the procedures described would not likely be found to impermissibility encroach upon judicial functions.

I hope these comments are helpful to you and to the Committee.

Very truly yours,



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December 15, 2003

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111 Hassan Street SE
Hutchinson, MN 55350-2522

Dear Mr. Sebora:

Thank you for your correspondence dated October 8, 2003 requesting an opinion as to the legal status of certain real property located in the City of Hutchinson that is currently being occupied by a Hutchinson elementary school building. I have also received letters dated October 26, 2003 and October 20, 2003 from Steven Cook, a community task force member who provided historical information regarding this issue.

FACTS

A plat of the site of Hutchinson was completed in 1856 by the proprietors of the Hutchinson Townsite Company. This plat depicted two parks now commonly known as North Park and South Park, but did not include any language of dedication. The plat was apparently not recorded until a later date. (Ex. A.1)

William H. Harrington received the patent for certain real property[1] including North Park[2] in 1863, but did not record the patent at that time. (Ex. A.2) You indicate that the Pendergast School was constructed on North Park in 1867. Mr. Harrington conveyed a portion of North Park consisting of a one acre parcel to the Methodist Church in 1871[3], and conveyed a separate one acre parcel, which included the land upon which the Pendergast School had been

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[1] Northwest Quarter of Section 6, Township 116, Range 29, McLeod County, Minnesota.

[2] That part of the Northwest Quarter of Section Six (6) in Township One Hundred and Sixteen (116) North of Range Twenty-nine (29) West, described as follows, to wit: Commencing at a point 16 rods East and 6 rods South of the Northwest Corner of said Section 6, thence extending South 45 rods; thence East 35 rods; thence North 45 rods, and thence West 35 rods to the place of commencement, being now designated as a 'PARK' on the plat of the "Townsite of Hutchinson, South Half."

[3] In the Townsite of Hutchinson 4 rods running North and South and 16 rods running East and West from the Southeast corner of the North Park Platten in connection with said above described Townsite.

constructed, to School District No. 2 in April, 1874.[4] (Ex. A.3) Both of these conveyances were specifically authorized by an act of the Minnesota Legislature approved March 9, 1867. (Ex. A.4)

In October 1874, the City of Hutchinson commenced an action against Mr. Harrington, as well as landowners J.H. Pendergast and H.C. Mansfield, in McLeod County District Court with respect to the public dedication of North Park and South Park. (Ex. A.5) Based on my review of the legal descriptions in the Notice of Lis Pendens and Judgment[5], it appears that this action excluded the portions of North Park which had been conveyed to School District No. 2 and to the Methodist Church. (Ex. A.6)

In March of 1879, the plat of Hutchinson was finally recorded. (Ex. A.7) Mr. Harrington recorded his patent in April of that year. (Ex. A.8) The District Court ruled in May 1879, that North Park and South Park, excluding the school and church properties, had been dedicated for public use by their owners, that the public had accepted the dedication, and that the public held easements in these properties. The District Court enjoined the defendants from "interfering with, interrupting or obstructing the use of the said premises by the public for the purposes for which the same have been dedicated as aforesaid and from occupying said premises or otherwise interfering with the same." (Ex. A.9)

In 1887, Mr. Harrington conveyed an additional one and one-half acre parcel, also part of North Park, to School District No. 2.[6] (Ex. A.10) Based on my review of the legal description, it appears that this property was subject to the 1879 District Court judgment. (Ex. A.11)

You indicate that the properties conveyed to School District No. 2 by Mr. Harrington have been used continuously for school purposes since 1867. You state that the Pendergast School was operated on the one-acre school district site from 1867 until 1936, and the South

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[4] Beginning at a point 16 rods South of the Northeast corner of North Park in the Townsite of Hutchinson; thence South 10 rods; then West 16 rods; then North 10 rods, then East 16 rods to the place of beginning, containing 1 acre.

[5] In the Northwest Quarter (NW1/4) of Section Six (6) of Township one hundred and sixteen (116) North of Range twenty-nine (29) West; Beginning at a point 16 rods East and 6 rods South of the Northwest corner of said Section Six (6); thence South 45 rods; thence East 19 rods to what is known as the Church Lot; thence North 4 rods; thence East 16 rods; thence North 15 rods to what is known as the School House Lot; thence West 16 rods; thence North 10 rods; thence East 16 rods; thence North 16 rods; thence West 35 rods to the place of beginning. (Legal description of South Park omitted)

[6] Beginning at the Southwest corner of the Lot previously deeded by W.H. Harrington to School Dist. No. 2, McLeod County, and running South to North line of Lot deed to M.E. Church Society thence East to Glen Street; thence North to Southeast corner of school lot aforesaid; thence West to point of beginning, being and containing one and one half acre more or less of the Northwest Quarter of Section 6, Township 116, Range 29.

School was located on the larger site from 1889 until 1936. In 1938, Park Elementary was constructed on the combined site, and it is still used today. (Ex. A.12)

Based upon this information, you have asked for an opinion as to the following questions:

Question #1: Without vacating the park, can the School District continue to use the Park Elementary Site for school or educational purposes, as well as make necessary improvements/repairs, and, if so, on what basis and for how long?

Question #2: If the answer to Question #1 is in the affirmative but the school ceases to use the building and quitclaims any interest the school district might have to the City, could the City use the building for cultural or artistic purposes, governmental offices, or as a community center, and may the building be upgraded or remodeled for these purposes?

Question #3: If the City vacates the Park, does the School District own the property free and clear of any other rights and interests or would the property be owned by the Harrington heirs or the City of Hutchinson?

The Attorney General's Office is unable to provide opinions as to factual matters, and these issues involve fact-sensitive determinations. *See* Attorney General Op. 629-a, May 9, 1975. While this Office is not in a position to provide a definitive answer to your questions, I offer the following comments, which I hope you will find helpful.

QUESTION #1

A. PUBLIC DEDICATION.

1. Generally.

In Minnesota, property may either be dedicated to the public by statute under Minnesota Statutes Chapter 505 or by common law. *See Headley v. City of Northfield,* 35 N.W.2d 606, 608 (Minn. 1949). Chapter 505 is derived from territorial statutes first enacted in 1851. *See* Pub. St. 1851 c. 31. Statutory dedication requires, among other things, recording of a plat which depicts the land to be dedicated to the public. *See id.*; *see also* Minn. Stat. § 505.01 (2002). A common law dedication, on the other hand, is based upon "(1) the landowner's intent -- express or implied -- to have his land appropriated and devoted to a public use, and (2) an acceptance of that use by the public." *Daughterty v. Sowers,* 68 N.W.2d 866, 868 (Minn. 1955). Common law dedication is a question of fact. *See id.* at 869. In *Town of Hutchinson v. William H. Harrington, J.H. Pendergast and H.C. Mansfield,* the district court determined that parts of North Park were publicly dedicated, although it did not state whether North Park (excluding the original school and church lands) was dedicated to the public by statute or by common law. (Ex. A.13)

Minn. Stat. § 541.023, subd. 1 (2003). The City of Hutchinson does not appear to have filed any statement with respect to the plat recorded in 1879. (Ex. A.14)

One of the significant exceptions under the Marketable Title Act, however, is that it will not bar the rights of any party in possession. *See* Minn. Stat. § 541.023, subd. 6 (2003). The possession required by the Act "must be of a character which would put a prudent person on inquiry." *Township of Villard v. Hoting,* 442 N.W.2d 826, 829 (Minn. App. 1989). Where adjacent owners challenged the dedication of a public road, the Minnesota Court of Appeals held that the Township was in possession within the meaning of the Marketable Title Act because members of the public consistently used the road and the Township performed regular maintenance, such as grading and snow plowing. *See id.* As mentioned above, it is the policy of the Attorney General's Office not to offer any opinion on factual matters. Thus, this Office cannot provide an opinion as to whether the City of Hutchinson has remained in possession of any portion of the Park Elementary site.

QUESTION #2

If the School District decides to discontinue use of the Park Elementary site and quitclaims the property to the City, the City would then hold fee title to the property. As discussed above, there may or may not be a valid public dedication of this property. If all or part of the Park Elementary site is a dedicated park, it will remain a dedicated park under the City's ownership and may only be used for "park" purposes. *See* 14 Richard R. Powell, *Powell on Real Property* § 84.01[8][a] (2003) (explaining that publicly dedicated land may be held either in fee or in easement). If the site is not a dedicated park, the City may use the property for any purpose consistent with its charter. Note that if the Park Elementary site is not a dedicated park, the City may hold no interest in the property. *See Etzler v. Mondale,* 123 N.W.2d 603, 611 (Minn. 1963) (stating that municipality's easement is extinguished where park is vacated).

Even if the Park Elementary site remains a publicly dedicated park, the City would likely be able to use the existing building for a variety of purposes, including recreation, cultural activities, or a public library or auditorium. *See* 59 Am. Jur. 2d *Parks, Squares and Playgrounds* §§ 23, 24 (2003).

QUESTION #3

If the City vacates North Park, the School District would continue to hold fee title to the Park Elementary site, any interest of the City in the site would be extinguished. It is well settled law in Minnesota that where a park is dedicated to the public, the dedicator and his or her grantees retain the fee title and the municipality receives only an easement in trust for the benefit of the public. *See Etzler,* 123 N.W.2d at 609. When a park is vacated, the dedicator or his or her grantee continues to hold fee title, which is no longer subject to the municipality's easement. *See id.* at 611.

CONCLUSION

As discussed above, the state of title to, and permissible uses of, the Park Elementary site depends upon various fact issues, as to which the Attorney General's Office is not able to render an opinion. Nonetheless, I hope the above comments are helpful to you.

Sincerely,

JILL SCHLICK
Assistant Attorney General

(651) 296-2377

cc: Steven W. Cook
AG: #940673-v2

Exhibit A

1. Letter from Marc A. Sebora, Hutchinson City Attorney, dated October 8, 2003 ("Sebora Letter"); Map of Hutchinson, attached as Exhibit A to Sebora Letter.

2. Sebora Letter; Copy of Abstract of Title attached to Sebora Letter ("Abstract") at entry 1.

3. Sebora Letter; Abstract at entries 9 and 10.

4. Sebora Letter; Act of Legislature attached as Exhibit B to Sebora Letter.

5. Sebora Letter; Abstract at entry 11.

6. Judgment attached to Sebora Letter as Exhibit C ("Judgment"); Abstract at entries 11 and 12.

7. Sebora Letter; Abstract at entry 17.

8. Sebora Letter; Abstract at entry 1.

9. Sebora Letter; Judgment; Abstract at entry 12.

10. Sebora Letter; Abstract at entry 18.

11. Abstract at entries 12 and 18.

12. Sebora Letter; attachment depicting schools located at North Park.

13. Judgment.

14. Abstract.

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
ATTORNEY GENERAL

December 31, 2003

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TELEPHONE: (651) 297-2040

Jennifer J. Hasbargen
Koochiching County Attorney
715 4th Street
International Falls, MN 56649-2438

VIA FACSIMILE
AND U.S. MAIL

Dear Ms. Hasbargen:

Thank you for your correspondence of December 17, 2003 requesting an opinion of the Attorney General with respect to the issue discussed below.

FACTS AND BACKGROUND

In 1992, the Koochiching Board of Commissioners (the "County Board") adopted a "hiring policy" and created a personnel system to develop and implement other needed policies. In 1999, the County Board's personnel committee recommended to the full board a personnel manual which included a "Hiring Policy." The Hiring Policy contains an anti-nepotism provision which states:

> NEPOTISM
>
> Relatives of County Department Heads and their employees may not be employed, promoted or engaged to perform services within the same department where one relative will or may exercise or directly influence the recruitment, employment, salary, fees or performance review of another relative. Relatives shall be defined as spouse, children, siblings, parents, parents of spouse and persons cohabitating with the employee.

Under the Hiring Policy, "department heads" are to first seek authority from the County Board to fill a position. Once the authority is granted, the department head is required to follow prescribed procedures in seeking and selecting candidates for a position. The department head must then come back to inform the Board of who was hired, and to record the paper trail. Prior to a hiring freeze put in place in 2003 due to budget cuts, the Sheriff and public health directors were granted authority from the Board to fill their roster of part-time slots without having to come to the Board each time a position came open. This was done because of the frequency of turnover in the part-time positions. You indicate that it was the intent of the County Board that this blanket authority did not override the other components of the Hiring Policy. Department heads were still required to follow the policy to seek and select candidates and to come back to the Board to inform them of the hire.

You state that Koochiching County has not adopted a county personnel system pursuant to Minn. Stat. § 375.56 *et seq*. Nor is there in place a sheriff's civil service personnel system as authorized by Minn. Stat. § 387.31 *et seq*.

You state that unbeknownst to the County Board, the Koochiching County Sheriff's Office did not follow the Hiring Policy with respect to adding names to the part-time employee list. Individuals who sought part-time employment approached the Sheriff and, if they met the qualifications, were added to the list, with the County Board being notified thereafter of the hire.

In 2003, due to the budget constraints, the County Board initiated a hiring freeze, requiring all new hires to be Board approved, including part-time employees. In the summer of 2003, the Sheriff indicated he was losing certain part-time employees. On July 22, 2003, the Sheriff requested two part-time correctional officers and two part-time deputies, with the County Board authorizing the hires on July 22, 2003.

According to the Sheriff, the part-time deputy positions and correctional positions were posted in the local paper for the required period of time, and only two applications were received for the part-time deputy positions. In September 2003, the County Board was informed of the hire of one part-time deputy and two part-time correctional officers. About the same time, the Sheriff advised the County Coordinator at a Board meeting that he was going to hire his son (the second applicant for the part-time deputy position). The Board was so informed. In response, the Board directed the County Coordinator to advise the Sheriff that the hire would violate the Hiring Policy and that the Board would not approve the hire. The Sheriff nonetheless hired his son and advised the Board of the hire on November 13, 2003.

The County Board maintains that the Sheriff does not have the authority to hire his son, and that they have the authority to prevent the hire as a violation of the nepotism policy. The Board points out that under the Public Employment Labor Relations Act, the Board, as the County's governing body, is defined as the "employer" of all county employees for purposes of collective bargaining, although the views of elected "appointing authorities" must be considered by the Board. The Board believes that this statute, as applied by the court in *General Drivers Local #346 v. Aitkin County Board*, 320 N.W.2d 695 (Minn. 1982), authorizes it to bargain collectively, and contract with employees over such matters as "selection of employees." The Board asserts that a strong argument exists that county policies having to do with the efficiency of the Sheriff's Department were within the scope of their collective bargaining and that under the current collective bargaining agreement (CBA) covering Sheriff's Office employees, the County Board retained the right to promulgate policies such as the Nepotism Policy.

The Sheriff takes the position that his appointments of deputies are not subject to the hiring policies promulgated by the Board. In support of his position, he cites Minn. Stat. § 387.14 (2002) and the case of *Otter Tail County v. Nelson*, (Otter Tail Co. Dist. Ct. No. C7-91-1107, Order filed Dec. 10, 1991) wherein the court held that:

> [A]bsent the adoption by Otter Tail County of a Sheriffs' Civil Service System pursuant to Minn. Stat. Section 387.31 et seq., neither the Personnel Policy nor the Supervisors Manual adopted by the County of Otter Tail constrain County Sheriff Gary A. Nelson with regard to his selection of [his son as] a deputy sheriff.

Based upon this background, you seek an opinion of this Office as to whether the County Board is empowered to enforce its Nepotism Policy to prevent the elected Sheriff from hiring his son as a part-time sheriff's deputy.

Subject to the qualifications discussed below, we answer your question in the negative.

LAW AND ANALYSIS

First, Minn. Stat. § 387.14 provides:

> The county board shall determine the number of permanent full time deputies and other employees and fix the compensation for each position. The county board shall also budget for special deputies, jailers, matrons, bailiffs and other temporary employees and shall fix their rates of compensation. The sheriff shall appoint in writing the deputies and other employees, for whose acts the sheriff shall be responsible and whom the sheriff may remove at pleasure. Before entering upon official duties, the oath and appointment of each shall be filed with the county recorder.

Under this language, the county board is authorized to fix the number of the sheriff's employees and fix their compensation, but the power to appoint and dismiss deputies is expressly granted to the sheriff personally.

Second, this express authority may be superseded by other statutory mechanisms. One such mechanism is the adoption of a civil service merit system pursuant to Minn. Stat. §§ 375.56, *et seq.* (for county personnel generally), or 387.131, *et seq.* (for the sheriff's office specifically). You have stated, however, that there is no civil service system in place in Koochiching County applicable to deputy sheriffs. As noted by the district court in *County of Otter Tail v. Nelson*, the court in *Gramke v. Cass Co.*, 453 N.W.2d 22 (Minn. 1990), while acknowledging the county board's authority to supercede the plenary power of the sheriff to appoint deputies through a civil service system, went on to state:

> Nevertheless, in the absence of these restraints on the sheriff's power of appointment, the sheriff retains an absolute common law right to freely appoint deputy sheriffs.

Id. at 26.

Third, while the court in *General Drivers* held that, notwithstanding the lack of a civil service system, the county board, as the "employer" for purposes of negotiating a collective bargaining agreement with county employees, could contract for a "cause only" discharge procedure notwithstanding the sheriff's statutory authority to discharge deputies at pleasure, the court also stated:

> [W]here the deputy sheriff is not a veteran, where there is no sheriff's civil service system, and where neither the county board nor the sheriff has entered into a CBA pursuant to PELRA. . . . only Minn. Stat. § 387.14 (1980) applies, giving the sheriff sole discretion over the discharge of his deputies.

320 N.W.2d at 699.

In other words, the more authority of a county board to contract for certain terms and conditions of employment which differ from the sheriff's statutory prerogatives does not, in itself, permit the board to supersede the sheriff's authority in the absence of such contractual provisions. Minn. Stat. § 179A.03, subd. 15 (2002) also states:

> Nothing in this subdivision diminishes the authority granted pursuant to law to an appointing authority with respect to the selection, direction, discipline, or discharge of an individual employee if this action is consistent with general procedures and standards relating to selection, direction, discipline, or discharge which are the subject of an agreement entered into under sections 179A.01 to 179A.25.

Therefore, if the appointment of the Sheriff's son as deputy does not contravene any provisions of a CBA entered into between the County Board and the exclusive representative of the sheriff's employees, it is within the statutory power of the Sheriff to do so.

Fourth, you state that a strong argument exists that county policies such as the Nepotism Policy were "within the scope of the collective bargaining agreement." As a general matter, for reasons set forth in Op. Atty. Gen. 629a, May 9, 1975, this Office does not undertake to construe contracts of local units of government, including collective bargaining agreements. Furthermore, we have not been supplied a copy of the CBA, so we are not in a position to say whether the proposed appointment contravenes any term of the agreement.[1] The materials do quote from one provision of the CBA captioned "Vested Rights of Management" which provides as follows:

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[1] While we are aware of no Minnesota case in point, it appears that application of a nepotism policy might, in some circumstances, be found to be an appropriate matter for collective bargaining. *See, e.g., School Dist. of Drummond v. Wisconsin Emp. Rel. Comm'n*, 120 Wis.2d 1, 352 N.W.2d 662 (1984).

> The County shall have the exclusive right to determine the hours of employment and length of the work week and to make changes in the detail of the employment of the various employees from time to time as it deems necessary for the efficient operation of the Law Enforcement Department and the Union and the Members agree to cooperate with the Board and/or its representative in all respects to promote its efficient operation of the Law Enforcement Department.

That provision is consistent with Minn. Stat. § 179A.07, subd.1 which provides, in part:

> Subdivision 1. **Inherent managerial policy.** A public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, *selection of personnel*, and direction and the number of personnel.

(Emphasis added.) You state that under the above contract language, the Board arguably "retained the right" to promulgate such rules as the Nepotism Policy. However, the above language contracts for nothing, promises nothing and requires nothing from the County in terms of the exercise of managerial judgment. Thus, it could hardly be said to be an enforceable contract term at variance with the Sheriff's statutory appointment authority. Furthermore, the County Board could not, by declining to negotiate management prerogatives, "retain" any inherent authority over appointment of deputy sheriffs because the Board had no such inherent authority in the first instance. Rather, the authority resided in the sheriff pursuant to section 387.14.

For the foregoing reasons, subject to any additional provisions of the CBA that may support a contrary result, it does not appear that the County Board may enforce its Nepotism Policy to prevent the Sheriff's appointment of his son as deputy.

The Board has also expressed concern over the sheriff's personal involvement in the hiring of his son. Insufficient facts have been presented to enable us to address this issue in any depth but do offer the following principles for consideration.

First, Minn. Stat. § 387.14 makes it the responsibility of the county sheriff to appoint deputies. Aside from the statutory mechanisms discussed above, there appears no authority for delegation of that authority or responsibility elsewhere.

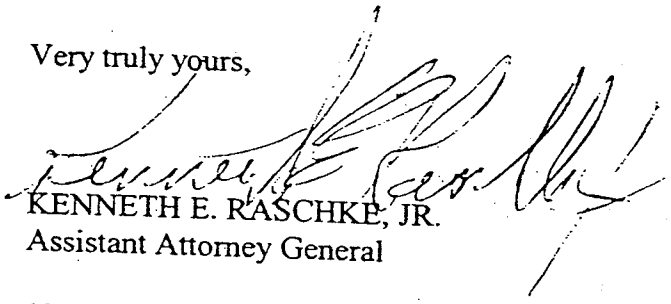
Second, if the Sheriff has a personal financial interest in the employment of his son, the appointment could be found to be a violation of Minn. Stat. §§ 382.18 and 471.87 (2000). If the prohibited interest is present, the Sheriff's voluntary recusal from the hiring process would not, in any event, avoid the violations. *See, e.g.*, Op. Atty. Gen. 90a, December 29, 1958 (City could

not purchase property from council member even though council member did not vote on the transaction). The prohibitions might be avoided, however, if one of the exceptions contained in Minn. Stat. § 471.88 (2002) were invoked by unanimous vote of the County Board. *See, e.g.*, Minn. Stat. § 471.88, subd. 5 (contracts not requiring competitive bids).

Third, if the sheriff has no personal financial interest in employment of his son, however, the above statutory prohibitions would not apply. *Cf.* Op. Atty. Gen. 90a, December 29, 1958 (Village may purchase property from emancipated son of council member). Determination of whether the sheriff has a personal financial interest in his son's employment is a matter of fact outside the scope of Attorney General's opinions. *See* Op. Atty. Gen. 629a, May 9, 1975. I note that nothing in the material presented suggests such an interest.

I hope the foregoing discussion is helpful to you in advising the County Board and Sheriff.

Very truly yours,



KENNETH E. RASCHKE, JR.
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STATE OF MINNESOTA

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February 12, 2004

Morris A. Grover
Attorney at Law
6340 E. Lake Carlos Dr. NE
Carlos, MN 56319

Dear Mr. Grover:

Thank you for your correspondence of January 12, 2004 concerning sanitary sewer district bonding.

FACTS

You state that the Villard Lakes Area Sanitary District (The District), which is organized pursuant to Minn. Stat. §§ 115.18-115.37, is planning to construct a sewage collection and treatment system. In connection with that project, the District proposes to sell bonds to be repaid one-half from assessments against benefitted properties and one-half from user fees.

You point out an apparent inconsistency in the statutes that may apply to such bonding. Minn. Stat. § 115.34, subd. 2 (2002) provides:

> The [sanitary district] board may authorize the issuance of bonds or obligations of the district to provide funds for the construction, improvement, or acquisition of any system, works, or facilities for any district purpose, or for refunding any prior bonds or obligations issued for any such purpose, and may pledge the full faith and credit of the district or the proceeds of tax levies or assessments or service, use, or rental charges, or any combination thereof, to the payment of such bonds or obligations and interest thereon or expenses incident thereto. *An election or vote of the people of the district shall be required to authorize the issuance of any such bonds or obligations.* Except as otherwise provided in sections 115.18 to 115.37, the forms and procedures for issuing and selling bonds and provisions for payment thereof shall comply with the provisions of chapter 475, as now in force or hereafter amended.

(Emphasis added). On the other hand, Minn. Stat. § 115.46, subd. 1 (2002) provides in part:

> *Any taxes, special assessments, levied or to be levied, and any bonds or other evidences of indebtedness issued or to be issued for the construction, installation, maintenance, or operation by a municipality of any disposal system or part thereof, shall not be subject to any limitation* and shall be excluded in computing amounts subject to any limitation on tax levies, special assessments, bonded indebtedness or other indebtedness and *the governing or managing body and the proper officers of the municipality concerned shall have the power and, to comply with any order of the [pollution control] agency, it shall be their duty to levy such taxes and special assessments and issue such bonds and take such other lawful actions as may be appropriate and necessary to provide funds to meet the cost of such construction or work, notwithstanding any such limit and without any election or referendum therefore.*

(Emphasis added). "Municipality" is defined by Minn. Stat. § 115.41, subd. 6 (2002) to include a sanitary district. In light of this apparent inconsistency, you seek the opinion of this Office as to whether the district may authorize and sell the described bonds without an election.

ANALYSIS

As you point out, Minn. Stat. § 115.34, subd. 2 authorizes the sale of bonds for constructions, improvement or acquisition of disposal systems and payment of such bonds by any combination of taxes, assessments and service charges. That statute, however, expressly requires an election to authorize the issuance of "any such bonds."

However, Minn. Stat. § 115.46 deals with funding the construction of waste disposal systems and permits the sale of bonds by a district as necessary to meet the costs of "such construction or work. . . without any election or referendum therefore." It could be argued that "such construction" refers only to that "needed to comply with any order of the agency." Such a limited reading is reinforced somewhat by the language that follows the referendum exemption.

> A recital in any bond, tax levy, or assessment that the same is issued or made *for the purposes of a disposal system or any part thereof ordered by the agency* and is not subject to any provisions of law prescribing limits or requiring an election or referendum therefore shall be prima facie evidence thereof and that all requirements of law relating thereto have been complied with."

(Emphasis added). However, a closer reading of the structure of the first sentence of the subdivision indicates that the clause "to comply with any order of the agency," does not condition the *power* of the municipality to issue bonds. Rather, it defines the *duty* to do so. Consequently, the authority to issue bonds under that subdivision for a sewage treatment facility

does not appear to be limited to circumstances involving enforcement action by the pollution control agency. That reading is consistent with the last sentence in the subdivision which states:

> In any suit, action, or proceedings involving the validity or enforceability of any bonds of a municipality or the security therefore, any such bond reciting in substance that it has been issued by the municipality *to aid in financing a sewage disposal system or part thereof,* shall be conclusively deemed to have been issued for such purpose, and in compliance with all requirements of the law relating thereto.

(Emphasis added) Thus, the section 115.37 referendum requirement seems irreconcilable with the authority expressly granted in section 115.46.

Minn. Stat. § 645.26, subd. 1 (2002) provides that when two statutes cannot be reconciled, any "special" provisions are to control over the more general ones, absent manifest legislative intent to the contrary. In the instant case, however, both provisions appear similarly specific in dealing directly with the necessity of an election to authorize bonds for sewage disposal systems.[1]

Minn. Stat. § 645.26, subd. 4 (2002) provides that in such a case the statute enacted at the later legislative session shall prevail. The provisions of section 115.34, subd. 2 pertaining to bond authorization were enacted in 1961, and have not been amended. *See* 1961 Minn. Laws, Ex. Sess Ch. 20, § 20. Section 115.46 was enacted in 1963 Minn. Laws ch. 874, § 8, and has undergone no substantive amendments. Accordingly, Section 115.46 appears to prevail over Section 115.34, subd. 2 when applying this principle.

In addition, Minn. Stat. § 115.30 grants a sanitary district general authority to exercise powers comparable to those of statutory cities in carrying out district functions. Such statutory city powers include those contained in Minn. Stat. § 444.075, subd. 2 (2002) providing generally for the financing of waterworks and sewer systems, and Minn. Stat. § 429.091, which addresses specifically the financing of such facilities with special assessments. Subdivision 3 of the latter section specifies that an election is required "if less than 20 percent of the cost is to be assessed against benefitted property." Conversely, then, an election would not be required if more than 20 percent of the cost is to be assessed against benefited property.

For the foregoing reasons, it does not appear that an election is required for the District to issue bonds to fund a sewage collection and treatment system to be repaid equally with special assessments and user fees.

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[1] Section 115.34, subd. 2 might, however, be considered slightly broader in application inasmuch as it provides for funding facilities for "any district purpose," while section 115.46 deals only with funding for a "disposal system."

I hope this analysis is helpful to you in advising the district.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

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February 25, 2004

Corrine H. Thomson
Kennedy & Graven
470 Pillsbury Center
200 South Sixth Street
Minneapolis, MN55402

Dear Ms. Thomson:

Thank you for your correspondence of December 23, 2003 concerning imposition of franchise fees by the City of Richfield upon gas and electric companies distributing utility services in the City.

FACTS AND BACKGROUND

You state that you are the attorney for the City of Richfield. You state that the City of Richfield has granted franchises to Northern States Power d/b/a Xcel Energy for electric service within the City and to CenterPoint Energy Minnegasco for gas service. The City has granted these franchises and adopted franchise ordinances pursuant to its authority under Minn. Stat. §§ 300.03 and 216B.36. Each franchise provides that the City may impose a franchise fee during the term of the franchise ordinance. The franchise requires that the fee be set forth in a separate ordinance. Both Xcel and Minnegasco have agreed to a franchise fee design (a monthly meter fee of equal amount by customer class) and the total fee amount (approximately 2.8% of gross operating revenues from utility operations within the City). The City and other Minnesota cities requiring similar franchise fees have historically relied on two statutory provisions for authority to impose the franchise fee ordinance at issue. Section 216B.36 provides, in relevant part:

> Any public utility furnishing the utility services enumerated in Section 216B.02 or occupying streets, highways, or other public property within a public municipality may be required to obtain a license, permit, right or franchise in accordance with the terms, conditions, and limitations of regulatory acts of the municipality, including the placing of distribution lines and facilities underground.
>
> *Under the license, permit, right, or franchise, the utility may be obligated by any municipality to pay to the municipality fees to raise revenue or defray increased municipal costs accruing as a result of utility operations, or both. The fee may include but is not limited to a sum of money based upon gross operating revenues or gross earnings from its operations in the municipality* so long as the public utility shall continue to operate in the municipality . . . (Emphasis added.)

Section 300.03 similarly provides, in relevant part:

> A corporation may be organized to construct, acquire, maintain, or operate internal improvements . . . or to furnish power for public use, and any work for supplying the public, by whatever means, with . . . light, heat, or power . . . *no corporation* formed for these purposes *may construct, maintain, or operate . . . a . . . conduit . . . in or upon a street, alley, or other public ground of a city, without first obtaining from the city a franchise conferring this right and compensating the city for it.* (Emphasis added.)

A long-time City resident and attorney has questioned the City's authority to establish a franchise fee that exceeds the City's cost of regulating the utility's operation within the City limits. He has cited the case of *Country Joe, Inc. v. City of Eagan,* 560 N.W.2d 681 (Minn. 1997). In *Country Joe,* the Minnesota Supreme Court held that the City of Eagan lacked the authority to charge in connection with issuance of building permits a road connection fee amount that raised revenue for street or other purposes, and that absent such authority, a city regulatory fee that exceeded the cost associated with the applicable regulations was an illegal tax. The case did not involve a public utility or Minn. Stat. § 216B.36. The resident's position is that, in light of the *Country Joe* case, the Section 216B.36 language involving the right to "raise revenues or defray costs" is limited to an amount approximating the costs to the City resulting from the utility's operations.

Accordingly, the city council has directed you to seek the opinion of this Office on the following questions:

1. Whether sections 216B.36 and 300.03, or either or both, allow the City to establish a gas and electric franchise fee that generates revenues in excess of the cost to the City of regulating the franchised utility's operations in the City.

2. Whether the *Country Joe* decisions limits franchise fee rates authorized by section 216B.36 and/or section 300.03 to the cost to the City of regulating the franchised utility's operations in the City.

LAW AND ANALYSIS

First, while Minn. Stat. § 300.03 (2002) simply confirms the requirement that utilities obtain a franchise from the City, Minn. Stat. § 216B.36 (2002) expressly authorizes cities to require the payment by gas and electric companies of franchise fees, either "to raise revenue *or* defray increased municipal costs. . . *or both.*" (Emphasis added.)

Second, as a general matter, words used in statutes should be construed according to their common and approved usage. Minn. Stat. § 645.08 (2002). The term "revenue" is normally understood to refer to any income available to a unit of government for payment of general expenses. *Blacks Law Dictionary* (7th Ed. 1999); *The American Heritage and College Dictionary* (3rd Ed. 2000). The word "or" is normally read in the disjunctive. *See, e.g., State v. Loge*, 608 N.W.2d 152 (Minn. 2000). Therefore, the plain wording of section 216B.36 does not limit the imposition of franchise fees to amounts necessary to reimburse the city for its regulatory costs, but permits the collection of revenue to be used for other purposes as well.

Third, rules of statutory construction also require that every law be construed if possible to give effect to all its provisions. *See* Minn. Stat. § 645.16 (2002). If section 216B.36 were construed to limit franchise fees to amounts needed to reimburse the City for added expenses, the terms "raise revenue" and "both" would be rendered meaningless.

Therefore, in our view cities are statutorily authorized to impose franchise fees in amounts that exceed the City's costs of regulating franchised utility operations. This conclusion is further supported by the saving clause language in section 216B.36 which provides for a city to levy an equivalent exercise tax if the section was determined by a court to improperly abrogate previously existing franchise fee agreements, and which expressly exempts such levies from statutory limits on local taxes, including that contained in Minn. Stat. § 477A.016.[1]

Fourth, the fact that section 216B.36 provides for the exercise of certain municipal regulatory powers over utility companies does not diminish the revenue raising authorization also present in that section. As pointed out by the court in *Northern States Power v. City of Oakdale*, 588 N.W.2d 534, 542 (Minn. Ct. App. 1999).

> SP's argument here assumes that the statute cannot be read to reserve both franchise power and some police powers. The portion of the statute involving collection of fees states:
>
> Under the license, permit, right, or franchise, the utility may be obligated by any municipality to pay to the municipality fees to raise revenue or defray increased municipal costs accruing as a result of utility operations, or both.

---

[1] That section provides:

> No county, city, town or other taxing authority shall increase a present tax or impose a new tax on sales or income.

Minn. Stat. § 216B.36. Clearly, the statute can be read to allow for a revenue-generating fee from a franchise and a separate fee for a permit to defray administrative costs.

Also Cf., Investment Company Inst. v. Hatch, 477 N.W.2d 747 (Minn. Ct. App. 1991) (statute providing for security registration fee could be construed as permissible revenue raising provision).

Fifth, the *Country Joe* decision was based upon the court's determination that the City of Eagan lacked statutory authority to impose a revenue-generating road unit connection charge as a condition to the issuance of building permits. There was no express statutory grant of revenue-generating power, and the court declined to imply such authority from the city's broad planning and zoning powers under Minn. Stat. § 462.351, *et seq*. The court noted that regulatory and license charges *per se* must generally be limited to amounts intended to cover costs of regulation and not be used for rising of revenue. *Id.* at 686. Fees imposed solely under general regulatory powers have been consistently struck down when they have been employed as unauthorized revenue measures. *See, e.g., State v. Labo's Direct Serv.*, 232 Minn. 175, 44 N.W.2d 823 (1950), *Barron v. City of Minneapolis,* 212 Minn. 566, 4 N.W.2d 622 (1942).

Sixth, the court's analysis in *Country Joe* and similar cases is not applicable to the instant issue. As noted above, Minn. Stat. § 216B.36 provides express statutory authority for cities to impose franchise fees for revenue raising as well as for cost recovery. Consequently, there is no need to determine whether revenue raising authority might be inferred from some more general grant of power.

For the foregoing reasons it is our opinion that cities are statutorily authorized to establish reasonable gas and electric franchise fees that generate revenues in excess of the City's regulatory costs. We express no opinion, however, concerning the reasonableness or propriety of any specific fee structure since such a determination would be outside the normal scope of opinions of this Office. *See* Op. Atty. Gen. 629a, May 9, 1975.

I hope this analysis is helpful to you in advising the City.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

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AG: #987779-v1

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March 10, 2004

Curtis D. Smith
Moss & Barnett
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90 South Seventh Street
Minneapolis, Minnesota 55402-4129

Dear Mr. Smith:

Thank you for your correspondence of September 23, 2003 and the additional information you provided on January 29, 2004.

FACTS AND BACKGROUND

You state that the Minneapolis Teachers Retirement Fund Association ("MTRFA"), which was created as a non-profit corporation in 1909, is governed by Minn. Stat. Ch. 354A and its restated Articles of Incorporation adopted on July 19, 1989 ("Restated Articles"). According to a study performed by the Legislative Commissioner on Pensions and Retirement, as of the end of fiscal year 2002, the MTRFA was substantially under-funded based upon current statutory benefit provisions and contribution rates.[1] You have indicated that it is expected that the gap

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[1] Minn. Stat. § 354A.12, subd. 1 (2002) provides:

> Subdivision 1. Employee contributions. The contribution required to be paid by each member of a teachers retirement fund association *shall not be less than the percentage of total salary specified below* for the applicable association and program:
>
> . . .
>
> Minneapolis Teachers Retirement Association
> basic program 8.5 percent
> coordinated program 5.5 percent
>
> . . .

(Emphasis added.) It appears that the specific employee contribution rates are intended to be fixed by the Association itself. Art. 18, § 18.1 of the Restated Articles fixes the rate of contributions by basic members at the statutory minimum of 8.5 percent, which rate became

(Footnote Continued on Next Page)

between fund assets and potential liabilities will continue to widen in the future as payments for mandated benefits exceed contributions.

Minn. Stat. § 354A.021, subd. 3 (2002) requires that all assets of the association other than those used for a tax shelter annuity plan, be placed in a "special retirement fund" which may only be used for payment of retirement benefits and authorized expenses.

Minn. Stat. § 354A.28 (2002) requires creation of an "annuity reserve fund" which consists of:

> "Money representing the actuarially determined required reserves for various retirement annuities and benefits payable by the Minneapolis Teachers Retirement Fund Association."

Id. subd. 3.

Subdivision 6 of that section provides:

> No later than the last business day of the month in which the benefit payment begins, the Board of Trustees of the Minneapolis Teachers Retirement Fund Association shall determine the reserves to be allocated to the respective annuity reserve fund in the following manner:
>
> (1) the present value of the benefit payable to the annuitant or benefit recipient must be determined using the postretirement earnings assumptions specified for the first class city teachers retirement funds in section 356.215, and the mortality table applicable to the fund; and
>
> (2) the amount determined in clause (1) must be multiplied by the funding ratio of the teachers retirement fund association determined for the previous fiscal year end, and the product must be identified as the amount allocated to the annuity reserve fund.

You state that as a result of the under-funded status of the MTRFA, all of the MTRFA assets have been allocated to the annuity reserve fund pursuant to the requirements of Section 359A.28 (2002).

(Footnote Continued From Previous Page)
effective on July 1, 1976. We have not located a specific contribution rate for coordinated members in the Restated Articles.

Minn. Stat. § 354A.37 (2002) provides, *inter alia*, that a teacher who stops teaching in the district is entitled to a refund of all of the teacher's employee contributions plus six percent interest compounded annually.[2] You believe that in the present circumstances, the requirement to pay refunds conflicts with the requirement to allocate all of the MTRFA's assets to the annuity reserve fund.

You also refer to Minn. Stat. § 354A.09 (2002) which provides:

> In the event that the assets of the special retirement fund of a teachers retirement fund association are not sufficient to pay annuities and other retirement benefits in full as they come due in any particular year, the amount of special retirement fund assets available for payment shall be prorated among those annuitants and beneficiaries entitled to receive annuities and other retirement benefits.

Based on this background you ask the following questions:

1. Under the proration statute, Minn. Stat. § 354A.09, and its companion provision in the MTRFA Articles, you question when proration should commence and how it should be accomplished. For example, you question whether the MTRFA Board should wait until there are insufficient assets to pay the benefits and other obligations due in a particular month to being the proration process. You also inquire whether the MTRFA Board should start the proration process now, and if so, how it should it be implemented.

2. You also ask whether the MTRFA Board should pay refunds out of funds allocated to the annuity reserve fund or should the Board refuse to make any refunds to withdrawing members on the grounds that all of its assets have been allocated to the annuity reserve fund. You inquire whether the MTRFA Board may authorize payment of refunds from assets allocated to the annuity reserve fund without violating the rights of the retired members and whether the MTRFA Board may prorate refunds under Minn. Stat. § 354A.09.

LAW AND ANALYSIS

First, the plain language of Minn. Stat. § 354A.09 (2002) and section 10.4 of the Restated Articles states that special fund assets are to be prorated among those entitled to receive annuities and other retirement benefits when "assets of the special retirement fund are not sufficient to pay

---

[2] That section applies specifically to "coordinated members" of the MTRFA. A similar provision applicable to basic members is contained in Art. 18, § 18.4 of the Restated Articles.

[those benefits] as they come due *in any particular year*." (Emphasis added.)[3] Thus, it seems clear that proration should only take place in a year when the MTRFA determines that benefit payments actually due to be paid in that year cannot be made from fund assets. When statutory language is clear and unambiguous, it must be given effect in accordance with its plain meaning. *See* Minn. Stat. § 645.16 (2002). *Erickson v. Fullerton*, 619 N.W.2D 204, 206 (Minn. Ct. App. 2000).

Second, the facts you have provided do not indicate that the fund assets are insufficient to meet obligations that will be payable in the current year. Thus, there appears to be no basis upon which to conclude that the MTRFA is either required or authorized to pay only a prorated share of benefits at the present time.

Third, this office does not generally undertake to render opinions on factual, policy or hypothetical matters. *See, e.g. Op. Atty. Gen.* 629a, May 9, 1975. Consequently, we are unable to opine as to how the MTRFA might best implement a proration program should it become necessary to do so at some future time.

Fourth, we are aware of no authority to support refusal by the MTRFA to pay refunds to withdrawing members as required by Minn. Stat. § 354A.37, subd. 1 and Restated Articles § 18.4. The statutory language is clear and mandatory, *i.e.*, a withdrawing teacher 'shall be entitled to a refund," and "[p]ayment of the refund shall be made within 90 days after receipt of the application."

Fifth, while your letter states that all of the MTRFA's assets have been allocated to the annuity reserve fund, the most recent audited MTRFA financial reports available to this Office indicate that, as of June 30, 2002, the annuity reserve fund balance was approximately $500,000,000 and a balance of approximately $255,000,000 was reported in the Retirement Deposit Fund which is held for benefits until "withdrawal, death or retirement."[4]

Sixth, while the MTRFA is directed by Minn. Stat. § 354A.28, subd. 2 to establish an annuity reserve fund as an "investment vehicle" for reserves estimated to be needed to fund future annuities and benefits for persons actually drawing benefits at any given time, there appears no statutory prohibition against use of such assets, if necessary, to satisfy a statutorily mandated obligation to refund contributions of withdrawing members in lieu of other benefits. Nor would such use appear to be necessarily inconsistent with the fiduciary responsibility of the trustees as set forth in Minn. Stat. § 356A.05 as follows:

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[3] Minn. Stat. § 645.44, subd. 13 (2002) provides that, unless otherwise stated "year" means a calendar year. The Restated Articles define "fiscal year" in section 5.14 but do not define "year."

[4] Report of the Office of the State Auditor on the Minneapolis Teachers' Retirement Ass'n for Years Ended June 30, 2002 and 2001, at pp. 21-22. The report acknowledged that neither reserve was fully funded in either 2001 or 2002.

> (a) The activities of a fiduciary of a covered pension plan must be carried out solely for the following purposes:
>
> (1) to provide authorized benefits to plan participants and beneficiaries
>
> (2) to incur and pay reasonable and necessary administrative expenses; or
>
> (3) to manage a covered pension plan in accordance with the purposes and intent of the plan document.
>
> (b) The activities of fiduciaries identified in section 356A.02 must be carried out faithfully, without prejudice, and in a manner consistent with law and the plan document.

If such use were not permissible, the MTRFA would, as a practical matter, cease to function due to inability to pay its current obligations long before its assets were depleted to the point that benefit proration would be required under the terms of section 254A.09 discussed above. Plainly, the legislature intended no such absurd result. *See, e.g.*, Minn. Stat. § 645.17 (2002).

Seventh, while qualified withdrawing members have a clear right to refunds under Minnesota law and the MTRFA's Restated Articles, members and retirees generally have no vested right to a MTRFA account that is fully funded in the actuarial sense. As the court noted in *Minneapolis Teachers Retirement Fund Association v. State*, 490 N.W.2d 124 (Minn. Ct. App. 1992), *rev. denied*:

> [The benefit apportionment language adopted in 1909] demonstrates that, from the time creation of MTRFA was authorized, the legislature considered the possibility that the fund would not have enough money to pay all retirement benefits earned under the plan. This possibility is inconsistent with an implied promise that the fund would remain actuarially sound.
>
> * * * *
>
> Contrary to appellants' assertions, no statute can be reasonably interpreted as an explicit or implicit legislative promise that the Minneapolis teachers' retirement fund would be maintained in an "actuarially sound manner." Absent such a promise, appellants claim that 1975 Minn. Laws ch. 306, § 30 unconstitutionally impaired a contract that required actuarial soundness must fail. If no promise of actuarial soundness was ever made, there was no contract to be impaired.

I hope that these comments are helpful to you in advising the MTRFA on these matters.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

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March 31, 2004

Laurence J. Klun
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1 East Chapman Street
P.O. Box 240
Ely, MN 55731-0240

Dear Mr. Klun:

Thank you for your correspondence dated February 25, 2004 concerning the licensing of a liquor establishment in the vicinity of a community college in the City of Ely.

You point out that Minn. Stat. § 340A.412, subd. 4(a)(8) (2002) provides:

> Subd. 4. Licenses prohibited in certain areas. (a) No license to sell intoxicating liquor may be issued within the following areas:
>
> . . .
>
> (8) within 1,500 feet of a state university, except that:

[The remainder of the provision contains specific exceptions related to Winona, Southwest, St. Cloud , Mankato and Metropolitan State Universities and to certain temporary licenses.]

You ask whether this restriction applies to the area surrounding Vermilion Community College in the City of Ely, which is part of the Minnesota State College and University System governed by a single board of trustees pursuant to Minn. Stat. Ch. 136F. In our opinion, it does not.

First, while the term "state university" is not defined in Minn. Stat. Ch. 340A, Minn. Stat. § 136F.10 (2002) contains a listing of the specific facilities included under each of the various categories of institutions considered to be Minnesota State Colleges and Universities. These include "community colleges" located in various cities including Ely, "technical colleges," and the "state universities" located specifically at Bemidji, Mankato, Marshall, Moorhead, St. Cloud, Winona, and the Twin Cities metropolitan area. Thus, the legislature has expressly identified the institutions considered to be "state universities" and distinguished them from those denominated "community colleges."

Second, this question was addressed in substance by Op. Atty. Gen. 218g-1b, June 18, 1969. In that opinion, the Attorney General determined that the prohibition, then contained in Minn. Stat. § 340.14, subd. 3(7), against liquor sales within 1500 feet of "any state college," did not apply to institutions denominated as "state junior colleges." The opinion noted that Minn. Stat. § 136.01 (1967) specifically designated certain institutions as state colleges while other legislation defined a category of "state junior colleges," and that the liquor sale prohibition made no mention of junior colleges *per se*. The opinion concluded that the plain wording of the statute precluded its application to the newly designated junior colleges.

Finally, while the laws in question have been recodified, the nomenclature modified and the governance of the post-secondary institutions combined under the Minnesota State Colleges and Universities (MnSCU) Board, we see no substantive basis upon which to reach a result contrary to that stated in the 1969 opinion.

In 1973 Minn. Laws Ch. 349, all junior colleges were redesignated as community colleges. In 1975 Minn. Laws Ch. 321, § 3, the institutions previously denominated as "state colleges" were designated as "state universities." Section 2 of that chapter directed the revisor of statutes to make corresponding substitutions of terminology in subsequent editions of Minnesota Statutes. Consequently, Minn. Stat. § 340.14, subd. 3(7) (1976) contained the term "state university" in the place of "state college." These changes do not in themselves change the character of the institutions referred to, or support any conclusion that the legislature intended to broaden in any way the category of institutions referred to in the liquor sale prohibitions then contained in section 340.14, subd. 3(7). If anything, changing the reference from "college" to "university" further undercuts any claim that junior "colleges" or community "colleges" were to be included.

Nor do we find any basis in the merger of the post-secondary systems, including the community college system, under the management of the MnSCU board[1] to conclude that the scope of the prohibition now contained in section 340A.412, subd. 4 should be broadened to include community colleges. Indeed, in 1996 Minn. Laws Ch. 395 § 18 the Revisor of Statutes was directed to substitute "Minnesota state colleges and universities" or a related term for "state university" or "community college" in specified Minnesota statutes. That list did not include Minn. Stat. § 340A.412.

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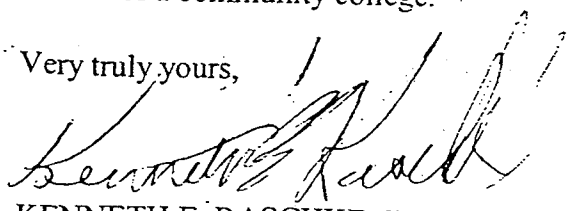
[1] *See* 1995 Minn. Laws Ch. 212, art. 4.

For the foregoing reasons, we are of the opinion that Minn. Stat. § 340A.412, subd. 4(8) does not prohibit issuance of a license within 1500 feet of a community college.

Very truly yours,



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OFFICE OF THE ATTORNEY GENERAL
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MIKE HATCH
ATTORNEY GENERAL

April 13, 2004

Carol Molnau
Lt. Governor/Commissioner
Minnesota Department of Transportation
395 John Ireland Boulevard
St. Paul, MN 55155-1899

Dear Commissioner Molnau:

Thank you for your letter dated March 9, 2004.

FACTS AND BACKGROUND

You state that a newspaper reporter recently requested from the Minnesota Department of Transportation (MnDOT) copies of all appraisals held by MnDOT pertaining to certain parcels of property that were in the process of being acquired by MnDOT through eminent domain procedures. The reporter was not an owner of any of the land in question and did not appear to be acting on behalf of any landowner. MnDOT staff provided the reporter access to appraisals that had been presented in a commissioner's hearing held pursuant to Minn. Stat. § 117.085, but did not provide access to appraisals which had not been used in the proceedings or otherwise shared with the property owners. The reporter then sought the opinion of the Commissioner of Administration pursuant to Minn. Stat. § 13.072 (Supp. 2003) as to the appropriate classification of the appraisal data withheld by MnDOT. On February 5, 2004, the Commissioner rendered an opinion to the effect that all MnDOT appraisals pertaining to a parcel of property become public as soon as any appraisal data is provided to the property owner or presented to the court or commissioners in an eminent domain proceeding. Dept. of Admin, Adv. Op. 04-005. Based upon these facts you ask, "If a condemning authority possesses multiple appraisals of a piece of property that is in the process of being condemned and if the condemning authority shares one or more of the appraisals with the landowner, what is the status of the remaining appraisals during the pendency of the condemnation process?"

LAW AND ANALYSIS

1. Generally

Minn. Stat. § 13.44, subd. 3(a) (2002) provides:

> Subd. 3. **Real property; appraisal data. (a) Confidential or protected nonpublic data**. *Estimated or appraised values* of individual parcels of real property which are made by personnel of the state, its agencies and departments, or a political subdivision or by independent appraisers acting for the state, its agencies and departments, or a political subdivision *for the purpose of selling or acquiring land through purchase or condemnation* are *classified as confidential data on individuals or protected nonpublic data*.[1]

(Emphasis added.)

Minn. Stat. § 13.44, subd. 3(b) (Supp. 2003), however, provides certain exceptions to the protections offered by paragraph (a):

> (b) **Public data**. The data made confidential or protected nonpublic by the provisions of paragraph (a) shall become public upon the occurrence of any of the following:
> (1) the negotiating parties exchange appraisals
> (2) the data are submitted to a court appointed condemnation commissioner;
> (3) the data are presented in court in condemnation proceedings;
> (4) the negotiating parties enter into an agreement for the purchase and sale of the property; or
> (5) the data are submitted to the owner under section 117.036.

---

[1] This opinion focuses solely on the provisions of Minn. Stat. § 13.44, subd. 3. It does not attempt to analyze what Rules of Civil Procedure, if any, may impact the status of the appraisals during a condemnation proceeding.

First, as noted by Commissioner Brian Lamb, the language in Section 13.44, subd. 3 can easily be interpreted in more than one way. First, it can be read in the manner read by the Commissioner where all appraisals become public when any of the triggering events in Section 13.44, subd. 3(b) takes place with respect to any one appraisal. Alternatively, it can be interpreted to mean that only the appraisal that triggers one of the exceptions of Section 13.44, subd. 3(b) becomes public when the triggering event occurs.

2. Legislative History

We have attempted to locate the legislative history of Section 13.44, subd. 3 to shed some light on the legislature's intent in enacting the law. Unfortunately, we were unable to locate any information relative to the enactment of the law. We were able to locate some legislative history, however, with respect to the amendment enacted in 2003 which added clause (5) to Section 13.44, subd. 3(b).

During the Senate Judiciary Committee hearing on April 1, 2003, the amendment adding clause (5) was discussed. The amendment also proposed enactment of Minn. Stat. § 117.036, which generally requires public authorities to obtain "at least one appraisal" for any property proposed to be acquired through condemnation. Minn. Stat. § 117.036, subd. 2 (Supp. 2003). That section further requires the public authority to provide the property owner with a copy of "the appraisal." The author of the Senate bill, Senator Don Betzold stated that, under the then-current law, the Minnesota Department of Transportation was unable to provide property owners with copies of appraisals because they were considered confidential data. The purpose of the bill was to enable public authorities to share appraisal data with property owners so they could understand the basis of the offer and to hopefully reach an agreement with the acquiring authority without having to resort to litigation. A bill amending Section 13.44, subd. 3(b)(5) and adopting section 117.036 was ultimately enacted by the legislature.

3. Minn. Stat. § 13.44, subd. 3(b)(2), (3), and (5)

As noted above, clause (5), as well as clauses (2) and (3), refers to the disclosure of "data" when "the data" are "submitted" or "presented" to specified persons or in specified proceedings. Because the exceptions in these clauses are for data submitted or presented only in certain, specific ways, it appears most reasonable to interpret these clauses to permit public disclosure of only the data that are so "submitted" or "presented". As a result, any data which is not submitted to a court appointed condemnation commissioner, not presented in court, and not submitted to the landowner pursuant to section 117.036 would not become public data.[2]

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[2] Clause (5) refers only to "the data" ... submitted to the owners under section 117.036. That section states, in pertinent part:
(Footnote Continued on Next Page)

4. Minn. Stat. § 13.44, subd. 3(b)(1) and (4)

Clause (1) states that confidential appraisal data becomes public when "negotiating parties exchange appraisals." Clause (4) provides that such data becomes public when "the negotiating parties enter into an agreement for the purchase or sale of the property." These clauses do not contain the limiting reference to "the data" contained in clauses (2), (3) and (5). Thus, it appears that all government appraisals become public if one is shared with the owner in an exchange of appraisals or if the parties enter into an agreement for the purchase and sale of the property.

CONCLUSION

We agree with the Commissioner of Administration that all appraisal data deemed confidential or protected nonpublic under the provisions of section 13.44, subd. 3(a) becomes public if one of the exceptions set forth in section 13.44, subd. 3(b)(1) or (4) applies to any one appraisal.

(Footnote Continued from Previous Page)

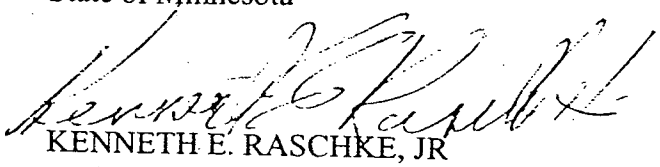
> Before commencing an eminent domain proceeding under this chapter, the acquiring authority must obtain at least one appraisal for the property proposed to be acquired. In making the appraisal, the appraiser must confer with one or more of the owners of the property, if reasonably possible. At least 20 days before presenting a petition under section 117.055, the acquiring authority must provide the owner with a copy of the appraisal and inform the owner of the owner's right to obtain an appraisal under this section.

Minn. Stat. § 117.036, subd. 2(a) (Supp. 2003). As noted, the acquiring authority must obtain "at least one appraisal" and provide a copy of "the appraisal" to the owner. In a case where an acquiring authority obtains more than one appraisal, the statute does not state that only one appraisal must be provided to the landowner. Indeed, the statute is premised on the notion that sharing information before having to litigate a case will hopefully result in a negotiated purchase rather than a condemnation proceeding. Consequently, if more than one appraisal has been obtained by the acquiring authority before providing an appraisal to the owner as required by this section, the apparent legislative intent indicates that all of those appraisals should be provided to the landowner pursuant to section 117.036, subd. 2.

It is our further opinion, however, that a property appraisal classified as confidential or protected nonpublic by Minn. Stat. § 13.44, subd. 3(a) does not become public under section 13.44, subd. 3(b)(2), (3), or (5) unless that particular appraisal is submitted to a condemnation commissioner; is presented in court in a condemnation proceeding; or is submitted to a landowner pursuant to Minn. Stat. § 117.036.

Very truly yours,

MIKE HATCH
Attorney General
State of Minnesota



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AG: #1199533-v1

STATE OF MINNESOTA

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May 4, 2004

John F. Cope
Cope & Peterson, Ltd.
415 South First Street
Virginia, MN 55792

Dear Mr. Cope:

Thank you for your correspondence of April 15, 2004.

FACTS AND BACKGROUND

You state that you are the city attorney for the City of Orr which is a statutory city operating under the Option Plan A form of government, pursuant to which the city clerk is not a member of the city council and the clerk and treasurer or clerk-treasurer are appointed by the council for an indefinite term. *See* Minn. Stat. §§ 412.541, 412.581 (2002).

You state that the person "hired by the City to act as Clerk" was terminated, and the mayor of Orr has been performing the clerk's duties, to which he has devoted substantial time. The City Council would like to compensate the mayor for providing services that would otherwise be provided by the clerk. Based upon these facts you request the opinion of this office on the following questions.

1. Are the positions of mayor and municipal clerk-treasurer both held by one person incompatible?

2. Are the positions of mayor and municipal clerk-treasurer both held by one person a conflict of interest?

3. Would there be a conflict of interest if the mayor holds these two positions?

4. May a mayor, in performance of duties, some of which would otherwise be performed by a paid clerk, receive pay from the City?

LAW AND ANALYSIS

First, the clerk and treasurer of a statutory city, whether elected or appointed, are not mere employees hired to perform ministerial functions. Rather, they are considered officers of the city with certain statutorily prescribed duties and are required to file a bond for faithful performance of the duties of office. *See, e.g.*, Minn. Stat. §§ 358.05, 412.02, 412.111, 412.141, 412.151, 412.581 (2002). Op. Atty. Gen. 401B-22, February 4, 1952.

Second, I am not aware of any express statutory prohibition against a statutory city mayor or council member performing duties normally performed by the clerk or clerk-treasurer.

Third, under common law public offices are incompatible, and thus may not be held simultaneously by one person, when their functions are inconsistent. The functions of an office are inconsistent if their performance results in antagonism and a conflict of duty such that the incumbent of one can not discharge with fidelity and propriety the duties of both. *See State ex rel. Hilton v. Sword*, 157 Minn. 263, 264, 196 N.W. 467 (1923). Offices have been held incompatible where one is subordinate to the other, if their functions are inconsistent or if one is in position to interfere with the other. *See, e.g.*, Op. Atty. Gen. 358A-5, November 25, 1985. In a similar vein, incompatibility arises where two officers are intended to act as a check on each other. *See* Op. Atty. Gen. 358e-7, March 5, 1965.

In the case of a Plan A statutory city, the office of clerk, treasurer or clerk-treasurer is filled by council appointment and the compensation is fixed by the council, of which the mayor is a voting member. In that sense, the office of clerk may be seen as subordinate to the council. *Cf.* Op. Atty. Gen. 358e-7, March 5, 1965. In addition, it appears that the city clerk, treasurer and mayor are intended to act as a check in certain circumstances on the actions of each other. *See, e.g.*, Minn. Stat. §§ 412.141 (treasurer may pay out money only upon written order of mayor and clerk); 412.191 (every ordinance shall be signed by the mayor and attested by the clerk), 412.201 (every written instrument to be executed for the city by the mayor and clerk). While there is express statutory authority for the council to combine the functions of clerk and treasurer (*see* Minn. Stat. § 412.591), and to delegate the clerk's "bookkeeping duties" to another officer or employee (*see* Minn. Stat. § 412.151, subd. 2 (2002)), there appears no authority that permits combining all of the formal responsibilities of the mayor clerk and treasurer in a single person. Consequently, it is our view that the positions of mayor and clerk-treasurer are incompatible.

Fourth, this conclusion also constitutes a response, in part, to your second and third questions inasmuch as incompatibility of office can be seen as one type of a "conflict of interest." i.e., conflicting public duties. In addition, since establishing compensation for the positions of clerk and treasurer is the responsibility of the council, holding both positions would also involve a conflict between public duty and personal financial interests. *See, e.g.*, Minn. Stat. §§ 412.311, 471.87 (2002); Op. Atty. Gen. 358e-7, March 5, 1965.

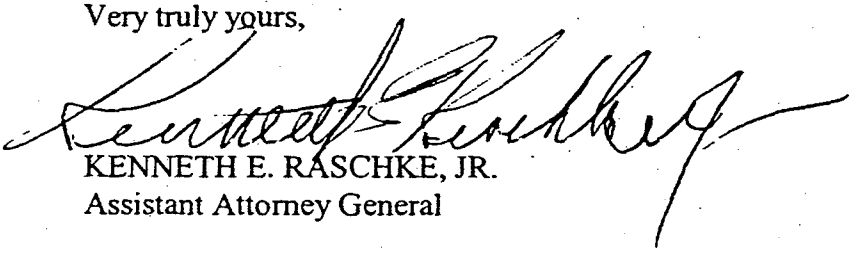
Fifth, as noted above, Minn. Stat. § 412.151, subd. 2 authorizes the council to delegate all or part of the clerk's bookkeeping duties to another officer or employee. Thus, it is possible that certain ministerial tasks might be delegated to the mayor insofar as they are not in conflict with the mayor's other duties. However, there appears no similar provision authorizing delegation of a treasurer's duties. *See* Minn. Stat. § 412.141 (2002). Furthermore, there appears to be no authority for the council to grant an increase in the mayor's compensation to reflect such increased duties to take effect before the next municipal election. *See* Minn. Stat. § 415.11, subd. 2 (2002).

Sixth, pursuant to Minn. Stat. §§ 412.311 and 471.87 the mayor would be prohibited from benefiting financially from a separate contract with the city, including an employment contract. *See, e.g.*, Op. Atty. Gen. 469a-2, Jan. 13, 1961. Therefore, unless one of the exceptions found in section 471.88 (2002) is applicable, the mayor could not be compensated under a separate contract for performing services for the city. One exception that may apply is Minn. Stat. § 471.88, subd. 5, which pertains to contracts that do not require public bidding. Utilization of that exception generally requires prior approval in compliance with the procedures in Minn. Stat. § 471.89 (2002).

For the foregoing reasons, it is our view that the mayor may not function as de facto city clerk-treasurer, or receive added compensation as mayor for performing any additional duties that might be delegated to him in that capacity. Rather, it is the responsibility of the council to appoint a qualified person to that position pursuant to Minn. Stat. § 412.581. While it is possible that the mayor might perform limited administrative services for the city on a contract basis, any such contract would need to be approved in the manner specified in Minn. Stat. §§ 471.88, and 471.89.

I hope the foregoing is responsive to your questions. I have enclosed copies of the cited Attorney General's opinions for your convenience.

Very truly yours,



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Enclosures

AG: #1218681-v1

STATE OF MINNESOTA

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June 14, 2004

Michael C. Karp
Blethen, Gage & Krause
127 South Second Street
P.O. Box 3049
Mankato, MN 56002-3049

Re: Lake Washington Sanitary District

Dear Mr. Karp:

I thank you for your correspondence dated May 6, 2004 requesting an opinion from the Attorney General with respect to the facts described below.

FACTS

You are counsel for the Lake Washington Sanitary District ("District"). You state that the Townships of Kasota, Washington and Jamestown petitioned for the creation of the District pursuant to Minn. Stat. § 115.18 *et seq.* You indicate that the Minnesota Pollution Control Agency ("MPCA") executed an order approving that petition and creating the District on December 16, 2002. You state that prior to MPCA's Order approving the creation of the District, a non-profit group called the Lake Washington Improvement Association paid for many of the costs associated with the creation of the District, including costs associated with the petition for creation of the District. You indicate that the Lake Washington Improvement Association is seeking reimbursement from the District for the costs associated with its creation. You have researched this issue and have concluded that the District is not legally authorized to reimburse the Lake Washington Improvement Association for these costs. Counsel for the Lake Washington Improvement Association has also researched this issue and has concluded that the District is authorized and required to provide the requested reimbursement. You ask this Office to review this matter.

LAW AND ANALYSIS

As you note, Minn. Stat. § 155.22 (2004) states that "[e]xpenses of the preparation and submission of petitions in proceedings under sections 115.19 to 115.21 shall be paid by the petitioners. Expenses of hearings therein shall be paid out of any available funds appropriated for the agency." You indicate that the MPCA's order creating the District identifies the Townships of Kasota, Washington and Jamestown as the petitioners. Accordingly, it appears

that the statute requires those three entities to pay for the expenses associated with the petition process.

Second, as you also note, Minn. Stat. § 115.24, subd. 4 (2004) provides:

> At any time before the proceeds of the first tax levy in a district become available the district board may prepare a budget comprising an estimate of the expenses of organizing and administering the district until such proceeds are available, with a proposal for apportionment of the estimated amount among the related governmental subdivisions, and may request the governing bodies thereof to advance funds in accordance with the proposal. Such governing bodies may authorize advancement of the requested amounts, or such part thereof as they respectively deem proper, from any funds available in their respective treasuries. The board shall include in its first tax levy after receipt of any such advancements a sufficient sum to cover the same and shall cause the same to be repaid, without interest, from the proceeds of taxes as soon as received.

This provision does not appear to authorize the District to reimburse the Lake Washington Improvement Association for pre-formation costs. This provision authorizes a district to borrow funds from related governmental subdivisions to organize and operate the district until such time as the district receives the proceeds of its first tax levy. In other words, this provision presupposes that a district has already been created when it borrows funds from related governmental subdivisions. The provision is also limited to authorizing a district to borrow money from and to repay related governmental subdivision. The provision does not address a district reimbursing a non-governmental entity for pre-formation costs.

Third, Minn. Stat. § 115.33, subd. 3 (2004) states that "[t]he board shall levy assessments on benefited property to provide funds for the cost of construction, improvement, or acquisition of any system, works, or facilities designed or used for any district purpose, or for payment of the principal and interest on any bonds issued therefor (sic) and expenses incident thereto." The term "board" is statutorily defined as "the board of managers of a sanitary district." Minn. Stat. § 115.18, subd. 5 (2004). Thus, the use of the term "board" in the above-referenced provision presupposes that a district has already been legally established. Moreover, the above-referenced provision does not include pre-formation costs in the list of items for which a board may levy assessments. As a result, this provision does not appear to authorize the District to reimburse the Lake Washington Improvement Association for pre-formation costs.

Finally, Minn. Stat. § 115.34, subd. 1 (2004) provides in part that "[t]he board may authorize the borrowing of money for any district purpose and provide for the repayment therof." Minn. Stat. § 115.34, subd. 2 (2004) provides that "[t]he board may authorize the issuance of bonds of the district to provide funds for the construction, improvement, or acquisition of any system, works, or facilities for any district purpose, of for refunding any prior bonds or obligations issued for any such purpose." One could argue that pre-formation costs are a "district

purpose" for which a board may authorize the borrowing and repayment of money. As noted above, however, the use of the term "board" presupposes that a district already exists. In this case, the costs for which the Lake Washington Improvement Association is seeking reimbursement were apparently incurred before a district (and necessarily a board) existed. As a result, it is unlikely that this provision authorizes the District to provide the requested reimbursement.

I thank you again for your correspondence. I hope this information is helpful to you.

Very truly yours,

MIKE HATCH
Attorney General
State of Minnesota

MAH/ab

AG: #1239164-v1

ISD 279

STATE OF MINNESOTA

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June 16, 2004

Stephen M. Knutson, Esq.
Knutson, Flynn and Deans
1155 Centre Pointe Drive, Suite 10
Mendota Heights, MN 55120

Dear Mr. Knutson:

Thank you for your letter of April 26, 2004, in which you request an opinion of the Attorney General with respect to three questions.

FACTS

You write on behalf of a school district, presenting the following facts.

On occasion, the School District initially employs teachers during the school year for specific time periods of less than a full school year. In some situations, the School District knows before the school year starts that it needs a teacher for less than the entire school year. In other situations, the School District discovers after the school year begins that it needs to hire a teacher, such as the unexpected resignation of a teacher. You write that, in these situations, the School District could not hire a substitute teacher under Minnesota Statutes Section 122A.44, subdivision 2 (2002) because the newly hired teacher would not be replacing a regular teacher who is "absent" or on a "leave of absence."

You ask whether, in a variety of circumstances, a teacher would obtain a year of probationary credit towards tenure under Minn. Stat. § 122A.40, subd. 5 (2002). The specific questions and responses are set forth below:

QUESTION ONE

Would a regular teacher (not a substitute) who is employed by the School District prior to the beginning of the school year for a period of time less than the full school year (e.g. the first grading period) complete a year of probation under Minnesota Statutes Section 122A.40, subdivision 5 (2002) as of the end of that school year?

We answer your first question in the affirmative.

Minn. Stat. § 122A.40, subd. 5 (2002) establishes the probationary period for teachers, in pertinent part:

> (a) The first three consecutive years of a teacher's first teaching experience in Minnesota in a single district is deemed to be a probationary period of employment, and after completion thereof, the probationary period in each district in which the teacher is thereafter employed shall be one year.

After the probationary period, a teacher has a continuing contract subject to termination only as stated in statute. Minn. Stat. § 122A.40, subds. 7, 9.

In *Poirier v. Independent Sch. Dist. No. 191*, 255 N.W.2d 400, 404 (Minn. 1977), the court considered the claim of a teacher who was employed for the first quarter of a school year (later extended to the first two quarters). The court held that the teacher qualified for a year of probationary credit. *Id.* Because Poirer was employed before the beginning of the school year, it seems that this case is directly on point with your question.

Likewise, in *Flaherty v. I.D.S. No. 2144, Chisago Lakes Area Schools*, 577 N.W.2d 229 (Minn. App. 1998), the Court of Appeals, relying on *Poirier*, held that 79 hours of non-substitute employment during a school year constituted a year of probationary employment. *Id.* at 236.

Your letter notes that a substitute teacher must be employed for the entire school year in order to earn one year of probation under Minn. Stat. § 122A.44, subd. 2 (2002). This statute supports the position that Minn. Stat. § 122A.40, subd. 5, does not set a minimum service requirement. Indeed, Minn. Stat. § 122A.44, subd. 2 demonstrates that the legislature understood how to craft language to require a teacher to work a full year to obtain a probationary credit.

In sum, court precedent makes clear that a teacher hired for less than a full year would still gain a year of probationary status.

QUESTION TWO

> Would a regular teacher (not a substitute) who is employed by the School District after the school year has begun due to an unanticipated need complete a year of probation under Minnesota Statutes Section 122A.40, subdivision 5 (2002) as of the end of that school year regardless of the fact that the teacher was not employed for the full school year?

We answer your second question in the affirmative.

You note that the court cases cited in the answer to Question One involved teachers hired at the beginning of a school year, rather than after the beginning of the school year. The reasoning of this authority, however, applies equally to a teacher hired after the start of the school year.

In *Poirier v. Independent Sch. Dist. No. 191*, 255 N.W.2d 400, 404 (1977), the court adopted the reasoning in the trial court memorandum as follows:

> The statute does not require that a teacher, as a party to either an annual or a continuing contract, provides services during the entire term of the contract. In fact in most school districts the practice has almost uniformly been to the contrary. It would appear to this court that the parties may, under the referenced statute, agree that the services to be performed by a teacher be in a period less than the term of the contract. It would therefore seem to this court that the annual contract between the petitioner and the school board which specifies that the petitioner's duties are to be performed during the first quarter is within the preview of the statute.

Poirer is based on the court's conclusion that the tenure act permits only one contract between a teacher and a school board in a single 12 month period, but that the contract may provide services for less than a full year. *Id.* There appears to be no basis for drawing a distinction based on when the teacher and the school board enter into this contract.

QUESTION THREE

> Would the answer to question 2 above change depending on the length of the period of time that the teacher was actually employed during the school year (e.g. two weeks as opposed to six months)?
>
> We answer your third question in the negative.

It appears that this question is controlled by *Flaherty v. I.D.S. No. 2144, Chisago Lakes Area Schools*, *supra*. In *Flaherty*, the court considered the claim of a teacher who worked for two hours per week, for a total of 79 hours. 577 N.W.2d at 235. This would equal about two-weeks of full-time employment. The court held the teacher qualified for a year's credit under Minn. Stat. § 125.12.[1] *Id.* at 236.

---

[1] In *Poirier v. Independent Sch. Dist. No. 191*, *supra*, the court saw no distinction between a six-month assignment and a three-month assignment.

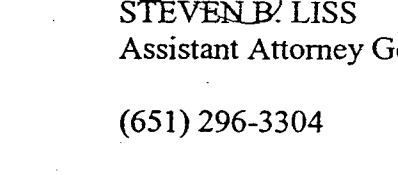
The court in *Flaherty* noted that the legislature specifically recognized that probationary service might last "significantly less than full-time" by requiring an evaluation for a teacher who works for less than 60 school days. 577 N.W.2d at 235. Of particular relevance, the court declined to set a minimum length of service required for probationary credit.

> But the legislature has authorized courts to add language to a statute only where it does not 'in any way affect [the statute's] scope and operation.' Minn. Stat. § 645.18 (1996). The courts also have imposed on themselves a prohibition against supplying 'what the legislature purposely omits or inadvertently overlooks.' *Ullom v. Independent Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994) (quoting *Renstrom v. Independent Sch. Dist. No. 261*, 390 N.W.2d 25, 27 (Minn. App. 1986)) (internal quotes omitted). Because the statute plainly does not require that employment be full-time and provides no minimum requirement for a 'year' of probationary employment, we conclude that we have no authority to amend the statute judicially by creating a *'de minimis'* exception to the requirements of section 125.12, subdivision 3. Such an amendment is properly a legislative function.

577 N.W.2d at 235.

Please let me know if you have further questions.

Very truly yours,



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APPENDIX A: SERVICE HOURS
By Agency or Political Subdivision for FY 2004

Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
Partner Agencies				
Administration--Risk Management		2,334.0		$ 200,070.00
AURI		48.9		$ 4,694.40
Corrections (3)	3,603.1	3,282.6	$ 297,525.00	$ 297,178.60
Education Department (3)	2,725.0	1,707.2	$ 261,600.00	$ 162,197.00
Gambling Control Board	800.0	758.2	$ 76,800.00	$ 72,787.20
Health	7,546.9	6,700.1	$ 660,000.00	$ 626,783.60
Higher Education Services Office (3)	30.0	41.5	$ 2,880.00	$ 3,984.00
Housing Finance	5,250.0	5,446.6	$ 504,000.00	$ 522,826.30
Human Services	25,675.0	23,903.9	$ 2,335,750.00	$ 2,172,284.60
Iron Range Resources & Rehabilitation (3)	2,250.0	2,250.0	$ 216,000.00	$ 216,000.00
Medical Practices Board	11,957.0	14,216.2	$ 824,985.00	$ 955,631.70
Minnesota Racing Commission	312.5	483.2	$ 30,000.00	$ 46,374.30
Minnesota State Retirement System		400.0		$ 38,400.00
MnSCU	12,225.0	10,060.7	$ 1,081,150.00	$ 912,275.00
Natural Resources	13,830.0	6,968.8	$ 1,242,755.00	$ 644,116.40
Petro Board	700.0	77.1	$ 67,200.00	$ 7,401.60
Pollution Control	19,527.0	20,337.5	$ 1,810,092.00	$ 1,881,626.30
Public Employees Retirement Association		662.3		$ 63,580.80
Public Safety (3)	1,500.0	1,500.0	$ 144,000.00	$ 144,000.00
Teachers Retirement Association		313.8		$ 30,124.80
Transportation	26,049.0	22,753.5	$ 2,297,443.00	$ 2,042,126.40
TOTAL PARTNER AGENCIES	**133,980.5**	**124,246.1**	**$ 11,852,180.00**	**$ 11,044,463.00**
Specialized Boards				
Accountancy Board		120.1		$ 10,863.10
Agricultural Chemical Response Comp. Board		15.3		$ 1,468.80
Animal Health Board		45.4		$ 4,302.50
Architecture Board		132.5		$ 12,638.30
Assessors Board		0.2		$ 19.20
Barber Board		32.3		$ 2,477.30
Client Security Board		421.2		$ 29,315.40
Crime Victims Reparations Board		75.4		$ 6,851.40
Electricity Board		192.1		$ 17,216.10
Land Exchange Board		10.1		$ 969.60
Peace Officers Standards and Training Board		258.4		$ 24,462.40
Private Detective Board		186.3		$ 17,884.80
School Administrators Board		201.5		$ 19,344.00
State Fair Board		29.6		$ 2,841.60
State Investment Board		460.0		$ 42,435.70
Teaching Board		948.1		$ 90,157.60
Zoological Board		100.1		$ 8,543.20
SUBTOTAL		**3,228.6**		**$ 291,791.00**
Health Boards				
Behavioral Health & Therapy Board		188.6		$ 15,916.90
Chiropractic Board		2,082.4		$ 159,318.40
Dentistry Board		2,904.0		$ 204,200.50
Dietetics & Nutrition Practice Board		30.6		$ 2,486.10
Emergency Medical Services Regulatory Board		405.7		$ 35,816.80
Health Professionals Services Program		36.8		$ 3,532.80
Marriage & Family Therapy Board		73.2		$ 4,563.30
Nursing Board		6,444.3		$ 455,141.00
Nursing Home Administrators Board		37.8		$ 3,005.30
Optometry Board		66.8		$ 5,600.10
Pharmacy Board		371.5		$ 32,073.50
Physical Therapy Board		396.3		$ 30,197.30
Podiatry Board		228.2		$ 17,043.90
Psychology Board		3,004.3		$ 207,688.90
Social Work Board		696.2		$ 44,694.50
Veterinary Medicine Board		699.1		$ 57,352.60
SUBTOTAL		**17,665.8**		**$ 1,278,631.90**
Higher Education				
Higher Education Facilities Authority		9.9		$ 950.40
Higher Education Services Office (3)		540.8		$ 51,405.10
SUBTOTAL		**550.7**		**$ 52,355.50**

APPENDIX A: SERVICE HOURS
By Agency or Political Subdivision for FY 2004

Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
Other Executive Branch Agencies				
Administration Department		1,692.0		$ 153,165.50
Administrative Hearings Office		8.2		$ 778.60
Agriculture Department		802.5		$ 76,412.20
Amateur Sports Commission		17.3		$ 1,660.80
Archaeologist Office		22.0		$ 2,112.00
Black Minnesotans Council		3.7		$ 355.20
Campaign Finance Board		874.6		$ 73,104.10
Capitol Area Architectural Planning Board		23.4		$ 2,246.40
Center for Arts Education		176.1		$ 16,707.80
Chicano-Latino People Affairs Council		5.4		$ 518.40
Commerce Department		12,150.5		$ 1,163,911.00
Continuing Legal Education Board		179.3		$ 16,249.60
Corrections Department (3)		4,346.9		$ 352,800.00
Corrections Department/Community Notification		1,042.8		$ 85,071.70
Disability Council		16.8		$ 1,612.80
Employment & Economic Development Department		1,970.8		$ 163,117.30
Education Department (3)		775.0		$ 74,400.00
Employee Relations Department		226.2		$ 20,932.60
Environmental Assistance Office		258.9		$ 24,854.40
Environmental Quality Board		815.9		$ 75,982.90
Executive Council		3.7		$ 355.20
Faribault Academies		12.7		$ 840.80
Finance		363.7		$ 33,556.40
Governor's Office		876.3		$ 83,036.90
Historical Society		9.0		$ 864.00
Human Rights Department		1,932.6		$ 174,973.10
Indian Affairs Council		24.2		$ 2,146.90
Iron Range Resources & Rehabilitation (3)		2,361.0		$ 162,762.30
Judiciary Courts		1,472.2		$ 131,686.30
Labor and Industry Department		2,548.2		$ 242,094.50
Law Examiner's Board		333.7		$ 31,308.50
Lawyer's Professional Responsibility Board		179.3		$ 17,212.80
Legal Certification Board		98.8		$ 9,484.80
Legislative Auditor		3.2		$ 307.20
Legislature		178.2		$ 15,284.00
Mediation Services Bureau		8.0		$ 768.00
Military Affairs Department		118.4		$ 11,194.40
Minnesota Commission Serving Deaf & Hard of Hearing People		1.4		$ 134.40
Minnesota Gang Strike Force		526.5		$ 50,544.00
Minnesota Supreme Court		21.6		$ 2,073.60
Ombudsman for Mental Health/Retardation Office		28.3		$ 2,716.80
Ombudsperson for Families		19.9		$ 1,910.40
OSHA Review Board		30.2		$ 2,899.20
Public Defender, Local		86.6		$ 8,163.10
Public Defender, State		5.1		$ 489.60
Public Safety Department (3)		27,535.5		$ 2,336,775.00
Public Utilities Commission		4,782.5		$ 458,771.70
Revenue Department		8,946.1		$ 852,960.40
Rural Finance Authority		19.8		$ 1,900.80
Secretary of State		154.8		$ 14,796.30
Sentencing Guidelines Commission		25.5		$ 2,439.40
State Arts Board		119.2		$ 11,206.70
State Auditor		93.1		$ 8,898.90
State Lottery		71.0		$ 6,816.00
State Treasurer (now part of Finance)		131.7		$ 12,621.70
Strategic and Long Range Planning Office		196.2		$ 18,766.40
Veterans Affairs Department		12.2		$ 1,119.60
Veterans Homes Board		394.6		$ 36,393.80
Water & Soil Resources Board		604.5		$ 58,032.00
SUBTOTAL		79,737.8		$ 7,114,299.20

APPENDIX A: SERVICE HOURS
By Agency or Political Subdivision for FY 2004

Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
OTHER GOVERNMENT				
Federal Government		1.5		$ 144.00
Local: Aitkin County Attorney		915.0		$ 55,891.00
Local: Beltrami County Attorney		142.8		$ 11,825.40
Local: Carlton County Attorney		221.0		$ 20,614.00
Local: Cass County Attorney		21.8		$ 2,092.80
Local: Chippewa County Attorney		30.3		$ 2,508.90
Local: Clay County Attorney		622.0		$ 44,963.00
Local: Clearwater County Attorney		14.4		$ 1,382.40
Local: Crow Wing County Attorney		3.7		$ 277.80
Local: Dakota County Attorney		25.3		$ 2,428.80
Local: Dodge County Attorney		75.0		$ 6,512.00
Local: Hennepin County Attorney		48.8		$ 4,684.80
Local: Houston County Attorney		177.5		$ 13,651.60
Local: Hubbard County Attorney		1,238.9		$ 102,942.70
Local: Itasca County Attorney		19.0		$ 1,824.00
Local: Jackson County Attorney		188.8		$ 15,531.90
Local: Kanabec County Attorney		542.1		$ 43,815.70
Local: Kandiyohi County Attorney		241.0		$ 22,856.50
Local: Koochiching County Attorney		19.3		$ 1,852.80
Local: Le Sueur County Attorney		0.5		$ 48.00
Local: Mahnomen County Attorney		73.0		$ 5,976.00
Local: Mille Lacs County Attorney		1,243.4		$ 110,465.40
Local: Pennington County Attorney		161.3		$ 13,197.20
Local: Pine County Attorney		0.6		$ 57.60
Local: Polk County Attorney		414.3		$ 35,911.40
Local: Redwood County Attorney		873.3		$ 61,098.40
Local: Rice County Attorney		722.1		$ 51,562.60
Local: Rock County Attorney		7.5		$ 720.00
Local: Roseau County Attorney		259.2		$ 24,345.70
Local: Sibley County Attorney		24.8		$ 2,380.80
Local: Stearns County Attorney		1,191.6		$ 99,580.10
Local: Todd County Attorney		1,231.4		$ 101,057.40
Local: Waseca County Attorney		398.7		$ 30,040.70
Local: Wright County Attorney		38.0		$ 3,648.00
Local: Various Cities		157.9		$ 15,158.40
Local: Various School Districts		93.4		$ 8,966.40
Local: Townships/Associations/Other Local Governments		122.7		$ 11,779.20
Local: Various Counties Psychopathic Personalities Commitments		5,757.3		$ 457,576.20
Various Counties/Criminal Appeals		12,421.1		$ 1,187,450.50
SUBTOTAL		**29,740.3**		**$ 2,576,820.10**
TOTAL NON-PARTNER AGENCIES SUBDIVISIONS		**130,923.2**		**$ 11,313,897.70**
TOTAL PARTNER/SEMI-PARTNER AGENCIES (from page A-1)		**124,246.1**		**$ 11,044,463.00**
TOTAL NON-PARTNER AGENCIES SUBDIVISIONS		**130,923.2**		**$ 11,313,897.70**
GRAND TOTAL HOURS/EXPENDITURES (4)		**255,169.3**		**$ 22,358,360.70**

Notes:

(1) The projected hours of service were agreed upon mutually by the partner agencies and the AGO. Actual hours may reflect a different mix of attorney and legal assistant hours than projected originally.

(2) Billing rates: Attorney $96.00 and Legal Assistant $53.00.

(3) A number of agencies signed agreements for a portion of their legal services.

(4) Not all AGO expenditures are included in M.S. 8.15 reporting. This amount does not include Civil Enforcement and Medicaid Fraud legal services.

APPENDIX B: SPECIAL ATTORNEY EXPENDITURES FOR FY 2004, BY AGENCY	
AGENCY	**AMOUNT**
Administration	$ 11.87
Agricultural and Economic Development Board	$ 48,539.16
Employee Relations	$ 205,014.68
Finance	$ 56,040.95
Higher Education Facilities Authority	$ 94,958.79
Higher Education Services Office	$ 56,756.94
Housing Finance Agency	$ 471,865.13
Human Services	$ 493.33
Iron Range Resources and Rehabilitation Agency	$ 60.00
Labor and Industry	$ 27,510.17
MnSCU	$ 11,650.10
Rural Finance Authority	$ 5,624.70
Supreme Court	$ 58,348.79
Trade and Economic Development	$ 89,293.06
TOTAL	**$ 1,126,167.67**
NOTE: Certain bond and workers compensation fund counsel are paid from proceeds.	