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**STATE OF MINNESOTA  
OFFICE OF THE ATTORNEY GENERAL**

**ANNUAL REPORT REQUIRED BY**

**Minnesota Statutes Sections 8.08 and 8.15,  
Subdivision 4 (2004)**

**Fiscal Year 2006**

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## **INTRODUCTION**

This report is intended to fulfill the requirements of Minnesota Statutes Sections 8.08 and 8.15, Subdivision 4, for Fiscal Year 2006 (FY 06).

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

# GOVERNMENT OPERATIONS SECTION

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## HUMAN RIGHTS/LABOR/CORRECTIONS/COLLECTIONS DIVISION

The Human Rights/Labor/Corrections/Collections Division represents the departments of Human Rights, Labor and Industry, Economic Security, and Veterans Affairs as well as the Bureau of Mediation Services, Public Employees Retirement Association ("PERA"), Minnesota State Retirement System, Teachers Retirement Association, Department of Corrections, Veterans Home Board, Client Security Board, the Collections Division of the Department of Revenue, and the Insurance Division of the Department of Employee Relations. In addition, attorneys within the division provide bankruptcy and collections advice to all State agencies.

The division's major Human Rights activity is the handling of cases forwarded by the department following a determination that there is reason to believe illegal discriminatory conduct has occurred. The division participates in mediation regarding these matters and seeks to obtain appropriate monetary and non-monetary relief. The division resolved 60 such cases in FY 06. The division's enforcement efforts resulted in Minnesota citizens receiving compensatory and injunctive relief for illegal discriminatory treatment. For example, in a case involving housing, the owners of rental facilities agreed to provide anti-discrimination training to their management, security, and maintenance staff; to provide employees with business cards in English, Spanish, and Somali containing relevant information about housing; to post fair housing posters; and to provide funding for cultural diversity training for community members at a local college. In FY 06, the division assisted the Department in obtaining compensatory relief for Minnesota citizens in the amount of approximately \$1,045,000.

In addition, the division work included:

- Litigation and appellate work to preserve the resources of state funds and state pension funds for injured workers and disabled public employees. For example, representation of PERA in disability claims matters resulted in savings of some \$1,429,000 in pension funds.
- Mediation and litigation to enforce occupational safety and health standards, including cases regarding workplace fatalities. In FY 06, the office assisted in resolving 32 OSHA cases and obtaining about \$218,000 in OSHA fines.
- Participation in bankruptcy proceedings in order to protect the State's interest in collecting reemployment benefits overpayments. In the past fiscal year, the Attorney General's Office intervention prevented the discharge in bankruptcy of approximately \$290,000 of improperly received benefits.

The division provided advice and representation to the Minnesota Department of Labor and Industry ("DOLI"), which assumed responsibility for regulating the residential building contractor industry, including the Building Contractor's Recovery Fund, in 2005.<sup>1</sup> The division prosecuted numerous disciplinary actions of residential building contractors, remodelers, roofers and manufactured home installers. Common violations include unlicensed building contractor activity, failure to satisfy judgments, failure to complete jobs, and code violations.

During FY 06, the division opened 143 building contractor files for DOLI and handled 69 district court claims against the Building Contractor's Recovery Fund.

The division also provides a broad range of legal services to the Department of Corrections and all state correctional facilities. These legal services include a substantial amount of litigation and a variety of client advice matters. The division also successfully defended a high volume of lawsuits brought by inmates against the Department. Last year, the division handled 49 cases brought by inmates.

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

- Obtained court judgments for the State, based on debts owed to various State agencies for overpayments, fees, loans, breach of contract, property damage, and fines;
- Protected the State's rights as a creditor in bankruptcies, receiverships, liquidations, and other such actions;
- Trained and worked with State personnel on collection, financial, and bankruptcy matters, and
- Represented the State's interests in probate court in escheat cases.

Examples of the division's work in bankruptcy matters include representation of the State's interests in the Northwest Airlines' bankruptcy case and providing advice to various State agencies with regard to potential claims against Northwest Airlines and related entities. Additionally, in the matter of *In re Intrepid, U.S.A., Inc.*, the division successfully defended objections by a debtor to two bankruptcy claims filed by the Department of Human Services ("DHS") in the total amount of \$221,323.03. As a result of the division's defense, DHS is expected to collect that entire amount. Over the past fiscal year, the division's collection work resulted in cash recoveries of over \$467,000, judgments of over \$700,000, and signed payment agreements of over \$50,000.

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<sup>1</sup> The residential building contractor's unit was moved from the Department of Commerce to the Department of Labor and Industry by order of the Governor.

## HUMAN SERVICES DIVISION

The Human Services Division provides litigation counsel and comprehensive legal services 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, Licensing, and Mental Health.

### Health Care

Division attorneys provided advice and representation to DHS in its administration of Minnesota Health Care Programs, Continuing and Long Term Care, Health Care Compliance, and Benefit Recovery.

**Health Care Programs:** division attorneys represent the agency in matters concerning Minnesota Public Health Care Programs, including Medical Assistance ("MA"), MinnesotaCare, and General Assistance Medical Care ("GAMC"). Examples of litigation in FY 06 include:

- *Medical Assistance Supplemental Payments litigation:* represented DHS in litigation with the federal Centers for Medicare and Medicaid Services ("CMS") regarding CMS's disapproval of a State MA Plan amendment providing for increased payments to county-owned nursing homes. Also represented DHS in separate proceedings involving CMS's effort to recover millions of dollars of federal payments relating to the disapproval. The federal administrator has upheld the disapproval, and division attorneys are reviewing with DHS its appeal options.
- *Lemons v. DHS:* represented DHS in district court and the court of appeals in defense of 2005 legislation denying MA coverage for sex reassignment surgery.
- *Dahl v. Goodno:* defended the commissioner in a class action lawsuit challenging a 2003 state law allowing providers to deny services to MA recipients who failed to pay required MA co-payments. The district court issued a declaratory judgment that federal law preempts the 2003 statutory provision, but denied plaintiffs' demand for injunctive relief, monetary recovery of co-payments in the millions of dollars, class certification, and other relief.

**Continuing Care:** division attorneys represent the Continuing Care Division, which includes a broad range of programs in the areas of Aging and Adult Services, Disability Services, Deaf and Hard of Hearing Services, and HIV/Aids programs. During FY 06, division attorneys represented DHS in litigation, such as:

- *United Family Practice Health Center v. DHS:* defended DHS in federal court litigation challenging the agency's implementation of rate setting for new Federally Qualified Health Centers under a Prospective Payment System.

- *In re Benedictine Health Center*: represented DHS in an administrative proceeding, and before the state court of appeals and supreme court regarding disallowance of employee health insurance premiums paid by nursing home to its parent organization.
- *Foundation for Rural Healthcare*: represented DHS in state and federal district courts, administrative hearings, and before the court of appeals regarding disallowance of costs related to the purchase of nursing homes between related parties.

**Compliance and Recovery:** division attorneys assist the agency in monitoring provider compliance and assist in recovering payments for health care services from providers, responsible third-parties, and estates. Examples of legal services provided in FY 06 include:

- *Schultz v. Goodno*: successfully obtained dismissal of a class action lawsuit seeking recovery of damages, costs and attorneys' fees related to legislation allowing retroactive application of Medical Assistance liens on life estates that survive the death of the MA recipient.
- *Reimbursement and third-party liability collections*: division attorneys assisted DHS in recovering millions of dollars in MA and Alternative Care services through liens and from special needs trusts, and through tort claims and lawsuits against third-parties.

## **Children & Family Services**

Division attorneys advise and represent DHS's Children & Family Services division in three broad areas:

**State public assistance programs:** provide representation and advice regarding the Minnesota Family Investment Program ("MFIP"), General Assistance Program ("GA"), Minnesota Supplemental Assistance Program ("MSA"), and the Food Stamp Program.

**DHS's Child Support division:** during FY 06, division attorneys assisted and represented DHS in a number of matters, including:

- *Gerber v. Gerber*: as an amicus before the Minnesota Supreme Court, assisted in obtaining reversal of a court of appeals decision involving income withholding for child support arrearages. The Court's reversal enabled counties to proceed with collection of tens of millions of dollars in support in thousands of cases.
- Assisted DHS in improving state and federal efforts to collect support from non-custodial parents. Last year, DHS collected almost \$600 million in child support.

**Children's protection:** provided counsel to DHS concerning children's welfare, adoption, foster care, guardianship, tribal issues, and other areas. Assisted DHS in negotiating Tribal/State Agreement on Indian Child Welfare with counties and Indian tribes.

## **Licensing**

Division attorneys represent the DHS Licensing division, the lead agency for investigating alleged maltreatment by personal care provider organizations and in programs licensed to provide adult daycare, adult foster care, and services for mental health, developmental disabilities, and chemical health. Division attorneys appear in administrative proceedings and appellate courts seeking to uphold disqualifications of individual health care providers and to enforce actions against license holders. Division attorneys represented DHS in over 80 licensing proceedings in FY 06.

## **Mental Health**

Division attorneys advise and represent DHS on issues concerning chemical health, adult and children's mental health, and state operated treatment facilities and forensic services.

- In FY 06, division attorneys represented the commissioner in numerous cases involving petitions for discharge, transfer, or other relief brought by individuals committed to the Minnesota Sex Offender Program ("MSOP") and the Minnesota Security Hospital ("MSH").
- Division attorneys defended DHS and state personnel in 40 civil lawsuits brought by patients at MSOP, MSH and other state treatment facilities.
- Division attorneys routinely assist county attorneys in pursuing orders in district court for neuroleptic medications to be given to patients residing in DHS facilities.

## **PUBLIC FINANCE/AGRICULTURE/NATURAL RESOURCES/COMMERCE DIVISION**

The Public Finance/Opinions/Small Boards/Agriculture/Natural Resources Division represents the departments of Administration, Finance, Natural Resources, Agriculture, and Employment and Economic Development; as well as the Housing Finance Agency, Iron Range Resources, State Board of Investment, Board of Water and Soil Resources, State Auditor, Legislative Auditor, Secretary of State, and many other smaller boards, agencies and commissions. The division also represents the Minnesota State Colleges and Universities System and other state agencies in contract, lease, and other transactional matters. The division's work during FY 06 included:

- Represented the Commissioner of Finance in connection with a collateral legal challenge to expenditures made pursuant to temporary court order for maintenance of essential government functions pending legislative action on necessary appropriations;
- Represented the Campaign Finance and Public Disclosure Board in court cases to enforce lobbyist and campaign finance laws and advised the Board regarding enforcement of campaign contribution, finance and lobbyist registration laws;

- Facilitated bond issuance by providing legal consultation to state agencies for over \$1.6 billion in general obligation and revenue bonds;
- Provided extensive advice to state clients on intellectual property, data practices, open meeting law, procurement, and other issues related to state government operations; assisted in drafting and revising leases, licenses and contracts; and registered trademarks on behalf of a number of state agencies;
- Responded to requests for formal legal opinions and a variety of requests for informal legal guidance from local governments;
- Advised the Housing Finance Agency (“HFA”) regarding numerous loans to preserve low income housing and several variable rate bond transactions with interest rate swaps;
- Advised and represented the Secretary of State in various election, corporate, and trade name registration matters, including matters pertaining to candidate residences and HAVA compliance and the defense of taxpayer action concerning cancellation of a service contract;
- Advised Iron Range Resources Agency and Board regarding various economic development loans and equity transactions, including Mesabi Nugget, Franconia Minerals (non-ferrous minerals extraction), Minnesota Steel Industries (integrated steel plant), Hibbing-Virginia Biomass Energy Project, and Excelsior Energy; workouts, collections, data practices requests and trademark registrations; various land sales, acquisitions, development agreements, master association, common interest community, title registration, and easement matters at Giants Ridge; Iron World Discovery Center’s conversion to a non-profit entity and related operational and land-use matters; employment matters, including agency’s early retirement incentive program; education facilities revenue bond issuance; Motorplex condemnation and various related real estate transactions and easements; United States Department of Agriculture intermediary lender program funds; Northwest Airlines bankruptcy loan claims; various taconite production tax distribution, and settlement matters involving LTV bankruptcy rebate retention agreement; and ore producer financial assistance programs;
- Defended the Office of Lawyers Professional Responsibility in a defamation action;
- Defended the State in a variety of matters, including administrative hearings, appeals, and a declaratory judgment action;
- Facilitated the filing of claims by the Minnesota State Board of Investment (“MSBI”); assisted in representation of the MSBI in securities litigation; and advised it in connection with various investment management agreements and alternative investments;
- Defended the Departments of Education and Administration in a suit by an unsuccessful bidder on the statewide basic skills test contract;

- Advised numerous small boards and agencies, including the boards of Accountancy, Architecture, Arts, Barbers and Cosmetologists, Crime Victims, Electricity, Peace Officer Standards and Training, Teaching, and School Administrators and represented those boards in approximately 15 contested matters;
- Successfully argued a motion to quash a subpoena in Sherburne County District Court on behalf of the Ombudsman for Mental Health;
- Filed four appeals to the Minnesota Court of Appeals regarding the denial of claims by the Public Safety Officers Benefit Eligibility Panel;
- Settled a federal district court discrimination lawsuit against the Board of Electricity;
- Advised and represented the Office of Administrative Hearings in connection with several municipal boundary adjustment matters and in challenges of enforcement of the Fair Campaign Practices Act;
- Assisted in representing the Minnesota Racing Commission in defense of challenges to the granting of a racing license and exclusions of persons from the track at Canterbury Downs;
- Defended the State in a lawsuit challenging the sale of the Big Island Veterans Camp to the City of Orono;
- Advised MnSCU and drafted documents for the following projects: banking services for nine metropolitan area MnSCU campuses; food service agreements for several MnSCU universities; implementation of new plan administrator and investment options for MnSCU employee retirement savings programs; and affiliation agreements with numerous health care facilities for clinical training of students;
- Advised the Department of Administration on plant and energy management agreements and various real estate matters, including disposition of surplus property from regional treatment centers;
- Represented and advised the Minnesota Zoo in connection with design and construction of a new multi-million dollar wildlife exhibit;
- Advised the Department of Human Services in connection with several multi-million dollar software contracts;
- Advised the commissioners of Administration and Transportation regarding contracts and barter arrangements to complete or enhance fiber network facilities;
- Advised the Office of the State Auditor on several local government finance issues, including funding for retiree insurance benefits and tax increment financing ("TIF") matters; resolved one TIF enforcement case against a city;

- Represented the Office of the State Auditor in opposing a subpoena *duce tecum* relating to records involved in a federal grand jury proceeding;
- Provided ongoing advice and representation to the Department of Natural Resources (“DNR”) Ecological Services in connection with the aquatic plant management permit program, the endangered and threatened species program and the Mississippi River Critical Area program;
- Provided general advice and district court representation to DNR Enforcement regarding numerous matters, including the Wetlands Conservation Act, and vehicle and equipment confiscations;
- Provided legal services to DNR in a wide variety of Indian law matters, including resource management and harvest issues under the 1837 Treaty (Mille Lacs), continued negotiation of Phase II of the 1854 Treaty case (Fond du Lac) and issues of tribal sovereignty and state-tribal jurisdiction;
- Assisted DNR with approximately 97 real estate acquisitions totaling over \$18.1 million and involving approximately 17,171 acres of land and prepared title opinions and drafted deeds with respect to approximately 27 land exchanges;
- Represented DNR in court actions involving real estate transactions and disputes; condemnation proceedings; responded on behalf of DNR to approximately 115 quiet title actions and land registrations in order to preserve the State’s mineral interests and regulatory rights on navigable waters and in an action relating to forfeiture of severed mineral rights;
- Represented DNR Waters Division in numerous administrative level, district court and court of appeals matters regarding maintenance and repair of drainage ditches, issuance of permits for work in public waters, enforcement of lakeshore zoning regulations and restoration of waters and wetlands;
- Provided legal services to DNR relating to prescriptive easements across wildlife lands, establishment of Scientific and Natural Areas, issues arising in connection with the Wildlife Division’s extensive regulatory programs;
- Represented DNR Fisheries Division in an administrative appeal of a private fish hatchery license revocation;
- Represented the Department of Agriculture (“MDA”) in various matters, including United States Court of Appeals for the Eighth Circuit in an Amicus Brief in support of Nebraska’s law limiting corporate farming (similar to Minnesota’s law); two actions seeking restraining orders of sugar beets because of alleged contamination from pesticide overspray; and a civil action to enforce penalties for pesticide violations;

- Advised the Board of Water and Soil Resources (“BWSR”) on real estate issues related to conservation easements, including reviewing approximately 75 Reinvest in Minnesota (“RIM”) easement files, the wetland banking program, and the state-federal MOU for the new Conservation Reserve Enhancement Program (“CREP II”) and Army Compatible Use Buffer (“ACUB”) programs;
- Advised and represented BWSR on Wetland Conservation Act program regulatory appeals, wetland banking and easement transactions, and represented both BWSR and DNR in administrative proceedings in district court and court of appeals involving implementation of the Wetland Conservation Act; and
- Advised the Minnesota Board of Animal Health on issues regarding the regulation of farmed cervidae.

The Attorney General’s Office also provides advice and representation to the Minnesota Department of Commerce, which is charged with regulating financial services industries in Minnesota, including insurance, banks and other financial institutions, securities, mortgage lending, and the real estate industry.<sup>2</sup> The AGO also provides advice and representation to the Petroleum Release Tank Compensation Board (“Petrofund”), which is administered by the Department of Commerce.

In FY 06, the division handled numerous contested cases for Commerce involving disciplinary action against licensees. As a result, the division obtained over \$105,000 in civil penalties and settlements. The division opened 46 files and handled a number of cases for Commerce, including:

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<sup>2</sup> The Commerce Department also regulates telecommunications and energy providers as a result of the merger between the Commerce Department and the Department of Public Service. The AGO’s Telecommunications and Energy Division handles representation of the Department with respect to telecommunications and energy issues.

- ***Disciplinary Actions Against Mortgage Originators.*** The division commenced contested case proceedings against several mortgage originators who submitted fraudulent mortgage applications to lenders;
- ***Disciplinary Actions Against Real Estate Salespersons.*** The division pursued actions against real estate salespersons who committed deceptive or fraudulent acts;
- ***Disciplinary Actions and Liquidation of Collection Agencies.*** The division obtained revocation orders against collection agents. The division is also assisting the commissioner in appointing a receiver in a case involving fraudulent retention or conversion of client funds;
- ***Disciplinary Actions Against Securities Salespersons.*** The division initiated disciplinary action against securities salespersons for numerous violations, including sale of unregistered securities, sale of securities by unlicensed personnel, and “selling away” without the permission of the broker dealer;
- ***Disciplinary Actions Against Insurance Salespersons.*** The division represented the Department in actions against numerous insurance salespersons for various activities, including the sale of fraudulent auto insurance binders, false applications, failure to obtain insurance for customers, and conversion;
- ***Licensing Actions.*** The division represented the Department in multiple cases contesting the eligibility of applicants to receive licenses granted by the commissioner (e.g., appraisers, mortgage originators, insurance producers, and real estate salespersons);
- ***Market Conduct Examinations.*** The division provided continuing legal advice and analysis to the Department during the course of market conduct examinations of insurance companies. For instance, the division provided continuing advice to the Department regarding its investigation into the Conseco Companies, which the Department ultimately resolved and imposed a \$2.5 million civil penalty;
- ***Petroleum Tank Release Compensation Board.*** The division continues to represent the Petrofund Board in connection with requests for reimbursement in connection with petroleum product releases. The division also provides legal advice to the Petrofund staff;
- ***Regulatory Action Regarding State-Chartered Banks.*** The division assisted the Department in obtaining the removal of bank officers engaged in unsafe and unsound practices, including the extension of unsound loans to over-extended commercial borrowers. The Department also obtained agreements to reform bank boards and to provide greater oversight of banking practices; and
- ***Unlawful Gasoline Sales.*** The division represented the Department in enforcing the Unlawful Gasoline Sales Act in a contested case proceeding which resulted in a \$140,000 civil penalty against Midwest Oil of Minnesota.

## TELECOMMUNICATIONS & ENERGY DIVISION

The Telecommunications and Energy Division represents the Telecommunications and Energy Divisions of the Minnesota Department of Commerce ("Department"), including its Weights and Measures Division, before the Minnesota Public Utilities Commission, Office of Administrative Hearings, federal agencies, and state and federal courts. In FY 06, the division provided legal advice and representation to the Department on many issues such as:

### Telecommunications

- ***Merger/Acquisition.*** The recent merger of SBC and AT&T, and the associated asset transfer, required continued review for purposes of monitoring and enforcement. The division provided the Department legal advice in connection with the matter.
- ***Wholesale Cost/Prices.*** The Department's position, adopted by the Commission, recently was sustained by a federal court concerning the wholesale cost that Qwest may charge for leasing its physical plant and network.
- ***Investigation of Anti-Competitive Conduct/Interconnection.*** The division represented the Department in various contested case proceedings involving allegations that Qwest violated competitive requirements. One case was an administrative trial in which a local carrier claimed to have been overcharged when customers transferred to it from Qwest. Other litigation included a claim by Qwest competitors that Qwest is unfairly failing to make certain parts of its network available to competitors.
- ***Price Discrimination and Untariffed Rate Cases.*** The division represented the Department in several actions against AT&T and various competitive local exchange carriers (CLECS) and national interexchange carriers (IXCs) alleging these carriers entered into and concealed discriminatory contracts that give AT&T preferential pricing for termination of long-distance calls. All but AT&T and its affiliates have reached settlements. In these cases, the authority of states to regulate intrastate calling was reaffirmed.
- ***Investigation/Implementation of Voice Over Internet Protocol (VoIP) Service.*** The division lawyers argued the Department's position before a federal appellate court in which one VoIP provider, Vonage, claimed federal preemption of State authority over VoIP providers, even with respect to state and local 911 services. The Federal Communications Commission ("FCC") required VoIP providers to comply with State 911 rules. The FCC also recently clarified that calls that originate on the telephone network that use the Internet for part of the call transmission are subject to State jurisdiction.
- ***Compensation for Dial-Up Telephone Access to Internet Service Providers.*** The division is representing the Department before the Public Utilities Commission concerning the complaint of Level 3 that Qwest not be allowed to block delivery of dial-up calls to

ISPs, and to determine compensation for the carriage of such calls. Ultimately, the decision may influence availability of dial-up internet access.

- ***Complaint regarding Phantom Traffic.*** The division is representing the Department in this action by rural phone companies against Qwest for failing to provide sufficient call identification information to allow them to bill other cellular and wireline telephone carriers and VoIP providers who pass voice traffic to Qwest for termination on the rural local networks.
- ***Local Service Competition - Network Elements and Resale.*** Since the 1996 Federal Telecommunications Act, Qwest has been required to lease certain parts of its network to other carriers at a cost. Lawyers assisted the Department in a Commission ordered investigation of the reasonableness of Qwest prices for wholesale transport.
- ***Alternative Form of Regulation ("AFOR") Petitions of Qwest.*** Division attorneys provided legal research and analysis concerning the rate implications of AFOR filings and assisted in settlement negotiations with respect to payment of penalty monies that remained in the service quality penalty fund as of December 31, 2005.
- ***Universal Service.*** Division attorneys provided legal assistance regarding state implementation of a federal universal support fund ("USF") for all local exchange carriers and wireless providers that receive USF funding.
- ***Introduction of 811 Service.*** Division attorneys advised the Department regarding Qwest's proposed request for payment from a federally mandated three digit (811) "one-call" notification of excavation plans.
- ***Rulemaking.*** The division provided legal advice to the Department in informal stages of rulemaking proceeding regarding 911 system requirements; reviewed drafts of proposed Commission rules regarding the Telephone Assistance Plan; and assisted with informal stages of State Universal Service Rulemaking.

## Energy

- ***Merger/Acquisitions.*** The division advised the Department in the merger of natural gas utility Aquila Natural Gas Company (doing business in Minnesota as Peoples Natural Gas and NMU) and Wisconsin Public Service Corporation.
- ***Asset Sales.*** Lawyers assisted the Department in opposing sale of Alliant Energy's Iowa nuclear plant so that Minnesota ratepayers will not be responsible for "stranded" investment since the nuclear plant did not serve Minnesota ratepayers. Division attorneys provided legal advice concerning Minnesota Power's sale of transmission rights.
- ***Rate Increase Requests.*** The division advised and represented the Department in cases involving the largest regulated natural gas utility, CenterPoint, and the largest regulated

electric company, Xcel Energy. Division attorneys also advised the Department involving Great Plains Natural Gas and Alliant (Interstate).

- ***Certificate of Need for Electric Transmission Line Construction.*** The division advised the Department with respect to a number of matters including the Big Stone II petition filed by several utilities for multiple transmission lines running from a planned coal plant in South Dakota.
- ***Electric Transmission Lines Operation/Control.*** On-going advice provided by division attorneys regarding the interpretation of federal as well as state enforcement jurisdiction.
- ***Certificate of Need for New Construction of Electric Generating Plants.*** The division represented the Department in a number of cases including Great River Energy's request for a peaking electric plant in Cambridge, Minnesota.
- ***Minnesota Pipeline Company.*** The division provided legal advice to the Department regarding the certificate of a nearly 300 mile long crude oil pipeline by Minnesota Pipeline Company to the Flint Hills refinery in Rosemount.
- ***Nuclear Waste Storage.*** Division lawyers represented the Department in the contested case proceeding involving Xcel Energy's request to expand its storage of spent nuclear fuel at its Monticello Nuclear Generating Facility in order to continue operation of the plant. Attorneys participated in the trial and legal briefing.
- ***Electric Service Territory Complaints.*** Division attorneys represented the Department in administrative trials involving boundary and compensation issues: *Grand Rapids v. Lake Country Power*, and *Buffalo v. Wright-Hennepin*.
- ***Rulemaking - Biodiesel.*** Division lawyers provided legal assistance to the Weights and Measures Division on proposed rules concerning the July 1, 2005 statutory requirement that most diesel fuel sold in Minnesota contain two percent biodiesel.
- ***Conservation Improvement Plan ("CIP") matters.*** Attorneys advised the Department in analyzing programs designed to meet statutorily required utility conservation spending, as requested.

## TRANSPORTATION DIVISION

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

The Transportation Division advises both MnDOT and other state agencies involved in construction projects and represents the state when contractors, subcontractors, or third parties sue the state on construction-related matters. The division also protects taxpayers by filing

claims on behalf of MnDOT against entities that perform defective work, fail to pay employees legally-mandated wages, or otherwise fail to comply with contract requirements.

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

In FY 06 the division's activities included:

- Litigation related to eminent domain actions and appeals. Hundreds of properties are acquired for roadways and other transportation projects in legal actions. The division also defended MnDOT against claims that its projects have resulted in inverse takings and provides legal assistance in voluntary sales of real estate for transportation projects.
- Provided the Commissioner of Transportation and staff with general counsel legal assistance.
- Represented MnDOT in its statutory prevailing wage enforcement responsibilities, recovering unpaid wages for contractors' employees on MnDOT projects.
- Advised the Commissioner in adjudicating contested case decisions in regulatory matters such as prevailing wages and advertising sign permits.
- Advised MnDOT regarding its programs and offices such as Equal Employment Opportunity; Aeronautics, Railroads and Waterways; Project Development; State Aid; Research and Investment Management; and Office of Motor Carriers.
- Represented the Minnesota National Guard regarding legal matters, including contract review and real estate transactions.
- Represented the Minnesota State College and University Board in litigation over construction contractor claims.
- Represented MnDOT in two major actions for relocation benefits under the Federal Relocation Assistance Act.
- Advised the Commissioner of Transportation in planning and coordinating responsibilities for a major rail transit project.

## GOVERNMENT REGULATION SECTION

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### CHARITIES DIVISION

The oversight and regulation of nonprofit organizations and charities in Minnesota is vested in the Attorney General's Office through Minnesota Statutes Chapters 309, 317A, and 501B and through common law.

Charitable organizations and professional fund-raisers must register and file regular reports with the Attorney General's Office. In the last fiscal year, over \$430,424 in registration fees were remitted to the general fund through the Charities Division. At the end of the fiscal year, the Division had registered and is maintaining public files for over 7,000 charitable (soliciting) organizations, over 2,600 charitable trusts, and about 280 professional fund-raisers. The information from these files is made available to the public in its entirety in a public file room in the Charities Division and in summary form on the Charities Division section of the Attorney General's website. The Division makes available brochures relating to charitable giving that are accessible to the public through the website or in paper form.

While the financial and other information that is filed with the Charities Division and made publicly available increases the accountability of charities and nonprofits to the public and allows prospective donors to research the charitable purposes and financial condition of an organization, many Minnesota citizens do not have access to such information or simply require assistance. The Charities Division has extensive knowledge of nonprofit and charity law and provides significant assistance to citizens who call or write to the Attorney General's Office about a wide variety of nonprofit or charities issues, including such topics as: charitable solicitation and "do not call" regulations; charitable organization and trust registration; forming and dissolving nonprofit corporations; nonprofit governance; the rights and responsibilities of directors and members; disputes with nonprofit hospitals, condominium associations, and town-home associations; and misuse of charitable assets.

Another function of the Charities Division is to educate the public and officers and directors of nonprofit organizations about nonprofit and charity law in Minnesota. Important topics include fiduciary duties for board members, governance issues, and solicitation and registration requirements. Typical audiences consist of nonprofit board members, community members; leaders and volunteers; certified public accountants; and attorneys who represent nonprofits. In the past year, the Division sponsored two governance training sessions, one in Virginia and the other in Detroit Lakes. Each training session was attended by over 100 board members from the surrounding areas. In addition, the Division met with about a dozen "troubled" boards to provide information to them and explain the requirements of Minnesota law.

The Charities Division enforces laws relating to nonprofits, charitable organizations, and professional fund-raisers. By statute, the Office receives notice of certain charitable trust and probate matters filed in the district courts that involve charitable assets or charitable

beneficiaries. Through the Charities Division, the Office often becomes involved in those matters protecting charitable assets and representing the interests of charitable beneficiaries that might otherwise be unable to represent themselves. Through the enforcement of laws governing nonprofit and charitable organizations, the Charities Division is able to help combat fraudulent solicitations, and hold nonprofit organizations accountable to the public for how they raise, manage, and spend charitable assets. Examples of the matters handled by the Charities Division in the past fiscal year include:

- ***Blue Cross and Blue Shield of Minnesota.*** The Office completed its compliance review of Blue Cross and Blue Shield of Minnesota in April of 2006. The Blue Cross compliance review demonstrated that the company was making millions of dollars in profits while failing to freeze or reduce premium rates for policy holders, shifted excessive revenues to affiliate companies with no employees, excluded certain assets when reporting its net worth to the State of Minnesota, and spent millions of dollars annually on programs of questionable value to its policy holders. Further, Blue Cross's board of directors is self-perpetuating -- its members elect themselves and their successors. Policyholders are not represented on the board, nor do they have the right to vote for directors. As with the compliance reviews of other health systems, this Office also found areas where improvements were needed to address executive compensation, administrative expenses, and travel and entertainment expenses. As a result of the compliance review, the Office recommended that Blue Cross return at least \$400 million in excess networth to policy holders.
- ***State v. TVDS.*** TVDS is a Minnesota nonprofit organization that contracted with Minnesota churches and charities to provide vehicle donation services. Donors could make vehicle donations to TVDS and designate that the proceeds go to a specific church or charity. TVDS claimed to sell the vehicles and to give the proceeds to the designated charity. Although many vehicles had been donated to TVDS, a number of charities have not received any proceeds from the sale of the vehicles. The Attorney General's Office initiated legal action against TVDS which, at the time of the lawsuit, owed at least \$153,000 to Minnesota charities. The Office charged TVDS with deceptive solicitation, breach of trust, breach of fiduciary duties, failure to be governed by a board of directors, and soliciting while not registered with the Attorney General's Office. The Office also filed a motion for a temporary restraining order. TVDS agreed to stipulate to the temporary restraining order and the temporary injunction while the litigation proceeds.
- ***In Re Bruce Kiernat.*** The Office filed an amicus brief on behalf of St. Paul Academy, which was the sole beneficiary of the trust and estate of Richard French. The trustee, Bruce Kiernat, had mismanaged the trust and paid himself in excess of \$1 million in trustee and attorney fees, over one-third of the trust's value. Kiernat was subsequently disbarred and sentenced to six months of confinement for over-billing the trust. The U.S. Bankruptcy Court, however, allowed him to discharge in bankruptcy his liability for over \$500,000 in fees that he took from the Trust. St. Paul Academy appealed, and the Office filed an amicus brief, stating that Kiernat violated his fiduciary duties under Minnesota law and that the Bankruptcy Court applied the wrong legal standard with regard to a trustee's duties to a charitable trust. The Court of Appeals held Kiernat to a

high standard of fiduciary duty and ruled that Kiernat must repay the trustee fees because those debts were not dischargeable in bankruptcy.

- ***Estate of Doris Prestegaard.*** The Office was able to preserve approximately \$100,000 for charity from the decedent's estate. In her will the decedent left approximately \$100,000 to the Prestegaard Family Foundation, which her children chose to dissolve approximately nine months after her death. The adult children then argued that the gift to the Foundation lapsed and should pass to the residuary estate, of which they were the beneficiaries. This Office successfully petitioned the Court and argued that the Court should apply the *cy pres* doctrine under Minn. Stat. § 501B.31 and distribute the assets for a similar charitable purpose.
- ***Newport Creative Communications.*** Newport Creative Communications is a professional fund-raiser which prepares sweepstakes solicitations for charities. The Office joined a multi-state action against Newport charging that the company engaged in deceptive solicitation practices. The states reached an agreement with Newport that requires Newport to pay the states \$400,000 and to make significant changes to its solicitation materials.
- ***In the Matter of B'nai Abraham Synagogue a/k/a B'nai Abraham Society.*** In August 2005, the Office brought a petition requesting the appointment of a special master to protect the charitable assets of B'nai Abraham Synagogue. B'nai's building is recognized on the National Register of Historic Places and it also owns a number of other assets, including religious artifacts. There was no formal board of directors managing the organization, the building was in serious disrepair, and the current and former members could not agree about how to proceed. In November 2005, the parties resolved the matter via a stipulation that required the creation of a new board of directors, the recognition of new members, and the marshalling and protection of religious artifacts.
- ***Vang Pao Foundation.*** In April 2005, the Office sued the Vang Pao Foundation, a nonprofit organization, for failing to register with the Office as a charitable soliciting organization or charitable trust and for several violations of the Minnesota Nonprofit Corporation Act, including failing to have a board of directors and failing to keep complete and accurate financial records. The Office discovered that the executive director was making questionable expenditures from the Foundation's bank accounts. In October 2005, the Office filed a Stipulation and Order for Restitution that required the Foundation to dissolve and required the executive director to pay \$32,375 in restitution to certain donors.

## ENVIRONMENTAL PROTECTION DIVISION

Attorneys in the Environmental Protection Division ("EPD") provide legal advice and representation to the Minnesota Pollution Control Agency ("MPCA") and the Environmental Quality Board ("EQB").

## **Environmental Law Enforcement**

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

For more serious violations, stipulation agreements are negotiated with the regulated party. These agreements generally establish a schedule for taking corrective actions or coming into compliance, the payment of a civil penalty, and sometimes the implementation of supplemental environmental improvement projects. Some enforcement actions also include a cost recovery component to recover monetary expenditures made by the State to mitigate or remediate environmental damage. EPD attorneys are involved in these negotiations to address legal issues that arise and assist in drafting language that clearly prescribes the roles and responsibilities of the parties. In situations where settlement cannot be reached, the enforcement matter is litigated in district court on behalf of MPCA by EPD attorneys.

In FY 06, MPCA initiated 208 enforcement actions, including 175 APOs and 33 stipulation agreements. The civil penalties imposed totaled \$1,244,743. Enforcement matters handled by EPD attorneys during FY 06 included the following:

- EPD represented MPCA in negotiating a stipulation agreement with Contractors Property Development Corporation and two of its contractors over the theft and subsequent release of jars of mercury from its facility in Rosemount. Under the terms of the agreement, the responsible parties paid \$410,000 to the State, which included a \$10,000 civil penalty, a \$25,000 supplemental environmental project, and \$375,000 to recover cleanup costs incurred by MPCA.
- EPD represented MPCA in negotiating a stipulation agreement with Edwards Oil Company resulting from a fuel oil delivery spill at a customer's residence, eventually leading to the destruction of the customer's home. Under the terms of the agreement, Edwards Oil paid \$95,000 in civil penalties and cost recovery.
- EPD represented MPCA in negotiating stipulation and corrective action agreements with SL - Montevideo Technology, Inc. to resolve hazardous waste violations and contamination from an underground tank at the facility. Under the terms of the agreements, the responsible party agreed to corrective action and a \$20,000 civil penalty.

## **Client Advice and Other Litigation**

EPD provides legal advice and litigation services to the MPCA on a variety of non-enforcement issues. On average approximately 200 files are maintained in the EPD regarding ongoing legal advice. The majority of issues on which MPCA seeks legal services involve permitting, rulemaking, and environmental review. For example, in FY 06, the EPD represented the MPCA on numerous environmental review and permitting appeals in state district courts, the Office of Administrative Hearings, the Minnesota Court of Appeals, the Minnesota Supreme Court, and in federal district court. The most noteworthy of these matters, some of which are ongoing, include a challenge to the issuance of the Annandale/Maple Lake wastewater treatment facility permit, which is awaiting a decision from the Minnesota Supreme Court; a settlement allowing for completion of the Minnesota River General Permit; and a settlement allowing for completion of the Municipal Separate Storm Water General Permit. The EPD also provided legal assistance to the MPCA in the permitting of the new Mesabi Nugget iron facility and in the permit reissuance for Northshore Mining's restart of facilities for its production expansion plans.

The EPD also represented the MPCA by defending against private actions related to regulatory matters. For example, the EPD successfully defended the MPCA against a \$5.5 million inverse condemnation/regulatory taking claim brought by the Dullea Land Company. The Dullea Land Company had operated an illegal and unpermitted feedlot that polluted the Buffalo River in Clay County. The MPCA subsequently denied the Dullea Land Company's application for a permit to operate a feedlot in the same location, and the Dullea Land Company sued the agency. In August 2005, the Minnesota Court of Appeals affirmed the district court's dismissal of this lawsuit.

The EPD also represented MPCA and the Minnesota Department of Natural Resources in amicus and reply briefs filed with the North Dakota Supreme Court challenging the North Dakota Department of Health's issuance of a permit for the Devil's Lake outlet. The North Dakota Supreme Court upheld the issuance of the discharge permit. However, the permit did include some concessions to Minnesota and other concerned entities.

The EPD also provided legal services to the MPCA on a variety of real estate and contract matters in FY 06, including several real estate transactions for MPCA's closed landfill program. Other areas in which the EPD provided legal advice and services included tank leak cleanup cost recoveries; superfund cleanups; natural resource damages; asbestos removals; bankruptcies; contract disputes; hazardous and solid waste disposal; creation of sewer districts; creation of conservation easements; purchases of easements and real property; groundwater contamination; federal facility superfund cleanups; individual septic treatment systems; administrative inspection orders; storm water runoff; air toxics; and federal new source review.

The Office of Environmental Assistance ("OEA") was merged with MPCA by legislation during FY 06. The former OEA, now a division with MPCA, awards grants for innovative projects to reduce and prevent waste and pollution, improve recycling and composting, conserve resources, conduct resource recovery, and provide environmental education. OEA also has responsibility to: assist businesses and local governments in all areas of solid waste matters,

coordinate the state-wide household hazardous waste program, approve county solid waste management plans, and issue certificates of need for mixed municipal solid waste capacity. In FY 06, the EPD provided a variety of general legal services to OEA, including loan document preparation, contract review and grant terms review.

### **Legal Services To Environmental Quality Board**

EPD provides legal advice to the Environmental Quality Board (“EQB”) with respect to the implementation of its delegated legal authorities. EQB operates as a general interagency coordinating board for environmental quality issues involving the State and its citizens. During FY 06 EQB continued to oversee the environmental review process as carried out by local and state governmental units under the Minnesota Environmental Policy Act. The EPD represented the EQB’s interests in filing an amicus brief at the Minnesota Supreme Court in *Citizens Advocating Responsible Development v. Kandiyohi County*, an environmental review case focusing on the legal meaning of cumulative impacts in environmental analysis. The Court’s ruling in this case further defined applicable analysis for environmental review matters. For example, the Court provided guidance on how responsible governmental units should apply cumulative impact and mitigative measures analyses to new projects. EQB’s participation in this matter was critical to the Court’s conclusions.

## **HEALTH/ANTITRUST DIVISION**

### **Health Matters**

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

Specific examples of the division’s work in FY 06 include the following:

- ***Mortuary Science Enforcement Actions.*** After a referral from the Attorney General’s Office, MDH staff investigated the Minnesota Funeral Directors Association (“MFDA”) Master Trust program, which accepted money from funeral home customers for pre-need funeral and burial arrangements. There are specific statutory requirements for these pre-need accounts to ensure that a consumer’s funds are preserved and will cover the costs of the funeral and burial needs at the time of their death. MDH determined the MFDA was violating the pre-need statutes in three areas: (1) failing to segregate consumer accounts at the bank; (2) failing to keep all funds in federally insured accounts and instead investing in bonds and other investments; and (3) charging administrative fees to the pre-need accounts. Ultimately, MDH and the funeral providers participating in the Master Trust entered into stipulations which required that the funeral providers withdraw all of their client funds from the Master Trust, make-up any existing shortfall in each account,

and reinvest each account in full compliance with the pre-need laws. The Master Trust was eventually dissolved and MDH and the MFDA entered into a stipulation which required the MFDA to reimburse the Department for investigation and legal costs. Although it was not part of the stipulation, the MFDA also agreed to reimburse funeral providers for funds paid to make up short falls in the Master Trust consumer accounts.

- ***Mobile Home Park Drinking Water Contamination.*** MDH's Drinking Water section issued an Administrative Penalty Order ("APO") to a mobile home park whose water system exceeded the maximum contaminant level for radionuclides. Radionuclides are naturally occurring low-level radioactive particles, which can cause cancer in cases of long-term exposure. The APO required that the water system be brought into compliance and included a \$2500 penalty that would have been forgiven if the corrective action had been completed. The corrective action was never undertaken. The Department filed the APO with the district court, a hearing was held, and the court ordered the park owner to install the proper equipment and pay the fine within 30 days. The owner eventually installed the equipment, and water quality tests show that the mobile home park's water system is now in compliance.
- ***Tuberculosis ("TB") Health Threat.*** MDH staff learned that a TB carrier, who had a strain of TB that is resistant to multiple drugs, was refusing to take his anti-TB medication. Due to his particular strain of TB, the TB carrier must take medication for up to two years to be cured. MDH staff investigated and found that the TB carrier had moved from one location to another, and from one state to another, to avoid taking the medication and to evade health officials. On behalf of the Commissioner of Health, division attorneys asked the District Court to issue an Apprehend and Hold Order to have the carrier taken to the hospital. The court issued the order and, while in the hospital, the TB carrier agreed to take his medication. The TB carrier was ultimately released from the hospital and has agreed to continue taking the necessary medication.
- ***HIV Health Threat.*** MDH staff learned that an HIV carrier had acquired multiple sexually transmitted diseases, suggesting that he was engaged in behavior that put him and his partners at risk. The HIV carrier refused to meet with MDH staff and continued to engage in at-risk behavior. As a result, the Commissioner issued a Health Directive under the Health Threat Procedures Act requiring the HIV carrier to attend counseling. When he refused to go to the counseling, division attorneys initiated a court proceeding to enforce the Health Directive. The HIV carrier ultimately agreed to go to counseling and thus the court proceedings have been continued until his counseling is completed.

As in prior years, a significant amount of the division's work in FY 06 involved defending MDH's determinations that individuals or health care facilities violated the Vulnerable Adults Act by neglecting, abusing or financially exploiting vulnerable adults. In addition, the division defended MDH decisions not to allow certain disqualified individuals to work in direct contact with patients or residents of health care facilities or health care service organizations (such as home care agencies). Examples of these cases include:

- ***Disqualification Appeal.*** The criminal history of a student enrolled in a nursing assistant training program showed that the student had been convicted of four thefts on four occasions in the past. Based on the convictions, state law disqualifies the student from working in certain health care positions, including working in the clinical portion of a nursing assistant training program. The student requested that the Commissioner of Health “set aside” her disqualification, arguing that she did not pose a risk of harm to patients in the clinical program. The Commissioner denied her request, concluding that patients in the clinical program are vulnerable to theft and the student still posed a risk of harm. The student appealed to the Minnesota Court of Appeals. Division attorneys represented the Commissioner and the court affirmed the Commissioner’s decision.
- ***Disqualification Appeal.*** A nursing assistant appealed MDH’s decision not to set-aside his disqualification and allow him to continue with his employment. An investigation determined that he had physically abused his children by punching his daughter, causing a “puffy” eye, and whipping two of his other daughters with an extension cord, causing cuts, welts and bruises to their legs and buttocks. Reports also indicated that he used marijuana and crack cocaine and that he had hidden a gun under his daughter’s mattress. On appeal, division attorneys defended MDH’s determination not to set-aside the nursing assistant’s disqualification and the Commissioner of Health affirmed.
- ***Nursing Home Abuse.*** A nursing assistant punched a nursing home resident in the face when he was uncooperative in being transferred from his bed to a wheelchair. The nursing home resident had aphasia due to a stroke, and thus was unable to speak. Facility staff and the MDH investigator interviewed the resident and determined that he was alert and oriented and that he could identify the nursing assistant who struck him. The Commissioner of Health affirmed MDH’s determination that the nursing assistant had abused the resident. On appeal to the District Court the judge reversed, finding that the resident was not competent to report the abuse. The Commissioner appealed to the Court of Appeals, and division attorneys argued that the Commissioner’s finding of abuse, including her finding that an aphasic nursing home resident was a competent reporter of abuse, should be upheld. The Court of Appeals ultimately upheld the finding of abuse.
- ***Nursing Home Neglect.*** An LPN who was employed by a nursing home miscalculated the dosage of morphine for a resident and gave the resident 20 times the morphine that was ordered. The nursing home resident died. MDH staff investigated and determined that the LPN had neglected the resident by not taking steps to intervene after she discovered her error. On appeal, division attorneys defended MDH’s finding, and the Commissioner of Health affirmed the finding of neglect.
- ***Nursing Home Neglect.*** A nursing assistant failed to follow a resident’s care plan and the nursing home’s policies and procedures and, as a result, lifted the resident in a mechanical lift without ensuring that the mechanical lift sling was properly placed and without the assistance of another employee. The resident fell to the floor and sustained cervical spine fractures, a maxillary sinus fracture, a nasal fracture, and a traumatic brain injury. The resident died four days later due to complications from her injuries. MDH staff investigated and determined that the nursing assistant neglected the resident. On

appeal, division attorneys defended MDH's finding of neglect. The Commissioner of Health affirmed.

- ***Nursing Home Neglect.*** A nursing assistant who was employed by a nursing home transferred a vulnerable adult resident to the toilet. Although she had been instructed not to leave the resident alone, she left the resident's room to obtain supplies, and the resident fell to the floor when she attempted to transfer herself off the toilet. The resident incurred a laceration to the head and a fracture of the hip. The resident died during her subsequent hospitalization. MDH staff investigated the incident and determined the nursing assistant had neglected the vulnerable adult. The nursing assistant appealed. Division attorneys defended MDH's findings and the Commissioner of Health affirmed.
- ***Nursing Home Neglect.*** A vulnerable adult resident had a pressure wound on her right heel and her physician's orders were for the nursing home staff to clean and change the dry bandage dressing daily. If the nursing home had followed the physician's orders, the wound would have been cleaned and properly bandaged to protect it from becoming infected. MDH staff investigated and determined the nursing home had neglected the resident, her wound becoming infested with maggots. The nursing home appealed. After negotiations with division attorneys, the nursing home withdrew its request for a hearing.
- ***Nursing Home Financial Exploitation.*** A nursing assistant who was employed as a caregiver at a transitional senior housing unit financially exploited two vulnerable adult residents. Wedding rings valued at \$6,000, \$1,600 and \$170 were discovered missing from the residents. A police department investigation located the rings at a local pawnshop. Two pawnshop tickets identified the nursing assistant, who used her driver's license with her home address and telephone number, as the person bringing the rings into the pawnshop and accepting money for them. MDH staff investigated the matter and determined that the nursing assistant had financially exploited two residents. The nursing assistant appealed. After negotiations with the division attorneys, the nursing assistant withdrew her request for a hearing.

The division also assists citizens with a variety of health related questions and concerns they have, including questions about health plans and health coverage. For example:

- ***Reimbursement of Medical Expenses.*** A citizen and his physician contacted the Attorney General's Office about the refusal of an insurance company to pay for a surgical procedure which it had previously approved. Specifically, the insurer had approved the medical procedure to treat depression, which required a surgical implant in the citizen's brain. The procedure had been approved by the FDA as acceptable treatment for depression in 2005. After the citizen had the procedure, his insurance company refused to pay for the procedure, saying it was investigative. This left the citizen with hospital and doctor bills of approximately \$65,000. Health division attorneys mediated the matter on behalf of the citizen and obtained reimbursement of hospital and doctor charges in the amount of \$65,000.

Additionally, the division has been actively monitoring the implementation of the Medicare Part D prescription drug benefit and has responded to numerous citizen calls and letters regarding the benefit.

### **Antitrust Matters**

The division investigates violations of state and federal antitrust laws, and enforces these laws when it uncovers evidence of anticompetitive conduct. The Minnesota Antitrust Act prohibits a number of activities that restrain trade, including price-fixing, bid-rigging, group boycotts, unlawful abuses of monopoly power and anticompetitive mergers. The division ensures consumers, businesses and the government have a competitive environment in which to purchase goods and services. Examples of the division's work in FY 06 include:

- ***Challenging Price-Fixing in the Computer Memory Chip Industry.*** The largest manufacturers of long-term computer memory chips, called "DRAM", conspired to fix the prices they would charge for their products, which are widely used in desktop computers, laptops, and servers. Minnesota participated in a multi-state investigation of the conspiracy on behalf of state agencies and consumers, both of which paid more for computers as a result of the conspiracy. On July 16, 2006, Minnesota and 33 other states filed a complaint against the DRAM manufacturers in federal court in the Northern District of California, alleging numerous violations of the federal and state antitrust laws, including price fixing, artificially restraining supply, allocating markets, and bid rigging.
- ***Investigating Possible Market Allocation in Waste Hauling.*** A resident of a Twin Cities suburb complained that when he called a sanitation company for waste hauling service, he was told that company didn't service his street and was referred to a competitor. The complainant suspected the two competitors had divided up the neighborhoods in his city. The Office issued Civil Investigative Demands to both companies to investigate possible market allocation. The antitrust division ultimately concluded that the documents showed no evidence of market allocation in that particular suburb. The division came to its conclusion by mapping customer addresses, which revealed overlap throughout the suburb.
- ***Investigating Consolidation in the Newspaper Industry.*** McClatchy announced that it planned to purchase Knight Ridder, which would result in one company owning both the *Minneapolis Star Tribune* and its competitor, the *St. Paul Pioneer Press*. To avoid antitrust problems, McClatchy proposed to sell the *Pioneer Press* to MediaNews in a complex transaction involving financing by Hearst. The Office issued Civil Investigative Demands to McClatchy, Knight Ridder, MediaNews, and Hearst and reviewed documents produced by all four companies to determine whether the transaction involved any bid rigging, collusion, market allocation, or other anticompetitive conduct. The United States Department of Justice ultimately approved both the sale of Knight Ridder to McClatchy, and McClatchy's sale of the *Pioneer Press* to MediaNews.
- ***Multistate Pharmaceutical Settlements.*** The State participated in multi-state settlements with GlaxoSmithKline, the manufacturer of the medications Paxil and Augmentin. The

settlements resolved allegations that Glaxo delayed generic competition for each drug by fraudulently obtaining and listing patents concerning the drugs' compounds and engaging in sham patent litigation to unlawfully maintain its monopoly of the market for each drug. Minnesota received approximately \$187,910 of the Paxil settlement and roughly \$25,953 of the Augmentin settlement for the State's proprietary purchases, primarily for Medical Assistance. Consumers were able to submit claims for their purchases of Paxil and Augmentin in connection with related class action settlements. Paxil is a widely prescribed antidepressant. Augmentin is a widely used antibiotic.

- ***Multistate Pharmaceutical Litigation.*** The State joined with 33 states and the District of Columbia in filing an antitrust lawsuit in the U.S. District Court for the District of Columbia regarding the prescription drug Ovcon, an oral contraceptive. The States' Complaint alleges that defendant drug companies Warner Chilcott Corporation, the exclusive marketer of Ovcon, and Barr Pharmaceuticals, an approved generic competitor, entered into an unlawful agreement not to compete whereby Warner Chilcott paid Barr \$20 million not to market a lower-cost generic version of Ovcon. The States are seeking injunctive relief and civil penalties.
- ***Drafted Price-Gouging Legislation.*** Division attorneys drafting anti-price gouging legislation that was introduced in the Minnesota legislature. The draft legislation would prohibit any person from selling or offering to sell essential consumer goods or services, including gasoline, for an unconscionably excessive price during an abnormal market disruption, like that occurring after Hurricane Katrina. The legislation did not pass.

## HEALTH LICENSING DIVISION

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

During FY 06 the division provided legal representation to all 16 of the State's health-related licensing boards. These include: Board of Medical Practice, Board of Nursing; Board of Psychology; Board of Chiropractic Examiners; Board of Veterinary Medicine; Board of Optometry; Board of Social Work; Board of Dietetics and Nutrition; Board of Marriage and Family Therapy; Board of Physical Therapy; Board of Behavioral Health and Therapy; Board of Nursing Home Administrators; Board of Dentistry; Board of Podiatry; Board of Pharmacy; and the Emergency Medical Services Board.

The legal services center on those activities of the boards that protect the public, including complaint investigation and disciplinary action. The division provides all legal services needed day-to-day to assist the committee investigation and complaint handling processes. Division attorneys also provide legal representation to the boards during disciplinary

hearings and conferences. During FY 06 the division handled numerous administrative contested case proceedings involving: professional misconduct, sexual misconduct, mental health/chemical dependency issues and health provider fraud. For example, the division assisted the Board of Nursing on 250 disciplinary complaints, successfully handled contested cases resulting in the temporary suspension of a physician's license, a recommendation for discipline of a nurse who sexually assaulted a co-worker and the suspension of a dentist's privileges to provide conscious sedation to patients. The division assisted the boards in entering into settlement agreements following mediation or direct negotiation, including an agreement with a pharmacist to surrender his license due to his tampering with patient medications, an agreement with an unlicensed veterinarian to cease performing veterinary work, and a settlement with a nurse related to her taking patient medications for her own use.

The division also drafts numerous documents and due process pleadings and provides legal advice on license application issues, data practices and open meeting law questions. Extensive use of pre-litigation mediation and negotiation was utilized to obtain contested case settlements during FY 06. During the past year the division negotiated several disciplinary agreements which required physicians and dentists to attend training sessions designed to improve their skills.

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

## **HEALTH LICENSING INVESTIGATIONS DIVISION**

The Health Licensing Investigations Division performs investigative services on behalf of 16 health licensing boards and two non-health licensing boards. The division works in conjunction with the Health Licensing Division.

Complaints referred by the health licensing boards for investigation are reviewed by the Division manager to determine whether jurisdictional and/or multiple issues exist which require investigative focus of the case prior to beginning the investigation. An investigator is then assigned to the case. This common point-of-entry procedure ensures a coordinated and focused approach from the beginning of the investigation through its completion.

Allegations involving alleged misconduct and the resulting issues have become increasingly complex and are often intertwined. Diverse investigative skills and technical knowledge are required to conduct thorough fact finding investigations to ensure maximum public protection.

Division staff includes investigators with professional expertise in nursing, physician assisting, psychology, dentistry, chiropractic and other disciplines. The staff investigates allegations of sexual misconduct, review allegations relating to competency and quality of care, review billing records relating to allegations of billing fraud and inspects practice settings for infection control procedures. Allegations which, if proven, present immediate danger to the

public or the subject of the investigation are handled on an expedited basis. During FY 05/06, division investigators completed over three hundred investigations.

Division staff uses investigative reporting procedures and case management software to manage their cases and, to some degree, conduct the investigation. These tools help investigators in achieving division objectives of conducting thorough investigations in a timely, efficient and objective manner. Upon completion of the investigation, the investigator prepares a report that is forwarded to the appropriate licensing board.

## **RESIDENTIAL AND SMALL BUSINESS UTILITIES DIVISION**

The Residential and Small Business Utilities Division ("RUD") represents and advances the interests of residential and small business utility consumers in the complex and changing telecommunications, gas and electric industries, particularly where matters involve utility rates, reliability of service, and service quality. Over the past few years, the issues presented by this area of the law have grown increasingly complicated, due in particular to the development and spread of new technologies. Staff members working in this field have developed highly specialized knowledge and experience. RUD staff members utilize this specialized knowledge and experience in two essential functions: mediation and legal advocacy.

- ***Complaint Mediation.*** The mediation component of the RUD involves investigating and mediating individual and small business complaints relating to all aspects of telecommunications and energy service. In addition to handling complaints directly reported to the RUD, the RUD also accepts complaints referred to the OAG by the Department of Commerce, the Public Utilities Commission, and the Federal Communications Commission. During FY 06, the RUD responded to over 2,800 complaints, resulting in savings and refunds to consumers and small businesses of almost \$325,000. The RUD's performance in this essential function has been consistent over time; in fact, over the last three years, the RUD's efforts have resulted in savings and refunds to consumers and small businesses of over \$1.4 million. The RUD also has negotiated innumerable non-monetary resolutions of customer concerns.

The RUD's mediators see firsthand the problems experienced by consumers and small businesses, and they work proactively with the division's attorneys to address problems that become apparent through complaints received by the division. For example, the RUD received a number of complaints regarding charges on Qwest local telephone bills for a third-party company called 800 Direct, Inc. Acting on the complaints, attorneys with the RUD began an investigation and subsequently learned that 800 Direct had failed to obtain appropriate authorization and verification for the charges. 800 Direct claimed that it marketed itself only to small business customers, but the RUD found that individuals were also being charged for the service. Ultimately, the RUD discovered that approximately 5,000 Minnesota customers were being improperly billed for services they had not ordered. The RUD worked with 800 Direct and Qwest to obtain customer lists and to ensure refunds for all customers improperly billed by 800 Direct.

- ***Cellco v. Hatch.*** In its legal advocacy role, the RUD advocates for the interests of residential and small business utility customers before the Minnesota Public Utilities Commission, in state and federal courts, and before the Federal Communications Commission. RUD attorneys appear on a wide range of matters. For example, the RUD has vigorously defended the constitutionality of Minn. Stat. § 325F.695 in a lawsuit captioned *Cellco v. Hatch*. The statute protects the interests of wireless customers with regard to changes in the terms of their cell phone contracts. Just two weeks before this law was to become effective, wireless carriers filed suit to enjoin the State from enforcing the statute. The RUD successfully defended the validity of the law in the U.S. District Court, but the U.S. Court of Appeals for the Eighth Circuit reversed the lower court's decision. The RUD then filed a Petition for Certiorari requesting that the U.S. Supreme Court consider the case. The Supreme Court recently asked the U.S. Solicitor General to file a brief addressing the issues presented, following which the Court will decide whether to hear the case.
- ***Qwest AFOR.*** The RUD also actively negotiated on behalf of the interests of Qwest customers in connection with Qwest's new alternative form of regulation ("AFOR") plan. Rather than submit to rate regulation, Qwest operates under an AFOR plan, and the current plan was to end as of the end of 2005. Qwest filed a new AFOR plan, but the RUD objected to its approval on the grounds that the terms of the initial filing failed to comply with the law, and also did not sufficiently protect the interests of residential and small business customers. The RUD filed comments in opposition to the AFOR plan, but also worked at the negotiating table to obtain concessions. Ultimately, Qwest revised its AFOR plan to address the RUD's concerns and the revised plan was approved by the Commission in December of 2005.
- ***Energy Rate Cases.*** The RUD has participated in the rate cases filed by CenterPoint Energy and Xcel Energy with the Public Utilities Commission. The RUD opposes the rate increases of \$40.5 million for CenterPoint and \$168 million for Xcel on numerous grounds, including that increases to customer charges are unwarranted and that the rate increases contravene the State's expressed policies encouraging conservation. In addition, with respect to Xcel's case, the RUD has argued that Xcel should not be allowed to raise its customers' rates to pass through taxes that Xcel will never pay to taxing authorities, including the State. The RUD attended public hearings in these cases and encouraged citizens and small businesses to become engaged in the process. The RUD also participated in extensive evidentiary hearings and will appear at the final hearings to urge the Commission to disallow the rate increases.
- ***Centerpoint and its Compliance with Cold Weather Rule.*** In addition, the RUD continued to be involved in the Commission's investigation into CenterPoint Energy's compliance with Minnesota's Cold Weather Rule. The Cold Weather Rule ensures that Minnesotans of limited financial means are not forced to live without heat when low temperatures could be life threatening. The RUD began an investigation for the Commission into CenterPoint's cold weather practices in January of 2004, and filed a number of thorough reports with the Commission. During the past year, while conducting this ongoing investigation, the RUD also intervened on behalf of the interests

of Minnesota citizens in a class action lawsuit filed in U.S. District Court against CenterPoint based on alleged violations of the Cold Weather Rule. A \$13.5 million settlement was reached in the class action case, which must be approved by a federal judge. A settlement of the Cold Weather Rule case was reached, which must be presented to and approved by the Commission. Further, in connection with the Cold Weather Rule case, CenterPoint and the OAG agreed that CenterPoint would adopt new procedures for customers entitled to Cold Weather Rule protections. The OAG and CenterPoint contacted all of CenterPoint's disconnected customers to offer the OAG's assistance in negotiating payment arrangements.

## GOVERNMENT SERVICES SECTION

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

The work of the Section includes defending the constitutionality of state laws and various principles and doctrines that are essential to the effective operation of state government. The Section is also responsible for the legal work for state agencies that oversee the State's educational system, for the State Revenue Department and for the Public Utilities Commission. The Section also collects debts owed to the State and successfully defends against claims that would have cost the State money.

### CIVIL LITIGATION DIVISION

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

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

- various civil rights actions brought against state officials in federal and state courts;
- the state court system's provision of sign language interpreters;
- the constitutionality of the jury-selection system in Hennepin County District Court;
- the constitutionality of legislation allowing the State Public Defender to decline representation in certain post-conviction cases;
- the judicial branch's interpretation of employee-transfer legislation; and
- the constitutionality of the standard of proof applied in physician disciplinary proceedings.

The Division provides legal representation to all state agencies and the judicial and legislative branches of the State on a broad range of employment issues and claims, including claims under the Minnesota Whistleblower statute, Minnesota Human Rights Act, Americans with Disabilities Act ("ADA"), Family Medical Leave Act ("FMLA") and claims of discrimination and harassment under Title VII. In addition, the Division has represented state agencies in several class action lawsuits involving claims of discrimination. The Division represents the State and state officials in actions filed in federal and state courts and before administrative tribunals.

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

The Division litigates tort claims against the State, its agencies and employees, in personal injury and property damage lawsuits. Most commonly, the allegations are of negligence, but they also involve defamation, infliction of emotional distress, excessive use of force, interference with business relations and violations of federal civil rights. Examples include: highway crash cases in which the Minnesota Department of Transportation is faulted for inadequate design, construction or maintenance of a state highway; suits against the Departments of Human Services and Corrections for deaths occurring in the institutions they operate; and claims against the Department of Natural Resources arising from snowmobile and ATV accidents on state trails. During FY 06 the Division saved the State more than \$4.3 million in its resolution of personal injury and employment litigation.

The Division represents the PUC in litigation in federal courts and before the Federal Communications Commission. The Division has seen a continuing high volume of legal work in the telecommunications area, increasingly involving contract interpretation and enforcement of existing interconnection agreements among telecommunications carriers. As an example, the Division successfully defended the PUC's decision to assess \$26 million in penalties upon Qwest for anticompetitive violations. The PUC's pricing decisions for local telephone service related to matters involving the implementation of the federal Telecommunications Act has also been appealed and successfully defended. The Division has also been involved in the defense of new state legislation designed to protect wireless telephone consumers. The Division successfully defended the law in federal district court but that decision was reversed by the Eighth Circuit Court of Appeals. Thirty-six states supported Minnesota's request for review by the United States Supreme Court. A decision as to whether the Court will review the case is expected this fall.

The Division also represents the PUC in litigation before state courts. In the past year, the Division has successfully defended PUC decisions involving the interpretation of the

renewable energy objectives statute and the PUC's determination of service territory compensation.

The Division advises the PUC on matters concerning the PUC's regulation of the rates and practices of electric and natural gas utilities providing energy services in the State of Minnesota, and provides counsel to the PUC on issues related to the implementation of legislative directives, such as development of the community-based energy development tariff. On July 1, 2005, the Division took on the responsibility of advising the PUC on siting and routing matters, which was the result of legislation transferring power plant siting authority from the Environmental Quality Board to the PUC. All responsibilities previously held by the EQB relating to power plant siting, transmission routing, wind energy conversion systems, and pipelines were transferred to the PUC.

## **EDUCATION DIVISION**

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

### **Minnesota State Colleges and Universities (MnSCU)**

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

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

### **Minnesota Department of Education**

MDE administers and oversees the State's K-12 education programs. The Division provides legal advice for MDE's many programs, including charter school issues, state merit pay legislation (Q Comp), data practices, the federal No Child Left Behind Act, graduation standards and testing, the child and adult food care program, and state financial audit issues. The Division provides legal advice and defends MDE in its investigation of and decision making in school-based maltreatment of minors' cases. The Division also helps interpret state and federal special education law and defends MDE in special education disputes.

## **Office of Higher Education (OHE)**

The Office of Higher Education administers federal and state higher education programs, including: (1) student loan and financial aid programs; (2) registration of private and out-of-state public higher education institutions that provide programs in Minnesota; and (3) licensure of private business, trade and correspondence schools. The Division provides a full range of legal services for OHE, especially in advising on licensing private trade schools and student and private school data practices issues. The Division also works with OHE negotiating contracts for MnLINK, a statewide, computerized library system involving public and private libraries throughout the State.

## **The Perpich Center for Arts Education (PCAE)**

The Perpich Center for Arts Education, also called the Arts High School, is a residential public high school operated by the state, not a school district. The Division advises PCAE on student discipline, grade appeals, admissions and residency requirements, data privacy and contracts.

Following are some examples of specific matters handled by the Division:

### **MnSCU**

- ***Litigation.*** Successfully obtained dismissal of age discrimination and retaliation claims brought in United States District Court by a former dean at a state university. This case is currently on appeal to the United States Court of Appeals for the Eighth Circuit. Currently defending a state university against a Title IX retaliation claim brought by a former soccer coach and against a wrongful death claim arising out of a party at an off-campus house.
- ***Financial Aid.*** Successfully negotiated resolution of several adverse audits by the U.S. Department of Education, resulting in substantial financial savings.
- ***Discrimination and Harassment Issues.*** Worked with the system office and the campuses to develop and implement policies to comply with state and federal anti-discrimination laws. Trained campus investigators and decision-makers who process internal discrimination and harassment complaints. Defended charges of discrimination filed with the state Human Rights Department, the federal Equal Employment Opportunity Commission, and the Office for Civil Rights of the U.S. Department of Education.
- ***Promoting Campus Safety and Integrity.*** Successfully represented MnSCU colleges and universities in a variety of student disciplinary matters. The reasons for disciplinary action included sexual assault, harassment, plagiarism, and threats.
- ***Client Advice.*** Counseled clients on approaches to preventing legal problems. Areas included student due process, First Amendment, managing risk in student activities and

organizations, study abroad, disability accommodations, alcohol abuse awareness and enforcement programs, and allied health education.

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

### **Minnesota Department of Education**

- **Charter Schools.** Provided legal advice to MDE on numerous issues relating to charter schools, including accountability, state aid overpayments, lease aid, grants management, sponsorship contract appeals, and financial audits.
- **Special Education.** Successfully defended MDE in numerous lawsuits in Minnesota federal district court and in the Eighth Circuit regarding special education. These lawsuits challenged MDE's supervision of local school districts in complying with federal and state special education laws. Also, successfully defended MDE in the Court of Appeals in two separate lawsuits brought by local school districts challenging MDE's complaint resolution decisions regarding special education services. In addition, provided legal advice in the interpretation of federal and state special education laws.
- **Maltreatment of Minors in Schools.** Represented MDE in several maltreatment hearings. Reports of maltreatment of minors that occur in school buildings are investigated by MDE. After MDE makes a finding of maltreatment by a school worker (such as a teacher, assistant teacher or bus driver), the school worker may request an administrative hearing. Successfully defended the first appeal of MDE's final determination of maltreatment to state district court.
- **Child and Adult Food Care Program Overpayments.** Defended MDE's determination to recover fraudulent overpayment for meals served in day care homes.
- **Desegregation Issues.** Provided legal advice to MDE in the implementation of the settlement of the public school desegregation litigation in the Twin Cities metropolitan area and application of the department's new desegregation rules.

## **MEDICAID FRAUD DIVISION**

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

1. Review and investigate reports of vulnerable adult abuse and neglect in nursing homes, group homes, foster care homes, hospitals, board and care residences, and by home care providers.
2. Investigate and prosecute health care providers who commit fraud in delivery of the Medical Assistance program.

The Division receives its referrals from citizens, police, county adult protection workers, and state agencies. The Division reviews all of the investigations generated by the two state licensing agencies: the Department of Health, which investigates complaints from hospitals, nursing homes, and assisted living and home health agencies, and the Department of Human Services, which investigates facilities and programs for the developmentally disabled, chemically dependent, and mentally ill, including those operated as adult foster care homes. In FY 06, the division reviewed 311 vulnerable adult cases involving Health Department investigations and 438 cases involving Department of Human Services investigations.

The staff in the Division follow up on these administrative investigations to ensure that law enforcement is involved in criminal cases, and interact with city and county attorneys to request the issuance of criminal complaints for assault, abuse, and financial exploitation of vulnerable adults. Division investigators assist local prosecutors in the investigation phase of cases by interviewing, reviewing documentation, and analyzing complex financial records obtained by search warrant. Division attorneys also assist local prosecutors and accept referrals to prosecute these cases around the State. The Division made court appearances in 11 counties during FY 06.

During FY 06, the Division's efforts resulted in the conviction of five individuals for Medicaid fraud, four individuals for abuse or neglect of vulnerable adults, and three individuals for theft of patient funds. In addition, the Division referred individuals for administrative sanctions and program exclusion. These referrals resulted in several professionals losing their licenses to practice; a chief financial officer, business office manager, licensed marriage and family therapist and several nurse aides receiving exclusions from working in federal programs; and agencies losing their ability to receive Medicaid funds. During the past fiscal year, 14 program suspensions and two licensing suspensions and other restrictions were obtained.

One goal of the Division is to recover Medicaid funds from providers who fraudulently bill the program. During FY 06, the division obtained a conviction of the co-owner of a personal care and home and community based services organization who billed the Medicaid program for unqualified services and services not provided. The co-owner was ordered to pay \$20,000 in Medicaid restitution and to serve two months in the county jail.

The Division also obtained a civil settlement with a physician provider. The Division executed a search warrant at the physician's place of business and residence, seizing evidence from both locations. The documents seized revealed that an excessive number of patients were seen in one day (up to 100 patients). Documentation of preventative medicine visits was insufficient. In addition, claims data was reviewed by investigators and compared to the physician's charts. The physician billed over 17 hours in a day, including Saturdays when the clinic hours were reduced to four hours; no dictated notes were in patient files; prescriptions were written with no evidence of an exam or assessment; multiple preventative visits were billed in succession. The physician agreed to reimburse the Medicaid program almost \$41,000. In addition, for a period of five years, the physician must allow the Department of Human Services Surveillance and Integrity Review Section and the Medicaid Fraud Control Unit to access records required to be maintained for participation in the Medicaid program, including documentation of claims billed to Medicaid, at any time with 24-hour notice.

In addition, the Division participated in national settlements with several pharmaceutical companies, returning \$849,462.44 to the State.

The Division also successfully prosecuted and assisted in the investigation of several theft and financial exploitation cases. A group home project manager was convicted of theft of patient funds. She was sentenced to pay the restitution to the victims in the amount of \$5,289.31, a fine in the amount of \$3,000, and to serve 14 months in jail, 12 months stayed. In addition, the Division assisted in the investigation of a chief financial officer charged with theft from a school for the deaf. The CFO was sentenced to pay restitution to the school in the amount of \$341,232.32 and to serve 24 months in prison.

The Division continues to provide training to social services, law enforcement, and provider groups on the Vulnerable Adults Act.

## **TAX LITIGATION DIVISION**

The Tax Litigation Division represents the Minnesota Department of Revenue ("Department") in taxpayer-initiated court cases appealing the Department's state tax assessments, seeking refunds, contesting collection actions, or challenging the validity of the State's tax laws. Division attorneys appear in the Minnesota Tax Court, State District Courts, Federal District and Bankruptcy Courts, and in the state and federal appellate courts. In FY 06, the Division opened 124 new cases, including 21 bankruptcy matters. In addition, the Division responded to 150 tax-related inquiries by citizens. As in the past, the majority of new cases involved the State's income and sales taxes. The Division continues to handle a large volume of pro se matters. These include tax protestor cases, in which persons assert—for reasons universally rejected by the courts—that the income tax is either unconstitutional or cannot be applied to particular forms of income. The following describes activities that occupied significant time for the Division during FY 06.

- Obtained a favorable decision in the Minnesota Supreme Court sustaining 2005 legislation imposing a 75-cent per-pack Health Impact Fee on cigarettes "to recover for

the state health costs related to or caused by tobacco use and to reduce tobacco use, particularly by youths.” Cigarette manufacturers who are parties to Minnesota’s 1998 Tobacco Settlement Agreement alleged that the fee qualified as a “released claim” under the Agreement and, accordingly, that its imposition on their products breached and impaired the Agreement. The Supreme Court’s ruling in favor of the State secured a revenue stream estimated at approximately \$200 million per year.

- Obtained a favorable decision in the Minnesota Supreme Court sustaining a 2003 statute imposing a 35-cent per-pack fee on cigarettes sold in Minnesota by any manufacturer that has not entered into a settlement agreement with the State under which it makes payments to the State.
- Obtained a largely favorable decision in the Minnesota Supreme Court upholding the Department’s determination that a physician who worked and traveled in Alaska for brief periods during 1998 and 1999 remained a Minnesota resident for those years because he maintained a Minnesota homestead and had many other substantial contacts with Minnesota, but reversing the Department’s imposition of a fraud penalty.
- Resisted a certiorari petition in the United States Supreme Court seeking review of a favorable 2005 Minnesota Supreme Court decision holding that the MinnesotaCare tax is fairly apportioned and does not discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution.
- Obtained a favorable decision in the Minnesota Court of Appeals, now on appeal to the Minnesota Supreme Court, upholding the Department’s position that a particular corporate election under the Internal Revenue Code governed for state tax income tax purposes.
- Obtained a favorable decision in the Minnesota Court of Appeals upholding the Department’s position that the Attorney General must formally approve any tax compromise agreement in excess of \$50,000.
- Obtained several favorable decisions in state supreme court, federal district court, state district court, and state tax court rejecting claims of tax protestors that their income was not subject to Minnesota income tax or concluding that protestors could not shield income from state taxation by shifting it into sham trusts.
- Appeared in court in approximately 22 new bankruptcy cases. These cases typically involve either individual debtors who fail to file income tax returns before declaring bankruptcy or debtors challenging the State’s claims in bankruptcy.
- Appeared in court in numerous quiet title, land registration, and foreclosure cases in state and federal court, and successfully defended or preserved the priority of state tax liens over the liens and judgments of other claimants. The Division received notice of and reviewed approximately 130 such matters, and was able to protect the State’s interest in most instances through correspondence to opposing counsel rather than through court appearances.

- Negotiated settlements where appropriate.

The complexity of the Division's tax litigation continues to increase. Current areas of litigation include the validity of the JOBZ and Bioscience Industry Zone Programs, which create tax-free zones throughout the State in the hope of spurring targeted job growth and economic development; individual residency and taxing jurisdiction cases; matters involving the correct valuation of the operating property of multi-state utilities, such as gas and oil transmission pipelines; and indirect sales tax audits issued to cash businesses, where a lack of business records requires the reconstruction of the taxpayers' sales through third-party records.

## SOLICITOR GENERAL SECTION

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### APPEALS DIVISION

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

In fiscal year 2006, the Appeals Division handled 182 state criminal appeals. Of these, 159 were before the Minnesota Court of Appeals and 23 were before the Minnesota Supreme Court. Along with filing briefs and motions on these cases, attorneys in the division represented the State in 59 oral arguments before the Minnesota Court of Appeals and the Minnesota Supreme Court. The cases handled by the Appeals Division in FY 06 involved, among other crimes: murder, sexual assault, drug distribution and manufacturing, child sexual abuse and felony assault.

Cases handled by the Appeals Division this fiscal year include the following: *State v. Brett Arnold Laine* (St. Louis County, first-degree murder); *State v. Wintersun Lemieux* (St. Louis County, first-degree murder); *State v. Ardelle Hope Manthey* (Aitkin County, first-degree murder); *State v. Troy Demetrius Mayhorn* (Clay County, first-degree murder); *State v. Paul Penkaty, Sr.* (Watonwan County, first-degree murder); *State v. Roger Lindbo Schleicher* (Steele County, first-degree murder); and *State v. Eric Maurice Wright* (Stearns County, first-degree murder).

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

### CONSUMER ENFORCEMENT AND SERVICES DIVISIONS

The Consumer Enforcement and Services Divisions seek to protect Minnesota consumers from unfair and deceptive conduct by taking legal action against violators of Minnesota consumer protection laws. The Divisions consistently return restitution dollars to Minnesota consumers and recover money for the State treasury far in excess of the costs incurred in their operation. The Divisions also obtain court orders halting deceptive practices.

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

- ***Foreclosure Equity Stripping.*** The Division continues to combat fraudulent equity stripping of homeowners in foreclosure. The Division's lawsuit against Home Funding resulted in a final judgment of \$2,582,736.38 in restitution and \$2,582,736.38 in civil penalties, in addition to injunctive relief and restoration of title to several homeowners.

The Division also has obtained the return of title, money or other interests to individual homeowners subjected to various equity stripping schemes. The Division also continues to administer restitution payments in connection with the Grant Holding equity stripping case, which settled in June 2005.

- ***Predatory Lending.*** Minnesota was one of the lead states in the multistate investigation of Ameriquest Mortgage Co. for abusive and deceptive predatory subprime mortgage lending practices, including misleading consumers about loan costs and terms, misleading consumers about points and fees they would be charged, obtaining falsely inflated appraisals, and abusing the stated income process, among other practices. The Division was instrumental in negotiating a settlement of \$325 million to consumers, at least \$295 million of which will be distributed as restitution. This settlement is the second largest consumer protection settlement in the nation's history.
- ***Deceptive Practices By Credit Card Issuers.*** In December 2004, the Division filed a lawsuit against a major credit card issuer, Capital One Corporation, for falsely advertising credit cards with an interest rate that is "low and fixed" and that "starts low and stays low." In fact, Capitol One has raised the interest rates on its credit cards, either through "trip wires" for cardholders (such as a cardholder paying a day late) or because the company unilaterally decided to increase the rate. The suit was settled pursuant to a consent judgment for injunctive relief barring Capitol One from disseminating certain "fixed rate" advertisements in Minnesota for eighteen months, and requiring Capitol One to pay a total of \$749,999 in *cy pres* restitution and costs and fees. In another case involving Cross Country Bank, the Division charged the bank with engaging in deceptive advertising practices and abusive collections practices. The Division successfully defended against Cross Country's appeal of a temporary injunction granted by the lower court. The case remains pending in Hennepin County District Court.
- ***Abusive Debt Collection and Debt Counseling.*** The Division continues to litigate against Messerli and Kramer, a local law firm, over allegations that Messerli engaged in unfair and illegal procedures in collecting debts owed by low-income consumers with exempt income, including many low income elderly living on social security. The Division also has a lawsuit pending in Ramsey County District Court against JBC and Associates, a California based law firm. The suit alleges that JBC made false and misleading statements in attempting to collecting old, time-barred debt that was often disputed by the consumers.
- ***Fraud Against Small Businesses and Nonprofit Organizations.*** Small businesses, churches and schools were the focus of the Division's lawsuit against Yellow Pages, Inc. in Ramsey County District. Yellow Pages sent these businesses and other entities checks for \$3.47 that appeared to be refunds, payments or donations. If the business or organization did not notice the fine print accompanying the check, Yellow Pages engaged in aggressive collection practices against the organization for \$177 per month for unwanted advertising services. The Division obtained a temporary injunction against Yellow Pages banning all such solicitations in Minnesota and preventing any collections against companies or organizations that had cashed the \$3.47 checks. The case

ultimately settled earlier this year through a multistate settlement. As a result of the settlement, Yellow Pages agreed to: (1) a total ban on check solicitations mailed to or from any of the settling states; (2) payment of certain refunds; (3) automatic cancellation of all unpaid accounts; and (4) no automatic renewal of existing accounts. Yellow Pages also agreed to pay \$535,000 to the states for costs and fees and other purposes.

- ***Automotive Repair Store.*** The Division enforced a 2003 Assurance of Discontinuance against Paul's Bobby & Steve's Auto World after discovering that the store had violated the assurance, which prohibited it from repossessing and impounding consumers' cars when a consumer disputed the repair work performed and withheld payment. The store settled with the Office, agreeing to pay a penalty, return the car, and comply with the assurance.
- ***Manufactured Home Parks.*** The Division obtained a temporary injunction in its case against Jack Hoffner, d/b/a Greenwood Communities, which is pending in Clay County. The suit alleges that Hoffner deceptively sold and financed mobile home purchases without a license or title to the homes, failed to transfer proper title to the new owners, brought illegal eviction actions, and engaged in other unlawful practices. The temporary injunction requires Hoffner to sell the manufactured home park to a non-profit cooperative organization which will manage the park, and convey title of the homes to the residents.
- ***E-85 Prices.*** The Division issued a report about E-85 pricing, after receiving numerous complaints from consumers and small wholesalers about dramatic increases in E-85 prices during the summer and fall of 2005. The report found nothing to substantiate claims of price-fixing or deceptive practices, but did find that E-85 prices track gasoline prices, as opposed to corn prices, and that unique factors in the ethanol market were also contributing to price increases.
- ***Amicus briefs.*** The Division also submitted amicus briefs in various cases dealing with areas ranging from insurance claims to equity-stripping.

The Consumer Services Division assists consumers, businesses and other organizations, and citizens who contact it for advice about their legal rights. By working to assist citizens and effect voluntary settlements between consumers and other parties, the Division often eliminates the need for costly and time-consuming litigation for both parties.

## **PUBLIC SAFETY/GAMBLING DIVISION**

The Public Safety/Gambling Division represents the Commissioner of Public Safety at thousands of implied consent hearings each year in which drivers contest the revocation of their licenses due to having been intoxicated while driving. The division is responsible for defending actions that resulted in the collection of driver's license reinstatement fees paid to state government over the last fiscal year. The division's litigation of overweight truck violations also

resulted in substantial fines paid to the state. Efforts by the division during the last fiscal year to reduce deaths, injuries, and property damage on Minnesota's streets and highways included:

- Handled over 5,400 district court implied consent proceedings challenging the revocations of driving privileges under Minn. Stat. §§ 169A.50-.53.
- Defended the state against numerous constitutional and other challenges to the DWI, implied consent, traffic, and other public safety laws.
- Provided satellite teleconference training on DWI procedures and traffic safety laws for law enforcement officers throughout the State of Minnesota.
- Published the Attorney General's 2005 DWI/IC Elements Handbook, utilized statewide by prosecutors, judges, defense attorneys and law enforcement professionals.
- Handled over 175 district court challenges to other driver's license cancellations, withdrawals, revocations, suspensions, and license plate impoundments under Minn. Stat. § 171.19.
- Argued appeals to the Minnesota Court of Appeals and Minnesota Supreme Court resulting from district court appearances involving the revocation, suspension, cancellation, or withdrawal of driving privileges.

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

The Public Safety/Gambling Division continues to face a significant challenge from a dramatically increased workload. Driver's license revocations under the implied consent law are being challenged at an increasing rate. For example, in 1993 six percent of all revocations were challenged in court. By 1997, the rate of challenges rose to ten percent. In FY 06, nearly 15 percent of all drivers' license revocations were challenged in court. Today's challenge rate is the result of the toughening of DWI laws by the Legislature over the last few years including the ability to use an implied consent revocation to impound license plates, forfeit motor vehicles, and enhance subsequent criminal offenses to gross misdemeanor and felony violations. Because drivers have more at stake from an alcohol-related license revocation on their driving records, they are more willing to challenge the underlying revocations in the State's district and appellate courts.

For example, in FY 96, the Public Safety/Gambling Division defended 2,121 implied consent cases in district court. In FY 06, it handled 5,452 implied consent cases, a 157% increase from FY 96. Implementation of the felony DWI law and increased license reinstatement fees to fund felony DWI continue to increase division caseload. Moreover, the Minnesota Supreme Court's recent ruling in *Fedziuk v. Commissioner of Public Safety*, 696 N.W.2d 340 (Minn. 2005), resulted in a sharp increase in petition filings during FY 06. The Court's implied mandate that all implied consent hearings be held within 60 days of filing of the petition for judicial review will continue to present a significant challenge for both the district courts and the division in FY 07.

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

With regard to the Racing Commission, the division represents the stewards in appeals of disciplinary action taken against horse owners, trainers, and jockeys. The division also provides representation as it relates to the commission's regulation of the card club at Canterbury Park. The approved license application and resulting appeals for the North Metro Harness Racetrack in Anoka County have kept the division busy during the last fiscal year and is expected to significantly increase division workload during FY 07. The division provides the State Lottery with a wide range of advice, from internet issues to lottery retailer contract suspensions, and represents the client in disciplinary hearings against lottery retailers and other licensees. A committee of the Gambling Control Board meets monthly with a number of licensees to discuss alleged violations of statutes and rules. The division provides representation at these settlement meetings, drafts the appropriate orders, and litigates the cases in the Office of Administrative Hearings and the Minnesota Court of Appeals. The division's representation of the Racing Commission, Gambling Control Board, and the Alcohol and Gambling Enforcement Division resulted in recovery of fines and costs in excess of \$50,000.00 during FY 06.

## **TRIAL DIVISION**

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

The division prosecutes serious crimes in trial courts throughout Minnesota when requested by a county attorney under Minn. Stat. § 8.01. Representative work during FY 06 included:

- Convicted John Jason McLaughlin for the shooting at Rocori High School in which students Seth Bartell and Aaron Rollins were killed. The prosecution involved a grand jury proceeding, a certification to adult court, an appeal of the certification and a trial in Stearns County District Court. McLaughlin was convicted of first degree murder and second degree murder. He is serving a life sentence.
- Convicted four defendants for the murder of Robert Berry, Jr. in the Lower Sioux Community in Redwood County. Five defendants have been charged as accomplices in the murder. Morris Pendleton, Jr. and Keith Crow were both convicted of first degree murder and are serving sentences of life imprisonment without the possibility of parole. Willis Swenson and Vernon Jones were both convicted of second degree murder and are serving sentences of 25 years and 20 years, respectively. Charges remain pending against one other accomplice.
- Prosecuted Justin Meyer for the murder of Mark Sullivan in Houston County. Meyer was convicted of first degree murder and is serving a life sentence.
- Prosecuted Lisa Shane for the child abuse murder of her two-month-old daughter in Nobles County. Shane was convicted of second degree murder and is serving a 15-year sentence.
- Convicted Victor Rodriguez of manslaughter in the second degree for the shooting death of Dennis Goodman during an argument at a party in Hubbard County.
- Prosecuted James Waltz for attempted first degree murder as a hate crime in Koochiching County. Waltz, who is white, shot an African-American man in International Falls because of his race. Waltz is serving a sentence of 15 years and four months.
- Convicted William Cherp of attempted second degree murder in a road-rage shooting case in Lincoln County.
- Prosecuted three defendants in an escape case in Nicollet County. Rodger Robb and Alexander Martinelli are sex offenders committed to the State Security Hospital at St. Peter. Both were convicted of felony escape from the facility. Matthew St. Hilaire was convicted of felony aiding an offender for helping them escape.
- Conducted two grand jury proceedings and obtained first degree murder indictments.
- Providing legal advice and prosecution support to the Metro Gang Strike Force.
- Prosecuting makers and dealers of methamphetamine and other drugs in 29 counties.

Also pursuant to Minn. Stat. § 8.01, division attorneys handle civil commitment hearings referred by counties in outstate Minnesota. Trial Division attorneys assist approximately 80 of Minnesota's 87 counties in civil commitment hearings involving dangerous sexual predators, upon the request of the county attorney. When a county attorney decides to proceed with a civil commitment petition, division attorneys are available to assist the county attorney in all aspects of the litigation, including preparation of the commitment petition, handling of pre-trial matters, and the handling of the commitment hearing and any appeal.

The number of these commitments and complexity of the cases increased significantly during the latter half of FY 04 and continued to increase throughout FY 05 and FY 06. During calendar year 2005, the AGO filed 46 petitions to commit sexual predators as sexually dangerous persons or sexually psychopathic personalities.

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

The division's attorneys also handle administrative hearings required by the Community Notification Act when a registered sex offender challenges the Department of Corrections' assessment of the offender's level of danger upon release from incarceration. Each month, the division handles several such cases, which affect the type of notice given to the community in which the sex offender will be released. The division also advises the BCA in registration issues and DNA collection issues, and the Department of Corrections on community notification issues.

Additionally, the division trains law enforcement officers and prosecutors throughout the state on such topics as: sex offender commitments, predatory offender registration, stalking and harassment laws, child exploitation laws, firearms laws, narcotics investigations, search and seizure, suspect interrogation, evidence, wiretaps and electronic surveillance, working with grand juries, forfeiture, gang investigation and prosecution, and trial advocacy.

APPENDIX A: SERVICE HOURS				
By Agency or Political Subdivision for FY 2006				
Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
<b>Partner Agencies</b>				
Administration--Risk Management		1,532.7		\$ 142,148.10
AURI		1.9		\$ 191.90
Corrections (3)	2,051.8	2,299.2	\$ 195,815.00	\$ 232,224.20
Education Department	2,263.0	2,612.8	\$ 228,560.00	\$ 261,261.60
Gambling Control Board	400.0	274.8	\$ 40,400.00	\$ 27,754.80
Health	6,390.0	6,671.2	\$ 620,000.00	\$ 631,034.20
Housing Finance Authority	5,250.0	5,375.2	\$ 530,250.00	\$ 542,895.20
Human Services	24,219.3	22,775.4	\$ 2,335,750.00	\$ 2,191,281.60
Iron Range Resources & Rehabilitation (3)	2,800.0	2,800.0	\$ 282,800.00	\$ 282,800.00
Medical Practices Board	11,360.0	14,935.2	\$ 829,408.00	\$ 1,143,477.40
Minnesota Racing Commission	600.0	408.9	\$ 60,600.00	\$ 40,719.30
Minnesota State Retirement System		81.5		\$ 8,231.50
MnSCU	9,650.0	8,706.2	\$ 905,650.00	\$ 811,269.20
Natural Resources	6,270.0	6,847.6	\$ 620,850.00	\$ 664,016.80
Petro Board		60.9		\$ 6,150.90
Pollution Control	19,527.0	20,727.1	\$ 1,903,227.00	\$ 2,013,640.90
Public Employees Retirement Association		982.8		\$ 99,262.80
Public Safety (3)	1,500.0	1,500.0	\$ 151,500.00	\$ 151,500.00
Teachers Retirement Association		684.0		\$ 68,794.20
Transportation	21,766.0	18,365.2	\$ 2,130,930.00	\$ 1,795,407.20
<b>TOTAL PARTNER AGENCIES</b>	<b>114,047.1</b>	<b>117,642.6</b>	<b>\$ 10,835,740.00</b>	<b>\$ 11,114,061.80</b>
<b>Specialized Boards</b>				
Accountancy Board		125.4		\$ 12,127.20
Animal Health Board		14.2		\$ 1,038.60
Architecture Board		89.6		\$ 9,049.60
Barber Board		257.2		\$ 23,451.80
Client Security Board		6,026.6		\$ 451,527.60
Crime Victims Reparations Board		304.1		\$ 28,124.30
Land Exchange Board		6.7		\$ 676.70
Peace Officers Standards and Training Board		175.5		\$ 16,672.10
Private Detective Board		172.0		\$ 17,372.00
School Administrators Board		169.5		\$ 17,119.50
State Fair Board		35.7		\$ 3,605.70
State Investment Board		368.2		\$ 36,079.60
Teaching Board		749.9		\$ 75,624.90
Zoological Board		62.0		\$ 5,880.20
<b>SUBTOTAL</b>		<b>8,556.6</b>		<b>\$ 698,349.80</b>
<b>Health Boards/Offices</b>				
Behavioral Health & Therapy Board		396.0		\$ 31,444.60
Chiropractic Board		1,014.9		\$ 75,484.50
Dentistry Board		3,941.9		\$ 282,685.70
Dietetics & Nutrition Practice Board		23.5		\$ 2,111.30
Emergency Medical Services Regulatory Board		330.5		\$ 30,404.30
Health Professionals Services Program		31.9		\$ 3,221.90
Licensed Drug & Alcohol Counselor Program		753.1		\$ 50,717.10
Marriage & Family Therapy Board		149.9		\$ 9,026.50
Mental Health Practice Office		45.0		\$ 2,488.80
Nursing Board		6,409.9		\$ 474,688.30
Nursing Home Administrators Board		49.9		\$ 5,039.90
Optometry Board		15.1		\$ 1,479.10
Pharmacy Board		305.3		\$ 25,237.10
Physical Therapy Board		427.8		\$ 34,049.20
Podiatry Board		209.4		\$ 13,071.80
Psychology Board		2,041.2		\$ 147,456.00
Social Work Board		593.2		\$ 38,523.20
Veterinary Medicine Board		801.2		\$ 63,294.00
<b>SUBTOTAL</b>		<b>17,539.7</b>		<b>\$ 1,290,423.30</b>
<b>Higher Education</b>				
Higher Education Facilities Authority		7.5		\$ 734.50
Higher Education Services Office (3)		161.9		\$ 16,121.90
<b>SUBTOTAL</b>		<b>169.4</b>		<b>\$ 16,856.40</b>

APPENDIX A: SERVICE HOURS				
By Agency or Political Subdivision for FY 2006				
Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
<i>Other Executive Branch Agencies</i>				
Administration Department		1,272.5		\$ 120,964.70
Administrative Hearings Office		137.8		\$ 13,117.40
Agriculture Department		180.4		\$ 18,215.80
Amateur Sports Commission		145.9		\$ 14,735.90
Archaeologist Office		590.2		\$ 59,605.60
Black Minnesotans Council		100.9		\$ 10,039.10
Campaign Finance Board		9,060.5		\$ 793,449.70
Capitol Area Architectural Planning Board		27.9		\$ 2,817.90
Center for Arts Education		52.3		\$ 4,886.70
Chicano/Latino Peoples Affairs Council		1.8		\$ 181.80
Commerce Department		8,404.7		\$ 839,168.70
Corrections Department (3)		4,063.2		\$ 352,800.00
Corrections Department/Community Notification		865.9		\$ 77,285.30
Disability Council		2.7		\$ 272.70
Employment & Economic Development Department		1,245.4		\$ 107,403.80
Employee Relations Department		152.1		\$ 14,524.90
Environmental Quality Board		250.0		\$ 25,167.20
Executive Council		11.7		\$ 1,181.70
Faribault Academies		9.6		\$ 969.60
Finance		858.0		\$ 83,364.40
Governor's Office		326.5		\$ 32,654.50
Historical Society		494.0		\$ 49,291.40
Human Rights Department		1,614.1		\$ 155,240.90
Indian Affairs Council		2.6		\$ 262.60
Iron Range Resources & Rehabilitation (3)		251.3		\$ 24,093.30
Judiciary Courts		17,604.4		\$ 1,693,570.00
Labor and Industry Department		5,891.2		\$ 593,221.80
Law Examiner's Board		84.3		\$ 8,514.30
Lawyer's Professional Responsibility Board		2,406.5		\$ 240,291.90
Legal Certification Board		195.3		\$ 19,532.10
Legislative Auditor		3.9		\$ 393.90
Legislature		117.5		\$ 11,867.50
Mediation Services Bureau		82.6		\$ 8,342.60
Military Affairs Department		126.2		\$ 12,102.20
Minnesota Commission Serving Deaf & Hard of Hearing People		1.8		\$ 181.80
Minnesota Gang Strike Force		2,881.4		\$ 289,724.20
Office of Enterprise Technology		51.0		\$ 4,290.80
Ombudsman for Mental Health/Retardation Office		62.3		\$ 6,292.30
Ombudsperson for Families		5.9		\$ 595.90
Pardon Board		10.0		\$ 1,010.00
Public Defender, Local		2,412.3		\$ 232,008.90
Public Defender, State		373.7		\$ 35,163.10
Public Safety Department (3)		32,381.3		\$ 2,855,982.30
Public Utilities Commission		4,499.5		\$ 454,173.50
Revenue Department		9,131.0		\$ 919,797.60
Rural Finance Authority		37.3		\$ 3,767.30
Secretary of State		345.1		\$ 33,769.50
Sentencing Guidelines Commission		347.5		\$ 35,088.30
State Arts Board		54.2		\$ 5,474.20
State Auditor		2,031.6		\$ 198,107.60
State Lottery		60.4		\$ 4,577.80
Strategic and Long Range Planning Office		321.8		\$ 32,432.80
Veterans Affairs Department		44.7		\$ 3,695.90
Veterans Homes Board		138.0		\$ 13,110.00
Water & Soil Resources Board		403.0		\$ 40,680.00
<b>SUBTOTAL</b>		<b>112,227.7</b>		<b>\$ 10,559,455.70</b>

**APPENDIX A: SERVICE HOURS**  
**By Agency or Political Subdivision for FY 2006**

Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
<b>OTHER GOVERNMENT</b>				
Anoka County Attorney		34.2		\$ 3,454.20
Big Stone County Attorney		11.6		\$ 1,171.60
Cass County Attorney		29.4		\$ 2,969.40
Chisago County Attorney		4.3		\$ 434.30
Clearwater County Attorney		571.8		\$ 42,663.80
Cottonwood County Attorney		317.3		\$ 23,859.30
Dodge County Attorney		492.4		\$ 33,945.20
Freeborn County Attorney		499.9		\$ 33,345.70
Houston County Attorney		62.0		\$ 6,262.00
Hubbard County Attorney		17.5		\$ 1,721.50
Itasca County Attorney		86.5		\$ 8,736.50
Kanabec County Attorney		383.4		\$ 30,549.20
Kandiyohi County Attorney		95.4		\$ 9,635.40
Koochiching County Attorney		1,168.0		\$ 71,853.00
Lincoln County Attorney		221.5		\$ 16,952.70
Meeker County Attorney		100.4		\$ 7,946.20
Mower County Attorney		0.6		\$ 60.60
Nicollet County Attorney		55.3		\$ 5,585.30
Nobles County Attorney		1,066.8		\$ 81,131.20
Polk County Attorney		20.7		\$ 2,090.70
Redwood County Attorney		886.0		\$ 69,167.80
Renville County Attorney		305.5		\$ 23,182.70
Sherburne County Attorney		553.6		\$ 41,593.80
Stearns County Attorney		295.4		\$ 29,766.40
Stevens County Attorney		2.4		\$ 242.40
Swift County Attorney		89.3		\$ 7,179.30
Todd County Attorney		1.0		\$ 101.00
Wadena County Attorney		107.5		\$ 8,534.50
Various Cities		191.0		\$ 19,291.00
Townships / Associations / Local Governments / Other		152.2		\$ 15,372.20
Various Counties Psychopathic Personalities Commitments		15,312.5		\$ 1,280,323.70
Various Counties/Criminal Appeals		12,573.2		\$ 1,225,066.20
<b>SUBTOTAL</b>		<b>35,708.6</b>		<b>\$ 3,104,188.80</b>
<b>TOTAL NON-PARTNER AGENCIES SUBDIVISIONS</b>		<b>174,202.0</b>		<b>\$ 15,669,274.00</b>
<b>TOTAL PARTNER/SEMI-PARTNER AGENCIES (from page A-1)</b>		<b>117,642.6</b>		<b>\$ 11,114,061.80</b>
<b>TOTAL NON-PARTNER AGENCIES SUBDIVISIONS</b>		<b>174,202.0</b>		<b>\$ 15,669,274.00</b>
<b>GRAND TOTAL HOURS/EXPENDITURES (4)</b>		<b>291,844.6</b>		<b>\$ 26,783,335.80</b>
<b>Notes:</b>				
(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 \$101.00 and Legal Assistant \$55.00.				
(3) A number of agencies signed agreements for a portion of their legal services.				
(4) Not all AGO expenditures are included in M.S. 8.15 reporting. This amount does not include Civil Enforcement and Medicaid Fraud legal services.				

<b>APPENDIX B: SPECIAL ATTORNEY EXPENDITURES FOR FY 2006, BY AGENCY</b>	
<b>AGENCY</b>	<b>Amount</b>
Administration	\$ 77,862.65
Attorney General's Office	\$ 21,146.49
Employee Relations	\$ 136,120.99
Finance	\$ 103,147.31
Human Services	\$ 19,578.09
Labor and Industry	\$ 49,481.55
Medical Practice Board	\$ 22,505.25
<b>TOTAL</b>	<b>\$ 429,842.33</b>

<b>APPENDIX B: SPECIAL ATTORNEY EXPENDITURES</b>	
<b>BOND COUNSEL FOR FY 2006, BY AGENCY</b>	
<b>AGENCY</b>	<b>Amount</b>
Agricultural and Economic Development Board	\$ 59,422.81
Employment and Economic Development	\$ 156,205.59
Finance	\$ 69,476.38
Higher Education Facilities Authority	\$ 213,814.04
Higher Education Services Office	\$ 57,370.12
Housing Finance Agency	\$ 356,420.15
IRRRA	\$ 21,912.32
MnSCU	\$ 1,790.05
Rural Finance Authority	\$ 4,415.93
<b>TOTAL</b>	<b>\$ 940,827.39</b>
NOTE: Certain bond fund counsel are paid from proceeds.	



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

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June 26, 2006

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220 W. Washington Avenue  
Fergus Falls, MN 56538-0117

Robert W. Bigwood  
Attorney for Aurdal Township  
110 North Mill Street  
Fergus Falls, MN 56538-0866

**Re: Request for Opinion/Assessment for Improving Town Road 772, Dane Prairie Township, a/k/a 229th Avenue**

Dear Counsel:

Thank you for your correspondence dated May 11, 2006, requesting an opinion of the Attorney General with respect to the facts described below.

## FACTS AND BACKGROUND

You state that Town Road 772 (also known as 229th Avenue) begins at Minnesota State Highway 210, runs north through Dane Prairie Township and ultimately crosses the east-west boundary line between Dane Prairie Township and Aurdal Township. This town road serves as the primary southern access to Birchwood Estates, a residential development, located entirely within Aurdal Township. You note that a portion of Town Road 772 located in Dane Prairie Township is in need of improvement, including repaving and retarring. You state that the residents of Birchwood Estates wish to petition for the improvement of this portion of the town road pursuant to Minnesota Statutes chapter 429 and are willing to be assessed for the full cost associated with the work. Based on these facts, you ask whether Aurdal Township may enter into an agreement with Dane Prairie Township to pay for the costs of improvements to be undertaken entirely within Dane Prairie Township and to assess the costs to the benefited properties, presumably limited to Birchwood Estates.

## LAW AND ANALYSIS

First, in certain circumstances, townships are authorized by statute to maintain roads beyond their territorial boundaries. *See* Minn. Stat. § 160.07 (2004) (township may expend funds to assist in maintenance of road leading into the town). In addition, a number of statutes specifically authorize governmental bodies to cooperate with one another through agreements to

construct or maintain shared roadways.<sup>1</sup> *See, e.g.*, Minn. Stat. § 164.12 (2004) (agreement between towns to maintain shared townline road); Minn. Stat. § 164.14 (2004) (agreements between city and town for shared boundary road).

Second, municipalities, including towns,<sup>2</sup> have the general power to undertake maintenance and reconstruction of roads and to assess the cost of such work to those properties benefited by the improvements pursuant to Minnesota Statutes chapter 429 (2004). In particular, towns may “acquire, open and widen any street, and to improve the same by constructing, reconstructing, and maintaining sidewalks, pavement, gutters, curbs, and vehicle parking strips of any material, or by grading, graveling, oiling, or otherwise improving the same” and assess the cost of such work “upon property benefited by the improvement.” Minn. Stat. §§ 429.021, subd. 1(1) and .051 (2004).

Third, absent specific statutory provision, however, municipalities are not authorized to impose special assessments for improvements constructed outside their boundaries. *See, e.g.*, Op. Atty. Gen. 377a, September 12, 1935 (authorization of city to pay for improvement of road outside boundary does not imply authority to levy special assessments) (attached). Minnesota Statutes section 160.07 referenced above, which authorizes towns to expend funds for extraterritorial road improvements, does not expressly provide for special assessments. Furthermore, Minnesota Statutes section 429.021, subdivision 1(1), which empowers towns to levy special assessments for road improvements, does not by its terms apply to projects lying outside the town. *Cf.* Minn. Stat. § 429.021, subd. 1(2) (storm and sanitary sewers), (5) (waterworks systems), (6) (parks) (2004).

Fourth, like the statutory provisions governing boundary line roads, Minnesota Statutes chapter 429 does recognize that municipalities may cooperate with one another on road projects and, if the procedures set forth in the chapter are followed, assess the costs to benefited properties. In particular, Minnesota Statutes section 429.031, subdivision 1(a), references such relationships when it requires a public hearing for improvement projects “made under a cooperative agreement with the state or other political subdivision for sharing the cost of making the improvement ....” Minnesota Statutes section 429.041, subdivision 5 also recognizes cooperative agreements between political subdivisions of the state for joint projects by limiting the contract bidding process to avoid duplication of effort between the cooperating municipalities. In an opinion issued in 1975 under a similar fact situation, this Office determined that these references, in combination with the Joint Powers Act, Minnesota Statutes section 471.59, authorize municipalities, including towns, to enter into agreements to undertake

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<sup>1</sup> In addressing the issue of adjoining townships sharing in the cost and responsibility of maintenance of township roads located along shared boundary lines, the Minnesota Supreme Court stated that the applicable statutes “evinced an intent that town lines not operate as insuperable barriers.” *Shinneman v. Arago Township*, 288 N.W.2d 239, 242 (Minn. 1980).

<sup>2</sup> A “municipality” is defined in chapter 429 to include “any town” for purposes of “construction, reconstruction or improvement of a town road ....” Minn. Stat. § 429.011, subd. 2b (2004).

road improvement projects and to assess the costs to the benefited properties where appropriate. *See* Op. Atty. Gen. 1007, February 26, 1975 (attached). We see no change in the law that would lead this Office to a different conclusion today.

Fifth, your correspondence implies that there may be an intent on the part of the townships to assess the total cost of the road improvements to the residents of Birchwood Estates by agreement irrespective of the actual benefit to that property and property located in Dane Prairie Township. As a general rule, special assessments must be based upon the actual increase in value to the real property benefited. *See* Minn. Stat. § 429.051 (2004) (“[t]he cost of any improvement ... may be assessed upon property benefited by the improvement, based upon the benefits received, whether or not the property abuts on the improvement ...”). The Minnesota appellate courts have held that such assessments may not exceed the benefit the property receives from the improvement. *See In re Village of Burnsville*, 310 Minn. 32, 39, 245 N.W.2d 445, 449 (1976); *Blankenburg v. City of Northfield*, 462 N.W.2d 608, 613 (Minn. Ct. App. 1990); *Rhodenbaugh v. City of Bayport*, 450 N.W.2d 508, 613 (Minn. Ct. App. 1990); *Special Assessment for Maplewood Public Project No. 78-10 v. City of Maplewood*, 358 N.W.2d 106, 108 (Minn. Ct. App. 1984). Consequently, assessing the entire cost of the improvements proposed for Town Road 772 to the residents of Birchwood Estates would appear to be appropriate only if the benefits to the Birchwood Estates properties equal or exceed the assessment amounts. Furthermore, all benefited properties should be assessed in proportion to benefits received. *See e.g., David E. McNally Dev. Corp. v. City of Winona*, 686 N.W.2d 553 (Minn. Ct. App. 2004) The only apparent exception to this general rule is found at Minnesota Statutes section 429.031, subdivision 3 (2004), which states that “[w]henver all owners of real property abutting upon any street named as the location of any improvement shall petition the council to construct the improvement and to assess the entire cost against their property the council may, without a public hearing, adopt a resolution determining such fact and ordering the improvement.” Under the facts you have provided, it does not appear that the proposed project would qualify under that subdivision since most, if not all, of the property abutting the improvement would not be assessed.

Sixth, one option that the Townships may wish to consider is the possibility of the residents of Birchwood Estates providing a monetary grant to Dane Prairie Township for the purpose of undertaking the road improvements. Statutory authority for a township to accept such a gift is found Minnesota Statutes section 465.03 (2004), which states as follows:

Any city, county, school district or town may accept a grant or devise of real or personal property and maintain such property for the benefit of its citizens in accordance with the terms prescribed by the donor. Nothing herein shall authorize such acceptance or use for religious or sectarian purposes. Every such acceptance shall be by resolution of the governing body adopted by a two-thirds majority of its members, expressing such terms in full.

In an opinion issued in 1990, this Office determined that a township has the authority under Minnesota Statutes section 465.03 (2004) to accept improvements made to a township road as a

Robert L. Russell  
Robert W. Bigwood  
June 26, 2006  
Page 4

gift. See Op. Atty. Gen. 434a6, October 11, 1999 (attached). This Office has also issued an opinion finding that the statute does authorize the acceptance of monetary gifts as well as gifts of real and personal property. See Op. Atty. Gen. 469A-6, February 25, 1957 (attached). Consequently, under these authorities, the Township could accept a monetary gift from the residents of Birchwood Estates earmarked for the proposed road improvements. Note, however, that pursuant to Minnesota Statutes section 465.03 (2004), the Township must accept the gift by resolution of a two-thirds majority of the Township Board members.

#### CONCLUSION

Based upon the foregoing, it is our opinion that the Townships of Dane Prairie and Aurdal may enter into a joint powers agreement for undertaking improvements on that portion of Town Road 772 lying entirely within Dane Prairie and assess the costs of such project to the properties within the Townships that are determined to be benefited by the improvements. Whether the residents of Birchwood Estates may be assessed for the entire cost of the project will depend upon whether it is determined that those properties are the sole beneficiaries of the improvement. In the alternative, the Townships could consider accepting the cost of the improvements as a monetary gift from the residents of Birchwood Estates if the gift is approved by a two-thirds vote of the Township Board members.

Sincerely,



DAVID P. IVERSON  
Assistant Attorney General  
(651) 296-0687 (Voice)  
(651) 297-4139 (Fax)

4 Enc.

cc: Kris Eiden  
✓ Ken Raschke  
AGO Library

AG: #1617284-v1



# STATE OF MINNESOTA

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June 13, 2006

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VIA U.S. MAIL & FACSIMILE

Dear Mr. Miller:

Thank you for your correspondence of May 4, 2006 concerning the application of Minnesota Statutes section 462.356, subdivision 2 to the City of North Branch (the "City").

## FACTS AND BACKGROUND

North Branch is a statutory city with a city council consisting of a mayor and four other members elected at large. *See* Minn. Stat. § 412.541 (2004). The City also has a Planning Commission and an Economic Development Authority ("EDA") which acquires and disposes of real property for development purposes. The City also acquires real property for its own needs, presumably through action of its City Council.

The City is currently dealing with two real estate transactions. One involves sale of property by the EDA to a developer for construction of a housing project, and the other involves a purchase of property by the EDA for expansion of an industrial park or other commercial development purposes.

The City has had a comprehensive plan, adopted pursuant to Minnesota Statutes section 462.355, in place for some time. Minnesota Statutes section 462.356, subdivision 2 provides:

After a comprehensive municipal plan or section thereof has been recommended by the planning agency and a copy filed with the governing body, no publicly owned interest in real property within the municipality shall be acquired or disposed of, nor shall any capital improvement be authorized by the municipality or special district or agency thereof or any other political subdivision having jurisdiction within the municipality until after the planning agency has reviewed the proposed acquisition, disposal, or capital improvement and reported in writing to the governing body or other special district or agency or political subdivision concerned, its findings as to compliance of the proposed acquisition, disposal or improvement with the comprehensive municipal plan. Failure of the planning agency to report on the proposal within 45 days after such a reference, or such other period as may be designated by the governing body shall be deemed to have



satisfied the requirements of this subdivision. The governing body may, by resolution adopted by two-thirds vote dispense with the requirements of this subdivision when in its judgment it finds that the proposed acquisition or disposal of real property or capital improvement has no relationship to the comprehensive municipal plan.

Minn. Stat. § 462.356, subd. 2 (2004).

Based upon the foregoing, you ask the following questions:

1. Is Minnesota Statutes section 462.356, subdivision 2 applicable to the City either at all or under these circumstances?
2. Does Minnesota Statutes section 462.356, subdivision 2 only require referral of proposed real estate transactions to the City's Planning Commission during the time period between recommendation of the Comprehensive Plan by the Planning Commission and its adoption by the City Council?
3. If the City is required to refer an acquisition or disposition of real property to the Planning Commission, what consequences does it face for failing to do so?

#### LAW AND ANALYSIS

First, when the words of a statute are clear and unambiguous, they must be applied in accordance with their plain meaning. *See, e.g.,* Minn. Stat. § 645.16; *Chanhassen Estates v. City of Chanhassen*, 342 N.W.2d 335 (Minn. 1984); *Rockford Twp. v. City of Rockford* 608 N.W.2d 903 (Minn. Ct. App. 2000). Furthermore, courts are not inclined to supply any provision which the legislature purposely omits or inadvertently leaves out. *See, e.g.,* *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 184 N.W.2d 588 (1971).

Minn. Stat. § 462.351 states in part:

Municipal planning, by providing public guides to future municipal action, enables other public and private agencies to plan their activities in harmony with the municipality's plans. Municipal planning will assist in developing lands more wisely to serve citizens more effectively, will make the provision of public services less costly, and will achieve a more secure tax base. *It is the purpose of sections 462.351 to 462.364 to provide municipalities, in a single body of law, with the necessary powers and a uniform procedure for adequately conducting and implementing municipal planning.*

(Emphasis added). Minn. Stat. § 462.351 (2004). *See also* *Nordmarken v. City of Richfield*, 641 N.W.2d 343 (Minn. Ct. App. 2002) (finding that Municipal Planning Act, Minn. Stat. §§ 462.331-.364 applies to all municipalities, and preempts inconsistent local enactments.)

Thomas F. Miller  
June 13, 2006  
Page 3

Minnesota Statutes section 462.356, subdivision 2 contains no categorical exemptions from its application, and none have been called to our attention. Consequently, we are unable to identify any basis for an argument that it does not apply to the City of North Branch.

Second, that subdivision plainly requires prior planning agency review of any acquisition or disposition of a public interest in real estate taking place after the filing of a recommended comprehensive plan with the governing body unless the governing body, by a two-thirds vote, dispenses with the requirement as unnecessary. Nothing in the statutory language indicates that this requirement lapses if the comprehensive plan is subsequently adopted by the governing body. To the contrary, previous cases and Attorney Generals' Opinions have presumed application of the Section 462.356 notice-and-review requirements where municipal comprehensive plans have been adopted. *See, e.g., Lerner v. City of Minneapolis*, 284 Minn. 46, 169 N.W.2d 380 (1969). Op. Atty. Gen. 161-b, August 8, 1966 (copy enclosed).

Finally, this Office is unable to determine the consequences that may flow from failure of the "City" or other governmental agency to comply with the requirements of Section 62.356, subdivision 2. As noted in Op. Atty. Gen. 629a, May 9, 1975 (copy enclosed), this Office cannot render opinions upon hypothetical questions. There can be a number of potential consequences to a government agency from acting contrary to the prohibition of Section 462.356, subdivision 2. *See, e.g., Minn. Stat. §§ 462.362* (planning and zoning requirements may be enforced by penalties, mandamus, injunction); 645.241 (performance of act prohibited by statutes is a misdemeanor where no other penalty is specified by statute); Op. Atty. Gen. 477b-34, July 29, 1991 (citizens may seek mandamus to compel municipal officers to enforce zoning regulations). However, the specific consequences, if any, that may be appropriate in any particular instance will depend upon the facts of the case.

#### OPINION

For the foregoing reasons, we answer your first question in the affirmative and your second question in the negative. We are unable to offer an opinion concerning the possible consequences that may flow from an agency's failure to comply with the requirements of Section 462.356, subdivision 2.

Very truly yours,

  
KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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

Enclosures  
AG: #1623297-v1



MIKE HATCH  
ATTORNEY GENERAL

STATE OF MINNESOTA  
OFFICE OF THE ATTORNEY GENERAL

June 6, 2006

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

The Honorable Patricia Anderson  
State Auditor  
525 Park Street, #500  
St. Paul, MN 55103-2139

VIA FACSIMILE AND  
U.S. MAIL

Dear Ms. Anderson:

Thank you for your correspondence of May 16, 2006 requesting an opinion from the Attorney General with respect to local government funding for employee post-employment benefits.

FACTS AND BACKGROUND

You note that many public entities in Minnesota have, for a number of years, promised their employees and officers post-employment benefits, mainly life insurance and medical benefits (sometimes referred to as "other post-employment benefits" (OPEB)). These benefits have been promised both in collective bargaining agreements and in personnel policies. The Government Accounting Standards Board (GASB) has issued GASB Statement No. 45 which will require most public entities to present the actuarial value of these promised benefits as a liability on their financial statements starting for year-end December 31, 2007. Many public entities in Minnesota are now in the process of obtaining actuarial reports regarding this liability.

GASB Statement No. 45 provides that employers may reflect in their financial statements that they have satisfied part or all of this actuarial liability to the extent they have:

1. Made direct payments to or on behalf of the retiree;
2. Made premium payments; or
3. Irrevocably transferred assets to a *trust or equivalent arrangement*, in which plan assets are dedicated to providing benefits to retirees and their beneficiaries in accordance with the term of the plan and are legally protected from creditors of the employer(s) or plan administrator.

(Emphasis added.) See para.13g. on p. 11 of GASB Statement No. 45.



You state that some public entities, anticipating the implementation of GASB Statement No. 45, have created trusts to finance these post-employment benefits. You enclosed a copy of an employee benefit trust created by Minnesota school district, which identifies the School District as both the creator of the trust and the trustee. The trust instrument states:

*Account.* The exclusive purpose of this Trust is to provide a source of funds for the District's employee welfare benefit obligations.

You are concerned that public entities are creating trusts without either express or implied authority to do so. You are also concerned as to the appropriate investment standard that would be applicable to such a trust.

On the basis of these facts, you request our opinion on the following questions:

1. Does authority exist for school districts and other public entities to create OPEB trusts?
2. If so, what is the applicable investment standard to be used for the investment of trust proceeds?
3. If no authority exists to create OPEB trusts, what status do those created currently have?

#### LAW AND ANALYSIS

First, as you know units of local government have no inherent powers, and may only perform such functions as are expressly authorized by statute or home-rule charter, or are reasonably implied as necessary to carrying out expressly authorized functions. *See, e.g., Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 683 (Minn. 1997).

Second, we are not aware of any statutes that expressly authorize local governments to create or contribute to irrevocable trusts for the described purposes.<sup>1</sup>

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<sup>1</sup> As you have noted, Minn. Stat. § 352.98 (2004) provides for the establishment of plans which enable public employers and employees to contribute to individual trust accounts whereby employees may accrue savings for future health care costs. These individual defined-contribution style accounts differ from the arrangements you describe, which are designed to fund the employer's obligations to retirees generally under a defined-benefit type of plan.

Third, Minnesota Statutes, section 471.61, subdivision 2a authorizes, but does not require, local governments to pay all or part of insurance premiums for retired employees. That subdivision also provides:

Any governmental unit, other than a school district,<sup>2</sup> which pays all or any part of such premiums or charges is authorized to levy and collect a tax, if necessary, *in the next annual tax levy for the purpose of providing the necessary funds for the payment of such premiums or charges*, and such sums so levied and appropriated shall not, in the event such sum exceeds the maximum sum allowed by the charter of a municipal corporation, be considered part of the cost of government of such governmental unit as defined in any tax or expenditure limitation; provided at least 50 percent of the cost of benefits on dependents shall be contributed by the retired officer or retired employee or be paid by levies within existing charter tax limitations.

*Id.* (Emphasis added.) This language appears to suggest a pay-as-you-go approach to payment for such benefits.

Furthermore, subdivision 2b of section 471.61, which requires local governments to permit retired employees to continue to participate in the employer's group health insurance program, states:

(e) The former employee must pay the entire premium for continuation coverage, *except as otherwise provided in a collective bargaining agreement or personnel policy*. A unit of local government may discontinue coverage if a former employee fails to pay the premium within the deadline provided for payment of premiums under federal law governing insurance continuation.

(Emphasis added.)

In that regard, Minn. Stat. § 179A.20, subd. 2a provides:

Subd. 2a. *Former employee benefits*. A contract may not obligate an employer to fund all or part of the cost of health care benefits for a former employee beyond the duration of the contract, subject to section 179A.20, subdivision 6.<sup>3</sup> A personnel policy may not obligate an employer to fund all or part of health care benefits for a former employee beyond the duration of the policy. A policy may not extend beyond the termination of the contract of longest duration covering

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<sup>2</sup> School district accounting for such benefits is addressed by Minn. Stat. § 123B.77, subd. 6.

<sup>3</sup> Subdivision 6 provides for extension of the terms of an expired contract during negotiations for a new contract.

other employees of the employer or, if none, the termination of the budgetary cycle during which the policy is adopted.

The Minnesota Supreme Court has, nonetheless, held that public employers are authorized to make contractual commitments to pay for all or part of a retired employee's insurance benefits for life. *See Housing and Redev. Auth. of Chisholm*, 696 N.W.2d 329 (Minn. 2005). The court cites Minnesota Statutes, section 471.61, subdivision 2b(k) as authority for that conclusion. That provision states:

(k) Notwithstanding section 179A.20, subdivision 2a, insurance continuation under this subdivision may be provided for in a collective bargaining agreement or personnel policy.

The court interpreted this provision as negating any restriction on the duration of a public employer's promises to pay for retirees' health care coverage. The court therefore described the effect of Minnesota Statutes, section 179A.20, subdivision 2a as follows:

We conclude that subdivision 2a was intended only to relieve public employers from any obligation to appropriate or set aside current resources to "fund" these future liabilities to retirees. The word to "fund" means to "make permanent provision of resources for discharging the interest or principal of" an obligation. *Webster's Third New International Dictionary Unabridged* 921 (1993). Thus, a public employer is authorized under section 179A.03, subdivision 19, to obligate itself in a CBA [collective bargaining agreement] to pay retiree healthcare premiums indefinitely, and the purpose of subdivision 2a was to relieve the employer from any obligation to set aside current resources to secure this future liability beyond the duration of the CBA.

*Id.* at 334-35 (footnote omitted). This reasoning, as well, appears to call for a pay-as-you go approach to OPEB funding.

Fourth, other statutory provisions also appear to negate any implied authority of local governments to create trust funds for payment of future OPEB liabilities. For example, Minn. Stat. § 123B.79, subd. 1, generally prohibits school districts, subject to stated exceptions, from permanently transferring money from an operating fund to a nonoperating fund. One of the exceptions in that section specifically provides limited authority for maintenance of a reserve account of not more than 50 percent of the amount needed to meet obligations for future payment of employees' severance pay and for accumulated sick leave to be used for payment of premiums on a former employee's group insurance. *See* Minn. Stat. § 123B.79, subd. 7 (2004).

For the foregoing reasons, we do not believe that local government units are statutorily authorized to create trust funds for payment of retirees' insurance benefits.

The Honorable Patricia Anderson

June 6, 2006

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Given our response to your first question, an answer to your second question is not required. However, we are aware of no authority for the proposition that any funds held in "trust" by or on behalf of a government employer for payment of its own obligation for future employee or retiree benefits may be deposited or invested in any manner other than as statutorily provided for all public funds. For example, Minnesota Statutes, section 118A.01, which defines "public funds" for purposes of deposit and investment, states as follows:

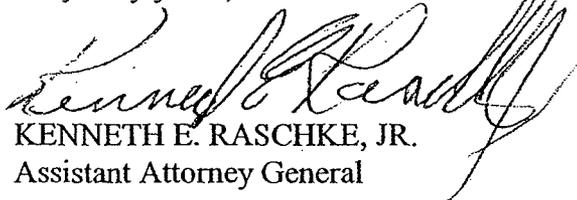
Subd. 4. *Public funds.* "Public funds" means all general, special, permanent, trust and other funds, regardless of source or purpose, held or administered by a government entity, unless otherwise restricted.

Regarding your third question, while we have not identified any statutory authority for local governments to create and transfer public money to irrevocable trusts for funding of their future OPEB obligations, we are unable to resolve questions about the exact "legal status" of any trusts or similar arrangements that currently exist. Rather, it is the responsibility of local officials and their counsel to review their relevant transactions in light of our opinion, the public interests involved, and possible legal claims of third persons.

Finally, I understand that bills were introduced during the past legislative session which would have expressly authorized the creation of trusts for OPEC funding by local governments. To the extent local governments would like to establish this method of funding, I recommend they pursue such legislation in the next legislature session. The effective date of any such legislation could be made to coincide with the effective date of GASB 45 and could as well clarify the permissible investments of such trusts.

Please contact me if you have further questions.

Very truly yours,



KENNETH E. RASCHKE, JR.  
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**STATE OF MINNESOTA**  
**OFFICE OF THE ATTORNEY GENERAL**

**MIKE HATCH**  
ATTORNEY GENERAL

May 11, 2006

102 STATE CAPITOL  
ST. PAUL, MN 55155-1002  
TELEPHONE: (651) 296-6196

The Honorable Steve Murphy  
Chair  
Senate Transportation Committee  
306 State Capitol Building  
St. Paul, MN 55175

**Re: I-35W/Hwy 62 Crosstown Commons Reconstruction Project**

Dear Senator Murphy:

I have received your letter dated May 1, 2006 requesting an opinion of the Attorney General with respect to certain questions related to the Highway 62 Crosstown Commons Reconstruction Project (the "Crosstown Project").

You note in your letter that, with respect to the Crosstown Project, the request for proposals issued by the Minnesota Department of Transportation ("MnDOT") requires the selected contractor to finance a portion of the project costs until federal funds are available to the State to pay the contractor. With respect to this manner of financing and payment, you ask the following questions:

1. Does MnDOT have the authority to borrow from contractors and, if so, what is its authority?
2. Does the Commissioner of Finance have the authority to make the certification required under Minn. Stat. § 16A.15, subd. 3 with respect to any contract issued with respect to the Crosstown Project?
3. Does MnDOT have the authority to enter into a trunk highway contract based on anticipated federal funds?
4. Who bears responsibility for contractor payments if MnDOT is unable to make the agreed upon payments when they are due?

LAW AND ANALYSIS

**1. Does MnDOT have the authority to borrow from contractors?**

Article XI of the Minnesota Constitution addresses government appropriations and finances. Among other things, this article states that "no money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." Minn. Const. art. XI, section 1.

That article further sets forth the circumstances under which the State of Minnesota may incur public debt and sets forth the purposes for which such debt may be incurred, which include public highways. In connection with the use of debt to establish and maintain public highways, additional limitations are set forth in Article XIV of the Constitution. That article provides, among other things, that the legislature may authorize the sale of bonds to construct, improve or maintain the public highways in the State. Minn. Const. art. XIV, section 11.

Neither article XI nor article XIV of the Minnesota Constitution provides any other authorization for the incurring of debt to establish, improve or maintain public highways in the State.

Accordingly, it does not appear that MnDOT has authority to borrow funds from contractors to finance the construction or improvement of public highways.

**2. Does the Commissioner of Finance have the authority to make the certification required under Minnesota Statutes section 16A.15, subd. 3 with respect to the Crosstown Project?**

Minnesota Statutes section 16A.15, subdivision 3 states, in pertinent part:

A payment may not be made without prior obligation. An obligation may not be incurred against any fund, allotment, or appropriation unless the Commissioner has certified a sufficient unencumbered balance or the accounting system shows sufficient allotment or encumbrance balance in the fund, allotment, or appropriation to meet it. ... An expenditure or obligation authorized or incurred in violation of this chapter is invalid and ineligible for payment until made valid.

Minn. Stat. § 16A.15, subd. 3 (2004).

The most recent Minnesota Supreme Court case applying the provisions of Minnesota Statutes section 16A.15, subd. 3 is *U.S. Fire Ins. Co. v. Minnesota Zoological Board*, 307 NW2d 490 (Minn. 1981). That case arose out of a lawsuit against the State brought by holders of certificates of participation issued to construct the zoo monorail. The suit sought to compel the State to appropriate funds to repay certificate holders even though the legislature had not appropriated sufficient funds for repayment. The contract with the certificate holders stated that

the Zoo Board would seek appropriation sufficient to make installment payments; the legislature, however, limited the appropriation to an amount equal to revenues from the zoo ride, which were ultimately insufficient to repay all amounts due to certificate holders. The court stated that in light of the provisions of Minnesota law, the State could not be required to pay money for the zoo ride unless and until the legislature appropriated funds for that purpose. *Id.* at 496. The net effect of the contract, as noted by the court, was that payments were limited to whatever amount the legislature appropriated.

In addressing the second question above, attorneys in this Office reviewed MnDOT's request for proposals, MnDOT's standard bid specifications, and the contract for State Highway Construction and Maintenance Projects. The attorneys could locate no provision in these documents that limited the amount for which the State of Minnesota would be liable to project funds transferred to the State of Minnesota by the federal government or monies otherwise appropriated by the legislature for the project. Under the above statute it appears that Commissioner of Finance may certify that there is an unencumbered balance only if there is a sufficient balance in a fund, allotment, or appropriation to meet the obligation. In this case you have indicated that the contractor must advance up to \$96 million in costs because the State will not have sufficient funds to timely pay for the project. If the State does not have sufficient funds to timely pay its \$96 million obligation, it appears problematic for the Commissioner to certify that sufficient funds have been encumbered for the project.

**3. Does MnDOT have authority to enter into a trunk highway construction contract based on anticipated federal funds?**

The Minnesota Supreme Court has recognized that the State of Minnesota may enter into contracts based on anticipated funds under certain circumstances. *See e.g., U.S. Fire Ins. Co. v. Minnesota Zoological Board*, 307 N.W.2d 490; *Butler v. Hatfield*, 277 Minn. 314, 152 NW2d 484, (1967). These cases indicate that a critical provision in any contract where payment is based on anticipated funds, however, is that the State's obligation to pay must be contingent upon the receipt and appropriation of the anticipated funds. With respect to the Crosstown Project, the construction contract should state that the State of Minnesota's obligations under the contract are expressly contingent upon and limited to the receipt of project funds from the federal government. The documents referenced above that were reviewed by the attorneys in this Office do not include such language.

**4. Who bears responsibility for contractor payments if MnDOT is unable to make the agreed upon payments when they are due?**

Based on the documents reviewed by attorneys in the Office, it appears that the State of Minnesota would be responsible to make payments to the contractor if federal funds are not received. As discussed above, this does not appear to be consistent with the Minnesota Constitution or Minnesota statutes.

The Honorable Steve Murphy

May 11, 2006

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Please let me know if you have further questions.

Very truly yours,



KRISTINE L. EIDEN  
Chief Deputy Attorney General

KLE/ab

AG: #1608230-v1



# STATE OF MINNESOTA

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MIKE HATCH  
ATTORNEY GENERAL

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April 21, 2006

Kevin A. Hofstad  
Ledin & Hofstad, Ltd.  
539 Main Street  
Pine City, MN 55083

Dear Mr. Hofstad:

Thank you for your correspondence dated February 14, 2006, requesting an opinion on behalf of Pokegama Township concerning the applicability of the Uniform Municipal Contracting Law to a contract for wastewater management.

## FACTS AND BACKGROUND

You indicate that Pokegama Township owns a sewer/wastewater collection system (the "System") that serves about 443 residences in the vicinity of Pokegama Lake. The System consists of approximately 50,000 feet of PVC pipelines and 27 lift stations. The System is operated pursuant to a Wastewater Management Agreement between Pokegama Township and LJJ Wastewater Maintenance, Inc. which was let in November of 2000, following the solicitation of competitive bids, for an initial term of three years (the "Contract"). The Contract provides that the contractor is the exclusive agent for the operation and maintenance of the System. The contractor's duties include normal service, repairs and maintenance of the System, including wet well cleaning, lift station maintenance and jetting services. The contractor is also required to provide monthly reports to the township regarding the operating efficiency and maintenance of the System.

The Contract does not cover System billing, bookkeeping, financial record management, rate setting or assessments. The effluent carried by the System is treated at the Pine City wastewater plant under a separate agreement and those expenses are not paid by the contractor. The contractor is not responsible for any regulatory issues arising from the financing or operation of the System.

The Contract provides that, after the initial three-year term, it will be renewed automatically for successive one-year terms, unless one of the parties gives notice of termination prior to November 1 preceding the end of the existing term. No such notice has been given by either party. In 2005, the township paid the contractor approximately \$55,000 for services performed under the Contract. Approximately \$15,000 was for jetting and the balance was for other services. The township expects that going forward the Contract will continue to exceed \$50,000 per year.



Based on these facts, you ask whether the Contract is subject to the sealed bid requirements of Minn. Stat. § 471.345, subd. 3?

### LAW AND ANALYSIS

First, legal requirements relating to bidding for contracts of municipalities are prescribed by the Uniform Municipal Contracting Law, UMCL). Minn. Stat. § 471.345, (Supp. 2005). A town is considered to be a municipality for purposes of the UMCL. *Id.*, subd. 1. A "contract" for purposes of the UMCL, is defined as:

an agreement entered into by a municipality for the sale or purchase of supplies, materials, equipment or the rental thereof, or the construction, alteration, repair or maintenance of real or personal property.

*Id.*, subd. 2. A contract, as so defined, must be publicly bid if its cost is estimated to exceed \$50,000.  
*Id.*, subd. 3.

Second, Minnesota courts have recognized that laws requiring public bidding serve important public purposes. *See, e.g., Collier v. City of St. Paul*, 223 Minn. 376, 387, 26 N.W.2d 835, 841 (1947) where the court stated:

The reasons for requiring competitive bidding are discussed in *Collier v. City of St. Paul*, 223 Minn. 376, 387, 26 N.W.2d 835, 841 (1947):

\* \* \* The very purpose of requiring competitive bidding is to divest the officials having the power to let contracts of discretion in some respects and to limit its exercise in others. In the area of discretion is precisely where such abuses as fraud, favoritism, extravagance, and improvidence in connection with the letting of contracts are prevalent. \* \* \* The purposes of requirements for competitive bidding are to prevent such abuses by eliminating opportunities for committing them and to promote honesty, economy, and aboveboard dealing in the letting of public contracts.

Third, in several more recent cases, however, courts have construed such statutes narrowly and not applied them in cases where the contracts taken as a whole did not clearly come within the statutory definition. In examining contracts with a mixed character, courts look at how much of the particular contract falls outside of the UMCL's purview. For example, in *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331 (Minn. 1978) the court held that a contract for overall management of a public parking facility was not subject to the UMCL, notwithstanding that the contract contemplated some maintenance activities, along with more traditional management functions.

Kevin A. Hofstad  
April 21, 2006  
Page 3

Likewise, in *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm'n*, 381 N.W.2d 842, 845 (Minn. 1986), the Metropolitan Sports Facilities Commission contracted with a vendor to supply a scoreboard system for the Metrodome. As part of the contract, the commission agreed that the vendor would retain the right to sell advertising on the scoreboard and share the revenue with the commission. *Id.* at 845. The Minnesota Supreme Court held that the UMCL was not applicable to the scoreboard contract because “[m]any of the features of the agreement [were] simply beyond any fair meaning of ‘contracts for materials, supplies and equipment’ within the statute.” The court emphasized the fact that the particular agreement gave the vendor the right to sell and contract for advertising on the scoreboard. *Id.* at 846.

In Op. Att’y Gen. 707A, February 8, 1990 it was determined that the Metropolitan Airports Commission’s contracts for the performance of janitorial services were not governed by Minn. Stat. § 471.345, subd. 2. That opinion stated that:

Given the narrow construction of the bidding law now required by [the *R.E. Short* and *Hubbard* cases], it is our belief that the Minnesota courts would probably find that the janitorial services described – many of which are arguably more closely related to the routine general operation of the airport than specifically keeping the property in a state of ‘repair or efficiency’ as noted in the 1974 opinion – are not maintenance of real or personal property ...

Thus if the predominant purpose of the contract falls outside range of activities specified in the UMCL the bidding requirements will not generally be applied, even if such activities may be involved to some small degree.

Fourth, when a contract predominantly deals with activities covered by the UMCL, however, it must be bid even though it also includes services not subject to the bidding requirement in themselves. For instance, in the case of *WV Nelson Const. Co., v. City of Lindstrom*, 565 N.W.2d 434 (Minn. Ct. App. 1997) the court found a contract for design and construction services to be subject to UMCL bidding requirements since only a small percentage of the total contract budget was for design. Thus, the critical question here is whether the Contract is properly characterized as one primarily for the “repair or maintenance of real or personal property” rather than as one for other services not governed by the UMCL.

“Maintenance” is generally defined as “the care and work put into property to keep it operating and productive.” Black’s Law Dictionary (8th ed. 2004). You acknowledge that the \$15,000 per year for “jetting” is properly characterized as “maintenance” cost. The remainder of the Contract also includes numerous references to “operations and maintenance” and “normal repairs and maintenance” of the system. It specifies such duties as wet well cleaning, lift station maintenance, bearing lubrication, tightening connections, meter calibration, coolant replacement,

Kevin A. Hofstad  
April 21, 2006  
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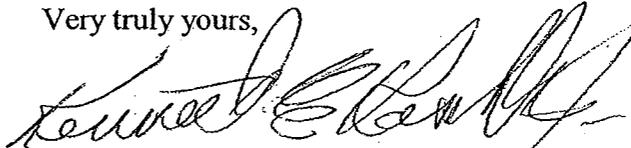
pressure washing and "repairs to the system." The contractor is also required to check the System for maintenance type problems and provide monthly reports about "the operating efficiency and maintenance." While the Contract also calls for other services such as responding to Gopher One calls and conducting certain inspections, it appears that most of the Contractor's responsibilities are focused on keeping the System operating and productive and in good repair.

In addition, many of the activities normally associated with over-all management, such as billing, collection, accounting and rate development are to be performed by the township or by Pine City rather than by the contractor.

#### OPINION

Therefore, it is our belief that, even under a narrow reading of the UMCL, Minnesota courts would likely find that the Contract is for the "repair and maintenance of real or personal property" and, therefore subject to the bidding requirements set forth in Minn. Stat. § 471.345, subd. 3 (2005) inasmuch as its cost is estimated to exceed \$50,000.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

April 13, 2006

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Soren M. Mattick  
CAMPBELL KNUTSON  
1380 Corporate Center Curve, #317  
Eagan, MN 55121

Dear Mr. Mattick:

Thank you for your correspondence of March 10, 2006 requesting our opinion concerning sewer and water connection changes in the City of Zimmerman.

You state that the City of Zimmerman has established connection fees for municipal water and sewer services. The fees were initially established at \$1,250 per "residential equivalent unit." A majority of the Council take the position that the proceeds of the connection charges should be used to fund capital improvements, including debt service, rather than to subsidize ongoing operations and maintenance. A member of the Council has taken the position that the City lacks statutory authority to impose such connection fees or to dedicate the proceeds of such fees to fund capital improvements.

In light of this difference of opinion, the City Council has requested that you seek an opinion from this Office on the following questions:

- 1) Does the City of Zimmerman have the statutory/legal authority to establish and impose water connection fees and sewer connection fees?
- 2) If the response to issue #1 is affirmative, does the City of Zimmerman have the statutory/legal authority to use the revenue generated from water connection charges and sewer connection charges for the payment of debt service (principal and interest) for water and sewer utility capital projects?

## LAW AND ANALYSIS

First, Minn. Stat. § 44.075 authorizes municipalities, including statutory cities such as Zimmerman, to construct, maintain and operate waterworks, sanitary sewer and storm sewer services. *Id.*, subd. 1(a) (copy attached).

Second, that section provides broad authority for municipalities to pay for the costs of establishing and maintaining such systems. For example, subdivision 3 provides,



Subd. 3. *Charges; net revenues.* (a) To pay for the construction, reconstruction, repair, enlargement, improvement, or other obtainment, the maintenance, operation and use of the facilities, and of obtaining and complying with permits required by law, the governing body of a municipality or county *may impose just and equitable charges for the use and for the availability of the facilities and for connections with them* and make contracts of the charges as provided in this section. The charges may be imposed with respect to facilities made available by agreement with other municipalities, counties or private corporations or individuals, as well as those owned and operated by the municipality or county itself.

(Emphasis added.)

Cities are also authorized to levy special assessments upon property benefited by construction and improvement of water and sewer services. *Id.*, subd. 4, Minn. Stat. ch. 429 (2004).

Third, Minn. Stat. § 444, 075, subd. 3d specifically provides:

Subd. 3d. *Facilities' connection charges.* Charges for connections to the facilities may in the discretion of the governing body be fixed by reference to the portion of the cost of connection which has been paid by assessment of the premises to be connected, in comparison with other premises, as well as the cost of making or supervising the connection.

Minnesota courts have held that connection charges authorized by Minn. Stat. § 444.075 may be imposed apart from, and in addition to, special assessments and other authorized charges. *See, e.g. Nordgren v. City of Maplewood*, 326 N.W. 2d 640 (Minn. 1982).

Fourth, Minn. Stat. § 444.075, subd. 2 authorizes municipalities to pledge various sources of revenue including taxes, special assessments, service charges or "other non-tax revenue" to payment of obligations issued for construction, reconstruction and improvement of water and sewer systems.

Fifth, Minn. Stat. § 444.075, subd. 3g provides:

In determining the reasonableness of the charges to be imposed, the governing body may give consideration to all costs of the establishment, operation, maintenance, depreciation and necessary replacements of the system, and of improvements, enlargements and extensions necessary to serve adequately the territory of the municipality or county including the principal and interest to become due on obligations issued or to be issued and the costs of obtaining and complying with permits required by law.

Sixth, Minn. Stat. § 444.075, subds. 3i and 3j provides:

Subd. 3i. *Collection funds for current costs.* All charges, when collected, and all moneys received from the sale of any facilities or equipment or any by-products, shall be placed in a separate fund, and used first to pay the normal, reasonable and current costs of operating and maintaining the facilities.

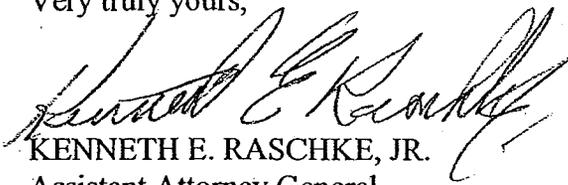
Subd. 3j. *Excess net revenues may be used for debt.* The net revenues received in excess of the costs may be pledged by resolutions of the governing body, or may be used though not so pledged, for the payment of principal and interest on obligations issued as provided in subdivision 2, or to pay the portion of the principal and interest as may be directed in the resolutions, and net revenues derived from any facilities of the types listed in subdivision 1a, whether or not financed by the issuance of the obligations may be pledged or used to pay obligations issued for other facilities of the same types.

The above provisions clearly grant a municipality authority to impose water and sewer connection fees. They also clearly provide that revenues that exceed costs may be used for debt service. Your letter does not describe the basis for the dissident council member's argument that such charges are not authorized or available for use in funding of capital improvements or debt service. Nor are we aware of any potential basis for such positions in light of the above authorities.

#### OPINION

For those reasons we answer both of your questions in the affirmative, subject to the applicable statutory conditions and limitations set forth above.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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

Attachment

AG: #1588025-v1

File - Richfield



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

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

March 6, 2006

Corrine H. Thomson  
Kennedy & Graven  
470 U.S. Bank Plaza  
200 South Sixth Street  
Minneapolis, MN 55402

**Re: Request for Opinion/Termination of Joint Police and Fire Civil Service Commission**

Dear Ms. Thomson:

Thank you for your correspondence requesting an opinion about termination of a joint police and fire civil service commission.

### FACTS AND BACKGROUND

You state that the City of Richfield established a police civil service system pursuant to Minn. Stat. ch. 419 as of October 29, 1943. A fire civil service system was established pursuant to Minn. Stat. ch. 420 on January 1, 1958. On April 23, 1973 the Richfield City Council adopted an ordinance pursuant to Minn. Stat. § 419.02, subd. 2 to establish a joint police and firefighters' civil service commission. The City is considering terminating the civil service commission, at least with respect to police department hiring and firing. It is undetermined whether the City will consider terminating civil service hiring and firing with respect to the fire department.

There is no statute that expressly addresses the abolition of a joint police and fire civil service commission. Section 419.16 of Minnesota Statutes provides that a police civil service commission may be abolished in one of two ways: (1) by the voters in accordance with Minn. Stat. § 419.17 or (2) by unanimous vote of the city council. Section 420.14 provides that a firefighter's civil service commission, except one that has been in existence for eight years or more, may be abolished by voters in accordance with that section.

Section 419.02, subdivision 2 is the sole statute that addresses joint police and fire civil service commissions. In addition to providing the means for creating a joint commission, it provides that:

*"The joint commission shall consist of three members appointed in the same manner, for the same terms, and with the same qualifications as a police civil service commission under sections 419.01 to 419.18."* (Emphasis added.)



Sections 419.01 to 419.18 include three sections that deal with abolition of a police civil service commission, those being sections 419.16, 419.17 and 419.18.

The reference to the terms and qualifications of the joint commission members as being the same as those provided for members of a police civil service commission under sections 419.01 to 418.18, is expressly limited to the qualifications and terms of the persons serving on the commission and does not negate any of the other provisions relating to the firefighters civil service systems.

Based upon this information, you present the following questions:

1. By its reference to sections 419.01 to 419.18, does section 419.02 allow a joint police and fire civil service commission to be abolished by unanimous vote of the city council, in accordance with section 419.16?
2. If the answer to the first question is "no," by what means may a joint police and fire civil service commission be abolished?
3. If the answer to the first question is "yes," is there any means by which the City could abolish the joint commission but leave in place a fire civil service commission, or would the City be required to abolish the joint commission and create a new fire civil service commission under Minn. Stat. § 420.02?

#### LAW AND ANALYSIS

First, Minn. Stat. § 419 provides for establishment and operation of a civil service system for the employment, promotion, discipline and discharge of officers and employees of municipal police departments. The system is under the supervision and control of a commission appointed pursuant to Minn. Stat. § 419.02, subd. 1.

Second, a police civil service commission established under chapter 419 can be abolished pursuant to Minn. Stat. § 419.16 which provides:

A police civil service commission created under this chapter may be abolished as follows: (1) by the voters in accordance with section 419.17; or (2) by a unanimous vote of the city counsel. Abolition by the voters shall be initiated by a petition signed by at least 25 percent of the number of legal voters voting at the last general municipal election filed with the governing body of the city requesting that the following question be submitted to the voters: "Shall the police civil service commission be abolished?"

Minn. Stat. § 419.18 provides:

The provisions of sections 419.02 to 419.18 with reference to the abolition of civil service commission shall not apply and shall have no force or effect in any city in this state where a commission has already been created.

This provision has been construed to refer to commissions created prior to April 10, 1933 when it was first enacted. *See* Op. Atty. Gen. 785e-1, December 31, 1934 (copy enclosed)

Third, Minn. Stat. ch. 420 authorizes the establishment of a fire civil service system supervised by a commission appointed pursuant to Minn. Stat. § 420.03.

Fourth, Minn. Stat. § 420.14 provides:

Any firefighter's civil service commission hereafter created pursuant to the provision of this chapter, *except where such civil service commission has been continuously in operation for eight years or more*, may be discontinued and abolished as follows: A petition signed by 25 percent of the number of legal voters voting at the last general municipal election, shall be filed with the governing body of such city and request that the following question be submitted to the voters: "Shall the firefighter's civil service commission be abolished?"

(Emphasis added.) The emphasized language has been interpreted as precluding abolition of any fire civil service commission that has been in continuous operation for eight or more years. *See* Op. Atty. Gen 688B, December 21, 1949 (copy enclosed).

Fifth, Minn. Stat. § 419.02, subd. 2 adopted by 1959 Minn. Laws, Ch. 694 §2, provides:

**Subd. 2. Transition to joint commission.** In any city establishing or having a firefighters' civil service commission, the city council may, in the ordinance establishing the police or firefighters' civil service commission or in a later ordinance adopted in the same manner, *provide that a single commission shall serve as both police and firefighters' civil service commissions. The joint commission shall consist of three members appointed in the same manner, for the same terms, and with the same qualifications as a police civil service commission under sections 419.01 to 419.18.* When existing police and firefighters' civil service commissions are combined, all the members of the two commissions shall become the members of the combined commission and shall continue to serve as members of the new commission for the remainder of the terms for which they were originally appointed. No successor shall be appointed for the members whose terms are the first, third, and fifth of the sixth to end, but at the end of every other term, one member shall be appointed for a three-year term, thus reducing the commission membership to five by the end of the first year, four by the of the second year, and three by the end of the third year.

(Emphasis added.)

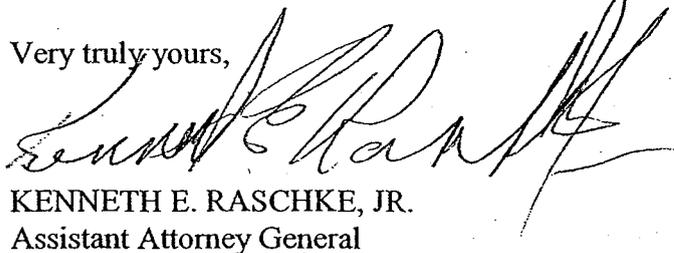
As we understand the above statutory provisions, the creation of a "joint commission" does not otherwise affect the applicability of any other provisions of chapters 419 and 420, or eliminate the existence or necessity for a commission to administer the provisions of each of these chapters. Rather the result, after any necessary transitory period, is that one set of three persons serves as the police commission and also serves as the fire commission. The reference in section 419.02, subdivision 2 to the appointment terms and qualifications is intended in our view only to address any inconsistencies between sections 419.02, subdivision 1 and 120.03, and not to supersede any other provisions of chapter 420.

Consequently, it is our opinion that, insofar as it functions as the police civil service commission, the joint body is subject to the provisions of chapter 419, including sections 419.16 to 419.18. Likewise, insofar as it serves as fire commission, it is subject to Minn. Stat. § 420, including section 420.14. We therefore answer your questions as follows:

1. The reference to sections 419.01 to 419.18 in section 419.02 does not authorize the abolition of both the police and fire civil service commissions in accordance with section 419.16. Abolition of the police commission pursuant to that section would eliminate the "joint" character of the commission, but would leave its role as the fire commission intact.
2. In our opinion, there is no statutory mechanism for abolition of both the police and fire civil service commissions, or their functions, in a single action. Rather, termination of each must be addressed separately pursuant to its own authorizing legislation. Inasmuch as the Richfield fire civil service system has been in continuous operation for more than eight years, there appears no authority under current statutes for its abolition.
3. The third question is answered by reference to questions 1 and 2.

Please contact me if you have further questions.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

**MIKE HATCH**  
ATTORNEY GENERAL

March 6, 2006

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

The Honorable Patricia Anderson  
State Auditor  
525 Park Street, #500  
St. Paul, MN 55103-2139

VIA FACSIMILE AND  
U.S. MAIL

Dear Ms. Anderson:

Thank you for your correspondence of February 22, 2006.

## FACTS AND BACKGROUND

You state that your office has received requests from Anoka, Ramsey and Washington Counties (the "Counties") for temporary exemptions from enforcement of Minn. Stat. §§ 206.57, subd. 1, 206.80(b)(2) and 206.80(b)(3) (Supp. 2005) which address requirements for electronic voting systems.

Minn. Stat. § 206.57, subd. 1 provides for the examination of electronic voting systems by the secretary of state and states in part:

If the report of the secretary of state or the secretary's designee concludes that the kind of system examined complies with the requirements of sections 206.55 to 206.90 and can be used safely, the system shall be deemed approved by the secretary of state, and may be adopted and purchased for use at elections in this state. A voting system not approved by the secretary of state may not be used at an election in this state.<sup>1</sup>

Minn. Stat. § 206.80(a) provides certain requirements an electronic voting system must meet in order to qualify for use in Minnesota elections. Section 206.80(b) which was enacted in 2005<sup>2</sup> provides:

<sup>1</sup> In addition, Minn. Stat. § 206.81 (Supp. 2005) authorizes the Secretary of State to certify a system for experimental use, prior to its approval for general use. It is not clear from the materials provided whether the Counties sought such approval prior to submitting their requests to your office.

<sup>2</sup> See Act of June 3, 2005 ch. 162, § 18, 2005 Minn. Laws 1817, 1822.

(b) An electronic voting system purchased on or after June 4, 2005, may not be employed unless it:

- (1) accepts and tabulates, in the polling place or at a counting center, a marked optical scan ballot;
- (2) creates a marked optical scan ballot that can be tabulated in the polling place or at a counting center by automatic tabulating equipment certified for use in this state; or
- (3) securely transmits a ballot electronically to automatic tabulating equipment in the polling place while creating an individual, discrete, permanent paper record of each vote on the ballot.

To date only one electronic voting system has been found to meet all state and federal<sup>3</sup> technical requirements including those forth in section 206.80(b). The Counties requesting the exemption have, however, previously invested in vote-counting equipment from a different vendor, which is not compatible for use with the approved electronic voting system. They represent that purchase of the approved system would require substantial expenditures of funds.

The Counties have identified an alternative electronic voting system that would be compatible with their current vote-counting equipment. They state that the alternative system meets the requirements of federal law and "nearly all" of Minnesota's requirements. Specifically, it may not satisfy the requirements of Minn. Stat. § 206.80(b). While the alternative system creates a paper record of votes cast, it does not create a marked optical scan ballot. Nor does it electronically transmit a ballot to separate automatic tabulating equipment. Rather, the votes are retained in the electronic voting machine, and separate results from the county's optical scan equipment are combined with the electronic votes and summarized by the electronic system.<sup>4</sup>

Minn. Stat. § 6.80 (Supp. 2005) authorizes the state auditor to grant a local unit of government a temporary, limited exemption from enforcement of "state procedural laws governing delivery of services by the local government unit."

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<sup>3</sup> The Federal Help America Vote Act (HAVA) imposes certain requirements for voting systems to be used in federal elections held after January 1, 2006. 42 U.S.C. § 15481.

<sup>4</sup> Anoka County asserts that its proposed system does satisfy Minn. Stat. § 206.80(b)(3), because the electronic voting device may, itself, be considered to be "automatic tabulating equipment." Thus, Anoka County believes that only an exemption from the requirement of secretary of state approval is needed. In the alternative, Anoka County also asks for exemption from portions of section 206.80(b).

In evaluating a request for such an exemption, the auditor:

shall determine whether a law from which an exemption for enforcement is sought is a procedural law, specifying how a local government unit is to achieve an outcome, rather than a substantive law prescribing the outcome or otherwise establishing policy. For the purposes of this section, "procedural law" does not include a statutory notice requirement. In making the determination, the state auditor shall consider whether the law specifies such requirements as:

- (1) who must deliver a service;
- (2) where the service must be delivered;
- (3) to whom and in what form reports regarding the service must be made; and
- (4) how long or how often the service must be made available to a given recipient.

Minn. Stat. § 6.80, subd. 3(b).

Based upon these facts, you seek the opinion of this Office as to whether Minn. Stat. §§ 206.80(b)(2), 206.80(b)(3) and 206.57, subd. 1 are substantive or procedural in nature, for purposes of Minn. Stat. § 6.80.

#### LAW AND ANALYSIS

First, as noted in Op. Atty. Gen. 629a, May 9, 1975, opinions of this Office do not generally undertake to resolve factual issues. Therefore, we will not address here whether the alternative voting systems proposed by the counties in fact perform in accordance with particular state or federal standards. Rather we will assume, for purposes of this opinion, that the proposed systems do not fully satisfy the standards set forth in Minn. Stat. § 206.80(b), but otherwise satisfy the performance requirements of state and federal law.

Second, as you note, Minn. Stat. § 6.80, subd. 3(b) defines a procedural law as one that specifies "how a local government is to achieve an outcome," as opposed to substantive law "prescribing the outcome or otherwise establishing policy." We do not find those definitions particularly helpful since virtually any statute or regulation can be portrayed as a means to achieve or further some broader purpose or "outcome." In this case, for example, the Counties argue that the specific criteria listed in section 206.80(b) merely describe how they and other election authorities are supposed to achieve the desired "outcomes" generally described in section 206.80(a).<sup>5</sup> However, it is unclear how the specific standards for recording and counting

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<sup>5</sup> (a) An electronic voting system may not be employed unless it:

- (1) permits every voter to vote in secret;
- (2) permits every voter to vote for all candidates and questions for whom or upon which the voter is legally entitled to vote;

(Footnote Continued on Next Page)

ballots contained in part (b) can be seen as any less “substantive” than the more general proscriptions in part (a). Both, in fact, specify the way in which electronic voting systems must perform if they are to be used in Minnesota elections. The fact that some of the requirements may go beyond those imposed under HAVA makes them no less substantive or enforceable. Furthermore, in this instance, we do not believe that consideration of the items listed in section 6.80, subd. 3(b)(1)(4) are helpful in the analysis of Minn. Stat. § 206.80(b) which itself contains none of the listed information.

Third, courts in Minnesota and elsewhere have addressed the distinction between procedural and substantive laws in a number of other contexts and have acknowledged that the line between procedural and substantive laws can be indistinct and can shift depending upon the context in which the problem arises. *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 471, 85 S.Ct. 1136, 1144. Furthermore, it can often be the case that particular statutes have both procedural and substantive components. *See, e.g., Lombardo v. Seylow-Weber*, 589 N.W.2d 702 (Minn. Ct. App. 1995) *rev. denied*, April 27, 1995 (requirement for supporting affidavits in malpractice case was substantive, but time limit for service of the affidavits was procedural).

In general, however, the cases consistently indicate that substantive laws are those that create, define and regulate rights<sup>6</sup>, relate to rights and duties giving rise to a cause of action<sup>7</sup> or create, define and regulate rights and duties.<sup>8</sup> Procedural laws on the other hand do not create new legal rights, duties, causes of action or defenses,<sup>9</sup> and while unrelated to the “merits” of a

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(Footnote Continued From Previous Page)

- (3) provides for write-in voting when authorized;
- (4) automatically rejects, except as provided in section 206.84 with respect to write-in votes, all votes for an office or question when the number of votes cast on it exceeds the number which the voter is entitled to cast;
- (5) permits a voter at a primary election to select secretly the party for which the voter wishes to vote;
- (6) automatically rejects all votes cast in a primary election by a voter when the voter votes for candidates of more than one party; and
- (7) provides every voter an opportunity to verify votes recorded on the permanent paper ballot or paper record, either visually or using assistive voting technology, and to change votes or correct any error before the voter’s ballot is cast and counted, produces an individual, discrete, permanent, paper ballot or paper record of the ballot cast by the voter, and preserves the paper ballot or paper record as an official record available for use in any recount.

<sup>6</sup> *Id. at, Meagher v. Kaili*, 251 Minn. 477, 488, 88 N.W.2d 871, 879-80 (1958)

<sup>7</sup> *See, e.g., Keeran v. Myers*, 172 S.W.3d 466, 469 (Mo. Ct. App. 2005)

<sup>8</sup> *Zanetsky v. Molecular Biosystems Inc.*, 464 N.W.2d 546, 548 (Minn. Ct. App. 1990)

<sup>9</sup> *See, e.g., State v. Johnson*, 514 N.W.2d 551, 555 (Minn. 1994)

case,<sup>10</sup> provide for the manner in which substantive rights or duties may be enforced or compliance determined.<sup>11</sup>

In the instant case it seems clear that the legislature, by enacting Minn. Stat. § 206.80(b), has prescribed specific, objective standards which electronic voting systems must meet to be used in Minnesota elections and has imposed a duty upon election authorities to employ only equipment that satisfies those standards.<sup>12</sup> In the terms employed by Minn. Stat. § 6.80, satisfaction of those specific requirements is a required “outcome” to be achieved by all election authorities in employing electronic voting systems.

Minn. Stat. § 206.57, subd. 1, however does not, in itself, establish standards that must be met by voting systems. Rather, it prescribes the mechanism whereby compliance with standards which are imposed elsewhere is to be determined. Therefore, that subdivision would appear to be “procedural” within the above definitions. As such, the specific requirement for secretary of state review and approval of a system might be subject to exemption from enforcement if the auditor finds that the other criteria in section 6.80 are met. However, an exemption from that requirement for review and approval would not in itself exempt the Counties from meeting the substantive standards imposed by state and federal law, including those in Minn. Stat. § 206.80. Thus, while the Counties might be spared the necessity of securing secretary of state approval, they might also forego any assurance, protection or other benefits such approval would provide.

Finally, as noted above, while Anoka County believes that the system it would like to use meets the requirements of section 206(b)(3), it seeks an exemption from that section if the state auditor disagrees with the County’s representation of compliance. While section 6.80 authorizes the auditor to grant limited exemptions from enforcement of certain procedural laws, however, it does not authorize or require the auditor to determine compliance with substantive legal requirements or to assume the responsibilities of the secretary of state for the procedural functions that are the subject of a waiver request. Therefore, we do not believe that the state auditor is authorized under section 6.80 to make determinations concerning the compliance of electronic voting systems with HAVA or Minnesota statutory requirements.

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<sup>10</sup> See, e.g., *Biosystems Inc.*, 464 N.W.2d at 550

<sup>11</sup> *Id.* at 548.

<sup>12</sup> 2006 Minn. Laws ch. 162 which adopts section 206.80(b) is entitled in part: “An act relating to elections; *setting standards for* and providing for acquisition of electronic voting systems....”

Patricia Anderson  
August 3, 2006  
Page 6

Please contact me if you have further questions.

Very truly yours,

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Assistant Attorney General

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AG: #1571001-v1



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

February 28, 2006

SUITE 1800  
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TELEPHONE: (651) 297-2040

Wayne H. Swanson  
Swanson Law  
213 R. North Broadway  
P.O. Box 555  
Crookston, MN 56716-0555

**Re: City of Winger/Request for Attorney General's Opinion**

Dear Mr. Swanson :

Thank you for your correspondence of January 5, 2006.

## FACTS AND BACKGROUND

Your state the statutory City of Winger has a fire department which is a "funded city department." The department is staffed by volunteers but is not officially considered to be a "volunteer" department. Additional information provided with your letter states that the Winger Fire Department consists of 14 volunteer personnel, two of whom are members of the City Council. The person who has served as fire chief since 1991 has also served on the city council during that time. The chief abstains from council actions pertaining to the department budget. You state that the chief or assistant chief presides at "fire meetings" which, among other functions, appear to play a role annually in the selection of a chief.<sup>1</sup> For several years no other qualified person has expressed willingness at such a meeting to assume the position. Based upon this information, you request an opinion on the following question: Is the office of council member for a statutory city incompatible with the position of fire chief for the same city?

## LAW AND ANALYSIS

First, at common law, two public offices that are "incompatible" may not be held by one person. Offices are considered to be incompatible when declared to be so by statute or when the functions of the two are inconsistent such that antagonism would result if one person attempted

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<sup>1</sup> This process would seem more in keeping with the selection of officers in an independent private organization than with the statutory provisions placing the responsibility for appointment of statutory city officers with the council. See Minn. Stat. § 412.111.

to perform the duties of both. If the offices are incompatible, the problem cannot be resolved by the incumbent's abstaining from the conflicting duties of one or both positions. Rather, acceptance of the second position works a vacation of the first. *See, e.g., State ex rel. Hilton v. Sword*, 157 Minn. 263, 196 N.W. 467 (1923); Op. Atty. Gen. 358e-9, April 5, 1971 (copies enclosed). Thus, for example the office of school board member and county commissioner have been held incompatible due to the differing responsibilities and constituencies of the school board and county board. *Id.* Likewise, the offices of city and county attorney have been found incompatible under the common law test due to the potential for conflict between the interests of city and county governments in many areas. *See, e.g., Ops. Atty. Gen. 358a-1*, July 27, 1939, 358e-3, July 29, 1997 (copies enclosed).

Second, incompatibility has also been said to arise where one position is subordinate to the other. It was on that basis that Op. Atty. Gen. 358e-9 April 5, 1971 concluded that the "office" of village fire chief was incompatible with that of village council member.

Third, in Minnesota, the doctrine of incompatibility has not been applied to all governmental positions. Rather it has been generally limited to positions constituting public "offices" as opposed to positions constituting employment or other contractual relationships. Therefore, previous opinions have held that the doctrine does not prevent city council members from serving as members of their cities' fire departments. *See, e.g., 90-E* April 17, 1978. Likewise, an assistant county attorney is not precluded from performing legal services on a contract basis for a city within the county. *See Ops. Atty. Gen. 358e-3*, August 18, 1982, July 29, 1007. *See also Op. Atty. Gen. 90a-1*, April 22, 1971 (copies enclosed). (Village may contract for services of council members if certain statutory requirements are met.)

Fourth, the Minnesota Supreme Court has articulated the distinction between a public office and public employment as follows:

Whether a person holds a disqualifying public office is not to be determined merely by the title of his position. A more appropriate test of whether he holds such an office 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, *State ex rel. Anderson v. Erickson*, 180 Minn. 246, 230 N.W. 637 (1930), holding that a legislator could not serve as a county commissioner, illustrates this test.

*McCutcheon v. City of St. Paul*, 298 Minn. 443, 447, 216 N.W.2d 137, 139 (1974) (deputy police chief, police lieutenant and patrolman are not within the prohibition of Minn. Const. Art. art. IV, § 5 against legislators holding other public "office").

Fifth, the powers and duties of members of the council of a statutory city are prescribed by statute, and plainly meet the *McCutcheon* definition of a public office.<sup>2</sup> However, the position of "fire chief" for a statutory city is not created, nor are its duties prescribed by statute. Rather, the position may be created, and its duties defined by the council. *See*, Minn. Stat. § 412.111.

Therefore, in our view, the council itself is in the best position to determine both whether the position of fire chief should be considered a "public office" for incompatibility purposes, and whether the powers and duties imposed upon it by the council are antagonistic to those of a council member.

We have considered the terms of Minn. Stat. § 412.152, which provides:

The offices of mayor of a statutory city and the fire chief of an independent nonprofit firefighting corporation serving the city are not incompatible offices, and a person may concurrently hold both offices if all of the following conditions exist:

- (1) the mayor does not appoint the fire chief;
- (2) the mayor does not set the salary or benefits of the fire chief;
- (3) neither officer performs functions that are inconsistent with the others;
- (4) neither officer in the officer's official capacity contracts with the other; and
- (5) the mayor does not approve the fidelity bond of the fire chief.

The purpose of this section, enacted by 1997 Minn. Laws ch. 23 § 1 is not clear. It appears to address a situation that would not fall under the incompatible office doctrine in any event. As defined by the statute, the fire chief position would not be a public office at all. Rather it would be an office in a private corporation. Furthermore, the conditions set forth in paragraphs (1) through (5) generally describe positions that would not likely be incompatible under common-law principles. Whatever its purpose, however, we do not believe that Section 412.152 supports a conclusion that every position denominated as "fire chief" in a city department is incompatible with council membership.

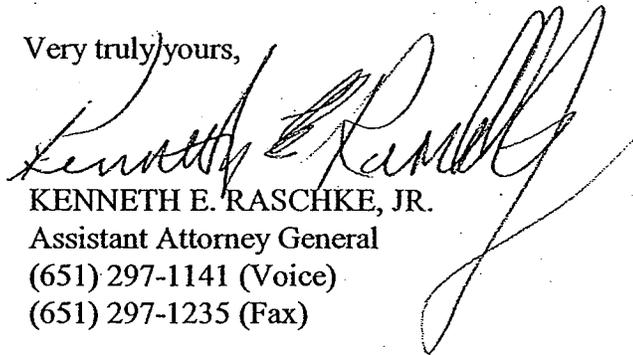
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<sup>2</sup> *See, e.g.*, Minn. Stat. §§ 412.021, 412.111, 412.191, 412.221.

Wayne H. Swanson  
February 28, 2006  
Page 4

It should be noted that even if it is determined that the positions of council member and fire chief are not incompatible *per se*, any contracts of the council pertaining to the fire department that would affect the personal financial interest of any of the council members would be within the prohibitions of Minn. Stat. §§ 412.311 and 471.87 unless approved unanimously in accordance with one of the exceptions contained in Minn. Stat. §§ 471.88-471.89.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General  
(651) 297-1141 (Voice)  
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Enclosures

AG: #1561521-v1



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

# FILE

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**MIKE HATCH**  
ATTORNEY GENERAL

December 16, 2005

Ms. Patricia Anderson  
Minnesota State Auditor  
525 Park Street, Suite 500  
St. Paul, MN 55103-2139

Dear Ms. Anderson:

Thank you for your correspondence of October 5, 2005 requesting an opinion from the Attorney General with respect to the questions set forth below.

### FACTS AND BACKGROUND

In the First Special Session of 2005, the legislature enacted a provision that states, in part, as follows:

[469.3201] Subd. 2. AUDITS. The Tax Increment Financing, Investment and Finance Division of the Office of the State Auditor must annually audit the creation and operation of all job opportunity building zones and business subsidy agreements entered into under Minnesota Statutes, sections 469.310 to 469.320.

Act of July 13, 2005, ch. 3, art. 7, § 19, subd. 2, 2005 Minn. Laws 1st Spec. Sess. 2273, 2413. Chapter 3 is an Omnibus Tax measure which includes a number of appropriations of money. *See, e.g., Id.*; art. 7, § 18; art. 10, § 23; art. 11, §§ 9-12. Most of the provisions of that Act have specified effective dates, including all of the appropriations which are covered by article 11, § 14 as follows:

Appropriations in this act are effective retroactively from July 1, 2005 and supersede and replace funding authorized by order of the Ramsey County District Court in Case No. C9-05-5928, as well as by Laws 2005, First Special Session chapter 2, which provided temporary funding through July 14, 2005.

No effective date is specified for the quoted Job Opportunity Building Zone ("JOBZ") audit requirement.

You state that the Tax Increment Financing Investment and Finance Division ("TIF Division") was created administratively within the Office of the State Auditor ("OSA") as a result of the enactment in 1995 of Minn. Stat. § 469.1771, subd. 1, which gave the OSA responsibilities related to enforcement of tax increment financing ("TIF") laws. Act of June 1,



1995, ch. 264, art. 5, § 34, 1995 Minn. Laws 2872, 2986. That Act also provided for a percentage of local TIF monies to be paid to the State, and created a standing appropriation of that money to the OSA:

[F]or the cost of (1) the financial reporting of tax increment financing information and (2) the cost of examining and auditing of authorities' use of tax increment financing as provided under section 469.1771, subdivision 1. Notwithstanding section 16A.28 or any other law to the contrary, this appropriation does not cancel and remains available until spent.

*Id.* 533, Minn. Stat. § 469.177, subd. 11 (2004).

Since the effective date of the 1995 legislation, the TIF Division of the OSA has been funded exclusively through the money appropriated by Minn. Stat. § 469.177, subd. 11 and has confined its activities to TIF compliance enforcement. You state that the 2005 legislation does not make any reference to the funding of the JOBZ auditing duties. Nor was there any change to the language of section 469.177, subd. 11 quoted above.

Based upon the facts you ask the following questions:

1. May the State Auditor's Office offset the cost of JOBZ audits required by 2005 Minn. Laws, 1st Spec. Sess. ch. 3, art. 7, § 8, section 19, with captured TIF deducted by county auditor's pursuant to Minn. Stat. § 469.1711, subd. 11?
2. Does the JOBZ audit requirement contained in 2005 Minn. Laws 1st Spec. Sess. ch. 3, take effect on July 1, 2006?

#### LAW AND ANALYSIS

First, Minn. Const. art. XI, § 1 provides:

No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.

In addition, Minn. Stat. § 16A.139 states in part:

It is illegal for any official or head of any state department, or any employee thereof, to use moneys appropriated by law, or fees collected for any other purpose than the purpose for which the moneys have been appropriated.

Second, the courts have held that legislation creating a state liability or directing an action by state officials does not, in itself, constitute an appropriation that would permit the expenditure of state funds. *See, e.g., Butler v. Hatfield*, 277 Minn. 314, 323-24, 152 N.W.2d 484, 492 (1967).

Third as you have noted:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.

Minn. Stat. § 645.16 (2004). However, as the Minnesota Supreme Court has stated:

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.

*Id.* See also *Green Giant Co. v. Comm'r of Revenue*, 534 N.W.2d 710 (Minn. 1995). In the instant case it might well be that the legislature, in imposing responsibility for JOBZ audits specifically upon the TIF Division of the OSA, assumed that those functions would be supported by the same funding source as the Division's other activities. Unfortunately, Minn. Stat. § 469.177, subd. 11 does not, by its terms, appropriate money for the activities of the OSA or the TIF Division in general. Rather, it unambiguously appropriates funds for specified activities related solely to tax increment financing. Consequently, it seems clear that the imposition of new responsibilities on the TIF Division cannot in itself be deemed to authorize expenditure by that Division of funds appropriated for another purpose.

Fourth, Minn. Stat. § 645.02 (2004) provides, in part:

Each act, except one making appropriations, enacted finally at any session of the legislature takes effect on August 1 next following its final enactment, unless a different date is specified in the act.

...

An appropriation act or an act having appropriation items enacted finally at any session of the legislature takes effect at the beginning of the first day of July next following its final enactment, unless a different date is specified in the act.

While 2005 Minn. Laws 1st Spec. Sess. ch. 3, art. 7, § 19, subd. 2 does not itself contain any appropriations, it is clear that chapter 3 is an act "having appropriation items." The general presumption of section 645.02 is directed to an "act" in its entirety. It does not purport to address individual portions of an act, or provide that only those parts of an act that actually appropriate money are to become effective on the following July 1. Nor may individual sections of a piece of legislation be reasonably considered a separate "act." The title of chapter 3 itself specifies that it is "[a]n act relating to financing and operations of government . . . appropriating money." Therefore, the presumptive effective date of all of its provisions, for which no other effective date is specified in the act, would be the first of July, "next following its enactment."

Ms. Patricia Anderson

December 16, 2005

Page 4

We must presume that the legislature was aware of the provisions of Minn. Stat. § 645.02 when it enacted chapter 3. We must also presume that the legislature was aware that July 1, 2005 had passed before the bill was approved by the legislature and presented to the governor. Indeed, that date had passed before HF 138, which became chapter 3, and its senate companion bill SF 106 were even introduced in their respective houses. 2005 Journal of the House, 1st Spec. Sess, p. 133, July 13, 2005; 2005 Journal of the Senate 1st Ex. Sess. p. 605, July 13, 2005. Therefore, if the legislature intended the JOBZ audit provision of the chapter to take effect at some time other than July 1, 2006, we would expect that such a date would have been specified.

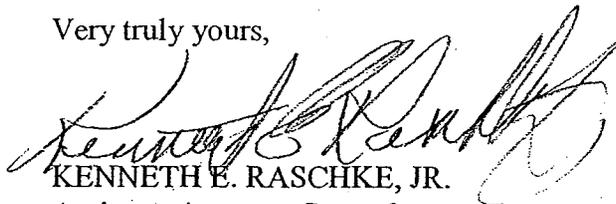
Finally, you point out in your letter that subdivision 1 of the section containing the JOBZ audit requirement specifies that certain data must be estimated by the Commissioner of Revenue by September 1, 2005 which perforce establishes an effective date earlier than July 1, 2006 for that subdivision. However, aside from the fact that both relate to the JOBZ Program, the subject matter of subdivision 1 has no relationship to, or effect on, the auditor's duties under subdivision 2. Therefore, while subdivision 1 seems to have a *de facto* effective date, that fact provides no real guidance concerning subdivision 2.

Consequently, it is our view that the auditor's JOBZ responsibilities under 2005 Minn. Laws ch. 3, art. 7, § 19, subd. 2 will take effect on July 1, 2006.

#### OPINION

For the foregoing reasons, we answer your first question in the negative and your second question in the affirmative. However, given your sense that the underlying legislative intent as to those issues is not clear, your Office may want to seek clarifying legislation when the legislature next convenes.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

(651) 297-1141 (Voice)

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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

November 22, 2005

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

Earl E. Maus  
Cass County Attorney  
303 Minnesota Avenue  
P.O. Box 3000  
Walker, MN 56484-3000

Dear Mr. Maus:

Thank you for your correspondence of August 31, 2005 requesting an opinion concerning the authority of Cass County to exercise planning and zoning authority over Indian lands.

## FACTUAL AND BACKGROUND

You state that the Leech Lake Band of Ojibwe (the "Band") is acquiring from a private individual, fee-simple title to some 400 acres of land within the boundaries of the Leech Lake Reservation. You further state that the Band will lease the land for \$5 million to a development company for the construction of housing. Normally, such development outside of city boundaries would be subject to regulation by Cass County through its Environmental Services Department. The Band has, however, challenged the County's authority to regulate the development. You point out that the Leech Lake Reservation is an "open" reservation where most of the land is held in fee simple by non-members of the Band. You indicate that The Band has not previously imposed its own land use regulations upon lands within the reservation. Based upon these facts, you seek the Opinion of this Office as to whether a political subdivision may exert land-use regulatory authority over land held in fee by a tribal government or tribal members within the boundaries of an Indian reservation such as Leech Lake.

After receiving your letter, we received information from an attorney for The Band stating that the land in question comprises approximately 80.78 acres rather than 400, and will be leased at no cost to the Leech Lake Housing Authority, a division of Tribal Government, for development of low-cost housing for tribal members. In addition, the Band's attorney states that the Band has adopted an "Interim Land Use Ordinance" which is similar to, and at least as restrictive as, the County's controls.

## LAW AND ANALYSIS

As noted in Op. Atty. Gen. 629a, May 9, 1975 (copy enclosed) opinions of the Attorney General are not generally directed to the resolution of issues of fact. Consequently, we will not

seek to resolve any discrepancies between the facts supplied in your letter and those submitted by The Band's attorney.

First, as a general proposition, an Indian Tribe is recognized as having inherent sovereign authority to govern its own affairs and to regulate actions of tribal members on its reservations, subject to the authority of Congress to modify or eliminate such power. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978). Therefore, absent an express grant of authority by Congress, a state or local government cannot ordinarily apply its laws or ordinances to the actions of Tribes or of tribal members on their reservations. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083 (1987) (ordinances regulating Poker and Bingo); *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102 (1976) (personal property tax on mobile home).

Second, the courts have held, however, that states may assert jurisdiction over reservation acts of tribal members, without express congressional authority in "exceptional circumstances" where a state can demonstrate that its interests are sufficiently strong to overcome traditional notions of tribal sovereignty and federal policies favoring tribal self-determination. *See Cabazon Band*, at 214-15, 107 S. Ct. at 109 quoting *New Mexico v. Mescaleno Apache Tribe*, 462 U.S. 324, 331-332, 103 S. Ct. 2378, 2385 (1983). For example in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069 (1980), the Court held that the State's interest in tax collection was sufficient to justify requiring Indian smoke-shops to impose state tax on cigarettes sold to non-members of the Tribe. In contrast, in *Cabazon*, the state's interest in controlling organized crime was not sufficient to permit the state to outlaw Indian bingo.

Third, in 18 U.S.C. § 1162 and 28 U.S.C. § 1360, commonly referred to collectively as "Public Law 280," Congress has granted substantial authority for states to apply their criminal laws, and, to a lesser extent, civil laws to Indian activities on certain reservations.<sup>1</sup> By its terms

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<sup>1</sup> 18 U.S.C. § 1162(a) provides:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory;

Minnesota All Indian country within the State, except the Red Lake Reservations.

28 U.S.C. § 136(a) provides:

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application  
(Footnote Continued on Next Page)

that act applies to all reservations in Minnesota except for Red Lake. *Id.*<sup>2</sup> However, the courts have determined that this authority does not extend to state laws that are determined to be "civil/regulatory" in nature. *See, e.g., Cabazon Band.* There the Court described the distinction as follows:

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as *civil/regulatory* and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

480 U.S. at 209, 107 S. Ct. at 1088.

Fourth, judicial analysis of the applicability of state and local laws to actions involving lands in Indian country appears similar, but not identical, to that pertaining to regulation of Indian conduct. While adhering to the principle that state laws will generally not apply to Indians and Tribes on their reservation, the result in a number of cases has turned upon the history and state of title of the land in question. For example in *Cass County v. Leech Lake Band of Chippewa*, 524 U.S. 103, 118 S. Ct. 1904 (1998), the Court held that, although Indian land on reservations cannot normally be taxed, reservation lands which had been allotted to individual Indians, released from trust status and later reacquired by the Band were taxable by the State and County on the grounds that Congress manifested its intent to authorize taxation when it made the lands "freely alienable," and reacquisition by the Band did not reestablish exempt status. *Id.* at 115, 118 S.Ct. at 911.

Likewise, the Court in *City of Sherrill New York v. Oneida Indian Nation of New York*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1487 (2005) held that the Tribe's open market purchase of parcels of land that were previously part of the Tribe's reservation, did not enable the Tribe to reassert sovereignty over the land thereby avoiding city property taxes. On the basis of the *Sherrill* decision, the Federal District Court in *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F. Supp.2d 203 (N.D.N.Y. 2005) summarily reversed its previous holding that land acquired in fee by the Tribe within the historic boundaries of its reservation was immune from state and local zoning regulations. *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp.2d. 128 (N.D.N.Y. 2004). *See also Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996). It appears, however, that those

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(Footnote Continued From Previous Page)

to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

Minnesota All Indian country within the State, except the Red Lake Reservations.

<sup>2</sup> In 1973, the State retroceded criminal jurisdiction over the Bois Forte Reservation to the Federal Government under 25 U.S.C. § 1323. *See State v. Stone*, 572 N.W.2d 725, 729, n.3 (Minn. 1997).

cases turned upon a determination that the land in question was not within "Indian country," because it was no longer within a reservation and was not part of a "dependent Indian community" within the meaning of 18 U.S.C. § 1151.<sup>3</sup>

In the case of *Brendale v. Confederated Tribes of The Yakima Nation*, 492 U.S. 408, 109 S. Ct. 2994 (1989), the Court held, in a plurality decision, that the Indian Tribe did not have authority to preempt county zoning regulations applicable to land owned in fee by non-members in the "open" portion of its reservation but did have such authority in part of the reservation that was generally closed to the general public. That case, however, did not address the converse question of county authority to impose its regulatory structure upon use of reservation lands owned in fee by the Tribe, or individual Indians.

Fifth, on the other hand, the court in *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002) found that reservation land owned in fee simple by Tribe members was not subject to county zoning controls. The court declined to extend the *Cass County* case to subject Indian fee-owned lands to general jurisdiction of states and local governments over all lands relating to such matters. See also, *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 112 S. Ct. 683 (1992) where the court held that the county could impose *ad valorem* taxes on reservation lands owned in fee by Indians but could not impose excise tax on the sale of such lands. The *Gobin* court also found that the county's various interests in regulating land use were not sufficient to overcome the Tribe's overriding interest in self-determination. 304 F.3d at 917-18.

The facts as presented by you and by the Band's attorney appear more analogous to the *Gobin* case than to cases such as *Brendale*, *Cass County*, or *Union Springs*. There appears no dispute that the land is within the reservation and, therefore, is in "Indian country." Zoning regulations unlike taxes, would appear to fall within the definition of "civil regulatory" measures, *i.e.*, they deal with activities and uses of property that are not prohibited or contrary to public policy as such, but are merely regulated as to location and design. Furthermore, the tribal interests in determining the appropriate uses for land owned by it or its members are plainly

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<sup>3</sup> That section provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

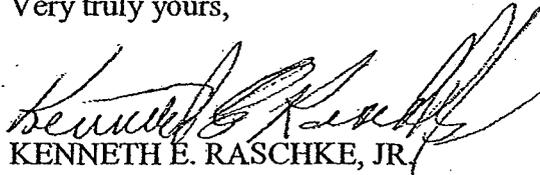
(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

more central to tribal self-determination than is authority to control the actions of non-members on the reservation.

**OPINION**

Therefore, absent an affirmative showing of "exceptional circumstances" by the County,<sup>4</sup> it is likely, in our opinion, that a court would find the fee-owned tribal land in question to be exempt from county land use controls.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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

AG: #1512432-v1

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<sup>4</sup> We note, however, that there appears no indication from the material supplied that the proposed housing development would be impermissible under the County's land-use regulations.



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

# FILE

**MIKE HATCH**  
ATTORNEY GENERAL

November 21, 2005

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

Patricia Anderson, State Auditor  
Office of the State Auditor  
525 Park Street, #500  
St. Paul, MN 55103-2139

Dear Ms. Anderson:

Thank you for your correspondence of October 5, 2005 seeking an opinion concerning application of the "salary cap" provisions of Minn. Stat. § 43A.17, subd. 9 to the compensation of certain employees of Dakota County.

## FACTS AND BACKGROUND

Your letter and accompanying documents set forth the following information:

Pursuant to collective bargaining agreements and personnel policies, employees of Dakota County accrue "Flex Leave" time in lieu of traditional separate vacation and sick leave balances. Normal accrual rates range from 160-304 hours per year for a full-time employee, depending upon the employee's length of service. Most employees may convert a certain proportion of their Flex Leave balances each year either to a monetary contribution to the County's deferred compensation plan, or to offset the employee's costs for other benefits. In addition, at the end of every year, the balance of each eligible employee's unused Flex Leave hours in excess of 1,000 hours is converted to a monetary contribution to the employee's post-employment health care savings plan account (HCSA) which is maintained by the Minnesota State Retirement System in accordance with Minn. Stat. § 352.98. Upon retirement, each employee receives a cash payment of 25% of the employee's flex leave balance and the remainder is transferred to the employee's HCSA.

Minn. Stat. § 43A.17, subd. 9 (Supp. 2005) sometimes called the "salary cap" law, limits the salary and value of all other forms of compensation for an employee of a political subdivision to 110 percent of the governor's salary,<sup>1</sup> subject to increase in specific cases by action of the State Commissioner of Employee Relations. Certain benefits are, however, excluded from that calculation. These include:

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<sup>1</sup> That limit was raised from 95 percent as of August 1, 2005 with an adjustment to be made each January based upon any increases in the Consumer Price Index. See Act of June 2, 2005, ch. 169, 2005 Minn. Laws 1976.

employee benefits that are also provided for the majority of all other full-time employees of the political subdivision, vacation and sick leave allowances, health and dental insurance, disability insurance, term life insurance, and pension benefits or like benefits the cost of which is borne by the employee or which is not subject to tax as income under the Internal Revenue Code of 1986;

*Id.*, subd. 9(c)(1).

Dakota County employees whose compensation level is at the maximum permitted under the salary cap law accrue Flex Leave hours based upon years of service, as do other employees. In addition, each such employee is credited at the end of each year with additional Flex Leave hours based upon the difference between the employee's actual salary as permitted under section 43A.17 and a "nominal salary" which is said to represent the salary the employee would be paid but for the salary cap. This difference is considered to represent consideration for "uncompensated hours." Employees whose salaries are at the salary cap are not permitted to convert Flex Leave hours to deferred compensation contributions or to offset other benefit costs. As with other employees, however, accumulated leave hours in excess of 1,000 remaining at the end of the year are converted to HCSA contributions.

Your office has expressed the view that the value of the "uncompensated hours" added to the Flex Leave balances of employees subject to the salary cap must be included in computing their total compensation because such additional hours are not available to most other Dakota County employees and because computation of the added leave hours is based upon a "nominal" salary in excess of that permitted by section 43A.17. The County takes the position that such added hours may be excluded because they represent vacation and sick leave allowances which are excluded from the computations by Minn. Stat. § 43A.17, subd. 9(c) (1). In addition, the County asserts that the conversion feature for Flex Leave balances exceeding 1,000 hours to HCSA contributions is applied to all employees, and is in the nature of a "pension" benefit not subject to federal income tax, which is another type of benefit that is excluded from the salary cap computation under Sections 43A.17, subd. 9(c)(1).

Based upon these facts, you present the following questions:

1. In order to be excluded from the salary/compensation calculation for compliance for Minn. Stat. 43A.17, subd. 9, must an employee benefit be provided for a majority of all other full time employees of the political subdivision?
2. If not, is there any limitation on the amount of hours or dollars an employee can be automatically credited annually in a Flex Account, Flex Leave Balance Account or Post Employment Medical Account under this salary/compensation limiting statute?

## LAW AND ANALYSIS

First, as noted above, Minn. Stat. § 43A.17, subd. 9(c)(1) lists several items that are excluded from computation of limited compensation:

1. Benefits also provided to a majority of other employees;
2. Vacation and sick leave;
3. Health and dental insurance;
4. Disability insurance;
5. Term Life Insurance;
6. Pension and similar benefits.

The plain statutory language indicates that each of the listed class of benefits is to be excluded. There is no wording in that provision that states that the items listed after the first are intended merely as examples. As a general proposition, statutory language is to be construed to give effect to its plain meaning. *See* Minn. Stat. § 645.16 (2004).

Second, where statutory language is ambiguous, certain presumptions may be applied in discerning legislative intent. One such presumption is that the legislature intends that all parts of a statute are to be given effect, and that no parts should be treated as superfluous. *See, e.g.,* Minn. Stat. §§ 645.16, 645.17(2) (2004); *Owen v. Federated Mut. Implement & Hardware Ins.*, 328 N.W.2d 162, 164 (Minn. 1983). If section 43A.17, subd. 9(c)(1) were construed such that the exclusion would apply only to benefits falling within the first category, the remainder of the items mentioned would seem superfluous. Therefore, such an interpretation would not be favored.

Third, under the principle of *ejusdem generis*, general words following a series of specific items are to be construed as limited to items of like kind. *See, e.g.,* Minn. Stat. § 645.08 (2004); *Krech v. Krech*, 624 N.W.2d 310 (Minn. Ct. App. 2001). That doctrine has also been applied where the general term precedes the more specific series. *I.e.,* the general term is, again, limited by the more specific ones. *See* 2A *Sutherland Statutory Construction* § 47.17 (6th Ed. 2000). However, we are aware of no authority for the proposition that the principle can be applied in reverse, *i.e.,* that a series of specific terms should be limited by a more general one. Therefore, there would seem no basis upon which to conclude that benefits such as vacation and health insurance enumerated in Minn. Stat. § 43A.17, subd. 9(c)(1) may be excluded only when the same benefits are provided to most other employees.

Fourth, your analysis appears to consider the size or amount of a benefit as a benefit in itself, *i.e.,* that an employee who receives more paid leave time than other employees has received a separate benefit not provided to other employees. However, section 43A.17, subd. 9(c) makes no reference to the relative size or value of exempted benefits. It seems likely that the reference in section 43A.7, subd. 9(1) to "employee benefits that are also provided for the majority of . . . other . . . employees" is intended to describe the type or identity of the benefit, rather than its size or value. That would seem especially true in the case of

benefits such as vacation and sick leave, which customarily vary in accrual rates depending upon several factors. Therefore, the fact that one employee receives more leave time than another would not, in itself, lead to the conclusion that the employee received a "benefit" not available to other employees.

Fifth, the fact that the amount of additional leave granted to an employee is computed with reference to a hypothetical "nominal salary" above that permitted by the salary cap does not impact the analysis. This is because leave time is expressly excluded from the computation of salary. So long as the amount of leave granted is not itself unreasonable, the means whereby it is calculated would not seem important. Assuming that the County is authorized to grant highly compensated employees additional leave hours each year, the number of hours could easily be stated outright in the contract or derived from any number of calculations. Cf. Op. Atty. Gen. 104a-9, December 28, 1994, which concluded that substantial "initial leave balances" established for the Hennepin County Administrator were not included in determination of the Administrator's permissible severance pay under Minn. Stat. § 465.722 (Supp. 1993), notwithstanding that up to 800 hours of accumulated leave could be paid to the Administrator upon his termination.<sup>2</sup>

Sixth, previous opinions of the Attorney General have distinguished between the granting of leave to employees and the conversion of that leave to cash or another benefit, either before or after leaving employment. See, e.g., Ops. Atty. Gen. 469b, September 14, 1993 (payment for unused vacation upon termination of employment did not violate salary cap law); 161b-12 August 4, 1997 (Section 43A.17, subd. 9 excludes vacation and sick leave allowances, but not conversion to cash prior to termination.). Thus, while leave time accrued or taken would not be included in the calculation of compensation for salary cap purposes, the conversion of such leave to cash, or some other asset, raises a separate issue under the salary cap law.

In our view, leave hours converted to cash or contributed to a "deferred compensation plan" prior to leaving employment would be included. See Minn. Stat. § 43A.17, subd. 9(c); Op. Atty. Gen. 161b-12, August 4, 1997. According to the material supplied, however, based on the advice of the County Attorney, Dakota County employees who are paid at the maximum permitted by the salary cap law are not able to make such conversions. Nor are they able to convert leave hours to offset the employees' cost of "other benefits." Such employees' accumulated leave hours in excess of 1,000 at year-end are, however, converted annually to monetary deposits in the employees' health care savings accounts. Whether those conversions, to the extent actually made, should be included in computing capped compensation is not entirely clear from the statutory language. As we understand the HCSA concept, amounts deposited into a qualifying account are not subjected to federal income tax. In addition, amounts

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<sup>2</sup> The opinion nevertheless recognized that: "[C]ircumstances may arise in which the granting of unreasonably large vacation allowances to be converted to cash upon termination could be viewed as contrary to the intended spirit of section 465.722 (Supp. 1993)."

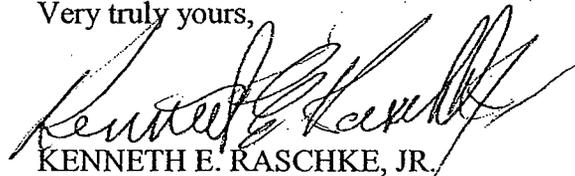
Patricia Anderson  
November 18, 2005  
Page 5

may be drawn out after leaving employment only to reimburse for qualified medical expenses, and are likewise not subject to tax. In these respects the HCSA program differs from ordinary "deferred compensation," and annuity contracts which allow for unlimited use of taxable proceeds withdrawn after retirement. Therefore, while an employee need not "retire" to access the account balance, amounts paid to an employee's HCSA could be seen to fall within the broad category of "pension . . . or like benefits . . . not subject to tax as income under the Internal Revenue Code."

**OPINION**

Based upon the foregoing analysis, we answer both of your questions in the negative.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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(651) 297-1235 (Fax)

Enclosures  
AG: #1507605-v1



MIKE HATCH  
ATTORNEY GENERAL

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

November 15, 2005

Polk  
**FILE**

SUITE 1800  
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Greg Widseth  
Polk County Attorney  
Crookston Professional Center, Suite 101  
223 East Seventh Street  
Crookston, MN 56716-1498

Dear Mr. Widseth:

Thank you for your correspondence dated October 6, 2005, requesting an opinion of the Attorney General concerning the process whereby a county may withdraw from a joint powers agreement for the operation of a regional jail.

## FACTS AND BACKGROUND

You state that in 1975, Polk, Norman, and Red Lake Counties entered into a joint powers agreement, pursuant to Minn. Stat. §§ 641.261 to 641.266, for the operation of a regional jail located in the city of Crookston, Polk County, Minnesota. You indicate that currently a new jail facility is being constructed in Polk County, and that Polk, Norman, and Red Lake Counties are in the process of amending the 1975 agreement to cover issues raised by the construction of the new facility. You state that in the course of these discussions, a question arose regarding withdrawal of a county from participation in this regional jail. You enclose a copy of the 1975 joint powers agreement along with a 1979 amendment, and you note that paragraph 6 of the joint powers agreement provides: "This agreement shall be in force and effect for an indefinite term, but any contracting party shall initially contract for one year and may withdraw upon 180 days written notice to each of the other contracting parties."

You point out that under Minn. Stat. § 641.265, subd. 2, a participant in a regional jail can withdraw from participation with the approval of a majority of the remaining participants. Based upon these facts, you ask the following question:

In light of the requirements of Minn. Stat. § 641.265, subd. 2, can the participants in a joint powers agreement for the operation of a regional jail contractually alter the statute's requirement of majority approval for withdrawal of a party from participation in the regional jail, absent a legislative amendment to this statute?

We answer your question in the negative. In our view, the parties to a joint powers agreement for the operation of a regional jail cannot contractually alter the statutory requirement of majority approval for withdrawal of a party from participation in the regional jail.

### LAW AND ANALYSIS

First, the legislature has provided a specific procedure for withdrawal from cooperation in a regional jail. Minn. Stat. § 641.265, subd. 2 provides:

Subd. 2. **Withdrawal.** A county board may withdraw from cooperation in a regional jail system if the county boards of all of the other cooperating counties decide, by majority vote, to allow the withdrawal. With the approval of the county board of each cooperating county, the regional jail board shall fix the sum, if any, to be paid to the county withdrawing, to reimburse it for capital cost, debt service, or lease rental payments made by the county prior to withdrawal, in excess of its proportionate share of benefits from the regional jail prior to withdrawal, and the time and manner of making the payments. The payments shall be deemed additional payments of capital cost, debt service, or lease rentals to be made proportionately by the remaining counties and, when received, shall be deposited in and paid from the regional jail fund; provided that:

(a) payments shall not be made from any amounts in the regional jail fund which are needed for maintenance and operation expenses or lease rentals currently due and payable; and (b) the withdrawing county shall remain obligated for the payment of its proportionate share of any lease rentals due and payable after its withdrawal, in the event and up to the amount of any lease payment not made when due by one or more of the other cooperating counties.

This law permits a county board to withdraw, but only if the county boards of all of the other cooperating counties decide, by majority vote, to allow the withdrawal.<sup>1</sup> Paragraph 6 of the joint powers agreement between Polk, Norman, and Red Lake Counties differs from the statutory method for withdrawal, however, because the agreement only requires 180 days advance written notice to the other parties.

Second, as with most other agencies of state and local government, a county is a creature of statute and holds only those powers conferred by the legislature. *See, e.g., Cleveland v. Rice County*, 238 Minn. 180, 56 N.W.2d 641 (1952). Such governmental units cannot, through their

---

<sup>1</sup> The statutory language is somewhat ambiguous as to whether approval is required from the boards of a majority of the remaining counties, or from all of the remaining boards, which are required, to act individually by majority vote. As you have pointed out, however, that issue is moot in your situation, since unanimous consent of the two remaining counties would be needed in any event.

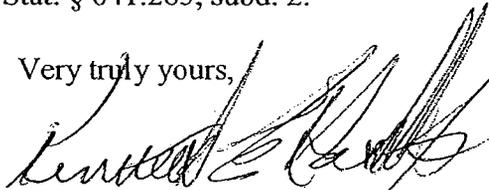
own actions, enlarge their authority beyond that which was contemplated by the legislature. *See In re De Laria Transport, Inc.*, 427 N.W.2d 745, 748 (Minn. Ct. App. 1988). Consequently the substantive provisions of a joint powers agreement for the performance of a particular governmental function must be consistent with the terms of the statutes pertaining to that function. *See Arrowhead Regional Corrections Board v. Aitkin County*, 534 N.W.2d 557, 559 (Minn. Ct. App. 1995) (A regional corrections board lacked authority to allocate costs in a manner inconsistent with statutorily prescribed joint powers agreement.) A provision in a joint powers agreement that does not comply with applicable statutes could be adjudicated void. *See Local Government Information Systems v. Village of New Hope*, 311 Minn. 258, 261-63, 248 N.W.2d 316, 319 (1976).

Finally, the powers of an agency can only be exercised in the manner prescribed by the legislature. *Waller v. Powers Department Store*, 343 N.W.2d 655, 657 (Minn. 1984). When the legislature sets out a specific method of conduct for a public body, that method operates to the exclusion of other possible modes of conduct. Op. Atty. Gen. 160-O, June 1, 1977 (statute prescribed only method for terminating a vocational center operated by ten school districts through a joint powers agreement). *Accord*, Op. Atty. Gen. 59a-23, November 24, 1961 (copy enclosed) (statute provided exclusive method for city to come under the jurisdiction of a county health department). (Copies enclosed.)

#### OPINION

For the foregoing reasons, it is our opinion that, absent a change in the relevant statutes, the counties participating in a joint powers agreement to operate a regional jail cannot contractually alter the statutory method for withdrawal from cooperation, but must follow the procedure for withdrawal prescribed by Minn. Stat. § 641.265, subd. 2.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL  
October 11, 2005

# FILE COPY

MIKE HATCH  
ATTORNEY GENERAL

102 STATE CAPITOL  
ST. PAUL, MN 55155-1002  
TELEPHONE: (651) 296-6196

Alberto Quintela, Jr.  
MINNESOTA SECRETARY OF STATE'S OFFICE  
180 State Office Building  
100 Constitution Avenue  
St. Paul, MN 55155-1299

**Re: Filing Dates for 2006 Elections**

Dear Mr. Quintela:

Thank you for your e-mail correspondence dated October 3, 2005 requesting an opinion from the Attorney General with respect to the issue discussed below.

## FACTS

In 2006, the State Primary will be held on September 12. The 70<sup>th</sup> day preceding the primary is Tuesday, July 4, a legal holiday. On behalf of the Secretary of State's Office, you ask whether the opening of filings for the 2006 election should be Monday, July 3; Tuesday, July 4; or Wednesday, July 5, 2006.<sup>1</sup>

## LAW AND ANALYSIS

Minn. Stat. § 204B.09 provides, in part:

(a) Except as otherwise provided by this subdivision, affidavits of candidacy and nominating petitions for county, state and federal offices filed at the state general election shall be filed not more than 70 days nor less than 56 days before the state primary. The affidavit may be prepared and signed at any time between 60 days before the filing period opens and the last day of the filing period.

First, the plain language of section 204B.09 expressly prohibits filing more than 70 days before the primary.

Second, Minn. Stat. § 645.44, subd. 5 (2004) prohibits the transaction of "public business" on specified legal holidays including July 4 except in cases of necessity. That prohibition has been applied to activities such as voter registration and filing for office. *See, e.g.*, Ops. Atty. Gen. 434B-4, March 1, 1963; 183-R, October 9, 1946.

<sup>1</sup> You indicate that the same situation occurred in 2000. At that time, the Secretary of State's Office identified the "70th day" as July 4, 2000.

Third, most of the prior opinions we have located pertaining to filing periods deal with determining the last day for filing or registration. *See, e.g.*, 434B-4, March 1, 1963; 911-E, February 1, 1954; 183-R, September 28, 1948; 183-R, October 9, 1946; 911-E, January 25, 1916. The only opinion that we could locate which deals with the first day of a prescribed period falling on a holiday states that voter registrations may begin on the next business day. *Op. Atty. Gen.* 183Q, July 22, 1929.

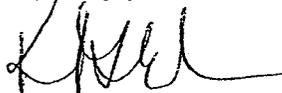
Fourth, it seems important to distinguish between the statutory "filing period" and the times when petitions and affidavits may actually be filed. While the "filing period" comprises 15 days from the 70<sup>th</sup> day to the 56<sup>th</sup> day preceding the primary, there is no suggestion that filings may actually be made at all times during that period. Rather, it should be assumed that they must be made during the business hours of the appropriate government office, where the filings are made. There would seem no greater reason to alter the span of the "filing period" when the first day is a holiday than there would be due to the occurrence of other non-business days during the period.

Furthermore, the timeframe of the "filing period" has significance beyond the identity of the hours during which filings can actually be made. For example, Minn. Stat. § 204B.08 permits nominating petitions to be signed, "during the period when petitions may be filed as provided in section 204B.09." Also, pursuant to section 204B.09, subd. 1, an affidavit of candidacy may be prepared and signed beginning 60 days before the filing period opens. There would seem no reason for the time available for doing these acts should be affected by the fact that filing offices will be closed on July 4.

#### CONCLUSION

Based on the above, we believe that the "filing period" for the 2006 election cycle commences July 4, 2006.

Very truly yours,



KRISTINE L. EIDEN  
Chief Deputy Attorney General

KLE/ab

AG: #1495827-v1



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

Kingston COPY

MIKE HATCH  
ATTORNEY GENERAL

September 16, 2005

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

David R. Wendorf, Esq.  
Couri, Macarthur & Ruppe, P.L.L.P.  
705 Central Avenue East  
P.O. Box 369  
St. Michael, MN 55376-0369

Dear Mr. Wendorf:

Thank you for your correspondence dated June 6, 2005, which you faxed to this Office on August 8, 2005, requesting an opinion of the Attorney General concerning the authority of the City of Kingston to issue liquor licenses when a local option election is pending pursuant to Minn Stat. § 340A.416. I regret that we have not located any record of having received the letter previously.

### FACTS AND BACKGROUND

You state that the City of Kingston has recently adopted a new liquor ordinance which provides for the issuance of intoxicating liquor licenses. You indicate that prior to the adoption of the new ordinance, the City had only issued 3.2 percent malt liquor licenses. You state that the City Clerk has no record of any prior local option elections occurring within the City. You further state that during the City's review of the new liquor ordinance, a citizen group filed a valid petition for a local option election pursuant to Minn. Stat. § 340A.416. You indicate that, since the petition was filed, the ordinance was adopted and the City has received an application for an intoxicating liquor license. The petitioning group has stated that, according to information received from someone in this Office, the City does not have the authority to issue an intoxicating liquor license during the time period between the filing of a valid local option election petition and the election on the local option question.<sup>1</sup>

Based upon these facts, you ask the following questions:

1. Does the filing of a valid local option election petition "suspend" or otherwise affect the City's powers to adopt an intoxicating liquor ordinance or to issue intoxicating liquor licenses during the time period between the filing of the petition and the election?

<sup>1</sup> We have been unable to verify that someone from the petitioning group consulted with someone in this Office and was given such information. Nor does this Office have any record of having sent previous correspondence regarding the subject of your opinion request.



2. If the answer to question one is in the negative, what would be the status of an intoxicating liquor license issued by the City if the local option election results in a vote "against license"?
3. Under the current statutory language can the City hold a special election for the local option question or must it wait until the next regular City election?

### LAW AND ANALYSIS

First, under Minnesota law cities are generally authorized by statute to issue licenses for the sale of intoxicating liquor, both on-sale and off-sale. *See* Minn. Stat. §§ 340A.404 - 34A.406 (2004). That authority is not dependent on voter approval. *Id.* *See also* Op. Atty. Gen. 218C-3, July 21, 1965; and 218C-13, November 3, 1947.

Second, Minn. Stat. § 340A.416 (2004) does establish a procedure whereby citizens may initiate local option elections to determine the continuing authority of the city to license liquor sales. Subdivision 1 of that statute provides:

Upon receipt of a petition signed by 30 percent of the persons voting at the last city election or 200 registered voters residing in the city, whichever is less, a statutory city or home rule charter city of the fourth class shall place before the voters of the city the question of whether the city *will* issue intoxicating liquor licenses.

(Emphasis added.)<sup>2</sup>

While the use of the future tense in this subdivision suggests an assumption that the city would not have already issued licenses, previous Attorney General's opinions have determined that cities may issue licenses if the most recent referendum favored licensure, or if there has been no previous referendum on the question. *See, e.g.,* Op. Atty. Gen. 218C-3, July 21, 1965; 218C.13, November 3, 1947.

Third, section 340A.416 does not state that the filing of a petition, in itself, has any effect upon the continuing authority of the city to issue licenses. In contrast, several other statutes in other subject areas contain specific language suspending the authority of government bodies to take certain actions following submission of a referendum petition until the referendum has been held. *See, e.g.,* Minn. Stat. §§ 128D.05, subd. 2 (change of school election date); 205.07 (change of city election date); 366.095, subd. 1 (town certificates of indebtedness); 412.221, subd. 2 (certain city contracts). Therefore it would be expected that, had the legislature intended to

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<sup>2</sup> It is our understanding that Kingston is a statutory city. A city of the fourth class is one having a population of 10,000 or fewer. Minn. Stat. § 410.01 (2004).

suspend city licensing authority upon the filing of a petition, it would have included similar language in section 340A.416.

For these reasons, it does not appear that the filing of a petition under Minn. Stat. § 340A.416 affects the existing authority of a city to issue liquor licenses as a strict matter of law.

Fourth, the Minnesota Supreme Court has held that, under previous statutory language similar to Minn. Stat. § 340A.416, a majority vote "against license" at a local option election will nullify any license granted prior to the election. The voters' decision that no licenses shall be granted operates as a revocation of existing licenses, which is effective on the date of the election. *State v. Cooke*, 24 Minn. 247 (Minn. 1877); see also *State ex rel Bankroft v. White*, 132 Minn. 470, 156 N.W. 251 (1916); *State ex rel Lower v. McKinnon*, 126 Minn. 505, 148 N.W. 99 (1914).

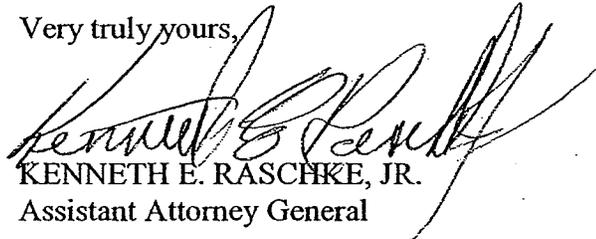
Finally, you state that previous opinions of the Attorney General (Op. Atty. Gen. 218E-3, August 6, 1947; Op. Atty. Gen. 218G-13, December 4, 1951; and Op. Atty. Gen. 218C-3, July 21, 1965) concluded that local option questions on liquor licensing must be presented to voters at a regular election, and you question the continuing validity of those opinions. The conclusion in those opinions was based on the wording of former Minn. Stat. § 340.20, which specifically provided that local option questions must be presented to voters at *annual* village elections. Similarly, the former Minn. Stat. § 340.21 provided that if the majority at a local option election votes against license, that decision is effective until reversed at a "subsequent *annual* election" (emphasis added). Currently, Minn. Stat. § 340A.416, subd. 1 requires a city to "place before the voters of the city the question of whether the city will issue intoxicating liquor licenses." Unlike the former Minn. Stat. § 340.21, the current law does not limit that submission to any specific election. Further, Minn. Stat. § 340A.416, subd. 3 now provides: "If a majority of persons voting on the referendum question vote "against license," the city may not issue intoxicating liquor licenses until the results of the referendum have been reversed at a subsequent election where the question has been submitted as provided in this section." Again, there is no reference to particular elections. Using a plain language construction, the deletion of the word "annual" as a modifier of the word "election" in both of these enactments is evidence of a current legislative intent that presentation of a local option question to voters is not restricted to regular city elections. See also Minn. Stat. § 205.10 which generally authorizes special elections to be held in cities and towns on "question[s] on which the voters are authorized by law or charter to pass judgment." Therefore, in our view a city does not have to wait for a regular election to present the local option question to the voters.

David R. Wendorf, Esq.  
September 16, 2005  
Page 4

**OPINION**

For the foregoing reasons we answer your first question in the negative and the third in the affirmative. In answer to your second question, it is our view that a vote "against license" would invalidate any licenses previously issued.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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

Enclosures

AG: #1475232-v1



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

September 6, 2005

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

Jeffrey R. Brauchle  
Jeffrey R. Brauchle P.A.  
Anchor Bank Building  
1055 E Wayzata Blvd., Suite 300  
Wayzata MN 55391

Dear Mr. Brauchle:

Thank you for your correspondence of July 5, 2005.

## FACTS AND BACKGROUND

You state that you are counsel to the Suburban Hennepin County Regional Park District (the "District"). The District is a political subdivision organized pursuant to Minn. Stat. ch. 398 and § 383B.68. The District is governed by a board of seven commissioners. Two commissioners are appointed by the Hennepin County Board, and one commissioner is elected from each of five election districts established by the District Board following each decennial census. The elected commissioners serve staggered terms of four years. In 2004, elections were held in districts 2 and 4. Mr. H, who lived in district 1, sought to file for election. He states that he was told that there would be no election for district 1, but that he could run in district 2 or 4. Mr. H decided to run in district 4. In completing his filing forms, Mr. H affirmed that he was a resident of "the district," believing that the question related to the Suburban Hennepin County Regional Park District, rather than election district 4. Mr. H, who has continued to reside in election district 1, won the primary and general elections, was issued a certificate of election as commissioner from district 4 and assumed that office. You indicate that Mr. H in fact does not live in District 4. Based on these facts, you ask the following questions.

1. Is Mr. H eligible to serve as commissioner from District 4 in light of his lack of residency in the District?
2. Is there any authority to support the contention that Mr. H may continue to serve as commissioner due to a mistake by election officials followed by his election and issuance of an election certificate?

## LAW AND ANALYSIS

Minn. Const. art VII, § 6 provides:

**Sec. 6 ELIGIBILITY TO HOLD OFFICE.** Every person who by the provisions of this article is entitled to vote at any election and is 21 years of age is eligible for any office elective by the people in the district wherein he has resided 30 days previous to the election, except as otherwise provided in this constitution, or the constitution and law of the United States.

Minn. Stat. § 383B.68, subd. 3 provides in part:

Subd. 3. **Five elected from outside Minneapolis.** Five park district commissioners shall be elected as provided in this subdivision to represent those portions of Hennepin County outside of the city of Minneapolis. *One park district commissioner shall be elected without party designation from each of the districts established pursuant to subdivision 4.* Elections under this subdivision shall be held at the same time and in the same manner as elections for the office of county commissioner beginning at the 1986 general election. Each park district commissioner elected pursuant to this subdivision shall *be a resident of the district represented* and shall serve for a term of four years and until a successor is elected and qualifies . . . .

(Emphasis added.)

Minn. Stat. § 351.02 (2004) provides in part:

Every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:

- (1) the death of the incumbent;
- (2) the incumbent's resignation;
- (3) the incumbent's removal;
- (4) *the incumbent's ceasing to be an inhabitant of the state, or, if the office is local, of the district, county or city for which the incumbent was elected or appointed, or within which the duties of the office are required to be discharged; . . .*

(Emphasis added).

First, based upon these constitutional and statutory provisions, a person who is not, and has not been, a resident of a particular election district is not eligible to serve as an elected representative of that district. Nor does it appear that the person's ineligibility would be affected by any claim of good faith misunderstanding, or receipt of misleading information from government officials. *Cf., Melendez v. O'Connor*, 654 N.W.2d 114 (Minn. 2002). Indeed, even if the question of Mr. H's residency at the time of the election were not considered, his subsequent failure to maintain any residency in the election district may render him disqualified under Minn. Stat. §§ 383B.68 and 351.02(4).

Second, the fact that Mr. H was actually elected to the office and issued a certificate of election would not negate the continuing legal disqualification due to his lack of required residency. However, issuance of a certificate of election together with his actual assumption of office would provide *prima facie* evidence of entitlement to serve. *See, e.g., Doyle v. Ries*, 205 Minn. 82, 285 N.W. 480 (1931) (Election certificate is *prima facie* evidence against direct attack on right to hold office and conclusive against a collateral attack.); *State ex rel. Erickson v. Magie*, 183 Minn. 60, 235

N.W. 526 (1931) (Person with certificate of election is *prima facie* entitled to possession of office, though legal entitlement to hold the office may be in doubt.)

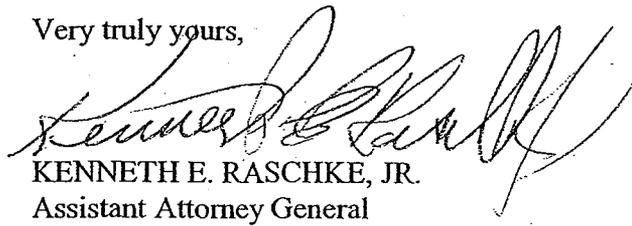
Thus, regardless of whether Mr. H may be legally qualified to serve as a commissioner *de jure*, he is presumptively entitled to possession of the office until he voluntarily relinquishes the position, is removed by direct action, such as *quo warranto*, or the District Board takes action to determine the existence of a vacancy pursuant to Minn. Stat. § 351.02(4) and to appoint a successor, pursuant to Minn. Stat. § 383B.68, subd. 3 (2004). See, e.g., *Magie*; c.f. Op. Atty. Gen. 330c-3, January 4, 1993 (copy enclosed ).(Park commissioner may continue in *de facto* capacity after expiration of terms pending selection of successors).

### OPINION

Based upon the foregoing it is our opinion that on the facts given:

1. Upon the facts as given, Mr. H is not eligible as a matter of law to hold the office of Park Commissioner, *de jure*.
2. By virtue of his certificate of election and assumption of office, however, Mr. H would be presumptively entitled to continued possession of the office *de facto*, should he choose to insist upon it, pending any direct action to remove him or a formal determination of a vacancy by the District Board.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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

Enclosures

AG: #1473121-v1/312772



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

September 6, 2005

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

Bea Hoffman  
Executive Director  
SE MN Water Resources Board  
Winona State University  
Winona, MN 55987-5838

Dear Ms. Hoffman:

I thank you for your correspondence dated July 19, 2005.

You state that your organization, the Southeast Minnesota Water Resources Board, is assisting small communities in an eleven-county with efforts to address wastewater treatment issues. You state that in certain circumstances, it is necessary to form a "public entity" such as a subordinate service district (SSD). Your staff members have found the statutes pertaining to such districts to be ambiguous. Therefore, you request the Opinion of this Office on the following questions:

#### Regarding 365A.04 Creation by Petition

- 1) When there are multiple property owners listed on a single deed within a proposed SSD, is each property owner on that deed entitled to a signature on the petition?
- 2) If one property owner within the proposed SSD owns multiple parcels, is the property owner entitled to just one signature on the petition?
- 3) If a piece of property within a proposed SSD is owned by a county, township, corporation, church, or other similar entity or institution, is the entity or institution entitled to a signature on the petition, and if so, who in the entity or institution is authorized to sign the petition?

#### Regarding Authorities of an SSD

- 4) Can the repair or replacement of a privately-owned ISTS (Individual Sewage Treatment System) be mandated through a SSD?
- 5) If yes, then can the upgrade of privately-owned ISTS be mandated through an ordinance that only has jurisdiction within the SSD boundaries?



6) Can the ISTS's (or other sewage treatment systems such as small cluster systems) within the boundaries of the SSD be owned by the SSD?

7) Does the SSD have the authority to appoint itself as the sole provider of the septic system management services (such as pumping, repair, inspections, etc. of individual or cluster systems) to all its members?

8) Does the SSD have the same authorities as the Township for borrowing, incurring debt, lending and levying for revenue?

9) Do the above opinions regarding SSD's formed under Township authority also apply to those SSD's formed under County authority (Minnesota Statutes 2004, Chapter 375B)?

You also ask for reference to any caselaw related to SSD formation in connection with decentralized water treatment.

The Office of the Attorney General's Office has limited jurisdiction under Minnesota law. For instance, it has authority to provide legal opinions, in appropriate circumstances, to State agencies and attorneys for local units of government. It is not authorized to provide legal advice or opinions to other local officers or to private citizens. It is expected that local governments will look to their own attorneys for legal advice. Those attorneys may request opinions of this Office, if necessary to assist them in advising their local government clients. Notwithstanding this limitation, I can provide the following comments, which I hope you will find helpful.

First, your questions appear to deal for the most part with SSDs formed pursuant to Minn. Stat. ch. 365A. Minn. Stat. § 365A.02 defines a subordinate service district as "a defined area within the town in which one or more governmental services or additions to townwide services are provided by the town specially for the area and financed from revenues from the area. The boundaries of a single subordinate service district may not embrace an entire town." Thus, establishment of a SSD defines a geographic area in which a town provides one or more town services at a level not provided throughout the town. I am not aware of any language in Chapter 365A indicating that a SSD is a separate legal entity.

Second, Minn. Stat. § 365A.03 provides:

Notwithstanding any provision of law requiring uniform property tax rates on real or personal property within the town, a town may establish subordinate service districts to provide and finance a governmental service or function that it is otherwise authorized to undertake. A function or service to be provided may include a function or service that the town ordinarily provides throughout the town only to the extent that there is an increase in the level of the function or service provided in the service district over that provided throughout the town.

Therefore, Chapter 365A does not appear to empower a town to provide any services within a SSD that it is not authorized to provide to the town generally.

Third, with respect to the creation of a district, Minn. Stat. § 365A.04, subd. 1, provides in part:

A petition signed by at least 50 percent of the property owners in the part of the town proposed for the subordinate service district may be submitted to the town board requesting the establishment of a subordinate service district to provide a service that the town is otherwise authorized by law to provide. The petition must include the territorial boundaries of the proposed district and specify the kinds of services to be provided within the district.

Courts have held that a statutory reference to a percentage of "property owners" means owners of property *per capita*, notwithstanding the amount of property owned. *See, e.g., Beck v. Council of the City of St. Paul*, 235 Minn. 56, 50 N.W.2d 81 (1951); Op. Atty. Gen. 602-i, September 19, 1947 (copies enclosed).

Furthermore, absent qualifying language, the term would ordinarily include legal entities such as corporations or governmental units, *Cf. Reiss Greenhouses, Inc. V. Hennepin Co.*, 290 N.W.2d 785 (Minn. 1980); Op. Atty. Gen. 602-i, May 1, 1952 (copies enclosed). Determination of how the exercise of such corporate authority should be approved and carried out would be dependent upon the statutes, charter provisions, articles or bylaws governing the entity in question.

Fourth, as noted above, SSDs are established to provide town services within a defined area. It is unclear whether passage of ordinances mandating actions by private property owners would be considered a "service" for purposes of that chapter. However, towns are authorized to adopt and enforce ordinances regulating individual sewage treatment systems that comply with state standards. *See, e.g., Minn. Stat. § 115.55, Minn. Rule 7080.0305.* Unincorporated areas not covered by conforming city or town ordinances must be regulated by county ordinances. *Id.*

Fifth, towns that are not involved in an orderly annexation process as of October 3, 1989 have authority pursuant to Minn. Stat. §§ 444.075 and 444.26 to acquire and construct wastewater treatment systems in accordance with the terms of those sections.

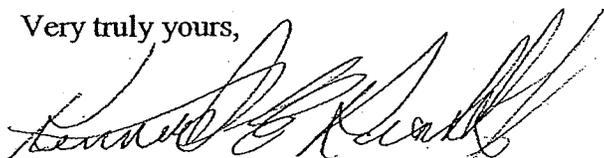
Sixth, I am enclosing a copy of Op. Atty. Gen. 125a, March 26, 1984, which discusses the operation of a sanitary sewer system by a county in a SSD pursuant to Minn. Stat. ch. 375B.

Finally, I am enclosing for your information, a copy of the Minnesota Court of Appeals decision in *Minnesota Center For Env. Advocacy v. Commissioner of Minnesota PCA*, 696 N.W.2d 95 (Minn. Ct. App. 2005) which discusses the potential for use of decentralized treatment systems. I have not located any other Minnesota cases that addresses that topic.

Bea Hoffman  
September 6, 2005  
Page 4

I hope this information is helpful to you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kenneth E. Raschke, Jr.", written over a light blue horizontal line.

KENNETH E. RASCHKE, JR.  
Assistant Attorney General

(651) 297-1141 (Voice)

(651) 297-1235 (Fax)

Enclosures

AG: #1474626-v1



STATE OF MINNESOTA  
OFFICE OF THE ATTORNEY GENERAL

FILE

MIKE HATCH  
ATTORNEY GENERAL

July 8, 2005

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

Thomas F. Miller, Esq.  
Miller Law Office, P.A.  
Oak Point Business Center, Suite 6  
26357 Forest Boulevard  
P.O. Box 807  
Wyoming, MN 55092

Dear Mr. Miller:

Thank you for your correspondence of June 14, 2005, requesting an opinion of the Attorney General as to the eligibility of two Chisago City Council members to vote on certain matters that may come before the Council.

FACTS AND BACKGROUND

Your letter follows previous correspondence concerning the same two council members who were financially interested in a company that owned property which was proposed for annexation to the city, rezoning and development (the "Company"). In response to that inquiry, we concluded that the council members in question had personal financial interests in the annexation, zoning and development proposals, and should not participate in council decisions on those issues under the criteria set out in *Lenz v. Coon Creek Watershed Dist.*, 271 Minn. 1, 153 N.W.2d 209 (1967) and Op. Atty. Gen. 59a-32, Sept. 11, 1978.

In your June 14, 2005 letter, you state that the previously-discussed annexation and rezoning were approved without the participation of the interested council members. In connection with that annexation, two additional members were elected to the council. The Company has now applied to the City for annexation, rezoning and development of additional company-owned property. After those applications were submitted, the interested council members divested themselves of any interest in the Company and submitted affidavits to that effect. Based upon those affidavits and your discussions with the members, you are satisfied that they no longer have any direct or indirect interest in the Company.

You then ask whether the members are legally prohibited from participating in discussions and voting on:

1. The annexation of the remaining portion of the Company's property into the City, whether by joint resolution, ordinance or otherwise;



2. If the remaining portion of the property is annexed into the City, the rezoning of such remaining portion consistent with the rezoning which has already been approved for the adjacent portion of the Property; and
3. Any proposed Development Agreement with respect to the Property.

#### DISCUSSION

First, as noted in our letter of February 9, 2005, Minn. Stat. §§ 412.311 and 471.87 (2005) generally prohibit city council members from having personal financial interests in contracts made by the council, or benefiting financially therefrom. In addition, public officials might be disqualified from participating in any official decision wherein they have personal financial interests, based upon a case-by-case evaluation of several factors. *See, e.g., Lenz v. Coon Creek Watershed Dist.*, 278 Minn. 1, 153 N.W.2d 209 (1967), Op. Atty. Gen. 59a-32, September 11, 1978.

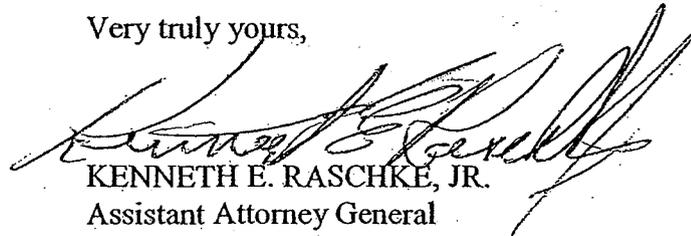
Second, these prohibitions and disqualifications are generally not applicable in situations that do not implicate personal financial interests of the public officials in question. *See, e.g., Rowell v. Bd. of Adjustment of City of Moorhead*, 446 N.W. 2d 917 (1989) (church member not disqualified from voting as council member on church's application for zoning variance); Op. Atty. Gen. 90a, December 29, 1958 (no prohibition against village purchase of land from emancipated son of council member) 90e-5, November 13, 1969 (city may contract with council member's employer if council member receives no financial benefit.)

Third, you indicate that the members no longer have any financial interest in the Company.

#### CONCLUSION

Because you indicate the members no longer have any financial interest in the Company, and assuming that the members have no other interest in the property, we are aware of no basis for mandatory disqualification of the members from participating in those decisions as council members.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

(651) 297-1141 (Voice)  
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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

May 31, 2005

102 STATE CAPITOL  
ST. PAUL, MN 55155-1002  
TELEPHONE: (651) 296-6196

MIKE HATCH  
ATTORNEY GENERAL

The Honorable Tim Pawlenty  
Governor, State of Minnesota  
130 State Capitol  
75 Rev. Dr. Martin Luther King Jr., Blvd.  
St. Paul MN 55155-1099

**HAND-DELIVERED**

Dear Governor Pawlenty:

Thank you for your correspondence of May 26, 2005.

## FACTS AND BACKGROUND

You state that on May 23, 2005, prior to interim adjournment, the legislature passed House File 1 - the Omnibus Public Safety Bill which contains several public safety initiatives. You would like to sign the bill.<sup>1</sup> The bill also includes a provision for a 1.5 percent salary increase for judges. That increase would apply to your wife, who is a judge in the First Judicial District. You point out that in *State ex rel. Gardner v. Holm*, 241 Minn. 125, 62 N.W.2d 52 (1954), the court held that an act of the legislature prescribing judicial salaries is not subject to gubernatorial veto. You then ask the following questions:

- (1) In light of the holding in *State v. Holm*, is it a conflict of interest for you (under Chapters 10A or 43A, or any other statute, law or regulation) to sign House File 1 into law?
- (2) If the answer to Question 1 is in the affirmative, is the conflict eliminated if the First Lady agrees to disclaim the prescribed salary increase?

## LAW AND ANALYSIS

First, Minn. Const. art IV § 23 provides in part:

Sec. 23. *APPROVAL OF BILLS BY GOVERNOR; ACTION ON VETO.* Every bill passed in conformity to the rule of each house and the joint rules of the two houses shall be presented to the governor. If he approves a bill, he shall sign it, deposit it in the Office of the Secretary of State and notify the House in which it originated of that fact. If he vetoes a bill, he shall return it with his objections to the house in which it originated. . . . Any bill not returned by the governor within

<sup>1</sup> You do not state whether House File 1 has been presented to you for approval, but, if not, we assume that it will be presented within the next several days.

three days (Sundays excepted) after it is presented to him becomes a law as if he had signed it, unless the legislature by adjournment within that time prevents its return.

An "adjournment . . . that prevents [a bills] return" must be a final, *sine die* adjournment of the legislature, and not a temporary adjournment in an odd-numbered year to a date in the next even-numbered year. See *State ex rel. Hoppe v. Herbst*, 298 Minn. 386, 215 N.W.2d 797 (1974). Under this constitutional provision, if House File 1 is formally presented to you more than three days before *sine die* adjournment in 2006, it will become law with or without your signature if it is not returned with a veto message to the House within three days of presentment. Consequently, signing the bill will not, in itself, result in any financial benefit to your wife or yourself.

Second, Minn. Const. art VI § 5 provides in part: "The compensation of all judges shall be prescribed by the legislature and shall not be diminished during their term of office." As you point out, the court in *Gardner* held that an action of the legislature prescribing judicial salaries is not subject to gubernatorial veto. *Gardner*, 62 N.W.2d 52. For this reason, as well, the legislative action increasing judicial salaries will take effect as specified in House File 1 without regard to any action or inaction by you as Governor.

Third, Minn. Stat. § 10A.07 (2004) prescribes actions to be taken in situations where a public official:

[W]ould be required to take an action or make a decision that would substantially affect the official's financial interests or those of an associated business, unless the effect on the official is no greater than on other members of the official's business classification, profession, or occupation.

The effect of the judicial salary increases in House File 1 is the same for all judges. Thus, the legislation does not appear to come within the scope of conflicts addressed by section 10A.07.

Finally, Minn. Stat. § 43A.38, subd. 5 (2004) generally precludes, *inter alia*:

(a) use or attempted use of the employee's official position to secure benefits, privileges, exemptions or advantages for the employee or the employee's immediate family or an organization with which the employee is associated which are different from those available to the general public;

Subdivision 7 of that section, however, provides:

If the employee, appointing authority or commissioner determines that a conflict of interest exists, the matter shall be assigned to another employee who does not have a conflict of interest. If it is not possible to assign the matter to an employee

Governor Tim Pawlenty  
May 31, 2005  
Page 3

who does not have a conflict of interest, interested persons shall be notified of the conflict and the employee may proceed with the assignment.

The Minnesota Constitution vests the exclusive authority to approve or veto legislation only in the Governor. Accordingly, the approval of the legislation cannot be assigned even if a conflict were to exist.

#### OPINION

For the foregoing reasons, it is our opinion that your wife's judicial compensation does not legally disqualify you as Governor from signing House File 1 into law. We, therefore, answer your first question in the negative.

Given our answer to the first question, it is not necessary to respond to your second question.

Very truly yours,



KRISTINE L. EIDEN  
Chief Deputy Attorney General

KLE/ab  
AG: #1428236-v1



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

April 28, 2005

NCL TOWER, SUITE 1100  
445 MINNESOTA STREET  
ST. PAUL, MN 55101-2128  
TELEPHONE: (651) 296-3421

Dawn R. Nyhus  
Assistant Mille Lacs County Attorney  
Courthouse Square  
525 2nd Street S.E.  
Milaca, MN 56353

Dear Ms. Nyhus:

Thank you for your correspondence dated January 24, 2005.

## FACTS AND BACKGROUND

You state that Mille Lacs County property owners frequently ask the county assessor how their real property can achieve an "agricultural land" classification for property tax purposes. You explain that this is a significant question for landowners because the classification of land affects property values and may permit owners to enjoy certain beneficial tax consequences.

You note that for purposes of property tax classification, the term "agricultural land" means "contiguous acreage of ten acres or more, used during the preceding year for agricultural purposes." Minn. Stat. § 273.13, subd. 23(c) (2004). The term "agricultural purposes," in turn, means "the raising or cultivation of agricultural products." *Id.* Finally, "the term 'agricultural products' ... includes production for sale of" an extensive list of items ranging from livestock to maple syrup. *See* Minn. Stat. § 273.13, subd. 23(e)(1)-(8) (2004).

You state that although Minnesota Statutes section 273.13, subdivision 23(e) defines "agricultural products," it does not provide any guidance concerning when there has been a sufficient "production for sale" of agricultural products so as to ensure that the property in question has been used for an "agricultural purpose," and thereby qualifies as "agricultural land."

You indicate that the Mille Lacs County Assessor would like to establish a guideline providing that property may qualify as "agricultural land" only if the owner can prove a minimum receipted income of \$1,000.00 from the sale of "agricultural products" during the preceding year, in addition to the statutory ten-acre requirement. You state that in reaching this proposed threshold, the County Assessor has conferred with county assessors from surrounding counties and the Minnesota Department of Revenue. You indicate that the County Assessor has also consulted literature issued by the United States Department of Agriculture.

Based on the foregoing, you pose the following question:

May the County Assessor develop a guideline that quantifies a dollar amount necessary to fulfill the "agricultural product" prong of Minn. Stat. § 273.13, subd. 23(e), or otherwise develop guidelines to permit her to apply a uniform standard to the varying fact scenarios with which she is confronted?

### LAW AND ANALYSIS

Minn. Stat. § 273.13, subd. 23 provides in part:

**Class 2.** (a) Class 2a property is agricultural land ...

(c) Agricultural land as used in this section means contiguous acreage of ten acres or more, used during the preceding year for agricultural purposes. "Agricultural purposes" as used in this section means the raising or cultivation of agricultural products... Agricultural classification for property shall be determined excluding the house, garage, and immediately surrounding one acre of land, and shall not be based upon the market value of any residential structures on the parcel or contiguous parcels under the same ownership.

(e) The term "agricultural products" as used in this subdivision includes production for sale of:

(1) livestock, dairy animals, dairy products, poultry and poultry products, fur-bearing animals, horticultural and nursery stock, fruit of all kinds, vegetables, forage, grains, bees, and apiary products by the owner;

(2) fish bred for sale and consumption if the fish breeding occurs on land zoned for agricultural use;

(3) the commercial boarding of horses if the boarding is done in conjunction with raising or cultivating agricultural products as defined in clause (1);

(4) property which is owned and operated by nonprofit organizations used for equestrian activities, excluding racing;

(5) game birds and waterfowl bred and raised for use on a shooting preserve licensed under section 97A.115;

(6) insects primarily bred to be used as food for animals;

(7) trees, grown for sale as a crop, and not sold for timber, lumber, wood, or wood products; and

(8) maple syrup taken from trees grown by a person licensed by the Minnesota Department of Agriculture under chapter 28A as a food processor.

First, Minnesota Statutes Section 273.13, subdivision 23, was extensively amended in 1997. See Act of June 2, 1997, ch. 231, art. 2, § 20, 1997 Minn. Laws 2436-38 (the "1997 Amendment"). Prior to that time, subdivision 23(c) provided that property exceeding ten contiguous acres had to be "*primarily* used during the preceding year for agricultural purposes." See Minn. Stat. § 273.13, subd. 23(c) (1996) (emphasis added). The 1997 Amendment thus eliminated the "primary use" requirement. See 1997 Minn. Laws at 2437. The *relaxation* of the use requirement contained in subdivision 23(c) appears to have been quite purposeful inasmuch as the 1997 Amendment also added a *more restrictive* use requirement to subdivision 23(d), governing the classification of land consisting of fewer than ten contiguous acres. To qualify as "agricultural land," these smaller tracts now had to be used "exclusively and intensively" for cultivating agricultural products. See 1997 Minn. Laws at 2437. Before the 1997 Amendment, in contrast, they had to be used "principally" for this purpose and not "primarily for residential purposes." See *id.*

Second, the 1997 Amendment also changed the manner of determining whether land of more than ten contiguous acres was "agricultural land." Prior to the 1997 Amendment, subdivision 23(c) provided that "[a]gricultural classification for property shall be determined *with respect to the use of the whole parcel ....*" See Minn. Stat. § 273.13, subd. 23(c) (1996) (emphasis added). The 1997 Amendment, however, deleted the emphasized phrase, and introduced the current language that the classification "shall be determined excluding the house, garage, and immediately surrounding one acre of land ...." See 1997 Minn. Laws at 2437; Minn. Stat. § 271.13, subd. 23(e) (2004).

Third, these changes appear to have been intended to overrule certain aspects of the Minnesota Supreme Court's decision in *Barron v. Hennepin County*, 488 N.W.2d 290 (Minn. 1992). In that case, the Court ruled that the subject property did not qualify for so-called "Green Acres" classification under Minn. Stat. § 273.111 for the January 2, 1989 assessment. *Id.* at 292.<sup>1</sup>

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<sup>1</sup> Property that qualifies for Green Acres classification is taxed based on its use, not on its market value, as is other property. Moreover, that classification allows payment of special assessments for such things as sewer, water, and utility services to be deferred indefinitely. See *Barron*, 488 N.W.2d at 292 n.1. "The financial benefits are clear: the development value of the land is not taken into account and the owner is not required to contribute to the special assessments that accompany continued development." *Id.*

The taxpayers in *Barron* owned and occupied 20 acres of land in Medina, on which they had constructed an "upscale" home that, with its yard space, occupied approximately one acre. *Barron*, 488 N.W.2d at 291. Taxpayers planted the remaining 19 acres with hay, oats and alfalfa, the sale of which generated income of \$650 in 1988, \$1,150 in 1989, and \$2,850 in 1990. *Id.* The county assessor found this agricultural use to be "insignificant" in comparison with the land's residential use, and thus classified the land as "residential homestead." *Id.* The taxpayers then filed a Green Acres application, which the assessor denied because the property was used primarily as a residential homestead. *Id.* The Tax Court reversed the county's denial of Green Acres classification, holding that property did not have to qualify as "agricultural land" under Minn. Stat. § 273.13, subd. 23(c) to achieve Green Acres classification under section 273.111. *Id.*

The Minnesota Supreme Court ruled that the Green Acres statute "was designed to provide significant property tax relief to promote the continued use as agricultural property of the land 'exclusively devoted to agricultural use,' and located on the fringes or amidst expanding urban areas." *Barron*, 488 N.W.2d at 291 (citation omitted) (quoting Minn. Stat. § 273.111). Because the Green Acres classification provided an exception to the general rule for valuing "agricultural land," the Court found it "fundamental" that a subject property "must first satisfy the broad definition of 'agricultural land' to qualify for the legislatively identified exception for the valuation of that agricultural property." *Id.* at 292 (footnote omitted).

The Court thus turned to the question of whether the subject property qualified as "agricultural land" under Minn. Stat. § 273.13, subd. 23(c), which at the time required that otherwise qualifying property be "*primarily* used during the preceding year for agricultural purposes." See *Barron*, 488 N.W.2d at 292 (quoting Minn. Stat. § 273.13, subd. 23(c)) (emphasis added). The Court first noted that, as a general matter,

[t]he task of classification also involves a factfinding responsibility and is not \* \* \* simply an administrative calculation of the appropriate tax that may be performed by the auditor. Whether a particular [piece of property] qualifies for [a particular classification] clearly depends on a wide range of factual judgments concerning compliance with specified statutory criteria.

*Barron*, 488 N.W.2d at 293 (quoting *Summit House Apartment Co. v. County of Hennepin*, 312 Minn. 358, 362-63, 253 N.W.2d 127, 129 (1977)). The Court then indicated how these general principles applied to the particular classification issue presented: "The 'primary use' test incorporated in Minn. Stat. § 273.13, subd. 23(c) implies an examination of the specific nature of the property and the use or multiple uses to which that property has been put, together with a subjective balancing of those relative uses." *Id.*

In accordance with the foregoing, the Court determined that "the assessor properly concluded that the primary use of the subject property was as a 'residential homestead.'" *Barron*, 488 N.W.2d at 293. The Court placed particular emphasis on the relative values of the agricultural and homestead uses, respectively. "While 19 out of the 20 acres of the parcel are

used for agricultural purposes, the crops have produced almost insignificant income when compared with the valuation of the homestead situated on the remaining acre.” *Id.* Because the subject property did not qualify as “agricultural land,” it was not entitled to Green Acres classification. *Id.* at 291, 293. In 1995, the Court reaffirmed the holding of *Barron* that property must satisfy the definition of “agricultural land” to qualify for Green Acres classification. *See McLean v. County of Dakota*, 540 N.W.2d 76 (Minn. 1995).<sup>2</sup>

By removing the word “primarily” from Minn. Stat. § 273.13, subd. 23(c), the 1997 Amendment eliminated “[t]he ‘primary use’ test incorporated in” that provision. *Cf. Barron*, 488 N.W.2d at 293. By eliminating the rule that “[a]gricultural classification for property shall be determined *with respect to the use of the whole parcel*,” *see* 1997 Minn. Laws at 2437, the 1997 Amendment prohibited classification based upon the comparative value of agricultural and homestead uses. *Cf. Barron*, 488 N.W.2d at 293. Finally, the 1997 Amendment also overruled the principal holding of *Barron* by adding to section 273.13, subd. 23(c) the following language: “Classification under this subdivision is not determinative for qualifying under [the Green Acres provision,] Minn. Stat. § 273.111.” *See* 1997 Minn. Laws at 2437.

Fourth, although the 1997 Amendment legislatively overruled certain aspects of *Barron*, there is no reason to believe that the Legislature disagreed with the general classification principles reiterated in that case. *See Barron*, 488 N.W.2d at 293. Accordingly, it remains true that “[w]hether a particular [piece of property] qualifies for [a particular classification] clearly depends on a wide range of factual judgments concerning compliance with specified statutory criteria.” *Barron*, 488 N.W.2d at 293 (quoting *Summit House Apartment Co. v. County of Hennepin*, 312 Minn. 358, 362-63, 253 N.W.2d 127, 129 (1977)).

Fifth, the need for classification to be based on case-specific factual judgments in light of particular statutory criteria requires a negative answer to the question you pose. In its current form, section 273.13, subd. 23(c) provides that tracts exceeding ten contiguous acres must be “used during the preceding year for agricultural purposes,” which means “the raising or cultivation of agricultural products.” Minn. Stat. § 273.13, subd. 23(c) (2004). As you note, subdivision 23(e) defines “agricultural products” but provides no quantitative criteria. *See* Minn. Stat. § 273.13, subd. 23(e) (2004). Because the “use” requirement resides in subdivision 23(c), however, a quantitative criterion governing use would more comfortably fit within that provision, as the word “primarily” formerly did. Because the 1997 Amendment removed the word “primarily,” it is plain that the legislature does not wish “use” determinations to be governed by a comparative standard. And because the legislature has not replaced the term

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<sup>2</sup> Naturally, the Tax Court routinely applied *Barron* to similar fact situations. *See, e.g., Borglund v. County of Scott*, No. 98-05080, 1998 WL 726418 (Minn. T.C. Oct. 18, 1998); *Beaulieu v. County of Hennepin*, No. TC-24172, 1997 WL 266812 (Minn. T.C. May 12, 1997); *Swanson v. County of Carver*, No. CX-96-452, 1996 WL 551208 (Minn. T.C. Sept. 24, 1996); *Rasmussen v. County of Hennepin*, No. TC-23982, 1996 WL 207409 (Minn. T.C. Apr. 24, 1996).

“primarily” with any other qualifier, it appears the legislature does not wish “use” to be governed by minimum quantitative requirements, bright-line or otherwise.

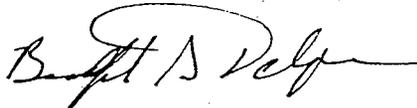
Sixth, a threshold requirement of \$1,000 receipted income from the sale of “agricultural products” would seem incompatible with the overall classification scheme. Subdivision 23(c) requires the “raising or cultivation of agricultural products,” while subdivision 23(e) requires the “production for sale” of such products. Neither provision requires actual sales. Certain items qualifying as “agricultural products,” such as trees, may take more than one year to achieve sufficient maturity for marketability. *See, e.g.*, Minn. Stat. § 273.13, subd. 23(e)(7) (2004). Under these circumstances, land could be used for the “raising or cultivation of agricultural products,” yet produce no receipted income from actual sales of such products in a given year. Likewise, marginal land used for cultivation might produce only minimal receipts. *See, e.g., Thorfinnson v. County of Hennepin*, No. TC-23450, 1996 WL 470530 (Minn. T.C. Aug. 15, 1996) (marginal land used for no other purpose than to produce low-quality hay qualified as agricultural land on facts presented). If property has been used in accordance with the requirements of subdivision 23(c), it should not be denied classification as “agricultural land” simply because the “agricultural products” produced for sale were not yet saleable, or could be sold for only a modest price. A minimum receipts standard, however would produce precisely these results.

Finally, it is worth noting that the Tax Court has been confronted by the specific issue you raise. The taxpayers in *Swanson v. County of Carver*, No. CX-96-452, 1996 WL 551208 (Minn. T.C. Sept. 24, 1996), sought an agricultural classification for a 40 acre tract that was “primarily wooded, contain[ed] [their] homestead and ha[d] a few tillable acres.” *Id.*, 1996 WL 551208 at \*1. The court noted that taxpayers did not contest that the land had only nominal agricultural use, “but they ask for clarification on what agricultural use is sufficient. [Taxpayers] want clearer rules so people with the same situation are treated the same.” *Id.* The Tax Court resolved the case applying *Barron*. *See id.* at \*2. The court thus rejected the request for “clarity” in favor of the non-mechanical and fact-specific judgments required by *Barron*. Where the legislature requires local officials to exercise discretion, they cannot adopt bright-line policies limiting their range of discretion. *Cf. Res Investment Co. v. County of Dakota*, 494 N.W.2d 64, 66-67 (Minn. 1992) (where legislature placed no time limit upon county board’s authority to consider property tax abatement requests, board could not limit its own jurisdiction by adopting a one-year limitation period).

**CONCLUSION**

Based on the foregoing analysis, we answer your question in the negative.

Very truly yours,



BRADFORD S. DELAPENA  
Assistant Attorney General  
Manager, Tax Litigation Division

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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

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TELEPHONE: (651) 297-1075

April 6, 2005

Michael D. Williams  
Marshall County Attorney  
423 North Main Street  
Warren, MN 56762

Dear Mr. Williams:

Thank you for your correspondence dated March 2, 2005 requesting an opinion of the Attorney General with respect to the facts described below.

## FACTS AND BACKGROUND

Pursuant to Minn. Stat. § 103D.311 (2004), the Marshall County Board of Commissioners appoints individuals to the board of managers of the local watershed district. These appointments are for three-year terms. At the end of the three-year term, the County Board may reappoint the current manager or may appoint a new manager to a new three-year term. You ask whether the Marshall County Board of Commissioners has the authority to remove a manager of a local watershed district prior to the expiration of the manager's three-year term, and whether the manager can be removed pursuant to the provisions of Minn. Stat. §§ 351.14-.23 (2004), which address the removal of elected county officials.

## LAW AND ANALYSIS

Minnesota Statutes chapter 103D (2004) contains the statutory provisions pertaining to the establishment and organization of watershed districts. While the Minnesota Board of Soil and Water Resources appoints the members of the first board of managers upon the initial creation of a watershed district, the county boards representing the counties within which the watershed district lies make all subsequent appointments. Minn. Stat. § 103D.225, subd. 4 and Minn. Stat. § 103D.311, subd. 2 (2004). For managers appointed by a county board, the term of office is set by statute at three years. Minn. Stat. § 103D.315, subd. 6 (2004).

As a general rule, the power to appoint a public officer carries with it the power to remove at will unless the Legislature has restricted such power by statute. *See* 39 Dunnell Minn. Digest *Public Officers and Employees* § 5.02 (4th ed. 1998); *State v. Poirier*, 189 Minn. 200, 203, 248 N.W. 747, 748 (1933). However, this general rule does not apply to individuals appointed for a fixed or definite term. *State v. Essling*, 268 Minn. 151, 155 n.4, 128 N.W.2d

307, 311 n.4 (1964); *Chisholm v. Bergeron*, 156 Minn. 276, 278, 194 N.W. 624 (1923). Where the appointment is for a fixed period, the power to remove, as well as the manner and circumstances in which the power may be exercised, must be determined by the statutes creating the office. Op. Atty. Gen. 475-h, April 30, 1985 (removal of public official limited to circumstances expressly listed in statute). In addition, when the statute creating the office does not specifically address the subject of removal, it is generally recognized that the appointing authority can dismiss the individual holding the office only for cause and after due notice and hearing. *Id*; *Rockwell v. State Board of Education*, 213 Minn. 184, 190, 6 N.W.2d 251, 257 (1942); 67 C.J.S. *Officers* § 151 (2002) (officers appointed for a definite term generally can only be removed for cause "even though it is not so provided by statute").

Applying the above criteria to the appointment of managers to watershed districts, it is clear that that a manager may not be removed by a county board at will because the manager serves for a fixed three-year term. See Minn. Stat. § 103D.315, subd. 6 (2004). Consequently, Minn. Stat. ch. 103D, the specific law creating watershed districts, must be reviewed to determine whether the authority to remove the managers, as well as the manner and circumstances in which such authority may be exercised, has been set forth by the Legislature.

A review of Minn. Stat. ch. 103D does not reveal any discussion regarding the removal of managers appointed by county boards. However, Minn. Stat. § 103D.315, subd. 7 (2004), which discusses vacancies, states that "[t]he provisions of section 351.02 regarding vacancies apply to members of the board of managers." Minnesota Statutes section 351.102 (3) (2004) in turn does provide that an office becomes vacant upon the incumbent's "removal," but does not set out the permissible grounds for such removal. Nor does that statute provide any overall authority to remove a public officer who is appointed to a fixed term. Consequently, as with chapter 103D, this statute does not provide the authority or the procedures for the removal of watershed board members. C.f. Op. Atty. Gen. 59a-30, July 24, 1996 (section 351.02 (3) alone does not provide a basis for removal from office). However, it does imply that there could be a situation where a manager is removed.

You have asked whether Minn. Stat. §§ 351.14-.23 (2004) provide a mechanism under which the county board may act to remove a watershed district manager. These statutory provisions address the removal of an "elected county official." See Minn. Stat. § 351.15 (2004) ("[a]n elected county official may be removed from office in accordance with the procedures established in sections 351.14 to 351.23"). An "elected county official" is defined as "any public official who is elected to countywide office or appointed to an elected countywide office...." Minn. Stat. § 351.14, subd. 5 (2004). Watershed district managers are not elected to a countywide office or appointed to an elected countywide office and, consequently, would not meet the definition of an "elected county official" as used in these statutes. Thus, we are of the opinion that Minn. Stat. §§ 351.14-.23 (2004) is not an available mechanism to be utilized by a county board to remove a watershed district manager.

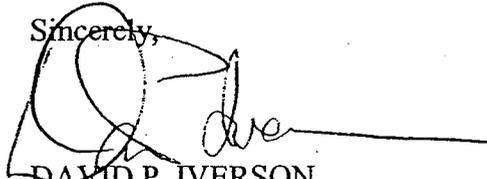
Michael D. Williams  
April 6, 2005  
Page 3

While the governing laws do not appear to address removal of a watershed manager, the appointed officer may still be removed for cause after due notice and hearing. *Rockwell*, 215 Minn. at 190, 6 N.W.2d at 257 (“the only effect of fixing the tenure by statute is that the appointing power cannot, in such cases, remove the official arbitrarily, but only for cause and after due notice and hearing”); 39 Dunnell Minn. Digest *Public Officers and Employees* § 7.01(a) (4th ed. 1998). Sufficient cause has been defined as “one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public....” *Rockwell*, 215 Minn. at 197, 6 N.W.2d at 260, quoting *Hart v. Common Council*, 53 Minn. 238, 244, 55 N.W. 118, 120 (1893). “In the absence of any statutory specification the sufficiency of the cause should be determined with the reference to the character of the office, and the qualifications necessary to fill it.” *Hart*, 53 Minn. at 244, 55 N.W. at 120. Thus, we are of the opinion that a watershed district manager may be removed prior to the expiration of his or her term in office for cause.

#### CONCLUSION

Based upon the foregoing, it is our opinion that the Marshall County Board of Commissioners may only remove an appointed manager of a watershed district for cause after providing due notice and hearing.

Sincerely,

A handwritten signature in black ink, appearing to read 'David P. Iverson', with a long horizontal line extending to the right.

DAVID P. IVERSON  
Assistant Attorney General

(651) 296-0687



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

March 31, 2005

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

David E. Schauer  
Sibley County Attorney  
307 N Pleasant Avenue  
P.O. Box H  
Winthrop MN 55396-0406

Dear Mr. Schauer:

Thank you for your correspondence of February 25, 2005.

## FACTS AND BACKGROUND

You state that the Sibley County Agricultural Society (the "Society") owns the Sibley County fairgrounds, which are located in the City of Arlington ("City"). The Society has constructed an automobile racetrack on the fairgrounds which has been leased to a private operator that sponsors races during the county fair and at other times during the summer. The City has indicated an intent to regulate racing at the fairgrounds either through zoning or some other form of ordinance. At the request of the Society, you seek an opinion as to whether Minn. Stat. § 38.16 limits the power of the City to regulate racing at the fairgrounds.

## LAW AND ANALYSIS

First, county agricultural societies are granted substantial authority and autonomy in conducting county fairs and in managing the fairgrounds in connection therewith.

Minn. Stat. § 38.01 authorizes county agricultural societies, among other things, to:

[a]dopt bylaws, rules, and regulations, alter and amend the same; [and] purchase and hold, lease and control any real or personal property deemed to promote the objects of the society. . . .

That section further provides:

An agricultural society shall have jurisdiction and control of the grounds upon which its fairs are held and of the streets and grounds adjacent thereto during such fair, so far as may be necessary for such purpose. At or before the time of holding any fair, the agricultural society may appoint, in writing, as many persons to act as special constables as necessary, for and during the time of holding the same and for a reasonable time prior and subsequent thereto. These

constables, before entering upon their duties, shall take and subscribe the usual oath of office, endorsed upon their appointment, and have and exercise upon the grounds of the society, and within one-half mile thereof, all the power and authority of constables at common law and, in addition thereto, may, within these limits, without warrant, arrest any person found violating any laws of the state, or any rule, regulation, or bylaw of the society, and summarily remove the persons and property of such offenders from jurisdiction to be dealt with according to law.

Minn. Stat. § 38.16 (2004) provides:

When lands lying within the corporate limits of towns or cities are owned by a county or agricultural society and used for agricultural fair purposes, the lands and the buildings now or hereafter erected are exempt from the zoning, building, and other ordinances of the town or city; provided, that no license or permit need be obtained from, nor fee paid to, the town or city in connection with the use of the lands.

Furthermore, the statutes relating to county agricultural societies contain a number of references to racing and racetracks. *See, e.g.*, Minn. Stat. §§ 38.02, subd. 1(c), 38.03, 38.15.

Second, the council of a statutory city, such as Arlington, also has substantial authority within its jurisdiction to enact and enforce ordinances to regulate noise and disorder; license, prevent or regulate exhibitions, shows and amusements; and generally to provide for the health, safety and general welfare of the community. *See* Minn. Stat. § 412.221, subd. 24, 25 and 32 (2004). In addition, all cities also have broad authority to adopt and enforce zoning regulations in connection with furthering the cities' comprehensive plans. *See* Minn. Stat. § 462.357 (2004).

Third, in Op. Atty. Gen. 772c-4, August 28, 1950, the attorney general determined that, in light of Minn. Stat. § 38.01, the City of Hopkins did not have authority to license or regulate automobile racing on the Hennepin County fairgrounds during the time of the county fair. The opinion further noted, however, that the city could regulate and prohibit racing at other times, assuming that the ordinance was reasonable and properly related to protecting the health, safety and welfare of the community. At the time of that opinion, Minn. Stat. § 38.16 applied only to towns and first- and second-class cities and, therefore, did not apply to the City of Hopkins.

Likewise, in Op. Atty. Gen. 772c-4, December 21, 1951, the attorney general reiterated the opinion that during the time of the county fair, the fairgrounds were under the jurisdiction of the agricultural society to the exclusion of city regulations. However, the opinion also indicated generally that the city could regulate activities and performances occurring on the fairgrounds at other times. Both of these opinions, however, declined to express an opinion concerning the validity of any particular ordinance.

As noted in the 1950 opinion, there appears from the statutes a clear legislative intent that the county agricultural societies should have control and jurisdiction over the fairgrounds as

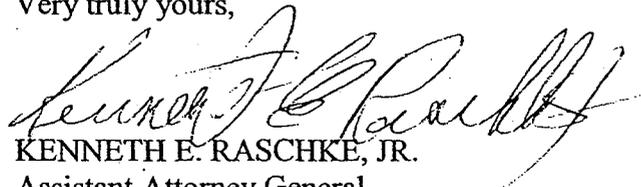
necessary to conduct the county fair, without interference from municipal regulations. Nothing in the language or apparent purpose of the statutes suggests, however, an intent to exempt all conduct taking place at the fairgrounds from otherwise valid municipal regulation, regardless of whether it takes place during, or in connection with, the county fair itself.

Finally, section 38.16, which was not addressed in the previous opinions, was amended in 2004 to extend its applications to all cities and towns as well as to property owned by agricultural societies and by counties. While that section expressly exempts "land and buildings" used for agricultural fair purposes from municipal zoning and other ordinances, it does not exempt non-fair-related conduct by persons from city regulation.

**OPINION**

For the foregoing reasons it is our opinion that Minn. Stat. §§ 38.01 and 38.16 would preclude application of city zoning and other ordinances to the race track facilities themselves, and to auto racing held on the Sibley County fairgrounds during the operation of the county fair. These states do not, however, prevent application of otherwise valid ordinances to other racing events that might be held at the race track.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

March 4, 2005

SUITE 1800  
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TELEPHONE: (651) 297-2040

**MIKE HATCH**  
ATTORNEY GENERAL

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<sup>1</sup> 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 interim 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

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<sup>1</sup> 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,<sup>2</sup> and no similar saving language appears expressly to preserve existing city controls against being superseded 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 any 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.<sup>3</sup>

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<sup>2</sup> See 1982 Minn. Laws ch. 507, § 21.

<sup>3</sup> 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.  
Assistant Attorney General

(651) 297-1141 (Voice)  
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Enclosures



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

102 STATE CAPITOL  
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TELEPHONE: (651) 296-6196

MIKE HATCH  
ATTORNEY GENERAL

March 3, 2005

Margaret A. Skelton  
Ratwik Roszak & Maloney PA  
300 U.S. Trust Building  
730 Second Avenue South  
Minneapolis, MN 55402

Dear Ms. Skelton:

Thank you for your letter of February 7, 2005, requesting an opinion of the Attorney General with respect to the question described below.

## FACTS

Your law firm represents Independent School District No. 116, Pillager (the "District"). The District has implemented mandatory direct deposit for its employees for greater efficiency and as a cost-savings measure. The District currently provides printed earnings statements to its employees. The District has informed its employees that it will discontinue providing the printed earnings statements and will instead provide its employees on-line access to their earnings statements. The employees will have on-line access to more information than was previously provided in the printed earnings statements, including access to all information set forth in Minn. Stat. § 181.032(a)-(h). The electronic method will permit employees to access their earnings statements on a secure internet site, which will be password protected. The employees will have the ability to print a copy of their statement information for their records. If needed, employees will have access to school computers to review and print their earnings statements. Education Minnesota, which is the duly authorized exclusive bargaining unit for the District's teachers, has informed the District that the decision to provide employees with earning statements on-line violates state law. Specifically, that Minn. Stat. § 181.032 requires that the District give employees printed copies of their earning statements. Based on the above, you ask the following:

Is an employer who provides employees online access to earnings statements, including all information set forth in Minn. Stat. § 181.032(a)-(h), in compliance with Minn. Stat. § 181.032, which requires the employer to "give each employee an earnings statement in writing covering that pay period?"

## LAW AND ANALYSIS

Minnesota Statutes Section 181.032 provides in part:

At the end of each pay period, the employer shall give each employee an earnings statement in writing covering that pay period. The earnings statement may be in any form determined by the employer. . . .” The statute does not define what it means to “give” the earnings statement to the employee “in writing.

First, you state that the common dictionary meaning of the term “in writing” means “the act or art of forming visible letters or characters.” You maintain that the form of the writing, whether on paper or electronically, is immaterial. You do note that the employee may print out a “hard copy” of the statement.

Minnesota Statutes, Section 645.44, subd. 14, provides that, as used in Minnesota Statutes, “writing” or “in writing” may include “any mode of representing words or letters.” This appears to support the argument that, by providing the statement via computer, the District would be providing the statement “in writing.” By contrast, other Minnesota Statutes distinguish between items “in writing” and items provided by electronic means. For example, the Internet Privacy Act, Minn. Stat. § 325M.04, provides that authorization may be “in writing or by electronic means.” This indicates a legislative understanding that writing and electronic transmissions are different. *See also* Minn. Stat. § 80A.14, subd. 9 (defines “investment advisor” as one who engages in advising others through “writings or electronic means.”)

Second, you state that on-line access meets the requirement in Minnesota Statutes, Section 181.032, that the employer “give” the written statement to the employee. You maintain that the word “give” is synonymous with “furnish,” which you believe means to make something available. You assert that an employee would have access to District computers, if needed, and could print a copy of the statement, making it “available” to the employee.

According to the American Heritage Dictionary, however, “give” means to “bestow” or “to place in the hands of,” implying that a tangible copy of the statement is transferred from one person to another. “Tangible” is defined as having or possessing physical form or capable of being touched and seen. *See Black’s Law Dictionary* (8th Ed. 2004). This clearly would not be satisfied if the employee were provided on-line access only. Even if a printed copy is “made available,” however, such availability appears to be something less than “placing in the hands of”.

Third, you argue that the purpose underlying the writing requirement would be satisfied by producing the earnings statement on-line. You write that, in general, “writings are required because they produce a tangible record of a transaction on agreement.” Further, you maintain that writings allow a person to verify the accuracy of a transaction and use the writing at a later date, if needed. You believe that the purpose is served because the employee could print a permanent record of the statement.

Presumably, however, not all employees will have ready access to a computer. Janitors, bus drivers and cooks are just some of the types of school district employees who may not have convenient access to a computer. Where such access is not readily available, the intent of the law does not seem satisfied. The purpose of the provision which requires an employer to "give" an earnings statement to employees implies that an employee need not take any action in order to obtain a copy of the earnings statement. In other words, the responsibility is placed on the employer to transmit the statement to each employee. If the law intended that a copy of the earnings statement simply be made available to employees, the law would have so stated.

We believe that an employee's ability to print the document is a necessary element for the requirement that the statement be in writing. We are not persuaded, however, that an employer's responsibility to "give" an employee a statement is satisfied by simply making the statement available via on-line access. Indeed, if that were the case, employers could simply indicate to employees that printed statements are generally available but require them to specifically request a copy in order to obtain one. Such a practice does not appear to be consistent with the language and purpose of Section 182.032.

#### CONCLUSION

We believe that the District must continue to provide a printed earnings statement to its employees. We also believe, however, that an employee could elect to receive the statement on-line, provided that such an election is purely voluntary. In that manner, employees with ready access to computers may choose to accept the statement via an on-line system. Those employees who do not have ready access to a computer, however, may continue to receive the printed earnings statement in the manner currently provided.

Very truly yours,



MIKE HATCH  
Attorney General  
State of Minnesota



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH  
ATTORNEY GENERAL

February 25, 2005

SUITE 1800  
445 MINNESOTA STREET  
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TELEPHONE: (651) 297-2040

James J. Thomson  
Kenney & Graven Chartered  
470 U.S. Bank Plaza  
200 S Sixth Street  
Minneapolis MN 55402

Dear Mr. Thomson:

Thank you for your correspondence of January 5, 2005.

You indicate that you are the City Attorney for the City of Brooklyn Park. You request an opinion from the Attorney General with respect to the issues discussed below.

## FACTS AND BACKGROUND

You indicate that a newly-elected member of the Brooklyn Park City Council is a firefighter in the Brooklyn Park Fire Department. The new council member is also a member of the Brooklyn Park Volunteer Firefighters' Relief Association. The Fire Department consists of full-time, salaried employees and part-time, paid on-call firefighters. The Fire Chief is appointed by the city manager, subject to approval by the city council. The newly elected council member does not hold any position in the Fire Department other than firefighter. He is paid an hourly rate on a per-call-basis. He is not appointed or otherwise supervised by the city council. As part of approving the annual budget for the city, the city council approves any increase in the hourly rate paid to firefighters.

The Brooklyn Park Firefighters' Relief Association is governed by Minnesota Statutes, chapter 424A. The city council approves the bylaws of the Relief Association and makes an annual contribution towards the retirement benefits for members of the Relief Association.

Another newly elected city council member has been employed in a part-time seasonal position with the City's Recreation and Parks Department. He works at the city-owned golf course, but he is not supervised or appointed by the city council.

Brooklyn Park is a charter city. Section 2.05 of the City Charter states:

No member of the council shall be appointed City Manager, *nor shall any member hold any non-elective paid municipal office or employment under the City*; and until one year after the expiration of his/her term as Mayor or Council

Member, no former member shall be appointed to any non-elective paid appointive office or employment under the City.

(Emphasis added.)

Minn. Stat. § 471.87 states that, except as authorized in section 471.88, a public officer cannot have a personal financial interest in, or personally benefit from, a contract entered into by the public body. Section 471.88 provides that the governing body of a city may, by unanimous vote, contract for goods or services with an interested officer of the governmental unit in several situations. Those permissible situations include contracts for which competitive bids are not required and contracts with a volunteer fire department for the payment of compensation or retirement benefits to members.

The Attorney General's Office has previously issued an opinion that section 471.88, subdivision 6, overrides a provision in the Montevideo city charter that is similar to section 2.05 of the Brooklyn Park Charter. Op. Atty. Gen. 358e-4, February 3, 1959. *See also* Op. Atty. Gen. 90E, April 17, 1978.

Based upon these facts, you ask the following questions:

1. Does Minnesota Statutes section 471.88 supersede section 2.05 of the Brooklyn Park City Charter with respect to a council member being a member of the Firefighters' Relief Association and serving as a part-time, paid on-call firefighter for the city?
2. Does Minnesota Statutes section 471.88 supersede section 2.05 of the Brooklyn Park City Charter with respect to a council member being able to serve as a part-time seasonal employee in the City's Recreation and Parks Department?

#### LAW AND ANALYSIS

First, Minn. Stat. § 471.87 (2004) provides:

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 prohibition applies to contracts of employment. *See, e.g.* Op. Atty. Gen. 59-b-11, May 15, 1963.

Second, Minn. Stat. § 471.88 (2004) provides in part:

Subdivision 1. Coverage. The governing body of any port, authority, seaway port authority, economic development authority, watershed district, soil and water conservation district, town, school district, hospital 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. 5. Contract with no bids required. A contract for which bids are not required by law.<sup>1</sup>

Subd. 6. Contract with volunteer fire department. 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.

Subdivision 5 has been applied generally to contracts of employment between cities and members of city councils. *See, e.g.*, Letter dated April 9, 1998 to the city attorney of Thief River Falls (copy enclosed).

Third, Op. Atty. Gen. 90-E, April 17, 1978 (copy enclosed) addressed a situation in which the City of Chisholm contracted with a separate nonprofit volunteer firefighting corporation for fire protection. One of the members of that organization was elected to the city council. The Opinion concluded that future amendments or renewals of the contract would be permissible if unanimously approved by the council under section 471.88, subdivisions 1 and 6. The Opinion did not, however, consider any provisions of the city charter.

Fourth, as you point out, Op. Atty. Gen. 358e.-4, February 3, 1959 determined that a previous version of section 471.88, subdivision 6 prevailed over a charter provision similar to that in Brooklyn Park, and that a council member could therefore remain a member of the city fire department if the requirements of that section were met. *See also* Op. Atty. Gen. 90e, July 14, 1955 and May 4, 1954 (copies enclosed).

Fifth, the preemptive effect of section 471.88 was further strengthened with the passage in 1967 of Minn. Stat. § 471.881, which provides:

The exceptions provided in section 471.88 shall apply *notwithstanding the provisions of any other statute or city charter.*

(Emphasis added.) *See* 1967 Minn. Laws ch. 18, § 1.

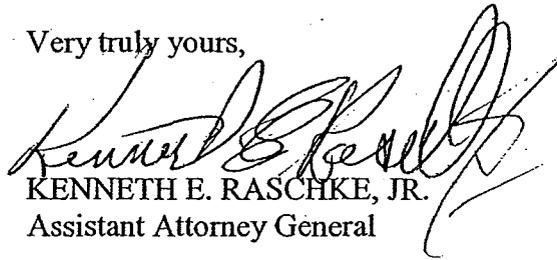
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<sup>1</sup> *See also* Minn. Stat. § 471.89 (2004) which imposes certain additional procedural requirements upon contracts approved under Minn. Stat. § 471.88, subd. 5.

**CONCLUSION**

For the foregoing reasons, it is our opinion that the provisions of Minn. Stat. §§ 471.88-471.89 permit a city council, in the situations listed therein, to contract with interested council members if the terms of those sections are satisfied, notwithstanding any city charter provisions to the contrary. We therefore answer your questions in the affirmative.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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Enclosures

AG: #1364129-v1



# STATE OF MINNESOTA

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**MIKE HATCH**  
ATTORNEY GENERAL

February 9, 2005

Thomas Miller  
Miller Law Office, P.A.  
Oak Point Business Center  
26357 Forest Boulevard, Suite 6  
P.O. Box 807  
Wyoming, MN 55092

Dear Mr. Miller:

Thank you for your correspondence of December 31, 2004.

## FACTS AND BACKGROUND

You state that two of the five members of the Chisago City Council are members of a limited liability company (the "Company"). The Company owns property which it is seeking to have annexed to the City for development purposes by means of a joint resolution by the City Council and neighboring town board.

It is anticipated that the following Chisago City Council actions would be required for the development to take place:

1. Consideration by the City of the Company's annexation request.
2. Consideration by the City of the Company's request for rezoning of the Property once it has been annexed into the City.
3. The negotiation, approval and execution of a development agreement (the "Development Agreement") pursuant to which the Company will be required to: (a) construct, at its cost, certain public improvements; (b) secure its obligations under the Development Agreement; and (c) pay certain costs and fees associated with such developments to the City.

It is anticipated that all of the foregoing matters will proceed in complete compliance with Chisago City ordinances and procedures and that the Company will not receive any benefits or subsidies from the City. Further, if the City is not prohibited from proceeding with any of the foregoing actions, including entry into the Development Agreement, you propose that the Council proceed as follows:

1. The Council Members who are members of the Company will be required to disclose their ownership interest in the Company;
2. The Council Members who are members of the Company will be directed to refrain from discussions and abstain from voting on any of the foregoing actions including, without limitation, the Development Agreement; and
3. The Development Agreement will only be approved by unanimous vote of the three remaining Council Members.

Based on the foregoing, you pose the following questions:

1. Does Minnesota Statutes Section 471.87 prohibit the City from approving and/or entering into any of the above-described actions including, without limitation, the Development Agreement?
2. Does Minnesota Statutes Section 412.311 prohibit any of the foregoing City actions including, without limitation, approval and execution of the Development Agreement?
3. Assuming the answers to one and two above are in the negative, is the process described above legally required or permissible with respect to addressing the situation?

#### LAW AND ANALYSIS

Minn. Stat. § 412.311 (2004) provides in part:

Except as provided in sections 471.87 to 471.89, no member of a [statutory city] council shall be directly or indirectly interested in any contract made by the council.

Minn. Stat. § 471.87 provides:

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 there from. Every public officer who violates this provision is guilty of a gross misdemeanor.

First, these prohibitions apply regardless of whether an interested council member actually votes or participates in discussion on the sale, lease or contract. *See, e.g., Op. Atty. Gen. 90a, December 29, 1958 (copy enclosed).*

Second, they apply, however, only to circumstances involving transactions of a contractual nature. They do not generally apply to a city's legislative or regulatory activities. *See, e.g., Op. Atty. Gen. 59a-32, September 11, 1978 (copy enclosed), (concluding that enactment and enforcement of municipal zoning ordinances is not within the scope of the prohibitions of Minn. Stat. §§ 412.311 and 471.87.)*

Third, the use of "developer agreements" in connection with the application of municipal land use controls is more problematic. I am aware of no Minnesota cases on point, and there appears to be a split of opinion generally as to whether "development agreements" are normally considered to be contractual or regulatory by nature. *See Generally 4 Rathkopf, The Law of Zoning and Planning § 50.07 (4th ed. 1993 Supp.)*. While the municipal planning and zoning laws, Minn. Stat. § 462.351 - 462.365 (2004), deal primarily with the adoption and enforcement of regulatory measures, they also contemplate transactions of a more contractual nature. For instance, a city's police power, as it relates specifically to land subdivision and development, is set forth in detail in Minn. Stat. § 462.358. Specifically, that statute authorizes a municipality to adopt and enforce regulations permitting it to condition its approval of a proposed development upon compliance by the developer with certain requirements, including the construction and installation of sewers, streets, water facilities and similar improvements. The regulations may also permit the municipality "to execute development contracts embodying the terms and conditions of approval," which the municipality may "enforce" by appropriate legal and equitable remedies. *See Min. Stat. § 462.358, subd. 2a (2004) (see also subdivision 3b of that section which requires a municipality to certify final approval of a proposed development if the applicant has complied with all conditions and requirements "either through performance or the execution of appropriate agreements assuring performance.")*

To the extent that such an agreement is designed merely as an enforcement vehicle to secure compliance on the part of the developer with conditions and requirements imposed by the city under its police powers, it may be viewed as essentially regulatory, rather than contractual, in nature, and therefore outside the scope of sections 412.311 and 471.87. However, some such agreements go beyond such purely regulatory objectives and provide for particular commitments by the city such as the installation of streets, sewer and water within the development area and the financing of such improvements through the issuance of bonds payable from special assessments levied against benefited property pursuant to Minn. Stat. ch. 429. Even though made in a regulatory context, such commitments do not appear to be solely an exercise of city police powers but also extend to an exercise of the city's power to make "necessary or desirable" contracts under Minn. Stat. § 412.221, subd. 2 (2004).

Fourth, authority for the annexation of unincorporated land to a municipality is contained in Minn. Stat., ch. 414 (2004) which provides several different annexation mechanisms. Most of these involve either approval of an annexation petition by a state agency pursuant to statutory criteria or unilateral legislative action by the city. *See Minn. Stat. §§ 414.031 and 414.033*. However, Minn. Stat. § 414.0325, subd. 1 (2004) provides a mechanism for a form of summary annexation based upon a joint resolution adopted by a city council and town board. Depending upon the provisions of such a joint resolution, it may be treated as a "binding contract" among

the parties. *Id.* subd. 6. For instance, some joint resolutions include concessions by a city in terms of restrictions on future annexations or monetary payments to the town in exchange for the town's agreeing to the present annexation. *See, e.g., Id.*, Minn. Stat. § 414.036. In such circumstances, a joint resolution for orderly annexation may also be considered a contract subject to the prohibitions of Minn. Stat. §§ 412.311 and 471.87.

Fifth, Minn. Stat. § 471.88 provides certain exceptions to the prohibitions contained in Sections 412.311 and 471.87. Specifically, that section permits the governing body, by unanimous vote, to contract with an interested member "for goods or services" in certain specified circumstances. One such exception applies to contracts "for which competitive bids are not required." *Id.* subd. 5.

In situations not covered by the above statutory prohibitions, there is no outright common-law prohibition against a city council taking an action in which a council member has a personal financial interest. Rather the courts will consider a number of factors in determining whether an interested member will be disqualified from participating in that decision in his or her official capacity. *See Lenz v. Coon Creek Watershed Dist.*, 278 Minn. 1, 153 N.W.2d 209 (1967). *Op. Atty. Gen.*, 59a-32, September 11, 1978.

#### CONCLUSION

It seems clear from the facts provided that the Council members in question do have a personal financial interest in the proposed annexation, rezoning and "Development Agreement," all of which would advance the potential for their Company to realize financial gain from its property.

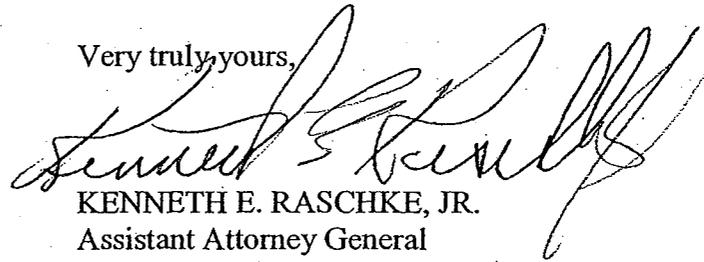
Since the adoption or amendment of a zoning ordinance, standing alone, would not normally be a contractual transaction, approval of a rezoning ordinance might not be found to violate Section 412.311 or 471.87. The interested Council members should not participate in that decision.

The next issue is whether the annexation resolution or the Development Agreement would be regulatory in nature. The answer to this issue depends upon the specific terms of those actions. If, as stated, the Company will not receive any special benefits or subsidies under the Development Agreement, it may not fall within the statutory prohibitions. Since the complete terms of these transactions are not before us, however, we can offer no definitive opinions in that regard. For the same reasons, it is not possible to make any definitive statements concerning the potential applicability of Minn. Stat. § 471.88, subd. 5. However, it seems unlikely that an orderly annexation agreement or a complex development agreement would ordinarily be characterized as merely a contract for "goods or services." *Cf. Op. Atty. Gen.* 469a-12, August 30, 1961 (copy enclosed) (land was not a "commodity" for purposes of applying earlier version of section 471.88, subd. 5 exception.)

Thomas Miller  
February 9, 2005  
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I hope the foregoing discussion is helpful to you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kenneth E. Raschke, Jr.", written in a cursive style.

KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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

Enclosures

AG: #1359820-v1



# FILE

## STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

**MIKE HATCH**  
ATTORNEY GENERAL

January 27, 2005

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

Raymond F. Schmitz  
Olmsted County Attorney  
151 4th Street Southeast  
Rochester, MN 55904-3710

Dear Mr. Schmitz:

Thank you for your correspondence of December 23, 2004 requesting an opinion of the Attorney General with regard to the issue described below.

### FACTS

You state that the Olmsted County Sheriff has hired a number of part-time employees to oversee the movement of prisoners. The employees are not licensed as peace officers, but hold permits to carry firearms under Minn. Stat. ch. 624. The Sheriff requires these employees to carry firearms while transporting prisoners. You state that the Rochester Police Department was recently advised that having volunteer medical personnel carry firearms while working with the Department's Emergency Response Unit was a violation of Minn. Stat. § 626.84, subd. 2 (2004). You point out that Minn. Stat. § 624.714, subd. 18 (2004) authorizes public and private employers to adopt policies that restrict the carrying of firearms by employees on duty. In light of this background, you seek the Opinion of this Office on the following question:

If the Olmsted County Sheriff employs individuals "licensed" to carry firearms under Minn. Stat. ch. 624 and requires them to carry while on duty, are the Sheriff and Olmsted County in violation of section 626.84, subd. 2?

### LAW AND ANALYSIS

Minnesota Statute § 626.84, subd. 2 (2004) provides:

Subd. 2. Scope. Notwithstanding sections 12.03, subdivision 4, 12.25, or any other law to the contrary, no individual employed or acting as an agent of any political subdivision shall be authorized to carry a firearm when on duty unless the individual has been licensed under sections 626.84 to 626.863. Nothing herein shall be construed as requiring licensure of a security guard as that term is defined in section 626.88, subdivision 1, clause (c).

Minn. Stat. § 624.714, subd. 18(a) provides:



(a) An employer, whether public or private, may establish policies that restrict the carry or possession of firearms by its employees while acting in the course and scope of employment. Employment related civil sanctions may be invoked for a violation.

First, it must be noted that section 624.714, subd. 18 was enacted as part of 2003 Minn. Laws ch. 28, art. 2. That legislation was held unconstitutional and its enforcement enjoined by the Ramsey County District Court in the case of *Unity Church of St. Paul v. State of Minnesota*, File No. C9-03-009570. The State's appeal of that case is presently pending in the Minnesota Court of Appeals. Appellate File No. A-04-1309.

Second, there is no particular ambiguity in the language set forth in Minn. Stat. § 626.84, subd. 2 (2004). That subdivision plainly states that no employees of any political subdivision aside from those licensed under sections 626.84 - 626.863 are to be permitted to carry firearms while on duty. When statutory language is unambiguous, it is to be applied in accordance with its plain meaning. See Minn. Stat. § 645.16 (2004); *State v. Bluhm*, 626 N.W.2d 649, 651 (Minn. 2004).

Third, nothing in Minn. Stat. § 624.714, subd. 18 is inconsistent with the plain wording of section 626.84. Section 624.714, subd. 18 authorizes employers to impose restrictions on their employees' carrying of firearms beyond those that are otherwise prescribed by law. It implies no authority to reduce or eliminate any independently existing statutory prohibitions. Even if there were some inconsistency between the two provisions, section 626.84, which applies more specifically to employees of political subdivisions, would likely be found to control over section 624.714, subd. 18, which applies generally to all employers, both public and private. See Minn. Stat. § 645.26 (2004)

Finally, you point out that the term "firearm" is not defined in Chapter 626 and that the definition contained in Minn. Stat. § 97A.015, subd. 19, is so broad as to potentially include such tools as power nail drivers and tranquilizing guns that might be used by public employees. That subdivision, which applies specifically only to game and fish laws, provides: "'Firearm' means a gun that discharges shot or a projectile by means of an explosive, a gas, or compressed air."<sup>1</sup> There are other statutory definitions, however, that are somewhat narrower in scope. For instance, Minn. Stat. § 609.666, subd. 1(a) (2004) provides: "(a) 'Firearm' means a device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion or force of combustion." Minn. Stat. § 609.669, subd. 2(2) (2004) provides: "(2) 'firearm' means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive; or the frame or receiver of any such weapon. See also *Blacks Law Dictionary* (8th ed. 2004) which defines a firearm as "a weapon that expels a

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<sup>1</sup> "Gun" is generally defined as "a weapon consisting of a metal tube from which a projectile is fired at high velocity." *American Heritage College Dictionary* (Third Ed. 2000)

projectile (such as a bullet or pellets) by the combustion of gunpowder or other explosive." All of these definitions are premised upon the understanding that the item described is, in essence, a weapon and all but section 97A.015 include explosion or combustion as the propellant. Such definitions seem clearly to exclude ordinary tools such as nailers. In any event, our understanding of your question is that it does not contemplate use of such tools, but rather the carrying of pistols for which a permit to carry is required pursuant to Minn. Stat. § 624.714. In that context, section 624.712, subd. 2 (2004) provides:

Subd. 2. Pistol. "Pistol" includes a weapon designed to be fired by the use of a single hand and with an overall length less than 26 inches, or having a barrel or barrels of a length less than 18 inches in the case of a shotgun or having a barrel of a length less than 16 inches in the case of a rifle (a) from which may be fired or ejected one or more solid projectiles by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances; or (b) for which the propelling force is a spring, elastic band, carbon dioxide, air or other gas, or vapor.

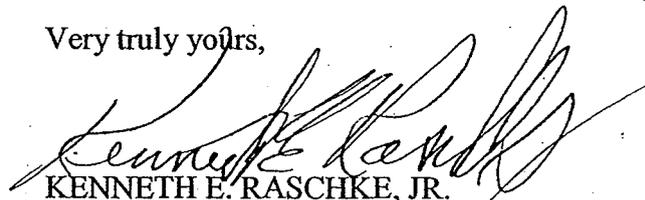
"Pistol" does not include a device firing or ejecting a shot measuring .18 of an inch, or less, in diameter and commonly known as a "BB gun," a scuba gun, a stud gun or nail gun used in the construction industry or children's pop guns or toys.

(Emphasis added) While there could arguably be some ambiguity regarding application of section 626.84, subd. 2 to the carrying of gas-powered weapons, handguns of the type normally carried by peace officers would be plainly within all of the above definitions of firearms.

#### OPINION

Based upon the foregoing, it is our opinion that pursuant to Minn. Stat. § 626.84, subd. 2 (2004), the Sheriff is not permitted to authorize or require employees, other than those licensed under sections 626.84-626.863, to carry firearms while on duty.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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



MIKE HATCH  
ATTORNEY GENERAL

STATE OF MINNESOTA  
OFFICE OF THE ATTORNEY GENERAL

December 15, 2004

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

*Fill Vadnais Heights*

Willard L. Converse  
Jensen, Bell, Converse & Erickson, P.A.  
1500 Wells Fargo Place  
30 East Seventh Street  
St. Paul, MN 55101

Dear Mr. Converse:

I thank you for your correspondence dated November 9, 2004 concerning approval of zoning variances.

**FACTS AND BACKGROUND**

You state that the Vadnais Heights City Council recently considered an application for a zoning variance at a meeting where two of the five council members were absent. Two of the three attending members voted in favor of the variance. You indicate that the third member abstained for reasons that appeared to be "on the line" between a "legal conflict of interest" and personal or political motivation. The motion was withdrawn due to concerns that:

1. The granting of a variance would require approval by a majority of all members of the council because it is, in effect, an amendment to the zoning ordinances as to a specific parcel of property, and
2. Disqualification of the abstaining member would deprive the meeting of a quorum of the council necessary to conduct council business.

The variance was considered and approved at a subsequent meeting at which all members were in attendance. You believe, however, that similar situations are likely to arise in the future.

Therefore, in light of these facts, you pose two questions:

1. For approval of a variance is a majority of a quorum sufficient or does it require a majority of all members of the council?
2. If a council member is disqualified from voting because of a conflict of interest, is a temporary vacancy created as to *that issue* thus creating a two-member council and lack of a quorum?

## LAW AND ANALYSIS

First, as a general proposition, absent specific statutory language to the contrary, actions of a governing body are valid if approved by a majority of the members voting at a meeting where a quorum is in attendance. *See, e.g.*, 4 McQuillin Municipal Corporations, § 13.31.10, 13.31.15 (3d Ed), Ops. Atty. Gen. 471 October 30, 1986, and 471-e, July 12, 1949. A majority of the members of a statutory city council constitutes a quorum. *See* Minn. Stat. § 412.191, subd. 1 (2004).

Second, absent statutory language requiring approval by a specific number of members, or by a stated proportion of the entire authorized membership, a quorum of a body and the requisite number of votes needed to approve a measure will be computed with reference to the number of members actually in office at the time the action is taken. For example, if there are two vacancies on a board that normally consists of seven members, it will be treated, for quorum and voting purposes, as if it were a five-member body. *See, e.g.*, *State ex rel Peterson v. Hoppe*, 194 Minn. 186, 260 N.W. 215 (1935), Op. Atty. Gen. 63-b-14, October 6, 1982.

Third, where the requisite quorum is present, the abstention of a member will not generally block adoption of a measure approved by a majority of the other members present and voting. *See, e.g.*, *Annot*, 65 ALR 3d 1072, Op. Atty. Gen. 471-M, October 30, 1986.

Fourth, if a member is legally disqualified from voting on a particular matter, however, the disqualification will be treated as the equivalent of a vacancy for purposes of computing the size of a quorum, and the required voting majority. *See, e.g.*, *In re 1989 Street Improvement Program v. Denmark Twp.*, 483 NW 2d 508 (Minn. Ct. App. 1992),<sup>1</sup> Op. Atty. Gen. 471-M, October 30, 1986.

Fifth, Minn. Stat. § 462.357, subd. 2 (b) (2004) provides that “the governing body” of a city or town may “adopt and amend a zoning ordinance by a majority vote of all its members.” Adoption and amendment of zoning ordinances are considered to be legislative acts. *See, Houn v. City of Coon Rapids*, 313 NW 2d 409 (Minn. 1981), *St. Croix Development, Inc., v. City of Apple Valley*, 446 NW 2d 392 (Minn. Ct. App. 1989).

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<sup>1</sup> The Court in *Denmark Township* did not conduct an in-depth analysis of the facts to determine whether the abstaining members were actually disqualified as a matter of law. Rather the court said:

Certainly, the interests in the property would give the appearance of impropriety, and that should allow a public official to abstain and not be second-guessed by a court as to the amount involved.

Sixth, pursuant to Minn. Stat. § 462.357, subd. 6 (2004) a "board of appeals and adjustments" is empowered to grant variances from the strict enforcement of a zoning ordinance based upon the criteria prescribed in that subdivision. Minn. Stat. § 462.354, subd. 2 (2004) requires each city having a zoning ordinance to establish such a board by ordinance. The council may perform that function itself or delegate it to a separate body. If a separate body is established, the ordinance may provide that its decisions will be final, appealable to the council or merely advisory. The statute does not specify any extraordinary voting majority necessary to approve variances. Decisions on variances are considered to be quasi-judicial in nature. *See, e.g., Honn, St. Croix Development, Inc.*

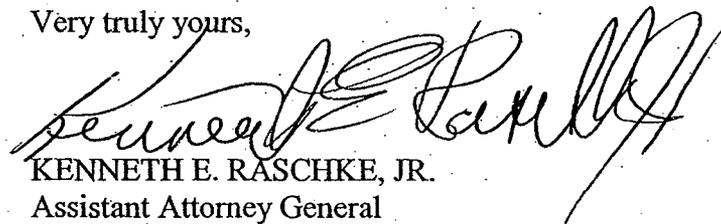
In light of these principles, we answer your specific questions as follows:

If a bare quorum (three-fifths) of the council is present at a meeting, and one of the attending members is disqualified from voting on a particular issue, the remaining two members may not act on that issue due to lack of a quorum, *i.e.* three-fourths of the existing qualified members.

Given the clear statutory distinction between the fundamental nature and statutory processes for enacting or amending zoning ordinances and the granting of variances, a variance should not be considered equivalent to a zoning amendment which would require approval by a majority of the entire council. Rather, in our view, a variance may be granted by a majority vote at a meeting of the council, or a separate board of appeals and adjustments, if appropriate, where a quorum is present.

Please call me if you have further questions.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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MIKE HATCH  
ATTORNEY GENERAL

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

SUITE 1800  
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TELEPHONE: (651) 297-2040

December 1, 2004

Ms. Patricia Anderson  
State Auditor  
525 Park Street, Suite 500  
Saint Paul, MN 55103-2139

Dear Ms. Anderson:

Thank you for your correspondence of September 29, 2004.

## FACTS AND BACKGROUND

You note that pursuant to authority granted by Minn. Stat. § 383A.551 *et seq.*, Ramsey County has adopted a home rule charter. In November 2000, Ramsey County voters approved an amendment to the Charter to add language stating that the County Board has the power

“to contract for the acquisition, construction, or improvement of real property or buildings in a manner determined by the county board to serve the best interest of the public in regard to cost, speed, and quality of construction. Alternative construction procurement methods include, but are not limited to: (1) the solicitation of proposals for construction on a design/build basis and subsequent negotiation of contract terms; or (2) the solicitation of proposals for a construction management agreement which may include a guaranteed maximum price.”

Ramsey County Charter § 2.02M.

You state that since this amendment was adopted, the County has proceeded with building construction projects exceeding \$50,000 in cost using a “design-build” process that does not involve solicitation of sealed bids as required by Minn. Stat. § 471.345, the Uniform Municipal Contracting Law (UMCL). In light of these facts you ask the opinion of this Office as to whether Ramsey County, or any charter city, can exempt itself from the provisions of the Uniform Municipal Contracting Law, Minn. Stat. § 471.345 (2004), through a provision in its charter that authorizes its governing board to use design build processes for contracts.

## LAW AND ANALYSIS

Minnesota Constitution art. 12 § 4 permits local governments, when authorized by law, to adopt home rule charters for their own self-government. Minnesota courts have held that in “matters of municipal concern, [local governments operating under a] home rule charter . . . have all the power possessed by the legislature of the state, save as such power is expressly or



impliedly withheld.” *State ex rel Town of Lowell v. City of Crookston*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958).

The courts have also held, however, that in matters involving issues of statewide concern, the authority of local governments to act pursuant to a charter will be narrowly construed unless the legislature expressly provides otherwise. *See, e.g., Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984); *Lilly v. City of Minneapolis*, 55 N.W. 107, 111 (Minn. Ct. App. 1995). In *Lilly*, for example, the court concluded that the question of providing public employee health care/benefits to same-sex domestic partners was a matter of state-wide concern in light of the legislature’s previous consideration of that issue along with same-sex marriage in connection with proposed amendments to the Minnesota Human Rights Act.

Furthermore, the legislature plainly has the authority to withhold, expressly or impliedly, local charter authority. *See Nordmarken v. City of Richfield*, 641 N.W.2d 343 (2000). In that case, the court pointed to express statutory language plainly expressing the legislature’s intent to establish uniformity in municipal zoning procedures, in support of the determination that initiative and referendum provisions in a city charter were preempted by the statutorily prescribed processes. With these principles in mind we turn to the specific question you have raised.

First, Minn. Stat. § 471.345, the Uniform Municipal Contracting Law, fixes certain dollar amount thresholds controlling the particular negotiating or bidding procedures required of counties and other local governments when entering contracts, including contracts for “the construction alteration, repair or maintenance of real or personal property,” *Id.* subd. 2. Subdivision 6 of that section provides:

The purpose of this section is *to establish for all municipalities, uniform dollar limitations upon contracts which shall or may be entered into on the basis of competitive bids, quotations or purchase or sale in the open market.* To the extent inconsistent with this purpose, all laws governing contracts by a particular municipality or class thereof are superseded. In all other respects such laws shall continue applicable.

(Emphasis added). The original session law enacting section 471.345, including subdivision 6 was entitled. “An act establishing a *uniform* municipal contracting law.” (Emphasis added). 1969 Minn. Laws Ch. 934.

Thus, there can be little doubt that, as in the case of the zoning laws reviewed in *Nordmarken*, the legislature has clearly expressed its intention to establish uniformity in the contracting procedures of local governments. In affirmation of that intention, the Attorney General, shortly after enactment of the UMCL, rendered the opinion that the mandatory bidding thresholds in the new statute superseded other limitations expressly set forth in a city charter. *See Op. Atty. Gen. 59-a-15, August 22, 1969.*

Second, the county has argued that the previous enactment of special legislation providing limited exemptions from bidding requirements for particular cities and counties in specific circumstances demonstrates a lack of general legislative intent to apply bidding laws uniformly throughout the state. We believe the opposite is true, *i.e.* the legislature's selectivity in granting exceptions underscores the uniform applicability of the UMCL to cases not covered by such exceptions. *See* Minn. Stat. § 645.19 (2004) (When the legislature enacts specific exceptions to a general law, any others are implicitly excluded).

Third, the legislative mandate for uniformity negates any claim that city or county contracting practices should be considered matters of purely local concern. Indeed, one principle underlying public bidding laws is the desire for fair and open competition among potential contractors. *See e.g. Rice v. City of St. Paul*, 208 Minn. 509, 295 N.W. 529 (1940). Such contractors must generally include those from outside the community letting the contract. *See e.g. Op. Atty. Gen. 707a-15*, October 5, 1966 (city could not limit bids for police car to the model that could be serviced at a local shop). Consequently, the effect of city or county contracting practices extends well beyond the community's borders.

Fourth, the County points out Minn. Const. Art. XII § 2 which provides in part:

The legislature may enact special laws relating to local government units, but a special law, unless otherwise provided by general law, shall become effective only after its approval by the affected unit expressed through the voters or the governing body and by such majority as the legislature may direct. *Any special law may be modified or superseded by a later home rule charter or amendment applicable to the same local government unit, but this does not prevent the adoption of subsequent laws on the same subject. The legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same except as provided in this section.*

(Emphasis added). In 1995 the legislature enacted a special law authorizing Ramsey County to conduct a "pilot project" whereby construction contracts could be entered with or without advertising for bids utilizing, *inter alia* negotiated design/build agreements. 1995 Minn. Laws Ch. 248, art. 17, § 6. The County argues that under the above-quoted constitutional language, it has constitutionally protected power to adopt and implement a charter provision permitting the negotiation of any or all construction contracts without advertising for bids. We do not agree. The 1995 special law, by its own terms, expired on December 31, 1997. Consequently it was no longer in effect in 2000 when the County adopted the charter amendment in question. More importantly, however, we are not aware of any authority for the proposition that charter amendments adopted pursuant to Article XII Section 2 are to be considered exempt from the general preemption principles discussed above.

Patricia Anderson, State Auditor  
December 1, 2004  
Page 4

For the foregoing reasons it is our opinion that a city or county must obtain specific legislative authority to exempt itself from the uniform bidding requirements in Minn. Stat. § 471.345.

Very truly yours,

*Kenneth E. Raschke Jr*  
(BE)

KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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**MIKE HATCH**  
ATTORNEY GENERAL

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

November 24, 2004

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

*File Red Wing  
HRA*

Catherine G. Johnson  
Vogel & Gorman  
Masonic Building  
4th and East Avenue  
P.O. Box 39  
Red Wing, MN 55066-0039

Dear Ms. Johnson:

Thank you for your correspondence of August 6, 2004 concerning authority for dissolution of the Red Wing Housing and Redevelopment Authority ("RWHRA"). I apologize for my delayed response.

## FACTS AND BACKGROUND

You state that, by resolution dated March 3, 1966, the City Council of the City of Red Wing declared the need for a city housing and redevelopment authority. Commissioners were appointed and the first meeting of the RWHRA was held on October 10, 1966. The RWHRA has continued to function since that time. The RWHRA has issued bonds and owns and manages several parcels of property, including housing units, within the City of Red Wing. In 1987, the legislature by, special legislation, authorized the City of Red Wing to establish a port authority commission possessing the powers of other port authorities and the powers of housing and redevelopment authorities established under Minn. Stat. § 469.001 - 469.047. *See* 1987 Minn. Laws Ch. 291 § 82, Minn. Stat. § 469.081. The Red Wing City Council has expressed the view that the RWHRA is no longer needed after creation of the port authority. The Council has obtained a legal opinion supporting the conclusion that the Council has authority to dissolve the RWHRA and to assume its assets and liabilities.

In light of these facts, you request the opinion of this Office on the following questions:

1. May a housing and redevelopment authority established pursuant to Minnesota law be dissolved and, if so, what is the process for dissolving such an agency?
2. If a housing and redevelopment authority can be dissolved, what happens to the property owned by the authority and what happens to the contracts and liabilities of the authority?



## LAW AND ANALYSIS

First, Minn. Stat. § 469.003 (2004) provides, in part:

Subdivision 1. **Preliminary city findings and declaration.** *There is created in each city* in this state a public body, corporate and politic, to be known as the housing and redevelopment authority in and for that city. No such authority shall transact any business or exercise any power until the governing body of the city shall, by resolution, [make specified findings relating to the need for the authority to function in the city].

Subdivision 2. **Public hearing.** The governing body of a city shall consider such a resolution only after a public hearing is held on it after publication of notice in a newspaper of general circulation in the city at least once not less than ten days nor more than 30 days prior to the date of the hearing. Opportunity to be heard shall be granted to all residents of the city and to all other interested persons. The resolution shall be published in the same manner in which ordinances are published in the municipality.

Subdivision 3. **Conclusiveness of resolution.** When the resolution becomes finally effective, it shall be sufficient and conclusive for all purposes if it declares that there is need for an authority and finds in substantially the terms provided in subdivision 1 that the conditions therein described exist.

Subdivision 4. **Copy filed with commissioner of employment and economic development.** When the resolution becomes finally effective, the clerk of the city shall file a certified copy of it with the commissioner of employment and economic development. In any suit, action, or proceeding involving the validity or enforcement of or relating to any contract of an authority, *the authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers upon that filing.* Proof of the resolution and of that filing may be made in any such suit, action, or proceeding by a certificate of the commissioner of employment and economic development.

(Emphasis added) This language is substantially the same as Minn. Stat. § 462.425 (1965) which was in effect when the resolution activating the RWHRA was passed. It is noteworthy, however, that subdivision 1 of the 1965 statute began, "There is *hereby* created in each municipality in this state ...." Minn. Stat. § 469.012 affirms that a housing and redevelopment authority is a "public body corporate and politic" having, with certain exceptions, all powers necessary to carry out its statutory purposes.

Therefore, while certain city council findings must be made before a municipal housing and redevelopment authority may begin to exercise its authority, it is not a creation, or mere subsidiary, of the governing body of the city in which it functions. Rather it is an independent governmental entity created by statute, with its own powers and responsibilities.

Second, under the law such municipal corporations, once created, may be dissolved only by the state, and not by the acts of local authorities, except as expressly authorized by law. 2A McQuillin, Municipal Corporations §§ 8.04-8.10 (3d. Ed.). This rule is also embodied by Minn. Const. art. XII § 3 which specifically states that it is the role of the legislature to provide for the creation, organization, administration and dissolution of local government units.

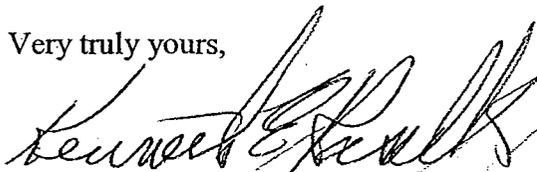
Third, these principles were applied in Op. Atty. Gen. 430, September 29, 1950 which stated that specific new legislation would be needed to authorize the dissolution of a housing and redevelopment authority. *See also* Op. Atty. Gen. 1033 November 28, 1978, which concluded that absent specific statutory authority, a regional development commission could not be dissolved, either by the commission itself or by counties and municipalities authorized to petition for the establishment of the commission in the first instance.

In conclusion, we are not aware of any statutory provision authorizing the dissolution of a housing and redevelopment authority, nor has any been called to our attention. Consequently, it is our view that new legislation would be required to permit dissolution of the Red Wing Housing and Redevelopment Authority. We, therefore, answer your first question in the negative.

In light of our response to the first question, no response to your second question is needed. Any future legislation authorizing the dissolution of a housing and redevelopment authority should also address the process for winding-up its affairs and the disposition of assets and liabilities.

If you have further questions, please contact me.

Very truly yours,



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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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September 9, 2004

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Dear Mr. Ratwik and Ms. Sobieck:

Thank you for your correspondence of July 27, 2004.

You point out Minn. Stat. § 471.975 (Supp. 2003) provided discretionary authority for local units of government, including school districts, to pay to each "eligible member" of the National Guard or reserve the difference between the member's military pay and the salary the employee would have been paid as a governmental employee. An "eligible member" was defined as: "a reservist or National Guard member who was an employee of a political subdivision at the time the member reported for active service on or after May 29, 2003, or who is on active service on May 29, 2003."

In 2004, the legislature amended Minn. Stat. § 471.975 by *inter alia* striking "school districts" from the list of governmental units with discretionary authority to make such payments and adding a paragraph (b) as follows:

(b) Subject to the limits under paragraph (g)<sup>1</sup>, each school district shall pay to each eligible member of the National Guard or other reserve component of the armed forces of the United States an amount equal to the difference between the member's basic active duty military salary and the salary the member would be paid as an active school district employee, including any adjustments the member would have received if not on leave of absence. The pay differential must be based on a comparison between the member's daily rate of active duty pay, calculated by dividing the member's military monthly salary by the number of paid days in the month, and the member's daily rate of pay for the member's school district salary, calculated by dividing the member's total school district salary, calculated by dividing the member's total school district salary by number of contract days. The member's salary as a school district employee must include

<sup>1</sup> Paragraph g provides for limiting the differential payment to the difference between the employee's district pay and the cost of substitutes.



the member's basic salary and any additional salary the member earns from the school district for cocurricular activities. The differential payment under this paragraph must be the difference between the daily rates of military pay times the number of school district contract days the member misses because of military active duty. This payment may be made only to a person whose basic active duty military salary is less than the salary the person would be paid as an active school district employee. Payments may be made at the intervals at which the member received pay as a school district employee. Payment under this section must not extend beyond four years from the date the employee reported for active service, plus any additional time the employee may be legally required to serve.

2004 Minn. Laws ch. 256, art. 1, § 6 (emphasis added).

The definition of "eligible member" was not changed. The new provisions were expressly made effective on July 1, 2004. 2004 Minn. Laws ch. 256, art. 1, § 6.

In light of these changes, you request the opinion of this Office on the following questions:

1. Whether Minnesota Statute § 471.975, as amended by Laws of Minnesota 2004, ch. 256, art. 1, § 6, mandating school districts to pay a salary differential to certain eligible members on active armed forces status, has the effect, on or after July 1, 2004, of creating an obligation for school districts to pay such salary differentials to their employees who were on active status between May 29, 2003 and June 30, 2004.

2. If such an obligation is created, is the effect of the amendment, therefore, one of retroactivity, which, in turn, renders the amendment void and unenforceable.

3. If the amendment is void and unenforceable for having a retroactive effect, what impact is there on a school district's discretionary power to pay its employees a salary differential?

#### LAW AND ANALYSIS

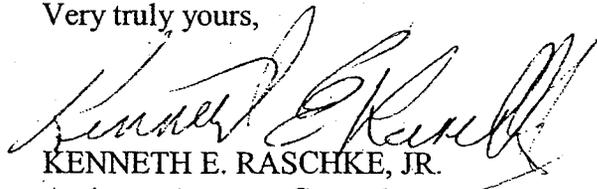
First, Minn. Stat. § 645.21 (2002) provides, "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." The 2004 legislature in enacting the new language did not in any manner manifest intent that it be applied retroactively so as to require school districts to make differential payments for service performed before the enactment. To the contrary, the legislature simply and expressly made the new provisions effective on July 1, 2004. *Cf.* 1991 Minn. Laws ch. 343, art. 23, § 95, which enacted the original version of section 471.975 authorizing pay differentials for service in the first Gulf War. Section 118 of that article provided "Sections 68 and 95 are effective the day after final enactment, and authorize back pay to the date the employee was called to active service."

Second, in our view, the fact that the legislature did not amend the definition of "eligible member" in section 471.975 does not imply any such retroactive obligation. That language defined, and continues to define, the category of employees to whom local governments have had authority to make differential payments and to whom school districts are required to make such payments for service after July 1, 2004. In other words, if a district employee was on active service as a reservist or National Guard member on or after May 29, 2003, the district had discretionary authority, but was not mandated by the statute, to make payments for time in active service before July 1, 2004. If the same employee remains on active duty, the district will be obligated to make differential payments for time spent in active service after July 1, 2004. For these reasons, we answer your first question in the negative.

Our answer to the first question obviates the need to respond to the second and third questions. Nevertheless, we should point out that Minn. Stat. § 645.21 (2002) is merely a rule of statutory construction, not a constitutional restriction on the power of the legislature. Plainly retrospective legislation is not *per se* "void and unenforceable." Rather retrospective legislation is ordinarily prohibited only to the extent that it divests "private vested interests." *See, e.g., In the Matter of Q Petroleum*, 498 N.W.2d 772, 782 (Minn. Ct. App. 1993) *review denied*. However, units of local government such as school districts can acquire no vested rights that are immune from legislative action. *See, e.g., Town of Bridgie v. County of Koochiching*, 227 Minn. 320, 35 N.W.2d 537 (1948) *rehng denied*; *LaCrescent Twp. v. City of LaCrescent*, 515 N.W.2d 608 (Minn. Ct. App. 1994). Therefore, even if the 2004 amendments to Minn. Stat. § 471.975 were found to create a retrospective payment obligation on behalf of the district, that fact would not invalidate the legislation.

I hope the foregoing discussion is responsive to your questions.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General