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STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

ANNUAL REPORT REQUIRED BY

Minnesota Statutes sections 8.08 and 8.15
subdivision 4 (2019)

Fiscal Year 2020

The Office of
Minnesota Attorney General Keith Ellison
helping people afford their lives and live with dignity and respect • www.ag.state.mn.us

October 1, 2020

Governor Tim Walz
130 State Capitol
75 Rev Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Representative Lyndon Carlson, Sr., Chair
House Ways and Means Committee
Minnesota House of Representatives
479 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Senator Julie Rosen, Chair
Senate Finance Committee
Minnesota Senate
2113 Minnesota Senate Building
95 University Avenue W.
Saint Paul, MN 55155

Dear Governor Walz, Chair Carlson, and Chair Rosen:

I submit to you the annual expenditure report of the Office of the Attorney General for FY 2020, as required under Minnesota Statutes §§ 8.08 and 8.15, subd. 4:

Role of the Office of the Attorney General

The Attorney General is a statewide elected position created by Article V of the Minnesota Constitution. The role of the Office of the Attorney General is to:

1) Defend the duly enacted laws of the State of Minnesota;
2) Represent nearly all the State's agencies, boards, and commissions in legal matters;
3) Assist Minnesota's county attorneys in criminal cases and appeals, and lead criminal prosecution of Medicaid Fraud; and
4) Protect Minnesotans from fraud and abuse, as authorized by many State statutes, most notably Minn. Stat. § 8.31: "The attorney general shall investigate violations of the law of this state respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade."

This report contains many representative examples of the work the Office has done in FY 2020 and continues to do on major current and future legal issues to fulfill each of the roles above. Some are already well known to the Legislature and the public, but many are not. All of them meet the constitutional, statutory, and regulatory duties of the Office, as well as our obligation to protect Minnesotans.

Organization of the Office of the Attorney General

The Office of the Attorney General helps the people of Minnesota afford their lives and live with dignity and respect. The Office consists of four large legal sections, each led by one of our Deputy Attorneys General or the Solicitor General. Within each Section are smaller Divisions organized around subject matter and client agencies.

During 2019, the administration made minor adjustments to Sections of the Office to improve organizational structure and consistency. The number of Sections was reduced from five to four and the names of the Sections were also slightly modified to improve clarity. Some Divisions also moved Sections. The number and names of the Divisions remained the same. The four Sections today are named (and were previously named): Consumer Protection (Civil Law), Health and Safety (State Government Services), Government Support (Government Legal Services), and Solicitor General (Civil Litigation, now consisting mostly of divisions from the prior Regulatory Law and Professions Section).

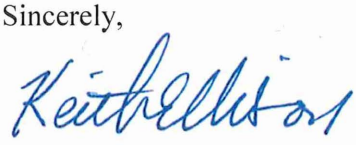
The Deputy Attorneys General and Solicitor General report to the Chief Deputy Attorney General and the Attorney General. The Attorney General is the Chief Legal Officer of the State of Minnesota and reports to the people of Minnesota.

About this report

It would be nearly impossible to list in this report every area of work and every accomplishment of the Office of the Attorney General in FY 2020. For this reason, we provide representative examples of our work rather than a long list of case names. If you do not see directly reflected in this report any cases or bodies of work that interest or concern you, please let me know and I will be happy to brief you.

It continues to be my honor to serve the people of Minnesota as your Attorney General. During my tenure, I have valued open communication and transparency with all members of the Legislature. My door continues to be open to you and the members of your Committees and the houses in which you serve.

Sincerely,



KEITH ELLISON
Attorney General

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SOLICITOR GENERAL

EMPLOYMENT, TORTS, AND PUBLIC UTILITIES COMMISSION DIVISION

The Employment, Torts, and Public Utilities Commission Division ("ETP") defends the duly enacted laws of the State of Minnesota; represents the State in employment and tort claims brought against the State; and provides legal representation to the Public Utilities Commission ("PUC").

In each of these three areas, ***a representative sample of some but not all*** of the major current and future legal issues that the Division has addressed in FY 2020 include:

DEFENDING THE DULY ENACTED LAWS OF THE STATE

- ***Voting***. The Solicitor's Section helped the Secretary of State ensure no voter had to choose between their health and their right to vote, by entering into consent decrees (for 2020 only) that allowed absentee ballots to be counted as long as they are postmarked by election day, and removed the requirement for a witness.

- ***Telescope v. Lucero, et al.*** Filed December 6, 2016, this is a pre-enforcement U.S. constitutional challenge to the Minnesota Human Rights Act. Plaintiffs own a videography business and would like to refuse to make wedding videos for same-sex weddings. Defendants argue the law is a neutral and generally applicable anti-discrimination law and it does not compel speech. The district court granted Defendants' motion to dismiss. On August 23, 2019, the 8th Circuit reversed in part, affirmed in part, and remanded. The parties are engaged in discovery.

EMPLOYMENT AND TORT CLAIMS

Employment litigation often includes claims under the Minnesota Whistleblower statute, Family and Medical Leave Act, Fair Labor Standards, and claims of discrimination and harassment under federal and state anti-discrimination statutes. The Division also provides legal representation to the State in lawsuits involving labor issues.

Tort claims against the State, its agencies, and employees typically arise in the form of personal- injury and property-damage lawsuits. Claims include negligence, medical malpractice, defamation, infliction of emotional distress, assault and battery, excessive use of force, and violations of federal civil rights.

- ***Greene v. Minnesota Bureau of Mediation Services, et al.*** In 2016, Plaintiffs filed this lawsuit under the Minnesota Government Data Practices Act ("MGDPA"), seeking to compel Minnesota Management and Budget, Bureau of Mediation Services, and Department of Human Services ("DHS") to provide names, home addresses, and personal telephone numbers of over 26,000 homecare workers represented by Service

Employment International Union, as part of a decertification effort. The state agencies refused to provide the private information, and the district court granted summary judgment against them. The Court of Appeals affirmed. After oral argument in March of 2020, the Minnesota Supreme Court reversed. The Supreme Court concluded that the State had been correct to withhold the information, because neither statute relied on by Plaintiffs (Public Employment Labor Relations Act and MGDPA) gave Plaintiffs access to the private information.

- ***Hanson v. Minn. Department of Natural Resources*** Defendant Department of Natural Resources ("DNR") ended the unclassified appointment of Plaintiff, a former DNR Regional Director, after she behaved erratically and inappropriately during her stay at a hotel, including entering a public space of the hotel while nude, insisting on involving county officials outside of their jurisdiction, attempting to use her high-level connections to receive favorable treatment, and misusing DNR resources by requiring subordinate employees to assist her in a personal matter. Nevertheless, Plaintiff brought suit alleging that she was fired because, during the hotel incident, she told law enforcement that she suspected child abuse and sex trafficking in a neighboring room of the hotel. Plaintiff brought claims of retaliation in violation of the Minnesota Whistleblowers Act, Minn. Stat. § 181.932, and the Reporting Maltreatment of Minors Act, Minn. Stat. § 626.556. The district court granted summary judgment to the DNR. This case is currently before the Minnesota Court of Appeals.

- ***Dwight Mitchell v. Dakota County, et al.*** After his children were removed due to his use of criminal corporal punishment, Dwight Mitchell sued the DHS Commissioner, along with the guardian ad litem and state public defender involved in his case, in federal court, alleging 25 state and federal constitutional and tort claims. Plaintiff had pleaded guilty (via an Alford plea) to the criminal charges relating to his use of corporal punishment and the district court had appropriately evaluated the best interests of the children. Defendants' motion to dismiss was granted in full and affirmed on appeal by the 8th Circuit.

PUBLIC UTILITIES COMMISSION

The Division provides counsel to and defends the PUC when its decisions are challenged in the courts.

- ***In re Application of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from North Dakota Border to the Wisconsin Border*** Enbridge Energy has proposed building a 338-mile pipeline for crude oil that extends from the North Dakota-Minnesota border to the Minnesota-Wisconsin border to replace its existing Line 3 pipeline. The U.S. portion is a $2.9 billion project that seeks to replace 13 miles of pipeline in North Dakota, 337 miles in Minnesota, and 14 miles in Wisconsin. For the second time, the PUC has approved the final environmental impact statement ("FEIS"), granted a certificate of need ("CN"), and granted a route permit. Appeals of the PUC's decision have been filed by multiple parties.

The Line 3 proceedings have been highly controversial and generated significant public interest and attention. There have been 67 public meetings, 12 days of evidentiary hearings, and more than 20 PUC meetings for Line 3. Thousands of Minnesotans have attended these meetings and thousands of public comments have been filed. Numerous stakeholders have participated in the case, including tribes, environmental groups, labor unions, government agencies, and private companies.

TAX LITIGATION

The Tax Litigation Division provides legal representation to the Minnesota Department of Revenue ("DOR") in the Minnesota Tax Court and at the Minnesota Supreme Court, as well as the State and federal district courts and federal bankruptcy court. The Division handles all tax types, including multimillion-dollar corporate franchise-tax claims and a high volume of complex sales- and use-tax cases. The Division also provides legal representation and assistance to DOR and other state agencies filing claims in bankruptcy court. Lawyers in the Division also review and respond to dozens of foreclosure proceedings, quiet title actions, and other cases involving State interests.

Below is ***a representative sample of some but not all*** of the legal work performed by the Tax Litigation Division in FY 2020:

CASES RELATED TO PIPELINE VALUATION

The personal property of utility companies is centrally assessed by the Commissioner of Revenue for county property-tax purposes, rather than being assessed by the county assessors for the multiple counties in which the pipeline is located. These cases pertain to the department's unitary valuation of gas-distribution pipelines and hydroelectric facilities located in Minnesota. Unitary valuation cases involve extremely complex appraisal concepts and competing appraisals from experts retained by both sides. In utility-valuation cases, these taxpayers typically seek an approximate 30% reduction in taxable value. Any decrease in the department's valuation will result in the affected counties refunding taxes.

- ***YAM Special Holdings, Inc. v. Commissioner of Revenue*** [Note that YAM Special Holdings is the entity formerly known as The Go Daddy Group, Inc.] This is a corporate franchise tax case assessing tax in the amount of nearly $1.8 million for the years 2009-2011. YAM contended it lacked sufficient nexus with the State, that its income from a sale of approximately 72 percent of its stock as part of a private-equity transaction was not subject to Minnesota taxation pursuant to Minnesota Statutes, section 290.17, subdivision 6. The Commissioner disagreed and prevailed at the tax court and YAM appealed to the Minnesota Supreme Court. In a decision issued on August 12, 2020, the Minnesota Supreme Court affirmed the tax court and upheld the assessed nearly $1.8 million in tax that YAM owes Minnesota. This case is also important in upholding the State's authority to assess taxes in the increasingly virtual economy.

- ***CenterPoint Energy Resources Corp. v. Commissioner of Revenue (2017-2019)*** CenterPoint Energy challenges the Commissioner's 2017, 2018, and 2019 valuations of its natural-gas pipeline operating property. CenterPoint Energy alleges the property's estimated market value is too high and that the property has been unequally assessed. In a July 15, 2020 decision, the tax court granted CenterPoint a substantial downward adjustment to its 2017 value. This decision is not yet final at the tax court level and is subject to both parties' right of appeal to the Minnesota Supreme Court. The trial on the 2018 and 2019 values will take place in the summer of 2021.

- ***Enbridge Energy, L.P. v. Commissioner of Revenue (2015-2016)*** These consolidated matters involve challenges to DOR's 2015 and 2016 valuations of Enbridge's oil pipeline system for property taxes payable in 2016 and 2017. The tax court issued a decision on June 25, 2019 in which it increased the taxable value of Enbridge's pipeline property by approximately 5% in 2015 and by 3% in 2016. This equates to an estimated $3.4 million in additional tax owed by Enbridge. The decision is not yet final because Enbridge appealed the decision to the Minnesota Supreme Court and the Court remanded the case to the tax court on one issue.

- ***Twin Cities Hydro, LLC v. Commissioner of Revenue (2019-2020)*** Twin Cities Hydro, LLC operates a hydroelectric facility located in Ramsey County along the Mississippi River. Twin Cities Hydro challenged the Commissioner's value of its facility for the assessment dates in 2019 and 2020. The case is scheduled to be trial-ready on August 17, 2021.

- ***Menard, Inc. v. Commissioner of Revenue*** Menard, Inc. operates home-improvement stores in locations throughout Minnesota. In filing its sales- and use-tax returns with the Department of Revenue for years 2007 through 2010 and 2012 through 2016, Menards used the bad-debt setoff in Minnesota Statues section 297A.81 to reduce its sales- and use-tax liability to the State. In an audit, the Commissioner disallowed the offset because the bad debt used by Menards was debt owed by Menard's customers to the financing companies that issued Menard's private-label credit cards. Menards filed an appeal with the tax court. The tax court affirmed the Commissioner's Order and Menards appealed to the Minnesota Supreme Court. Oral argument before the Minnesota Supreme Court is scheduled for October 12, 2020.

EDUCATION DIVISION

The Education division provides legal representation to the State's complex and varied educational system, handling most student- and some faculty- and staff-related matters for the Minnesota State Colleges and Universities (Minnesota State) system of 37 separate colleges and universities. In addition to providing legal representation to the numerous Minnesota State campuses, the division also provides legal representation to the Minnesota Department of Education, the Office of Higher Education, the Perpich Center for Arts Education, the State Academies and the State pension boards.

Below is ***a representative sample of some but not all*** of the legal work performed by the Schools & Higher Education division in FY 2020:

- ***Alejandro Cruz-Guzman, et al. v. State of Minnesota, et al. and Higher Ground Academy, et al.*** This is a class-action lawsuit brought in November 2015 against the State, the Minnesota Senate, the Minnesota House of Representatives, the Minnesota Department of Education, and its Commissioner alleging that the education that the school children in the Minneapolis and Saint Paul Public Schools receive is inadequate and discriminatory on the basis of race and socioeconomic status (poverty and free lunch). Certain charter schools have intervened as defendants. The case has been remanded to the district court following an appeal to the Minnesota Supreme Court. The parties have been engaged in ongoing mediation sessions since March 2019.

- ***Portz, et al. v. St. Cloud State University/Minnesota State*** Five members of the women's tennis team filed a class action complaint in federal court alleging Title IX and Equal Protection violations in the wake of the University's decision to eliminate six (four men's and two women's) sports teams. Subsequently, the second women's team (Nordic skiing) joined the lawsuit. The case was tried before Chief Judge Tunheim from November 26-December 4, 2018. The federal district court ruled for Plaintiffs on August 1, 2019, issued a permanent injunction, and awarded Plaintiffs attorney's fees and costs of litigation. SCSU appealed the decision to the 8th Circuit. Oral argument before the 8th Circuit has not been scheduled yet.

- ***St. Cloud Educational Rights Advocacy Council v. Governor Walz, Commissioner Mary Cathryn Ricker, Minnesota Department of Education, Minnesota Senate, and Minnesota House of Representatives*** In February 2019, the St. Cloud Educational Rights Advocacy Council (SCERAC), a nonprofit association of interested persons, sued contending the State is underfunding St. Cloud area schools. On September 4, 2019, Judge Davick-Halfen of Stearns County denied Plaintiff's motion for preliminary injunction and granted State Defendants' motion to dismiss on all five grounds. SCERAC appealed to the Court of Appeal. Oral argument at the Court of Appeals was held on September 17, 2020.

ENVIRONMENTAL & NATURAL RESOURCES

Attorneys in the Environmental & Natural Resources Division ("ENR") provide legal representation to various state agencies, including the Minnesota Pollution Control Agency ("MPCA"), Minnesota Department of Natural Resources ("DNR"), Minnesota Department of Agriculture ("MDA"), Environmental Quality Board ("EQB"), Board of Water and Soil Resources ("BWSR"), and the Board of Animal Health ("BAH").

ENR attorneys provide legal representation in matters arising out of the agencies' and boards' enforcement programs. The Division provides legal representation to the agencies and boards in the State and federal district and appellate courts and at the Office of Administrative Hearings. ENR attorneys also defend the agencies and boards in state and federal district,

appellate, and administrative courts when parties bring actions challenging their programs or actions.

Below is ***a representative sample of some but not all*** of the legal work performed by ENR for the agencies and boards during FY 2020:

- ***BFI Waste Systems of North America, LLC Permit Amendment*** Pursuant to Minn. Stat. § 473.848, Minnesota landfills are prohibited from disposing of Minneapolis–Saint Paul Metro area ("Metro") waste unless it has been certified as unprocessible, which can occur when the four resource-recovery facilities (waste-to-energy incinerators) serving the Metro are full. After being found in violation of the applicable statutes, certain landfill operators filed legal challenges to the MPCA's enforcement of the statutory scheme. ENR successfully defended the State's statutory scheme, and the matter is now on remand for determination of whether the non-compliant landfills are subject to civil penalties.

- ***Fargo-Moorhead Flood Diversion Board of Authority*** The proposed Fargo-Moorhead flood diversion project has generated several related cases in federal district court and the Minnesota Office of Administrative Hearings. Through this litigation, ENR has assisted the DNR in securing significant improvements to the project that reduced adverse impacts on Minnesota and its residents, while protecting important separation-of-powers principles and preserving the State's jurisdiction to regulate dam projects that impact Minnesota. ENR continues to represent DNR and the State in legal challenges to the present proposal for the project.

- ***Northern Metals*** Northern Metals operates metal shredding and recovery facilities in Becker and North Minneapolis. The North Minneapolis facility was subject to prior enforcement action by MPCA for unpermitted air emissions, and as part of the resolution of that matter Northern Metals agreed to relocate certain operations to Becker. In FY 2020, ENR assisted MPCA in further enforcement action when a whistleblower revealed that Northern Metals was falsifying control-equipment readings at the North Minneapolis facility, and again when a large fire at the Becker facility resulted in water- and hazardous-waste issues.

- ***Line 3*** ENR defended MPCA in a contested-case challenge brought to MPCA's proposed certification of Enbridge's proposed Line 3 project under Section 401 of the Clean Water Act. The matter was handled on an expedited basis, with the contested case going from initiation to hearing in approximately two months.

ENR also provides legal representation to the Department of Administration, Land Exchange Board, BWSR, DNR, MPCA, Department of Revenue, and the Department of Transportation on various real-estate matters, including various real-estate acquisition, title, and land-use matters, ownership of submerged lands, tax forfeitures, easements (including easements for wetland and habitat protection and wetland banking), probate proceedings, trusts, life estates, adverse possession, bankruptcy, boundary agreements, indemnification, deed restrictions, land

registration, quiet title, road vacation, condemnation, declarations, protective covenants, local government fees charged against state-owned lands, and use of state bond-financed property.

CROSS-DIVISIONAL WORK ON COVID-19

The pandemic has presented challenges that do not fit neatly in just one division. This year, the Solicitor created a cross-divisional group of attorneys to support our State's response to COVID-19 by advising on and defending executive orders. Each of the 90 emergency executive orders issued by the Governor were carefully reviewed in advance by the Solicitor's cohort to ensure they were clear and within the Governor's authority.

The cohort also defended constitutional officers from 13 lawsuits challenging the constitutionality of the executive orders. To date, the team has not lost: succeeding in two proposed recalls of the Governor; another case was dismissed on the merits; and two others were voluntarily dismissed by plaintiffs. This work underscores the Governor's authority to act during an emergency and helps establish clear precedent for future Governors

GOVERNMENT SUPPORT

ADMINISTRATIVE LAW DIVISION

The Administrative Law Division provides legal representation to the Departments of Administration, Commerce, Employment and Economic Development, Minnesota Management and Budget, Labor and Industry, and the Minnesota Housing Finance Agency, the Iron Range Resources and Rehabilitation Board, Minnesota State Board of Investment, Minnesota executive branch officials, and many other boards, agencies, councils, and commissions. The division also provides legal representation to the Minnesota State Colleges and Universities System and other state agencies in contract, lease, and transactional matters. Below is a representative sample of some, but not all, of the work performed by the Division in FY 2020:

- **Litigation** The division continued to represent the State to recover millions owed under the 1998 tobacco settlement agreement in *In re Petition of the State of Minnesota for an Order Compelling Payment of Settlement Proceeds Related to ITG Brands, LLC,* Ramsey Cty. No. 62-cv-18-1912. The division defended the constitutionality of numerous election-related laws and licensing requirements for cosmetologists. The division also successfully defended data-practices challenges by plaintiffs seeking access to private voter data in *Cilek v. Office of Minnesota Secretary of State*, 941 N.W.2d 411 (Minn. 2020), and by a plaintiff claiming that public licensing data were private in *Tyler v. Professional Educator Licensing and Standards Board*, Ramsey Cty. No. 62-cv-19-2319.

- **Commerce and Labor Enforcement** The Division represents the Departments of Commerce and Labor and Industry in numerous enforcement actions against individuals and businesses that act in regulated industries and violate state laws. For example, in *In re Administrative Order Issued to Wazwaz*, 943 N.W.2d 212 (Minn. Ct. App. 2020), an unlicensed individual unlawfully acted as a residential building contractor and contracted with more than 50 homeowners to perform storm repairs. His subpar work resulted in numerous private lawsuits against him. The Division also assisted the Department of Commerce in stopping the sale of children's toys with high levels of lead and cadmium in Minnesota ahead of the holiday shopping season.

- ***Telecom and Energy*** The Division represents the Department of Commerce in proceedings before the Public Utilities Commission to ensure that electric and gas-utility rates are just and reasonable. Division staff assisted the Department in a settlement that reduced CenterPoint Energy's proposed revenue increase by about 37%, or $23.5 million, and reached a settlement that reduced Minnesota Power's sought rate increase from about 10.6% to 4.1%. The Division also assists the Department in telecommunication proceedings, including an investigation and resulting settlement with Frontier Communications that required the company to improve its landline telephone network, provide refunds to eligible customers, and submit ongoing status reports to the Department and Commission.

- **Licensing Boards** The Division represents numerous non-health-related licensing boards, routinely giving advice to boards and separately assisting complaint and ethics committees in reviewing complaints against licensees and pursuing administrative action against licensees who violate applicable laws and rules. During FY2020, staff assisted many boards in adapting to remote practices in response to COVID-19 precautions and in applying executive orders to their areas of regulation.

- **Transactional Work** Division staff routinely provide legal advice and representation to all agencies in contract and financial-investment matters. In the last fiscal year, staff assisted the State Board of Investment in investing more than $2 billion, and represented Minnesota Management and Budget in issuing and refunding more than $660 million in general obligation, trunk highway, appropriation, and revenue bonds; Minnesota Housing Finance in issuing and refunding more than $860 million in revenue and state-supported bonds; and the Office of Higher Education in issuing and refunding approximately $53 million in student loan revenue bonds.

HUMAN SERVICES

The Human Services Division provides litigation services and legal counsel to the Minnesota Department of Human Services ("DHS"), the State's largest agency. Division attorneys provide legal services to DHS in the four broad areas of Health Care, Children and Family Services, Mental Health, and Licensing.

HEALTH CARE

Division attorneys in the health care area handle matters concerning Minnesota Health Care Programs ("MHCP"), continuing and long-term care, health care compliance, and benefit recovery. MHCP includes Medical Assistance and MinnesotaCare, which together cover approximately 1.2 million Minnesotans. The Division successfully defended a DHS eligibility decision and ultimately received a favorable decision at the Minnesota Supreme Court in *In re the Matter of: Esther Schmalz and the Commissioner of the Minnesota Department of Human Services*. This victory protected the public policy of the State that individuals with available resources pay for their care.

CHILDREN AND FAMILY SERVICES

Division attorneys in the children and family services area handle legal issues relating to public-assistance programs, child support, and child-protection matters. Public-assistance programs include the Minnesota Family Investment Program, the General Assistance program, the Minnesota Supplemental Aid program, the Federal Supplemental Nutrition Assistance Program ("SNAP," formerly called Food Stamps) and Group Residential Housing. Division attorneys represented the agency in appeals from agency actions related to public assistance programs.

MENTAL HEALTH

Division attorneys in the mental-health area provide legal representation to DHS's adult and children's mental-health programs, chemical-dependency programs, state-operated treatment facilities and forensic services, which include regional treatment centers, state-operated community facilities, children's and adolescent behavioral-health centers, the Minnesota Security Hospital ("MSH"), and the Minnesota Sex Offender Program ("MSOP"). Division attorneys represent DHS's interests in a broad spectrum of litigation. Litigation includes class actions such as *Karsjens v. Harpstead*, a challenge to the Minnesota Sex Offender Program, which is at the Eighth Circuit. Division attorneys also regularly defend DHS-operated facilities and their employees when they are sued, including two separate cases brought by an MSOP client, *Benson v. Piper* and *Benson v. Fischer*, which the district court dismissed on summary judgment.

LICENSING

Division attorneys provide legal representation to the DHS Licensing division in maltreatment cases (abuse, neglect, and financial exploitation) involving personal-care provider organizations and programs licensed to provide adult daycare, adult foster care, child foster care, child care, and services for mental health, developmental disabilities, and chemical health. One such case is a licensing appeal by Chappy's Golden Shores where DHS revoked its license. Division attorneys also defended litigation and a challenge to DHS's investigation in *Minnesota Best Child Care Center v. DHS.*

STATE AGENCIES DIVISION

The State Agencies Division provides legal representation to the Departments of Corrections, Employment and Economic Development, Health, Human Rights, Labor and Industry, Veterans Affairs, the Client Security Board, and the Bureau of Mediation Services. Below is ***a representative sample of some but not all*** of the legal work performed by the State Agencies Division in FY 2020:

- **Litigation** The Division defends statutes from constitutional challenges. For instance, the Legislature enacted the Minnesota Radon Licensing Act (Minn. Stat. § 144.4961), requiring that the Department of Health license radon-mitigation professionals to protect consumers from being adversely affected by unqualified contractors. After the Department was sued by entities challenging the Act, the Division submitted expert testimony demonstrating its public-safety benefits, and the judge found the Act constitutional and dismissed the lawsuit. *Standard Water Control Systems, Inc. v. Malcolm, et al.*, Ramsey Cty. Dist. Ct. 62-cv-18-4356. The Division also brings claims on behalf of agencies to enforce statutes. The Division intervened in a lawsuit on behalf of the Human Rights Department to allege a school district violated the Human Rights Act by forcing a transgender student to use a segregated locker room. The case is now on appeal. *See N.H. and Lucero v. Anoka-Hennepin Sch. Dist.*, Minn. Ct. App. No. A19-1944.

- **Administrative Enforcement** The Division represents state agencies that bring enforcement proceedings in a variety of legal forums. For instance, the Division represents the Department of Labor and Industry in proceedings to enforce occupational safety and health ("OSHA") standards, including cases regarding workplace fatalities and employers' retaliation against employees for raising workplace-safety issues. For instance the division successfully handled a case where a student worker fell 120 feet from a steel tower without fall protection and died. The Division also represents Department of Health and its Office of Health Facility Complaints when individuals or health care facilities have violated the Vulnerable Adults Act by neglecting, abusing, or financially exploiting vulnerable adults. The Division expects to provide increased legal representation as the Department of Health prepares to regulate assisted-living facilities.

- **Appellate Advocacy** The Division advocated in the appellate courts to support workers' rights and to explain agencies' interpretations of statutes they enforce. For instance, the division filed amicus briefs arguing that the Department of Labor and Industry's statutes do not preempt Minneapolis ordinances. *See Graco, Inc. v. City of Minneapolis*, 937 N.W.2d 756 (Minn. 2020) (upholding minimum wage ordinance); *Minn. Chamber of Commerce v. City of Minneapolis*, 944 N.W.2d 441 (Minn. 2020) (upholding sick and safe leave ordinance). The Division also filed two amici briefs on behalf of the Department of Human Rights in the Minnesota Supreme Court in cases concerning the Human Rights Act's statute of limitations in hostile environment cases regarding, whether the Act protects an unpaid intern in a practicum program, and whether the Act precludes common law claims. *See Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58 (Minn. 2020).

- **Injunctive Relief to Protect the Public** The Office assists state agencies in enforcing statutes by seeking court orders to protect the public and preserve meaningful enforcement of state laws. For instance, following the death of George Floyd, the Department of Human Rights ("MDHR") filed a Commissioner's charge against the City of Minneapolis to investigate systematic discrimination in the police department. The division obtained a temporary injunction on behalf of MDHR requiring Minneapolis to make policy changes, including banning the use of choke holds and neck restraints, during the pendency of the investigation. *Lucero v. City of Minneapolis*, Hennepin Cty. Dist. Ct. 27-cv-20-8182. In another case, the Departments of Health and Labor and Industry sued in Ramsey County to continue a shutdown of Water Gremlin's manufacturing operations because the children of its workers had been poisoned by lead dust that workers carried home from the plant. The district court judge ordered Water Gremlin to institute new industrial hygiene procedures, build new facilities, and test for lead and abate lead dust that migrated to employees' homes. The Minnesota Court of Appeals held that Water Gremlin's failure to prevent the migration of lead from its plant to employees' homes constituted a public-health nuisance for which the Minnesota Department of Health could seek an injunction under Minn. Stat. § 145.075. *Leppink, et al. v. Water Gremlin Company*, 944 N.W.2d 493 (Minn. Ct. App. 2020).

- **Recovery for Workers** The Division represented the Department of Labor and Industry in an administrative proceeding to enforce the Minnesota Fair Labor Standards Act

against an employer that failed to pay employees overtime wages. The Minnesota Supreme Court held that the employer's split-day schedule violated the Minnesota's Fair Labor Standards Act and employees were entitled to overtime wages. *In the Matter of Minnesota Living Assistance, Inc., d/b/a Baywood Home Care*, 934 N.W.2d. 300 (Minn. 2019). As a result, the employer paid employees back wages and liquidated damages totaling more than $1.1 million.

- **Defense of State Employees and Programs** The Division provided legal representation to defend the Department of Corrections ("DOC") in a high volume of lawsuits brought by incarcerated persons involving complex constitutional issues in state and federal court. For instance, incarcerated persons at the Moose Lake correctional facility sued the DOC on behalf of a purported class, seeking release and injunctive relief regarding facility conditions in light of the COVID-19 pandemic. The Carlton County District Court dismissed the case. *Foster v. Minnesota Dep't of Corrections*, Carlton Cty. Dist. Ct. 09-cv-20-633. The petitioners appealed to the Minnesota Court of Appeals.

HEALTH AND TEACHER LICENSING DIVISION

The Health and Teacher Licensing Division represents Minnesota's 16 health-related licensing boards, the Emergency Medical Services Regulatory Board, the Health Professionals Services Program, and the Professional Educator Licensing and Standards Board in litigation and administrative actions related to their licensure and regulatory oversight of healthcare providers and educators. The Division also investigates complaints received by the boards alleging licensee misconduct, and it provides legal advice to the boards. Below is ***a representative sample of some but not all*** of the legal work performed by the Health and Teacher Licensing Division in FY 2020:

- **Unprofessional Conduct** The Health and Teacher Licensing Division investigated and took action on complaints received by the boards against healthcare providers and educators who engaged in unprofessional conduct. The misconduct at issue in many of these cases involved violations of professional boundaries with patients or students, including inappropriate financial relationships, improper social relationships, and sexual misconduct. These cases resulted in board orders for discipline under the rules and statutes that govern healthcare providers and educators, which are enforced by the Division and its clients to protect the public. For example, in *In the Matter of Alan Joshua Woggon, D.C.*, the Division investigated and filed a contested case with the Office of Administrative Hearings against a chiropractor in St. Cloud who engaged in sexual misconduct with his patient and disclosed the patient's confidential information. This case resulted in an order from the Board of Chiropractic Examiners suspending the chiropractor's license, which was affirmed by the Court of Appeals.

- **Improper Prescribing and Diversion** The Health and Teacher Licensing Division investigated and took action on complaints received by the boards against healthcare providers who engaged in substandard practice, including improper prescribing and diversion of controlled substances. The misconduct at issue in many of these cases involved unnecessary, improper, or unsafe treatment of patients. Some of these cases

involved improper prescribing for financial gain, or diversion for personal use, of opioids and other controlled substances. Many of these cases resulted in board orders for discipline under the rules and statutes that govern physicians, physician assistants, nurses, and pharmacists, which are enforced by the Division and its clients to protect the public. For example, in *In the Matter of Tammie J. Porras, APRN-CNP, RN*, the Division investigated and filed a contested case with the Office of Administrative Hearings against a nurse who prescribed dangerously high doses of opioids and benzodiazepines without medical justification to her patients at a pain clinic in Brooklyn Park. This case resulted in an order from the Board of Nursing suspending the nurse's licenses.

- **Fraudulent and Abusive Billing** The Health and Teacher Licensing Division investigated and took action on complaints received by the boards against healthcare providers who engaged in fraudulent and abusive billing. The misconduct at issue in these cases involved billing for services that were not provided, requiring improper cash payment from Medicaid patients, submitting false claims or improper billing codes to insurance providers, and charging patients for treatments based on false or deceptive advertising. Many of these cases resulted in board orders for discipline under the rules and statutes enforced by the Division and its clients to protect the public. For example, in *In the Matter of Timothy Larsen Kuss, LMFT*, the Division investigated and took action against a therapist in New Brighton who failed to supervise other therapists and interpreters who submitted inaccurate bills without supporting documentation for payment from Minnesota's Medical Assistance Program. This case resulted in an order from the Board of Marriage and Family Therapy suspending the therapist's license.

STATE GOVERNMENT SERVICES

MEDICAID FRAUD DIVISION

The Medicaid Fraud Division is a federally certified Medicaid Fraud Control Unit ("MFCU") that prosecutes health care providers that commit fraud in the delivery of the Medical Assistance ("Medicaid") program. Upon referral from a Minnesota County Attorney, the division also has authority to investigate and prosecute abuse, neglect, and financial-exploitation cases that occur in certain Medicaid-funded facilities.

The Minnesota Department of Human Services ("DHS") administers the Medicaid program in Minnesota. DHS's Surveillance and Integrity Review Section ("SIRS") is responsible for investigating fraud in the Medicaid program. SIRS can then refer cases to the Division for prosecution.

The Division prosecutes health-care providers who participate in the State's Medicaid program and submit false claims for reimbursement. Typical fraud schemes include billing for services not provided, billing for authorized units rather than actual units of care provided, providing group care but billing as if one-on-one care is provided, and billing for services provided by individuals who are not qualified due to a lack of credentials or failure to pass background checks. Some fraud cases have a criminal neglect component because the recipient's condition is compromised due to lack of care.

The Medicaid Fraud Division also intervenes in civil lawsuits under the Minnesota False Claims Act.

Below is ***a representative sample of some but not all*** cases prosecuted by the Medicaid Fraud Division in FY 2020.

- ***State of Minnesota v. Theresa Olson et al.*** Ten owners, managers, and employees of comprehensive home care facility Chappy's Golden Shores, located in Hill City, Aitkin County, have been charged with a collective 76 counts of manslaughter, assault, neglect, racketeering, theft, operating a comprehensive home care facility without a license, concealing the proceeds of these crimes, perjury, and obstructing the State's criminal investigation for conduct that included:

    - Subjecting multiple residents to neglect by failing to provide them with proper health care, supervision, food, or shelter, which resulted in the death of one resident;
    - Bilking the Medicaid program of more than $2.1 million by billing for health care services that did not occur or were not covered by the Medicaid program;

    - Continuing to house former Chappy's residents after Chappy's license was suspended and providing those residents with unlicensed health-care services;

- Engaging in an extensive and coordinated effort to conceal evidence of fraud and maltreatment, falsify records in response to State investigations, and convince potential witnesses to provide false or misleading answers to State investigators; and

- Concealing the proceeds of their financial crimes through business bank account withdrawals and property transfers.

Briefing is underway on several dozen motions brought by the State and defendants.

- ***State of Minnesota v. Jonathan Newcomb et al.*** In May 2020, the Division charged a network of 16 therapists, interpreters, medical transportation providers, and other associated individuals with a total of 113 felonies, including racketeering, theft, and concealing the criminal proceeds of these crimes. The State alleges that the criminal enterprise collectively defrauded the Medicaid program of more than $1 million by billing for individual therapy sessions, one-on-one interpretation, and rides given to individuals, when in fact services were provided in groups if at all. All defendants have been charged in Anoka County District Court; First Appearances have not yet been set for most cases.

- ***State of Minnesota v. Tommie Johnson et al.*** Johnson and his wife, Adrienne Ford, who were not qualified to enroll as Medicaid providers, illegally owned and managed two personal-care assistant agencies, where they billed for almost $1.7 million of services that were not provided or not eligible for reimbursement. In furtherance of their fraudulent schemes, the Johnsons paid Medicaid recipients cash kickbacks for use of their information and often billed DHS for claims provided by individuals who did not even live in Minnesota at the time. Johnson and Ford, along with several co-defendants, have been charged in Hennepin County District Court and the Division's investigation into several related individuals is ongoing.

PUBLIC SAFETY DIVISION

The Public Safety Division provides legal representation to the Minnesota Department of Public Safety ("DPS") at thousands of implied consent hearings each year in which drivers contest the revocation of their driver's license due to an arrest for driving while impaired by alcohol or controlled substances. In FY 2020, the Division handled district court actions the resolution of which has typically resulted in multi-million dollar recovery

The Division provides legal services to DPS and its various Divisions, including the Minnesota State Patrol, the Minnesota Bureau of Criminal Apprehension, the State Fire Marshal's Office, the Office of Pipeline Safety, the Office of Homeland Security and Emergency Management, the Office of Traffic Safety, the Alcohol and Gambling Enforcement Division, and the DPS Driver and Vehicle Services Division.

The Division also provides legal representation to state boards and commissions, including the Gambling Control Board, the Minnesota Racing Commission, and the Private

Detective and Protective Agent Services Board. These entities issue thousands of licenses and conduct numerous investigations each year, which may result in contested case hearings that require legal representation from this Division at the Office of Administrative Hearings, or in state district and appellate courts. The Division provides legal representation to the Minnesota Racing Commission in appeals from commission licensing decisions and disciplinary action taken against horse owners, trainers, and jockeys, and has also provided legal representation to the commission at the Minnesota Court of Appeals. The Division also provides legal representation to the Gambling Control Board and the Private Detective and Protective Agent Services Board in appeals from the boards' licensing decisions and disciplinary actions.

In FY 2020, Division attorneys handled nearly 4,000 district court proceedings and associated appeals challenging the revocation, cancellation, withdrawal, and disqualification of driving privileges under various provisions of Minnesota law. Attorneys also represented the Minnesota State Patrol in forfeiture proceedings in the district courts.

Below is ***a representative sample of some but not all*** of the legal work performed by the Public Safety Division in FY 2020:

- Division attorneys have thus far successfully defended against dozens of discovery motions by drivers who request the source code of the breath-testing instrument used by law enforcement throughout the State. The Division's success has supported the work of the Bureau of Criminal Apprehension in its comprehensive testing determination that the instrument is fit for use by law-enforcement officers and the Commissioner's subsequent approval of the instrument. It has saved the State from being a party to unnecessary protracted and expensive litigation in federal court.

- Division attorneys also defended the State against nearly two dozen constitutional and statutory challenges in Minnesota appellate courts. In a representative published case decided by the Court of Appeals, *Pauline Christin Jensen v. Comm'r of Pub. Safety*, Division attorneys responded to a driver's claim that her license was improperly revoked because the officer who executed the warrant to test Jensen's blood after her arrest for Driving While Intoxicated did not inform her that under the relevant statute, refusal to test to the blood test is a crime.

- Division attorneys successfully defended the State Fire Marshal and the Gambling Control Board at the Office of Administrative Hearings against claims that the entities engaged in unpromulgated rulemaking, which saved the State the cost of engaging in unnecessary rulemaking proceedings.

- ***In the Matter of CenturyLink Notices of Probable Violations*** Division attorneys brought an enforcement action at the Office of Administrative Hearings on behalf of the DPS Office of Pipeline Safety against CenturyLink for its alleged failures to timely mark its underground utilities for contractors who needed to excavate in the area, and for failure to meet with excavators and contractors regarding the markings. Division attorneys successfully negotiated a settlement where CenturyLink agreed to immediately

pay a civil penalty of $2,250,000 with an additional $750,000 stayed for two years contingent on CenturyLink's compliance with on-time response requirements.

TRANSPORTATION DIVISION

The Transportation Division provides legal representation to the Minnesota Department of Transportation (MnDOT). A large part of the Division's work involves eminent-domain litigation. In addition, the Division provides legal advice to MnDOT, other state agencies, and the National Guard involved in construction projects and provides legal representation to those entities when contractors, subcontractors, or third parties sue on construction-related matters. The Division also protects taxpayers by filing claims on behalf of MnDOT against entities that perform defective work, fail to pay employees legally mandated wages, or otherwise fail to comply with contractual requirements.

The Division advises client agencies on the legal ramifications of proposed activities and development projects, assists State agencies in real estate transactions, and evaluates and attempts to resolve claims before litigation arises.

Below is ***a representative sample of some but not all*** the legal work performed by the Transportation Division in FY 2020:

- ***CM Construction v. State of Minnesota, by its Dept. Of Military Affairs v. BWBR*** A general contractor sued the National Guard for more than $3.5 million for retained contract funds and additional project costs arising from an armory construction project. Division attorneys successfully negotiated a settlement that saved taxpayers more than $3 million dollars.

- ***Minnesota Veterans' Home Bridge 5756*** The Department of Administration contracted for restoration of Bridge 5756 and noted defects in some of the work performed. A Division attorney successfully mediated a settlement among the parties for changes in design and remedial work that saved the State in excess of $1 million.

- ***State of Minnesota, by its Commissioner of Transportation v. Robert P. Carlson, et al.*** A Division attorney successfully argued at the Minnesota Supreme Court that the court clarify and limit the scope of damages that a landowner may claim in an eminent-domain proceeding, which will be helpful to limit future payment of taxpayer dollars for unnecessary litigation and improper damages claims.

CRIMINAL DIVISION

The Criminal Division provides prosecutorial assistance to county attorneys and local law-enforcement agencies in prosecuting serious crimes and in the civil commitment of dangerous sex offenders. The Division assists counties in the prosecution of serious crimes in trial courts throughout Minnesota when requested by a county attorney. Division attorneys also provide assistance to county attorneys in civil-commitment hearings involving dangerous sexual predators, upon the request of the county attorney.

The Division's attorneys also assist the Department of Corrections in 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. The Division also advises the BCA in registration and DNA collection issues, and the Department of Corrections on community-notification issues, and provides legal assistance to the Advisory Committee on the Rules of Civil Commitment.

The Division provides assistance to county attorneys in felony appeals. The cases handled in FY 2020 involved, among other crimes, murder, sexual assault, drug distribution and manufacturing, child sexual abuse, and felony assault.

Below is ***a representative sample of some but not all*** cases prosecuted by the Criminal Division in FY 2020.

- ***State of Minnesota v. Lois Riess*** (Dodge County) Lois Riess shot her husband to death in Dodge County in March 2018. She then fled to Florida, murdered a woman there, and then fled to Texas. She was arrested in South Padre Island, Texas and held on murder charges in Florida. Riess entered a guilty plea to a first-degree murder charge in Florida and was returned to Minnesota. On August 11, 2020, Riess pled guilty to first-degree murder in Dodge County and the court sentenced her to serve life in prison.

- ***State of Minnesota v. James Montano*** (Carlton County) On April 20, 2019, James Montano shot and killed his uncle, Andrew Gokee, and shot at but missed his cousin, Hudson Gauthier, in rural Carlton County. On January 21, 2020, a jury convicted him of first-degree murder and attempted first-degree murder. The court sentenced him to serve life in prison.

- ***State of Minnesota v. Scott Engelbrecht*** (Watonwan County) Engelbrecht shot and killed his wife after an argument in their home. He then pursued his wife's adult daughter to a nearby home, where she went to call for help, and shot her to death on the front porch. A jury convicted Engelbrecht of two counts of premeditated murder on November 7, 2019. The court sentenced him to life in prison.

- ***State of Minnesota v. Chauvin, Kueng, Lane, and Thao*** (Hennepin County) On May 25, 2020, four Minneapolis police officers killed George Floyd by using excessive force while arresting him for a misdemeanor. The officers used an unauthorized restraint technique in which Chauvin pressed his knee into George Floyd's neck for nine minutes while the others restrained him on his stomach with his hands cuffed behind his back. Bystanders pleaded with the officers to stop the assault as George Floyd fell unconscious, while some filmed it and posted it to social media. During a period of major social unrest and turbulent protests following the release of the video, at the request of Hennepin County and the Governor, the Office assumed the prosecution of the former officers on murder charges. The prosecution team consists of veteran prosecutors in the Criminal Division and appointed expert litigators from outside the office as Special Assistant Attorneys General to supplement the team. The case is currently scheduled for trial on March 8, 2021.

CONSUMER PROTECTION

CHARITIES DIVISION

The Charities Division serves a number of functions. First, it maintains a public registry of charities, charitable trusts, and professional fundraisers that operate in the State for transparency purposes. Second, it oversees and regulates charities, charitable trusts, and nonprofits active in Minnesota pursuant to the Office's authority under statute and common law. Third, it enforces state charitable solicitation, charitable trust, and nonprofit laws.

With respect to the Division's registration function, Minnesota law requires charitable trusts, charitable organizations, and professional fundraisers to register and file annual reports with the Attorney General's Office ("AGO"). In the last fiscal year, the Division deposited $561,828 in registration-related fees into the State's general fund. The Division currently has more than 13,129 soliciting charitable organizations, more than 2,783 charitable trusts, and 434 professional fundraisers registered. These entities collectively held more than $694 billion in assets and had $309 billion in total revenue last year. Registration information, which is available on the Attorney General's web site, permits the donating public to review a charitable organization's financial information, allowing for greater transparency and more informed giving.

With respect to its oversight role, the Charities Division reviews for compliance multiple filings and notices concerning charities, charitable trusts, and nonprofits. For charitable trusts, the Division receives notice of certain trust and estate actions, so it can act to protect charitable beneficiaries that might otherwise be unable to represent themselves. The Division received notice of hundreds of such matters in fiscal year 2020. For nonprofits, the Division receives statutory notice when a corporation seeks to dissolve, merge, or otherwise change its status, so it can ensure that assets are used for nonprofit purposes. The Division received and reviewed 171 such notices from nonprofits last fiscal year. For charities and professional fundraisers, the Division reviews numerous tax returns, financial statements, and other registration documents for financial misuse, solicitation fraud, and other violations.

For its enforcement role, the Charities Division conducts informal and formal investigations into complaints and other allegations of fraud, misuse of funds, breaches of fiduciary duties, and other wrongdoing by regulated entities. Depending on the circumstances, investigations are resolved with a spectrum of remedies, from formal enforcement actions, to voluntary education and compliance efforts. Through the enforcement of laws governing nonprofit and charitable organizations, the Charities Division helps combat fraudulent solicitations, deter fraud in the nonprofit sector, educate the public about charitable giving, and hold nonprofit organizations accountable for how they raise, manage, and spend charitable assets. At the same time, the Division works proactively with donors, charities, and nonprofit boards to provide education, outreach, technical assistance, and other support to strengthen the charitable giving sector and help prevent future violations.

The following is ***a representative sample of some but not all*** legal work performed, including investigations and lawsuits brought or resolved, by the Charities Division in FY 2020:

- ***Charitable Trust Enforcement*** An example of charitable trust oversight initiated last year includes *In re Otto Bremer Trust*. The AGO initiated a public investigation into the trustees of the Otto Bremer Trust ("OBT") in January 2020. In August, the AGO filed petitions seeking to remove the trustees of OBT. The AGO asserted that trustees should be removed for breaching their fiduciary duties, failing to administer the trust effectively, and violating state laws governing charitable trusts—culminating in a hostile takeover attempt of OBT's primary asset, Bremer Financial Corporation, in October 2019. The Office brought the action under the Attorney General's authority as the chief law officer of the State, the supervisor of charitable trusts in Minnesota, and the sole representative of the beneficiaries of the OBT—the public at large.

- ***Nonprofit Corporation Enforcement*** In December 2019, the AGO filed *State v. Journey Home Minnesota and Blake Huffman*, individually against Minnesota nonprofit corporation Journey Home Minnesota ("JHM") and its president, Blake Huffman. The AGO's lawsuit alleges that Huffman misappropriated tens of thousands of dollars intended to provide affordable housing to veterans, fraudulently solicited money to build a handicap-accessible home for a family with terminally ill children only to abandon the project, increased tenants' rates contrary to its nonprofit mission, and abandoned the charity by failing to pay its bills, resulting in multiple property foreclosures. In September 2020, the AGO secured a settlement permanently banning Huffman from operating any Minnesota charities, requiring Huffman to pay back tens of thousands in misused nonprofit assets, and requiring the nonprofit to dissolve its operations.

- ***Charitable Solicitation Enforcement*** After a years-long investigation, in 2020 the AGO, in partnership with the Federal Trade Commission and other states filed *Federal Trade Commission et al. v. Outreach Calling et al.*, alleging that the sprawling fundraising operation scammed donors nationwide out of millions of dollars for sham charities by falsely claiming to use donations to help homeless veterans, disabled law-enforcement officers, breast-cancer survivors, and others, when in reality, these organizations spent almost none of the donations on the promised activities. In September 2020, the parties secured a settlement permanently banning Outreach and its operators from fundraising for charities and requiring defendants to pay back $892,755 to legitimate charities. The AGO also initiated in 2020 *In the Matter of Healing Heroes Network et al.*, alleging that the Florida charity deceptively solicited donors by, among other things, falsely claiming that the organization had a nationwide network of medical providers helping veterans and misusing their financial statements to appear more efficient than actually was the case. Working with 10 other states, the AGO secured the charity's dissolution, a $95,000 penalty, and a 5-year injunction against the board members from operating charities in the future.

CONSUMER ACTION DIVISION

The Consumer Action Division serves two primary functions. First, it answers calls, correspondence, and on-line complaints from people, businesses, and other organizations who contact the consumer assistance division. Staff members are often able to answer questions and provide information over the phone, talk through consumer-related problems, and assist people in locating other government agencies that may be able to help address their concerns. In FY 2020, the Consumer Action Division answered more than 84,000 calls from the public. Consumers have contacted the Division at record-breaking rates during COVID-19, and on one day following the death of George Floyd, fielded a record-breaking 3,200 calls. Some of the topics people most commonly call about include health care, housing, credit reports, and utilities. Second, the Consumer Action Division helps Minnesota residents informally mediate and resolve thousands of complaints with businesses and other organizations each year. More than 17,000 files were handled arriving at settlements of over $5.6 million. Through its efforts to assist Minnesotans in these matters, the Division regularly eliminated the need for costly and time-consuming litigation for all parties.

Below is ***a representative sample of some but not all*** of the work performed by the Consumer Action Division in FY 2020:

- The Division helped a Minnesota resident who lost her health insurance because her employer did not pay its portion of the insurance premiums. The resident gave birth to a child in a hospital without insurance and incurred a bill of approximately $14,000 that she could not afford to pay. The Division mediated the problem with the hospital, which agreed to waive her bill, saving the resident approximately $14,000.

- The Division assisted a Minnesota resident whose insurance claim was incorrectly categorized, which led to her being pursued for an out-of-pocket bill of more than $10,000. After the Division mediated the problem with the resident's insurance company, it correctly categorized the claim and paid the full amount remaining on it, saving the resident over $10,000.

- The Division helped a Minnesota resident who had fallen behind on her mortgage payments due to a previous loss of work. Because the resident had regained employment, her mortgage servicer told her that she did not qualify for a mortgage modification and had to pay the arrears in full, which she could not afford to do. The Division mediated the problem with the resident's mortgage servicer, after which it offered her an affordable payment plan on the arrears and a permanent modification to her mortgage that allowed her to stay in her home.

RESIDENTIAL UTILITIES DIVISION

The Residential Utilities Division ("RUD") represents the interests of residential and small-business utility consumers in the complex and changing electric, natural gas, and telecommunications industries, particularly regarding utility rates, reliability of service, and service-quality issues. The RUD's work supports Minnesota's economy and its residents'

quality of life by making sure that utilities' rates are reasonable, their expenses are prudent, and that customers receive high-quality service. This is essential to ensure that the State's citizens and small businesses are not burdened by excessive costs or poor reliability for these necessary services.

Below is ***a representative sample of some but not all*** of the legal work performed by the RUD in FY 2020:

- ***Utility Rate Cases*** Utility Rate Cases are the primary means for the Public Utilities Commission ("PUC") to establish the amount that utility customers pay. The PUC decides how much utilities should recover for providing electric or natural-gas service, the amount that different ratepayer groups pay (i.e. residential customers, industrial customers, commercial customers, etc.), and how much of these costs will be "fixed" or vary with the amount of energy consumed. This past year, four utilities sought to increase the cost of electricity and natural gas. They also sought to apply these increases disproportionately on residential customers and to increase the amount of fixed charges that residential customers must pay simply to access utility service. These utilities serve customers in large swaths of the Minneapolis–Saint Paul Metro area and Greater Minnesota. The RUD intervened in all of these cases, opposing multiple aspects of the utilities' requests. In total, these four utilities' requests were reduced by more than $60 million annually. The RUD's advocacy also ensured more proportional increases, so that residents and small businesses were not subjected to large or disproportionate price hikes. In addition, three of the four utilities did not increase their fixed charges for residential customers, which helps these customers to control their energy bill by taking steps to reduce consumption. The RUD anticipates that up to three more Minnesota utilities will file requests to increase rates in the next fiscal year.

- ***Xcel's Proposal to Purchase the Mankato Energy Center*** The RUD intervened in an attempt by Xcel Energy to purchase the Mankato Energy Center ("MEC") for $650 million—an amount that would have been paid by Xcel's ratepayers. Xcel already had contracts to receive power from MEC for years-—at a cost lower than its proposed purchase price. But Xcel attempted to justify charging ratepayers more to finance purchasing this facility by making two significant assumptions: (1) that MEC would operate well beyond Xcel's contract term, and (2) that renewing these contracts in the future will cost significantly more. These risky assumptions would mean that Xcel's ratepayers would have paid higher rates now for the speculative benefit that they might save money decades from now. The RUD and other ratepayer advocates presented legal and policy analysis opposing Xcel's request, and the PUC rejected it. This means that ratepayers are not burdened with paying higher rates to finance a $650 million purchase over the coming decades.

- ***Frontier Service Quality*** In February 2018, the PUC opened its investigation into Frontier Communications' service quality, customer service, and billing practices. The RUD participated in the PUC's investigation by filing comments and attending mediation conducted by the Office of Administrative Hearings, which resulted in a settlement between Frontier and the Department of Commerce on steps to address the company's

service quality issues. The RUD initiated its own broader investigation regarding consumer protection concerns. This investigation was resolved this past year with an Assurance of Discontinuance that benefits Minnesota consumers in several ways. First, Frontier must invest $10 million of non-public money into improving its broadband network, much of which serves rural populations in Greater Minnesota that do not have access to quality broadband. Second, Frontier paid $750,000 in restitution for Minnesota customers who received poor service or were not accurately informed of their contract price or terms. Third, Frontier must take affirmative steps to ensure that its advertising and sales practices accurately communicate the services its network can provide. Frontier must submit reports to the RUD on the first and third anniversary of the Assurance of Discontinuance updating its compliance efforts.

CONSUMER, WAGE, AND ANTITRUST DIVISION

The Consumer, Wage, and Antitrust Division investigates violations of and enforces State laws, including Minnesota's laws prohibiting consumer fraud, deceptive trade practices, false advertising, and wage theft. The Division also investigates potential violations of state and federal antitrust laws, and enforces these laws when it uncovers evidence of anticompetitive conduct.

The Division conducts investigations and takes action where appropriate to stop and deter fraud, anticompetitive conduct, and other unlawful practices in business, commerce, or trade and to protect consumers and workers. The Division also participates in numerous coordinated investigations of potential fraudulent or anticompetitive conduct by multiple state and federal enforcers of consumer protection, worker protection, and antitrust laws, including other state attorneys general, the U.S. Department of Justice, and the Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB").

The following are ***some but not all*** of the investigations and suits brought or resolved by the Consumer, Wage, and Antitrust Division:

COVID-19 Related Consumer Protection Enforcement Activities

The Division has taken a proactive role in protecting Minnesotans from a number of harms that have resulted from the ongoing COVID-19 pandemic. This work includes reviewing and enforcing executive orders related to price-gouging and the evictions moratorium, as well as working to stop COVID-19-related scams and wage theft. In addition, the Division has taken action to protect the health and safety of Minnesotans and help stop the community spread of COVID-19 by enforcing executive orders restricting the operations of restaurants and bars as well as large gatherings for recreational activities or events.

- ***Pandemic Price-Gouging*** The Division has been proactively enforcing Executive Order 20-10, which prohibits pandemic profiteering of essential items—such as face masks, gloves, hand sanitizer, toilet paper, and eggs—during the COVID-19 peacetime emergency. To date, the Division has received and investigated more than

2,200 price-gouging complaints. In response to these complaints, a team of attorneys and investigators have made hundreds of calls to businesses and consumers, conducted numerous "secret shop" visits, and sent over 100 enforcement and resolution letters to sellers. The Division has also established direct channels of communications with online sales platforms, including Facebook, Amazon, and eBay, in order to quickly share information and stop price-gouging conduct by third-party sellers.

Where appropriate, the Division has also taken legal action to put an end to COVID-19 price-gouging, including obtaining numerous Assurances of Discontinuance. For example, we filed an Assurance of Discontinuance with an eBay re-seller that was selling 3M N95 face masks at a markup of more than 1,000 percent over their normal retail price. We similarly put an end to price-gouging by a Minnesota egg producer that had increased its price by more than 150 percent over the company's pre-emergency egg pricing. Investigations and enforcement work in this important area remains ongoing.

- ***Evictions and Lease Termination Moratorium*** The Division has also taken swift and strong action to enforce Minnesota's landlord-tenant laws as well as Executive Orders 20-14 and 20-79, which prohibit landlords from filing eviction actions or terminating residential leases for the duration of the COVID-19 peacetime emergency.

  To date, more than 1,300 tenants have reported to the Office that their landlord may be violating these Executive Orders, and many of them report that they fear they will be removed from their home with no place to shelter during the ongoing pandemic. A team of attorneys and investigators quickly respond to these complaints by calling and educating the landlord on the relevant law as well as to obtain the landlord's agreement to comply with the Executive Orders. Most landlords have agreed to cease their efforts to evict or force their tenants to vacate their homes after such calls. In some cases, however, landlords have refused to comply with the law. When this happens, the Division has swiftly filed enforcement actions in court and obtained temporary restraining orders in order to protect the health and safety of tenants during the pandemic.

  To date, the Division has filed seven such enforcement actions. For example, as part of these lawsuits, the Division has obtained temporary restraining orders that authorized tenants to continue to shelter in place in their home after their landlords have unlawfully attempted to force them out through unlawful self-help tactics such as disconnecting their electricity, heat, or water supply or by changing the property's locks. This important enforcement work remains ongoing.

- ***COVID-19-Related Scams*** The Division has partnered with the U.S. Attorney's Office for the District of Minnesota and the Minnesota County Attorney's Association to form the Minnesota COVID-19 Action Team ("MCAT"). As part of this team, the Division investigates reports of COVID-19-related scams that can vary

from scammers selling fraudulent health-related cures, products and treatments, to fraudulent websites purporting to sell personal protective equipment (like face masks) that are never provided. For example, the Division has stopped several chiropractic clinics from making deceptive representations about COVID-19 treatments such as that chiropractic services are "WAY more effective than social distancing," as well as stopped a company from representing that its supplement products constituted a "COVID-19 Prevention Protocol."

- ***COVID-19-Related Wage Theft*** The Division continues to investigate and respond to complaints from workers that state they have not been paid all the wages they have earned as a result of the COVID-19 pandemic. For example, the Division continues to investigate a restaurant company that failed to pay numerous employees earned wages. As a result of this investigation, the company has already represented it has paid back wages totaling more than $60,000 to harmed employees.

- ***Businesses' Compliance with COVID-19 Safety Requirements, including Bars and Restaurants*** To date, the Division has received and investigated more than 400 complaints regarding businesses' (including bars and restaurants) noncompliance with Executive Orders 20-74 and 20-81. As appropriate, the Division contacts the business, investigates the complaint, and refers the complaint to other relevant agencies that also have enforcement authority related to the subject of the complaint. Where appropriate, the Division will bring an enforcement action to protect public health and safety. For example, the Division obtained a temporary injunction enjoining a chain of six bar-restaurants from opening for on-site dining in violation of the Governor's then-existing emergency executive order that prohibited on-premises dining to slow the spread of COVID-19. This litigation and the Division's enforcement work in this area is ongoing.

- ***Large Recreational Events' Compliance with COVID-19 Safety Requirements*** The Division has partnered with the Departments of Health and Labor & Industry to investigate reports of large recreational events occurring throughout the State. Such events may be especially fertile environments for the community spread of COVID-19 if not planned and carried out in a safe manner that is compliant with Executive Order 20-74. Accordingly, this inter-agency team works to educate event organizers about relevant safety requirements that must be implemented, capacity restrictions, and compliant COVID-19 Preparedness Plans. The Division has participated in more than 60 such investigations and contacts with event organizers. To the extent an event organizer refuses to comply with applicable safety requirements, the Division will take action to enforce relevant requirements. For example, the Division filed an enforcement action against a company that held a large rodeo event in northern Minnesota in defiance of applicable capacity, social distancing, and other safety measures required by Executive Order 20-74. This litigation and the Division's investigations of large recreational events remains ongoing.

CONSUMER PROTECTION

- ***JUUL's Deceptive Marketing and Targeting Youth for its Electronic-Cigarette Products*** In December 2019, the Office filed suit against JUUL Labs, Inc. alleging it has violated multiple state consumer-protection laws, breached its duty of reasonable care, and created a public nuisance by deceptively marketing its highly addictive e-cigarette products to youth. The complaint alleges that JUUL closely followed Big Tobacco's marketing playbook, which focused on deceptively luring youth into using and becoming addicted to its products. In the wake of this fraudulent and deceptive conduct, tobacco use has risen dramatically among Minnesota's youth, wiping out the last ten years' of progress Minnesota has made in combatting youth tobacco use. As part of its lawsuit, the Office is seeking, among other things, to permanently stop JUUL's deceptive conduct, fund a corrective public-education campaign and vaping-cessation programs in Minnesota, take affirmative steps to prevent the sale of its products to children, disclose all its research relating to vaping and health, and obtain monetary relief. This litigation is ongoing.

- ***Fraudulent Marketing Practices of Opioid Manufacturers and Distributors*** The national opioid epidemic continues to ravage the nation, including in Minnesota. Approximately one Minnesotan a day dies from opioid addiction. The actions the Office has taken against manufacturers and distributors that have caused this damage include:

    - *State of Minnesota v. Purdue Pharma L.P., et al.* In July 2018, the Office filed suit against OxyContin manufacturer Purdue Pharma, alleging that Purdue misrepresented the risks of opioid addiction and the benefits of long-term opioid use. In August 2019, the Office filed an amended complaint adding members of the Sackler family, the owners of Purdue Pharma, as co-defendants. Purdue filed for bankruptcy in September 2019 and, over the objections of the Office and many other states, convinced the bankruptcy judge to halt all litigation against the company and the Sacklers. The Office is pursuing Minnesota's interests within the bankruptcy by working to maximize the value of the state's recovery from Purdue and the Sackler family, which would be put into Minnesota's opioid stewardship fund and used to address the harm of the opioid crisis in Minnesota. The Office is also seeking public disclosure of Purdue's documents, in order to ensure that Purdue and the Sackler family are held accountable by allowing the public to directly view the evidence of their misconduct.

    - State of Minnesota v. Insys Therapeutics, Inc. In May 2018, the Office filed suit along with the Minnesota Board of Pharmacy against Insys Therapeutics, an opioid manufacturer that sold a highly potent fentanyl product called Subsys. In its enforcement action, the Office alleged Insys violated Minnesota law by unlawfully promoting Subsys and by paying Minnesota physicians "sham" speaker fees in order to induce prescriptions. After Insys filed for bankruptcy in June 2019, the Office helped craft a bankruptcy settlement that

liquidated Insys, ensured its documents will be made public, and required the purchaser of Subsys to abide by restrictions designed to prevent future misconduct involving the product. The bankruptcy court confirmed this bankruptcy plan in January 2020.

- *Multistate Opioid Investigations* The Office is engaged in multistate investigations and settlement negotiations with numerous pharmaceutical manufacturers and distributors for violations of state consumer protection laws. The Office is leading nationwide efforts to ensure public disclosure of opioid-related documents, which are designed to achieve accountability, transparency, and prevention of future harm. The Office is also coordinating with the Opioid Epidemic Response Advisory Council to ensure any potential settlement funds are used as effectively as possible throughout Minnesota to remedy the ongoing opioid crisis.

- ***Fraudulent Contractual Terms and Marketing Practices*** The Division continues to investigate and bring enforcement actions to stop fraudulent and deceptive contractual terms and marketing practices in a variety of industries including, for example, residential leasing between landlords and tenants and extended auto warranties:

  - *State of Minnesota v. Stephen Meldahl, et al.* The Office filed suit against North Minneapolis landlord Steven Meldahl for including numerous misleading and deceptive provisions in his leases with tenants. Among other things, the complaint alleges these fraudulent lease provisions misrepresent tenants' legal rights to habitable housing, unlawfully shift the burden of making normal housing repairs onto tenants, misrepresent that tenants cannot have their homes inspected by local authorities without Meldahl's permission, and charge unlawful late fees. The Office secured a temporary injunction requiring Meldahl to seek inspections of all his rental properties, inform his tenants of their right to request inspections from local authorities, and to stop charging unlawful late fees by increasing his tenants' rent. Litigation in this matter is ongoing.

  - *State of Minnesota v. AutoAssure, LLC* In 2018, the Office filed suit against AutoAssure, LLC, a Texas-based seller of motor vehicle service contracts—commonly known as "extended warranties"—that claim to provide repair coverage to vehicles beyond what is provided by the manufacturer's warranty coverage. The lawsuit alleged AutoAssure misled Minnesotans about the characteristics of its extended warranties and its own identity in the course of marketing and selling its service contracts. The Office obtained a settlement that (1) banned AutoAssure from marketing to Minnesotans for four years, (2) required AutoAssure to reform its sales practices if it resumes marketing in Minnesota after this four-year period, and (3) pay $400,000 to Minnesota, which the Office can use to restitute harmed consumers.

- ***Deceptive Pricing Practices by Minnesota's Largest Telecommunications Companies*** The Division reached settlements with CenturyLink and Comcast, which resolved enforcement actions the Office had filed against both telecom companies for misrepresenting the prices Minnesota consumers would pay for their services. As part of these settlements, the Office secured meaningful reforms to the companies pricing and billing practices, along with refunds and debt relief for thousands of Minnesota consumers. For example, as part of the CenturyLink settlement over 12,000 Minnesota consumers have already received $844,655 in refunds and up to 17,000 additional consumers may receive up to $8 million in refunds as part of the Office's ongoing restitution process. Similarly, as part of the Comcast settlement, 15,600 Minnesotans will receive $1.14 million in refunds and an additional 16,000 Minnesotans will receive debt relief worth millions of dollars.

- ***State v. Minnesota School of Business, Inc. & Globe University, Inc.*** This Office brought an enforcement action for fraud and illegal lending against Minnesota School of Business ("MSB") and Globe University ("Globe") in 2014, which was litigated through trial in 2016. The court found in favor of the State, ordered partial refunds for borrowers on illegal loans, and instituted a process for students harmed by fraud to claim restitution. Appeals over those rulings were completed in 2019, including a final ruling by the Minnesota Supreme Court in September 2019 upholding the district court's order for restitution in favor of the State.

  Following those appeals, the schools filed for Chapter 11 bankruptcy in November 2019, though the state court proceedings continued to resolve remaining issues. Following remand from appeal over the illegal-lending claims, the state district court ordered $3.5 million in additional restitution, $500,000 in civil penalties, and $1.9 million in costs and fees.

  The State has continued to proceed towards collection on its judgments in the bankruptcy proceedings. The State also commenced the notice-and-claims process ordered for the 1,321 students affected by MSB/Globe's fraudulent marketing of its criminal-justice program. Among those students, 904 returned claim forms. The State, the Chapter 11 Trustee appointed by the bankruptcy court, and MSB/Globe's equity ownership are working to resolve a large number of disputed claims and have agreed to present disputed claims that cannot be resolved to the bankruptcy court for resolution. Those claims and other judgments will eventually be paid out of MSB/Globe's liquidated assets in accordance with the U.S. Bankruptcy Code.

- ***Student-Loan and Tax-Debt Settlement Scams*** The Division has ongoing investigations and litigation against numerous debt settlement companies, which charge consumers hundreds or thousands of dollars of illegal upfront fees in exchange for deceptive promises of debt forgiveness that never materialize. In addition to violations of Minnesota's consumer-fraud laws, these companies fail to register as debt-settlement service companies in violation of the Debt Settlement Services Act. Our Office has achieved the following results against these scams:

- *CFPB v. Consumer Advocacy Center, Inc., et al.* The Office filed a joint lawsuit with the CFPB, North Carolina, and City of Los Angeles against numerous related southern California companies and their owners and officers for running a fraudulent student-loan debt-settlement scam. The Court granted an emergency order halting the defendants' conduct and froze their assets. Minnesota, along with the other plaintiffs, have reached settlement with several of the defendants for significant injunctive relief, redress to consumers, and civil penalties. Litigation continues with the remaining defendants.

- *Assurances of Discontinuance* The Office secured Assurances of Discontinuance from two student-loan debt-settlement companies—Student Education Center and EDU Doc Support, LLC—requiring them to cease doing business in Minnesota and provide full refunds of the fees they collected from Minnesota consumers, totaling over $170,000.

- *State of Minnesota v. Wall & Associates, Inc.* The Office filed suit against a Virginia-based tax-debt-settlement company that falsely claimed to have local offices in Minnesota. The company further deceived consumers into paying thousands of dollars in upfront fees based on misrepresentations that it would settle their outstanding tax debt for 10% of what they owed. The Office has prevailed in numerous discovery motions and litigation is ongoing.

WAGE THEFT

The Minnesota Attorney General's Office Wage Theft Unit was created in June 2019. The Wage Theft Unit's goal is to protect and advance the economic rights of all Minnesotans by investigating and litigating cases involving unlawful patterns and practices affecting economic rights, as well as other persistent issues, that cause workers in Minnesota not to receive the wages they have earned. The Unit monitors emerging labor and employment issues and engages in dialogue with other governmental entities, community groups, labor, and the business community to increase awareness of economic-rights issues and to identify unlawful practices. The Unit is deepening partnerships with local, state, and federal agencies to strategically enforce the law in order to achieve maximum compliance. In doing so, the Unit will benefit both workers' whose rights have been violated and employers who respect workers and follow the rules. The Unit is engaged in numerous non-public investigations related to violations of Minnesota's wage and hour laws, as well as the following:

- ***Investigation of Madison Equities, Inc. et al.*** Madison Equities is a company that owns, leases, and manages real estate in downtown Saint Paul. The Unit issued a civil investigative demand ("CID") to Madison Equities after receiving multiple complaints from whistleblower employees that the company was engaged in a systemic practice of evading paying earned overtime wages to its security guard employees. Rather than pay overtime premiums (i.e., time-and-a-half) for hours worked over 40 hours a week, the whistleblowers reported Madison Equities would pay these employees only their regular rate of pay through various companies

affiliated with Madison Equities. After the Ramsey County District Court ordered Madison Equities to comply and produce information to the Office in response to the CID, Madison Equities appealed the order to the Minnesota Court of Appeals. Oral argument before the Court of Appeals is scheduled for October 14, 2020.

- ***New York, et al. v. Scalia, et al.*** Minnesota joined with sixteen states and the District of Columbia in a lawsuit against the U.S. Department of Labor ("U.S. DOL"). The lawsuit sought to strike down a new rule issued by the U.S. DOL that would have substantially weakened the ability of employees to hold affiliated businesses jointly liable for their unpaid minimum and overtime wages, through the longstanding "joint employer doctrine." This well-established doctrine provides that if (among other things) multiple businesses share common operations and the ability to exercise control over an employee they may be held jointly liable for unpaid wages. The proposed U.S. D.O.L. rule would have substantially weakened and narrowed this doctrine to the detriment of workers. For example, U.S. DOL's rule would have made it significantly more difficult to hold a parent company responsible where it has multiple affiliate companies operating under one umbrella. The States argued that the rule was contrary to the language and purpose of the federal Fair Labor Standards Act and that the promulgation of the rule was arbitrary and capricious in violation of the Administrative Procedure Act. On summary judgment, the district court ruled in favor of the States and struck down U.S. DOL's rule.

ANTITRUST

- ***Generic Drug Price Manufacturers*** Minnesota and a coalition of states and territories have filed three complaints in federal court against a variety of generic-drug manufacturers and executives. The first complaint is against 18 pharmaceutical companies and 2 individuals. Two former executives from Heritage Pharmaceuticals have entered into settlement agreements and are cooperating with the attorneys general in that case. The second complaint is against 20 pharmaceutical companies and 15 individuals. The states are preparing for trial in this case. The third complaint was filed in June 2020 and is against 26 pharmaceutical companies and 10 individuals. All three of the complaints allege that the defendants violated state and federal antitrust laws by conspiring to fix prices and allocate markets for more than 180 generic drugs. The lawsuits seek injunctive relief, civil penalties, damages, and disgorgement. Litigation is ongoing.

- ***Deceptive Insulin Pricing*: *State of Minnesota v. Sanofi-Aventis U.S., LLC, et al.*** The Office filed a lawsuit against the nation's three major manufacturers of insulin, which is used to treat diabetes. The lawsuit alleges that these insulin manufacturers fraudulently set an artificially high "list" price for their insulin products, but then negotiated a much lower, secret actual price by paying rebates to pharmacy benefit managers. The lawsuit alleges that this deceptive conduct resulted in the manufacturers' life-saving insulin products being far more expensive for uninsured patients, patients in high-deductible health plans, and senior citizens on Medicare. The lawsuit was filed in the United States District Court for the District of New Jersey and seeks injunctive and monetary relief for

Minnesotans who paid out-of-pocket for their insulin. Minnesota's consumer-protection claims survived the defendants' motion to dismiss and the case is in the discovery phase. Litigation is ongoing.

- ***Agricultural*** The Division continues to focus its resources particularly on issues of importance to farmers, the agricultural sector, and rural Minnesotans. Although details of the Division's investigations remain confidential and non-public, the matters involve important aspects of the livestock industry and other agricultural products of importance in Minnesota. The Division will continue to keep this focus over the upcoming year.

APPENDIX A: SERVICE HOURS				
By Agency or Political Subdivision for FY 2020				
Agency/Political Subdivision	**Estimated Service Hours (1)**	**Actual Service Hours**	**Estimated Expenditures**	**Actual Expenditures (2)**
Partner Agencies				
Administration--Risk Management		837.6		$ 99,381.60
AURI		4.6		$ 611.80
Corrections (3)		4,276.4	$ 318,200.00	$ 520,598.00
Education Department		3,655.2		$ 486,141.60
Environmental Quality Board		89.8		$ 11,681.60
Gambling Control Board		144.8		$ 19,258.40
Health		5,519.0		$ 714,491.90
Housing Finance Authority		156.2		$ 20,563.40
Human Services		29,661.9		$ 3,879,747.70
Iron Range Resources & Rehabilitation		18.8		$ 2,476.40
Labor and Industry Department (3)		2,925.1		$ 375,234.60
Lottery		50.6		$ 6,518.60
Medical Practices Board	6,437.0	8,015.8	$ 635,321.00	$ 833,435.80
Minnesota Racing Commission		66.2		$ 8,766.20
Minnesota State Retirement System		201.1		$ 26,746.30
Minnesota State		5,851.6		$ 764,246.80
MNsure		7.2		$ 957.60
Natural Resources		4,675.5		$ 613,892.50
Petroleum Tank Release Compensation Board		46.1	$ 26,600.00	$ 6,131.30
Pollution Control		4,939.0		$ 624,451.40
Public Employees Retirement Association		165.8		$ 21,840.20
Public Safety (3)		7,415.9		$ 834,409.10
Revenue (3)	4,300.0	4,300.0	$ 571,900.00	$ 571,900.00
Teachers Retirement Association		148.9		$ 19,803.70
Transportation		8,839.2		$ 1,165,770.70
TOTAL PARTNER AGENCIES	**10,737.0**	**92,012.3**	**$ 1,552,021.00**	**$ 11,629,057.20**
Health Boards/Offices				
Behavioral Health & Therapy Board		894.6		$ 93,997.80
Chiropractic Board		2,075.4		$ 226,847.40
Dentistry Board		936.3		$ 102,380.70
Dietetics & Nutrition Practice Board		17.6		$ 2,340.80
Emergency Medical Services Regulatory Board		337.7		$ 42,062.90
Health Professionals Services Program		22.4		$ 2,979.20
Licensed Drug & Alcohol Counselor Program		1,909.3		$ 192,295.30
Marriage & Family Therapy Board		869.7		$ 84,474.90
Nursing Board		6,257.6		$ 740,744.00
Nursing Home Administrators Board		67.9		$ 8,190.70
Occupational Therapy Board		48.0		$ 6,384.00
Optometry Board		83.8		$ 10,895.80
Pharmacy Board		1,144.7		$ 131,753.90
Physical Therapy Board		364.2		$ 38,291.40
Podiatry Board		105.2		$ 11,999.60
Psychology Board		1,299.7		$ 141,986.50
Social Work Board		1,589.4		$ 153,655.80
Veterinary Medicine Board		445.8		$ 50,089.80
SUBTOTAL		**18,469.3**		**$ 2,041,370.50**
Other State Agencies/Political Subdivisions				
Accountancy Board		196.1		$ 26,081.30

Administration Department		1,094.1		$ 143,355.30
Administrative Hearings Office		11.1		$ 1,476.30
Agriculture Department		720.3		$ 95,414.90
Agriculture Chemical Response Compensation Board		17.6		$ 2,340.80
Amateur Sports Commission		1.1		$ 146.30
Animal Health Board		60.2		$ 8,006.60
Architecture Board		395.7		$ 52,628.10
Barber Board		71.7		$ 9,536.10
Board on Aging		7.4		$ 984.20
Campaign Finance Board		109.3		$ 14,013.70
Capitol Area Architectural Planning Board		8.1		$ 1,077.30
Center for Arts Education		66.1		$ 8,791.30
Client Security Board		254.9		$ 30,709.70
Commerce Department		5,784.3		$ 757,053.40
Commission Serving Deaf and Hard of Hearing		24.6		$ 3,271.80
Corrections Department (3)		4,079.1		$ 541,800.30
Corrections Department/Community Notification		1,590.5		$ 186,264.50
Cosmetology Examiners Board		838.7		$ 107,323.10
Council for Minnesotans of African Heritage		6.4		$ 851.20
Council on Latino Affairs		6.9		$ 917.70
Crime Victims Reparations Board		149.3		$ 19,736.90
Disability Council		48.0		$ 6,384.00
Employment & Economic Development Department		2,216.3		$ 240,249.50
Executive Council		41.7		$ 5,546.10
Explore Minnesota Tourism		2.9		$ 385.70
Firefighter Training & Education Board		2.1		$ 279.30
Governor's Office		1,655.0		$ 211,325.60
Higher Education Facilities Authority		0.8		$ 106.40
Higher Education Services Office		227.5		$ 30,257.50
Human Rights Department		1,915.1		$ 244,925.90
Indian Affairs Council		12.9		$ 1,715.70
Judiciary Courts		468.4		$ 62,086.00
Labor and Industry Department (3)		3,461.4		$ 424,774.50
Land Exchange Board		1.9		$ 252.70
Law Examiner's Board		358.7		$ 47,707.10
Legislature		467.9		$ 55,448.30
Mediation Services Bureau		72.2		$ 9,602.60
Military Affairs Department		216.4		$ 28,781.20
Minnesota Management & Budget		668.1		$ 88,434.70
Minnesota State Academies		33.4		$ 4,355.80
MN.IT Services Office		137.3		$ 18,049.70
Ombudsman for Long Term Care		39.3		$ 5,226.90
Ombudsman for Mental Health & Developmental Disabilities		25.8		$ 3,431.40
Ombudsperson for Corrections		7.3		$ 970.90
Ombudsperson for Families		15.2		$ 2,021.60
Peace Officers Standards and Training Board		267.9		$ 35,462.70
Private Detective Board		93.8		$ 12,475.40
Professional Educator Licensing & Standards Board		1,348.0		$ 179,245.60
Public Defender, Local		10.8		$ 1,436.40
Public Defender, State		41.5		$ 5,519.50
Public Facilities Authority		5.9		$ 784.70
Public Safety Department (3)		17,002.1		$ 2,041,962.50
Public Utilities Commission		3,489.4		$ 463,879.00
Revenue Department (3)		4,512.7		$ 588,952.30
School Administrators Board		149.1		$ 19,830.30
Secretary of State		3,394.3		$ 448,489.90
Sentencing Guidelines Commission		42.6		$ 5,665.80
State Arts Board		14.2		$ 1,888.60
State Auditor		32.6		$ 3,807.80
State Fair Board		1.9		$ 252.70
State Guardian Ad Litem Board		249.5		$ 31,124.30

State Historical Society		9.0		$	1,197.00
State Investment Board		204.1		$	27,145.30
Tax Court		1.0		$	133.00
Veterans Affairs Department		22.6		$	2,953.00
Veterans Homes		244.4		$	31,113.20
Water & Soil Resources Board		1,342.6		$	178,565.80
Zoological Board		0.8		$	106.40
SUBTOTAL		**60,069.9**		**$**	**7,586,091.10**
Medicaid Fraud Control Unit Investigations and Prosecutions					
Aitkin County Attorney		2,522.7		$	259,208.70
Anoka County Attorney		792.2		$	79,879.40
Carlton County Attorney		5.0		$	665.00
Chisago County Attorney		516.0		$	49,192.80
Clay County Attorney		36.5		$	4,590.50
Cottonwood County Attorney		664.3		$	70,001.50
Crow Wing County Attorney		549.6		$	47,464.80
Dakota County Attorney		562.1		$	51,460.10
Hennepin County Attorney		18,011.4		$	1,693,631.40
Isanti County Attorney		231.9		$	21,290.70
Kanabec County Attorney		101.8		$	8,806.60
Kandiyohi County Attorney		0.5		$	42.50
Lac qui Parle County Attorney		1.5		$	199.50
Nobles County Attorney		184.3		$	22,409.50
Olmsted County Attorney		258.0		$	25,794.00
Ramsey County Attorney		3,703.2		$	364,399.20
Rice County Attorney		227.4		$	19,329.00
Scott County Attorney		1.3		$	172.90
Sherburne County Attorney		11.4		$	1,468.20
St. Louis County Attorney		211.4		$	19,836.20
Stearns County Attorney		198.0		$	17,185.20
Steele County Attorney		27.7		$	2,988.10
Stevens County Attorney		1.0		$	133.00
Traverse County Attorney		115.3		$	13,981.30
Winona County Attorney		317.5		$	27,179.50
Wright County Attorney		44.0		$	5,684.00
SUBTOTAL		**29,296.0**		**$**	**2,806,993.60**
Other Local Government Assistance					
Aitkin County Attorney		469.4		$	51,966.20
Becker County Attorney		1,367.4		$	165,611.40
Beltrami County Attorney		270.2		$	33,104.60
Benton County Attorney		298.0		$	39,442.00
Big Stone County Attorney		77.7		$	10,334.10
Blue Earth County Attorney		427.9		$	55,686.70
Brown County Attorney		0.5		$	66.50
Carlton County Attorney		1,057.5		$	119,109.90
Cass County Attorney		241.7		$	28,594.10
Chippewa County Attorney		493.5		$	54,595.50
Chisago County Attorney		96.0		$	8,184.00
Clay County Attorney		0.5		$	42.50
Clearwater County Attorney		686.2		$	82,783.00
Cottonwood County Attorney		594.1		$	65,844.10
Dodge County Attorney		60.1		$	7,321.30
Douglas County Attorney		8.8		$	1,026.40
Faribault County Attorney		53.8		$	4,827.40
Fillmore County Attorney		102.7		$	12,795.10
Freeborn County Attorney		16.7		$	2,221.10
Goodhue County Attorney		0.5		$	42.50
Hennepin County Attorney		417.7		$	50,658.10
Houston County Attorney		649.5		$	69,223.50

Hubbard County Attorney		162.5		$ 19,860.50
Isanti County Attorney		409.2		$ 48,102.00
Itasca County Attorney		659.5		$ 76,913.50
Jackson County Attorney		225.4		$ 28,754.20
Kandiyohi County Attorney		260.5		$ 34,526.50
Le Sueur County Attorney		280.2		$ 36,714.60
Lincoln County Attorney		172.1		$ 18,382.10
Lyon County Attorney		73.2		$ 9,639.60
Meeker County Attorney		1.0		$ 133.00
Mille Lacs County Attorney		712.7		$ 88,861.10
Morrison County Attorney		219.7		$ 29,148.10
Mower County Attorney		57.9		$ 7,484.70
Nicollet County Attorney		377.4		$ 40,330.20
Otter Tail County Attorney		574.9		$ 71,109.70
Pennington County Attorney		1,180.9		$ 127,635.70
Pine County Attorney		77.4		$ 10,246.20
Pipestone County Attorney		88.1		$ 11,261.30
Pope County Attorney		84.4		$ 10,985.20
Red Lake County Attorney		150.0		$ 16,614.00
Redwood County Attorney		9.5		$ 1,263.50
Renville County Attorney		349.2		$ 41,547.60
Roseau County Attorney		98.0		$ 12,410.00
Scott County Attorney		233.7		$ 23,224.50
Sibley County Attorney		268.4		$ 30,743.60
St. Louis County Attorney		1,211.5		$ 160,265.50
Stearns County Attorney		284.4		$ 37,705.20
Steele County Attorney		609.7		$ 80,826.10
Stevens County Attorney		35.6		$ 3,462.80
Swift County Attorney		159.9		$ 21,170.70
Todd County Attorney		611.7		$ 70,484.10
Wabasha County Attorney		371.7		$ 42,020.10
Wadena County Attorney		117.6		$ 15,616.80
Watonwan County Attorney		673.2		$ 81,639.60
Wilkin County Attorney		211.7		$ 21,748.10
Winona County Attorney		339.1		$ 38,236.30
Wright County Attorney		43.0		$ 5,719.00
Yellow Medicine County Attorney		22.0		$ 2,902.00
Association of County Attorneys		55.9		$ 7,434.70
Various Local Governments		139.0		$ 18,487.00
SUBTOTAL		**19,002.2**		**$ 2,267,089.40**
TOTAL PARTNER/SEMI-PARTNER AGENCIES (from page A-1)		**92,012.3**		**$ 11,629,057.20**
TOTAL NON-PARTNER AGENCIES SUBDIVISIONS		**126,837.4**		**$ 14,701,544.60**
GRAND TOTAL HOURS/EXPENDITURES		**218,849.7**		**$ 26,330,601.80**

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 $133.00, Attorney Fellowship $56.00 and Legal Assistant $85.00

(3) A number of agencies signed agreements for a portion of their legal services.

APPENDIX B: SPECIAL ATTORNEY EXPENDITURES FOR FY 2020, BY AGENCY/POLITICAL SUBDIVISION		
AGENCY/POLITICAL SUBDIVISION	**Amount**	
Administration	$	675,259.94
Attorney General	$	47,936.70
Education	$	47,408.91
Minnesota Management & Budget	$	27,075.41
Minnesota State	$	112,179.15

APPENDIX B: SPECIAL ATTORNEY EXPENDITURES		
BOND COUNSEL FOR FY 2020, BY AGENCY/POLITICAL SUBDIVISION		
AGENCY/POLITICAL SUBDIVISION	**Amount**	
Agricultural and Economic Development Board	$	202.50
Commerce	$	5,855.24
Higher Education Facilities Authority	$	135,713.65
Higher Education, Office of	$	23,589.42
Housing Finance Agency	$	307,124.25
Minnesota Management & Budget	$	96,495.34
Minnesota State	$	15,816.36
NOTE: Certain bond fund counsel are paid from proceeds.		

APPENDIX C

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

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February 15, 2019

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444 Sheyenne St. Ste. 102
West Fargo, ND 58078-0458

Re: Request For Opinion Concerning Municipal Public Utility Commission's Authority to Hold Title to Real Property

Dear Mr. Shockley:

I thank you for your January 23, 2019 letter to the Attorney General[1] requesting an opinion regarding a question pertaining to the Moorhead Public Service Commission ("the Commission").

You state that the City of Moorhead has adopted an amendment to its city charter establishing the Commission and giving it specific powers, including the power to contract in its own name, the authority to purchase "fuel, equipment and supplies," and the power to impose particular "rates and charges for the use and availability of the utility services . . . under its control." The charter amendment, however, does not authorize the Commission to own real property. You ask whether the Commission has legal authority to hold title to real property, including fee-simple title or easements.

For the reasons noted in Op. Atty. Gen. 629-a (May 9, 1975), this Office does not render opinions upon hypothetical or fact-dependent questions. It appears that, as attorney for the City, you may be in a position to make the appropriate factual determinations pertaining to the relationship between the Commission and the City of Moorhead. That having been said, I can provide you with the following information, which I hope you will find helpful.

Minnesota Statutes sections 412.331 – 412.391 govern public utilities commissions. Section 412.361 lists the powers of such commissions. As you note, no provision in section 412.361 or elsewhere in the statute authorizes public utilities commissions to hold title to real property.

As you are aware, the Attorney General's Office has interpreted the relevant statutes in Chapter 412 to provide that public utilities commissions are not authorized to own real property.

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[1] Your letter was addressed to former Minnesota Attorney General Lori Swanson. For your reference, as of January 7, 2019, Keith Ellison is the Minnesota Attorney General.

Op. Atty. Gen. 469-b-6 (Sept. 22, 1958) ("There is no authority in [Minn. Stat. §] 412.321-412.391 for the commission itself to possess any right, title or interest in land."). I am aware of no amendments to the statute, court decisions, or Attorney General's Opinions since 1958 that would call the prior opinion's analysis into doubt.[2] As a result, it appears unlikely that a court would hold that a municipal public utility commission has the legal authority to hold title to real property, whether in fee simple or as an easement. Should the City of Moorhead wish to permit the Commission to own interests in real property, the City may wish to seek special legislation on this topic.

Very truly yours,

NATHAN J. HARTSHORN
Assistant Attorney General

(651) 757-1252 (Voice)
(651) 297-1235 (Fax)
nathan.hartshorn@ag.state.mn.us

Enclosures: Op. Atty. Gen. 629-a (May 9, 1975)
Op. Atty. Gen. 469-b-6 (Sept. 22, 1958)
Johnson v. Princeton Pub. Utils. Comm'n, 899 N.W.2d 860 (Minn. App. 2017)

[2] Note, however, that a public utilities commission has been held to be a "political subdivision for the state" in a context unrelated to the commission's authority to own real property. *See Johnson v. Princeton Pub. Utils. Comm'n*, 899 N.W.2d 860, 864-67 (Minn. App. 2017) (holding commission is "political subdivision for the state" for purposes of awarding preverdict interest under Minn. Stat. § 549.09, subd. 1(c)(1)(i), to plaintiff in lawsuit against commission) (copy enclosed). It appears unlikely that this holding would have any impact on the legal analysis provided in the 1958 Attorney General's Office opinion.

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

PLEASE DO NOT REMOVE
MASTER FILE

May 9, 1975

629-a
(Cr.Ref. 13)

Thomas M. Sweeney, Esq.
Blaine City Attorney
2200 American National Bank Building
101 East Fifth Street
St. Paul, Minnesota 55101

Dear Mr. Sweeney:

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election dis-

tricts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."[1]

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1966). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a

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[1]Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

> The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved shall be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. Id.

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist. Ct. (Civ.) R. 24.04; Op. Atty. Gen. 733G, July 23, 1945.

(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

(3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See Op. Atty. Gen. 629-a, July 25, 1973.

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956 and 196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion supra.

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion supra.

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

Very truly yours,

WARREN SPANNAUS
Attorney General

THOMAS G. MATTSON
Assistant Attorney General

WS:TGM:bw

Section 111 of said c. 119 (M. S. 412.921) provides that M. S. 453.01—453.10, 455.23—455.25 shall not apply to villages. Section 110 thereof (412.911) expressly repealed 455.12 and 455.33.

M. S. 412.321—412.391, being Sections 39—49 of said c. 119, as amended, relates to utilities of the village. M. S. 412.331 reads as follows:

> "Any village may by ordinance expressly accepting the provisions of sections 412.331 to 412.391 establish a public utilities commission with the powers and duties set out in those sections. **Any water, light, power and building commission now in existence in any village shall hereafter operate as a public utilities commission under sections 412.321 to 412.391.**" (Emphasis supplied)

M. S. 412.361, Sub. 1, provides:

> "The **commission** shall have power to extend and to modify or rebuild any public utility and to do anything it deems necessary for its proper and efficient operation; and it **may enter into necessary contracts** for these purposes. * * * " (Emphasis supplied)

An easement of the kind under consideration is, as you state, an interest in land. 6 Dun. Dig., 3rd Ed., Section 2851. It can be acquired by grant, Id. Section 2853, and it is within the power of the village to acquire it under the powers contained in M. S. 412.211. If the proposed arrangement involves a monetary consideration to be paid to the school district, payment can, and undoubtedly will, be made out of village funds, whether from the public utilities fund (Section 412.371) or otherwise. The utilities commission is but a department of the village government and not a municipal corporation in its own right. There is no authority in M. S. 412.321—412.391 for the commission itself to possess any right, title or interest in land.

Accordingly, it is our opinion that the easement should run to and operate in favor of the village.

2. We assume you have reference in your second question to the execution of documents in connection with the construction and use of the easement. The public utilities commission having the power to enter into contracts for the purposes stated in 412.361, Subd. 1, should execute all contracts and other documents relating to the easement.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Truman Village Attorneys.
September 22, 1958. 469-B-6

136

Villages—Public Utilities Commission. Easement for access to and from well should run to and operate in favor of village rather than commission. Commission should execute contracts and other documents relating to easement. M. S. 412.361, Subd. 1.

Facts

"The Village of Truman, Martin County, is organized under the regular village laws. At a special meeting of the village council on Dec. 12, 1938, the council determined by motion to establish a Water, Light, Power and Building Commission, pursuant to Sections 1852 to 1860, both inclusive, of Mason's Minnesota Statutes for 1927, which are now incorporated in M. S. A. Sections 453.01 through perhaps 455.25. The Water & Light Commission has built a new well and to gain access to and from it they are anxious to obtain from the School Board an easement. It is, of course, a right in real estate and I am not clear as to whether or not the easement with its benefits and detriments should be executed by the council of the village or the commisison."

Questions

1. "Should this easement run and operate in favor of the Commission or should it operate in favor of the village?"

2. Should the Commission rather than the village council execute the easement?

Opinion

1. The new Minnesota village code, L. 1949, c. 119, effective July 1, 1949, is applicable to the Village of Truman, irrespective of the law under which it was originally incorporated. See M. S. 412.901.

899 N.W.2d 860
Court of Appeals of Minnesota.

James M. JOHNSON, et al., Respondents,
v.
PRINCETON PUBLIC UTILITIES COMMISSION,
defendant and third party plaintiff, Appellant,
v.
Hydrocon, Inc., Third Party Defendant.

A16-1737
|
Filed July 10, 2017

Synopsis

Background: Employee of sewer-and-water contractor brought negligence action against public utilities commission, seeking to recover for work-related injuries employee sustained when a utility pole fell on his compacting machine. Following jury trial, the District Court, Mille Lacs County, No. 48-CV-11-2174, Sarah E. Hennesy, J., 2014 WL 3800451, entered judgment in favor of employee, but reduced the jury's award by the amount that employee received in settlement of his workers' compensation claim against sewer-and-water contractor, and further reduced the award by 30 percent, to account for the jury's apportionment of comparative fault, and denied both parties' motions for judgment as a matter of law. On appeal, the Court of Appeals, 2016 WL 22243, affirmed the District Court's orders denying judgment as a matter of law, but reversed the collateral-source reduction and the reduction based on comparative fault. On remand, the District Court concluded that it lacked the authority to grant public utilities commission's motion seeking a reduction of the judgment under the workers' compensation and collateral-source statutes, and entered judgment for damages, plus preverdict interest at the rate of ten percent per year, and costs. Public utilities commission appealed.

Holdings: The Court of Appeals, Peterson, J., held that:

[1] public utilities commission was a political subdivision of the state, for purposes of preverdict-interest statute, and

[2] district court did not have the authority to apply a collateral-source offset on remand of employee's negligence action against public utilities commission to recover for injuries sustained in a work-related accident.

Affirmed in part, reversed in part, and remanded.

West Headnotes (12)

[1] **Workers' Compensation**
Right of Employer or Insurer to Remedy of Employee or Employee's Representative

A reverse-*Naig v. Bloomington Sanitation*, 258 N.W.2d 891, settlement occurs when the tortfeasor settles potential subrogation claims for workers' compensation benefits with the employer and the employer's workers' compensation insurer.

1 Cases that cite this headnote

[2] **Interest**
Computation of rate in general

Public utilities commission was a political subdivision of the state, for purposes of preverdict-interest statute; legislature intended to authorize cities to provide electric service to customers in specified geographic areas and to allow cities to delegate to a public utilities commission the responsibility for performing such authorized government function. Minn. Stat. Ann. §§ 412.321 et seq., 549.09(1).

Cases that cite this headnote

[3] **Statutes**
What constitutes ambiguity;how determined

Statutes
Purpose and intent;determination thereof

The Court of Appeals looks first at the plain language of a statute to determine whether it is clear or ambiguous; only if a statute is ambiguous will the court use the rules of statutory construction to discern

the legislature's intent. Minn. Stat. Ann. § 645.08(1).

Cases that cite this headnote

[4] **Statutes**
What constitutes ambiguity;how determined

A statute is ambiguous if its language is susceptible to more than one reasonable interpretation, but the mere lack of a definition does not make a statute ambiguous, if a reviewing court can apply a term's common and approved usage. Minn. Stat. Ann. § 645.08(1).

Cases that cite this headnote

[5] **Municipal Corporations**
Nature and Status as Corporations

"Political subdivision" is commonly understood to mean an entity with a prescribed area and authority for subordinate local government.

Cases that cite this headnote

[6] **Appeal and Error**
Proceedings After Remand

District court did not have the authority to apply a collateral-source offset on remand of employee's negligence-action against public utilities commission to recover for injuries sustained in a work-related accident, where that issue was already decided by the Court of Appeals on an earlier appeal, without any indication that the Court of Appeals contemplated any further proceedings on the issue beyond entry of judgment.

Cases that cite this headnote

[7] **Appeal and Error**
Jurisdiction

The Court of Appeals reviews the question of whether the district court has jurisdiction to entertain a specific claim for relief as a question of law, to be reviewed de novo.

Cases that cite this headnote

[8] **Appeal and Error**
Jurisdiction of lower court after remand

If an appellate court's decision finally concludes the litigation in a case, the trial court is without jurisdiction to entertain an appellant's post-appeal motion.

Cases that cite this headnote

[9] **Appeal and Error**
Origin, nature, and scope of remedies in general

Policy considerations, including bringing litigation to a definite conclusion with reasonable dispatch, support the finality of appellate decisions.

Cases that cite this headnote

[10] **Appeal and Error**
Mandate or order in general

An appellate court may be unable to completely and finally dispose of a matter, but if something remains to be done by the court below, the appellate court will ordinarily so indicate, usually by a remand with directions or a mandate which the trial court must follow; consequently, the scope of the finality of an appellate decision depends on what the court intends to be final, and this is determined by what the court's decision says.

Cases that cite this headnote

[11] **Appeal and Error**
Compliance with mandate or directions

On remand, a district court must execute an appellate court's mandate strictly according to its terms and lacks power to alter, amend, or modify that mandate.

2 Cases that cite this headnote

[12] **Appeal and Error**

Powers and Duties of Lower Court

When the Court of Appeals decides an issue and indicates in its opinion that it intends the decision to be final, a district court, on remand, may not reconsider that issue.

Cases that cite this headnote

*862 Mille Lacs County District Court, File No. 48-CV-11-2174

Attorneys and Law Firms

Grim Daniel Howland, James E. Lindell, Lindell & Lavoie, LLP, Minneapolis, Minnesota (for respondents).

John M. Baker, Katherine M. Swenson, Kathryn N. Hibbard, Greene Espel PLLP, Minneapolis, Minnesota (for appellant).

Susan L. Naughton, League of Minnesota Cities, St. Paul, Minnesota (for amicus curiae League of Minnesota Cities).

Considered and decided by Peterson, Presiding Judge; Smith, Tracy M., Judge; and Randall, Judge. *

Syllabus by the Court

I. A public utilities commission created by a statutory city pursuant to Minn. Stat. §§ 412.321-.391 (2016) is a political subdivision of the state for purposes of Minn. Stat. § 549.09, subd. 1(c)(1)(i) (2016).

II. When this court decides an issue and indicates in its opinion that it intends the decision to be final, a district court, on remand, may not reconsider that issue.

OPINION

PETERSON, Judge

In this appeal following a remand by this court to the district court, appellant public utilities commission argues that the district court erred by (1) concluding that it is not a political subdivision of the state entitled to a lower preverdict interest rate under Minn. Stat. § 549.09, subd. 1(c)(1)(i); and (2) declining to grant a collateral-source offset for workers' compensation benefits paid to the injured respondent. We affirm the district court's collateral-source decision, but reverse the award of preverdict interest at the rate of ten percent per year and remand for a preverdict interest award at the statutory four-percent rate that applies to a judgment or award against a political subdivision of the state.

FACTS

While employed by Hydrocon, Inc., a sewer-and-water contractor, respondent James Johnson was working on a water main for an ice arena in the City of Princeton. An employee of appellant Princeton Public Utilities Commission (PUC) agreed to secure a utility pole located near where Johnson was operating a compacting machine. Johnson told the PUC employee that he had finished compacting the soil, and the PUC employee released the utility pole from the truck that secured it. The pole fell on Johnson's machine, which caused injuries to Johnson's neck and back.

[1] Johnson received workers' compensation benefits from Hydrocon and settled his workers' compensation claims in February 2011. Hydrocon assigned its indemnity and subrogation rights to PUC in a reverse-*Naig* settlement. [1] Johnson and his *863 wife, respondent Sherri Johnson, sued PUC for negligence in September 2011.

After a trial, the jury returned a special verdict on October 22, 2013, finding that PUC was negligent and its negligence was a direct cause of harm to Johnson. The jury also found that Johnson was negligent but his negligence was not a direct cause of his injuries. The jury then considered all of the negligence that contributed as a direct cause of Johnson's injuries and attributed 70% of the negligence to PUC and 30% to Johnson. Finally, the jury awarded Johnson $40,000 for past bodily and mental harm and $200,000 for past loss of earnings and declined to award any other damages.

On October 29, 2013, one week after the jury returned its special verdict, PUC moved for an order directing entry of judgment in the amount of $0 pursuant to PUC's motion for collateral-source determination. PUC cited

the workers' compensation act, Minn. Stat. § 176.061, and the collateral-source statute, Minn. Stat. § 548.251, and argued that because Johnson received workers' compensation benefits in excess of the amount of the jury award, judgment should be entered for $0.

In January 2014, the district court issued an order for a new trial based on the inconsistency between the jury's special-verdict finding that Johnson's negligence was not a direct cause of his injuries and its finding that 30% of all of the negligence that contributed as a direct cause of Johnson's injuries should be attributed to Johnson. Respondents moved for reconsideration. In May 2014, in response to respondents' motion to reconsider, the district court amended its new-trial order to allow respondents to choose between entry of judgment for 70% of the original verdict or a new trial on only the issues of liability and comparative fault.

The district court interpreted respondents' response to this order to be that respondents did not intend to reject entry of judgment for 70% of the original verdict and that they were not seeking a new trial. The district court then concluded that $48,450 of the workers' compensation benefits that Johnson received were for wage-loss benefits, and, under the collateral-source rule, the $200,000 jury verdict for past loss of earnings should be reduced by $48,450. In an order filed July 11, 2014, the district court awarded respondents 70% of the remaining $151,550 for past loss of earnings and 70% of the $40,000 jury verdict for past bodily and mental harm, resulting in an award of $134,085. The district court denied both parties' posttrial motions for judgment as a matter of law and entered judgment on December 2, 2014.

On appeal, this court affirmed the district court's orders denying both parties judgment as a matter of law. *Johnson v. Princeton Pub. Utils. Comm'n*, No. A15-0038, 2016 WL 22243, at *3-5 (Minn. App. Jan. 4, 2016). But this court reversed the district court's collateral-source reduction after concluding that PUC failed to comply with the collateral-source statute when it brought its motion for collateral-source reduction more than eight months before, rather than within ten days after, the district court's order for judgment on July 11, 2014, pursuant to the jury's special verdict. This court also reversed the district court's reduction of the jury's award based on comparative fault and directed the district court on remand to enter judgment for $240,000. This court concluded that, because ***864** the jury should not have answered the special-verdict question regarding apportionment of fault, its answer had no legal effect.

On remand, the district court entered judgment in favor of respondents for $240,000. Three days later, on April 21, 2016, PUC filed a motion seeking a reduction of the judgment under the workers' compensation and the collateral-source statutes. Based on this court's direction to enter judgment in the amount of $240,000, the district court concluded that it lacked authority to grant PUC's motion.

Respondents filed a motion in district court seeking an award for interest, costs, and disbursements. On October 25, 2016, the district court issued a second amended order for judgment awarding respondents $240,000, plus preverdict interest at the rate of ten percent per year, and costs of $37,267.91. The district court concluded that the ten-percent rate applied because the judgment was not a judgment against a political subdivision of the state.

This appeal followed.

ISSUES

I. When awarding preverdict interest under Minn. Stat. § 549.09, subd. 1 (2016), is a judgment against PUC a judgment against a "political subdivision of the state"?

II. Did the district court err in determining that it could not consider PUC's motion seeking a collateral-source reduction of the judgment entered on remand?

ANALYSIS

I.

[2] PUC argues that the district court erred by applying a ten-percent interest rate to calculate preverdict interest on respondents' damages award. We agree. The preverdict-interest statute establishes the method to be used when computing interest on pecuniary damages from the time an action is commenced. *See* Minn. Stat. § 549.09, subd. 1(b) (stating that preverdict interest on pecuniary damages

shall be computed as provided in Minn. Stat. § 549.09, subd. 1(c)).

Under the preverdict-interest statute, judgments against the state or a political subdivision of the state are treated differently than other judgments. The statute provides that "[f]or a judgment or award over $50,000, other than *a judgment or award for or against* the state or *a political subdivision of the state* ..., the interest rate shall be ten percent per year until paid." Minn. Stat. § 549.09, subd. 1(c)(2) (emphasis added).

The statute also provides that "[f]or a judgment or award of $50,000 or less or *a judgment or award for or against* the state or *a political subdivision of the state*, regardless of the amount, ... the interest shall be computed as simple interest per annum." Minn. Stat. § 549.09, subd. 1(c)(1)(i) (emphasis added). For these judgments or awards, the statute contains a formula for determining an interest rate each year and provides that the rate determined by this formula "or four percent, whichever is greater, shall be the annual interest rate during the succeeding calendar year."[2] *Id.*

The district court awarded respondents more than $50,000. Thus, whether preverdict interest should be calculated using a ten-percent interest rate or a four-percent interest rate depends on whether PUC is a political subdivision of the state. The preverdict-interest statute provides that, for ***865** its purposes, " 'political subdivision' includes a town, statutory or home rule charter city, county, school district, or any other *political subdivision of the state*." Minn. Stat. § 549.09, subd. 1(e)(2) (emphasis added). Citing *Winberg v. Univ. of Minn.*, 499 N.W.2d 799, 802 (Minn. 1993), the district court concluded that, because PUC is not an entity with the power to levy taxes and is not a traditional unit of the state, it is not a "political subdivision" within the meaning of section 549.09, subdivision 1(e)(2).

[3] **[4]** "[S]tatutory construction is a question of law, which we review de novo." *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009). The object of statutory construction is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2016). We look first at the plain language of the statute to determine whether it is clear or ambiguous. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). Only if a statute is ambiguous will we use the rules of statutory construction to discern the legislature's intent. *Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010). A statute is ambiguous if its language "is susceptible to more than one reasonable interpretation." *Schroedl*, 616 N.W.2d at 277 (quotation omitted). But the mere lack of a definition does not make a statute ambiguous, if a reviewing court can apply a term's "common and approved usage." *City of Brainerd v. Brainerd Inv. P'ship*, 827 N.W.2d 752, 757 (Minn. 2013); *see also* Minn. Stat. § 645.08(1) (2016) (stating that when interpreting a statute, "words and phrases are construed ... according to their common and approved usage").

In *Winberg*, the supreme court concluded that the University of Minnesota was not a "political subdivision" for purposes of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.455; .46 (1990). 499 N.W.2d at 803. Using language similar to the preverdict-interest statute, both of those sections in the veterans preference act provided that they applied to a veteran employed by a county, city, town, school district, or other political subdivision of this state. *Id.* at 801.

The supreme court reasoned that the university is "a unique constitutional corporation, established by territorial act in 1853 and perpetuated by the state constitution in 1857." *Id.* at 801. Under the state constitution, the university's affairs and property are governed by the board of regents, which is not subject to legislative or executive control, but the university is not above the law. *Id.* The supreme court explained that the legislature recognizes this unique constitutional status, and

> if the legislature had intended the Veterans Preference Act to apply to the University of Minnesota, it most likely would have included the University by specific reference. Using Minn. Stat. § 645.27, a rule of statutory construction which provides that "the state is not bound by the passage of a law unless named therein," the University, which is itself a constitutional arm of the state, would not be bound by the Veterans Preference Act unless explicitly named.

Id. at 801-02. The supreme court concluded that the legislature had not specifically included the university within the purview of the veterans preference act and held that the university is not a "political subdivision" to which the veterans preference act applied. *Id.* at 803.

In *Winberg*, the supreme court also stated:

> Nor does the case law suggest that the University should be considered a political subdivision of the state to which the Act applies. The only case defining "political subdivision" for purposes of the Veterans Preference Act is ***866** *Dahle v. Red Lake Watershed Dist.*, 354 N.W.2d 604, 606 (Minn. Ct. App. 1984), in which the court of appeals determined that watershed districts are political subdivisions within the meaning of section 197.46 because they are "empowered to cause taxes to be levied." Because the University has no direct or indirect power to cause taxes to be levied, it is not a political subdivision under this definition.
>
> Finally, the term "political subdivision" is commonly understood to mean an entity with a prescribed area and authority for subordinate local government. "Political subdivision," as used in the Veterans Preference Act and other Minnesota statutes, consistently refers to such traditional units of the state as counties and cities.

Id. at 802. This is the portion of *Winberg* that the district court relied on in concluding that PUC is not a "political subdivision" within the meaning of section 549.09, subd. 1(e)(2).

The district court's reliance was misplaced. In *Winberg*, having concluded that the university would not be bound by the veterans preference act unless explicitly named, the supreme court considered whether the term "political subdivision" included the University. The supreme court considered two definitions of "political subdivision," and first concluded that the university was not bound by the act under the definition of "political subdivision" that this court applied in *Dahle v. Red Lake Watershed Dist.*, 354 N.W.2d 604 (Minn. App. 1984), because the university had no power to levy a tax. The supreme court then concluded that the university was not bound by the act under the common meaning of "political subdivision" because the university was not a traditional unit of the state with a prescribed area and authority for subordinate local government, such as a county or city. *Id.* at 802-03.

We agree with the district court that PUC is not a political subdivision of the state under the definition this court applied in *Dahle*; like the university, PUC has no power to levy a tax. But we do not agree with the district court that, because PUC is not a traditional unit of the state, such as a county or city, it is not a political subdivision of the state within the meaning of Minn. Stat. § 549.09, subd. 1(e)(2).

[5] Under the plain language of Minn. Stat. § 549.09, subd. 1(e)(2), towns, cities, counties, and school districts are explicitly included in the definition of "political subdivision." But the definition also includes "any other political subdivision of the state." The phrase "any other" indicates that entities other than the specifically identified entities are included in the definition of political subdivision and refutes a limiting construction that includes only traditional units of the state. However, because the definition of "political subdivision" includes "any other political subdivision," it essentially lacks a definition of entities other than those that are specifically identified in the statute. Consequently, we must construe "political subdivision" according to its common and approved usage. As the supreme court stated in *Winberg*, " 'political subdivision' is commonly understood to mean an entity with a prescribed area and authority for subordinate local government." 499 N.W.2d at 802. *See also Black's Law Dictionary* 1346 (10th ed. 2014) (defining "political subdivision" as "[a] division of a state that exists primarily to discharge some function of local government").

Unlike the University of Minnesota, PUC is not a unique constitutional arm of the state not subject to legislative or executive control. The legislature has authorized any statutory city to "own and operate ***867** any waterworks, district heating system, or gas, light, power, or heat plant for supplying its own needs for utility service or for supplying utility service to private consumers or both." Minn. Stat. § 412.321, subd. 1. The legislature has also authorized any statutory city to establish a public utilities commission to operate any public utility in accordance with the provisions of Minn. Stat. §§ 412.321-.391. Minn. Stat. § 412.331.

Members of a public utilities commission are appointed by the city council. Minn. Stat. § 412.341, subd. 1. A public utilities commission has the power to (1) extend, modify, or rebuild a public utility and to enter into contracts to do so; (2) hire, manage, and pay personnel; (3) buy energy or water or fuel and supplies; (4) fix rates and adopt service rules; and (5) enter into contracts with the city council for utility services, payments, transfers, and other matters involved in the relationship between the city and the commission. Minn. Stat. § 412.361. The city council

and the voters may decide to abolish the public utilities commission. Minn. Stat. § 412.391, subd. 2.

Also, when a city owns a public utility, "[a] separate fund or a separate account shall be established in the city treasury for each utility," and "[i]nto this fund or account shall be paid all the receipts from the utility and from it shall be paid all disbursements attributable to the utility." Minn. Stat. § 412.371, subd. 1. And a city's annual financial report of the city's operations is required to cover operations of public utility commissions. *See* Minn. Stat. §§ 471.697, subd. 1(a) (financial report for city with population of more than 2,500); .698, subd. 1(a) (2016) (financial report for city with population of less than 2,500). Finally, the legislature has declared that "the state of Minnesota shall be divided into geographic service areas within which a specified electric utility shall provide electric service to customers on an exclusive basis." Minn. Stat. § 216B.37 (2016).

Together, these statutory provisions demonstrate that the legislature intended to authorize cities to provide electric service to customers in specified geographic areas and to allow cities to delegate to a public utilities commission the responsibility for performing this authorized government function. Because PUC is responsible for operating a public electric utility, it is an entity with a prescribed area and authority for subordinate local government. We, therefore, conclude that PUC is a "political subdivision," under the common and ordinary meaning of that term, and we reverse the preverdict-interest award against PUC and remand for the district court to award respondents preverdict interest at a four-percent rate.

II.

[6] PUC argues that the district court erred by denying its motion for a collateral-source reduction under Minn. Stat. §§ 176.061 (governing third-party liability for workers' compensation benefits) and 548.251 (2016) (governing collateral-source calculations) following this court's remand to the district court. Citing this court's opinion, the district court concluded that it lacked jurisdiction to apply a collateral-source offset on remand and denied the motion.

[7] [8] [9] [10] We review the question of "[w]hether the district court has jurisdiction to entertain a specific claim for relief ... as a question of law, to be reviewed de novo." *City of Waite Park v. Minn. Office of Admin. Hearings*, 758 N.W.2d 347, 352 (Minn. App. 2008), *review denied* (Minn. Feb. 25, 2009). If an appellate court's decision "finally concluded the litigation in [a] case ... the trial court is without jurisdiction to entertain [an appellant's] post-appeal ***868** motion." *Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 717-18 (Minn. 1987).[3] Policy considerations, including bringing litigation to "a definite conclusion with reasonable dispatch ... support the finality of appellate decisions." *Id.* at 720. An appellate court may be unable to completely and finally dispose of a matter, but

> if something remains to be done by the court below, the appellate court will ordinarily so indicate, usually by a remand with directions or a mandate which the trial court must follow. Consequently, the scope of the finality of an appellate decision depends on what the court intends to be final, and this is determined by what the court's decision says.

Id.

In the earlier appeal of this case, this court concluded that, because PUC's motion for a collateral-source offset was not timely, PUC is not entitled to a collateral-source offset, *Johnson*, 2016 WL 22243, at *6, and, because the jury should not have answered the comparative-fault question on the special-verdict form, the jury's answer to that question had no legal effect and the district court abused its discretion by reducing respondents' damages award based on the jury's answer. *Id.* at *7. This court reversed the collateral-source offset and the remittitur granted by the district court and remanded with an instruction "for entry of judgment for the full amount of the jury verdict, $240,000." *Id.* There is no indication that this court contemplated any further proceedings beyond entry of judgment.

[11] [12] "On remand, a district court must execute an appellate court's mandate strictly according to its terms and lacks power to alter, amend, or modify that mandate." *Drewitz v. Motorwerks, Inc.*, 867 N.W.2d 197,

209 (Minn. App. 2015) (quotation omitted), *review denied* (Minn. Sept. 15, 2015). This court's remand instruction was clear: the district court was to enter judgment in favor of respondents in the amount of $240,000. This court gave no other instruction or direction, and, on remand, the district court filed an order directing entry of judgment against PUC for $240,000, and judgment was entered.

PUC argues that it filed a timely motion for collateral-source reduction following entry of that judgment. But this court determined in the earlier appeal that PUC is not entitled to a collateral-source offset, and the language in this court's decision plainly indicates that this court intended that determination to be final. The district court did not err in determining that it did not have authority to apply a collateral-source offset on remand because that issue *869 was already decided by this court in the earlier appeal.

DECISION

Because a public utilities commission created by a statutory city pursuant to Minn. Stat. §§ 412.331-.391 is a political subdivision of the state for purposes of Minn. Stat. § 549.09, subd. 1(c)(1)(i), the preverdict-interest award against PUC must be calculated at a rate of four percent. Because this court's decision in the earlier appeal indicated that this court's decision that PUC is not entitled to a collateral-source offset was intended to be final, the district court, on remand, did not have authority to apply a collateral-source offset.

Affirmed in part, reversed in part, and remanded.

All Citations

899 N.W.2d 860

Footnotes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

1 "A reverse-*Naig [v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977)] settlement occurs when the tortfeasor settles potential subrogation claims for workers' compensation benefits with the employer and the employer's workers' compensation insurer." *Sayre v. McGough Constr. Co.*, 580 N.W.2d 503, 504, n.1 (Minn. App. 1998), *review denied* (Minn. Aug. 18, 1998).

2 During the relevant years for calculating respondents' preverdict interest, four percent was greater than the interest rate determined by the statutory formula.

3 The United States Supreme Court and the Minnesota Supreme Court have acknowledged that courts and parties often use concepts and language associated with "jurisdiction" imprecisely to refer to, among other things, nonjurisdictional claim-processing rules or nonjurisdictional limits on a court's authority to address a question. *See e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 1242, 163 L.Ed.2d 1097 (2006) (noting that "[j]urisdiction ... is a word of many, too many, meanings" and giving examples of imprecise use of the term (quotation omitted)); *Eberhart v. United States*, 546 U.S. 12, 16, 126 S.Ct. 403, 405, 163 L.Ed.2d 14 (2005) (discussing distinction between jurisdictional rules and "claim-processing rules"); *Rubey v. Vannett*, 714 N.W.2d 417, 422 (Minn. 2006) (noting same distinction as *Eberhart*). The outcome of this appeal will be the same whether the district court lacked jurisdiction to entertain PUC's motion for a collateral-source offset or lacked authority to depart from this court's instruction. Therefore, we will not decide whether there was a jurisdictional or a nonjurisdictional limit on the district court's authority and, instead, simply address the district court's lack of authority to apply a collateral-source offset on remand.

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STATE OF MINNESOTA

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February 19, 2019

Ronald W. Brandenburg
Quinlivan & Hughes, P.A.
P.O. Box 1008
St. Cloud, MN 56302

Re: Request For Opinion Concerning Official Elected to Two Offices in One General Election

Dear Mr. Brandenburg:

I thank you for your January 23, 2019 letter to the Attorney General requesting an opinion regarding a question pertaining to the Moose Lake Community Hospital District ("the Hospital District").

You state that a single individual submitted affidavits of candidacy for two different offices elected at the November 2018 general election: Silver Township supervisor and member of the Hospital District's board. You are unaware which affidavit the individual submitted first. It is unclear whether the individual or anyone else is aware which affidavit was submitted first. You indicate that the Carlton County Auditor permitted the individual to run for both offices because he concluded that the offices were not incompatible according the analysis provided by an information brief published by the research department of the Minnesota House of Representatives. The county auditor's determination did not take into account the provisions of Minn. Stat. § 204B.04, subd. 4. You state that, at the November election, the individual was elected to both offices.

For the reasons noted in Op. Atty. Gen. 629-a (May 9, 1975), this Office does not render opinions upon hypothetical or fact-dependent questions. That having been said, I can provide you with the following information, which I hope you will find helpful.

Your letter poses two questions that appear to apply to the fact pattern you describe:

1. Application of Minn. Stat. § 204B.04, subd. 4

As you note, state law generally bars candidates from submitting affidavits of candidacy for more than one office elected on the date of the same general election:

> A candidate who files an affidavit of candidacy for an office to be elected at the general election may not subsequently file another affidavit of candidacy for any other office to be elected on the date of that general election, unless the candidate withdraws the initial affidavit pursuant to section 204B.12.

Minn. Stat. § 204B.04, subd. 4 (2018). Specific statutory provisions pertaining to township elections are found in chapter 205. *See, e.g., id.* §§ 205.02, subd. 1 ("Except as provided in this chapter the provisions of the Minnesota Election Law apply to municipal elections, so far as practicable."), .075, subd. 2 (permitting town to "designate the first Tuesday after the first Monday in November of either the even-numbered or the odd-numbered year as the date of the town general election"). Chapter 447 contains similar provisions governing hospital-district elections. *See, e.g., id.* § 447.32, subd. 2 ("Except as provided in this chapter, the Minnesota Election Law applies to hospital district elections, as far as practicable. Regular elections must be held in each hospital district at the same time, in the same election precincts, and at the same polling places as general elections of state and county officers."). Notably, neither chapter exempts township or hospital-district elections from the operation of section 204B.04, subd. 4.

As a result, the individual in question was subject to the provisions of section 204B.04. Under that statute, whichever of the two affidavits of candidacy he or she filed second was invalid, unless he or she withdrew the earlier one.[1]

2. Qualification to hold office

You next ask which of the two positions the individual is qualified to hold, if either.

You note that the individual in question was elected to both offices in the November general election. Though you do not explicitly mention it in your letter, it appears likely that the individual in question has received the certificates of election and has taken the oaths of office pertaining to both offices. *See id.* §§ 205.185, subd. 3(b) (governing certificates of election for elected municipal officials), 358.05 (governing oaths of office for "[e]very person elected or appointed to any . . . public office"), 447.32, subd. 4 (governing certificates and oaths for members of hospital-district boards). Under Minn. Stat. § 351.02, only a court can provide the determination you seek. *See* Minn. Stat. § 351.02 (listing circumstances creating vacancy in public office, including "the decision of a competent tribunal declaring the incumbent's election or appointment void"). If, however, the individual were to resign the office for which he or she submitted the second of the two affidavits of candidacy, this would create a vacancy in that office without requiring the decision of a court.[2] *See id.*

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[1] Minnesota Statutes section 645.241 provides that "[w]hen the performance of any act is prohibited by a statute, and no penalty for the violation of the same shall be imposed in any statute, the doing of such act shall be a petty misdemeanor." This statute may have application in the instant case.

[2] Even after resigning, however, the individual could face a court challenge alleging that the affidavit of candidacy for the office he or she has not resigned from was the second affidavit submitted and was therefore void.

Litigation could theoretically be brought in state court under various legal mechanisms, such as the writ of quo warranto or a petition under Minn. Stat. § 204B.44. *See State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 614 n.1 (Minn. 1995) ("An action in the nature of quo warranto is a common law writ designed to test whether a person exercising power is legally entitled to do so."); *Minn. Voters Alliance v. Simon*, 885 N.W.2d 660, 664 ("Minnesota Statutes § 204B.44 authorizes proceedings before [state] court[s] that seek to correct errors, omissions, or wrongful acts by election officials, particularly with respect to election ballots."). Proceedings before the court would presumably resolve crucial factual issues, most notably (1) which of the two affidavits of candidacy the individual filed first and (2) whether the individual withdrew either affidavit.

In the absence of such litigation, it is not possible to determine which office the individual is entitled to hold and what effects the 2018 election proceedings would have on the actions taken by the hospital-district or township board.

I thank you again for your correspondence.

Sincerely,

NATHAN J. HARTSHORN
Assistant Attorney General

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(651) 297-1235 (Fax)
nathan.hartshorn@ag.state.mn.us

Enclosures: Op. Atty. Gen. 629-a (May 9, 1975)

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

PLEASE DO NOT REMOVE
MASTER FILE

May 9, 1975

629-a
(Cr.Ref. 13)

Thomas M. Sweeney, Esq.
Blaine City Attorney
2200 American National Bank Building
101 East Fifth Street
St. Paul, Minnesota 55101

Dear Mr. Sweeney:

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election dis-

tricts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."[1]

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1966). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a

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[1]Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

> The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved shall be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. Id.

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist. Ct. (Civ.) R. 24.04; Op. Atty. Gen. 733G, July 23, 1945.

(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

(3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See Op. Atty. Gen. 629-a, July 25, 1973.

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956 and 196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion supra.

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion supra.

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

Very truly yours,

WARREN SPANNAUS
Attorney General

THOMAS G. MATTSON
Assistant Attorney General

WS:TGM:bw

KEITH ELLISON
ATTORNEY GENERAL

STATE OF MINNESOTA

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May 1, 2019

Paul S. Jensen
Dalton City Attorney
125 South Mill Street
Fergus Falls, MN 56537

Re: Request for opinion concerning manufactured home park closure

Dear Mr. Jensen:

I thank you for your April 8, 2018 letter requesting an opinion from the Attorney General's Office regarding the City of Dalton's closure of a manufactured home park it owns.

You ask whether, under Minnesota Statutes section 327C.095, a manufactured home park owner who is closing a park may require a manufactured home owner residing in the park to vacate sixty days after the conclusion of the public hearing required under section 327C.095, subd. 4, assuming all other statutory requirements are properly satisfied. You question the interplay between the two timing requirements in Minnesota Statutes section 327C.095, subd. 1 (1018).

As you indicated in your letter, there does not appear to be any case law specifically discussing the timing requirements stated in Minnesota Statutes section 327C.095, subd. 1. However, every law shall be construed, if possible, to give effect to all its provisions. Minn. Stat. § 645.16. Minnesota Statutes section 327C.095, subd. 1 specifically states, "A resident may not be required to vacate until 60 days after the conclusion of the public hearing required under subdivision 4." It also requires that nine months before the closure of a manufactured home park, the park owner must prepare a closure statement and provide a copy to the commissioners of health and the housing finance agency, the local planning agency, and a resident of each manufactured home where the residential use is being converted. The statute can be read to give effect to both timing requirements. A closure statement must be prepared and delivered at least nine months before the park closure and residents may not be required to vacate until sixty days after the conclusion of the public hearing.

Sixty days after the conclusion of the public hearing is the earliest residents could be required to vacate due to a park closure under Minnesota Statutes section 327C.095, assuming all other statutory requirements are properly satisfied. The statute sets forth the minimum requirement. As I am sure you are aware, a longer time frame may be necessary or appropriate depending on the specific factual circumstances and other considerations.

Finally, please be aware that a number of bills seeking to amend Minnesota Statutes section 327C.095 are pending in the current legislative session which, if passed, may alter the process the City must take to close the manufactured home park.

I thank you again for your correspondence.

Sincerely

SARAH KRANS
Assistant Attorney General

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#4475999-v1

SCHOOL PUPILS: GRADUATION: FEES: Public schools are prohibited from denying students – who are eligible to receive their diploma – the opportunity to participate in graduation ceremonies due to unpaid meal debts.

169j
(cr.ref. 169x)

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

KEITH ELLISON
ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155-1609
TELEPHONE: (651) 296-6197

May 14, 2019

Mary Cathryn Ricker
Commissioner
Minnesota Department of Education
1500 Highway 36 West
Roseville MN 55113

Dear Commissioner Ricker:

Thank you for asking the Attorney General's Office to provide a written opinion on whether denying a student's opportunity to participate in graduation ceremonies or activities because of an unpaid meal debt violates state law. Pursuant to Minn. Stat. § 8.07 (2018), here is our response.

FACTS

You indicated that you have recently become aware that several Minnesota school districts have policies that restrict a student's ability to participate in graduation ceremonies or activities when the student has an unpaid school meal debt owing to the school.

QUESTION

You have asked whether the practice of restricting a student from participating in graduation ceremonies or activities because the student has an outstanding school meal debt violates Minnesota statutes.

LEGAL ANALYSIS

In my opinion, public schools[1] are prohibited under Minnesota statutes from denying students the opportunity to participate in graduation ceremonies due to unpaid meal charges. I base this opinion on both the Minnesota Public School Fee Law, Minn. Stat. §§ 123B.34-39, (the "Law") and the Lunch Aid Law, Minn. Stat. § 124D.111, subd. 4.

[1] "Public schools" refer to Minnesota public elementary and secondary schools; school districts; and charter schools that are all subject to the Public School Fee Law.

Minnesota Public School Fee Law:

"It is the policy of the state of Minnesota that public school education shall be free." Minn. Stat. § 123B.35. The Minnesota Public School Fee Law explicitly provides:

> No pupil's rights or privileges, including the receipt of grades or diplomas may be denied or abridged for nonpayment of fees...

Minn. Stat. § 123B.37, subd. 2. The Law further provides:

> Any practice leading to suspension, coercion, *exclusion*, withholding of grades or diplomas, or *discriminatory action based upon nonpayment of fees* denies pupils their right to equal protection and entitled privileges.

Minn. Stat. § 123B.35 (emphasis added). As discussed in more detail below, (1) a charge for a school-provided meal qualifies as a "fee" under the Law, and (2) the opportunity to participate in graduation ceremonies is covered by this Law, and is a privilege that cannot be denied because of outstanding meal balances.

First, a charge for a meal by a public school is a "fee" subject to the Public School Fee Law. Minn. Stat. § 123B.36, subd. 1(b) lists "authorized fees" that a public school may require payment, and subdivision 1(b)(6) authorizes: "fees specifically permitted by any other statute." Both federal (*see* 42 U.S.C. § 1760(p)(2) – "each school food authority shall establish a price for paid lunches" served to students who are not certified to receive free or reduced price meals) and state (Minn. Stat. § 124D.111, subd. 4 – entitled "No fee" and restricts reminders for payment of meals) statutes authorize participating schools to charge a fee for meals for qualified students. In addition, subdivision 1(b)(5) in the list of authorized fees includes: "items of personal use or products that a student has an option to purchase…", which can include a meal (a product) that the student has option to purchase.

Second, the Law applies to students' participation in graduation ceremonies. While section 123B.37, subd 2 cited above expressly cites "grades or diplomas," its use of the introductory term "including" means the statutory prohibition is not limited to those examples. *See Fed. Land Bank of St. Paul v. Bismarck Lumber Co.,* 314 U.S. 95, 100 (1941) (stating that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *LaMont v. Indep. Sch. Dist. No. 728,* 814 N.W.2d 14, 19 (Minn. 2012) ("The word 'includes' is not exhaustive or exclusive").

In general, many courts across the country have held that participation in a graduation ceremony does not constitute a constitutional property right in the same way as the right to

receive a diploma or degree when one has met all academic requirements.[2] Participation in graduation ceremonies is more likely a privilege,[3] akin to participation in extracurricular athletic activities.[4] *See Olson v. Robbinsdale Area Schools,* No. Civ. 04–2707, 2004 WL 1212081 *4 (D. Minn. 2004) ("Participating in a high school graduation ceremony with one's own peers is, almost by definition, an unrepeatable event" and upholding a hearing officer's conclusion that participation in the graduation ceremony with peers is an "important educational benefit."). Accordingly, I conclude that participation in a graduation ceremony constitutes a benefit or privilege, for which public schools cannot deny or abridge for nonpayment of fees under section 123B.37, subd. 2.

Graduation ceremonies are significant events and a memorable way to celebrate the important achievement of graduation with families, fellow students, and teachers. Participation in graduation ceremonies is a privilege, and therefore, a public school cannot exclude a student from participating in the school activity based upon nonpayment of fees. Minn. Stat. § 123B.37, subd. 2. Moreover, this practice leading to exclusion or discriminatory action based upon nonpayment of fees denies students their right to equal protection and entitled privileges as provided by Minn. Stat. § 123B.35.

Lunch Aid Law:

In addition to the Public School Fee Law, public schools participating in the School Lunch Program under current Minnesota law are expressly prohibited from demeaning or stigmatizing students for outstanding student meal balances:

> The [school] must also ensure that any reminders for payment of outstanding student meal balances do not demean or stigmatize any child participating in the school lunch program.

Minn. Stat. § 124D.111, subd. 4. Denying students the opportunity to participate in their school graduation due to nonpayment of meals is a reminder or message to others that would demean or stigmatize students. That is prohibited under Section 124D.111, subd. 4.

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[2] *See Nieshe v. Concrete Sch. Dist,* 129 Wash. App. 632, 645, 127 P.3d 713, 720, (2005); *See also, Williams v. Austin Indep. Sch. Dist.,* 796 F.Supp. 251, 255 (W.D.Tex 1992).

[3] "Privilege" is defined as "a right or immunity granted as a peculiar benefit, advantage or favor." *Merriam–Webster's Collegiate Dictionary* 936 (9th ed. 1983). Participation in a graduation ceremony due to successful completion of required coursework, examinations and all academic requirements is a benefit.

[4] *See Brown v. Wells,* 288 Minn. 468, 181 N.W.2d 708 (1970) (membership in interscholastic sports teams is a privilege).

In sum, schools retain the right to pursue legal collection action for unpaid fees. But public schools are prohibited from denying students – who are eligible to receive their diploma – the opportunity to participate in graduation ceremonies due to unpaid meal debts, under the Public School Fee and State School Lunch Aid Laws.

CONCLUSION

I understand that there is pending legislation to strengthen the enforcement, reporting and policies regarding school meals and lunch aid. I support that legislation. In the meantime, because we are in the midst of high school graduation season, I am issuing this Written Opinion that is binding on school officers unless overruled by a court.[5]

Let me know if you have further concerns. Thank you for your concern for all students in Minnesota's public schools.

Sincerely,

KEITH ELLISON
Attorney General

|#4488342-v1

[5] *See,* Minn. Stat. § 120A.10; *Minnesota Voters Alliance v. Anoka-Hennepin Sch. Dist.,* 868 N.W.2d 703, 707, n.2, (Minn. Ct. App. 2015) (written opinion of the attorney general is "decisive" on all school matters until decided otherwise by courts.) *See also, Eelkema v. Bd. of Educ. of City of Duluth*, 215 Minn. 590, 593, 11 N.W.2d 76, 78, (Minn. 1943) (attorney general "opinion, though not binding on the courts, was, by statute law, binding upon school officers until overruled by the courts.")

PUBLIC UTILITIES: ELECTRICITY – LIGHT & POWER: DELINQUENT BILLS: Municipal utilities must use reasonable methods to compel payment for services and utility service may not be disconnected other than for good cause. Op. Atty. Gen. 624c-4 (Nov. 2, 1938) superseded.

624c-4
(cr.ref. 624d-5)

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

KEITH ELLISON
ATTORNEY GENERAL

SUITE 1800
445 MINNESOTA STREET
ST. PAUL, MN 55101-2134
TELEPHONE: (651) 297-2040

May 16, 2019

John T. Shockley
Ohnstad Twichell, P.C.
444 Sheyenne St., Ste. 102
West Fargo, North Dakota 58078-0458

Re: Request for Opinion Concerning Disconnection of Municipal Utility Services

Dear Mr. Shockley,

I thank you for your April 12, 2019 letter requesting an opinion regarding the ability of municipal utilities to disconnect a utility service for nonpayment of another municipal service.

FACTS

You state that the Moorhead Public Service Commission currently provides water and electric service to residents, while the city provides and charges for garbage, solid waste, pest and forestry, recycling, stormwater, streetlight utility, and wastewater.

QUESTION

You ask whether the municipality may shut off utility service, water or electricity, for failure to pay charges for another utility service or any municipal service listed above.

ANALYSIS

We answer your question in the negative. In Minnesota, customers of municipal utilities have a legitimate entitlement to continued utility service, and utility service may not be disconnected without good cause. *See Smith v. City of Owatonna*, 450 N.W. 2d 309, 311, 313 (Minn. 1990). Municipal utilities, however, may enforce collection of charges by reasonable regulations, subject to statutory prohibitions on disconnection and provided that the customer receives proper notice and has an opportunity to be heard. *See, e.g., id.* at 313; *City of East Grand Forks v. Luck*, 107 N.W. 393, 394 (Minn. 1938); Minn. Stat. §§ 216B.097, 216B.0975 (2018). Certain methods to compel payment of utility services and fees, however, have been found unreasonable. *See Cascade Motor Hotel, Inc. v. City of Duluth*, 348 N.W.2d 84, 85-86 (Minn. 1984) (finding a city's refusal to deliver utility service to a customer unless the customer paid the overdue account of a previous occupant to be arbitrary and unreasonable).

Courts in other states have discussed the methods municipal utilities may or may not use to enforce the collection of fees or utility charges. As you noted in your letter, the South Dakota Supreme Court held that a city wrongfully disconnected electrical and telephone service for nonpayment of garbage collection fees because garbage collection was a collateral matter. *See Owens v. City of Beresford*, 201 N.W.2d 890, 893 (S.D. 1972). Similarly, the Nebraska Supreme Court held that a city could not attempt to force collection of garbage fees by disconnecting water service. *See Garner v. City of Aurora*, 30 N.W.2d 917, 921 (Neb. 1948). On the other hand, the California Supreme Court held that, where a city used a single bill for municipal services (water, sewer, and garbage collection), the city did not violate due process by terminating all municipal services for failure to pay the garbage collection portion of the joint bill. *See Perez v. City of San Bruno*, 616 P.2d 1287, 1296-97 (Cal. 1980). The court cautioned, however, that "when a statutory or legislative scheme utilizes a means to reach its end and which is unduly harsh or exacts a penalty which may be deemed oppressive in light of the legitimate objections sought to be achieved, it may be held to be violative of constitutional due process guarantees." *Id.* at 1297.

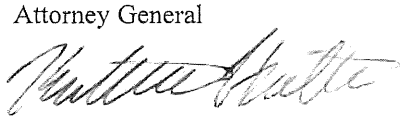
A Minnesota Attorney General opinion from 1938 opined that a village providing water, heat, and electricity, all billed on one statement, may adopt a regulation allowing for discontinuance of any and all services for delinquency of one service. Op. Atty. Gen. 624c-4 (Nov. 2, 1938). While Attorney General opinions are given careful consideration, they are not binding. *Village of Blaine v. Indep. Sch. Dist. No. 12, Anoka Cty.*, 138 N.W.2d 32, 39 (Minn. 1965). Given the substantial development of the law since 1938, regarding consumer protection, entitlements to provision of gas, electric, and water service, and the reasonableness of terminating services for nonpayment, this Office is not confident that the 1938 opinion remains an accurate legal analysis and expressly overrules it.

Ultimately, whether enforcement of a city ordinance that allows for disconnection of a utility service based upon nonpayment of another service is unreasonable turns on specific questions of fact and the construction of any local ordinance or resolution implementing the enforcement method. The Attorney General does not render opinions that require making such factual determinations or construing the meaning of terms in local ordinances or resolutions. *See* Op. Atty. Gen. 629a (May 9, 1975). You did not supply a specific ordinance, rule, or regulation

implementing the enforcement method you discussed in your request. Given the breadth of the municipal services established in your inquiry, however, we do not believe that the law allows a municipality to disconnect utility service for nonpayment of the varied and unrelated municipal services stated in your letter.

Sincerely,

KEITH ELLISON
Attorney General



KATHERINE HINDERLIE
Assistant Attorney General

(651) 757-1468 (Voice)
(651) 297-1235 (Fax)

Enclosure: Op. Atty. Gen. 629a (May 9, 1975)
Op. Atty. Gen. 624c-4 (Nov. 2, 1938)

#4479693-v1

Opinions of the Attorney General

Hon. WARREN SPANNAUS

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

Thomas M. Sweeney, Esq. May 9, 1975
Blaine City Attorney 629-a
2200 American National Bank Building (Cr. Ref. 13)
St. Paul, Minnesota 55101

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election districts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."*

* Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

> The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

IN THIS ISSUE

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1966). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. **Id.**

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist Ct. (Civ.) R 24.04; Op. Atty. Gen. 733G, July 23, 1945.

(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

(3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See, Op. Atty. Gen. 629-a, July 25, 1973.

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in

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such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion **supra.**

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion **supra.**

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

WARREN SPANNAUS, Attorney General
Thomas G. Mattson, Assist. Atty. Gen.

INDEX: Villages -- Water and light department -- Services -- Discontinuance of service for failure to pay for same.

November 2, 1938

Mr. Mahman Schochet
Village Attorney
Colsraine, Minnesota

Dear Sir:

This will acknowledge receipt of your letter to Attorney General William S. Ervin wherein you state and inquire:

> "Situation: The village water, light, etc. commission sells the three following services: (1) water, (2) heat, and (3) electricity. The three items are billed on one statement, although itemized separately. Consumer, in our case, pays up his water and electricity in full, leaving the heat charges unpaid. Can the commission discontinue either of the other services (water or electricity) upon adoption of such a ruling as long as the heat is not paid?"

In the case of City of East Grand Forks v. Lusk, 97 Minn. 375, our Supreme Court held that a municipality may adopt reasonable rules and regulations to enforce payment of charges for such services rendered to consumers by the municipality. As pointed out in that case, and also in the case of Powell v. City of Duluth, 81 Minn. 55, the obligation on the part of the consumer to receive and pay for such services rests upon contract and if the method of enforcement of payment for the same adopted by the municipality is reasonable and not prohibitory the consumer subjects himself to the rules and regulations of the municipality pertaining to such method of payment.

Under the rule laid down by our Supreme Court in the above referred to cases, we are of the opinion that said water and light commission may adopt a regulation providing that whenever any of the charges for services furnished by the water and light department of the village become delinquent any or all of such services may be discontinued until the consumer pays such delinquent bills.

You also inquire:

> "Would it make any difference if, when less than the total due on the commission's statement is paid, if the receipt were marked 'payment on account' instead of 'payment in full for water and electricity to_____'?"

If the commission adopts a regulation providing that when the charges for any of the services furnished to a consumer by the water and light department become delinquent all of such services may be discontinued until the charges therefor are paid, we believe that the commission's right to discontinue such services to delinquent consumers would not be affected by the commission's acceptance of a part of the amount due from the consumer.

Yours very truly

WILLIAM G. ERVIN
Attorney General

By

DWIGHT N. JOHNSON
Special Assistant Attorney General

DNJ/DMG

KEITH ELLISON
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

SUITE 1800
445 MINNESOTA STREET
ST. PAUL, MN 55101-2134
TELEPHONE: (651) 297-2040

August 6, 2019

Steven B. Hanke
Deputy City Attorney
411 West First Street, Room 410
Duluth, MN 55802-1198

Dear Mr. Hanke:

I thank you for your June 26, 2019 letter requesting an opinion from the Attorney General's Office on behalf of the Duluth Civil Service Board regarding the application of the Public Employment Labor Relations Act (PERLA) to several of the City of Duluth's current job descriptions.

You state that the Board has raised concerns that some recent job descriptions for non-supervisory positions effectively include five or more of the ten supervisory functions under Minn. Stat. § 179A.03, subd. 17 (2018). You ask, on behalf of the Board, when, or if, an employee who exercises, or effectively recommends, supervisory functions may be included in a nonsupervisory collective bargaining group, or whether such positions must be reclassified with the supervisory unit under PERLA.

To answer your question, a more fact-specific inquiry regarding the form and substance of the delegation of supervisory authority appears to be required. For the reasons noted in Op. Atty. Gen. 629-a (May 9, 1975) (enclosed), this Office does not generally render opinions upon fact-dependent or hypothetical questions.

In addition, your question raises issues that may affect the duties of not only the Duluth Civil Service Board but also the City of Duluth. It is the understanding of this Office that although the Duluth City Charter delegates to the Board the power to provide "for the classification of all employees," it does so subject to "the approval of the council." City of Duluth, City Charter ch. V, § 36. Attorney General opinions are generally issued only at the request of the government agency whose authority or duties are at issue. *See* Op. Atty. Gen. 629a (July 1, 1935) ("[T]he Attorney General is permitted to render official opinions on matters of city administration only upon request of the city attorney and on matters relating to county administration only upon request of the county attorney.") (enclosed). Because your request is submitted on behalf of the Board and not the City, this Office cannot render a formal opinion that purports to definitively answer the question you pose.

That having been said, I can provide you with the following information, which I hope you will find helpful.

As you recognize in your letter, it is generally improper for an organization to be the exclusive representative for both supervisory and nonsupervisory employees of the same public employer. *See Am. Fed'n of State, Cty. and Mun. Emps., Council No. 65, Nashwauk v. City of Buhl*, 541 N.W.2d 12, 13 (Minn. Ct. App. 1995) (enclosed); Minn. Stat. § 179A.06, subd. 2 (2018).

As you state in your letter, Minn. Stat. § 179A.03, subd. 17 (2018) defines "supervisory employee." Under the statute, a "supervisory employee" is "a person who has the authority to undertake a majority of the following supervisory functions in the interest of the employer: hiring, transfer, suspension, promotion, discharge, assignment, reward, or discipline of other employees, direction of the work of other employees, or adjustment of other employees' grievances on behalf of the employer." To be considered a supervisory function, the employee's exercise of authority "must require the use of independent judgment." For nonessential employees, an employee "who has authority to effectively recommend a supervisory function, is deemed to have authority to undertake that supervisory function."

In determining whether the requisite delegation of supervisory authority has occurred under PERLA, the Bureau of Mediation Services (BMS) has looked to the following standards: (1) whether the employee is aware of and knowledgeable of the delegation; (2) whether the authority has been accepted and would be exercised; and (3) whether the employee understands how to execute the authority. *In re Petition for Clarification of Appropriate Unit City of Cannon Falls, Minn. and Int'l Union of Operating Eng'rs, Local No. 49, Minneapolis, Minn.*, BMS Case No. 07-PCL-0451, 2007 WL 5037104 at *3 (July 12, 2007) (enclosed); *Sch. Serv. Emps. Local 284 v. Indep. Sch. Dist. No. 281*, No. 01-2219, 2002 WL 1013767 at *4 (Minn. Ct. App. May 21, 2002) (recognizing these standards) (enclosed). Although the BMS generally gives significant weight to job descriptions when determining the supervisory status of employees, it has emphasized that job descriptions are not determinative and "the Statute requires the delegation of supervisory authority to employees must be a matter both of form and substance." *City of Cannon Falls*, 2007 WL 503104 at *4.

The BMS standard appears to require a more fact-specific inquiry regarding the form and substance of the delegation of supervisory authority to determine whether an employee is a "supervisory employee" under PERLA. As stated above, the Attorney General's Office does not generally render opinions upon hypothetical or fact-dependent questions and is not equipped to investigate and evaluate questions of fact. Op. Atty. Gen. 629a (May 9, 1975). As attorney for the Civil Service Board, you may be in a position to make the appropriate factual determinations and provide relevant legal analysis to the Board.

Other resources may also be available to you: The League of Minnesota Cities has published guidance on the definition of supervisory employees under PERLA. *See* League of Minnesota Cities Human Resources Reference Manual, ch. 6 at 21-23 (July 8, 2019) (excerpt

enclosed). The manual is available in its entirety at *https://www.lmc.org/media/document/1/laborrelationschapter.pdf?inline=true*. You may also wish to contact the BMS, which has the authority to resolve labor disputes involving public employees.

Sincerely,

KATHERINE HINDERLIE
Assistant Attorney General

(651) 757-1468 (Voice)
(651) 297-1235 (Fax)
katherine.hinderlie@ag.state.mn.us

Enclosures:
Op. Atty. Gen. 629a (May 9, 1975)
Op. Atty. Gen. 629a (July 1, 1935)
Am. Fed'n of State, Cty. and Mun. Emps., Council No. 65, Nashwauk v. City of Buhl, 541 N.W.2d 12 (Minn. Ct. App. 1995)
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League of Minnesota Cities Human Resources Reference Manual, ch. 6 (July 8, 2019) (excerpt)

|#4525266-v1

Opinions of the Attorney General

Hon. WARREN SPANNAUS

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

Thomas M. Sweeney, Esq. May 9, 1975
Blaine City Attorney 629-a
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St. Paul, Minnesota 55101

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Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

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(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

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(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion **supra.**

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion **supra.**

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

WARREN SPANNAUS, Attorney General
Thomas G. Mattson, Assist. Atty. Gen.

unofficial

ATTORNEY GENERAL OPINIONS — Rendered only upon request of county attorney on county matters, city attorney on city matters. § 115, M.M.St., 1927.

July 1, 1935.

Dr. E. W. Rimer
Breckenridge, Minnesota

Dear Sir:

Your letter to Attorney General Harry H. Peterson under date of June 28th, together with enclosures, have been referred to the undersigned for attention.

It appears from the statements accompanying your letter that you have filed certain claims against the city of Breckenridge and the county of Wilkin for medical services rendered in certain cases. It also appears from a letter of the county attorney, E. H. Elwin, under date of April 25, 1935, that after he investigated your claims he found "that this service was never authorized from the county's side of the claim, and accordingly I made a memorandum thereon of 'Disapproved'."

It also appears from a letter written to you under date of April 27, 1935, by your attorney, Mr. Lewis E. Jones, that "having filed your claim and let the time go by within which to appeal, we are simply helpless."

We also direct your attention to Mason's Minnesota Statutes of 1927, Section 115, whereby the Attorney General is permitted to render official opinions on matters of city administration only upon request of the city attorney and on matters relating to county administration only upon request of the county attorney.

If the city council of Breckenridge desires an opinion on any of the matters referred to by you, it may have its attorney submit a request for the same. It will then become our duty and we will be glad to render an official opinion on matters so submitted by the city attorney. The same rule holds true with reference to requests for opinions on county matters. The county attorney is the legal adviser of the county board, as well as other county officials with reference to administrative affairs of the county. As appears from the letters accompanying your communication the county attorney has disallowed your claims and your attorney has advised you that you let the time go by within which to file an appeal from the disallowance of your claims. It is apparent, therefore, that an opinion from this office would be of no avail.

Moreover, as a professional man, you will readily understand the impropriety of the attorney general in giving any such opinion in the absence of any request therefor from the proper authorities. It has long been the established practice of this office to give such opinions only when requested in writing by the city attorney with reference to city matters and the county attorney with reference to county matters. Confusion could only result from any other course of procedure.

Trusting that you will understand our position in the matters, we are

Yours very truly,

HARRY H. PETERSON
Attorney General

By DAVID J. ERICKSON
Assistant Attorney General

DJE:LL

541 N.W.2d 12
Court of Appeals of Minnesota.

In the Matter of a Petition for Investigation and Determination of Public Employees' Appropriate Unit and Exclusive Representative.
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL NO. 65, NASHWAUK, Minnesota, Respondent,
v.
CITY OF BUHL, Minnesota, Relator,
Commissioner of Bureau of Mediation Services, Respondent.

No. C5–95–1617.
|
Dec. 12, 1995.
|
Review Denied Jan. 25, 1996.

Synopsis
The Commissioner of the Bureau of Mediation Services certified union as exclusive representative of all supervisory employees of city police department. City sought judicial review. The Court of Appeals, Schumacher, J., held that union could be certified as exclusive representative for both supervisory and nonsupervisory employees of police department.

Affirmed.

***12** *Syllabus by the Court*

Under Minn.Stat. § 179A.06 (1994), a labor organization may be the exclusive representative of both supervisory/confidential and nonsupervisory/nonconfidential employees of the same public employer if the employees are "peace officers subject to licensure under sections 626.84 to 626.855."

Attorneys and Law Firms

Don L. Bye and Timothy W. Andrew, Halverson Watters Downs Reyelts & Bateman, Ltd., Duluth, for American Federation of State, County and Mun. Employees, Council No. 65.

Rodney G. Otterness, Kent E. Nyberg Law Office, Ltd., Grand Rapids, for City of Buhl.

Considered and decided by HARTEN, P.J., and SCHUMACHER and FORSBERG *, JJ.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION

SCHUMACHER, Judge.

Relator City of Buhl seeks review of the decision of the Commissioner of the Bureau of Mediation Services certifying respondent American Federation of State, County and Municipal Employees, Council No. 65 as the exclusive representative of all supervisory employees of the city's police department. The city argues that AFSCME No. 65 may not be certified as the exclusive representative of the city's police department's supervisory employees because AFSCME No. 65 is the exclusive representative for a unit of nonsupervisory employees of the city's police department. We affirm.

FACTS

AFSCME Council No. 65 is a labor organization that is certified as the exclusive representative ***13** of the nonsupervisory employees of the Buhl Police Department. On February 9, 1995, the union petitioned the Bureau of Mediation Services for a determination of appropriate unit and certification as the exclusive representative for a unit of supervisory employees within the police department. The unit the union seeks to represent includes two employees.

Following a hearing, the Commissioner certified the union as the exclusive representative for the following unit:

> All supervisory employees of the Police Department of the City of Buhl, Minnesota, who are public employees within the meaning of Minn.Stat. 179A.03, Subd. 14, excluding all other employees.

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This appeal followed.

ISSUE

May the Bureau of Mediation Services certify as the exclusive representative of supervisors in a police department a union that already is the exclusive representative of nonsupervisors in that same police department?

ANALYSIS

The city argues that, under Minn.Stat. § 179A.06, subd. 2 (1994), AFSCME No. 65 may not be certified as the exclusive representative of the police department's unit of supervisory employees because AFSCME No. 65 is already the exclusive representative for a unit of nonsupervisory employees of the police department.

An appellate court is not bound by an agency's decision when statutory interpretation is involved. *Arvig Tel Co. v. Northwestern Bell Tel Co.*, 270 N.W.2d 111, 114 (Minn.1978). The Public Employment Labor Relations Act gives public employees the right to form and join labor organizations. Minn.Stat. § 179A.06, subd. 2. Public employees "in an appropriate unit" have the right to designate an exclusive representative to negotiate with the employer. *Id.* PELRA addresses which units are "appropriate":

> Supervisory or confidential employee organizations shall not participate in any capacity in any negotiations which involve units of employees other than supervisory or confidential employees. Except for organizations which represent supervisors who are: (1) firefighters, peace officers subject to licensure under sections 626.84 to 626.855, guards at correctional facilities, or employees at hospitals other than state hospitals; and (2) not state or University of Minnesota employees, a supervisory or confidential employee organization which is affiliated with another employee organization which is the exclusive representative of nonsupervisory or nonconfidential employees of the same public employer shall not be certified, or act as, an exclusive representative for the supervisory or confidential employees. For the purposes of this subdivision, affiliation means either direct or indirect and includes affiliation through a federation or joint body of employee organizations.

Id.

Under PELRA it is generally improper to certify a union as the exclusive representative for both supervisory and nonsupervisory employees of the same public employer. The statute, however, creates an exception to this general rule for firefighters, peace officers, guards at correctional facilities, employees at hospitals other than state hospitals, and state and University of Minnesota employees. Because the unit that AFSCME No. 65 seeks to represent is composed of "peace officers subject to licensure under sections 626.84 to 626.855," the exception applies and AFSCME No. 65 may represent both the supervisory and nonsupervisory employees.

DECISION

The Commissioner properly certified AFSCME No. 65 as the exclusive representative for the unit made up of supervisors of the Buhl Police Department.

Affirmed.

All Citations

541 N.W.2d 12

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2007 WL 5037104 (MN BMS)

Bureau of Mediation Services

State of Minnesota

IN THE MATTER OF A PETITION FOR CLARIFICATION OF AN
APPROPRIATE UNIT CITY OF CANNON FALLS, MINNESOTA
AND
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 49, MINNEAPOLIS, MINNESOTA

BMS Case No. 07-PCL-0451
July 12, 2007

UNIT CLARIFICATION ORDER

INTRODUCTION

*1 On November 6, 2006, the State of Minnesota, Bureau of Mediation Services (Bureau), received a petition from the International Union of Operating Engineers, Local No. 49, Minneapolis, Minnesota (Local 49), requesting clarification of an appropriate unit for certain employees of the City of Cannon Falls, Minnesota (City). On April 20, 2007, the Bureau conducted a hearing at the City's office and the record was closed upon completion of the hearing. Shortly before the hearing was scheduled to begin at 1:00 p.m., the hearing officer discovered his tape recorder was malfunctioning. He informed the parties they had a right to a recording of the hearing pursuant to Minn. R. 5510.0710 Subp.10 (E) (2006), and asked if they would like to postpone the hearing until the tape recorder could be repaired. The parties informed the hearing officer they wanted to waive their right to a recording and go forward with the hearing. We approved the request because we found waiving the recording requirement would not likely harm the interests of the public or impair or frustrate the intent or purposes of the Public Employment Labor Relations Act, §§ 179A.01-.25 (2006) (PELRA) and Minn. R. 5510.0210 (2006).

APPEARANCES

Kathleen Miller, City Administrator, appeared on behalf of the City; and Todd Doncavage, Area Business Representative, appeared on behalf of Local 49.

ISSUE

Are the positions of Utilities Supervisor and Streets/Parks Supervisor supervisory within the meaning of Minn. Stat. §179A.03, subd. 17 (2006)?

DEFNITION OF THE APPROPRIATE UNIT

On June 1, 1979, the Bureau certified Local 49 as the exclusive representative for:
All employees of the Public Works Department of the City of Cannon Falls whose employment service exceeds the lesser of 14 hours per week or 35 percent of the normal work week and more than 100 work days per year, excluding supervisory and confidential employees. BMS Case No. 79-PR-765-A.

BACKGROUND

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The case arises out the City's reorganization of its Public Works Department (Department) during the spring of 2006. The Department continued its historical structure of separate divisions for the Utilities and Streets/Parks functions and Local 49 still represents two employees in the General Maintenance Worker II classification in Utilities and three employees in the General Maintenance Worker I classification in Streets/Parks. However, the City created two new positions, Utilities Supervisor and Streets/Park Supervisor, because it determined the Department was understaffed. The City was particularly concerned about problems in the Utilities division which it primarily attributed to inadequate supervision. Before the Department was reorganized the only person in the Department with supervisory authority since 2002 was the Department Director, Barry Underdahl. Underdahl had been the Assistant Director of the Department between 1999 and 2002, but the City eliminated that position when it promoted him to Director in 2002.

*2 The City promoted Mark Albert, a General Maintenance Worker II, to Utilities Supervisor in May 2006 and he continues to occupy that position. The City hired an outside candidate to fill the Streets/Park Supervisor position shortly thereafter, but the City terminated his employment last December and the position was vacant at the time of the hearing. On November 6, 2006, Local 49 filed a petition with the Bureau in which it disputed the City's contention the positions were supervisory and requested the Bureau conduct a hearing to determine an appropriate unit for the positions.

POSITIONS OF THE PARTIES

The City maintains the positions of Streets/Parks Supervisor and Utilities Supervisor (subject positions or positions) have been delegated authority to perform or effectively recommend a majority of the functions in Minn. Stat. § 179A.03, subd. 17 (2006) and therefore, they are supervisory within the meaning of PELRA. Alternatively, the City argues even if the positions do not satisfy the supervisory test they are presumed to be supervisory because they are assistant(s) to the administrative head of the Department. Since supervisory employees are essential under PELRA they must be excluded from Local 49's non-essential unit.

Local 49 maintains the City removed the positions from its unit in violation of Minn. Stat. § 179A.03, subd. 17. It also contends the City has not delegated authority to the positions to perform a majority of the supervisory responsibilities. Finally, it asserts 85% to 90% of the work performed in the subject positions is the same as that performed by bargaining unit members. Therefore, the positions should be included in its unit because they are not supervisory and/or share a community of interest.

DISCUSSION

I. APPLICABLE STANDARDS.

Minn. Stat. §179A.09, subd. 2 (2006), provides, "[t]he commissioner shall not designate an appropriate unit which includes essential employees with other employees." Minn. Stat. §179A.03, subd. 7 (2006), includes supervisory employees among those defined as essential. Therefore, if we determine the subject positions are supervisory they may not be included within the appropriate unit of other-than-essential employees represented by Local 49. Minnesota Statutes §179A.03, subd. 17 (2006), provides:

Supervisory employee. "Supervisory employee" means a person who has the authority to undertake a majority of the following supervisory functions in the interests of the employer: hiring, transfer, suspension, promotion, discharge, assignment, reward, or discipline of other employees, direction of the work of other employees, or adjustment of other employees' grievances on behalf of the employer. To be included as a supervisory function which the person has authority to undertake, the exercise of the authority by the person may not be merely routine or clerical in nature but must require the use of independent judgment. An employee, other than an essential employee, who has authority to effectively recommend a supervisory function, is deemed to have authority to undertake that supervisory function for the purposes of this subdivision. The Administrative head of a ... municipal utility...and the administrative head's assistant, are always considered supervisory employees.

*3 The removal of employees by the employer from a nonsupervisory appropriate unit for purposes of designating the employees as "supervisory" shall require either the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner before the redesignation is effective.

In American Federation of State, County, and Municipal Employees, Local No. 66, and Independent School District No. 700, Hermantown, BMS Case No. 85-PR-570-A (March 15, 1985), the Bureau set out the standards we apply to determine whether the requisite delegation of supervisory authority has occurred. First, the employer must establish the employee is aware of and knowledgeable of the delegation. Second, the employer can demonstrate authority has been accepted and would be exercised. Third, the employee understands how the authority would be executed. *See also,* Independent School District No. 727 and School Service Employees Local 284, BMS Case No. 06-PCL-915 (The Court of Appeals affirmed our use of this test in School Service Employees Local 284 v. I.S.D. No. 281, Robbinsdale, BMS File No. 01-PCL-1121 (Minn. App. 2002) (Unpublished). [1]

II. ANALYSIS

Local 49 maintains the positions should be included in its unit because the City violated the Statute in designating them supervisory. It also contends the positions belong in its unit because they do bargaining unit work and, therefore, share a community of interest. We reject these arguments for the reasons described below.

Local 49 argues the City violated Minn. Stat. § 179A.03, subd. 17, by removing the subject positions from its unit without, "either the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner before the designation is effective." We disagree. This section bars employers from removing existing positions from a nonsupervisory unit. The City did not ""remove" or "redesignate" an existing position. Rather, it created two new positions. When an employer creates new positions or designates a vacant position supervisory we have consistently found the foregoing section to be inapt and do not believe it applies here. *See, e.g.,* Independent School District No. 727, *supra;* AFSCME, Local 49 and Virginia Public Utilities Commission and Minnesota Association of Professional Employees, BMS Case No. 05-PCL-1018 (August 2, 2005).

The City does not dispute Local 49's claim that 85% to 90% of the duties performed by the new positions is indistinguishable from bargaining unit work, but argues it is not relevant to our determination. We agree. Our authority in this matter is limited to determining whether the subject positions s are supervisory under PELRA. United Steelworkers of America and Housing and Redevelopment Authority of Virginia, BMS Case No. 84-PR-1191-A (August 15, 1984); IUOE, Local No. 49 and City of Minneapolis and City Employees Local No. 363, 93-PCL-25 (May 23, 1996) *Ruling on Request for Reconsideration.* The Bureau has no statutory authority to include supervisory or confidential employees in a bargaining unit because they are found to perform duties normally carried out by employees within the unit. Indeed, such a determination would explicitly be contrary to law. Accordingly, such an issue in not justiciable through unit clarification proceedings but, is reserved for the parties to resolve through the bargaining process." United Steelworkers, *supra* (footnote omitted).

*4 As with most cases that come before us concerning supervisory status, the ultimate authority to execute many, if not all, of the statutory duties rests with its governing body of the public employer. For example, even the City's administrator lacks authority to discharge an employee without the City Council's approval. Nevertheless, as the City notes, if we determine the subject employees have authority to "effectively recommend" a majority of the functions in Minn. Stat. § 179A.03, Subd. 17 (2006), they meet the definition of a "supervisory employee" and must be excluded from the appropriate unit of non-essential employees represented by Local 49. Accordingly, we will apply Hermantown to determine whether the City has established the positions are supervisory.

The City relies almost exclusively on the positions' job descriptions in support of its position. The descriptions were produced in the spring of 2006 when the positions were created. [Joint Exhibits 3, 4]. The supervisory responsibilities of the positions were described, in relevant part as:

> "Directly supervises employees in the Department. Carries out supervisory responsibilities in accordance with the City's policies and applicable laws ... planning and directing work; evaluating performance and ensuring adequate execution and completion of tasks assigned."

The City modified the job descriptions last December by adding an additional sentence at the end of this section: "Recommends hiring, transfer, suspension, promotion, demotion, discharge, reward, and discipline of ... Department employees." [Joint Exhibits 1, 2].

Other than the job descriptions, the only evidence the City submitted regarding the supervisory authority of the positions were some conversations between the Director, Barry Underdahl, and the Utilities Supervisor, Mark Albert, around the time he was promoted in May 2006. They discussed some of the problems at the wastewater treatment plant and how Albert would be expected to provide supervisory oversight in his new position, which had been lacking due to understaffing. The Director talked about the importance of keeping the employees busy and on task and suggested Albert set up a written schedule to ensure proper system maintenance. We find this testimony and the job descriptions support the City's position regarding the supervisory functions of assignment and the direction of the work of other employees.

The City apparently recognized the initial job descriptions did not strongly support its position because it changed them by granting additional authority to recommend eight (8) additional supervisory functions. The City argues this additional authority renders the positions supervisory because the modified job descriptions grant authority to recommend a majority of the supervisory functions under the Statute. Although we generally give significant weight to job descriptions when determining the supervisory status of employees, we have never treated them as determinative. Hermantown reflects our view that the Statute requires the delegation of supervisory authority to employees must be a matter both of form and substance and in that latter regard the City's position is unpersuasive.

*5 It is particularly significant that the City never communicated the change in supervisory authority to the Utilities Supervisor, Mark Albert, or the Streets/Parks Supervisor before he left the City. Consequently, the City cannot meet the threshold Hermantown standard that the employees be aware of and knowledgeable of their supervisory authority. Since the employees were unaware of the alleged delegation it follows the City could not meet the other Hermantown standards. That is, the employees accepted the additional authority, would exercise it, and understood how it would be applied. Albert's testimony indicated he knew he was responsible for assigning and directing work but beyond that he was unclear about the scope of his authority. It was clear from his testimony he would consult with the Director and defer to his judgment should a supervisory issue arise. The Director and the City Administrator stated they would not make supervisory decisions relating to an employee in Mark Albert's division without considering his opinion. We find this testimony credible but agree with Local 49 it undermines rather than supports the City' position, because it evinces a lack of independent judgment by Mark Albert. Thus, the facts do not support the requirement the positions, "effectively recommend", a majority of the supervisory functions. Minn. Stat. § 179A.03, subd. 17.

The City contends the Bureau does not consider the concerns of smaller public employers like Cannon Falls when it makes supervisory determinations. The City argues, unlike larger employers, smaller employers lack resources to comply with the Statute and requiring them to do so place an unfair burden on them. We disagree because we do not believe the statutory requirements are particularly burdensome even for a smaller employer such as the City. More importantly, the Bureau lacks authority under PELRA to create such an exception even if we believed the City's argument had merit.

We conclude the City has failed to establish the positions are supervisory. The evidence indicates the City has sufficiently delegated authority to the positions to undertake or effectively recommend only two (2) of the ten (10) supervisory functions on behalf of the City. In sum, the record indicates the positions are "lead workers" rather than supervisors with a broad range of authority.

Finally, the City argues in the alternative we must exclude the positions from Local 49's unit based on the section of the Statute which states, in relevant part, that "the Administrative head of a ... municipal utility...and the administrative head's assistant, are always considered supervisory employees." Minn. Stat. § 179.03, Subd. 17. If this section controlled we agree the positions would be presumptively supervisory. For example, the current Department Director, Barry Underdahl, was excluded from Local 49's unit when he was the Assistant Department Director before being promoted in 2002. Nevertheless, we reject this argument because this section no longer applies. The City did not reestablish Underdahl's old position as the sole assistant to the Public Works Director which had supervisory authority over rank and file employees in both Department divisions. Instead, it created two new positions with more limited authority whose job duties are determined and circumscribed by their respective division assignments.

CONCLUSIONS OF LAW AND ORDER.

*6 1. The Utilities Supervisor is not supervisory within the meaning of Minn. Stat. §179A.03, subd. 17 (2006), and is **included** in the appropriate unit represented by Local 49.

2. The Streets/Parks Supervisor, is not supervisory within the meaning of Minn. Stat. §179A.03, subd. 17 (2006) and is **included** in the appropriate unit of non-essential employees represented by Local 49.

3. The County shall post this Order at the work locations of the employees involved.

James A. Cunningham, Jr.
Commissioner
Neil Bowerman
Hearing Officer

Footnotes

1 The Court describes the factors somewhat differently but the test is not materially different. The Court stated it thusly; "When dealing with newly created job descriptions, the evidence must show that there has been an express delegation of supervisory functions to the employees, the employees have been trained regarding their new responsibilities, and the employees have the knowledge necessary to meet their new responsibilities and intend do so."

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Court of Appeals of Minnesota.

SCHOOL SERVICE EMPLOYEES LOCAL 284, Eden Prairie, Minnesota, Relator,
v.
INDEPENDENT SCHOOL DISTRICT NO. 281, Robbinsdale, Minnesota, and the State of Minnesota, Bureau of Mediation Services, Respondents.

No. C6-01-2219.
|
May 21, 2002.

Bureau of Mediation Services, File No. 01-PCL-1121.

Attorneys and Law Firms

Bruce P. Grostephan, Peterson, Engberg & Peterson, Minneapolis, MN, for relator.

Frank J. Madden, Pamela R. Galanter, Frank Madden & Associates, Plymouth, MN, for respondent ISD No. 281.

Mike Hatch, Attorney General, Richard L. Varco, Jr., Assistant Attorney General, St. Paul, MN, for respondent Bureau of Mediation Services.

Considered and decided by KLAPHAKE, Presiding Judge, RANDALL, Judge, and FOLEY, Judge. *

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge.

*1 Respondent Independent School District No. 281 filed a "Petition for Clarification or Amendment of Appropriate Unit" with respondent Bureau of Mediation Services (BMS), seeking to exclude six newly created positions, which are held by nine incumbent employees from an existing bargaining unit, on the basis of their supervisory status. Relator School Service Employees, Local No. 284, is the exclusive representative for the existing unit, described as:

> Service employees employed by the School District excluding the following: confidential employees, supervisory employees, essential employees, emergency employees, part-time employees whose service does not exceed 14 hours per week, employees who hold positions of a temporary or seasonal character for a period not in excess of 67 working days in any calendar year.

Based on testimony and evidence presented during a four-day hearing, the hearing officer found that the positions are supervisory within the meaning of Minn.Stat. § 179A.03, subd. 17 (2000), and thus excluded from the existing bargaining unit.

Relator seeks certiorari review of the clarification order. Because the commissioner's decision is supported by substantial evidence in the record and is not arbitrary or capricious or affected by other error of law, we affirm.

DECISION

In this certiorari review of a decision by the Commissioner of the Bureau of Mediation Services (BMS) relating to supervisory employees,

> [t]his court will affirm the BMS [c]ommissioner's decision unless, upon independent evaluation, the decision is shown to be unsupported by substantial evidence, based upon errors of law, or arbitrary and capricious. When reviewing questions of law, this court is not bound by the agency's decision and need not defer to the agency's expertise. Statutory

> construction is a question of law, subject to de novo review.

Minn. Teamsters Pub. & Law Enforcement Employee's Union, Local No. 320 v. County of McLeod, 509 N.W.2d 554, 556 (Minn.App.1993) (citations omitted); *see also* Minn.Stat. § 179A.051 (2000) ("Decisions of the commissioner relating to supervisory * * * employees * * * may be reviewed on certiorari by the court of appeals.").

I.

Relator argues that the hearing officer erred by refusing to consider whether respondent committed unfair labor practices by allegedly meeting and negotiating with the nine employees from the unit without giving relator notice of its intent to do so. The commissioner, however, has the authority to hear claims of unfair labor practices only when those claims affect the result of an election. *See* Minn.Stat. § 179A.12, subd. 11 (2000). Claims of unfair labor practices must be brought in district court under Minn.Stat. § 179A.13, subd. 1 (2000) ("Any employee, employer, employee or employer organization, exclusive representative, or any other person or organization aggrieved by an unfair labor practice * * * may bring an action * * * in the district court of the county in which the practice is alleged to have occurred."). Thus, district courts have original jurisdiction over claims of unfair labor practices that arise outside of an election. *See Am. Fed'n of State, County & Mun. Employees Local 66 v. St. Louis County Bd. of Comm'rs*, 281 N.W.2d 166, 170 (Minn.1979) ("district court has jurisdiction over an action alleging an unfair labor practice by a public employer").

*2 Because the district court has jurisdiction over claims of unfair labor practices, the hearing officer did not err in determining that the commissioner lacked authority to consider these claims. The parties' various arguments regarding whether respondent's actions constituted improper negotiations or involved inherent managerial policy, which may implicate unfair labor practices, are outside the scope of this appeal. *Cf. Minneapolis Ass'n of Adm'rs & Consultants v. Minneapolis Special Sch. Dist. No. 1*, 311 N.W.2d 474, 475 (Minn.1981) (rejecting union's claim that school district committed unfair labor practice when it altered several positions by divesting them of their administrative functions, without engaging in collective bargaining, and then petitioned to eliminate those petitions from bargaining unit that represented supervisory employees).

II.

Relator argues that the hearing officer erred by refusing to allow it to introduce evidence on how respondent treated the employees. Relator claims that this evidence falls within the community-of-interest factors, which include "the history and extent of [the] organization" and "the desires of the petitioning employee representatives." Minn.Stat. § 179A.09, subd. 1 (2000). Relator argues that these factors must be considered whenever the commissioner exercises his power to determine appropriate units. *See* Minn.Stat. § 179A.04, subd. 2 (2000) (commissioner's powers, authority, and duties include "determin[ing] appropriate units, under the criteria of section 179A.09").

Respondent's petition, however, did not seek to determine the appropriateness of a unit; rather, it sought to clarify an existing unit by determining whether these nine employees should be excluded from the unit because, with their new job duties, they are now supervisory employees. *See* Minn.Stat. § 179A.03, subd. 17 (2000) (definition of supervisory employee). Despite dicta in several cases from this court that suggest otherwise, the community-of-interest factors set out in Minn.Stat. § 179A.09 are not relevant and do not apply to petitions seeking to clarify a unit by determining whether certain employees are supervisory. *See, e.g., In re Petition for Clarification of Appropriate Unit*, 555 N.W.2d 552, 554 (Minn.App.1996) (discussing community of interest criteria in certiorari appeal from commissioner's order prohibiting confidential supervisory employee from remaining in supervisory bargaining unit); *Local No. 320*, 509 N.W.2d at 556 (citing community of interest criteria on review of commissioner's order concluding that employee was supervisory and thus member of unit composed of supervisory employees).

Even if the community-of-interest factors were relevant to this proceeding, those factors do not involve unfair labor practices. As respondent aptly states:

> The factors [set out in Minn.Stat. § 179A.09, subd. 1] are intended to aid in determining whether the classifications proposed for inclusion in an appropriate unit have a sufficient community of

> interest so as to promote orderly and constructive collective bargaining, rather than divergent interests and goals that may result in turmoil and an inability of either the employer or the exclusive representative to meet the needs of all members.

*3 The evidence relator claims that it would offer on the community-of-interest factors appears identical to the evidence it cites in support of its unfair labor practices claim. We agree with respondent and BMS that relator's arguments on this issue are merely an attempt to "bootstrap" its claims of unfair labor practices onto the community-of-interest factors. The hearing officer's refusal to allow evidence on relator's claimed community-of-interest factors was thus appropriate.

III.

The process for excluding supervisory employees from a nonsupervisory bargaining unit is set forth as follows:

> The removal of employees by the employer from a nonsupervisory appropriate unit for the purpose of designating the employees as "supervisory employees" shall require either the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner before the redesignation is effective.

Minn.Stat. § 179A.03, subd. 17. This statute further sets out the criteria to be considered when determining whether an employee is a supervisor:

> "Supervisory employee" means a person who has the authority to undertake a majority of the following supervisory functions in the interests of the employer: hiring, transfer, suspension, promotion, discharge, assignment, reward, or discipline of other employees, direction of the work of other employees, or adjustment of other employee's grievances on behalf of the employer. To be included as a supervisory function which the person has authority to undertake, the exercise of the authority by the person may not be merely routine or clerical in nature but must require the use of independent judgment. An employee, other than an essential employee, who has authority to effectively recommend a supervisory function, is deemed to have authority to undertake that supervisory function for the purpose of this subdivision.

Id.

At the beginning of the hearing, both parties agreed that these employees do not have the authority to transfer. And in this certiorari appeal, relator does not specifically challenge the hearing officer's findings that the employees have authority to assign, reward, discipline (oral and written reprimands), and direct the work of other employees. Thus, these five factors are not at issue here and will not be addressed.

Relator argues that because only the school board has the authority to hire, discharge, suspend, or promote employees and because the school board cannot delegate this authority to other individuals, these employees cannot be assigned these responsibilities. *See* Minn.Stat. § 123B.02, subd. 14 (2000) (school "[b]oard may employ and discharge necessary employees and may contract for other services"). Relator also argues that the evidence fails to establish that the employees have authority to exercise independent judgment in the adjustment of grievances. Relator finally argues that the testimony of the employees failed to establish that they have current actual authority or ability to perform these functions. *See County of McLeod v. Law Enforcement Labor Servs., Inc.*, 499 N.W.2d 518, 520 (Minn.App.1993) (employee must have current actual authority to exercise majority of supervisory functions).

*4 The statute requires only that the employees exercise independent judgment and have "authority to effectively

recommend a supervisory function." Minn.Stat. § 179A.03, subd. 17 (emphasis added).[1] When dealing with newly created job descriptions, the evidence must show that there has been an express delegation of supervisory functions to the employees, the employees have been trained regarding their new responsibilities, and the employees have the knowledge necessary to meet their new responsibilities and intend to do so.

1 Although this language does not appear to apply to essential employees, at oral arguments before this court, relator conceded that these employees are not "essential." Minn.Stat. § 179A.03, subd. 7 (2000) (definition of "essential" employee).

The employees here testified that they have accepted the responsibility for these supervisory functions and that they have the knowledge and training to exercise these functions. They further testified that they would make independent judgments in each of these areas and make their recommendations to their immediate supervisors. In turn, their immediate supervisors testified that they delegated these functions to these employees and that they would follow the recommendations made by these employees.

We conclude that this testimony was sufficient to support the conclusion that these employees will exercise their independent judgment and that they have the "current authority to undertake the function." The commissioner's decision that the nine employees are supervisory employees is therefore supported by substantial evidence in the record and is not arbitrary or capricious. *See County of McLeod*, 499 N.W.2d at 520-21 (affirming commissioner's decision that patrol and investigative sergeants are not supervisory employees, where they had authority to undertake only five of the ten supervisory functions and where sergeants, who are essential employees, only have power to effectively recommend suspension).

We therefore affirm the decision of the commissioner.

Affirmed.

All Citations

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RELEVANT LINKS:

Two v. Ilse, 380 N.W.2d 895 (Minn. App. 1986).

Minn. Stat. § 179A.03, subd. 15

The definition of public employer also provides that "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.01-179A.25 [MNPELRA]."

Minn. Stat. § 44.10

MNPELRA does not provide any procedural or substantive protection to probationary employees. This means the union contract will determine whether a probationary employee has rights to contest a discharge during the probationary period or has access to other benefits provided by the contract. This is important for a city because failure to specifically indicate in the union contract that an employee on probation may not contest their discharge will generally mean the employee has access to the grievance procedure, including the right to binding arbitration to contest this decision. Cities covered by municipal civil service laws have a specific law governing probationary employees.

15. Strike

Minn. Stat. § 179A.18

Minn. Stat. § 179A.19

The term "strike" is the concerted action in failing to report for duty, the willful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purposes of inducing, influencing, or coercing a change in the conditions, compensation, or the rights, privileges, or obligations of employment.

This definition is very broad and includes more actions than the traditional situation where an employee is outside a facility picketing rather than working. What is considered a strike is very important because essential employees may not strike and other employees may only strike in limited circumstances.

16. Supervisory employee

Minn. Stat. § 179A.03, subd. 17

The phrase "supervisory employee" is defined to mean a person who has the authority to undertake at least six of the following supervisory functions in the interests of the city:

- Hiring.
- Transfer.
- Suspension.
- Promotion.
- Discharge.
- Assignment.

RELEVANT LINKS:

- Reward.
- Discipline of other employees.
- Direction of the work of other employees.
- Adjustment of other employees' grievances on behalf of the employer.

To be included as a supervisory employee, the individual must use independent judgment in exercising his or her authority. In other words, the individual may not exercise authority that is merely routine or clerical in nature. The statute also provides that an employee, other than an essential employee, who has authority to effectively recommend a supervisory function is deemed to have authority to undertake that supervisory function for the purposes of this subdivision. The administrative head of a municipality, municipal utility, or police or fire department, and the administrative head's assistant, are always considered supervisory employees.

County of McLeod v. Law Enforcement Labor Services, Inc., 499 N.W.2d 518 (Minn. App. 1993).

There are two methods to use when determining whether an individual is a supervisor. In the event the individual meets either test, he or she is considered a supervisor for purposes of the statute. The first test is to determine whether the individual has the authority to exercise six of the 10 listed factors. If one of the factors does not apply, it does not reduce the number of factors needed to qualify the individual as a supervisor.

Teamsters Local 320 v. County of McLeod, 509 N.W.2d 554 (Minn. App. 1993).

The Bureau of Mediation Services does not have the authority to look at any factors outside the 10 listed in the statute. The focus should be on the 10 factors and no other information is relevant in meeting this test.

County of McLeod v. Law Enforcement Labor Services, Inc., 499 N.W.2d 518 (Minn. App. 1993).

In the event the employee is not otherwise an essential employee, "authority" is more broadly defined to include instances where the employee has the authority to effectively recommend the supervisory function. In contrast, essential employees must have the actual authority–it is not sufficient if they merely have the authority to effectively recommend.

The employees must also have current authority to undertake the function. Prospective authority is not sufficient. An employee may have the authority to undertake a supervisory function without actually exercising that authority.

Minn. Stat. § 179A.06

Minn. Stat. § 179A.03, subd. 7

The second method to determine whether an individual is a supervisor does not rely on the 10 factors. Rather, the individual will be deemed a supervisor if he or she is the administrative head of a city, city utility, or police or fire department. In addition, the administrative head's assistant is also always included in the definition of a supervisor. This portion of the definition gives a city some significant control over this designation.

RELEVANT LINKS:

Minn Stat § 179A 03, subd 17
See Section III-B-1, *Defining the bargaining unit*

Supervisory employees may not be in the same bargaining unit with the individuals they supervise, but may join a union of other supervisory employees.

Supervisory employees are also essential employees. Supervisory employees may not strike.

The definition of supervisory employee also provides a city may not designate an individual as supervisor and remove him or her from a nonsupervisory appropriate unit, unless the city obtains the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner.

17. Terms and conditions of employment

Minn Stat § 179A 03 subd 19

Minn Stat § 179A 07

The phrase "terms and conditions of employment" is defined to mean the hours of employment and the compensation, including fringe benefits. Terms and conditions of employment does not include retirement contributions or benefits, but does include employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay. Terms and conditions of employment also includes the employer's personnel policies affecting the working conditions of the employees. The phrase terms and conditions of employment is subject to the portion of MNPELRA on the rights and obligations of cities as employers.

Minn Stat § 179A 07

Minn Stat § 179A 25

This definition is extremely important because the portion of MNPELRA detailing the rights and obligations of employers provides that public employers have an obligation to meet and negotiate in good faith with the exclusive representative of public employees regarding grievance procedures and terms and conditions of employment (unless the terms and conditions are so intertwined with management rights that negotiation of one would by necessity include negotiation of the other).

Alexandria Housing and Redevelopment Auth v Rost, 756 N W 2d 896 (Minn App 2008)

This definition is also important because an employee has a right to independent review of any grievance arising out of the interpretation or adherence to terms and conditions of employment. When a public employee is not covered by a union contact, his or her right to an independent review stems from any contractual protections that the employee has to not be terminated except for "cause." At-will employees do not have such contractual protections and, therefore, are not entitled to an independent review.

Teamsters Local 320 v City of Minneapolis 225 N W 2d 254 (Minn 1975)

Court decisions explaining which items are included in the phrase terms and conditions of employment frequently arise from disputes over an employer's obligation to negotiate with unions on mandatory subjects of bargaining.

KEITH ELLISON
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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445 MINNESOTA STREET
ST. PAUL, MN 55101-2134
TELEPHONE: (651) 297-2040

August 7, 2019

David E. Schauer
Sibley County Attorney
400 Court Avenue
P.O. Box 171
Gaylord, MN 55334

Mr. Schauer:

Thank you for your correspondence dated April 25, 2019.

You understand that certain townships are obtaining ORIs (originating agency identification numbers) from the Bureau of Criminal Apprehension (BCA) for the purpose of receiving a fine allocation under Minn. Stat. § 484.90, subd. 6 (2018). You report that there was a training where township officers were told that under a 2016 law change, that any time the court collects a fine for a crime that occurred within their township boundary, the township should receive a portion of the fine collected. You indicate that townships do not contract with the county attorney's office for such prosecutions.

You ask about fine revenue allocation to townships under Minn. Stat. § 484.90, subd. 6; and general county attorney office obligations for prosecution of crimes arising in any township.[1]

First, this Office has limited jurisdiction under the law. Because this Office's opinions are not legally binding, we generally do not offer advice unless specifically requested by the attorney for the agency whose powers and duties are at issue. Op. Atty. Gen. 629a, July 1, 1935, (Unofficial) (copy enclosed). Your question pertains to fine allocations pursuant to Minn. Stat. § 484.90, subd. 6. Those fine allocations are administered by the State Court Administrator. Because an opinion has not been requested by the State Court Administrator, this Office is not in a position to opine on subjects relating to the authority or administration of the statute by the State Court Administrator.

In 2013, the State Court Administrator provided a legal analysis of Minn. Stat. § 484.90, subd. 6 to the Carver County Attorney's Office. The State Court Administrator determined that the version of Minn. Stat. § 484.90, subd. 6 in force in 2013 only permitted townships to receive the two-third fine distribution for fines collected on township ordinance violations. This Office

[1] This Office does not generally opine on hypothetical or factual questions. *See* Op. Atty. Gen. 629a, May 9, 1975, (copy enclosed). It appears that some of the questions or issue presented in your letter may fall into one of those categories.

found no reason to render an opinion contrary to the opinion of the State Court Administrator. Copy enclosed.

Second, as you know, after the State Court Administrator's 2013 opinion, the legislature amended Minn. Stat. § 484.90, subd. 6. The earliest reference to a proposed amendment is in the Carvery County's "2015 Legislative Platform" proposed extending Minn. Stat. § 484.90, subd. 6 so that all townships would be entitled to "all fine revenues."[2] Carver County's proposed language was: "The county attorney prosecutes statutory or ordinance violations on behalf of county towns or townships." Carver County's proposed language was not adopted *verbatim*. The legislature amended the statute to include language that the county attorney will be "considered the attorney for any town in which a violation occurs."

The amendment to Minn. Stat. § 484.90 in 2016 was passed as part of the omnibus supplemental budget bill. Before being incorporated into the omnibus bill, the amendment was proposed as a stand-alone bill in both the house (HF 1291) and the senate (SF 1681). The background contained in the bill summaries for both bills indicates that when a county attorney is prosecuting in their capacity as a county attorney all fines go to the general fund. Copies enclosed. The background states that when a county attorney is prosecuting "under the authority of a city or town" the money is distributed two-thirds to the city or town and one-third to the general fund. The description of the amendment indicates that the effect of the bill would be that "the county attorney shall be considered the attorney for the town, and fine allocation will be based on the prosecutorial authority under which the county attorney is acting." *Id.*

The house file received one hearing before the House Public Safety and Crime Prevention Policy and Finance Committee.[3] During that committee hearing, three witnesses testified, in addition to the bill's chief author, Representative Jim Nash. Those witnesses were: Peter Ivy, Carver County Attorney; Neil Johnson, Chairman of the Watertown Township Board; and a representative from the Minnesota Association of Townships. All witnesses testified in support of the bill, and indicated that the bill was intended to provide the township with revenue from all of the citations issued within the township.

The State Court Administrator is entrusted with administration of this statute, including the 2016 amendment. The fiscal note attached to the 2016 amendment in the legislature (HF 1291), from the State Court Administrator and approved by Minnesota Management and Budget, may provide some additional guidance. Copy enclosed. The primary assumption of that fiscal note is that "fines and penalties will be distributed to towns under Minn. Stat. § 484.90, subd. 6, only when the county attorney prosecutes township ordinance violations for the town." The note goes on and indicates that it is also assumed that with the amendment "the county

---

[2] The Carver County 2015 Legislative Platform is enclosed.

[3] *See* H.F. 1291, Status in the House, available at https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF1291&ssn=0&y=2015. Substantially similar testimony was adduced at a Senate Judiciary Committee hearing on the companion Senate File.

attorney will serve as the township attorney only in cases charging township ordinance violations, and will prosecute as the county attorney in cases charging felony, gross misdemeanor, misdemeanor, and petty misdemeanor violations of state law, and county ordinance violations." It is this Office's understanding that the State Court Administrator has been administering Minn. Stat. § 484.90, subd. 6, since the 2016 amendment, consistent with the assumptions made in this fiscal note, and consistent with their 2013 opinion.

Finally, you ask generally about the prosecution obligation of any county attorney. Felonies, regardless of where they occur, are prosecuted by the county attorney. Minn. Stat. § 388.051, subd. 1(3) (2018). The division of prosecutorial authority for petty misdemeanors, misdemeanors, and gross misdemeanors, is controlled primarily by Minn. Stat. § 484.87 (2018). Subdivision 3 provides many instances in which an attorney for a statutory or home rule charter city is charged with prosecution of petty misdemeanor or misdemeanor violations of state law that occur within its jurisdiction. Minn. Stat. § 484.87, subd. 3. Subdivision 3 also provides that "[a]ll other petty misdemeanors, misdemeanors, and gross misdemeanors must be prosecuted by the county attorney of the county in which the alleged violation occurred." Local ordinances or rules are addressed later in that subdivision as follows: "All violations of a municipal ordinance, charter provision, rule, or regulation must be prosecuted by the attorney for the governmental unit that promulgated the municipal ordinance, charter provision, rule, or regulation, regardless of its population, or by the county attorney with whom it has contracted to prosecute these matters." Minn. Stat. § 484.87, subd. 3. Townships may employ their own attorney. Minn. Stat. § 366.01, subd. 7 (2018) (permitting a town board to employ an attorney for prosecutions).

I thank you again for your correspondence.

Sincerely,

STEPHEN D. MELCHIONNE
Assistant Attorney General

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(651) 297-1235 (Fax)
stephen.melchionne@ag.state.mn.us

Enclosures

|#4484593-v1

Opinions of the Attorney General

Hon. WARREN SPANNAUS

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

Thomas M. Sweeney, Esq. May 9, 1975
Blaine City Attorney 629-a
2200 American National Bank Building (Cr. Ref. 13)
St. Paul, Minnesota 55101

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election districts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."*

IN THIS ISSUE

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1966). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. **Id.**

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist Ct. (Civ.) R 24.04; Op. Atty. Gen. 733G, July 23, 1945.

(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

(3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See. Op. Atty. Gen. 629-a, July 25, 1973.

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in

---

* Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

> The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

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such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion **supra.**

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion **supra.**

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

WARREN SPANNAUS, Attorney General
Thomas G. Mattson, Assist. Atty. Gen.

unofficial

ATTORNEY GENERAL OPINIONS — Rendered only upon request of county attorney on county matters, city attorney on city matters. § 115, M.S.St., 1927.

July 1, 1935.

Dr. E. V. Rimer
Breckenridge, Minnesota

Dear Sir:

Your letter to Attorney General Harry H. Peterson under date of June 28th, together with enclosures, have been referred to the undersigned for attention.

It appears from the statements accompanying your letter that you have filed certain claims against the city of Breckenridge and the county of Wilkin for medical services rendered in certain cases. It also appears from a letter of the county attorney, E. H. Elvin, under date of April 25, 1935, that after he investigated your claims he found "that this service was never authorized from the county's side of the claim, and accordingly I made a memorandum thereon of 'Disapproved'."

It also appears from a letter written to you under date of April 27, 1935, by your attorney, Mr. Lewis E. Jones, that "having filed your claim and let the time go by within which to appeal, we are simply helpless."

We also direct your attention to Mason's Minnesota Statutes of 1927, Section 115, whereby the Attorney General is permitted to render official opinions on matters of city administration only upon request of the city attorney and on matters relating to county administration only upon request of the county attorney.

If the city council of Breckenridge desires an opinion on any of the matters referred to by you, it may have its attorney submit a request for the same. It will then become our duty and we will be glad to render an official opinion on matters so submitted by the city attorney. The same rule holds true with reference to requests for opinions on county matters. The county attorney is the legal adviser of the county board, as well as other county officials with reference to administrative affairs of the county. As appears from the letters accompanying your communication the county attorney has disallowed your claims and your attorney has advised you that you let the time go by within which to file an appeal from the disallowance of your claims. It is apparent, therefore, that an opinion from this office would be of no avail.

Moreover, as a professional man, you will readily understand the impropriety of the attorney general in giving any such opinion in the absence of any request therefor from the proper authorities. It has long been the established practice of this office to give such opinions only when requested in writing by the city attorney with reference to city matters and the county attorney with reference to county matters. Confusion could only result from any other course of procedure.

Trusting that you will understand our position in the matters, we are

Yours very truly,

HARRY H. PETERSON
Attorney General

By DAVID J. BRICKSON
Assistant Attorney General

DJB:LL

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

SUITE 1100
445 MINNESOTA STREET
ST. PAUL, MN 55101-2128
TELEPHONE: (651) 282-5700

May 22, 2013

Mr. Peter Ivy
Chief Deputy County Attorney
Carver County Attorney's Office
604 E. Fourth Street
Chaska, MN 55318-2102

Dear Mr. Ivy,

Thank you for your correspondence received April 15, 2013.

According to your letter, the Carver County Attorney's Office contracts with most of the cities in Carver County to do their misdemeanor prosecutions. Under Minn. Stat. § 484.90, subd. (6)(a)(2), those cities receive two-thirds of the fines collected by the Carver County District Court.

The Carver County Attorney's Office also handles misdemeanor prosecutions for various townships in the county, but the county does not have formal contracts with those townships. A Carver County representative asked the State Court Administrator's Office, the administrator of section 484.90, subd. 6, about the application of the statute to townships. That Office advised the County that section 484.90, subd. 6 only allows townships to receive a two-thirds portion of fines recovered for *ordinance* violations. The State Court Administrator's Office provided the County with a legal analysis supporting its interpretation. *See attached.*

Your letter inquires about the same issue under section 484.90, subd. 6 that was addressed in the attached analysis of the State Court Administrator's Office. We have no basis to render an opinion contrary to that of the State Court Administrator's Office.[1] This is based, in part, on the deference afforded to an entity entrusted with the administration of a statute. *See, e.g.,* Minn. Stat. § 645.16(8); *In re Cities of Annandale NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 515 (Minn. 2007) ("[D]eference to an agency's interpretation of a statute is

[1] We note that there is some confusion caused by the use of the terms "city" and "town" in Minn. Stat. § 484.90, subd. 6. While subsection (a) explicitly uses the phrases "municipality" and "town," subsection (b) refers only to "city." Because a statute should be interpreted to give effect to all its provisions and no word or phrase should be deemed "superfluous, void, or insignificant," *Amaral v. Saint Cloud Hospital*, 598 N.W.2d 379, 384 (Minn. 1999), we believe it is reasonable for the State Court Administrator's Office to interpret subsection (b) to apply equally to towns.

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appropriate, particularly 'when the administrative practice at stake involves a contemporaneous construction of a statute by the [people] charged with the responsibility of setting its machinery in motion.'") (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)); *Krumm v. R.A. Nadeau Co.*, 276 N.W.2d 641, 644 (Minn. 1979) ("[C]ourts should give great weight to a construction placed upon it by the department charged with its administration."); *In re Administrative Order Issued to Wright County*, 784 N.W.2d 398, 402-03 (Minn. App. 2010) ("[A]n agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purposes of the Act and intention of the legislature." (quoting *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988)).

Sincerely,

ALETHEA M. HUYSER
Assistant Attorney General

(651) 757-1243 (Voice)
(651) 282-5832 (Fax)

Enclosure

Answer

You've essentially asked whether townships should or should not be set up in MNCIS to receive fine distribution for offenses that occur within the township.

Response:

As amended effective 7/1/2009, Minn. Stat. § 484.90 states:

Subd. 6. **Allocation.** (a) In all cases prosecuted in district court ***by an attorney for a*** municipality or ***other subdivision of government within the county*** for violations of state statute, or of an ordinance; or charter provision, rule, or regulation of a city; all fines, penalties, and forfeitures collected shall be deposited in the state treasury and distributed according to this paragraph. Except where a different disposition is provided by section 299D.03, subdivision 5, 484.841, 484.85, or other law, on or before the last day of each month, the courts shall pay over all fines, penalties, and forfeitures collected by the court administrator during the previous month as follows:

(1) 100 percent of all fines or penalties for parking violations for which complaints and warrants have not been issued to the treasurer of the city or town in which the offense was committed; and

(2) ***two-thirds of all other fines to the treasurer of the city or town in which the offense was committed and one-third credited to the state general fund.***

All other fines, penalties, and forfeitures collected by the court administrator shall be distributed by the courts as provided by law.

(b) Fines, penalties, and forfeitures shall be distributed as provided in paragraph (a) when:

(1) a city contracts with the county attorney for prosecutorial services under section 484.87, subdivision 3;

(2) a city has a population of 600 or less and has given the duty to prosecute cases to the county attorney under section 487.87; or

(3) the attorney general provides assistance to the county attorney as permitted by law.

Fines are to be distributed under Minn. Stat. 484.90, subd. 6, when the court takes jurisdiction of a prosecution for violation of a statute or ordinance by a governmental subdivision that is a city or town within the county. So when a case is submitted for prosecution by a municipality or other subdivision of government within a county (i.e., town/township), the municipal fine provision would apply, unless another distribution is required by law (e.g., Minn. Stat. §§ 169.686, subd. 3, 299D.03, subd. 5). Essentially, whether Minn. Stat. § 484.90 applies to an offense that occurred within a city or town first depends on whether the city attorney or the township attorney has prosecutorial authority. For example, if an offense occurs within a city, whether this statute will apply depends first on if the city attorney has prosecutorial authority. If the county attorney has prosecutorial authority in the case, this distribution statute will not apply, i.e., the offense that occurred within the city is a felony, a gross misdemeanor outside the

prosecutorial authority of the city attorney, or a county ordinance. If the offense that occurred within the city is a petty misdemeanor, misdemeanor, or some gross misdemeanors, the city attorney would have prosecutorial authority and the fine would distribute under this statute, unless a different distribution is required by law. It does not matter whether the city attorney had been hired by the city, or the city had contracted with the county attorney for prosecution services, or a resolution has been passed in cities with a population under 600.

The analysis in the city example also applies to offenses that occur within a township. However, the prosecutorial authority of a township attorney is not the same as that for a city attorney. As far as I have been able to determine the prosecutorial authority for a township is limited to prosecuting township ordinance violations. Minn. Stat. § 366.01. Any other offenses committed within a township are within the prosecutorial authority of the county attorney. Minn. Stat. § 484.87, subd. 3 (Except as otherwise provided in subd. 3, "All other petty misdemeanors, misdemeanors, or gross misdemeanors must be prosecuted by the county attorney of the county in which the alleged violation occurred.") (If the county attorney is aware of a statute that gives a township attorney broader prosecutorial authority, could you have him share that with me? Thank you.)

It was my understanding at the time that we are implementing MNCIS and Auto Assessment that most township were not set up or asking to be set up to receive fines under Minn. Stat. § 484.90 because most offenses that occurred within a township were within the prosecutorial authority of the county attorney, not a township attorney.

In conclusion: The fact an offense is committed within a township is not determinative of how the fine for that offense distributes. If a township attorney is prosecuting a violation within the prosecutorial authority of the township attorney, i.e., a township ordinance violation, under Minn. Stat. § 484.90, the township should receive 2/3 of the fine. If a township has contracted with the county attorney to serve as the township attorney, and the county attorney serving as the township attorney prosecutes a violation within the prosecutorial authority of the township attorney, i.e., a township ordinance violation, the township should receive 2/3 of the fine. When the county attorney is serving as the township attorney, the ORI for the township attorney should be used in the case. However, if the county attorney serving as the county attorney is prosecuting a violation of an offense committed within a township, Minn. Stat. § 484.90 does not apply.

Hope this helps.

Deb

Deborah J. Blees, Attorney
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Deborah.Blees@courts.state.mn.us

Question

Currently in Carver County, we have a couple townships listed as a jurisdiction, set up like a municipality. So for example we have the City of Watertown, with a Watertown City attorney as a prosecutor (which happens to be our County attorney that prosecutes) We also have a jurisdiction of Watertown Township that we enter with Watertown Township Attorney (which also is the county attorney who prosecutes).

So the 2/3 money of a fine on both the city jurisdictions and the township jurisdictions goes to the city or township and 1/3 to the State. We have now been asked by our County to add another township, Camden Township. I have submitted a IT ticket to add the township to MNCIS, the attorney's office is asking for an ORI number for prosecution. The State IT is questioning me now on adding this township as a municipality and I am questioning also of adding townships based on contracts each year.

I have asked other counties in our district if they have some of their jurisdictions set up as townships with their own prosecutors, they replied that they do not. They have the jurisdiction as the township name but the prosecuting agency is the County attorney, so I assume the money on a fine would be going to county fines and not to the township.

I am asking for a legal opinion or help on the way we are to be setting these up for the future and may have to discontinue what we have been doing in the past.

Thank you

Rita A. Worm
Carver County Court Administration
604 E. 4th Street
Chaska, Mn 55318
952-361-1447

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CARVER
COUNTY

2015

Legislative Platform

Item numbering is not a priority listing

Top priorities:

A. Governance and Finances

1. Township Fine Revenue

B. Roads, Bridges and Transportation

2. Transportation Revenue
3. Eminent Domain Statute
4. Representation on the Transportation Advisory Board and Approval Authority for the Transportation Policy Plan

C. Parks, Natural Resources and Environment

5. Operations and Maintenance Funding for Regional Parks
6. Parks and Trails Legacy Funding

CARVER COUNTY

Issue #1: Township Fine Revenue

Background

Watertown and Laketown Townships have historically contracted with the Carver County Sheriff's Office for patrol services above mandated base level services. For more than two decades, Watertown and Laketown Townships have received fine revenues from the State Court Administrator to help subsidize these contracts.

Camden Township elected to enter into a contract with the Sheriff for additional patrol services. However, when the Carver County Court Administrator attempted to obtain an "ORI" number from the State Court Administrator, the Carver County Court Administrator was told that townships are not eligible for ORI designation, and therefore, townships are not entitled to any fine revenues.[1]

The State Court Administrator has now removed Watertown and Laketown Townships as entities entitled to receive fine revenue. In turn, Carver County Sheriff Jim Olson is concerned that Watertown and Laketown Townships may not be able to fund their contracts for added patrol services which will have a detrimental impact on public safety.

Unlike incorporated cities, the Carver County Attorney's Office is legally required to prosecute all statutory violations on behalf of the townships. Minn. Stat. § 484.87, Subd 3. Nevertheless, it is clear that ***all*** Minnesota townships are still entitled to all fine revenues under Minn. Stat. § 484.90, Subd. 6 (a) (emphasis added):

> (a) In **all cases** prosecuted in district court by an attorney for a municipality **or other subdivision of government within the county for violations of state statute, or of an ordinance**

The terms "towns" and "townships" are used interchangeably throughout Minnesota statutes. In the context of governmental units, "incorporated" means a city and "unincorporated" means a town. *See*, Minn. Stat. § 414.02. "When a county, town, or city is mentioned, without any particular description, it imports the particular county, town, or city appropriate to the matter." Minn. Stat. § 645.44, subd. 3.

The County Attorney's office recently met with attorneys representing the State Court Administrator's Office and they are unwilling to yield.

Requested Position

Carver County encourages the Legislature to clarify the law and effectuate the plain meaning of Minn. Stat. § 484.90, Subd. 6 (a) to allow the townships to receive fine revenue, the following amended language should be added to Minn. Stat. § 484.90, Subd. 6 (b): **The county attorney prosecutes statutory or ordinance violations on behalf of county towns or townships.**

[1] The timing of these matters coincides with the state-wide implantation of E-Charging criminal complaints.

CARVER
COUNTY

Issue #2: Transportation Revenue

Background

Building and maintaining a safe, efficient and effective transportation system is one of the most basic and vital services provided by all levels of government. Counties are a critical element of the state's transportation system. Over 45,000 miles of Minnesota's 143,000 miles of roads and highways are under county jurisdiction.

Counties and other local units of government oversee 14,700 bridges - 75% of all bridges in the state. The 2008 Legislature enacted a comprehensive transportation funding bill that provided new, dedicated revenues for bridges, roads and transit - at both the state and local levels of government. However as MnDOT's projections make clear, much of that new funding will be exhausted by 2016 and what remains will only be available for maintenance of existing roads. That means new transportation projects in both the metropolitan area and greater Minnesota will continue to be delayed.

Minnesota's transportation system is a critical element of the state's economic vitality. It gets people to and from work and school and gets goods and services to markets. With today's just-in-time inventory management and Minnesota's expanding role in the global economy, speedy delivery is critical to the state's competitiveness. Unfortunately, much of the state's transportation infrastructure is not up to the task. The time that Twin Cities' commuters and shippers spend trapped in traffic is growing at a faster rate than that in other metropolitan areas. And the financial resources available to expand the capacity of the state transportation system will literally nose-dive in 2016.

There are four major transportation priorities in Carver County that require an increase in transportation funding. Three out of the four priorities involve the state Trunk Highway system which is clearly underinvested in Carver County.

I. Address County Turnback Account shortfall.

5% of the Minnesota Highway Users Tax Distribution Fund (HUTDF) or approximately $90 million annually is allocated to the Town Bridge, Town Road and Flexible Highway Account. The Flexible Highway Account is allocated 53.5% or approximately $48 million annually which is used for the restoration of former Trunk Highways turned back to Counties or Cities. The problem is there is not enough funding in the County Turnback Account (part of Flexible Highway Account) to restore these highways which typically become the most travelled county highways and have the most safety and congestion issues. This is a significant problem in Carver County where there are many projects waiting for funding including portions of TH101 (now CSAH 101) and TH212 (now CSAH 61).

The County is the lead agency for the 101 Bridge and 61 "Y" reconstruction project, also known as the Southwest Reconnection Project and is responsible to finance $18 Million of the State

share of the project as the County Turnback Account does not have available funding. The next segment of highway 61 east of the "Y" is funded; however, there remains $70 million in unfunded Turnback projects on 101 and 61.

II. Improve deficient MnDOT A-Minor Arterials (TH 212, TH 5, TH 41)

Theses highways are the most significant trunk highways in Carver County. They carry the most vehicular and freight traffic, yet all are deficient in geometry which has caused significant congestion and safety issues. None of them, however, have been identified for expansion in the 2040 Transportation Policy Plan (TPP) or the State Highway Investment Plan (MnSHIP).

III. Provide funding for flood mitigation highway projects.

Damage to state and local roadways and bridges from flooding is occurring more and more frequently. Carver County, Scott County, MnDOT and other partners have studied options to reduce the impact of flooding in the Minnesota River Valley on the transportation system including highways 101 and 41. The 101 bridge is under construction but TH 41 remains a significant flood risk every year. The benefit to cost ratio for construction of a new TH 41 river bridge is over 3.0. The estimated cost for the flood protection bridge is $20 million.

IV. Increase funding to the Local Bridge Bonding Program

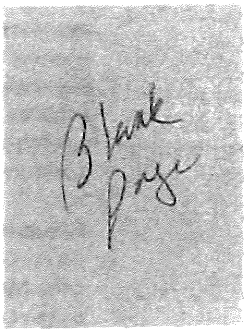
Carver County estimates $1 million in annual bridge replacement needs. The local bridge bonding program augments the budgets of counties and cities statewide by supplying between 50% and 100% of bridge replacement construction costs for deficient structures. The program is first come first serve which rewards project readiness; however large earmark projects have recently dominated the program which jeopardizes the funding for smaller ready to go projects. If large earmark projects are funded the program needs to be grow to support all local bridges.

Carver County will assist with these priorities and is already investing significant local funding in the state transportation system but this is not sustainable without the resulting degradation of the local county transportation network and considerable burden on the local tax base.

Requested Position

Carver County urges the legislature to pass a comprehensive transportation funding bill that includes the following provisions:

A. Provide trunk highway bonding for highways planned to be turnbacked to counties like TH 101 and increase funding to the county turnback account for roadways already turnbacked to the county like CSAH 61.
B. Provide trunk highway bonding for the Corridors of Commerce program to fund projects like TH 212 between Chaska and Norwood Young America.
C. Provide general obligation bonds for the local bridge replacement program at a level to fund all project ready local bridges.
D. Provide bonding for flood mitigation projects on state and local roadways including TH41.
E. Distribute all the proceeds from the Leased Motor Vehicle Sales Tax 50-50 between Greater MN Transit and the 5 Metropolitan Suburban Counties.
F. Retain the 1/2¢ Local Option Sales Tax for All Transportation Purposes for the Currently Authorized 82 Counties and Expand It to the Five Remaining Counties.
G. Oppose any increase in sales tax for transit only.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CARVER
COUNTY

Issue #3: Eminent Domain Statute

Background

Carver County requests revisions to Chapter 117, Eminent Domain, to mitigate the unintended consequences of the legislation which provides procedures, definition, remedies and limitations for condemning authorities when exercising the power of eminent domain for public use or public purpose.

The 2006 revisions to the eminent domain law has resulted in a significant cost increase related to attorney fees and interest payments incurred by agencies implementing public transportation improvements which has put an unreasonable and unintended burden on transportation funding. Wholesale rewrites or challenges will likely be unsuccessful given the political sensitivity with the law. However, discussion and controversy remains in several areas including: attorney's fees, owner appraisals, land commissioner qualifications, response to offers, and timing and schedules. The modest changes proposed below would give condemning authorities a chance to respond to new information that may come to light in the owner's appraisal, possibly totally avoiding the need acquire the property through the exercise of eminent domain authority.

Requested Position

Carver County recommends adding a definition to Section 117.025 to define the Last Written Offer (referred to in 117.031 Attorneys Fees) as the last offer for compensation made in writing by the Condemning Authority to the Owner a maximum of 20 days following the receipt of the Owner's appraisal. Carver County recommends revising Section 117.195 to determine the annual interest on award based on the secondary market yield of one year United States Treasury bills rounded to the nearest one percent.

CARVER COUNTY

Issue #4: Representation on the Transportation Advisory Board and Approval Authority for the Transportation Policy Plan

Background

The Metropolitan Council is required to adopt a Transportation Policy Plan (TPP) that guides the development of transportation infrastructure and services and their provision within the seven county metropolitan area. The nontransit element of the plan is required to be developed in consultation with the 1) transportation advisory board, 2) the Metropolitan Airports Commission and 3).cities having an airport located within or adjacent to its corporate boundaries. The Council as the Twin Cities metropolitan planning organization (MPO) distributes federal funds under its Transportation Improvement Program (TIP) for locally-initiated highway, road, transit and other transportation improvements. The award of funds is supposed to be consistent with the priorities identified in the TPP. MNDOT also looks to the TPP to guide the state's transportation investments or projects within the Twin City metropolitan area.

Given the preeminent role the TPP plays in governing the distribution of federal transportation funds and the state's transportation investments within the metropolitan area, it is critical that the concerns and interests of all localities as represented by their elected representatives be taken into account. The current composition of the Transportation Advisory Board (TAB) does not do that nor does its composition meet the requirements of federal law.

A composition that meets this objective would be:

(A) the commissioner of transportation or the commissioner's designee;
(B) the commissioner of the Pollution Control Agency or the commissioner's designee;
(C) one member of the Metropolitan Airports Commission appointed by the commission;
(D) one person appointed by the council to represent non-motorized transportation;
(E) one person appointed by the commissioner of transportation to represent the freight transportation industry;
(F) one member of the Metropolitan Transit Agency;
(G) one member of the Suburban Opt Outs appointed by the Suburban Transit Providers Organization
(H)nine elected officials of cities within the metropolitan area, including two representatives of first-class cities, appointed by the Association of Metropolitan Municipalities;
(I) one member of the county board of each county in the seven-county metropolitan area, appointed by the respective county boards.

Since the role of the TAB is to advise the Metropolitan Council - not rubber stamp the recommendations of the council's staff, the TAB must have sufficient independence to exercise that role. That independence should include the ability to elect its own chair from among its ranks of appointees, employ an independent TAB coordinator, and to approve the TPP and the TIP. Absent the later, the appointed Metropolitan Council would be free to ignore the TAB's and localities wishes as represented by elected officials on the board.

Requested Position

Carver County requests that the legislature change the composition of the Metropolitan Council's Transportation Advisory Board (TAB) to meet federal requirements that the membership consist of (A) local elected officials, (B) officials of the public agencies that administer or operate major modes of transportation and (C) appropriate State officials. Carver County further urges that the TAB elect its own chair, be able to employ an independent coordinator and that the TAB must approve the Transportation Policy Plan (TPP) that the council is required to adopt under section 473.146 and the Transportation Improvement Program (TIP) that the Council is required to adopt under federal law.

CARVER COUNTY

Issue # 5: Operations and Maintenance Funding for Regional Parks

Background

Carver County receives a portion of its operations and maintenance (O&M) funding for the regional parks it administers. O&M funding comes from the State General Fund and Metropolitan Council. Annually Carver County receives approximately 11 percent or roughly $128,000 for O&M funds. Benefits of this funding include:

- Reduces County property tax to maintain its regional parks
- Continues a satisfactory levels of park services
- Helps off-set cost of users outside of Carver County

Requested Position

Support Legislation to continue operations and maintenance funding for 2015-2016 at the same level as compared to the 2013-2014 funding cycle.

CARVER COUNTY

Issue #6: Parks and Trails Legacy Funding

Background

In April of 2012, the Minnesota Department of Natural Resources contracted with the Environmental Initiative to manage and facilitate a nine-member working group to develop consensus recommendations and accompanying rationale to serve as a model for parks and trails funding allocations for the FY 2014-2015 biennium and beyond. The Parks and Trails Legacy Funding Committee has reached consensus on an interim agreement for parks and trails legacy funding allocations to the majority state and regional providers.

The proposed funding breakdown for Parks and Trail legacy funding is for FY 2014-2019. The breakdown is as follows:

- 0.25% off the top for coordination among partners for marketing and promotional efforts for all parks and trails of state or regional significance.
- 0.25% off the top to fund resources to establish criteria to allocate Legacy funding

The remainder to be split:

- 40% Minnesota Department of Natural Resources
- 40% Metropolitan Regional Parks and Trails
- 20% Greater Minnesota Regional Parks

Requested Position

Carver County requests that funding from 2016 legacy funding shall be no less than 40% to Metro Regional Parks and Trails after the 0.5% allocation for coordinated marketing and establishment of criteria to allocate Legacy Funding. It is preferred that the allocation of Parks and Trails Legacy Funding for Metro Regional Parks and Trails be equal to the amount of sales tax proceeds generated in the Metropolitan area.

HOUSE RESEARCH

Bill Summary

FILE NUMBER: H.F. 1291 **DATE:** April 5, 2016
Version: As introduced

Authors: Nash and others

Subject: Fine allocation; towns

Analyst: Rebecca Pirius, 651-296-5044

This publication can be made available in alternative formats upon request. Please call 651-296-6753 (voice); or the Minnesota State Relay Service at 1-800-627-3529 (TTY) for assistance. Summaries are also available on our website at: www.house.mn/hrd/.

This bill addresses fine allocation when a county attorney prosecutes a case for a town.

Background: If a county attorney is prosecuting a case in his or her capacity as county attorney, all fine revenue is deposited in the state general fund. If a county attorney is prosecuting a case under the authority of city or town attorney, the money is distributed as follows: two-thirds to the city or town in which the offense was committed and one-third to the general fund.

This bill provides that, for purposes of fine allocation, the county attorney shall be considered an attorney for the town, and the fine allocation will be based on the prosecutorial authority under which the county attorney is acting.

Senate Counsel, Research
and Fiscal Analysis

Minnesota Senate Bldg.
95 University Avenue W. Suite 3300
St. Paul, MN 55155
(651) 296-4791
Tom Bottern
Director

Senate

State of Minnesota

S.F. No. 1681 - Fine allocation; towns

Author: Senator David J. Osmek

Prepared By: Chris Turner, Senate Fiscal Analyst (651/296-4350)

Date: April 8, 2016

This bill addresses fine allocation when a county attorney prosecutes a case for a town.

Background: If a county attorney is prosecuting a case in his or her capacity as county attorney, all fine revenue is deposited in the state general fund. If a county attorney is prosecuting a case under the authority of city or town attorney, the money is distributed as follows: two-thirds to the city or town in which the offense was committed and one-third to the general fund.

This bill provides that, for purposes of fine allocation, the county attorney shall be considered an attorney for the town, and the fine allocation will be based on the prosecutorial authority under which the county attorney is acting.

Check on the status of this bill

Back to Senate Counsel and Research Bill Summaries page

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Last review or update: 04/08/2016

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HF1291 - 0 - "County attorney considered as attorney"

Chief Author: **Jim Nash**
Commitee: **Public Safety and Crime Prevention Policy and Finance**
Date Completed: **04/07/2016**
Agency: Supreme Court

State Fiscal Impact	Yes	No
Expenditures		X
Fee/Departmental Earnings		X
Tax Revenue		X
Information Technology		X

Local Fiscal Impact		X

This table shows direct impact to state government only. Local government impact, if any, is discussed in the narrative.
Reductions shown in the parentheses.

State Cost (Savings)			Biennium		Biennium
Dollars in Thousands	FY2015	FY2016	FY2017	FY2018	FY2019
Total	-	-	-	-	-
Biennial Total			-		-

Full Time Equivalent Positions (FTE)			Biennium		Biennium
	FY2015	FY2016	FY2017	FY2018	FY2019
Total	-	-	-	-	-

Executive Budget Officer's Comment

I have reviewed this fiscal note for reasonableness of content and consistency with MMB's Fiscal Note policies.

EBO Signature: Jim King Date: 4/7/2016 5:51:52 PM
Phone: 651 201-8033 Email jim.king@state.mn.us

State Cost (Savings) Calculation Details

This table shows direct impact to state government only. Local government impact, if any, is discussed in the narrative.
Reductions are shown in parentheses.
*Transfers In/Out and Absorbed Costs are only displayed when reported.

State Cost (Savings) = 1-2		Biennium		Biennium	
Dollars in Thousands	FY2015	FY2016	FY2017	FY2018	FY2019
Total	-	-	-	-	-
Biennial Total			-		-
1 - Expenditures, Absorbed Costs*, Transfers Out*					
Total	-	-	-	-	-
Biennial Total			-		-
2 - Revenues, Transfers In*					
Total	-	-	-	-	-
Biennial Total			-		-

Bill Description

HF 1291 amends Minn. Stat. § 484.90, subd. 6, to provide that the county attorney is considered the attorney for any town in which a violation occurs for purposes of the distribution of court fines, penalties and forfeitures.

Assumptions

It is assumed that under this bill, fines and penalties will be distributed to towns under Minn. Stat. § 484.90, subd. 6, only when the county attorney prosecutes township ordinance violations for the town. This assumption is based on the application of Minn. Stat. § 484.87, subd. 3. Under Minn. Stat. § 484.87, subd. 3, municipal ordinance violations must be prosecuted by the attorney for the governmental unit that promulgated the ordinance or by the county attorney with whom the municipality has contracted to prosecute ordinance violations. When the governmental unit that has promulgated an ordinance is a town, the township attorney or the county attorney with whom the town contracted, must prosecute township ordinance violations.

This bill does not amend Minn. Stat. § 484.87. As a result, when offenses occur within a town, it is assumed that the county attorney will serve as the township attorney only in cases charging township ordinance violations, and will prosecute as the county attorney in cases charging felony, gross misdemeanor, misdemeanor and petty misdemeanor violations of state law, and county ordinance violations.

It is assumed that when the county attorney prosecutes ordinance violations as a township attorney that 100% of parking fines and penalties, and 2/3 of all other fines and penalties will be paid to the town, and the remaining 1/3 will be paid to the state general fund. It is assumed that when the county attorney prosecutes as the county attorney, 100% of fines and penalties will be credited to the state general fund, unless a different distribution is required by statute.

The Judicial Branch implemented an automated assessment application which distributes fines and penalties to the appropriate governmental agency, based partially on the prosecuting agency code submitted when a citation or complaint is filed. This prosecuting code is commonly referred to as the prosecuting agency ORI (Originating Agency Identifier). Prosecuting attorneys apply to the Bureau of Criminal Apprehension (BCA) for prosecuting agency codes. When fine distribution is determined by who the prosecuting agency is, the ORI code is used in the Judicial Branchs automated assessment application to distribute fines and penalties to the appropriate governmental entity.

When an offense occurs in a city and the county attorney is prosecuting as the city attorney, the prosecuting agency code for that city is submitted. When an offense occurs in a city and the county attorney is prosecuting as the county attorney, the county attorneys prosecuting agency code is submitted. It is assumed a county attorney will apply for a prosecuting agency code for each town in which that county attorney will prosecute township ordinance violations as a township attorney. It is assumed that when the county attorney prosecutes as a township attorney, the prosecuting agency code for that town will be submitted when a complaint or citation is submitted.

If a township decides to prosecute township ordinance violations, the ordinances are submitted to the Judicial Branch and are set up in the Minnesota Judicial Branch Case Management System (MNCIS). At present 71 towns have township ordinances set up in MNCIS. Township attorneys are set up for forty eight (48) of the towns which enables the distribution of ordinance violation fines and penalties to the townships. It is not known why the remaining 23 towns with ordinances in MNCIS have not set up township attorneys. It is also not known if additional towns will decide to prosecute township ordinance violations.

Based on established protocol and experience it takes the Judicial Branch approximately 16 hours to set up one township to receive ordinance fines and penalties.

If county attorneys decide to obtain township prosecuting agency codes for the remaining 23 towns, it is assumed the updates to MNCIS could not be completed before August 1, 2016, because of the time it will take for the county attorneys to obtain the prosecuting agency codes and the time it will take the Minnesota Judicial Branch to update MNCIS using existing staff. It is assumed these same changes may be completed before January 1, 2017, if the township prosecuting agency codes are provided to State Court Administration no later than October 1, 2016.

It is assumed this bill will not result in a change in the number of cases filed, or in judge or court administration staff need.

Expenditure and/or Revenue Formula

Beginning in July 2014 ordinances added in MNCIS identify the subdivision of government that enacted the ordinance, enabling the identification of township ordinance violations charged in cases. In FY15 there were 14 cases found in which a county attorney prosecuted a township ordinance violation (excluding cases if there was a felony or gross misdemeanor charge in addition to the township ordinance) while acting in the capacity of a county attorney not a township attorney. The fines and penalties collected in FY15 in these cases totaled $435. If the county attorney would have used the township attorney ORI approximately $290 ($435 x 2/3) would have been distributed to townships, instead of to the state general fund.

It is assumed that the 48 towns currently set up with township attorneys in MNCIS will not see a change in fine and penalty revenue as a result of this bill.

If all of the remaining 23 towns obtain township prosecuting agency codes, the Judicial Branch staff needed to set up these towns will be less than 1 FTE in FY17. It is unknown if additional time will be needed to set up other towns.

Since it is not known if any townships beyond the 48 with township attorneys set up will set up township attorneys, additional revenue to be distributed to townships and subsequent loss to the State General Fund is not estimated for this bill.

This bill will not impact the distribution of county law library fees.

Long-Term Fiscal Considerations

This bill may result in a modest loss of revenue to the state general fund. The amount is unknown.

Local Fiscal Impact

This bill may result in fine and penalty revenue to townships in which the county attorney prosecutes at the township attorney. The amount is unknown.

References/Sources

Agency Contact: Janet Marshall

Agency Fiscal Note Coordinator Signature: Janet Marshall **Date:** 4/7/2016 5:33:35 PM

Phone: 651 297-7579 **Email:** Janet.marshall@courts.state.mn.us

KEITH ELLISON
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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November 8, 2019

Ms. Ann R. Goering
Ratwick, Roszak & Maloney, P.A.
730 Second Avenue South, Suite 300
Minneapolis, MN 55402

Re: Request for opinion concerning conflict of interest

Dear Ms. Goering:

I thank you for your September 30, 2019 letter requesting an opinion from the Attorney General's Office regarding Douglas County negotiating a collective bargaining agreement with the county sheriff's department when one county commissioner is married to a sheriff's deputy.

For the reasons noted in Op. Atty. Gen. 629-a (May 9, 1975), this Office does not generally render opinions upon hypothetical or fact-dependent questions. That having been said, I can provide you with the following information, which I hope you will find helpful.

First, as you note, county officials are subject to the provisions of Minnesota Statutes chapter 471, including the section providing that any such official "who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom." *Id.* § 471.87. A violation of this section is a gross misdemeanor. *Id.* There are several statutory exemptions that apply to these restrictions, provided particular requirements or procedures are followed. *Id.* § 471.88. For the reasons you describe in your letter, based on your analysis of the specific text of sections 471.88 and .89, and especially the text and legislative history of section 471.88, subdivision 21, it is likely that a court would hold that the potential conflict you describe does not fit within any of the exceptions listed in section 471.88.

Second, for that reason, the most straightforward solution to the county's legal issue may be a legislative fix. As you note, in 2008, the legislature amended section 471.88 by adding subdivision 21, which addresses conflict-of-interest questions that arise when a school board contracts with a class of employees that includes the spouse of a board member. *See id.* § 471.88, subd. 21; 2008 Minn. Laws ch. 176 § 1, at 284. The legislature could resolve the questions you now ask by passing a further amendment to section 471.88 that either expands subdivision 21 or adds a new subdivision to address negotiations between a county and a collective bargaining class that includes the spouse of a county commissioner.

Third, I am not aware of a judicial decision or Attorney General's opinion interpreting sections 471.87-.89 in the context of a county commissioner who is married to an employee subject to a contract that is the result of a collective bargaining agreement with the county.

Questions stemming from public bodies contracting with their members' spouses are particularly difficult ones, and this Office has generally declined to render opinions in such cases on the ground that the extent to which one spouse has a financial interest in a particular contract of the other requires factual determinations outside the scope of the Attorney General's opinion function. (*See, e.g.*, Ops. Atty. Gen. 90-c-4, August 26, 1965 (husband of school board member contracting to perform medical services for school district); 90-e-5, May 25, 1966 (husband of hospital board member furnishing goods and services to hospital); 90-c-6, August 31, 1951 (husband of school board member purchasing school building).)

Fourth, it has long been the opinion of this Office that, where an officer who is authorized to take part in contract approval has a voluntary personal financial interest within the prohibition of section 471.87, violation of the statute is not avoided by the official's recusal. However, in conflict of interest situations not falling directly within a statutory prohibition such as the one in Minn. Stat. § 471.87, questions concerning disqualification of an interested public official from participation in an official decision are generally addressed on a case-by-case basis in the manner set forth by the state supreme court in *Lenz v. Coon Creek Watershed District*, 153 N.W.2d 209 (Minn. 1967). The *Lenz* court explained:

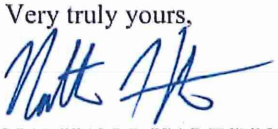
> The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome is to insure that their decision will not be an arbitrary reflection of their own selfish interests. There is no settled general rule as to whether such an interest will disqualify an official. Each case must be decided on the basis of the particular facts present.

Id. at 219 (emphasis added). The *Lenz* court established a five-factor test used in determining when a public official will be disqualified from participating in proceedings in a decision-making capacity: (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.*

The court determined that, although the officials who owned land in the district benefited from the official action, they were not *per se* disqualified from voting. *Id.* at 220. The court gave weight to the fact that procedural safeguards were available to members of the public who might challenge the officials' decisions. *Id.*; *see also E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815, 819-20 (Minn. 1985) (analyzing *Lenz* factors); *Twp. Bd. of Lake Valley Twp. v. Lewis*, 234 N.W.2d 815, 819 (Minn. 1975) (same). A court answering your questions would likely need to take into account the legal standards provided by Minn. Stat. § 471.87, *Lenz*, and *E.T.O.*

I thank you again for your correspondence.

Very truly yours,



NATHAN J. HARTSHORN
Assistant Attorney General

(651) 757-1252 (Voice)
(651) 297-1235 (Fax)

Enclosures: Ops. Atty. Gen. 90-c-4, August 26, 1965; 90-e-5, May 25, 1966; 90-c-6, August 31, 1951

#4579550

EDUCATION: SCHOOL DISTRICTS: SCHOOL BOARD - CONTRACTS - PERSONAL FINANCIAL INTEREST - EXEMPTIONS - COOPERATIVE ASS'N. - PURCHASE OF FUEL. Whether a board member has a "personal financial interest" in contracts for medical services performed for school district by husband of board member, question of fact to be determined by board. Whether facts warrant exemption from application of M.S. 1961, § 471.88 under Subd. 4 or under Subd. 5 must be determined by board.
M.S. 1961, § 123.37, Subd. 1 applicable to purchase of fuel.

OFC

FCN

August 26, 1965
Feb. 20, 1953
May 31, 1949

Mr. Duane J. Mattheis
Commissioner of Education
Centennial Building
St. Paul, Minnesota

90c-4

Dear Mr. Mattheis:

In your letter to Attorney General Robert W. Mattson, you request an opinion on facts and questions submitted to you by the superintendent of Fairfax Independent School District #649.

FACTS

"X, treasurer of the board of education of Independent School District #649, is the wife of a physician and surgeon. Being the only M.D. in Fairfax, many of the boys who go out for athletics obtain their physical examinations at his office. The school board at Fairfax makes it their policy to pay for the physical examinations of teachers and students when such examinations are required by law or by the Minnesota State High School League."

QUESTION

"Does payment of such claims as the physician and surgeon may present for services rendered constitute a conflict of interest as defined in M.S.A. 471.87 and 471.88?"

FACTS

"Y, Chairman of the board of education of Independent School District #649, is also secretary of the board of directors of the Fairfax Grain and Supply Co-op. of Fairfax. On July 15 and again on July 22, the board of education advertised for sealed bids to furnish approximately 300 tons of coal for use during the 1965-66 school year. On August 10th these bids were opened and read aloud. There were three bids submitted: Fairfax Grain & Supply Co-op, $15.40 per ton; Farmers Co-op Elevator Co. $17.35 per ton; and Fullerton Lumber, $16.60 per ton."

QUESTION

"Should such a contract be judged to constitute conflict of interest, are the provisions of M.S.A. 123.37 relating to awarding of contracts to the lowest bidder to be ignored in awarding the contract to furnish coal?"

OPINION

M.S. 1961, § 471.87 provides as follows:

"PUBLIC OFFICERS, INTEREST IN CONTRACT; PENALTY. Except as authorized in section 471.88, a public officer who is authorized to take part in any manner in making any sale, lease, or contract in his official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor."

M.S. 1961, § 471.88, Subdivision 1 provides:

"EXCEPTIONS. Subdivision 1. The governing body of any port authority, seaway port authority, town, school district, village, or city, by unanimous vote, may contract for goods or services with an interested officer of the governmental unit in any of the following cases:"

M.S. 1961, § 471.88, Subd. 4 provides:

"Subd. 4. A contract with a cooperative association of which the officer is a shareholder or stockholder but not an officer or manager;"

M.S. 1961, § 471.88, Subd. 5, as amended by L. 1965, c. 806, Sec. 2, provides:

"Subd. 5. A contract for which competitive bids are not required by law and where the amount does not exceed $1000 when the commodity or service contracted for is not otherwise available in the affected governmental unit."

M.S. 1961, § 471.88, Subd. 6, as amended by L. 1965, c. 806, Sec. 3 provides:

"Subd. 6. Contracts for goods or services when the consideration does not exceed $1,000 in any year and the contracting governmental unit has a population of less than 5,000;"

1. The treasurer of the school board is a "public officer" as meant and intended by M.S. 1961, § 471.87, but the fact that the public officer is the wife of the doctor performing the service is not a determinative factor. Whether the public officer has a "personal financial interest" as meant and intended by M.S. 1961, § 471.87 must be determined by the school board as a fact question. Previous opinions of this office on the question (90c-4, Feb. 20, 1953; 90c-1, Oct. 8, 1953; 90c-2, Sept. 17, 1953; 90c-5, Aug. 25, 1955 and March 23, 1959) are enclosed and will aid the school board in making that determination.

Further, your factual statement is not sufficient to show whether the population of the district is less than 5,000 and whether the cost of the services will not exceed $1,000 in any year as the exemption provided in § 471.88, Subd. 8 provides. If your facts come within the conditions prescribed in said Subd. 8, of course the prohibition of M.S. 1961, § 471.87 would not apply.

Further, your factual statement is not sufficient to show whether the services can be brought within the exception provided in Subd. 5 of § 471.88, as amended by L. 1965, c. 836, Sec. 2.

2. Again, you do not give us sufficient facts so that we can determine whether the board member comes within the exception stated in § 471.88, Subd. 4. You state the school board member is also "secretary of the board of directors" of the stated cooperative. Subdivision 4 permits the school board to contract with a cooperative association even though the public officer

be a shareholder or stockholder in said cooperative association. But if the public officer be an officer or manager of the cooperative association, then the public officer is prohibited by M.S. 1961, § 471.87. "Secretary of the board of directors" is not an officer or manager of the cooperative association, although as such secretary he may also be an officer and/or a manager of the association. This is a fact question for the board to determine.

3. The provisions of M.S. 1961, § 123.37, Subdivision 1 are applicable to contracts to furnish coal to independent school districts. Op. Atty. Gen. September 6, 1921 (No. 314, 1922 Report), copy enclosed.

Very truly yours,

ROBERT W. MATTSON
Attorney General

LJH:dk
Enc.

LJHRS J. HARKINS
Assistant Attorney General

MUNICIPALITIES - CITIES - PUBLIC OFFICERS - HOSPITAL BOARD MEMBERS. A member of a municipal hospital board is a public officer prohibited from having any financial interest in contracts or purchases of the board under M.S. § 471.87. Question whether such financial interest exists is one of fact in the particular case -- relationship of husband and wife does not necessarily result in a finding of financial interest.

May 25, 1966

Honorable Carl A. Jensen
City Attorney
127 East Main Street
Sleepy Eye, Minnesota

Dear Mr. Jensen:

In your letter to Attorney General Robert W. Mattson you present the following

FACTS

"The wife of a partner in a local electric business has been appointed to the Hospital Board. Our Hospital Board manages the Hospital as provided in Chapter 2 of our ordinance book referred to as the City code of the City of Sleepy Eye of which you have a copy. This ordinance gives the Hospital Board the power to purchase goods and services. In the past, this electric firm has been engaged to provide some electrical goods and services, probably not exceeding $1,000 in any one year."

You make these

COMMENTS

"Minnesota Statutes 471.88 makes certain provisions relative to the governing body of certain governmental units to contract for goods and services with an interested officer of the governmental unit. Subd. 8 allows such interested officers to provide goods and services which do not exceed $1,000 in any year in a governmental unit having a population of less than 5,000."

You ask the following

QUESTIONS

"1. Would Minnesota Statutes 471.88 be applicable to a member of a Hospital Board appointed by the Council?

"2. If this statute does not apply to such a situation, is there any prohibition relative to such a Hospital Board obtaining goods and services from a firm in which one of the Hospital Board members has a financial interest?

"3. Where the official is the wife of a partner in a firm which does business with the Board or government unit and where the wife has no interest in the firm except for the fact that she is a wife of a partner, is there any prohibition relative to the Board doing business with the firm?"

OPINION

1. M.S. § 471.88 provides in part as follows:

"Subdivision 1. The governing body of any port authority, seaway port authority, town, school district, village, or city, by unanimous vote, may contract for goods or services with an interested officer of the governmental unit in any of the following cases:

" * * *

"Subd. 8. Contracts for goods or services when the consideration does not exceed $1,000 in any year and the contracting governmental unit has a population of less than 5,000;" (Emphasis supplied)

The provisions of M.S. § 471.88, supra, are applicable to "[t]he governing body of any * * * city". The statute is not applicable to contracts or purchases made by the hospital board of such city.

Your first question is therefore answered in the negative.

2. M.S. § 471.87 provides as follows:

"Except as authorized in section 471.88, a public officer who is authorized to take part in any manner in making any sale, lease, or contract in his official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor." (Emphasis supplied)

A member of a municipal hospital board is a public officer who is prohibited from having any personal financial interest in any contract of the board under M.S. § 471.87, supra. Op. Atty. Gen. 90a, July 11, 1957. See also Charter of City of Sleepy Eye, as adopted February 9, 1960, § 12.03. The rule prohibiting such conflict of interest existed at common law. See Stone v. Bevans, 88 Minn. 127, 129, 92 N.W. 520; 13 Dun. Dig. "Municipal Corporations" § 6712, and cases cited therein.

In our opinion a hospital board may not purchase goods and services from a firm in which a board member is financially interested. We therefore answer your second question in the affirmative.

3. The question whether a disqualifying interest exists in a particular case is one of fact which may not be determined by this office. The relationship of husband and wife does not in and of itself result in a finding of the prohibited financial interest.

The subject has been considered by previous opinions of the Attorney General as follows: Ops. Atty. Gen. 90e-5, September 16, 1954; 172a, March 22, 1952; and 90c-2, September 17, 1953.

Copies of opinions cited are enclosed.

Very truly yours,

ROBERT W. MATTSON
Attorney General

WOOD W. REMINGTON
Special Assistant
Attorney General

WWR:jk
Encs.

EDUCATION: School districts - Property - Purchase - Fact that proposed purchaser of building from school district is husband of school board member without showing that the member is interested individually in the purchase directly or indirectly does not prohibit sale of building to such husband. M. S. 1949, 620.04. 125.09, subd 2

August 31, 1951

Mr. L. A. Wilson
Attorney for Independent School District No. 1
Mahnomen, Minnesota

Dear Mr. Wilson:

In response to your letter of August 22, there is enclosed a copy of an opinion of the Attorney General from File 6221-8, dated April 3, 1946. I also call your attention to the Attorney General's 1936 Report, Opinion No. 177, which is dated December 19, 1936, File 6221-8, copy enclosed.

Your second question involves these

FACTS:

A consolidated school district owns a schoolhouse formerly used by one of the districts formerly existing and included in the consolidation. It is unsuitable for use as a schoolhouse and the district now has no use therefor. Therefore, the consolidated district desires to sell the building.

You call attention to M.S.A. 125.09, subd. 2. It is provided thereby that the school board in a consolidated school district may sell or otherwise dispose of schoolhouse sites when deemed advisable and for the best interests of the district. It is not clear from a reading of this subdivision that it is intended to authorize the board in such a district to sell and dispose of buildings.

In your problem, the husband of a member of the school board had offered to pay $250 for the building and remove it from its present site. The offer is considered adequate and advantageous to the school district. You have the

QUESTION:

Would a sale to the husband of a school board member be prohibited by M.S.A. 620.04 or any other statute?

OPINION

In reading and applying Sec. 620.04, supra, the test seems to be whether the school board member is interested individually in the sale directly or indirectly.

Opinion of the Attorney General, File 90[illegible], August 16, 1944, was to the effect that a wife of one of the bidders was employed by the board of education of the city, but this did not disqualify from bidding on a contract for sale of a stoker to the city, where the wife had no interest in the stoker business carried on by her husband. Copy is enclosed.

Opinion 90F, November 12, 1942, is to the effect that the state could enter into a contract or lease with the wife of captain of highway patrol for storage of state automobile on premises of wife. Copy is enclosed.

The test being as stated, and the facts stated not appearing to me to disclose that the proposed purchaser's wife, who is a school board member, is individually interested either directly or indirectly in the purchase of the building, I fail to see that the sale to such husband is prohibited.

Yours very truly

J. A. A. BURNQUIST
Attorney General

CHARLES E. HOUSTON
Assistant Attorney General

CEH-mr sm
cc: Department of Education
Enc.

January 2, 2020

Steven B. Hanke
Deputy City Attorney
411 West First Street, Room 410
Duluth, MN 55802-1198

Dear Mr. Hanke:

I thank you for your November 7, 2019 letter requesting an opinion from the Attorney General's Office on behalf of the City of Duluth regarding the Public Employment Labor Relations Act (PELRA). You previously requested an opinion from the Office related to this matter on behalf of the Duluth Civil Service Board, to which I responded on behalf of the Office on August 6, 2019.

Background

You state that the Board is concerned that approving job descriptions that include a majority of supervisory functions for inclusion in a nonsupervisory bargaining unit may violate PELRA. The City Attorney's Office now asks if such an action by the Board would violate PELRA and if disputes regarding the supervisory status of employees would be determined by the respective bargaining units and/or the Bureau of Mediation Services (BMS).

Discussion

As I explained in my August 6 letter, the Attorney General's Office does not generally render opinions upon hypothetical or fact-dependent questions. Op. Atty. Gen. 629a (May 9, 1975).[1] This Office is not equipped to investigate and evaluate questions of fact. *Id.* The City Attorney's Office, however, may be in a position to make the appropriate factual determinations and provide the relevant legal analysis to the City. That having been said, I can provide you with the following information, which I hope you will find helpful.

PELRA does not directly prohibit an employer from approving a job description containing a majority of PELRA's supervisory functions for inclusion in a nonsupervisory unit. PELRA does, however, contain prohibitions related to supervisory employees directed at various actors. *See, e.g.*, Minn. Stat. § 179A.09, subd. 2 (2018) (prohibiting the BMS Commissioner from designating an appropriate unit that includes essential and nonessential employees—

[1] I enclosed a copy of this opinion with my August 6 letter.

supervisory employees are deemed essential under section 179A.03, subd. 7); Minn. Stat. § 179A.06, subd. 2 (2018) (prohibiting supervisory employee organizations from participating in negotiations involving nonsupervisory employee units). In addition, other issues may arise under the City's charter, labor agreements, or other state and federal laws. This Office will not issue opinions interpreting the meaning of terms in contracts or other agreements nor will it construe terms in city charters, local ordinances, or local resolutions. *See* Op. Atty. Gen. 629a (May 9, 1975). In addition, in specific fact-dependent circumstances, an employer's conduct may constitute an unfair labor practice, including "interfering with the formation, existence, or administration of any employee organization." *See* Minn. Stat. § 179A.13, subd. 2 (2018).

PELRA and the BMS's rules set out a process for the removal of supervisory employees from nonsupervisory appropriate units and resolving disputes related to supervisory status. To remove employees from a nonsupervisory appropriate unit for the purposes of designating the employees as "supervisory employees," the employer must obtain either (1) a written agreement of the exclusive representative and written approval of the BMS Commissioner; or (2) a separate determination by the BMS Commissioner. Minn. Stat. § 179A.03, subd. 17 (2018). The BMS rules also set out processes by which exclusive representatives and employers may petition for clarification of the positions included in an appropriate unit. *See* Minn. R. 5510.0410, subps. 2B-C, 3B (2019). A petitioner may ask the BMS to clarify the "inclusion or exclusions of positions or job classifications in an appropriate unit" or "the confidential, supervisory, or essential status of positions, classifications, or the unit itself." Minn. R. 5510.0310, subp. 24 (2019). There are limitations, however, on when the BMS may consider unit clarification petitions. *See* Minn. R. 5510.0510, subp. 1 (2019).

If a dispute arises regarding the inclusion of positions in an appropriate unit or a position's supervisory status, or the City wishes to remove employees from a nonsupervisory appropriate unit to designate those employees as supervisory, the City may wish to contact the BMS.

Sincerely,

KATHERINE HINDERLIE
Assistant Attorney General

(651) 757-1468 (Voice)
(651) 297-1235 (Fax)
katherine.hinderlie@ag.state.mn.us

|#4525266-v2

SECRETARY OF STATE: ELECTIONS: POLLING PLACES: County auditors may designate voting site(s) for early voting in three ways: (1) absentee balloting alone during entire 46-day period before election; (2) both ballot counter-ballot box voting and absentee balloting during 7-day period before election; or (3) absentee balloting during 46-day period, with additional voter option of ballot counter-ballot box voting during final 7 days of period. Minn. Stat. § 203B.081, subds. 1, 3.

185a-5
(cr ref. 385a)

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January 2, 2020

Steve Simon
Minnesota Secretary of State
180 State Office Building
100 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155-1299

Re: Request for Opinion Concerning

Dear Secretary Simon:

I thank you for your December 13, 2019, letter requesting an opinion regarding the meaning of Minn. Stat. § 203B.081, subdivisions 1 and 3.

FACTS

You report that the Office of Secretary of State has a longstanding interpretation of section 203B.081 that it has provided to county and local election officials when they have requested an interpretation. Under your Office's longstanding reading, section 203B.081 requires that any polling place designated by a county auditor for use as an in-person absentee balloting site must be open and available to the public for the entire 46-day absentee balloting period.

The legislature amended the statute to add subdivision 3 in 2016. 2016 Minn. Laws ch. 161, art. I, § 2, at 593-94. You note that your Office has not until recently considered the effect on your interpretation of the alternative procedure provided by the new subdivision.

You indicate that a number of jurisdictions are now establishing absentee voting locations for elections in 2020 that they intend to operate for less than the entire 46-day absentee balloting period. In this context, you ask whether section 203B.081 permits a county auditor to (1) designate a location for in-person absentee balloting that operates for only a portion of the 46-day absentee balloting period or (2) establish locations for the alternate procedures identified in subdivision 3 that have not also served as locations for in-person absentee balloting locations for the entire 46-day period.

LEGAL ANALYSIS

The statute in question provides, in pertinent part:

> Subdivision 1. **Location; timing.** An eligible voter may vote by absentee ballot in the office of the county auditor and at any other polling place designated

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> by the county auditor during the 46 days before the election, except as provided in this section.
>
> [...]
>
> Subd. 3. **Alternative procedure.** (a) The county auditor may make available a ballot counter and ballot box for use by the voters during the seven days before the election. If a ballot counter and ballot box is provided, a voter must be given the option either (1) to vote using the process provided in section 203B.08, subdivision 1, or (2) to vote in the manner provided in this subdivision.

Minn. Stat. § 203B.081, subds. 1, 3(a) (2018). The remainder of subdivision 3 describes the new alternative voting procedure. *Id.*, subd. 3(b)-(e). Minnesota Statutes section 203B.08, subdivision 1, which is referenced in subdivision 3(a) of section 203B.081, governs the process by which voters mark and submit absentee ballots. *Id.* § 203B.08, subd. 1.

In response to your first question, subdivision 1 of the statute at issue provides that voters may vote by absentee ballot at "any polling place designated by the county auditor during the 46 days before the election." *Id.* § 203B.081, subd. 1. Your Office has long explained to county and local election officials that this provision requires any polling place designated by a county auditor for in-person absentee balloting to be open for the entire 46-day period referenced in the statute.

This appears to be the correct interpretation of subdivision 1. If, hypothetically, a county auditor designated a particular site for in-person absentee balloting under subdivision 1 but failed to keep it open to voters for some portion of the 46-day period, a voter presenting herself at that site during the portion of the 46-day period that the polling place was closed would then be denied the right to vote by absentee ballot at that place and time, even though Minn. Stat. § 203B.081, subd. 1, explicitly grants her that right. Accordingly, the answer to your first question is that a county auditor may not designate a location specifically for in-person absentee balloting that operates for only a portion of the 46-day period before the election.

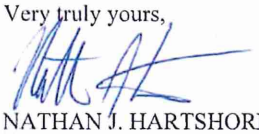
In response to your second question, the new alternative procedures that the legislature created in 2016 are clearly intended to permit county auditors to designate additional locations with ballot counters and ballot boxes for use by voters only "during the seven days before the election." *Id.*, subd. 3(a). In the event that a county auditor elects to maintain a site with a ballot counter and ballot box, subdivision 3 requires election officials to permit voters to vote either via the in-person absentee process or the alternative ballot counter and ballot box method. *Id.* Moreover, the clear intent of the provision is that a voter is to be permitted to vote in either of these manners in the same location. *See id.*

Thus, the answer to your second question is that, under Minn. Stat. § 203B.081, subd. 3, a county auditor may designate one or more locations that operate only during the seven days

before the election and at which voters are permitted to cast ballots by either the in-person absentee process or the ballot counter and ballot box process.

If a county auditor designates a particular site for absentee balloting alone, that site is governed by subdivision 1 and must be available for use by voters for the entire 46-day period prior to the election. If, however, the county auditor provides a ballot counter and ballot box at a particular site, the auditor need not designate the site for absentee balloting under subdivision 1; instead, she can open it pursuant to subdivision 3 alone, which means permitting voting during the seven days before the election by either the in-person absentee process or the ballot counter and ballot box process. As a final alternative, a county auditor could elect to designate a particular site for voting under both subdivisions 1 and 3: that is, in-person absentee balloting during the entire 46-day period prior to the election and ballot counter and ballot box voting as an additional option during the final seven days of that period.

Very truly yours,



NATHAN J. HARTSHORN
Assistant Attorney General

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February 3, 2020

Kevin S. Sandstrom
Eckberg Lammers, P.C.
1809 Northwestern Avenue
Stillwater, MN 55082

Re: Request For Opinion Concerning Official Conflict of Interest

Dear Mr. Sandstrom:

I thank you for your January 8, 2020 letter requesting an opinion regarding an issue that has arisen with the City of St. Mary's Point regarding members of the city council.

You state that the council is currently considering a proposal to convey a portion of the 100-foot-wide right-of-way that the City currently owns on either side of the southern end of Itasca Avenue South. Under the proposal, the City would reduce the width of the right-of-way to sixty feet by conveying twenty feet of right-of-way on each side of the street to the owners of the adjoining properties. The proposal would affect fourteen homeowners, three of whom are members of the city council; one of these three is the mayor. A fourth member of the five-member city council lives on a more northerly portion of Itasca Avenue South that already has a narrower right-of-way and would not be directly affected by the current proposal.

You indicate that the current Itasca Avenue South, including the unaffected more northerly portion, was a private roadway until 1991, when the City purchased the land it sits on for the purpose of managing it as a public road. You note that the mayor and fourth councilmember were among the individuals who entered into the 1991 agreement under which they and other owners of property adjoining the avenue each paid the City $500 and the City used those funds to purchase the property on which the road sits.

You ask whether the three councilmembers who would receive title to land from the City under the proposed conveyance are prohibited from taking part in the vote on the proposal. You further ask whether the involvement of the mayor and the fourth councilmember in the 1991 agreement with the City creates a conflict of interest for those councilmembers.

For the reasons noted in Op. Atty. Gen. 629-a (May 9, 1975) (enclosed), this Office does not render opinions upon fact-dependent questions. That having been said, I can provide you with the following information, which I hope you will find helpful.

Public officials in city governments are subject to the provisions of Minnesota Statutes chapter 471, including the section providing that any such official "who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom." Minn. Stat. § 471.87 (2018). There are several statutory exemptions that apply to this restriction, provided particular requirements or procedures are followed. *Id.* § 471.88.

As you have seen, in *Lenz v. Coon Creek Watershed District*, 153 N.W.2d 209 (Minn. 1967), the court explained:

> The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome is to insure that their decision will not be an arbitrary reflection of their own selfish interests. There is no settled general rule as to whether such an interest will disqualify an official. Each case must be decided on the basis of the particular facts present.

Id. at 219 (emphasis added). As you note, the *Lenz* court established a five-factor test used in determining when a public official will be disqualified from participating in proceedings in a decision-making capacity: (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.*

The court determined that, although the officials who owned land in the district benefited from the official action, they were not *per se* disqualified from voting. *Id.* at 220. The court gave weight to the fact that procedural safeguards were available to members of the public who might challenge the officials' decisions. *Id.*; *see also E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815, 819-20 (Minn. 1985) (applying *Lenz* factors and invalidating town board decision to deny renewed liquor license to bar because board supervisor, who voted against renewal resolution, had conflict of interest); *Traverse County v. Lewis*, 234 N.W.2d 815, 819 (1975) (applying *Lenz* factors and upholding town board order establishing town road because participation by board supervisors in initial decision to circulate petition for establishment of road did not create conflict of interest).

You have reviewed the *Lenz* decision and explain that your overall legal conclusion is that this case "falls within a 'gray area' without a clear right-or-wrong as to whether the three interested councilmembers are disqualified from voting." I agree that it is difficult to determine what result a court applying the *Lenz* factors would reach in this case. Weighing in favor of finding a disqualifying conflict of interest is the fact that the interested councilmembers would receive a clear and tangible benefit from the proposal: that is, title to land directly conveyed from the City. Weighing against such a finding is the fact that, if the interested councilmembers were excluded, only two of the council's five members would remain to vote on the proposal.

You note that narrowing the 100-foot right-of-way has been under discussion by the city council for many years and suggest that this history may weigh in favor of finding no conflict of interest on the part of the current councilmembers. In light of the fact that prior city councils took no formal action pertaining to the land at issue, however, it appears unlikely to me that this factor would help the current council members meet the *Lenz* balancing test.

You ask whether the mayor and the fourth councilmember would be subject to additional conflict-of-interest concerns in light of their historical role in the City's acquisition of the land on which Itasca Avenue South sits. On the facts that you have provided, it does not appear to me that the mayor and fourth councilmember's role in the 1991 transaction would create conflict-of-interest concerns in a 2020 conveyance of right-of-way land.

Finally, I enclose an information memorandum from the League of Minnesota Cities examining law pertaining to official conflicts of interest. You may find the analysis and citations to legal authority in the memorandum helpful.

Very truly yours,

Christie B. Eller

CHRISTIE B. ELLER
Deputy Attorney General

(651) 757-1440 (Voice)
(651) 297-1235 (Fax)

Enclosures: Op. Atty. Gen. 629-a, May 9, 1975
League of Minnesota Cities Information Memo: *Official Conflict of Interest*

|#4644051-v1

Opinions of the Attorney General

Hon. WARREN SPANNAUS

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

Thomas M. Sweeney, Esq. May 9, 1975
Blaine City Attorney 629-a
2200 American National Bank Building (Cr. Ref. 13)
St. Paul, Minnesota 55101

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election districts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."*

* Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

> The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

IN THIS ISSUE

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1966). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. **Id.**

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist Ct. (Civ.) R 24.04; Op. Atty. Gen. 733G, July 23, 1945.

(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

(3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See. Op. Atty. Gen. 629-a, July 25, 1973.

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in

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such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion **supra.**

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion **supra.**

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

WARREN SPANNAUS, Attorney General
Thomas G. Mattson, Assist. Atty. Gen.

LEAGUE of MINNESOTA CITIES

INFORMATION MEMO

Official Conflict of Interest

Learn responsibilities of city officials to avoid prohibited personal or financial benefits in contracts, which public offices may not be held simultaneously by the same person, need to disclose economic interests, and limits on gifts. Links to model resolutions for contracting with an interested council member.

RELEVANT LINKS:

I. Ethical responsibilities of local office in Minnesota

Most Minnesotans can run for and hold elected office at the federal, state, or local level. Candidates need not pass a civics test, attend mandatory trainings, obtain a specific degree or certification, or otherwise demonstrate their fitness. Nevertheless, election or appointment to public office may impact one's personal and professional life—perhaps quite significantly.

Some of the most important regulations impacting local governments address the ethical responsibilities of public office–laws that can apply to both elected and appointed city officials. Such safeguards exist to:

- Ensure integrity in government.
- Protect the city's and/or the city residents' interests.
- Limit the opportunity for officials to benefit (personally or financially) from public office.

Unfortunately, such regulations also are some of the most misunderstood. City officials—particularly those new to their positions—need to be aware of their responsibilities and the types of prohibited conduct. Various regulations:

- Limit an official's ability to act independently.
- Provide the public access to the decision-making process.
- Prohibit public officials from accepting gifts.
- Prohibit conflicts of interest.
- Prohibit officials from holding incompatible offices.
- Require public officials to disclose conflicts or economic interests when they do arise.

This memo examines the ethical responsibilities of local office in Minnesota.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

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RELEVANT LINKS:

While this memo focuses on the general principles behind these various regulations and prohibitions, remember ethical questions often are difficult to answer. Not all situations fit neatly into current guidelines, so conduct that is not clearly prohibited still may seem inappropriate. This appearance of impropriety can damage a councilmember's image (as well as the city's reputation), making it worthy of consideration.

II. City government in Minnesota

Minn. Const. art. XII, § 3

The Minnesota Constitution authorizes the Minnesota Legislature to provide for the "creation, organization, administration, consolidation, division, and dissolution of local government units and their functions, for the change of boundaries thereof, [and] for their elective and appointive officers." The form and function of city government, and the powers, duties and limitations of elected and appointed office, help shape our basic ethical responsibilities.

A. Form and function

Minn. Stat. § 414.01, subd. 1a(2).

Popfinder for cities and townships, Minnesota State Demographic Center

Minnesota law considers cities public corporations. The Legislature has described cities as the type of government that "most efficiently provides governmental services in areas intensively developed for residential, commercial, industrial and governmental purposes." About 82 percent of the people in Minnesota live in cities, even though cities only cover about 4.9 percent of the state's land area. Since most Minnesotans live in cities, the basic goal of city government is to provide services. In many parts of the state, cities serve as the main governmental entities.

Handbook, *The Statutory City*.
Handbook, *The Home Rule Charter City*.

Minn. Stat. ch. 412.

Minn. Stat. ch. 410.

Minnesota has two basic types of cities: statutory cities and home rule charter cities. The enabling legislation under which each is incorporated represents the major difference between the two:

- Statutory cities derive many of their powers from Chapter 412 of the Minnesota statutes.
- Home rule charter cities obtain their powers from a home rule charter.

Statutory and home rule charter cities differ in terms of organization and powers, not because of any classification of population, area, geographical location, or other physical features.

B. City council

The elected city council serves as the cornerstone of city government in Minnesota. The council fashions the policies that determine a community's present and future well-being. Because people look to their local government for leadership, much of the responsibility for community development falls on the shoulders of city councilmembers.

RELEVANT LINKS:

Handbook, *Elected Officials and Council Structure and Role*.

Minn. Stat. § 412.191, subd 2.

Minn. Stat. § 412.191, subd 4.

Minn. Stat. § 412.111

Minn. Stat. § 412.201

Minn. Stat. § 412.241

Minn. Stat. § 412.111.

Minn. Stat. § 412.221, subd 32.

Van Cleve v. Wallace, 216 Minn. 500, 13 N.W.2d 467 (1944).

The major areas of council authority and responsibility include:

- Judging the qualifications and election of its own members.
- Setting and interpreting rules of procedure.
- Legislating for the city.
- Enforcing city ordinances.
- Appointing and dismissing administrative personnel.
- Transacting city business.
- Managing city finances.
- Making appointments to boards, commissions, and committees.
- Protecting the welfare of the city and its inhabitants.
- Providing community leadership.

The city council is a continuing body. New members have no effect on the body except to change its membership. This means that all ordinances and resolutions remain in effect until the council alters or rescinds them, or until they expire through their own terms. At any time, the council can change any resolution, ordinance, or administrative order, whether or not the individuals presently on the council are the same members as when the council originally took action.

Councilmembers fulfill their statutory duties, almost without exception, by acting as a council as a whole. For example, the council, not individual councilmembers, supervise administrative officers, formulate policies, and exercise city powers.

III. Gifts

Minn. Stat. § 10A.071, subd 1(b).

State law defines a "gift" as money, property (real or personal), a service, a loan, the forbearance or forgiveness of debt, or a promise of future employment, given and received without the giver receiving something of equal or greater value in return.

A. General prohibition

Minn. Stat. § 471.895 subd 2.

Elected and appointed "local officials" generally may not receive a gift from any "interested persons."

1. Local officials

Minn. Stat. § 471.895, subd 1(d).

A "local official" represents any elected or appointed official of a city, or of an agency, authority, or instrumentality of a city. The gift prohibition clearly applies to the members of the city council. However, the law does not further define the term "local official", making it unclear if the law intends to cover all city employees, or just certain high-level employees (such as city managers or administrators) and other appointed officials.

RELEVANT LINKS:

Since so many individuals can get involved in the decision-making process, trying to distinguish between city "employees" and "officials" becomes quite difficult. As a result, the safest course of action is to assume the law applies to all employees, regardless of their title or job responsibilities.

2. Interested persons

Minn. Stat. § 471.895, subd. 1(c).

State law defines an "interested person" as a person or representative of a person or association that has a direct financial interest in a decision that a local official is authorized to make.

An interested person likely includes anyone who may provide goods or services to a city such as engineers, attorneys, financial advisers, contractors, and salespersons. However, virtually every resident or person doing business in the city could have a direct financial interest in a decision that an official is authorized to make. These may include:

- Special assessments
- Property tax levies.
- Licenses and permits.
- Land use decisions.

If an individual could benefit financially from a decision or recommendation that a city official would be authorized to make, he or she might qualify as an interested person for purposes of the gift law.

B. Exceptions

The gift law allows the following types of gifts:

Minn. Stat. § 471.895, subd. 3.

- Lawful campaign contributions.
- Services to assist an official in the performance of official duties. Such services can include (but are not limited to) providing advice, consultation, information, and communication in connection with legislation and services to constituents.
- Services of insignificant monetary value.
- A plaque or similar memento. Such items are permitted when given in recognition of individual services in a field of specialty or to a charitable cause.
- A trinket or memento costing $5 or less.
- Informational material of unexceptional value.
- Food or beverage given at a reception, meal, or meeting. This exception only applies if the recipient is making a speech or answering questions as part of a program located away from the recipient's place of work.

RELEVANT LINKS:

- Gifts between family members. However, the gift may not be given on behalf of someone who is not a member of the family.
- Gift because of the recipient's membership in a group. The majority of this group's members must not be local officials and an equivalent gift must be given or offered to the other group members.
- Food or beverages given to national or multi-state conference attendees. The majority of dues paid to the organization must be paid from public funds and an equivalent gift must be given or offered to all other attendees.

C. Gifts to cities

Minn. Stat. § 465.03. *Kelly v. Campaign Fin. and Pub. Disclosure Board*, 679 N.W.2d 178 (Minn. Ct. App. 2004), *rev. denied* (Minn. July 20, 2004).

The law prohibits gifts to city officials, not to cities themselves. Cities may accept gifts of real or personal property and use them in accordance with the terms prescribed by the donor. A resolution accepting the gift and the donor's terms must receive an affirmative vote of two-thirds of the members of the council. A city may not, however, accept gifts for religious or sectarian purposes.

D. Metro area cities over 50,000

Minn. Stat. ch. 10A.See Section VII below, *Ethics in Government Act* 1978.

Metropolitan cities with a population over 50,000 must comply with additional regulations. Under the Ethics in Government Act, local officials in these cities also may not receive gifts from "lobbyists," though similar exceptions may apply.

MN Campaign Finance and Public Disclosure Board: Lobbyist Handbook

The Minnesota Campaign Finance and Public Disclosure Board issues advisory opinions regarding the lobbyist gift ban. These opinions may be relevant to any Minnesota city struggling with the application or implication of a gift ban to a particular situation.

E. Municipal liquor stores

Minn. R. 7515.0620.

Municipal liquor store employees may not suggest, request, demand, or accept any gratuity, reward, or promise thereof from any representative of a manufacturer or wholesaler of alcoholic beverages. Any manager or employee who violates this provision is guilty of a gross misdemeanor.

IV. Conflicts of interest

Two broad types of conflicts of interest exist that city officials and municipal bodies may encounter: those involving contractual decisions, and those involving non-contractual decisions.

RELEVANT LINKS:

A. Contracts

1. General prohibition

Minn. Stat. § 471.87.

A.G. Op. 470 (June 9, 1967).

A public officer, who has authority to take part in making any sale, lease, or contract in his or her official capacity, shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially from it. The term "public officer" certainly includes mayors, councilmembers, or other elected officials. It also may include appointed officers and employees who have influence over the decision-making process.

A.G. Op. 90-F-5 (Nov. 13 1969)
A.G. Op. 90e-6 (June 15, 1988)

The attorney general has advised that the conflict of interest law applies to any councilmember "authorized to take part in any manner" in the making of the contract. Simply abstaining from voting on the contract is not sufficient. The attorney general reasoned that if the Legislature had only wanted to prohibit interested officers from voting on the contract, it would not have used the word "authorized."

A.G. Op. 90e-6 (June 15, 1988).

A literal reading of the statute might suggest that it only applies to city officers who enter into contracts on behalf of the city. However, the attorney general has given the statute a broader interpretation, which could affect more officials than just those directly involved in the decision-making process. As a result, cities may want to take a conservative approach regarding contracts with any city official.

a. Statutory cities

Minn. Stat. § 412.311.
See Section IV-A-2 below, *Exceptions and procedures*
Singewald v. Minneapolis Gas Co., 274 Minn. 556, 142 N.W.2d 739 (1966).
A.G. Op. 90a-1 (Oct. 7, 1976).

Statutory cities must consider an additional restriction. No member of a statutory city council may have a direct or indirect interest in any contract the council makes (notwithstanding the limited exceptions discussed below). This restriction may affect some contractual situations not covered by the general prohibition. For example, even though the actual contract is not with a councilmember, the fact that he or she has an indirect interest in it could be an issue.

b. Home rule charter cities

Handbook, *The Home Rule Charter City*.

Minn. Stat. § 471.881

Many home rule charters contain provisions that address conflicts of interest in contracts as well. Some charters go beyond the statute to prevent all city officers and employees from having an interest in a city contract, whether or not the individual has a role in the process. Because charter provisions vary from city to city, this memo does not discuss them in any detail. However, the exceptions listed below apply to all cities, regardless of any other statute or city charter provision to the contrary.

RELEVANT LINKS:

Minn. Stat. § 471.88.

1989 St. Improvement Program v. Denmark Twp., 483 N.W.2d 508 (Minn. Ct. App. 1992).

2. Exceptions and procedures

Several important exceptions exist that apply to all cities. In these circumstances, a city may move forward with the matter if the interested officer discloses his or her interest at the earliest stage and abstains from voting or deliberating on any contract in which he or she has an interest. Generally, this exception only applies when a unanimous vote of the remaining councilmembers approves the contract. However, additional requirements or conditions, as discussed below, relate to the applicability of the exceptions.

A 1992 decision by the Minnesota Court of Appeals suggests that interested officers should abstain from voting, even when not expressly required to do so under the law. In that case, a township was challenged because an improvement project had not received the required four-fifths majority vote of the town board (two members whose properties would be assessed abstained). The court said the two interested board members were correct to abstain since their interests disqualified them from voting. As a result, the remaining three board members' unanimous vote was sufficient.

A city council may enter into the following contracts if the proper procedure is followed, notwithstanding that the contract may impact the interests of one of its officers.

a. Bank or savings association

Minn. Stat. § 471.88, subd. 2.

Minn. Stat. ch. 118A.

The city council may designate a bank or savings association that a city officer has an interest in as an authorized depository for public funds and as a source of borrowing. No restriction applies to the designation of a depository or the deposit of public funds if the funds are protected in accordance with state law.

Procedure:

- The officer discloses his or her interest in the bank or savings association (this should occur when the bank or savings association is first designated or when the official is first elected or appointed, whichever is later). The disclosure is recorded in the meeting minutes and serves as notice of such interest for each successive transaction.
- The interested officer abstains from voting on the matter.
- The council approves the designation by unanimous vote.

b. Official newspaper

Minn. Stat. § 471.88, subd. 3.
Minn. Stat. § 331A.04.

The city council may designate as the official newspaper (or publish official matters in) a newspaper in which a city officer has an interest.

RELEVANT LINKS:

LMC information memo, *Newspaper Publication.*

However, this exception only applies if the interested officer's newspaper is the only qualified newspaper available.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the designation by unanimous vote.

c. Cooperative association

Minn. Stat. § 471.88, subd. 4.

A city may enter into a contract with a cooperative association of which the city officer serves as a shareholder or stockholder. This exception does not apply if the interested city officer is an officer or manager of the association.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the designation by unanimous vote.

d. Competitive bidding not required

Minn. Stat. § 471.88, subd. 5.
Minn. Stat. § 471.345.
Minn. Stat. § 412.311.

A city may contract with a city officer when competitive bidding is not required. The municipal contracting act generally requires cities to go out for bid on the following types of contracts if they are estimated to exceed $175,000:

- Sale, purchase, or rental of supplies, materials, or equipment.
- Construction, alteration, repair, or maintenance of property.

Minn. Stat. § 471.88, subd. 5
LMC information memo, *Competitive Bidding Requirements in Cities.*

This exception appears to apply to contracts that do not have to be competitively bid, such as contracts for professional services or employment. A city may need to seek a legal opinion if unsure whether this exception applies to a particular situation.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.
- The council passes a resolution setting out the essential facts, such as the nature of the officer's interest and the item or service to be provided and stating that the contract price is as low as (or lower than) could be found elsewhere.

Minn. Stat. § 471.89, subd. 2.
See *Contracting with a City Official*, LMC Model Resolution

- Before a claim is paid, the interested officer must file an affidavit with the clerk that contains:

Minn. Stat. § 471.89, subd. 3.
See *Affidavit of Official Interest in Claim*, LMC Model Form.

  - The name and office of the interested officer.
  - An itemization of the commodity or services furnished.

RELEVANT LINKS:

- The contract price.
- The reasonable value.
- The interest of the officer in the contract.
- A declaration that the contract price is as low as or lower than could be obtained from other sources.

Minn. Stat. § 471.89, subd. 2.
Minn. Stat. § 365.37, subd. 4.
Minn. Stat. § 415.01, subd. 2.
See *Ratifying an Emergency Contract*, LMC Model Resolution
Handbook, *Expenditures, Purchasing, and Contracts*

- In an emergency where the contract cannot be authorized in advance, payment must be authorized by resolution describing the emergency.

e. Volunteer fire department

Minn. Stat. § 471.88, subd. 6.

Cities may contract with a volunteer fire department for the payment of compensation or retirement benefits to its members.

A.G. Op. 358-E-4 (Jan. 19, 1965).
A.G. Op. 90-E (Apr. 17, 1978).

Confusion has arisen as to whether this exception applies to both municipal and independently operated fire departments. A literal reading of the statute suggests it applies only to actual contracts. Since cities do not usually contract with a municipal fire department, there is a possibility this exception may only apply to contracts with independent fire departments. However, the attorney general has issued opinions that imply that the exception can apply to both kinds of fire departments.

See, Section V below, *Compatibility of offices*

A councilmember interested in serving the city in multiple positions (for example, plowing streets or serving on the volunteer fire department) should also consider the compatibility of the functions and responsibilities of those positions.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.

f. Volunteer ambulance service

Minn. Stat. § 471.88, subd. 6a.

Cities may contract with a volunteer ambulance service for the payment of compensation or retirement benefits to its members. This provision is similar to the volunteer fire department exception.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.

RELEVANT LINKS:

g. Municipal band

Minn. Stat. § 471.88, subd. 7

Cities may contract with a municipal band for the payment of compensation to its members.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.

h. EDAs and port authorities

Minn. Stat. § 471.88, subds. 9, 10.
See, Section VII-C-2-d below, *HRAs and EDAs*

An economic development authority (EDA), port authority, or seaway port authority may contract with firms engaged in the business of importing, exporting, or general trade that employ one of its commissioners.

Procedure:

- The interested commissioner abstains from voting on the matter.
- The authority approves the contract by unanimous vote.
- The commissioner does not take part in the determination (except to testify) and abstains from any vote that set any rates affecting shippers or users of the terminal facility.

i. Bank loans or trust services

Minn. Stat. § 471.88, subd. 11.

Banks that employ a public housing, port authority, or EDA commissioner may provide loans or trust services to property affected by that authority.

Procedure:

- The commissioner discloses the nature of those loans or trust services of which he or she has personal knowledge.
- The disclosure is recorded in the meeting minutes.
- The interested commissioner abstains from voting on the matter.
- The authority approves the contract by unanimous vote.

j. Construction materials or services (cities with a population of 1,000 or less)

Minn. Stat. § 471.88, subd. 12.

A city with a population of 1,000 or less (according to the last federal census) may contract with one of its officers for construction materials and/or services through a sealed bid process.

Procedure:

- The interested officer abstains from voting on the contact.
- The council approves the contract by unanimous vote.

RELEVANT LINKS:

k. Rent:

Minn. Stat. § 471.88, subd. 13.

Cities may rent space in a public facility to a public officer at a rate equal to that paid by other members of the public.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.

l. Local development organizations

Minn. Stat. § 471.88, subd. 14

City officers may apply for a loan or grant administered by a local development organization. A "local development organization" is defined to include housing and redevelopment authorities (HRAs), EDAs, community action programs, port authorities, and private consultants.

Procedure:

- The interested officer discloses that he or she has applied for a grant.
- That interest is recorded in the official minutes.
- The interested officer abstains from voting on the matter.
- The local development organization approves the application by unanimous vote.

m. Franchise agreements

Minn. Stat. § 471.88, subd. 15

When a city enters into a franchise agreement or contract for utility services to the city, a councilmember who is an employee of the utility may continue to serve on the council during the term of the franchise or contract.

Procedure:

- The interested officer abstains from voting on any franchise matters.
- The reason for the interested councilmember's abstention is recorded in the meeting minutes.
- The council approves the franchise agreement by unanimous vote.

n. State or federal grant programs

Minn. Stat. § 471.88, subd. 17.

Cities may apply for and accept state or federal grants (housing, community, or economic development) which may benefit a public officer.

Procedure:

- The interested officer abstains from voting on matters related to the grant.

RELEVANT LINKS:

- The governing body accepts the grant by unanimous vote.

o. Loans or grants—St. Louis County

Minn. Stat. § 471.88, subd. 18.
Community Development Block Grant (CDBG).

A public officer may participate in a loan or grant program administered by the city with community development block grant funds or federal economic development administration funds. This exception applies only to cities in St. Louis County with a population of 5,000 or less.

Procedure:

- The public officer discloses that he or she has applied for the funds.
- The disclosure is recorded within the official meeting minutes.
- The interested officer abstains from voting on the application.
- The governing body approves the application by unanimous vote.

p. HRA officer loan

Minn. Stat. § 471.88, subd. 19.

HRA officers may participate in a loan or grant program administered by the HRA utilizing state or federal funds.

Procedure:

- The public officer discloses that he or she has applied for the funds.
- The disclosure is recorded within the official meeting minutes.
- The public officer must abstain from voting on the application.
- The governing body approves the application by unanimous vote.

3. Application

A.G. Op. 90a-1 (Apr. 14, 1960).
A.G. Op. 90-F-5 (Aug. 30, 1949).
A.G. Op. 90e-1 (May 12, 1976).
Minn. Stat. § 471.88

The statutes apply to all kinds of contracts (formal or informal, written or unwritten) for goods and services. The statute applies not only when the city is the buyer, but also when the city is the seller. Generally, it seems the law intends to prohibit a contract with a public official who has had the opportunity to influence the terms of the contract or the decision of the governing body. Even when a contract is allowed under one of the exceptions (such as for contracts for which bids are not required by law), councils should proceed with caution.

a. Business interests and employment

A.G. Op. 90a-1 (May 16, 1952).
A.G. Op. 90b (Aug. 8, 1969).

The attorney general has advised that a councilmember who holds stock in a corporation that contracts with the city has an unlawful interest and that a councilmember who acts as a subcontractor on a contract also has an unlawful interest.

RELEVANT LINKS:

The attorney general has also advised that a member of a governing body that receives a percentage of the money earned by a construction company for jobs done under a contract with it has an unlawful interest.

Singewald v. Minneapolis Gas Co., 274 Minn. 536, 142 N.W.2d 739 (1966)
A.G. Op. 90-E-5 (Nov. 13, 1969).

The Minnesota Supreme Court has held that employment by a company with which the city contracts may give a councilmember an indirect interest in the contract. However, the attorney general has advised that if a councilmember is an employee of the contracting firm and his or her salary is not affected by the contract, then the council may make the determination that no personal financial interest exists.

A.G. Op. 90a-1 (Oct. 7, 1976).

The attorney general further has stated that city councils may need to consider factors, other than employment, to determine the presence of a prohibited interest. The attorney general concluded that a council may contract with the employer if:

- The councilmember has no ownership interest in the firm.
- The councilmember is neither an officer nor a director.
- The councilmember is compensated with a salary or on an hourly wage basis and receives no commissions, bonus or other remuneration.
- The councilmember is not involved in supervising the performance of the contract for the employer and has no other interest in the contract.

A.G. Op. 90e-1 (May 12, 1976).
A.G. Op. 90E-1 (Dec. 6, 1955).

The law prohibits making a contract with any public official who has had the opportunity to influence its terms. The attorney general has advised that a former councilmember could not be a subcontractor on a municipal hospital contract if he was a councilmember when the prime contract was awarded.

More difficult questions can arise when a councilmember takes office after a city has entered into a contract. The assumption of office by someone with a personal financial interest in an already existing contract raises concerns about possible conflicts of interest during the performance of the contract.

A.G. Op. 90a-1 (Mar. 30, 1961).

In one case, the attorney general advised that a councilmember was eligible for office and entitled to commissions on insurance premiums payable by the city on an insurance contract entered into before the person became a councilmember.

A.G. Op. 90a-1 (Apr. 15, 1975).

In an informal letter opinion, the attorney general said the director of a malting company could assume office as a councilmember even though the city had entered into a 20-year contract with the company to allow it to use the city's sewage disposal plant. The contract also fixed rates for service subject to negotiation of new rates under certain circumstances. The attorney general said the councilmember could continue to serve as long as no new negotiations were required.

RELEVANT LINKS:

However, the city and the company could not enter into a new agreement as long as the interested councilmember held office.

Individuals faced with a possible conflict of interests should seek legal advice.

b. Elected officials and city employment

Minn Stat § 471.88, subd 5
Minn Stat § 471.345.

LMC information memo, *Competitive Bidding Requirements in Cities.*

The League often receives questions about whether an elected city official can also be employed by the city. The exception to the conflict of interest law that allows the city to enter into a contract not required to be competitively bid with an interested official appears to allow a city, in certain situations, to hire an elected official as an employee, since both contracts for professional services and employment need not be competitively bid.

However, cities must consider several issues to determine the permissibility of hiring an elected official based on the specific facts of the situation.

(1) Full-time employment

Minn Stat § 410.191.
Minn Stat § 412.02, subd. 1a.

Neither the mayor nor any city councilmember may be a "full-time, permanent" city employee. The city's employment policy should define full-time, permanent employee.

(2) Part-time employment

See Section V, *Compatibility of offices* below.
"Compatibility of Offices," House Information Brief (July 2012)

For part-time employment, the city must analyze the compatibility of the two positions. If the positions are incompatible, an individual may not serve in both positions at the same time.

c. Contracts with family members

Lewick v. Glazier, 116 Mich. 493, 74 N.W. 717 (1898).
Section IV-B below, Non-*contractual situations*

The conflict of interest laws does not directly address conflicts that may arise out of family relationships. The courts of other states generally have held that family relationship alone has no disqualifying effect on the making of a contract and that proof that a councilmember has a financial interest in the contract must exist. Non-contractual situations are similar.

Minn Stat § 519.05.
Minn Stat § 412.311
A.G. Op. (June 28, 1928).
A.G. Op. 90-C-5 (July 30, 1940).

Under existing law, spouses are responsible for each other's necessities. A contract with the councilmember's spouse in a statutory city may violate the law if the councilmember has a direct or indirect interest in it. The attorney general has construed the law broadly to hold such contracts invalid. If the money earned under the contract is used to support the family, the councilmember derives some benefit. In this type of situation, the attorney general has held that there is an indirect interest in the contract.

RELEVANT LINKS:

A.G. Op. 90-b (Apr. 5, 1955).
A.G. Op. (Dec. 9, 1976) (informal letter opinion).

However, in more recent opinions, the attorney general has taken the position that each case turns on its individual facts. If a spouse who contracts with the city uses the earnings from the contract individually and not to support the family, the contract probably would not be invalid simply because the spouse is a councilmember.

Minn. Stat. § 363A.08, subd. 2.

In the alternative, if the facts show otherwise, the legality of the contract may be in doubt. In short, the mere fact of the relationship does not affect the validity of the contract.

Minn. Stat. § 363A.08, subd. 2.

Also, the Minnesota Human Rights Act prohibits discrimination in employment based upon marital status. As a result, making inquiries into the marital status of employees or applicants for city positions is not recommended.

d. Sale of city property

Minn. Stat. § 15.054.

State law generally prohibits officers and employees of the state or its subdivisions from selling government-owned property to another officer or employee of the state or its subdivisions. This does not apply to the sale of items acquired or produced for sale to the general public in the ordinary course of business. In addition, the law allows government employees and officers to sell public property if the sale falls within the scope of their duties.

Minn. Stat. § 15.054.

Property no longer needed for public purposes may be sold to an employee (but not an officer) if the following conditions exist:

- There has been reasonable public notice.
- The property is sold by public auction or sealed bid.
- The employee who buys the property was not directly involved in the auction or sealed response process.
- The employee is the highest responsible bidder.

A.G. Op. 469a-12 (Aug. 30, 1961).
A.G. Op. 90-a-1 (Sept. 28, 1955).

The attorney general has also concluded that cities may not contract to purchase land from or sell land to their city council members.

4. Violations

Minn. Stat. § 471.87
Minn. Stat. § 609.43

A.G. Op. 90a-1 (Apr. 22, 1971).

A determination that a public officer violated the conflict of interest law may result in a gross misdemeanor, fines up to $3,000, and imprisonment for up to one year. Any contract made in violation of the conflict of interest law is generally void. Public officers, who knowingly authorize a prohibited contract, even though they do not receive personal benefit from it, may be subject to criminal penalties as well.

RELEVANT LINKS:

City of Chaska v. Hedman, 53 Minn. 525, 55 N.W. 737 (1893).
Currie v. Sch. Dist. No. 26, 35 Minn. 163, 27 N.W. 922 (1886).
Bjelland v. City of Mankato, 112 Minn. 24, 127 N.W. 397 (1910).

Stone v. Bevans, 88 Minn. 127, 92 N.W. 520 (1902).
City of Minneapolis v. Canterbury, 122 Minn. 301, 142 N.W. 812 (1913).
Currie v. Sch. Dist. No. 26, 35 Minn. 163, 27 N.W. 922 (1886).
Singewald v. Minneapolis Gas Co., 274 Minn. 556, 142 N.W.2d 739 (1966).

When a city enters into a contract that is beyond the city's powers, the city generally will have no liability for the contract. Even when the contract falls within the city's powers, any contract made in violation of the unlawful interest statutes generally is void.

However, for contracts deemed illegal, a city may not have authority to follow through on the performance of that illegal contract. If a contract is invalid and does not fall under the cited exceptions, it does not matter that the interested councilmember did not vote or participate in the discussion. Likewise, it does not matter that the interested councilmember's vote was not needed for the council's approval of the contract. Even if the councilmember acted in good faith and the contract appears fair and reasonable, the contract generally is void if it violates a conflict of interest.

Stone v. Bevans, 88 Minn. 127, 92 N.W. 520 (1902).

When the city enters into a prohibited contract with an interested councilmember, the councilmember may not recover on the contract nor recover the value on the basis of an implied contract. If a councilmember already has received payment, restitution to the city can be compelled. For example, if the mayor is paid for services to the city under an illegal contract, a taxpayer could sue to recover the money for the city. It does not matter that the mayor was not present at the meeting at which the agreement for compensation was adopted.

Frisch v. City of St. Charles, 167 Minn. 171, 208 N.W. 650 (1926).
Mares v. Janutka, 196 Minn. 87, 264 N.W. 222 (1936).

If a councilmember has unlawfully sold goods to the city and the goods can be returned, a court probably will order the goods returned and prohibit any payment for them. For example, when the city purchased a lot from a councilmember, but a building has yet to be built on it, or if supplies, such as lumber, have been bought and not yet used. However, if the goods cannot be returned, the city did not exceed its powers to contract for those goods and no fraud or collusion in the transaction had occurred, the court will determine the reasonable value of the property and permit payment on the basis of the value received.

In case of doubt, the city may want to just assume it cannot contract with one of its officers. If the contract is necessary, a legal opinion or court ruling should be secured before proceeding.

B. Non-contractual situations

Nevada Commission on Ethics v. Carrigan, 131 S. Ct. 2343 (2011)

63C Am. Jur. 2d Public Officers § 246

While the laws discussed previously relate only to contracts with interested officials, courts throughout the country, including the Minnesota Supreme Court, have followed similar principles in non-contractual situations. Any city official who has a personal financial interest in an official non-contractual action generally cannot participate in the action.

RELEVANT LINKS:

This especially holds true when the matter concerns the member's character, conduct, or right to hold office. Conflicts can also arise when the official's own personal interest is so distinct from the public interest that the member cannot fairly represent the public interest.

In general, when an act of a council represents quasi-judicial decision, no member who has a personal interest may take part. Some would argue that the member's participation makes the decision voidable, even if his or her vote was not necessary. The bias of one councilmember could make a city council's decision arbitrary.

When a disqualifying personal interest exists, however, the action is not necessarily void. In contrast to the rules regarding conflict of interest in contract situations, the official action may remain valid if the required number of non-interested council members approved the action.

1. Disqualifying interest—factors

Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 153 N.W.2d 209 (1967).

The Minnesota Supreme Court has utilized several factors when determining whether a disqualifying interest exists:

- The nature of the decision.
- The nature of the financial Interest.
- The number of interested officials.
- The need for the interested officials to make the decision.
- Other means available, such as the opportunity for review.

Courts consider these factors in light of the conflict in issue.

Gonsalves v. City of Dairy Valley, 71 Cal. Rptr. 255 (Cal. Ct. App. 1968).

When an administrative body has a duty to act on a matter and is the only entity capable of acting, the fact that members may have had a personal interest in the result may not disqualify them from performing their duties.

Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 153 N.W.2d 209 (1967). *Twp. Bd. of Lake Valley Twp. v. Lewis*, 305 Minn. 488, 234 N.W.2d 815 (1975).

For example, courts consider whether other checks and balances exist to ensure city officials will not act arbitrarily or in furtherance of self-interests. In one case, the court took into account the fact that a decision by a board of managers could be appealed to the state water resources board. In another case, the court said that the ability to appeal to the district court would adequately protect owners from any possible prejudice.

2. Common concerns

a. Self-judgment

On the theory that no person should serve as the judge of his or her own case, courts have generally held that an officer may not participate in proceedings where he or she is the subject.

RELEVANT LINKS:

On the theory that no person should serve as the judge of his or her own case, courts have generally held that an officer may not participate in proceedings where he or she is the subject. As a result, councilmembers probably should not participate in a decision involving their own possible offense. For example, determination of a councilmember's residency may represent one such issue from which an interested officer should abstain.

b. Self-appointment

Minn Stat § 471.46.
Minn Stat § 415.15.
A.G. Op. 471M (Oct. 30, 1986).

Generally, city officials may not appoint a councilmember to fill a vacancy in a different elected position, even if the councilmember resigns from his or her existing position before the new appointment is made. However, councilmembers may be appointed mayor or clerk, but may not vote on their appointment. For example, this prohibits the mayor and a councilmember "switching" positions because they want to do so.

Minn Stat § 415.15.

Resigning city councilmembers shall not participate in a vote to choose a person to replace the resigning member.

See Section V, *Compatibility of offices* below

For appointments to non-elective positions, the general rule is that an official has a conflict in terms of self-interest. This conflict disqualifies the official from participating in the decision to appoint him- or herself. Appointing one council member to serve in two positions simultaneously triggers analysis of compatibility of the two offices or positions.

c. Council compensation

Minn Stat. § 415.11.

A.G. Op. 471-K (May 10, 1976).

State law authorizes a council of any second, third, or fourth-class city in Minnesota to set its own salary and the salary of the mayor by ordinance. However, increases in salary cannot begin until after the next regular city election. Since every councilmember has a personal interest in his or her compensation, the need for interested officials to make the decision is unavoidable in this situation.

Minn Stat § 412.191, subd. 1

A special situation exists for setting the clerk's salary in a Standard Plan statutory city. In these cities, the clerk is elected and is thus a voting member of the council. While the other councilmembers may vote on the clerk's compensation without any disqualifying self-interests, it is probably best for the clerk not to vote on his or her own salary.

d. Family connections

A.G. Op. (Apr. 14, 1975) (informal letter opinion).

A.G. Op. (Dec. 9, 1976) (informal letter opinion).

In an informal letter opinion, the attorney general has advised that a councilmember was not disqualified from voting on a rezoning because his father owned legal title to the tract in question. The attorney general has further stated that a prohibited interest does not necessarily arise when the spouse of a city employee is elected mayor.

RELEVANT LINKS:

Nolan v. City of Eden Prairie, 610 N.W.2d 697 (Minn. Ct. App. 2000).

Minn. Stat. § 363A.08, subd. 2

A.G. Op. 430 (Apr. 28, 1967).

A.G. Op. 90c (Aug. 25, 1997).

The opinion carefully avoids any statement about future action of the council on the existing employment relationship. Further, the court has stated that no conflict existed from a councilmember's brother's law firm representing the applicant for a preliminary plat.

The Minnesota Human Rights Act prohibits discrimination in employment based upon marital status. Making inquiries into the marital status of employees or applicants for city positions is not recommended.

e. Business connections

Business interests can also create conflicts—even if no personal financial interest arises under the general law.

In one situation, the attorney general advised that a housing authority commissioner had a conflict when—as a foreman—he would aid his employer, a contractor, in making a bid to the housing authority.

In a different opinion, the attorney general found that a mayor or councilmember would not be disqualified from office because he was an employee of a nonprofit corporation that provided public access cable service to the city, but the official must abstain from participating in any related actions.

f. Land use

Since a city council must deal with land matters within its jurisdiction, it is almost inevitable that such decisions will affect property owned or used by one of its members.

(1) Property ownership

Whether or not property ownership disqualifies a councilmember from participating in a land use decision will depend (to some extent) on the nature of the decision and the numbers of persons or properties affected.

At one extreme is adoption of a new zoning ordinance (or a comprehensive revision of an existing ordinance) that may impact all property in the city. In this situation, the councilmember's interest is not personal and he or she should be able to participate. If this was not allowed, such ordinances might never be adopted.

At the other extreme is the application for a zoning variance or special use permit that only applies to a councilmember's property. Such a specific, personal interest would likely disqualify the member from participating in the proceedings. However, the councilmember should still be able to submit the required application to the city.

RELEVANT LINKS:

Between these two extremes lie those proceedings affecting some lots or parcels, one of which a councilmember owns. Such situations raise questions of fact on whether the councilmember should not vote. In such circumstances, the council must decide whether the member should be disqualified—a decision which is subject to review in the courts if challenged. In many situations where the right to vote is questioned, an interested councilmember will refrain from participating in order to avoid the "appearance" of impropriety.

(2) Bias

Continental Prop. Grp., Inc v. City of Minneapolis, No. A10-1072 (Minn. Ct. App. May 3, 2011) (unpublished opinion).

Personal bias can also create concern. In one case, a biased councilmember voting on a land use matter made the council's decision arbitrary.

As a result, the court found the city violated the property buyer's due process rights and returned the matter for a new hearing—one where the biased councilmember would not participate.

(3) Local improvements and special assessments

LMC information memo, *Special Assessment Toolkit*

A councilmember owning land to be benefited by a local improvement is probably not prohibited from petitioning for the improvement, voting to undertake it, or voting to adopt the resulting special assessment. Although one Minnesota decision found an interested county board member's participation on a county ditch proceeding inappropriate, a subsequent case found otherwise.

Petition of Jacobson, 234 Minn. 296, 48 N.W.2d 441 (1951).

The ditch case involved a proposed county ditch that bypassed a county board member's property. Although the board member participated in preliminary proceedings, he did not attend the final hearing. The court vacated the county board's order establishing the proposed ditch since the preliminary proceedings may have had a substantial effect on later actions taken at the final hearing. The court said the board member should not have participated in any of the proceedings regarding the project.

Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 153 N.W.2d 209 (1967).

The court in the second case found no disqualifying conflict of interest when four of the five managers of a watershed district owned land that would benefit from a proposed watershed district improvement project. The court recognized the situation was similar to those where members of a city council assess lands owned by them for local improvements. As a result, the court found this potential conflict of interest did not disqualify the district board members from participating in the improvement proceedings.

RELEVANT LINKS:

It is possible a councilmember's property ownership might result in a more favorable treatment of that property in an assessment project. If that happened, the assessment might be challenged for arbitrariness and set aside—whether or not the councilmember participated in the proceedings.

(4) Zoning

A.G. Op. 59a-32 (Sept. 11, 1978).

The attorney general has advised that a council is not prevented from rezoning property owned by a councilmember (or property owned by his or her client). However, the councilmember may not participate in those proceedings.

A.G. Op. 471-f (Sept. 13, 1963).

In an earlier opinion, the attorney general said it was a question of fact whether a town board member had a disqualifying interest for having sold land that was the subject of rezoning. However, the attorney general appeared to assume that if the board member had a sufficient interest in the land, the member would be disqualified from voting on the rezoning.

(5) Condemnation

LMC information memo, *Dangerous Properties*.

Webster v. Bd. of Cnty. Comm'rs of Washington Cnty., 26 Minn. 220, 2 N.W 697 (1897).

While a councilmember's ownership interest in land subject to condemnation seems to preclude participation in any council actions regarding the property, Minnesota courts have not ruled directly on this question. However, the Minnesota Supreme Court did not disqualify a county board member from participating in condemnation proceedings to establish a highway even though the board member owned land adjoining the proposed highway. The court suggested the decision might have been different if the owner had been entitled to damages if the highway had gone through his property.

(6) Renewal and redevelopment

See Section VII-C-2-d, *HRAs and EDAs*

An interest in property subject to urban renewal may trigger disqualification. However, when the property sits within a larger urban renewal program, but not in the project area subject to the decision, it is arguable the councilmember would not be disqualified from voting. Since there have been no Minnesota cases addressing this issue, councilmembers with these types of interests may wish to abstain from voting or seek an opinion from the city attorney regarding the appropriateness of their participation.

(7) Church affiliation

Rowell v. Bd. of Adjustment of the City of Moorhead, 446 N.W.2d 917 (Minn. Ct. App. 1989).

The Minnesota Court of Appeals did not set aside a zoning action based on the participation by a zoning board member on a zoning variance requested by that member's church. The court found the nature of the financial interest could not have influenced the voting board member.

RELEVANT LINKS:

The person's membership in the church, without evidence of a closer connection, did not sufficiently create a direct interest in the outcome to justify setting aside the board's zoning action.

g. Streets

(1) Acquisition

Webster v. Bd. of Cnty. Comm'rs of Washington Cnty., 26 Minn. 220, 2 N.W. 697 (1897).

As previously noted, the Minnesota Supreme Court has held that a county board member who owned land adjoining a proposed county highway did not have a disqualifying interest preventing him from voting on the establishment of the highway.

The board member's interest was similar to that of the rest of the public and differed only in degree. A different decision may have been reached, however, had the highway gone through the commissioner's land.

Twp. Bd. of Lake Valley Twp. v. Lewis, 305 Minn. 488, 234 N.W.2d 815 (1975).

LMC information memo, *Acquisition and Maintenance of City Streets*

The Minnesota Supreme Court also refused to disqualify a town board supervisor that asked a landowner to circulate a petition for a road. The court reasoned that the decision to establish a town road is, by its very nature, of interest to all local citizens, including board members who may be in the best position to know the need for a road. The court also stated that the ability of affected property owners to appeal to the district court would adequately protect them from any possible prejudice.

(2) Vacation

A.G. Op. 396g-16 (Oct. 15, 1957).
Petition of Jacobson, 234 Minn. 296, 48 N.W.2d 441 (1951).
LMC information memo, *Vacation of City Streets.*

Arguably, a street vacation does not differ significantly from the establishment of a street, which, as stated, the court has found abutting owners not to have a disqualifying interest. However, the attorney general may disagree since it advised that a councilmember who had an interest in property abutting a street proposed for vacation could not participate in the vacation proceedings.

h. Licenses and permits

When a councilmember applies for a license or a permit that requires council approval, the member's personal (often financial) interest should prevent his or her participation in the decision-making process.

A.G. Op. 218-R (Apr. 29, 1952).

In some situations, a councilmember may have a possible conflict of interest even when he or she is not the licensee. The attorney general said that a councilmember who was a part-time employee of a licensee could not vote on reducing the liquor license fee if it could be shown that the councilmember had a personal interest. For example, if the fee reduction would affect the councilmember's compensation or continued employment, he or she would obviously have a personal financial interest in the decision.

RELEVANT LINKS:

However, whether an individual's personal interest is sufficient to disqualify him or her from voting on the decision represents a question involving specific facts that must be determined on a case-by-case basis.

E.T.O., Inc. v. Town of Marion, 375 N.W.2d 815 (Minn. 1985).

In a similar case, the Minnesota Supreme Court held that a town board member who owned property across from a bar could not vote on the license renewal. The town board member stated his property had been devalued by $100,000 since the bar opened, and he was elected to the board based largely on his opposition to the bar. The court stated, "A more direct, admitted, financial interest is hard to imagine."

Minn. R. 7515.0430, subd. 5.

A state rule prohibits a councilmember from voting on a liquor license for a spouse or relative. The rule does not define who is included as a "relative," so cities may need to consult with their city attorney for guidance in specific situations.

3. Consequences

Nodes v. City of Hastings, 284 Minn. 552, 170 N.W.2d 92 (1969).

Courts may uphold actions taken where a councilmember with a disqualifying interest participated if the result would have been the same without the interested official's vote. For example, the Minnesota Supreme Court considered a decision by a three-member civil service commission to terminate a police officer for failing to pay his financial debts. The court held that it would have been a "better practice" for the commission member who had been a creditor of the officer to have disqualified himself and abstained from voting; however, that commission member's participation in a unanimous decision did not invalidate the commission's decision.

1989 Street Improvement Program v. Denmark Twp., 483 N.W.2d 508 (Minn. Ct. App. 1992).

Councilmembers who have a disqualifying interest in a matter generally are excluded when counting the number of councilmembers necessary for a quorum, or for the number necessary to approve an action by a four-fifths vote, such as approving a special assessment.

C. Recommendation

City officials concerned about conflicts of interest in contractual or non-contractual situations should:

- Consult the city attorney.
- Disclose the interest as early as possible (orally and in writing).
- Not attempt to influence others.
- Not participate in any discussions (when possible, leave the room when the governing body is discussing the matter).
- Follow the statutory procedures provided for the contracting exceptions.

RELEVANT LINKS:

- Abstain from voting or taking any other official actions unless the city attorney determines that there is no prohibited conflict of interest.

V. Compatibility of offices

State ex rel. Hilton v. Sword, 157 Minn. 263, 196 N.W 467 (1923).
Kenney v. Goergen, 36 Minn. 190, 31 N.W. 210 (1886).

Whether a city official can also serve the city or other government entity in some other capacity gets quite complicated. State law does provide some guidance on incompatible positions; however, in general, state law does not prevent a person from holding two or more governmental positions. However, keep in mind, without specific statutory authority, government officials cannot hold more than one position if the functions of those two positions are incompatible or if the jobs create a conflict between two different public interests.

McCutcheon v. City of St. Paul, 298 Minn. 443, 216 N.W.2d 137 (1974).

The common-law doctrine of incompatibility provides some insight into what constitutes functions of two inconsistent offices. However, no clear definition of what constitutes an "office" for the purpose of this law exists. Certainly, it would include all elected offices.

"Compatibility of Offices," House Information Brief (July 2012).

However, it seems that the term "office" could also include appointed offices such as city administrators, managers, and police chiefs. Generally, an office has greater responsibility, importance, and independence than mere city employment.

A. Public employment

1. Federal employees

5 U.S.C. §§ 7321-7326
5 C.F.R. § 734.101

Federal employees generally cannot run in local partisan elections. An election is considered "partisan" if candidates are elected as representing political parties.

2. State employees

Minn. Stat. § 43A.32
MN Management & Budget, 400 Centennial Building, 658 Cedar Street, St. Paul, MN 55155; (651) 201-8000.

State employees generally can run for and hold local elected office as long as no conflict exists with their regular state employment. The commissioner of the department of management and budget will determine whether a conflict exists.

3. City employment

Minn. Stat. § 410.191.
Minn. Stat. § 412.02, subd 1a.

Neither the mayor nor any city councilmember may also work as a "full-time, permanent" city employee. The city's employment policy defines full-time, permanent employment.

RELEVANT LINKS:

For "part-time" positions, it must be determined if the elements or responsibilities of the two positions are incompatible with one another. If the two positions are incompatible, an individual may not serve in both positions at the same time.

B. Incompatible offices—elements

Offices are generally incompatible when a specific statute or charter provision:

- States that one person may not hold two or more specific positions.
- Requires that the officer may not take another position.
- Requires that the officer devote to the position full-time.

Kenney v. Goergen, 36 Minn. 190, 31 N.W. 210 (1886). *State ex rel. Hilton v. Sword*, 157 Minn. 263, 196 N.W 467 (1923).

In addition, positions may be determined incompatible with one another. This typically occurs when the holder of one position (or the group or board of which the person is a member):

- Hires or appoints the other.
- Sets the salary for the other.
- Performs functions that are inconsistent with the other, for example, a person cannot supervise or evaluate himself or herself.
- Approves the official or fidelity bond of the other.

C. Specific offices

It is important to remember that incompatibility often depends on the nature of the offices and their relationship to one another. So, while offices may have been determined to be incompatible in the past, a different conclusion could be reached based on current relationships or responsibilities. A city official who is considering seeking an additional office should obtain a legal opinion from the city attorney on the compatibility of the two offices.

1. Compatible offices

The following offices are compatible pursuant to state statute:

Minn. Stat. § 410.05, subd. 1.

- City charter commission member and any elective or appointed office other than judicial (however, the city charter may specifically exclude councilmembers from serving on the charter commission).

Minn. Stat. § 469.003, subd. 6.
Minn. Stat. § 469.095, subd. 2.

- City councilmember and HRA commissioner.
- City councilmember and EDA commissioner.

Minn. Stat. § 481.17.

- City attorney and county attorney (in counties with a population under 12,000).

RELEVANT LINKS:

In addition, the attorney general has found the following offices compatible:

A.G. Op. 358e-9 (Feb. 10, 1912).
A.G. Op. No. 639 (Mar. 17, 1919).
A.G. Op. 358e-3 (July 29, 1997).
A.G. Op. 90e (Aug. 25, 1997).

- City mayor and county treasurer.
- City mayor and court administrator.
- City attorney and assistant county attorney.
- City councilmember and officer of nonprofit, public-access cable service provider.

2. Incompatible offices

State statute lists the following offices as incompatible:

Minn. Stat. § 420.03.
Minn. Stat. § 273.061, subd. 1c.

- Firefighter's civil service commission member and any other office or employment under the city, the United States, or any of the state's political subdivisions.
- City councilmember and county assessor.

In addition, the attorney general has found the following offices incompatible:

A.G. Op. 63a11 (Feb. 21, 1947).
A.G. Op. 358e-3 (Mar. 6, 1946).
A.G. Op. 358e-7 (Mar. 5, 1965).
A.G. Op. 358 (Dec. 18, 1970).
A.G. Op. 358e-9 (Dec. 13, 1939).
A.G. Op. 358f (May 21, 1954).
A.G. Op. 358f (June 30, 1955).
A.G. Op. 358a-1 (Feb. 25, 1958).
A.G. Op. 218-R (Feb. 25, 1946).

- Mayor and city councilmember.
- Councilmember and city attorney.
- Councilmember and city treasurer.
- City attorney and city treasurer.
- Mayor and school board member.
- Councilmember and school board member.
- Councilmember and school board treasurer.
- City councilmember and county assessor.
- Councilmember and municipal liquor store manager.

3. Fire departments

City officials often ask if a member of the city fire department—perhaps the chief or another officer—can also serve on the city council. Unfortunately, that question is not easy to answer.

A.G. Op. 358-E-4 (Jan. 19, 1965).
Minn. Stat. § 471.88, subd. 6.

In 1965, the attorney general advised that a councilmember could also serve as a member of a volunteer city fire department under the exception to the conflict of interest law that permits contracts with a volunteer fire department for payment of compensation or retirement benefits. But in a later opinion, the attorney general advised that the fire chief of a municipal fire department automatically vacate the office of fire chief when he accepted a seat on the city council. This opinion did not mention the exception listed in the conflict of interest law or the 1965 opinion.

A.G. Op. 358-L-9 (Apr. 5, 1971).

RELEVANT LINKS:

A.G. Op. 90-E (Apr. 17, 1978).

In 1978, the attorney general considered the issue again and advised that the exception to the conflict of interest law allows a councilmember to be a member of an independent volunteer fire department when a contract for compensation or retirement benefits is negotiated, as long as the procedural requirements for the exception are followed. The attorney general also explained that the reason for the different results in the two earlier opinions was because the 1965 opinion involved a fire department member who was not an officer and the 1971 opinion involved a fire department member who was the fire chief.

Minn. Stat. § 412.152

Minn. Stat. § 410.33

In 1997, the Minnesota Legislature attempted to clarify the issue by allowing one person to hold the position of statutory city mayor and fire chief of an independent, nonprofit firefighting corporation that serves the city. Although the statute is specifically for statutory cities, home rule charter cities may be able to use it if their charters are silent on the matter. Basically, the mayor and fire chief positions are not incompatible as long as:

- The mayor does not appoint the fire chief.
- The mayor does not set the salary or the benefits of the fire chief.
- Neither office performs functions that are inconsistent with the other.
- Neither office contracts with the other in their official capacity.
- The mayor does not approve the fidelity bond of the fire chief.

The statute remains unclear on several points, however. It does not address council positions other than the mayor. It also appears to be limited to independent, nonprofit fire departments, so city departments (whether volunteer or salaried) are not addressed. And although it outlines general criteria under which there will not be incompatibilities, ambiguity still exists regarding what functions would be considered inconsistent.

Because each city has a different relationship with its fire department, a city may want to get a legal opinion from its attorney or from the attorney general before allowing a councilmember to serve as a volunteer firefighter with any sort of supervisory powers.

D. Consequence—automatic resignation

A.G. Op. 358-E (Feb. 18, 1958).
State ex rel. Hilton v. Sword, 157 Minn. 263, 196 N.W. 467 (1923)

An individual generally can run for election to a position that is incompatible with the position the person already holds without resigning from the first position. However, when an official qualifies for a second and incompatible position (by taking an oath and filing a bond, if necessary), he or she automatically resigns from the first position, which then becomes vacant.

RELEVANT LINKS:

"Compatibility of Offices," House Information Brief (July 2012).

Whether two offices are incompatible will depend upon the responsibilities of each of the offices and their relationship. Cities with questions may wish to secure a legal opinion from the city attorney or the attorney general.

VI. Codes of conduct

Councils often struggle with conveying ethical expectations of their councilmembers. In addition, the conflict of interest (or "ethics") laws are scattered throughout many statutes and court cases, making them difficult to find and hard to interpret. As a result, some cities have developed and adopted their own policies on ethics and conflicts of interest. These policies must not conflict with state law and generally these policies appear in one of two forms: a values statement expressing core principles for ethical conduct, or a formal code of conduct. Cities may adopt a values statement or a code of conduct or both. However, it is important to note that state law does not require formal adoption of a city ethics policy.

League of Minnesota Cities Insurance Trust (LMCIT) Collaboration Services.

If your city needs assistance with learning about codes of conduct, the League of Minnesota Cities Insurance Trust (LMCIT) Collaboration Services will work with you to get your city the help it needs. There is no charge for this service for LMCIT members.

A. Professional rules of conduct

International City/County Management Association's Code of Ethics (February 2019).

Minnesota City/County Management Association's

Many professionals have adopted rules of conduct to guide individuals working within those fields. For example, the International City/County Management Association (ICMA) as well as our state's affiliate (MCMA) has adopted a code of ethics that defines a manager's core set of values. These values help define and guide a city manager's ethical obligations to council, other staff, the general public, and the profession itself.

VII. Ethics in Government Act (campaign financing)

Minn. Stat. ch. 10A.
MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889.

Minn. Stat. ch. 10A, also known as the Ethics in Government Act (Act), governs campaign financing. The following briefly overviews some of the major responsibilities of the act (as well as some related statutes) and how they impact some city officials.

MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889.

The Minnesota Campaign Finance and Public Disclosure Board (Board) administers the act. The Board has four primary responsibilities:

RELEVANT LINKS:

- Campaign finance registration and disclosure.
- Public subsidy administration.
- Lobbyist registration and disclosure.
- Economic interest disclosure by public officials.

Minn. Stat. § 10A.02, subd. 12.
MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889

Individuals subject to the Act may request an advisory opinion from the Board to guide their compliance with the law. Requests for an opinion (as well as the opinions themselves) are classified as "nonpublic" data, but a "public" version of the opinion may be published on the Board's website.

A. Application

Minn. Stat. § 10A.01.

All candidates for and holders of state constitutional or legislative offices, as well as other "lobbyists," "principals" and "public officials" must comply with the Act. In addition, while not applicable to all city officials, the Act does apply to "local officials" serving "Metropolitan government units."

1. Local officials

Minn. Stat. § 10A.01, subd. 22.

A "local official" represents a person who falls into one or both of these categories:

- Holds elected office.
- Is appointed to or employed in a public position in which the person has authority to make, to recommend, or to vote on as a member of the governing body, major decisions regarding the expenditure or investment of public money.

2. Metropolitan government units

Minn. Stat. § 10A.01, subd. 24.
Minn. Stat. § 473.121, subd. 2.

The Act applies to local officials in "metropolitan government units," which includes cities with populations over 50,000 in the seven-county metro area.

3. Advocates

The Act contains broad reporting requirements for individuals and associations who try to influence the decision-making process.

a. Lobbyists

Minn. Stat. § 10A.01, subd. 21.

A "lobbyist" is an individual who:

RELEVANT LINKS:

- Is paid more than $3,000 from all sources in any year attempting to influence legislative or administrative action, or the official action of a metropolitan governmental unit, by communicating (or urging others to communicate) with public officials or local officials.
- Spends more than $250 (not including travel expenses or membership dues) in any year attempting to influence legislative or administrative action, or the official actions of a metropolitan government unit, by communicating (or urging others to communicate) with public officials or local officials.

Minn. Stat. §§ 10A.03-.05
"Lobbyist Handbook,"

Lobbyists must register with and report their expenditures to the Board by January 15 and June 15 each year. These reports must include gifts and items valued at $5 or more given to local officials, state lawmakers, or other public office holders.

b. Principals

Minn. Stat. § 10A.01, subd. 33.

Minn. Stat. § 10A.04, subd. 6

A "principal" is an individual or association that spends more than $500 in any calendar year for a lobbyist or $50,000 or more in a calendar year to influence legislative action, administrative action, or the official action of metropolitan governmental units. Principals must file spending reports with the Board.

c. City advocates

Minn. Stat. § 10A.04.
Minn. Stat. § 10A.01, subd. 21

City employees and non-elected city officials who spend more than 50 hours in any month on lobbying activities must also register and submit expense reports with the Board.

B. Gift ban

Minn. Stat. § 10A.071, subd. 1(b).
See Section III, *Gifts*.

A "gift" is defined as money, property (real or personal), a service, a loan, the forbearance or forgiveness of debt, or a promise of future employment, given and received without the giver receiving equal or greater value in return.

1. Prohibition

Minn. Stat. § 10A.071, subd. 2.

A lobbyist or principal may not give gifts, or request that others give gifts to officials, and officials may not accept gifts from lobbyists or principals.

2. Exceptions

Minn. Stat. § 10A.071, subd. 3

The law allows the following types of gifts under specific exceptions to the general ban:

RELEVANT LINKS:

- Contributions to a political committee, political fund, principal campaign committee, or party unit.
- Services to assist an official in the performance of official duties. Such services can include advice, consultation, information, and communication in connection with legislation and services to constituents.
- Services of insignificant monetary value.
- A plaque with a resale value of $5 or less.
- A trinket or memento costing $5 or less.
- Informational material with a resale value of $5 or less.
- Food or beverage given at a reception, meal or meeting. This exception applies if the recipient is making a speech or answering questions as part of a program that is located away from the recipient's place of work. This exception also applies if the recipient is a member or employee of the legislature and an invitation to attend was given to all members of the legislature at least five days before the date of the event.
- Gifts received because of membership in a group. This exception does not apply if the majority of group members are officials. In addition, an equivalent gift must also be offered to the other members of the group.
- Gifts between family members. However, the gift may not be given on behalf of someone who is not a member of the family.

3. Advisory opinions

Minn. Stat. § 10A.02, subd. 12.
MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889.

The Board issues advisory opinions regarding the lobbyist gift ban. These opinions may be relevant to any Minnesota city struggling with the application or implication of a gift ban to a particular situation.

C. Filings and disclosures

Minn. Stat. § 10A.01, subd. 24
MN Campaign Finance and Public Disclosure Forms

Chapter 10A applies to "metropolitan governmental units" and includes some cities. Only local officials (including candidates for elected office) in the seven county metropolitan area cities with a population over 50,000 must submit the following to the Board.

1. Statements of economic interest

Minn. Stat. § 10A.09

Local officials (including candidates for elected office) in cities within the seven-county metropolitan area with a population over 50,000 must file a statement of economic interest with the Board.

RELEVANT LINKS:

a. Time for filing

Minn. Stat. § 10A.09, subd. 1.

An individual must file within one of the following timeframes:

- Within 60 days of accepting employment.
- Within 14 days after filing an affidavit of candidacy or petition to appear on the ballot for an elective office.

b. Notification

Minn. Stat. § 10A.09, subd. 2.
MN Campaign Finance and Public Disclosure Board: Elected Statement of Economic Interest and Appointed Statement of Economic Interest.

The county auditor must notify the Board upon receipt of an affidavit of candidacy or a petition to appear on the ballot from someone required to file a statement of economic interest. Likewise, an official who nominates or employs an individual required to file a statement of economic interest must notify the Board. The county auditor or nominating official must provide:

- The individual's name.
- The date of the affidavit of candidacy, petition, or nomination.

c. Form

Minn. Stat. § 10A.09, subd. 5.

Local officials must report the following information:

- Their name, address, occupation, and principal place of business.
- The name of each associated business (and the nature of that association).
- A listing of all real property interests in the state (excluding homestead).
- Any interests connected to pari-mutuel horse racing in the U.S. or Canada.
- A listing of the principal business or professional activity category of each business where the individual receives more than $50 in any month as an employee, but only if the individual has a 25% or more ownership interest in the business.
- A listing of each principal business or professional activity category where the individual has received more than $2,500 in compensation in the past 12 months as an independent contractor.
- The full name of each security with a value of more than $10,000 owned in part or in full by the public official at any time during the reporting period.

Minn. Stat. § 10A.09, subd. 6.

Local officials must file annual statements by the last Monday in January of each year. The annual statement must cover the period through Dec. 31 of the year prior to the year when the statement is due.

RELEVANT LINKS:

The annual statement must include the amount of each honorarium in excess of $50 received since the previous statement and the name and address of the source of the honorarium. The board must maintain each annual statement of economic interest submitted by an officeholder in the same file with the statement submitted as a candidate. An individual must file the annual statement of economic interest required by this subdivision to cover the period for which the individual served as a public official even though, at the time the statement was filed, the individual no longer is holding that office as a public official.

d. Access

Minn. Stat. § 10A.09, subd. 6a.

The local official must file the statement with the city council. If an official position is both a public official and a local official of a metropolitan governmental unit, the official must also file the statement with the Board. Statements of economic interest are classified as public data.

e. Pension plan trustees

Minn. Stat. § 356A.06, subd. 4(c)
Minn. Stat. § 424A.04

Each member of the governing board of a public pension plan must file a statement of economic interest. This applies to the trustees of a local relief association pension plan and includes ex-officio members, such as the mayor and city clerk. The statement must include:

- The person's principal occupation and place of business.
- Whether or not the person has an ownership of or interest of ten percent or greater in an investment security brokerage business, a real estate sales business, an insurance agency, a bank, a savings and loan, or another financial institution.
- Any relationships or financial arrangements that could give rise to a conflict of interest.

Minn. Stat. § 356A.06, subd. 4

The statement must be filed annually with the plan's chief administrative officer and be available for public inspection during regular office hours. The statement must also be filed with the Board by January 15 of each year.

f. Hennepin County

Minn. Stat. § 383B.053.

Additional disclosure requirements for elected officials of cities in Hennepin County with a population of 75,000 or greater exist.

RELEVANT LINKS:

Minn. Stat. § 10A.07.
Minn. Stat. § 10A.01, subd. 22
Minn. R. ch. 4515

2. Conflicts of Interest

Local officials (including city employees with authority to make, recommend, or vote on major decisions regarding the expenditure or investment of public funds) must disclose certain information if they will be involved in decisions or take actions that substantially affect their financial interests or those of a business with which they are associated. However, disclosure is not required if the effect on the official is no greater than on others in that business classification, profession, or occupation more generally.

a. Disclosure

Minn. Stat. § 10A.07.

MN Campaign Finance and Public Disclosure Board: Potential Conflict of Interest Notice.

When conflicts arise, the interested official or employee must:

- Prepare a written statement describing the matter requiring action or decision and the nature of the potential conflict of interest.
- Deliver a copy of the notice to his or her superiors.
  - If the official is an employee, notice should be provided to his or her immediate supervisor.
  - If the official reports directly to the city council, notice should be given to the council.
  - If the official is appointed, notice should go to the chair of that board, commission, or committee. If the chair has the conflict, notice should go to the appointing authority—the city council.
  - If the official is elected, the written statement should go to the presiding officer (typically the mayor).
  - If the potential conflict involves the mayor, notice should be provided to the acting presiding officer.

Minn. Stat. § 10A.07, subd. 1

If a potential conflict arises and there is not time to provide written notice, the official must orally inform his or her supervisor or the city council.

b. Delegation or abstention

Minn. Stat. § 10A.07, subd. 2

The official's supervisor must assign the matter to another employee who does not have a potential conflict of interest. If there is no immediate supervisor (as is the case with the city council), the official must abstain from voting or otherwise influencing the decision-making process.

c. Inability to abstain

Minn. Stat. § 10A.07, subd. 2.

MN Campaign Finance and Disclosure Board: Inability to Abstain from Potential Conflict of Interest Form.

If the city official is not permitted to abstain or cannot abstain, he or she must file a statement describing the potential conflict and the action taken. The official must file this statement with the city council within a week of the action.

RELEVANT LINKS:

Minn. Stat. § 469.009.
Minn. Stat. § 469.098.

d. HRAs and EDAs

Before taking an action or making a decision which could substantially affect the commissioner's (or an employee's) financial interests (or those of an organization with which the commissioner or an employee is associated), commissioners or employees of an HRA or EDA must disclose their interests. Individuals face criminal penalties for noncompliance.

D. Violations

"Local Officials in a Metropolitan Government Unit Handbook," MN Campaign Finance and Public Disclosure Board (Feb. 2010).

Individuals, subject to the Act, can be personally responsible for any sanctions that result from failing to comply with the reporting requirements. Individuals may be subject to criminal and civil penalties if they:

- Knowingly file false information or knowingly omit required information.
- Willfully fail to amend a filed statement.
- Knowingly fail to keep records for four years from the date of filing.

MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889.

Local officials with questions concerning their responsibilities under the Act should contact their city attorney or Board staff.

VIII. Conclusion

All public officials face ethical challenges during the term of their public service. Reviewing the roles elected and appointed officials play within city government helps councils and staff sort out responsibilities, identify and mitigate conflicts of interests, and generally avoid the appearance of impropriety.

The Office of
Minnesota Attorney General Keith Ellison
helping people afford their lives and live with dignity and respect • www.ag.state.mn.us

February 14, 2020

Mr. David J. Walker
Freeborn County Attorney
Government Center
411 South Broadway
Albert Lea, MN 56007

Re: Request for Opinion Concerning County's Authority to Accept Gift

Dear Mr. Walker:

Thank you for your January 28, 2020 letter requesting an opinion regarding Freeborn County's authority to accept a parking lot near a contemplated health clinic as a gift.

FACTS

Your letter describes community efforts to develop a vacant Albert Lea retail property into a health clinic and outpatient surgery center. You explain that this facility is needed to provide adequate health care access to county residents and enhance market competition. You also state that donors propose to gift a parking lot located near the contemplated health clinic to Freeborn County on the condition that the parking lot be repaired and maintained for use by clinic staff and patients.

QUESTION

You ask whether the Freeborn County Board of Commissioners may accept the parking lot near the contemplated clinic location as a gift on the conditions required by the prospective donors.

ANALYSIS

While it is beyond the scope of Attorney General opinions to decide questions relating to a presently speculative gift, Op. Atty. Gen. 629a (May 9, 1975), we certainly want to help in any way we can. I hope the following information may assist your analysis.

Minnesota Statutes chapter 376 addresses county ownership of hospitals and nursing homes. A county hospital may consist of multiple buildings at one or more locations within the county. Minn. Stat. § 376.009 (2018). Additionally, the state health commissioner is responsible for the issuance of licenses to operate hospitals, outpatient surgical centers, and other health care institutions. Minn. Stat. § 144.55, subd. 1(a) (2018). You may wish to contact the Minnesota

Department of Health for more information regarding facility licensing and related regulatory obligations:

Minnesota Department of Health
P.O. Box 64975
625 Robert Street North
St. Paul, MN 55164
Toll-Free Telephone: 888-345-0823
Direct Telephone: 651-201-4101
Website: *www.health.state.mn.us/facilities/regulation/licensure.html*

With regards to the parking lot, the Freeborn County Board of Commissioners must consider whether the county has authority to accept it. In general, a county board of commissioners may accept real or personal property by gift for the use and benefit of county residents. A county board also may accept the gifted property subject to conditions and may appropriate funds to maintain it. Minn. Stat. §§ 375.26–.27 (2018); *see also* Minn. Stat. § 465.03 (2018). A previous Attorney General opinion, however, concluded that a county cannot accept a gift conditioned on waiving powers granted to it by statute. Op. Atty. Gen. 1001-B (Mar. 30, 1953).

Your letter suggests that the purpose of this gift is to indirectly subsidize the contemplated health clinic through reduced operation and property tax expenses. As a result, the Board must consider whether repairing and maintaining a parking lot for use by a private clinic constitutes a public purpose. Minnesota courts have held that local governments, including counties, cannot spend public funds except for a public purpose. *Visina v. Freeman*, 89 N.W.2d 635, 643 (Minn. 1958). A public purpose is an activity that benefits the community and is directly related to government functions. What constitutes a public purpose is an evolving standard based on contemporary conditions. *Minnesota Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 338 (Minn. 1984). Courts typically have construed this requirement to encompass activities that promote community health, safety, morals, and general welfare, even if a private corporation will receive a large incidental benefit. *City of Pipestone v. Madsen*, 178 N.W.2d 594, 600, 603 (Minn. 1970).

If the Board deems public purpose analysis necessary, it may want to consider whether the parking lot would be exclusively available to clinic staff and patients, or whether it would be open to the general public. Additionally, the Board may want to evaluate whether the county operates other parking facilities on similar terms, or would be prepared to accept parking facilities as gifts from other privately-owned institutions that a deliver a service constituting a public purpose.

A related matter for consideration is whether providing an indirect subsidy to a private clinic implicates the state's conflict of interest requirements for county officials. State law appears to restrict counties from participating in transactions and contracts where a commissioner or other official has a direct or indirect interest unless a statutory exception applies

Minn. Stat. § 382.18 (2018); Minn. Stat. § 471.87–.881 (2018). For example, a prior Attorney General opinion concluded that state law precluded a physician who received compensation as a county official from also receiving compensation from the county for care provided to low-income patients at a hospital that he partially owned. Op. Atty. Gen. 707b-6 (Apr. 16, 1935). Accordingly, if a commissioner or other official has an interest in the health care provider that would operate the contemplated clinic or the retail center in which the clinic would be located, these statutory requirements may be applicable.

Thank you again for your correspondence.

Sincerely,

Christie B. Eller

CHRISTIE B. ELLER
Deputy Attorney General

(651) 757-1440 (Voice)
(651) 297-1235 (Fax)
christie.eller@ag.state.mn.us

Enclosures: Op. Atty. Gen. 629a (May 9, 1975)
Op. Atty. Gen. 1001-B (Mar. 30, 1953)
Op. Atty. Gen. 707b-6 (Apr. 16, 1935)

|#4653925-v1

Opinions of the Attorney General

Hon. WARREN SPANNAUS

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

Thomas M. Sweeney, Esq. May 9, 1975
Blaine City Attorney 629-a
2200 American National Bank Building (Cr. Ref. 13)
St. Paul, Minnesota 55101

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election districts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."*

* Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

> The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

IN THIS ISSUE

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1966). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. **Id.**

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist Ct. (Civ.) R 24.04; Op. Atty. Gen. 733G, July 23, 1945.

(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

(3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See, Op. Atty. Gen. 629-a, July 25, 1973.

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in

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such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion **supra.**

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion **supra.**

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

WARREN SPANNAUS, Attorney General
Thomas G. Mattson, Assist. Atty. Gen.

COUNTIES: HOSPITALS: Gift to county for hospital purposes under restrictions and conditions stated cannot be accepted. MSA 376.06. 7A

O.F.C.

March 30, 1953
Mar. 12, 1953 1001-B

Mr. John J. McCarten
Douglas County Attorney
Alexandria, Minnesota

Dear Mr. McCarten:

You wrote your letter to the Attorney General on March 23 after having received the opinion of the Attorney General dated March 12, 1953, File 1001B. You now present for consideration these

FACTS:

It has been proposed that in Douglas County a county hospital shall be constructed and established. There is now a local hospital association which operates a hospital. If the county hospital shall be established, it has been proposed that such local hospital association liquidate its affairs and contribute its assets, amounting to between $60,000 and $75,000 to the county, upon the condition that the hospital should forever remain under the control of the county and should never be leased or the operation thereof surrendered to any hospital association.

You ask the

QUESTION:

"Does the county have authority to accept a gift or contribution in an amount of $60,000.00 or $75,000.00 cash toward the erection of a county hospital under M.S. 376.01 - 376.04, or is the power of the County Board to accept gifts or contributions toward the erection of such a hospital limited to lands in the county under M.S. 376.01?"

Approved by
J. M.

OPINION

I fail to recognize that MSA 376.01-376.04 apply to these facts. The reference therein is to gifts of land, not money.

MSA 375.26 is authority to the county to receive by gift in accordance with the terms of the trust or conditions of the gift any personal property for the use and benefit of the inhabitants of the county. So, without restrictions or conditions which are prohibited by law from being attached, such proposed gift could be accepted by the county. But under the conditions proposed, I am of the opinion that the gift may not be accepted because, as stated in the opinion of the Attorney General, File 1001-b, dated March 12, 1953, "Leasing of the property to a hospital association by a county board is authorized by MSA 376.06 and the board has no authority to bargain away its powers. Accordingly, the county board is without authority to accept the gift upon the condition named".

Yours very truly

J. A. A. BURNQUIST
Attorney General

CHARLES E. HOUSTON
Assistant Attorney General

CEH:MR

COUNTIES-Officers-Contracts-Interest in-
County Physician-Health officer.
M.H.St.§930,§10305,§5174

April 16, 1935

Mr. Clayton A. Gay
County Attorney
Stevens County,
Morris, Minnesota

Dear Sir:

Your letter to Attorney General Harry H. Peterson, under date of April 11, has been referred to the undersigned for attention.

Therein you state that the coroner of Stevens County operates a mortuary in partnership with one J. J. Ryan. You inquire:

> "1. Can J.A.Ringness (coroner), or Ringness & Ryan, of John J. Ryan handle funerals for those on poor relief in Stevens County and bill Stevens County for it?"

This office has heretofore held, as far back as 1918, that county coroners cannot contract with the county for funeral and burial expenses of the poor of such county. This is because of the provisions of Mason's Minn. Statutes 1927, Section 930, as well as the provisions of Section 10305, which prohibit any county official from being directly or indirectly interested in any contract with the county. It would also prohibit the coroner's partner or the partnership from contracting with the county for such

burial expenses. This is particularly true in the event that the coroner has an interest, either directly or indirectly, in the business of the partnership.

You further state that the county physician receives the annual salary of $350.00; that he owns approximately a one-seventh interest in the Stevens County Hospital. You inquire:

(a) "Can Dr. F. (the county physician) perform operations and bill the County for them when they are properly performed on county poor relief clients?"

(b) "Can the Stevens County Hospital bill the County of Stevens for hospital care etc. given to Stevens County poor relief clients, as long as Dr. F. holds an interest in the said Hospital?"

Pursuant to Mason's Minnesota Statutes 1927, Section 3174, it is provided that the county board shall appoint one or more practicing physicians who shall hold office during the pleasure of the board. Said section also prescribes the duties of such county physician. It is obvious that such county physician is an officer of the county pursuant to said Section 990 as well as said Section 10305, and consequently cannot be interested, either directly or indirectly, in any contract with the county. It would seem to follow, therefore, that since the county physician has an interest in the hospital in question, he cannot enter into a contract with the county for the care of such poor

persons at such hospital where he would derive a benefit from such contract. It is possible, however, in case of an emergency, where it might endanger the life of a poor person of the county to operate elsewhere in the event that there is only one hospital in the city, that such county physician might properly perform an operation at such hospital and provide hospital care to such poor person where it is necessary to do so in order to save the life of such patient. This, however, involves questions of fact upon which we cannot pass.

You also state that the health officer for Stevens County receives no remuneration of any kind; that said health officer is the owner of the Morris Hospital. You inquire:

> "3. Can Dr. C. (the county health officer) bill Stevens County for operations performed on poor relief patients and can the Morris Hospital bill the County for hospitalization of county poor clients?"

In answer to your third inquiry, permit us to state that a county health officer is not to be considered a county officer within the meaning of said Section 990 and, consequently, he may perform operations on county poor persons and provide hospitalization for them in a hospital owned by such county health officer. See opinion No. 387, Attorney General Report for 1914.

Yours very truly,
HARRY H. PETERSON,
Attorney General.

By DAVID J. ERICKSON
Assistant Attorney General

DJE:BG

February 28, 2020

Mr. Michael LaCoursiere
Red Lake County Attorney
Courthouse Annex, Lower Level
125 Edward Avenue
Red Lake Falls, MN 56750

Re: Request for Opinion Regarding County Treasurer's Community Advisory Council Service

Dear Mr. LaCoursiere:

Thank you for your February 13, 2020 e-mail correspondence requesting an opinion regarding the Red Lake County Treasurer's ability to serve on a local bank's community advisory council.

FACTS

Your e-mail states that County Treasurer Nick Knott has been asked to serve on a community advisory council for a local bank. You explain that service on this council does not entail any formal or legal obligations. You also state that council members are provided $200 per meeting and that the council meets approximately six times a year. Additionally, your message explains that the Office of Red Lake County Treasurer is an elected, full-time position. You lastly indicate that Red Lake County obtains financial services from the same local bank.

QUESTION

You ask whether it is permissible for the County Treasurer to serve on a community advisory council for a financial institution at which the Red Lake County does its banking.

ANALYSIS

The County Treasurer may find Minnesota Statutes chapter 385 helpful in assessing whether to serve on the advisory council. Chapter 385 describes the statutory duties assigned to county treasurers. Among other responsibilities, county treasurers are directed to promptly deposit county funds in one or more designated banks, savings and loan associations, or credit unions in a manner consistent with Minnesota Statutes chapter 118A. Minn. Stat. § 385.07 (2018). Minnesota Statutes chapter 118A addresses local public funds deposit and investment requirements.

The County Treasurer also should consider whether advisory council service implicates state conflict of interest law. As you may know, county officials may not be interested in any contract, work, labor, or business to which the county is a party unless a statutory exception applies. Minn. Stat. § 382.18 (2018); Minn. Stat. § 471.87–.881 (2018). First, while the term is not defined in chapter 382, a county treasurer likely constitutes a "county official" within the statute's meaning. Elsewhere, state law similarly classifies county treasurers as "county administrative officials." Minn. Stat. § 375.18, subd. 1a (2018). Additionally, a prior Attorney General Opinion concluded that a county attorney – another local elected officer – was a county official under Minn. Stat. § 382.18. Op. Atty. Gen. 121b-4 (June 16, 1964).

Second, the term "interest" generally describes a concern that accompanies or causes an individual to pay special attention to something. The State Auditor suggests, as a general principle, that an interest exists when an official is on one side of a contract (e.g., as a buyer or seller). A conflict of interest thus may arise when an official is on both sides of the transaction or relationship. *See* Office of the State Auditor, *Minnesota Legal Compliance Audit Guide For Counties* at 2-1 (2019). In this instance, the County Treasurer would receive – albeit relatively modest – compensation for his advisory council service. Accordingly, it appears that Minn. Stat. § 382.18 may be relevant to the arrangement described in your e-mail because the County Treasurer has a financial stake in the bank's ongoing existence.

Assuming Minn. Stat. § 382.18 otherwise precludes the County Treasurer from advisory council service, a secondary consideration is whether an exception applies. Minnesota Statutes section 471.88 allows the county board, by unanimous vote, to contract with a bank in which an officer is interested. Specifically, the statute provides:

> [N]o restriction shall apply to the deposit or borrowing of any funds or the designation of a depository by such authority or governmental unit in any bank or savings association in which a member of an authority or officer of a governmental unit shall have an interest if such deposited funds are protected in accordance with chapter 118A[.]

Minn. Stat. § 471.88, subd. 2. *See also* Minn. Stat. § 471.881 (2018). This exception further requires that the interested officer disclose his or her interest to the county and the disclosure must be entered into the county board's meeting minutes. This disclosure should occur when the county contracts with the bank or when the official's interest arises whichever is later. Minn. Stat. § 471.88, subd. 2.

I hope the above information is helpful to you. Thank you again for your correspondence.

Sincerely,

RICHARD DORNFELD
Assistant Attorney General

(651) 757-1327 (Voice)
(651) 297-1235 (Fax)
richard.dornfeld@ag.state.mn.us

Enclosures: Op. Atty. Gen. 121b-4 (June 16, 1964)
Minnesota Legal Compliance Audit Guide for Counties (2019)

|#4664821-v1

LEGAL COMPLIANCE AUDIT GUIDE

CONFLICTS OF INTEREST

Introduction

Rule: A public officer authorized to take part in the making of a sale, lease, or contract shall not voluntarily have a personal financial interest in the transaction or personally benefit financially from it. Minn. Stat. § 471.87. The following persons are specifically forbidden from having any interest in any contract made by their respective governing bodies:

1. elected officers;
2. town supervisors and town board members;
3. county officials, county deputies, county clerks, and employees of such officials; or
4. school board members.

Exceptions: For practical reasons, the legislature has created certain limited exceptions to the general prohibition set forth in Minn. Stat. § 471.88. Part I of this questionnaire will assist you in making a determination as to whether an otherwise forbidden transaction fits within any of the statutory exceptions. Care should be taken to determine whether any exception considered applies to the entity and contract being audited.

For the purposes of this checklist, "interested officer" shall mean a public officer or employee, as listed above, who directly or through his or her spouse (see "Discussion" below) has a prohibited position or interest in either the entity making or the subject matter of the sale, lease, or contract with the county. Examples include:

1. officer;
2. director;
3. employee (see "Discussion" below);
4. partner;
5. owner (complete or partial); or
6. shareholder.

Discussion: The determination as to whether a particular transaction involves an "interested officer" often calls for a judgment on the part of the auditor. A helpful concept to remember for analysis is that it is a conflict of interest to be on both sides of a contract or transaction.

JOINT HOSPITALS: CITY AND COUNTY ATTORNEYS: FEES: COLLECTION OF UNPAID HOSPITAL ACCOUNTS.
County attorney may not be employed by city-county hospital to collect unpaid accounts, but has uncompensated duty to represent county in any legal proceedings. City attorney's compensation and duties are to be determined by employment contract.

June 16, 1964

121-b-4

Honorable Richard H. Hilleren
Swift County Attorney
Benson, Minnesota

Attention: Mr. Frank A. Barnard
Assistant County Attorney

Dear Mr. Barnard:

In your letter to Attorney General Walter F. Mondale you call our attention to Op. Atty. Gen. 121b-4, May 12, 1964, dealing with the duties of county and city attorneys in the collection of unpaid hospital claims. With reference to this opinion you ask the following

QUESTIONS

1. May a county or city attorney employed by a joint city-county hospital charge a regular fee for the collection of unpaid claims arising from services rendered a patient?

2. If it becomes necessary to institute an action for the collection of such claims, would it be the uncompensated duty of the county and city attorney to pursue such action?

OPINION

1. Op. Atty. Gen. 121b-4, May 12, 1964 concerned the Swift County-Benson Hospital, a joint city-county hospital organized under M. S. § 471.59. It was held therein that a county attorney has no duty to collect unpaid claims of the city-county hospital

for services rendered a patient. You now ask if, in the absence of such a duty, the county attorney or city attorney may be employed by the joint hospital to collect delinquent accounts.

M. S. § 382.18 provides that no county official shall be directly or indirectly interested in any contract, work, labor or business in which the county is or may be interested. We are of the opinion that the county attorney is a county official for the purposes of this section (see M. S. § 382.01) and is therefore prohibited from being employed to collect such claims.

Whether or not the city attorney may be employed and accept additional compensation for rendering collection services would depend upon the terms of the contract of employment between the attorney and the city.

2. We answer this question in the affirmative with reference to the county attorney. The duties and compensation of the city attorney in this regard, on the other hand, are again to be determined by the contract of employment.

Very truly yours

WALTER F. MONDALE
Attorney General

GHS:MM

GERALD H. SWANSON
Special Assistant
Attorney General

Elections-Ballots-General: Marking-Rules: Section 208 of the VRA preempts the prohibition on a candidate assisting a voter and the prohibition on a person assisting more than three voters in an election, as set forth in Minn. Stat. § 204C.15, subd 1. Any enforcement of these prohibitions would violate the Supremacy Clause of the U.S. Constitution.

28a-6
cr ref 185a-5; 385a)

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Minnesota Attorney General Keith Ellison
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May 7, 2020

Steve Simon
Minnesota Secretary of State
180 State Office Building
100 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155-1299

Re: Request for Opinion Concerning Minnesota's Voter Assistance Statute

Dear Secretary Simon:

Thank you for your April 22, 2020, letter requesting an opinion regarding whether restrictions in Minn. Stat. § 204C.15, subd. 1, are preempted by section 208 of the Voting Rights Act. Specifically, you ask whether the prohibition on a candidate assisting a voter and the prohibition on a person assisting more than three voters in an election are preempted. Our conclusion is that the answer to your question is yes, these prohibitions are preempted by section 208 of the Voting Rights Act.

FACTS

Minnesotans speak many different languages in their homes, including Spanish, Hmong, and Somali. We are home to many people who may need assistance to read and mark their ballots on election day. We are also home to many people with disabilities who may need assistance to cast their ballots at the polls.

Section 204C.15 provides that a voter who needs assistance, because of an inability to read English or physical inability to mark the ballot, may receive assistance from the person of their choice. Minn. Stat. § 204C.15, subd. 1. The statute, though, contains several exceptions, including one that prohibits candidates from assisting voters and another that prohibits a person from assisting more than three voters in an election. *Id.*

The legislative history shows that these restrictions existed in Minnesota before section 208 of the Voting Rights Act was passed. Early versions of Minnesota's voter assistance statutes date back to the 1890s. *See* Minnesota Statutes 1894, ch. 1, s. 108; *State v. Gay*, 59 Minn. 6 (1894). Those also contained a three-person limit. The Minnesota Legislature enacted the first version of Minnesota Statute § 204C.15, subd.1, in 1981.

In 1965, Congress passed the Voting Rights Act (VRA) to protect the right of American citizens to vote. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433-34 (2006). Under the VRA, "[a]ll citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, . . . county, [or] city, . . . shall be entitled and allowed to vote at all such elections." 52 U.S.C. § 10101(a)(1). The VRA defines the terms "vote" and "voting" broadly as "all action necessary to make a vote effective," which includes any "action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly." 52 U.S.C. § 10310(c)(1).

In 1982, Congress added section 208 of the VRA, which guarantees a voter who requires assistance, by reason of blindness, disability, or inability to read or write, the right to receive assistance from "a person of the voter's choice." 52 U.S.C. § 10508. Unlike Minnesota's voter assistance statute, section 208 of the VRA does not limit the voter's choice by prohibiting assistance from a candidate or from someone who has already assisted three voters in the election.

LEGAL ANALYSIS

The VRA preempts any state laws that conflict with it or prevent its effectiveness. 52 U.S.C. § 10101(a)(1). Preemption occurs when a "state law confers rights or imposes restrictions that conflict with the federal law," *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018), or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Minnesota does not have the authority to enforce a law that is preempted by the Supremacy Clause of the United States Constitution. *Murphy*, 138 S. Ct. at 1476.

Generally, any Minnesota statute that infringes on the assistance guaranteed in section 208 of the VRA for disabled or limited-English voters would be preempted. Section 204C.15 restricts the right to voter assistance that is guaranteed by section 208 of the VRA because section 204C.15 includes exceptions that do not exist in the federal law.

Section 204C.15 provides in pertinent part that a "voter who claims a need for assistance because of inability to read English or physical inability to mark a ballot" may receive assistance from "any individual the voter chooses." Minn. Stat. § 204C.15, subd. 1. A voter cannot receive assistance, though, from "the voter's employer, an agent of the voter's employer, an officer or agent of the voter's union, or a candidate for election." *Id.* In addition, there is the three-voter limit: "No person who assists another voter as provided in the preceding sentence shall mark the ballots of more than three voters at one election." *Id.*

Section 208 of the VRA guarantees voters in need of assistance the right to receive that assistance from a person of their choice, while only listing exceptions that prohibit assistance from the voter's employer or union. It states in full:

> Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.

52 U.S.C. § 10508.

While section 208 establishes a couple of exceptions to a voter's right to obtain assistance from the person of the voter's choice, Minnesota's statute adds two more: assistance cannot come from a candidate or someone who has already assisted three voters. By adding these exceptions, Minnesota's statute limits the right guaranteed by section 208 of the VRA. *Cf.* Minn. Stat. § 645.19 ("Exceptions expressed in a law shall be construed to exclude all others."). By restricting this federal right, the statute conflicts with federal law.

Minnesota's law also frustrates Congress's purpose in enacting section 208. The Senate Judiciary Committee explained that section 208 was designed to protect individuals at the polls and ensure they receive trusted and meaningful assistance:

> To limit the risks of discrimination against voters in these specified groups and avoid denial or infringement of their right to vote, the Committee has concluded that they must be permitted to have the assistance of a person of their own choice. The Committee concluded that this is the only way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter. To do otherwise would deny these voters the same opportunity to vote enjoyed by all citizens.

S. Rep. No. 97-417, 1982 U.S.C.C.A.N. 177, 240-41.

The state law can create indefensible situations like the following: the only fluent English speaker in a family can help her parents and grandmother to vote but not her grandfather, who then must either receive assistance from a less-trusted individual or eschew his right to vote. Or, a personal care assistant who cares for multiple people with disabilities must choose which three to help vote and leave the others to seek help elsewhere. This frustrates the purpose and objective of section 208 of the VRA, which is to assure trusted and meaningful assistance for voters who cannot read English or who have a disability.

Two recent cases finding that section 208 of the VRA preempted contrary state law are consistent with this preemption analysis. In 2017, Mr. Dai Thao was on the ballot as a candidate in the election for the Mayor of St. Paul. After an elderly Hmong-American voter sought Mr. Thao's assistance with the voter's ballot, Mr. Thao was prosecuted for violating section 204C.15,

subd. 1. The prosecution failed, however. Ramsey County District Court Judge Nicole Starr issued an Order finding that Minn. Stat. § 204C.15, subd. 1, conflicts with section 208 of the VRA and is preempted. As she explained:

> [T]he legislative history of the VRA demonstrates that Congress considered situations such as this, and determined that the overriding interest was access to the voting versus possible voter manipulation. The committee made special note of the need for flexibility with regard to insular communities comprised of "language minorities" where there are few choices of people who speak the same language. . . . Congress saw the individual's ability to determine who would be trustworthy assistant as an internal check against manipulation.

Findings of Fact, Conclusions of Law, and Order, *State of Minnesota v. Dai Thao*, 62-CR-18-927 (Ramsey County District Court Oct. 23, 2018). The court concluded that "the prohibition of a candidate as a possible trusted assistant acted as an obstacle to the accomplishment of the full purpose and objective of Congress." *Id.* at 5. The same reasoning extends to preempt the statute's prohibition on assisting more than three voters.

Similarly, in *OCA-Greater Houston v. Texas*, the Fifth Circuit Court of Appeals examined a Texas law requiring that interpreters assisting voters must be registered to vote in the county where the voter needs assistance. 867 F.3d 604, 607 (5th Cir. 2017). The court held the state law was preempted because it "impermissibly narrows the right guaranteed by Section 208 of the VRA." *Id.* at 615. The same reasoning extends to preempt Minnesota's prohibitions on assisting voters.

This Office could find no court case in the country that examined a similar state law and concluded it was not preempted.

The answer to your question is that section 208 of the VRA preempts both the prohibition on a candidate assisting a voter and the prohibition on a person assisting more than three voters in an election, as set forth in Minn. Stat. § 204C.15, subd 1. Any enforcement of these prohibitions would violate the Supremacy Clause of the U.S. Constitution.

Sincerely,

Keith Ellison

KEITH ELLISON
Attorney General

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May 8, 2020

Ms. Maureen O'Brian, Esq.
Assistant City Attorney
City of Bloomington
1800 West Old Shakopee Road
Bloomington, MN 55431-3027

Via E-Mail and Fist Class Mail:
msobrien@bloomingtonmn.gov

Re: Request for Opinion Regarding Property Tax Exemption and Minnesota Statutes Section 145A.131, subdivision 2(d)

Dear Ms. O'Brian:

Thank you for your April 21, 2020 correspondence requesting an opinion regarding the implementation of Minnesota Statutes section 145A.131, subdivision 2(d) with respect to county property tax levies for community health services.

FACTS

You indicate that the City of Bloomington ("City") operates a community health board to provide community health services, and that the City funds those services through a property tax. You state that Hennepin County also levies a property tax to pay for community health services. You state that no exemption is currently being provided relative to the portion of Hennepin County property taxes that are levied to pay for community health services.

You note a provision in Minnesota Statutes section 145A.131, subdivision 2(d), which states:

> (d) A city organized under the provision of sections 145A.03 to 145A.131 that levies a tax for provision of community health services is exempt from any county levy for the same services to the extent of the levy imposed by the city.

QUESTION

You ask whether Minnesota Statutes section 145A.131, subdivision 2(d) requires that "residents of cities that provide public health services are exempt from taxation by counties that also provide the public health services in the same area."

ANALYSIS

Your question focuses on Hennepin County's authority to levy property taxes. While this Office issues legal opinions at the request of local units of government, they generally are provided only in response to the local government whose powers or duties are at issue. This is because this Office does not sit as a court of law to adjudicate disputes. *See* Op. Atty. Gen. 629a (July 1, 1935) ("the Attorney General is permitted to render official opinions on matters of city administration only upon request of the city attorney and on matters relating to county administration only upon request of the county attorney") (enclosed). Further, for reasons noted in Op. Atty. Gen. 629a (May 9, 1975) (enclosed), this Office does not generally issue opinions on hypothetical or fact-dependent questions, or issues that may arise in litigation.

That having been said, I can provide you with the following information, which I hope you will find helpful. Under Minnesota law, property taxes are levied on real and personal property, and not on individuals, businesses, or cities. *See* Minn. Stat. § 272.01, subd. 1 ("All real and personal property in this state is taxable, except Indian lands and such other property as is by law exempt from taxation"); Minn. Stat. § 272.31 ("taxes assessed upon real property shall be a perpetual lien thereon"). All property is presumed taxable, and the taxpayer has the burden of proving entitlement to a specific exemption. *Living Word Bible Camp v. Cty. Of Itasca*, 829 N.W.2d 404, 408 (Minn. 2013). Section 145A.131, subdivision 2(d) states that "a city . . . is exempt from any county levy . . . ." The statute does not state that otherwise taxable property located within a city is exempt from taxation. Thus, it is not clear this subdivision exempts any real or personal property from taxation in the traditional sense of tax exemptions for real or personal property. The City may wish to seek legislative clarification if it believes the statute is not sufficiently clear with respect to what type of tax exemption, if any, is intended by section 145A.131, subdivision 2(d).

I thank you again for your correspondence.

Sincerely,

/s/ **Jennifer A. Kitchak**

JENNIFER KITCHAK
Assistant Attorney General

(651) 757-1019 (Voice)
(651) 297-8265 (Fax)
jennifer.kitchak@ag.state.mn.us

Enclosures: Ops. Atty. Gen. 629a (July 1, 1935)
Ops. Atty. Gen. 629a (May 9, 1975)

unofficial

ATTORNEY GENERAL OPINIONS -- Rendered only upon request of county attorney on county matters, city attorney on city matters. § 115, M.M.St., 1927.

July 1, 1935.

Dr. E. W. Rimer
Breckenridge, Minnesota

Dear Sir:

Your letter to Attorney General Harry H. Peterson under date of June 28th, together with enclosures, have been referred to the undersigned for attention.

It appears from the statements accompanying your letter that you have filed certain claims against the city of Breckenridge and the county of Wilkin for medical services rendered in certain cases. It also appears from a letter of the county attorney, E. H. Elwin, under date of April 25, 1935, that after he investigated your claims he found "that this service was never authorized from the county's side of the claim, and accordingly I made a memorandum thereon of 'Disapproved'."

It also appears from a letter written to you under date of April 27, 1935, by your attorney, Mr. Lewis E. Jones, that "having filed your claim and let the time go by within which to appeal, we are simply helpless."

We also direct your attention to Mason's Minnesota Statutes of 1927, Section 115, whereby the Attorney General is permitted to render official opinions on matters of city administration only upon request of the city attorney and on matters relating to county administration only upon request of the county attorney.

If the city council of Brockenridge desires an opinion on any of the matters referred to by you, it may have its attorney submit a request for the same. It will then become our duty and we will be glad to render an official opinion on matters so submitted by the city attorney. The same rule holds true with reference to requests for opinions on county matters. The county attorney is the legal adviser of the county board, as well as other county officials with reference to administrative affairs of the county. As appears from the letters accompanying your communication the county attorney has disallowed your claims and your attorney has advised you that you let the time go by within which to file an appeal from the disallowance of your claims. It is apparent, therefore, that an opinion from this office would be of no avail.

Moreover, as a professional man, you will readily understand the impropriety of the attorney general in giving any such opinion in the absence of any request therefor from the proper authorities. It has long been the established practice of this office to give such opinions only when requested in writing by the city attorney with reference to city matters and the county attorney with reference to county matters. Confusion could only result from any other course of procedure.

Trusting that you will understand our position in the matters, we are

Yours very truly,

HARRY H. PETERSON
Attorney General

By DAVID J. ERICKSON
Assistant Attorney General

DJE:LL

Opinions of the Attorney General

Hon. WARREN SPANNAUS

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

Thomas M. Sweeney, Esq. May 9, 1975
Blaine City Attorney 629-a
2200 American National Bank Building (Cr. Ref. 13)
St. Paul, Minnesota 55101

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election districts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."*

* Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

> The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

IN THIS ISSUE

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1966). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. **Id.**

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist Ct. (Civ.) R 24.04; Op. Atty. Gen. 733G, July 23, 1945.

(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

(3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See, Op. Atty. Gen. 629-a, July 25, 1973.

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in

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such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion **supra.**

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion **supra.**

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

WARREN SPANNAUS, Attorney General
Thomas G. Mattson, Assist. Atty. Gen.

June 9, 2020

Thomas L. Borgen
Office of the City Attorney
City of New Ulm
11 N. Minnesota St.
P.O. Box 214
New Ulm, MN 56074

Re: Request for Opinion Concerning City Authority to Repair and Maintain Private Sewer Laterals and to Levy Special Assessments

Dear Mr. Borgen:

Thank you for your correspondence of April 23, 2020.

FACTS

You state that the City of New Ulm's main public sewer lines generally run underneath streets that head north and south. To connect to the main line, private sewer lateral lines for properties on east to west streets run underneath the public streets, the distance of which at times may be up to a half-block away. Under the City's Code, the property owner is responsible for the maintenance of these private sewer lateral lines (from the connection at the main line to the property). Given the distance and to maintain these aging private lines, property owners may have to bear the cost of digging up and repaving a significant length of the public road. You report that the cost is substantial.

The City is considering options to alleviate the concerns of potentially prohibitive cost to property owners who desire to repair their private sewer lateral lines. The City's Public Utilities Commission is exploring an option to amend the City Code to allow property owners to authorize the PUC to make these repairs and make a special assessment against the benefitted properties.

QUESTION

Does the City of New Ulm have authority to maintain and repair private sewer lateral lines with the property owner's authorization and levy the costs of doing so against the benefitted property as unpaid special assessments under Minn. Stat. § 429.101 (2018) or § 444.075 (2018)?

ANALYSIS

For the reasons noted in Op. Atty. Gen. 477b-14 (Oct. 9, 1973) (enclosed), this Office does not render opinions upon the general review of a local ordinance, regulation, resolution, or contract to determine their validity or to ascertain possible legal problems.[1] That having been said, I can provide you with the following information, which I hope you will find helpful.

Local governments may exercise only the powers delegated to them by the legislature, *Breza v. City of Minnetrista*, 725 N.W.2d 106, 110 (Minn. 2006). Home rule charter cities like New Ulm are allowed to legislate for the general welfare. *See* Minn. Stat. § 410.33 (2018); New Ulm, Minn. City Charter (2018); *cf. Nordmarken v. City of Richfield*, 641 N.W.2d 343, 347 (Minn. App. 2002) (explaining that provisions of home rule charters must not run afoul of state law). Broadly speaking, cities have long-recognized authority under to Minn. Stat. § 429.051 (2018) and § 444.075 to maintain sewers and recoup their costs through various mechanisms such as special assessments. *Id.* Minn. Stat. § 444.075 allows municipalities "maximum flexibility in financing municipal sewer and water services." *Crown Cork & Seal Co. v. City of Lakeville*, 313 N.W.2d 196, 201 (Minn. 1981). Statutory authority under Chapter 429 for municipalities to finance local improvements is appropriate to ensure "front-end financing." *See Rettman v. City of Litchfield*, 354 N.W.2d 426, 428 (Minn. 1984). As you note, the law is less clear, however, whether this authority extends to maintaining private sewer lateral lines.

Under Minn. Stat. § 429.021 (2018), cities may make certain "local improvements" that include "storm sewers or other street drainage and connections from sewer, water, or similar mains *to curb lines.*" *Id.* (emphasis added). The costs for these improvements may be assessed upon any benefitted property. *Id.* While the term "local" is used, this authority does not appear to turn on whether sanitary sewers are designated as public or private. *Cf.* Minn. Stat. § 462.358 (2018) (explaining that municipalities may adopt regulations surrounding various "public services and facilities"). Instead, Minn. Stat. § 429.021 envisions that a city's authority over sewers is broad enough to make improvements to the "curb lines" even if the private sewer lateral line extends beyond that point. Under Minn. Stat. § 429.011, this Office noted that a city could construct a private sewer lateral and assess that cost to the property owner if that owner refused to construct a water service line. Op. Atty. Gen. 624-D-10 (June 26, 1956) (enclosed).[2]

[1] It is important to point out that, with limited exceptions not applicable here, opinions of the Attorney General are advisory in nature and not "binding" *per se*. *See, e.g., West St. Paul Fed. of Teachers v. ISD No. 197,* 713 N.W.2d 366, 373 (Minn. Ct. App. 2006).

[2] We are aware of one city that has applied the same reasoning to sanitary sewer lines. *See* Minneapolis City Code § 511.60 (enclosed).

While Chapter 429 neither expressly denies nor permits a city from repairing and maintaining private sewer laterals and levying an assessment against the property, case law suggests that city expenditures are authorized only for infrastructure deemed to be public unless otherwise indicated by law. *See, e.g.*, *Harstad v. City of Woodbury*, 902 N.W.2d 64, 74 (Minn. App. 2017), *aff'd*, 916 N.W.2d 540 (Minn. 2018) (explaining that sewer connection charges are allowed under Minn. Stat. § 444.075 for "public" improvements); *In re Vill. of Burnsville*, 310 Minn. 32, 37, 245 N.W.2d 445, 448 (1976) (stating that under Minn. Const. art. 10, § 1, assessments may be made for local improvements that benefits the general "public").

Like Chapter 429, Minn. Stat. § 444.075 authorizes municipalities, including cities such as New Ulm, to construct, maintain and operate waterworks, sanitary sewer, and storm sewer services. *Id.,* subd. 1(a). Municipalities are also authorized to levy special assessments upon property benefited by construction and improvement of water and sewer services. *Id.*, subd. 4. Municipalities have various sources of revenue to pay obligations issued for improvements to these systems, including taxes, special assessments, service changes, or "other non-tax revenue." *Id.*, subd. 2 (allowing special assessments under Minn. Stat. § 429.051). Like Chapter 429, Minn. Stat. § 444.075 makes no distinction on whether the sewers are designated as public or private. So neither statute expressly denies nor permits a city from repairing and maintaining private sewer laterals and levying an assessment against the property.

A previous opinion of this Office expressed concern over municipalities constructing or financing construction of private sewer laterals under Minn. Stat. § 443.12 (1949), *repealed* 1957 Minn. Laws Chp. 608 § 1 at 763. Op. Atty. Gen. 387-G-5 (Jan. 19, 1951) (enclosed).[3] The legislature has since significantly broadened Minn. Stat. § 442.075, and Minnesota courts have noted that subdivision 3 constitutes a non-exhaustive list of means to charge for sewer services. *See, e.g.*, *Crown Cork & Seal Co.*, 313 N.W.2d at 201 (emphasizing that subdivision 3 constitutes the legislature's additional attempt to provide another method to calculate charges); *JAS Apartments, Inc. v. City of Minneapolis*, 668 N.W.2d 912, 915 (Minn. Ct. App. 2003).

A potential complication of assessing the entire cost of road repair to property owners is that while the sewer of one property owner may be benefitted, the cost authorized by that one person might be borne incidentally also by his or her neighbors if the City makes road repairs that are otherwise unnecessary for others. Minnesota law only allows municipalities to assess any "benefitted property." I enclose an information memorandum from the League of Minnesota Cities examining law pertaining to special assessments.

Since Chapters 429 and 444 do not expressly deny or permit the City to repair private sewer lateral lines and subsequently levy the costs against the property with permission from the property owner, an ordinance allowing property owners to authorize the PUC to make these

[3] Later opinions have concluded that cities have the power to purchase sewer lines from property owners. Op. Atty. Gen. 59a-36 (Mar. 7, 1967) (enclosed), and explained that when a municipality has authorized a private person to establish a sewer in a public street, the municipality is not precluded from subsequently constructing its own system therein. Op. Atty. Gen. 387b-1 (July 28, 1969) (enclosed). These later opinions emphasize municipalities' prerogative to ensure an adequate and interconnected sewer system.

repairs and special assessments against the benefitted properties may be open to an as applied challenge as not for a "public" rather than "private" purpose. A municipal government's authority to make expenditures under Chapters 429 and 444 does not only turn on whether such improvements are made to property designated as public or private. Instead, the City could make a determination that a public purpose is served in maintaining and repairing aging private sewer laterals under its duty to ensure the health and safety of public sewer systems and prevent pollution.

Thank you again for your correspondence.

Sincerely,

/s/ **Cha Xiong**

CHA XIONG
Assistant Attorney General

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Enclosures: Op. Atty. Gen. 477b-14 (Oct. 9, 1973)
Op. Atty. Gen. 624-D-10 (June 26, 1956)
Minneapolis City Code § 511.60
Op. Atty. Gen. 387-G-5 (Jan. 19, 1951)
Op. Atty. Gen. 59a-36 (Mar. 7, 1967)
Op. Atty. Gen. 387b-1 (July 28, 1969)
League of Minnesota Cities Special Assessment Toolkit

|#4708998-v2

MUNICIPALITIES: VILLAGES: SOLID WASTE DISPOSAL REGULATIONS: Metropolitan Solid Waste Disposal Act (Minn. Stat. ch. 473D) and state regulations adopted pursuant thereto do not preempt the field and metropolitan area municipalities are not, therefore, prohibited from regulating solid waste disposal. No local regulations may, however, conflict with the Act or state regulations. Discussion of conflicts between Burnsville ordinance and state law and regulations. Task of making a general review of local ordinances, regulations, resolutions and contracts necessarily rest with local authorities.

October 9, 1973

477b-14
(Cr.Ref. 13, 59a-32(Grp. 4), 274 and 629a)

O.F.C.

Vance B. Grannis, Esq.
Attorney for the Village
of Burnsville
F. J. Schult Building
South St. Paul, Minnesota 55075

Dear Mr. Grannis:

In your letter to Attorney General Warren Spannaus, you present substantially the following

FACTS

The Metropolitan Solid Waste Disposal Act (hereinafter "the Act") was enacted by the 1969 Legislature and amended by the 1971 Legislature. The Act is codified as Minn. Stat. §§ 473D.01-473D.07 (1971). It provides for regulation and planning with respect to solid waste disposal in the seven-county metropolitan area by the Pollution Control Agency, the Metropolitan Council and the county governments.

The Village of Burnsville, which is located in the metropolitan county of Dakota, has an ordinance relating to the disposal of solid waste. The following four section synopses include some of the key provisions in the ordinance:

1. Section 7-3-2 prohibits the use of land within the village for a dump or a landfill without first obtaining a permit from the village council. The provisions governing the issuance of permits require the council to consider, among other things, a report of the

10-9-73

village planning commission on the suitability of the location of the proposed dump or landfill.

2. Section 7-3-3 allows all "refuse" except garbage to be disposed of at licensed dumps. "Refuse" is defined in section 7-3-1 to include "all waste substances."

3. Section 7-3-4 establishes rules for the operation of landfills and dumps. Included is section 7-3-4(D) requiring cover at a sanitary landfill. It provides in part that "[t]he active faces of landfills should be covered at the end of each day's operation, or as otherwise directed by the [local] inspector." Also noteworthy is section 7-3-4(I) which sets out procedures for salvaging materials from the landfill or dump. Finally, section 7-3-4(J) restricts burning to tree limbs and wooden crates in a location at least 200 feet away from the area where refuse is being compacted and covered.

4. Section 7-3-6 restricts all dumping within the village to sites licensed by the village.

Subsequent to January 1, 1970, the Village of Burnsville ceased to require permits as a necessary condition precedent to the operation of solid waste disposal sites and facilities and has also ceased enforcing any other provisions of the ordinance. This action was premised on the assumption that the Act had invalidated the provisions of the ordinance by pre-emption. At the present time any necessary permits for the operation of landfills are obtained from the Pollution Control Agency and any other necessary permits are obtained from regulatory agencies other than the Village of Burnsville.

You then ask the following

QUESTION

Has Burnsville's solid waste disposal ordinance been invalidated by the enactment of the Metropolitan Solid Waste Disposal Act?

OPINION

Two distinct but related legal doctrines which are applicable here are pre-emption and conflict. These doctrines have been discussed at length by the Minnesota Supreme Court in the landmark case of Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 143 N.W.2d 813 (1966).

The Mangold opinion sets forth the criteria of pre-emption in the form of four questions:

> (1) What is the "subject matter" which is to be regulated? (2) Has the subject matter been so fully covered by state law as to have become solely a matter of state concern? (3) Has the legislature in partially regulating the subject matter indicated that it is a matter solely of state concern? (4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state?

Id. at 356, 143 N.W.2d at 820.

Criterion one speaks in terms of the subject matter to be regulated. The subject matter here is solid waste disposal in the metropolitan area, which includes Burnsville. The Burnsville ordinance is concerned with a subject matter addressed by state statute and is therefore potentially pre-empted by such statute.

The key language of criteria two and three set out in Mangold is whether the subject matter is "solely a matter of state concern." All necessary planning, requisition, construction, operation, maintenance, and regulation of solid waste disposal sites and facilities could be carried out under the authorization provided by section 473D. There is no direct

statement or implication, however, that municipalities are to be entirely excluded from regulating these matters. The Act grants authority to the Pollution Control Agency and to metropolitan counties to adopt regulations concerning solid waste disposal but does not indicate that such regulations must cover every aspect of this matter. See sections 473D.05 subd. 5 and 473D.07 subd. 1. Furthermore, there is no indication that the Pollution Control Agency and the counties have in fact adopted regulations fully governing the subject of metropolitan solid waste disposal. Legislation should, moreover, be construed in conjunction with other statutes, and Minn. Stat. § 412.221 subd. 22 (1971) provides in part:

> The village council shall have power by ordinance . . . to provide for or regulate the disposal of sewage, garbage, and other refuse . . . .

In addition, a number of provisions in chapter 473D appear to contemplate the existence of local governmental regulations.[1/] These provisions include section 473D.03 which deals with the operation of solid waste sites by local governmental units; section 473D.04 which deals with the existence of municipal and private sites after adoption of a comprehensive Solid Waste Disposal Plan; section 473D.05 which deals with cooperation between county and

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1/ Section 473D.02 subd. 5 provides:

> "Local government unit" means any municipal corporation or governmental subdivision other than a metropolitan county located in whole or in part in the metropolitan area, authorized by law to provide for the disposal of solid waste.

local governmental units pursuant to Minn. Stat. § 471.59 (1971); section 473D.06 which deals with schedules of rates and charges to be submitted to the Metropolitan Council by local governmental units; and section 473D.07 dealing with the operation of sites by local governmental units provided there is compliance with Pollution Control Agency regulations. Thus, the matter is one of great state concern, but not a matter solely of state concern. We conclude that the subject matter is not "solely a matter of state concern," and therefore, neither criterion two nor three is a basis for establishing pre-emption.

Criterion four is based on whether or not local regulations would have an unreasonably adverse effect on the general populace. The legislature, in passing the Metropolitan Solid Waste Disposal Act, concluded that more efficient and economical solid waste disposal regulation was needed in the metropolitan area. For that reason, substantial authority to regulate solid waste disposal in the seven-county metropolitan area was granted to the Pollution Control Agency, the Metropolitan Council, and the metropolitan counties. As we have indicated, however, municipal regulation was allowed to co-exist.

The question to be addressed in determining whether the Burnsville ordinance is pre-empted by the Act when measured by criterion four of Mangold is whether varying regulations by municipalities would have unreasonably adverse effects on the general populace of the metropolitan area. See generally Minnetonka

Electric Co. v. Village of Golden Valley, 273 Minn. 301, 141 N.W.2d 138 (1966) and Village of Brooklyn Center v. Rippen, 255 Minn. 334, 96 N.W.2d 585 (1959). Varying regulations will not adversely affect landfill operators because a landfill is always in the same location, continually subject to the same ordinance. With respect to haulers, the Act itself specifically provides for their regulation by the municipalities. Minn. Stat. § 473D.05 subd. 5 provides in part:

> A municipality within a metropolitan county may adopt either the county ordinance by reference or a more strict ordinance than the county's to regulate solid waste haulers making pickups within its boundaries.

Because landfill operators and solid waste haulers will not be adversely affected by varying local regulations, it appears that adequate solid waste collection and disposal services will be available to the general populace of the metropolitan area. Therefore, Mangold criterion four is not a basis for establishing pre-emption.

Having reviewed the facts in light of the pre-emption doctrine as enunciated in Mangold, we find that although the Burnsville ordinance deals with a subject capable of pre-emption by state statute, this has not occurred in the case of the Metropolitan Solid Waste Disposal Act, and therefore, the Village of Burnsville may regulate solid waste disposal.

This leads us to a discussion of the doctrine of conflict. Although Burnsville is not pre-empted from regulating solid waste disposal, the village may not enforce provisions of an ordinance which conflict with a state statute or regulation. The task of making a general review of local ordinances, regulations, resolutions and contracts is, of course, the responsibility of local authorities. If after such review there is a question as to whether a specific local provision is invalidated by a specific statutory provision, this question could be submitted to our office accompanied by the local attorney's results of his review of the issue. In the instant case, however, our review of the Burnsville ordinance and the state statute and regulations reveals a number of substantial conflicts which we point out below.

In Mangold, the court set out the following tests to determine whether a fatal conflict exists:

> (a) As a general rule, conflicts which would render an ordinance invalid exist only when both the ordinance and the statute contain express or implied terms that are irreconcilable with each other.
>
> (b) More specifically . . . [a] conflict exists where the ordinance permits what the statute forbids.
>
> (c) Conversely, a conflict exists where the ordinance forbids what the statute expressly permits . . . .

274 Minn. 352, 143 N.W.2d 816. Mangold test (b) states that an ordinance cannot permit what the statute (or state regulation) forbids. One major area of conflict between the village ordinance

and the Act or the regulations adopted pursuant to it is found in the regulation of land disposal facilities. Throughout the Burnsville ordinance a distinction is made between "dumps" and "landfills." Both are allowed and there are separate provisions relating to the operation of each. This recognition of a land disposal method that is different from a landfill is in direct conflict with the introductory provision of Minn. Reg. SW 6 which provides that "the sanitary landfill method shall be used for all final disposal of solid waste." More specifically, section 7-3-3 of the ordinance allows the deposit of "refuse" (except garbage) in dumps. Under Minn. Reg. SW 1(18) "solid waste" is defined to include "refuse" and as we have seen above, the Pollution Control Agency regulations require it to be finally disposed of in a sanitary landfill and not in a dump.

In addition, section 7-3-4(D) of the ordinance gives the village inspector authority to vary the requirement for daily cover at a landfill, while such discretion is reserved to the Pollution Control Agency by Minn. Reg. SW 6(2)(d). The ordinance allows salvaging in section 7-3-4(I), while salvaging is prohibited at landfills by Minn. Reg. SW 6(2)(1). Finally, limited open burning is allowed under section 7-3-4(J) of the ordinance while it is totally prohibited by Minn. Reg. SW 6(2)(a).

In view of the tests regarding conflicts established in Mangold, it is our opinion that those provisions of the Burnsville

ordinance which authorize the operation of dumps as an acceptable land disposal facility, as well as sections 7-3-4(D), (I) and (J), to the extent indicated above, are invalidated by the Minnesota Solid Waste Disposal Act.

Another major area of conflict between the ordinance and the Act arises over whether the village may control the location of land disposal sites.

Section 7-3-2 of the ordinance prohibits the use of any land within the Village of Burnsville for a dump or a landfill without first obtaining a permit from the village council. The provisions governing the issuance of permits require the council to consider, among other things, a report of the village planning commission on the suitability of the location of the proposed dump or landfill. These provisions relating to disposal site location create an irreconcilable conflict with the terms of the Metropolitan Solid Waste Disposal Act. The "general location" of needed disposal facilities is included in the comprehensive solid waste plan required under section 473D.03 subd. 1 of the Act. Once adopted by the Metropolitan Council, the comprehensive plan "shall be followed" in the metropolitan area. Subdivision 1 of section 473D.07 directs the Pollution Control Agency to adopt regulations relating to the location of solid waste disposal sites and subdivision 2 of that section provides generally that after January 1, 1970, no county, local governmental unit or person shall operate any disposal site unless a permit has been obtained

from the Pollution Control Agency. Furthermore, under section 473D.05 a metropolitan county may locate and operate a landfill within the limits of the Village of Burnsville without complying with any local zoning ordinances adopted after April 15, 1969.

In short, the location and licensing of landfills is controlled by the Act and the acceptability of a site does not hinge upon a local permit as provided under section 7-3-2 of the ordinance. Therefore, because the permit provisions of 7-3-2 are dependent upon the siting provisions, which as we have established are beyond the authority of the village, and because the section provides for the licensing of "dumps," it is our opinion that the entire section must fail.

Section 7-3-6 is invalid for the same reasons that section 7-3-2 is invalid. Section 7-3-6 restricts all dumping within the village to sites licensed by the village. As noted, a site which is consistent with the comprehensive metropolitan plan and permitted by the Pollution Control Agency may be operated in Burnsville without a permit from the village.

Thus sections 7-3-2, 7-3-3, 7-3-6 and portions of section 7-3-4 of the Burnsville ordinance are invalid because of conflicts with the Act. No conclusions are made with respect to other provisions of the ordinance.

Your question is therefore answered in the affirmative to the extent conflicts exist between the ordinance and the Act.

Very truly yours,

WARREN SPANNAUS
Attorney General

WS:JVdN:tm

JOHN VAN de NORTH
Special Assistant Attorney General

CITIES - Public Improvements under M.S.A. 429.011 - 429.111 - Water Service Lines; Sidewalks - Hastings City Charter

June 26, 1956

6248

The Honorable Roy W. Canfield
City Attorney
Hastings, Minnesota

Dear Sir:

In your letter of May 24, 1956, you state these

FACTS:

"The City of Hastings, upon its own motion and without a petition, proposes to rebuild the sidewalk on both sides of Second Street, the main business street in the city, between Vermillion Street and Tyler Street, a distance of three blocks, pursuant to provisions of MSA Sec. 429.011 to Sec. 429.111.

"Upon information from our city water department we learn that most of the water service lines from the mains to the property line have been installed for many years and are badly corroded and in need of replacement.

"Laws of Minnesota for 1919, Chapter 65, Sec. 4 and the Laws of Minnesota for 1925, Chapter 382, Sec. 7, both now repealed, provided that in the event of improving a street by the laying or construction of paving thereon, the city council might order the property owners to construct branch water service lines from the mains to the property line before the improvement was made, and if they failed to do so the city might construct such service lines and assess the cost thereof against the property. I find no reference in those sections to the reconstruction of a sidewalk nor do I find any other provision of any such nature relating to the construction of sidewalk, though in our situation, this being the main business street of the city and the sidewalks being at least 14 feet wide, the cost of opening the sidewalk and replacing it to its original condition for the purpose of laying a new water service line thereunder, after the new sidewalk has been constructed, would be a considerable amount. There is no such provision in the laws of 1953, Chapter 398 (MSA 429.011 to Sec. 429.111).

59814

You ask this

QUESTION:

"May the city council of the city of Hastings under any presently existing law, require the property owners to construct new water service lines from the water main in the street to their property line before proceeding to construct the new sidewalks along the street above mentioned, and if the property owner fails to do so, may the city of Hastings cause the work to be done and assess the cost thereof against the property benefited?"

OPINION

Your question is answered in the affirmative.

The City Council of the City of Hastings may proceed under M. S. A. 429.011 to 429.111, upon notice and public hearing as therein prescribed, to provide for the construction of water service lines which need replacement and which the property owners refuse to replace, and assess the cost thereof against the property benefited.

M. S. A. 429.021 provides:

"Subdivision 1. The council of a municipality shall have power to make the following improvements:

"(1) To acquire, open, and widen any street, and to improve the same by constructing, reconstructing, and maintaining sidewalks, pavement, gutters, curbs, and vehicle parking strips of any material, or by grading, graveling, oiling, or otherwise improving the same, including the beautification thereof and including storm sewers or other street drainage and connections from sewer, water or similar mains to curb lines.

* * * * *

"(5) To construct, reconstruct, extend and maintain water works systems, including mains, valves, hydrants, service connections, wells, pumps, reservoirs, tanks, treatment plants, and other appurtenances of a water works system, within and without the corporate limits."

"Subd. 2. An improvement on two or more street or two or more types of improvement in or on the same street or streets may be included in one proceeding and conducted as one improvement.

"Subd. 3. When any portion of the cost of an improvement is defrayed by special assessments, the procedure prescribed in this chapter shall be followed unless the council determines to proceed under charter provisions; but this chapter does not prescribe the procedure to be followed by a municipality in making improvements financed without the use of special assessments."

M. S. A. 429.051 sets out the apportionment of costs.

You state these further

FACTS:

"Chapter VIII, Sections 1, 2 and 3 of the City Charter of the City of Hastings, Minnesota, provide as follows:

"'Sec. 1. The city council shall have power to construct or rebuild any sidewalk, sewer, or gutter, and to assess the expense thereof upon the lots or tracts of land abutting upon such improvement or adjacent thereto or benefitted thereby.

"'Sec. 2. Whenever the city council shall deem it necessary to construct or rebuild any sidewalk, sewer or gutter, it shall adopt a resolution to that effect, which resolution shall specify the place or places where such sidewalk, sewer or gutter, is to be constructed or rebuilt, the character of the work to be done, the kind and quality of material to be used, the size, manner, and construction of the same, and the time within which the same shall be completed, which resolution shall be published at least once in the official newspaper of said city. It shall require a two-thirds vote of the members of the city council to adopt such resolution unless a majority of the owners of the lands to be assessed therefor shall petition the council to adopt the same, in which case a majority of the members present and voting shall be sufficient.

"'Sec. 3. When any stone, brick, cement, or concrete sidewalk in the city of Hastings has been constructed by order and direction of the city council

> and the expense thereof assessed to the property benefitted thereby, and whenever any such sidewalk shall have been constructed under the direction or permission of the city council and the cost thereof shall have been paid by the owner of the abutting property, it shall be the duty of the city of Hastings to keep such sidewalk in repair without further expense to the property so benefitted."

In connection therewith, you present this

QUESTION:

> "Assuming that the total cost of the construction of the original sidewalk, constructed many years ago, was paid by the owners of the abutting property, may the city of Hastings assess the total cost of rebuilding the sidewalk above mentioned against the owners of the abutting property, or is the city, under the provisions of Sec. 8 above quoted, required to forever keep the present sidewalk in a state of repair at its own cost and expense?"

OPINION

Your city council may proceed under M. S. A. 429.011 to 429.111 to provide for the rebuilding of the sidewalk and assess the cost thereof against the property benefited. The charter provision as to the duty of the city to repair does not include a duty to rebuild.

"Rebuild" is distinguished from "repair" in 36 W. & P. (Perm. Ed.) 427. Our Minnesota court, in Julius v. Lang, 215 Minn. 106, 110, 9 N. W. (2d) 255, distinguishes "repairs" from "rebuilding":

> "* * * If a building is so changed in plan, structure, or general appearance that it 'might, according to common understanding, in common parlance, be called "a new building,"' then the work is properly called 'building' or 'rebuilding' and not 'repair.'" * *"

M. S. A. 429.111 provides:

> "Any city of the second class operating under special legislative charter and any municipality operating under a home rule charter may proceed either under

this chapter or under its charter in making an improvement unless a home rule charter or amendment adopted after April 17, 1953, provides for making such improvement under this chapter or under the charter exclusively."

Your city charter has not been amended after April 17, 1953, and so your city may proceed either under M. S. A. Chapter 429 (See 429.021, Subd. 3; 429.111, supra) or under its charter to rebuild the sidewalks and assess the cost thereof upon the property benefited based upon the benefits received.

Very truly yours

MILES LORD
Attorney General

JOHN F. CASEY, Jr.
Special Assistant
Attorney General

JFC:DK

511.60. - Responsibility to keep in good operating condition, written order, citations and civil fines.

The entire length and each piece of the lateral, whether or not in active use, shall be maintained and kept in operating condition by the owner adequate to collect and transmit all wastewater that is discharged into the public sanitary sewer system. Any failure to maintain the lateral and keep it in operating condition adequate to collect and transmit all wastewater that is discharged into the public sanitary sewer system may result in the city engineer or city engineer's designee issuing a written order to the owner of the property setting forth the correction or repair required to be done and specifying the date by which such repair is to be completed. The date will be determined by the city engineer or city engineer's designee according to the level of hazard and may vary from fifteen (15) to one hundred eighty (180) calendar days after the date of the notice. The written order will also state any requirements for televising and video recording of the sanitary sewer service lateral by the owner, to determine condition. Any property owner that has received a written order to make sanitary sewer service lateral repairs or corrections and/or submit required televising and video recording or any condition that is potentially non-compliant shall comply with such order by the date specified.

An owner failing to comply with such an order by the date specified may be subject to administrative enforcement pursuant to Chapter 2 of this Code. The City, in its discretion, may also take any other appropriate and available enforcement action provided by law or use any available remedy to make the lateral consistent with city standards or to protect the city's system from a non-compliant lateral. These remedies shall include, but not be limited to: (1) Disconnection of the lateral, and (2) The city or its contractor televising and video recording the service lateral to determine its condition and the city or its contractor making the necessary corrections, repairs or replacements and applying all the costs and related expenses of all such work to the property owner's utility bill, and if not paid, assessing all of the cost of the work including reasonable overhead and attorney fees to the property as a special assessment on the tax rolls. If applied as a special assessment, the assessment procedures will be those outlined in this chapter.

The city shall obtain any owner permissions or other permissions that are required to enter any particular piece of property where work will be performed. If an owner subject to an order under this section disputes the authority or legal reasonableness of the order issued by the city engineer or city engineer's designee, the owner shall serve a written protest and request for a meeting for review of the order with the city engineer or city engineer's designee. The written protest and request shall state all grounds for the protest and shall be served on the city engineer within ten (10) calendar days of receipt of the order. The city engineer or the city engineer's designee shall conduct a meeting with the appellant regarding the order within fifteen (15) calendar days of receiving the protest and request or before the date specified for performance of the order, whichever occurs first.

(Ord. No. 2018-055 , § 9, 10-19-18)

MUNICIPALITIES:
Under M. S. 1949, § 443.12, Municipality is not authorized to construct or finance construction of sewer from lot line to building of lot owner.

387-B-5

January 19, 1951

Mr. Harold M. Moody
Village Attorney for Chisago City
512 Endicott Bldg.
St. Paul 1, Minnesota

Dear Sir:

Your letter of January 12, 1951 addressed to Attorney General J. A. A. Burnquist has been referred to the undersigned.

You inquire as to the following

FACTS

"This village has heretofore constructed a sanitary sewer system and treatment plant and has levied assessments for front foot benefits for the mains in the streets and is making a charge of $1.00 per month for sewer service to the average residence. The property owner has been making his own arrangements and paying for the cost of constructing the sewer from the lot line to his house.

"However, there are a few cases where the property owner does not have the cash to pay for the work done on his own lot and it would help if the Village could with proper agreement with the home owner contract to have this work done and pay this initial cost. The Village would then add an additional monthly charge over a period of two or three years to repay the money spent by the Village which charge would be added to the present monthly rental."

QUESTION

"Has the Village the right to contract for such construction on private property and make such additional charge?"

ANSWER

R. S. 1949, § 443.12 provides that a municipality

> "* * * which has installed or may hereafter install, a system of sewers, sewage pumping station, or sewage treatment or disposal plant or plants for public use, in addition to all other powers granted to it, shall have authority, by an ordinance duly adopted by the governing body thereof, to charge just and equitable rates, charges, or rentals for the use of such facilities and for connection therewith by every person, firm, or corporation whose premises are served by such facilities, either directly or indirectly. * * *"

It should be noted that this provision does not authorize the municipality to construct or to finance the construction by the owner of the sewer from the lot line to his house. There is no other provision of law granting such authority.

It is therefore our opinion that the Village of Chisago City does not have the right to construct or finance the construction of the sewer from the lot line to the owner's house. That is something that must be done by the owner himself.

Very truly yours

J. A. A. BURNQUIST
Attorney General

IMF:MM

IRVIN M. FRISCH
Special Assistant
Attorney General

TAXATION. Mill rate must be uniform throughout district levying taxes. Municipalities: Municipality may acquire sewer and water system installed by private parties in annexed area.

March 7, 1967

59a-36
(gang)

The Honorable Edward J. Gavin
Attorney for City of Glencoe
First National Bank Building
Glencoe, Minnesota 55336

Dear Mr. Gavin:

Your recent letter addressed to the Honorable Douglas Head, Attorney General, states the following

FACTS:

"The city of Glencoe is a city of the 4th class operating under a home rule charter. Immediately South of the city and abutting upon the South boundary of the city is a platted, unincorporated area upon which have been built about fifty homes."

You then ask the following

QUESTIONS:

"Assuming that this area would be annexed, can the mill rate of taxation of this area be less than that paid by the present residents of the city of Glencoe until sewer and water facilities have been installed in this area? If your answer is no, is there any other manner in which tax relief might be given to the residents of the area to be annexed, until such facilities have been installed?

"In the event that water and sewer facilities are installed in this area by its residents and there remained a large indebtedness to be paid for such installation prior to annexation and assuming that annexation would in fact be made, could such remaining indebtedness for such installation so privately made be assumed by the city and then the costs thereof assessed against the benefited property owners in the usual manner?"

OPINION

Minnesota Statutes, Section 275.01, requires that taxes be voted in specific amounts. After the taxes are voted they are certified to the County Auditor, who calculates the tax rate. Minnesota Statutes, Sections 275.07 and 275.08. The rate as calculated is then applied uniformly to all property in the taxing district. Op. Atty. Gen. 59 a-44, June 29, 1964.

In that opinion we said:

> "We are not aware of any statutory provision which authorizes the auditor to fix different rates to be applied to the taxable property in the taxing district. . . ."

Since the opinion was rendered there has been no legislative action which would indicate that we should deviate. Accordingly your question is answered in the negative.

The question of tax relief, as we view it, is actually one of the proper appraisal of the property. This is a question for the assessor.

By virtue of Minnesota Statutes, Sections 412.0321 and 444.075, Subdivision 1, the city would have the power to acquire from the owner or owners the water and sewer lines. The purchase price should be the reasonable value of the property as distinguished from the cost to the owners. Op. Atty. Gen. 624 d-10, April 5, 1965 (copy enclosed).

Assuming that the assumption of the indebtedness is not in excess of the reasonable value of the property and this constitutes payment for the property, the question is answered in the affirmative.

In Op. Atty. Gen. 624 d-10, April 5, 1965, we held that the cost of acquisition of a water and sewer system may be assessed against benefited property. The procedure for assessment set forth in Minnesota Statutes, Chapter 429, must be followed. Collections may be paid into the sinking fund provided for in Minnesota Statutes, Section 429.091, Subd. 4. Moneys in the fund may be used to pay the purchase price or retire the indebtedness.

Yours very truly,

DOUGLAS M. HEAD
Attorney General

JEROME J. SICORA
Assistant Attorney General

JJS:db

SEWERS: Municipal Assessments - In the interest of public health, safety and welfare, Minnesota Municipality may control the extent of the use and the connection into the public sewer system from any and all sources. Authorized link-up with a private system is in the nature of a license, unless otherwise provided and can be terminated by action of the municipal governing body: Charges to be assessed the citizens of the municipality being served by a sewer line may be based upon availability of service and the possibility of connection to the public system. M.S. 1967 § 444.075, Subd. 3 and 5.

July 28, 1969

387b-1

The Honorable Harvey E. Gardner
Village of Janesville Attorney
Janesville, Minnesota 56048

Dear Mr. Gardner:

In your letter to Attorney General Douglas M. Head you present the following

FACTS

The village council of Janesville has received a petition to install a sanitary sewer. The proposed sewer runs parallel to an existing private sewer line which the village council had previously authorized, and had collected a rental charge for link-up with the municipal sewer system. The owner of the private sewer system objects both to the installation of the new municipal line and to having his property assessed, as he claims the new line will not benefit his property.

You then ask the following

QUESTIONS

I. Does the village council of Janesville have the authority to order authorized private sewer link-ups disconnected when the municipality constructs a public sanitary sewer system making available municipal service to the area previously served by the private system?

II. If question number one is answered in the affirmative, can the village council assess the property previously served by the private sewer line that was connected to the public sewer system?

I. Minnesota Statutes 1967 § 444.075 authorizes and empowers the village council to construct, repair and maintain a sanitary sewer system for the benefit of the public's health, safety and welfare. The establishment and maintenance of a sewer system by a municipality is regarded as an exercise of the general "police power" to act in the interest of public health, safety and welfare. This power extends to the establishment of public control over private sewer systems located on public property. Lee v. Scriver, 143 Minn. 17, 172 N.W. 802, (1919), Op. Atty, Gen. no. 387-C-3, of December 7, 1954.

The power to construct a public sewage system is not exhausted when it is once exercised, nor is the power exhausted when the public authority grants a private person the option of exercising the municipal power to establish a sewer system. Permission to a private party to construct a private sewer system, even in a public street, does not preclude the municipal authority from subsequently constructing its own system. In re Assessment of Improvement of Lateral Sewer in Amundson Avenue, Mount Vernon, 24 Misc. 2d 618, 194 N.Y.S.2d 279, (1959); McQuillin Municipal Corporations, vol. 11, sec. 31.11.

In addition to the power of the village council to provide for a sewage system, M.S. 1967 § 444.075, subd. 5 authorizes the village to permit any person to connect a private sewer system

with existing public facilities. This grant of use is discretionary with the village governing body as to the terms and contractual relationships concerning the sewer link-up. Inherent in the village government's power to enter into a contract for the connection of a private sewer system with the public sewer facilities is the power to terminate such an arrangement subject to existing contractual and property rights relating to the original permit. Unless the right to connection is in the form of an easement or perpetual grant, the right given to a property owner to connect with a municipal sewer is in the nature of a license. It does not become a vested right simply because of the expense incurred by the owner of the private system connecting his system to the public system. Ericksen v. Sioux Falls, 70 S.D. 40, 14 N.W.2d 89 (1944), McQuillin Municipal Corporations, vol. 11, sec. 31.31. In the interest of public health, safety and welfare, the municipality may control the extent of the use and the connection into the public sewer system from any and all sources. Your first question is answered in the affirmative.

II. The former general rule as to the legality of assessments for public improvements such as a municipal sewer system requires a benefit to the property being assessed. The question as to whether a benefit was received by the property to be assessed was ordinarily a question of fact. People ex rel. Delaware &.

and W.R.R. Co. v. Wildy, 262 N.Y. 109, 186 N.E. 410, (1933). However, in 1957 the Minnesota legislature established a different standard for charges and assessments for the construction, maintenance and use of municipal sewer systems. Municipalities were authorized in the construction, maintenance and repair of the public sewer system to ". . . impose just and equitable charges for the use and for the availability" of those systems. Furthermore M.S. 1967 § 444.075, Subd. 3, now provides that ". . . minimum charges for the availability of water or sewer service may be imposed for all premises abutting on streets or other places where municipal mains or sewers are located, whether or not connected thereto . . ." (language added by Laws 1957, Chapter 608). In your inquiry, you state that the property to be assessed abuts the public street where the public sewer is to be located. In the exercise of a municipality's police power in the interest of the public's health, safety and welfare, the legislature has authorized municipalities to assess for the availability as well as the construction, use and connection into the public sewer system. The charges to be assessed the citizens of the municipality being served by a sewer line may be based not only on actual use or actual connection, but also upon availability of the service and the possibility of connection to the public system. This added basis for assessment facilitates early

construction of sewage systems in anticipation of further and future development, thus making possible the orderly and timely availability of this service which is so essential to users and to the community as a whole. Your second question is answered in the affirmative.

Very truly yours,

DOUGLAS M. HEAD
Attorney General

LANE C. FRIDELL
Special Assistant
Attorney General

DMH:LCF:glf

INFORMATION MEMO

Special Assessment Toolkit

Discusses city authority to levy special assessments for local improvements like streets, waterworks, sanitary sewer and more. It defines special assessments, gives a synopsis of the procedure, discusses challenges by property owners, levying and collecting assessments, borrowing, making corrections, and applicability to tax exempt and railroad properties.

This toolbox icon marks the link to a downloadable tool. All tools are listed and available in Appendix B, Index of forms for special assessments.

Take action with Information Memo toolkits. They contain the forms, samples or models a city can use to take action on a process or project. Look for the toolkit icon so you can download that tool to use or modify it for your city.

RELEVANT LINKS:

I. What are special assessments?

Special assessments are a charge imposed on properties for a particular improvement that benefits the owners of those selected properties. The authority to use special assessments originates in the state constitution which allows the state legislature to give cities and other governmental units the authority "to levy and collect assessments for local improvements upon property benefited thereby." The legislature confers that authority to cities in Minnesota Statutes Chapter 429. Court decisions and attorney general opinions interpreting the statute add complexity to the issue.

Minn. Stat. ch. 429.

A charter city may choose to use either Chapter 429 or provisions of the charter to assess for local improvements but even so state law requires that charter cities follow state law in certain steps of the proceedings, as discussed subsequently.

See Section VIII: *Charter cities.*

To ensure full protection for property owners, state law and courts applying that law insist on strict compliance with complex procedural requirements. Because these requirements have legal implications, city councils should have the city attorney guide assessment proceedings.

Special assessments have three distinct characteristics:

- They are a levy a city uses to finance, or partially finance, a particular public improvement program.
- The city levies the charge only against those particular parcels of property that receive some special benefit from the program.
- The amount of the charge bears a direct relationship to the value of the benefits the property receives.

A. What do special assessments pay for?

Special assessments have a number of important uses:

- The most typical use is to pay for infrastructure in undeveloped areas of a city, particularly when the city is converting new tracts of land to urban or residential use. Special assessments frequently pay for opening and surfacing streets; installing utility lines and constructing curbs, gutters, and sidewalks.
- Special assessments may partially underwrite the cost of major maintenance programs. Cities often finance large scale repairs and maintenance operations on streets, sidewalks, sewers, and similar facilities in part with special assessments.
- Another use of special assessments is the redevelopment of existing neighborhoods. Cities use special assessments when areas age and the infrastructure needs updating.

B. The special benefit test

Special assessments reflect the influence of a specific local improvement on the value of selected property. No matter what method the city uses to establish the amount of the assessment, the real measure of benefit is the increase in the market value of the land because of the improvement.

Buzick v. City of Blaine, 505 N.W.2d 51 (Minn. 1993).

Under the special benefit test, special assessments are presumptively valid if:

EHW Properties v. City of Eagan, 503 N.W.2d 135 (Minn. Ct. App. 1993). *Schumacher v. City of Excelsior*, 427 N.W.2d 235 (Minn. 1988). *Tri-State Land Co. v. City of Shoreview*, 290 N.W.2d 775 (Minn. 1980).

- The land receives a special benefit from the improvement.
- The assessment does not exceed the special benefit measured by the increase in market value due to the improvement.
- The assessment is uniform as applied to the same class of property, in the assessed area.

Because special assessments are appealable to district court, it is important that the city considers the benefit to the property as a result of the specific improvement. Councils can and sometimes do this by retaining a qualified, licensed appraiser. At the hearings on the assessments, the council may choose to have the appraiser present a written or oral report on the increase in market value as a result of the improvement.

Buettner v. City of St. Cloud, 277 N.W.2d 199 (Minn. 1979). *Southview County Club. v. City of Inver Grove Heights*, 263 N.W. 2d 385 (Minn. 1978). Minn. Const. art X, § 1.

A special assessment that exceeds the special benefit is a taking of property without fair compensation and violates both the Fourteenth Amendment of the United States Constitution and the Minnesota Constitution. Property assessed must enjoy a corresponding benefit from the local improvement. This is a different concept than property tax valuation. The Minnesota Constitution states:

"The Legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to cash valuation." As the courts have made clear, the special benefit is the increase in market value of the land as a result of the improvement.

Ewert v. City of Winthrop, 278 N.W.2d 545 (Minn. 1979).

If a city's assessment is challenged in district court, the assessment roll constitutes prima facie (or initial) proof that an assessment does not exceed the special benefit. The party contesting the assessment must introduce evidence sufficient to overcome that presumption. If the evidence as to the special benefit is conflicting it is the responsibility of the district court to determine whether the assessment exceeds the market value increase and, if so, by what amount.

Bisbee v. City of Fairmont, 593 N.W.2d 714 (Minn. Ct. App. 1999). *Quality Homes, Inc. v. Village of New Brighton*, 289 Minn. 274, 193 N.W.2d 555 (1971). *Anderson v. City of Bemidji*, 295 N.W.2d 555 (Minn. 1980). *Village of Edina v. Joseph*, 264 Minn. 84, 119 N.W.2d 809 (1962).

For this reason, the city's assessment method should at least approximate market-value analysis. A formula that does not consider an analysis of the increase in market value of each parcel may be invalid. For instance, a method that bases assessment amounts on the average costs of street improvement projects from previous years and doesn't take into consideration the cost of the currently proposed project has been found arbitrary and invalid on its face.

Roberts v. City of Crystal Lake, No. A03-172 (Minn. Ct. App. Nov. 4, 2003) (unpublished decision). *Allen v. City of Minneapolis*, No. C1-02-1506 (Minn. Ct. App. April 23, 2003) (unpublished decision). *Haverberg v. City of Madison*, No. C8-02-1146 (Minn. Ct. App. Jan. 28, 2003) (unpublished decision).

Courts often uphold special assessments based on evidence from a city's qualified and licensed appraiser that the assessment did not exceed the increase in market value as a result of the improvement.

Eagle Creek Townhomes v. City of Shakopee, 614 N.W. 2d 246 (Minn. Ct. App. 2000). *Shorma Family Trust v. Maine Township*, No. C9-01-1548 (Minn. Ct. App. April 16, 2002) (unpublished decision). *Belanger v. City of Long Lake*, No. C1-99-1347 (Minn. Ct. App. May 9, 2000) (unpublished decision). *Reiling v. City of Lino Lakes*, No. C7-99-1594 (Minn. Ct. App. Apr. 11, 2000) (unpublished decision). *Anderson v. City of Buffalo*, No. C7-99-641 (Minn. Ct. App. Jan. 18, 2000) (unpublished decision). *Rohling v. City of Champlin*, No. C3-98-1209 (Minn. Ct. App. Feb. 16, 1999) (unpublished decision). *In re Appeal by Eastside Development*, C4-01-582; (Minn. Ct. App. 2001) (unpublished decision).

However, in many published and unpublished opinions, the appellate courts have routinely upheld decisions that went against the city because the district court found a lack of adequate evidence of a market value increase equal to or exceeding the amount of the special assessment.

Especially with regard to street improvements, it can be difficult to demonstrate that there is an increase in market value as a result of the resurfacing or reconstruction, though not impossible, depending on the circumstances.

In re Appeal by Eastside Development, No.C4-01-582 (Minn. Ct. App. Sept. 11, 2001). *Blomquist v. City of Eagan*, No. C2-00-1591 (Minn. Ct. App. May 1, 2001) (unpublished decision).

Johnson v. City of Eagan, 584 N.W.2d 770 (Minn. 1998).
In re Village of Burnsville, 310 Minn. 32, 245 N.W.2d 445 (Minn. 1976).

When a court disallows a portion of an assessment because it was in excess of the benefit to the specific property, the city may not try to recoup the disallowed amount through another method–such as by imposing a charge for a utility line on only that property and not on the other properties involved in the assessment. When the cost of an improvement exceeds the benefit, the difference must not be borne by a particular property, but instead by the city as a whole.

Nordgren v. City of Maplewood, 326 N.W.2d 640 (Minn. 1982).
Minn. Stat. § 444.075.
Smith v. Spring Lake Township, No. C0-01-370 (Minn. Ct. App. Nov. 20, 2001) (unpublished decision).

The Minnesota Supreme Court has held that connection charges, based on a different state law, are not assessments and may be imposed on top of prior assessments. One unpublished Court of Appeals decision, however, held that the cost of the connection charges should be included with the amount of special assessments in determining the special benefit to the property.

Farmers Ins. Grp. v. Comm'r of Taxation, 153 N.W.2d 236 (Minn. 1967) (Only those cases where regulation is the primary purpose of a revenue-raising law can be specially referred to the police power.)
Am. Bank v. City of Minneapolis, 802 N.W.2d 781 (Minn. Ct. App. 2011).
First Baptist Church v. St. Paul, 884 N.W.2d 355 (Minn. 2016).

Id. at 365.

Applicability of the special benefit test to a given assessment relies on whether it arises out of regulation of conduct. The Minnesota Court of Appeals has held that the special benefit test does not apply to unpaid special charges collected in the form of special assessments when defraying the cost of providing "police power" services such as removal of public nuisances. However, the Minnesota Supreme Court has held a right-of-way assessment largely collected to address "standard wear and tear on the streets, caused largely by Minnesota weather and use by the general public" with services such as snow plowing and ice control, is not a regulation of landowner conduct. An assessment such as this, the Court held, that is "annually recurring, imposed nearly city wide, benefiting largely the general public traveling the rights-of-way, with diverse services largely provided on an 'as needed' basis," is charged under the taxing power and is subject to the special benefit test.

C. Practical points to consider

The following three strategies help avoid the problem of proceeding on estimates that do not equal actual revenue.

1. Coordinating procedures

Chapter 429 allows coordinating the timelines of the special assessment and competitive bidding processes in a way that may protect the city from successful appeals and ensuing budget shortfalls. The city may determine the assessment amount and prepare the assessment roll before work on the local improvement even begins.

Minn. Stat. § 471.345.
Minn. Stat. § 429.041, subd.1.

The competitive bidding threshold for all cities, regardless of size, is $175,000. Thus, special assessment projects must be bid if the estimated cost exceeds $175,000. If needed, the city may advertise for bids and allow sufficient time after the bid closing date to permit the city to prepare the assessment roll based on the lowest responsible bid the city receives and to hold the assessment hearing (the second hearing) based on that low bid. The city then proceeds with the actual work of the project after certification of the assessment roll and the 30-day appeal period is over.

Using this "coordinated procedure" means the city knows both important numbers up front -- how much money will be available through special assessments and the cost of the local improvement. Because the time for appeals is over before the contract is issued, the city will not need to cover potential budget shortfalls that may occur if a property owner successfully challenges a special assessment or the lowest bid comes in higher than expected. This Guide and the forms attached track this coordinated procedural format.

For larger projects in particular, city councils should seriously consider having provisions in the specifications that give the city more time to accept or reject bids. Either the city can make the improvement contract conditional on the absence of objections filed within 30 days after the assessment hearing, or the city may specify (in the bid documents, or specifications) that the improvement work will not begin until 90 days after the city receives bids. Under both strategies, the council would not enter into a binding contract, nor would any improvement work start until after the improvement and assessment hearings and the time for appeals elapses.

2. Specially assessing less of the cost

See Section II-A-2: *By council.*

The city can also avoid appeals by paying a substantial portion of the cost of all improvements out of general funds. The larger the portion of cost the city assumes, the less the chances that any individual assessment would exceed the benefit from the improvement as measured by the increase in market value.

Indeed, the council can proceed with the proposed assessment based on estimates -- and plan to use monies from a reserve fund from general taxes and other uncommitted sources of revenue making up any difference between the assessments and the project cost.

3. Waivers

Ruzic v. City of Eden Prairie, 479 N.W.2d 417 (Minn. Ct. App. 1991).
Minn. Stat. § 429.081.
Minn. Stat. § 462.3531.

The council might obtain, under certain circumstances, waivers of rights to appeal before entering into the contract and ordering the improvement. Any waiver of rights is effective only for the amount of assessment agreed on by the city and property owners or developers.

See LMC model, *Agreement of Assessment and Waiver* (Form 2).

An effective waiver of rights of appeal is essentially a contract and may contain additional conditions providing for the increases in assessments that will not be subject to appeal; consult the city attorney for specific advice on effective waivers.

D. Pros and cons of special assessments

Following is a summary of the advantages and disadvantages of special assessment financing. The council can avoid many of the disadvantages with adequate plans and a long-range capital improvement program.

Advantages of special assessment financing include:

- Special assessments are generally a dependable source of revenue.
- Special assessments are a means of raising money outside city debt and general property taxes. (Special assessment bonds do not count toward statutory debt limitations).
- Special assessments provide a means of levying charges for public services against property otherwise exempt from taxation.
- Special assessments lower the cost to the community of bringing undeveloped land into urban use.
- Charging the property owner for the benefit received prevents or minimizes the possibility that a property owner will reap a financial profit from the improvement at the expense of the general taxpayer.

Disadvantages of special assessment financing include:

- The difficulty and expense in establishing the special benefit to the property.
- The difficulties in special assessment administration. The administrative procedures require careful execution in order to avoid litigation.
- Cities have at times used special assessments to pay for premature public improvements. Because the city generally bears some of the cost of every public improvement, land speculators sometimes urge councils to do unjustifiable special assessment programs.
- The availability of special assessment financing often tempts city officials to underwrite the cost of governmental programs that should be an obligation of the entire city.
- Unless special assessments conform to a city's long-term financial and capital improvement plans, they can subject a city to two serious financial dangers. First, if a city frequently undertakes special assessment bond issues backed by the full faith and credit of a city in an unplanned manner, city credit might be overextended. This leads to higher interest charges on all city and school district borrowing and increases the possibility of default.

Second, placing too heavy a burden on individual property owners (with special assessments and regular property taxes) runs the risk of increasing tax delinquencies and potentially jeopardizes a city's credit and borrowing position.

- From the council's point of view, the public's reaction to a proposed special assessment might be the most important determinative factor. While taxpayer resistance is usually minimal, this is not true in every instance. Special assessment programs receive much greater public support if the council adequately informs people of its intentions to make the improvement, the benefit the improvements will provide, and the necessary financial demands.

E. Special assessment policies

See Section I-B: *The special benefit test.*

Some cities have attempted to minimize the controversy over special assessment financing by adopting a special assessment policy (not an ordinance). Whatever the policy provides it must adhere to the rule that the amount of a special assessment cannot exceed the special benefit to the property as measured by increase in market value due to the improvement.

With frequent turnover on the council a policy may increase consistency in the use of financing improvements with special assessments. Justifying council decisions in a particular case may also be easier with a policy in place. An updated and current special assessment policy may also facilitate the development of a long-range capital program for public improvements.

A policy should reflect basic procedural decisions on financing local improvements -- decisions that the council must think through carefully, taking into account past practice, equity, revenue productivity, political acceptability, and the rest of the city's revenue system. Practically speaking, many city special assessment policies provide procedures for city-specific issues, such assessing oddly shaped lots, corner lots, lots with septic systems and what method of assessment the city uses. (E.g. including but not limited to the area method of assessment, unit method or a per lot assessment). Cities may wish to work with citizens, appraisers, an attorney and city engineers to develop a special assessment policy that fits the unique needs of their city.

F. Programs cities may finance with special assessments

Generally, cities use special assessments to at least partially finance a variety of public improvements. Cities may also use special assessments to collect certain unpaid service charges, discussed in the next section.

1. Local improvements

Minn. Stat. § 429.021.

Cities are statutorily authorized to finance the following public improvements at least partially through special assessments:

Minn. Stat. § 429.021, subd. 1(1).

- **Streets, sidewalks, alleys, curbs and gutters:** Acquiring, opening, and widening streets and alleys; constructing, reconstructing, and maintaining sidewalks, streets, gutters, curbs, and vehicle parking strips. (These projects may include charges for beautification, storm sewers, or other street drainage systems, and installation of connections from utilities to curb lines).

Minn. Stat. § 429.021, subd. 1(2).

- **Storm and sanitary sewer systems:** Acquisition, development, construction, reconstruction, extension, and maintenance of storm and sanitary sewer systems including outlets, treatment plants, pumps, lift stations, and storm water holding areas and ponds.

Minn. Stat. § 429.021, subd 1(3).

- **Steam heating mains:** Construction, reconstruction, extension, and maintenance.

Minn. Stat. § 429.021, subd. 1(4).

- **Street lighting systems:** Installation, replacement, extension, and maintenance.

Minn. Stat. § 429.021, subd. 1(5).
Minn. Stat. § 444.075.
A.G. Op. 387-B-10 (Mar. 8, 1993).
Minn. Stat. § 429.091, subd. 7a.

- **Waterworks systems:** Construction, reconstruction, extension, and maintenance. (This includes all appurtenances of a waterworks system, even the treatment plant). Special assessments may also pay for the infrastructure necessary to maintain water, sewer, and storm sewer systems; and for the payment of any obligations issued to pay the costs of the waterworks facilities and systems or to refund bonds issued for those purposes.

Minn. Stat. § 429.021, subd. 1(6).

- **Parks, playgrounds, and recreational facilities:** To acquire, improve and equip parks, open space areas, playgrounds, and recreational facilities within or without the corporate limits.

Minn. Stat. § 429.021, subd 1(7).

- **Street trees:** Planting, trimming, care, and removal.

Minn. Stat. § 429.021, subd 1(8).

- **Abating nuisances:** Includes, but not limited to, draining and filling swamps, marshes, and ponds on public or private property.

Minn. Stat. § 429.021, subd. 1(9).

- **Dikes and other flood control works:** Construction, reconstruction, extension, and maintenance.

Minn. Stat. § 429.021, subd. 1(10).

- **Retaining and area walls, including highway noise barriers:** Construction, reconstruction, extension, and maintenance.

Minn. Stat. § 429.021, subd. 1(11).
Minn. Stat. § 429.031, subd. 3.

- **Pedestrian skyway systems:** Construction, reconstruction, maintenance, and promotion of bridges, overpasses, hallways, plazas, elevators, and escalators on public or private property. A petition for a pedestrian skyway system must meet unique statutory requirements.

Minn. Stat. § 429.021, subd. 1(12).

- **Underground pedestrian concourses:** Construction, reconstruction, maintenance, and promotion of tunnels, arcades, plazas, elevators, and escalators.

Minn. Stat. § 429.021, subd. 1(13).

- **Malls:** Acquisition, construction, improvement, alteration, extension, operation, maintenance, and promotion of public malls, plazas or courtyards.

Minn. Stat. § 429.021, subd. 1(14).

- **District heating systems:** Construction, reconstruction, extension, and maintenance of district heating systems.

Minn. Stat. § 429.021, subd. 1(15). Minn. Stat. § 429.031, subd. 3.

- **Fire protection systems:** Construction in existing buildings upon petition of owners. A petition for a fire protection system, on public or private property, must meet unique statutory requirements.

Minn. Stat. § 429.021, subd. 1(16).

- **Highway sound barriers:** Acquisition, construction, reconstruction, improvement, alteration, extension, and maintenance of highway sound barriers.

Minn. Stat. § 429.021, subd. 1(17).

- **Gas and electric distribution facilities:** Improvement, construction, reconstruction, extension, and maintenance of gas and electric distribution facilities owned by a municipal gas or electric utility.

Minn. Stat. § 429.021, subd. 1(18).

- **Markers relating to 911 services:** Purchase, installation, and maintenance of signs, posts, and other address markers related to the operation of enhanced 911 services.

Minn. Stat. § 429.021, subd. 1(19).

- **Internet access:** Improvements, construction, extension, and maintenance of facilities for Internet access, and other communication purposes, if the council finds that the facilities:
  - Are necessary to make Internet access (or other communications services) available that are not and will not be available through other providers or the private market in the reasonably foreseeable future.
  - Provide services that will not compete with service provided by private entities.

Minn. Stat. § 429.031, subd. 3.
Minn. Stat. § 429.011, subd. 16.

- **On-site water contaminant systems:** Installation of publicly or privately owned pipes, wells, and other devices and equipment in or outside a building for the primary purpose of eliminating water contamination caused by lead or other toxic or health threatening substances in the water. A petition for an on-site water contaminant system must meet unique statutory requirements.

Minn. Stat. § 429.021, subd. 1(20).
Minn. Stat. § 429.031, subd. 3.

- **Burying overhead utility lines within the public right-of-way:** Cities can only finance the burying of overhead utility lines with special assessments in response to a petition from all the abutting landowners. In addition, burying the lines in the public right of way must exceed the utility's design and construction standards, or those set by law, tariff, or franchise. In that situation all or a portion of the costs associated with burying the lines, or altering a new or existing distribution system, can be specially assessed as agreed to with an electric utility, telecommunications carrier, or cable system.

Minn. Stat. § 459.14.

- **Parking facilities:** Acquisition and construction.

Minn. Stat. §§ 216C.435-.437.
Minn. Stat. § 429.021, subd. 1(21).
Minn. Stat. § 429.101, subd. 1(c).

- **Energy improvement programs:** Cities may finance cost-effective energy improvements to residential dwellings, or commercial or industrial buildings, through revenue bonds funded by special assessments. Among other requirements of such a program is a petition by all owners of the qualifying real property requesting collections of repayments as special assessments as with other unpaid charges assessable under chapter 429.

Joint Indep. Sch. Dist. No. 287 v. City of Brooklyn Park, 256 N.W.2d 512 (Minn. 1977).
In re Village of Burnsville, 310 Minn. 32, 245 N.W.2d 445 (Minn. 1976).

Chapter 429 defines a number of projects as local improvements that may benefit the entire city, such as a sewage disposal plant, interceptor sewer or water treatment plant. The constitutional provision authorizing special assessments for local improvements may allow these kinds of projects as long as they confer a special benefit on assessed property that the improvements do not confer upon the city as a whole.

2. Assessing unpaid special service charges

Minn. Stat. § 429.101, subds. 1, 2.
Minn. Stat. § 412.221, subd. 6.

Cities may, through an ordinance, require that property owners perform certain property-related special services -- or the ordinance can allow that the city performs the special services and sends a bill to property owner for the work. If the property owner fails to pay, the city may assess for all or any part of the unpaid charges as a special assessment against the property benefitted. When assessing unpaid service charges, cities must follow some, but not all, of the special assessment notice, hearing and calculation procedures in Chapter 429.

Minn. Stat. § 429.101, subd. 2.
Sykes v. Rochester, 787 N.W.2d 192 (Minn. Ct. App. 2010).

The law specifically lists the special services that cities can specially assess if not paid by the property owner or occupant. Statutory cities cannot add the following to this list, but charter cities may be able to add to it by charter amendment:

Minn. Stat. § 429.101, subd. 1(a)(1).
Minn. Stat. § 429.101, subd. 1(a)(2).
Minn. Stat. § 429.101, subd. 1(a)(3).

- Snow, ice and rubbish removal from sidewalks.
- Weed elimination from streets and private property.
- Removal or elimination of public health or safety hazards from private property, excluding any hazardous or substandard buildings.

Minn. Stat. § 429.101, subd. 1(a)(4).

- Installation and repair of water service lines, and sprinkling and dust treatments.
- Trimming and care of trees, and removal of unsound trees.
- Treatment and removal of insect-infested or diseased trees on private property and the repair of sidewalks and alleys.
- Operation of a street lighting system.
- Operation and maintenance of a fire protection or a pedestrian skyway system.
- Inspections related to a municipal housing maintenance code violation.
- Recovery of payments to rehabilitate and/or maintain safe and habitable housing conditions over the useful life of a house or land - including payment of utility bills and other services, even if provided by a third party in rental situations.
- The recovery of delinquent vacant building registration fees under a municipal program designed to identify and register vacant buildings.
- Garbage collection and disposal.

Minn. Stat. § 429.101, subd. 1(a)(5).
Minn. Stat. § 429.101, subd. 1(a)(6).
Minn. Stat. § 429.101, subd. 1(a)(7).
Minn. Stat. § 429.101, subd. 1(a)(8).
Minn. Stat. § 429.101, subd. 1(a)(9).
Minn. Stat. § 429.101, subd. 1(a)(10).
Minn. Stat. § 429.101, subd. 1(a)(12).
Minn. Stat. § 443.015.

Minn. Stat. § 429.101, subd 1(b).

Again, a city cannot exercise this authority until passing an authorizing ordinance providing that such matters are the responsibility of the property owner. (The ordinance cannot require that property owners perform street sprinkling or other dust treatment, alley repair, tree trimming, care, and removal or the operation of a street lighting system.)

Minn. Stat. § 429.101, subd. 2. See also *Sykes v. Rochester*, 787 N.W.2d 192 (Minn. Ct. App. 2010). *Am. Bank v. City of Minneapolis*, 802 N.W.2d 781 (Minn. Ct. App. 2011).

Unpaid charges collected as special assessments are subject to the same notice, hearing, and appeal requirements as any other special assessments. They are not, however, subject to the special benefit test.

Minn. Stat. § 429.101, subd. 3.

Cities may issue bonds or other debt instruments to finance the cost of special services in the same manner as for local improvements, with three modifications:

- These obligations may not run for more than two years.
- The amount of debt a city issues at any one time may not exceed the estimated cost of the work it will do during the next six months.
- The council must set up a separate fund for each of the different services financed through this procedure.

II. Synopsis of procedures

All model forms in a compressed file.

The following discussion is a guide, but not legal advice, as to the proper fulfillment of special assessment procedures. The council should consult an attorney familiar with the individual project to make sure the city follows all legal procedures.

Gadey v. City of Minneapolis, 517 N.W.2d 344 (Minn. Ct. App. 1994).

Minn. Stat. ch. 429.

If the proper procedures are not followed, a court may set the assessment aside and order a reassessment.

In general, Chapter 429 proposes the following steps.

A. Initiation of proceedings

Minn. Stat. § 429.031.

Either a petition from affected property owners or the council initiates Chapter 429 proceedings.

1. By petition

Minn. Stat. § 429.031, subd. 1(f).

LMC model, *Petition for Local Improvement – more than 35% of property owners* (Form 3).

If the council chooses to proceed with an improvement based on a petition (they are not required to do so) it must have the signatures of the owners of at least 35 percent in frontage of the property bordering the proposed improvements. Computing the 35 percent is not always easy.

A.G. Op. 396g7 (June 9, 1958).

The Minnesota Attorney General has opined that the 35 percent requirement applies to the entire area petitioning for the local improvement so each specific street need not meet it.

City of Brainerd v. Brainerd Investments Partnership, 827 N.W. 2d 752 (Minn. 2013).

A.G. Op. 387-B-10 (June 29, 1954). A.G. Op. 408-C (October 28, 1954).

The Minnesota Supreme Court finds that the state may be an "owner" for purposes of this 35 percent petition. (The Court finds the statute unambiguous and refuses to consider extrinsic evidence by looking at three Attorney General Opinions. These Opinions suggested that neither the state nor the city is an "owner" for purposes of this 35 percent petition.)

If the council relies upon the petition as its basis for proceeding, it cannot make a substantial change in the nature of the improvement from that asked for in the petition. For example, it may not order an improvement for water and sewer when the petition has asked for water alone, or add curb and gutter to a petition for blacktop.

In some cases, for example buried utility lines, 100 percent of landowners must petition for an improvement.

LMC model, *Petition for Local Improvement - 100% of property owners* (Form 1).
and
LMC model, *Agreement of Assessment and Waiver of Irregularity and Appeal* (Form 2).

Minn. Stat. § 429.035.
Minn. Stat. § 429.036.

LMC model, *Resolution Declaring Adequacy of Petition and Ordering Preparation of Report* (Form 4).

The council must pass and publish a resolution determining whether the petition is legally sufficient or not. Any person directly affected by the resolution may challenge the council's determination (as to the legal sufficiency of the petition) in district court. The appeal must be made within 30 days and include a bond of $250.

2. By council

Minn. Stat. § 429.031, subd. 1(f).

LMC model, *Alternate Resolution Ordering Preparation of Report on Improvement* (Form 4-Alt).

See Section II-F-1: *Voting requirements for ordering the improvement.*

The council certainly may act on its own initiative in proposing a local improvement and ordering a feasibility report. As a practical note, an extraordinary majority vote from the council is not necessary to initiate the proceedings. (Later in the process, a four-fifths council vote will be required to pass the resolution ordering an improvement initiated by council). The council must calculate the cost of the improvement or direct staff to do so.

B. Feasibility report

Minn. Stat. § 429.031, subd. 1(b).

Whether initiated by petition or by council, Chapter 429 requires that the city engineer, or another person with similar skills, prepare what is commonly called a "feasibility report." (Bond attorneys require a certified copy of a feasibility report before issuing bonds to finance a local improvement.) The feasibility report must cover such factors as whether the project is necessary, the availability of money in the general fund to pay the city's share of the cost, an estimate of that cost, whether the improvement is cost effective, and any other information necessary for council consideration.

Minn. Stat. § 429.031, subd. 1(d).

LMC model, *Resolution Receiving Feasibility Report and Calling Hearing on Improvement* (Form 5).

Note: If someone other than a city employee prepares the report, the law prohibits using a percentage of the costs of the proposed improvement as a basis to pay for the report. The feasibility report must also include the estimated cost of the improvement as recommended. Since a reasonable estimate of the total amount to be assessed, and a description of the methodology used to calculate individual assessments for affected parcels, must be available at the hearing, it could be part of the commissioned report. The feasibility report is integral to the assessment process. Best practice suggests that the city council pass a resolution receiving the report and provide preliminary notice of the improvement.

C. Initial considerations

Overall the law requires two public hearings commonly known as an improvement hearing and an assessment hearing; in between these two public hearings councils may order the improvement, decide how to construct the project and tabulate an assessment roll. This Guide outlines some initial considerations, describes the improvement hearing, discusses ordering and constructing the improvement; and subsequently addresses the assessment hearing.

1. Determining benefit districts

Determining what area benefits from improvement projects, or the area against which the city will levy assessments, is a major policy decision for the city council. The benefit district (or assessment district) varies with the kind of improvement. For some improvements, such as a new water tank, the area benefited might be very large. In levying an assessment to finance the tank's construction, for example, the council might assess the entire area the tank services. The special benefit test still applies. City staff, city engineers, consultants and attorneys may provide the basis for council to determine what area or district to assess for a specific improvement because that area benefits from the improvement.

See Section I-B: *The special benefit test.*

2. City's share

Minn. Stat. § 429.061, subd. 1.

LMC model, *Resolution Declaring Cost to Be Assessed and Ordering Preparation of Proposed Assessment* (Form 12).

Minn. Stat. § 429.051, applied in *In Re Mackubin St.*, 279 Minn. 193, 155 N.W.2d 905 (1968).

At any time before or after the city actually incurs expenses for the improvement, the council must pass a resolution determining how much the city plans to pay (above and beyond what it may decide to pay for city-owned property in the assessment area) and separate from amounts to be assessed. Cities may assess the cost of an improvement to property benefited whether or not any part of the cost of the improvement is paid from the county state-aid highway fund, the municipal state-aid street fund or the trunk highway fund. Best practice suggests the council work with an appraiser and an attorney to determine the appropriate city share of a particular project.

The council must also decide, with consultation from staff and consultants, which cost allocation methodology most nearly equates costs and benefit. Such methodology is often described as unit or area charges and involves classification of assessed properties. (The third prong of the benefit test requires a uniform assessment applied to the same class of property, in the assessed area). Methodology may address the treatment of corner and odd-shaped lots. Many cities have adopted a policy of paying for all intersections, crosswalks, curb returns, and similar parts of public improvement projects not immediately fronting on private property. Other communities distribute the same costs over the benefited area.

See Section I-B: *The special benefit test.*

3. Non-abutting property

Normally, cities assess all properties abutting or bordering on the improvement, but the council may wish to levy assessments against adjacent, non-abutting properties if the properties benefit from the improvement.

4. Service laterals

LMC model, *Resolution Ordering Installation of Service Lateral for Sewer and Water in Advance of Street Paving* (Form 8).

Minn. R. 7560.0100, subp. 12.
Minn. R. ch. 7560.

See LMC information memo, *Acquisition and Maintenance of City Streets*.

City utility ordinances often require that property owners maintain private water or sewer service laterals. "Service lateral" means an underground facility that is used to transmit, distribute, or furnish gas, electricity, communications, or water from a common source to an end-use customer. A service lateral is also an underground facility that is used in the removal of wastewater from a customer's premises. When an improvement project requires new service laterals, and the city's ordinance assigns responsibility for service laterals to property owners, the city may require that property owners install or replace them. If the property owner fails to do so, the city may (with notice) install or replace the service lateral and charge the cost to the property owner. Note: under state utility marking rule, cities must locate the portion of the service lateral within the public right-of-way.

5. May omit improvement hearing

Minn. Stat. § 429.031, subd 3.

See Section II-A-1, *Initiation of proceedings by petition*.

The council may omit the improvement hearing if 100 percent of the affected landowners sign the petition requesting the improvement. Cities should be aware that the law is not as clear on omitting a public hearing where the city pays for any portion of the petitioned for local improvement. In that case, where landowners do not pay all the costs of the local improvement, cities may still want to hold both public hearings.

6. Two or more simultaneous local improvements

Minn. Stat. § 429.021, subd. 2.

If a city proposes undertaking two or more local improvements simultaneously the city does not need to issue separate notices and hold separate improvement hearings.

An improvement on two or more streets or two or more types of improvement in or on the same street or streets or different streets may be included in one proceeding and conducted as one improvement.

7. Local planning agency review

Minn. Stat. § 462.356, subd. 2.

If a city has a comprehensive plan, the council may not approve a capital improvement project until the local planning agency reviews whether the improvement complies with the comprehensive plan and reports its findings to the council in writing.

(Capital improvement simply means the basic facilities, services, and installations needed for the functioning of a city, including transportation, water, storm water, wastewater plants and pipes, and so on). The council may -- by resolution adopted by two-thirds vote -- dispense with this requirement to send the capital improvement to the local planning agency for review if, in the council's judgment, it finds that the proposed capital improvement has no relationship to the comprehensive plan.

D. Prepare for the improvement hearing

The purpose of the first hearing is for the council to discuss a specific local improvement before ordering it done. The council considers all the information in the feasibility report and any other information necessary for council deliberation.

1. Publish notice of the improvement hearing

Minn. Stat. § 429.031, subd. 1(a).

The city must publish notice of the initial public hearing (the improvement hearing) on the proposed project twice in the official newspaper, stating the time and place of the hearing, the general nature of the improvement, the estimated cost, and the area proposed to be assessed. The notices must appear at least one week apart. At least three days must elapse between the last publication date and the date of the hearing.

LMC model, *Notice of Hearing on Improvement* (Form 6).

2. Mail notice of improvement hearing

Minn. Stat. § 429.031, subd. 1(a).

The city must mail a notice once to each property owner in the proposed assessment area, at least 10 days prior to the improvement hearing that states the time and place of the hearing, the general nature of the improvement, the estimated cost and the proposed assessment area. The notice must also contain a statement that a reasonable estimate of the cost of the assessment will be available at the hearing.

Klapmier v. Town of Center, 346 N.W.2d 133 (Minn. 1984).

Cities will want to use great care when notifying citizens about assessment proceedings. An accurate description of the assessment area is important. The law requires detailed and careful notification to communicate which property owners face paying assessments for local improvements.

According to the statute, failure to give mailed notice of the improvement hearing will not invalidate subsequent assessment proceedings. In spite of this statutory language one case found that failure to include the correct information in mailed notices invalidated the entire special assessment proceeding on that property.

Minn. Stat. § 429.031, subd. 1.

See Section V: Tax-*exempt property.*

Tax exempt properties or those not listed on county tax records potentially pose problems for cities when notifying property owners about public hearings regarding special assessments.

Minn. Stat. § 303.10.

Minn. Stat. § 435.19, subd. 2.

Cities may use any "practicable means" to determine the owners of such property. This could include mailing notice to the owner's principal office in the state or the owner's registered business office. Notice to other governmental entities must be sent out at least two weeks before the improvement hearing, by registered or certified mail to the head of the instrumentality, department or agency having jurisdiction over the property.

E. Improvement hearing

In re Channel Lane, 444 N.W.2d 602 (Minn. Ct. App. 1989).
Minn. Stat. § 429.031, subd. 1.

At the improvement hearing, interested persons may voice their concerns, whether or not they are in the proposed assessment area. A reasonable estimate of the total amount to be assessed and a description of the methodology used to calculate individual assessments for affected parcels must be available at the hearing. If the council rejects the project, it may not reconsider that same project unless another hearing is held following the required notice. The council must prepare a record of the proceedings and make written findings.

Minn. Stat. § 429.031, subd. 1(f).

The council may adjourn and subsequently continue the improvement hearing. To provide proper notice, before the improvement hearing is adjourned, the council must state on the record, the date, time and place of the continuation of the improvement hearing, if any.

F. Ordering the improvement

Minn. Stat. § 429.031, subd. 1(f).

LMC model, *Resolution Ordering Improvement and Preparation of Plans* (Form 7).

A resolution ordering the improvement may be adopted at any time within six months after the date of the improvement hearing. This resolution may reduce, but not increase, the extent of the improvement as stated in the notice of hearing. As a practical matter, if the cost of improvement and thus the amount to be assessed changes by at least 25%, council might wish to hold the improvement hearing again.

1. Vote requirements for ordering the improvement

Minn. Stat. § 429.031, subd. 1(f).

If the improvement is made pursuant to a legally sufficient petition from property owners, the council adopts the resolution by a simple majority vote of all members of the council.

Nastrom v. City of Blaine, 515 N.W.2d 374, (Minn. 1994).

If there is not a petition, adoption requires a "super-majority" vote, meaning the council can only adopt the resolution by a four-fifths vote of all members of the council. (If the mayor of a charter city has no vote or votes only in case of a tie, the mayor is not considered a member for the purpose of determining a four-fifths majority vote).

LMC model, *Alternative Resolution Ordering Improvement and preparation of Plans* (Form 7-Alt).

Minn. Stat. § 462.356.

There is another voting quirk tangentially related to ordering the improvement; as noted above, if a city with a comprehensive plan determines that the improvement has no relationship to the plan, it need not send the proposed capital improvement to the planning agency for review; however, the council must adopt such a resolution by a two thirds vote.

2. Time limits for local improvements

Minn. Stat. § 429.031, subd. 1(f).

The resolution ordering the improvement may be adopted at any time within six months after the date of the improvement hearing.

Minn. Stat. § 429.041, subd. 1.
Minn. Stat. § 435.191.
See Section I-C: *Practical points to consider.*

Either arrangements for day labor or a contract must be made within one year of adopting the resolution ordering the improvement -- unless the council specifically states a different timeframe in the resolution ordering the improvement.

G. Competitive bidding

The law permits the council to carry out, in advance of the assessment hearing, virtually all the necessary steps prior to actually issuing a contract for the improvement. Thus, if the council wishes to provide firm estimates of costs at the improvement (first) hearing, it may, in addition to the required preliminary report, prepare completed plans and specifications, advertise for bids, and open and tabulate them before the assessment (second) hearing.

LMC model, *Resolution Approving Plans and Specifications and Ordering Advertisement for Bids* (Form 9).

Once a city council orders a public improvement, staff or consultants prepare the necessary plans and specifications and the council either:

- Contracts for all or part of the work to be performed by outside parties, or
- Orders all or part of the work to be done by day labor (city employees) and merely contracts for any necessary materials and equipment.

LMC information memo, *Competitive Bidding Requirements in Cities.*

In either case, contracting law applies. Consult the city attorney to coordinate the contracting process in combination with the special assessment process and remember to include the city's right to reject all bids in advertisements and bid specifications.

1. Performance by contract

Minn. Stat. § 429.041, subd. 2.

The uniform municipal contracting law, or competitive bidding process, applies to most contracts for local improvements.

LMC model, *Advertisement for Bids* (Form 10).

Minn. Stat. § 429.041, subd. 4.
See LMC information memo, *Competitive Bidding Requirements in Cities*.

If a contract is likely to exceed $175,000, cities must use municipal contracting procedures, which include the "best value" alternative in some situations. There is an exception to the competitive bidding requirement; the council may order the use of day labor (city employees) discussed subsequently for grading, graveling or bituminous surfacing of streets and alleys regardless of the estimated cost.

Minn. Stat. § 429.041, subd. 1.

Minn. Stat. § 331A.01, subd. 11.

Chapter 429 is very specific in bid advertisement requirements. If the estimated cost exceeds $175,000, the city must advertise for bids for the improvement in the newspaper or a "recognized industry trade journal" for however long the council deems advisable. A "recognized industry trade journal" is defined as a printed or digital publication or Web site that contains building and construction news of interest to contractors in this state, or that publishes project advertisements and bids for review by contractors or other interested bidders in its regular course of business. If the estimated cost exceeds $350,000, publication must be made no less than three weeks before the last day for submission of bids once in the newspaper and at least once in either a newspaper published in a city of the first class or a recognized industry trade journal.

Minn. Stat. § 429.041, subd. 1.
See Section I-C-1, *Coordinating procedure.*
Minn. Stat. § 429.041, subd. 2.

Cities should remember that citizens may challenge special assessments in district court. If a court reduces the amount of a special assessment, the city has less money than anticipated to pay for the work. For this reason, cities may want to coordinate the timing of the competitive bidding process and the special assessment process.

LMC model, *Resolution Accepting Bid* (Form 20).

Minn. Stat. § 429.041, subd. 2.

LMC model *Contract* (Form 21).
Minn. Stat. § 574.26, subd. 2.

LMC model, *Contractor's Performance Bond* (Form 22).
LMC model, *Contractor's Payment Bond* (Form 23).

When contracting for an improvement, the council must require the execution of one or more written contracts which comply with relevant public contracting law. Also, contractors must give the city both performance and payment bonds.

A.G. memorandum to public officials (Feb. 22, 1974).

The council must award the contract to the lowest responsible bidder or it may reject all bids. Note: the attorney general suggests that cities should take great care in specifying the contractual obligations of both parties in bid advertisements. Cities may want to address the city's right to reject all bids in the bid advertisements and in the bid specifications. If any bidder to whom a contract is awarded fails to enter promptly into a written contract and to furnish the required bond, the defaulting bidder shall forfeit to the municipality the amount of the defaulter's cash deposit, cashier's check, bid bond, or certified check, and the council may then award the contract to the next lowest responsible bidder.

Minn. Stat. § 429.041, subd. 6.

LMC model, *Engineer Estimate for Partial Payment* (Form 24).

LMC model, *Engineer Recommendation for Final Acceptance* (Form 26).
LMC model, *Resolution Accepting Work* (Form 27).

State law governs ongoing payments to contractors performing work on local improvements. Cities may retain 5 percent of the amount the contractor actually earns each month. The percentage retained protects the city's interest in getting the work done satisfactorily. The city engineer recommends to the council when such retained funds should be released and final payment made to the contractor. The city council may accept the work by resolution. However, if the city fails to pay the amount due within 30 days of a monthly estimate, or 90 days after the final estimate, the city must pay interest on the past due amount as prescribed by law.

Minn. Stat. § 270C.66.

Minnesota Department of Revenue Contractor Affidavit Requirements.

Note: Cities may not make final payment to a contractor until the contractor has shown proof of compliance with the state income tax withholding requirements. The Department of Revenue requires all contractors and subcontractors to file a Form IC-134 to show compliance with the withholding requirements. This certificate is the contractor's proof of compliance. A city should request a copy of this document from contractors before making the final payment on a contract.

Minn. Stat. § 429.041, subd. 2.

LMC model, *Order to Suspend Work* (Form 25).
LMC model, *Resolution Approving Plans and Ordering Day Labor*, (Form 28).
LMC model, *Detailed Report on Construction Work by Day Labor* (Form 30).

If the contractor improperly constructs or unreasonably delays work on the local improvement, the council may order suspension of the work at any time and re-let the contract, or order reconstruction of any portion of the work improperly done. If the cost of completing or reconstructing the improvement is less than $175,000, the council may do it by use of day labor.

Minn. Stat. § 429.041, subd. 7.

LMC model, *Proposal for Local Improvement* (Form 11).

Chapter 429 provides that once work begins on an improvement involving a unit price contract, the council may, without advertising for bids, authorize changes to include additional units of work at the same unit price. This may be done, however, only if the additional work costs no more than 25 percent of the "original contract price." To determine the "original contract price" multiply the estimated number of units required by the unit price.

2. Day labor

Minn. Stat. § 429.041, subd. 1 and 2.

See Appendix B, Forms 28 – 32 for performing work by day labor.

Using day labor, or city employees, means there is no contract to bid out for labor but there may be a contract to bid for materials and equipment. The city may use day labor in the following situations:

Minn. Stat. § 429.041, subd. 2.

- the estimated contracts are under $175,000, or
- the improvement is grading, graveling or bituminous surfacing of streets and alleys, or
- there are no bidders on the project, or
- if the only bids the council receives exceed the estimated cost of the project.

Even using day labor, however, the city must get bids for purchases of materials or equipment worth more than $175,000.

Minn. Stat. § 429.041, subd. 2.

The council may have the work performed by day labor supervised by the city engineer or other qualified person. However, council must have the work supervised by a registered engineer if done by day labor and it appears to the council that the entire cost of all work and materials for the improvement will be more than $25,000.

Minn. Stat. § 429.041, subd. 3.

When the council orders construction work done by day labor it must require a detailed report indicating that the work was done according to the plans and specifications, or, if there were any deviations from them, an itemized statement of those deviations. This report must be certified by the registered city engineer (or other person in charge if there is no registered engineer). The report must also show:

LMC model, *Detailed Report on Construction Work by Day Labor*, Form 30.

- the complete cost of the construction.
- final quantities of the various units of work done.
- materials furnished for the project and the cost of each item thereof.
- cost of labor, cost of equipment hired, and supervisory costs.

H. Prepare the proposed assessment rolls

Minn. Stat. § 429.061, subd. 1.

See Section I-B: *The special benefit test.*

The city clerk, with the assistance of the engineer or other qualified person selected by the council, prepares the proposed assessment rolls. (Cities should seriously consider retaining the services of a qualified and licensed appraiser to help assure that the amount of the special assessment does not exceed the increase in market value accruing to the property as a result of the public improvement project). While there are no specific directions in the law on the subject of making up the assessment roll, it should contain:

LMC model, *Resolution Declaring Cost to be Assessed and Ordering Preparation of Proposed Assessment* (Form 12).

- A legal description of each lot or tract assessed, including an address according to tax records;
- The name of the owner according to tax records unless the records are known to be inaccurate, and
- The total amount assessed against each lot or tract; and (4) the parcel identification number of each parcel.

The assessment should be a complete statement including each installment with the interest. Ditto marks should not be used.

I. Prepare for the assessment hearing

LMC model, *Resolution for Hearing on Proposed Assessment*, Form 13.

The purpose of the second hearing, commonly known as the assessment hearing, is to give property owners an opportunity to express concerns about the actual special assessment. Best practice suggests cities pass a resolution setting the date and time of the assessment hearing and directing that the city clerk publish and mail notice about the assessment hearing. This resolution need not be published.

1. Publish notice of the assessment hearing

Minn. Stat. § 429.061, subd. 1.

LMC model, *Notice of Hearing on Proposed Assessment* (Form 14 - modify slightly, see FN 2).

At least once and at least two weeks before the assessment hearing, the city must publish notice of the hearing in the city newspaper or, if no city newspaper exists, in a county seat newspaper. The published notice must include the hearing time, date, place, overall project description, area to be assessed, total cost of the improvement, a description of a landowner's right to appeal the assessment, and any deferment options, if available.

2. Mail notice of the assessment hearing

Minn. Stat. § 429.061, subd. 1.
Klapmier v. Town of Center, 346 N.W.2d 133 (Minn. 1984).

LMC model, *Notice of Hearing on Proposed Assessment* (Form 14).

At least two weeks before the hearing the city must also mail notice of the hearing to each affected property owner. This mailed notice must include the amount of the special assessment against the individual parcels, a description of the landowner's right to appeal the assessment, possible prepayment provisions, and the interest rate on the assessments. (Note: Certain properties (e.g., railroads) may not be reflected on the county's records because these property owners pay no state property tax. To provide notice, cities may need to search other records for such owners). For the assessment hearing, failure to comply with the requirements for published and mailed notice invalidates the assessments.

Minn. Stat. § 429.061, subd 1.

Because specific mailed notice of the assessment is important at this stage of the process, best practice suggests the clerk execute an affidavit attesting to the mailing to property owners.

LMC model, *Optional Affidavit of Mailing Assessment Hearing Notice* (Form 14-Opt.).

J. Assessment hearing

Minn. Stat. § 429.061, subd. 2.

The assessment hearing may be adjourned and continued to another time. If the assessment hearing is adjourned provide proper notice by stating on the record, the date, time and place of the continuation of the hearing.

1. Resolution adopting assessment roll

Minn. Stat. § 429.061, subd. 2.

At the assessment hearing the council shall hear and consider all objections to the proposed assessment, whether presented orally or in writing. The council has some flexibility before it adopts the assessment roll and may change, or amend, the proposed assessment as to any parcel. Council must, by resolution, adopt the same as the special assessment against the lands named in the assessment roll.

LMC model, *Resolution Adopting Assessment* (Form 15).

Metropolitan Airports Com'ns v. Bearman, 716 N.W.2d 403 (Minn. Ct. App. 2006).
Minn. Stat. § 272.32.
Minn. Stat. § 272.37.

Once the assessment roll is adopted the assessments are set and become liens against the properties listed. The council must prepare a record of the proceedings and written findings as to the amount of the assessment roll at this hearing.

2. Notice to affected landowners

Imperial Refineries of Minnesota, Inc. v. City of Rochester, 282 Minn. 481, 165 N.W.2d 699 (1969),

The statute does not require notification of affected landowners, either by publication or personally, of the final approval of the assessment. While the Minnesota Supreme Court has held that the notices of hearing on the improvement and on the assessment satisfied the requirement of due process without the constitutional need for a notice of the final approval of the assessment, the council may wish to provide for such notice on grounds of fairness to the property owner as well as to avoid the possibility of judicial challenge in the future if the courts continue to expand the concept of due process in such cases. In any event, the notice of the assessment hearing must state that the owner may appeal his/her assessment to the district court within 30 days after the adoption of the assessment.

3. Council decides interest on special assessments

Minn. Stat. § 429.061, subd. 2.
Minn. Stat. § 475.55, subd. 3.

Special assessments may bear interest at any rate the council determines, (unless a charter sets limits on interest rates for assessments).

In setting the rate, the council should make sure there is a reasonable relationship between the assessment interest rate and the bond interest rate if the city issued bonds to finance the project. If the city finances the project with funds on hand without using bonds, the council will want to look at the interest rate the city would otherwise have earned on the funds.

4. Council decides payment timelines

Minn. Stat. § 429.061, subd. 2.

The council must also decide the number of years over which the property owners may pay the assessment. The statutes permit payment over a period of not more than 30 years. Council may wish to consider the life expectancy of the improvement when selecting the payment period for the assessments.

See Section II-D-2: *Mail notice of assessment hearing.*

LMC model, *Notice of Final Assessment*, (Form 16).

Minn. Stat. § 429.061, subd. 2.

Generally, the law does not require that the city send a final notice of assessment to property owners if the amount assessed is the same as that listed in the previously mailed assessment hearing notice. However, the clerk must notify property owners of any change if the final assessment amount differs from the proposed assessment as to any particular lot, piece or parcel of land. The clerk must also notify owners by mail of any changes in interest rates or prepayment requirements the council adopts that differ from those contained in the previously mailed notice of the proposed assessment.

III. Challenges by property owners

The law sets out discrete timelines and procedures for challenging a city's special assessment. For the most part, objections must be raised at or before the assessment hearing. Only those who object at this stage may proceed to appeal an assessment to the district court. Further, these provisions for appeals to the district court are the exclusive method of appeal from a special assessment levied under the local improvement code. Thus, it is not possible to contest such an assessment under the statute providing for contesting property tax levies.

Minn. Stat. § 429.081.

Minn. Stat. § 278.01 subd. 3.

A. Objections

Minn. Stat. § 429.061, subd. 2.
Minn. Stat. § 429.081.

No one can formally object to, or appeal, the amount of an assessment unless the property owner signs a written objection and files it with the city clerk prior to the assessment hearing or presents it to the presiding officer at the hearing. Property owners subject to proposed special assessments must be informed of this requirement in the mailed notice. They should also be reminded of the requirement at the hearing itself.

Habel v. City of Chisago City, 346 N.W.2d 668 (Minn. Ct. App. 1984).

Any objections to the assessments not received at the public assessment hearings in the manner prescribed are waived, unless the failure to object at the assessment hearing is due to a "reasonable cause." Reasonable cause is not defined in statute and has not received in-depth judicial analysis.

B. Appeals to the district court

Minn. Stat. § 429.081.

Within 30 days after the adoption of the assessment roll, a property owner who has properly objected to the assessment may appeal a special assessment to the district court. The property owner appeals by serving notice upon the mayor or city clerk and then filing the served notice with the district court within 10 days of that service. The city clerk is required to furnish the person appealing a certified copy of objections filed in the assessment proceedings, the assessment roll or part complained of, and all papers necessary to present the appeal.

See Section I-B.

If a city's assessment is challenged in district court, the assessment roll constitutes initial proof that an assessment does not exceed the special benefit. The party contesting the assessment must introduce evidence sufficient to overcome that presumption. If the evidence as to the special benefit is conflicting it is the responsibility of the district court to determine whether the assessment exceeds the market value increase and, if so, by what amount.

Minn. Stat. § 429.081.

Pres. Ass'n v. City of Eden Prairie, 421 N.W.2d 419, 420 (Minn. Ct. App. 1988).

State v. Roselawn Cemetery Association, 259 Minn. 479, 108 N.W.2d 305 (1961).

The appeal is placed upon the calendar of the next general term of the district court, commencing more than five days after the date of serving the notice, and is tried like other appeals in such cases. If the person appealing does not win his/her case, the court must award the city its costs of the appeal (other than attorney fees). All objections to the assessment are waived unless presented on such appeal except the defense of payment or exemption of the property from assessment. On appeal the district court must either affirm the assessment or set it aside and order a reassessment.

See Section I-C-1.

As discussed previously, if the city coordinates the competitive bid process with the special assessment process, the city now proceeds with the actual work of the project after certification of the assessment roll and the 30-day appeal period is over. Because the time for appeals is over before the contract is issued, the city will not need to cover potential budget shortfalls that may occur if a property owner successfully challenges a special assessment or the lowest bid comes in higher than expected.

IV. Levying and collecting assessments and interest

Minn. Stat. § 429.061, subd. 3.

Metropolitan Airports Com'ns v. Bearman, 716 N.W.2d 403 (Minn. Ct. App. 2006).

Assessment rolls are lists for each assessment project containing a description of each parcel of property, including the parcel identification number (PID), the name of the property owner, and the amount of the assessment. The clerk should prepare a separate assessment roll for each improvement project prior to the assessment hearing. At or after the assessment hearing, the council must officially adopt the roll by resolution and then the clerk must certify it to the county auditor.

Minn. Stat. § 429.061, subd. 3.

There are two ways for a city to collect assessments:

- The city clerk, on council direction, certifies a duplicate copy of the assessment roll and sends it to the county auditor who spreads the assessments every year for collection with taxes.
- The city clerk retains the assessment roll in his or her office and annually certifies to the county auditor the total amount of principal and interest due on special assessments from each parcel of property for the following years.

LMC model, *Certificate to County Auditor* (Form 17).

In the first method, the certification of assessments should be filed with the county auditor on or before Nov. 30 if the auditor is to spread the first installment on the books for collection the following year. The auditor is then responsible for spreading the assessment against the properties every year that an installment payment is due. This is the preferred method for two reasons. First, it eliminates the clerk having to do an annual computation and, thus, avoids errors in later years.

Second, once all the assessments have been certified, the city may retain the ability to collect the assessments if the land is forfeited due to nonpayment of property taxes, or the owner declares bankruptcy.

Minn. Stat. § 429.061, subd. 3.

If the council prefers the second method it may direct the clerk to file all the special assessment rolls in the clerk's office, and to certify annually to the county auditor only the total amount of principal and interest due on special assessments from each parcel of property for the following year. The clerk must certify all assessments to the county auditor on or before Nov. 30 if the auditor is to spread the first installment on the books for collection in the following year.

LMC model, *Alternate Certificate to County Auditor* (Form 17-Alt.).

A. Payment of assessments and interest

Minn. Stat. § 429.061, subd. 3.

Once the clerk has prepared the special assessment roll and the council has approved it, property owners initially have two options:

- either pay the total amount of their assessment immediately, or
- pay the assessments in annual installments (with interest) under the terms set by the council.

Minn. Stat. § 429.061, subd. 3.

Alternatively, the property owner can:

- Pay the entire amount of the assessment within 30 days after the council adopts the assessment rolls. In this situation, the city cannot charge any interest.
- Pay the entire amount at any time after 30 days, but before any certification to the county auditor. The property owner pays only the amount of interest accrued as of the date of payment.

- At any time after the certification, the property owner may still pay the entire remaining unpaid amount to the county treasurer. However, the property owner must pay the entire remaining unpaid amount of the assessment before Nov. 15 of any year, and must also pay all interest accrued until the end of that calendar year.

Minn. Stat. § 429.061, subd. 3.

The council may authorize, by ordinance, partial prepayment of assessments prior to certification to the county auditor.

See Section II-J-3: *Council decides interest on special assessments.*

If the property owner elects not to pay the entire amount of the assessment at once, he or she may pay it in annual installments spread over the number of years the council has allowed. As noted previously, postponement of payment may require city borrowing to pay for the improvement so the city must add an interest charge to each year's assessment payment.

Minn. Stat. § 462.353, subd. 5.

As an added collection tool, a city may require payment of all delinquent assessments before granting a building permit, a conditional use permit, variance, or a zoning change.

The city must notify residents of this requirement in an ordinance or in the application materials used to request such a change or permit.

B. Postponed assessments

Minn. Stat. § 429.051.
Minn. Stat. § 429.052.

Postponed assessments occur when a city pays the cost of a local improvement, and delays assessing one or more benefited properties. Postponed assessments are not generally a good idea as they are not liens against the property and the city may not recoup what has already been spent on a project. If a city wishes to eventually reimburse itself for improvement costs by applying postponed assessments, those assessments may only be collected if 1) the property was not previously assessed for the project, and 2) the property owners were provided notice and hearing at the same time as those whose assessments were not postponed. A successful appeal of the assessment leaves the city with less money to pay for the completed project.

Given that concern, there are certain situations where the council may postpone the assessment of the cost of water, storm sewer, sanitary sewer, and street construction or road improvements until a later date. Such situations include:

Minn. Stat. § 429.051.

- Property is unplatted and undeveloped; the owner will subdivide or otherwise make it available for building sites in the future.
- The city cannot immediately use a trunk main because of the absence of laterals.

Minn. Stat. § 429.052.

Street or road improvements may be completed outside the city's jurisdiction with the consent of either the affected township (or if the property is located in unorganized territory, the county) and then assessed when later annexed into the city. This would likely only make sense if the land was soon to be annexed. And as above, these postponed assessments cannot be collected unless the property eventually being assessed was given the notice and hearing of the improvements at the time the improvement was ordered (provided under Minn. Stat. § 429.031), and subsequently in accordance with the notice, hearing, and appeal rights (provided for under Minn. Stat. §§ 429.061 and 429.081).

C. Deferred assessments

Minn. Stat. § 429.061, subd. 2.

Deferred assessments are certified to the county auditor but collection is deferred. All deferred assessments constitute liens on the property and must be paid within 30 years of the assessment levy. Interest on the assessments discussed subsequently, may be paid or deferred. Cities are authorized to let a property owner defer paying a certified assessment until a later date, provided the property owner or the property meets certain criteria.

There are three types of authorized deferrals:

- undeveloped property.
- senior citizen, permanent and total disability and military service deferrals.
- green acres.

1. Notice of deferred assessments

LMC model, *Certificate to County Recorder of Deferred Assessments* (Form 19).

Minn. Stat. § 429.061, subd. 2.

The law requires that cities record deferred special assessments with the county recorder. A certificate of the deferred assessment must contain the legal description and the parcel identification number (PID) of the affected property and the amount deferred.

2. Interest on deferred assessments

Minn. Stat. § 429.061, subd. 2.

The city also determines, by ordinance or resolution, the amount of interest on deferred assessments. Property owners may pay interest either annually during the period of deferment, or when the assessment becomes payable. In the resolution deferring the assessment, the council may forgive interest for the deferment years through Dec. 31 of the year before the first installment is due. The county auditor records deferred interest as well as deferred assessments.

3. Deferrals for undeveloped property

Minn. Stat. § 429.061, subd. 2.

For undeveloped property it is better to defer an assessment than to postpone it because the city will eventually recoup costs. The council must include all benefited property in the proceedings. At the meeting where the council approves the assessment, it may levy the assessment but defer the first installment of the assessment for unimproved property until a designated future year, or until the platting of the property or the construction of improvements. The council may set, by resolution, terms, conditions, standards, and criteria for the deferral and future payments. The city must file a certificate with the county recorder stating the legal description of property subject to deferred assessments, and the amount of the deferred assessment.

4. Deferrals for senior citizens, people with disabilities and members of the military

Minn. Stat. §§ 435.193 to 435.195.

When adopting a special assessment, a city council has authority to defer the payment of that assessment for any homestead property owned by a person 65 or older or retired by virtue of a permanent and total disability for whom it would be a hardship to make the payments.

Minn. Stat. § 190.05, subd, 5b or 5c.

Cities may also defer assessment payments for property owned by a member of the Minnesota National Guard (or other military reserves) ordered into active military service if it would be a hardship for that person to make the payments. If the city grants the deferment, it must notify the register of deeds of the deferment. The council may determine the amount of interest charges on the deferred assessment.

The deferment ends and all accumulated amounts (plus applicable interest, if any) become due upon the death of the owner (if the spouse is not otherwise eligible for the deferment); the sale, transfer or subdivision of any part of the property; loss of homestead status on the property; or the council's determination that immediate or partial payment would impose no hardship.

Minn. Stat. §§ 435.193.

Minn. Stat. § 429.061, subd. 1.

The council must adopt an ordinance or resolution establishing general rules for granting deferments to senior citizens, people with disabilities or members of the military including guidelines for determining the existence of a hardship. If the council follows a policy of deferring payment of assessments in hardship cases, it must include a notice of that fact in the notice of the proposed assessment.

5. Deferrals for green acres

Minn. Stat. § 273.111, subds. 3, 3a and 11.

"Green acres" law requires deferrals for certain agricultural or specialized use property (such as a nursery or a greenhouse).

Minn. Stat. § 273.111.

To defer these assessments on agricultural property, a city must file a certificate with the county recorder stating the legal description of property subject to deferred assessments and the amount of the deferred assessment. Agricultural deferrals follow different procedures in addition to those in Chapter 429. In addition, property must meet strict requirements to qualify for tax benefits as agricultural property. Consult the city attorney to ensure the property qualifies.

D. Abandoned improvements

Minn. Stat. § 435.202, subd. 1.

If a city abandons a local improvement project before completion the city must notify the collecting agent for the special assessment (either the city treasurer or more likely, the county auditor). Upon notification, the auditor or treasurer must cancel collection of all payments and interest not already collected, or in the process of collection. This law does not preclude a city reassessing the same properties benefitted by the improvement.

Minn. Stat. § 435.202, subd. 2.

Once the city council decides to abandon an improvement project, the clerk must notify citizens of that fact. The notice must describe the local improvement; state that is has been abandoned and may provide information on refunds. The city may, but is not required to, refund payments to any person who files a substantiated claim within six months of the abandonment notice.

Claims may be paid from funds collected for the improvement or from the general fund. However, abandoning the improvement does not alleviate the city's obligation to make bond and bond interest payments related to the project.

Minn. Stat. § 435.202, subd. 3.

Funds collected for the abandoned improvement must be transferred to the general fund if they are not canceled, refunded, or needed to pay the cost of the improvement or needed for bond payments.

See A.G. Op. 480-B (April 26, 1954).

In most cases, if the council abandons the local improvement in the early stages, before any assessments are levied, the city must pay the costs associated with the proceedings, even if a petition initiated them.

V. Tax-exempt property

Minn. Const. Art. X, § 1. Minn. Stat. § 429.061, subd. 4. *In re Front Street Sewer Assessment*, 138 Minn. 67, 163 N.W. 978 (1917). *Ramsey County v. Trustees of Macalester College*, 87 Minn. 165, 91 N.W. 484 (1902). *Washburn Mem'l Orphan Asylum v. State*, 73 Minn. 343, 76 N.W. 204 (1898).

The tax exemptions the Minnesota Constitution grants to religious, charitable, and educational institutions do not prevent special assessments against these types of property. Most privately owned cemeteries churches, hospitals, schools, and similar institutions must pay special assessments. Railroads in Minnesota are not exempt from special assessments.

Minn. Stat. § 306.14, subd. 2. *Oakland Cemetery Ass'n v. City of St. Paul*, 36 Minn. 529, 32 N.W. 781 (1887). *State v. Crystal Lake Cemetery Ass'n*, 155 Minn. 187, 193 N.W. 170 (1923).

Public cemeteries are usually exempt from special assessments but private, for-profit cemeteries must pay them.

Minn. Stat. § 307.09.

Land dedicated as a private cemetery by a private person or a religious corporation is exempt to a certain extent.

A. Other governmental lands

A.G. Op. 408-C (Sept. 21, 1953). Minn. Stat. § 435.19.

Property owned by the United States government is exempt from assessments for local improvements. Regarding the property of any other governmental unit, cities may levy special assessments against such property to the same extent as if the property were privately owned. For this purpose, "governmental unit" refers to all cities (except First Class cities) towns, school districts, public utility corporations, and counties. If the unit does not pay the amount of an assessment against it, the city may recover the money in a civil action.

Minn. Stat. § 435.19, subds. 2, 3.

In the case of state-owned property, or property owned by First Class cities, the city should determine the amount it would assess the land if it were privately owned. Before making this determination, the city must hold a public hearing on the proposed assessment.

Minn. Stat. § 3.754.

The hearing must take place at least two weeks after giving notice by registered or certified mail to the head of the department or agency having jurisdiction over the property. The council's determination is not binding, however, and if the state agency or the other city decides the measure of benefit is a lesser amount, it may pay the lesser amount. Note that other law requires agencies or departments which feel they were "unfairly assessed" to contact particular legislative committee members for review of the assessment. Ideally state agencies and departments negotiate assessments prior to commencement of the project.

B. Collecting assessments from tax-exempt or railroad property

Minn. Stat. § 429.061, subd. 4.

LMC model, *Notice of Assessment Against Public Corporation* (Form 18). Minn. Stat. § 429.061, subd. 4.

When the council approves an assessment bill, the city mails notice to the owners of tax-exempt or railroad property so long as the property benefits from the improvement. The notice specifies the amount payable under the assessment and the conditions for payment, including the number and the amount of each installment, the rate of interest, and the penalties for default. Interest does not accrue until 30 days after the mailed notice is given. If the assessment is not paid in a single installment, the law requires that the city annually mail a payment reminder to certain owners. These are:

- the owner of any railroad;
- a utility right-of-way owner, or
- to the owner of any public property (another governmental unit).

Minn. Stat. § 429.061, subd. 4.

Technically the law allows a city to collect the amount due from the owner of any railroad or privately owned public utility by a seizing and selling personal property. Consult the city attorney before using this collection method.

Minn. Stat. § 435.19.

State-owned land, such as state parks and recreational land may be notified of the amount it will be charged for a special assessment. The state, however, cannot be required to pay special assessments against state-owned land, although it may agree to do so.

VI. Corrections

Minn. Stat. § 429.071.
Independent Sch. Dist. No. 254 v. City of Kenyon, 411 N.W.2d 545 (Minn. Ct. App. 1987).

After a city has made special assessments, it is sometimes possible to correct errors or make other changes either by levying supplemental assessments, ordering a reassessment for the entire project or reapportioning an assessment.

A. Supplemental assessments

Minn. Stat. § 429.071, subd. 1.
In re Meyer, 158 Minn. 433, 199 N.W. 746 (1924).

If, because of omissions or errors in the assessment of any improvement, the council wishes to increase the amount of assessments, it may levy supplemental assessments. The council may levy these assessments only after giving property owners notice and a chance to be heard at a public hearing. Requirements are the same as those for the original assessment and owners may appeal the supplemental assessment.

B. Reassessments

Minn. Stat. § 429.071, subd. 2.

The council may order reassessment of all properties affected by special assessment levy for any of the following reasons:

- To reassess property when the courts nullify the original assessment.
- To validate an assessment that the city attorney feels the city may have made improperly or not in compliance with jurisdictional requirements.
- To reduce assessments the city later determined to be excessive.

C. Reapportionment

When a city levies a special assessment against land that is later subdivided, the council may, on its own motion or on application of the owner of any part of the tract, equitably apportion the unpaid portion of the assessment among the lots.

Minn. Stat. § 429.071, subd. 3.

When a city levies a special assessment against land that is later subdivided, the council may, on its own motion or on application of the owner of any part of the tract, equitably apportion the unpaid portion of the assessment among the lots. The council must determine that the apportionment will not impair collection of the balance due. If the city has pledged the assessment toward payment of bonds, the council must require that the property owners furnish surety bonds.

D. Tax-forfeited land returned to private ownership

Minn. Stat. § 429.071, subd. 4.
Minn. Stat. § 444.076.
Minn. Stat. § 435.23.
Minn. Stat. § 435.19, subd. 2.
Singer v. Minneapolis, No.C5-97-1265 (Minn. Ct. App. Nov. 10, 1997) (unpublished decision).

When tax-forfeited land returns to private ownership, and the parcel benefitted from an improvement for which the city canceled special assessments because of the forfeiture, the city may, with the same notice and hearing as for the original assessment, assess or reassess the parcel. The assessment amount would be equal to the amount remaining unpaid on the original assessment. Any city may reassess or make a new assessment on tax-forfeited land that returns to private ownership. A city can specially assess state-owned tax-forfeited land while it is owned by the state. The state has the option of paying the assessment or not, but the assessment can be collected from someone who acquires title to the property from the state in the future.

VII. Borrowing for special assessment purposes

For more information on bonding, see Handbook, *Debt and Borrowing*.

Cities collect most special assessment revenue over a period of several years. Consequently, cities often obtain funds for public improvement projects from bond issues. The city pays off the bonds as the funds become available through collection of the assessments and any taxes the city levied especially for that purpose.

There are three kinds of debt instruments cities use for special assessment purposes, none of which count in determining the net debt of the city. (Net debt refers to the total outstanding debt of the city subject to the city debt limit).

Improvement bonds are the first kind of debt instrument cities use for special assessments. Payment of these bonds is backed by the special assessments the city has levied and by the general taxing power of the city.

Improvement warrants are the second kind of debt instrument. These differ from improvement bonds in that they are not backed by the taxation power of the city. Improvement warrants are payable only from the assessments against the affected property owners. Because improvement bonds are more readily marketable at a lower rate of interest than improvement warrants, very few cities issue improvement warrants.

The council may also issue and sell temporary bonds at any time before completion of a public improvement project. These obligations must mature within three years, and are payable from the proceeds of the regular improvement bonds the city must issue by the maturity of the temporary bonds. Temporary bonds are subject to redemption and repayment of any interest due on 30 days mailed notice to registered holders.

Unlike improvement warrants, some cities frequently issue temporary improvement bonds. By issuing these bonds, cities can postpone the issuance of the regular special assessment bonds. There are two other advantages:

- The city may consolidate several improvement projects into a single bond issue.
- The city reduces the chance of excessive borrowing by delaying the long-term bond issue until it knows all the costs of a project.

Frequently, cities will purchase their own temporary improvement bonds with surplus cash available in other funds, such as a liquor or utilities fund. This results in savings of interest and other investment expenses.

Minn. Stat. § 429.091, subds. 3, 4.

The city may issue regular improvement bonds or warrants after ordering one or more improvements. Generally, cities issue them before the work is complete and before determining the final cost. If the city uses this procedure and the cost estimate turns out to be higher than actual costs the city may use the surplus funds to finance any other improvements it started under Chapter 429, or it may transfer the surplus to the fund used for the repayment of the bonds themselves. If the cost estimate is too low, the city may sell additional bonds.

Minn. Stat. § 429.091, subd. 1.

If the city is involved with several public improvements at the same time under Chapter 429, it may be advisable to consolidate all necessary financing into a single issue of improvement bonds or warrants, even if the city did not consolidate the assessment proceedings. Such a substantial block of bonds is often more readily marketable than several smaller issues.

Minn. Stat. § 429.091, subd. 3.
Minn. Stat. § 475.58, subd. 1(3).

Although in most cases the special benefit test limits the percentage of the cost of the improvement that can be assessed, an election is required for bonds if less than 20 percent of the cost is to be assessed against the benefitted property. Put another way, if the city itself is to pay 80 percent or more of the cost through its general funds, the voters must approve the bond issue on the improvement project.

If some funding for an improvement project comes from county or federal sources, the application of the 20 percent is less clear. Consult the city attorney and bond counsel for specific legal advice on this question.

Minn. Stat. § 429.091, subd. 3.

In a resolution authorizing a bond issue, the council must decide the bond maturity, denominations, interest rate, and form. The factors the council should consider in fixing such terms include the marketability of the bonds, the anticipated collection of the assessments, and the need for future bond issues under the comprehensive city plan and the capital improvement budget.

Before it can deliver the bonds or warrants to the purchaser, the council must levy a general tax for the payment of that portion of the cost not covered by the special assessment levies.

The council must make any tax levy for this purpose irrevocable for as long as the bonds or warrants are outstanding. While the council cannot repeal the levy until after all the principal and interest are paid, it may reduce the tax in any year if a surplus occurs in the sinking fund from which the city pays the improvement bonds.

A. Interest on improvement bonds

Minn. Stat. § 429.091, subd. 3.

Bonds may carry any interest rate the council determines. In effect, the market determines the interest rate cities will pay on bonds.

B. Interest on special assessments

Minn. Stat. § 429.061, subd. 2.
Minn. Stat. § 475.55, subd. 3.
See Section II-J-3: *Council decides interest on special assessment.*

As noted previously special assessments may bear interest at any rate the council determines, unless the charter sets interest limits on the rates for assessments. In setting interest rates on assessments, the council should make sure there is a reasonable relationship between the assessment interest rate and the bond interest rate if the city issued bonds to finance the project. If the city finances the project with funds on hand without using bonds, the council will want to look at the interest rate the city would otherwise have earned on the funds.

VIII. Charter cities

Minn. Stat. § 429.111.
A.G. Op. 59-B-14, (June 26, 1956).
Minn. Stat. § 429.021, subd. 3.

Generally, any city operating under a home rule charter may proceed either under Chapter 429 or under its charter in making an improvement, unless a home rule charter or amendment taking effect after April 17, 1953 provides for an improvement under Chapter 429 or the charter exclusively. If a city proceeds under its charter, the city council should consult the city attorney to ensure that the charter procedure complies with Chapter 429 where state law so requires. Some specific areas to consider are as follows:

A. Special benefit test

See Section I-B: *The special benefit test.*

The special benefit rule applies to charter cities.

Again, the special benefit rule requires that the amount of special assessments to a parcel of property cannot exceed the increase in market value of that property because of the improvement.

B. Assessing unpaid charges

Minn. Stat. § 429.101.
See Section I-F-2: *Assessing unpaid special service charges.*

The law specifically lists the special services that cities can specially assess if not paid by the property owner or occupant. Statutory cities cannot add to this list but charter cities may be able to add to it by charter amendment.

C. Voting requirements

Minn. Stat. § 429.031, subd.1(f).
See Section II-F-1: *Voting requirements for ordering the improvement.*

If there is no petition for the local improvement, statutory city councils must adopt the resolution ordering an improvement with a "super-majority" vote. This means the council can only adopt the resolution by a four-fifths vote of all members of the council. If the mayor of a charter city has no vote or votes only in case of a tie, the mayor is not considered a member for the purpose of determining a four-fifths majority vote.

D. Notice of right to appeal

Minn. Stat. § 429.061, subd. 1.
Minn. Stat. § 429.021, subd. 3.
See Section II-D-1: *Publish notice of assessment hearing.*

Even if the city follows charter procedures, state law requires that charter cities send the same notices of proposed assessments to inform property owners of the procedures they must follow under the charter in order to appeal the assessments to district court.

E. Deferrals

Minn. Stat. § 429.021, subd. 3.
See Section IV-C: *Deferred assessments.*

If the city offers deferments, notices of proposed assessments must tell property owners about deferments and how to procure them. Like statutory cities, charter cities may choose to offer deferrals to those who are 65 years of age or older or retired by virtue of a permanent and total disability.

F. Day labor

Minn. Stat. § 429.021, subd. 3.

State law considers charter provisions as requiring that the council issue the contract for all or part of the work, or order all or part of the work done by day labor, no later than one year after the adoption of the resolution ordering such improvement–unless the council specifically states a different time limit in the resolution ordering the improvement.

Appendix A: Special Assessment Checklist

The following is a suggested checklist that may be useful in helping to ensure that every step in the process of making the local improvement, assessment of the cost, and financing is done as required. In no way does it diminish the necessity of checking with the city attorney throughout the process to assure legal compliance. Some of the steps will be omitted in some projects, others in different projects, but these can be crossed off when not applicable in the individual case. Where certain steps are never done locally, as where the financing steps are the responsibility of an outside consultant, these may be omitted altogether from the list. Additional steps may be put in the list – for example, to list both the preparation of the notice of hearings and of their affidavits of publication.

No checklist of this kind is legally required. For proceedings where some steps are combined for a number of projects, the form as drawn may be cumbersome and perhaps impractical.

SPECIAL ASSESSMENT CHECKLIST[1]

Steps to Follow	Completed by Whom	Date
1) Petition received (Forms 1-3)		
2) Resolution declaring adequacy of petition and order in preparation of feasibility report (Form 4, 4-Alt.)		
3) Feasibility report (preliminary report and cost estimate)		
4) Resolution accepting report and calling for hearing (Form 5)		
5) Publication of notice of improvement hearing (Form 6)		
6) Mailing notice to affected property owners (Form 6)		
7) Minutes of public hearing showing testimony and findings		
8) Resolution ordering improvement and preparation of plans (Forms 7, 7-Alt, 8)		
9) Resolution approving plans and ordering advertisements for bids (Form 9)		
10) Publication of advertisement for bids (Form 10)		
11) Preparation of contract proposal (Form 11)		
12) Preparation of assessment roll (Form 12)		

Steps to Follow	Completed by Whom	Date
13) Resolution for hearing on proposed assessment (Form 13)		
14) Publication of notice of assessment hearing (Form 14)		
15) Mailing notice to affected property owners (Form 14-Opt.)		
16) Minutes of public hearing showing testimony and findings		
17) Resolution adopting assessment (Form 15)		
18) Notice of final assessment (NOTE: This may be an optional step. See Form 16, FN1)		
19) Certification of assessment to county auditor (Form 17, 17-Alt.) (NOTE: If annual certification plan is followed, the clerk may wish to include a separate sub-step for each year)		
20) Notice of assessment against public corporation (Form 18)		
21) Resolution accepting bid and awarding contract (Form 20)		
22) Contract (Form 21)		
23) Receipt of contractor's performance and payment bonds (Forms 22 and 23)		
24) Engineer's recommendation for final acceptance (Form 26)		
25) Resolution accepting work (Form 27) (NOTE: If work is sometimes done by day labor, additional steps might be added here based on Forms 28 to 32.)		
26) Resolution of issuance of temporary improvement bonds		
27) Advertisement for bids for temporary improvement bonds		
28) Affidavit of publication of advertisement for bids for temporary improvement bonds		
29) Resolution awarding contract for temporary improvement bonds (NOTE: Steps 27, 28, 29 may be omitted if city invests in its own temporary improvement bonds. If temporary bonds are not used, Step 26 may be omitted also.)		

Steps to Follow	Completed by Whom	Date
30) Resolution for issuance of improvement bonds a. Advertisement for bids for improvement bonds b. Affidavit of publication of advertisement for bids for improvement bonds		
31) Resolution awarding contract for improvement bonds		
32) Resolution prescribing bond form and making tax levy		
33) Certified copy to county auditor		
34) Certificate of county auditor		
35) Signature and no litigation certificate		
36) Treasurer's receipt and delivery certificates		

[1] In the event that assessment occurs after awarding the contract, Steps 12-20 (Forms 12-18) would take place beginning after Step 29.

Appendix B: Index of forms for special assessments

Before using these forms:

The sample forms on this page help cities complete the steps in making a special assessment for a local improvement under Chapter 429 of the Minnesota Statues. Please read the Special Assessment Toolkit to understand the procedure and areas for special care. The League of Minnesota Cities provides the Special Assessment Toolkit as informational material on a detailed statutory procedure. Cities should consult their attorney, engineer, qualified licensed appraiser and financial advisor for professional advice in using these materials.

How to use these forms:

All forms are Microsoft Word documents. Open a document and save it to your computer. Read all footnotes to assist you in best completing the forms.

Remove all footnotes before making any official use of the forms (i.e. adoption, publication, notice) by selecting each superscript number (e.g. [1]) in the form with your cursor, then deleting it. The corresponding footnote text will be removed at the same time.

All model forms in a compressed file.
Note: Will not download to some mobile devices.

Forms for Commencing Improvements	
 Form 1	Petition for Local Improvement (100 percent of property owners)
 Form 2	Agreement of Assessment and Waiver of Irregularity and Appeal
 Form 3	Petition for Local Improvement (at least 35 percent of property owners)
 Form 4	Resolution Declaring Adequacy of Petition and Ordering Preparation of Report

Form 4-Alt.	Alternate Resolution Ordering Preparation of Report
Form 5	Resolution Receiving Feasibility Report and Calling Hearing on Improvement
Form 6	Notice of Hearing on Improvement
Form 7	Resolution Ordering Improvement and Preparation of Plans
Form 7-Alt.	Alternate Resolution Ordering Improvement and Preparation of Plans
Form 8	Resolution Ordering Installation of Service Laterals for Sewer and Water in Advance of Street Paving

Forms for Plan Approval and Advertisement for Bids	
Form 9	Resolution Approving Plans and Specifications, and Ordering Advertisement for Bids
Form 10	Advertisement for Bids
Form 11	Proposal for Local Improvement

Forms for Assessing Cost	
 Form 12	Resolution Declaring Cost to be Assessed, and Ordering Preparation of Proposed Assessment
 Form 13	Resolution for Hearing on Proposed Assessment
 Form 14	Notice of Hearing on Proposed Assessment
 Form 14-Opt	Optional Affidavit of Mailing Assessment Hearing Notice
 Form 15	Resolution Adopting Assessment
 Form 16	Notice of Final Assessment
 Form 17	Certificate to County Auditor
 Form 17-Alt.	Alternate Certificate to County Auditor – Annual Certification
 Form 18	Notice of Assessment Against public Corporation
 Form 19	Certificate to County Recorder of Deferred Assessments

Forms for Contracting and Work Under Contract	
Form 20	Resolution Accepting Bid
Form 21	Contract
Form 22	Contractor's Performance Bond
Form 23	Contractor's Payment Bond
Form 24	Engineer's Estimate for Partial Payment
Form 25	Order to Suspend Work
Form 26	Engineer's Recommendation for Final Acceptance
Form 27.	Resolution Accepting Work

Forms for Work by Day Labor	
 Form 28	Resolution Approving Plans and Ordering Day Labor
 Form 29	Resolution Ordering Improvement by Day Labor
 Form 30	Detailed Report on Construction Work by Day Labor

Special Forms for Street Graveling,	
 Form 31	Resolution Making Estimates of Materials and Equipment, and Ordering Advertisement for Bids
 Form 32	Advertisement for Bids

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June 22, 2020

Alan R. Felix
City Attorney
Bemidji City Hall
317 Fourth Street NW
Bemidji, MN 56601-3116

Re: Request For Opinion Concerning Official Conflict of Interest

Dear Mr. Felix:

I thank you for your June 5, 2020 letter requesting an opinion regarding an issue that has arisen with the City of Bemidji regarding a current candidate for election to the city council.

You state that a current candidate for city council is the executive director and primary employee of the local visitors and convention bureau (VCB). You indicate that the VCB is a private, non-profit organization that is solely funded by lodging-tax proceeds through a contract with the City.

You ask whether the candidate, if elected to the city council, would be in violation of Minn. Stat. §§ 471.87 and .88 because of the possible conflict of interest between his or her role as an employee and official of the VCB and his or her hypothetical role as a member of the city council. If so, you ask whether the official would be subject to criminal penalties under section 471.87.

For the reasons noted in Op. Atty. Gen. 629-a (May 9, 1975) (enclosed), this Office does not generally render opinions upon hypothetical or fact-dependent questions. That having been said, I can provide you with the following information, which I hope you will find helpful.

Public officials in city governments are subject to the provisions of Minnesota Statutes chapter 471, including the section you have cited providing that any such official "who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom." Minn. Stat. § 471.87 (2018). There are several statutory exemptions that apply to this restriction, provided particular requirements or procedures are followed. *Id.* § 471.88.

In *Lenz v. Coon Creek Watershed District*, 153 N.W.2d 209 (Minn. 1967), the court explained:

> The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome is to insure that their decision will not be an arbitrary reflection of their own selfish interests. There is no settled general rule as to whether such an interest will disqualify an official. Each case must be decided on the basis of the particular facts present.

Id. at 219 (emphasis added). The *Lenz* court established a five-factor test used in determining when a public official will be disqualified from participating in proceedings in a decision-making capacity: (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.*

The court determined that, although the officials who owned land in the district benefited from the official action, they were not *per se* disqualified from voting. *Id.* at 220. The court gave weight to the fact that procedural safeguards were available to members of the public who might challenge the officials' decisions. *Id.*; *see also E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815, 819-20 (Minn. 1985) (applying *Lenz* factors and invalidating town board decision to deny renewed liquor license to bar because board supervisor, who voted against renewal resolution, had conflict of interest); *Traverse County v. Lewis*, 234 N.W.2d 815, 819 (1975) (applying *Lenz* factors and upholding town board order establishing town road because participation by board supervisors in initial decision to circulate petition for establishment of road did not create conflict of interest).

If a court determined that one or more public officials had violated the conflict of interest statute by knowingly authorizing a prohibited contract or receiving a personal benefit from such a contract, those officials could be subject to criminal penalties. See Minn. Stat. §§ 471.87, 609.43 (2018). I enclose an information memorandum from the League of Minnesota Cities examining law pertaining to this issue as well as other legal issues that can arise from city officials' potential and actual conflicts of interest. You may find the analysis and citations to legal authority in the memorandum helpful.

I thank you again for your correspondence.

Sincerely,

Christie B. Eller

CHRISTIE B. ELLER
Deputy Attorney General
(651) 296-3353

Enclosures: Op. Atty. Gen. 629-a, May 9, 1975
League of Minnesota Cities Information Memo: *Official Conflict of Interest*

|#4737824-v1

Opinions of the Attorney General

Hon. WARREN SPANNAUS

ATTORNEY GENERAL: OPINIONS OF: Proper subjects for opinions of Attorney General discussed.

Thomas M. Sweeney, Esq. May 9, 1975
Blaine City Attorney 629-a
2200 American National Bank Building (Cr. Ref. 13)
St. Paul, Minnesota 55101

In your letter to Attorney General Warren Spannaus, you state substantially the following

FACTS

At the general election in November 1974 a proposal to amend the city charter of Blaine was submitted to the city's voters and was approved. The amendment provides for the division of the city into three election districts and for the election of two council members from each district. It also provides that the population of each district shall not be more than 5 percent over or under the average population per district, which is calculated by dividing the total city population by three. The amendment also states that if there is a population difference from district to district of more than 5 percent of the average population, the charter commission must submit a redistricting proposal to the city council.

The Blaine Charter Commission in its preparation and drafting of this amendment intended that the difference in population between election districts would not be more than 5 percent over or under the average population for a district. Therefore, the maximum allowable difference in population between election districts could be as great as 10 percent of the average population.

You then ask substantially the following

QUESTION

Does the Blaine City Charter, as amended, permit a maximum population difference between election districts of 10 percent of the average population per district?

OPINION

The answer to this question depends entirely upon a construction of the Blaine City Charter. No question is presented concerning the authority to adopt this provision or involving the application or interpretation of state statutory provisions. Moreover, it does not appear that the provision is commonly found in municipal charters so as to be of significance to home rule charter cities generally. See Minn. Stat. § 8.07 (1974), providing for the issuance of opinions on questions of "public importance."*

* Minn. Stat. § 8.07 (1974) lists those officials to whom opinions may be issued. That section provides as follows:

> The attorney general on application shall give his opinion, in writing, to county, city, town attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education he shall give his opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved be decided otherwise by a court of competent jurisdiction.

See also Minn. Stat. §§ 8.05 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

IN THIS ISSUE

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1966). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. Id.

Thus, an interpretation of a charter provision such as that referred to in the facts would require an examination of a number of factors, many of which are of a peculiarly local nature. Local officials rather than state officials are thus in the most advantageous position to recognize and evaluate the factors which have to be considered in construing such a provision. For these reasons, the city attorney is the appropriate official to analyze questions of the type presented and provide his or her opinion to the municipal council or other municipal agency. The same is true with respect to questions concerning the meaning of other local legal provisions such as ordinances and resolutions. Similar considerations dictate that provisions of federal law generally be construed by the appropriate federal authority.

For purposes of summarizing the rules discussed in this and prior opinions, we note that rulings of the Attorney General do not ordinarily undertake to:

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 555.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist Ct. (Civ.) R 24.04; Op. Atty. Gen. 733G, July 23, 1945.

(2) Make factual determinations since this office is not equipped to investigate and evaluate questions of fact. See, e.g., Ops. Atty. Gen. 63a-11, May 10, 1955 and 121a-6, April 12, 1948.

(3) Interpret the meaning of terms in contracts and other agreements since the terms are generally adopted for the purpose of preserving the intent of the parties and construing their meaning often involves factual determinations as to such intent. See. Op. Atty. Gen. 629-a, July 25, 1973.

(4) Decide questions which are likely to arise in litigation which is underway or is imminent, since our opinions are advisory and we must defer to the judiciary in

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such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 196n, March 30, 1951.

(5) Decide hypothetical or moot questions. See Op. Atty. Gen. 519M, May 8, 1951.

(6) Make a general review of a local ordinance, regulation, resolution or contract to determine the validity thereof or to ascertain possible legal problems, since the task of making such a review is, of course, the responsibility of local officials. See Op. Atty. Gen. 477b-14, Oct. 9, 1973.

(7) Construe provisions of federal law. See textual discussion **supra.**

(8) Construe the meaning of terms in city charters and local ordinances and resolutions. See textual discussion **supra.**

We trust that the foregoing general statement on the nature of opinions will prove to be informative and of guidance to those requesting opinions.

WARREN SPANNAUS, Attorney General
Thomas G. Mattson, Assist. Atty. Gen.

LEAGUE of MINNESOTA CITIES

INFORMATION MEMO

Official Conflict of Interest

Learn responsibilities of city officials to avoid prohibited personal or financial benefits in contracts, which public offices may not be held simultaneously by the same person, need to disclose economic interests, and limits on gifts. Links to model resolutions for contracting with an interested council member.

RELEVANT LINKS:

I. Ethical responsibilities of local office in Minnesota

Most Minnesotans can run for and hold elected office at the federal, state, or local level. Candidates need not pass a civics test, attend mandatory trainings, obtain a specific degree or certification, or otherwise demonstrate their fitness. Nevertheless, election or appointment to public office may impact one's personal and professional life—perhaps quite significantly.

Some of the most important regulations impacting local governments address the ethical responsibilities of public office–laws that can apply to both elected and appointed city officials. Such safeguards exist to:

- Ensure integrity in government.
- Protect the city's and/or the city residents' interests.
- Limit the opportunity for officials to benefit (personally or financially) from public office.

Unfortunately, such regulations also are some of the most misunderstood. City officials—particularly those new to their positions—need to be aware of their responsibilities and the types of prohibited conduct. Various regulations:

- Limit an official's ability to act independently.
- Provide the public access to the decision-making process.
- Prohibit public officials from accepting gifts.
- Prohibit conflicts of interest.
- Prohibit officials from holding incompatible offices.
- Require public officials to disclose conflicts or economic interests when they do arise.

This memo examines the ethical responsibilities of local office in Minnesota.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

145 University Ave. West
Saint Paul, MN 55103-2044

www.lmc.org
(651) 281-1200 or (800) 925-1122

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RELEVANT LINKS:

While this memo focuses on the general principles behind these various regulations and prohibitions, remember ethical questions often are difficult to answer. Not all situations fit neatly into current guidelines, so conduct that is not clearly prohibited still may seem inappropriate. This appearance of impropriety can damage a councilmember's image (as well as the city's reputation), making it worthy of consideration.

II. City government in Minnesota

Minn. Const. art. XII, § 3

The Minnesota Constitution authorizes the Minnesota Legislature to provide for the "creation, organization, administration, consolidation, division, and dissolution of local government units and their functions, for the change of boundaries thereof, [and] for their elective and appointive officers." The form and function of city government, and the powers, duties and limitations of elected and appointed office, help shape our basic ethical responsibilities.

A. Form and function

Minn. Stat. § 414.01, subd. 1a(2).

Popfinder for cities and townships, Minnesota State Demographic Center

Minnesota law considers cities public corporations. The Legislature has described cities as the type of government that "most efficiently provides governmental services in areas intensively developed for residential, commercial, industrial and governmental purposes." About 82 percent of the people in Minnesota live in cities, even though cities only cover about 4.9 percent of the state's land area. Since most Minnesotans live in cities, the basic goal of city government is to provide services. In many parts of the state, cities serve as the main governmental entities.

Handbook, *The Statutory City*.
Handbook, *The Home Rule Charter City*.

Minn. Stat. ch. 412.

Minn. Stat. ch. 410.

Minnesota has two basic types of cities: statutory cities and home rule charter cities. The enabling legislation under which each is incorporated represents the major difference between the two:

- Statutory cities derive many of their powers from Chapter 412 of the Minnesota statutes.
- Home rule charter cities obtain their powers from a home rule charter.

Statutory and home rule charter cities differ in terms of organization and powers, not because of any classification of population, area, geographical location, or other physical features.

B. City council

The elected city council serves as the cornerstone of city government in Minnesota. The council fashions the policies that determine a community's present and future well-being. Because people look to their local government for leadership, much of the responsibility for community development falls on the shoulders of city councilmembers.

RELEVANT LINKS:

Handbook, *Elected Officials and Council Structure and Role*.

Minn. Stat. § 412.191, subd. 2.

Minn. Stat. § 412.191, subd. 4.

Minn. Stat. § 412.111

Minn. Stat. § 412.201

Minn. Stat. § 412.241

Minn. Stat. § 412.111

Minn. Stat. § 412.221, subd. 32.

Van Cleve v. Wallace, 216 Minn. 500, 13 N.W.2d 467 (1944).

The major areas of council authority and responsibility include:

- Judging the qualifications and election of its own members.
- Setting and interpreting rules of procedure.
- Legislating for the city.
- Enforcing city ordinances.
- Appointing and dismissing administrative personnel.
- Transacting city business.
- Managing city finances.
- Making appointments to boards, commissions, and committees.
- Protecting the welfare of the city and its inhabitants.
- Providing community leadership.

The city council is a continuing body. New members have no effect on the body except to change its membership. This means that all ordinances and resolutions remain in effect until the council alters or rescinds them, or until they expire through their own terms. At any time, the council can change any resolution, ordinance, or administrative order, whether or not the individuals presently on the council are the same members as when the council originally took action.

Councilmembers fulfill their statutory duties, almost without exception, by acting as a council as a whole. For example, the council, not individual councilmembers, supervise administrative officers, formulate policies, and exercise city powers.

III. Gifts

Minn. Stat. § 10A.071, subd. 1(b).

State law defines a "gift" as money, property (real or personal), a service, a loan, the forbearance or forgiveness of debt, or a promise of future employment, given and received without the giver receiving something of equal or greater value in return.

A. General prohibition

Minn. Stat. § 471.895 subd 2.

Elected and appointed "local officials" generally may not receive a gift from any "interested persons."

1. Local officials

Minn. Stat. § 471.895, subd 1(d).

A "local official" represents any elected or appointed official of a city, or of an agency, authority, or instrumentality of a city. The gift prohibition clearly applies to the members of the city council. However, the law does not further define the term "local official", making it unclear if the law intends to cover all city employees, or just certain high-level employees (such as city managers or administrators) and other appointed officials.

RELEVANT LINKS:

Since so many individuals can get involved in the decision-making process, trying to distinguish between city "employees" and "officials" becomes quite difficult. As a result, the safest course of action is to assume the law applies to all employees, regardless of their title or job responsibilities.

2. Interested persons

Minn. Stat. § 471.895, subd. 1(c).

State law defines an "interested person" as a person or representative of a person or association that has a direct financial interest in a decision that a local official is authorized to make.

An interested person likely includes anyone who may provide goods or services to a city such as engineers, attorneys, financial advisers, contractors, and salespersons. However, virtually every resident or person doing business in the city could have a direct financial interest in a decision that an official is authorized to make. These may include:

- Special assessments
- Property tax levies.
- Licenses and permits.
- Land use decisions.

If an individual could benefit financially from a decision or recommendation that a city official would be authorized to make, he or she might qualify as an interested person for purposes of the gift law.

B. Exceptions

The gift law allows the following types of gifts:

Minn. Stat. § 471.895, subd. 3.

- Lawful campaign contributions.
- Services to assist an official in the performance of official duties. Such services can include (but are not limited to) providing advice, consultation, information, and communication in connection with legislation and services to constituents.
- Services of insignificant monetary value.
- A plaque or similar memento. Such items are permitted when given in recognition of individual services in a field of specialty or to a charitable cause.
- A trinket or memento costing $5 or less.
- Informational material of unexceptional value.
- Food or beverage given at a reception, meal, or meeting. This exception only applies if the recipient is making a speech or answering questions as part of a program located away from the recipient's place of work.

RELEVANT LINKS:

- Gifts between family members. However, the gift may not be given on behalf of someone who is not a member of the family.
- Gift because of the recipient's membership in a group. The majority of this group's members must not be local officials and an equivalent gift must be given or offered to the other group members.
- Food or beverages given to national or multi-state conference attendees. The majority of dues paid to the organization must be paid from public funds and an equivalent gift must be given or offered to all other attendees.

C. Gifts to cities

Minn. Stat. § 465.03
Kelly v. Campaign Fin. and Pub. Disclosure Board, 679 N.W.2d 178 (Minn. Ct. App. 2004), *rev. denied* (Minn. July 20, 2004).

The law prohibits gifts to city officials, not to cities themselves. Cities may accept gifts of real or personal property and use them in accordance with the terms prescribed by the donor. A resolution accepting the gift and the donor's terms must receive an affirmative vote of two-thirds of the members of the council. A city may not, however, accept gifts for religious or sectarian purposes.

D. Metro area cities over 50,000

Minn. Stat. ch. 10A.See Section VII below, *Ethics in Government Act* 1978.

Metropolitan cities with a population over 50,000 must comply with additional regulations. Under the Ethics in Government Act, local officials in these cities also may not receive gifts from "lobbyists," though similar exceptions may apply.

MN Campaign Finance and Public Disclosure Board Lobbyist Handbook

The Minnesota Campaign Finance and Public Disclosure Board issues advisory opinions regarding the lobbyist gift ban. These opinions may be relevant to any Minnesota city struggling with the application or implication of a gift ban to a particular situation.

E. Municipal liquor stores

Minn. R. 7515.0620.

Municipal liquor store employees may not suggest, request, demand, or accept any gratuity, reward, or promise thereof from any representative of a manufacturer or wholesaler of alcoholic beverages. Any manager or employee who violates this provision is guilty of a gross misdemeanor.

IV. Conflicts of interest

Two broad types of conflicts of interest exist that city officials and municipal bodies may encounter: those involving contractual decisions, and those involving non-contractual decisions.

RELEVANT LINKS:

A. Contracts

1. General prohibition

Minn. Stat. § 471.87.

A.G. Op. 470 (June 9, 1967).

A public officer, who has authority to take part in making any sale, lease, or contract in his or her official capacity, shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially from it. The term "public officer" certainly includes mayors, councilmembers, or other elected officials. It also may include appointed officers and employees who have influence over the decision-making process.

A.G. Op. 90-E-5 (Nov. 13, 1969)
A.G. Op. 90e-6 (June 15, 1988)

The attorney general has advised that the conflict of interest law applies to any councilmember "authorized to take part in any manner" in the making of the contract. Simply abstaining from voting on the contract is not sufficient. The attorney general reasoned that if the Legislature had only wanted to prohibit interested officers from voting on the contract, it would not have used the word "authorized."

A.G. Op. 90e-6 (June 15, 1988).

A literal reading of the statute might suggest that it only applies to city officers who enter into contracts on behalf of the city. However, the attorney general has given the statute a broader interpretation, which could affect more officials than just those directly involved in the decision-making process. As a result, cities may want to take a conservative approach regarding contracts with any city official.

a. Statutory cities

Minn. Stat. § 412.311.
See Section IV-A-2 below, *Exceptions and procedures*
Singewald v. Minneapolis Gas Co., 274 Minn. 556, 142 N.W.2d 739 (1966).
A.G. Op. 90a-1 (Oct. 7, 1976).

Statutory cities must consider an additional restriction. No member of a statutory city council may have a direct or indirect interest in any contract the council makes (notwithstanding the limited exceptions discussed below). This restriction may affect some contractual situations not covered by the general prohibition. For example, even though the actual contract is not with a councilmember, the fact that he or she has an indirect interest in it could be an issue.

b. Home rule charter cities

Handbook, *The Home Rule Charter City*.

Minn. Stat. § 471.881

Many home rule charters contain provisions that address conflicts of interest in contracts as well. Some charters go beyond the statute to prevent all city officers and employees from having an interest in a city contract, whether or not the individual has a role in the process. Because charter provisions vary from city to city, this memo does not discuss them in any detail. However, the exceptions listed below apply to all cities, regardless of any other statute or city charter provision to the contrary.

RELEVANT LINKS:

2. Exceptions and procedures

Minn. Stat. § 471.88.

Several important exceptions exist that apply to all cities. In these circumstances, a city may move forward with the matter if the interested officer discloses his or her interest at the earliest stage and abstains from voting or deliberating on any contract in which he or she has an interest. Generally, this exception only applies when a unanimous vote of the remaining councilmembers approves the contract. However, additional requirements or conditions, as discussed below, relate to the applicability of the exceptions.

1989 St. Improvement Program v. Denmark Twp., 483 N.W.2d 508 (Minn. Ct. App. 1992).

A 1992 decision by the Minnesota Court of Appeals suggests that interested officers should abstain from voting, even when not expressly required to do so under the law. In that case, a township was challenged because an improvement project had not received the required four-fifths majority vote of the town board (two members whose properties would be assessed abstained). The court said the two interested board members were correct to abstain since their interests disqualified them from voting. As a result, the remaining three board members' unanimous vote was sufficient.

A city council may enter into the following contracts if the proper procedure is followed, notwithstanding that the contract may impact the interests of one of its officers.

a. Bank or savings association

Minn. Stat. § 471.88, subd. 2.

Minn. Stat. ch. 118A.

The city council may designate a bank or savings association that a city officer has an interest in as an authorized depository for public funds and as a source of borrowing. No restriction applies to the designation of a depository or the deposit of public funds if the funds are protected in accordance with state law.

Procedure:

- The officer discloses his or her interest in the bank or savings association (this should occur when the bank or savings association is first designated or when the official is first elected or appointed, whichever is later). The disclosure is recorded in the meeting minutes and serves as notice of such interest for each successive transaction.
- The interested officer abstains from voting on the matter.
- The council approves the designation by unanimous vote.

b. Official newspaper

Minn. Stat. § 471.88, subd. 3.
Minn. Stat. § 331A.04.

The city council may designate as the official newspaper (or publish official matters in) a newspaper in which a city officer has an interest.

RELEVANT LINKS:

LMC information memo, *Newspaper Publication.*

However, this exception only applies if the interested officer's newspaper is the only qualified newspaper available.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the designation by unanimous vote.

c. Cooperative association

Minn. Stat. § 471.88, subd. 4

A city may enter into a contract with a cooperative association of which the city officer serves as a shareholder or stockholder. This exception does not apply if the interested city officer is an officer or manager of the association.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the designation by unanimous vote.

d. Competitive bidding not required

Minn. Stat. § 471.88, subd. 5.
Minn. Stat. § 471.345.
Minn. Stat. § 412.311.

A city may contract with a city officer when competitive bidding is not required. The municipal contracting act generally requires cities to go out for bid on the following types of contracts if they are estimated to exceed $175,000:

- Sale, purchase, or rental of supplies, materials, or equipment.
- Construction, alteration, repair, or maintenance of property.

Minn. Stat. § 471.88, subd. 5
LMC information memo, *Competitive Bidding Requirements in Cities.*

This exception appears to apply to contracts that do not have to be competitively bid, such as contracts for professional services or employment. A city may need to seek a legal opinion if unsure whether this exception applies to a particular situation.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.
- The council passes a resolution setting out the essential facts, such as the nature of the officer's interest and the item or service to be provided and stating that the contract price is as low as (or lower than) could be found elsewhere.

Minn. Stat. § 471.89, subd. 2. See *Contracting with a City Official*, LMC Model Resolution

- Before a claim is paid, the interested officer must file an affidavit with the clerk that contains:

Minn. Stat. § 471.89, subd. 3. See *Affidavit of Official Interest in Claim*, LMC Model Form.

  - The name and office of the interested officer.
  - An itemization of the commodity or services furnished.

RELEVANT LINKS:

- The contract price.
- The reasonable value.
- The interest of the officer in the contract.
- A declaration that the contract price is as low as or lower than could be obtained from other sources.

Minn. Stat. § 471.89, subd. 2.
Minn. Stat. § 365.37, subd. 4.
Minn. Stat. § 415.01, subd. 2
See *Ratifying an Emergency Contract*, LMC Model Resolution
Handbook, *Expenditures, Purchasing, and Contracts*

- In an emergency where the contract cannot be authorized in advance, payment must be authorized by resolution describing the emergency.

e. Volunteer fire department

Minn. Stat. § 471.88, subd. 6.

Cities may contract with a volunteer fire department for the payment of compensation or retirement benefits to its members.

A.G. Op. 358-E-4 (Jan. 19, 1965).
A.G. Op. 90-E (Apr. 17, 1978).

Confusion has arisen as to whether this exception applies to both municipal and independently operated fire departments. A literal reading of the statute suggests it applies only to actual contracts. Since cities do not usually contract with a municipal fire department, there is a possibility this exception may only apply to contracts with independent fire departments. However, the attorney general has issued opinions that imply that the exception can apply to both kinds of fire departments.

See, Section V below, *Compatibility of offices*

A councilmember interested in serving the city in multiple positions (for example, plowing streets or serving on the volunteer fire department) should also consider the compatibility of the functions and responsibilities of those positions.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.

f. Volunteer ambulance service

Minn. Stat. § 471.88, subd. 6a.

Cities may contract with a volunteer ambulance service for the payment of compensation or retirement benefits to its members. This provision is similar to the volunteer fire department exception.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.

RELEVANT LINKS:

g. Municipal band

Minn. Stat. § 471.88, subd. 7

Cities may contract with a municipal band for the payment of compensation to its members.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.

h. EDAs and port authorities

Minn. Stat. § 471.88, subds. 9, 10.

See, Section VII-C-2-d below, *HRAs and EDAs*

An economic development authority (EDA), port authority, or seaway port authority may contract with firms engaged in the business of importing, exporting, or general trade that employ one of its commissioners.

Procedure:

- The interested commissioner abstains from voting on the matter.
- The authority approves the contract by unanimous vote.
- The commissioner does not take part in the determination (except to testify) and abstains from any vote that set any rates affecting shippers or users of the terminal facility.

i. Bank loans or trust services

Minn. Stat. § 471.88, subd. 11.

Banks that employ a public housing, port authority, or EDA commissioner may provide loans or trust services to property affected by that authority.

Procedure:

- The commissioner discloses the nature of those loans or trust services of which he or she has personal knowledge.
- The disclosure is recorded in the meeting minutes.
- The interested commissioner abstains from voting on the matter.
- The authority approves the contract by unanimous vote.

j. Construction materials or services (cities with a population of 1,000 or less)

Minn. Stat. § 471.88, subd. 12.

A city with a population of 1,000 or less (according to the last federal census) may contract with one of its officers for construction materials and/or services through a sealed bid process.

Procedure:

- The interested officer abstains from voting on the contact.
- The council approves the contract by unanimous vote.

RELEVANT LINKS:

k. Rent:

Minn. Stat. § 471.88, subd. 13.

Cities may rent space in a public facility to a public officer at a rate equal to that paid by other members of the public.

Procedure:

- The interested officer abstains from voting on the matter.
- The council approves the contract by unanimous vote.

l. Local development organizations

Minn. Stat. § 471.88, subd. 14

City officers may apply for a loan or grant administered by a local development organization. A "local development organization" is defined to include housing and redevelopment authorities (HRAs), EDAs, community action programs, port authorities, and private consultants.

Procedure:

- The interested officer discloses that he or she has applied for a grant.
- That interest is recorded in the official minutes.
- The interested officer abstains from voting on the matter.
- The local development organization approves the application by unanimous vote.

m. Franchise agreements

Minn. Stat. § 471.88, subd. 15

When a city enters into a franchise agreement or contract for utility services to the city, a councilmember who is an employee of the utility may continue to serve on the council during the term of the franchise or contract.

Procedure:

- The interested officer abstains from voting on any franchise matters.
- The reason for the interested councilmember's abstention is recorded in the meeting minutes.
- The council approves the franchise agreement by unanimous vote.

n. State or federal grant programs

Minn. Stat. § 471.88, subd. 17.

Cities may apply for and accept state or federal grants (housing, community, or economic development) which may benefit a public officer.

Procedure:

- The interested officer abstains from voting on matters related to the grant.

RELEVANT LINKS:

- The governing body accepts the grant by unanimous vote.

o. Loans or grants—St. Louis County

Minn. Stat. § 471.88, subd. 18.
Community Development Block Grant (CDBG).

A public officer may participate in a loan or grant program administered by the city with community development block grant funds or federal economic development administration funds. This exception applies only to cities in St. Louis County with a population of 5,000 or less.

Procedure:

- The public officer discloses that he or she has applied for the funds.
- The disclosure is recorded within the official meeting minutes.
- The interested officer abstains from voting on the application.
- The governing body approves the application by unanimous vote.

p. HRA officer loan

Minn. Stat. § 471.88, subd. 19.

HRA officers may participate in a loan or grant program administered by the HRA utilizing state or federal funds.

Procedure:

- The public officer discloses that he or she has applied for the funds.
- The disclosure is recorded within the official meeting minutes.
- The public officer must abstain from voting on the application.
- The governing body approves the application by unanimous vote.

3. Application

A.G. Op. 90a-1 (Apr. 14, 1960).
A.G. Op. 90-E-5 (Aug. 30, 1949).
A.G. Op. 90e-1 (May 12, 1976).
Minn. Stat. § 471.88

The statutes apply to all kinds of contracts (formal or informal, written or unwritten) for goods and services. The statute applies not only when the city is the buyer, but also when the city is the seller. Generally, it seems the law intends to prohibit a contract with a public official who has had the opportunity to influence the terms of the contract or the decision of the governing body. Even when a contract is allowed under one of the exceptions (such as for contracts for which bids are not required by law), councils should proceed with caution.

a. Business interests and employment

A.G. Op. 90a-1 (May 16, 1952).
A.G. Op. 90b (Aug. 8, 1969).

The attorney general has advised that a councilmember who holds stock in a corporation that contracts with the city has an unlawful interest and that a councilmember who acts as a subcontractor on a contract also has an unlawful interest.

RELEVANT LINKS:

The attorney general has also advised that a member of a governing body that receives a percentage of the money earned by a construction company for jobs done under a contract with it has an unlawful interest.

Singewald v. Minneapolis Gas Co., 274 Minn. 556, 142 N.W.2d 739 (1966)
A.G. Op. 90-E-5 (Nov. 13, 1969).

The Minnesota Supreme Court has held that employment by a company with which the city contracts may give a councilmember an indirect interest in the contract. However, the attorney general has advised that if a councilmember is an employee of the contracting firm and his or her salary is not affected by the contract, then the council may make the determination that no personal financial interest exists.

A.G. Op. 90a-1 (Oct. 7, 1976).

The attorney general further has stated that city councils may need to consider factors, other than employment, to determine the presence of a prohibited interest. The attorney general concluded that a council may contract with the employer if:

- The councilmember has no ownership interest in the firm.
- The councilmember is neither an officer nor a director.
- The councilmember is compensated with a salary or on an hourly wage basis and receives no commissions, bonus or other remuneration.
- The councilmember is not involved in supervising the performance of the contract for the employer and has no other interest in the contract.

A.G. Op. 90c-1 (May 12, 1976).
A.G. Op. 90E-1 (Dec. 6, 1955).

The law prohibits making a contract with any public official who has had the opportunity to influence its terms. The attorney general has advised that a former councilmember could not be a subcontractor on a municipal hospital contract if he was a councilmember when the prime contract was awarded.

More difficult questions can arise when a councilmember takes office after a city has entered into a contract. The assumption of office by someone with a personal financial interest in an already existing contract raises concerns about possible conflicts of interest during the performance of the contract.

A.G. Op. 90a-1 (Mar. 30, 1961).

In one case, the attorney general advised that a councilmember was eligible for office and entitled to commissions on insurance premiums payable by the city on an insurance contract entered into before the person became a councilmember.

A.G. Op. 90a-1 (Apr. 15, 1975).

In an informal letter opinion, the attorney general said the director of a malting company could assume office as a councilmember even though the city had entered into a 20-year contract with the company to allow it to use the city's sewage disposal plant. The contract also fixed rates for service subject to negotiation of new rates under certain circumstances. The attorney general said the councilmember could continue to serve as long as no new negotiations were required.

RELEVANT LINKS:

However, the city and the company could not enter into a new agreement as long as the interested councilmember held office.

Individuals faced with a possible conflict of interests should seek legal advice.

b. Elected officials and city employment

Minn Stat § 471.88, subd 5
Minn Stat § 471.345.

LMC information memo, *Competitive Bidding Requirements in Cities.*

The League often receives questions about whether an elected city official can also be employed by the city. The exception to the conflict of interest law that allows the city to enter into a contract not required to be competitively bid with an interested official appears to allow a city, in certain situations, to hire an elected official as an employee, since both contracts for professional services and employment need not be competitively bid.

However, cities must consider several issues to determine the permissibility of hiring an elected official based on the specific facts of the situation.

(1) Full-time employment

Minn Stat § 410.191.
Minn Stat § 412.02, subd. 1a.

Neither the mayor nor any city councilmember may be a "full-time, permanent" city employee. The city's employment policy should define full-time, permanent employee.

(2) Part-time employment

See Section V, *Compatibility of offices* below.
"Compatibility of Offices," House Information Brief (July 2012)

For part-time employment, the city must analyze the compatibility of the two positions. If the positions are incompatible, an individual may not serve in both positions at the same time.

c. Contracts with family members

Lewick v. Glazier, 116 Mich. 493, 74 N.W. 717 (1898).
Section IV-B below, Non-*contractual situations*

The conflict of interest laws does not directly address conflicts that may arise out of family relationships. The courts of other states generally have held that family relationship alone has no disqualifying effect on the making of a contract and that proof that a councilmember has a financial interest in the contract must exist. Non-contractual situations are similar.

Minn Stat § 519.05.
Minn Stat § 412.311
A.G. Op. (June 28, 1928).
A.G. Op. 90-C-5 (July 30, 1940).

Under existing law, spouses are responsible for each other's necessities. A contract with the councilmember's spouse in a statutory city may violate the law if the councilmember has a direct or indirect interest in it. The attorney general has construed the law broadly to hold such contracts invalid. If the money earned under the contract is used to support the family, the councilmember derives some benefit. In this type of situation, the attorney general has held that there is an indirect interest in the contract.

RELEVANT LINKS:

A.G. Op. 90-b (Apr. 5, 1955).
A.G. Op. (Dec. 9, 1976) (informal letter opinion).

However, in more recent opinions, the attorney general has taken the position that each case turns on its individual facts. If a spouse who contracts with the city uses the earnings from the contract individually and not to support the family, the contract probably would not be invalid simply because the spouse is a councilmember.

Minn. Stat. § 363A.08, subd. 2.

In the alternative, if the facts show otherwise, the legality of the contract may be in doubt. In short, the mere fact of the relationship does not affect the validity of the contract.

Minn. Stat. § 363A.08, subd. 2.

Also, the Minnesota Human Rights Act prohibits discrimination in employment based upon marital status. As a result, making inquiries into the marital status of employees or applicants for city positions is not recommended.

d. Sale of city property

Minn. Stat. § 15.054.

State law generally prohibits officers and employees of the state or its subdivisions from selling government-owned property to another officer or employee of the state or its subdivisions. This does not apply to the sale of items acquired or produced for sale to the general public in the ordinary course of business. In addition, the law allows government employees and officers to sell public property if the sale falls within the scope of their duties.

Minn. Stat. § 15.054.

Property no longer needed for public purposes may be sold to an employee (but not an officer) if the following conditions exist:

- There has been reasonable public notice.
- The property is sold by public auction or sealed bid.
- The employee who buys the property was not directly involved in the auction or sealed response process.
- The employee is the highest responsible bidder.

A.G. Op. 469a-12 (Aug. 30, 1961).
A.G. Op. 90-a-1 (Sept. 28, 1955).

The attorney general has also concluded that cities may not contract to purchase land from or sell land to their city council members.

4. Violations

Minn. Stat. § 471.87
Minn. Stat. § 609.43

A.G. Op. 90a-1 (Apr. 22, 1971).

A determination that a public officer violated the conflict of interest law may result in a gross misdemeanor, fines up to $3,000, and imprisonment for up to one year. Any contract made in violation of the conflict of interest law is generally void. Public officers, who knowingly authorize a prohibited contract, even though they do not receive personal benefit from it, may be subject to criminal penalties as well.

RELEVANT LINKS:

City of Chaska v. Hedman, 53 Minn. 525, 55 N.W. 737 (1893).
Currie v. Sch. Dist. No. 26, 35 Minn. 163, 27 N.W. 922 (1886).
Bjelland v. City of Mankato, 112 Minn. 24, 127 N.W. 397 (1910).

When a city enters into a contract that is beyond the city's powers, the city generally will have no liability for the contract. Even when the contract falls within the city's powers, any contract made in violation of the unlawful interest statutes generally is void.

Stone v. Bevans, 88 Minn. 127, 92 N.W. 520 (1902).
City of Minneapolis v. Canterbury, 122 Minn. 301, 142 N.W. 812 (1913).
Currie v. Sch. Dist. No. 26, 35 Minn. 163, 27 N.W. 922 (1886).
Singewald v. Minneapolis Gas Co., 274 Minn. 556, 142 N.W.2d 739 (1966).

However, for contracts deemed illegal, a city may not have authority to follow through on the performance of that illegal contract. If a contract is invalid and does not fall under the cited exceptions, it does not matter that the interested councilmember did not vote or participate in the discussion. Likewise, it does not matter that the interested councilmember's vote was not needed for the council's approval of the contract. Even if the councilmember acted in good faith and the contract appears fair and reasonable, the contract generally is void if it violates a conflict of interest.

Stone v. Bevans, 88 Minn. 127, 92 N.W. 520 (1902).

When the city enters into a prohibited contract with an interested councilmember, the councilmember may not recover on the contract nor recover the value on the basis of an implied contract. If a councilmember already has received payment, restitution to the city can be compelled. For example, if the mayor is paid for services to the city under an illegal contract, a taxpayer could sue to recover the money for the city. It does not matter that the mayor was not present at the meeting at which the agreement for compensation was adopted.

Frisch v. City of St. Charles, 167 Minn. 171, 208 N.W. 650 (1926).
Mares v. Janutka, 196 Minn. 87, 264 N.W. 222 (1936).

If a councilmember has unlawfully sold goods to the city and the goods can be returned, a court probably will order the goods returned and prohibit any payment for them. For example, when the city purchased a lot from a councilmember, but a building has yet to be built on it, or if supplies, such as lumber, have been bought and not yet used. However, if the goods cannot be returned, the city did not exceed its powers to contract for those goods and no fraud or collusion in the transaction had occurred, the court will determine the reasonable value of the property and permit payment on the basis of the value received.

In case of doubt, the city may want to just assume it cannot contract with one of its officers. If the contract is necessary, a legal opinion or court ruling should be secured before proceeding.

B. Non-contractual situations

Nevada Commission on Ethics v. Carrigan, 131 S. Ct. 2343 (2011)

63C Am. Jur. 2d Public Officers § 246

While the laws discussed previously relate only to contracts with interested officials, courts throughout the country, including the Minnesota Supreme Court, have followed similar principles in non-contractual situations. Any city official who has a personal financial interest in an official non-contractual action generally cannot participate in the action.

RELEVANT LINKS:

This especially holds true when the matter concerns the member's character, conduct, or right to hold office. Conflicts can also arise when the official's own personal interest is so distinct from the public interest that the member cannot fairly represent the public interest.

In general, when an act of a council represents quasi-judicial decision, no member who has a personal interest may take part. Some would argue that the member's participation makes the decision voidable, even if his or her vote was not necessary. The bias of one councilmember could make a city council's decision arbitrary.

When a disqualifying personal interest exists, however, the action is not necessarily void. In contrast to the rules regarding conflict of interest in contract situations, the official action may remain valid if the required number of non-interested council members approved the action.

1. Disqualifying interest—factors

Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 153 N.W.2d 209 (1967).

The Minnesota Supreme Court has utilized several factors when determining whether a disqualifying interest exists:

- The nature of the decision.
- The nature of the financial Interest.
- The number of interested officials.
- The need for the interested officials to make the decision.
- Other means available, such as the opportunity for review.

Courts consider these factors in light of the conflict in issue.

Gonsalves v. City of Dairy Valley, 71 Cal. Rptr. 255 (Cal. Ct. App. 1968).

When an administrative body has a duty to act on a matter and is the only entity capable of acting, the fact that members may have had a personal interest in the result may not disqualify them from performing their duties.

Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 153 N.W.2d 209 (1967). *Twp. Bd. of Lake Valley Twp. v. Lewis*, 305 Minn. 488, 234 N.W.2d 815 (1975).

For example, courts consider whether other checks and balances exist to ensure city officials will not act arbitrarily or in furtherance of self-interests. In one case, the court took into account the fact that a decision by a board of managers could be appealed to the state water resources board. In another case, the court said that the ability to appeal to the district court would adequately protect owners from any possible prejudice.

2. Common concerns

a. Self-judgment

On the theory that no person should serve as the judge of his or her own case, courts have generally held that an officer may not participate in proceedings where he or she is the subject.

RELEVANT LINKS:

On the theory that no person should serve as the judge of his or her own case, courts have generally held that an officer may not participate in proceedings where he or she is the subject. As a result, councilmembers probably should not participate in a decision involving their own possible offense. For example, determination of a councilmember's residency may represent one such issue from which an interested officer should abstain.

b. Self-appointment

Minn Stat § 471.46
Minn Stat § 415.15.
A G Op 471M (Oct 30, 1986).

Generally, city officials may not appoint a councilmember to fill a vacancy in a different elected position, even if the councilmember resigns from his or her existing position before the new appointment is made. However, councilmembers may be appointed mayor or clerk, but may not vote on their appointment. For example, this prohibits the mayor and a councilmember "switching" positions because they want to do so.

Minn Stat § 415.15.

Resigning city councilmembers shall not participate in a vote to choose a person to replace the resigning member.

See Section V, *Compatibility of offices* below

For appointments to non-elective positions, the general rule is that an official has a conflict in terms of self-interest. This conflict disqualifies the official from participating in the decision to appoint him- or herself. Appointing one council member to serve in two positions simultaneously triggers analysis of compatibility of the two offices or positions.

c. Council compensation

Minn Stat. § 415.11.

A G Op 471-K (May 10, 1976).

State law authorizes a council of any second, third, or fourth-class city in Minnesota to set its own salary and the salary of the mayor by ordinance. However, increases in salary cannot begin until after the next regular city election. Since every councilmember has a personal interest in his or her compensation, the need for interested officials to make the decision is unavoidable in this situation.

Minn Stat § 412.191, subd 1

A special situation exists for setting the clerk's salary in a Standard Plan statutory city. In these cities, the clerk is elected and is thus a voting member of the council. While the other councilmembers may vote on the clerk's compensation without any disqualifying self-interests, it is probably best for the clerk not to vote on his or her own salary.

d. Family connections

A G Op (Apr 14, 1975) (informal letter opinion).

A G Op (Dec 9, 1976) (informal letter opinion).

In an informal letter opinion, the attorney general has advised that a councilmember was not disqualified from voting on a rezoning because his father owned legal title to the tract in question. The attorney general has further stated that a prohibited interest does not necessarily arise when the spouse of a city employee is elected mayor.

RELEVANT LINKS:

Nolan v. City of Eden Prairie, 610 N.W.2d 697 (Minn. Ct. App. 2000).

Minn. Stat. § 363A.08, subd. 2.

A.G. Op. 430 (Apr. 28, 1967).

A.G. Op. 90c (Aug. 25, 1997).

The opinion carefully avoids any statement about future action of the council on the existing employment relationship. Further, the court has stated that no conflict existed from a councilmember's brother's law firm representing the applicant for a preliminary plat.

The Minnesota Human Rights Act prohibits discrimination in employment based upon marital status. Making inquiries into the marital status of employees or applicants for city positions is not recommended.

e. Business connections

Business interests can also create conflicts—even if no personal financial interest arises under the general law.

In one situation, the attorney general advised that a housing authority commissioner had a conflict when—as a foreman—he would aid his employer, a contractor, in making a bid to the housing authority.

In a different opinion, the attorney general found that a mayor or councilmember would not be disqualified from office because he was an employee of a nonprofit corporation that provided public access cable service to the city, but the official must abstain from participating in any related actions.

f. Land use

Since a city council must deal with land matters within its jurisdiction, it is almost inevitable that such decisions will affect property owned or used by one of its members.

(1) Property ownership

Whether or not property ownership disqualifies a councilmember from participating in a land use decision will depend (to some extent) on the nature of the decision and the numbers of persons or properties affected.

At one extreme is adoption of a new zoning ordinance (or a comprehensive revision of an existing ordinance) that may impact all property in the city. In this situation, the councilmember's interest is not personal and he or she should be able to participate. If this was not allowed, such ordinances might never be adopted.

At the other extreme is the application for a zoning variance or special use permit that only applies to a councilmember's property. Such a specific, personal interest would likely disqualify the member from participating in the proceedings. However, the councilmember should still be able to submit the required application to the city.

RELEVANT LINKS:

Between these two extremes lie those proceedings affecting some lots or parcels, one of which a councilmember owns. Such situations raise questions of fact on whether the councilmember should not vote. In such circumstances, the council must decide whether the member should be disqualified—a decision which is subject to review in the courts if challenged. In many situations where the right to vote is questioned, an interested councilmember will refrain from participating in order to avoid the "appearance" of impropriety.

(2) Bias

Continental Prop. Grp., Inc v. City of Minneapolis, No. A10-1072 (Minn. Ct. App. May 3, 2011) (unpublished opinion).

Personal bias can also create concern. In one case, a biased councilmember voting on a land use matter made the council's decision arbitrary.

As a result, the court found the city violated the property buyer's due process rights and returned the matter for a new hearing—one where the biased councilmember would not participate.

(3) Local improvements and special assessments

LMC information memo, *Special Assessment Toolkit*

A councilmember owning land to be benefited by a local improvement is probably not prohibited from petitioning for the improvement, voting to undertake it, or voting to adopt the resulting special assessment. Although one Minnesota decision found an interested county board member's participation on a county ditch proceeding inappropriate, a subsequent case found otherwise.

Petition of Jacobson, 234 Minn. 296, 48 N.W.2d 441 (1951).

The ditch case involved a proposed county ditch that bypassed a county board member's property. Although the board member participated in preliminary proceedings, he did not attend the final hearing. The court vacated the county board's order establishing the proposed ditch since the preliminary proceedings may have had a substantial effect on later actions taken at the final hearing. The court said the board member should not have participated in any of the proceedings regarding the project.

Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 153 N.W.2d 209 (1967).

The court in the second case found no disqualifying conflict of interest when four of the five managers of a watershed district owned land that would benefit from a proposed watershed district improvement project. The court recognized the situation was similar to those where members of a city council assess lands owned by them for local improvements. As a result, the court found this potential conflict of interest did not disqualify the district board members from participating in the improvement proceedings.

RELEVANT LINKS:

It is possible a councilmember's property ownership might result in a more favorable treatment of that property in an assessment project. If that happened, the assessment might be challenged for arbitrariness and set aside—whether or not the councilmember participated in the proceedings.

(4) Zoning

A.G. Op. 59a-32 (Sept. 11, 1978).

The attorney general has advised that a council is not prevented from rezoning property owned by a councilmember (or property owned by his or her client). However, the councilmember may not participate in those proceedings.

A.G. Op. 471-f (Sept. 13, 1963).

In an earlier opinion, the attorney general said it was a question of fact whether a town board member had a disqualifying interest for having sold land that was the subject of rezoning. However, the attorney general appeared to assume that if the board member had a sufficient interest in the land, the member would be disqualified from voting on the rezoning.

(5) Condemnation

LMC information memo, *Dangerous Properties*.

Webster v. Bd. of Cnty. Comm'rs of Washington Cnty., 26 Minn. 220, 2 N.W. 697 (1897).

While a councilmember's ownership interest in land subject to condemnation seems to preclude participation in any council actions regarding the property, Minnesota courts have not ruled directly on this question. However, the Minnesota Supreme Court did not disqualify a county board member from participating in condemnation proceedings to establish a highway even though the board member owned land adjoining the proposed highway. The court suggested the decision might have been different if the owner had been entitled to damages if the highway had gone through his property.

(6) Renewal and redevelopment

See Section VII-C-2-d, *HRAs and EDAs*

An interest in property subject to urban renewal may trigger disqualification. However, when the property sits within a larger urban renewal program, but not in the project area subject to the decision, it is arguable the councilmember would not be disqualified from voting. Since there have been no Minnesota cases addressing this issue, councilmembers with these types of interests may wish to abstain from voting or seek an opinion from the city attorney regarding the appropriateness of their participation.

(7) Church affiliation

Rowell v. Bd. of Adjustment of the City of Moorhead, 446 N.W.2d 917 (Minn. Ct. App. 1989).

The Minnesota Court of Appeals did not set aside a zoning action based on the participation by a zoning board member on a zoning variance requested by that member's church. The court found the nature of the financial interest could not have influenced the voting board member.

RELEVANT LINKS:

The person's membership in the church, without evidence of a closer connection, did not sufficiently create a direct interest in the outcome to justify setting aside the board's zoning action.

g. Streets

(1) Acquisition

Webster v. Bd. of Cnty. Comm'rs of Washington Cnty., 26 Minn. 220, 2 N W 697 (1897).

As previously noted, the Minnesota Supreme Court has held that a county board member who owned land adjoining a proposed county highway did not have a disqualifying interest preventing him from voting on the establishment of the highway.

The board member's interest was similar to that of the rest of the public and differed only in degree. A different decision may have been reached, however, had the highway gone through the commissioner's land.

Twp. Bd. of Lake Valley Twp. v. Lewis, 305 Minn. 488, 234 N W.2d 815 (1975).

LMC information memo, *Acquisition and Maintenance of City Streets*

The Minnesota Supreme Court also refused to disqualify a town board supervisor that asked a landowner to circulate a petition for a road. The court reasoned that the decision to establish a town road is, by its very nature, of interest to all local citizens, including board members who may be in the best position to know the need for a road. The court also stated that the ability of affected property owners to appeal to the district court would adequately protect them from any possible prejudice.

(2) Vacation

A.G. Op. 396g-16 (Oct. 15, 1957).
Petition of Jacobson, 234 Minn. 296, 48 N.W.2d 441 (1951).
LMC information memo, *Vacation of City Streets.*

Arguably, a street vacation does not differ significantly from the establishment of a street, which, as stated, the court has found abutting owners not to have a disqualifying interest. However, the attorney general may disagree since it advised that a councilmember who had an interest in property abutting a street proposed for vacation could not participate in the vacation proceedings.

h. Licenses and permits

When a councilmember applies for a license or a permit that requires council approval, the member's personal (often financial) interest should prevent his or her participation in the decision-making process.

A.G. Op. 218-R (Apr. 29, 1952).

In some situations, a councilmember may have a possible conflict of interest even when he or she is not the licensee. The attorney general said that a councilmember who was a part-time employee of a licensee could not vote on reducing the liquor license fee if it could be shown that the councilmember had a personal interest. For example, if the fee reduction would affect the councilmember's compensation or continued employment, he or she would obviously have a personal financial interest in the decision.

RELEVANT LINKS:

However, whether an individual's personal interest is sufficient to disqualify him or her from voting on the decision represents a question involving specific facts that must be determined on a case-by-case basis.

E.T.O., Inc. v. Town of Marion, 375 N.W.2d 815 (Minn. 1985).

In a similar case, the Minnesota Supreme Court held that a town board member who owned property across from a bar could not vote on the license renewal. The town board member stated his property had been devalued by $100,000 since the bar opened, and he was elected to the board based largely on his opposition to the bar. The court stated, "A more direct, admitted, financial interest is hard to imagine."

Minn. R. 7515.0430, subd. 5.

A state rule prohibits a councilmember from voting on a liquor license for a spouse or relative. The rule does not define who is included as a "relative," so cities may need to consult with their city attorney for guidance in specific situations.

3. Consequences

Nodes v. City of Hastings, 284 Minn. 552, 170 N.W.2d 92 (1969).

Courts may uphold actions taken where a councilmember with a disqualifying interest participated if the result would have been the same without the interested official's vote. For example, the Minnesota Supreme Court considered a decision by a three-member civil service commission to terminate a police officer for failing to pay his financial debts. The court held that it would have been a "better practice" for the commission member who had been a creditor of the officer to have disqualified himself and abstained from voting; however, that commission member's participation in a unanimous decision did not invalidate the commission's decision.

1989 Street Improvement Program v. Denmark Twp., 483 N.W.2d 508 (Minn. Ct. App. 1992).

Councilmembers who have a disqualifying interest in a matter generally are excluded when counting the number of councilmembers necessary for a quorum, or for the number necessary to approve an action by a four-fifths vote, such as approving a special assessment.

C. Recommendation

City officials concerned about conflicts of interest in contractual or non-contractual situations should:

- Consult the city attorney.
- Disclose the interest as early as possible (orally and in writing).
- Not attempt to influence others.
- Not participate in any discussions (when possible, leave the room when the governing body is discussing the matter).
- Follow the statutory procedures provided for the contracting exceptions.

RELEVANT LINKS:

- Abstain from voting or taking any other official actions unless the city attorney determines that there is no prohibited conflict of interest.

V. Compatibility of offices

State ex rel. Hilton v. Sword, 157 Minn. 263, 196 N.W. 467 (1923).
Kenney v. Goergen, 36 Minn. 190, 31 N.W. 210 (1886).

Whether a city official can also serve the city or other government entity in some other capacity gets quite complicated. State law does provide some guidance on incompatible positions; however, in general, state law does not prevent a person from holding two or more governmental positions. However, keep in mind, without specific statutory authority, government officials cannot hold more than one position if the functions of those two positions are incompatible or if the jobs create a conflict between two different public interests.

McCutcheon v. City of St. Paul, 298 Minn. 443, 216 N.W.2d 137 (1974).

The common-law doctrine of incompatibility provides some insight into what constitutes functions of two inconsistent offices. However, no clear definition of what constitutes an "office" for the purpose of this law exists. Certainly, it would include all elected offices.

"Compatibility of Offices," House Information Brief (July 2012)

However, it seems that the term "office" could also include appointed offices such as city administrators, managers, and police chiefs. Generally, an office has greater responsibility, importance, and independence than mere city employment.

A. Public employment

1. Federal employees

5 U.S.C. §§ 7321-7326
5 C.F.R. § 734.101

Federal employees generally cannot run in local partisan elections. An election is considered "partisan" if candidates are elected as representing political parties.

2. State employees

Minn. Stat. § 43A.32
MN Management & Budget, 400 Centennial Building, 658 Cedar Street, St. Paul, MN 55155; (651) 201-8000.

State employees generally can run for and hold local elected office as long as no conflict exists with their regular state employment. The commissioner of the department of management and budget will determine whether a conflict exists.

3. City employment

Minn. Stat. § 410.191.
Minn. Stat. § 412.02, subd. 1a.

Neither the mayor nor any city councilmember may also work as a "full-time, permanent" city employee. The city's employment policy defines full-time, permanent employment.

RELEVANT LINKS:

For "part-time" positions, it must be determined if the elements or responsibilities of the two positions are incompatible with one another. If the two positions are incompatible, an individual may not serve in both positions at the same time.

B. Incompatible offices—elements

Offices are generally incompatible when a specific statute or charter provision:

- States that one person may not hold two or more specific positions.
- Requires that the officer may not take another position.
- Requires that the officer devote to the position full-time.

Kenney v. Goergen, 36 Minn. 190, 31 N.W. 210 (1886). *State ex rel. Hilton v. Sword*, 157 Minn. 263, 196 N.W 467 (1923).

In addition, positions may be determined incompatible with one another. This typically occurs when the holder of one position (or the group or board of which the person is a member):

- Hires or appoints the other.
- Sets the salary for the other.
- Performs functions that are inconsistent with the other, for example, a person cannot supervise or evaluate himself or herself.
- Approves the official or fidelity bond of the other.

C. Specific offices

It is important to remember that incompatibility often depends on the nature of the offices and their relationship to one another. So, while offices may have been determined to be incompatible in the past, a different conclusion could be reached based on current relationships or responsibilities. A city official who is considering seeking an additional office should obtain a legal opinion from the city attorney on the compatibility of the two offices.

1. Compatible offices

The following offices are compatible pursuant to state statute:

Minn. Stat. § 410.05, subd. 1.

- City charter commission member and any elective or appointed office other than judicial (however, the city charter may specifically exclude councilmembers from serving on the charter commission).

Minn. Stat. § 469.003, subd 6.

- City councilmember and HRA commissioner.

Minn. Stat. § 469.095, subd 2.

- City councilmember and EDA commissioner.

Minn. Stat. § 481.17.

- City attorney and county attorney (in counties with a population under 12,000).

RELEVANT LINKS:

In addition, the attorney general has found the following offices compatible:

A.G. Op. 358e-9 (Feb. 10, 1912).
A.G. Op. No. 639 (Mar. 17, 1919).
A.G. Op. 358e-3 (July 29, 1997).
A.G. Op. 90e (Aug. 25, 1997).

- City mayor and county treasurer.
- City mayor and court administrator.
- City attorney and assistant county attorney.
- City councilmember and officer of nonprofit, public-access cable service provider.

2. Incompatible offices

State statute lists the following offices as incompatible:

Minn. Stat. § 420.03.
Minn. Stat. § 273.061, subd. 1c.

- Firefighter's civil service commission member and any other office or employment under the city, the United States, or any of the state's political subdivisions.
- City councilmember and county assessor.

In addition, the attorney general has found the following offices incompatible:

A.G. Op. 63a11 (Feb. 21, 1947).
A.G. Op. 358e-3 (Mar. 6, 1946).
A.G. Op. 358e-7 (Mar. 5, 1965).
A.G. Op. 358 (Dec. 18, 1970).
A.G. Op. 358e-9 (Dec. 13, 1939).
A.G. Op. 358f (May 21, 1954).
A.G. Op. 358f (June 30, 1955).
A.G. Op. 358a-1 (Feb. 25, 1958).
A.G. Op. 218-R (Feb. 25, 1946).

- Mayor and city councilmember.
- Councilmember and city attorney.
- Councilmember and city treasurer.
- City attorney and city treasurer.
- Mayor and school board member.
- Councilmember and school board member.
- Councilmember and school board treasurer.
- City councilmember and county assessor.
- Councilmember and municipal liquor store manager.

3. Fire departments

City officials often ask if a member of the city fire department—perhaps the chief or another officer—can also serve on the city council. Unfortunately, that question is not easy to answer.

A.G. Op. 358-E-4 (Jan. 19, 1965).
Minn. Stat. § 471.88, subd. 6.

In 1965, the attorney general advised that a councilmember could also serve as a member of a volunteer city fire department under the exception to the conflict of interest law that permits contracts with a volunteer fire department for payment of compensation or retirement benefits. But in a later opinion, the attorney general advised that the fire chief of a municipal fire department automatically vacate the office of fire chief when he accepted a seat on the city council. This opinion did not mention the exception listed in the conflict of interest law or the 1965 opinion.

A.G. Op. 358-L-9 (Apr. 5, 1971).

RELEVANT LINKS:

A.G. Op. 90-E (Apr. 17, 1978).

In 1978, the attorney general considered the issue again and advised that the exception to the conflict of interest law allows a councilmember to be a member of an independent volunteer fire department when a contract for compensation or retirement benefits is negotiated, as long as the procedural requirements for the exception are followed. The attorney general also explained that the reason for the different results in the two earlier opinions was because the 1965 opinion involved a fire department member who was not an officer and the 1971 opinion involved a fire department member who was the fire chief.

Minn. Stat. § 412.152

Minn. Stat. § 410.33

In 1997, the Minnesota Legislature attempted to clarify the issue by allowing one person to hold the position of statutory city mayor and fire chief of an independent, nonprofit firefighting corporation that serves the city. Although the statute is specifically for statutory cities, home rule charter cities may be able to use it if their charters are silent on the matter. Basically, the mayor and fire chief positions are not incompatible as long as:

- The mayor does not appoint the fire chief.
- The mayor does not set the salary or the benefits of the fire chief.
- Neither office performs functions that are inconsistent with the other.
- Neither office contracts with the other in their official capacity.
- The mayor does not approve the fidelity bond of the fire chief.

The statute remains unclear on several points, however. It does not address council positions other than the mayor. It also appears to be limited to independent, nonprofit fire departments, so city departments (whether volunteer or salaried) are not addressed. And although it outlines general criteria under which there will not be incompatibilities, ambiguity still exists regarding what functions would be considered inconsistent.

Because each city has a different relationship with its fire department, a city may want to get a legal opinion from its attorney or from the attorney general before allowing a councilmember to serve as a volunteer firefighter with any sort of supervisory powers.

D. Consequence—automatic resignation

A.G. Op. 358-E (Feb. 18, 1958).
State ex rel. Hilton v. Sword, 157 Minn. 263, 196 N.W. 467 (1923)

An individual generally can run for election to a position that is incompatible with the position the person already holds without resigning from the first position. However, when an official qualifies for a second and incompatible position (by taking an oath and filing a bond, if necessary), he or she automatically resigns from the first position, which then becomes vacant.

RELEVANT LINKS:

"Compatibility of Offices," House Information Brief (July 2012).

Whether two offices are incompatible will depend upon the responsibilities of each of the offices and their relationship. Cities with questions may wish to secure a legal opinion from the city attorney or the attorney general.

VI. Codes of conduct

Councils often struggle with conveying ethical expectations of their councilmembers. In addition, the conflict of interest (or "ethics") laws are scattered throughout many statutes and court cases, making them difficult to find and hard to interpret. As a result, some cities have developed and adopted their own policies on ethics and conflicts of interest. These policies must not conflict with state law and generally these policies appear in one of two forms: a values statement expressing core principles for ethical conduct, or a formal code of conduct. Cities may adopt a values statement or a code of conduct or both. However, it is important to note that state law does not require formal adoption of a city ethics policy.

League of Minnesota Cities Insurance Trust (LMCIT) Collaboration Services.

If your city needs assistance with learning about codes of conduct, the League of Minnesota Cities Insurance Trust (LMCIT) Collaboration Services will work with you to get your city the help it needs. There is no charge for this service for LMCIT members.

A. Professional rules of conduct

International City/County Management Association's Code of Ethics (February 2019).

Minnesota City/County Management Association's

Many professionals have adopted rules of conduct to guide individuals working within those fields. For example, the International City/County Management Association (ICMA) as well as our state's affiliate (MCMA) has adopted a code of ethics that defines a manager's core set of values. These values help define and guide a city manager's ethical obligations to council, other staff, the general public, and the profession itself.

VII. Ethics in Government Act (campaign financing)

Minn. Stat. ch. 10A.
MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889.

Minn. Stat. ch. 10A, also known as the Ethics in Government Act (Act), governs campaign financing. The following briefly overviews some of the major responsibilities of the act (as well as some related statutes) and how they impact some city officials.

MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889.

The Minnesota Campaign Finance and Public Disclosure Board (Board) administers the act. The Board has four primary responsibilities:

RELEVANT LINKS:

- Campaign finance registration and disclosure.
- Public subsidy administration.
- Lobbyist registration and disclosure.
- Economic interest disclosure by public officials.

Minn. Stat. § 10A.02, subd. 12.
MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889

Individuals subject to the Act may request an advisory opinion from the Board to guide their compliance with the law. Requests for an opinion (as well as the opinions themselves) are classified as "nonpublic" data, but a "public" version of the opinion may be published on the Board's website.

A. Application

Minn. Stat. § 10A.01.

All candidates for and holders of state constitutional or legislative offices, as well as other "lobbyists," "principals" and "public officials" must comply with the Act. In addition, while not applicable to all city officials, the Act does apply to "local officials" serving "Metropolitan government units."

1. Local officials

Minn. Stat. § 10A.01, subd. 22.

A "local official" represents a person who falls into one or both of these categories:

- Holds elected office.
- Is appointed to or employed in a public position in which the person has authority to make, to recommend, or to vote on as a member of the governing body, major decisions regarding the expenditure or investment of public money.

2. Metropolitan government units

Minn. Stat. § 10A.01, subd. 24.
Minn. Stat. § 473.121, subd. 2.

The Act applies to local officials in "metropolitan government units," which includes cities with populations over 50,000 in the seven-county metro area.

3. Advocates

The Act contains broad reporting requirements for individuals and associations who try to influence the decision-making process.

a. Lobbyists

Minn. Stat. § 10A.01, subd. 21.

A "lobbyist" is an individual who:

RELEVANT LINKS:

- Is paid more than $3,000 from all sources in any year attempting to influence legislative or administrative action, or the official action of a metropolitan governmental unit, by communicating (or urging others to communicate) with public officials or local officials.
- Spends more than $250 (not including travel expenses or membership dues) in any year attempting to influence legislative or administrative action, or the official actions of a metropolitan government unit, by communicating (or urging others to communicate) with public officials or local officials.

Minn. Stat. §§ 10A.03-.05 "Lobbyist Handbook,"

Lobbyists must register with and report their expenditures to the Board by January 15 and June 15 each year. These reports must include gifts and items valued at $5 or more given to local officials, state lawmakers, or other public office holders.

b. Principals

Minn. Stat. § 10A.01, subd. 33.

Minn. Stat. § 10A.04, subd. 6

A "principal" is an individual or association that spends more than $500 in any calendar year for a lobbyist or $50,000 or more in a calendar year to influence legislative action, administrative action, or the official action of metropolitan governmental units. Principals must file spending reports with the Board.

c. City advocates

Minn. Stat. § 10A.04.
Minn. Stat. § 10A.01, subd. 21

City employees and non-elected city officials who spend more than 50 hours in any month on lobbying activities must also register and submit expense reports with the Board.

B. Gift ban

Minn. Stat. § 10A.071, subd. 1(b).
See Section III, *Gifts*.

A "gift" is defined as money, property (real or personal), a service, a loan, the forbearance or forgiveness of debt, or a promise of future employment, given and received without the giver receiving equal or greater value in return.

1. Prohibition

Minn. Stat. § 10A.071, subd. 2.

A lobbyist or principal may not give gifts, or request that others give gifts to officials, and officials may not accept gifts from lobbyists or principals.

2. Exceptions

Minn. Stat. § 10A.071, subd. 3

The law allows the following types of gifts under specific exceptions to the general ban:

RELEVANT LINKS:

- Contributions to a political committee, political fund, principal campaign committee, or party unit.
- Services to assist an official in the performance of official duties. Such services can include advice, consultation, information, and communication in connection with legislation and services to constituents.
- Services of insignificant monetary value.
- A plaque with a resale value of $5 or less.
- A trinket or memento costing $5 or less.
- Informational material with a resale value of $5 or less.
- Food or beverage given at a reception, meal or meeting. This exception applies if the recipient is making a speech or answering questions as part of a program that is located away from the recipient's place of work. This exception also applies if the recipient is a member or employee of the legislature and an invitation to attend was given to all members of the legislature at least five days before the date of the event.
- Gifts received because of membership in a group. This exception does not apply if the majority of group members are officials. In addition, an equivalent gift must also be offered to the other members of the group.
- Gifts between family members. However, the gift may not be given on behalf of someone who is not a member of the family.

3. Advisory opinions

Minn. Stat. § 10A.02, subd. 12.
MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889.

The Board issues advisory opinions regarding the lobbyist gift ban. These opinions may be relevant to any Minnesota city struggling with the application or implication of a gift ban to a particular situation.

C. Filings and disclosures

Minn. Stat. § 10A.01, subd. 24
MN Campaign Finance and Public Disclosure Forms

Chapter 10A applies to "metropolitan governmental units" and includes some cities. Only local officials (including candidates for elected office) in the seven county metropolitan area cities with a population over 50,000 must submit the following to the Board.

1. Statements of economic interest

Minn. Stat. § 10A.09

Local officials (including candidates for elected office) in cities within the seven-county metropolitan area with a population over 50,000 must file a statement of economic interest with the Board.

RELEVANT LINKS:

a. Time for filing

Minn. Stat. § 10A.09, subd. 1.

An individual must file within one of the following timeframes:

- Within 60 days of accepting employment.
- Within 14 days after filing an affidavit of candidacy or petition to appear on the ballot for an elective office.

b. Notification

Minn. Stat. § 10A.09, subd. 2.
MN Campaign Finance and Public Disclosure Board: Elected Statement of Economic Interest and Appointed Statement of Economic Interest.

The county auditor must notify the Board upon receipt of an affidavit of candidacy or a petition to appear on the ballot from someone required to file a statement of economic interest. Likewise, an official who nominates or employs an individual required to file a statement of economic interest must notify the Board. The county auditor or nominating official must provide:

- The individual's name.
- The date of the affidavit of candidacy, petition, or nomination.

c. Form

Minn. Stat. § 10A.09, subd. 5.

Local officials must report the following information:

- Their name, address, occupation, and principal place of business.
- The name of each associated business (and the nature of that association).
- A listing of all real property interests in the state (excluding homestead).
- Any interests connected to pari-mutuel horse racing in the U.S. or Canada.
- A listing of the principal business or professional activity category of each business where the individual receives more than $50 in any month as an employee, but only if the individual has a 25% or more ownership interest in the business.
- A listing of each principal business or professional activity category where the individual has received more than $2,500 in compensation in the past 12 months as an independent contractor.
- The full name of each security with a value of more than $10,000 owned in part or in full by the public official at any time during the reporting period.

Minn. Stat. § 10A.09, subd. 6.

Local officials must file annual statements by the last Monday in January of each year. The annual statement must cover the period through Dec. 31 of the year prior to the year when the statement is due.

RELEVANT LINKS:

The annual statement must include the amount of each honorarium in excess of $50 received since the previous statement and the name and address of the source of the honorarium. The board must maintain each annual statement of economic interest submitted by an officeholder in the same file with the statement submitted as a candidate. An individual must file the annual statement of economic interest required by this subdivision to cover the period for which the individual served as a public official even though, at the time the statement was filed, the individual no longer is holding that office as a public official.

d. Access

Minn. Stat. § 10A.09, subd. 6a.

The local official must file the statement with the city council. If an official position is both a public official and a local official of a metropolitan governmental unit, the official must also file the statement with the Board. Statements of economic interest are classified as public data.

e. Pension plan trustees

Minn. Stat. § 356A.06, subd. 4(c)
Minn. Stat. § 424A.04

Each member of the governing board of a public pension plan must file a statement of economic interest. This applies to the trustees of a local relief association pension plan and includes ex-officio members, such as the mayor and city clerk. The statement must include:

- The person's principal occupation and place of business.
- Whether or not the person has an ownership of or interest of ten percent or greater in an investment security brokerage business, a real estate sales business, an insurance agency, a bank, a savings and loan, or another financial institution.
- Any relationships or financial arrangements that could give rise to a conflict of interest.

Minn. Stat. § 356A.06, subd. 4

The statement must be filed annually with the plan's chief administrative officer and be available for public inspection during regular office hours. The statement must also be filed with the Board by January 15 of each year.

f. Hennepin County

Minn. Stat. § 383B.053.

Additional disclosure requirements for elected officials of cities in Hennepin County with a population of 75,000 or greater exist.

RELEVANT LINKS:

Minn. Stat. § 10A.07.
Minn. Stat. § 10A.01, subd. 22
Minn. R. ch. 4515

2. Conflicts of Interest

Local officials (including city employees with authority to make, recommend, or vote on major decisions regarding the expenditure or investment of public funds) must disclose certain information if they will be involved in decisions or take actions that substantially affect their financial interests or those of a business with which they are associated. However, disclosure is not required if the effect on the official is no greater than on others in that business classification, profession, or occupation more generally.

a. Disclosure

Minn. Stat. § 10A.07

MN Campaign Finance and Public Disclosure Board: Potential Conflict of Interest Notice.

When conflicts arise, the interested official or employee must:

- Prepare a written statement describing the matter requiring action or decision and the nature of the potential conflict of interest.
- Deliver a copy of the notice to his or her superiors.
  - If the official is an employee, notice should be provided to his or her immediate supervisor.
  - If the official reports directly to the city council, notice should be given to the council.
  - If the official is appointed, notice should go to the chair of that board, commission, or committee. If the chair has the conflict, notice should go to the appointing authority—the city council.
  - If the official is elected, the written statement should go to the presiding officer (typically the mayor).
  - If the potential conflict involves the mayor, notice should be provided to the acting presiding officer.

Minn. Stat. § 10A.07, subd. 1

If a potential conflict arises and there is not time to provide written notice, the official must orally inform his or her supervisor or the city council.

b. Delegation or abstention

Minn. Stat. § 10A.07, subd. 2

The official's supervisor must assign the matter to another employee who does not have a potential conflict of interest. If there is no immediate supervisor (as is the case with the city council), the official must abstain from voting or otherwise influencing the decision-making process.

c. Inability to abstain

Minn. Stat. § 10A.07, subd. 2.
MN Campaign Finance and Disclosure Board: Inability to Abstain from Potential Conflict of Interest Form.

If the city official is not permitted to abstain or cannot abstain, he or she must file a statement describing the potential conflict and the action taken. The official must file this statement with the city council within a week of the action.

RELEVANT LINKS:

Minn. Stat. § 469.009.
Minn. Stat. § 469.098

d. HRAs and EDAs

Before taking an action or making a decision which could substantially affect the commissioner's (or an employee's) financial interests (or those of an organization with which the commissioner or an employee is associated), commissioners or employees of an HRA or EDA must disclose their interests. Individuals face criminal penalties for noncompliance.

D. Violations

"Local Officials in a Metropolitan Government Unit Handbook," MN Campaign Finance and Public Disclosure Board (Feb. 2010).

Individuals, subject to the Act, can be personally responsible for any sanctions that result from failing to comply with the reporting requirements. Individuals may be subject to criminal and civil penalties if they:

- Knowingly file false information or knowingly omit required information.
- Willfully fail to amend a filed statement.
- Knowingly fail to keep records for four years from the date of filing.

MN Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155; (651) 539-1180 or (800) 657-3889.

Local officials with questions concerning their responsibilities under the Act should contact their city attorney or Board staff.

VIII. Conclusion

All public officials face ethical challenges during the term of their public service. Reviewing the roles elected and appointed officials play within city government helps councils and staff sort out responsibilities, identify and mitigate conflicts of interests, and generally avoid the appearance of impropriety.