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

September 30, 2022

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

Representative Rena Moran, Chair
House Ways and Means Committee
Minnesota House of Representatives
449 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

Senator Julie Rosen, Chair
Senate Finance Committee
Minnesota Senate
2113 Minnesota Senate Building
Saint Paul, MN 55155

Dear Governor Walz, Chair Moran, and Chair Rosen:

I submit to you the annual expenditure report of the Office of the Attorney General for FY 2022, 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 2022 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. The four legal sections include: Consumer Protection, Health and Safety, Government Support, and Solicitor General (Employment, Torts, and Public Utilities Commission). This report is organized similarly by the four sections. New additions to the Office's work include opportunities representing the Metropolitan Council, expansion of work for Housing Finance, a Post-Conviction Justice unit, and a Special Outreach and Protection unit.

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 2022. For this reason, we provide representative examples of our work rather than a long list of case names. However, one area that is nearly always in the background but I believe represents a clear example of why we all are dedicated to this Office is the work done by our Consumer Action division. This group answers phone calls and on-line complaints every day from Minnesotans. Last year they received over 50,000 calls. They listen to callers' concerns about housing, medical or student debt, utilities, transportation, fraud or other important life issues and diligently seek to find solutions and often mediate resolution of thousands of day-to-day issues. Last year the division handled 14,000 files and returned over $10.4 million via settlements to Minnesotans to assist them to live their lives with more dignity, respect and safety.

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

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

ANNUAL REPORT REQUIRED BY

Minnesota Statutes sections 8.08 and 8.15 subdivision 4 (2021)

Fiscal Year 2022

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SOLICITOR GENERAL SECTION

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*** the major current and future legal issues that the Division has addressed in FY 2022 include:

EMPLOYMENT AND TORT CLAIMS

Employment litigation often includes claims against the State 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.

- ***Walsh v. State***. In *Walsh*, ETP represented the State to ensure it is not required to defend and indemnify county prosecutors on tort claims, which saved millions of dollars in likely defense costs. The Legislature provided two separate frameworks for lawsuits against public officials, one for county employees and one for State employees. Plaintiffs (a county attorney and sheriff who were sued in federal court), attempted to shift the burden and expense of their lawsuit from the county to the State. They argued that the State is responsible for defending and indemnifying all 87 county attorneys and their staff, all city attorneys and their staff, and over 10,000 sheriffs and city police officers. The district court dismissed the case. The Court of Appeals affirmed and the Supreme Court affirmed.

- ***Greg King v. Minnesota Guardian ad Litem Board***. Mr. King was terminated from the Guardian ad Litem Board after an employee came forward with complaints indicating that King promised her career opportunities in exchange for sexual favors. An investigation substantiated the allegations. Mr. King thereafter filed a federal lawsuit alleging his termination was based on race, age, and whistleblowing. The district court granted summary judgment in favor of the Guardian ad Litem Board. Mr. King appealed to the 8th Circuit, which affirmed.

- ***Hanson v. Dep't of Natural Resources***. Ms. Hanson was terminated by the Department of Natural Resources after an incident in a hotel where she was staying for a work-related conference. An investigation substantiated that she appeared nude in the hotel hallway,

refused the hotel manager's demand that she leave because of her disruptive behavior, had to be escorted out by law enforcement, and otherwise abused her authority. Ms. Hanson alleged that she was actually fired because she reported her belief that there was criminal activity taking place in the hotel room next door to hers. The Minnesota Supreme Court concluded the district court did not err when it granted summary judgment for the Department, because there was no material fact dispute that the alleged protected activity was not a motivating factor in the termination decision.

- ***Gamble v. Minnesota State Operated Services***. Mr. Gamble and other sexually dangerous civil detainees at the Minnesota Sex Offender Program argued the defendants failed to pay them minimum wage under the Fair Labor Standards Act. Plaintiffs participate in a voluntary Vocational Work Program. Under state law, the Vocational Work Program is an extension of therapeutic treatment in order for civilly committed sex offenders to learn valuable work skills and work habits while contributing to their cost of care. At the district court, plaintiffs raised constitutional claims, which were dismissed. The district court granted conditional class certification and later granted defendants' motion for summary judgment. On appeal, the Eighth Circuit agreed with defendants and the district court that the plaintiffs were not employees for purposes of FLSA.

PUBLIC UTILITIES COMMISSION

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

- ***Natural Gas Spike Investigation and Prudence Determination***. Attorneys in this division advised the PUC on whether Minnesota natural gas utilities acted prudently when facing an unprecedented spike in gas prices resulting from the 2021 Winter Storm Uri. Storm-related equipment failures in states from which Minnesota receives natural gas resulted in price increases of up to 200%. Natural gas commodity price increases are generally automatically recovered from ratepayers. In August 2022 the PUC found some level of imprudence in each of the four Minnesota gas utilities (Xcel, CenterPoint, Great Plains and Minnesota Energy Resources Corporation) and disallowed cost recovery of $58.5 million in total that the utilities cannot pass onto Minnesota consumers.

- ***Renewable Energy Projects***. Attorneys in this division also advised the Commission on permitting several renewable energy projects. These projects included:

    A. Big Bend Wind/Red Rock Solar. This is the first hybrid (wind/solar) project in the state and consists of 300 megawatts of wind and 60 megawatts of solar generation. The project is located near the historically significant Jeffers Petroglyphs. After initial concerns were raised by the Commission about visual impact on the site, the developer engaged the Lower Sioux Indian Community, the Upper Sioux Indian Community and the Minnesota Historical Society to modify the site layout to mitigate visual impacts by moving wind turbines at least seven miles from the historical site.

B. Sherco Solar. As Xcel Energy implements the closure of its Sherco coal-fired plant in Becker, Minnesota, it plans to use the transmission infrastructure on site to bring up to 460 megawatts of solar onto its system. In August 2022, the PUC approved site and route permits for the solar project and two transmission lines.

DEFENDING THE DULY ENACTED LAWS OF THE STATE

- ***Buzzell v. Governor Walz***. Plaintiff argued his businesses were commandeered when the Governor issued emergency executive orders that imposed limits on in-person dining. The orders were put in place to mitigate transmission of COVID-19, by limiting the operations of high-risk public accommodations such as Plaintiff's businesses, but they did not order restaurants to completely close. Plaintiff sought just compensation for the government's alleged "use" of his property. The district court granted the Governor's motion to dismiss, and the Minnesota Court of Appeals affirmed. In May 2022, the Minnesota Supreme Court concluded that for property to be commandeered, the government must exercise exclusive control over or obtain exclusive possession of the property such that the government could physically use it for an emergency management purpose. The court also found the government exercises exclusive physical control or possession of private property when only the government may exercise control or possession of the property and the owner is denied all control over or possession of the property. The Minnesota Supreme Court remanded the case to the district court to analyze the motion to dismiss in light of this definition of commandeering.

ENVIRONMENTAL & NATURAL RESOURCES DIVISION

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.

In FY 2022, the AGO brought five transactional attorneys who had been spread across the office together into one division (ENR) to share resources and cross-train, The transactional group within ENR provides legal representation to the Department of Administration, Minnesota Housing Finance Agency, 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.

Below is a ***representative sample of some but not all*** legal work performed by ENR for the agencies and boards during FY 2022:

- **Chronic Wasting Disease Issues**. The Office successfully represented the DNR and BAH in important regulatory and enforcement work to prevent the spread of chronic wasting disease in deer. This included defending BAH orders issued to fence and contain an area in which a cervid farmer had improperly disposed of carcasses from a farm with confirmed positive cases of chronic wasting disease on public land. It also included defending orders issued by DNR to temporarily prohibit the transfer of farmed deer while the spread of chronic wasting disease through farmed deer was traced. In August, the Minnesota Court of Appeals issued a precedential decision confirming that DNR had authority to issue those orders.

- **Line 3 Issues**. The Office successfully represented MPCA in challenges brought to its issuance of certifications necessary for the permitting of the project and represented various state agencies in regulatory enforcement work to ensure compliance with permits issued for the project and with state laws and regulations. The Office also successfully defended the DNR from suit brought in a tribal court, obtaining a determination from the tribal court itself that it lacked jurisdiction to hear the claims.

- **Mesabi Metallics**. The Office defended the DNR's decision to terminate mineral leases held by Mesabi Metallics after Mesabi Metallics failed to meet agreed deadlines to secure the necessary funding to advance its mining project following many years of delays.

- **PFAS**. The Office continues to represent state agencies in a wide variety of enforcement and remediation actions brought as a result of PFAS contamination of soils and groundwater. These efforts have focused on preventing additional releases and ensuring the parties responsible for existing contamination pay for the costs of clean-up, rather than State taxpayers.

TAX LITIGATION DIVISION

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 courts. The Division handles all tax types, including multimillion-dollar corporate franchise-tax claims, a high volume of complex sales-and use-tax cases, and complex utility valuation 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*** legal work performed by the Tax Litigation Division in FY 2022.

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 located in Minnesota. Unitary valuation cases involve extremely complex valuation 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.

- ***CenterPoint Energy Resources Corp. v. Commissioner of Revenue*** **(2018-2021)**. CenterPoint Energy challenges the Commissioner's 2018, 2019, 2020, and 2021 valuations of its natural-gas distribution pipeline operating property. CenterPoint Energy alleges the property's estimated market value is too high and that the property has been unequally assessed. The trial of the 2018 and 2019 cases resulted in the tax court reducing the values for each year. The Commissioner appealed that decision to the Minnesota Supreme Court. The trial on the 2020 and 2021 values is scheduled to begin sometime after October 3, 2023.

CASES RELATED TO CORPORATE FRANCHISE TAX

- ***E. I. du Pont de Nemours and Company & Subsidiaries v. Commissioner of Revenue***. This case involves a corporate franchise tax assessment of the DuPont chemical company in the amount of approximately $11 million. At issue is the treatment of forward exchange contracts ("FECs") involved in currency trading, as well as the treatment of gains from the sale of a business and certain asserted royalty income when determining the amount of DuPont's income apportionable to Minnesota. The case is in the discovery phase. There is currently no date set for trial.

CASES RELATED TO WHOLESALE DRUG DISTRIBUTOR TAX

- ***Dakota Drug v. Commissioner of Revenue***. The Commissioner audited Dakota Drug's wholesale drug distributor tax returns and assessed additional tax based on an adjustment that increased Dakota Drug's gross revenues. The adjustment is based on the Commissioner's conclusion that Dakota Drug's gross revenues should not be reduced by rebates or account credits Dakota Drug provides to pharmacies through its rebate program. The case is in the discovery phase. There is currently no date set for trial.

CASES RELATED TO SALES AND USE TAX

- ***Jeffrey Sheridan, et al. v. Commissioner of Revenue***. In this sales and use tax case, Plaintiffs contends that their payment of sales tax on their purchase of aircraft in addition

to annual registration tax violates article X, section 5, of the Minnesota Constitution. The Minnesota Tax Court granted summary to the Commissioner and Plaintiffs appealed. The Minnesota Supreme Court affirmed and held that Minnesota's statutes related to taxation of aircraft did not violate the Minnesota Constitution.

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 three public pension boards.

Below is a ***representative sample of some but not all*** legal work performed by the Education Division in FY 2022.

- ***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. Plaintiff sought partial summary judgment after the Minnesota Supreme Court remanded the case. The district court denied partial summary judgment and Plaintiff appealed that decision to the Minnesota Court of Appeals. In its September 26, 2022, decision, the court of appeals determined a racially imbalanced school system caused by de facto segregation by itself is not enough to demonstrate an Education Clause violation, even if state action contributed to the racial imbalance.

- ***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, a second women's team (Nordic skiing) joined the lawsuit. Following a trial, the federal district court found St. Cloud State in violation of Title IX, entered a permanent injunction, and awarded attorneys' fees. St. Cloud State appealed the decision and the Eighth Circuit affirmed in part and reversed in part the federal district court's decision. On remand, and in response to the parties' motions, the federal district court found St. Cloud State is in nearly full compliance with Title IX and the earlier injunction. The court will continue monitoring compliance and determine attorneys' fees.

- ***Feeding Our Future v. Minnesota Department of Education***. Feeding Our Future ("FOF"), a participant in the federal food programs, displayed irregularities that the Minnesota Department of Education deemed suspicious and sought to slow FOF's

unexplained growth and to suspend payments to FOF until Education could validate the eligibility of FOF's claims.. FOF sued t Education alleging Education, who administered the federal programs at the state level, was discriminating against FOF and violating the federal regulations governing the federal food programs. Education denied any wrongdoing and defended the allegations against it. Education referred the suspicious activity to federal authorities with jurisdiction over the funds which later lead to 49 criminal indictments by the US Attorney's Office. FOF dismissed the lawsuit after its involvement in a scheme to steal millions of dollars of federal food aid became public on January 20, 2022. Education filed a claim in Feeding Our Future's dissolution proceeding to recover the litigation fees and costs it incurred in defending itself against FOF's baseless lawsuit.

- ***K.O., et al. v. Heather Mueller, Commissioner of Education***. On behalf of its client, the Disability Law Center sued in federal court contending that Minnesota's statute that caps the age to receive special education services to July 1 of the year that the student turns 21 conflicts with federal law requiring states to provide special education services "through the age of 21." Plaintiff filed a motion on September 7, 2022, seeking class certification. It is anticipated cross motions for summary judgment will be filed in December 2022.

GOVERNMENT SUPPORT SECTION

ADMINISTRATIVE LAW DIVISION

The Administrative Law Division primarily provides legal representation to the Secretary of State, the Department of Commerce, the Department of Labor and Industry ("DLI"), and many other boards, agencies, councils, and commissions. The Division appears in state and federal district and appellate courts and in administrative proceedings.

Below is a ***representative sample of some but not all*** legal work performed by the Division in FY 2022.

- **Litigation**.
    - Division staff continued defending a lawsuit challenging the constitutionality of the Alec Smith Insulin Affordability Act. The law has allowed more than 1,100 Minnesotans to receive life-saving insulin in the year and a half since the law took effect in 2020. The district court dismissed the lawsuit. The case is pending before the Eighth Circuit.

    - Division staff represented the Secretary of State in successfully defending the constitutionality and legality of numerous election-related laws. Division staff also represented the Secretary in the redistricting proceedings that followed the 2020 Census and successfully advocated for the redistricting panel to reduce the plaintiffs' requested attorney fees by $557,000.

    - Division staff successfully defended a challenge at the Minnesota Court of Appeals seeking to invalidate the Board of Electricity's adoption of the most recent edition of the National Electrical Code as the Minnesota Electrical Code.

- **Commerce and Labor Enforcement**. The Division represents the Department of Commerce and DLI in numerous enforcement actions against individuals and businesses that act in regulated industries and violate state laws. For example, Division staff are representing the Department of Commerce in an action against a pharmacy benefit manager that is limiting where insureds can refill prescription medications by denying coverage to consumers who do not fill prescriptions at pharmacies associated with the pharmacy benefit manager. Staff also represented the agency to summarily suspend and then revoke the license of a currency-exchange company that repeatedly issued usurious loans to Minnesota consumers. Division staff represented DLI in revoking two commonly owned entities' residential building contractor licenses after the companies repeatedly misled homeowners and charged them and insurers for services and materials they did not provide, and they engaged in other misconduct. The companies' individual owners were also barred from applying for a license or holding a position of authority in any other entity that requires a residential building contractor license.

- **Energy and Telecom**. The Division represents the Department of Commerce in proceedings before the Public Utilities Commission and federal regulatory agencies, and in related court cases. Through this representation, Division staff help the Department secure safe, reliable, and affordable electric, gas, and telephone service for Minnesota customers. For example, following proceedings that stretched throughout FY 2022, in August 2022, the Division secured historic savings totaling nearly $60 million for natural gas consumers by proving that certain utilities failed to act prudently during Winter Storm Uri in 2021. In collaboration with financial experts at Commerce, the Division is also advancing Minnesota ratepayers interests in a series of ongoing rate case proceedings filed by electric and natural gas utilities. The Division has advocated against unreasonable or unsupported cost increases, securing one settlement in 2022 that reduced a proposed cost increase by $18.6 million. In addition to its energy work, the Division is assisting the Department of Public Safety in an ongoing dispute with certain telephone companies to ensure Minnesotans have reliable next generation 9-1-1 network access at a reasonable cost.

- **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. For example, the Division represented the Board of School Administrators in revoking a school administrator's license based on her alleged involvement in investing $5 million dollars in public funds in a manner that state law prohibited. The Division also represented the Board of Cosmetologist Examiners in disciplining two cosmetology schools for violating record-keeping laws, which was negatively affecting the schools' students. One school surrendered its license and the other school's license was revoked.

HUMAN SERVICES DIVISION

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.

Below is a ***representative sample of some but not all legal*** work performed by the Division in FY 2022.

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 1.1 million Minnesotans. The Division has defended a class action related to disability services in *Murphy, et al. v Harpstead* for the past six years, which recently settled and awaits court approval. The Division also represents DHS in connection with a lawsuit over a

Medical Assistance and MinnesotaCare procurement, and the district court recently granted DHS summary judgment in that case.

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, and the Federal Supplemental Nutrition Assistance Program ("SNAP," formerly called Food Stamps). Division attorneys represented the agency in appeals from agency actions related to public assistance programs. The Division is defending at the Eighth Circuit a dismissal order in a lawsuit against the DHS Commissioner arising out of a county child protection matter.

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. Division attorneys continue to represent DHS in the *Karsjens, et al. v. Harpstead, et al.* class action challenging conditions of confinement at the Minnesota Sex Offender Program. Division attorneys also regularly defend DHS in connection with admissions to DHS facilities in Rule 20 matters.

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, childcare, and services for mental health, developmental disabilities, and chemical health. Division attorneys regularly defend DHS actions that seek license revocations when a party appeals, including the revocation of Bridges MN's Home and Community Based Services license.

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*** legal work performed by the State Agencies Division in FY 2022.

ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

The Division represents state agencies that bring enforcement proceedings in a variety of legal forums. For instance, on August 1, 2021, Minnesota's Assisted Living Licensure law went into effect. The law established regulatory standards governing the provision of housing and services in assisted living facilities to help ensure the health, safety, and well-being of residents. The division represents the Department of Health ("MDH") in administrative proceedings to enforce correction orders issued to assisted living facilities that have violated the new law. In addition, the Division successfully moved for a temporary injunction in state district court to prohibit a business from advertising itself as an assisted living facility before it received a license from MDH. The Division also represents MDH when individuals or health care facilities have violated the Vulnerable Adults Act by neglecting, abusing, or financially exploiting vulnerable adults.

In addition, the Division represents the Department of Labor and Industry ("DLI") in proceedings to enforce occupational safety and health ("OSHA") standards. For instance, Division staff represented DLI in a contested case where an administrative law judge found the employer's violation of safety standards caused an employee's death by electrocution, and substantial penalties were appropriate. OSHA proceedings also included cases where the employer failed to implement adequate precautions to prevent transmission of disease in the workplace, and Division staff negotiated settlements where employers agreed to implement safety measures to protect employees in the future.

DEFENSE OF STATE EMPLOYEES AND PROGRAMS

The Division provided legal representation to defend the Department of Corrections ("DOC") in lawsuits brought by incarcerated persons involving constitutional issues in state and federal court. Examples include constitutional challenges to prison contraband/security policies; challenges to alleged restrictions on religious practice during the COVID-19 pandemic under the First Amendment and the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"); and wrongful incarceration claims. Other lawsuits involved incarcerated individuals seeking early release from prison due to the pandemic, or bringing negligence claims based on exposure to COVID-19. In *Baker v. Minn. Dep't of Corrections*, *et al*., persons incarcerated in Minnesota correctional facilities brought a class action lawsuit against state officials, seeking release and other injunctive relief regarding facility conditions in light of the COVID-19 pandemic. The state district court granted the state officials' motion to dismiss the lawsuit and denied injunctive relief.

APPELLATE ADVOCACY

The Division represented the DOC in cases challenging the DOC's decision not to grant conditional medical release to particular incarcerated persons. For instance, an individual serving a sentence for second-degree murder sued the DOC under 42 U.S.C. § 1983 after the DOC determined he was not eligible for release. The state district court dismissed the lawsuit. The Minnesota Court of Appeals issued a precedential decision in the DOC's favor in *Husten v. Schnell*, recognizing a jurisdictional defense based on United States Supreme Court case law

applying section 1983. In addition, the Division represented the Bureau of Mediation Services ("BMS") before the Minnesota Supreme Court, where BMS established that it was not a proper party to the appeal of an independent arbitrator's decision.

HEALTH AND TEACHER LICENSING DIVISION

The Health and Teacher Licensing Division represents Minnesota's 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*** legal work performed by the Health and Teacher Licensing Division in FY 2022.

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 these cases involved healthcare providers or educators who violated professional boundaries, engaged in financial exploitation, used unreasonable force or discipline, and engaged in substandard practice. These cases resulted in board orders for discipline under rules and statutes that govern licensees, which are enforced by the Division and its clients to protect the public. For example, in *In the Matter of the Medical License of Todd A. Leonard*, the Division represented the Board of Medical Practice in an investigation and a contested case at the Office of Administrative Hearings involving a physician who was the owner and medical director of a company that provided medical care to inmates at several county jails in Minnesota. The Board suspended the physician's license as a result of substandard medical care he provided to a patient who died in his care at the Beltrami County Jail. And in *In the Matter of the License of Dasherline Johnson, Psy.D., L.P.*, the Division represented the Board of Psychology in an investigation and disciplinary proceeding involving a psychologist who owned and operated a clinic engaged in fraudulent billing practices, including billing insurance companies for services that were not provided or for which there was no clinical documentation. The Board placed limitations and conditions on the psychologist's license, restricting her from managing a clinic or supervising other practitioners and requiring her own practice to be supervised.

SEXUAL MISCONDUCT

The Health and Teacher Licensing Division investigated and took action on complaints received by the boards against healthcare providers and educators who engaged in sexual misconduct. The misconduct at issue in these cases involved healthcare providers or educators who abused their position of authority to engage in inappropriate sexual relationships with patients or students. For example, in *In the Matter of Riley Sean Cullinane*, the Division represented the Board of Chiropractic Examiners in an investigation and a contested case at the Office of Administrative Hearings involving a chiropractor who engaged in sexual misconduct toward his

patients. The Board revoked the chiropractor's license as a result of his sexual misconduct. And in *In the Matter of the Medical License of Sanjeev K. Arora, M.B., B.S.*, the Division represented the Board of Medical Practice in an investigation and contested case at the Office of Administrative Hearings involving a physician who engaged in sexual misconduct toward his patient. The Board suspended the physician's license as a result of his sexual misconduct.

UNAUTHORIZED PRACTICE

The Health and Teacher Licensing Division investigated and took action on complaints received by the health-related licensing boards involving the unauthorized practice of healthcare. The misconduct at issue in these cases involved individuals who failed to comply with laws governing their practice, practiced outside of the scope of their licensure, engaged in the unlicensed practice of healthcare, or aided and abetted the unlicensed practice of healthcare. For example, in *In the Matter of Larry Lindberg, R.Ph.*, the Division represented the Board of Pharmacy in an investigation and a contested case at the Office of Administrative Hearings involving a pharmacist who owned and operated pharmaceutical companies through which he compounded drugs under unsanitary conditions, sold expired drugs and drugs that were not properly sterilized, unlawfully repackaged morphine and other controlled substances, and permitted unlicensed individuals to take drug orders over the phone. The Board revoked the pharmacist's license as a result of his unauthorized and unsafe practice.

HEALTH AND SAFETY SECTION

MEDICAID FRAUD DIVISION

The Medicaid Fraud Division is a federally certified Medicaid Fraud Control Unit ("MFCU") that investigates and prosecutes health care providers who commit fraud in the delivery of services in 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, or against certain Medicaid recipients.

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. After completing its administrative investigation, SIRS may refer cases to the Division for criminal investigation and prosecution. The Division also receives referrals from other sources, including but not limited to Managed Care Organizations, other State Agencies, and other Federal, State, and local law enforcement entities.

Most of the Division's work involves investigating and prosecuting 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 prior conviction, 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.

Below is a ***representative sample of some but not all*** cases prosecuted by the Medicaid Fraud Division in FY 2022.

- ***State of Minnesota v. Trenea Davis, et al***. In FY2021, the Division charged a network of 8 people in Hennepin County with a total of 46 felony theft counts for their participation in a years-long scheme that defrauded the Minnesota Medical Assistance program out of over $860,000.00. Davis, the admitted ringleader of the scheme, acknowledged recruiting family and friends to feign or exaggerate medical conditions to qualify themselves for personal care assistant ("PCA") services. Davis then enlisted others to report providing services that never occurred and coordinated check splitting arrangements among PCAs, recipients, and herself. Some members of Davis's fraud ring were living and/or receiving public assistance in Louisiana, where Davis is originally from, during times that Medicaid paid for care reportedly occurring in Minnesota. Davis herself reported working more than 7,000 hours between December 2014 and May 2018, before switching to the role of a patient who allegedly needed 12 hours of care per day.

  In FY2022, all 8 charged defendants pled guilty and were sentenced. The district court judge sentenced Davis to serve 57 months in prison and ordered her to pay $852,347.18 in restitution.

- ***State of Minnesota v. Dr. Xiaoyan Hu***. In March 2022, the Division charged acupuncturist Dr. Xiaoyan Hu in Hennepin County with defrauding the Medicaid program out of over $1.6 million. Dr. Hu owned and operated a series of clinics, Chinese Acupuncture and Herb Center (CAHC) throughout the Twin Cities. Through CAHC, Dr. Hu overbilled the Medicaid program for acupuncture services, frequently by billing for one hour of services when patients received services for only 15 – 30 minutes. Dr. Hu, through CAHC, also billed for services not provided and used acupuncture codes to bill for services that were not eligible for reimbursement.

  Dr. Hu has a contested omnibus hearing in the fall.

- ***State of Minnesota v. Omobolanle Akinsanye, et al***. In January 2022, the Division charged three people in Hennepin County with operating two separate PCA services agencies that swindled the Medicaid program out of over $1.7 million. Akinsanye previously went by the name Suwebatu Gbadamosi. In 2009, under her previous name, Akinsanye was suspended and terminated from participating as a Medicaid provider by the Minnesota Department of Human Services. Two co-defendants – one of whom was Akinsanye's husband – enrolled their PCA services agencies with the Department of Human Services, but did not disclose Akinsanye's role as an owner or managing employee under either her current or former name, or her suspension and termination under her former name. Akinsanye operated both agencies despite her suspension, and while operating the agencies billed for services not provided and for services ineligible for payment because Akinsanye was prohibited from participating as a Medicaid provider.

  The defendants have omnibus hearings set for this fall.

- ***State of Minnesota v. Dr. Leon Frid***. In August 2022, the Division charged Dr. Leon Frid in Hennepin county with defrauding the Medicaid program out of over $94,000. Dr. Frid, the owner and operator of Life Medical, is licensed to provide chiropractor and acupuncture services. Dr. Frid also worked an as interpreter for clients at his own clinic. Dr. Frid billed for interpreter services he did not provide, and forged the signature of a former employee to "verify" that the interpreter services he did provide actually occurred. Dr. Frid also claimed to provide interpreter services to patients during appointments where he was the patients' treating medical provider, despite a known prohibition on being reimbursed for interpreter services he personally claimed to provide when the provider (Dr. Frid) spoke the same language as the client.

  Dr. Frid has an omnibus hearing in the fall.

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 where drivers contest the revocation of their driver's license for an arrest for driving while impaired by alcohol or controlled substances. In FY 2022, the Division successfully handled district court actions

resulting in the recovery of nearly a half-million dollars in license reinstatement fees to state government.

The Division provides legal services to DPS and its various divisions, including the Minnesota State Patrol, the Alcohol and Gambling Enforcement Division, the Driver and Vehicle Services Division, 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, and the Office of Traffic Safety.

The Division also provides legal representation to state boards and commissions, including the Gambling Control Board and the Minnesota Racing Commission. These entities issue thousands of licenses and conduct numerous investigations each year. 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 in appeals from the board's licensing decisions and disciplinary actions.

Below is a ***representative sample of some but not all*** legal work performed by the Public Safety Division in FY 2022.

- The Division defended the State against over a dozen constitutional and statutory challenges in Minnesota appellate courts. In a published case decided by the Court of Appeals, *Messenburg v. Comm'r of Pub. Safety*, Division attorneys responded to a driver's claim that his license was improperly revoked because the officer who saw that the driver exhibited indicators of impairment administered a preliminary breath test with only a reasonable suspicion that the driver was impaired rather than probable cause. The Court of Appeals rejected the driver's claim that probable cause was needed to ask a driver for a preliminary breath test and affirmed the district court's decision to sustain the revocation based on the officer's reasonable suspicion that the driver was impaired. The Supreme Court denied the driver's petition for further review.

- Division attorneys handled over 3,500 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 Driver and Vehicle Services Division in title matters and the Minnesota State Patrol in forfeiture proceedings in the district courts.

- The Division represented DPS at the Office of Administrative Hearings in cases involving benefits disputes and the Alcohol and Gambling Enforcement Division in enforcement actions involving food and beverage establishments that were alleged to have violated Minnesota statutes in cases related to the COVID-19 pandemic.

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 and other State agencies against entities that make false claims, 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. The Division advocates in the appellate courts on behalf of its client agencies. The Division also assists in the representation of other state agencies in conflict cases and cases where its expertise is sought.

Below is a ***representative sample of some but not all*** legal work performed by the Transportation Division in FY 2022.

- ***Eminent Domain/Land Acquisition Matters on behalf of the Department of Transportation***. The Division is representing MnDOT in the acquisition of over 500 parcels that are necessary for infrastructure improvements to Minnesota's Trunk Highway System. Division attorneys protect the public interest in these special proceedings by ensuring that MnDOT has the necessary right-of-way to improve and build new roads and bridges throughout the entire state, including for example, the completion of the four-lane expansion of the Trunk Highway 14 corridor, improvements to Trunk Highway 169, and the Highway 23 expansion in central Minnesota. Trunk Highway right-of-way acquired by and through this work is used to facilitate construction of vital municipal utility improvement projects, such as upgrading outdated sewer and water infrastructure, in communities throughout the state. These cases, integral to the timely completion of these construction projects, make Minnesota's highway system safer and more efficient, and implicate the powers and protections of the Minnesota and U.S. Constitutions. Division attorneys work to carry out these Constitutional provisions to ensure the compensation paid for land necessary for these vital improvements is just to both the affected landowners and the public that funds the projects.

- ***Administrative Enforcement on behalf of Department of Labor & Industry ("DLI")***. The Division represented DLI in an administrative proceeding to enforce occupational safety and health ("OSHA") standards. The Division successfully defended civil penalties imposed and corrective measures taken by DLI to improve workplace-safety at a correctional facility following a workplace fatality. Division attorneys helped facilitate resolution of the case, which helped preserve enhancement of OSHA workplace-safety standards.

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 Correction's assessment of the offender's level of danger upon release from incarceration. The Division also advises the Bureau of Criminal Apprehension ("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 also provides assistance to county attorneys in felony appeals. The cases handled in FY 2022 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 2022.

- ***State of Minnesota v. Devon Pulczinski*** (Pennington County). On March 27, 2019, Pulczinski strangled Alexandra Ellingson to death in his home in Thief River Falls. He then lit the apartment on fire in an attempt the conceal the murder, which caused four family members (including three young children) to flee the lower apartment. A jury found Pulczinski guilty of first-degree premeditated murder and the court sentenced him to life in prison.

- ***State of Minnesota v. Morris Dodd*** (Becker County). On November 10, 2018, Dodd was hunting on public land in rural Becker County when he fired his rifle to scare a deer. The bullet struck and killed Jay Nelson, a retired sheriff's deputy, who was driving on a logging road in the distance. Dodd was prohibited from possessing a gun or ammunition because of a prior sexual assault conviction, and he pled guilty to being a prohibited person in possession of a firearm and ammunition. After a trial, the jury convicted Dodd of second-degree manslaughter and sentenced him to 78 months in prison.

- ***State v. Christopher Colgrove*** (Clearwater County). On September 7, 2020, Christopher Colgrove called the police to his home because he believed he was having a bad reaction to using methamphetamine. When officers arrived, Colgrove was acting erratically and fled from the officers. Colgrove forced his way into the home of his neighbor, Dawn Swenson. As the officers approached Swenson's home, the officers could hear her yelling at Colgrove to "get out" and "not hurt" her. The officers entered the home as Colgrove

stabbed Ms. Swenson with a kitchen knife twice, killing her. On January 19, 2022, a jury found Colgrove guilty of first-degree murder and the court sentenced him to life in prison.

- ***State v. Sheldon Thompson*** (Carlton County). A Carlton County grand jury indicted Sheldon Thompson on multiple counts of first- and second-degree murder for killing his girlfriend, their unborn child, and her 20-month-old son. After a three-week trial, the jury found Thompson guilty of all charges. The court sentenced Thompson to three consecutive life sentences.

- ***State v. Jonathan Greyblood*** (Morrison County). During the night of February 5 and 6, 2021, Greyblood strangled his wife to death and dumped her body from a bridge into the frozen river below. Greyblood then lied to their children and friends about her whereabouts for more than a day before admitting killing her. After a trial, the jury found Greyblood guilty of second-degree murder and the court sentenced him to 180 months in prison.

- ***State v. Victor Morales*** (Grant County). On December 2, 2020, Victor Morales used a 20-pound dumbbell to strike his girlfriend in the head multiple times while she was sleeping, killing her. Morales then set the apartment on fire. Morales pled guilty to one count of intentional murder and the court sentenced him to 306 months 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 assisted and 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.

  In early February 2021, the district court severed Chauvin's case from the other three co-defendants' cases and Chauvin's trial commenced on March 8, 2021. After a six weeks of jury selection and three weeks of testimony, a jury returned guilty verdicts on all counts on April 20, 2021. The district court also found, based on the evidence at trial, the presence of aggravating factors, including that Chauvin abused his position of authority and trust, Mr. Floyd was particularly vulnerable, and Mr. Floyd was treated with particular cruelty. At sentencing on June 26, 2021, the district court sentenced Chauvin to 270 months in prison. Lane accepted responsibility and pleaded guilty to aiding and abetting second-degree manslaughter and the judge imposed a 36-month sentence in September 2022. The trial of the two remaining co-defendants is scheduled for October 24, 2022.

- ***State of Minnesota v. Kimberly Potter*** (Hennepin County). On April 11, 2021, Brooklyn Center Police Office Kimberly Potter was working with another officer on patrol when they stopped a vehicle being driven by Daunte Wright. The officers learned that Mr. Wright had a warrant and as the other officer tried to take him into custody, Mr. Wright pulled away from that officer. Officer Potter then announced her intent to use her Taser on Mr. Wright but pulled her firearm instead and shot Mr. Wright in the chest from close

range. Mr. Wright died almost immediately. This incident occurred during the trial of Derek Chauvin. The Hennepin County Attorney asked the Washington County Attorney's Office to handle the case. The Washington County Attorney charged Ms. Potter with manslaughter in the second degree. Shortly thereafter the Washington County Attorney decided that office could not take the case and the Hennepin County Attorney asked this Office to handle the prosecution of the matter. This Office then added a first-degree manslaughter charge.

After several weeks of trial in December 2021, the jury found Ms. Potter guilty of both counts. On February 18, 2022, the Court sentenced Ms. Potter to 24 months in prison.

POSTCONVICTION JUSTICE DIVISION

The Postconviction Justice Division was created during FY2022 to carry out two important initiatives to seek justice for persons who have been convicted of crimes in the past. First, the Division seeks to identify cases in which a wrongful conviction may have occurred. Second, the Division seeks to mitigate the collateral consequences of past criminal convictions for persons who have served their sentences and rehabilitated themselves.

The Postconviction Justice Division houses Minnesota's first-ever Conviction Review Unit ("CRU"). A CRU is an independent unit within a prosecutor's office with a mission to identify, remedy, and prevent wrongful convictions. Most CRUs throughout the country are housed in the office of a single-jurisdiction prosecutor, like a district attorney or a county attorney. Minnesota is one of several states that have developed a statewide CRU, giving it the ability to review cases in any county in the state.

The CRU has an application process to allow persons with a credible claim of actual innocence to request review of a conviction. For cases accepted for review, the CRU will conduct a comprehensive, non-adversarial review of the evidence in the case, in cooperation with both the applicant's counsel and the prosecuting attorney. The CRU review is an extrajudicial process, meaning it occurs outside of the court system. The CRU operates independently from the prosecutors that procured the conviction in the first place, and from the other prosecutors in the Criminal Division within the Office. The CRU has an Advisory Board consisting of prosecutors, criminal law and justice stakeholders, and community members.

In cases where the CRU concludes there was a wrongful conviction, the CRU will work cooperatively to seek remedial measures necessary to correct injustices uncovered. The CRU will also study and collect data on the causes of wrongful convictions in order to shape policies and procedures to prevent them from occurring in the future.

The mitigation of collateral consequences is the second service provided by the Postconviction Justice Division. It recognizes that for many people who have been convicted of crimes, criminal records can hamper their efforts to improve their prospects for jobs, housing, and education long after they have atoned for their crimes. To mitigate collateral consequences of convictions for people who have since rehabilitated themselves, the Division created a website

where qualifying individuals can request that their records be sealed so they no longer appear on background checks.

Division staff accept applications for sealing records, determine eligibility under state law, and for those that qualify, work cooperatively with prosecutors across the state to prepare court filings. Under this program, because requests to seal records are filed by prosecutors rather than the applicants, applicants avoid expensive court filing fees and confusing forms that are difficult to navigate for non-lawyers.

CONSUMER PROTECTION SECTION

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. Second, it oversees and regulates charities, charitable trusts, and nonprofits active in Minnesota. 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 $808,205 in registration-related fees into the State's general fund. The Division currently has more than 12,000 soliciting charitable organizations, more than 2,600 charitable trusts, and more than 300 professional fundraisers registered. These entities collectively held more than $891 billion in assets and had more than $373 billion in total revenue last year. Registration information on the Attorney General's website permits the donating public to review a charitable organization's financial information. The Charities Division is currently developing a new registration and reporting system that will enable even 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 FY 2022. 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 196 such notices 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 through 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 2022.

- ***In the Matter of Otto Bremer Trust***. In January 2020, the AGO instigated an investigation into the trustees of Otto Bremer Trust following the trustees' partial sale of the Trust's largest asset, Bremer Financial Corporation. As a result of the investigation, the AGO brought a petition to remove the three trustees in August 2020 for breaches of fiduciary duties related to self-dealing, abusing the grantmaking process, misrepresenting facts to the AGO, and conduct related to their execution and disclosures of the partial sale. The case went to trial in September 2021. In April 2022, the Court issued an order removing one of the trustees for his "egregious misconduct" and "repeated improprieties." The Court also made changes to the remaining trustees' compensation and issued other relief. The order is currently being appealed by the removed trustee.

- ***In the Matter of Feeding Our Future***. In FY 2022, the AGO made public its investigation into Feeding Our Future for potential violations of Minnesota's nonprofit and charities laws following the unsealing of federal search warrants directed at organizational insiders for misusing government grant funds. The AGO further filed a petition in Dakota County District Court asking the court to supervise the nonprofit pending its dissolution to provide oversight, protect against potential fraud and waste, and to ensure proper oversight over the corporation pending dissolution. The AGO's petition was granted in April 2022. The AGO's investigation and the court supervision proceedings remain ongoing.

- ***State v. Pamela Fergus, a/k/a Philando Feeds the Children***. In 2017 and 2018, Pamela Fergus held a charitable fundraiser called "Philando Feeds the Children" for the stated purpose of paying down the lunch debts of St. Paul Public School students. The AGO sued Fergus in Ramsey County for misusing just over $120,000 of the more than $200,000 donated. In March 2022, the AGO obtained a consent judgment where Fergus agreed to pay $120,000 in restitution for distribution to Saint Paul Public Schools to pay off the lunch debts of students in need—as the donors originally intended. The State also obtained a permanent injunction banning Fergus from handling charitable funds.

- ***In the Matter of Minnesota Cameroon Community***. In May 2022, the AGO secured an Assurance of Discontinuance with Minnesota Cameroon Community ("MINCAM"). The AGO alleged its leaders breached their fiduciary duties by neglecting MINCAM's chief asset—a community center—and allowing it to fall into severe disrepair. The AGO also alleged MINCAM conducted misleading charitable solicitations, failed to properly manage its affairs, and failed to maintain appropriate records. Under the Assurance, MINCAM agreed to substantially overhaul its structure and practices, enact stricter financial controls and recordkeeping, prevent its community center property from falling into further disrepair, and report quarterly to the AGO about its progress toward achieving compliance with the Assurance and Minnesota nonprofit laws.

- ***In the Matter of A Place to Call Home***. In September 2021, the AGO secured an Assurance of Discontinuance with Minnesota nonprofit corporation A Place to Call Home ("APCH") and its board member, Genevieve LaVoi. The AGO's investigation revealed that LaVoi used APCH's charitable assets for her personal purposes instead of its nonprofit purpose of helping foster children. Under the Assurance, LaVoi was required to pay back $66,000 and was permanently banned from operating a charity, having access to charitable

assets, or soliciting charitable contributions in Minnesota. In addition, APCH was required to liquidate its assets, distribute them to a Minnesota-based charity benefitting foster children, and to dissolve its operations.

- ***In the Matter of BFW Institute of Education & Research a/k/a Pain Free Patriots***. In September 2021, the AGO secured an Assurance of Discontinuance with Minnesota nonprofit BFW Institute of Education & Research ("BFW"), also known as Pain Free Patriots. The AGO alleged that BFW violated Minnesota law when its leadership directed that its charitable grantees seek pain relief only at insider-owned businesses, made grants of more than $2 million to those insider-owned entities, and turned a blind eye to hundreds of thousands of dollars in debt amassed by BFW under the direction of its founder. Under the Assurance, BFW agreed to replace its board, determine any potential claims and remedies against wrongdoers, and conduct governance reviews and implement substantial changes to prevent future abuses.

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. Division staff 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 2022, we answered more than 52,000 calls from the public and returned more than 1,000 voicemails regarding consumer concerns and other issues. Some of the consumer topics people most commonly call about include health care, housing, credit reports, utilities, and transportation. The Division also answered calls on high-profile state, national, and international issues, as well as calls with concerns about implementation of COVID-19 related programs like RentHelp, Homehelp, etc., issues with the eviction moratorium and its ramp down, and numerous other issues.

Second, the Consumer Action Division helps Minnesota residents informally mediate and resolve thousands of complaints with businesses and other organizations each year. We handled more than 14,000 files and arrived at settlements of more than $10.4 million for Minnesota consumers. This figure represents a more than 30% increase in settlements over the prior fiscal year, likely due to the financial impact of the pandemic on our constituents and resumption of normal financial transactions as the pandemic eased. The Division also assisted our wage theft unit with cases involving Spanish speakers, assisted with investigations into solar providers, reviewed thousands of documents related to housing lawsuits, and participated in multiple consumer protection lawsuits by taking affidavits and doing other legal assistance work. 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*** work performed by the Consumer Action Division in FY 2022.

- A homeless individual reached out to the Office because the vehicle he lived in had been towed and impounded. He was not able to establish ownership, but he lived in the vehicle, and kept his mother's ashes in the vehicle with him. The impound lot was not willing to work with him because he was not listed as the official owner and planned to crush his vehicle over the weekend after we received the call. We contacted the impound lot, who initially indicated that they searched the vehicle but were not able to locate the ashes. After a more extensive search at the insistence of the Office, the ashes were found and returned to our constituent.

- We helped obtain a mortgage modification for a single mother with multiple health issues that were exacerbated by a COVID-19 hospitalization. She fell significantly behind on payments and her home appreciated in value significantly, so without a modification she would have lost the home and more than $150,000 in equity. After months of mediation, we were able to obtain a loan modification, allowing this mother to keep the significant equity in her home and offering her a much more affordable payment going forward.

- An individual contacted us about their billing concerns related to a failed dental procedure that left them with $35,000 in bills, as well as ongoing, new expenses from a new practitioner. This Office mediated, and the dental office agreed to waive the entire $35,000 balance for the consumer.

- A mother contacted us after her insurance company denied gender affirming care for her child. There were two separate bills that totaled more than $13,000. After months of mediation contact, the insurance company conceded that the treatment was medically necessary and covered the claim.

- A mother contacted this Office regarding denial of coverage for chemical dependency treatment for her son. She had received letters of medical necessity from providers and filled out all of the required paperwork, but the insurance company denied coverage, leaving her with a bill of more than $45,000. She had been in contact with the insurance company for months, and gone through an appeal, but her dependent son's medically necessary care was still denied. We contacted the insurance company, and within one month, the service was entirely covered.

- An individual contacted us regarding the second mortgage on their home. Due to severe health issues they declared bankruptcy, but the second mortgage still had a lien on their home. The loan was transferred to a new servicer who did not contact our constituent for many years, and when the servicer finally did contact the consumer, it was to inform them that the amount of the lien it had on her property had increased by nearly $30,000, solely from interest. The company also announced its intentions to foreclose. After months of mediation, we secured modified terms for the mortgage, and the company fully forgave the $30,000 in interest that had accrued, allowing our constituent to stay in their home with an affordable payment.

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 acts 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").

Below is a ***representative sample of some but not all*** investigations and suits brought or resolved by the Consumer, Wage, and Antitrust Division in FY 2022.

CONSUMER PROTECTION

FRAUDULENT MARKETING PRACTICES OF OPIOID MANUFACTURERS AND DISTRIBUTORS

The national opioid epidemic continues to ravage the nation, including in Minnesota where 924 Minnesotans died from opioid-related overdoses in 2021, a 35% increase from 2020. The actions the Office has taken against companies that caused this damage include:

- **Distributors and Johnson & Johnson Settlements**. In August 2021, this Office joined historic $26 billion multistate settlement agreements with pharmaceutical distributors McKesson, Cardinal Health, and Amerisource Bergen, and opioid manufacturer Johnson & Johnson. The settlement agreements resolve investigations into the companies' roles in distributing and marketing opioids. Minnesota's share of the settlements was dependent on the participation of Minnesota cities and counties in the settlements. By January 2022, Minnesota achieved near-universal sign-on from cities and counties, which will result in over $300 million flowing in the state over the next 18 years. Also in early 2022, the Office reached an agreement with cities and counties on allocation and distribution of the settlement funds. This agreement, called the Minnesota Opioids State-Subdivision Memorandum of Agreement (MOA), details that 75% of the settlement payments will go directly to local units of government, and 25% will be put into Minnesota's opioid abatement fund to be overseen by the Opioid Epidemic Response Advisory Council. The settlement agreements were finalized in July 2022 by state court order.

- **Updating Minnesota's Opioid Legislation**. In 2019, the Office worked with the Minnesota Legislature to become one of the first state legislatures in the country to take decisive action in fighting the opioid crisis by passing landmark opioid response legislation. Among other things, this legislation placed opioid-related monies into a separate, restricted opioid fund, and created the Minnesota Opioid Epidemic Response

Advisory Council—a new state council responsible for deciding how to spend Minnesota's opioid litigation recoveries and revenue earned from opioid manufacturer and distributor fees. During the 2022 legislative session, the Office worked with state and local stakeholders and the Legislature to pass new legislation to update the state's opioid epidemic response framework in conjunction with national settlements and the MOA. The resulting legislation made several changes to the state's opioid framework to accommodate the MOA and the settlements, including allowing direct payments of settlement proceeds to cities and counties, enabling the immediate transfer of settlement funds into the state opioid response fund, and implementing reporting requirements for Minnesota subdivisions. Finally, to ensure that Minnesota would receive the maximum level of payment from the Distributors and Johnson & Johnson settlements, the legislation bars opioid-related claims by Minnesota subdivisions against the Distributors and Johnson & Johnson.

- ***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 pursued Minnesota's interests within the bankruptcy by working to maximize the value of the state's recovery from Purdue and the Sackler family. In 2021, this Office reached a multistate settlement with Purdue and the Sackler family for payments of up to $6 billion over 10 years. Minnesota's share of those payments is expected to exceed $50 million, and will be distributed pursuant to the MOA—meaning 75% of the funds will go directly to local governments, and the remaining 25% will be put into Minnesota's opioid abatement fund overseen by the Opioid Epidemic Response Advisory Council The settlement also provides for unprecedented public disclosure of more than 30 million documents, including attorney-client privileged documents, which will ensure that Purdue and the Sackler family are held accountable by allowing the public to directly view the evidence of their misconduct. The settlement agreement is currently on hold, pending resolution of appeals involving Purdue's bankruptcy plan.

- ***State of Minnesota v. McKinsey & Company, Inc***. In February 2021, the Office joined a multistate coalition of attorneys general in reaching a $573 million settlement with McKinsey & Company, one of the world's largest consulting firms. The settlement resolved investigations into the company's role in working for opioid companies, helping those companies promote their drugs, and profiting from the opioid epidemic. Minnesota's share of the settlement is nearly $8 million, $7 million of which has already been paid. The remainder will be paid over the following three years. The entire settlement sum will be placed into the opioid abatement fund overseen by the Opioid Epidemic Response Advisory Council.

- **Mallinckrodt Bankruptcy**. In October 2020, the Office joined a $1.6 billion multistate settlement with opioid manufacturer Mallinckrodt. The amount has since increased to

$1.725 billion. The settlement was approved as part of a bankruptcy plan, which took effect in June 2022. Minnesota's share of the payments is expected to total approximately $14 million, which will be paid over eight years and will be distributed pursuant to the MOA referenced above—75% to local governments and 25% to the State, which will be put into Minnesota's opioid abatement fund overseen by the Opioid Epidemic Response Advisory Council. As part of the settlement, Mallinckrodt also disclosed about 1.4 million documents to this Office, which were published in a document repository established by the University of California San Francisco and Johns Hopkins University.

- **Endo Bankruptcy**. On August 17, 2022, the Office joined a $450 million multistate settlement in principle with opioid manufacturer Endo. Like Mallinckrodt, Endo is seeking approval of the settlement as part of the bankruptcy process and plans to pay Minnesota and other states upon emergence from bankruptcy. Endo also agreed to be permanently banned from marketing opioids and turn over millions of opioid-related documents for publication in an online document archive.

- **Teva and Allergan Settlements**. In July 2022, the Office announced it was joining multistate agreements in principle with major opioid manufacturers Teva Pharmaceutical and Allergan worth up to a combined $6.6 billion. The final terms of the settlements have not been reached.

PROTECTING THE RIGHTS OF RESIDENTIAL TENANTS

The Office continues investigating violations of the consumer-protection laws in the residential rental marketplace.

- ***State of Minnesota v. Stephen Meldahl, et al***. The Office prevailed in its lawsuit against North Minneapolis landlord Steven Meldahl for including numerous misleading and deceptive provisions in his leases with tenants, including misrepresenting to tenants that they did not have a right to habitable housing and could not have their homes inspected by local authorities without Meldahl's permission. After trial, judgment was entered against the defendants for over $1.2 million, in addition to significant injunctive relief to ensure tenants are protected.

- ***State of Minnesota v. Schierholz and Associates, Inc. d/b/a Broadmoor Valley***. In August 2021, the Office filed suit alleging that Schierholz and Associates, Inc. ("S&A") failed to maintain the Broadmoor Valley manufactured home park in Marshall and its roads to the standards required by Minnesota law. The complaint also alleges that S&A inserted misleading and deceptive provisions in its leases, residents were charged late fees above the legal limit and other fees prohibited by law, and S&A retaliated against residents and interfered with the resident association's protected right to freedom of expression within the park. In April 2022, the Office amended its complaint by adding S&A's owner, Paul Schierholz, as a personally named defendant. As part of the lawsuit, the Office is seeking, among other things, to permanently stop the defendants' deceptive conduct, illegal fees, and retaliatory acts, obtain monetary relief for residents who were charged illegal fees, and

to abate the substandard conditions of the park and its roads. Litigation in this matter is ongoing.

PROTECTING THE RIGHTS OF STUDENTS

The Office has and continues to investigate and enforce Minnesota's consumer protection laws with respect to higher education and student loans.

- ***State v. Minnesota School of Business, Inc. & Globe University, Inc***. The Office concluded its consumer-fraud litigation against Minnesota School of Business and Globe University. Following several trials and appeals, the courts found in favor of the State, ordered refunds for borrowers on illegal loans, and awarded restitution to students harmed by fraud. The schools then filed for bankruptcy and the State collected monetary relief through the bankruptcy proceedings. The resolution provided for $23 million in federal student loan debt relief and nearly $16 million in cash restitution to Minnesota consumers affected by the schools' misconduct. The State completed distribution of restitution checks in FY 2022. The total amount of financial relief secured for former students from the litigation, including debt forgiveness and restitution, exceeds $46.3 million.

- ***In re Argosy University Institutional Loan Debt***. Following the abrupt closure of Argosy University in 2019, the Office advocated for students left holding debt from the defunct school. In February 2022, the Office led a bipartisan multistate investigation and settlement with the current owners of student loan debt extended by Argosy and secured cancellation of $2.1 million in debt nationwide, including $135,000 for Minnesota students that attended Argosy's Eagan campus and online. The agreement also prevented further collection and negative credit reporting. In addition, the Office led a 30-state bipartisan effort to seek relief from federal student debt from the U.S. Department of Education for students affected by Argosy's closure. The Office awaits a decision from the Department.

- **Other Student Loan Advocacy and Litigation**. The Office undertook several other efforts and secured substantial relief for students. For example, in January 2022, the Office resolved its investigation against student loan servicer Navient that provided $14 million in relief to Minnesota borrowers. The settlement resolved allegations of widespread unfair and deceptive student loan servicing practices and abuses in originating predatory student loans. In August 2022, the Office secured $26.3 million in federal student debt relief for Minnesota borrowers who attended the now-defunct ITT Technical Institute between 2005 and its 2016 closure. This relief came in response to an investigation by the Office and other states that uncovered widespread fraud by ITT, as well as the Office's advocacy before the U.S. Department of Education. The Office also shut down and secured refunds for Minnesota student-borrowers who fell victims to several student debt relief scams. Finally, a representative of the Office was the lead negotiator on behalf of state attorneys general in federal rulemaking sessions in 2022 to enhance accountability and oversight of schools receiving federal student aid.

PROTECTING CONSUMERS FROM FRAUDULENT AND DECEPTIVE MARKETING AND DOOR-TO-DOOR SALES

The Division has and continues to investigate and take action against companies engaged in deceptive marketing practices and unlawful or deceptive practices.

- ***State v. Juul Labs & Altria Group***. The Office continues to litigate claims against Juul Labs, Inc. and Altria Group. The Office alleges that the companies violated consumer-protection laws and created a public nuisance by deceptively marketing highly addictive e-cigarette products to youth. The Office seeks, among other things, to enjoin deceptive conduct, fund a corrective public-education campaign and cessation programs, take affirmative steps to prevent the sale of Juul products to children, disclose all research relating to vaping and health, and obtain monetary relief. The Office defeated motions to dismiss in June 2021. Discovery completed in June 2022. The case is set for trial in March 2023.

- ***State v. Brio Energy LLC et al***. The Office filed a lawsuit in April 2022 against four Utah-based solar-panel sales companies and three company executives for engaging in deceptive and fraudulent practices in marketing and selling residential solar panel systems that cost Minnesota homeowners anywhere from $20,000 to over $55,000. The Office is also suing several lenders that partnered with the solar companies to finance Minnesotans' purchases and assumed liability for consumers' claims and defenses. The case is currently in discovery. Trial is scheduled for November 2023.

- ***State v. Center for COVID Control, LLC et al***. The Office filed a lawsuit in January 2022 against two Illinois-based companies that advertised prompt and accurate COVID-19 testing services, collected samples from Minnesotans for COVID-19 testing, but then failed to provide test results, sent results later than advertised, or provided false or inaccurate results to consumers. The Office's civil consumer protection lawsuit was stayed by the district court pending the outcome of a federal criminal investigation into the conduct of the companies.

- ***In the Matter of Safe Haven Security Services, LLC***. In July 2022, the Office resolved its investigation into door-to-door security alarm sales company Safe Haven by entering an Assurance of Discontinuance with the company. The Assurance required the company to reform several deceptive door-to-door sales practices, comply with Minnesota's home solicitation and personal solicitation laws, and pay a $125,000 civil penalty to the State, which was deposited in the general fund.

WAGE THEFT UNIT

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, and 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 to achieve maximum compliance. In doing so, the Unit benefits both workers whose rights have been violated and employers who respect workers and follow the law. The Unit is engaged in numerous non-public investigations related to violations of Minnesota's wage and hour laws. These non-public investigations include issues related to worker misclassification, nonpayment of overtime, and failure to pay the applicable state and local minimum wage. The Unit's work also includes the following public matters:

- ***In the Matter of Madison Equities et al***. The Unit has an ongoing investigation of the Madison Equities group, a property management company that has significant property holdings in St. Paul through a number of subsidiaries. Madison Equities workers have accused the company of using its subsidiaries to avoid paying them the overtime wages they are owed. After Madison Equities refused to respond to a civil investigative demand ("CID"), the Unit moved to compel a response in district court. Litigation surrounding whether the Unit could obtain information about all hourly workers at all Madison Equities properties as part of its investigation progressed to the Minnesota Supreme Court. The Unit prevailed before the Supreme Court and secured an opinion reaffirming the Attorney General's broad investigative authority. The Unit's investigation is ongoing.

- ***In the Matter of Biltwell Restaurant, LLC and Related Bartmann Companies***. As the result of an investigation conducted by the Unit, the Bartmann Companies, a Minnesota-based restaurant group that consists of numerous restaurants in the Twin Cities area, will pay its workers more than $230,000 to compensate them for its failure to pay owed back wages and overtime wages. The settlement provides affected workers with the full back wages and overtime wages they are owed as well as overtime liquidated damages. The settlement also requires the Bartmann Companies to establish a written overtime policy that specifically addresses sharing workers between companies. The settlement was paid to the State over the span of 12 months, with the final payment occurring in August 2022.

- ***In the Matter of Loving Care Home Services, Inc***. The Unit investigated a home health and nanny company, Loving Care Home Services, Inc., for failure to pay back wages and overtime wages to its low-wage home health and nanny employees. Loving Care agreed to a settlement with the Division providing full back wages, overtime wages, and liquidated damages, totaling approximately $40,000 to 60 employees. The settlement also requires Loving Care to put a written overtime policy in place and to comply with Minnesota's recordkeeping requirements for employers.

- **Outreach**. The Unit's work also includes educational outreach to Minnesotans around the state and collaboration with stakeholders on important public policy issues. For example, the Unit participated in a state Labor Trafficking Protocol Task Force. The Task Force developed educational and instructional protocol to educate law enforcement and victim advocate groups on the issue of labor trafficking. In collaboration with the Bureau of Criminal Apprehension and other stakeholders, the Unit will participate in law enforcement

trainings. The Unit has also performed outreach with various communities within Minnesota to educate them on their employment rights.

ANTITRUST

- **Generic Drug Price Manufacturers Lawsuit**. Minnesota and a coalition of states and territories brought three complaints in federal court against numerous generic-drug manufacturers and executives. The first complaint is against 18 pharmaceutical companies and two individuals. Two former executives from Heritage Pharmaceuticals 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 third complaint was brought in June 2020 and is against 26 pharmaceutical companies and 10 individuals. The states are preparing for trial in this case. All three 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. As part of this relief, the Office is seeking damages on behalf of four state agencies that paid higher prices as a result of the conspiracy. Litigation is ongoing.

- **UnitedHealth Group/Change Healthcare Merger Lawsuit**. On February 27, 2022, Minnesota, the U.S. Department of Justice, and New York, sued to enjoin the merger of UnitedHealth Group Incorporated ("United") and Change Healthcare Inc. ("Change"). The lawsuit alleged the merger was both vertically and horizontally unlawfully anticompetitive. The federal district court denied the challenge, allowing the merger to proceed. Although the merger was allowed to proceed, pro-competitive actions were taken by the acquiring company after the lawsuit was filed.

- **Google Lawsuits**. Minnesota has joined with a large coalition of attorneys general offices from across the country in filing two separate lawsuits against Google. The first lawsuit deals with Google's monopoly in "general search" and the second lawsuit involves the Google Play Store, which is the only practical way to acquire new apps on Android-powered mobile devices. Litigation in these cases is ongoing.

- **Facebook Lawsuit**. Minnesota also joined with a large coalition of attorneys general offices in filing a lawsuit against Facebook, alleging that Facebook engaged in several illegal, anticompetitive behaviors to acquire and maintain its current monopoly in personal social networking. This lawsuit is on appeal of a dismissal ruling.

- **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 claims of consumer fraud and deceptive trade practices survived the defendants' first and second motions to dismiss. The case remains in the discovery phase. Litigation is ongoing.

- **Suboxone "Product Hopping" Lawsuit**. Minnesota joined a group of 42 states in bringing an antitrust lawsuit against drug manufacturer Indivior for misconduct related to its blockbuster drug Suboxone, which is prescribed to treat opioid addiction. The lawsuit alleges that when Indivior's patent exclusivity period for selling tablet-form Suboxone was expiring, Indivior shifted to manufacturing Suboxone in film-strip form, where it still had patent exclusivity. The states allege Invidior concocted false claims about why film strips were safer than tablets and used these false safety concerns to convince the FDA to delay allowing competitors to manufacture a generic, tablet form of Suboxone. This resulted in the suppression of generic competition and enabled Invidior to continue to charge very high prices for Suboxone long after its tablet-form exclusivity period expired. In August 2022, the court denied Invidior's motion for summary judgment in its entirety. Though Invidior may appeal this ruling, this is a major victory for the states and removes the last major obstacle to having the lawsuit tried on its merits. Litigation is ongoing.

- **Agricultural and Food Industry Practices and Pricing**. The Division continues to focus its resources on issues of particular importance to farmers, the agricultural and food sectors, and rural Minnesotans. Although details of many of the Division's investigations remain confidential and non-public, the matters involve important aspects of the livestock and other protein production, food supply chain, and other agricultural and food products of importance in Minnesota. The Division has also led multistate and bipartisan advocacy to the USDA supporting rules that would improve competition in Minnesota's agricultural and food industries. For example, in August 2022, the Attorney General led a bipartisan group of 10 states attorneys general in submitting a comment to a proposed USDA rule to increase transparency in the poultry industry. Likewise, in December 2021, the Attorney General co-led a bipartisan letter signed by 16 states attorneys general making recommendations to improve competition in the meat processing industry under the Packers & Stockyards Act, including dedicating funds to support new competition, consider review and reform of cash market and contract limitations, assess both public and private data reporting, and establish a working group bringing together agency stakeholders. In January 2022, the Biden Administration adopted a number of these recommendations.

- **Pesticides Lawsuit: Syngenta and Corteva Unlawful Suppression of Competition**. In the winter of 2021, Minnesota joined an investigation by the FTC and several other states into pesticide manufacturers Syngenta's and Corteva's "loyalty programs" for certain active ingredients in their branded pesticide products that suppress competition from generic manufacturers. On September 29, 2022, Minnesota joined the FTC and 9 other states in bringing an antitrust lawsuit against Syngenta and Corteva in the United States District Court for the Middle District of North Carolina for this conduct. Minnesota seeks injunctive and monetary equitable relief, including disgorgement of defendants' ill-gotten profits on behalf of Minnesota farmers.

- **Other Multi-Jurisdictional Activity**. The Division actively partners with state and federal antitrust enforcement authorities on a variety of advocacy and enforcement matters. While details of ongoing investigations remain non-public, this work has allowed the Division to expand its capacity to review the competitive effects of mergers in many industries, including health care and technology, and investigate suspected collusive conduct among competitors. Additionally, the Division has partnered with other states to file amicus briefs arguing in support of jurisprudence that protects consumers from competitive harm and corresponding with Congress to advocate for legislation that would lead to more robust antitrust enforcement.

- **Antitrust Outreach**. The Division has been engaged in outreach to state and federal agencies and other constituents about antitrust issues and concerns. For example, on March 24, 2022, the Division presented a panel discussion about the "right to repair," which included both proponents and opponents of proposed legislation on the issue. On June 8, 2022, Attorney General Ellison spoke in person to a large group of attorneys in connection with the Antitrust Section of the Minnesota State Bar Association. Attorneys in the Division have also conducted the following outreach: provided training to state agencies that solicit bids for state work about warning signs for unlawful bid rigging; presented trainings about antitrust issues and concerns with respect to labor markets, including no-poach agreements among employers; and presented trainings with respect to bid-rigging risks associated with real estate forfeiture auctions.

- **Antitrust Legislation**. The Division supported a number of legislative initiatives related to antitrust and competition including updating Minnesota's antitrust laws that were initially drafted in 1971 to better reflect modern markets, strengthening price-discrimination laws to closer match federal law, and proposing an abuse of dominance standard targeting monopolistic behavior. The Division also supported legislation regarding the right to repair, app-store access, and covenants not to compete.

SPECIAL OUTREACH AND PROTECTION UNIT

The Office's new Special Outreach and Protection unit within the Consumer, Wage, and Antitrust Division was launched in January 2022 and is focused on investigating and bringing enforcement actions to stop and deter deceptive and unlawful practices that target historically marginalized communities and those that have been under-represented by consumer protection enforcement actions in the past. The unit also engages in outreach to communities to proactively determine what frauds and legal violations are affecting them without relying on the victims to report concerns to the Office first.

Examples of the unit's enforcement work include:

- ***State of Minnesota v. HavenBrook Partners, LLC, Pretium Partners, LLC, et al***. In February 2022, the Office filed suit against a group of vertically integrated companies that rent out over 600 single-family homes to Minnesota families. The lawsuit alleges that defendants severely under maintain their homes and fail to make repairs in compliance with Minnesota's lead-paint hazard laws. The suit also alleges that defendants violated

Emergency Executive Order 20-79 by issuing notices of non-renewal and notices to vacate to tenants who fell behind on their rent during the Peacetime Emergency. Lastly, the suit alleges that defendants violated the Consumer Fraud Act and Deceptive Trade Practices Act by misrepresenting to tenants that defendants offered a 24-hour emergency repair service when in fact they often did not make repairs within 24 hours and tenants have been forced to wait days or weeks for emergency repairs. Litigation is ongoing.

- ***In re Lakeshore Management, d/b/a Viking Terrace***. In June 2022, the Office investigated Lakeshore Management's compliance with Minnesota's manufactured housing park laws and discovered that the company had illegally unilaterally imposed new leases and substantial, arbitrary, and sometimes cruel new rules on park residents. Some of the rules forbade residents from enjoying their home, like having grills and children's playsets in the yard, and walking around their neighborhood at night. Residents received rule-violation notices that threatened eviction for non-compliance. The unit sent Lakeshore a cease-and-desist letter to prevent it from enforcing its new rules and leases; the unit successfully gained compliance with the law.

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 with regard to utility rates, reliability of service, and service-quality issues. The Division's work supports Minnesota's economy and 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*** legal work performed by the Division in FY 2022.

- **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, two utilities sought to increase the cost of electricity. They also sought to apply these increases disproportionally on residential customers and to increase the amount of fixed charges that residential customers must pay to simply access utility service. These utilities serve customers in large swaths of the Metro area and Greater Minnesota. RUD intervened in these cases. In one rate case, involving CenterPoint Energy, the RUD successfully negotiated a settlement with the utility that saved ratepayers $18.6 million. A second rate case, involving Minnesota Power, has been briefed before an Administrative Law Judge. The RUD's advocacy in that case has focused on reducing the amount of the increase on all customers, and ensuring that any rate increase is shared equitably, so that residents and small businesses were not subjected to large price hikes. Two other rate cases, involving Xcel Energy's natural gas and electric utilities, are

in earlier stages. In one of those cases, the RUD has filed its initial positions, arguing for a reduction in the total rate case and a more just sharing of any increase among its customer classes. In the other case, the RUD is still conducting its investigation to develop its recommendations. These utilities jointly serve millions of Minnesotans all over the state.

- **Natural Gas Price Spike**. In February 2021, Winter Storm Uri caused extreme cold across the entire mid-continent of the United States. This resulted in disruptions to the wholesale natural gas markets that serve natural gas utilities. During a period of approximately one week, Minnesota's natural gas utilities spent an additional $800 million on natural gas. The utilities then sought to pass these costs along to their customers. The PUC opened an investigation to determine whether these increased costs were prudent, and how any prudent costs should be recovered. The RUD successfully opposed a utility's request to charge ratepayers carrying costs for the gas, resulting in a PUC order that saved ratepayers $57.6 million. The RUD also participated in a contested case before an Administrative Law Judge opposing recovery of hundreds of millions of dollars in gas costs from ratepayers. Ultimately, the PUC disallowed an additional $58.6 million as a result of this case. These disallowances included approximately $35.7 million for CenterPoint Energy, $19 million for Xcel Energy, and $845,000 for Great Plains Natural Gas Company, as well as a $3 million settlement that the RUD and other parties negotiated with Minnesota Energy Resources Corporation.

- **Ratepayer Funded Electric Vehicle Rebates**. In September 2020, Xcel Energy asked the PUC to allow it to implement a $150 million electric vehicle rebate program at ratepayer expense. Xcel further asked the PUC to allow it to account for these rebates as capital assets, thereby enabling it to charge ratepayers a rate of return on top of the cost of the rebates themselves. In August 2020, the RUD filed comments opposing this request, arguing that because electric vehicle rebates were not considered "utility service," it would not be lawful to charge captive ratepayers for this program. The PUC denied Xcel's request, saving ratepayers $150 million in addition to what Xcel would have charged as its rate of return.

DISCOVERY AND LITIGATION SUPPORT DIVISION

The eDiscovery & Litigation Support Division consists of attorneys, litigation support specialists, and other professionals who provide technical assistance with electronic discovery management, legal research services, and data practices guidance to staff.

The eDiscovery team provides services to assist in all aspects of electronic discovery – helping to develop strategy, implement legal holds, collect and process electronic data, set up document reviews, apply advanced analytical tools, run document productions, and aid with trial presentation. They also help during discovery negotiations and draft protocols for how electronic data will be handled. As different forms of electronic documents and communications become increasingly common throughout state government, the volume of electronic data that must be collected, reviewed, and produced in each case is increasing rapidly. The Division manages terabytes of data, consisting of tens of millions of documents, and processes several hundred document productions each year.

The Division also assists with trial logistics and presentation needs. Staff survey available courtroom technology and propose solutions to address any gaps identified. Depending on case needs, staff may attend trial and present evidence electronically. The Division also provides consultative services to design graphics and other exhibits that visually communicate the case theme.

The Division regularly explores technological solutions that support the AGO's complex litigation portfolio. The Division provides a robust suite of legal research, citation, and drafting tools to help prepare legal papers.

The Division also houses the AGO's Data Practices Compliance Official and provides technical support to staff responding to data requests.

APPENDIX A: SERVICE HOURS				
By Agency or Political Subdivision for FY 2022				
Agency/Political Subdivision	**Estimated Service Hours (1)**	**Actual Service Hours**	**Estimated Expenditures**	**Actual Expenditures (2)**
Partner Agencies				
Administration--Risk Management		249.8		$ 35,117.80
AURI		1.9		$ 281.20
Corrections (3)		2,923.8	$ 599,400.00	$ 432,717.45
Education Department		4,717.2		$ 693,543.60
Environmental Quality Board		27.9		$ 4,129.20
Gambling Control Board		55.1		$ 8,154.80
Health		4,437.0		$ 644,236.10
Housing Finance Authority (3)		941.8		$ 139,386.40
Human Services		27,362.6		$ 3,915,575.50
Iron Range Resources & Rehabilitation		134.9		$ 19,965.20
Labor and Industry Department (3)		3,908.5		$ 576,842.00
Lottery		23.7		$ 3,507.60
Medical Practice Board		5,707.9	$ 1,000,000.00	$ 715,712.60
Metropolitan Council (4)		108.2		$ 16,013.60
Minnesota Racing Commission		29.1		$ 4,306.80
Minnesota State Retirement System		339.4		$ 50,231.20
Minnesota State		4,832.4		$ 698,515.90
MNsure		0.9		$ 133.20
Natural Resources		4,173.5		$ 597,645.90
Petroleum Tank Release Compensation Board		19.3		$ 2,856.40
Pollution Control		4,894.1		$ 664,972.20
Public Employees Retirement Association		65.8		$ 9,738.40
Public Safety (3)		9,964.5		$ 1,283,733.50
Revenue (3)	3,440.0	3,440.0		$ 509,120.00
Teachers Retirement Association		297.9		$ 44,089.20
Transportation		7,672.6		$ 1,129,465.30
TOTAL PARTNER AGENCIES	**3,440.0**	**86,329.8**	**$ 1,599,400.00**	**$ 12,199,991.05**
Health Boards/Offices				
Behavioral Health & Therapy Board		1,449.1		$ 163,178.10
Board of Executives for Long Term Services & Supports		115.5		$ 17,094.00
Chiropractic Board		1,134.9		$ 132,258.40
Dentistry Board		710.8		$ 96,307.10
Dietetics & Nutrition Practice Board		28.4		$ 4,203.20
Emergency Medical Services Regulatory Board		713.2		$ 98,349.70
Health Professionals Services Program		74.3		$ 10,996.40
Licensed Drug & Alcohol Counselor Program		1,864.0		$ 193,720.40
Marriage & Family Therapy Board		469.6		$ 51,535.30
Nursing Board		5,662.7		$ 738,422.70
Occupational Therapy Board		95.2		$ 14,089.60
Optometry Board		44.1		$ 6,526.80
Pharmacy Board		805.2		$ 111,015.80
Physical Therapy Board		607.2		$ 65,711.00
Podiatry Board		24.0		$ 3,552.00
Psychology Board		817.4		$ 96,443.00
Social Work Board		3,013.1		$ 315,478.00
Veterinary Medicine Board		450.3		$ 53,634.90
SUBTOTAL		**18,079.0**		**$ 2,172,516.40**

Other State Agencies/Political Subdivisions				
Accountancy Board		164.1		$ 24,286.80
Administration Department		523.9		$ 77,537.20
Administrative Hearings Office		33.0		$ 4,884.00
Agriculture Department		347.3		$ 51,400.40
Agriculture Chemical Response Compensation Board		11.2		$ 1,657.60
Amateur Sports Commission		0.9		$ 133.20
Animal Health Board		387.9		$ 57,409.20
Architecture Board		452.7		$ 66,999.60
Barber Board		188.6		$ 27,912.80
Board on Aging		63.1		$ 9,338.80
Campaign Finance Board		210.4		$ 30,844.20
Capitol Area Architectural Planning Board		67.8		$ 10,034.40
Center for Arts Education		80.4		$ 11,899.20
Client Security Board		134.9		$ 18,218.80
Commerce Department		6,543.6		$ 961,880.20
Commission Serving Deaf and Hard of Hearing		23.8		$ 3,522.40
Corrections Department (3)		3,122.3		$ 432,717.45
Corrections Department/Community Notification		1,439.5		$ 178,236.00
Cosmetology Examiners Board		271.9		$ 40,211.70
Council for Asian Pacific Minnesotans		1.4		$ 207.20
Council for Minnesotans of African Heritage		0.6		$ 88.80
Council on Latino Affairs		14.4		$ 2,131.20
Crime Victims Reparations Board		100.1		$ 14,814.80
Disability Council		31.7		$ 4,691.60
Employment & Economic Development Department		407.1		$ 60,250.80
Explore Minnesota Tourism		14.4		$ 2,131.20
Firefighter Training & Education Board		9.2		$ 1,361.60
Governor's Office		1,967.3		$ 282,119.70
Higher Education Facilities Authority		2.8		$ 414.40
Human Rights Department		1,188.3		$ 175,868.40
Indian Affairs Council		15.9		$ 2,353.20
Judiciary Courts		522.8		$ 77,032.20
Labor and Industry Department (3)		1,044.1		$ 154,526.80
Land Exchange Board		9.0		$ 1,332.00
Law Examiner's Board		189.7		$ 28,075.60
Lawyers Professional Responsibility Board		31.0		$ 4,588.00
Legislature		42.2		$ 6,245.60
Legislature Auditor's Office		2.9		$ 429.20
Mediation Services Bureau		277.5		$ 41,070.00
Military Affairs Department		449.7		$ 63,328.30
Minnesota Management & Budget		480.5		$ 70,370.60
Minnesota State Academies		156.5		$ 18,459.70
MN.IT Services Office		521.2		$ 72,276.00
Office of Higher Education		155.9		$ 21,952.20
Ombudsman for Long Term Care		43.0		$ 6,364.00
Ombudsman for Mental Health & Developmental Disabilities		52.5		$ 7,681.50
Ombudsperson for Corrections		15.3		$ 2,264.40
Ombudsperson for Families		8.1		$ 1,198.80
Peace Officers Standards and Training Board		701.5		$ 103,308.70
Private Detective Board		128.3		$ 18,988.40
Professional Educator Licensing & Standards Board		1,339.4		$ 198,195.80
Public Defender, Local		82.6		$ 12,130.40
Public Defender, State		1.9		$ 281.20
Public Facilities Authority		8.6		$ 1,272.80
Public Safety Department (3)		22,269.2		$ 2,964,220.30
Public Utilities Commission		2,621.1		$ 387,922.80
Revenue Department (3)		2,345.9		$ 344,396.60
School Administrators Board		126.3		$ 18,692.40

Secretary of State		3,052.1		$ 447,079.30
State Advisory Council on Mental Health		16.6		$ 2,456.80
State Arts Board		9.6		$ 1,420.80
State Fair Board		22.8		$ 3,374.40
State Guardian Ad Litem Board		58.4		$ 8,413.10
State Historical Society		8.2		$ 1,213.60
State Investment Board		208.0		$ 30,784.00
Tax Court		56.9		$ 5,618.70
Veterans Affairs Department		87.2		$ 12,864.30
Veterans Homes		122.8		$ 18,050.50
Water & Soil Resources Board		745.3		$ 107,903.20
Zoological Board		14.3		$ 2,116.40
SUBTOTAL		**55,849.4**		**$ 7,823,456.25**
Medicaid Fraud Control Unit Investigations and Prosecutions				
Aitkin County Attorney		154.8		$ 19,370.40
Anoka County Attorney		608.4		$ 69,788.50
Blue Earth County Attorney		107.6		$ 9,605.90
Carlton County Attorney		51.5		$ 4,996.50
Chisago County Attorney		184.0		$ 22,883.70
Cottonwood County Attorney		28.6		$ 3,465.80
Crow Wing County Attorney		336.9		$ 31,205.40
Dakota County Attorney		268.5		$ 25,572.10
Hennepin County Attorney		17,858.5		$ 1,874,724.60
Isanti County Attorney		24.0		$ 2,372.00
Kandiyohi County Attorney		85.3		$ 9,627.20
Nobles County Attorney		95.2		$ 14,089.60
Olmsted County Attorney		121.9		$ 12,164.80
Polk County Attorney		26.9		$ 2,801.20
Ramsey County Attorney		8,106.5		$ 814,497.90
Rice County Attorney		1,744.0		$ 175,689.00
Stearns County Attorney		46.4		$ 4,129.60
Washington County Attorney		23.9		$ 2,138.90
Winona County Attorney		285.3		$ 40,660.90
Wright County Attorney		59.7		$ 6,404.80
SUBTOTAL		**30,217.9**		**$ 3,146,188.80**
Other Local Government Assistance				
Becker County Attorney		855.1		$ 123,693.30
Beltrami County Attorney		254.1		$ 33,901.60
Blue Earth County Attorney		555.7		$ 72,066.10
Brown County Attorney		585.0		$ 82,125.50
Carlton County Attorney		1,310.4		$ 172,197.70
Cass County Attorney		377.9		$ 46,813.70
Chippewa County Attorney		25.9		$ 3,833.20
Chisago County Attorney		229.0		$ 27,372.50
Clay County Attorney		526.8		$ 68,437.90
Clearwater County Attorney		875.8		$ 114,402.30
Cook County Attorney		722.4		$ 89,114.90
Cottonwood County Attorney		210.6		$ 27,422.30
Crow Wing County Attorney		311.7		$ 38,432.10
Douglas County Attorney		1.3		$ 192.40
Faribault County Attorney		55.5		$ 8,214.00
Freeborn County Attorney		505.0		$ 62,291.00
Goodhue County Attorney		42.7		$ 6,319.60
Grant County Attorney		139.7		$ 17,896.70
Hennepin County Attorney		4,496.1		$ 611,119.20
Isanti County Attorney		27.0		$ 3,996.00
Jackson County Attorney		117.7		$ 17,360.60

Kanabec County Attorney		499.2		$ 59,438.40
Koochiching County Attorney		48.6		$ 7,104.30
Le Sueur County Attorney		234.2		$ 30,283.80
Lincoln County Attorney		71.7		$ 10,523.10
Lyon County Attorney		68.8		$ 10,152.90
Marshall County Attorney		72.9		$ 10,730.20
Martin County Attorney		3.1		$ 399.80
Meeker County Attorney		51.2		$ 7,489.10
Mille Lacs County Attorney		225.8		$ 32,739.90
Morrison County Attorney		1,262.8		$ 154,934.10
Mower County Attorney		485.1		$ 56,366.30
Nicollet County Attorney		344.9		$ 46,809.00
Nobles County Attorney		50.5		$ 4,553.50
Otter Tail County Attorney		806.0		$ 110,691.70
Pennington County Attorney		513.1		$ 69,094.80
Pine County Attorney		362.6		$ 38,354.30
Pipestone County Attorney		5.4		$ 592.70
Pope County Attorney		306.6		$ 38,768.80
Ramsey County Attorney		10.5		$ 1,465.50
Renville County Attorney		350.6		$ 45,782.30
Rice County Attorney		14.5		$ 1,349.50
Rock County Attorney		72.5		$ 10,730.00
Scott County Attorney		303.5		$ 35,920.50
Sherburne County Attorney		36.9		$ 4,133.70
Sibley County Attorney		5.0		$ 504.00
St. Louis County Attorney		510.4		$ 75,261.90
Stearns County Attorney		400.0		$ 58,975.80
Steele County Attorney		438.5		$ 58,821.00
Stevens County Attorney		9.5		$ 845.50
Swift County Attorney		17.1		$ 2,530.80
Todd County Attorney		228.5		$ 30,814.90
Traverse County Attorney		20.8		$ 2,830.60
Wabasha County Attorney		43.3		$ 5,641.40
Wadena County Attorney		38.5		$ 5,698.00
Waseca County Attorney		76.9		$ 11,381.20
Watonwan County Attorney		16.0		$ 1,719.00
Wilkin County Attorney		64.1		$ 9,457.30
Wright County Attorney		18.5		$ 1,646.50
Association of County Attorneys		64.6		$ 9,560.80
Various Local Governments		3.3		$ 488.40
SUBTOTAL		**20,381.4**		**$ 2,691,787.90**
TOTAL PARTNER/SEMI-PARTNER AGENCIES (from page A-1)		**86,329.8**		**$ 12,199,991.05**
TOTAL NON-PARTNER AGENCIES SUBDIVISIONS		**124,527.7**		**$ 15,833,949.35**
GRAND TOTAL HOURS/EXPENDITURES		**210,857.5**		**$ 28,033,940.40**
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 $148.00, Attorney Fellowship $56.00 and Legal Assistant $89.00.				
(3) A number of agencies signed agreements for a portion of their				
legal services.				
(4) Metropolitan Council signed an agreement starting in FY 2022 for				
their legal services.				

APPENDIX B: SPECIAL ATTORNEY EXPENDITURES FOR FY 2022, BY AGENCY/POLITICAL SUBDIVISION

AGENCY/POLITICAL SUBDIVISION		Amount
Administration	$	940,993.08
Agriculture	$	4,637.50
Attorney General	$	234,610.41
Education	$	234,486.00
Lottery	$	17,735.00
Minnesota Management & Budget	$	50,758.00
Minnesota State Retirement System	$	841.50
Public Employees Retirement Association	$	12,177.00
Teachers Retirement Association	$	23,064.48

Notes:
(1) A portion of certain Attorney General costs were reimbursed by Hennepin County.

APPENDIX B: SPECIAL ATTORNEY EXPENDITURES
BOND COUNSEL FOR FY 2022, BY AGENCY/POLITICAL SUBDIVISION

AGENCY/POLITICAL SUBDIVISION		Amount
Commerce	$	9,347.34
Higher Education Facilities Authority	$	117,104.97
Higher Education, Office of	$	26,829.23
Housing Finance Agency	$	283,738.21
Minnesota Management & Budget	$	102,229.23
Minnesota State	$	8,535.78

Note: Certain bond fund counsel are paid from proceeds.

Elections-Challengers: Challengers do not have any role or authority within the ballot-board process.

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(cr ref 183)

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October 16, 2020

Bibi Black
Office of the Secretary of State
180 State Office Building, 100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Re: Request for Opinion Concerning Challengers in Ballot Board Proceedings

Dear Ms. Black:

I thank you for your October 5, 2020 letter requesting an opinion regarding an issue pertaining to Minnesota election statutes.

BACKGROUND

You note that Minnesotans are voting via absentee ballot in greater numbers in the 2020 election cycle than in previous cycles. You indicate that the question has arisen whether Minnesota law allows individuals to participate in the meetings of county and municipal ballot boards in a capacity that is analogous to polling-place challengers.

QUESTION

You request an opinion regarding whether challengers are allowed to participate in the meetings of absentee ballot boards and, if they are, what state law authorizes them to do.

LEGAL ANALYSIS

We answer your question in the negative. The duties and powers of ballot boards are defined by two sections in Minn. Stat. ch. 203B. *See* Minn. Stat. §§ 203B.121 (describing ballot-board authority and process pertaining to standard absentee balloting), .23 (describing ballot-board authority and process pertaining to military and overseas absentee balloting). Meanwhile, as you note, only a small number of provisions within the state's election statutes regulate challengers. Specifically:

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- Minn. Stat. § 204C.07 authorizes particular political parties, candidates, and campaigns to appoint individual voters "to act as challengers of voters at the polling place in each precinct." *Id.* § 204C.07, subds. 1-3. The statute also regulates the qualifications and conduct of these polling-place challengers. *Id.*, subds. 3a-5.

- Minn. Stat. § 204C.12 defines an interrogation process that election judges, challengers, and other individuals may initiate within a polling place to challenge the eligibility of a person who is attempting to vote. *Id.* § 204C.12, subds. 1-4.

- Minn. Stat. § 204C.13 regulates eligibility challenges to individual voters when they are made in polling places "[a]t any time before the ballots of any voter are deposited in the ballot boxes, [by] the election judges or any individual who was not present at the time the voter procured the ballots, but not otherwise." *Id.* § 204C.13, subd. 6. The statute explicitly contemplates challenges being made to the eligibility of individual voters who are not present in the polling place because they voted by absentee ballot. *Id.* Under the process described in the statute, a ballot cast by any voter who is not in the polling place when he or she is challenged must be received or rejected according to the standards that state law provides for reviewing absentee ballots. *Id.* § 204C.13, subd. 6 (requiring election judges deciding "whether to deposit received absentee ballots in the ballot boxes" to apply the standards provided by Minn. Stat. §§ 203B.121 and .24 for review of absentee ballots).

- Finally, Minn. Stat. § 201.195 authorizes a registered voter to challenge the eligibility of another voter registered in the same Minnesota county by initiating a contested case hearing before the county auditor or his or her designee. *Id.* § 201.195, subd. 1. The challenged voter may appeal an adverse decision of the county auditor to the Secretary of State. *Id.*, subd. 2.

I am not aware of any Minnesota statute other than the four listed above that grants authority to challengers or regulates their activities.

Notably, none of the above statutes explicitly or implicitly contemplate a challenger being present at, taking part in, or stating a challenge during a ballot-board meeting. Instead, three of the statutes above explicitly apply solely to activities conducted within polling places. *See id.* §§ 204C.07, .12, 13. No Minnesota law states or implies that a ballot-board meeting is a polling place. *See id.* § 200.02, subd. 12 (defining "[p]olling place" as "the place of voting"). The fourth statute above, meanwhile, creates an administrative remedy that has no specific connection to any other election proceeding. *See id.* § 201.195.

By the same token, I am not aware of any Minnesota statute pertaining to ballot boards or their activities that contains any reference to eligibility challenges or to individuals authorized to make them. *See, e.g.*, Minn. Stat. §§ 203B.121, .23.

Finally, the Minnesota Supreme Court has held that state law does not grant anyone the right to challenge the decisions of a ballot board. *In re Contest of Gen. Election Held on Nov. 4, 2008, for Purpose of Electing a U.S. Senator from State of Minn.*, 767 N.W.2d 453, 468 n.19 (Minn. 2009). The court based this conclusion on the time limitations quoted above from Minn. Stat. § 204C.13, subd. 6. *Id.* Under the court's ruling, the polling-place procedure described in section 204C.13, subdivision 6, provides the only opportunity to challenge the acceptance of an absentee ballot. *Id.*

In light of the above, it is this Office's opinion that challengers do not have any role or authority within the ballot-board process.

I thank you again for your correspondence.

Sincerely,

/s/ **Nathan J. Hartshorn**
NATHAN J. HARTSHORN
Assistant Attorney General
(651) 757-1252

|#4818099

Public Funds-General-City: Regardless of new technology or public health crises, a city may not use public funds to advocate for one side of a ballot question. Minn. Const. Art. 10 § 1, Minn. Stat. §§ 10.60, 412.211

355a
(Cr. Ref. 159a-3, 442a-20)

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October 27, 2020

VIA EMAIL: mmanders@bloomingtonmn.gov

Melissa Manderschied
Bloomington City Attorney
1800 W. Old Shakopee Road
Bloomington, MN 55431-3027

RE: Question of Interpretation of Op. Att'y Gen. 159a-3 (May 24, 1966)

Ms. Manderschied:

Thank you for your correspondence, which this Office received on October 19, 2020. You state that voters in the City of Bloomington are being asked three ballot questions during the November 3, 2020 General Election. You request an opinion from this Office regarding whether city officials may use written communication such as email and social media to advocate for one side of a ballot question.

As explained further below, we cannot answer your question definitively because the answer turns on whether the City of Bloomington is expending public funds to create, maintain, and use its email and social media accounts, which is a factual determination for the City. If the written communications you describe would involve the expenditure of public funds, we believe a Minnesota court would likely find them to be unlawful and against public policy.

BACKGROUND

As you note, this Office has issued several opinions related to this subject. In 1927, we concluded that spending taxpayer money to pay an association to campaign for one side of a proposed constitutional amendment is "against public policy, and illegal." Op. Att'y Gen. 442-a-20 (July 18, 1927). We reasoned that "some of the taxpayers may feel one way and some another," so if a town were to spend public money "for or against some political proposition,

some of the taxpayers will find their money being spent without their consent, campaigning for a proposition to which they are opposed, or vice versa." *Id.*[1]

In 1957 and 1962, we opined that a school district may expend a reasonable amount of public funds to disseminate facts and data about a ballot question so voters can make an informed decision. Op. Att'y Gen. 159b-11 (Sept. 17, 1957); Op. Att'y Gen. 159a-3 (May 25, 1962). We were then asked in 1966 to issue an opinion on three questions: (1) whether a school district may expend a reasonable amount of public funds to create and mail literature urging the passage of a bond issue; (2) whether a school district may expend a reasonable amount of public funds to mail advocacy literature if others paid the cost of creating it; and (3) whether members of the School Board could advocate for passage of the bond issue when making oral presentations to citizens' groups. Op. Att'y Gen. 159a-3 (May 24, 1966).

This Office answered the first two questions in the negative, citing an opinion from the New Jersey Supreme Court that reached the same conclusion. *Id.* (citing *Citizens to Protect Pub. Funds v. Bd. of Ed. of Parsippany–Troy Hills Twp.*, 98 A.2d 673, 676–78 (1953)). Like our 1927 opinion, the New Jersey Supreme Court explained that "[t]he public funds entrusted to the board belong equally to the proponents and opponents of the proposition," so the board cannot use public funds to advocate only one side "without affording the dissenters the opportunity by means of that financed medium to present their side." *Id.* at 677.

As for the third question—whether school board members could orally advocate for passage of a bond issue when presenting to citizens' groups—we concluded that board members "like other public officials, are free to appear before citizens' groups to support their decision and advocate approval of a bond issue." Op. Att'y Gen. 159a-3 (May 24, 1966).

QUESTIONS

Fifty-four years have passed since our 1966 opinion. As you note, government entities and public officials now have additional methods for communicating with voters like email, websites, and social media, all of which can be utilized through mobile devices. We are also currently in the midst of a global pandemic where in-person gatherings are restricted and discouraged. You ask us to revisit our 1966 opinion in light of these developments. Specifically, you ask the following three questions: (1) during a public health pandemic when gathering in large groups in person is discouraged, may city officials use written communication like email and social media to advocate for one side of a ballot question; (2) when it is again safe for large groups to gather in person, may city officials use written communication like email and social media to advocate for one side of a ballot question; (3) if such written communication is permissible, can a city-issued device or account be used for such purposes as long as the financial cost to the City is *de minimis*?

[1] This Office gave similar opinions in 1928 and 1952. Op. Att'y Gen. 442-a-20 (Mar. 16, 1928); Op. Att'y Gen. 442-a-20 (July 10, 1952).

LEGAL ANALYSIS

We believe our analysis in the 1966 opinion is still correct, and we decline to extend it. Regardless of new technology or public health crises, the key question remains the same: Is the City or its officials using public funds to advocate for only one side of a ballot question? If the answer is yes, then the expenditure is unlawful and against public policy.

Indeed, the Minnesota Court of Appeals came to the same conclusion in 2011. *Abrahamson v. St. Louis County Sch. Dist.*, 802 N.W.2d 393 (Minn. App. 2011), *aff'd in part, rev'd in part*, 819 N.W.2d 129 (Minn. 2012). The Court held that "although a school district may expend a reasonable amount of funds for the purpose of educating the public about school-district needs and disseminating facts and data, a school district may not expend funds to promote the passage of a ballot question by presenting one-sided information on a voter issue." *Id.* at 403.[2]

The Minnesota Supreme Court granted review, but determined that it did not need to decide that issue because it could resolve the case on other grounds. *Abrahamson v. St. Louis County Sch. Dist.*, 819 N.W.2d 129, 135 (Minn. 2012). Nevertheless, we believe the Court of Appeals decision still supports this Office's long-standing position on this question. *See Fishel v. Encompass Indem. Co.*, A16-1659, 2017 WL 1548630, at *2 (Minn. App. May 1, 2017) (stating that the Court of Appeals "typically follows the rule of law announced in a published opinion, even one subject to further review, until the Minnesota Supreme Court announces a different rule of law").

In addition, the Minnesota State Auditor issued a Statement of Position in 2014 on this subject. The Auditor stated that "it has been generally recognized that elected officials may appear before citizens to orally advocate for a particular position *as long as no expenditure of public funds is involved*." (Emphasis added.)

Turning to your specific questions about city officials using the city's email and social media accounts to advocate in writing for one side of a ballot question, we are unable to answer definitively. The answer turns on whether the City of Bloomington is expending public funds to create, maintain, and use its email and social media accounts, which is a factual determination. This Office does not make factual determinations in its opinions. Op. Att'y Gen. 629-a (May 9, 1975).

If the written communications you describe would involve the expenditure of public funds, then a Minnesota court would likely find them to be unlawful and against public policy. We are not aware of any Minnesota case or statute recognizing an exception for *de*

[2] The Court found our opinions to be "instructive" and found the New Jersey Supreme Court case and similar cases in other states to be "persuasive." *Id.* at 401–02.

minimis expenditures of taxpayer money. Until the Legislature says otherwise, we believe that Minnesota courts would find that all unauthorized expenditures are prohibited, no matter how small. *See also, e.g.*, Op. Att'y Gen. 159a-3 (May 24, 1966) (postage is not a permissible expense).

We recognize that the Legislature has addressed the use of publications and websites funded with public money to some extent in Minn. Stat. § 10.60. But we do not believe this statute applies to your questions for at least three reasons. First, the permitted material must be used "to provide information about the duties and jurisdiction of a . . . political subdivision or to facilitate access to public services and information related to the responsibilities or functions of the . . . political subdivision." Second, the Legislature addressed ballot question advocacy only when discussing the Secretary of State's website. Third, section 10.60 existed when the Court of Appeals decided *Abrahamson*, but it did not affect the outcome.

Thank you again for your correspondence.

Sincerely,

/s/ **Jacob Campion**

JACOB CAMPION
Assistant Attorney General

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|#4832416-v1

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February 24, 2021

Mr. Chad Lemmons
Kelly & Lemmons, P.A.
2350 Wycliff Street, Ste 200
St. Paul, MN 55114

Re: Request for Attorney General Opinion

Dear Mr. Lemmons,

Thank you for your correspondence. As you described, the Town of White Bear will be conducting its annual town meeting on March 9, 2021, at Otter Lake Elementary School. Due to the COVID-19 pandemic, the town board is considering whether to conduct this meeting electronically. You ask two questions: (1) whether the provisions in the Open Meeting Law that allow for electronic meetings apply to the annual town meeting; and (2) whether Minn. Stat. § 365.57 requires town electors to be physically present at the meeting location to vote.

We answer both questions in the negative. We do not believe that the Open Meeting Law applies to the annual town meeting. We also do not believe that section 365.57 requires town electors to be physically present to vote. We hope this information helps you find a way to hold an annual town meeting while also prioritizing the public health of the town.

BACKGROUND

In Minnesota townships, the town board of supervisors generally has "charge of all town affairs." Minn. Stat. § 366.01, subd. 1. But every year, towns must hold an annual meeting of the electors. Minn. Stat. § 365.51. An elector is a town resident who is qualified to vote at a general election. Minn. Stat. § 365.57. The town electors have the powers listed in Minn. Stat. § 365.10.

The time and place of the annual town meeting is governed by Minn. Stat. § 365.51, subd. 1, which requires towns to hold the annual town meeting on the second Tuesday of March at the place named during the previous annual town meeting. If the electors did not select a place, then the town board selects the location. *Id.*

The 2020 annual town meetings were held on March 10, 2020, which means town electors selected the 2021 meeting locations before Governor Tim Walz declared a peacetime emergency in response to the COVID-19 pandemic. You note that the Town of White Bear has always conducted the annual town meeting in person, and the electors named Otter Lake Elementary School as the location for their 2021 meeting.

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COVID-19 is a deadly virus that spreads via respiratory droplets that are released when people talk, breath, cough, or sneeze. The most common way COVID-19 spreads is through close contact with an infected individual. Infected individuals are often unaware that they are infected because they are asymptomatic. The Centers for Disease Control and Prevention and the Minnesota Department of Health encourages everyone to avoid in-person gatherings whenever possible.

During this peacetime emergency, electronic or telephone meetings are permitted by Minnesota's Open Meeting Law if certain conditions are met. Minn. Stat. § 13D.021. But the Open Meeting Law and, by extension, section 13D.021, only applies to certain entities. Minn. Stat. § 13D.01, subd. 1.

QUESTIONS

You ask two questions: (1) whether the Open Meeting Law and, by extension, section 13D.021, applies to the annual meeting of town electors; and (2) whether Minn. Stat. § 365.57 requires town electors to be physically present at the meeting location to vote.

LEGAL ANALYSIS

We answer both questions in the negative. The Open Meeting Law does not apply to the annual meeting of town electors, so section 13D.021 does not apply either. But if a town chooses to hold the annual meeting remotely, in whole or in part, section 365.57 would not require electors to be physically present to vote.

I. Minnesota's Open Meeting Law Does Not Apply to the Annual Meeting of Town Electors.

The Open Meeting Law applies to "the governing body" of a town and any "(1) committee, (2) subcommittee, (3) board, (4) department, or (5) commission, of a public body." Minn. Stat. § 13D.01, subd. 1. Whether the annual meeting of town electors falls within any of these categories appears to be an open question.

"The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. If the Legislature's intent is clear from the unambiguous language of the statute, courts will apply the plain meaning of a statute. *Greene v. Minn. Bureau of Mediation Servs.*, 948 N.W.2d 675, 679 (Minn. 2020) (quotation omitted). A statute is ambiguous if its language is subject to more than one reasonable interpretation. *Id.* Statutes must be construed "as a whole so that statutory language is understood in context." *Id.* (quotation omitted). If possible, courts will attempt to harmonize statutes. *Id.*; *see also* Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions.").

Based on the plain language of section 13D.01 and chapter 13D as a whole, we believe that the Open Meeting Law does not apply to the annual meeting of town electors. Although the Legislature gave town electors certain powers, *see* Minn. Stat. § 365.10, the governing body of a town for purposes of the Open Meeting Law seems to be the town board. *See, e.g.*, Minn. Stat. § 366.01, subd. 1 (board of town supervisors generally has charge of all town affairs); *In re Goodland Twp.*, No. A07-0694, 2008 WL 224009, at *4 (Minn. Ct. App. Jan. 29, 2008) (referring to the town board as the governing body under Minn. Stat. § 13D.01, subd. 1(b)(5)); Op. Minn. Dep't of Admin. No. 06-012, 2006 WL 8461320, at *1 (April 7, 2006) (concluding that town board is subject to the Open Meeting Law because it is the governing body of a town). In addition, the plain and ordinary use of words like committee, subcommittee, board, department, and commission does not, in our view, include the entire electorate.

Our conclusion that the Open Meeting Law does not apply is further supported by other language in chapter 13D. Chapter 13D contains several provisions that do not make sense in the context of town electors and their annual meeting. For example, the meetings that are subject to the Open Meeting Law are "those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body." *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983). But the town electorate does not have a quorum requirement. As in elections, the voters who attend the annual meeting get to make the decisions.

Another example is in Minn. Stat. § 13D.06, which describes the penalties for violating the Open Meeting Law. The penalties include forfeiting the right to serve on the governing body "for a period of time equal to the term of office such person was then serving." Minn. Stat. § 13D.06, subd. 3. Unlike board members, voters do not have a "term of office," and we seriously doubt the Legislature intended to disenfranchise township residents who privately discuss town affairs with their neighbors.

Finally, with respect to social media, the Legislature stated that "[t]he use of social media by members of a public body does not violate this chapter *so long as the social media use is limited to exchanges with all members of the general public*." Minn. Stat. § 13D. 065. Citing this statute, the Minnesota Department of Administration has advised public body members to "refrain from engaging in discussions over social media that include a quorum or more of the public body members." Op. Minn. Dep't of Admin. No. 19-001, 2019 WL 9362549, at *2 (Jan. 2, 2019). Again, there is no quorum of voters, and the Legislature plainly did not intend to regulate the social media use of the hundreds of thousands of Minnesota voters who live in townships. *See* Minn. Stat. § 645.17 (the Legislature does not intend absurd or unreasonable results).

In sum, the Open Meeting Law does not apply to town electors or their annual meeting. Nevertheless, the Legislature has built in other protections to prevent secret meetings and ensure that the public can be informed and participate in the annual town meeting. *See St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 4 (Minn. 1983) (discussing the purposes of the Open Meeting Law). Towns are still required to give ten days' published notice of the time

and place of the meeting. Minn. Stat. § 365.51, subd. 2. The meeting location must be inside the town or within five miles of a town boundary. *Id.*, subd. 1. And, as the Minnesota Association of Townships has stated, "the annual meeting is a public meeting" where "anyone can attend." Minn. Assoc. of Townships, Doc. No. TM 6000 at pg. 6, *available at* https://mntownships.org/information-library/ (last visited Feb. 21, 2021).

Because the Open Meeting Law does not apply to the annual town meeting, the provisions in section 13D.021 regarding telephonic or electronic meetings do not apply either.

II. Section 365.57 Does Not Prohibit Remote Voting.

Your second question is whether Minn. Stat. § 365.57 requires voters to be physically present to vote at the annual town meeting. Section 365.57 states that "[a] town resident who is qualified to vote at a general election may vote at the town's meetings." You question whether the phrase "at the town's meetings" requires physical presence. We do not believe it does.

As you indicate, the word "at" can mean presence. At, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/at (last visited February 21, 2021). But "at" can also mean "occurrence in," *id.*, in which case voting "at the town's meetings" would mean that the vote occurred in the meeting. Also, the focus of section 365.57 is on who may vote rather than where they must vote. On balance, we believe that section 365.57 does not require voters to be physically present to vote. *See also* Op. Att'y Gen. 434-B-2 (July 14, 1948) ("The town meeting, of course, determines its own rules of procedure. Unless [a] statute requires [otherwise], it may vote in any other manner that it may choose.").

Sincerely,

/s/ **Jacob Campion**

JACOB CAMPION
Assistant Attorney General

(651) 757-1459 (Voice)
(651) 282-5832 (Fax)
jacob.campion@ag.state.mn.us

Enclosed: Op. Att'y Gen. 434-B-2 (July 14, 1948)

|#4899932-v1

Special TOWN MEETINGS - Vote by ballot required only where law so specifies. M. S. A., Sec. 365.10 (10) and 365.26 considered.
Vote in a purchase of cemetery.

July 14, 1948

434-B-2

Mr. Fred A. Cina
Attorney, Town of White
Aurora, Minnesota

Dear Sir:

Your letter to the Attorney General dated July 12 calls attention to M. S. A., Section 365.26. In the same connection I call your attention to M. S. A., Section 365.10 (10), which gives the electors at town meetings the power "To authorize the town board, by vote, to purchase grounds for a town cemetery, and limit the price to be paid, and to vote a tax for the payment thereof".

870-A

Section 365.26 also refers to a vote of the electors of a town. Of course the vote of the electors of the town is given at the town meeting.

The town meeting, of course, determines its own rules of procedure. Unless the statute requires a vote by ballot, it may vote in any other manner that it may choose.

Yours very truly

J. A. A. BURNQUIST
Attorney General

CHARLES E. HOUSTON
Assistant Attorney General

CEH/IBM

See opinion March 9-1951 F.C. 434.C-5

COPY

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March 11, 2021

Via U.S. Mail and email: smith@smithpartners.com

Louis N. Smith
Smith Partners PLLP
400 Second Ave. S.
Suite 1200
Minneapolis, MN 55401

Re: Request for Attorney General Opinion

Dear Mr. Smith,

Thank you for your correspondence. You state that the Board of Managers for the Riley Purgatory Bluff Creek Watershed District has recordings of closed meetings, during which they discussed the job performance of the district administrator. The district administrator requested copies of the recordings. You ask whether the Board is required by the Minnesota Government Data Practices Act to provide the recordings. Based on the information provided, we believe the answer is yes.

BACKGROUND

The RPBC Watershed District is a special-purpose unit of local government created by statute to "[t]o conserve the natural resources of the state by land use planning, flood control, and other conservation projects." Minn. Stat. § 103D.201; *Zutz v. Nelson*, 788 N.W.2d 58, 60 (Minn. 2010). The District is governed by a Board of Managers, which is subject to the Minnesota Open Meeting Law, Minn. Stat. ch. 13D, and the Minnesota Government Data Practices Act, Minn. Stat. ch. 13.

The District's Board of Managers recently conducted a performance review of the district administrator. As part of that review, the Board held closed meetings to evaluate the administrator's job performance. *See* Minn. Stat. § 13D.05, subd. 3(a) (authorizing closed meetings to evaluate job performance). These closed meetings were recorded as required by Minn. Stat. § 13D.05, subd. 1(d). The administrator, who was not allowed to attend the closed meetings, requested copies of the recordings.

QUESTION

Is the Board obligated to provide copies of the recordings to the administrator?

LEGAL ANALYSIS

Based on the information provided, we answer in the affirmative.

Although we cannot review the recordings, you report that they are personnel data under Minn. Stat. § 13.43. Personnel data is "private data on individuals" unless specifically listed as "public data." *Id.*, subds. 2, 4. You state that the recordings are "private data on individuals" because they do not fall within any of the listed categories of public data.

"Private data on individuals" is not public, but it is accessible to the subject of the data. Minn. Stat. § 13.02, subd. 12. You therefore advised the Board that the district administrator, as the subject of the recordings, is entitled to access the data. *See* Minn. Stat. § 13.04, subd. 3 (requiring entities to provide copies to the subjects of private data immediately upon request, if possible, or within ten days). We agree.

As you note, the Data Practices Office in the Minnesota Department of Administration also agrees. *See* Minn. Stat. § 13.072 (authorizing the Department to give opinions on the Data Practices Act and requiring courts to defer to those opinions in some circumstances). In advisory opinion 10-019, a school board closed a meeting to evaluate the performance of the superintendent. Op. Minn. Dep't of Admin. No. 10-019, 2010 WL 11711328, at *1 (Sept. 20, 2010). The school board asked the superintendent to leave the meeting room, but the meeting was recorded. *Id.* The superintendent authorized the local newspaper to review the recording. *Id.* The school board refused to release it to the newspaper. *Id.* The Department of Administration concluded that the recording was private data on the superintendent and, therefore, the school board violated the Data Practices Act by not releasing it as authorized by the superintendent. *Id.* at *2. The same analysis applies here.[1]

According to your letter, some members of the RPBC Watershed District Board have expressed the following three concerns: (1) making these types of recordings available to the subject of the performance review discourages candor; (2) the Board's deliberative process should be protected from disclosure; (3) individuals who want to hear the Board's discussions about their performance should exercise their right to an open meeting. We address each in turn.

With respect to candidness, we believe that Minnesota courts would find the argument unpersuasive. Courts "state what the law is, and express no opinion about what it should be." *Cilek v. Office of Minn. Sec'y of State*, 941 N.W.2d 411, 417 (Minn. 2020). Here, the Legislature made a policy decision in section 13.43 to provide public employees access to their personnel data. Any concerns about that outcome in this situation should be brought to the Legislature.

[1] In a similar context, the Department of Administration concluded that recordings of closed meetings in which the body discusses allegations or charges against an employee "are private personnel data under section 13.43, subdivision 4, and *accessible to the data subject*." Op. Minn. Dep't of Admin. No. 10-001, 2010 WL 11711334, at *2 (Jan. 26, 2010) (emphasis added).

Turning next to the deliberative process, we again believe that Minnesota courts would reject the argument. "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. If the Legislature's intent is clear from the unambiguous language of the statute, courts will apply the plain meaning of a statute. *Greene v. Minn. Bureau of Mediation Servs.*, 948 N.W.2d 675, 679 (Minn. 2020) (quotation omitted). As discussed above, the plain and unambiguous language of the Data Practices Act provides public employees access to their personnel data. The Legislature has not provided an exception for deliberative materials in this context, so private personnel data cannot be withheld from the subject on that basis.

This conclusion is further supported by the fact that the Legislature has provided limited protection for deliberative materials in other contexts. *See, e.g.*, Minn. Stat. §§ 13.605, subd. 1(b) (legislative and budget proposals, including preliminary drafts); 13.64, subd. 1(a) (certain notes and preliminary drafts at Minnesota Management and Budget); 13.67(c) (same). But it has not done so here. *See, e.g.*, *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 229 (Minn. 2019) ("[W]hen the Legislature uses language in one section and omits it in another, we regard the omission as intentional and do not add those words to other sections." (citation omitted).) Any concerns about this omission should be brought to the Legislature.

Finally, we have not found any authority supporting the argument that a public employee's decision to not exercise their right to an open meeting deprives them of access to their personnel data. Rather, it appears from the plain language of the Open Meeting Law and the Data Practices Act that the Legislature gave public employees both rights, and they may exercise them however they choose.

Sincerely,

/s/ Jacob Champion

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|#4919721-v1

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March 24, 2021

Via Email
CRamstad@cityofdetroitlakes.com

Charles J. Ramstad, Esq.
City Attorney, City of Detroit Lakes
114 Holmes Street West
Detroit Lakes, MN 56501

Re: Request for Opinion Regarding Minn. Stat. § 462.358, subd. 1a

Dear Mr. Ramstad:

I write in response to your February 24, 2021 correspondence about a potential conflict between the subdivision controls regulations of the City of Detroit Lakes and subdivision controls regulations that may be adopted by one or more of the six surrounding townships. On behalf of the City, you ask this Office to opine on whose subdivision regulations would control if any of the townships decided to adopt subdivision regulations for the area currently regulated by the City. For the reasons described below, the Attorney General declines to provide an opinion at this juncture.

According to your letter, the City has regulated the approval of plats within two miles of the city limits since 1960, and regulated the subdivision of land in that area since 1967. You state that recently the six surrounding towns have expressed dissatisfaction with the City's regulations and discussed plans to adopt their own subdivision controls ordinances. But you note that none of the townships have taken this step yet.

The City and townships have been attempting to find a mutually agreeable solution, but so far they have failed to reach a compromise, and the City is now considering litigation. Michael Achterling, *Detroit Lakes may sue neighboring townships over 2-mile extraterritorial dispute*, DETROIT LAKES TRIBUNE (Feb. 10, 2021), *available at* https://www.dl-online.com/news/government-and-politics/6878819-Detroit-Lakes-may-sue-neighboring-townships-over-2-mile-extraterritorial-dispute.

You believe that this situation is nearly identical to the circumstances in Op. Att'y Gen. 59a-32 (June 29, 1967), in which we opined that the City of Benson's regulations would not be rendered inoperative by subsequent regulations adopted by its neighboring townships. Nevertheless, the City of Detroit Lakes requests an opinion on whether its subdivision regulations would lose their force and effect if any of the surrounding townships actually decided to enact their own subdivision regulations.

Under these circumstances, we decline to issue an opinion. This Office does not typically render opinions on hypothetical questions, or questions likely to arise in litigation. Op. Atty. Gen. 629a (May 9, 1975). Nonetheless, as we have previously noted:

> The Legislature has . . . provided an available solution for the potential problems posed by divided land use and development control in the two miles surrounding the city. Minn. Stat. § 462.3585 [2020] provides for the creation of a joint board to exercise planning and land use control authority in the two miles of unincorporated territory surrounding a municipality and to serve as the 'governing body' and board of appeals and adjustments over the territory for land use control purposes.

Op. Att'y Gen. 59a-32 (Aug. 18, 1995).

Please feel free to reach out if the circumstances change materially or if you have follow up questions.

Sincerely,

/s/ **Susan C. Gretz**

SUSAN C. GRETZ
Assistant Attorney General

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susan.gretz@ag.state.mn.us

Enclosures: Op. Att'y Gen. 59a-32 (June 29, 1967)
Op. Att'y Gen. 629a (May 9, 1975)
Op. Att'y Gen. 59a-32 (Aug. 18, 1995)

|#4924964-v1

CITIES: PLANNING: SUBDIVISION REGULATIONS

Under facts herein, subdivision regulations adopted by City of Benson pursuant to former M.S. §§ 471.26 to 471.33 continue in effect as to approval of plats of land located in portion of township and such regulations may not be rendered inoperative as to such land by action of town in adopting its own subdivision regulations.

June 29, 1967

540-37 (Group 4)

Honorable R. A. Bodger
City Attorney
Benson, Minnesota 56215

Dear Mr. Bodger:

In your request for an opinion of the Attorney General you present the following

FACTS:

"The City of Benson, a fourth class city in Swift County, Minnesota, adopted subdivision regulations in 1965 pursuant to State law and in accordance with Section 462.351 through 462.364 M.S.A. While the State law provides that the subdivision regulations may extend the application thereof for two miles outside of its City limits, the City of Benson provided that its regulations apply to land only within one mile of the City limits. The surrounding townships do not have subdivision regulations. However, one particular township has become disenchanted with our subdivision regulations and has indicated to the City of Benson that the township will adopt subdivision regulations of its own, but much less restrictive than the subdivision regulations of the City of Benson. It is the theory of the township officers that when the township subdivision regulations become law such regulations will then supersede the subdivision regulations of the City of Benson with respect to the township lands within one mile of the Benson City limits and that Benson City subdivision regulations will have no force and effect on the township lands within one mile of the City limits. The township officers rely on Section 462.358 Subdivision 1 wherein it states as follows:

'A Municipality may by resolution extend the application of its subdivision regulations to unincorporated territories located within two miles of its limits in any direction but not in a town which has adopted subdivision regulations;'".

LOC 14-67

You make the following

COMMENTS:

"It is our understanding that had the township adopted subdivision regulations prior to the adoption of such regulations by the City, then in that case the City regulations could not have regulated that area within one mile outside of the Benson limits."

You ask the following

QUESTION:

"The question now is if the township adopts such subdivision regulations, which may be much less restrictive than the City and obviously for the purpose of ousting the City's jurisdiction, does the City of Benson lose jurisdiction to regulate outside of its City limits within the township wherein the township has adopted subdivision regulations after the City regulations have become law?"

ADDITIONAL FACTS:

You have subsequently advised this office that the regulations to which you refer were adopted by the City of Benson pursuant to former M.S. §§ 471.26 to 471.33, which authorized municipalities to carry on planning activities and adopt subdivision regulations in connection therewith.

OPINION

Former M.S. §§ 471.26 to 471.33 were repealed, effective January 1, 1966, by M.S. § 462.364. The authority for municipal planning and zoning is presently contained in M.S. §§ 462.351 to 462.364 which became effective January 1, 1966. As to ordinances and regulations in effect on the effective date of M.S. §§ 462.351 to 462.364, supra, the legislature provided in M.S. § 462.363 that:

> "Except as otherwise provided in sections 462.351 to 462.364, valid ordinances and regulations now in effect shall continue in effect until amended or repealed."

As indicated by the additional facts supplied, the subdivision regulations of the City of Benson were adopted pursuant to former M.S. §§ 471.26 to 471.33, supra. Former M.S. § 471.29, Subd. 1, which dealt in part with the authority of certain municipalities to approve plats of land located within two miles of the municipal limits, provided as follows:

> "The governing body of any municipality is authorized by resolution to approve all plats of land hereafter proposed within that municipality. Any city, village, or borough is also authorized by resolution to approve such plats of land located within two miles of its limits in any direction and not in a town which has elected to require the approval of plats under this act, provided that where two or more municipalities have contiguous territory or are situated with their boundaries less than four miles apart, each shall have control of the platting of land equidistant from its boundaries within this two-mile radius. After the adoption of platting regulations consistent with a city plan adopted pursuant to the provisions of sections 471.26 to 471.33, approval may be denied if the proposed plat fails to conform to the plan or with any reasonable regulation of the municipality applicable thereto. No plat shall be filed or accepted for filing unless it is accompanied by a certified copy of the resolution approving it or accepting it as being in accord and conformity with any plans or regulations as herein specified. A copy of this resolution shall be supplied to the applicant."

In view of M.S. 462.363, supra, the subdivision regulations previously adopted by the City of Benson, assuming they were validly enacted, must be regarded as continuing in effect until amended or repealed. Since these regulations draw their authority from former

M.S. §§ 471.26 to 471.33, supra, it is our opinion that they should be applied in conjunction with those former sections.

With respect to the township referred to in your letter, which now intends to adopt its own subdivision regulations, it appears from the facts presented that a portion of the land thereof is located within the one mile limit prescribed by the subdivision regulations of the City of Benson under authority of former M.S. § 471.29, supra. It further appears that the town in question never elected, as provided by former M.S. § 471.29, supra, to require the approval of plats under former M.S. §§ 471.26 to 471.33, supra. Having not so elected, the town is without power to do so at the present time by reason of the repeal of those sections. Under these circumstances, therefore, we are of the opinion that the subdivision regulations of the City of Benson continue in effect as to the approval of plats of land located in that portion of the township situated within one mile of the City's limits. We do not believe that these regulations may be rendered inoperative as to such land by action of the town at this time in adopting its own subdivision regulations.

Accordingly, we answer your question in the negative.

Very truly yours,

DOUGLAS M. HEAD
Attorney General

MICHAEL R. GALLAGHER
Special Assistant
Attorney General

MRG:tr

MINNESOTA LEGAL REGISTER

MAY, 1975 Vol. 8, No. 5 Page 22

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.

CITIES: ZONING: City may extend subdivision regulations and building code enforcement, but not zoning controls, two miles beyond city limits where county zoning regulations are in effect. Minn. Stat. §§ 16B.62, 16B.72, 462.357, 462.358 (1994).

59a-32
(Cr. Ref. 59a-9, 125a-66)

August 18, 1995

John Wenker
Assistant County Attorney
Mille Lacs County Courthouse
635 2nd Street SE
Milaca, MN 56353

Steven Anderson
City Attorney, City of Milaca
Arnold, Anderson, & Dove
501 South Fourth Street
Princeton, MN 55371

Dear Messrs. Wenker and Anderson:

In your joint letter to the Office of the Attorney General, you set forth the following:

FACTS

In 1972, Mille Lacs County adopted a Development Code which included a zoning ordinance. In 1978, the City of Milaca adopted a subdivision ordinance which was extended to include the two mile radius of unincorporated area extending around the city limits, pursuant to Minn. Stat. § 462.358, subd. 1a. The Mille Lacs County zoning ordinance zones this two mile radius as an Agricultural Preservation District which requires a 300 foot minimum lot width. The City of Milaca's zoning ordinance allows for a lot width of less than 300 feet.

Mille Lacs County has not adopted the state building code, but does issue land use permits before permitting construction. The City of Milaca has adopted the state building code.

A situation has arisen where a developer wants to subdivide land within the two mile radius of Milaca's city limits. The proposed lots would be less than the 300 foot minimum required by Mille Lacs County's zoning ordinance, but would meet the requirements of the City of Milaca's subdivision and zoning ordinances.

You then ask substantially the following questions:

QUESTION ONE

In the two-mile zone, does Mille Lacs County's or the City of Milaca's zoning ordinance control in the subdivided area?

OPINION

In our opinion, while the city's subdivision regulation and plat-approval authority control subdivision approval in the area at issue, it is the county's zoning controls which apply.

A. Subdivision Regulations

Milaca extended its subdivision ordinance pursuant to Minn. Stat. § 462.358, subd. 1a (1994) which provides:

> A municipality may by resolution extend the application of its subdivision regulations to unincorporated territory located within two miles of its limits in any direction but not in a town which has adopted subdivision regulations . . .

(Emphasis added)

Subdivision 1a gives a city the authority to extend subdivision regulations into an unincorporated territory not covered by town regulations, even though it may already be covered by county subdivision regulations. Minn. Stat. § 462.358 does not require a city to defer to the county ordinance if the county and city subdivision ordinances conflict. This office has previously opined that where a city has exercised subdivision control pursuant to Minn. Stat. § 462.358, county subdivision regulations otherwise operative in the two mile radius are superseded by city regulations. Op. Atty. Gen. 59a-32, Dec. 1, 1972.

Subdivision regulations adopted pursuant to Minn. Stat. § 462.358, subd. 1a may establish standards, requirements, and procedures for the review and approval or disapproval of subdivisions. Minn. Stat. § 462.358, subd. 3b provides that subdivision regulations must include preliminary and final review of subdivision applications provisions, and the coordination of such review is to occur with affected political subdivisions. Therefore, the subdivision ordinance adopted by Milaca must have a provision whereby applications for review of proposed subdivisions in the two mile radius will be coordinated with the county, which is a political subdivision. However, this requirement of coordination between the city

and the county does not mean that any agreement needs to be reached concerning such application.

The county may enforce subdivision controls within the two mile zone only if the city chooses not to, and there are no applicable town subdivision regulations. Op. Atty. Gen. 59a-32, Nov. 4, 1977. Inasmuch as your letter makes no mention of town subdivision regulations, we assume that there are none. Thus, the city's subdivision regulations would control the area to the exclusion of the county's subdivision regulation.

B. Zoning

Notwithstanding the city's authority over subdivision regulations, it is our view that Mille Lacs County's zoning ordinance applies within the two mile zone of unincorporated territory, including areas already subdivided. Minn. Stat. § 462.357 (1994) provides that:

> A city may by ordinance extend the application of its zoning regulations to unincorporated territory located within two miles of its limits in any direction, but not in a county or town which has adopted zoning regulations . . .

(Emphasis added).

This provision differs from its counterpart relating to subdivisions in Minn. Stat. § 462.358 quoted above, which provides that subdivision ordinances may not be extended in any town with subdivision ordinances. The extension language relating to subdivision regulations was part of Minn. Stat. § 462.358 as enacted in 1965. Minn. Stat. § 462.357 was also enacted in 1965, however, the provision permitting zoning regulations to be extended was added in a 1969 amendment. See Act of May 22, 1965, ch. 670, §§ 7-8, 1965 Minn. Laws 1000-1003; Act of April 30, 1969, ch. 259, § 1, 1969 Minn. Laws 402. That amendment expressly precluded extension or enforcement of city zoning regulations in unincorporated areas covered by town or county zoning. The same limitation exists presently.

Municipal authority to enact and enforce zoning ordinances is limited to the power granted by the legislature. Costley v. Caromin House, Inc., 313 N.W.2d 21, 27 (Minn. 1981). A municipality is not allowed to exceed the limitations imposed on it by the enabling legislation. Id. at 27. Since the enabling legislation at issue here expressly provides that a municipality may extend its zoning ordinance into the two miles of unincorporated territory only if neither the county nor town has not adopted zoning regulations, it seems clear that the Mille Lacs County zoning ordinance controls in the entire area surrounding Milaca, including the subdivided areas. However, the Milaca subdivision ordinance also controls in the two-mile area. This means that, in order for a developer to subdivide and develop land in the two mile region, the developer must seek approval from both the zoning authority of the county and the platting authority of the city.

While this result may seem less than satisfactory to developers and local governments alike, it is nonetheless required by the plain wording of the statutes. The legislature has, however, provided an available solution for the potential problems posed by divided land use and development control in the two miles surrounding the city. Minn. Stat. § 462.3585 (1994) provides for the creation of a joint board to exercise planning and land use control authority in the two miles of unincorporated territory surrounding a municipality and to serve as the "governing body" and board of appeals and adjustments over the territory for land use control purposes.

QUESTION TWO

If the answer to question one is that both zoning ordinances apply where they are not inconsistent, in situations where they are inconsistent do the more restrictive provisions of either the City or the County zoning ordinance control over the other's less restrictive provisions?

OPINION

In light of our answer to Question One, no response to this question is required.

QUESTION THREE

Does the City or County Building Code control in the subdivided areas of the two mile zone?

OPINION

In our opinion, the City is authorized to extend enforcement of the State Building Code (Code) into the two mile zone.[1] Absent such an extension, application of the Code in that area depends upon the status of the county's actions regarding the Code. Commencing in 1977, all cities and counties were required to adopt and enforce the Code within their jurisdictions. See Act of June 2, 1977, ch. 381, § 2, 1977 Minn Laws 846, 848; Op. Atty. Gen. 59a-9, February 14, 1979. The 1977 law also provided that a city could extend its enforcement of the Code up to two miles from the city limits. The operative language, now contained in Minn. Stat. § 16B.62 (1994) provides:

> A city may by ordinance extend the enforcement of the code to contiguous unincorporated territory not more than two miles distant from its corporate limits in any direction. . . . After the extension, the city may enforce the code in the designated area to the same extent as if the property were situated within its corporate limits.

Commencing in 1979, however, persons in certain areas of non metropolitan counties were permitted, by referendum, to reject application of the code in areas of the county "outside home rule charter or statutory cities or towns that adopted the building code prior to January 1, 1977. . . . " Act of May 31, 1979, ch. 287, § 2, 1979 Minn. Laws 626; 631. See Minn. Stat. § 16B.72 (1994).[2] Notwithstanding the referendum, however, a city which had not adopted

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1. We note that inasmuch as the State Building Code supersedes local codes, the question would appear to involve application of the State Building Code rather than differing municipal codes.

2. The Code provision relating to handicapped persons and elevator safety, however, will continue to apply, notwithstanding the referendum results. Minn. Stat. § 16B.72 (1994), Act of May 15, 1995, ch. 166, § 3 (1995) Minn. Laws _____, _____.

the code before January 1, 1977 was still permitted to adopt the code voluntarily "within its jurisdiction." Id.

We assume from your statement that Mille Lacs County "has not adopted" the code, reflects a negative result in a referendum held pursuant to that authority. Thus, pursuant to section 16B.72, the code would not generally apply outside any cities or towns which had adopted it prior to 1977 or voluntarily chose to adopt it subsequent to the referendum. Thus, it might be argued that, after such a referendum, cities may not extend code application into unincorporated territory.

However, section 16B.72 (1994) permits any municipality to choose to adopt and enforce the Code "within its jurisdiction." Inasmuch as section 16B.62, subd. 1 (1994) expressly allows a city to extend code enforcement two miles into unincorporated territory "to the same extent as if the property were . . . .within its corporate limits," the city can extend its building code "jurisdiction" beyond its corporate limits.

Consequently, it is our view that the city is authorized to extend code enforcement into the zone by ordinance. If the city has not done so, however, the code would not at present, be applicable in the zone, except for the provisions relating to handicapped persons and elevator safety.

QUESTION FOUR

Which entity controls zoning and building permits within the two-mile zone in the unsubdivided areas?

OPINION

As stated above. Mille Lacs County's zoning ordinance controls in the two mile zone of unincorporated territory. Therefore. the Mille Lacs County authority charged by ordinance with responsibility for approving permits related to zoning would be responsible for that

function in the two mile zone of unincorporated territory just as they were responsible for such functions before the city of Milaca extended its subdivision authority.

If the city has extended enforcement of the Code into the two mile zone, the city is responsible for the code-related permitting process. If not, then code-related permitting would not be in effect except for that related to handicapped persons and elevator safety. Administration of these provisions would, it appears, remain county responsibility.

We have confined our answer here to permits relating directly to local zoning or state building code enforcement. There are, of course, many other permit requirements which might apply to particular development and building projects. See, e.g., Minn. Stat. §§ 103D.345 (Watershed); 103G.221 (Wetlands); 32G.244 (Electrical Code).

Best regards,

HUBERT H. HUMPHREY III
Attorney General

KENNETH E. RASCHKE, JR.
Assistant Attorney General

(612) 297-1141

.ad4

HOUSING AND REDEVELOPMENT AUTHORITY: LATE FEES: Statutory cap applies to each overdue rent payment once and may not be applied to a cumulative total of overdue rent that includes rent for which a late fee has previously been assessed. Recalculation of late fee on a partial payment is not required. Minn. Stat. § 504B.177

430

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June 30, 2021

VIA EMAIL: bengblom@duluthhousing.com

Brandon Engblom, Esq.
General Counsel
Duluth Housing and Redevelopment Authority
222 East 2nd Street, P.O. Box 16900
Duluth, MN 55816-0900

Re: Request for Opinion Concerning Minn. Stat. § 504B.177(a)

Mr. Engblom:

Thank you for your correspondence requesting an opinion regarding Minn. Stat. § 504B.177(a), which prohibits landlords from charging a late fee that "exceed[s] eight percent of the overdue rent payment." You ask whether a late fee may be imposed each month on the cumulative total of past due rent payments under this statute. Based on the facts presented, we conclude that a landlord may impose a late fee only once on each past due rent payment, and not on the cumulative total. We also conclude that the statute does not require recalculation of the late fee upon partial payment of past due rent.

BACKGROUND

Section 504B.177(a) states in part:

> A landlord of a residential building may not charge a late fee if the rent is paid after the due date, unless the tenant and landlord have agreed in writing that a late fee may be imposed. The agreement must specify when the late fee will be imposed. In no case may the late fee exceed eight percent of the overdue rent payment.

You provided an example lease used by the Housing and Redevelopment Authority of Duluth (HRA), which provides that late fees are calculated and charged on the unpaid rent on the sixth day of each month. The lease provision states:

Late Payment Charges. If you do not pay your rent and all other charges by the fifth day of the month, and the Landlord has not agreed to accept payment at a later date, a 14 day Notice to Pay or Vacate will be issued to you. In addition, you will have to pay a late fee in an amount as allowed by Minnesota Statutes, but not to exceed $25 (twenty-five dollars).

You also provided the following example of how the HRA assesses late fees:

Date	Description	Charge	Credit	Balance
January 1	Rent	$100.00		$100.00
January 6	Late Fee	$8.00		$108.00
February 1	Rent	$100.00		$208.00
February 6	Late Fee	$16.00		$224.00
March 1	Rent	$100.00		$324.00
March 6	Late Fee	$24.00		$348.00
March 31	Payment		$100.00	$248.00
April 1	Rent	$100.00		$348.00
April 6	Late Fee	$24.00		$372.00

The example illustrates the HRA's practice of imposing an eight percent late fee on the cumulative total of unpaid rent on the sixth day of each month that rent is past due.

You note that in this example on April 6 the total of $72.00 in assessed late fees exceeds eight percent of the total rent due of $300.00. You state that tenant advocates believe the statute requires that on any given day of the month the total amount of late fees cannot exceed eight percent of the total amount of late rent. In the example given, the maximum late fee owed by the tenant on April 6 would be $24.00 under the advocates' interpretation.

QUESTIONS

You pose the following two questions:

1. If a landlord calculates an eight percent late fee on the total unpaid rent on the date listed in their lease, is the landlord in compliance with Minn. Stat. § 504B.177?

2. In the event that partial payments are credited to the account after the date that the late fee is assessed, is the landlord required to recalculate the outstanding late fees to maintain the eight percent maximum fee?

QUESTION 1

Your first question is whether the landlord may, as illustrated in the example, charge a late fee each month equal to eight percent of cumulative unpaid rent payments and comply with the statute. We answer this question in the negative.

The object of all statutory interpretation is to ascertain and effectuate the intent of the Legislature. Minn. Stat. § 645.16. Words in a statute are to be given their plain and ordinary meaning. *Engfer v. General Dynamics Adv. Info. Sys., Inc.*, 869 N.W.2d 295, 300 (Minn. 2015). When the language is plain and unambiguous, it must be given effect. *In re Reichmann Land & Cattle, LLP*, 867 N.W.2d 502, 509 (Minn. 2015).

Section 504B.177(a) states that "[i]n no case may the late fee exceed eight percent of the overdue rent payment." The statute thus refers to "the late fee" (singular) on the "the overdue rent payment," again in the singular tense. The statute allows a late fee based on rent due on "the due date," also singular, and requires the lease to provide a specific date on which the late fee will be assessed. *Id.*

The plain and ordinary meaning of this unambiguous language is to cap the fee at eight percent of the particular rent payment that is overdue on a single date in time, and not on the cumulative total of multiple overdue rent payments.

Applying the statute to the illustration provided, January's payment is due January 1; if not paid it is subject to a single eight percent penalty on January 6, and it remains due until paid. The January rent payment is not due again on February 1; nor is it subject to a second late fee. The cap applies to "the overdue rent payment," which became overdue once, on January 6.

Penalizing a late rent payment at the statutory maximum more than once immediately violates the statute because, as shown in the example provided, imposing the maximum late fee multiple times on the same late payment results in the late fee exceeding the eight percent statutory cap. In the example, on February 6 the late fees of $24 exceed eight percent of the total overdue rent of $200.

We are mindful of the canon of statutory construction providing that the singular includes the plural. Minn. Stat. § 645.08(2). If this canon applied here, the statute may allow a late fee not to exceed eight percent of overdue rent "payments." However, canons are applicable "unless their observance would involve a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute." Minn. Stat. § 645.08. In our view, the context of the late fee statute is the non-payment of rent on a particular date to be established in the lease. It therefore makes sense to interpret the statute to apply the cap to that singular date on which a singular rent payment is overdue.

The intent of the Legislature to impose the cap on a singular rent payment and not a cumulative total is further supported by the legislative history. At the Senate Judiciary Committee hearing on the bill that became Minn. Stat. § 504B.177, Senator Limmer asked whether the eight percent cap was an annual limit, or what the eight percent was based on. The following discussion ensued:

Sen. Moua: "Senator Limmer, I think it's eight percent of the rent payment."

Sen. Limmer: "Per month, Madam Chair?"

> . . .
>
> Ron Elwood (Legal Services Advocacy Project): Excuse me, Madam Chair and members, . . . the reason we left it as "of the rent payment" is because sometimes the rent is paid bi-weekly. It's not always a monthly rent, so um I think it's understood that it's whatever the the periodic rent payment would be. . . .
>
> [discussion of inserting "total amount" before "of the rent payment"]
>
> Sen. Scheid: . . . I think I understand what Senator Limmer is getting at. But I think you still don't know for what period that is, so why don't we say on Line 225, "In no case may the late fee exceed a certain percentage of the overdue rent payment," or something to that effect, or excuse me, eight percent of the overdue rent payment, whatever it is, if it's weekly or bi-weekly or monthly.

Act Relating to Real Property; Landlord and Tenant; . . . Hearing on SF 2595 before the S. Judiciary Comm., 86th Legis., 2010 Reg. Session (Minn., Mar. 16, 2010) (Statements of Senators Moua, Limmer, Scheid, members, and Ron Elwood, Supervising Attorney, Legal Services Advocacy Project) (https://www.lrl.mn.gov/media/file?mtgid=860947 File 2 of 2 at 58:42 to 1:02:18). A motion incorporating Senator Scheid's proposed insertion of "the overdue" before "rent payment" passed.

The discussion reveals an intent that the percentage cap apply to an individual rent payment regardless of frequency. If the intent had been to impose the cap based on the cumulative past due balance at a particular point in time (monthly, e.g.), it would not have mattered when the rent payment was due under the lease. That there was an attempt to encompass a variety of payment due dates reflects the intent to apply the percentage cap to each past due rent payment, and to reject application of the fee cap at a particular point in time based on a cumulative balance.

Based on this manifest intent of the Legislature, we believe Minnesota courts would reject application of the canon of statutory construction providing that the singular "rent payment" includes the plural. Minn. Stat. § 645.08. Under Minn. Stat. § 504B.177(a), a landlord may not charge a late fee equal to eight percent of the total unpaid rent when the total includes an overdue rent payment for which a late fee has already been assessed.

QUESTION 2

The second question posed is whether the landlord is required to recalculate the permissible late fee under the statutory cap when a partial payment is made. In light of our interpretation of the statute to allow a one-time imposition of a late fee for a singular past due rent payment, we conclude that it is not necessary to recalculate the late fee upon partial payment of the rent. That is because, if a late fee is validly imposed, it is still owed even if a partial rent payment is later made.

We do not believe the phrase "in no case" in the statute alters this analysis. The Legislature uses this phrase in other contexts to signal absolute limits. See, e.g., Minn. Stat. § 15.0575, subd. 2 (service "in no case" later than July 1); Minn. Stat. § 48.24, subd. 2 (mortgage loans "in no case" to exceed 50 percent of cash value of security); and Minn. Stat. § 244.04, subd. 2 (loss of good time "in no case" more than 90 days). In the context of the late fee statute, the tenant could argue that "in no case" requires reassessment to keep the late fee under eight percent of the existing balance at all times during the period of delinquency.

However, as noted above the statute is written in terms of a single late fee imposed on a set date for a singular overdue rent payment. In this context, the "case" to which "in no case" refers is that individual late fee imposed on the particular date, and not a fluctuating fee based on the current balance of past due rent.

This conclusion is supported by considering the consequences of requiring recalculation of the late fee upon partial payment and the "mischief" to be remedied by the statute. Minn. Stat. § 645.16(3) and (6). Recalculation of the late fee based on partial payment would incentivize the use of partial payments to reduce or avoid the late fee. Assume a tenant was three months behind in $100 per month rent payments, and had been assessed the statutory maximum $24 in late fees. If a partial payment of $250 is made, reassessment of the late fee would reduce it to $4 ($50 x .08 = $4).

In our view, this result is contrary to the legislative intent to incent the payment of rent without excessively burdening the tenant.[1] If a tenant could pay 95% of the balance due on the last day of the month, and require a corresponding immediate reduction of a previously imposed late fee, the intent of the Legislature to allow for reasonable late fees is thwarted.

We believe interpreting Minn. Stat. § 504B.177(a) to not require reassessment of the late fee upon partial payment is more consistent with the statutory text and legislative intent. We also conclude, in response to your first question, that the statutory cap applies to each overdue rent payment once, on the date set forth in the lease, and may not be applied to a cumulative total of overdue rent that includes rent for which a late fee has previously been assessed. Application of these interpretations to the tenant account you provided as a sample, and assuming the March 31 payment is applied to past due amounts and not the April rent payment, yields the following:

Date	Description	Charge	Credit	Balance
January 1	Rent	$100.00		$100.00
January 6	Late Fee	$8.00		$108.00
February 1	Rent	$100.00		$208.00
February 6	Late Fee	$8.00		$216.00

[1] *Act Relating to Real Property; Landlord and Tenant; . . . Hearing on SF 2595 before the S. Judiciary Comm.*, 86th Legis., 2010 Reg. Session (Minn., Mar. 16, 2010) (Statement of Ron Elwood, Supervising Attorney, Legal Services Advocacy Project) (https://www.lrl.mn.gov/media/file?mtgid=860947 File 2 of 2 at 55:15 – 56:01.)

March 1	Rent	$100.00		$316.00
March 6	Late Fee	$8.00		$324.00
March 31	Payment		$100.00	$224.00
April 1	Rent	$100.00		$324.00
April 6	Late Fee	$8.00		$332.00

We hope this opinion is helpful and thank you again for your correspondence.

Sincerely,

Susan C. Gretz

SUSAN C. GRETZ
Assistant Attorney General
(651) 757-1336

|#4986186-v1

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July 8, 2021

VIA EMAIL: mhc@costleylaw.com

Michael H. Costley, Esq.
Costley & Morris, P.C.
609 1st Avenue/P.O. Box 340
Two Harbors, MN 55616

Re: Request for Opinion Concerning Minn. Stat. § 469.190

Mr. Costley:

Thank you for your correspondence requesting an opinion regarding the use of lodging tax proceeds by the City of Silver Bay.

As you note, state law limits the use of 95% of the gross proceeds from a lodging tax to fund "a local convention or tourism bureau for the purpose of marketing and promoting the city or town as a tourist or convention center." Minn. Stat. § 469.190, subd. 3. You ask whether, to market and promote Silver Bay as a destination and to attract tourists to the area, funds from 95% of lodging tax proceeds may be used to fund a) the City's annual summer "Bay Days" festival; and b) an event featuring nationally known music performers.

The answer to these questions will often turn upon whether the event -- and the specific expenditures subsidized -- are reasonably calculated to attract people from outside the community for tourism or convention business, as opposed to general enhancement of the city's amenities. *See* Op. Atty. Gen. 59a-44, January 30, 1985 (use of lodging tax proceeds not authorized for capital expenditures such as cross-country ski trails); April 17, 2003 Letter to John H. Bray re City of Proctor, attached.

This analysis is largely factual in nature, and is best left to local officials with knowledge of the particular expenditures and their purposes. Opinions of this office do not attempt to address factual issues that may determine the answer to a legal question. Op. Atty. Gen. 629-a, May 9, 1975.

Notwithstanding the foregoing, the April 17, 2003 letter referenced above and a 1993 letter to a state representative (attached) include discussions of local festivals that may be helpful to you.

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Thank you again for your correspondence.

Sincerely,

Susan C. Gretz

SUSAN C. GRETZ
Assistant Attorney General

Enclosures: Op. Atty. Gen. 59a-44, January 30, 1985
April 17, 2003 Letter to John H. Bray re City of Proctor
February 24, 1993 Letter to Representative Dave Battaglia

|#5006019-v1

CITIES: POWERS: LODGING TAXES: DISPOSITION OF PROCEEDS. The City of Winona has no authority to use ninety-five percent of city lodging tax revenues to finance capital expenditures such as a cross-country ski trail. Minn. Stat. § 477A.018, subd. 3 (1983).

January 30, 1985

Mr. Richard F. Blahnik
City Attorney, City of Winona
Winona City Hall
4th and Lafayette Streets
Winona, Minnesota 55987

59a-44
(Cr. Ref. 59a-22, 476b-2)

Dear Mr. Blahnik:

In your letter to Attorney General Hubert H. Humphrey, III, you present substantially the following:

FACTS

The City of Winona's Tourist Bureau would like to use the funds it receives from the hotel and motel lodging tax imposed under Minn. Stat. § 477A.018, subd. 1 (1983) to finance capital expenditures such as building a cross-country ski trail.

You then ask substantially the following:

QUESTION

Does Minn. Stat. § 477A.018, subd. 3 (1983) authorize the City of Winona tourist bureau to expend revenues it receives from the city lodging tax to finance capital expenditures such as building a cross-country ski trail?

OPINION

We answer your question in the negative. Minn. Stat. § 477A.018, subd. 3, reads as follows:

> Disposition of proceeds. Ninety-five percent of the gross proceeds from any tax imposed under subdivision 1 shall be used by the statutory or home rule charter city to fund a local convention or tourism bureau for the purpose of marketing and promoting the city as a tourist or convention center. . . .

The plain language of Minn. Stat. § 477A.018, subd. 3, empowers cities such as Winona to establish local convention or tourism bureaus using ninety-five percent (95%) of the funds generated by city lodging taxes. The statute limits the further use of these tax revenues to "the purpose of marketing and promoting the city as a tourist or convention center. . . ." The question then becomes what expenditures will be considered to meet the specific purpose stated in the statute.

The legislative directive in Minn. Stat. § 477A.018, subd. 3, clearly contemplates expenditures for advertising or similar types of marketing or promotion of a city as a tourist or convention center. While it could be argued that building a cross-country ski trail or undertaking other capital expenditures are for the purpose of marketing and promotion because tourists would thereby be attracted to the city, we do not believe that this is what the legislature intended for the following reasons.

It is an established principle that cities have only the powers granted to them by the legislature, e.g., Kronschnabel v. City of St. Paul, 272 Minn. 256, 137 N.W.2d 200(1965). The

language of Minn. Stat. § 477A.018, subd. 3, does not mention capital expenditures. Other statutes unambiguously give cities authority to use their general revenues for parks and recreation. See Minn. Stat. § 471.15 et. seq; Cf. Minn. Stat. § 85.44. If the legislature had intended that revenues generated by city lodging taxes be spent in this way it would have so stated.

Among the factors to be considered in construing a statute are the legislative history, the consequences of a particular interpretation, and the legislature's intent that the entire statute be effective and certain. Minn. Stat. §§ 645.16(6) and 645.17(2).

Our examination of the legislative history of Minn. Stat. § 477A.018, subd. 3, indicates that the legislature did not intend to authorize the use of city lodging tax revenues for capital expenditures. An amendment to the House Bill, H.F. 680, which would have authorized construction of a civic or convention center and would have broadly stated that the tax revenues could be used "to otherwise promote tourism" was defeated in committee. The final bill had much more restrictive language concerning how the funds were to be spent. Also, some of the bills considered by the legislature on this subject matter provided that only fifty percent of the tax revenues be spent on promotion of tourism. The fact that the legislature had to decide how much of

the tax revenues must be spent in accordance with the restrictions in the statute, demonstrates that the legislature was aware that those tax revenues the expenditure of which was not governed by Minn. Stat. § 477A.018, subd. 3, could be used by cities for many other municipal purposes. Since the legislature enacted a bill which earmarked ninety-five percent of the tax revenues for tourism promotion, it made a choice that the vast majority of the money be spent strictly for that purpose.

Regarding the other factors to be considered in ascertaining legislative intent, if the statute were to be interpreted as allowing the use of lodging tax revenues for capital expenditures, then the statute could be interpreted to include virtually any expenditure which arguably enhances the attractiveness of the city. It would be difficult to see where any distinction could be drawn between what use of funds would be authorized or not. To construe Minn. Stat. § 477A.018, subd. 3, as authorizing capital expenditures would effectively remove the limitation on spending, namely tourism promotion, which the legislature imposed, and would render a significant portion of the statute ineffective and useless.

Minn. Stat. § 477A.018, subd. 3, is silent as to how the remaining five percent of city lodging tax revenues may be

spent. Absent legislative restriction, we believe these monies can be spent for any authorized public purpose.

Based on the foregoing, it is our opinion that the City of Winona is not authorized to use ninety-five percent of the revenues generated by its city lodging tax to build a cross-country ski trail. The city will have to independently consider how it wishes to utilize the remaining five percent of the tax revenues.

Very truly yours,

HUBERT H. HUMPHREY, III
Attorney General

MICHELE M. OWEN
Special Assistant
Attorney General

MMO/bw

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OFFICE OF THE ATTORNEY GENERAL

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April 17, 2003

John H. Bray
CLURE EATON LAW FIRM
222 West Superior Street
Skyway Level, Suite 200
Duluth, MN 55802-1907

Re: The Use of Lodging Tax Proceeds/City of Proctor

Dear Mr. Bray:

Thank you for your letter of April 4, 2003, concerning permissible expenditures of lodging tax proceeds.[1]

You state that your letter is an "amended request" for an opinion from this Office asking two questions in addition to other ones you posed in an August 19, 2002 letter, and which were addressed in my October 15, 2002 letter to you (copy enclosed):[2]

1. May lodging tax proceeds be used to purchase fireworks associated with an annual city festival?

2. May lodging tax proceeds be used to assist in funding a local festival?

As noted in my previous letter, the answers to your questions on this topic are dependent on a determination of whether a particular expenditure would actually aid in marketing or promoting the city for tourism or convention business. Such fact-specific determinations are beyond the scope of opinions of this Office and are best evaluated by local officials.

As with expenditures addressed in my previous letter, the permissibility of using lodging tax proceeds for expenses associated with a "local festival" would depend upon whether the expenditure is for an activity related to attracting tourist and convention business. For example, advertising or similar efforts to make tourists and convention planners aware of local events such as festivals would seem clearly to fall within the class of permissible uses. In addition, a

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[1] Pursuant to Minn. Stat. § 469.190, subd. 3 (2002) ninety-five percent of the proceeds of a lodging tax must be used "for the purpose of marketing and promoting the city as a tourist or convention center." My analysis has been limited to that portion of the proceeds. The remaining five percent may be spent for any authorized city purposes.

[2] Upon review of the relevant statute and other current authorities, I have nothing to add to my earlier response to those questions.

statewide or national competition or a recreational or entertainment event of such stature that it would, in itself, bring potential tourists or convention planners to the community would likely qualify. An event of interest only to residents of the immediate area, however, would not appear to be a permissible expenditure.

I regret that I am not able to provide more specific answers, but I hope these comments are helpful to you.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

(651) 297-1141

AG: #833897-v1

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
ATTORNEY GENERAL

525 PARK STREET
SUITE 200
ST. PAUL, MN 55103-2106
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October 15, 2002

Mr. John H. Bray
CLURE EATON LAW FIRM
222 West Superior Street
Skywalk Level, Suite 200
Duluth, MN 55802-1907

Re: The Use of Lodging Tax Proceeds/City of Proctor

Dear Mr. Bray:

Thank you for your letter of August 19, 2002. On behalf of the City of Proctor you ask whether certain proposed expenditures of lodging tax proceeds are permitted by law.

BACKGROUND

Minn. Stat. § 469.190, subd. 1 (2000) authorizes cities and towns to impose a tax of up to three percent upon receipts for lodging at hotels, motels, rooming houses, tourist courts, and resorts. Minn. Stat. § 469.190, subd. 3 (2000) provides in part:

> Subd. 3. **Disposition of Proceeds.** Ninety-five percent of the gross proceeds from any tax imposed under subdivision 1 shall be used by the statutory or home rule charter city or town to fund a local convention or tourism bureau for the purpose of marketing and promoting the city or town as a tourist or convention center.

Thus, five percent of the lodging tax proceeds is unrestricted as to use. However, the remaining 95 percent of these revenues may be used only to fund of a tourism bureau, local bureau for sole purposes of "marketing" or promoting the city "as a tourist or convention center." For purposes of this opinion this allocation will be referred to as the "95 percent category."

There appear no court decisions addressing the permissible uses for those funds. However this Office has previously considered the scope of expenditure authority.

In Op. Atty. Gen. 59a-44, January 30, 1985 (copy enclosed), this Office concluded that this language, then codified as Minn. Stat. § 477A.018, subd. 3 (1983), did not authorize the City of Winona to spend portions of the "95 percent category" on construction of a cross-country ski trail. That opinion was based on a review of the legislative history which indicted that the legislature did not intend to authorize use of lodging tax funds for general city purposes, and more particularly did not intend that they be used for capital expenditures of general benefit to the City. That opinion further reasoned that the restrictive statutory language could not be

interpreted so broadly as to include any and all expenditures that would arguably enhance the attractiveness of the city, because to do so would effectively negate the restrictions.

On December 7, 1988, this Office issued an opinion in the context of a proposal to use the "95 percent category" funds to underwrite a rent reduction for facilities to be used by an organization in holding a convention. *See* opinion dated December 7, 1988, to Alan R. Felix, Bemidji City Attorney (copy enclosed). That opinion concluded that the "promoting" and "marketing" authorized by the statute was not necessarily limited to advertising alone but could include other activities that are reasonably designed to encourage the use of the city as a tourist or convention center. In that regard, a city could determine that a convention facility rental subsidy would be an appropriate way to attract a group to hold its convention in that city.

Each of the proposed uses of proceeds set forth in your letter would need to be evaluated based on all relevant facts to determine whether the expenditure would "market" or "promote" the city "as a tourist or convention center." The ultimate determination whether any of such expenditures would actually market or promote the city for tourism or convention business in a particular circumstance would be dependent upon the facts of each given case. City officials rather than this Office are in the best position to conduct such a factual analysis. *See, e.g.,* Op. Atty. Gen. 629-a, May 9, 1975. However, I can informally discuss the expenditures you propose in light of the principles mentioned above.

1. **May lodging tax proceeds be used for the painting and maintenance of tourist attractions owned by the City, in this case, a steam locomotive engine (Proctor has historically been associated with trains) and a mounted fighter jet?**

The use of proceeds for the painting and maintenance would seem analogous to the ski trail expenditure discussed in the 1985 opinion. While such a use could serve to enhance or preserve assets of the city, it is difficult to see how that action in itself would market or promote the city's tourism or convention resources. Rather, expenditures for dissemination of information *about* such attractions to potential visitors would seem more in keeping with the statutes' intent.

2. **May lodging tax proceeds be used for seasonal decorations and decorative lighting?**

The same reasoning set forth in response to your first question would also apply to your questions about using the tax proceeds for decorative lighting or "seasonal decorations" that would generally beautify the city's "main thoroughfare."

3. **May lodging tax proceeds be used to develop and maintain welcome signs?**

The authority to expend lodging tax proceeds for welcome signs would be dependent upon the particulars of each sign. For example, a sign placed at the city limits merely saying, "Welcome to Proctor, population 2852" would not appear to have any particular marketing or

promotional effect. On the other hand, a sign placed on a major highway notifying passersby of notable local attractions, or activities that would be of interest to tourists or convention planners would seem to be permitted.

4. **Are lodging tax proceeds predominantly meant to promote tourism to a city, or to encourage visitors to stay in local hotels?**

It would seem that the above two goals are complementary, rather than mutually exclusive. Section 469.190, subd. 3 (2000) speaks generally of using the proceeds to promote tourism and convention business. It does not limit its coverage to encouraging people to stay at local hotels, although the permissible uses of the tax are ones calculated to attract to the city people who are likely to patronize such facilities. Thus, a promotional campaign funded with lodging tax dollars would not necessarily be required to mention local hotels at all. On the other hand, there is no question that the nature and availability of local lodging facilities is an important consideration for tourists and essential information for convention planners. Indeed, in some circumstances, hotels may themselves be tourist attractions or convention centers. Therefore, creation and distribution of materials that publicize the features of local hotels would seem to be a permissible expenditure.

As noted above, the extent to which specific lodging tax expenditures will actually market or promote the tourism or convention features of the city is a factual determination to be made by the city on a case-by-case basis. I hope the foregoing discussion is helpful to that process.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

(651) 297-1141

Enclosure

AG: #728066-v1

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

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February 24, 1993

Representative Dave Battaglia
517 State Office Building
St. Paul, MN 55155

Dear Representative Battaglia:

You have sought our analysis of the scope of permitted expenditures of proceeds of local lodging taxes authorized pursuant to Minn. Stat. § 469.190, subd. 3 in the context of four particular examples, i.e.:

1. To pay for high school band uniforms;

2. To pay for fireworks to be used at a 4th of July celebration;

3. To subsidize a county fair;

4. To subsidize local "festivals" for local sports events, such as hockey, baseball or fishing tournaments.

We apologize for the long delay in providing you with a response.

Minn. Stat. § 469.190, subd. 3 provides:

> Subd. 3. **Disposition of proceeds.** Ninety-five percent of the gross proceeds from any tax imposed under subdivision 1 shall be used by the statutory or home rule charter city or town to fund a local convention or tourism bureau for the purpose of marketing and promoting the city or town as a tourist or convention center. This subdivision shall not apply to any statutory or home rule charter city or town that has a lodging tax authorized by special law or enacted prior to 1972 at the time of enactment of this section.

Your question is directed to the 95 percent of the proceeds that must be used to fund a "convention or tourism bureau for the purpose of marketing and promoting the city or town as a tourist or convention center." (Emphasis added.) Thus, the authority of the use of the 95 percent portion of these revenues by the local bureau for the purposes specified would depend upon whether those uses could ever be seen as "marketing" or promoting the city "as a tourist or convention center."

In Op. Atty. Gen. 59a-44, January 30, 1985 (copy enclosed), we concluded that Minn. Stat. § 477A.018, subd. 3 (1983) did not authorize the City of Winona to spend portions of the

95 percent of the revenues generated by its city lodging tax to build a cross-country ski trail. This opinion was based on a review of the legislative history which demonstrated that the legislature did not intend to authorize unrestricted use of lodging tax funds and more particularly did not intend that they be used for capital expenditures. We further reasoned that the restrictive language then in section 477A.018 could not be interpreted so broadly as to include any and all expenditures which would arguably enhance the attractiveness of the city.[1] Thus while that opinion dealt with the use of funds for capital expenditures, I do not believe that was intended to imply that capital expenditures for city improvements are the only uses for which lodging tax expenditures might be unauthorized. For example, expenditures for maintaining and grooming the ski trails would present the same difficulty perceived in constructing the trails.

On December 7, 1988, we again addressed the scope of authority to expend lodging tax proceeds in the context of a proposal to use funds to underwrite a rent reduction for facilities to be used by an organization in holding a convention. See letter dated December 7, 1988, to Alan R. Felix, Bemidji City Attorney (copy enclosed). In that letter we concluded that the "promoting" and "marketing" authorized was not necessarily limited to advertising alone but could include other activities which are reasonably designed to encourage the use of the city as a tourist or convention center. In that regard, we indicated that a city could determine that a convention facility rental subsidy would be an appropriate way to attract a group to hold its convention in that city. Thus we have been of the view that "marketing and promoting" the city for purposes of lodging tax expenditures includes activities directly related to providing information concerning tourist or convention assets of the city to persons outside the immediate area or in directly seeking to attract such persons to the city, but does not generally include creation of such assets or the support of community betterment in general. In light of the fact that the revenue in question is raised by taxation of hotels, motels and like tourist facilities, it is likely that the legislature intended that the restricted 95 percent be used in ways calculated to directly attract persons likely to patronize such facilities as opposed to uses which generally benefit the city as a whole.

In the context of your inquiry, each of the proposed uses would have to be evaluated based on all relevant facts to determine whether the use would "market" or "promote" the city, and whether it would be in the City's best interest to compete with other municipalities in that manner, given the City's budget constraints. City officials would be in the most advantageous position to conduct such an analysis. See Op. Atty. Gen. 629-a, May 9, 1975. We can informally discuss the expenditures you propose in light of the principles mentioned above. However, the ultimate determination whether any of such expenditures would actually market or promote the city for tourism or convention business in a particular circumstance would likely be heavily dependent upon the facts of each given case.

---

1. Minn. Stat. § 477A.018, subd. 3 was repealed in 1989 Minn. Laws, ch. 277, art. 1, § 35. However, Minn. Stat. § 469.190, subd. 3 (1992) contains the same operative language.

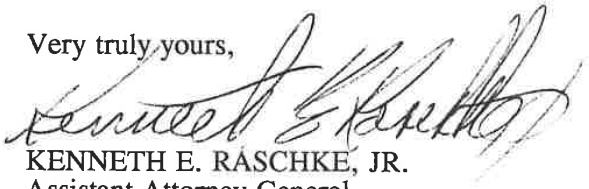
1. Purchase of school band uniforms. It is frankly difficult to see how the purchase of band uniforms could be perceived as marketing or promoting the city as a tourist or convention center. While new uniforms could enhance the appearance of the band and the image it may convey when performing outside the community, it is not clear how the uniforms in themselves would convey any sort of message about any tourist or convention resources the city may have or result in the increase of tourism or convention business.

2. Purchase of fireworks. Qualification of this expenditure would seem heavily dependent upon the circumstances of each case. If the fireworks were to make a significant contribution to a city's effort to attract tourists or convention business, especially if the display was advertised outside the city for that purpose, it could be determined to be related to promotion and marketing for those purposes. On the other hand, if the display were essentially a local event for residents of the city and surrounding area it may not qualify.

3. The same might also be said for expenditures to subsidize a county fair or local sports event. The matter would, I believe, turn on whether the particular expenditure is reasonably related to a specific activity for attracting tourists or convention business. Certainly advertising or similar efforts to make tourists or convention planners from outside the area aware of local events such as the fair or sporting events would appear to be legitimate marketing or promotion. If, on the other hand, the result of the expenditures is simply to assist the event in general or in some way that would not reasonably be seen as calculated to attract additional people for tourism or convention business, they would not likely qualify. For example, subsidy for a statewide sporting event such as the Star of the North games to be held in the city would appear far more appropriate than underwriting an event essentially for local teams and their supporters.

I am sorry that I cannot be more definite, but I hope these thoughts are helpful to you. Again, we apologize for the delay. Please contact us if we can provide more assistance.

Very truly yours,



KENNETH E. RASCHKE, JR.
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KER:gpp

Enclosures

The Office of
Minnesota Attorney General Keith Ellison
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August 19, 2021

Via Email
CRamstad@cityofdetroitlakes.com

Charles J. Ramstad, Esq.
City Attorney, City of Detroit Lakes
114 Holmes Street, West
Detroit Lakes, MN 56501

Re: Request for Opinion Concerning Minn. Stat. § 462.358, subd. 1a

Dear Mr. Ramstad:

I write in further response to your February 24, 2021 correspondence about a potential conflict between the subdivision control regulations of the City of Detroit Lakes and those of surrounding townships. At the time of our initial March 24, 2021 response, surrounding townships had not yet adopted subdivision regulations, and this Office declined to issue an opinion in part due to the hypothetical nature of the question. You have now informed us that several surrounding townships have adopted subdivision control regulations.

BACKGROUND

As you note the Municipal Planning Act grants municipalities the authority to regulate by ordinance the subdivision of land, and by resolution:

> extend the application of its subdivision regulations to unincorporated territory located within two miles of its limits in any direction but not in a town which has adopted subdivision regulations.

Minn. Stat. § 462.358, subd. 1a. Pursuant to this statute and its predecessor[1], the City of Detroit Lakes adopted two ordinances, Ordinance 292 in 1960 and Ordinance 510 in 1967, each extending

[1] Minn. Stat. § 471.29, subd. 1 (1961) (*repealed by* 1965 Minn. Laws ch. 670 § 14) provided:

> The governing body of any municipality is authorized by resolution to approve all plats of land hereafter proposed within that municipality. Any city, village, or borough is also authorized by resolution to approve such plats of land located within two miles of its limits in any direction and not in a town which has elected to require the approval of plats under this act, . . .

subdivision authority within the corporate limits of the city and the unincorporated area within two miles of its limits.

Lake View Township is adjacent to the City of Detroit Lakes, and includes land encompassed within the two miles over which the City has extended its subdivision authority. In June of this year the Township informed you that it had exercised its authority to adopt zoning and subdivision regulations. In a telephone call you indicated that other townships affected by the City's extension of its subdivision regulations have either adopted subdivision regulations or plan to do so.

QUESTION

You pose the following question:

> If a town adopts subdivision controls regulations pursuant to Minn. Stat. § 462.351 to § 462.364 or otherwise after subdivision controls regulations of a City are made effective within the unincorporated lands of the town lying within two miles of the City limits pursuant to Minn. Stat. § 462.358 subd. 1a, do those subsequently adopted town subdivision regulations supersede the previously adopted subdivision controls regulations of the City, and render the City subdivision controls regulations no longer of any force or effect in that area?

ANALYSIS

Minnesota law authorizes cities and towns to adopt comprehensive land use plans and official controls, including both zoning and subdivision ordinances. Minn. Stat. §§ 462.351-462.364. Section 462.358, subd. 1a provides in full:

> Subd. 1a. **Authority.** To protect and promote the public health, safety, and general welfare, to provide for the orderly, economic, and safe development of land, to preserve agricultural lands, to promote the availability of housing affordable to persons and families of all income levels, and to facilitate adequate provision for transportation, water, sewage, storm drainage, schools, parks, playgrounds, and other public services and facilities, a municipality may by ordinance adopt subdivision regulations establishing standards, requirements, and procedures for the review and approval or disapproval of subdivisions. The regulations may contain varied provisions respecting, and be made applicable only to, certain classes or kinds of subdivisions. The regulations shall be uniform for each class or kind of subdivision.
>
> A municipality may by resolution extend the application of its subdivision regulations to unincorporated territory located within two miles of its limits in any direction but not in a town which has adopted subdivision regulations; provided that where two or more noncontiguous municipalities have boundaries less than

> four miles apart, each is authorized to control the subdivision of land equal distance from its boundaries within this area.

The current definition of "municipality" in the Act includes "any town." Minn. Stat. § 462.352, subd. 2. Therefore, the townships surrounding Detroit Lakes are authorized to adopt subdivision regulations.

Your question is what effect the prior extension of subdivision controls by the City to the two miles surrounding the City has on controls later adopted by the affected towns. As noted in our previous response, the Legislature provided authority to establish a joint planning board to address subdivision regulation in the two-mile extraterritorial zone. *See* Minn. Stat. § 462.3585. Establishment of a joint planning board requires a request by one of the units of government, however, and we understand that no such board has been established for the territory surrounding Detroit Lakes. Thus, we are asked to determine which unit of government's subdivision regulations govern where the process offered by the Legislature is not used.

1967 Attorney General Opinion

To support the position that the City's subdivision regulations supersede a later adopted town subdivision regulation, you rely in large part on a 1967 Opinion of this Office responding to a similar question from the City of Benson. *See* Op. Atty. Gen. 59a-32, Jun. 29, 1967. That Opinion addressed the City of Benson's 1965 adoption of subdivision regulations that extended one mile beyond the city's borders. One particular township affected by the extension threatened to adopt less restrictive subdivision regulations. The city attorney asked this Office to render an opinion as to whether the city lost jurisdiction upon the township's adoption of subdivision controls.

Our opinion first noted that in 1965 the statutory authorization for municipalities to adopt subdivision control regulations—Minn. Stat. §§ 471.26-.33—was repealed effective January 1, 1966. Op. Atty. Gen. 59a-32, p. 2. However, valid ordinances and regulations in effect before the repeal continued in effect. *Id.,* citing Minn. Stat. § 462.363 (1965). Because the township never elected to require approval of plats under former Minn. Stat. §§ 471.26 to 471.33, it was "without power to do so at the present time by reason of the repeal of those sections." Op. Atty. Gen. 59a-32, p. 4.

That is because in 1965 when Minn. Stat. §§ 471.26-471.33 were repealed and replaced with sections 462.351-462.364, the definition of municipality changed. Prior to the 1965 repeal, a municipality authorized to approve subdivisions included "any city, village, town or borough however organized." Minn. Stat. § 471.26 (1961). With the adoption of the Municipal Planning Act in 1965 the definition of a municipality authorized to adopt subdivision controls was restricted to cities, any village or borough and "any town having the powers of villages pursuant to

Minnesota Statutes, Section 368.01"[2] Minn. Stat. § 462.352, subd. 2 (1965). Although the 1967 Opinion is silent on this point, apparently the town described in the Opinion was not a town "having the power of a village" as described in the statute, and thus as of January 1, 1966, did not have the power to adopt subdivision controls.

No such limitation exists today. Since 1982, the definition of municipality in the Municipal Planning Act includes all towns. 1982 Minn. Laws ch. 507 § 21[3], codified at Minn. Stat. § 462.352, subd. 2. Thus, as noted in a 2005 informal letter opinion issued to the city attorney for the City of Rockford (attached), the 1967 Opinion offers little guidance with respect to current authority.

Statutory Interpretation

We are left then to interpret the statutory language. You note use of the past tense "has adopted" in the prohibition on a city extending its subdivision regulations to a town with existing subdivision regulations. Minn. Stat. 462.358, subd. 1a. We interpret the provision to apply only to that point in time when the city adopts its extraterritorial subdivision regulations. If a town has subdivision regulations at that time, the city may not extend its own regulations. The phrase fails to answer the question about later enacted town subdivision regulations.

In the 2005 letter opinion we recognized a lack of clarity in the statutory language, and ultimately turned to principles of statutory construction. Specifically, we considered laws on the similar subject of zoning, and the consequences of a particular interpretation. *See* Minn. Stat. § 645.16. Zoning authority, which also permits extension of city regulations into two miles of unincorporated territory, expressly provides that the city zoning rules are enforceable "until the county or town board adopts a comprehensive zoning regulation which includes the area." Minn. Stat. § 462.357, subd. 1.[4]

With respect to the territory outside city boundaries, it would seem reasonable to construe subdivision and zoning authority in a similar manner. Otherwise, in the absence of forming a joint planning board, authority over subdivision regulations and zoning regulations within a township could be divided among the county, an adjoining city, and the township. As noted in the 2005 letter, this result appears contrary to the Legislative intent expressed in Minn. Stat. § 462.358, subd. 1a that towns of any size can plan for orderly development. March 4, 2005 letter, p. 3. We do acknowledge the value of allowing cities to anticipate and plan for future development beyond

[2] Such towns were those having platted portions a) in which there resided 1,200 or more people, or b) within 20 miles of the city hall of a city of the first class with population over 200,000. Minn. Stat. § 368.01 (1965).

[3] "Sec. 21. Minnesota Statutes 1980, Section 462.352, Subdivision 2, is amended to read: Subd. 2. 'Municipality' means any city, including a city operating under a home rule charter, and any town ~~having the powers of statutory cities pursuant to section 368.01~~."

[4] Similarly, in the joint planning board statute, subdivision regulations a municipality has extended into the two-mile territory pursuant to section 462.358, subd. 1a before establishment of a joint planning board apply "until the joint board adopts subdivision regulations." Minn. Stat. § 462.3585.

their borders by extending and enforcing their subdivision regulations in the two-mile extraterritorial zone. These important and competing interests would be best addressed by the Legislature.

In the absence of legislative guidance or other intervening authority, we see no compelling reason to depart from the view expressed in the 2005 letter opinion that after a town adopts its own subdivision regulations, the city's regulations will not be applicable to the subject area. *Cf. Fleeger v. Wyeth*, 771 N.W.2d 524, 529 (Minn. 2009) (court requires a compelling reason to overrule precedent); *Johnson v. Chicago, Burlington & Quincy RR*, 66 N.W.2d 763, 770 (1954) (reasons for departure from precedent must greatly outweigh reasons for adherence).

We believe the reasoning expressed in the 2005 letter opinion in support of this position remains sound. Nonetheless, if you believe there are compelling reasons to depart from the view expressed there, particularly in light of our clarification that the 1967 Opinion carries little continuing force, we hope you will share those reasons with us.

We also hope this opinion and the attached letter are helpful and thank you again for your correspondence.

Sincerely,

Susan C. Gretz

SUSAN C. GRETZ
Assistant Attorney General
(651) 757-1336

Enclosures: Op. Atty. Gen. 59a-32, Jun. 29, 1967
March 4, 2005 Letter

|#5026284-v1

CITIES: PLANNING: SUBDIVISION REGULATIONS

Under facts herein, subdivision regulations adopted by City of Benson pursuant to former M.S. §§ 471.26 to 471.33 continue in effect as to approval of plats of land located in portion of township and such regulations may not be rendered inoperative as to such land by action of town in adopting its own subdivision regulations.

June 29, 1967

540-37 (Group 4)

Honorable R. A. Bodger
City Attorney
Benson, Minnesota 56215

Dear Mr. Bodger:

In your request for an opinion of the Attorney General you present the following

FACTS:

"The City of Benson, a fourth class city in Swift County, Minnesota, adopted subdivision regulations in 1965 pursuant to State law and in accordance with Section 462.351 through 462.364 M.S.A. While the State law provides that the subdivision regulations may extend the application thereof for two miles outside of its City limits, the City of Benson provided that its regulations apply to land only within one mile of the City limits. The surrounding townships do not have subdivision regulations. However, one particular township has become disenchanted with our subdivision regulations and has indicated to the City of Benson that the township will adopt subdivision regulations of its own, but much less restrictive than the subdivision regulations of the City of Benson. It is the theory of the township officers that when the township subdivision regulations become law such regulations will then supersede the subdivision regulations of the City of Benson with respect to the township lands within one mile of the Benson City limits and that Benson City subdivision regulations will have no force and effect on the township lands within one mile of the City limits. The township officers rely on Section 462.358 Subdivision 1 wherein it states as follows:

'A Municipality may by resolution extend the application of its subdivision regulations to unincorporated territories located within two miles of its limits in any direction but not in a town which has adopted subdivision regulations;'".

You make the following

COMMENTS:

"It is our understanding that had the township adopted subdivision regulations prior to the adoption of such regulations by the City, then in that case the City regulations could not have regulated that area within one mile outside of the Benson limits."

You ask the following

QUESTION:

"The question now is if the township adopts such subdivision regulations, which may be much less restrictive than the City and obviously for the purpose of ousting the City's jurisdiction, does the City of Benson lose jurisdiction to regulate outside of its City limits within the township wherein the township has adopted subdivision regulations after the City regulations have become law?"

ADDITIONAL FACTS:

You have subsequently advised this office that the regulations to which you refer were adopted by the City of Benson pursuant to former M.S. §§ 471.26 to 471.33, which authorized municipalities to carry on planning activities and adopt subdivision regulations in connection therewith.

OPINION

Former M.S. §§ 471.26 to 471.33 were repealed, effective January 1, 1966, by M.S. § 462.364. The authority for municipal planning and zoning is presently contained in M.S. §§ 462.351 to 462.364 which became effective January 1, 1966. As to ordinances and regulations in effect on the effective date of M.S. §§ 462.351 to 462.364, supra, the legislature provided in M.S. § 462.363 that:

> "Except as otherwise provided in sections 462.351 to 462.364, valid ordinances and regulations now in effect shall continue in effect until amended or repealed."

As indicated by the additional facts supplied, the subdivision regulations of the City of Benson were adopted pursuant to former M.S. §§ 471.26 to 471.33, supra. Former M.S. § 471.29, Subd. 1, which dealt in part with the authority of certain municipalities to approve plats of land located within two miles of the municipal limits, provided as follows:

> "The governing body of any municipality is authorized by resolution to approve all plats of land hereafter proposed within that municipality. Any city, village, or borough is also authorized by resolution to approve such plats of land located within two miles of its limits in any direction and not in a town which has elected to require the approval of plats under this act, provided that where two or more municipalities have contiguous territory or are situated with their boundaries less than four miles apart, each shall have control of the platting of land equidistant from its boundaries within this two-mile radius. After the adoption of platting regulations consistent with a city plan adopted pursuant to the provisions of sections 471.26 to 471.33, approval may be denied if the proposed plat fails to conform to the plan or with any reasonable regulation of the municipality applicable thereto. No plat shall be filed or accepted for filing unless it is accompanied by a certified copy of the resolution approving it or accepting it as being in accord and conformity with any plans or regulations as herein specified. A copy of this resolution shall be supplied to the applicant."

In view of M.S. 462.363, supra, the subdivision regulations previously adopted by the City of Benson, assuming they were validly enacted, must be regarded as continuing in effect until amended or repealed. Since these regulations draw their authority from former

M.S. §§ 471.26 to 471.33, supra, it is our opinion that they should be applied in conjunction with those former sections.

With respect to the township referred to in your letter, which now intends to adopt its own subdivision regulations, it appears from the facts presented that a portion of the land thereof is located within the one mile limit prescribed by the subdivision regulations of the City of Benson under authority of former M.S. § 471.29, supra. It further appears that the town in question never elected, as provided by former M.S. § 471.29, supra, to require the approval of plats under former M.S. §§ 471.26 to 471.33, supra. Having not so elected, the town is without power to do so at the present time by reason of the repeal of those sections. Under these circumstances, therefore, we are of the opinion that the subdivision regulations of the City of Benson continue in effect as to the approval of plats of land located in that portion of the township situated within one mile of the City's limits. We do not believe that these regulations may be rendered inoperative as to such land by action of the town at this time in adopting its own subdivision regulations.

Accordingly, we answer your question in the negative.

Very truly yours,

DOUGLAS M. HEAD
Attorney General

MICHAEL R. GALLAGHER
Special Assistant
Attorney General

MRG:tr

MIKE HATCH
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

March 4, 2005

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

Michael C. Couri
Couri, MacArthur & Ruppe, P.L.L.P.
705 Central Avenue East
P.O. Box 369
St. Michael, MN 55376-0369

Dear Mr. Couri:

Thank you for your correspondence of January 7, 2005 requesting an opinion from the Attorney General with respect to the issues discussed below.

FACTS AND BACKGROUND

You indicate that your office represents the City of Rockford in Wright County, Minnesota. You state that Rockford Township ("the Township") is located entirely within Wright County and borders portions of the City of Rockford ("the City"). For many years, Wright County has been enforcing both subdivision and zoning regulations in the Township. On August 24, 2004, the Rockford City Council adopted a resolution extending its subdivision regulations two miles beyond the City limits pursuant to Minn. Stat. § 462.358, subd. 1a. This resolution caused the extension of the City's subdivision regulations two miles into the Township. At that time, the Township had not adopted its own subdivision regulations and the only subdivision regulations applicable to the Township prior to the City's extension were Wright County's subdivision regulations. On October 19, 2004, the Rockford Town Board adopted an interim subdivision ordinance pursuant to Minn. Stat. § 462.355, subd. 4. It is the Township's position that the adoption of this interim ordinance by the Township reinstated subdivision authority in the Rockford Town Board (subject also to Wright County's subdivision authority) to the exclusion of the City within the two-mile zone of the Township.

Based upon these facts, you request an Opinion of this Office on the following questions:

1. Does the City presently have the authority to enforce its subdivision ordinance in that portion of the Township that lies within two miles of the City's boundary?

2. If the answer to question one is in the affirmative, what is the legal effect, if any, of the Township's ordinance adopted on October 19, 2004?

3. If the Township adopts a permanent subdivision ordinance, which local government would have authority to enforce its subdivision ordinance in that portion of the Township that lies within two miles of the City's boundary?

LAW AND ANALYSIS

Minn. Stat. §§ 462.351-462.36 (2004) authorize cities and towns to adopt comprehensive land use plans, and to implement those plans by adopting and enforcing various types of official controls, including zoning and subdivision ordinances.

Minn. Stat. § 462.355, subd. 4, provides in part:

> Subd. 4. *Interim Ordinance.* If a municipality[1] is conducting studies or has authorized a study to be conducted or has held or has scheduled a hearing for the purpose of considering adoption or amendment of a comprehensive plan or official controls as defined in section 462.352, subdivision 15, or if new territory for which plans or controls have not been adopted is annexed to a municipality, the governing body of the municipality may adopt an interim ordinance applicable to all or part of its jurisdiction for the purpose of protecting the planning process and the health, safety and welfare of its citizens. The interim ordinance may regulate, restrict or prohibit any use, development, or subdivision within the jurisdiction or a portion thereof for a period not to exceed one year from the date it is effective.

The purpose of such interm ordinances is to maintain the status quo pending study and consideration of passage of new official controls by the municipality. *See, e.g., Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1976); *City of Crystal v. Fantasy House, Inc.*, 569 N.W.2d 225 (Minn. Ct. App. 1997); Op. Atty. Gen. 63b-14, October 6, 1982. For purposes of this Opinion, I will assume that Rockford Township is "conducting studies or has authorized a study to be conducted or has held or has scheduled a hearing for the purpose of considering adoption or amendment of a comprehensive plan or official controls."

Minn. Stat. § 462.358, subd. 1a provides in part:

> A municipality may by resolution extend the application of its subdivision regulations to unincorporated territory located within two miles of its limits in any direction *but not in a town which has adopted subdivision regulations*; provided that where two or more noncontiguous municipalities have boundaries less than four miles apart, each is authorized to control the subdivision of land equal distance from its boundaries within this area.

(Emphasis added.)

First, the italicized language above is somewhat ambiguous. It is not clear whether the restriction against applying city subdivision regulations in a town with its own regulations is an

[1] As used in Minn. Stat. §§ 462.351-462.369, the term "municipality" is defined to include both cities and towns. *Id.* § 462.352, subd. 2 (2004).

ongoing one or is only operative at the time of adoption of the City's resolution to extend its jurisdiction. In Op. Atty. Gen. 59a-32, June 29, 1967, it was determined that, where a city had, under a previous statute, extended its subdivision regulations into a town with no regulations, the City's jurisdiction would not be affected by subsequent adoption by the town of its own regulations. That Opinion was largely based upon a specific statutory saving clause preserving existing ordinances in effect when the previous statute (which included the authority of towns to regulate subdivisions) was repealed, and section 462.358 was adopted. *See* 1966 Minn. Laws ch. 670 §§ 13, 14. That Opinion offers little guidance here inasmuch as all towns were granted express statutory authority to adopt official controls in 1982,[2] and no similar saving language appears expressly to preserve existing city controls against being superceded by later town controls.

Second, Minn. Stat. § 462.357, subd. 1, which permits extension of city zoning regulations into unincorporated territory, is much clearer. It states:

> A city may by ordinance extend the application of its zoning regulations to unincorporated territory located within two miles of its limits in ay direction, but not in a county or town which has adopted zoning regulations; provided that where two or more noncontiguous municipalities have boundaries less than four miles apart, each is authorized to control the zoning of land on its side of a line equidistant between the two noncontiguous municipalities unless a town or county in the affected area has adopted zoning regulations. Any city may thereafter enforce such regulations in the area to the same extent as if such property were situated within its corporate limits, *until the county or town board adopts a comprehensive zoning regulation which includes the area.*

Id. (emphasis added). Thus, it is clear that city zoning controls extending beyond city limits will be superseded by subsequently-enacted town controls governing the same area.

Third, in construing ambiguous statutory language we are to consider, *inter alia,* other laws on the same or similar subjects and the consequences of particular interpretations. *See* Minn. Stat. § 645.16 (2004). In the instant case, it seems reasonable to construe the ambiguous language of section 462.358, subd. 1a, to provide a result that is consistent with that which would be reached for zoning regulations under section 462.357. To construe it otherwise could require a result in which the authority over subdivision regulations and zoning regulations would be divided. Such a result seems contrary to the apparent legislative purpose of allowing communities to create and further a single comprehensive plan.[3]

---

[2] *See* 1982 Minn. Laws ch. 507, § 21.

[3] Such a result was reached in Op. Atty. Gen. 59a-32, August 18, 1995 (copy enclosed) which addressed city versus county authority over zoning and subdivision regulations. That Opinion acknowledged that split authority was not a satisfactory situation for developers or local governments, but concluded that it was compelled by the plain wording of the pertinent statutes.

We are therefore inclined to the view that adoption of town subdivision regulations will supercede preexisting extraterritorial city regulations applicable to the same area.

Fourth, adoption of an interim ordinance is not, however, the equivalent of adopting an actual zoning or subdivision ordinance. Rather, as noted above, it is a temporary measure put into effect to restrict development while a municipality is considering adoption or amendment of a comprehensive plan or official controls. Therefore, continued enforcement of the City's subdivision ordinance would not contravene the statutory prohibition against enforcement in a "town which has adopted subdivision regulations."

Fifth, towns are, nonetheless, expressly authorized to adopt interim ordinances to restrict or prohibit certain uses temporarily to protect their planning process. There would appear no necessary incompatibility between the continued enforcement of a city's subdivision regulations and enforcement of a town's interim ordinance applicable to the same area. Accordingly, both the City's subdivision regulations and the Town's interim ordinance may be enforced during the period in which the interim ordinance is in effect.

CONCLUSION

For the foregoing reasons, it is our Opinion that, pending adoption of subdivision regulations by the Town, the City may continue to enforce its subdivision regulations within the two mile area surrounding the City, and that the Town's interim ordinance is also enforceable in that area to the extent that it is otherwise valid. In other words, during the time when the interim ordinance is in place, proposed subdivisions would be subject to both it and the City's regulations. After the town adopts its own subdivision regulations, the City's regulations will not be applicable to the subject area.

Very truly yours,

Kenneth E. Raschke, Jr.

KENNETH E. RASCHKE, JR.
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Enclosures

AG: #1372609-v1

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January 4, 2022

VIA EMAIL
Bengblom@DuluthHousing.com

Mr. Brandon M. Engblom
General Counsel
Housing and Redevelopment Authority
of Duluth, Minnesota
PO Box 16900
Duluth, MN 55816

Re: Tenant Property Question

Dear Mr. Engblom:

Thank you for your November 2, 2021 letter regarding statutes relating to the storage and disposal of tenant property after an eviction.

BACKGROUND

Your letter indicates that two different statutory time periods might apply to storing a tenant's abandoned personal property after an eviction action in Minnesota. You state that some law enforcement and public housing authorities observe a 28-day holding period if the tenant's personal property is stored on-site after an eviction, and a 60-day period if the tenant's personal property is stored off-site after an eviction. In a follow-up email, you indicate that the HRA of Duluth observes a 60-day holding period after an eviction regardless of where the tenant's property is stored.

In a telephone call you noted that the distinction is important because a longer holding period delays people on the waiting list for public housing from accessing this housing.

SHORT ANSWER

In our opinion, as long as the tenant's property is stored on the premises, defined as a building and the area of land the building is on, Minn. Stat. § 504B.365, subd. 3(d) allows a landlord to dispose of the tenant's property 28 days after the triggering events described in Minn. Stat. § 504B.271, subd.1(b). The tenant's property need not be stored in the dwelling unit after the eviction to qualify for the shorter, 28-day holding period. The 60-day holding period applies to property removed from the premises to an offsite storage area.

QUESTIONS[1]

1. What is the correct storage/holding time period for a tenant's personal property held on the premises (in the unit or a storage building on the same property) ("on-site") after a lawful eviction?

2. What is the correct storage/holding time period for a tenant's personal property held off the premises ("off-site") after a tenant has been evicted?

LEGAL ANALYSIS

As you note, two statutes address the storage and disposal of tenant property. The first applies to abandoned property generally, i.e., not necessarily occurring after an eviction.

> **Abandoned property**. (a) If a tenant abandons rented premises, the landlord may take possession of the tenant's personal property remaining on the premises, and shall store and care for the property. The landlord has a claim against the tenant for reasonable costs and expenses incurred in removing the tenant's property and in storing and caring for the property. (b) The landlord may sell or otherwise dispose of the property 28 days after the landlord receives actual notice of the abandonment, or 28 days after it reasonably appears to the landlord that the tenant has abandoned the premises, whichever occurs last.

Minn. Stat. § 504B.271, subd. 1.

A different statute addresses storage and disposal after an eviction action (in which the tenant is the defendant and landlord is the plaintiff), and states:

> **Removal and storage of property**.
>
> (a) If the defendant's personal property is to be stored in a place other than the premises, the officer shall remove all personal property of the defendant at the expense of the plaintiff.

---

[1] You phrased the questions as:

1. What is the correct storage/holding time period for a tenant's personal property held within the dwelling unit (on-site) after a lawful eviction?

2. What is the correct storage/holding time period for a tenant's personal property held at another (off- site) location after a lawful eviction?

For the reasons noted herein, we believe the relevant inquiry is what storage/holding time applies when tenant property is stored either on or off the premises.

> (b) The defendant must make immediate payment for all expenses of removing personal property from the premises. If the defendant fails or refuses to do so, the plaintiff has a lien on all the personal property for the reasonable costs and expenses incurred in removing, caring for, storing, and transporting it to a suitable storage place.
>
> (c) The plaintiff may enforce the lien by detaining the personal property until paid. If no payment has been made for 60 days after the execution of the order to vacate, the plaintiff may hold a public sale as provided in sections 514.18 to 514.22.
>
> (d) If the defendant's personal property is to be stored on the premises, the officer shall enter the premises, breaking in if necessary, and the plaintiff may remove the defendant's personal property. Section 504B.271 applies to personal property removed under this paragraph. The plaintiff must prepare an inventory . . .
>
> (e) The officer must retain a copy of the inventory.
>
> (f) The plaintiff is responsible for the proper removal, storage, and care of the defendant's personal property and is liable for damages for loss of or injury to it caused by the plaintiff's failure to exercise the same care that a reasonably careful person would exercise under similar circumstances.
>
> (g) The plaintiff shall notify the defendant of the date and approximate time the officer is scheduled to remove the defendant, family, and personal property from the premises. . . .

Minn. Stat. § 504B.365, subd. 3 (emphasis added). You question whether subparagraph d's incorporation of section 504B.271 includes the 28-day holding period, or only other aspects of section 504B.271, such as a punitive damages provision in subdivision 2 of that statute.

You consider subdivision 3(c) (60-day holding period) to apply to all of subdivision 3, and conclude the longer holding period applies to all evictions regardless of where the property is stored. Although section 504B.365 does not precisely delineate the subparagraphs that apply when a tenant's personal property is stored "in a place other than the premises," the express terms and sequence of provisions lend meaning to the intent. Subparagraphs a, b, and c appear to all apply to the context in which the tenant's personal property is stored in a place other than the premises. Subparagraph 3(a) states so explicitly; subparagraph 3(b) addresses expenses of removing personal property "from the premises" and the resulting lien on the property; and subparagraph 3(c) discusses enforcement of the lien and the 60-day holding period.

Then subparagraph 3(d) explicitly addresses the situation in which the defendant's personal property is to be stored on the premises, incorporating section 504B.271.

We note that section 504B.271 (the general property abandonment statute) originally provided for a 60-day holding period before a landlord could dispose of abandoned property, identical to that applying after an eviction. Minn. Stat. § 504B.271 (2008). In 2010, the statute

was amended to reduce the holding period to 28 days as part of a package of changes to landlord tenant laws. 2010 Minn. Laws, ch. 315 §§ 8, 9 (H.F. 2668). Legislators describing the changes explained that the reduction in the time required before the sale of abandoned property was in exchange for an increase in punitive damages for landlords who prematurely destroyed the abandoned property, also a feature of section 504B.271.[2]

The legislative history behind the reduction in the holding period from 60 to 28 days in section 504B.271 does not reflect knowing application to the eviction context, or the distinction between personal property stored on the premises and that removed from the premises embodied in section 504B.365. Nonetheless, "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16. Thus, even if the Legislature was unaware that it was modifying a holding period applicable after an eviction action, the statute must be applied as written.

We believe the words of the statute are clear in application. When, after an eviction, a tenant's property is removed from the premises and stored off-site, the landlord must wait 60 days after the execution of the order to vacate to hold a public sale as provided in Minn. Stat. §§ 514.18 to 514.22. If instead the tenant's property is on the premises, the 28-day holding period applies. The start of that 28-day period begins, "when the landlord receives actual notice of the abandonment, or it reasonably appears to the landlord that the tenant has abandoned the premises, whichever occurs last." Minn. Stat. § 504B.271, subd. 1.

We note that "premises" is not defined in the statute. Accordingly, we refer to the common definition. The Merriam Webster Dictionary defines "on the premises" as, "a building and the

---

[2] House File 2668, Amendment A2, deleting 60 days and inserting 28 days, was made on the House Floor on March 25, 2010 at 46:35, where Representative Mullery stated, … "It reduces the time that the landlord has to hold abandoned property and in return it raises the punitive damages for landlords who destroy the tenants' property. …"
https://www.lrl.mn.gov/media/file?mtgid=1011538

The change was not in the Senate bill, but the Senate agreed to it in conference committee and addressed it during the repassage of HF2688 on the Senate Floor on May 5, 2010, (third video) at 3:47:12, when the following statement was made by the author, Senator Dibble:

> … we shortened the amount of time that housing authorities and landlords have to hang on to abandoned property from 60 to 28 days but we do increase the penalty for a violation of that standard if the property is disposed of earlier than is required. We increased damages from 300 to $1,000. …

https://www.lrl.mn.gov/media/file?mtgid=861092

area of land it is on."[3] Use of this broad definition is supported by section 504B.271, subdivision 2, which discusses both "removing" a defendant's personal property and storing it "on the premises." Applying this definition, a landlord may remove property from the dwelling unit to a storage building or other area on the premises while remaining within the confines of section 504B.365, subd. 3(d) and the 28-day holding period incorporated therein.

Thus, while your questions specifically referred to personal property "held within the dwelling unit" or, alternatively, "another, off-site location," the relevant inquiry is whether the property is stored on the premises (*e.g.*, within the dwelling unit or in a garage or storage shed on the premises) or off the premises (*e.g.,* in a storage unit or building not on the premises).

Finally, we remind the Authority of the requirements for advance notice of removal and sale of tenant property. *See* Minn. Stat. §§ 504B.365, subd. 3(g) (notice of removal); 514.21 (notice of sale to be served on owner of property); § 504B.271, subd. 1(d) (reasonable efforts to notify tenant of sale at least 14 days in advance). In addition, landlords are responsible for the proper removal, storage and care of tenant property regardless of whether the storage arises from an eviction. *See* Minn. Stat. §§ 504B.365, subd. 3(f); 504B.271, subd. 1(a).

We hope this is helpful and thank you again for your correspondence.

Sincerely,

/s/ **Susan C. Gretz**
SUSAN C. GRETZ
Assistant Attorney General

(651) 757-1336 (Voice)
susan.gretz@ag.state.mn.us

|#5123165-v1

[3] "On the premises." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/on%20the%20premises. Accessed 20 Dec. 2021

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February 16, 2022

VIA EMAIL
mmelchert@mhslaw.com

J. Michael Melchert
Melchert Hubert Sjodin
121 W. Main Street, Suite 200
Waconia, MN 55387

Re: Ward Election System Question

Dear Mr. Melchert:

Thank you for your January 27, 2022 letter regarding elections for the City of Waconia, for which you serve as City Attorney.

Your letter indicates that Waconia is a statutory city that elects city council members through a two-ward system. Each ward elects two city councilmembers and the mayor serves as a fifth vote of the council. The City was incorporated and the two-ward system established on July 23, 1921, via an order of the probate court of Carver County.

City staff and the council have determined the wards no longer serve a purpose and maintaining the ward system creates an undue expense to taxpayers. The City is about to incur the expense associated with reestablishing ward boundaries after the 2020 census. The Waconia City Council preliminarily agrees that wards might be eliminated and elections conducted at-large, and has requested your guidance on a procedure for transitioning to at-large voting before Waconia needs to redistrict them this spring.

You note that as a statutory city, Waconia is subject to Minnesota Statutes § 412.191, subd. 2, which provides in relevant part that a City Council "shall be the judge of the election and qualification of its members." You also note that four years after a new municipality is incorporated through a process involving the Office of Administrative Hearings, Minn. Stat. § 414.02, subd. 3(f) allows a city council to dissolve any wards created in the incorporation via a four-fifths affirmative vote.

While you acknowledge that Minnesota law does not explicitly address whether and how a statutory city not incorporated through chapter 414 of Minnesota Statutes transitions from a ward system to an at-large system of voting, you believe that a reasonable interpretation of these two statutes is that any city council of a statutory city can dissolve its wards with an affirmative four-fifths vote.

Accordingly, Waconia plans to notice a public hearing and solicit input from its residents regarding the proposed elimination of its wards. The City Council would then consider the matter at a duly noticed meeting. If four-fifths of the City Council approves, Waconia will no longer administer its elections using the two-ward system, and all municipal elections will be at-large.

Your letter requested that this office search for any unpublished Attorney General Opinions on the topic and indicates that in the absence of any guidance the City is inclined to proceed as outlined above.

We have not located a previous formal or informal opinion from this Office on the issue presented. However, we note the following history of the establishment of wards for municipal elections. First, in 1921 probate courts were authorized to incorporate cities of the fourth class and "designate the metes, bounds, wards and name thereof" upon petition of two thirds of the voters. 1921 Minn. Laws ch. 462 § 1. The law in 1921 also required each city governed by the chapter to be divided into not less than two wards. *Id.* at § 6.

In 1963 the law governing cities of the fourth class (such as Waconia)[1] and requiring not less than two wards (codified as Minn. Stat. § 411.06), was amended to include a new subdivision 2, which stated:

> At any time not less than 60 days prior to the biennial city election, the council may by ordinance provide that thereafter the city shall have four aldermen who shall be elected at large.

1963 Minn. Laws ch. 646 § 1.[2] However, this section was repealed in 1973 as part of the adoption of uniform municipal laws. 1973 Minn. Laws ch. 123 art. 5 § 5. The goal of the repeal was to simplify statutes relating to municipal government and to "effect the transition with a maximum recognition of the desires of the citizens." Minn. Stat. § 412.015, subd. 2; see also *Id*. at subd. 4, calling for liberal interpretation of the repeal to effectuate these purposes.

Thereafter cities of the fourth class were governed by the laws applicable to statutory cities generally, Chapter 412. Minn. Stat. § 412.018, subd. 1.

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[1] A Revisor's note on the title page of the 1971 Statutes, Chapter 411 (Incorporation, Cities Fourth Class) states, "At the time of this publication, it appears that the only municipalities governed by this chapter are North Mankato and Waconia."

[2] The statute is consistent with a treatise on municipal law, which characterizes the act of dividing a municipality into wards as a legislative act: "As wards do not possess any power of local self-government they are erected exclusively for the purpose of securing representation in the city government. They are merely convenient territorial subdivisions of the city for this purpose. . . . The districting of a city into wards is a legislative act which ordinarily cannot be delegated." 2A McQuillin Mun. Corp. § 7:66 (3d ed.) (internal citations omitted).

As you note, Chapter 412 does not address the transition of a statutory city from a ward system of election to at-large elections. In the absence of adverse authority, and consistent with the legislative intent to interpret the repeal of Chapter 411 consistent with "maximum recognition of the desires of the citizens," this Office has no objection to the City proceeding as you have outlined. A well-noticed public hearing with full participation of interested citizens in advance of the council vote will help effectuate legislative intent.

We hope this is helpful and thank you again for your correspondence.

Sincerely,

/s/ **Susan C. Gretz**

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|#5123165-v1

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March 3, 2022

VIA EMAIL
chadlemmons@kellyandlemmons.com

Chad D. Lemmons
Kelly & Lemmons, P.A.
2350 Wycliff Street, Ste. 200
St. Paul, MN 55114

Re: Administrative Fine and Hearing Question

Dear Mr. Lemmons:

Thank you for your February 7, 2022 letter requesting an opinion from this office regarding an administrative hearing and fine process for the Town of Eureka, for which you serve as township attorney.

You ask whether the Town has authority to adopt a system of administrative hearings and administrative fines pursuant to a proposed ordinance attached to your letter.

This Office does not render opinions on hypothetical questions or conduct general reviews of local enactments or proposals to identify possible legal issues. *See* Op. Atty. Gen. 629a, May 9, 1975. However, we provide the following information in hopes that it may be helpful to you:

As you may be aware, in 2008 the State Auditor's office published a lengthy report on administrative penalty programs that identified several questions about them. The report is at: https://www.osa.state.mn.us/media/veeos5qs/adminpen_08_fullreport.pdf

In 2003 this Office responded to a request for an opinion on local administrative penalty programs from a state representative. The letter (enclosed) addresses several legal questions regarding such programs that may be applicable to the proposed ordinance.

Note that both the State Auditor's Report and the letter predate the passage of Minn. Stat. § 169.999, which authorized the use of administrative fines exclusively for a small set of traffic offenses.

Finally, we note that the Minnesota Association of Townships recommends that any township considering adoption of administrative penalties contact them before proceeding. https://drive.google.com/file/d/1nahzaz3FBmIsu5nxVU34wHUlDCN30fXr/view

We hope this is helpful and thank you again for your correspondence.

Sincerely,

/s/ **Susan C. Gretz**

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Encls: 2003 AGO Letter
Op. Atty. Gen. 629a, May 9, 1975

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December 1, 2003

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

Dear Representative Smith:

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

FACTS AND BACKGROUND

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

Most of the procedures are similar in several respects:

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

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

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

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

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

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

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

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

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

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

Based upon this information, you ask the following questions.

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

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

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

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

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

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

Our analysis of these issues is set forth below.

LAW AND ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

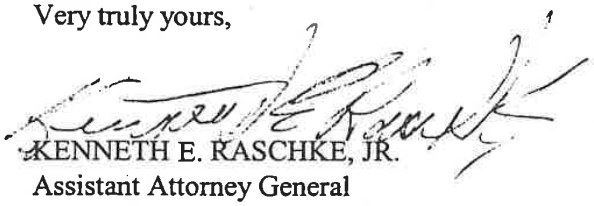
6. Likewise, a completely voluntary process would not appear to offend the separation of powers principles embodied in the constitution or to encroach upon the judicial function. In *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999), the court indicated that evaluation of administrative hearing schemes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

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

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

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

Very truly yours,



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MINNESOTA LEGAL REGISTER

MAY, 1975 Vol. 8, No. 5 Page 22

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.

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Minnesota Attorney General Keith Ellison
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March 17, 2022

VIA EMAIL
LForsgren@krekelberglaw.com

Lindsay K. Forsgren
Krekelberg Law Firm
10 North Broadway, PO Box 353
Pelican Rapids, MN 56572

Re: Local Ordinance Review Question

Dear Ms. Forsgren:

Thank you for your February 23, 2022 letter requesting an opinion from this office regarding an ordinance recently adopted by the City Council for Pelican Rapids, for which you serve as city attorney.

You state that the purpose of the ordinance is to ensure that compensation of library employees, which is set by the library board, does not conflict with the city code. You ask whether the ordinance conflicts with, or is in violation of any statutes, including Minnesota Statutes Chapter 134.

This Office does not conduct general reviews of local enactments or proposals to identify possible legal issues. *See* Op. Atty. Gen. 629a, May 9, 1975. However, we provide the following information in hopes that it may be helpful to you.

On May 9th, 2008, this Office issued an informal opinion to the Brainerd city attorney addressing a conflict between provisions of the Brainerd city charter governing the local library board and Minnesota Statutes relating to library boards. The opinion letter noted that Minnesota Statutes section 134.08, subdivision 3 provides:

> Nothing in sections 134.08 to 134.15 shall be construed as abridging any power or duty in respect to libraries conferred by any city charter. If a city charter does not address matters provided for in this chapter, the provisions of this chapter shall apply.

The opinion notes that several prior opinions from this office acknowledge and recommend that to avoid any uncertainty about whether the charter or statutes should be followed, home rule cities address the establishment and operation of libraries in their charters in detail. *See also* Op. Atty. Gen. 285a, Aug. 24, 1937 (noting that city libraries have traditionally been considered appropriate

for local control, and that municipal code provisions supersede general laws on the subject). The 2008 letter restates that the legislative policy as expressed in section 134.08, subd. 3 is to defer to local determinations concerning the operation of libraries as expressed in municipal charters.

We hope this is helpful and thank you again for your correspondence.

Sincerely,

/s/ **Susan C. Gretz**

SUSAN C. GRETZ
Assistant Attorney General

(651) 757-1336
susan.gretz@ag.state.mn.us

Encls: Op. Atty. Gen. 285a, Aug. 24, 1937
Op. Atty. Gen. 629a, May 9, 1975
May 9, 2008 Letter to Brainerd City Attorney

|#5185991-v1

CITIES -- Libraries -- Library Board -- Appointment or election of should be prescribed by terms of home rule charter. Sec. 5662, M.S.St., 1927.

August 24, 1937.

Mr. Herman A. Semmska
City Attorney
Glenwood, Minnesota

Dear Sir:

Your letter to Attorney General William S. Ervin under date of July 8, 1937, has been referred to the undersigned for reply.

Therein you state that the city of Glenwood is a city of the fourth class operating under a home rule charter; that in 1927 prior to incorporation of your municipality as a city with a home rule charter a public library was established with the aid of a grant from the Carnegie Library Foundation, pursuant to an agreement which required only that the municipality furnish the site for the library and contribute $1000 annually to its support; that your city charter "is entirely silent on the subject of libraries, but the library board of nine members has been maintained by the appointment of three members each year by the Mayor with the consent of the City Commission."

You further state that the Charter Commission is now drafting a new charter for your city.

You inquire:

> "* * * as to the validity of a provision in such home rule charter for the maintenance of the membership of the library board by appointment or election of new members by the City Commission (Glenwood has a commission form of government) instead of the mode prescribed by Section 5663 of the Minnesota General Statutes."

Mr. Hermann A. Heinecke -- 2.

We are of the opinion that your charter commission may provide in such charter for the management and control of the city library, as well as the method of appointment or election of the members of such board by the city commission. In our opinion your city library should be administered in accordance with the provisions of your city charter.

Section 5068 of Mason's Minnesota Statutes of 1927 specifically provides:

> "Nothing in this chapter shall be construed as abridging any power or duty in respect to libraries conferred by any city or village charter."

A city library is a local institution which is peculiarly fitted for local control and regulation. Many, if not most, of the cities which have adopted home rule charters have provided by their charters for the management and control of the city library. Their right to do this does not seem to have been questioned.

Upon the adoption by the electors of your city of the proposed new charter it will be the last expression of the legislative will on the subject of the management and control of your city library. The general rule is that the provisions of a home rule charter, when germane to the proper subject for municipal regulation, supersede the provisions of general laws on the subject. As indicated, your city library is a local

Mr. Herman A. Dennska -- 5.

matter and one of the institutions which is peculiarly fitted for local control and regulation by the terms of your charter.

The cases cited in the annotations to Section 6839 of Dunnell's Digest, (2nd ed.) illustrate the application of the above referred to rule.

In view of the language of said Section 8862, hereinabove quoted, and in view of other considerations above mentioned, it is our opinion that your public library should be administered in accordance with the provisions of your city charter and that such charter should contain a provision covering the method of appointment or election of the members of the library board.

Yours very truly,

WILLIAM S. ERVIN
Attorney General

By
DAVID J. ERICKSON
Deputy Attorney General

DJE:LL

MINNESOTA LEGAL REGISTER

MAY, 1975 Vol. 8, No. 5 Page 22

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

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(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.

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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.

LORI SWANSON
ATTORNEY GENERAL

STATE OF MINNESOTA

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TELEPHONE: (651) 297-2040

May 9, 2008

Mr. Thomas Fitzpatrick
Brainerd City Attorney
City Hall, 501 Laurel Street
Brainerd MN 56401

Dear Mr. Fitzpatrick:

Thank you for your correspondence dated April 2, 2008.

You note that the City of Brainerd (the "City") is a home-rule-charter city located in Crow Wing County. You state that the Brainerd City Charter, of which you enclosed a copy, has included provisions pertaining to a local library board since at least 1908. You further state that the City and Crow Wing County are both members of the Kitchiagami Regional Library system. You point out that there are a number of differences between the provisions of the Brainerd City Charter governing the City Library Board and Minnesota Statutes relating to library boards. For example:

1. Chapter 2, section 8 of the Charter establishes terms of six years for board members, while Minn. Stat. § 134.09, subd. 2 (2006) specifies three year terms.

2. Chapter 2, section 9 of the Charter requires city officers, including library board members to be city residents; however, Minn. Stat. § 134.09, subd. 1 (2006) states:

> If the city library is a branch or a member of a regional public library system, as defined in section 134.001, the mayor, with the approval of the city council, may appoint to the city library board, residents of the county, provided that the county is participating in the regional public library system and that the majority of the members of the city library board are residents of the city.

3. Minn. Stat. § 134.09, subd. 2 states in part that a library board member shall not be eligible to serve more than three consecutive three-year terms. The Charter contains no limitation upon the number of terms a member may serve.

In light of the inconsistencies, you request an opinion of this Office on the following questions:

1. May the City of Brainerd continue six-year terms for its library board members?

2. May the City appoint library board members who reside outside of the City?

3. Should the City limit library board members to three consecutive terms?

First, for reasons discussed in Op. Atty. Gen. 619a, May 9, 1975 (copy enclosed), Opinions of the Attorney General are not generally addressed to interpretation of local charters or ordinances. Therefore, to the extent that resolution of any of the above issues turns upon interpretation of the Charter, those issues would better be addressed by Brainerd city officials.

Second, Minn. Stat. § 134.08, subd. 3 provides in part:

> Subd. 3 Applicability. All public library service heretofore established and now existing in cities and counties is continued and all ordinances and resolutions setting apart public property for their support are hereby confirmed. Nothing in sections 134.08 to 134.15 shall be construed as abridging any power or duty in respect to libraries conferred by any city charter. If a city charter does not address matters provided for in this chapter, the provisions of this chapter shall apply.

In light of this language and the general principle that the provisions of home rule charters will ordinarily prevail over general statutes upon subjects proper for local regulation,[1] previous Opinions of this Office have concluded that matters pertaining to the establishment and operation of city libraries should be in accordance with home-rule charter provisions, rather than the general statutory authority now contained in sections 134.08, *et seq.* *See, e.g.,* Ops. Atty. Gen. 285a, August 24, 1937, December 27, 1939, November 4, 1943 (copies enclosed). Indeed, the 1937 and 1943 Opinions both recommended that home-rule cities address the establishment and operation of libraries in their charters in detail so as to avoid any uncertainty about which authority should be followed. We concur in the conclusion of those Opinions that the legislative policy as expressed in section 134.08, subd. 3 is to defer to local determinations concerning the operation of libraries as expressed in municipal charters.

---

[1] *See, e.g., State ex rel. Town of Lowell v. City of Crookston,* 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958) where the court stated:

> The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or implied withheld.

That principle has been reaffirmed in more recent cases such as *Nordmarken v. City of Richfield,* 641 N.W.2d 343, 347 (Minn. Ct. App. 2002). The express language of section 134.08, subd. 3, however, obviates the need to engage in the preemption analysis that led the *Nordmarken* court to hold that state planning and zoning statutes prevailed over charter provisions relating to initiative and referendum.

Third, as you have pointed out, the Brainerd Charter contains a number of fairly detailed provisions relating to the City's library and library board. In addition, however, Chapter 10, Section 120 of the Charter states:

> The general laws of the state with respect to the establishment and maintaining of public libraries are hereby made a part of this Charter, except so far as the same herein changed or modified.

In response to your specific questions, it is our view that Minn. Stat. §§ 134.07 *et seq.,* do not preclude city authorities, acting pursuant to a home-rule charter, from appointing library board members to six-year terms without limitation as to serving of consecutive terms; or from limiting qualification for service on the Library Board to City residents. Therefore, in our view the answers to your specific questions turn upon determination of the extent to which the Brainerd City Charter addresses each of the matters raised in a manner inconsistent with the statutes. As noted above, this Office does not generally address matters of charter interpretation upon which local officials are in a better position to pass judgment.

I might say informally, however, that the Charter language does appear quite clear and specific in establishing six-year terms for members of the library board and in requiring elected and appointed officers to be city residents. The question of consecutive term limits would, however, seem more open to interpretation. As you point out, the Charter itself does not contain any provision relating to consecutive term limitations, and could therefore be said not to address the matter or to expressly "change or modify" the statutes in that regard. Nevertheless, if the Charter provision for six-year terms is to be given effect, it would not be possible to implement the specific statutory limitation of three consecutive three-year terms. Thus, the city could rationally conclude that the Charter does not incorporate the term limitation contained in Minn. Stat. § 134.09, subd. 2.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

(651) 297-1141 (Voice)
(651) 297-1235 (Fax)

Enclosures: Op. Atty. Gen. 619a, May 9, 1975
Ops. Atty. Gen. 285a, August 24, 1937, December 27, 1939, November 4, 1943

AG: #1999752-v1/KER

#16987.3

The Office of
Minnesota Attorney General Keith Ellison
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April 29, 2022

VIA EMAIL

Robert C. Pearson
Johnson, Killen & Seiler
230 West Superior Street, Suite 800
Duluth, MN 55802

Re: Question re Conflict of Interest; Incompatible Offices

Dear Mr. Pearson:

Thank you for your April 7, 2022 letter requesting an opinion from this office regarding matters affecting the Township of Breitung, for which you serve as township attorney. In your letter you relate the following facts.

On March 8, 2022, the Township elected as a new town supervisor an individual who is the current operator of the Tower Breitung Wastewater Board and is also the assistant fire chief of the Breitung Fire & Rescue Department.

The Tower Breitung Wastewater Board (TBWB) operates the water and wastewater facilities for both the township and the City of Tower under a joint powers agreement pursuant to Minn. Stat. § 471.59. The TBWB consists of four members; two members from the Breitung Township Board and two members from the Tower City Council. The joint powers agreement provides that the TBWB shall have the authority to appoint, hire, contract and/or engage staff as necessary.

Although the Fire Chief manages the hiring process, the Township Board is responsible for the final hiring decisions in the Breitung Fire & Rescue Department, including the assistant fire chief.

In a follow-up conversation you confirmed that the supervisor who is the operator does not serve as a township board representative on the TBWB. You also indicated that the terms of employment as operator are governed by a union contract, a copy of which you provided. Compensation for service as assistant fire chief is set periodically by the town board.

You pose the following questions:

1. Whether a town supervisor has a conflict of interest as the employee-operator of the Tower Breitung Wastewater Board?
2. Whether a town supervisor has a conflict of interest as the assistant fire chief of the Breitung Fire and Rescue department?
3. Whether either position, operator of the Tower Breitung wastewater facility or assistant fire chief, is incompatible with the office of town supervisor?

With respect to incompatible offices, you noted in particular a concern that if the TBWB acts as an agent of both the City of Tower and Breitung Township, the operator could be considered to be an employee of each entity at the same time.

LEGAL ANALYSIS

Conflict of Interest.

Conflicts of interest for township officers are recognized under statute and under the common law. Minn. Stat. § 365.37 states:

> Except as provided in section 471.87 to 471.89, a supervisor or town board must not be a party to, or be directly or indirectly interested in, a contract made or payment voted by the town board.

Id. at subd. 1. A town officer who violates this section is guilty of a misdemeanor and must leave office. *Id.* at subd. 5.

Conflict of Interest as Operator for the TBWB. The statute quoted above prohibits supervisor interest in a "contract made or payment voted by the town board." With respect to the supervisor's position as operator, there is no contract made or payment voted by the town board as such. The contract in which the supervisor is interested is with the TBWB, on which this particular supervisor does not serve. That the township is a party to the TBWB, and the operator is a supervisor of the township, does not appear to fall within the express language of the statute.

As for a conflict of interest evaluated under the common law, the Minnesota Supreme Court has 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.

Lenz v. Coon Creek Watershed Dist., 153 N.W.2d 209, 219 (Minn. 1967). Again, as noted, the supervisor/operator is not a member of the TBWB, and as such, he does not participate in a decision-making capacity in a matter in which he has a direct interest in the outcome.

Thus, there does not appear to be either a statutory or common law conflict of interest for the supervisor to serve as operator of the TBWB.

Conflict of Interest as Assistant Fire Chief. We apply the same analysis to the assistant fire chief position. The Breitung Town Board appears to annually (in January) approve a recommended level of monthly payments to the officers of the Fire and Rescue Department, including the assistant fire chief. On January 27, 2022, before he was elected supervisor, the Board authorized the assistant fire chief to receive $375 per month.[1]

In 1978 this office considered the potential conflict of interest of a city councilperson who was serving in the city volunteer fire department at the time of election to the council. See Op. Atty. Gen 90-E (April 17, 1978). We evaluated the facts in light of Minn. Stat. § 471.87, which prohibits conflicts of interest in public officers and is worded similar to section 365.37. In that situation the fire department had formed a non-profit corporation and the city council, by accepting the by-laws and constitution of the fire department, formed a contract for fire protection between the fire department and the city. The by-laws provided that the council could from time to time determine, by resolution, the compensation that the volunteers would receive.

In determining there was no prohibited conflict of interest for the official, we noted an exception in the statute for contracts, unanimously approved, with a volunteer fire department for the payment of compensation to its members. Minn. Stat. § 471.88, subds. 1, 6. This statute is also an exception to the town supervisor conflict statute (section 365.37). We also relied on a prior opinion in which we held that section 471.87 does not prohibit a councilmember from having an interest in, or benefiting from, certain contracts made by the council before he or she became a member thereof. *See, e.g,* Op. Atty. Gen. 90-a-1 (Mar. 30, 1961). However we also found that the ability of the council to from time to time determine the compensation level was tantamount to a contractual renewal that would subject the official to the prohibition in section 471.87 unless unanimously approved by the council, as provided in section 471.88, subds. 1, 6.

As this opinion illustrates, the exceptions to the broad prohibition in the conflict of interest statutes are for contracts, and not for authorized payments such as the payment of compensation approved by periodic action of the Breitung Town Board. We find no exception in section 365.37 for payments of this nature. *See Town of Buyck v. Buyck*, 127 N.W. 452 (Minn. 1910) (holding that the employment of members of a board town of supervisors to work on a road was a violation of the predecessor to Minn. Stat. § 365.37). Whether the town board's setting of compensation and subsequent performance by the fire officials gives rise to an implied or quasi-contract requires a determination of facts that is outside the scope of our opinion function. *See* Op. Atty. Gen. 629a (May 9, 1975). If you find that such a contract has been formed, note that to take advantage of exceptions to the conflict statute there are procedural requirements set forth in Minn. Stat. §§ 471.88, subd. 1 and 471.89.

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[1] https://www.breitungtownship.org/wp-content/uploads/2022/03/01-27-22-Regular-Board-Meeting-Approved.pdf

We have traditionally also evaluated whether the public official is sufficiently interested in a matter to disqualify the official from acting. The court in *Lenz* described the analysis as follows:

> 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. Among the relevant factors that should be considered in making this determination are: (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.

153 N.W.2d at 219 (footnote omitted). The Minnesota Supreme Court has applied these concepts to town supervisors. In *E.T.O., Inc. v. Town of Marion*, 375 N.W. 2d 815 (Minn. 1985), the Court held a town board supervisor who owned property that could be devalued by approximately $100,000 by a licensing decision of the board had a conflict of interest that prohibited him from voting on issuance of the license.

However, where a town board supervisor did not have a pecuniary interest in the outcome of a board decision there was not a disqualifying conflict. *Twp Board of Lake Valley Twp Traverse County v. Lewis*, 234 N.W.2d 815, 819 (Minn. 1975). Similarly, as noted in Op. Atty. Gen. 358-E-4 (May 16, 1947), if the supervisor does not receive the compensation authorized, a conflict is avoided.

We believe the town board is in the best position to apply the *Lenz* criteria to this situation, and also to assess whether any of the statutory exceptions for contracts in Minn. Stat. § 471.88 might apply despite the absence of a written contract. Going forward the Township might consider entering into a contract for services with the volunteer fire department so as to expressly avail itself of the exceptions set forth in Minn. Stat. § 471.88, subds. 1, 6. In the short term and perhaps until a contract is in place, disclaiming any remuneration to be received as assistant fire chief may be a preferred option for the supervisor.

Finally, I refer you to Chapter 10 from the Minnesota Association of Township's Manual on Town Government, which addresses Conflicts of Interest.

Incompatible Offices.

Public offices are incompatible when "their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both." *State ex rel. Hilton v. Sword*, 196 N.W. 467, 467 (Minn. 1923).

In a 1971 opinion this Office concluded that the offices of city council member and *chief* of the volunteer fire department are incompatible. See Op. Atty. Gen. 358-E-9 (Apr. 5, 1971). We

noted that because the council supervised the discharge of the fire chief's duties, one person serving in both capacities would encounter a conflict of public duties.

However, because the concern is with conflicting responsibilities *to the public*, we have more recently held that for two positions to be incompatible offices under the *Hilton v. Sword* principles, both must be "public offices." The Minnesota Supreme Court explained the distinction in *McCutcheon v. City of St. Paul*, 216 N.W.2d 137 (Minn. 1974):

> There is a distinction between a public official and a public employee which is frequently difficult to trace. . . . The majority of decisions hold that a position is a public office when it is created by law, with duties cast upon the individual which involved the exercise of some position of the sovereign power. . . .
>
> Whether a person holds a disqualifying public office is not to be determined merely by the title of his position. A more appropriate test . . . is whether that person has independent authority under the law, either alone or with others of equal authority, to determine public policy or to make a final decision not subject to the supervisory approval or disapproval of another.

216 N.W.2d at 139 (quotation and citations omitted). Accordingly, we have concluded that an employee in a city utility department was not foreclosed by the incompatibility doctrine from serving on the city council. See Letter to Paul Ihle (April 9, 1998).

Application of the standard from the *McCutcheon* case to the positions of operator and assistant fire chief requires a factual determination that is outside our opinion function. *See* Op. Atty. Gen. 629a (May 9, 1975). The town board is in the best position to determine whether either the assistant fire chief position or operator of the TBWB involve the kind of independent authority to determine public policy or make final decisions, and ultimately whether the powers and duties are antagonistic to those of a supervisor.

You indicated a specific concern that if the TBWB is considered an agent of the member municipalities, the operator position may be incompatible with that of supervisor. The legal nature of the entity created by a joint powers agreement is determined on a case-by-case basis. *In re Greater Morrison Sanitary Landfill, SW-15*, 435 N.W.2d 92, 96 (Minn. App. 1989). The entity could have attributes of agency, partnership or corporation, depending on the facts of each case. *Id.*

In a 2009 letter we analyzed whether a probation officer who worked for a joint powers authority was in a position incompatible with that of county commissioner. See Letter to Dale O. Harris (Jan. 15, 2009). The county for which the officer served as commissioner was a member of the joint powers authority. In that situation the probation officer reported through a chain-of-command comprised of only other joint powers employees without the involvement of any county official acting as such. We concluded the employee was an employee of the joint powers entity and not the county.

We believe the same conclusion applies here. The terms and conditions of the operator's employment are set by a union contract to which the TBWB is a party. Neither the Breitung Town Board nor the City of Tower is a party to the union contract. The operator reports to the TBWB directly and not to either member municipality. Accordingly, the positions are not incompatible simply by virtue of the joint powers agreement.

We hope these comments are helpful to you in advising the town board. I enclose copies of the cited Attorney Generals' Opinions and thank you again for your correspondence.

Sincerely,

/s/ **Susan C. Gretz**

SUSAN C. GRETZ
Assistant Attorney General

(651) 757-1336
susan.gretz@ag.state.mn.us

Encls: Op. Atty. Gen. 629a (May 9, 1975).
Op. Atty. Gen 90-E (April 17, 1978)
Op. Atty. Gen. 90-a-1 (Mar. 30, 1961)
Op. Atty. Gen. 358-E-4 (May 16, 1947)
Letter to Paul Ihle (April 9, 1998)
Letter to Dale O. Harris (Jan. 15, 2009)
Chapter 10, Minnesota Association of Township's Manual on Town Government

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MINNESOTA LEGAL REGISTER

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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.

CONTRACTS: OFFICERS INTEREST IN: CITIES: Under facts herein, city councilman who is member of city volunteer fire department has no prohibited conflict of interest under Minn. Stat. § 471.37 (1976) provided that, during time he serves on council, any renewal, extension or modification of contract between city and volunteer fire department is approved by unanimous vote of council as provided in Minn. Stat. § 471.88, subdivisions 1 and 6 (1976).

April 17, 1978

90-E

Mr. Tom Wangensteen
Chisholm City Attorney
Chisholm, Minnesota 55719

Dear Mr. Wangensteen:

In your letter to Attorney General Warren Spannaus you submit the following

FACTS

In 1969 the City of Chisholm, which operates under a home rule charter, established a volunteer fire department for fire protection. The arrangement was that a group of individuals organized the volunteer fire department by forming a non-profit corporation. After filing articles of incorporation, the organizers adopted a constitution and by-laws, elected officers and a board of directors and, in effect, set up a separate group and organization from the city's department of public safety. The city council accepted the by-laws and constitution forming a contract between the volunteers and the city for fire protection. The constitution and by-laws provide, among other things, that the council may from time to time determine, by resolution, the compensation that the volunteers would receive for attendance at fire drills and meetings as well as some pension provision. These provisions are part of the contract between the volunteers and the city.

When the volunteer fire department was organized, an individual named "A" was a charter member thereof. Subsequent to the organization of volunteers, "A" was elected as an alderman on the city council. The city has five aldermen elected at large and a mayor. While "A" could at some time be elected as mayor or function as "acting mayor" and also has the opportunity to be a chief of volunteers, he presently serves only as alderman and holds no office in the volunteer fire department. The volunteers elect all their own officers independently from the city, including their fire chief and assistant fire chief.

You ask substantially the following

QUESTION

In this situation, does a city councilman have a prohibited conflict of interest by reason of the fact that he is also a member of the city's volunteer fire department?

OPINION

In answering this question, we have not considered any provisions of the home rule charter inasmuch as the interpretation of such provisions is more properly left to the city attorney who has a day to day working knowledge thereof. Op. Atty. Gen. 629-a, May 9, 1975. There is, in our opinion, no prohibited conflict of interest for "A" under applicable state statutes provided that, during the time he serves on the city council, any renewal, extension or modification of the contract between the city and the volunteer fire department is approved by unanimous vote of the council.

Minn. Stat. § 471.87 (1976) prohibits public officers from being interested in, or benefiting from, certain contracts:

> 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.

Minn. Stat. § 471.88 subdivisions 1 and 6 (1976) provide an exception in the case of certain contracts between governmental units and volunteer fire departments:

> Subdivision 1. The governing body of any port authority, seaway port authority, town, school district, county, 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. 6. A contract with a volunteer fire department for the payment of compensation to its members or for the payment of retirement benefits to these members;

This office has previously held that section 471.87 does not prohibit a council member from having an interest in, or benefiting from, certain contracts made by the council before he or she became a member thereof. Thus, in Op. Atty. Gen. 90-a-1, March 30, 1961 we ruled that a village council member was not prohibited from receiving commissions on insurance policies which he had sold to the village prior to becoming a member of the council. The opinion cautioned, however, that the statute could operate to prohibit the renewal, extension or modification of the insurance contracts while such person was a member of the council.

The facts presented indicate that the initial contract between the city and the volunteer fire department arose prior to the time "A" became a member of the council. However, the contract contemplates that the council may, from time to time, determine the compensation and retirement benefits of the volunteers who, in turn, presumably consent to such determinations by their continued performance of the agreed-upon services. Such action by the council and response by the volunteers is, in our opinion, tantamount to a renewal, extension or modification of the contract between the city and the volunteer fire department. Action of this kind taken by the council of which "A" is a member subjects "A" to the prohibition in section 471.87 unless unanimously approved by the council as provided in the exception in section 471.88, subdivisions 1 and 6.

Our conclusion herein is consistent with Op. Atty. Gen. 358-E-4, Jan. 19, 1965 which held that a member of a volunteer fire department

elected to the village council did not have to resign from the fire department but could continue to serve on the council. The holding in Op. Atty. Gen. 358-E-9, April 5, 1971 that a village councilman could not serve as chief of the volunteer fire department in a situation where the chief was appointed and supervised by the council, is clearly distinguishable on its facts and therefore inapplicable here.

Very truly yours,

WARREN SPANNAUS
Attorney General

MICHAEL R. GALLAGHER
Special Assistant
Attorney General

WS:MRG:bw

17-2

MUNICIPALITIES - Officers - Conflict of Interest. Person entitled to commissions on insurance premiums payable by village pursuant to existing contract is eligible to municipal office. M.S. 471.87, 471.88, 412.311.

March 30, 1961

Honorable Harold R. Pfeiffer
Attorney for Village of Danube
Olivia, Minnesota

90a-1

Dear Sir:

In your letter to Attorney General Walter F. Mondale you submit the following

FACTS:

"In 1959 a resident of the village who is in the insurance business sold three insurance policies to the village, one covering public liability and property damage from the use of the village police car, another covering public liability and property damage from the village fire truck and the third carrying fire and comprehensive on village owned buildings. In 1960, one of the members of the council resigned and the party having sold the insurance was requested to finish the unexpired term. He agreed to do so.

"If this party will be in violation of Section 471.88 then he intends to resign from the council rather than to sacrifice the commissions on the policy.

"The insurance policies are payable in annual installments and there are several installments remaining to be paid, including an installment payable in 1960. The total of all installments on all policies is less than $500."

QUESTION

"Whether or not the new council member who sold the insurance before becoming a member of the council would be in violation of any portion of Section 471.87 of M.S.A. if these policies are continued in force and having in mind that this council member will receive some commission from each insurance company from each installment on these policies."

OPINION

If the obligation of the village to pay the installments of premiums payable in the future is fixed and determined by the provisions of the insurance contracts heretofore entered into, and the insurance agent now has an enforcible right to his commissions on such installments when paid, we see no reason why the insurance agent may not be appointed to and qualify for the office of village trustee and continue to receive such commissions. In answer to your particular inquiry, it is our opinion on the basis of such facts that his becoming such member will not be in violation of M.S. § 471.87. See in this connection Op. Atty. Gen. 90a-1, (1-K-4) December 1, 1949.

Said § 471.87 and M.S. 412.311 may operate to prohibit the renewal, extension or modification of the insurance contracts while the agent holds the office of trustee, unless one or more of the exceptions contained in M.S. 471.88 will have application. A question of fact may then be involved. See Op. Atty. Gen. 90c-5, January 22, 1953, and Op. 90c-4, January 10, 1955.

Copies of all of the above opinions are herewith enclosed.

Very truly yours

WALTER F. MONDALE
Attorney General

HARLEY G. SWENSON
Assistant Attorney General

HGS-sm
Enc.

MUNICIPALITIES: Volunteer fire departments- Membership in fire department paid by city council action is illegal if the member is on the city council, and other reasons why in the City of [illegible] because such positions are inconsistent- Coverage of workmen's compensation policy discussed- Relief department liability discussed

358-B-4

May 16, 1947

Mr. Martin J. Healy
City Attorney
[illegible], Minnesota

Dear Sir:

FACTS:

"Our sitting mayor and one councilman have for many years been members of the City Volunteer Fire Department. We pay our firemen, in the event that they report to a fire call, $1.00 for the first hour and $1.00 an hour thereafter. After a fire call is made, the chief certifies to the City Clerk and list of firemen responding to the call and the number of hours of such employment. This payroll is presented to and allowed by the Council the same as any other bill. As it happens, our mayor and councilman are valuable additions to the department. They have been designated fire truck drivers and have been so for many years."

QUESTIONS:

"(1) May this mayor and councilman continue to be members of the volunteer fire department?

"(2) If your answer to question number 1 is in the affirmative, may they draw their pay for answering calls?

"(3) If your answer to question 2 is in the negative, can they continue as members of the department, but without pay? If so, will they be protected under our Workmen's Compensation policy and are they eligible under the Volunteer Firemen's Relief [illegible]?"

OPINION:

Several opinions have been rendered by this office to the effect that the office of councilman and membership in a paid fire

department are incompatible. See opinions of March 27, 1940, and December 20, 1935 (file 358-e-4), copy of which opinions are enclosed herewith.

These earlier opinions hold it would be illegal for a member of the council to be a member of a paid fire department because the statute makes it illegal for an officer to vote payments to himself. This objection could be obviated if he waived any compensation for his services and did not receive any compensation. However, in the case of your city and under your charter, another objection is presented which in my opinion would make it inconsistent for the councilman to remain a member of the fire department.

The charter provision to which I refer is found in Chapter 5, Section 26. That section provides for the formation of fire companies. It authorizes the council to disband any company. It provides that every company shall enact its own by-laws "subject to the approval of the council". This makes it the duty of the councilman to vote upon the approval or disapproval of by-laws which as a member of the fire department he may have taken part in preparing. This also creates an incompatibility between the duties of the councilman and the duties of a member of the fire department; so that the same person acting both as councilman and member of the fire department would be placed in an inconsistent position.

It is contrary to public policy for a person to be placed in a position where as a public officer he has to pass judgment upon his own acts performed in another capacity. I think that it would be contrary to public policy for the reasons stated for the councilman to remain a member of the fire department.

I may add this, however, I think the councilman would not subject himself to any penalty by remaining a member of the fire department as long as he disclaims any compensation for his services and does not receive any compensation therefor.

Furthermore, I think that membership in the fire department is not an office. I think that the office of councilman and membership in the city volunteer fire department would not call for the application of the rule that the acceptance of an incompatible office automatically vacates the first office held.

Therefore, if, receiving no compensation for his services as fireman, the councilman is permitted to serve in the fire department, no criminal offense is committed.

Assuming that the councilman disclaims any claim for compensation as a fireman and receives no such compensation, but chooses to continue as a fireman even in view of the inconsistency hereinbefore pointed out, the question would arise whether in case of injury to such councilman at a fire your workmen's compensation policy would cover such injury.

I should see the policy in order to pass upon this question.

There being doubt as to the question, the policy should have a rider attached to it showing that such unpaid councilman acting with the fire department at a fire is covered.

I enclose copy of opinion of April 4, 1938 (file 198a-8), and also copy of opinion of January 16, 1942 (file 328e-4).

I call your attention to Minnesota Statutes 1945, section 176.01, Subd. 14, reading as follows:

'Daily wage' means the daily wage of the employee in the employment in which he was engaged at the time of the injury, and if at the time of the injury the employee is working on part time for the day, his daily wage shall be arrived at by dividing the amount received or to be received by him, for such part time service for the day by the number of hours of such part time service and multiplying the result by the number of hours of the normal working day for the employment involved. In the case of persons performing services for municipal corporations in the case of emergency, then the normal working day shall be considered and computed as eight hours, and in cases where such services are performed gratis or without fixed compensation the daily wage of the person injured shall, for the purpose of calculating compensation payable under this chapter, be taken to be the usual daily wage paid for similar services in municipalities where such services are performed by paid employees." (Underscoring supplied)

See also Stevens v. Mashweuk, 141 Minn. 20.

The remaining question which you propound is whether these two officials would be eligible for relief from the fire department relief association.

This is a question that I could not answer fully without seeing a copy of the constitution and by-laws of the association. I may say, however, that if these two men would be otherwise eligible under the rules and by-laws of the association and do not receive any compensation as firemen, and if the council has no part in determining whether relief should be granted to them or the amount thereof, I see no reason why the relief department could not, if not contrary to the by-laws, extend relief to them.

Yours very truly

J. A. A. BURNQUIST
Attorney General

WILLIAM J. TONE
Assistant Attorney General

file

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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April 9, 1998

Paul Ihle
City Attorney City of Thief River Falls
312 North Main Avenue
PO Box 574
Thief River Falls, MN 56701

Dear Mr. Ihle:

In your letter you state that an employee of the City of Thief River Falls, who works as a Computer Aideel Drafting (CAD) operator in the city utilities department, was elected mayor of the city in November of 1997. You ask whether the mayor may continue as a city employee while serving as mayor. Subject to the conditions discussed below, we believe the answer is in the affirmative.

Minnesota, "[p]ublic offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and conflict of duties, so that the incumbent cannot discharge with fidelity and propriety the duties of both." State ex rel. Hilton v. Sword, 157 Minn. 263, 264, 196 N.W. 467 (1923). Incompatibility does not depend upon the physical inability of one person to discharge the duties of both offices. The test is the character and relation of the offices, whether the officers are inherently inconsistent and repugnant. State ex rel. Hilton v. Sword, 263, 264, 196 N.W. 467 (Minn. 1923). If the holder of a public office accepts a second, incompatible office, the first office is deemed vacated. See Hilton, 157 Minn. at 266, 196 N.W. at 468.

In applying the Hilton test, courts will compare the duties and functions of each office, using several criteria to determine incompatibility. For example, incompatibility will often be found when one office is subordinate to the other, or when one officer can interfere with or has supervision over the other. See Kenney v. Goergen, 36 Minn. 190, 192, 31 N.W. 210, 211 (Minn. 1886); Op. Atty. Gen. 358-E-9, April 5, 1971. In the instant case, the two positions could be seen as incompatible since the position of CAD operator occupied by the employee in question is, ultimately subordinate to the council through the city's management structure which includes the council utilities committee, the director of utilities and the electric project manager. However, it has been our position that in order for two positions to be incompatible offices for purposes of applying the Hilton v. Sword principles, both must be "public offices." The distinction was explained by the Minnesota Supreme Court in McCutcheon v. City of St. Paul, 216 N.W.2d 137 (Minn. 1974). In McCutcheon, the court discussed the difference between a public official and a public employee:

> There is a distinction between a public official and a public employee which is frequently difficult to trace. The majority of decisions hold that a position is a public office when it is created by law, with duties . . . which involve the exercise of some portion of the sovereign power. . . . Whether a person holds a disqualifying public office is not to be determined merely by the title of his position.
>
> A more appropriate test . . . is whether that person has independent authority under law, either alone or with others of equal authority, to determine public policy or to make a final decision not subject to the supervisory approval or disapproval of another.

McCutcheon, 216 N.W.2d at 139.

Although the specific issue in McCutcheon involved an interpretation of Minn. Const. art. 4, § 9, the basic idea would appear applicable to your situation. From the material submitted, it would not appear that the CAD operator position includes any independent policy-making authority. Nor does the position appear to have any duties or responsibilities apart from those prescribed by the council itself. Thus, in our view, while the CAD operator position is subordinate to the council, of which the mayor is one member, it is not a public office for purposes of incompatibility analysis.

In addition to common law incompatibility, it is necessary to consider statutes which could preclude the mayor from also being employed by the city.

There are two state statutes that prohibit city council members from having personal financial interests in contracts with the city. The first, Minn. Stat. § 471.87 (1994) states:

> 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 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.

This statute applies to all public officials, both elective and appointive. See Op. Atty. Gen. 90-A, December 26, 1956. The exceptions to this statute are found in Minn. Stat. § 471.88 (1996). The second statute, Minn. Stat. § 412.311 provides in part that: "Except as provided in sections 471.87 to 471.89 no member of the council shall be directly or indirectly interested in any contract made by the council." It seems clear that the mayor has a personal financial interest in the contract affecting the terms and conditions of his employment. The existence of such an interest, however, does not in itself constitute a violation of the above statutes. For example, we have previously held that when such a contract was entered into at a time when the current public

official did not have authority to participate in official capacity, then the officer may continue to perform in accordance with the terms of the contract. See Op. Atty. Gen. 90a-1, March 30, 1961.

Thus to the extent that the contract addressing the individual terms and conditions of employment was in place prior to his taking office as mayor, there was no statutory conflict at the time the contract was executed, and the mayor could continue to perform all duties prescribed under the contract until the date of the contract's expiration.[1] However, at such time as the contract is renewed or amended the mayor who is authorized to participate in making the contract would be in violation of sections 412.311 and 471.87 unless one of the exceptions contained in section 471.88 applies.

Section 471.88, subd. 5 provides an exception for contract "for which competitive bids are not required by law." Generally, cities are not required to seek competitive bids for municipal employment contracts; Minn. Stat. § 471.345 (1994), also known as the Uniform Municipal Contracting Law, does not apply generally to employment contracts. Furthermore, the procedures for negotiating collective bargaining agreements as set forth in the Public Employment Labor Relations Act (Minn. Stat. ch. 179A) does not involve the concept of public bidding. Therefore, it appears that the exception contained in section 471.88, subd. 5 may be utilized in renewing the employment contract to avoid a violation of section 412.311 or 471.87.

However, a governing body that contracts with an interested member must still comply with several procedural requirements, despite the fact that an exception exists. See Minn. Stat. §§ 471.88, subd. 1; 471.89 (1996). Assuming those requirements are met it is our view that the person in question may continue in the employ of the city while serving as mayor.

You have also asked a number of other questions concerning particular conflicts that could arise from the person's status as mayor and city employee. The first is whether the employee may perform mayoral functions during the time for which he is paid as an employee or must perform those functions when "off duty." The answer to this question could depend, at least in part, upon the provisions in the employee's employment contract, which is beyond the scope of our opinion function. Absent some contract provision to the contrary it is our view that the employee may not perform mayoral functions during his hours of paid employment. Minn. Stat. § 415.11 provides that governing bodies of statutory cities may set their own compensation, and that of the mayor, by ordinance. No change in salary can take effect until after the next succeeding municipal election. If the mayor could perform mayoral duties during his hours of paid employment, he would, in essence, be receiving unauthorized compensation from the city at his hourly employment rate for his mayoral duties in addition to that fixed by ordinance according to statute.

---

[1] You indicate that the CAD operator is covered by a collective bargaining agreement, but you do not state when that agreement expires.

The remainder of your questions concern potential conflicts that might arise in consideration of various issues that could affect, in varying degrees the mayor's personal financial interests.

With respect to issues not coming under the proscription of sections 412.311, 471.87-89, disqualification of public officials from participation in matters in which they are personally interested is determined on a case-by-case basis by evaluating various factors articulated in Lenz v. Coon Creek Watershed District, 278 Minn. 1, 153 N.W.2d 209 (1967):

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

Id. at 15, 153 N.W.2d at 219.

Applying these factors, there will undoubtedly be circumstances in which they mayor will be disqualified from participation in council proceedings. The most likely of these being consideration of contract provisions or personnel policies directly affecting his employment. However, each occasion will need to be evaluated separately as it arises. Cf. 1989 Street Improvement Program v. Denmark Twp., 483 N.W.2d 508 (Minn. App. 1992); Rowell v. Board of Adjustment, 446 N.W.2d 917 (Minn. App. 1989); E.T.O., Inc. v. Town of Marian, 375 N.W.2d 815 (Minn. 1985).

I hope this analysis is responsive to your questions.

Sincerely,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

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AG:47391 v1

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January 15, 2009

Mr. Dale O. Harris
Assistant County Attorney
100 North Fifth Avenue West, Suite 501
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Dear Mr. Harris:

Thank you for your correspondence dated November 17, 2008, on behalf of Arrowhead Regional Corrections, questioning the compatibility of the positions of probation officer and county commissioner.

You state that Carlton, Cook, Koochiching, Lake, and St. Louis Counties entered a joint powers agreement to establish Arrowhead Regional Corrections (ARC) under the Community Corrections Act (CCA), Minn. Stat. ch. 401. ARC has an eight-member governing board composed of a county commissioner from each of the five member counties, an additional commissioner representative from one of the counties selected on a rotating basis, and two additional representatives from St. Louis County. Commissioner representatives are appointed by a majority vote of their respective county boards. You state that Carlton County has five county commissioners, and at any given time one or two of these commissioners are serving on ARC's board. The board contracts for the services of an executive director who reports to the board. ARC's budget is determined by a formula that accounts for the relative usage of services by its member counties. Each county's board must approve its county's contribution to ARC.

You state that ARC has the authority to enter contracts, establish budgets and programming priorities, and establish policies and procedures for the organization. The collective bargaining contract requires a hearing before the ARC board as Step 3 of the labor grievance procedure. Probation officers are ARC employees, but payroll and personnel matters are administered by St. Louis County. ARC probation officers' local supervisors report to the Chief Probation Officer, who is located in Duluth. The Chief Probation Officer reports to the board's executive director.

You state that, in November 2008, an ARC probation officer was elected as a Carlton County Commissioner. This officer is assigned to ARC's Carlton County office and reports to a supervisor in Carlton County. The officer's supervisor reports to the Chief Probation Officer in Duluth. The Chief Probation Officer reports to the executive director of ARC. This officer will take office as a commissioner in January 2009.

Based on these facts, you ask this Office for guidance on three questions: (1) whether the ARC probation officer is employed by Carlton County; (2) whether service as an ARC probation officer is incompatible with service as a county commissioner; and (3) whether a county commissioner who is an ARC probation officer is eligible for appointment to the ARC governing board.

First, I am unaware of any prior reported cases or Attorney Generals' opinions that specifically address the compatibility of the positions of probation officer and county commissioner or ARC board member.

Second, a county commissioner may not be employed by the county during his or her tenure as commissioner. Minn. Stat. § 375.09, subd. 1 (2008). As you point out, the statute does not define "employed by the county" or reflect the nature of employment pursuant to a joint powers agreement. Section 471.59 permits governmental units to form a single entity to accomplish a common goal. *Arrowhead Reg'l Corr. Bd. v. Aitkin County*, 534 N.W.2d 557, 558–59 (Minn. Ct. App. 1995). The Minnesota Court of Appeals has recognized that the legal nature of the entity created by a joint powers agreement likely varies on a case-by-case basis. *In re Greater Morrison Sanitary Landfill, SW-15*, 435 N.W.2d 92, 96 (Minn. Ct. App. 1989).

In the context of the CCA, the CCA indicates that, when a group of counties enters a joint powers agreement to provide correctional services, the entity formed is distinct from the individual counties that form the entity. Section 401.04 provides that "[t]o the extent that participating counties shall assume and take over state and local correctional services presently provided in counties, employment shall be given to those state and local officers, employees, and agents thus displaced." Minn. Stat. § 401.04 (2008). This provision indicates that county employees who performed correctional services before the county entered a joint powers agreement would become employees of the joint entity. The facts you provided indicate that ARC probation officers report through a chain-of-command comprising only ARC employees without the involvement of any individual county. The Chief Probation Officer is located in St. Louis County. The ARC board determines probation officers' terms and conditions of employment and St. Louis County administers ARC's payroll.

Because the joint powers agreement supplants the role a county would otherwise have in providing correctional services, ARC employees appear to be employees of the joint entity rather than the individual counties in which they may physically work. Caselaw also reflects that ARC probation officers are employees of ARC rather than the county in which they are employed. *See, e.g., AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 296, 298 n.3 (Minn. 1984); *Arrowhead Reg'l Corr. Bd. v. Graff*, 321 N.W.2d 53, 54 (Minn. 1982). The ARC probation officer that is the subject of your inquiry therefore appears to be employed by ARC and is not employed by Carlton County for purposes of Minn. Stat. § 375.09, subd. 1.

Third, at common law, public offices are incompatible when the functions of the two offices are inconsistent such that an antagonism would result if the person attempted to perform the duties of both offices. *State ex rel. Hilton v. Sword*, 157 Minn. 263, 264, 196 N.W. 467, 467

(1923); *State ex rel. Young v. Hays*, 105 Minn. 399, 400–01, 117 N.W.2d 615, 615–16 (1908). The same person may not hold incompatible public offices. Relevant factors to a determination of incompatibility are whether one office is subordinate to the other and whether one office is able to interfere with or supervise the other. *See, e.g.*, *Kenney v. Goergen*, 36 Minn. 190, 192, 31 N.W.2d 210, 211 (1986).

Fourth, some courts have suggested that, to apply the *Hilton* principles on incompatibility, each of the considered offices must be a public office as opposed to mere public employment. The Minnesota Supreme Court has stated that the appropriate test in distinguishing an office from employment is "whether that person has independent authority under the law, either alone or with others of equal authority, to determine public policy or to make a final decision not subject to the supervisory approval or disapproval of another." *McCutcheon v. City of St. Paul*, 216 N.W.2d 137, 139 (Minn. 1974). For example, this Office has previously concluded that an employee in a city utility department was not foreclosed by the incompatibility doctrine from serving on the city council, but that membership on a city library board constituted holding a public office that precluded the city mayor from serving on the board. *See* Letter to Paul Ihle, Thief River Falls City Attorney, dated April 9, 1998 (copy enclosed); Letter to Michael Kennedy, North Mankato City Attorney, dated April 12, 2007 (copy enclosed).

Applying the *McCutcheon* definition of an office, the position of ARC probation officer is employment rather than an office. Probation officers' duties are prescribed by Minn. Stat. § 244.19 (2006). Probation officers serve both the courts and the Commissioner of the Department of Corrections. *Id.*, subd. 3. The primary duty of a probation officer is to supervise offenders according to the terms of probation established by a district court or to supervise offenders released from prison according to the terms of release established by the Commissioner. A probation officer may assist in preparing the presentencing investigation and recommend the terms and length of probation, but a court makes the final determinations on these issues. Similarly, a probation officer may not unilaterally change an offenders' release status. The officer may only recommend revocation of release; a court or hearing officer makes the final decisions based on the law and facts of a particular case. Within ARC, a probation officer is also subject to supervisory control. As you state in your letter, ARC probation officers report to local supervisors, and the local supervisors report to the Chief Probation Officer. Because probation officers do not have independent authority to determine public policy, or make final decisions without supervisory approval, a person who is a probation officer holds public employment rather than public office.

Fifth, this Office has recognized that, even in the context of public employment, conflicts may arise between the position and another public office. Op. Atty. Gen. 358a-5, Nov. 25, 1985 (copy enclosed); *see also Tarpo v. Bowman Pub. Sch. Dist. No. 1*, 232 N.W.2d 67 (N.D. 1975). A public officer who has authority to sell, lease, or contract may not have a personal financial interest in any sale, lease, or contract that he or she makes. Minn. Stat. § 471.87 (2008).

Holding the positions of ARC probation officer and Carlton County Commissioner does not appear to implicate the prohibition of Minn. Stat. § 471.87. The duties and obligations of a probation officer are prescribed by the district courts, the Commissioner of Corrections, and the ARC board. A county board member's financial interests are generally not implicated by simultaneous service as a probation officer. Although individual county boards must approve the county's payment to ARC, the amount owed is determined by a formula established by ARC. Similarly, you indicate that a county may reduce its personnel complement, but the facts do not indicate that the county would have any control over specific employees or the terms and conditions of their employment. As you have noted, however, serving as a commissioner and probation officer may require a commissioner to abstain from participating in certain decisions should a conflict of interest arise.

The ARC board does, however, exercise contracting authority affecting the financial interests of its employees, including probation officers. The existence of such authority in the board does not in itself constitute a violation of section 471.87. For example, we have previously held that when a contract was entered into before the interested person became a member of the contracting public body, performance under the contract may continue. *See* Op. Atty. Gen. 90a-1, Mar. 30, 1961 (copy enclosed). But when the contract is renewed or amended the interested board member who is authorized to participate in making the contract would be in violation of section 471.87 unless one of the exceptions contained in section 471.88 applies. *Id.*

Section 471.88, subdivision 5, provides an exception for contract "for which competitive bids are not required by law." Generally, government agencies are not required to seek competitive bids for employment contracts; Minn. Stat. § 471.345 (2008), also known as the Uniform Municipal Contracting Law, does not apply generally to employment contracts. Furthermore, the procedures for negotiating collective bargaining agreements as set forth in the Public Employment Labor Relations Act (Minn. Stat. ch. 179A) does not involve the concept of public bidding. Therefore, it appears that the exception contained in section 471.88, subdivision 5, may be utilized in renewing an employment contract to avoid a violation of section 471.87.

A governing body that contracts with an interested member must still comply with several procedural requirements, despite the fact that an exception exists. *See* Minn. Stat. §§ 471.88, subd. 1, .89 (2008). Assuming those requirements are met, a person might continue in the employ of the ARC while serving on the board.

For the foregoing reasons, it is our opinion that an ARC probation officer is not a Carlton County employee, and employment as an ARC probation officer is not incompatible with holding the office of Carlton County Commissioner. Holding the positions of both ARC probation officer and ARC board member, however, could, at some point, lead to a potential

violation under Minn. Stat. § 471.87 unless any ARC contracts affecting the officer's financial interests are within the statutory exceptions of section 471.88.

Sincerely,

Angela Behrens

ANGELA BEHRENS
Assistant Attorney General

Enclosures: Op. Atty. Gen. 358a-5, Nov. 25, 1985
Op. Atty. Gen. 90a-1, March 30, 1961
Letter to Paul Ihle, Thief River Falls City Attorney, April 9, 1998
Letter to Michael Kennedy, North Mankato City Attorney, April 12, 2007

AG: #2347497-v1/404595/2008/ab

Chapter Ten

Conflicts of Interest

§ 10-1. Overview

Public office is considered a public trust. To protect that trust, public officers are subject to restrictions on what they may do while in office. One such restriction is the requirement to avoid self-dealing. Most everyone has a sense that self-dealing in public office is wrong, but the law applicable to conflicts of interest is much more nuanced than simply prohibiting all conflicts.

There are two types of conflicts of interest town officers face:

(1) **statutory conflicts**, which arise when an officer has a direct or indirect financial interest in a contract with the town. and

(2) **common law conflicts**, which arise when an officer has a direct interest in a matter to be acted upon by the town board.

While there is some potential overlap between the two types of conflicts, it is important to keep them separate when analyzing whether a conflict of interest exists. Supervisors must always be aware of the potential for a conflict of interest and err on the side of caution whenever possible.

A third type of situation, often referred to as a conflict of interest by mistake, involves an officer holding two public offices whose duties may be incompatible. Incompatibility of offices is an important issue and is discussed in Chapter Four.

Inside this chapter

§ 10-2. Statutory Conflicts of Interest

An officer authorized to take part in making a contract is prohibited from having a direct or indirect personal financial interest in any payment, sale, lease, or contract with the town or to benefit financially from one. Minn. Stat. §§ 365.37, subd. 1; 471.87. This is a very broad and sweeping prohibition against officers having a financial interest in a matter they are authorized to decide or control. There is not a dollar threshold in this conflict; it applies to all contracts, even for a nominal amount of one dollar.

The purpose of this prohibition is to protect the public from a supervisor benefiting from a contract on which he or she is authorized to vote. Because the focus tends to be on those officers authorized to vote on a matter, the issue of a conflict of interest usually focuses on supervisors.

However, the prohibition goes beyond voting and includes those officers "taking part" in making a contract, something clerks are arguably doing when posting or publishing notices, collecting quotes, or even reviewing bids for compliance to the specifications. Also, the conflict exists for any contract in which an officer is "authorized" to take part in making. It does not matter whether the officer did not vote or participate in making the contract; abstaining does not clear up this type of conflict of interest.

Despite this broad prohibition, there are some important exceptions that allow an officer to have a personal financial interest in a contract with the town if **all** the conditions of the exception are satisfied. The exceptions listed in Minn. Stat. § 471.88 cover several situations. The two most common exceptions are found in Minn. Stat. § 471.88, subd. 5 & 12.

The first common exception allows an officer to enter a "contract for which competitive bids are not required by law," Minn. Stat. § 471.88, subd. 5. Under the municipal contracting law, sealed bids are not required unless the estimated amount of the contract is over $175,000. Minn. Stat. § 471.345, subd. 3. This broad exception is sufficiently flexible to be a useful tool for boards when seeking goods and services. However, to use the exception, the resolution and affidavit requirements of Minn. Stat. § 471.89 must be followed.

Summary of Exception: An officer may contract with the township if:
(1) the board expects the contract price to be $175,000 or less;
(2) the board passes a resolution described in Minn. Stat. § 471.89, subd. 2; and
(3) the officer submits an affidavit with claims for payment as described in Minn. Stat. § 471.89, subd. 3.

For a contract with a supervisor to be valid, the board must pass a resolution setting out the essential facts of the contract and determining that the contract price is as low as or lower than could be obtained elsewhere. In addition, the interested officer must file an affidavit with the clerk before payment is received. An affidavit must be filed before each payment under the contract. The affidavit should essentially state that the contract is for a fair price.

MAT Recommendation: Each supervisor who could perform manual labor for the township for payment should have a resolution passed for him or her that authorizes the extra work. Such work could be considered as performed under contract, even if no written contract exists. The process should be added to the board's reorganization meeting agenda.

A sample resolution and affidavits are available in MAT's Information Library, Document **C6000.**

The second popular exception (Minn. Stat. §471. 88 subd. 12) allows an officer in a town

with a population 1,000 or less to contract with the town to provide construction materials and/or services provided the sealed bid procedure is used. The interested officer may not vote on awarding the contract. There is no cap on the amount of the contract under this exception, but the sealed bid procedure must be used even if the contract is for $175,000 or less.

To rely on any of the exceptions, the board must authorize the contract with the interested officer by a unanimous vote. Minn. Stat. § 471.88, subd. 1. The interested officer should abstain from the vote even though the statute says "unanimous vote." (See Abstention Conundrum below.)

Other exceptions may apply in some circumstances, but the two described here are commonly relied on by town officers.

Summary of Exception: An officer may contract with the township for construction materials and services if:
(1) the population of the township is 1,000 or fewer;
(2) the board uses the sealed bid procedure to award the contract;
(3) the board unanimously votes on the award of the contract; and
(4) the interested officer does not vote on awarding the contract.

Whenever the board is acting under one of the exceptions, it must keep accurate records of its actions and retain the related documentation (e.g., the resolution and affidavits completed pursuant to Minn. Stat. § 471.89).

§ 10-3. Common Law Conflicts of Interest (Disqualifying Interests)

The second type of conflict of interest arises when a supervisor has a personal financial interest in a matter to be acted upon by the board that is not a contract.

When an officer has an interest in a matter before the board that does not involve a contract, the officer is supposed to consider the following factors to decide whether he or she is disqualified from voting:

1) the nature of the decision being made;
2) the nature of any pecuniary (financial) interest;
3) the number of officers 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 officers will not act arbitrarily to further their selfish interest.

Lenz v. Coon Creek Watershed District, 153 N.W.2d 209, 219 (Minn. 1967). Unlike a statutory conflict of interest, abstaining from participation in the decision does solve a common law conflict of interest.

These factors can be difficult to apply; town officers should seek the advice of an attorney in considering whether an officer has a disqualifying interest. Determining when there is a conflict of interest is rarely as clear as one might think. Often an officer is dealing with varying shades of gray. Sometimes an officer will abstain from participating in a decision because there is an appearance of impropriety even when there isn't a legal conflict of interest. This can be important for maintaining public confidence that the board is acting in the public's interest and not a self-interest.

Abstaining is not always appropriate, even when there is a common law conflict of interest. Sometimes abstaining deprives the board of enough members to conduct the town's business. In those situations, the board member should publicly acknowledge the conflict or apparent impropriety and the reasons it is necessary for him or her to participate in the decision. It's also important to remember that the people of your township elected you to do a job and voluntary abstention should not be used just to avoid taking a side on a controversial decision.

Each officer must decide if he or she is disqualified from voting because of a conflict of interest.

The town board does not have the authority to make that decision for its members. The board may, however, point out a possible conflict of interest to a board member.

Refer to Document Number **TP7000** for additional information on common law conflicts of interest.

§ 10-4. Consequences for Violating Conflict of Interest Laws

The importance of making the correct determination regarding a conflict of interest cannot be over emphasized. Violating the statutory conflict of interest prohibition can result in a criminal prosecution for a gross misdemeanor (up to one year in jail and a $3,000 fine) and expulsion from office. Minn. Stat. §§ 365.37, subd. 5; 471.87. Voting despite a common law conflict of interest can invalidate the board's decision.

Abstention Conundrum

What happens when a supervisor abstains from a vote, yet the authorizing statute requires a unanimous or super-majority vote?

It depends on the reason the person is abstaining from the vote.

- If the supervisor is abstaining because of a disqualifying interest, like a statutory conflict of interest, the size of the town board is reduced to the number of remaining members, i.e., on a three member board, the number is reduced to two and on a five member board the number would be down to four. However, the board must have at least a quorum to take any action. If the abstentions of more than one supervisor prevent the board from reaching a quorum, the town will need direction from the town attorney.
- If the supervisor is simply abstaining for a non-disqualifying reason and a quorum is present, the courts have counted the abstaining member as part of the majority. The rationale is that members who refuse to vote should not be allowed to defeat a legitimate board action.

A good example of this is the requirement in Chapter 429, when the town board must approve a special assessment by a 4/5 vote. In one case, a five-member town board had two members abstain because they owned property bordering the proposed improvement. *In re 1989 Street Improvement Program (117th Street) v. Denmark Township, Washington County, Minnesota*, 483 N.W.2d 508 (Minn. Ct. App. 1992) The Court of Appeals held that "public policy demands that a majority of those remaining should have power to act.." *Id*. At 510, *citing* Op.Atty.Gen. 471-M (October 30, 1986.) The Court said it would be bad public policy to encourage a town official, who would be otherwise disqualified due to a conflict of interest, to vote on a the matter simply to ensure the statutory vote requirement is met.