# STATE OF MINNESOTA
# OFFICE OF THE ATTORNEY GENERAL

## ANNUAL REPORT REQUIRED BY

## Minnesota Statute Sections 8.08 and 8.15 Subdivision 4 (2017)

## Fiscal Year 2018

# TABLE OF CONTENTS

# INTRODUCTION

This report is intended to fulfill the requirements of Minnesota Statutes Sections 8.08 and 8.15, Subdivision 4, for Fiscal Year 2018 (FY 2018).

The Attorney General's Office (AGO) is organized into five sections under the direction of deputy attorneys general: Civil Litigation, Regulatory Law and Professions, Government Legal Services, State Government Services and Civil Law. This report contains summaries of the services provided to state agencies and other AGO constituencies by these sections.

# CIVIL LITIGATION

The Solicitor General division provides litigation services to all three branches of government. Solicitor General division attorneys provide legal representation in cases with significant constitutional or other state interests, including employment and tort claims brought against the State. The division also provides legal representation to the Public Utilities Commission (PUC). For example, the division is involved in litigating the following cases:

- ***T.F.*, et al. *v. Hennepin County, Emily Piper,* et al.** Plaintiffs are Next of Friends filing on behalf of children in Hennepin County's foster care system. They bring a putative class action complaint challenging Hennepin County's provision of child protection services. Plaintiffs allege Hennepin County fails to investigate abuse/neglect reports; fails to provide appropriate services; fails to provide safe and appropriate foster care placements; and fails to secure safe, permanent homes. Plaintiffs bring two causes of action against the Department of Human Services defendants: (1) Substantive Due Process (on behalf of the Special Relationship Class); and (2) violations of the First, Ninth, and Fourteenth Amendments (on behalf of both classes).
- ***Ronaldo Ligons and Barry Michaelson v. Minnesota Dep't of Corrections,* et al.** Plaintiffs are inmates in the custody of the Minnesota Department of Corrections. Plaintiffs allege that they are candidates for medical treatment of their chronic Hepatitis C infections with newly-developed oral medications that could potentially cure their infections, and that the Department's decision not to administer treatment at early stages of the disease is unconstitutional.
- ***In the Matter of Arbitration between State of Minnesota, DOC v. Steven Hammer.*** An individual was terminated from his warden position for, among other things, sending and receiving sexually explicit emails through his state email account. He appealed to the Bureau of Mediation Services (BMS). The BMS arbitrator found the DOC did not have just cause to terminate him. DOC filed a petition of certiorari. The Minnesota Court of Appeals reversed the BMS decision and held the DOC had just cause to terminate the employee.
- ***Brian Rinkel,* et al. *v. Minnesota Department of Corrections.*** Plaintiffs are current and former inmates who allege discrimination based on their disabilities with regard to access to public services in prison. Specifically, Plaintiffs are individuals who are hearing impaired or deaf. They allege that they do not have adequate access to videophone services, have not been given sufficient in-personal programming and ASL services, and that they are not provided equivalent notices and announcements as those provided to hearing inmates.
- ***Anna Glover v. State of Minnesota.*** Plaintiff brings Americans with Disabilities Act and Civil Rights Act Title VII claims regarding her employment by several state agencies in the past ten years. Plaintiff alleges that the defendant state agencies did not

accommodate her disability, discriminated against her on the basis of her race and sex, and retaliated against her.

- ***Erin M. Lundblad and Alexis A. O'Brien v. Community Living Options,* et al.** Plaintiffs are former employees of a group home that is privately run, but licensed by DHS. Plaintiffs allege that they were assaulted by a resident of the group home, and contend that defendants failed to warn them of the resident's past history of physical and sexual abuse.

- ***Ryan M. Larson v. John L. Sanner,* et. al.** Plaintiff alleges violations of his civil rights during the murder investigation of a Cold Springs police officer killed in the line of duty. Plaintiff alleges that state and local Defendants forced entry into his apartment without consent, a warrant, or exigent circumstances and probable cause in violation of the Fourth and Fourteenth Amendments.

- ***Alexis Bailly Vineyard v. Mona Dohman.*** Minnesota law requires farm wineries to produce their wine with a majority of ingredients grown or produced in Minnesota. Plaintiffs, two farm wineries, challenge this requirement as unconstitutional under the Dormant Commerce Clause because they allege that it favors in-state grape growers at the expense of interstate commerce. The district court upheld Minnesota's law, and an appeal is currently pending before the United States Court of Appeals for the Eighth Circuit.

- ***Heirs of Beckett Gast v. State of Minnesota,* et al.** Plaintiff is Next-of-Kin of a minor child who died while in a private day care that is licensed by the Department of Human Services (DHS) and Pennington County. Plaintiff asserts that the day care provider was using a crib that was noncompliant with state and federal law and claims the Defendants were negligent in licensing the day care provider. The district court granted DHS' motion to dismiss.

- ***Tiffini Flynn Forslund,* et al. *v. State of Minnesota,* et al.** Plaintiffs are parents of Minnesota students who claim that Minnesota teacher tenure laws are unconstitutional. Plaintiffs contend that as a result of tenure and continuing contract laws Minnesota school districts hire and retain ineffective teachers. Plaintiffs allege the statutes violate the Education Clause, Equal Protection Clause, and Procedural Due Process Clause of the Minnesota Constitution. The district court dismissed the Plaintiffs' Complaint, and the Minnesota Court of Appeals affirmed the dismissal. Following a Minnesota Supreme Court decision in a related case, the case has been remanded to the Minnesota Court of Appeals for additional consideration.

- ***Andrew Carufel,* et al. *v. Minnesota Dep't of Public Safety.*** In this class action complaint, Plaintiffs allege that the Department of Public Safety unlawfully obtains real-time geolocation (GPS) data regarding Minnesota Ignition Interlock Program participants, in violation of the Minnesota Government Data Practices Act. The district court dismissed the action, and it is now pending before the Minnesota Court of Appeals.

- ***State of Minnesota v. 3M Company.*** The state brought an environmental lawsuit against 3M Company for natural resource damages caused by the release of perfluorochemicals (PFCs) into the Minnesota environment. PFCs are a man-made chemical invented by 3M Company, and 3M disposed of the chemicals into Minnesota landfills and waters for

decades. The case settled on February 20, 2018, with about $720 million dedicated to investment in drinking water and natural resource projects in affected areas.

- ***Telescope Media Group v. Lindsey et al.*** Plaintiff Telescope Media Group and its founders filed suit, bringing a pre-enforcement challenge to a provision of the Minnesota Human Rights Act (MHRA). Plaintiffs operate a wedding video production company and allege that the MHRA forces them to violate their religion by producing wedding videos of same-sex weddings. The district court granted Defendants' motion to dismiss and an appeal is currently pending before the United States District Court for the Eighth Circuit.

- ***Susan Afryl, trustee for the next of kin of Shawn Afryl, deceased, vs. Winona State University.*** A Winona State student-athlete collapsed and died at a voluntary strength and conditioning workout at the school in July 2014. His estate alleges that Winona State is liable for the death.

- ***Ahmed Ali,* et al. *v. Thomas Roy,* et al.** Plaintiffs are current or former inmates at Minnesota Correctional Facility—Stillwater who allege they were injured by the release of their individual, private health records, without their knowledge or permission, by a former employee. Plaintiffs allege that the former employee publicly released the documents by filing them in federal court during her employment case.

- ***Kayla Miller v. County of Hennepin & State of Minnesota Department of Public Safety.*** Plaintiff brings a negligence claim alleging that DPS breached its duty of care when it arrested Plaintiff on an apparent outstanding warrant. Plaintiff alleges that the warrant was issued for a different Kayla Marie Miller.

- ***State of Washington,* et al. *v. U.S. Dep't of State.*** Defense Distributed—a Texas Corporation—seeks to publish blueprints online for its 3D-printed pistol and AR-15 frame. If such online publication is allowed, anyone with Internet access and a 3D-printer would then be able to create 3D-printed guns without serial numbers to use or sell that are virtually undetectable and untraceable by law enforcement. Until recently, the longstanding practice of the federal government was to prohibit the online publication of 3D-print gun blueprints. In June 2018, the federal government abruptly reversed course, entering a settlement with Defense Distributed and indicating it will alter federal rules to allow the company to publish online blueprints for 3D-printed guns. On August 27, 2018, the federal district court issued a preliminary injunction stopping the publication of the blueprints.

- ***Stoltz v. MnSCU & DCTC.*** A former employee of DCTC in the athletics program, filed suit against Minnesota State and DCTC alleging a violation of Whistleblower law, as well as other common law and statutory claims. In 2013, the former employee made a number of allegations regarding DCTC's athletics program, which prompted a large investigation. Earlier this year, DCTC told the employee that it was not renewing his position with the school.

- ***Gamble v. MSOP.*** Plaintiffs are individuals committed to MSOP who bring putative class action claims under Fair Labor Standards Act (FLSA). Plaintiffs allege that as MSOP clients they are not paid minimum wage for vocation work performed in MSOP

and that this violates the FLSA. Gamble also makes equal protection, substantive due process, and procedural due process claims.

- ***AFCSME v. Minnesota Management and Budget and Minnesota Department of Natural Resources.*** Plaintiff alleges interference with employee rights and organization under Minn. Stat. § 179A.13. Plaintiffs allege that DNR's employment policies relating to the display of signs and shirts in the workplace violate Minnesota law.
- ***Donald G. Heilman v. Patrick C. Courtney, Program Manager for Minnesota Department of Corrections.*** Plaintiff is a former DOC inmate who claims that he was improperly incarcerated beyond the expiration of his sentence due to a failure to properly calculate his release date. Plaintiff brings claims for negligence and false imprisonment. Both the state district court and Minnesota Court of Appeals found the claim failed as a matter of law. The Minnesota Supreme Court has granted review.
- ***Blawat v. DNR.*** Plaintiffs allege that on November 11, 2016, a DNR Officer stopped them as they exited from a field known for hunting activity. The Officer indicated they were illegally "hunting over bait" and seized their guns, a camera, a deer head, and a dead deer that was in the vehicle. Plaintiffs allege that Defendant lacked probable cause for the stop and lack legal justification for the continued possession of the seized property.

Some of the PUC matters for which the division provides representation and legal assistance include the following:

- ***LSP Transmission Holdings v. Lange.*** Plaintiff, an out-of-state electric transmission company, brings a dormant commerce clause challenge to a Minnesota law that gives a right of first refusal (ROFR) to incumbent Minnesota utilities to build electric transmission lines that connect to their existing facilities. The district court granted a motion to dismiss in PUC's favor, and an appeal is now before the United States District Court for the Eighth Circuit.
- ***BNSF Railway Co. v. Qwest Corp. and PUC.*** Centurylink filed a petition with the PUC asking the PUC to determine whether the utility crossing facility that it had placed on BNSF Railway Company's right-of-way was governed by the so-called pay-and-go statute, Minn. Stat. § 237.045, which allows a utility to pay a one-time standard fee of $1,250 for each new crossing. The PUC found that the crossing was covered by the statute. BNSF filed a writ of certiorari with the Court of Appeals. The issues on appeal are: (1) whether the statute is unconstitutional under the Takings Clause; (2) whether the statute is preempted by federal railway law; and (3) whether the PUC misinterpreted the statute.
- ***In re the Application of Otter Tail Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota.*** Otter Tail Power challenges the PUC's decision to exclude certain costs and revenues from its rate case filing. Otter Tail alleges that the PUC's decision violates the filed rate doctrine, which prevents collateral attacks on rates filed by FERC. The Court of Appeals reversed the PUC's order on June 11,

2018, concluding that the method used by the PUC to calculate Otter Tail's rate was preempted by the Federal Power Act. The Minnesota Supreme Court has granted review.

- ***Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC v. Beverly Heydinger, Nancy Lange, Dan Lipschultz, John Tuma, and Matthew Schuerger.*** Plaintiffs contend their telephone services are not subject to state regulation because they use Voice over IP (VoIP) to transport customer calls. Plaintiffs seek declaratory and injunctive relief from an order of the PUC asserting jurisdiction and requiring compliance with state laws, many of which protect consumers, and include programs that serve low income and deaf and hard of hearing individuals. Plaintiffs' central contention is that federal law preempts state regulation of its telephone service. Division attorneys are defending the decision of the PUC before the United States Court of Appeals for the Eighth Circuit.

- ***In the Matter of a Revised Petition by Minnesota Power for a Competitive Rate for Energy-Intensive Trade-Exposed (EITE) Customers and an EITE Cost Recovery Rider.*** Large Power Intervenors filed an appeal of the Commission's decision in the Minnesota Rate Case related to the implementation of Minn. Stat. § 216B.1696 (the "EITE statute"). The EITE statute, Minn. Stat. § 216B.1696, was enacted in 2015 and allows an investor-owned electric utility to propose EITE-specific rate schedules. Minn. Stat. § 216B.1696, subd. 2(a). Under the statute, the Commission must approve an EITE rate schedule and any corresponding rate "upon a finding of net benefit to the utility or the state." Minn. Stat. § 216B.1696, subd. 2(b).

- ***In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*** **(MPUC Docket PL-9/CN-14-916);** ***In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*** **(MPUC Docket PL-9/PPL-15-137).** On April 24, 2015, Enbridge Energy filed its Certificate of Need application and Route Permit application for its proposed Line 3 Replacement Project extending 337 miles in Minnesota from the North Dakota Border to the Wisconsin Border. The Commission has now granted the Certificate of Need and is determining routing and the sufficiency of the environmental review.

- ***In the Matter of the Petition of Northern States Power Company for Approval of its Proposed Community Solar Gardens Program*** **(MPUC Docket No. E001/M-13-867).** The Community Solar Garden (CSG) statute, Minn. Stat. § 216B.1641 (2013), required Xcel Energy to file a plan to operate a CSG program. The statute requires that CSG customers will be able to subscribe to solar generating facilities and receive bill credits for a portion of the energy generated from the CSG. The Commission adopted the value of solar rate calculation for new community solar gardens and has addressed several co-locating issues.

More generally, employment litigation often includes claims under the Minnesota Whistleblower statute, Family and Medical Leave Act, Fair Labor Standards, and claims of discrimination and harassment under federal and state anti-discrimination statutes. The division

also provides legal representation to the State in lawsuits involving labor issues. Tort claims against the State, its agencies and employees, typically arise in the form of personal injury and property damage lawsuits. Claims include negligence, medical malpractice, defamation, infliction of emotional distress, assault and battery, excessive use of force, and violations of federal civil rights. Examples of specific cases include: highway crash cases in which the Minnesota Department of Transportation is faulted for inadequate design, construction, or maintenance of state roadways and highways; suits against the Department of Human Services and Department of Corrections for deaths or injuries occurring in institutions they operate; and personal injury claims against multiple state agencies related to sidewalk maintenance and snow removal practices or other accidents.

# REGULATORY LAW AND PROFESSIONS

## TAX LITIGATION

The Tax Litigation division provides legal representation to the Minnesota Department of Revenue (DOR) in the Minnesota Tax Court and at the Minnesota Supreme Court, as well as the state and federal district courts and federal bankruptcy court. In FY 2018, the division helped DOR secure more than $11 million in tax revenue and saved the State and local taxing districts more than $11 million in refund claims. The division handles all tax types, including multimillion dollar corporate franchise tax claims and a high volume of complex sales and use tax cases. The division also provides legal representation and assistance to DOR and to other state agencies filing claims in bankruptcy court. Lawyers in the division also review and respond to dozens of foreclosure proceedings, quiet title actions, and other cases involving State interests.

### SIGNIFICANT RESOLVED AND PENDING TAX LITIGATION & BANKRUPTCY CASES:

- Legend Drug Use Tax. Obtained Minnesota Supreme Court decision determining the legend drug use tax applied to transactions by a large retailer and that application of the tax was constitutional. Taxpayer had claimed refund of nearly $15 million, and the estimated total refund exposure was $84 million.
- Commissioner Valuations of Natural Gas Pipeline, Utility and Railroad Companies. Defended assessments by the Department of Revenue in cases brought by several natural gas pipeline, utility, and railroad companies. The companies generally seek refunds of millions of dollars in property taxes paid to the State and county authorities, arguing that the market value of the properties is overstated. Division lawyers obtained a Minnesota Supreme Court ruling in FY 2018 finding no external obsolescence in a valuation of a natural gas pipeline. Division lawyers also help the Department of Revenue negotiate favorable settlements with several railroads, resulting in savings of nearly $8 million in refund claims to the State and to local taxing districts.
- Corporate Franchise Tax. Provided legal representation to the Department of Revenue in an alternative apportionment case in the Minnesota Supreme Court.
- Tobacco Tax. Provided legal representation to the Department of Revenue in a statutory and constitutional challenge to tobacco taxation, resulting in partial denial of refund claims, amounting to nearly $2 million.
- Corporate Franchise Tax. Obtained favorable resolution of challenge to tax assessment, resulting in $517,494 payment of assessed taxes.
- Corporate Franchise Tax. Helped the Department of Revenue negotiate a settlement of corporate franchise tax dispute, resulting in payment of more than $1 million in unpaid taxes.
- Collection. Obtained $6.5 million payment from mining business in a lawsuit arising from default on a state economic development loan.

- Bankruptcy. Provided legal representation to the Department of Revenue in several chapter 11 and 13 bankruptcy cases, securing payment of approximately $600,000 in unpaid taxes.
- Corporate Franchise Tax. Provided legal representation in several tax court cases concerning the computation of the Minnesota Research and Development Credit.
- Bad debt deduction (sales and use tax). Provided legal representation in defending assessment determining that the taxpayer is ineligible to deduct the bad debt owed to a financing source that offers taxpayer's customers credit on a credit card branded with the taxpayer's name and logo.

## OCCUPATIONAL LICENSING

The Occupational Licensing division provides legal representation to the state's health licensing boards and the Health Professional Services Program, including representing the boards at board meetings and disciplinary conferences and in contested cases at the Office of Administrative Hearings. The division provides legal representation to the Boards in matters in the district and appellate courts.

Some cases for FY 2018 included:

- A nurse who diverted narcotics from her place of employment.
- A compounding pharmacy that engaged in mixing of drugs in unsterile conditions.
- A nurse who practiced under an expired license, provided substandard care to patients, and engaged in improper billing and deficient recordkeeping while operating a home healthcare agency.
- A chiropractor who sexually assaulted a patient during an appointment.
- A nurse who physically assaulted a ventilated infant patient.
- A physician assistant who purchased illicit drugs from patients to whom the licensee prescribed controlled substances.
- A physician who took unused prescription medications from patients and distributed them to other patients.
- A dentist who failed to keep a controlled substance log or properly maintain opioids at the dentist's clinic, provided treatment outside of the scope of practice, and engaged in a sexual relationship with a patient.
- A physician who engaged in sexual conduct with patients to whom the physician prescribed opioids in combination with other controlled substances without documented justification.
- A professional clinical counselor who bought, used, and sold client's prescription drugs.
- A nurse who engaged in deficient recordkeeping of medication inventory and administration, falsified records, and failed to account for missing medications.

- A psychiatrist who prescribed stimulants, opioids, and benzodiazepines concurrently to individual patients without documented medical justification.
- A chiropractor who engaged in a conspiracy to commit insurance fraud.
- A social worker who engaged in sexual conduct with a client.
- A dentist who failed to maintain proper infection control and hygiene at the dental clinic.
- A therapist who was arrested for possession of child pornography.
- A psychologist who engaged in sexual abuse of a client over a period of several years.
- A social worker who met with clients while under the influence of alcohol and failed to maintain professional boundaries.
- A physical therapist who treated patients, while under the influence of alcohol and tampered with toxicology screens while participating in the Health Professionals Service Program.

During FY 2018, the division provided legal representation to the boards in various contested case proceedings before the Office of Administrative Hearings including matters involving professional misconduct, sexual misconduct, billing fraud, and mental health/chemical dependency.

In addition to contested cases before the Office of Administrative Hearings, the division provided legal representation to the boards' disciplinary committees in matters involving licensees' failure to comply with their respective practice acts and resulting in disciplinary actions, noncompliance with existing disciplinary orders warranting further discipline, temporary suspensions, orders for mental and physical examinations, and the boards' review of ALJ reports and recommendations resulting from contested case proceedings. For example, the division regularly provided legal representation to the boards where licensees failed to remain chemical free as required by their disciplinary orders or where the boards sought to temporarily suspend a license.

The division also provided legal representation to the boards in Minnesota district court and before the Minnesota Court of Appeals. For example, the appellate court affirmed the Board of Nursing's decision to revoke the license of a nurse who engaged in improper prescribing of opioids. In another matter, the appellate court affirmed the Board of Nursing's decision to place limitations and conditions on the license of a nurse who engaged in substandard care and deficient recordkeeping.

The division provides legal representation to the Health Professionals Services Program, which is the health boards' diversion program for health care providers diagnosed with mental illness or chemical dependency. The program establishes practice restrictions, monitoring requirements, and sets boundaries for impaired physicians, nurses, pharmacists, dentists, and other participating health care practitioners.

## ENVIRONMENTAL & NATURAL RESOURCES

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

The attorneys provide legal representation in matters arising out of the agencies' and boards' enforcement programs. The division provides legal representation to the agencies and boards in the state and federal district and appellate courts and at the Office of Administrative Hearings (OAH). The attorneys also defend the agencies and boards in state and federal district, appellate and administrative courts when parties bring actions challenging their programs or actions.

The work for the agencies and boards during FY 2018 included:

- Provided legal representation to the DNR, including obtaining a temporary injunction against the federal government and a local project proponent, in an action challenging the construction of a $2 billion flood diversion project without obtaining the necessary DNR permits.
- Provided legal representation to the MPCA related to the enforcement of statutes and rules prohibiting the unauthorized disposal of hazardous and solid waste.
- Provided legal representation to the MPCA in an action challenging phosphorus limits set in a municipal waste water treatment plant's National Pollution Discharge Elimination System permit.
- Provided legal representation to the MPCA at the Minnesota district court in an action against a hazardous waste collector who buried hazardous waste on an industrial site, which was later abandoned.
- Provided legal representation to the DNR at the Minnesota Court of Appeals defending a challenge by a mining company related to the DNR's authority and discretion over issuance and termination of water appropriation permits.
- Participated in a multi-state lawsuit and subsequent settlement against an international automobile manufacturer in which Minnesota was awarded natural resource damages in the amount of $47 million.
- Provided legal representation to the MDA in negotiating a settlement with an alcohol and food producer in an attempt to resolve continuing food safety and food sale violations.
- Provided legal representation to the MPCA at the Minnesota Court of Appeals defending the establishment of Total Maximum Daily Loads for waters that fail to meet applicable water quality standards.
- Provided legal representation to the DNR at OAH in an action challenging a restoration order to restore aquatic plants illegally sprayed with herbicide.

- Provided legal representation to the MDA in district court litigation regarding constitutional challenges to the MDA's statutory right to inspect dairy farms for purposes of ensuring compliance with Minnesota food and safety statutes and regulations.
- Provided legal representation to the MPCA and the DNR, as co-trustees for Minnesota, in various negotiations undertaken with other federal and Tribal trustees, seeking to settle Natural Resource Damages resulting from releases of hazardous substances pursuant to the Comprehensive Environmental Response.
- Provided legal representation to the MPCA at the D.C. federal district court regarding a challenge to the U.S. Environmental Protection Agency's approval of certain aspects of water quality standards adopted by MPCA to reduce "eutrophication" in Minnesota's rivers and streams.
- Provided legal representation to the DNR in several actions to recover fire suppression costs.
- Provided legal representation to the DNR in two actions at the Minnesota Court of Appeals confirming the agency's authority and discretion to amend the public waters inventory.
- Provided legal representation to the BAH at the Minnesota Court of Appeals related to the BAH's authority to license commercial dog and cat breeders.
- Provided legal representation to the MPCA at the Minnesota district court and Minnesota Court of Appeals in multiple actions by four metropolitan area landfills challenging the agency's authority to enforce permit amendments and statutory provisions restricting the disposal of solid waste.
- Provided legal representation to the MPCA at the Minnesota Court of Appeals defending the MPCA's authority to issue rules under the good cause exempt rulemaking provisions of the Minnesota Administrative Procedures Act.
- Provided legal representation to the BAH at the Minnesota federal district court and the Eighth Circuit Court of Appeals in an action challenging the BAH's enforcement of a quarantine order.
- Provided legal representation to the DNR at the Minnesota District Court and the Minnesota Court of Appeals to defend challenges against the DNR's authority to issue water appropriation permits to municipalities in the North and East Metropolitan Area surrounding White Bear Lake.
- Provided legal representation to the MPCA related to multiple state and federal superfund sites.
- Provided legal representation to the MPCA in an action at OAH challenging the MPCA's enforcement action regarding oil spilled in a floodplain.
- Provided legal representation to the MPCA, the DNR, the Minnesota Department of Commerce, and the Minnesota Department of Transportation at federal district and appellate courts regarding various federal environmental and natural resources initiatives concerning energy, water, air and hazardous waste.

**REAL ESTATE:**

Provide legal advice and drafting assistance to BWSR, DNR, MPCA, MDA, Minnesota State Colleges and Universities, Minnesota Department of Administration, and Minnesota State Historic Preservation Office on various real estate matters, including conveyances, leases, licenses, use agreements, access easements, restrictive covenants, conservation easements, title insurance commitments, and quiet-title actions.

# GOVERNMENT LEGAL SERVICES

## ADMINISTRATIVE LAW DIVISION

The Administrative Law division provides legal representation to the Departments of Administration, Commerce, Employment and Economic Development, Iron Range Resources and Rehabilitation, Minnesota Management and Budget, and Labor and Industry; the Minnesota Housing Finance Agency; the Minnesota State Board of Investment; Minnesota executive-branch officials; and many other boards, agencies, councils, and commissions. The division also provides legal representation to the Minnesota State Colleges and Universities System and other state agencies in contract, lease, and other transactional matters. The division's work during fiscal year 2018 included:

### BOARDS AND COUNCILS

- Division staff provided legal representation to boards or complaint committees at board meetings and in contested-case proceedings when boards pursued action against licensees or unlicensed individuals who should have been licensed. Boards for which the division provided legal representation include: Accountancy; Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design; Barbers; Cosmetologist Examiners; Peace Officers Standards and Training; Professional Educator Licensing and Standards (formerly the Board of Teaching); and School Administrators. The division also provided legal representation to the Crime Victims Reparations Board in distributing funds to claimants affected by crimes; the Campaign Finance and Public Disclosure Board in enforcing lobbyist and campaign finance laws; and a variety of other state councils, commissions, ombudspersons, and other small boards. Examples of the division's work in the last fiscal year include:
    - Providing legal representation to the Board of Accountancy in a contested case proceeding that resulted in the suspension of an accountant's CPA certificate after he repeatedly underreported his income on his tax returns and was convicted of a federal crime.
    - Providing legal representation and assistance to the Board of Teaching and its successor agency, the Professional Educator Licensing Standards Board, on a variety of matters related to the transition between the two agencies and numerous new laws and rules affecting the boards.
    - Providing legal representation to the Crime Victims Reparations Board in a contested case concerning a claimant seeking compensation based on the death of her son, who was affiliated with gang activity and illegally possessed and fired a gun before he was fatally shot.
    - Providing legal representation to the Peace Officers Standards and Training Board in licensing matters and contested case proceedings involving a peace officer who sexually harassed a coworker, an officer who stole prescription drugs from a drug-collection site, and an officer who had a sexual relationship with a minor.

- Providing legal representation to the Professional Educator and Licensing Standards Board in numerous disciplinary and licensing matters involving teachers and license applicants, including teachers who neglected children, committed crimes, improperly used drugs or alcohol, and possessed sexually explicit material on school-district property.

## Bonds and Investments

- Division staff provided legal representation to MMB with respect to bond issuance and refunding by MMB of more than $865 million in general obligation, trunk highway bonds, appropriation, and revenue bonds.
- Division staff provided legal representation to the Minnesota State Board of Investment (MSBI) on various investments and investment-management agreements. Examples of the division's work in the last fiscal year include reviewing and negotiating more than 30 alternative investments totaling about $4.85 billion made by the MSBI with resource, real estate, private equity, and mezzanine asset managers.
- Division staff provided legal representation to the Minnesota Housing Finance Agency with respect to bond issuance of over $840 million in revenue and state supported bonds.
- Division staff provided legal representation to the Office of Higher Education with respect to bond issuance and refunding of approximately $185 million in student loan revenue bonds.

## Commerce

- Division staff provided legal representation to the Department of Commerce in litigation and in numerous contested cases involving license applications, disciplinary actions against licensees, and enforcement actions against unlicensed individuals or businesses engaged in activities requiring licensure. Cases involved businesses and individuals in a variety of industries, including mortgage originators, real estate appraisers, real estate salespersons, collections agencies, securities salespersons, insurance salespersons, bail bond agents, bullion coin dealers, and notaries public. Examples of the division's work in the last fiscal year include:
    - Continuing to provide legal representation before the Minnesota Supreme Court and in district court in a still-pending putative class-action lawsuit challenging the constitutionality of the state's unclaimed-property laws. While holding that one plaintiff stated a claim, the supreme court rejected the majority of the plaintiffs' constitutional challenges.
    - Continuing to provide legal representation in a liquidation proceeding and challenge to the denial of a $483,735 claim filed by the federal government.
    - Continuing to provide legal representation in an enforcement action against an unlicensed lender that fraudulently issued 178 motor vehicle title loans to Minnesota residents with interest rates as high as 247.65%. The enforcement proceeding resulted in a $302,000 civil penalty and an order voiding each loan.

- Continuing to provide legal representation in relation to its initial denial of a national bank's application to acquire 49% of a nearby state-chartered bank's shares and in relation to a later settlement that conditionally approved the transaction after the bank provided further information and agreed to certain conditions.

- Providing legal representation in an enforcement action against an insurance producer who continued to allow an individual to sell, solicit, and negotiate bail bonds after Commerce revoked his license based on his substantial history of misconduct, including many incidents that resulted in criminal convictions.

- Continuing to provide legal representation to the Department of Commerce in a lawsuit filed against it by an auto-glass company industry participant and in administrative enforcement proceedings against the same company.

- Providing legal representation in a variety of contested cases involving the real estate industry, including a realtor who forged and falsified documents in the course of a transaction; a real estate broker who failed to disclose past criminal conduct and otherwise engaged in multiple acts demonstrating that he was untrustworthy and unqualified to hold a license; and a real estate company and broker who converted clients' trust account proceeds.

- Providing legal representation in a proceeding involving the denial of an abstracter license to an individual who diverted about $125,000 in corporate assets.

- Providing legal representation in a proceeding to revoke the securities agent registration and insurance-producer license of an individual who forged documents and misappropriated funds.

- Providing legal representation in a contested-case proceeding to revoke the insurance-producer license of an individual who improperly solicited and then defaulted on loans from senior citizens.

- Division staff also provided legal representation related to Commerce's telecommunications, energy, and energy-environmental-review responsibilities. Staff provided legal representation to Commerce before the Minnesota Public Utilities Commission (PUC) and the Office of Administrative Hearings in numerous matters. Litigation and other work by division staff related to requests to build, site, or route large electricity generators; solar-garden electricity generation; gas and crude-oil pipelines; and the Public Utility Regulatory Policies Act. Staff further handled litigation related to telecommunications. Examples of the division's work in the last fiscal year include:

    - Providing legal representation in several general rate proceedings and other contested matters before the PUC involving public utilities like CenterPoint Energy, Minnesota Energy Resources Corporation, Otter Tail Power, and Minnesota Power, that sought in aggregate millions of dollars in rate increases from ratepayers, including residential consumers.

- Providing legal representation in litigation regarding electrical-generation facilities, including a proposed natural gas plant, transmission lines, and wind, solar, and nuclear generation. These proceedings also involved companies' requests to recover costs from ratepayers.
- Continuing to providing legal representation in complex proceedings related to Enbridge Energy's request to build and route a new oil pipeline through environmentally sensitive areas of the state.
- Providing legal representation in litigation involving a contract dispute between a small renewable energy facility and a public utility regarding the terms for purchasing energy output.
- Providing legal representation in litigation involving subscriber complaints against telecommunications carriers about a variety of conduct, including extended service outages, incomplete services, and improper billing.

### CONTRACTS AND INTELLECTUAL PROPERTY

- Division staff provided legal representation to numerous state agencies on issues related to state governmental operations; assisted in drafting and revising leases, licenses and contracts; and advised on intellectual property matters, including registering trademarks on behalf of state agencies.
- Division staff provided legal representation to Minnesota State Colleges and Universities regarding a variety of real estate construction, contract, intellectual property, condemnation, and licensing matters. Examples of division staff's work include:
    - Reviewing agreements for purchases, rentals, and data-sharing for compliance with state and federal law.
    - Assisting universities with contracts related to general banking and depository services.
    - Advising various campuses on software license agreements.
    - Reviewing clinical-affiliation agreements.

### LABOR AND CODE ENFORCEMENT

- Division staff provided legal representation to the Department of Labor and Industry's Construction Codes and Licensing Division and its Contractor Recovery Fund, handling numerous disciplinary and enforcement actions against residential building contractors, remodelers, roofers, electricians, plumbers, and unlicensed individuals and companies engaging in these professions. Examples of division staff's work in the last fiscal year include:
    - Providing legal representation in an administrative license-revocation proceeding and a district court action seeking an injunction and about $1.5 million in restitution against an electrical contractor and master electrician who breached

numerous contracts and made material misrepresentations to Minnesota consumers related to installing solar energy systems.

- Providing legal representation in administrative proceedings and on appeal in an action against an unlicensed contractor who continued to engage in unlicensed residential building contractor activities after he signed a consent cease-and-desist order that revoked his license.

### OTHER LITIGATION AND REPRESENTATION

- Division staff initiated litigation on behalf of the State to recover millions after a company subject to the tobacco settlement agreement transferred several cigarette brands and neither the selling nor purchasing company continued to make the payments required by the agreement.
- Division staff provided legal representation to the Department of Natural Resources in a complex, multi-billion dollar bankruptcy proceeding in Delaware regarding the Department's mineral leases with the debtors.
- Division staff provided legal representation on appeal to the state and Department of Management and Budget in litigation seeking to declare that the state owed compensation to smokers whose claims may have been released as part of the state's tobacco settlement. The Eighth Circuit affirmed the dismissal of the case.
- Division staff provided legal representation to the Commerce and Labor commissioners in a challenge to administration of the Minnesota Workers Compensation Reinsurance Fund and steps the Commissioners took to maintain the fund's solvency. The court of appeals affirmed the dismissal of the lawsuit.
- Division staff provided legal representation to the Secretary of State in a variety of cases, including challenges to the constitutionality of the laws concerning the election of the state's presidential electors and the clothing voters may wear in polling places on election day; a case seeking access to information from the statewide registration database; and a case involving the adoption of new ward boundaries in a city.
- Division staff provided legal representation to the Municipal Boundary Adjustment Unit of the Office of Administrative Hearings on two appeals from the unit's decisions pertaining to municipal annexations.

## SCHOOLS & HIGHER EDUCATION DIVISION

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

## MINNESOTA DEPARTMENT OF EDUCATION (MDE)

The division provides legal representation to MDE, which administers and oversees the State's K-12 education programs, including charter school issues, state and federal special education programs, student maltreatment, data practices, student expulsion, the child and adult food care program, and state financial audit issues. The division's legal work for MDE included:

- Educational Adequacy Lawsuit. Seven parents (as guardian and next friend of minor children) and a non-profit corporation brought a putative class action alleging that the education the children receive in Minneapolis and St. Paul public schools is inadequate on the basis of race and socioeconomic status. The Complaint named the State of Minnesota, Governor, Minnesota Senate, Minnesota House, Senate President, Speaker of the House, Minnesota Department of Education, and its Commissioner. Three charter schools intervened in the case. Plaintiffs allege violations of the Education, Equal Protection and Due Process clauses of the Minnesota Constitution and a claim under the Minnesota Human Rights Act. The Court of Appeals held the case presented a nonjusticiable political question and dismissed the complaint. The Supreme Court reversed and returned the case to district court. This case is currently being litigated at the district and appellate courts.
- Special Education. Providing legal representation in defending MDE's determinations regarding local school districts' implementation of special education laws.

## STATE ACADEMIES

Provided legal advice and representation to the Academies regarding board procedures, special education and complaints alleging unlawful discrimination.

## MINNESOTA STATE COLLEGES AND UNIVERSITIES (MINNESOTA STATE)

In FY 2018, the division provided legal representation to Minnesota State in a variety of lawsuits initiated primarily by students and some by former staff against Minnesota State. The division provided legal advice on a wide range of issues, including student disciplinary proceedings, employment law matters and various additional issues that arise in the context of educating, counseling and housing students. Examples of the division's work for Minnesota State during the last year include:

- Providing legal representation to Minnesota State at the Office of Administrative Hearings against claims by students that the campus should not have expelled or suspended them for violations of Student Codes of Conduct.
- Providing legal representation in federal court to Minnesota State against claims brought by female members of a sports team that was eliminated as a result of an effort in cost-containment and program realignment and obtained dismissal of various causes of action with remaining issue scheduled for trial in FY 2019.

- Providing legal advice and obtained several dismissals and findings of no discrimination of numerous complaints filed with U.S. Department of Education, Office for Civil Rights (OCR), the U.S. Equal Employment Opportunities Commission (EEOC), the Minnesota Department of Human Rights (MDHR) against various Minnesota State employees and Minnesota State campuses concerning alleged unlawful discrimination and retaliation.
- Providing legal representation to Minnesota State in administrative and federal court proceedings against claims that sexual assault disciplinary procedures discriminate against males.

### OFFICE OF HIGHER EDUCATION (OHE)

The division provides OHE with legal representation on a variety of issues that arise from OHE's administration of 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.

### STATE PENSION BOARDS

Division staff provided the State's pension boards - Minnesota State Retirement System (MSRS), Public Employees Retirement Association (PERA) and Teachers Retirement Association (TRA) - with legal advice and representation on a variety of issues arising from the boards' administration of the state pension funds.

## STATE AGENCIES DIVISION

The State Agencies Division provides legal representation to the Departments of Corrections, Employment and Economic Development, Health, Human Rights, Labor and Industry, Veterans Affairs, the Client Security Board, and the Bureau of Mediation Services. Work of the division included:

### DEPARTMENT OF CORRECTIONS

Provided a range of legal services to the Department of Corrections (DOC) and state correctional facilities. Provided legal representation to defend the DOC in a high volume of lawsuits brought by inmates involving constitutional issues, tort claims, and habeas corpus appeals in state and federal court. Current and recent litigation includes:

- ***Defense of Prison Employees/Policies.*** Division staff frequently defend prison employees and DOC policies against challenges under the federal Civil Rights Act (section 1983). For instance, cases litigated in FY 2018 involved the rights of inmates regarding mail, medical care, and access to court, as well as claims involving correctional officers' use of force to keep inmates and prisons secure. Division staff also defended the DOC in cases inmates brought under the Americans with Disabilities Act and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

- ***RLUIPA and First Amendment.*** An inmate sued the DOC alleging that that prison staff improperly suspended its provision of kosher meals to him. The division successfully defended the DOC in federal court, where the court dismissed the RLUIPA claim and held that the DOC's religious diet policy did not violate the First Amendment.
- ***Use of Force.*** An offender brought section 1983 and state tort claims against prison staff alleging deliberate indifference to his medical needs after he was restrained because of his self-injurious behavior. In FY 2018, the division represented prison nurses and staff in federal court, where the magistrate judge recommended dismissing of all of the offender's claims. The presiding federal judge recently adopted the magistrate's recommendation.
- ***DOC Sentence Administration.*** The Minnesota sentencing statute for felony DWIs provides that the DOC shall place an offender on a five-year conditional-release term after the offender is "released from prison." An inmate filed a habeas corpus petition, arguing that the DOC should have given him credit for being "released from prison" on the date when he began a work release program instead of when he completed his traditional term of imprisonment. The division represented the DOC at the Minnesota Court of Appeals, which agreed with the DOC's interpretation of the statute in a published opinion.
- ***DOC Conditions of Release.*** Division staff provided legal representation before the court of appeals and Minnesota Supreme Court to defend the DOC's decisions to re-incarcerate sex offenders during their supervised-release or conditional-release terms of their criminal sentences. Several cases involved predatory sex offenders who are required by Minnesota statute to be placed on intensive supervised release while they reside in the community, but they failed to identify agent-approved housing where they could be supervised. In FY 2018, the court of appeals ruled in the DOC's favor in several cases. In one case, the court held that the offender's petition was moot when he obtained his release from prison, and that the DOC's use of review hearings to extend a projected re-release date is lawful. The supreme court granted that offender's petition for review, and is considering petitions for review filed by offenders in two other cases.

## DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT

Provided legal representation to the Minnesota Department of Employment and Economic Development and participated in bankruptcy proceedings to protect the State's interest in collecting unemployment benefits overpayments. In the past fiscal year, cases brought by this Office prevented the discharge in bankruptcy of more than $900,000 of improperly received benefits. Other current litigation involved:

***Grant Administration.*** In 2016 the legislature appropriated a $35 million grant package to DEED to address issues related to racial equality, including $4.25 million to one grantee and its subgrantees. A grantee was found to be out of compliance with grant contracts due to deficiencies identified by DEED during its monitoring visit, the grantee failed to correct deficiencies, and DEED suspended funding. The grantee sued DEED for breach of contract and DEED counterclaimed to seek return of some of the funds already

paid. The district court denied the grantee's request for a temporary restraining order but granted a partial writ of mandamus against DEED. DEED appealed to the court of appeals and the grantee cross-appealed.

## DEPARTMENT OF HEALTH

The Minnesota Department of Health (MDH) has authority to regulate and oversee a number of different subject areas, including infectious diseases, food-borne illness outbreaks, health care facilities, environmental health hazards, health maintenance organizations (HMOs), medical cannabis, hospitals, nursing homes, and certain health professionals. Provided legal representation to MDH concerning its regulatory responsibilities and in litigation and administrative enforcement actions.

Examples of the division's legal work for MDH in the past fiscal year include the following:

- ***Asbestos Contamination.*** Division staff provided legal representation to MDH in actions to revoke licenses of companies that fail to comply with the Minnesota Asbestos Abatement Act and Rules.
- ***Food, Beverage, and Lodging Establishments.*** The division provided legal representation to MDH in enforcement proceedings against restaurants, hotels, and campgrounds.
- ***Nursing Assistant Registry.*** Federal law requires the State to maintain a registry of individuals who completed nurse aide training and competency evaluation programs, and to include information in the registry if the State finds that the nurse aide neglected or abused a resident or misappropriated resident property. An individual had been disqualified from having direct contact with persons in some State-licensed facilities receiving services based on a maltreatment finding, but his seven-year disqualification period had expired under State law. The division provided legal representation to MDH when the individual appealed MDH's refusal to remove the maltreatment finding from Minnesota's Nursing Assistant Registry. The Minnesota Court of Appeals held that MDH correctly applied federal law.
- ***Mandamus Proceeding.*** A resident of the Minnesota Sex Offender Program (MSOP) sued MDH in Ramsey County District Court asking the judge to order MDH to investigate MSOP. The resident alleged that MDH had an obligation to intervene in his dispute with MSOP over issues that included MSOP's denial of an HD-TV amplifier. The division represented MDH at an evidentiary hearing and before the court of appeals, where MDH prevailed.

A significant amount of work in the past fiscal year involved providing legal defense of 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 provided legal defense of 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 types of cases include:

- MDH found that a health care worker maltreated a nursing home resident by abusing her. The abuse was uncovered because of a "granny cam" set up by a family member. The division provided legal representation to MDH in an administrative enforcement proceeding, and in a district court appeal, where MDH prevailed. The worker has appealed to the court of appeals.
- In one case, the division provided legal representation to MDH where a health care worker was disqualified based upon financial exploitation of a vulnerable adult. MDH refused to set aside the disqualification, which would have allowed her to work with vulnerable adults. In another case, MDH disqualified a health care worker from working with vulnerable adults after the worker left a resident alone in a shower where the resident fell and sustained neck fractures. The division provided legal representation to MDH staff in an administrative proceeding where MDH prevailed.

### DEPARTMENT OF HUMAN RIGHTS

Provided legal representation to the Department of Human Rights (MDHR) following MDHR's determination that there is probable cause to believe that illegal discriminatory conduct has occurred. For instance, division staff represented MDHR in a lawsuit alleging that a hospital discriminated against a patient's spouse by failing to accommodate his hearing disability. The victim received $82,000 in a settlement and the hospital agreed to report related complaints to MDHR for three years. Staff also represented MDHR in a lawsuit alleging that an employer fired an employee because of her age. Division staff also filed an *amicus curiae* brief on behalf of MDHR before the Minnesota Supreme Court, arguing that the supreme court should interpret the Minnesota Human Rights Act to require employers to engage in an interactive process regarding possible reasonable accommodations with a qualified employee with a disability.

### DEPARTMENT OF LABOR AND INDUSTRY

Provided legal representation to the Minnesota Department of Labor and Industry (DLI). Engaged in litigation to enforce occupational safety and health standards, including cases regarding workplace fatalities and employers' retaliation against employees for raising workplace safety issues. Engaged in litigation to enforce Minnesota labor laws, such as the Fair Labor Standards Act, including prevailing wage and child labor laws. Examples of recent litigation include:

- ***OSHA Enforcement Action regarding Unsafe Scaffolding.*** DLI staff issued citations to an employer because employees were performing work on incomplete scaffolding. The employer contested the citations, arguing it was in the process of erecting the scaffolding at the time the inspection occurred thus cited standards did not apply. The division provided legal representation at an administrative enforcement proceeding, before the OSHA Review Board, where DLI prevailed.
- ***OSHA Enforcement Action regarding Fall Protection.*** DLI staff issued citations to an employer after an employee was seriously injured and fractured his back. DLI staff found that the employer failed to use and provide fall protection, which caused the employee's serious injury, and failed to train its employees. The employer contested the

citations, arguing the accident resulted from the employee's own misconduct. The division provided legal representation at an administrative enforcement proceeding before an administrative law judge, where DLI prevailed.

- ***OSHA Enforcement Action regarding Hearing Protection.*** DLI staff issued citations to an employer after finding it violated OSHA's hearing standard. In a final order, the employer agreed to settle the citation and correct the hazard by implementing controls at its workplace to reduce employees' exposure to excessive noise. When the employer failed to follow through, DLI staff issued another citation for failing to comply with the order. The division provided legal representation at an administrative enforcement proceeding, where DLI prevailed.
- ***OSHA Enforcement Action regarding Earth Moving Vehicles.*** DLI staff issued a citation to an employer performing excavation using dump trucks and excavation machinery. One employee driving a dump truck ran over another employee causing his death. DLI staff found that the employer had a deficient training program that caused or contributed to the fatality. The division provided legal representation at an administrative enforcement proceeding, where DLI prevailed.

### DEPARTMENT OF VETERANS AFFAIRS

Provided legal representation to the Minnesota Department of Veterans Affairs (MDVA). For instance, the division provided legal representation to the MDVA in discharge proceedings after the MDVA concluded that a resident was a danger to himself or others, or Veterans Homes were unable to meet the medical needs of a resident.

### MINNESOTA CLIENT SECURITY BOARD

The Client Security Fund reimburses clients who suffer economic loss because of the dishonest conduct of their attorneys. Brought collection actions on behalf of the Minnesota Client Security Board to collect and preserve debt obligations to the Fund.

## TRANSPORTATION DIVISION

The Transportation division provides legal representation to the Minnesota Department of Transportation (MnDOT). A large part of the division's work involves eminent domain litigation. In addition, the division provides legal advice to MnDOT and other state agencies involved in construction projects and provides legal representation to 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 contractual requirements.

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

In FY 2018, the division:

- Provided legal representation to MnDOT in litigation related to proceedings subsequent, eminent domain actions and appeals arising in connection with hundreds of properties that are acquired for roadways and other transportation projects such as light rail and bridge replacement. The division also defended MnDOT against claims that its projects have resulted in inverse takings and provided legal assistance in responding to quiet title and torrens proceedings, and challenges to statutory conveyances of land.
- Provided legal representation to and advised MnDOT, Minnesota State, the Minnesota Departments of Administration, Natural Resources, and Labor and Industry in litigation, settlement negotiations, arbitration, and mediation of construction and other claims against the agencies.
- Appeared before the Minnesota Supreme Court and Court of Appeals in appeals challenging the award of attorney fees, and the denial of damages for the alleged taking of noncontiguous tracts of land.
- Appeared before the Minnesota Supreme Court as amicus on behalf of the Minnesota Departments of Transportation and Administration.
- Provided legal representation to the Minnesota National Guard in district court actions with respect to solid waste permitting and inspection, and as to a breach of contract claim.
- Provided legal representation to MnDOT in district court actions challenging MnDOT's entry onto property for purposes of environmental testing and for MnDOT's maintenance of its highway easement area.
- Provided legal representation to MnDOT in contested case hearings in regulatory matters addressing issues such as advertising device permits, requests for orders directing action by a railway company, and prevailing wage requirements.
- Advised MnDOT and its offices regarding programs such as, Aeronautics, Railroads and Waterways, State Aid, Office of Environmental Stewardship, and Office of Civil Rights.

The division's work in FY 2018 includes:

- Provided legal representation to MnDOT in an eminent domain action regarding MnDOT's construction of a new by-pass of Highway 371 around the City of Pequot Lakes. The landowner claimed damages, attorney fees, and costs in excess of $1.3 million. Following a commissioners' hearing and ruling in MnDOT's favor, the parties agreed to a global settlement of $486,000.
- Provided legal representation to MnDOT in an eminent domain action regarding MnDOT's reconstruction of Highway 52 near the City of Cannon Falls. The owner sought just compensation of over $1.8 million. Division staff facilitated a negotiated settlement of the matter for $477,000.

- Provided legal representation to MnDOT in an eminent domain action regarding MnDOT's work on Trunk Highway 61 in Lake County. Both parties appealed from a Report of Commissioners. Division staff successfully defended MnDOT from a landowner's claim for impermissible alleged loss of access, contractor trespass, and construction interference damages.
- Provided legal representation to MnDOT in an eminent domain action regarding MnDOT's reconstruction of a railroad bridge over Highway 65, aka Central Avenue in Minneapolis. The landowner sought over $1 million in compensation. Commissioners awarded $535,000. Division staff facilitated settlement of the matter after pre-trial mediation for $487,500.
- Successfully defended MnDOT in an inverse condemnation action arising out of construction to 35W and County Road E2. Landowners claimed damages of $390,000. Division staff facilitated settlement of the matter after mediation for $30,000.
- Successfully defended MnDOT in an eminent domain action regarding MnDOT's reconstruction of Highway 1. Landowners moved the district court for an order to expand the scope of the land landowners owned of record to include a parcel previously sold by a different owner of record to MnDOT. The district court denied the landowners' motion, and, instead ordered the landowners to commence a separate action to clarify their ownership and any possible adverse possession landowners may have against the other owner of record.
- Provided legal representation to Metro State University in an eminent domain action regarding construction of a student center, science center, and parking ramp at Metro State University in St. Paul. The landowner appealed the Commissioners' award of $210,000, seeking over $525,000 at the jury trial. Division attorneys successfully argued pre-trial motions limiting landowner's claims and the matter settled for costs and fees and the amount of the Commissioners' award.

# STATE GOVERNMENT SERVICES

## TRIALS AND APPEALS

The Trials and Appeals division provides prosecutorial assistance to county attorneys and local law enforcement agencies in prosecuting serious crimes and in the civil commitment of dangerous sex offenders. In addition, the division provides training for police officers and prosecutors.

The division assists counties in the prosecution of serious crimes in trial courts throughout Minnesota when requested by a county attorney. Representative work during FY 2018 included:

- Convicted Zachary Anderson of first-degree murder in Cass County. Anderson kidnapped a girl who was five years of age from her home in Meeker County, sexually assaulted her, strangled her to death, and submerged her body in a swamp in Cass County. The court sentenced him to life in prison without parole.
- Convicted Antonio St. Marie of first-degree murder in Wadena County. St. Marie had been arrested for domestic assault against his former girlfriend. After his release from jail on bail, St. Marie obtained a handgun and held his former girlfriend and her child captive in their home for several hours before letting the child go and then shooting his former girlfriend to death. The court sentenced him to life in prison without parole.
- Convicted Gerald Blevins and Cyrus Trevino of second-degree murder in Steele County. With Blevins's aid, Trevino shot and killed a man they believed was working with law enforcement as an informant. The court sentenced Trevino to 361 months in prison and Blevins to 150 months in prison based on their respective criminal histories.
- Convicted Jose Herrera Torres of second-degree murder for the stabbing death of his former girlfriend in her home in Todd County. The court sentenced him to 306 months in prison.
- Convicted Jason Luckhardt of conspiracy to commit first-degree murder in Lincoln County. Luckhardt tried to get another jail inmate to kill his estranged wife, and that inmate passed the information on to law enforcement officers. Thereafter, Luckhardt conspired with an undercover police officer to kill his wife. The court sentenced him to 190 months in prison.
- Conducted grand jury proceedings and obtained first-degree murder indictments.
- Provided legal representation to the State in post-conviction challenges to murder convictions.
- Provided continuing legal advice and assistance to the Bureau of Criminal Apprehension, the Child Mortality Review Board, the Violent Crime Coordinating Council, the Advisory Committee on the Rules of Criminal Procedure, Criminal Justice and Juvenile

Information Advisory Group, the Restitution Working Group, the Stop it Now Advisory Committee, the Minnesota Peace Officer Standards and Training Board, the Human Trafficking Taskforce, and the Minnesota Board of Law Examiners.

Division attorneys also provide assistance to county attorneys 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 assist the county attorney in preparation of the commitment petition, handling of pre-trial matters, and the handling of the commitment hearing and any appeal. The division also provides legal assistance to the Advisory Committee on the Rules of Civil Commitment.

The division's attorneys assist counties in numerous cases in which civilly committed sexual predators filed motions to vacate their commitments. As the population of committed sexual predators increases, the number of petitions for habeas corpus and motions from the Department of Human Services' regional treatment centers continues to grow.

The division's attorneys also assist the Department of Corrections in administrative hearings required by the Community Notification Act when a registered sex offender challenges the Department of Corrections' assessment of the offender's level of danger upon release from incarceration. Each month, the division handles numerous 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, narcotics investigations, search and seizure, suspect interrogation, evidence, working with grand juries, trial advocacy, and appeals.

The division provides assistance to county attorneys in felony appeals. The cases handled in FY 2018 involved, among other crimes, murder, sexual assault, drug distribution and manufacturing, child sexual abuse and felony assault. Examples include:

- ***State v. Fraga.*** Minnesota Supreme Court affirmed conviction for first-degree murder in Nobles County. The defendant sexually assaulted and beat to death his two-year old niece.
- ***State v. Vasquez.*** Minnesota Supreme Court affirmed the conviction for first-degree murder in Brown County. Vasquez shot his girlfriend in the apartment they shared with their two children, cut her head off and put it in a bag in a nearby river, and burned her torso in their van.
- ***Wayne v. State.*** Minnesota Supreme Court affirmed the conviction of second-degree murder in Waseca County.

- ***State v. Lund.*** Minnesota Court of Appeals affirmed convictions of aiding second-degree murder and prohibited person in possession of a firearm following a drive-by shooting in St. Louis County.
- ***State v. Kaiser.*** Minnesota Court of Appeals affirmed conviction of second-degree murder in Stearns County. Kaiser assaulted his two-month old son, causing his death.
- ***State v. Rossbach.*** Minnesota Court of Appeals affirmed the conviction of aiding a murder after the fact in Beltrami County. Rossbach helped the murderer burn and bury the victim's body, provided false information to investigators, and destroyed evidence of the murder.
- ***State v. Motley.*** Minnesota Court of Appeals affirmed convictions of attempted murder, criminal sexual conduct, second-degree assault, and burglary in Martin County. Motley broke into a neighbor's apartment, sexually assaulted her, and stabbed her in the neck.
- ***State v. Mittelstad.*** Minnesota Court of Appeals affirmed multiple convictions of first-degree criminal sexual conduct for the repeated abuse of two children in Mower County.
- ***State v. Morey.*** Minnesota Court of Appeals affirmed multiple convictions of first- and second-degree criminal sexual conduct in Clearwater County. Morey sexually abused his two adopted sons over a lengthy period of time.
- ***State v. Curtis.*** Minnesota Court of Appeals affirmed multiple convictions of first-degree criminal sexual conduct in Cass County. Curtis sexually abused his daughter multiple times when she was seven years of age.
- ***State v. Spicer.*** Minnesota Court of Appeals affirmed two convictions of first-degree criminal sexual conduct in St. Louis County. Spicer sexually abused his seven-year old daughter on multiple occasions.
- ***State v. Wutzke.*** Minnesota Court of Appeals affirmed conviction of second-degree criminal sexual conduct in Becker County. Wutzke sexually abused a seven-year old child he was babysitting.
- ***State v. Johnson.*** Minnesota Court of Appeals affirmed convictions of second-degree criminal sexual conduct and two counts of possession of pornographic works involving minors in Watonwan County. Johnson video recorded some of his sexual assaults of the child victim.
- ***State v. DeLaCruz.*** Minnesota Court of Appeals affirmed convictions of burglary, kidnapping, and criminal sexual conduct in Waseca County. DeLaCruz was giving the victim, his former girlfriend, a ride home when he became angry about their relationship. He began assaulting her, and refused to stop the car when she asked to get out. He drove to her home, dragged her into the home, and sexually assaulted her.
- ***State v. Byrne.*** Minnesota Court of Appeals affirmed the conviction of criminal sexual conduct in the second degree in Yellow Medicine County.
- ***State v. Bellanger.*** Minnesota Court of Appeals affirmed two convictions of criminal sexual conduct in the first degree in Becker County.

- ***State v. Rabold.*** Minnesota Court of Appeals affirmed conviction of criminal sexual conduct in the second degree in St. Louis County.
- ***State v. Rierson.*** Minnesota Court of Appeals affirmed convictions for possession of a pornographic work involving a minor in Stearns County.
- ***State v. Davis.*** Minnesota Court of Appeals affirmed conviction for sex trafficking in Stearns County.
- ***State v. Gundy.*** Minnesota Court of Appeals affirmed the convictions of electronic solicitation of a child to engage in sexual activity and possession of controlled substances in St. Louis County.
- ***State v. Miles.*** Minnesota Court of Appeals affirmed convictions of kidnapping, domestic assault, and terroristic threats in Pipestone County.
- ***State v. Smith.*** Minnesota Court of Appeals affirmed convictions of aggravated robbery and assault in Mille Lacs County.
- ***State v. Rodriguez.*** Minnesota Court of Appeals affirmed convictions of aggravated robbery, second-degree assault, and prohibited person in possession of a firearm in Mower County.
- ***State v. Goodman.*** Minnesota Court of Appeals affirmed the conviction of aggravated robbery in Becker County.
- ***State v. Ali.*** Minnesota Court of Appeals affirmed the conviction of aggravated robbery in Steele County.
- ***State v. Schrupp.*** Minnesota Court of Appeals affirmed convictions of aggravated robbery and burglary in Benton County.
- ***State v. Ellison.*** Minnesota Court of Appeals affirmed convictions of aggravated robbery and assault over a drug debt in Stearns County.
- ***State v. Ramirez.*** Minnesota Court of Appeals affirmed convictions of burglary and assault after Ramirez broke into the apartment of his former girlfriend and assaulted her in Pennington County.
- ***State v. Edwards.*** Minnesota Supreme Court affirmed conviction of second-degree assault in St. Louis County.
- ***State v. Uloa.*** Minnesota Court of Appeals affirmed the conviction of second-degree assault with a dangerous weapon in Watonwan County.
- ***State v. Plantenberg.*** Minnesota Court of Appeals affirmed conviction of second-degree assault with a dangerous weapon in Meeker County.
- ***State v. Comeaux.*** Minnesota Court of Appeals affirmed the conviction of second-degree assault following a stabbing in Le Sueur County.
- ***State v. Hoversten.*** Minnesota Court of Appeals affirmed convictions of burglary and domestic assault in Stearns County.

- ***State v. Turman.*** Minnesota Court of Appeals affirmed the conviction of domestic assault by strangulation in Becker County.
- ***State v. Cannon.*** Minnesota Court of Appeals affirmed the conviction of domestic assault by strangulation in Morrison County.
- ***State v. Srnsky.*** Minnesota Court of Appeals affirmed the conviction of criminal vehicular operation in Pennington County. While driving drunk, Srnsky engaged in a game of "chicken" with a friend and caused a head-on collision, which killed his friend in the other car.
- ***State v. Linskie.*** Minnesota Court of Appeals affirmed the conviction of criminal vehicular homicide in St. Louis County. Linskie hit and killed a woman standing on the shoulder of the road, most likely taking photographs of the nearby lake, and then fled the scene.
- ***State v. Lopez.*** Minnesota Supreme Court affirmed the conviction of burglary in Kandiyohi County. The Supreme Court interpreted the statutory term "building" to include the hotel room Lopez entered without permission.
- ***State v. Rassmussen.*** Minnesota Court of Appeals affirmed the conviction of arson in Wright County. Rassmussen started a fire in his home to collect insurance money.
- ***State v. Longo.*** Minnesota Court of Appeals affirmed the conviction of racketeering in Pennington County, based on Longo's drug and other enterprises.
- ***State v. Robbins.*** Minnesota Court of Appeals affirmed the conviction of first-degree controlled substance crime in Lyon County.

The division also handled federal habeas corpus petitions challenging state-court convictions for non-metro counties during FY 2018. Attorneys in the division appeared on behalf of the State on multiple habeas petitions in federal district court and one in the Eighth Circuit Court of Appeals in FY 2018. Attorneys also assisted prosecutors in responding to federal habeas petitions challenging state court convictions.

Appellate attorneys assisted prosecutors by providing legal research and preparing legal memoranda, and assisted local prosecutors with legal questions.

## MEDICAID FRAUD

The Medicaid Fraud division is a federally-certified Medicaid Fraud Control Unit (MFCU) that prosecutes health care providers committing fraud in the delivery of the Medical Assistance (Medicaid) program. The Minnesota Department of Human Services (DHS) administers the Medicaid program in Minnesota. The DHS's Surveillance and Integrity Review Section (SIRS) is responsible for investigating fraud in the Medical Assistance program. SIRS can then refer cases to the MFCU for prosecution.

The division prosecutes health care providers who participate in the state's Medicaid program, and who submit false claims for reimbursement. Two of those provider-types, Personal Care Assistants (PCAs) and Personal Care Provider Organizations (PCPOs), have

disproportionately engaged in fraudulent billing practices. Typical schemes include billing for services not provided, billing for authorized units rather than actual units provided, billing for registered nurse (RN) services when there is no RN employed by the agency, providing group care but billing as if one-to-one care is provided, and using identities of individuals not employed by the agency, as if they are employees. Some fraud cases have a criminal neglect component because the recipient's condition is compromised due to lack of care.

Examples during the 2018 FY include:

**Provider Fraud Cases**

- ***State v. Currin et al.*** After Currin was excluded from participation in the Medicaid program due to a Medicaid fraud conviction, Currin and six family members and associates ran a Medicaid fraud scheme centered around a number of home care nursing agencies. Currin pled guilty to racketeering and was sentenced to 122 months in prison. Her co-conspirators all pled guilty to felony theft. The seven co-defendants were ordered to pay restitution ranging from $1.75 to $2.65 million.
- ***State v. Gboeah.*** Gboeah's PCPO provided PCA services without an RN on staff to supervise recipients' care. A Hennepin County jury convicted Gboeah of six felony counts of theft by swindle. He was also ordered to pay restitution totaling $322,000.
- ***State v. Kurvers.*** After moving to Wisconsin, Kurvers continued to sign off on timesheets for PCA services purportedly provided in Minnesota. Kurvers' PCAs—including his girlfriend, her son, and his friends—also submitted claims for dates and times that overlapped with outside employment and during times that they were gambling with Kurvers at a Wisconsin casino. Kurvers and his four PCAs all pled guilty to felony theft by false representation and were ordered to pay restitution.
- ***State v. Walker.*** PCPO owner Walker stole the identity of a social worker and falsely represented that he supervised her company's PCAs, billed for PCA services not provided or provided by an ineligible provider, and paid recipients kickbacks to induce them to become her clients. Walker pled guilty to felony identity theft and theft by false representation and was ordered to pay $195,000 in restitution.
- ***State v. Dahir.*** Dahir, an interpreter, billed for services when there was no underlying medical appointment because the provider was on parental leave. He pled guilty to felony theft by false representation.
- ***State v. Wright.*** Wright and his PCA signed and submitted timesheets for over 4,000 hours of services that were not provided and then split the proceeds. He was convicted of felony theft by false representation.
- ***State v. Pachan.*** Pachan instructed a recipient to sign blank timesheets and then used them to submit claims for individual support worker services that she did not provide. She pled guilty to felony theft by false representation.
- ***State v. Whipple.*** Whipple pled guilty to theft by false representation as a result of submitting dozens of timesheets for PCA services she did not provide. Instead, the

services were provided by Whipple's daughter, who had been excluded from working as a Medicaid provider based on prior Medicaid fraud.

- ***State v. Quirk.*** Quirk submitted PCA timesheets for times when he was clocked in and working at another job and/or his recipients were in school or receiving medical treatment. He pled guilty to felony theft by false representation.
- ***State v. Glover.*** Glover pled guilty to felony theft by false representation for submitting PCA claims after one recipient died and for services she could not have provided because she was working at a shoe store.

**Financial Exploitation Cases**

Upon request of a county attorney, division attorneys assist in prosecuting vulnerable adult abuse and neglect (including financial exploitation) in Medicaid funded facilities, and non-Medicaid board and care facilities, such as:

- ***State v. Michael and Martina Christie.*** Michael Christie served as conservator for his elderly mother, a vulnerable adult. Michael and his wife Martina transferred over $300,000 of the vulnerable adult's property to themselves by quit claim deed for less than $500. They also used over $30,000 of the vulnerable adult's financial resources for themselves and failed to pay over $70,000 of the vulnerable adult's living expenses, which resulted in her eviction from her nursing home. The Christies were each convicted of two felony counts of financial exploitation of a vulnerable adult.

**Appeals**

- ***State v. Bakare.*** The Minnesota Court of Appeals affirmed five counts of medical assistance fraud.
- ***State v. Currin.*** The Minnesota Court of Appeals affirmed the district court's ranking of racketeering (racketeering is an unranked defense) as a severity level nine offense, which resulted in a 122-month prison sentence. The Minnesota Supreme Court denied further review.
- ***State v. Schoenrock.*** The Minnesota Court of Appeals affirmed two counts of felony theft by false representation, a decision that was affirmed by the Minnesota Supreme Court.
- ***State v. Twin Cities Care Services.*** The Minnesota Court of Appeals affirmed four counts of felony theft by false representation.

**False Claims Act Cases**

The Medicaid Fraud division also intervenes in civil lawsuits under the Minnesota False Claims Act. The Minnesota MFCU participated in 12 False Claims Act cases that resulted in recoveries paid to the General Fund between July 1, 2017, and June 30, 2018, totaling $5,035,372.28.

## PUBLIC SAFETY

The Public Safety division provides legal representation to the Minnesota Department of Public Safety (DPS) at thousands of implied consent hearings each year in which drivers contest the revocation of their driver's license due to an arrest for driving while impaired by alcohol or controlled substances. In FY 2018, the division handled district court actions the resolution of which results in approximately $3 million in driver's license reinstatement fees owing to state government. Efforts by the division during FY 2018 to reduce deaths, injuries, and property damage on Minnesota's streets and highways included:

- Handled approximately 4,500 district court Implied Consent proceedings and associated appeals challenging the revocations of driving privileges under Minn. Stat. §§ 169A.50-.53, Minn. Stat. § 169A.20, subd. 2, and Minn. Stat. § 171.177.
- Defended the state against constitutional and statutory challenges to the DWI, implied consent, refusal, traffic, and other public safety laws. Like all states, Minnesota imposes license revocations on drivers who are arrested for DWI and asked to submit to a chemical test as part of the implied consent process, with revocations imposed regardless of whether the driver fails the chemical test or refuses to provide a sample for testing. The division is defending the state against statutory and constitutional challenges to these license revocations at the Minnesota Court of Appeals and at the Minnesota Supreme Court.
- Appeared in nearly 180 district court challenges and resulting appeals to other driver's license cancellations, withdrawals, revocations, suspensions, and license plate impoundments under Minn. Stat. § 169A.60 and § 171.19.
- Appeared in over 40 appeals to the Minnesota Court of Appeals and the Minnesota Supreme Court resulting from district court appearances involving the revocation, suspension, cancellation, or withdrawal of driving privileges.
- Provided legal representation to DPS and other boards in contested case hearings at the Office of Administrative Hearings in regulatory matters addressing matters such as challenges to license enforcement actions by DPS, the Board of Private Detective and Protective Agent Services, and the Minnesota Racing Commission.
- Defended DPS in a district court action brought by an ignition interlock distributor seeking relief including a declaratory judgment regarding the enforceability of DPS real-time reporting requirements for ignition interlock devices, temporary injunctive relief, and civil remedies under the Minnesota Government Data Practices Act.
- Represented DPS in a district court enforcement action of the Highway Traffic Regulation Act.
- Provided training on DWI procedures and traffic safety laws for law enforcement officers and prosecutors throughout Minnesota.
- Published the 2018 DWI/Implied Consent Elements Handbook, which is utilized statewide by prosecutors, judges, defense attorneys and law enforcement professionals.

- Defended DPS in Federal District Court addressing various federal claims including alleged violation of a constitutional right to travel.

In FY 2018, approximately 20 percent of all driver's license revocations imposed as a result of a DWI arrest were challenged in court. Today's high challenge rate is the result of the strengthening of DWI laws by the legislature over the years, including adoption of laws allowing for: the use of an implied consent revocation as the basis to impound license plates and to require installation of ignition interlock devices in a violator's car, criminal forfeiture of motor vehicles, and enhancement of subsequent criminal offenses to gross misdemeanor and felony violations. Because drivers have much at stake from an alcohol-related license revocation appearing on their driving records, they are more likely to challenge the underlying driver's license revocations in the state's district and appellate courts. The increasing complexity of our state's DWI law has resulted in a specialized DWI defense bar that vigorously challenges license revocations. Implementation of the felony DWI law, statutory increases in the length of revocation periods, and availability of ignition interlock use for repeat offenders continue to increase the division caseload.

In FY 2018, the division appeared before the Minnesota Supreme Court and successfully defended against a constitutional challenge to the Implied Consent Law in two cases, *Commissioner of Public Safety v. Morehouse* and *Commissioner of Public Safety v. Johnson.* Revoked drivers like *Morehouse* and *Johnson*, had raised due process challenges under the Implied Consent Law claiming that police failed to comply with the law by not properly advising the driver of his or her rights and obligations under the statute. The Supreme Court adopted the division's argument and issued decisions which clarified that when police read an inaccurate implied consent advisory, a driver's right to due process of law is not always violated.

The division has defended against other statutory and constitutional challenges as a result of significant changes to the Implied Consent and DWI laws that took effect on July 1, 2017. Changes to the law include adoption of provisions that allow for license revocation based on driver refusal to comply with the execution of a search warrant for collection of a blood or urine sample, an extension of the time to file a request for judicial review from thirty to sixty days, and a change in the language of the implied consent breath test advisory.

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

The division also provides legal representation to state boards and commissions including the Gambling Control Board, the Minnesota Racing Commission, and the Private Detective and Protective Agent Services Board. These entities issue thousands of licenses and conduct numerous investigations each year, which may result in contested case hearings requiring legal representation from this division at the Office of Administrative Hearings, or in state district and appellate courts. The division provides legal representation to the Minnesota Racing Commission in appeals from commission licensing decisions and disciplinary action taken

against horse owners, trainers, and jockeys, and has also provided legal representation to the commission at the Minnesota Court of Appeals. The division also provides legal representation to the Gambling Control Board and the Private Detective and Protective Agent Services Board in appeals from the boards' licensing decisions and disciplinary actions.

## INFORMATION SERVICES AND CONSUMER

The Information Services and Consumer divisions assist consumers, businesses and other organizations who contact it for information and assists them in obtaining settlements with other parties. Through its efforts, the division often eliminates the need for costly and time-consuming litigation for all parties.

## HUMAN SERVICES

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

### HEALTH CARE

Division attorneys in the health care area handle matters concerning Minnesota Health Care Programs (MHCP), continuing and long-term care, health care compliance, and benefit recovery. MHCP includes Medical Assistance and MinnesotaCare, which together cover approximately 1.2 million Minnesotans. In continuing care, division attorneys provide legal representation to DHS on matters concerning autism services, aging and adult services, disability services, medical assistance, and personal care assistance. In the compliance and recovery area, division attorneys handle health care compliance matters and recover payments for health care services from providers, responsible third-parties, and estates.

### CHILDREN AND FAMILY SERVICES

Division attorneys in the children and family services area handle legal issues relating to public assistance programs, child support, and child protection matters. Public assistance programs include the Minnesota Family Investment Program, the General Assistance program, the Minnesota Supplemental Aid program, the Federal Supplemental Nutrition Assistance Program (SNAP, formerly called Food Stamps) and Group Residential Housing. Division attorneys provided legal representation to DHS in litigation contesting the operation of these programs. In child protection, attorneys provide legal representation to DHS in matters concerning children's welfare, adoption, foster care, guardianship, tribal issues, and other matters.

### MENTAL HEALTH

Division attorneys in the mental health area provide legal representation to DHS's adult and children's mental health programs, chemical dependency programs, state operated treatment facilities and forensic services, which include regional treatment centers, state operated

community facilities, children's and adolescent behavioral health centers, the Minnesota Security Hospital (MSH), and the Minnesota Sex Offender Program (MSOP). Division attorneys represent DHS's interests in a broad spectrum of litigation including Jarvis/Price-Sheppard hearings to authorize forced neuroleptic medication and/or electroconvulsive therapy; Judicial Appeal Panel court trials involving petitions for discharge from persons civilly committed as mentally ill and dangerous, sexually dangerous persons, or sexual psychopathic personalities; Section 1983 civil rights actions in state and federal district and appellate courts; petitions for Writ of Habeas Corpus in state and federal courts; as well as providing legal advice to state-operated facilities administration and staff.

## LICENSING

Division attorneys provide legal representation to the DHS Licensing division in maltreatment cases (abuse, neglect, and financial exploitation) involving personal care provider organizations and programs licensed to provide adult daycare, adult foster care, child foster care, child care, and services for mental health, developmental disabilities, and chemical health. Division attorneys appear in administrative proceedings and district and appellate courts seeking to uphold disqualifications of individuals providing services in programs licensed by DHS, respond to expungement petitions in district court to preserve judicial and administrative records for disqualification, and also appear in administrative proceedings and appellate courts to uphold licensing actions against programs licensed by DHS.

The following are some examples of specific matters handled by the division:

- ***MSOP litigation***. Although attorneys in the division obtained the complete dismissal of the *Karsjens* matter subject to an appeal, MSOP clients have filed new lawsuits in both state and federal court, which attorneys in the division defend on behalf of DHS. These lawsuits arise out of various incidents or policies at MSOP, including client assaults, property restrictions, media restrictions, searches, use of the high security area, and religious practices. There are also many cases that were stayed pending the outcome of the *Karsjens* matter, which attorneys in the division will continue to defend on behalf of DHS.
- ***Gordon, et al. v. DHS, et al.*** Plaintiffs are recipients of the Medical Assistance program's Disability Waiver who are challenging the use of Community Residential Settings as opposed to what they allege are more integrated settings. The plaintiffs' claims are based on the Medicaid Act, the Fourteenth Amendment, the Americans with Disabilities Act, and the Rehabilitation Act. Among other things, the plaintiffs claim that state policy and implementation by counties denies them information that would allow them to live in a setting that they believe is more integrated.
- ***Judicial Appeal Panel.*** Division attorneys provided legal representation to the Commissioner of DHS on numerous hearings before the SCAP on petitions from civilly committed individuals for transfer, provisional discharge, or discharge.
- ***Jarvis/Price-Sheppard Hearings.*** Division attorneys provided legal representation at numerous hearings to authorize medically necessary medication and/or electroconvulsive therapy for patients who lack the legal capacity to make the decision themselves.

- ***Medicaid Overpayment Recovery.*** Division attorneys provided legal representation to the State of Minnesota in connection with the recovery of overpayments in the Medicaid program.
- ***Disqualification Matters.*** Division attorneys handled disqualification proceedings.
- ***New York & Minnesota v. United States Department of Health and Human Services.*** Division attorneys pursued a claim against the federal government in connection with a reduction in funding for MinnesotaCare. The federal government revised its funding methodology, which resulted in over $60 million in additional payments to the State for the first three quarters of 2018, while the case is pending.
- ***ARRM v. Piper.*** Division attorneys represented DHS in a lawsuit alleging that certain providers were entitled to a reimbursement rate that was 7% higher under Minnesota law. The district court denied the plaintiffs' request for a temporary restraining order while the case proceeds.
- ***In the Matter of the Civil Commitment of Bradley Woltjer.*** Woltjer, a client at the Minnesota Sex Offender Program, petitioned for transfer, provisional discharge, and discharge from his civil commitment. The division provided legal representation to the DHS Commissioner, who opposed the petition, and successfully defeated the petition.
- ***Cormell Williamson v. Piper.*** Williamson sued the DHS Commissioner under the Minnesota Government Data Practices and the Minnesota Health Records Act in connection with an alleged unauthorized disclosure of a petition and letter regarding a Special Review Board proceeding. Division attorneys defended the DHS Commissioner and successfully moved to dismiss the lawsuit.
- ***Scott Anderson v. State.*** Anderson sought prior authorization for a particular dosage of morphine. DHS ordered that the dosage taper over several months. Anderson sought judicial review of DHS's determination. Division attorneys provided legal representation to the DHS Commissioner. The district court affirmed the DHS Commissioner's determination.
- ***In the Matter of the Maltreatment, Disqualification, and Revocation by Linda Tripp.*** DHS found Tripp responsible for maltreatment, disqualified her from providing care to vulnerable individuals in DHS (and other agency) licensed programs, and revoked her adult foster care license. Tripp appealed. Division attorneys provided legal representation to the department. The administrative law judge recommended affirming the maltreatment finding, disqualification, and revocation.
- ***In the Matter of the SIRS Appeal of Michael Newson.*** SIRS suspended the appellant due to overbilling the Medical Assistance program when he billed DHS for time he worked at another job. Division attorneys provided representation to DHS in a contested case hearing, which recommended upholding SIRS's decision. The Commissioner affirmed the suspension.

# CIVIL LAW

## CIVIL

The Civil Division investigates violations of and enforces State laws, including Minnesota's laws prohibiting consumer fraud, deceptive trade practices, and false advertising. The division conducts investigations, serves investigative requests, and takes action where appropriate to stop and deter fraud in the marketplace and to protect consumers.

The following are examples of investigations and suits brought or resolved by the Civil Division:

- ***Insys Therapeutics, Inc. lawsuit regarding opioids.*** The office sued Insys Therapeutics, Inc., an opioid manufacturer of a form of fentanyl marketed under the brand name Subsys. The lawsuit alleges that although Subsys was only approved by the U.S. Food and Drug Administration (FDA) to treat breakthrough pain for cancer patients, Insys Therapeutics illegally promoted Subsys to Minnesota prescribers for off-label uses and at doses many times higher than approved by the FDA. The lawsuit further alleges that Insys Therapeutics created a sham "speaker fee" program in order to pay Minnesota prescribers money to incentivize them to prescribe Subsys for off-label purposes. The lawsuit alleges violations of Minnesota's Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44, *et seq.*; Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69, *et seq.*; and the Wholesale Drug Distribution Licensing Act, Minn. Stat. § 151.461, *et seq.* The lawsuit is ongoing.
- ***Purdue Pharma lawsuit regarding opioids.*** The Division sued Purdue Pharma, a large manufacturer of several opioid drugs including OxyContin. The lawsuit alleges that Purdue misrepresented the risks of opioids and exaggerated their benefits. The lawsuit claims that, among other things, Purdue misrepresented the danger of opioid addiction, asserted that patients' drug-seeking behavior was "pseudoaddiction," misrepresented the efficacy of opioids to treat long-term chronic pain, and exaggerated and misrepresented the risks of various forms of non-opioid pain treatment. The lawsuit alleges violations of Minnesota's Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69, *et seq.*; Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44, *et seq.*; False Statement in Advertising Act, Minn. Stat. § 325F.67; Unlawful Trade Practices Act, Minn. Stat. § 325D.09, *et seq.*; and the Minnesota False Claims Act, Minn. Stat. ch. 15C. The lawsuit is ongoing.
- ***CenturyLink lawsuit regarding consumer fraud.*** The office sued CenturyLink—a large phone, cable, and internet company based in Louisiana—for billing Minnesota consumers higher amounts than its sales agents quoted and promised them for internet and cable television service. The lawsuit alleges that CenturyLink systematically quoted Minnesota consumers one price, but then charged them a different, higher amount. The Court issued a temporary injunction order requiring CenturyLink to better disclose its prices and fees during the pendency of the lawsuit. The Court's order further prohibited CenturyLink

from making false statements about the prices and terms of its products as well as charging Minnesota consumers a greater amount than that disclosed at the time of sale. The lawsuit alleges violations of Minnesota's Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69, *et seq.* and Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44, *et seq.*, and seeks permanent injunctive relief, restitution on behalf of harmed Minnesota consumers, and civil penalties. The lawsuit is ongoing.

- ***Future Income Payments lawsuit regarding pension advance fraud.*** The division sued Future Income Payments, LLC and FIP, LLC (collectively, FIP), for engaging in an illegal "pension advance" scheme. The lawsuit alleged that FIP issued loans to Minnesota consumers—many of whom were veterans or spouses of veterans—without first being licensed as required by Minnesota law as well as charged rates of interest far in excess of those allowed by Minnesota law (*e.g.*, as high as 240%). The lawsuit further alleged that FIP attempted to disguise its illegal lending scheme by falsely characterizing its transactions with Minnesota consumers as the purchase and sale of their future pension or benefit payments. The division obtained a temporary injunction order from the Court prohibiting FIP from further engaging in unlicensed or usurious lending, and from further collecting on existing loans during the pendency of the case. Subsequently, the Court issued summary judgment in the State's favor. The Court's final judgment bans FIP from engaging in the business of making loans in Minnesota, voids and cancels all of the illegal loans FIP issued to Minnesota consumers, and requires FIP to provide a substantial monetary payment to the State in order to provide full refunds of all amounts borrowers paid (plus interest) on the illegal loans.

- ***AutoAssure lawsuit regarding consumer fraud.*** The division sued AutoAssure, LLC, a Texas automobile warranty company that does business as Vehicle Services Department. The lawsuit alleges that AutoAssure deceptively sold costly and often unnecessary car warranties to nearly 1,000 Minnesota consumers. The lawsuit further alleges that, in order to induce consumers to purchase these warranties, AutoAssure sometimes falsely told consumers, among other things, that the factory warranty on their vehicle had expired, that AutoAssure was affiliated with the manufacturer of their car, or that their warranty contracts covered "everything" despite containing dozens of exclusions. The lawsuit alleges violations of Minnesota's Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69, *et seq.*; Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44, *et seq.*; Deceptive Sale of Service Contracts Act, Minn. Stat. § 59B.07; and Deceptive Acts Perpetrated Against Senior Citizens Act, Minn. Stat. § 325F.71. The lawsuit seeks permanent injunctive relief, restitution on behalf of harmed Minnesota consumers, and civil penalties. The lawsuit is ongoing.

- ***Minnesota School of Business/Globe University lawsuit regarding consumer fraud.*** In the division's lawsuit against the for-profit college companies Minnesota School of Business (MSB) and Globe University (Globe), the Court held that MSB and Globe falsely and misleadingly represented that their criminal justice program provided the required education to become a Minnesota police officer or probation officer in violation of consumer protection laws. The Court found that the schools' criminal justice program "served as a trap for the unwary" and entered an Order in favor of the State for a permanent injunction, civil penalties, costs and attorney's fees. On June 4, 2018, the Minnesota Court of Appeals affirmed in part and reversed in part the district court's order

for restitution. The Minnesota Supreme Court accepted review, and its decision is pending. In addition, in a separate decision, the Minnesota Supreme Court held that the schools violated Minnesota law by issuing loans to their students without being licensed and charging rates of interest on the loans that exceeded the maximum rate allowed under Minnesota law. Subsequently, this Office sought an order from the Hennepin County district court declaring all of these illegal loans void and requiring the schools to refund all amounts that borrowers have paid on the illegal loans (plus interest). A trial was held before the district court on the remedial relief sought by this Office. The district court's findings of fact, conclusions of law, and order concerning remedial relief for MSB and Globe's illegal lending was issued on August 29, 2018. An appeal is pending.

## CHARITIES

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

The Charities Division enforces and administers laws relating to charities and other nonprofits. By statute, the Attorney General's Office also receives notice of certain private trust and probate matters filed in the district courts that affect charitable beneficiaries/interests. The division received and reviewed approximately 176 such notices in Fiscal Year 2018. When necessary, the division acts to protect charitable assets and represents the interests of charitable beneficiaries that might otherwise be unable to represent themselves.

The division also receives notice of the dissolution, merger, consolidation, conversion, or transfer of all or substantially all assets of Minnesota nonprofit corporations. It received approximately 167 such notices in Fiscal Year 2018. The division reviews these notices to ensure that charitable assets are protected during these transactions and used for the purposes for which they were solicited and held.

Additionally, the Charities Division responds to complaints about nonprofits and charities, and investigates allegations of fraud, misuse of funds, and other wrongdoing by such organizations. Depending on the circumstances, these investigations can lead to formal legal action, are resolved by working with nonprofit boards to bring them into compliance with the requirements of Minnesota law, or are referred to other government officials and agencies.

The division brings suit against organizations that commit charitable solicitation fraud or otherwise violate the State's charities and nonprofit laws. Through the enforcement of laws governing nonprofit and charitable organizations, the Charities Division helps combat fraudulent solicitations, deter fraud in the nonprofit sector, educate the public about charitable giving, and hold nonprofit organizations accountable for how they raise, manage, and spend charitable assets.

Minnesota law requires charitable organizations and professional fundraisers to register and file annual reports with the Attorney General's Office. In Fiscal Year 2018, approximately $668,000 in registration-related fees were deposited into the State's general fund. At present, the division has registered and is maintaining public files for more than 12,070 soliciting charitable organizations, more than 2,840 charitable trusts, and 376 professional fundraisers. The charitable organizations and charitable trusts that the division regulates held more than $584 billion in assets, and had $260 billion in total revenue the prior year. The information from these files permits the donating public to review a charitable organization's financial information, allowing for greater transparency and more informed giving. The information is made available to the public in summary form on the "Charities" page of the Attorney General's website regarding charities, in its entirety on the website regarding professional fundraisers, and in its entirety at the Attorney General's Office regarding all registered organizations.

The following are examples of investigations and lawsuits brought or resolved by the Charities Division during the last year:

- **Help the Vets, Inc.** Help the Vets, Inc. (HTV) was a charity that told donors it provided veterans medical care, operated a suicide prevention program for veterans, and offered assistance to veterans fighting cancer, among other things. These representations were allegedly false and deceptive. The vast majority of HTV's claimed "charitable" programing consisted of distributing chiropractic vouchers, which HTV received for free and that were good only at a Florida chiropractic clinic, and hotel vouchers, which it also received for free and that were redeemable only at hotels located in Florida and Mexico. HTV could not substantiate that it helped a single veteran through either of these voucher programs. The Charities Division sued and subsequently obtained a Consent Judgment permanently banning HTV from soliciting in Minnesota and HTV's principal, Neil Paulson, from operating any other charities in the future. The Consent Judgment also required Paulson to pay $1.75 million in restitution. This action was taken in conjunction with the Federal Trade Commission and attorneys general from five other states.
- **International Health Care Services, Inc**. International Health Care Services (IHCS) is a Minnesota health care nonprofit. The Charities Division brought an action against IHCS and its officers Michael Tobak, Natasha Kushner (Tobak's sister), and Alex Kushner (Tobak's brother-in-law). The lawsuit alleged that from at least 2004 through 2016, Tobak siphoned more than $15 million in charitable assets from IHCS to, among other things, shop at luxury retailers like Neiman Marcus, pay his credit cards and property taxes, and play the stock market. The settlement requires Tobak to pay $12.2 million in restitution and civil penalties and the Kushners are required to pay $83,000 in restitution and civil penalties. In addition, the settlement permanently barred Tobak and the Kushners from exercising any control over a nonprofit's finances, operations, or other affairs.
- **Communications Specialists, Inc**. Communications Specialists, Inc. (CSI) is a professional fundraiser that solicited contributions from Minnesota donors for the Minnesota charities Amvets and Shriners. CSI allegedly solicited hundreds of thousands of dollars in donations for these charities in Minnesota without being registered to do so. CSI hired Patrick Sharpe to collect contributions from Minnesota donors. Acting in his

role as CSI's courier, Sharpe allegedly kept $72,000 of these donations for himself. The Charities Division brought a lawsuit against CSI for soliciting without being registered in Minnesota, and against Sharpe for misappropriating donations intended for Amvets and Shriners. The settlement of this lawsuit required CSI and Sharpe to pay restitution of the $72,000 that Sharpe allegedly misappropriated from Amvets and Shriners. The settlement also prohibited CSI from soliciting in Minnesota in the future, and permanently banned Sharpe from handling or controlling any charitable donations from Minnesota donors.

- **Healing American Heroes, Inc**. Healing American Heroes, Inc. (HAH) is a Texas charity that allegedly used deceptive tactics to solicit contributions in Minnesota. HAH, for example, told potential donors that their contributions would be used for its charitable program of providing phone cards to military service members. In reality, HAH spent only 0.17% of the donations it solicited in 2016 on phone cards, and in 2015, it failed to distribute even a single phone card to service members. HAH also failed to disclose that its largest charitable program (85% of its charitable spending) consisted of the so-called "educational" content it claimed was part of the mail solicitations asking them for money that it sent to donors. HAH further filed allegedly false documents with the AGO that made it appear as if its spending on charitable causes was larger than it was in reality. The Charities Division obtained an Assurance of Discontinuance permanently barring HAH and its principal from soliciting any additional contributions in Minnesota.

## RESIDENTIAL UTILITIES AND ANTITRUST

The division represents the interests of residential and small business utility consumers in the complex and changing electric, natural gas, and telecommunications industries, particularly with regard to utility rates, reliability of service, and quality issues pursuant to statute.

The division also investigates potential violations of state and federal antitrust laws, and enforces these laws when it uncovers evidence of anticompetitive conduct. The division participates in numerous coordinated investigations of potential anticompetitive conduct by multiple state and federal enforcers of antitrust laws, including other state attorneys general, the U.S. Department of Justice, and the Federal Trade Commission.

Specific examples of the division's work in FY 2018 include:

- ***Minnesota Power's Proposed Rate for EITE Customers.*** Minnesota Power requested a discounted rate for its Energy Intensive Trade Exposed (EITE) customers in November of 2015. The division intervened and contested the utility's claim that it had met its burden to show that the discount would result in a net benefit to the utility or the state. The Public Utilities Commission rejected Minnesota Power's request and required the utility to provide more evidence of the net benefit. Minnesota Power then filed a revised request in June of 2016 and the division again intervened. The Public Utilities Commission approved the utility's revised filing and authorized the utility to provide discounts to its EITE customers. The division also opposed Minnesota Power's proposed cost recovery mechanism, because it did not refund non-EITE customers for any increased revenues from the EITE rate. The Public Utilities Commission agreed with the

division's critique and ordered Minnesota Power to file a different cost-recovery mechanism that uses any increased revenues from higher sales to EITE customers to refund surcharges imposed on non-EITE customers. The EITE customers have appealed this decision. The division is supporting the Commission's decision on appeal.

- ***Otter Tail Power's Proposed Rate for EITE Customers.*** Otter Tail Power requested a discounted rate for its Energy Intensive Trade Exposed (EITE) customers in June of 2016. The division intervened and contested the utility's claim that it had met its burden to show that the discount would result in a net benefit to the utility or the state. The Public Utilities Commission rejected Otter Tail's request and required the utility to provide more evidence of the net benefit. Otter Tail then filed a revised request in April of 2017 and the division again intervened. The Public Utilities Commission approved the utility's revised filing at its June 29, 2017 hearing, and authorized the utility to provide discounts to its EITE customers. Otter Tail then requested a cost recovery mechanism for the discount. This Office submitted comments recommending that Otter Tail's proposal be approved because it complied with the applicable statutes. The Commission approved Otter Tail's proposal.

- ***Minnesota Power Electric Rate Case.*** Minnesota Power filed a rate case seeking a $55.1 million rate increase in November, 2016. The division intervened in the rate case and filed testimony opposing the request, including the allowed return for Minnesota Power's shareholders; the company's expenses for travel, entertainment, and gifts; incentive compensation, and the proportion of any increase that Minnesota Power was seeking to recover from residential ratepayers. Additionally, the division recommended reducing the monthly customer charges paid by residential and small business ratepayers. A contested case proceeding was held in August, 2017, before the Office of Administrative Hearings. On May 29, 2018, the Public Utilities Commission issued a final order permitting a rate increase of approximately $11.9 million, around 21 percent of what Minnesota Power initially requested. On August 10, 2018, the division filed comments disputing the method that Minnesota Power used to calculate interim rate refunds. The Public Utilities Commission is expected to schedule a hearing on the matter soon.

- ***Minnesota Energy Resources Corporation (MERC) Gas Rate Case.*** MERC filed a rate case seeking a $12.6 million increase in rates in 2017. The division intervened in the rate case and contested multiple aspects of the request, including the return that MERC's investors require to invest in the company, recovery of costs for a headquarters that was demolished, MERC's recovery of travel and entertainment expenses and administrative costs for charitable contributions, the appropriate recovery of MERC's costs for the rate case, the study used to determine which customer classes contribute to the cost of providing utility service, and the revenue apportionment between MERC's different classes. The division has filed briefs with the Administrative Law Judge, who will issue Recommended Findings of Fact and Conclusions of Law. The division will then present its issues to the Public Utilities Commission.

- ***Xcel Energy's Gas Utility Infrastructure Rider.*** In November, 2017, Xcel Energy's gas utility filed its fourth petition for rider recovery of approximately $27.5 million for 2018 costs incurred for projects the company argues are eligible for rider recovery. The

division filed comments recommending a reduction to the allowed return. The Public Utilities Commission has not taken action on this docket at the time of this writing.

- ***Fuel Clause Reform.*** In May, 2017, the division filed comments at the PUC supporting a mechanism to reform how electric utilities are able to automatically adjust their rates to recover their fuel costs. The goal of this reform would be to provide stronger incentives for electric utilities to save ratepayers money by controlling their fuel costs. The Public Utilities Commission issued an order adopting this mechanism on December 19, 2017.

- ***CenterPoint Energy Natural Gas Rate Case.*** CenterPoint Energy filed a natural gas rate case requesting a $56.5 million rate increase. The division filed testimony challenging the rate increase, and proposing cost reductions on many issues including the proposed return on equity. The division also challenged CenterPoint's proposal for allocating the costs of any increase. A settlement on all issues was adopted by the Public Utilities Commission. The settlement adopts a rate increase of approximately $3.8 million, a reduction to the initial request of around 93 percent, and reducing the rate increase on residential customers from the initial request of 8 percent to a final amount of approximately 0.5 percent. In July, 2018, CenterPoint filed its proposal for an interim rate refund, which the division is currently reviewing.

- ***Xcel Energy Time of Use Rate Pilot.*** In part based on recommendations made by the division in its last rate case, Xcel Energy held a stakeholder workgroup and filed a proposal for a Time of Use rate pilot for residential customers. The division agreed with the proposal in principle, because it has the potential to reduce peak energy demand and system costs. The division proposed several changes to the program. In an order issued on August 7, 2018, the Public Utilities Commission approved the program but did not adopt all of the changes proposed by the division.

- ***Dakota Electric Request for Grid-Modernization Rider.*** The Dakota Electric energy cooperative requested a rider to recover the costs of grid-modernization projects without filing a rate case. The division intervened and provided legal analysis of the statute Dakota Electric based its request on, which had not previously been used. The Commission approved Dakota Electric's request.

- ***Commission Investigation of Frontier Service Quality.*** The Commission requested comments from interested parties after receiving numerous complaints from customers of Frontier Communications regarding service quality problems. The division submitted comments in response to the Commission's request and recommended that the Commission hold public hearings throughout Frontier's service territory. The Commission has scheduled six public hearings during the fall of 2018 and requested that the Department of Commerce submit a report on customer complaints after the public hearings are concluded. The division also submitted comments opposing Frontier's attempt to limit this phase of the Commission's investigation. The Commission adopted the division's recommendation and did not limit the investigation.

- ***Xcel Energy 2017 Transmission Cost Recovery Rider.*** Xcel Energy filed a proposal to recover costs related to transmission investments, as well as investments in distribution grid modernization that were previously certified by the Public Utilities Commission. On April 2, 2018, the division filed comments recommending that rate of return paid on the

rider should be reduced to account for the lower risk of investments that are allowed special recovery mechanisms.

- ***Xcel Energy Community Solar Gardens.*** The Public Utilities Commission requested comments on whether it would be reasonable to increase the price paid to community solar gardens to incentivize the participation of residential customers. The division filed comments stating that the same objectives could be accomplished by creating a carve-out for residential customers rather than increasing the price of the program. The Public Utilities Commission agreed with the division's analysis and took no action on the issue. The division also filed comments recommending that Xcel Energy not be permitted to own and operate community solar gardens. The Public Utilities Commission considered the division's arguments but determined that, while important issues were raised, Xcel had taken steps to avoid harming the market in this instance.

- ***Xcel Energy Performance Metrics.*** The Commission opened a proceeding to address performance metrics following Xcel Energy's most recent electric rate case. Performance metrics and, more broadly, performance incentive mechanisms, are an emerging regulatory tool being employed to track how utilities are meeting both traditional regulatory obligations and newer goals that are based upon trends in public policy, such as energy efficiency and renewable energy. The division filed comprehensive comments recommending adoption of a rigorous process be established to design a mechanism that can hold utilities accountable for meeting these public policy-related goals. Although the Commission has yet to consider this docket, the division's proposed process garnered widespread stakeholder support and was explicitly adopted by another state that is going through a similar process.

- ***Commission Inquiry into Electric Vehicles.*** The Commission opened a proceeding to investigate the role of electric utilities and of regulators in the growing electric vehicle market. The division filed comments recommending that the Commission: adopt a three-step analysis to determine the future need for electric vehicle infrastructure; develop cost-effectiveness tests to evaluate utility proposals; and consider the broader policy issues that include electric vehicles, such as integrated demand-side management so as to avoid duplication of efforts and an inconsistent regulatory approach.

- ***Stakeholder Proceeding on Fuel Switching.*** The Department of Commerce, which administers aspects of the state's energy efficiency program, convened a stakeholder group to discuss the issue of fuel switching. Fuel switching is when the fuel used to power a device, such as a furnace, is replaced by a fuel that is more efficient or otherwise beneficial. Recent examples of fuel switching are propane-burning furnaces being replaced by electric-powered heat pumps and gasoline-burning vehicles being replaced by electric-powered vehicles. Due to an increase in carbon-free electricity driven by renewable energy, some see fuel switching as a means to reduce the state's greenhouse gas emissions. The division filed comments that were generally supportive of the concept, but that analyzed the limitations of the practice under the existing energy efficiency program.

- ***Xcel Energy Biennial Grid Modernization Certification.*** On November 1, 2017, Xcel filed its second biennial grid modernization plan and proposed certification of two projects: its Time of Use rate design pilot, and a Fault Location, Isolation, and Service

Restoration (FLISR) program. The division recommended approval of the Time of Use pilot, but rejection of the FLISR investment, and the Public Utilities Commission adopted the recommendation of the division.

- ***Impact of 2017 Federal Tax Act on Utility Rates and Services.*** The Commission opened an investigation to determine how to address the impact of recent federal tax litigation on regulated electric and natural gas rates. The division filed comments in March 2018, April 2018, and June 2018 urging the Commission to order the utilities to return, in the form of direct refunds or rate reductions, as soon as possible the reduced tax liabilities those utilities will face in light of the tax changes. The Commission adopted most of the division's recommendations and estimated the total rate reductions at $200 million.

- ***Xcel Energy Conservation Improvement Program Triennial Program Modifications.*** In June, 2018, Xcel Energy filed a request to modify an existing energy efficiency program to include a demand response project. The proposed demand response project would provide a monetary rebate (funded by ratepayers) to some commercial and industrial customers in exchange for that customer moving some electricity demand to a different time of day, when the price of energy is lower. The division filed comments opposing this modification because the proposal would not reduce the amount of energy used, which is required under the law for cost recovery under the state's energy efficiency program. Department of Commerce staff agreed with the division's interpretation of the law and recommended rejection of Xcel Energy's request, but no formal decision has been made as of this writing.

- ***Natural Gas Competition.*** The Commission opened a proceeding to investigate the parameters by which natural gas companies compete for new customers. The division filed comments in November, 2017, and December, 2017, urging the Commission to adopt a new mechanism to prevent unnecessary duplication of natural gas facilities that would drive up costs for ratepayers. The Commission did not adopt the division's specific recommendation, but did adopt new standards to address the division's concerns.

- ***Net Neutrality Litigation.*** The division, along with 21 other attorneys general, filed a lawsuit in January, 2018, challenging the Federal Communications Commission's order to repeal its net neutrality provisions. The division argues that the order was arbitrary, capricious, and an abuse of discretion by the FCC.

- ***Generic Pharmaceuticals Pricing Antitrust Litigation***. Minnesota and other states filed a complaint in Connecticut federal court against Heritage Pharmaceuticals Inc., Teva Pharmaceuticals, Mylan NV, Mayne Pharma, Aurobindo Pharma, and Citron Pharma LLC, alleging that the companies violated state and federal antitrust laws by conspiring to fix prices and allocate markets for Doxycycline Hyclate Delayed Release, an antibiotic, and Glyburide, an oral diabetes medication. In August 2017, the case was transferred to the Eastern District of Pennsylvania and consolidated with other private class action cases alleging similar antitrust violations against generic drug manufacturers. In October, 2017, the states moved to amend their complaint to include a dozen pharmaceutical companies for similar conduct related to widely-used generic medicines. The amended complaint was filed in June, 2018. The lawsuit seeks injunctive relief, civil penalties, damages, and disgorgement.

- ***Suboxone Multistate Antitrust Litigation.*** In September, 2016, Minnesota and other states filed a complaint in Pennsylvania federal court against Indivior, Inc., Reckitt Benckiser Healthcare (UK), Ltd., Indivior PLC, and MonoSol Rx LLC, alleging that the companies conspired to coerce patients to switch from a tablet form to a film form of the drug Suboxone in order to prevent cheaper generic competition. Suboxone is used to treat patients addicted to opioids. The lawsuit seeks injunctive relief, civil penalties, and disgorgement.
- ***Provigil Multistate Antitrust Litigation.*** In July, 2017 a Pennsylvania federal district court granted final approval of a settlement that Minnesota and other states reached with Cephalon, Inc., Teva Pharmaceuticals Industries Ltd., Teva Pharmaceuticals USA, Inc., and Barr Pharmaceuticals, who allegedly entered into legal settlements that kept generic competition to the branded drug Provigil from entering the market. The settlement provides for payment of approximately $1 million to the State of Minnesota and will make available funds for recovery of losses by Minnesota consumers.
- ***LIBOR Rate Manipulation Investigation.*** In October, 2017, Minnesota and other states entered into settlement to reimburse public and non-profit entities injured by manipulation of the LIBOR rate. In June, 2018, Minnesota and other states reached a similar settlement with Citibank.
- ***Lidoderm Antitrust Litigation.*** In January, 2018, Minnesota and other states filed a complaint against Teikoku alleging a "pay for delay" scheme related to the drug Lidoderm. At the same time, the states agreed to a settlement with Teikoku for injunctive relief that bans Teikoku from engaging in reverse settlement agreements for twenty years.

## APPENDIX A: SERVICE HOURS
### By Agency or Political Subdivision for FY 2018

| Agency/Political Subdivision | Estimated Service Hours (1) | Actual Service Hours | Estimated Expenditures | Actual Expenditures (2) |
|---|---|---|---|---|
| ***Partner Agencies*** | | | | |
| Administration--Risk Management | | 1,138.5 | | $ 133,620.30 |
| AURI | | 11.1 | | $ 1,454.10 |
| Corrections (3) | 2,330.2 | 5,049.9 | $ 305,250.00 | $ 657,428.10 |
| Education Department | | 1,783.1 | | $ 229,722.10 |
| Environmental Quality Board | | 141.8 | | $ 18,575.80 |
| Gambling Control Board | | 83.7 | | $ 10,964.70 |
| Health | | 2,999.9 | | $ 391,964.50 |
| Housing Finance Authority | | 52.4 | | $ 6,864.40 |
| Human Services | | 29,386.4 | | $ 3,832,852.00 |
| Iron Range Resources & Rehabilitation | | 158.7 | | $ 20,789.70 |
| Labor and Industry Department (3) | | 2,766.7 | | $ 360,935.30 |
| Lottery | | 2.1 | | $ 275.10 |
| Medical Practices Board | 6,437.0 | 5,288.5 | $ 622,447.00 | $ 520,862.30 |
| Minnesota Racing Commission | | 322.6 | | $ 42,260.60 |
| Minnesota State Retirement System | | 412.8 | | $ 53,640.00 |
| Minnesota State | | 6,899.5 | | $ 859,189.70 |
| MNsure | | 7.3 | | $ 956.30 |
| Natural Resources | | 5,261.7 | | $ 688,010.70 |
| Petroleum Tank Release Compensation Board | 100.0 | 35.5 | $ 13,100.00 | $ 4,650.50 |
| Pollution Control | | 6,384.0 | | $ 835,406.40 |
| Public Employees Retirement Association | | 209.4 | | $ 27,431.40 |
| Public Safety (3) | | 7,306.1 | | $ 824,417.50 |
| Revenue (3) | 4,300.0 | 4,300.0 | $ 563,300.00 | $ 563,300.00 |
| Teachers Retirement Association | | 319.3 | | $ 41,828.30 |
| Transportation | | 9,600.4 | | $ 1,242,902.00 |
| **TOTAL PARTNER AGENCIES** | **13,167.2** | **89,921.4** | **$ 1,504,097.00** | **$ 11,370,301.80** |
| | | | | |
| | | | | |
| ***Health Boards/Offices*** | | | | |
| Behavioral Health & Therapy Board | | 543.2 | | $ 51,152.80 |
| Chiropractic Board | | 1,615.1 | | $ 169,242.10 |
| Dentistry Board | | 970.6 | | $ 109,647.80 |
| Dietetics & Nutrition Practice Board | | 153.8 | | $ 19,826.20 |
| Emergency Medical Services Regulatory Board | | 547.1 | | $ 59,886.10 |
| Health Professionals Services Program | | 7.0 | | $ 917.00 |
| Licensed Drug & Alcohol Counselor Program | | 1,766.9 | | $ 167,451.10 |
| Marriage & Family Therapy Board | | 742.9 | | $ 71,102.30 |
| Nursing Board | | 5,971.9 | | $ 689,078.90 |
| Nursing Home Administrators Board | | 63.0 | | $ 7,437.00 |
| Occupational Therapy Board | | 34.0 | | $ 4,454.00 |
| Optometry Board | | 43.8 | | $ 5,305.80 |
| Pharmacy Board | | 1,972.4 | | $ 228,202.00 |
| Physical Therapy Board | | 199.2 | | $ 26,095.20 |
| Podiatry Board | | 24.3 | | $ 3,183.30 |
| Psychology Board | | 1,775.6 | | $ 184,814.80 |
| Social Work Board | | 2,242.4 | | $ 218,764.00 |
| Veterinary Medicine Board | | 641.2 | | $ 68,560.40 |
| **SUBTOTAL** | | **19,314.4** | | $ 2,085,120.80 |
| | | | | |

APPENDIX A: SERVICE HOURS
By Agency or Political Subdivision for FY 2018

| Agency/Political Subdivision | Estimated Service Hours (1) | Actual Service Hours | Estimated Expenditures | Actual Expenditures (2) |
|---|---|---|---|---|
| *Other State Agencies/Political Subdivisions* | | | | |
| Accountancy Board | | 292.4 | | $ 37,632.40 |
| Administration Department | | 452.7 | | $ 59,294.10 |
| Administrative Hearings Office | | 106.2 | | $ 13,912.20 |
| Agriculture Department | | 564.0 | | $ 73,884.00 |
| Animal Health Board | | 604.0 | | $ 79,124.00 |
| Architecture Board | | 234.6 | | $ 30,732.60 |
| Asian Pacific Minnesotans Council | | 2.1 | | $ 275.10 |
| Assessors Board | | 3.5 | | $ 458.50 |
| Barber Board | | 64.4 | | $ 8,436.40 |
| Campaign Finance Board | | 142.4 | | $ 18,361.60 |
| Capitol Area Architectural Planning Board | | 3.0 | | $ 393.00 |
| Center for Arts Education | | 106.1 | | $ 13,899.10 |
| Client Security Board | | 158.0 | | $ 19,282.00 |
| Commerce Department | | 10,675.2 | | $ 1,390,617.60 |
| Commission Serving Deaf and Hard of Hearing | | 3.0 | | $ 393.00 |
| Continuing Legal Education Board | | 5.3 | | $ 694.30 |
| Corrections Department (3) | | 4,187.3 | | $ 519,750.70 |
| Corrections Department/Community Notification | | 1,249.8 | | $ 141,711.00 |
| Cosmetology Examiners Board | | 116.4 | | $ 15,248.40 |
| Council for Minnesotans of African Heritage | | 9.5 | | $ 1,244.50 |
| Council on Latino Affairs | | 12.6 | | $ 1,650.60 |
| Crime Victims Reparations Board | | 117.2 | | $ 14,681.20 |
| Disability Council | | 0.2 | | $ 26.20 |
| Employment & Economic Development Department | | 3,551.8 | | $ 395,508.20 |
| Executive Council | | 7.2 | | $ 943.20 |
| Explore Minnesota Tourism | | 102.9 | | $ 13,355.10 |
| Faribault Academies | | 18.3 | | $ 2,397.30 |
| Firefighter Training & Education Board | | 11.3 | | $ 1,480.30 |
| Governor's Office | | 247.5 | | $ 32,369.70 |
| Higher Education Facilities Authority | | 0.6 | | $ 78.60 |
| Higher Education Services Office | | 507.0 | | $ 66,417.00 |
| Human Rights Department | | 539.4 | | $ 70,277.40 |
| Judiciary Courts | | 442.7 | | $ 57,993.70 |
| Labor and Industry Department (3) | | 2,098.1 | | $ 269,009.50 |
| Land Exchange Board | | 1.7 | | $ 222.70 |
| Law Examiner's Board | | 202.5 | | $ 26,527.50 |
| Legislative: Auditor's Office | | 5.6 | | $ 733.60 |
| Legislature | | 2.0 | | $ 262.00 |
| Mediation Services Bureau | | 505.2 | | $ 66,123.60 |
| Military Affairs Department | | 80.4 | | $ 10,532.40 |
| Minnesota Management & Budget | | 1,162.2 | | $ 150,429.00 |
| MN.IT Services Office | | 314.6 | | $ 41,140.60 |
| Ombudsman for Mental Health & Developmental Disabilities | | 1.8 | | $ 235.80 |
| Ombudsperson for Families | | 23.0 | | $ 3,013.00 |
| Peace Officers Standards and Training Board | | 246.3 | | $ 32,265.30 |
| Private Detective Board | | 560.8 | | $ 73,464.80 |
| Professional Educator Licensing & Standards Board | | 782.1 | | $ 102,455.10 |
| Public Defender, State | | 101.0 | | $ 13,154.20 |
| Public Safety Department (3) | | 19,113.4 | | $ 2,219,647.40 |
| Public Utilities Commission | | 2,816.8 | | $ 366,509.60 |
| Revenue Department (3) | | 5,510.1 | | $ 721,343.10 |
| Rural Finance Authority | | 2.3 | | $ 301.30 |
| School Administrators Board | | 243.4 | | $ 31,885.40 |
| Secretary of State | | 1,503.7 | | $ 193,763.90 |
| State Arts Board | | 13.0 | | $ 1,703.00 |
| State Auditor | | 20.0 | | $ 1,996.00 |
| State Fair Board | | 3.3 | | $ 432.30 |
| State Guardian Ad Litem Board | | 33.9 | | $ 4,440.90 |
| State Historical Society | | 16.0 | | $ 2,096.00 |
| State Investment Board | | 209.4 | | $ 27,431.40 |
| Teaching Board | | 500.9 | | $ 65,617.90 |

APPENDIX A: SERVICE HOURS
By Agency or Political Subdivision for FY 2018

| Agency/Political Subdivision | Estimated Service Hours (1) | Actual Service Hours | Estimated Expenditures | Actual Expenditures (2) |
|---|---|---|---|---|
| Veterans Affairs Department | | 35.0 | | $ 4,585.00 |
| Veterans Homes | | 918.6 | | $ 113,247.00 |
| Water & Soil Resources Board | | 567.1 | | $ 74,290.10 |
| Workers Comp Court of Appeals | | 6.1 | | $ 799.10 |
| Zoological Board | | 0.4 | | $ 52.40 |
| **SUBTOTAL** | | **62,139.3** | | **$ 7,702,233.90** |
| | | | | |
| **OTHER GOVERNMENT** | | | | |
| Aitkin County Attorney | | 379.0 | | $ 43,620.20 |
| Anoka County Attorney | | 326.8 | | $ 31,790.00 |
| Becker County Attorney | | 270.2 | | $ 35,084.20 |
| Beltrami County Attorney | | 746.3 | | $ 86,792.50 |
| Benton County Attorney | | 745.9 | | $ 76,650.50 |
| Big Stone County Attorney | | 1.5 | | $ 196.50 |
| Blue Earth County Attorney | | 575.6 | | $ 58,123.60 |
| Brown County Attorney | | 347.0 | | $ 43,215.40 |
| Carlton County Attorney | | 4.2 | | $ 550.20 |
| Carver County Attorney | | 12.7 | | $ 1,663.70 |
| Cass County Attorney | | 785.9 | | $ 78,165.70 |
| Chippewa County Attorney | | 70.9 | | $ 9,119.90 |
| Chisago County Attorney | | 8.5 | | $ 1,113.50 |
| Clay County Attorney | | 605.1 | | $ 61,805.70 |
| Clearwater County Attorney | | 0.5 | | $ 65.50 |
| Cook County Attorney | | 56.2 | | $ 6,402.20 |
| Cottonwood County Attorney | | 354.6 | | $ 40,740.60 |
| Crow Wing County Attorney | | 19.8 | | $ 1,873.80 |
| Dakota County Attorney | | 2,527.8 | | $ 263,476.20 |
| Fillmore County Attorney | | 8.2 | | $ 1,074.20 |
| Freeborn County Attorney | | 55.7 | | $ 6,903.10 |
| Goodhue County Attorney | | 238.3 | | $ 26,791.70 |
| Hennepin County Attorney | | 18,235.6 | | $ 1,808,620.40 |
| Hubbard County Attorney | | 13.6 | | $ 1,685.60 |
| Itasca County Attorney | | 305.3 | | $ 33,034.30 |
| Kandiyohi County Attorney | | 666.0 | | $ 82,038.00 |
| Koochiching County Attorney | | 166.3 | | $ 21,785.30 |
| Lac qui Parle County Attorney | | 224.9 | | $ 20,557.90 |
| Le Sueur County Attorney | | 295.3 | | $ 34,508.30 |
| Lincoln County Attorney | | 1,147.6 | | $ 118,271.60 |
| Marshall County Attorney | | 111.9 | | $ 13,938.90 |
| Martin County Attorney | | 76.8 | | $ 9,988.80 |
| Meeker County Attorney | | 152.8 | | $ 19,872.80 |
| Mille Lacs County Attorney | | 155.2 | | $ 20,187.20 |
| Morrison County Attorney | | 202.8 | | $ 26,221.20 |
| Mower County Attorney | | 20.8 | | $ 2,724.80 |
| Nobles County Attorney | | 288.0 | | $ 28,598.40 |
| Olmsted County Attorney | | 507.0 | | $ 49,895.40 |
| Otter Tail County Attorney | | 592.9 | | $ 71,708.30 |
| Pennington County Attorney | | 600.8 | | $ 75,080.80 |
| Pine County Attorney | | 239.8 | | $ 30,333.80 |
| Pipestone County Attorney | | 58.7 | | $ 7,593.70 |
| Polk County Attorney | | 344.3 | | $ 39,319.30 |
| Pope County Attorney | | 23.9 | | $ 3,130.90 |
| Ramsey County Attorney | | 9,746.9 | | $ 943,085.50 |
| Redwood County Attorney | | 116.1 | | $ 15,017.10 |
| Rock County Attorney | | 65.3 | | $ 8,554.30 |
| Scott County Attorney | | 119.3 | | $ 14,053.90 |
| Sherburne County Attorney | | 604.9 | | $ 67,625.90 |
| Sibley County Attorney | | 418.3 | | $ 48,883.70 |
| St. Louis County Attorney | | 1,264.9 | | $ 164,525.90 |
| Stearns County Attorney | | 679.8 | | $ 87,100.20 |
| Steele County Attorney | | 785.2 | | $ 84,141.20 |
| Stevens County Attorney | | 304.5 | | $ 36,649.50 |
| Swift County Attorney | | 81.4 | | $ 10,663.40 |

| APPENDIX A: SERVICE HOURS<br>By Agency or Political Subdivision for FY 2018 | | | | |
|---|---|---|---|---|
| Agency/Political Subdivision | Estimated Service Hours (1) | Actual Service Hours | Estimated Expenditures | Actual Expenditures (2) |
| Todd County Attorney | | 1,056.2 | | $ 106,370.20 |
| Traverse County Attorney | | 56.6 | | $ 6,944.20 |
| Wabasha County Attorney | | 107.9 | | $ 13,894.90 |
| Wadena County Attorney | | 904.2 | | $ 90,058.20 |
| Waseca County Attorney | | 98.4 | | $ 12,794.40 |
| Washington County Attorney | | 15.9 | | $ 1,905.30 |
| Watonwan County Attorney | | 0.5 | | $ 65.50 |
| Wilkin County Attorney | | 180.7 | | $ 17,215.70 |
| Wright County Attorney | | 522.4 | | $ 56,295.20 |
| Yellow Medicine County Attorney | | 230.1 | | $ 27,815.10 |
| Association of County Attorneys | | 66.4 | | $ 8,698.40 |
| Various Local Governments | | 131.5 | | $ 16,842.50 |
| **SUBTOTAL** | | **50,128.4** | | **$ 5,233,514.80** |
| **TOTAL PARTNER/SEMI-PARTNER AGENCIES (from page A-1)** | | **89,921.4** | | **$ 11,370,301.80** |
| **TOTAL NON-PARTNER AGENCIES SUBDIVISIONS** | | **131,582.1** | | **$ 15,020,869.50** |
| **GRAND TOTAL HOURS/EXPENDITURES** | | **221,503.5** | | **$ 26,391,171.30** |
| Notes: | | | | |
| (1) The projected hours of service were agreed upon mutually by the partner agencies and the AGO. Actual hours may reflect a different mix of attorney and legal assistant hours than projected originally. | | | | |
| (2) Billing rates: Attorney $131.00 and Legal Assistant $83.00 | | | | |
| (3) A number of agencies signed agreements for a portion of their legal services. | | | | |

## APPENDIX B: SPECIAL ATTORNEY EXPENDITURES FOR FY 2018, BY AGENCY/POLITICAL SUBDIVISION

| AGENCY/POLITICAL SUBDIVISION | Amount |
|---|---|
| Administration | $ 568,323.47 |
| Housing Finance Agency | $ 3,352.69 |
| Minnesota Department of Natural Resources | $ 3,450.00 |
| Minnesota Management & Budget | $ 59,315.30 |
| Revenue | $ 105,470.92 |
| 3M Settlement* | |
| | |
| | |

*On February 20, 2018, a settlement was reached in *State of Minnesota v. 3M Company,* Hennepin County District Court No. 27-CV-10-28862. Under the settlement, the company was required to pay $850 million to the State of Minnesota Environmental Remediation Fund. The law firm of Covington and Burling, LLC received a payment of $125 million from the settlement proceeds pursuant to an agreement approved in advance by the Legislative Advisory Council.

## APPENDIX B: SPECIAL ATTORNEY EXPENDITURES
## BOND COUNSEL FOR FY 2018, BY AGENCY/POLITICAL SUBDIVISION

| AGENCY/POLITICAL SUBDIVISION | Amount |
|---|---|
| Higher Education Facilities Authority | $ 423,598.11 |
| Higher Education Services Office | $ 144,198.24 |
| Housing Finance Agency | $ 393,476.44 |
| Minnesota Agricultural and Economic Development Board | $ 11,049.12 |
| Minnesota Department of Commerce | $ 7,823.50 |
| Minnesota Management & Budget | $ 133,580.22 |
| Minnesota State | $ 2,568.75 |
| Public Facilities Authority | $ 2,620.00 |
| Rural Finance Authority | $ 670.80 |

NOTE: Certain bond fund counsel are paid from proceeds.

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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

March 29, 2017

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

**Re: Request For Opinion Concerning Special Election Issue**

Dear Mr. Thomson:

I thank you for your March 10, 2017 letter regarding the applicability of Minn. Stat. § 204B.04, subd. 4 (2016) to a special election for mayor of the City of Oakdale (the "City") if it were held the same day as the City's general election.

You state that the City's mayor resigned on December 5, 2016, leaving a vacancy in the office of mayor. You indicate the City appointed a person to fill the vacancy pursuant to Minn. Stat. § 412.02, subd. 2a, but the appointed person will serve only until the qualification of a successor elected at a special election to fill the unexpired portion of the term. You note that the special election to fill the unexpired portion of the current mayoral term must be held at or before the next regular city election, which is November 6, 2018. You state that the City Council has not yet decided when to hold the special election. You note that Minn. Stat. § 204B.04, subd. 4 precludes an individual who files an affidavit of candidacy for an office to be elected at the general election from filing another affidavit of candidacy for any other office elected on the date of the general election. You state that Minn. Stat. § 204B.04, subd. 4 appears to be aimed at preventing someone from being elected to fill multiple seats with coterminous terms, but applying the plain language under these circumstances would preclude someone from running for two separate offices where the terms are not coterminous. You ask whether Minn. Stat. § 204B.04, subd. 4 prohibits an individual who files an affidavit of candidacy for an office elected at the general election from subsequently filing an affidavit of candidacy for an office to be elected at a special election held on the same day, or vice versa, where the terms will not be coterminous.

For the reasons noted in Op. Atty. Gen. 629a (May 9, 1975), this Office does not generally render opinions upon hypothetical or fact-dependent questions. (I am enclosing a copy of Op. Atty. Gen. 629a, with this letter for your review.) Given that the City has not set a date for the special election to elect a successor for the unexpired portion of the current mayoral term and you do not indicate that any candidates have expressed an intention to file affidavits of candidacy for both elections, the questions presented are hypothetical. Accordingly, we are unable to provide definitive answers to these questions. That having been said, I can provide you with the following information, which I hope you will find helpful.

First, The Minnesota Legislature has delegated authority over the administration of elections to the Minnesota Secretary of State. The Minnesota Secretary of State has developed a *2016 City Clerk Election Guide*, which contains information designed to aid city clerks and their staff to administer city elections and contains a section specifically pertaining to filling vacancies in elected offices. I enclose a copy of The Minnesota Secretary of State's *2016 City Clerk Election Guide* for your reference. You may wish to contact the Minnesota Secretary of State's Office directly with questions about the requirements of Minn. Stat. § 204B.04, subd. 4 as follows:

Secretary of State Steve Simon
180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155
(651) 215-1440
Toll-free: 1-877-600-8683
*www.sos.state.mn.us*
*Email: elections.dept.@state.mn.us*

Second, Minnesota courts interpret statutes to determine whether the statutory language is ambiguous. *Weston v. McWilliams & Assoc., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006). When the statutory language is clear and free of ambiguity, Minnesota courts enforce the plain language of the statute and do not explore its spirit or purpose. *In re Welfare of J.J.P.*, 831 N.W.2d 260, 264 (Minn. 2013). Minn. Stat. § 204B.04, subd. 4 provides in relevant part that a "[a] candidate who files an affidavit of candidacy for an office to be elected at the general election may not subsequently file another affidavit of candidacy for any other office to be elected on the date of that general election[.]" As you note, the plain language of the statute would preclude an individual who files an affidavit of candidacy for the regular election from filing another affidavit of candidacy for an office to be elected at a special election held on the same date.

Third, the Minnesota Election Law, which is defined to include Minn. Stat. § 204B.04, subd. 4, applies to all elections held in Minnesota unless otherwise specifically provided by law. Minn. Stat. §§ 200.01–5 (2016). The Minnesota Election Law similarly provides that general election laws are applicable to special elections and municipal elections so far as practicable. Minn. Stat. § 204D.18 (2016); Minn. Stat. § 205.02 (2016). Consequently, barring a specific law to the contrary or an impracticality, the Minn. Stat. § 204B.04, subd. 4 prohibition on multiple candidacies would apply to a municipal special election.

Finally, while Minnesota courts may look past the plain language of a statute, they are "very reluctant to look past the plain language of an unambiguous statute." *Rohmiller v. Hart*, 811 N.W.2d 585, 591 (Minn. 2012). When construing an unambiguous statue, Minnesota courts will not override the plain language of a clear and unambiguous statue except in "an exceedingly rare case in which the plain meaning of the statute 'utterly confounds' the clear legislative

purpose of the statute." *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 651 (Minn. 2012); *Rohmiller*, 811 N.W.2d at 591; *State v. Schouweiler*, 887 N.W.2d 22, 27 n. 4 (Minn. 2016). While it is possible that Minn. Stat. § 204B.04, subd. 4 was aimed in whole or in part to prevent someone from being elected to multiple seats with coterminous terms, courts have also recognized states' interest in avoiding voter confusion and overcrowded ballots and in protecting the integrity, fairness, and efficiency of their ballots and election processes as a means for electing public officials. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (upholding prohibition on multiple-party candidacies). When the legislature enacted Minn. Stat. § 204B.04, subd. 4, it may have intended to prohibit multiple candidacies to protect the integrity of election processes, regardless of whether the terms of the offices were coterminous. Accordingly, in our view, it is unlikely that a court would find that the circumstances you describe represent the "exceedingly rare" case where the plain meaning of the statute utterly confounds a clear legislative purpose. *Schouweiler*, 887 N.W.2d at 27 (holding that statutory language did not confound a clear legislative purpose where legislature may have intended to limit criminal liability to the circumstances outlined in the statute); *Olson v. Ford Motor Co.*, 558 N.W.2d 491, 495–96 (Minn. 1997) (holding that statutory language did not confound a clear legislative purpose because the legislature might logically have been designed for a different purpose than the allegedly frustrated legislative purpose).

I thank you again for your correspondence.

Very truly yours,

JEFFREY D. WEBER
Assistant Attorney General

(651) 757-1017 (Voice)
(651) 297-1235 (Fax)

Enclosures: Ops. Atty. Gen. 629a (May 9, 1975)
Minnesota Secretary of State's *2016 City Clerk Election Guide*

# Opinions of the Attorney General

Hon. WARREN SPANNAUS

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

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

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

FACTS

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

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

You then ask substantially the following

QUESTION

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

OPINION

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

IN THIS ISSUE



In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1956). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. Id.

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

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

(1) Determine the constitutionality of state statutes since this office may deem it appropriate to intervene and defend challenges to the constitutionality of statutes. See Minn. Stat. § 525.11 (1974); Minn. R. Civ. App. P. 144; Minn. Dist Ct. (Civ.) R 24.04; Op. Atty. Gen. 733G, July 23, 1945.

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

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

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

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

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

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

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such cases. See Ops. Atty. Gen. 510M, Oct. 18, 1956, and 196n, March 30, 1951.

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

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

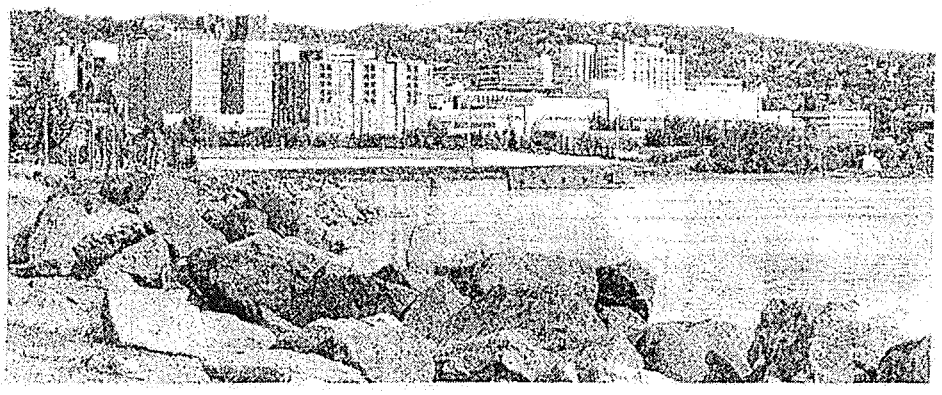
(7) Construe provisions of federal law. See textual discussion supra.

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

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

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

# 2016
# City Clerk Election Guide

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Website: www.sos.state.mn.us

# TABLE OF CONTENTS

# ABBREVIATED ELECTION ADMINISTRATION CALENDAR

This abbreviated calendar lists important deadlines related to a state election year. Each listing includes citations to Minnesota Statutes or Minnesota Rules. Minnesota Statutes and Rules are available at www.revisor.leg.state.mn.us. This calendar is not intended to provide legal advice and should not be used as a substitute for legal guidance. Readers should consult with an attorney for advice concerning specific situations.

When a statutory reference is to a certain number of days before an election or other event, start counting from the day before the event. When determining the days after the event, start counting from the day after the event. If the last day falls on a weekend or legal holiday, that day is usually omitted. For example, if a deadline falls on a Sunday, that day is omitted and Monday becomes the day of the deadline.

The complete detailed version of the 2016 Election Calendar is available at the OSS Elections Calendars website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-calendars/.

May:

- **5-17-2016 to 5-31-2016: Candidate filing period (cities with a primary)** – not more than 84 days nor less than 70 days before election. The municipal clerk's office must be open for filing from 1:00 p.m. to 5:00 p.m. on the last day of the filing period. *M.S. 205.13, subd. 1a*

June:

- **6-1-2016: Last day to change precinct boundary** – no later than June 1 in the year of the State General Election. *M.S. 204B.14, subd. 4*
- **6-2-2016: Withdrawal period ends (cities with a primary)** – until 5:00 p.m. 2 days after filing closes. *M.S. 204B.12, subd.1; 205.13, subd. 6*
- **6-24-2016: Absentee voting available for State Primary Election** – during the 46 days before the election. *M.S. 203B.05, subd. 2; 203B.085; 204B.35*

July:

- **7-19-2016: Voter pre-registration closes** – at 5:00 p.m. 21 days before the primary. *M.S. 201.061, subd. 1*

August:

- **8-2-2016 to 8-16-2016: Filing period for cities without a primary** – opens 98 days before and closes 84 days before the election. Hospital district office seat candidates also file with city or town clerk during this same time period. The municipal clerk's office must be open for filing from 1:00 p.m. to 5:00 p.m. on the last day of the filing period. *M.S. 205.13, subd. 1a; M.S. 447.32, subd. 4*
- **8-6-2016 & 8-8-2016: Clerk's office open for absentee voting (if applicable)** – from 10:00 am to 3:00 p.m. on the Saturday before the election and until 5:00 p.m. on the day before the election.
- 8-9-2016: **State Primary Election Day** – 2nd Tuesday in August. *M.S. 205.065, subd. 1; 204D.03*

- **8-12-2016: Canvass primary results** – the canvass must be conducted on the 3rd day after the primary. A canvass *may be* conducted on the 2nd day after the primary *if* the county auditor of each county in which the municipality is located agrees to administratively review the municipality's primary voting statistics for accuracy and completeness within a time that permits the canvass to be conducted on that day. *M.S. 205.065, subd. 5*
- **8-18-2016: Withdrawal period ends for cities without a primary** – until 5:00 p.m. 2 days after filing closes. *M.S. 204B.12, subd. 1; 205.13, subd. 1a*

September:

- **9-23-2016: Absentee ballots available for State General Election** – 46 days before state general election. *M.S. 203B.05; 203B.081; 204B.35*

October:

- **10-18-2016: Voter pre-registration closes for November general election** – at 5:00 p.m. 21 days before the general election. *M.S. 201.061, subd. 1*

November:

- **11-5-2016 & 11-7-2016: Clerk's office open for absentee voting (if applicable)** – from 10:00 a.m. to 3:00 p.m. on the Saturday before the November general election and until 5:00 p.m. on the day before the election. *M.S. 203B.085*
- **11-8-2016: State General Election Day** – the 1st Tuesday after the 1st Monday in November. *M.S. 204D.03; 205.065, subd. 1*
- **11-11-2016 to 11-18-2016: Canvass the results of the November general election** – between the 3rd and 10th day following the November general election. *M.S. 204C.33, subd. 1; 205.185, subd. 3*

January:

- **1-2-2017: Terms begin for city officers elected at the November general election** – 1st Monday in January following the year of election. *M.S. 412.02, subd. 2*

## LIST OF ELECTION ACTIVITIES BY MONTH

| | |
|---|---|
| January | • Elected city officials take office.<br>• Confirm the city's contact information with all the county auditors that fall within your city's boundaries.<br>• Confirm city's election schedule, odd or even year general elections? Primary possible?<br>• Charter items that affect elections?<br>• Confirm offices that are scheduled to be on that year's general ballot.<br>• Inform county auditors as to potential special elections, vacancies, change in election schedules, change in primary possibility, etc.<br>• Confirm health care facility outreach locations and contacts. |
| March | • Possibility of city meeting restrictions on statewide caucus date.<br>• Make note of election supplies on hand and contact auditors to replenish supplies if needed.<br>• Review HR policies regarding hiring and appointment of election judges. |
| April | • Many election year materials, guides, calendars are updated for the year's election cycle and placed on OSS web pages.<br>• "Primary possible" candidate filing notices. |
| May | • Even years, many OSS election year paper materials are delivered to Auditor's Office for distribution to local jurisdictions.<br>• "Primary possible" candidate filings.<br>• Primary ballot preparation. In odd years, counties might not assist with ballot ordering activities.<br>• Campaign financial reporting.<br>• Even years, political party election judge lists are shared with municipalities. |
| June | • Absentee voting for primary elections begins. UOCAVA ballots are distributed by 46 days by county auditors.<br>• Odd years, master lists provided by all counties for primary voting not using SVRS. |
| July | • Primary AB voting continues.<br>• Election judge training conducted by auditor or delegated municipal clerk.<br>• Notices of candidate filings for jurisdictions that are not "primary possible." |
| August | • Primary elections. Canvass meetings. Notices of nomination.<br>• "Late" candidate filing period.<br>• Campaign financial reporting.<br>• Begin preparing general election ballots. In odd years, counties might not assist with ballot ordering activities. |
| September | • Review previous years' election items and determine if retention period is over.<br>• AB voting for general elections begins. UOCAVA ballots are delivered by 46 days by county auditors. |
| October | • AB voting for general elections continues. |
| November | • General Election. Canvass meetings. Certificates of election. |

# 1.0 INTRODUCTION

This guide is designed to aid city clerks and their staff to administer city elections. Please use this guide with the Office of the Minnesota Secretary of State (OSS) publication "Minnesota Election Laws". Citations in this guide refer to the Minnesota election laws (M.S. citations) or rules (M.R. citations). Full text of the Minnesota election laws and rules can be found at the OSS Election Law website located at http://www.sos.state.mn.us/election-administration-campaigns/election-administration/election-laws/.

If you are using an interactive electronic edition of this guide, you may simply click on the citations to retrieve current statute or rule. For home rule charter cities refer to your city charter for specifics concerning your municipal elections.

City clerks have a key role in administering the election process that involves a sequence of "must do" tasks. For this reason, this guide is organized to generally follow the election calendar.

For a more comprehensive view of election administration in Minnesota we refer you to the following election guides:

- County Auditors Election Guide
- Township Clerk Election Guide
- School District Clerk Election Guide
- Election Judge Guide
- Voting Equipment Testing Guide
- Absentee Voting Administration Guide
- Mail Election Guide
- Recount Guide
- Post Election Review Guide
- Campaign Manual

These guides, training materials and other publications are updated periodically. Current editions are available at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/. Please contact this office if you have comments on how this publication could better support the needs of city clerks.

## 2.0 ELECTION ADMINISTRATOR TRAINING AND CERTIFICATION

City clerks who serve as the local election administrators must be trained and certified before they may administer elections:

### 2.1 INITIAL CERTIFICATION

- initial certification requires successful completion of five hours of training
- initial certification is good for the election cycle in which it is earned and through the following election cycle
- each election cycle begins on January 1 of an even-numbered year and ends on December 31 of an odd-numbered year

### 2.2 ANNUAL CERTIFICATION MAINTENANCE

To maintain certification to administer elections, city clerks need to complete 4 hours of election training during each election cycle after the expiration of the initial certification. *M.R. 8240.2700, subp. 4*

Training may be provided by the county auditor or by the OSS.

If the county auditor has delegated election judge training responsibility under M.S. 204B.25, the clerk is responsible for training election judges. If delegated, the clerk must complete, in addition to the initial training or maintenance training, a "train the trainer" course conducted by or approved by the OSS before each state primary election. *M.R. 8240.1100*

If a city clerk is designated to provide absentee voting using the statewide voter registration system (SVRS), the clerk must receive training approved by the OSS on the use of SVRS before accessing the system. The auditor will notify the OSS of the clerk's access to the system. *M.S. 203B.05, subd. 1*

There is emergency training provisions in statute for a city clerk who has taken office less than six months before an election. They may administer that election after completing two hours of emergency training conducted by the home county auditor or the OSS. *M.R. 8240.0100, subp. 2; 8240.1100; 8240.2700*

### 2.3 CITY CLERK ELECTION ADMINISTRATION TRAINING AREAS

City clerk election training addresses the following:

- candidate filings;
- campaign practices;
- campaign finance;
- election calendar;
- ballot preparation;
- election judge recruitment and duties;
- notice requirements;
- voting systems;
- mail elections;
- absentee voting;
- local procedures; and
- post election duties. *M.R. 8240.2700, subp. 5*

## 2.4 ALTERNATE TRAINING

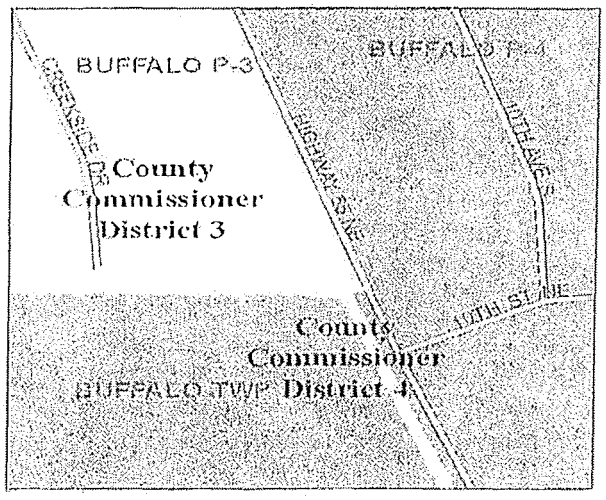
Up to four of the five training hours for initial certification, and three of the four training hours for certification maintenance, may be from other sources, subject to the approval of the home county auditor. Time spent attending, or teaching, election judge training may be counted toward a clerk's initial certification or biennial certification maintenance requirement, however, "train the trainer" sessions may not be counted toward these requirements. The clerk's county auditor will issue their election administrator certificate and maintain a record of related training. *M.S. 204B.25; M.R. 8240.2700, subp. 6; 8240.2700, subp. 7*

## 3.0 PRECINCTS

County election officials must know when municipal governments change precinct boundaries to ensure that voter registration records for affected voters in SVRS and the related online precinct finder are updated. The address ranges that individual voters are tied to in SVRS must be kept up to date. *M.S. 201.022; M.R. 8200*

### 3.1 WHAT ARE PRECINCTS?

Precincts are the basic geographical areas for organizing and administering elections. The graphic below shows three different sample precincts: Buffalo P-3, Buffalo P-4 and Buffalo Twp.




Precinct boundaries are established by the governing body of each municipality, and the county board in unorganized territories. City councils and township boards establish precinct boundaries as the result of various requirements in state statutes and also to suit the needs of the community. At a minimum, each municipality must be at least one precinct; additional precincts are necessary if the municipality is divided by a county, county commissioner, legislative or congressional district boundary. Within these broad requirements, municipalities may create as many or as few precincts as suits the community. Precincts are not tied to population size. However, precincts sized much beyond 1,500 registered voters become difficult to manage. *M.S. 204B.14*

### 3.2 PRECINCT BOUNDARY CHANGES

The municipality (or county board for unorganized territories) may make precinct boundary changes at any time except:

- after January 1 of a year ending in 0 until after the legislature has been redistricted except for certain annexations or to divide an existing precinct;
- after June 1 of state election (even) years; or
- within 10 weeks before the next election. *M.S. 204B.14, subds. 3 & 4*

Precinct lines must not cross city, ward, county, county commissioner, legislative or congressional district boundaries. When municipalities are further subdivided into two or more precincts, the boundary between two precincts should follow "visible, clearly recognizable physical features" or the jurisdictional boundaries (M.S. 204B.14, subd. 6 was repealed in 2015). Examples of recognizable physical features include streets, rivers and railway rights-of-way. Precinct

boundaries may also follow school district boundaries that are lacking a recognizable physical feature. If necessary, 2 precincts may be formed which share a boundary that is not located on a recognizable physical feature, as long as the boundary of the two precincts combined is entirely located on recognizable physical features or jurisdictional boundaries. The names of these 2 precincts are ***no longer required*** to reflect their adjoining relationship (e.g. 1A, 1B) (M.R. 8255.0020 repealed in 2016). *M.S. 204B.14, subds. 2 & 3*

The city clerk (or county board for unorganized territories) must provide the following notification after a boundary change occurs:

- must immediately notify the county auditor and the OSS;
- must file a corrected base map with the county auditor and the OSS within 30 days after the boundary change was made;
- post a notice of the change for at least 56 days; the change cannot go into effect until a notice has been posted for the 56 day period; and
- if polling locations change, make arrangements with the county auditor to notify the affected voters and their households of the change. *M.S. 204B.14, subd. 5*

The county auditor must use the corrected map filed by the city clerk to update the precinct finder in SVRS. The corrected map and precinct finder must be made available for inspection. If a municipality makes a change to the boundary of an election precinct (or if an annexation occurs affecting a precinct boundary) the auditor must notify each school district with territory affected by the boundary change at least 30 days before the effective date of the change. *M.S. 204B.14, subd. 5*

The map information sent to the OSS is used to update the statewide database of precinct and election district boundaries. The precinct map data is used by a variety of state agencies and available to the public for download. A variety of maps are available for download at the OSS Maps website located at www.sos.state.mn.us/election-administration-campaigns/data-maps/. Printed maps are also available from OSS for the cost of production. *M.S. 204B.146*

## 3.3 ANNEXATIONS AND PRECINCT BOUNDARY CHANGES

A common trigger event for precinct boundary changes is municipal annexation, which usually goes through the Minnesota Boundary Adjustments unit of the Office of Administrative Hearings. The Minnesota Boundary Adjustments staff works with property owners, local governments, and state agencies to review and facilitate municipal boundary adjustments. After an annexation has occurred affecting a precinct boundary, the city clerk must comply with the precinct boundary change requirements in M.S. 204B.14, subd. 5, described above. Annexed territory may be incorporated into the existing adjacent precinct if the new precinct meets all legal requirements and the pre-annexation municipal boundary was **not** coterminous with a county, county commissioner, legislative or congressional district boundary. Coterminous boundaries have a boundary in common. In the graphic in Section 3.1, the boundaries of the Buffalo P-3 precinct are coterminous with the boundaries between County Commissioner Districts 3 and 4.

If the pre-annexation municipal boundary was coterminous with a county, county commissioner, legislative or congressional district boundary, a new precinct must be created. If the affected territory is contiguous with the municipal boundary, in the same county, and contains 50 or fewer registered voters, the OSS may move the boundary to be coterminous. Please call the Elections Division at (651) 215-1440 or 1-877-600-8683 for more information on the process of obtaining a Boundary Adjustment Order from the OSS. *M.S. 204B.14, subd.5; 204B.146, subd. 3*

A change in the boundary of a precinct that has occurred as a result of a municipal boundary adjustment that is effective more than 21 days before a regularly scheduled election takes effect at the scheduled election. A change that is effective less than 21 days before a regularly scheduled election takes effect the day after the scheduled election. *M.S. 204B.14, subd. 4a*

For additional information on boundary changes and annexations see the redistricting information available at the Minnesota Legislative Reference Library.

## 3.4 HOUSE NUMBER & STREET ADDRESS CHANGES

If a municipality administratively changes the number or name of a street address of an existing residence, the city clerk shall promptly notify the county auditor and the county auditor shall immediately update the voter records of registered voters in SVRS to reflect the change. A municipality must not make a change to the number or name of a street address of an existing residence effective during the 45 days prior to any election in a jurisdiction which includes the affected residence. *M.S. 201.11, subd. 2*

# 4.0 POLLING PLACES

Polling places are designated by the governing body of each municipality or each county for unorganized territory.

## 4.1 DESIGNATION

The governing body of a municipality making the polling place designation must designate, by ordinance or resolution, a polling place for every precinct. The polling place designation remains in effect until the governing body makes a new designation. Changes cannot be made less than 90 days before the next election, including school district elections or referenda, nor anytime between the state primary and state general election. The county auditor needs to be notified of polling place changes when they are made so county staff can update the polling place in SVRS and work with the governing body to appropriately notify voters. The governing body making a polling place change must notify every affected household with at least one registered voter by non-forwardable mail at least 25 days prior to the next election. *M.S. 204B.16 subds. 1a & 3*

All polling places must be:

- fully accessible (see section 4.4);
- large enough to accommodate the election activities;
- free of other, non-election, activities;
- smoke free;
- liquor free and not next to a liquor service area; and
- for cities in the metro area, within the precinct or within one mile of the precinct boundary or it is part of a combined polling place (see the Combined Polling Place section below). *M.S. 144.414; 200.02, subd. 24; 204B.16, subd. 1*

**Note:** Governing bodies using school district buildings as polling places should contact the school district annually to verify that their security requirements have not changed.

## 4.2 EMERGENCY DESIGNATION

The only exception to what is in 4.1 above is when an emergency renders the original polling place unusable, the election judges can move the polling place (with permission of the administering clerk or county auditor) to another nearby location. *M.S. 204B.16, subd. 3*

Election judges must do the following when designating an emergency polling place:

- meet at original location on Election Day;
- fill election judge vacancies;
- announce the polling place change to any voters who show up at original location;
- post notice indicating the polling place change (must be easily seen by voters in vehicles); and
- meet at new polling place and post notice indicating the change. *M.S. 204B.17*

## 4.3 COMBINED POLLING PLACE

Under certain circumstances, the governing body of a municipality may combine polling places into a single, accessible location, with a single team of election judges. A copy of the ordinance or resolution establishing a combined polling place must be filed with the county auditor within 30 days after approval by the governing body or, in the case of multiple municipalities, all governing bodies. Separate ballot boxes and separate returns are kept for each precinct involved.

A single, accessible, combined polling place may be established no later than May 1 of any year in any of the following:

- cities of the 3rd and 4th class;
- cities located in more than one county;
- contiguous precincts in the same city;
- up to four contiguous municipalities located outside the metro area and in the same county;
- noncontiguous precincts located in one or more counties subject to approval by both of the governing bodies of each municipality and the secretary of state; and
- mail election precincts, in which case the designation by the municipality or the auditor of only one centrally-located polling place is required. See the Mail Voting Guide found at the OSS Election Guide website found at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/. *M.S. 204B.45; M204B.14*

**Note:** The metropolitan area is defined as Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington and Wright counties. *M.S. 200.02, subd. 24*

One precinct-count voting system and one memory unit may be used to count ballots for combined precincts. A separate summary statement must be produced for each precinct being counted by the precinct count voting system and the voted ballots must be separated and sealed by precinct. *M.R. 8230.4365*

A municipality withdrawing from participation in a combined polling place must do so by resolution. The resolution of withdrawal must be filed with the county auditor no later than April 1 of any year. *M.S. 204B.14, subd. 2*

## 4.4 VOTER NOTIFICATION

When municipalities change polling places, in addition to notifying the auditor to update SVRS, they also must notify all affected households with at least one registered voter by a non-forwardable mailing no later than 25 days before the next election. *M.S. 204B.16, subd. 1a*

There are multiple ways to provide the required voter notification:

- The clerk may request that the county auditor mail a Postal Verification Card (PVC) to all households with at least one registered voter in the affected precincts.
- The clerk may request that the county auditor mail a PVC to all the voters in the affected precincts.
- The clerk may purchase household address labels from the OSS to send their own notification to all affected households with at least one registered voter.
- The clerk may purchase voter labels from the OSS to send their own notification to all affected voters.

Be sure the County Auditor enters the new polling place information into SVRS BEFORE PVCs are mailed out.

Order forms to purchase labels are available from the OSS Voter Information Request website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-administrator-forms/.

## 4.5 POLLING PLACE ACCESSIBILITY

Federal and state laws require that all polling places be fully accessible and usable by elderly voters or voters with disabilities. *M.S. 204B.16, subd. 4*

Minimum requirements include:

- paved parking with extra wide spaces reserved for disabled persons;
- curb cuts or temporary ramps;
- paved main routes free of stairs or with ramp or elevator bypasses;
- entrances/doorways a minimum of 32 inches wide;
- walkways and hallways at least 36 inches wide;
- hallways free of protrusions overhanging the floor;
- handrails on all stairs;
- signs directing voters around obstructed entrances or stairs to accessible routes;
- signs outlining the assistance available to voters; and
- one or more wheelchair accessible voting booth(s) or station(s) with stable, flat writing surfaces 34 inches high. *M.S. 204B.16*

Minnesota election law offers some additional accommodations if the voter needs assistance with the voting materials:

- voting by absentee ballot;
- curbside voting;
- a team of election judges from different major political parties to provide assistance in the polling place;
- voters bringing someone of their choosing to assist in the polling place; and
- assistive voting equipment available at the polling place. *M.S. 203B.02; 204B.16, subd. 5; 204C.15*

When using large buildings such as a school or athletic complex for a polling location, accessible parking is to be made available at the *closest entrance to the polling place within the building*. If the building's permanent accessible locations are at another entrance, election judges are to use the accessible parking signs found in their election supplies to set aside accessible parking spots right next to the entrance that is the shortest distance to the polling place within the building.

Municipalities should visit polling locations periodically to verify that polling locations are still accessible. The Office of the Secretary of State Polling Place Accessibility Diagnostic Tool provides instructions on how polling place inspections should be performed.

For more specific details on accessibility, the following is recommended: Americans with Disabilities Act

## 4.6 POLLING PLACE MATERIALS AND EQUIPMENT

City clerks are responsible for ensuring that all necessary supplies are delivered to the polling place for use on Election Day. This includes ballots, ballot boxes, voting equipment such as precinct optical scan ballot counter, assistive voting device, rosters, posters, flags, and boxes, envelopes and seals to secure ballots and other election materials. A more extensive example supply list is included in the Appendix 2 of this guide. *M.S. 204B.28*

## 4.7 ELECTION SUPPLIES/COSTS

The clerk is responsible for providing all the supplies for conducting a city election. An example polling place supply list is provided in the Appendix 2 of this guide, although specific needs may vary. Generally, the cost of these supplies is borne by the city. Costs may be prorated, however, for elections that involve other jurisdictions such as county, school district, soil and water district, or a hospital district. Local units of government can agree on any method of cost sharing that is mutually agreeable or use methods described in the OSS Cost Allocation Procedures. This document is available at the OSS Election Administrator Forms website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-administrator-forms/. *M.S. 204B.32*

# 5.0 ELECTION JUDGES

## 5.1 ELECTION JUDGE QUALIFICATIONS

An election judge must be:

- eligible to vote in the State of Minnesota;
- able to read, write and speak English;
- appointed by the appointing authority (county, city, township, or school board); and
- trained and currently certified as an election judge. *M.S. 204B19, subd. 2; 204B.21; 204B.25*

Individuals applying to be election judges need to declare their party affiliation, if they are affiliated with a major political party.

An exception to the requirement that all election judges be trained and certified is provided for precincts in which less than 100 people voted at the last state general election. In these precincts, having only 2 of the required number of election judges trained is sufficient if they are not from the same major political party. If electronic voting equipment is in use in the precinct such as in a statewide election, it is highly recommended that all election judges be trained and certified. *M.S. 204B.25, subd. 3*

An election judge cannot be:

- a candidate in that election (i.e., they are running for an office on a ballot used in that precinct. An individual actively campaigning as a write-in candidate is a candidate.);
- the husband, wife, parent, child, brother, sister of or domiciled with (permanently or temporarily) a candidate;
- the husband, wife, parent, child, stepchild, brother, or sister, or stepsibling, of a candidate or another judge in the same precinct; or
- a challenger.

Individuals who are related to each other may serve as election judges in the same precinct provided that they serve on separate shifts that do not overlap. *M.S. 204B.19*

## 5.2 STUDENT ELECTION JUDGE TRAINEES

High school students, including home schooled students that are 16 and 17 years of age can be trainee election judges. Students who are 18 years of age or older can serve as regular election judges.

To serve as trainee election judges students must:

- be a United States citizen;
- be at least 16 years of age;
- serve in the county where they reside or adjoining county;
- be in good academic standing; and
- have permission from their school and parents.

Trainee election judges can serve for all elections. They serve without party affiliation and must be paid at least 2/3 of the minimum wage. They cannot serve past 10:00 p.m. and cannot number more than 1/3 of the election judges in any one precinct. Trainee election judges, like other election judges, are not required to serve the entire day.

Because trainee judges serve without party affiliation, they cannot perform tasks that must be performed by two judges of different political parties, like curbside voting. Trainee election judges can perform any other election judge tasks and should be assigned those duties just as other election

judges are assigned. Trainees do not count toward the minimum number of election judges required. *M.S. 204B.19; M.R. 8240.1655*

## 5.3 APPOINTING ELECTION JUDGES

### 5.3.1 County Lists

Each major political party will furnish electronic lists of potential election judges to the Secretary of State's Office by May 1st of even numbered years. The OSS will in turn furnish the list to the auditor's office by May 15th. County auditors must promptly forward the lists to city clerks.

The party lists are used to appoint election judges to serve at elections in their jurisdictions over the next two years. If there aren't enough people on the lists from your municipality or no lists have been received, the governing body may appoint other people who meet the qualifications. *M.S. 204B.21; M.R. 8240.0300*

### 5.3.2 Appointment by City Council

The clerk recommends elections judges to be appointed for the upcoming election (including health care and absentee ballot boards if applicable), and then the city council makes the appointments at least 25 days before the election. The city council may pass a resolution authorizing additional election judges within 25 days before the election, if they deem necessary. If there aren't enough people on the list, the city council may appoint other people who meet the qualifications. The city council may evaluate applicants to determine if they are capable of carrying out the duties. *M.S. 204B.21, subd. 2*

**Note:** The clerk may suggest that the council include wording to the resolution to allow the clerk substitutions as necessary.

**Note:** In 1988, the U.S. Immigration and Naturalization Service exempted jurisdictions that hire election judges from the Form I-9 employment verification procedures.

### 5.3.3 Party Balance

At least two election judges in each precinct must serve with a different major political party designation (except in school district and township elections not held in conjunction with a statewide election, and for student trainee election judges). The remaining election judges in a precinct can serve without an affiliation to a major political party. No more than half the judges in a precinct may belong to the same major political party. *M.S. 204B.19, subd. 5; M.S. 204B.21, subd. 2; 205A.10, subd. 2; 205.075, subd. 4*

### 5.3.4 Required Number of Election Judges

A minimum of four election judges shall be appointed for each precinct in the state general election, provided that a minimum of three election judges shall be appointed for each precinct with fewer than 500 registered voters as of 14 weeks before the state primary. In all other elections, a minimum of three election judges shall be appointed for each precinct. In a combined polling place, at least one judge must be appointed from each municipality that has precincts in the combined polling place.

Student election judge trainees do not count towards the election judges appointed per precinct requirement. *M.S. 204B.22*

Currently, in the State of Minnesota, there are two major parties: Republican and DFL.

### 5.3.5 Head Election Judge

When the city council appoints the election judges, they designate one of the judges as head election judge. The head election judge assigns duties among the judges and is responsible for the performance of all required duties. In addition to election judge training and certification, head election judges complete an additional hour of training every two years to be certified as head election judge. *M.S. 204B.20; M.R. 8240.1750*

## 5.4 VACANCIES

If a judge doesn't show up at the polling place or doesn't perform required duties, the other judges may select a qualified person from the precinct to fill the vacancy. The clerk may also fill vacancies as they occur. *M.S. 204B.23*

## 5.5 COMPENSATION

The city council sets the compensation for election judges, but it must be at least the state minimum hourly wage. Training and work-related travel time along with work related travel mileage must be included. Judges may volunteer their time without pay by submitting a written statement no later than 10 days before the election. *M.S. 204B.31*

## 5.6 TIME-OFF FROM WORK

People who would like to be election judges may take time-off from work without loss of pay. Prospective judges must give their employer at least 20 days' written notice and a certificate from the city that shows the hours the person will work and rate of pay. The employer may deduct what the person receives for being an election judge from their salary for the hours that overlap. For example, if the employee normally works eight hours per day at $10 per hour (8 hours X $10=$80), and the rate of pay established by the city for election judges is $8 per hour for the same eight hours of service as an election judge (8 hours X $8=$64), the city will pay the election judge $64 and the employer must pay the difference of $16. As an alternative, if the employee takes vacation for the time off, the employee can keep the salary paid by the city for election judge service. An employer can also restrict the number of persons serving to no more than 20 percent from any single work site. An employer cannot force an employee to take vacation. *M.S. 204B.195*

## 5.7 ELECTION JUDGE TRAINING

### 5.7.1 Certification and Administration

All election judges must successfully complete training. Student election judge trainees (16 -17 year olds) complete the same training as all other election judges. County auditors are responsible for training election judges or delegating the responsibility to municipal clerks. If the clerk will be conducting election judge training, the clerk or a designee must attend an adult education ("train the trainer") training provided by the OSS. A review of the Train the Trainer Manual found on the OSS website for guides equates to the required OSS training. *M.S. 204B.25; M.R. 8240.1100; 8240.1655*

Working through the county auditors, the OSS will provide copies of the Election Judge Guide, Election Judge DVD, customizable slide presentation, and other training materials to municipalities. Current editions of guides and training materials are available at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/. Clerks must arrange to have at least one Election Judge Guide available in each polling place on Election Day. The training authority, whether auditor or clerk, must develop a training plan that outlines the staff and resources assigned to training, the dates, topics to be covered, and materials to be used. The plan must be kept available for public inspection. *M.R. 8240.2000; 8240.2400*

Trainers must keep a record of the training each election judge has completed. The trainer must give a certificate to each election judge, head election judge, or health care facility absentee voting election judge who successfully completes a training course. *M.R. 8240.2100; 8240.2300*

Time spent attending, or conducting, election judge training may be counted toward a clerk's initial election administrator certification, or biennial certification maintenance requirement. City clerks (and their deputies) are strongly encouraged to take advantage of election judge training. *M.R. 8240.2700, subp. 7*

The training includes the following phases:

- basic training course;
  - all election judges must complete a two-hour basic training course every two years;
- maintaining certification;
  - a person must successfully complete the basic training course every two years to remain qualified to serve as an election judge; and
- additional training;
  - after completing the basic training course, judges may need to complete additional training if they will be administering health care facility voting or serving as a head judge. *M.R. 8240.1300*

### 5.7.2 Election Judge Training Plan and Course Content

Each training authority shall prepare a training plan which shall be available for public inspection. The training plan must include:

- the names of persons conducting training;
- number of sessions planned;
- projected attendance at each session; training materials to be used;
- training methods employed; and
- an outline of the content of each election judge training course. *M.R. 8200.2400*

Election judge training is two hours long and covers the following topics:

- eligibility;
- training and assignment;
- new laws, rules, forms, and procedures;
- role of head judge;
- preparations on Election Day before polls open;
- poll opening activities;
- greeting and directing duties;
- roster duties;
- challenge process;
- providing assistance to voters with disabilities;
- operation of voting equipment;
- vote tabulation duties; and
- closing the polls. *M.S. 204B.25; M.R. 8240.1600*

Additional training requirements may be adopted provided they are reasonably related to the ability to perform election judge duties in that election. *M.S. 204B.25, subd. 2; M.R. 8240.1600, subp. 2*

### 5.7.3 Health Care Facility (HCF) Absentee Voting Election Judge Training

If the city has a health care facility (HCF), special outreach to that facility is required by any full-time clerk responsible for absentee balloting in that election. (See Section 11 for more information). HCFs located in a particular area can be looked up at www.health.state.mn.us. In order to be certified as a HCF absentee election judge, in addition to the basic election judge training, an individual must complete another hour of training every two years.

The HCF absentee voting course shall be at least one hour long and cover the following topics:

- who is eligible to vote absentee from HCF;
- application process, including methods for providing proof of residence;
- voter registration;
- providing assistance to voters;
- voting procedures;
- names and addresses of eligible facilities;
- name of contact person at each facility; and
- transporting the materials and voted ballots. *M.R. 8240.1800*

### 5.7.4 Head Election Judge Training

In addition to election judge training, head election judges must complete an additional hour of training. This training includes:

- duties before Election Day;
- training and assignment;
- new laws, rules, forms, and procedures;
- preparations on Election Day before polls open;
- polling place opening activities;
- use of training materials to find answers to questions on Election Day;
- helping election judges work together on Election Day;
- use of voting equipment;
- handling emergencies;
- preparing election returns; and
- returning election materials to the local election official. *M.R. 8240.1750*

## 5.8 ABSENTEE BALLOT BOARD ELECTION JUDGE TRAINING

In order to serve as an election judge on an absentee ballot board, individuals must be appointed as provided in M.S. 204B.19 to 204B.22 and trained on the handling and processing of absentee ballots. It is recommended that this be at least a one-hour training that covers all aspects of the handling and processing of absentee ballots. An individual does not need to attend a basic election judge training course to serve on an absentee ballot board. *M.S. 203B.121*

# 6.0 GIVING NOTICE

## 6.1 CANDIDATE FILING PERIOD NOTICE

City clerks must publish a notice of filing dates at least two weeks before the first day of the candidate filing period. The city shall publish a notice in the official newspaper stating the first and last dates on which affidavits may be filed in the clerk's office and the closing time for filing on the last day for filing. The clerk must post a similar notice 10 days before filing opens. The notice must list separately any office(s) where candidates can file affidavits to fill the unexpired term of a vacancy at a special election. The posted notice must also state the opening date, the closing time on the last day of the filing period, and where candidates may file affidavits of candidacy. *M.S. 205.13, subd. 2*

Note: The municipal clerk's office must be open for filing from 1:00 p.m. to 5:00 p.m. on the last day of its filing period.

## 6.2 ELECTION NOTICE TO COUNTY AUDITOR

Before every municipal election the municipal clerk must provide at least 74 days' written notice to the county auditor.

The notice should include the date of the election, the offices to be voted on, and the title and language for each ballot question. With this information, auditors are able to provide accurate information to the public, coordinate absentee voting, and begin ballot layout. *M.S. 205.16, subd. 4; 205A.07, subd. 3*

At least 74 days' written notice must be given to the county auditor by the city clerk of any special election cancelled. *M.S. 205.16, subd. 4; M.S. 205A.05, subd. 3*

For mail elections, additional notice of the mail procedures must begin at least six weeks before the election. Please refer to the Mail Voting Guide available at the OSS Election Guides website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/. *M.S. 204B.45, subd. 2*

## 6.3 ELECTRONIC VOTING SYSTEM NOTICE REQUIREMENTS

### 6.3.1 Notice of Public Accuracy Test (PAT)

Public notice of the time and place of the Public Accuracy Test (PAT) must be given at least two days in advance by publication once in official newspapers. The PAT of the voting system must be performed within 14 days before Election Day. *M.S. 206.83*

### 6.3.2 Notice to OSS of Use of New Equipment

When using new voting equipment, the clerk must submit a plan for the use of this equipment to the OSS more than 60 days before the first election where the municipality will use the new equipment. This plan must include information regarding the acquisition of sufficient facilities, computer time, and professional services. The plan must be signed and notarized before it is submitted to the OSS. The OSS shall review each plan for sufficiency. Within 20 days of receiving the plan, the OSS shall notify each reporting authority of the sufficiency or insufficiency of its plan. *M.S. 206.58; 206.80; 206.82*

### 6.3.3 Notice to Public of New Voting System

The governing body of a municipality must provide information to the public regarding the use of a new voting system at least 60 days prior to the election. A demonstration voting system must be

provided in a public place for the six weeks immediately prior to the first election at which the new voting system will be used. *M.S. 206.58*

### 6.3.4 Notice to Secretary of State of Change in Plan

The clerk or auditor must notify the OSS of any changes to the plan on file prior to May 1st of each year following general election year. *M.S. 206.82*

## 6.4 NOTICE OF MAIL ELECTION PROCEDURES

In a city where a mail election under M.S. Chapter 204B for mail ballot precincts will occur, notice of the election and procedures must be given at least 10 weeks prior to the election. When a mail election will occur, notice of the election and procedures must be given at least six weeks prior to that election. Please refer to the Mail Elections Guide available at the OSS Election Guide website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/. *M.S. 204B.45; 204B.46*

## 6.5 PUBLIC NOTICE OF ELECTION

In every city, except for those of the fourth class, the clerk must publish notice of the election two weeks before Election Day and again one week before Election Day. The clerk may also give 10 days' posted notice. *M.S. 205.16, subd. 1*

Cities of the fourth class not located within a metropolitan county, as defined in M.S. 471.121. are not required to provide published notice of the election but must provide posted notice 10 days before Election Day. *M.S. 205.16, subd. 1*

All notices of election must include:

- the election date;
- voting hours;
- all polling place locations; and
- a list of all offices and questions on the ballot. *M.S. 205.16, subd. 1*

## 6.6 NOTICE OF NO PRIMARY

If there are no partisan or nonpartisan offices for which nominees must be selected, the city council may decide whether a state primary will be held. If the city council decides that there will not be a primary, within 15 days of the close of filing, the clerk must post a notice of the primary cancellation, and must also notify the OSS. *M.S. 204D.03; 204D.07*

## 6.7 SAMPLE BALLOT

For every municipal election, the clerk must publish a sample ballot at least two weeks before the city election, post the sample ballot at least four days before the election, and post a sample ballot on Election Day in each polling place. *M.S. 205.16, subds. 2 & 3*

Fourth class cities not located within a metropolitan county, as defined in M.S. 473.121, are not required to publish the sample city ballot. *M.S. 205.16, subd. 2*

**Note:** Providing an electronic sample ballot file to the OSS is optional for elections not held in conjunction with state elections. *M.S. 205A.07, subd. 2*

# 7.0 CANDIDATE FILING

## 7.1 FILING PERIOD

Candidate filing is the process through which candidates have their names placed on the ballot. City clerks are the filing officers for the city offices, meaning the clerk, or a designated deputy, administers candidate filing. *M.S. 205.13, subd. 1*

Candidates must file during a two week filing period. In cities nominating candidates at a municipal primary, an affidavit of candidacy for a city office voted on in November must be filed during a two-week period that opens not more than 84 days (May 17, 2016) before the primary and closes not less than 70 days (May 31, 2016) before the primary. In all other cities, affidavits of candidacy must be filed during a two-week period that opens not more than 98 days (August 2, 2016) before the general and closes not less than 84 days (August 16, 2016) before the general. Hospital district office candidates file with the city or township clerk during the same "late filing" time period. *M.S. 447.32, subd. 4*

For special elections not held in conjunction with another election, candidates file affidavits of candidacy during a two-week period that opens not more than 70 days before the election and closes not less than 56 days before the election. *M.S. 205.13, subd. 1a*

If a candidate will be absent from the state during the filing period, the candidate may file an affidavit, and filing fee or required petition during the seven days immediately before the candidate leaves the state. The candidate must state in writing the reason for being unable to file during the normal filing period. In cities of the first class (and other cities which permit the use of a nominating petition under city charter), a nominating petition for an absent candidate may be signed during the 14 days immediately before the affidavit is filed. *M.S. 205.13, subd. 1a; 205.13, subd. 1b*

The clerk must publish a notice of filing dates, location and closing time at least two weeks before filing opens and must post a similar notice 10 days before filing opens. The municipal clerk's office must be open from 1 p.m. to 5 p.m. on the last day of filing. *M.S. 205.13, subd. 2*

## 7.2 CANDIDATE ELIGIBILITY

For a city office, any person may be a candidate who is:

- eligible to vote;
- will be 21 years old on assuming office; and
- will have been a resident of the city for 30 days before the general election. *M.S. 204B.06, subd. 1*

Also, mayor or city council member elected or appointed after August 1, 2010 may not be a full-time permanent employee of the city. *M.S. 410.191, 412.02, subd. 1a*

**Note:** Charter cities may have additional requirements.

## 7.3 FILING PROCESS

A candidate for city office must file an affidavit of candidacy with the city clerk. The steps for candidate filing are as follows:

- a candidate for an office to be voted for at the city general election must file an affidavit of candidacy with the city clerk;
- affidavits must be signed, notarized and delivered in person or otherwise to the clerk during the candidate filing period;
    - in most cases, affidavits are completed, signed and signed by the authorized filing officer at the time of filing;
    - however, some are completed before arriving. If so, affidavits must be signed, notarized and delivered in person or otherwise to the clerk during the filing period;
- absent candidates may follow the process listed in section 7.1 above;
- alternatively, five or more voters can "draft" a candidate by filing an application on behalf of an eligible voter in the city with the city clerk;
    - this candidate's name is placed on the ballot after the proper filing fee is received;
- the proper filing fee must be paid or a petition in place of a filing fee must be filed at the time of filing;
- candidate filings are not complete unless accompanied by the filing fee or petition in place of the filing fee;
    - filing fees are nonrefundable once accepted by the filing officer;
    - filing fees are $20 in first class cities, $5 in second or third class cities, and $2 in fourth class cities; charter cities may have different filing fee requirements;
- the candidate may file in place of the filing fee a petition by eligible voters having either 500 or a number equal to 5% of the total number of persons who voted in the last general election when the office was on the ballot (whichever is less);
- affidavits of candidacy must be numbered in the order they are received by the filing officer;
- when the similarity of both the first and last names of two more candidates for the same office and election may cause confusion, candidates may provide up to three additional words to be printed to distinguish between the two;
- the name placed on the ballot is the candidate's true name or the name by which the candidate is commonly and generally known in the community;
- confirm the capitalization of a candidate's name;
- any individual who has an issue with the names placed on a ballot or with the candidate filing process may file an error and omissions petition in accordance with M.S. 204B.44; and
- Charter cities may have additional requirements. *M.S. 204B.10; 204B.11, subd. 2(d); 205.13, subd. 1; 205.13, subd. 3; 205.13, subd. 4*

Because candidate names will now appear on ballots with upper and lower case lettering, it is important to make sure that the candidate has listed exactly how the ***name should be spelled and capitalized.*** It is suggested to make a copy of the affidavit and go over the spelling and capitalization of the name with the candidate, underlining the exact letters that should be capitalized, before the candidate leaves.

### 7.3.1 Withdrawal

A candidate may withdraw from participation in the election by filing an affidavit of withdrawal with the filing officer. The affidavit shall request that the official withdraw the candidate's name from the ballot. The candidate's filing fee is non-refundable. A candidate may stop campaigning but their name will remain on the ballot if they fail to submit an affidavit of withdrawal during the withdrawal period. City candidates have until 5:00 p.m. two days after the close of filing to withdraw.

A copy of the affidavit of withdrawal form is available at the OSS Candidate Withdrawal website located at www.sos.state.mn.us/election-administration-campaigns/become-a-candidate/candidate-withdrawal/. *M.S. 205.13, subd. 6*

### 7.3.2 Non-partisan Vacancy in Nomination

A non-partisan vacancy in nomination exists when:

- a candidate for any non-partisan office, for which one or two candidates filed, withdraws as provided in M.S. 204B.12, subd. 1; or
- a candidate for any nonjudicial nonpartisan office, for which only one or two candidates filed or who was nominated at a primary, dies on or before the 79th day before the date of the general election.

A non-partisan vacancy in nomination may be filled by:

- filing an affidavit of candidacy and paying a filing fee, or
- by filing an affidavit of candidacy and filing a petition in place of a filing fee, in the manner provided in M.S. 204B.06, 204B.09 and 204B.11.

All documents and fees required must be filed within five days after the non-partisan vacancy in nomination occurs. There must be a two-day period for withdrawal of candidates after the last day for filing.

If the non-partisan vacancy in nomination resulted from a withdrawal during the withdrawal period held on the 68th to 69th day before the primary, and if, at the end of the withdrawal period to fill the vacancy, there are more than two candidates, the candidates' names must appear on the primary ballot. In all other cases, the candidates' names must appear on the general election ballot. *M.S. 204B.131*

## 7.4 CAMPAIGN PRACTICE AND FINANCIAL REPORTING (CAMPAIGN MANUAL)

As candidates file, the clerk must give them a copy of the Minnesota Campaign Manual, available at www.sos.state.mn.us/election-administration-campaigns/campaigning/. This Manual explains campaign financial reporting requirements, found in M.S. 211A, and campaign practices requirements, found in M.S. 211B, that apply to municipal candidates. *M.S. 211B.14*

Although the clerk does not interpret or enforce campaign finance laws, the clerk must:

- give a copy of the Minnesota Campaign Manual, the financial reporting form, and the Certificate of Filing form to each candidate at the time of filing;
- receive financial reports from candidates and committees according to campaign finance report filing schedule, described in the Minnesota Campaign Manual; with the clerk's permission, these forms may be filed electronically;

- the campaign report filing schedule is triggered after a committee or candidate files an initial campaign finance report, due within 14 days after they receive contributions or make expenditures in excess of $750;
- charter cities may have additional campaign finance requirements;
- collect Certification of Filing forms from all candidates and committees within seven days after the election;
- have financial reports available for public inspection;
- post the financial reports on web site for four years if a web site is maintained as soon as received, but not later than 30 days after receipt;
- provide the Campaign Finance and Public Disclosure Board with the link to the financial reports section of their web site;
- if a candidate or committee has filed an initial report, but fails to file a subsequent campaign finance report when due, notify the candidate or committee of the failure; if no reply is received within 10 days after notification is mailed, file a complaint before the Minnesota Office of Administrative Hearings; and
- must issue Certificates of Election only to winning candidates who have filed Certification of Filing forms. *M.S. 13.601, subd.1; 211A.02; 211A.05; 211B.14*

For information on campaign practices for state office candidates or constitutional amendment campaigns, call the Minnesota Campaign Finance and Public Disclosure Board at (651) 296-5148 or visit www.cfboard.state.mn.us.

## 7.5 CAMPAIGN COMPLAINTS

Complaints of campaign finance or practice violations (M.S. 211A or 211B) are heard by the Office of Administrative Hearings (OAH). To initiate a complaint, a completed form must be filed with the OAH; the matter is then subject to review and possible hearing. Additional information and the appropriate forms are available at https://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp.

In addition to receiving financial reports required under M.S. 211.02, clerks also have to notify a candidate or committee that has filed an initial report of the failure to file a subsequent report. If a report is not filed within 10 days after the notification is mailed, the filing officer must file a complaint with the OAH. *M.S. 211A.05, subd. 2; 211A.32*

Clerks are not responsible for interpreting or enforcing campaign finance or practices laws but have the following administrative duties for local candidates who report under M.S. 211A:

- provide report forms to candidates or committees (the forms are printed by the OSS and distributed through the auditors and are available at the OSS Campaign Finance Filings website located at www.sos.state.mn.us/election-administration-campaigns/campaigning/campaign-finance-filings/.
- receive financial reports from candidates and committees (They may be filed electronically);
- notify a candidate or committee that has filed an initial report of the failure to file a subsequent report on the date it is due;
- file a complaint with the OAH of any candidates or committees who appear to have collected or spent more than $750 but did not file Campaign Financial Reports and/or a Certification of Filing form;
- hold financial reports available for public inspection;

- collect Certification of Filing forms from all candidates and committees within seven days after the election, form available at the OSS Campaign Finance Filings website located at www.sos.state.mn.us/election-administration-campaigns/campaigning/campaign-finance-filings/; and
- issue Certificates of Election only to winning candidates who have filed Certification of Filing forms. *M.S. 13.60; 211A.02; 211A.05; 211B.32*

## 7.6 STATEMENT OF ECONOMIC INTEREST

Candidates in a metropolitan governmental unit, as defined in M.S. 10A.01, subd. 24, are required to file a statement of economic interest within 14 days of filing an affidavit of candidacy or a petition to appear on the ballot. A supplemental statement of economic interest must be filed on April 15 of each year after this initial filing if the individual remains in office and the information on a previously filed statement has changed. Any city clerk collecting statements of economic interest must maintain them as public data. *M.S. 10A.01; 10A.09*

# 8.0 BALLOT PREPARATION

## 8.1 BALLOT PRINTING ARRANGEMENTS

Contact the county election official to confirm the specifics of responsibilities for printing ballots for the city. During state election years the county auditor will instruct on how ballot preparation will be coordinated with the city.

The official administering the election must identify a ballot printer as early as possible and begin working with the printer well before filing closes. Immediately after the filing period closes and the withdrawal period has passed, the official administering the election needs to finalize the ballot preparation. The ballots must be prepared in time to have a supply for every precinct available to cover absentee voting at least 46 days before all elections. *M.S. 203B.081; 204B.35*

The official charged with preparation of the ballots prepares instructions for the printer in writing addressing candidate name rotation, if any, and ballot layout. These instructions must be approved by the legal advisor of the official before delivery to the printer. If the printing contract will exceed $1000, the election official may request the printer first furnish a bond, letter or credit, or certified check conditioned on the ballot being prepared in accordance with the furnished instructions and Minnesota election law. *M.S. 204D.04, subd. 2*

Each precinct must be provided with at least 100 ballots for every 85 individuals who voted in that precinct at the previous election for the same office or on similar questions, or in an amount at least 10 percent greater than the number of votes which are reasonably expected to be cast in that precinct, whichever supply of ballots is greater. The auditor or clerk must certify the number of ballots being provided to each precinct, without opening any of the packages of ballots, and provide this number to the election judges for inclusion on the summary statement. *M.S. 204B.28, subd. 3; 204B.29 sub. 1*

When determining ballot quantities, also consider:

- referring to turnout statistics of previous similar elections;
- noting campaign activity and public interest which may increase voter turnout. *M.S. 204B.29, subd. 1*

A major decision to resolve well in advance is whether to use an electronic voting system or traditional hand counted ballots. Even when normally using an electronic voting system for state elections, it may be more convenient and cost-effective to hand count the ballots for low turnout elections. Even with hand counting, ballots must be in optical scan format to accommodate use of the assistive voting devices.

## 8.2 BALLOT LAYOUT

By May 1 of state election years, the OSS will distribute examples of the ballots to county auditors. These example ballots are available at the OSS Example Ballots web page located at www.sos.state.mn.us/election-administration-campaigns/election-administration/example-ballots/. The county auditor distributes copies of the example ballots to the clerks in municipalities holding elections that year. *M.R. 8250.1810, subp. 18; M.S. 204D.09, subd. 1*

### 8.2.1 Optical Scan Ballot Layout

Ballots must be prepared by the county auditor according to the rules for format of optical scan systems. The ballots must be packaged for each precinct in groups of 25, 50 or 100. *M.R. 8250.1810*

## 8.3 PROOFING TIPS

- Check ballot header language for accuracy.
- Check the layout matches the example ballot.
- Check the headings on the ballot.
- Check order of offices on ballot.
- Check the vote for # on each office.
- Check to make sure candidates are in proper order for each race.
- Check that candidate names are spelled correctly.
- Check capitalization of candidate names.
- Check these items for both the front and back sides of the ballots.

**Note:** If it is determined that the candidate name provided on the affidavit of candidacy should not appear on the ballot because it gives the candidate an advantage over an opponent, including words descriptive of the candidate's occupation, qualifications, opinions or principles, then the candidate should be notified that their name will appear on the ballot in a different form than was provided in the affidavit of candidacy. *M.S. 204B.06; 204B.35 subd. 2*

## 8.4 COURT REMEDY FOR ERRORS AND OMISSIONS

Any person may petition a court to seek to correct any error, omission or wrongful act that they feel has occurred or is about to occur in the election process or ballot preparation. This includes mistakes in preparing or printing ballots, errors or omissions in printing names or questions, or any error or wrongful act of any individual charged with any duty concerning an election.

The petitioner must state the problem and the proposed solution in the petition. In matters concerning election for state or federal office the petition must be filed with any judge of the state Supreme Court. In matters concerning election for county, municipal, or school district office the petition must be filed with any judge of the district court in the county where the election was held. The court will hold an expedited hearing and issue its findings and order as soon as possible after. Failure to obey the order is contempt of court. *M.S. 204B.44*

# 9.0 BALLOT QUESTIONS

## 9.1 WHAT ARE BALLOT QUESTIONS?

The city may decide to place certain questions on the ballot that the voters are authorized or required under the law to vote on. Some of the more common questions include:

- Adoption or amendment of a city charter.
- Changing options for organizing governing body.
- Liquor licensing or Sunday liquor sales.
- Issuance of city bonds.
- Other subjects authorized by the city charter. *M.S. 275.60; 340A.416; 416; 340A.504, subd 3(c)*

## 9.2 PETITIONS

Special elections may be held in a city on a question on which the voters are authorized by law to pass judgment. In these cases, a special election may be ordered by a city council by its own motion or upon receipt of a petition signed by a number of voters equal to 20 percent of the voters at the last city general election. A question is carried only with a majority in its favor required by law or charter. The same question must not have been submitted to voters within the previous six months. Specific directions for all petitions used in elections are provided in M.R. 8205. This rule addresses petition form, circulation, signing, filing and verification. *M.S. 205.10; M.R. 8205*

## 9.3 ADVISORY ELECTIONS

Occasionally there will be calls for an "advisory" election on a given topic. The Attorney General has previously ruled that unless authorized by a specific law, advisory elections would violate Minnesota law. *M.S. 205.10, subd. 1*

A specific exception is provided for cities when the council has sole authority to decide whether the city should join a special district or similar independent governmental body having taxing powers within the city. In these cases, the council has authority to submit to the voters at a regular or special election the question of whether the municipality should join such a body. The results of the election on the question so submitted shall be advisory to the council only and shall have no binding effect upon its decision to join or withdraw from the special district or similar independent body. *M.S. 412.221, subd. 33*

An additional specific exception is a special election held by a city to authorize a city charter. *M.S. 205.10 subd 1*

## 9.4 BOND AND LEVY REFERENDUMS

A bond referendum is a referendum held to determine if the jurisdiction should be authorized to sell bonds to obtain the funds to finance a project, such as a new building. For all bond or levy referendums that will have the effect of raising property taxes, the ballot must include the notice:

BY VOTING "YES" ON THIS BALLOT QUESTION, YOU ARE VOTING FOR A PROPERTY TAX INCREASE. *M.S. 275.60*

A levy referendum is a referendum held to determine if the jurisdiction should be authorized to levy additional property taxes to fund general operational expenses. Levy referendum ballots may also require notice of the maximum amount of the increased levy as a percentage of market value and the amount that will be raised by the new referendum tax rate in the first year it is to be levied. *M.S. 275.61*

# 10.0 VOTING SYSTEMS

## 10.1 WHAT ARE VOTING SYSTEMS?

All voting systems must meet standards issued by the federal government and be certified by the OSS before they can be used in Minnesota.

### 10.1.1 Optical Scan

Optical scan voting systems are electronic ballot counters that use scanners for reading the marks voters make on the ballots similar to the process used for standardized testing. They can instantly produce vote totals, even on the most complex ballots. Other than paper ballots, current state law permits the use of only optical scan type voting systems. *M.S. 206.57, subd. 6*

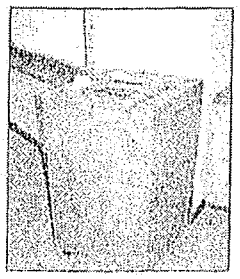
Optical scan systems are available in two configurations:

- "precinct ballot counters" that sit on top of the ballot box in the polling place and that scan the ballot as the voter places the ballot into the ballot box.
- "central count" systems where ballots are collected from several precincts and brought to the scanner for tabulation. *M.S. 206.56, subd. 8; 206.57*

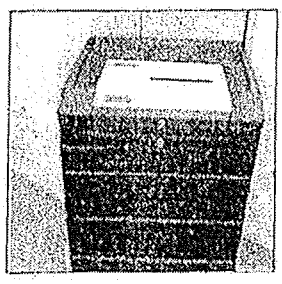
### 10.1.2 Assistive Voting Device

Every precinct must have at least one assistive voting device. The assistive voting device allows voters with disabilities to mark their ballot independently and privately but does not count the ballot. Local jurisdictions must make assistive voting devices purchased with HAVA funds available to other jurisdictions holding stand-alone elections. The jurisdictions providing the equipment cannot charge the jurisdiction using the equipment a rental fee, but may require reimbursement for any actual direct cost that results from the equipment's use and prorated indirect cost of maintaining and storing the equipment. Reimbursements for any cost paid for with HAVA funds must be deposited in the counties HAVA account. *M.S. 204B.18, subd. 1*

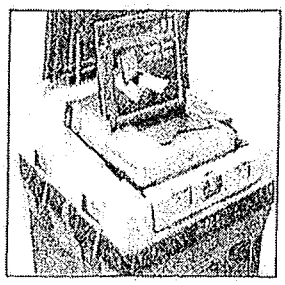
### 10.1.3 Pictures of voting system equipment certified for use in Minnesota polling locations:



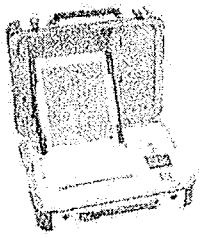
M100 tabulator



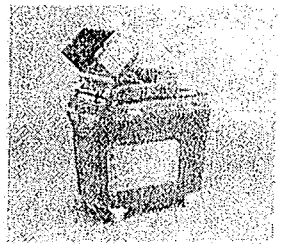
Accu-Vote tabulator



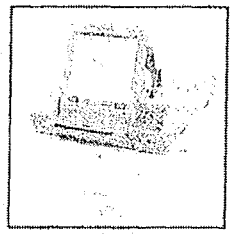
DS200 tabulator



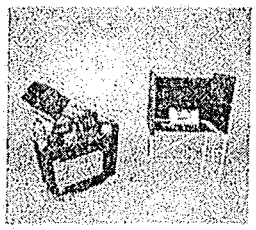
VerityScan tabulator



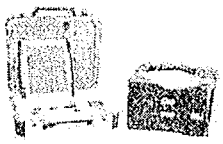
ImageCast Evolution tabulator



AutoMARK AVD



ImageCast Evolution AVD



Verity Touch Writer AVD

## 10.2 STATE COOPERATIVE PURCHASING VENTURE (CPV)

The Minnesota Department of Administration, working with the OSS, may enter into purchasing agreements with certified vendors of optical scan voting systems to provide low prices and easy purchasing of precinct ballot counters.

For a nominal fee, local governmental subdivisions may join the CPV program and make purchases at state prices without the necessity of doing a competitive procurement. For more information about the state CPV program, contact the Department of Administration at (651) 296-2600. Ask for details about Contract Release V-18(5). Jurisdictions may contact the vendors directly to make their purchases.

Jurisdictions may enter into maintenance agreements to have a vendor provide service to the voting systems. Under this type of maintenance agreement, the vendor regularly services and repairs the voting systems. The level of service varies depending on the terms of the maintenance agreement.

## 10.3 PROGRAMMING AND BALLOT LAYOUT

Voting systems require specific programming for each election, and the programming must be carefully coordinated with ballot printing. Some jurisdictions opt to do their own programming, but the vast majority contract for this service. Either way, timeliness is critical. As soon as possible, jurisdictions must provide the programmer with complete ballot information including office order, candidate names, base rotation, ballot questions, and the precinct registration counts used in the rotation algorithm. The deadline for providing the candidate names is within five days after the withdrawal period closes. If all candidates are entered into ERS, the OSS works to electronically transfer the candidate information to the vendor. Share candidate name pronunciation instructions with the auditor to enter into ERS for ballot vendors.

The vendor or programmer, in turn, must provide the completed programming to the jurisdiction at least 21 days prior to the election. *M.R. 8220.0850*

## 10.4 TESTING

State statutes and rules require jurisdictions to complete two rounds of testing of optical scan equipment and assistive voting equipment and programming prior to Election Day. Contact the county election official to confirm the specifics responsibilities in the testing process. Preliminary testing is extensive and should be performed as soon as possible. The second round of testing is a Public Accuracy Test which occurs within 14 days of the election. Each jurisdiction that operates electronic voting equipment, even if only an assistive voting device is employed, must hold a PAT, giving at least 48 hour published and posted notice of the time and place of the test. At least two election judges from different parties must be on hand to witness the test. If the jurisdiction has three or fewer precincts, all precincts must be tested. If more precincts exist, test at least three including one from each congressional, legislative, county commissioner, school district and ward. The public is welcome to watch the test. See the Voting Equipment Testing Guide for more details on conducting testing found at the OSS Elections Guide website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/. *M.S. 206.83; M.R. 8220.1550*

# 11.0 ABSENTEE VOTING

Some absentee voting information is provided in this guide in Section 11.0. More details regarding absentee voting can be found in the Absentee Voting Administration Guide. This guide can be found at the OSS Election Guides website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/.

## 11.1 PREPARING TO ADMINISTER ABSENTEE VOTING

### 11.1.1 Administering Absentee Voting

Voters must not be required to go to more than one location in order to cast an absentee ballot. For example, if a county and a municipality are conducting an election on the same day, the auditor administers absentee voting for the municipality whose residents also reside in the county. There are other scenarios where the county may designate this responsibility or where it is the responsibility of the municipality to administer absentee voting, but the county auditor is always responsible for administering absentee voting for military and overseas (UOCAVA) voters.

#### State Elections

The county auditor administers absentee voting for county, state and federal elections, and for UOCAVA voters for all elections. An auditor may designate the task of administering regular absentee to a full-time municipal clerk. If the auditor has not designated, a full-time clerk may give the auditor notice that the municipality will administer regular absentee voting. A clerk of a city that is located in more than one county may only administer absentee voting if the clerk has been designated by each of the county auditor or has provided notice to each of the county auditors that the city will administer absentee voting.

When the designation or notice is given, it must specify whether the clerk will be responsible for the administration of a ballot board. A municipality may only be designated to administer regular absentee voting if they have the technical capacity to access the state voter registration system (SVRS) and must first receiving training from or approved by the OSS.

If the designation specifies that the clerk will be responsible for the administration of a ballot board the governing body of the municipality must establish an absentee ballot board by ordinance or resolution for processing returned regular absentee ballots. Absentee ballot boards must consist of a sufficient number of election judges, or deputy city clerks trained in the handling and counting of absentee ballots. In order to serve as an election judge on a ballot board, individuals must be appointed as provided in M.S. 204B.19 to 204B.22 and trained on the handling and processing of absentee ballots. It is recommended that this be an additional one hour training course that covers all aspects of absentee ballot administration. *M.S. 203B.121*

#### Special Elections and Municipal Elections

When a city election is held on a different day other than a state/county election, the city is responsible for administering absentee voting for its election, with the exception of UOCAVA absentees, which are always administered by the county auditor. If the city asks the county, and if the county agrees, the county may administer all absentee voting for the city.

The city, or the county if agreed, must establish an absentee ballot board by ordinance or resolution for processing returned regular absentee ballots. The county must also establish a UOCAVA AB Board.

When administering absentee voting, the clerk must conduct AB outreach to health care facilities located in the city. HCFs mean hospitals, residential treatment centers and nursing homes governed by M.S. 144.50. You can confirm a facility's status by calling its administrator or by using the Minnesota Department of Health website located at www.health.state.mn.us. *M.S. 203B.01, subd. 4*

HCF outreach is conducted during the 20 days preceding the election and consists of organizing teams of election judges to travel to the HCF, collect applications, issue ballots, assist voters and return voted ballots. More information on HCF outreach can be found in the Absentee Voting Administration Guide found at the OSS Election Guides website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/.

Clerks administering absentee voting are subject to the same polling place prohibitions that election judges will enforce on Election Day. During absentee voting the place of business is the voter's polling place.

**How Many Absentee Voters Should Be Anticipated?**

Use your past experience in similar elections, and feedback from the county or other clerks in your county that administer regular absentee voting, to estimate the number of anticipated absentee voters. Adjust for health care facilities within your jurisdiction and for municipal growth. Some counties have formulas to use for this process.

**What If My Ballots Are Not Available Yet?**

Ballots must be available for absentee voters at least 46 days before the election. If the vendor preparing your ballots is late in providing them, absentee voting must still begin as scheduled. You must accommodate absentee voters at least 46 days before the election, under emergency procedures, using substitute ballots. This situation is similar to running out of printed ballots at the polling place on Election Day. *M.S. 204B.35, subd. 4; 204B.39*

Substitute ballots are prepared to look like the official ballots as much as possible. The words "Substitute" must be printed in brackets directly above the words "Official Ballot" on the ballots. When delivered, these ballots must be accompanied by an initialed affidavit from the election official who prepared them that lists the reason why the official ballots were not ready. *M.S. 204B.39*

For more information regarding absentee ballot boards and health care facility voting, please review the Absentee Voting Administration Guide found at the OSS Election Guide website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/.

## 11.2 AGENT DELIVERY

During the seven days preceding an election, and up until 2:00 p.m. on Election Day, an eligible voter who would have difficulty getting to the polls because of incapacitating health reasons, or who is disabled, or who is a patient in a HCF, a resident of an assisted living facility governed by M.S. Chapter 144G, in a residential program, or a battered women's shelter may designate someone to serve as an agent to pick up and return absentee ballots for them. The voter may be in a home or facility anywhere the agent is willing to travel and the agent must have a preexisting relationship with the voter.

The voter must authorize the agent in writing. A candidate at the election may not be an agent for a voter. A special request form can be combined and submitted with the application. A copy of the agent delivery form is available at the OSS Vote-Early-In-Person website (found at the bottom of the screen) located at www.sos.state.mn.us/elections-voting/other-ways-to-vote/vote-early-in-person/. To cut down on back and forth trips, you may fax or e-mail the application to the voter, and the voter may return it by fax or as an attachment to an e-mail. Ballots returned under this provision must arrive back to the county auditor or city clerk by 3:00 p.m. on Election Day. *M.S. 203B.11, subd. 4*

## 11.3 SPECIAL CATEGORIES OF ABSENTEE VOTING

### 11.3.1 Military Voters & Voters Temporarily Outside of the U.S

This group of voters is entitled to vote for all offices and they receive a full ballot. These voters claim Minnesota as their permanent residence but are temporarily away from their voting precinct. Even though the federal law is specifically geared toward military and overseas voters, the regular absentee process under M.S. 203B.04 to M.S. 203B.15 is available to them as an option. These ballots are handled by the county auditor. Many of the ballots are sent by e-mail to the voters.

### 11.3.2 Voters Indefinitely (Permanently) Outside of the U.S. (Federal Ballot Only)

This variation is available to U.S. citizens who live indefinitely (permanently) outside the U.S. or have no definite plans for returning to the U.S. (aka "Ex Pats"). They meet all qualifications of voter eligibility except residence in Minnesota. They may vote based on their last residence before leaving the U.S. or, if they have never resided in the U.S., the last residence of a parent. This is the address to be included on the application. In order to cast a ballot in Minnesota, they have to have maintained residence in Minnesota at least 20 days prior to leaving the U.S. Unlike military voters or those residing temporarily outside of the U.S., the only procedural option available is to apply using the FPCA and vote by absentee ballot. They are not entitled to vote for all offices; they may vote only for the federal offices of U.S. President, U.S. Senator or U.S. Representative. These voters will be issued a "special federal ballot". *M.S. 203B.16; 204D.11, subd. 4*

### 11.3.3 Federal Write-In Absentee Ballot

Minnesota allows the use of a Federal Write-In Absentee Ballot (FWAB). After requesting an official absentee ballot, eligible voters who feel that there may not be sufficient time to receive and return the official ballot may use the Federal Write-In Absentee Ballot. For federal offices, either a candidate name or political party can be written in. For state or local offices, a candidate name must be written in for the votes to count. If both the official ballot and the Federal Write-In Absentee Ballot are returned prior to 8:00 p.m. on Election Day, count only the official ballot. *M.R. 8210.2700, subp. 2; M.S. 203B.227*

Any Write-In absentee ballots that are received will need to be duplicated by the AB board on an official ballot.

### 11.3.4 Safe At Home

Safe at Home (SAH) is a program offered by the OSS in collaboration with local victim service providers, to help establish a confidential address for survivors of domestic violence, sexual assault, and/or stalking, or others who fear for their safety.

Individuals participating in the program register with the OSS as a permanent absentee voter. Before every election, the OSS reviews participants and their voting precinct to determine who is eligible to cast a ballot in the election. The OSS will contact the appropriate county auditor to request the necessary number of absentee ballots for SAH voters. The OSS mails the ballot and AB materials to the voter. The voter returns their absentee ballot to the OSS where ID numbers are compared. Ballots are then forwarded to the appropriate election official to be counted along with the rest of the ballots. *M.S. 5B.06*

**Note:** Voters participating in the Safe at Home program will not have a voter record in SVRS and will not be listed on the polling place roster. All absentee ballots from the Safe at Home program must be counted if certification indicates that ID numbers matched. The absentee ballot board will mark "SAH" followed by a sequential number and "AB" on the Election Day registration roster page for all accepted Safe at Home ballots. You will not know the identity of the Safe at Home voter, and it is important that you only share the existence of any Safe at Home voters in any particular precinct with those who need to know.

# 12.0 ELECTION DAY

## 12.1 VOTING HOURS & POSTPONEMENT

For state primaries and general elections, polling places must be open from 7:00 a.m. to 8:00 p.m.

For municipal elections, the minimum voting hours for cities in the metropolitan area are from 10:00 a.m. to 8:00 p.m. For municipal elections outside the metropolitan area, minimum hours are from 5:00 p.m. to 8:00 p.m. The "metropolitan area" for elections is defined as the counties of Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington and Wright. *M.S. 205.175, subd. 1*

Voters waiting in line at closing time are allowed to register and/or vote. Those who arrive after the closing hour cannot vote.

Local municipal elections not held in conjunction with a state or federal election may be postponed for inclement weather. When one or more local jurisdictions are holding elections in conjunction with one another, the jurisdiction with the largest local geographic area has the authority, after consulting with other auditors and clerks, to postpone the election. A decision to postpone must apply to every precinct in the jurisdiction and must be made no later than 6:00 p.m. on the day before the election. A postponed election must be rescheduled for the next following Tuesday. An election that is postponed due to weather may be postponed again. *M.S. 204C.05; 205.07, subd. 1a; 205.105; 205.175*

## 12.2 ACTIVITY IN OR NEAR THE POLLING PLACE

### 12.2.1 Authorized Persons in the Polling Place during Voting

The polling place will be administered by the head election judge and the other election judges on Election Day. No public official, including the clerk may assume the duties of an election judge simply because they hold elected or appointed office. All election judges must be eligible to serve, trained, and appointed according to the law. Each official on duty in the polling place must wear an identification badge that shows their name and role in the election process, such as head judge, election judge, or election judge trainee. The name and role badge must not show their party affiliation. *M.S. 204C.06, subd. 2; 204B.19; 204B.20; 204B.21; 204B.25*

During voting hours, the law allows only election judges, people directly engaged in voting, and authorized persons to be present in the polling place.

Authorized persons are:

- Persons helping a voter who is disabled or unable to read English.
- Persons who are vouching for a voter's residence.
- Observers with written authorization from the OSS, the county auditor, or the clerk for the purpose of observing election procedures.
- Peace officers, if the election judges request their presence to keep order.
- Children when accompanying voters.
- Challengers authorized to observe in the polling place.
- Teachers, elementary and high school students if participating in a mock election that has been authorized by the secretary of state.
- The news media.
- Persons making a written complaint. *M.S. 204C.06*

### 12.2.2 Media Access

A news media representative may enter a polling place during the voting hours only to observe the voting process. A media representative must present photo identification to the head election judge upon arrival at the polling place, along with either a recognized media credential or written statement from a local election official attesting to the media representative's credentials.

A media representative must:

- Stay at least six feet from voters.
- Not converse with voters or interfere with the voting process.
- Not make a list of those voting or not voting. *M.S. 204C.06, subd. 8*

### 12.2.3 Prohibited Polling Place Activities

Some persons, items and activities are not allowed in the polling place:

- Disorderly persons.
- Intoxicated persons and/or liquor.
- Persons who are campaigning and/or campaign materials including literature or buttons.
- Smoking.
- Lingering. *M.S. 204B.06*

People may not gather or linger in the polling place or within 100 feet of the building in which the polling place is located. One exception is an individual conducting an exit poll. Exit polls cannot be conducted within the polling place, but may be conducted anywhere outside of the room being used as the polling place. An individual conducting an exit poll may only approach voters as they leave the polling place after having voted to ask them to take an anonymous written questionnaire. Furthermore, campaigning is also not allowed in the polling place, within 100 feet of the building where the polling place is located or on public property if the polling place is on public property. This prohibition on campaigning means that campaign buttons cannot be worn in the polling place and campaign signs cannot be displayed within 100 ft of the building or on public property if the polling place is on public property.

Voters, however, may take sample ballots from the newspapers or campaign flyers into the voting booth for personal use but they should take care not to display these materials outside of the voting booth. These prohibitions also limit where meetings and other activities can be held in polling place sites with multiple rooms. *M.S. 204C.06; 204C.13, subd. 2; 211B.11*

See the Election Judge Guide for additional information regarding prohibited conduct in the polling place. The Election Judge Guide can be found at the OSS Election Guides website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/

On Election Day, if the clerk and other elected officials are not eligible to be appointed as election judges (e.g., they may be candidates in that election), special care must be taken to ensure that they do not act "in any manner" to influence voters in, or near, the polling place.

**Note:** Per *Schimming v. Riverblood*, OAH 7-6347-20326-CV (June 5, 2009), the prohibition of signs and campaign materials within 100 feet does not apply to adjacent private property.

## 12.3 ELECTION JUDGE NEUTRALITY IN THE POLLING PLACE

Even though many judges are affiliated with major parties and often have strong political opinions about candidates and ballot questions, once a judge steps into the polling place and takes the oath, they are to remain neutral while serving in the role of election judge. Voters have the right to vote in a polling place, free of any influence.

This can be difficult when there is a controversial question on a ballot; especially a constitutional amendment. Many people will ask election judges, what does this "mean?" Or, what effect does this or that action have on the outcome of the election?

There should be nothing for election judges to explain orally about any question. The instruction wording is printed on the ballot above all questions. The instructions above a constitutional amendment are very clear and are explicitly laid out in law.

It is suggested that when election judges are asked about ballot questions, to refer the voter to the instructions. If needed, the election judge may read the instructions out loud. No further explanation is needed.

## 12.4 ELECTION DAY VOTER REGISTRATION

Minnesota permits Election Day registration. The clerk may expect 20 percent or more of voters to register at the polling places on Election Day. To help avoid delays and congestion, plan a flow of traffic for voter registration and voting lines. Consider appointing additional judges to handle registration duties. Judges who register voters cannot also handle ballots for the same voter. These duties must be separated. *M.S. 201.061; 201.018; M.R. 8200.5300*

Election judges must make sure each applicant is registering in the proper place. The clerk must supply an accurate precinct finder or precinct map to each polling place in the city. Election judges use the precinct finder or precinct map supplied by the clerk to determine if persons are registering in the correct precinct. *M.R. 8200.5300*

The clerk must return the polling place roster(s) and completed VRAs to the county auditor within 48 hours following the end of voting. *M.S. 204C.07; 201.018*

## 12.5 CHALLENGERS

Specifically-appointed "challengers" are permitted to be present in the polling place during the hours of voting. When challengers arrive at a precinct, they should be directed to the Head Judge to prove their Minnesota residency by presenting one of the proofs of residence accepted for Election Day registration (see M.S. 201.061, subd. 3 for list) and a letter of appointment from a party or non-partisan candidate. Challengers do not need to prove residence in the precinct where they are appointed on Election Day. *M.S. 204C.07; 204C.12*

The challenger cannot speak to voters. Furthermore, the challenger cannot:

- handle or inspect any of the voting materials
- make lists of who has or has not voted
- compile lists of voters to challenge on the basis of mail sent by a political party that was returned undeliverable, and
- cannot attempt to influence voting in any manner.

Challenge of a particular voter's eligibility to vote takes place through the election judge. The challenger must complete the Oath of Challenge to Voters Eligibility form for each challenge and

the election judge then resolves the issue with the voter. See the Election Judge Guide for more detailed information.

Appointment as a challenger requires issuance of a written certificate according to the following circumstances:

**Partisan elections.** At an election to fill partisan offices, the chair of an authorized committee of each major political party may appoint by written certificate voters from that political party to act as challengers of voters at the polling place for each precinct. Only one challenger from each major political party for each precinct is allowed to remain in the polling place at one time.

**Nonpartisan elections.** At an election to fill nonpartisan offices, nonpartisan candidates may appoint, by written certificate, voters to act as challengers of voters at the polling place for each precinct. Only one challenger for each candidate is allowed to remain in the polling place for each precinct at one time.

**Elections on questions.** At an election where a question is to be voted upon, the mayor of a city, or the school board of a school district, or the board of supervisors of a town, upon receiving a written petition signed by at least 25 eligible voters, must appoint by written certificate one voter for each precinct in the municipality, or school district if applicable, to act as a challenger of voters in the polling place for that precinct.

## 12.6 EMERGENCIES

Nothing must interfere with the right of voters to vote free of undue delay or inconvenience. Should emergencies occur, auditors, clerks and election judges have wide discretion to resolve the problem. Polling places may be moved, additional judges enlisted, and materials or supplies (including ballots and voter registration applications) photocopied, if necessary. If a precinct ballot counter should break down, the emergency voting slot in its ballot box should be opened immediately. *M.S. 204B.16, subd. 7; 204B.25, subd. 1; 204B.30*

## 12.7 PUBLIC COUNTING

After all voters in line at 8:00 p.m. have voted, the polling place is open to the public, including members of the media and candidates, until votes are counted and results are declared. Please make sure to notify those present that the results are only for the poll place itself (do not include absentee ballot totals) and are "unofficial." Election judges will count the ballots/run results tapes, prepare the summary of results, secure and turn in election materials. Unless appointed as an election judge, no individual will touch election materials during this process, including the clerk. *M.S.204C.19, subd.1; 204C.19, subd. 2; 204C.07*

## 12.8 SUMMARY STATEMENTS

After the last voter in line at 8:00 p.m. has voted, the election judges count the ballots; prepare summary statements of the votes for each candidate for each office for and against each ballot question; and sign the summary statement.

Three copies of the summary statements must be completed by the election judges, except that only two copies of the summary statements are needed for elections not held on the same day as the state elections.

In precincts with a precinct ballot counter, the summary statement is printed at the end of the results tape. All present election judges must complete the three copies of the summary statement and seal each in individually signed envelopes. The first copy must remain attached to the "zeros" report printed when the polls were opened.

Each copy of the summary statements must include the following:

- Total ballots delivered to your precinct as adjusted by the actual count
    - From any adjustments noted on the incident log;
- The number of voting booths
    - All stations set up to provide a space for a voter with a ballot;
- The number of election judges
    - Count number of signatures of judge's oath;
- The number of unofficial ballots made, if any;
- The number of spoiled ballots;
- The number of duplicate ballots made, if any;
- The number of unused ballots at the end of the day;
- The number of persons registered to vote at 7am on Election Day;
    - This number is listed in the back of the pre-registered roster.
- The number of persons who registered to vote at the polling place on Election Day;
    - This is the number of voter signatures on the Election Day registration roster (or the number of EDR voter registration applications).
- The number of signatures on the rosters (pre-registered roster plus the election day registration roster);
    - This is the number of voter signatures on both rosters.
- Do not count "AB" notations printed, written, or stamped on the registered roster. Do not count the names listed on the non-registered AB supplemental report.
- The total number of voters that voted at the polling place on Election Day. *M.S. 204C.24*

## Example of a Summary Statement

### Precinct Summary Statement
### State General Election November 8, 2016

Municipality _____

Ward _____ Precinct _____ ☐ Check if AB

County _____

Number of Election Judges who worked in this precinct *_____

Number of Voting Booths in this precinct *_____

**Registration Statistics**

Number of persons registered at 7 a.m. *1._____

Number of new registrants on election day *2._____

**Ballots delivered to the precinct**

Ballots delivered as certified by the clerk 3._____

Ballot count adjustments from incident log (+/-) 4._____

Number of unofficial ballots made 5._____

Number of absentee ballots delivered 6._____

Total number of ballots delivered to precinct (3+4+5+6 = A) A[ ]

**Ballots not in the ballot box**

Number of spoiled ballots *7._____

Number of originals for which duplicates made *8._____

Number of rejected absentees *9._____

Number of unused ballots 10._____

Total number ballots not in the ballot box (7+8+9+10 = B) B[ ]

**Ballots cast in the ballot box**

Number of signatures on roster (preregistered + EDR) *11._____

Number of accepted regular, military and overseas absentee & mail ballots *12._____

Number of accepted federal only absentee ballots *13._____

Number of accepted presidential only absentee ballots *14_____

Total number of ballots in the ballot box (= persons voting) (11+12+13+14 = C) C[ ]

**Ballots returned to Auditor/Clerk**

Ballots returned from the precinct (B + C = D) D[ ]

Difference for auditor/clerk notation on delivery record (A - D = E) E[ ]

* are entered into ERS stats

# 13.0 AFTER THE ELECTION

## 13.1 RECEIVING MATERIALS

On election night at least one election judge from each precinct must deliver the following items to the county auditor or the city clerk (who delivers to the county auditor) after all ballots have been counted but no later than 24 hours after voting ends at 8:00 p.m. on election night:

- two sets of summary statements; and
- all voted, duplicated and spoiled ballots. *M.S. 204C.27*

Every auditor (or city clerk) must remain in their office on the night of the election until all returns have been delivered. The auditor (or city clerk) must prepare a record of all materials delivered to their office on the night of the election. This record must be prepared in the presence of who delivered the materials to the auditor's office (or clerk's office).

The record must include all materials delivered, the time of delivery, the name of the individual who made the delivery, the number of ballots delivered to the precinct and the total number of ballots returned as listed on the summary statement. A discrepancy between the number of ballots delivered and returned must be noted. All envelopes returned on election night must remain sealed and stored in a secure place. *M.S. 204C.28, subd. 1*

At least one election judge from each precinct must deliver the following to the city clerk within 24 hours after voting has ended on the night of the election:

- remaining summary statements and returns;
- all unused and defective municipal ballots;
- completed voter registration applications;
- voter rosters (both EDR and pre-registered); and
- voting systems.

The city clerk then must return all polling place rosters and completed voter registration applications to the county auditor within 48 hours after voting ends on election night. Rosters may need to be returned to the county auditor sooner to complete accepting/rejecting absentee ballots within 24 hours after the polls close. *M.S. 204C.27*

## 13.2 CANVASSING OF THE RETURNS

The city council serves as the canvassing board for city elections. The council must meet to canvass the returns and declare the results on the second or third day after a primary and within three to 10 days after a general election. The canvass may only be held on the second day after a primary if the county auditor agrees to review primary voting statistics within a time that permits the canvass to be conducted on that day. *M.S. 205.185, subd. 3; 205.065, subd. 5*

The steps to canvass the results are:

- the clerk prepares a canvassing report (abstract) to accumulate results from multiple precincts; this report may be available from the state Election Reporting System (ERS);
- the canvass board publicly canvasses the election returns by reviewing the abstract and write-in reports
- the board may ask to examine summary statements before it declares the results;

- when satisfied that the abstract reports are correct, the board signs the abstracts and they become the official results;
- in the case of a tie vote, the canvassing board determines the winner by lot;
- errors by election judges in counting may be corrected by following specific procedures as prescribed by law. *M.S. 204C.38; 204C.39; 205.185*

## 13.3 RECOUNTS

Minnesota election law authorizes administrative recounts after the canvassing board certifies the results. Rather than seeking a court order, the election administrator, on behalf of the canvassing board, may conduct a manual recount. A recount is limited in scope; the sole issue a recount may resolve is whether the election judges arrived at the correct vote total. Original ballots that have been duplicated are not within the scope of a recount and must not be examined except as provided by a court in an election contest. Rejected absentee envelopes may not be opened or subject to further review except in an election contest pursuant to Chapter 209. *M.S. 203B.121, subd. 2; 204C.35, subd. 3*

Minnesota Rules Chapter 8235 provides a complete discussion of the procedures for conducting a recount. See the Minnesota Recount Guide for more information on general procedures.

### 13.3.1 Publicly Funded Municipal Recounts

There are no automatic recounts for local, municipal office races. There are provisions for a publically funded recount:

**Written Request:** Candidates for city offices who wish a recount or those who would like a recount of a ballot question shall file a written request with the city clerk. All requests shall be filed during the time for notice of contest as per M.S. 209.021, subd. 1: Within five days after the canvass of primary results and within seven days after the canvass of a general election's results. *M.S. 204C.36, subd. 1*

**More than 50,000 total votes cast for the office:** If the total number of votes cast for that election was more than 50,000, a losing municipal candidate may request a recount, at the expense of the city, of the votes cast if the difference between the votes cast for that candidate and for the winning candidate is less than one-quarter of one percent of the total votes counted for that office. In the case of offices where two or more seats are being filled from among all the candidates for the office, the one-quarter of one percent difference is between the elected candidate with the fewest votes and the candidate with the most votes from among the candidates who were not elected.

**Between 400 and 50,000 total votes cast for the office:** If the total number of votes cast for that election was between 400 and 50,000, a losing candidate may request a recount of the votes cast, at the expense of the city, if the difference between the votes cast for that candidate and for a winning candidate is less than one-half of one percent. If two or more seats are being filled from among all the candidates for the office, the one-half of one percent difference is between the elected candidate with the fewest votes and the candidate with the most votes from among the candidates who were not elected.

**Less than 400 total votes cast for the office:** If the total numbers of votes cast for that election was fewer than 400, a losing candidate may request a recount of the votes cast, at the expense of the city, if the difference between the votes cast for that candidate and for a winning candidate is less than 10 votes. In cases of offices where two or more seats are being filled from among all the

candidates for the office, the 10 vote difference is between the elected candidate with the fewest votes and the candidate with the most votes from among the candidates who were not elected.

### 13.3.2 Discretionary Municipal Recounts

A losing candidate for a city office may request a recount at the candidate's own expense when the vote difference is greater than the differences mentioned in 13.3.1. The requesting candidate files with the city clerk a bond, cash or surety in an amount set by the city for the payment of the recount expenses. The requesting candidate may provide the city clerk with a list of up to three precincts that are to be recounted first and may waive the balance of the precincts after the precincts have been counted. If a list is provided, the expected costs of the three or less precincts must be determined. If the winner of the race is changed by the optional recount, the costs of the recount are then paid by the city. And, if a result of the vote counting is different from the result of the vote counting reported on election night by a margin greater than the standard for acceptable performance of the voting systems, the cost of the recount is also then paid by the city. *M.S. 204C.36, subd. 2*

### 13.3.3 Ballot Question Recounts

A written request for a recount on a question must be:

- filed by any person eligible to vote on the ballot question
- filed with the city clerk and
- be accompanied by a petition containing the signatures of 25 voters eligible to vote on the question.

A recount on a ballot question may be requested within five days after a primary election canvass, and within seven days following the canvass of a general election. The clerk is responsible for conducting the recount on behalf of the city. The recount will be conducted at the city's expense if the difference between votes for and against the ballot questions is at or less than what is listed in 13.3.1. If the difference between votes for and against the ballot question is greater, the person requesting the recount shall also file with the clerk a bond, cash or surety in an amount set by the city for payment of recount expenses at the time when the written request and petition is submitted. *M.S. 204C.36, subd. 3*

## 13.4 CONTEST OF ELECTION

A "contest of election" means to challenge the result of an election in district court, usually seeking a specific correction. A voter or candidate may contest the election of a candidate or ballot question in which they were eligible to vote. An election may be contested over an irregularity in the conduct of an election, canvass of votes or on the grounds of deliberate, serious, and material violations of Minnesota election law. *M.S. 209.02; 209.021*

The individual contesting the election must file a written notice of contest with the clerk of the district court of the county. The notice must specify the points the contest is based on, and must be filed within seven days after the canvassing board declares the results of the election or recount. For a primary, the notice of contest must be filed with the clerk of the district court within five days. Anyone considering filing a notice of contest, should read and carefully comply with M.S. 209, which governs the contest of election process. As a clerk, do not allow yourself to be misunderstood as providing legal counsel to an individual. Advise citizens to seek legal counsel to ensure that their efforts are in compliance with the law. *M.S. 209.02; 209.021*

If an election is contested, the clerk cannot issue a certificate of election until the contest has been determined by the court. The clerk takes no other action except as directed by the court. *M.S. 205.185, subd. 3(b); 209*

### 13.4.1 Security and Storage of Election Items for a Contest

There are numerous statutes and rules regarding the retention and safeguarding of election materials:

| | |
|---|---|
| Secured and sealed in ballot boxes and precinct supply boxes | • All ballots cast and counted in original sealed envelopes. M.S. 204C.27; 204C.28; 209.05; M.R. 8235.0400; 8235.0600<br>• All precinct summary statements. M.S. 204C.27; 204C.28<br>• All defective ballots not counted in original sealed envelopes. M.S. 204C.23; 204C.25; 204C.27; 204C.28<br>• All spoiled and unused ballots. M.S. 204C.27, 204C.28<br>• All electronic voting systems and counting programs.<br>• All polling place rosters and completed election day registration applications. M.S. 204C.27<br>• All records of materials delivered to them after completion of voting. M.S. 204C.28<br>• All canvassing board reports. M.S. 204C.33<br>• All records of access to ballots. M.S. 204C.28<br>• All lists submitted by residential facilities and educational institutions pursuant to M.S. 135A.17 & 201.061, subd. 3<br>• All election day challenges to voters pursuant to M.S. 204C.12.<br>• All precinct incident logs. M.S. 204C.27; 204C.28<br>• All absentee ballot applications. M.S. 203B.06<br>• All absentee and mail ballot return envelopes. M.S. 203B.08; 203B.12<br>• Any voting machine tape reports recording the votes cast on Election Day in each precinct. M.S. 204C |
| Other materials that have varying retention schedules | • Pre-election accuracy test results, including copies of any machine tapes generated as part of the process, or copies of any other similar documented means of verification. M.S. 206.83<br>• All voter registration applications. M.S. 201.081<br>• All records of notices of late, incomplete and deficient registrations. M.S. 201.061, M.R. 8200.2900; 8200.3100; 8200.3110<br>• All records of notices of ineligibility for registration. M.S. 201.061, subd. 7<br>• All reports of deceased voters, name changes, felony convictions, guardianships and commitments. M.S. 201.13 through 201.155<br>• All records of notices of challenge removal. M.R. 8200.3550<br>• All records of notices of application removal. M.R. 8200.3700<br>• All challenges to voter registration submitted pursuant to M.S. 201.195.<br>• Copies of post-election machine audits, including machine tapes generated as part of the process, or copies of any other similar documented means of verification. M.S. 206.89 |
| During a contest period it is suggested: | • Communicating with all staff about the importance of preserving and/or protecting any election items.<br>• Search all offices and premises under the clerk's jurisdiction and authority, including computer networks, to ensure that all documents, materials and election items are preserved and protected.<br>• Except when conducting official or court ordered tasks, the ballots remain under lock and key at all times. No less than two official elections staff enter the room at any time. A room-access log, including the time, date and purpose, shall be kept. No "visual guards" posted pursuant to M.S. 209.05 may enter the ballot storage room at any time.<br>• A copy of the security policy should be posted on the ballot storage room. |

## 13.5 CERTIFYING RESULTS

The clerk must certify the results of the city election to the county auditor. If a question on the ballot involves intoxicating beverages or a change in the form of city government, the clerk must promptly notify the county auditor and certify to the OSS the form of the question and votes for and against the proposition. *M.S. 204C.40; 205.185; 340A.416*

## 13.6 CAMPAIGN FINANCE REPORTING

The clerk shall ensure that candidates have certified that all campaign financial reports required by M.S. 211A.02 have been submitted, including the Certification of Filing. The Certification of Filing is due no later than 7 days after the general or special election. *M.S. 211A.02; 211A.05, subd. 1*

If a candidate or committee fails to file a campaign finance report when due, the clerk shall notify the candidate or committee of the failure. If no reply is received within 10 days after notification is mailed, the clerk must file a complaint with the Minnesota Office of Administrative Hearings. *M.S. 211A.05, subd. 2*

## 13.7 CERTIFICATE OF ELECTION

After the time for recounts and contesting election results has passed (and after any contests have been resolved), and after confirming that all required campaign financial reports due from the successful candidate are on file, the clerk shall issue a certificate of election to the successful candidate. A clerk or auditor who issues a certificate of election to a candidate who has not certified that all campaign finance reports have been filed is guilty of a misdemeanor. *M.S. 205.185; 211A.02; 211A.05*

## 13.8 OATH OF OFFICE

Every person elected or appointed to any public office shall take and subscribe an oath or affirmation to support the U.S. Constitution and the Constitution of Minnesota, and to discharge faithfully the duties of their office to the best of their judgment and ability. This requirement applies to every official commissioner or member of a public board or body before transacting any of the business or exercising any privilege of such office. Unless otherwise specified in law, city officials take and subscribe their oath of office with their city clerk or recorder. *M.S. 358.05; 359.04; 358.11; Constitution of the State of Minnesota*

## 13.9 RECORD RETENTION

The clerk is responsible for custody of the ballots and returns in city elections. The clerk must secure all materials used in the election including optical scan testing materials and the voted ballots for 22 months following the election. Abstracts filed by canvassing boards shall be retained permanently by the officer with whom those abstracts are filed. These abstract are permanently retained because they contain the original signatures of the canvassing board. *M.S. 138.163; 204B.40*

## 13.10 POST ELECTION REVIEW

For the state general election, the county canvass board will select the precincts by lot for a post election review. Details can be found in the Post Election Review Guide, available at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/. The county auditor is the post election review official unless the auditor designates the city clerk as the review official within 24 hours after the county canvass of the state general election. *M.S. 206.89*

# 14.0 VACANCIES IN ELECTIVE OFFICES

## 14.1 OCCURRENCES

Vacancies in elective offices occur due to the incumbent's death, resignation, becoming ineligible or moving out of the elective district. Occasionally, someone who has been elected to an office will decline or refuse to serve, and this is considered a vacancy as well. A resignation creates a vacancy when the letter of resignation is received and accepted by the officer, body, or board authorized to receive it, or upon the effective date specified in that letter. Preparations for a special election, if needed, may begin immediately after the written resignation is received by the official(s) authorized under M.S. 351.01 to receive it. *M.S. 351.01, subd. 2; 351.02; 351.055*.

### 14.2 FILLING VACANCIES

For charter cities, refer to your city charter for how vacancies are filled for your city.

For statutory cities, a vacancy in an elected city office shall be filled by council appointment of an individual who is eligible to hold the office until a special election is held or the remainder of the term expires. In the case of a vacancy arising from a mayor's or council member's inability or refusal to serve, the appointee serves until the mayor or council member is able to resume their duties or until the term expires. *M.S. 412.02, subd. 2a; 412.02, subd. 2b*

A special election shall be held at or before the next regular city election if more than two years remain in the unexpired term and the vacancy occurs before the first day to file affidavits of candidacy for the next regular city election. *M.S. 412.02, subd. 2a*

If less than two years remain in the unexpired term, or the vacancy occurs on, or after the first day to file affidavits of candidacy for the regular city elections, a special election may be held, or a person appointed by the city council may serve the remainder of the unexpired term. *M.S. 412.02, subd. 2a*

The city council must specify by ordinance under what circumstances it will hold a special election to fill a vacancy other than a special election held at the same time as the regular city election.

If a special election is being held to fill a vacancy, candidates must file their affidavit of candidacy for the specific office with the vacancy to fill the unexpired portion of the term. *M.S. 412.02, subd. 2a*

When filling a vacancy by special election, regular laws, including election related deadlines, must be followed as far as practicable. *M.S. 204D.18, 205.02*

Also, the precincts, polling places, and election judges are the same as the last general election, unless they are changed according to law. *M.S. 204D.24*

# 15.0 OTHER ELECTIONS

## 15.1 UNIFORM LOCAL ELECTION DAY

Cities must hold their officer elections in the fall of either even or odd numbered years (but not both) at local option. The general elections occur on the first Tuesday after the first Monday in November. Cities have the option to hold a primary election; if held, it must be on the second Tuesday in August, and the election calendar is essentially the same as for state elections. If a city wishes to choose nominees for municipal offices by a primary, the city council must adopt a resolution or ordinance by April 15th in the year when the municipal general election is held. The resolution or ordinance is effective for all municipal elections until it is revoked. The clerk must provide notice of the adoption of the resolution or ordinance within 30 days after adoption. *M.S. 205.065; 205.13; 205.16*

Timeline for municipalities without a primary:

- Notice of Filing published 15 weeks before election—municipal clerk's office is open from 1-5:00 p.m. on last day of filing;
- filing opens 12 weeks before and closes 10 weeks before;
- candidate withdrawal closes at 5:00 p.m., two days following the close of filing;
- clerk notifies auditor of election details at least 74 days before an election;
- Notice of Election is published two weeks before; and
- the governing body canvasses between three and 10 days after the election.

Metropolitan area cities minimum voting hours are from 10:00 a.m. to 8:00 p.m. In non-metro areas, minimum hours are from 5:00 p.m. to 8:00 p.m. *M.S. 205.16; 205.175; 205A.09*

## 15.2 MAIL BALLOTING AND MAIL ELECTIONS

Minnesota Statutes provide procedures for the conducting of an election by mail, where the only polling place is the office of the clerk or auditor. M.S. 204B.45 allows certain municipalities or counties to use special mail balloting procedures for precincts for all of their elections. M.S. 204B.46 allows a special election for question(s) to be conducted as a mail election for precincts which would normally vote at a regular polling place in other elections.

A Mail Voting Guide (for mail balloting and mail elections) is available at the OSS Election Guides website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-guides/.

### 15.2.1 Mail Balloting

Minnesota Statutes permit mail balloting for the following:

- Towns of any size located outside the seven-county metro area,
- Cities with fewer than 400 registered voters located outside the seven-county metro area (June 1 voter registration number),
- Any precinct having fewer than 100 registered voters (June 1 voter registration number),
- Unorganized territories if provided for by the county board.

Mail balloting can be used at any municipal, county or state election. The governing body of a municipality, or county board for unorganized territories, must authorize mail balloting no later than 90 days prior to the first election at which mail balloting will be used. The resolution must specify at which elections (municipal, county and/or state) mail balloting will be used.

If conducting balloting by mail, the Notice of Special Mail Election procedures must be given at least 10 weeks prior to the election. The clerk will need to develop a plan for the mailing and for processing the voted ballots. The Office of the County Auditor or municipal clerk is the only polling place. Excluding a mail special election for a question, the county auditor (all auditors if municipality is located within multiple counties) must give approval before mail ballot procedures can be used for elections.

Ballots are mailed no more than 46 days nor later than 14 days before a regularly scheduled election, and not more than 30 days nor later than 14 days prior to any other election day. If needed, the county auditor or clerk does a second mailing no later than 14 days before the election to voters who registered to vote after the initial mailing but before the voter registration cutoff.

The auditor or clerk must appoint a ballot board, as done for processing regular absentee ballots, to process returned mail ballots. One board may be created to process both AB and MB ballots. The ballot board must mark returned ballots "accepted" or "rejected" within five days they are received, and within three days if they are received 14 or fewer days before the Election Day. *M.S. 204B.45; M.R. 8210.3000*

### 15.2.2 Mail Election Questions

A county, municipality, or school district submitting questions to the voters at a special election may conduct the election by mail with no polling place other than the office of the auditor or clerk. No offices may be voted on at a mail election under this provision. The county auditor must be given a 74-day notice and a notice must be posted at least six weeks prior to the election. Ballots are mailed no more than 46 or later than 14 days prior to the election. No later than 14 days before the election, the auditor or clerk must make a subsequent mailing of ballots to voters who registered to vote after the initial mailing was sent but before the voter registration cutoff (20 days before Election Day) for the election.

The auditor or clerk must appoint a ballot board, as done for processing regular absentee ballots, to process returned mail election ballots. One board may be created to process both ABs and MBs. The ballot board must mark returned ballots "accepted" or "rejected" within five days after they are received, and within three days if they are received 14 or fewer days before Election Day. More detailed information regarding mail balloting is available in the Mail Elections Guide. *M.S. 204B.46; M.R. 8210.3000*

## 15.3 CITY SPECIAL ELECTIONS

Provisions are made in Minnesota Statutes for cities to hold special elections in certain instances. In general, these elections begin with a council resolution, are conducted in the same manner as regular city elections and would follow procedures described in this guide, unless the law authorizing the election has specific instructions otherwise. The governing body of a city may on its own motion cancel a special election held under M.S. 205.10, subd. 1, but not less than 46 days before the election. Notice must be provided at least 46 days before the election if a city special is cancelled in this manner. Charter cities should refer to your city charter for special election details. *M.S. 205.10; 205.16, subd. 4*

## 15.4 STATE ELECTIONS

Clerks share responsibility for administering state elections with county auditors and the OSS. State elections are held every even-numbered year.

### 15.4.1 State Primary

Held on the 2nd Tuesday in August (August 9, 2016) to select political party and nonpartisan candidates for elective offices to be filled at the general election. *M.S. 204D.03*

If there are no partisan or nonpartisan offices for which nominees must be selected, the city council may decide whether a state primary will be held. If the city council decides that there will not be a primary, within 15 days of the close of filing, the clerk must post a notice of the primary cancellation, and must also notify the OSS. *M.S. 204D.03; 204D.07*

At least 15 weeks before the state primary, the OSS notifies each county auditor of the offices to be voted for in that county at the next state general election for which candidates file with OSS. Within 10 days after notification by the OSS, each county auditor must notify each city clerk in the county of all the offices to be voted for in the county at that election and the time and place for filing for those offices. The county auditors and city clerks must promptly post a copy of that notice in their offices. *M.S. 204B.33*

Notice of election must be posted in the clerk's office 15 days before the election stating: officers to be nominated; location of each polling place; and hours for voting. The notice may also be published. *M.S. 204B.34*

No write-in candidates are permitted on a primary ballot. Voters may vote in only one party's primary column on the ballot; voters may not "cross-party vote" between the parties' columns and candidates. *M.S. 204B.36*

Nonpartisan (judicial, local, and school) offices appear on the primary ballot only when more than twice the number of persons to be elected file for the nomination. Municipalities and schools must, by resolution or ordinance, elect to choose nominees for municipal or school office by primary. *M.S. 204D.07; 205.065; 205A.03*

### 15.4.2 State General Election

Held on 1st Tuesday after the first Monday in November (November 8, 2016) to elect all elective state and county officers, judges of the state supreme, appeals, and district courts, members of the legislature, senators and representatives in congress, and presidential electors. Proposed amendments to the Minnesota Constitution may be on the ballot as well as elective offices for soil and water conservation districts and hospital districts. For specific dates and notices see the 2016 Elections Calendar on the OSS Election Calendar website located at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-calendars/. *M.S. 103C.305; 204D.03; 204D.13; 204D.15; 447.32*

### 15.4.3 Summary Statements For Returns

For state elections, each official responsible for printing ballots must furnish three or more blank summary statement forms for the returns of those ballots for each precinct. Blank summary statement forms are furnished at the same time and in the same manner as the ballots. After election judges complete the returns, they deliver at least three copies of the summary statement to the clerk. In first, second and third Class cities the clerk must remain in the clerk's office to receive delivery of the summary statements and other election materials from the election judges or until 24 hours have elapsed since the polls were closed, whichever occurs first. *M.S. 204C.24; 204C.26; 204C.28*

### 15.4.4 Canvassing

Results of state elections are declared by the appropriate county canvassing boards and the state canvassing board. *M.S. 204C.32; 204C.33*

## 15.5 SCHOOL DISTRICT ELECTIONS

School districts are required to conduct their board elections in November of either even or odd numbered years. If a school district is holding an election at the same time as a city election or a state primary or state general election, the city clerks in the school district will in effect be conducting the election for the school district. The school district will still take the candidate filings for school board office, prepare and supply a school district optical scan ballot, and canvass the results of the election. The city, however, is responsible for all other facets of the election including election judges, and polling locations. If the election is not held with the state election, but is held in conjunction with a city election, the city is also responsible for optical scan ballot preparation, and absentee ballots. *M.S. 205A.04; 205A.06*

A school board may, by resolution, decide to choose nominees for school board by a primary. If school candidates are to be nominated by primary, a primary must be held when there are more than two candidates for a specified school board position or more than twice as many candidates as there are at-large school board positions available. The primary would be held on the first Tuesday in August. The candidate filing period would open 84 days before and close 70 days before the primary. *M.S. 205A.03, subd. 1*

The city may bill the school district for a fair share of conducting the election. The OSS has developed a Cost Allocation Procedure for election expenses that can be used as the basis for billing election costs. A copy of the Cost Allocation Procedures is available at www.sos.state.mn.us/election-administration-campaigns/election-administration/election-administrator-forms/.

# GLOSSARY

**Absentee ballot board:** A special board of election judges, that handles all processing of regular absentee ballots.

**Agent delivery:** A process by which during the seven days preceding an election, and up until 2:00 p.m. on Election Day, specific eligible voters designate someone to serve as an agent to pick up and return absentee ballots to them. *M.S. 203B.11, subd. 4*

**Assistive voting device:** An electronic ballot marker with a touch screen, keypad, keyboard, earphones, or any electronic ballot marker that assists voters to use an audio or electronic ballot display in order to cast votes. *M.S. 206.56, subd. 1*

**Ballot, spoiled:** A ballot returned to an election judge due to an error made by the voter. The voter can exchange this for a new blank ballot.

**Ballot, defective:** A ballot is defective if the voter overvoted, voter's intent cannot be determined during counting, or if the voter has written their name, ID number, signature on the ballot. A ballot may be defective in whole (as in cross-party voting in a primary) or as to a single office or ballot question (as in voting for too many candidates for one office).

**Ballot, duplicate:** A ballot created by an election judge team to replace a ballot that cannot be scanned by a ballot counter.

**Ballot box:** Secure box used to hold voted ballots. The ballot counter sits atop the ballot box.

**Ballot counter:** Electronic optical scan device that counts paper ballots.

**Bond referendum:** A referendum held to determine if the jurisdiction should be authorized to sell bonds to obtain the funds to finance a project, such as a new building.

**Challenger:** An individual with written authorization to be present in a polling place to question the eligibility of voters. A challenger must prove they are a resident of Minnesota by providing the Head Judge with one of the proofs of residence acceptable for Election Day registration and complete an Oath of Challenge to Voter' s Eligibility form to challenge a voter's eligibility.

**City:** A home rule charter or statutory city. *M.S. 200.02, subd. 8*

**City, first class:** A city with more than 100,000 inhabitants. *M.S. 410.01*

**City, second class:** A city with between 20,000 and 100,000 inhabitants. *M.S. 410.01*

**City, third class:** A city with between 10,000 and 20,000 inhabitants. *M.S. 410.01*

**City, fourth class:** A city with less than 10,000 inhabitants. *M.S. 410.01*

**Clerk:** Statutes refer to "municipal" clerks meaning either the city clerk or township clerk or a designee. References to school districts mean the school district clerk or a designee.

**Coterminous:** Two precincts having the same border or covering the same area.

**Cross-party voting:** Voting for candidates of more than one party when candidates compete for party nomination in a partisan primary. "Cross-party" voting is not allowed in a partisan primary.

**DOH:** Department of Health. Also known as the Minnesota Department of Health or MDH.

**Exit polling:** Individuals may conduct exit polls, surveys of voters, anywhere outside of the room being used as the polling place. An individual conducting an exit poll may only approach a voter as

they leave the polling place after having voted to ask them to complete a written anonymous questionnaire.

**General election:** An election held at regular intervals on a day set by law at which voters of the state or any of its subdivisions choose by ballot public officials or presidential electors. *M.S. 200.02, subd. 2*

**Governing body:** The board of commissioners of a county, the elected council of a city, the board of supervisors of a township, or the school board of a school district. *M.S. 200.02, subd. 10*

**Health care agent delivery:** When a patient in a healthcare facility authorizes a person to pick up and return absentee ballots for the patient.

**Health care facility:** A hospital, residential treatment center, or nursing home licensed under Minnesota Statutes 144A.02 or 144.50. The Minnesota Department of Health has lists of licensed facilities.

**Levy referendum:** A referendum held to determine if the jurisdiction should be authorized to levy additional property taxes to fund general operational expenses.

**Mail balloting:** A method of voting that a qualified jurisdiction has chosen to be used for its regularly scheduled elections. *M.S. 204B.45*

**Mail election:** A special election for question(s) submitted to the voters of a county, municipality or school district with no polling place other than the office of the auditor or clerk. *M.S. 204B.46*

**Metropolitan Area:** The counties of Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington and Wright. *M.S. 200.02, subd. 24*

**Metro Towns:** Towns located in the "metropolitan area" as defined above.

**Municipality:** Any city or township. *M.S. 200.02, subd. 9*

**Non-partisan:** Offices that do not have party designation.

**Partisan:** Offices with party designation.

**Posted:** "Posted" notice refers to the posting of a copy of the notice in a manner likely to attract attention by affixing the notice to a wall, post, or bulletin board, etc. *M.S. 645.12*

**Precinct:** The basic geographical units for organizing and administering elections. *M.S. 200.02, subd. 3*

**Primary:** An election at which voters choose the nominees for the offices to be filled at a general election. A primary can be either partisan or non-partisan, based on the office. *M.S. 200.02, subd. 3*

**Prior registration:** The registration record of an individual at the individual's most recent prior residence address.

**Published:** "Published" notice means the publication in full of the notice in the regular issue of a qualified newspaper, once each week for the number of weeks specified. *M.S. 645.11*

**Roster:** The document provided to each precinct listing the voters registered in that precinct current residence address and date of birth.

**Summary statement:** The precinct summary statement is the official record of the numbers of voters and vote totals for the precinct. In precincts using an electronic ballot counter, the machine tape is the summary statement.

**Voter Registration Application (VRA):** Application used to register to vote or to update an existing registration.

**Vouching:** An Election Day procedure that permits an individual to register to vote and to cast a ballot if another authorized individual swears an oath that the individual resides in that precinct. Election Day voter vouchers within a polling place are limited to vouching for eight voters. However, that limitation does not apply to employees of residential facilities vouching for residents of those facilities.

Registered Voter in the Precinct: A registered voter in the precinct or a voter who registers on Election Day in the precinct who can attest to a new registrant's residence allowing them to register in the same precinct on Election Day. A voter may vouch for a maximum of 8 persons. Vouched for voters cannot vouch for new voters on Election Day.

Employee of a Residential Facility: An individual who proves that they are an employee of a residential facility in the precinct and attests to know a new registrant's residence at the facility. The employee voucher may vouch for an unlimited number of residents of the facility.

**Witness:** A registered voter who signs an absentee ballot envelope to document that the ballots inside were marked by the voter entitled to cast the ballots. Please refer to M.S. 200.02. for other definitions that may be used in this guide.

**Please refer to M.S. 200.02 for other definitions that may be used in this guide.**

# APPENDIX 1

## ELECTION RESOURCES

### COUNTY AUDITOR

County auditors are required to train municipal clerks, election judges and individuals serving on the absentee ballot board (unless delegated) prior to the state primary. Training will address election laws and procedures; duties of municipal clerks and duties of election judges; and related subjects. *M.S. 204B.25; 204B.28*

### SECRETARY OF STATE

The OSS supports county auditors' training programs by training the auditors (or their designees) in the administration of election laws and the training of local election officials and election judges. As part of the OSS's training program, the Secretary meets with election officials to present information about new laws and rules, and to discuss proposals for laws and for amendments to rules. The OSS also collaborates with other programs and conferences offered for election officials by their own associations. *M.S. 204B.27*

To assist county auditors, municipal clerks, and other election officials in their duties, the OSS makes available the following publications in hardcopy or electronic form:

MINNESOTA ELECTION LAWS - A compilation of Minnesota's election laws with annotations by the Attorney General. Printed in odd-numbered years, copies and updates are sent to county auditors for distribution to municipal clerks. It is updated online in even-numbered years. In all matters, the law and rule are the final authority. *M.S. 204B.27*

MINNESOTA ELECTION JUDGE GUIDE - Explains election judge duties.

MINNESOTA CITY CLERK ELECTIONS GUIDE - Provides city election procedure summary and references to Minnesota election laws.

MINNESOTA TOWNSHIP CLERK ELECTIONS GUIDE - Provides township election procedure summary and references to Minnesota election laws.

MINNESOTA SCHOOL DISTRICT CLERK ELECTIONS GUIDE - Provides school board election procedure summary and references to Minnesota election laws.

MINNESOTA CAMPAIGN MANUAL – Summarizes campaign financial reporting and fair campaign practices references to Minnesota election laws.

MINNESOTA ABSENTEE VOTING ADMINISTRATION GUIDE – Provides Absentee voting procedures summary and references to Minnesota Election Laws.

MINNESOTA MAIL ELECTIONS GUIDE – Provides Mail Election and Mail balloting procedures summary and references to Minnesota Election Laws.

MINNESOTA ELECTION RECOUNT GUIDE – Provides procedural summary for Election recounts and references to Minnesota Election Laws.

MINNESOTA POST-ELECTION REVIEW GUIDE – Provides procedural summary for Post Election Reviews and references to Minnesota Election Laws.

MINNESOTA VOTING EQUIPMENT TESTING GUIDE – contains procedures for creating test decks, conducting pre-testing and public accuracy tests when using electronic voting equipment.

# APPENDIX 2

## EXAMPLE POLLING PLACE SUPPLY LIST

This list is provided as an example only. Depending on your voting equipment, or arrangements your office may have with other units of government, you may not use certain items, you may use items not listed.

- Alphabetical tabs – 1 set
- Assistive voting device
- Bag of rubber bands & paper clips
- Ballot counter & power cord
- Ballots
- Ballot marking pens
- Ballot marker boxes/strings
- Ballot receipts for registered voter
- Blank cardboard pieces for signs
- Certificate of registered voter for curbside voting
- Clipboard
- Deceased voter forms
- Demonstration ballot
- Duplicated ballot envelope
- Duty cards
- Election Judge Manual(s) – add phone numbers on the back
- Election day registration applications
- Extension cords
- Flag(s) & stand
- HAVA Election Complaint Form
- State Election Law Complaint Forms
- Highlighter
- "I Voted" stickers
- Identification Badges
- Incident logs
- Key(s) to polling place; ballot box
- Letter opener
- Magic marker
- Magnifying lens
- Masking tape
- Oath of election judge form
- Oath of challenge to voter's eligibility form
- Official certification sheet
- Opening/closing the polls checklist
- Payroll/timesheet records for election judges
- Poll closing sign for last voter in line at 8 p.m.
- Polling place posters and signs
- Precinct finder
- Precinct list of persons vouched for Form
- Precinct map
- Precinct rosters
- Results tape envelope
- Rubber fingers
- Sample ballots
- Scissors
- Secrecy cover for ballots
- Security seals for ballot transfer case
- Spoiled ballot envelope
- Voter registration tally sheet
- Voter registration bags
- Oath of Vouching to Voter's Eligibility
- Precinct List of Person's Vouched for Form
- Non-registered AB voter supplemental report(s)
- Voter receipts (may be different receipts to identify different school districts within same precinct)
- Write-in tally sheets/summary statements
- Greeter's Lists

# INDEX

# Important Telephone Numbers

County Auditor's Office _____

Voting Machine Repair _____

County Sheriff / Local Police _____

Fire Department _____

Emergency Medical Services _____

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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


June 20, 2017

Chad A. Staul
Rinke Noonan, Ltd.
1015 W. St. Germain St., Ste. 300
P.O. Box 1497
St. Cloud, MN 56302

**Re: Attorney General Opinion Request**

Dear Mr. Staul:

I thank you for your correspondence dated May 22, 2017, requesting an opinion on whether Minnesota law authorizes the City of Spicer to offer its City Administrator a whole life insurance policy that builds cash value and provides a $250,000 death benefit. You indicate that the policy will serve as a deferred funding mechanism for an eventual severance package for the employee. If such authorization exists, you ask whether the City can fund the policy through an increase in the employee's compensation or through public funds. You attach a policy illustration underwritten by New York Life Insurance Company.

This Office generally does not issue opinions on hypothetical or fact-dependent questions, or opinions that require interpretation of contracts. Op. Atty. Gen. 629a (May 9, 1975) (enclosed). Notwithstanding the above limitations, I can offer the following comments, which I hope you will find helpful.

*Legal Authorization*

Minn. Stat. § 471.61, subd. 1, authorizes political subdivisions to insure its employees "under a policy . . . or contract . . . of group insurance or benefits . . . covering life . . . ." Absent other express statutory authority, this section describes the kind of life insurance that a city may provide to its employees. *See* Op. Atty. Gen. 161b-12 (Aug. 4, 1997) (citing *Lily v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995)) (attached). Because the whole life insurance policy described in your letter is not a group policy, and because it differs from other forms of life insurance in that it builds cash value while also paying a death benefit, providing such a policy is not authorized by Minnesota law. *Id.*

*Limits On Local Government Employee Salaries*

Under Minnesota law, the salary of a city employee must not exceed 110 percent of the governor's salary.[1] Minn. Stat. § 43A.17, subd. 9. This limit applies to salary and the value of all other forms of compensation. *Id.* Salary is defined as "hourly, monthly, or annual rate of pay including any lump-sum payments and cost-of-living adjustment increases." *Id.* at subd. 1. Although the value of *term* life insurance is excluded for the purpose of computing salary, the costs of other forms of life insurance are not excluded. *Id.* at subd. 9(c)(1). *See also* Op. Atty. Gen. 161b-12 (Aug. 4, 1997) (attached). Employer-provided deferred compensation payments are also considered salary. Minn. Stat. § 43A.17, subd. 9(c).

The policy illustration attached to your letter assumes that the policy owner would pay a guaranteed annual premium of $50,000 for the first three years of the contract and $39,458 for the fourth year.[2] If the policy is to act as deferred compensation, as you indicated in your letter, these premiums would likely be considered salary. *Id.* As such, it is possible that costs of the annual premiums—when combined with standard salary and other compensation—could cause the City Administrator's total salary to exceed the cap prescribed by § 43A.17.[3]

*Requirements For Severance Pay*

It is also uncertain whether such a policy could be deemed severance. Under Minnesota law, severance pay for city employees must not exceed an amount equivalent to one year of pay. Minn. Stat. § 465.72. If a retired or terminated employee dies before all or a portion of the severance pay is disbursed, the sum is paid to a named beneficiary or the deceased's estate. *Id.*

Because it is not known when the City Administrator's employment will end or what her salary will be at that time, it is impossible to know whether the future guaranteed cash value of the policy would exceed the amount equivalent to one year of her pay. Moreover, should the City Administrator die after her separation from employment but before the policy is cashed-out

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[1] Effective Jan. 1, 2017, the compensation limit for local government employees is $167,978. MN Mgmt. and Budget, Local Government Compensation Limits by Year, available at https://mn.gov/mmb/employee-relations/compensation/laws/local-gov/comp-limits/lgcomplimitsbyyear.jsp

[2] Premiums for years five and onwards appear to vary from zero to $8,368.

[3] Cities may request a waiver to pay an employee in excess of 110 percent of the governor's salary. Minn. Stat. § 43A.17, subd. 9(e).

for severance purposes, the policy illustration indicates that the beneficiary would be entitled to as much as $558,320 guaranteed, a sum that would almost certainly be in excess of the amount authorized under § 465.72. *Id.*

Very truly yours,

IAN M. WELSH
Assistant Attorney General

(651) 757-1018 (Voice)
(651) 297-1235 (Fax)

Enclosures: Op. Atty. Gen. 629a (May 9, 1975)
Op. Atty. Gen. 161b-12 (Aug. 4, 1997)

# Opinions of the Attorney General

Hon. WARREN SPANNAUS

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

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

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

**FACTS**

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

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

You then ask substantially the following

**QUESTION**

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

**OPINION**

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

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

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

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

IN THIS ISSUE



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

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

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

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

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

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

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

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

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

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

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

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

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

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

Minn. Op. Atty. Gen. 161B-12 (Minn.A.G.), 1997 WL 471778

Office of the Attorney General

State of Minnesota
161b-12 (Cr. Ref. 161b-4, 397)
August 4, 1997

**School Board Powers: Superintendent: Salary and Benefits: School district powers regarding salary and benefits for superintendent discussed. Authority of Commissioner of Children, Families and Learning discussed. Minn. Stat. §§ 43A.17, 123.33-123.35, 356.24, 356.25, 471.38, 471.665**

*1 Robert J. Wedl
Commissioner
Minnesota Department of Children, Families and Learning
550 Cedar Street
St. Paul, MN 55101-2273

Dear Commissioner Wedl:
In a letter to Attorney General Hubert H. Humphrey III, your office noted that "during 1995, the Office of the State Auditor reviewed school superintendent contracts in the metropolitan area. The OSA found in many of the contracts, violations of Minnesota Statutes including violations of the 95 percent compensation cap set forth in Minn. Stat. § 43A.17, subd. 9. Although some of the school districts have amended their contracts to comply with the findings of the OSA, others have challenged the OSA's application of Minnesota law to their particular contracts."

In order to provide guidance to the educational community, our opinion was sought as to whether school districts are authorized to provide certain benefits to superintendents and whether the value of such benefits must be included in determining whether the superintendent's compensation is within the compensation permitted by Minn. Stat. § 43A.17, subd. 9 which provides in pertinent part:
Subd. 9. Political subdivision compensation limit. The salary and the value of all other forms of compensation of a person employed by a statutory or home rule charter city, county, town, school district, metropolitan or regional agency, or other political subdivision of this state, or employed under section 422A.03, may not exceed 95 percent of the salary of the governor as set under section 15A.082, except as provided in this subdivision. Deferred compensation and payroll allocations to purchase an individual annuity contract for an employee are included in determining the employee's salary. Other forms of compensation which shall be included to determine an employee's total compensation are all other direct and indirect items of compensation which are not specifically excluded by this subdivision. Other forms of compensation which shall not be included in a determination of an employee's total compensation for the purposes of this subdivision are:

(1) 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;

(2) dues paid to organizations that are of a civic, professional, educational, or governmental nature; and

(3) reimbursement for actual expenses incurred by the employee which the governing body determines to be directly related to the performance of job responsibilities, including any relocation expenses paid during the initial year of employment.

*2 The value of other forms of compensation shall be the annual cost to the political subdivision for the provision of the compensation.

For purposes of this inquiry five sets of facts were presented with questions as follows:

## FACTS

The superintendents of several school districts receive, on an annual basis, all or a part of their accrued vacation in the form of cash payments. For example, the superintendent of one School District has the following provisions in his contract:

Basic Work Year

The work year shall be for twelve (12) months, including twenty-eight (28) days of paid vacation annually. All vacation time must be taken within 19 months of the start of the contract year in which it is received or be forfeited. At the Superintendent's option, sixteen (16) of the twenty-eight (28) vacation days may be work days and the Superintendent shall be additionally compensated at the rate of 1/223 for each vacation day worked.

During 1993 and 1994, the superintendent was paid $5,851 and $6,848 respectively in lieu of taking vacation. If these amounts of cashed out vacation were included in the superintendent's salary for the purposes of Minn. Stat. § 43A.17, his salary for these years would have exceeded the 95 percent cap.

The school district believes they have authority to cash out vacation and these amounts are excluded from the "salary" calculation. The school district claims these payments are similar to overtime amounts which are excluded from the calculation under the terms of Minn. Stat. § 43A.17.

Based upon these facts you ask substantially the following questions:

## QUESTION ONE

Does a school district have the statutory authority to convert vacation benefits to cash in situations other than termination of employment?

## OPINION

We answer this question in the affirmative. The situation described is analogous to that addressed in Op. Atty. Gen. 161b-4, May 27, 1980. In that Opinion we concluded that a school district had authority to include in contracts with teachers a provision for a payment based upon unused sick leave and personal business days at the end of the year. We observed there:

Such a plan is simply a method of providing compensation to teachers for services rendered during the contract period. The fact that the compensation is calculated on the basis of accumulated sick leave and unused business days does not alter its essential character. Accordingly, since a school district may agree to compensate its teachers, it may, in the exercise of its discretion, agree to do so in this manner,

The same reasoning would seem applicable to the situation you present. Thus it is our opinion that districts subject to limits such as that discussed below do possess authority to provide compensation to superintendents for unused vacation days.

## QUESTION TWO

If a school district cashes out accrued vacation in situations other than termination of employment, are such amounts included as salary and the value of all other forms of compensation under the compensation limitation found in Minn. Stat. § 43A.17?

## OPINION

*3 We answer this question in the affirmative. Minn. Stat. § 43A.17, subd. 1 defines "salary" as:

.... hourly, monthly, or annual rate of pay including any lump-sum payments and cost-of-living adjustment increases but excluding payments due to overtime worked, shift or equipment differentials, work out of class as required by collective bargaining agreements or plans established under section 43A.18, and back pay on reallocation or other payments related to the hours or conditions under which work is performed rather than to the salary range or rate to which a class is assigned.

In Op. Atty. Gen. 469b, September 14, 1993 we concluded that, while the statute was somewhat ambiguous on this issue, compensation paid for unused vacation at the time of termination should not be considered salary for purposes of the salary cap. We then indicated that such a liquidation of vacation at separation was more analogous to a continuation of salary at the regular rate than to an addition to salary. See also Minn. Stat. § 43A.17, subd. 11 which implies that vacation conversion at termination is more in the nature of severance pay than salary.

Such reasoning would not apply, however, to payment for unused vacation in circumstances of continued employment. Such payments would seem rather to constitute "lump sum payments" included within the above definitions of salary.

It has been suggested that such payments might be considered "overtime" pay, and thus are excluded from salary. However, the concept of overtime in its normal usage relates to hours worked outside of or in addition to, an employee's normal scheduled days or hours of work. See, e.g., Minn. Stat. § 177.25 (work time in excess of 48 hours per week); the American Heritage Dictionary (Second College Edition, 1995) 887 (working hours in addition to those of the regular schedule). That concept would not apply to additional pay received for working on regularly scheduled work days in lieu of taking vacation. For example, unlike a normal overtime situation, it would be impossible to determine which of the superintendent's normal work days could be considered "overtime" when unused vacation is cashed in. Furthermore, it appears that the conversion of vacation to pay is entirely within the discretion of the superintendent, unlike most overtime arrangements which depend upon the specific direction or request of the employer or supervisor. In effect the superintendent here has been given the option of receiving a higher annual salary in exchange for less paid vacation. Thus we believe that the vacation cash-out payments described should be considered salary for purposes of section 43A.17. This conclusion is further supported by the fact that other statutes expressly exclude vacation cash-out payments in defining "salary" for other purposes. Cf., Minn. Stat. §§ 353.01, subd. 10 and 354.05, subd. 35 (1996) which, in defining "salary" for purposes of public employees and teacher retirement, expressly exclude "unused annual leave" payments and "lump sum annual leave" payments.

*4 Even if liquidated vacation were not considered "salary," however, it would seem clearly to fall within the ambit of "all other forms of compensation" as defined in section 43A.17, subd. 9. That subdivision excludes "vacation and

sick leave allowances." However, it does not exclude cash payments received during employment for unused vacation or sick leave. Cf. Minn. Stat. § 43A.17, subd. 11 which excludes from severance pay limitations "payments for accumulated vacation ...."

Thus it is our opinion that payments for unused vacation days in the circumstances described would be included in computing compensation for purposes of the salary cap.

## FACTS

Various school districts offer their superintendents deferred compensation packages. For instance, one school district superintendent's employment contract states the school district "adopted a Deferred Compensation Plan under section 457(f) of the Internal Revenue Code. In accordance with the provisions of that Plan, the School District shall contribute $15,000 annually to that [deferred compensation] Plan on behalf of the Superintendent...."

For each school year 1993/94 and 1994/95, the district contributed $15,000 on behalf of the superintendent to deferred compensation plans pursuant to the employment contract. Of the $15,000 invested in 1993/94, $5,500 was invested in a "457(f) plan" and $9,500 was invested in a 403(b) plan. Of the $15,000 invested in 1994/95, $7,000 was invested in a 457(f) plan and the remaining $8,000 was invested in a 403(b) plan. When these $15,000 deferred contribution payments were combined with the superintendent's salary, it exceeded the 95 percent cap of Minn. Stat. § 43A.17.

Based upon these facts you ask the following question:

## QUESTION THREE

With the exception of an employer contribution totaling $2,000 permitted by Minn. Stat. § 356.24, subd. 1(a)(4)(ii), does a school district have the statutory authority to make an employer contribution or other non-salary amounts into a superintendent's 403(b), 457(f) or other types of deferred compensation plans?

## OPINION

We are unable to provide a categorical answer upon the facts supplied. Minn. Stat. §§ 356.24 and 356.25 severely restrict the authority of school boards to use public funds to purchase supplemental pension or deferred compensation plans. A supplemental plan is defined as a plan "established, maintained, and operated in addition to a primary pension program for the benefit of the governmental subdivision employees." Minn. Stat. § 356.24, subd. 1 (1996).[1]

That subdivision of the statute outlaws employer contributions to supplemental plans, with six specific exceptions. One such exception found in subdivision 1(5) permits an employer to match an employee contribution of up to $2,000 per year, if provided for in the personnel policy of the public employer. This contribution is permitted in one of two circumstances: (i) if it is made to a section 352.96 deferred compensation plan (not applicable to these facts) or (ii) if it is part payment of the premium on a tax-sheltered annuity contract under section 403(b) of the Internal Revenue Code. Minn. Stat. § 356.24, subd. 1(5)(i) and (ii). As applied to these facts, the permissible employer contribution to a 403(b) plan is limited to $2,000, subject to a matching contribution by the employee. We have found no authority, however, to support employer contribution in excess of that amount. Instead, contribution of an amount over this $2,000 if permitted at all, must be considered compensation to the employee deferred at the employee's request. See, Op. Atty. Gen. 59-a-41, February 22, 1984; Minn. Stat. § 123.35, subd. 12 (1996).

*5 The specific details of the Section 457(f) plan referred to are not set out in your letter or the accompanying materials. As we understand 26 U.S.C. § 457(f), it provides that deferred compensation, provided under certain plans of state or local government employers which are not "eligible" for tax deferral under Section 457, is included in taxable income of the recipient "in the first year in which there is no substantial risk of forfeiture of the rights to such compensation." These amounts are subject to a substantial risk of forfeiture if conditioned upon the future performance of substantial services. 26 U.S.C. § 457(f)(3)(B). In the instant case the district states that the superintendent would forfeit all rights to the funds held by the district under the 457(f) plan if the contract is terminated for "cause." However, when the superintendent retires or otherwise terminates employment, the benefits would fully vest.

We are unable to find general statutory authorization for employer contributions to 457(f) plans, which are distinguishable from a section 403(b) annuity contract plan. See 12 U.S.C. 457(f)(2)(B). Furthermore, the only exception contained in Minn. Stat. § 356.24, subd. 1 that appears potentially applicable to such an arrangement is paragraph (a)(4), which permits payments to "a plan that provides solely for severance pay under section 465.72 to a retiring or terminating employee."

Minn. Stat. § 465.72 authorizes payment of severance pay to employees of school districts and imposes limitations thereon. For example, severance payments generally may not exceed the equivalent of one year's pay and must be paid over a period not to exceed five years from retirement or termination. In the case of a "highly compensated employee" as defined in section 465.722, severance pay may not, with certain specified exceptions, exceed six months' pay. See also Minn. Stat. § 43A.17, subd. 11 (1996).

It is possible that a 457(f) plan may be established so as to operate within the authorization for severance pay. To the extent that it is so constructed, it is our view that a district is authorized to provide funds to satisfy its obligations under such a plan.

Thus, it is our view that a school district is authorized to provide funds to a 457(f) plan only to the extent that it is within statutory authority to provide for severance pay and to contribute up to $2,000 to a 403(b) plan.

## QUESTION FOUR

If the school district contributes to the superintendent's 403(b), 457(f) or other types of deferred compensation plan(s), are such amounts salary under Minn. Stat. §43A.17?

## OPINION

The question is answered in the affirmative, with respect to contributions to the 403(b) plan. Minn. Stat. § 43A.17, subd. 9 explicitly provides that "Deferred compensation and payroll allocations to purchase an individual annuity contract for an employee are included in determining the employee's salary."

The plain language of the statute includes as salary, deferred compensation and payroll allocations used to purchase an individual annuity contract such as the 403(b) plan in this case. Up to $2,000 of the contribution may be considered a payment from the employer, as discussed in the answer to Question Three. The remaining contribution would be permitted only as a payroll allocation. However, this distinction is meaningless for purposes of Minn. Stat. § 43A.17, subd. 9, which specifically includes deferred compensation as well as payroll allocations in determining the employee's salary. Thus, the entire amount of contributions to a section 403(b) plan should be included for purposes of the salary cap calculation. See Op. Atty. Gen. 59a-41, February 22, 1984.

*6 It is suggested that these amounts might be excluded pursuant to Minn. Stat. § 43A.17, subd. 9(1) which excludes from the calculation of total the amount of "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." We do not agree. The salary cap is imposed by subdivision 9 upon "salary and the value of all other forms of compensation." The items listed in paragraphs (1), (2) and (3) of that subdivision are excluded from consideration as "other forms of compensation." However, since the payments in question are expressly included as "salary," we do not reach the question whether they might be considered "other forms of compensation."

Furthermore, the payments in question would not seem to constitute a pension or like "benefit." Rather, they would be in the nature of contributions. Consequently, it is our view that the amounts in question are included in the salary cap computation.

Inclusions of contributions to the 457(f) plan would, in our view, not be included, to the extent that the superintendent obtains no vested right thereto prior to termination. As noted above, however, such a plan would be authorized only to the extent that it meets the requirements for severance pay. To the extent that entitlement to the amounts contributed would vest in the superintendent prior to termination, it is our view that those amounts would, at the time of the vesting, be considered "salary" for purposes of the cap.

## FACTS

Many school districts provide to their superintendents "expense reimbursements" for the use of the superintendents' personal vehicles in addition to the mileage or monthly allowances authorized by Minn. Stat. § 471.665. These "expense reimbursements" include payments for insurance, maintenance, fuel and other expenses. One district's superintendent's contract provides as follows:

"VI. Transportation:

Pursuant to Minn. Stat. § 471.665, subd. 3, the School Board shall provide the Superintendent the monthly amount of $387.00 to compensate the Superintendent for business usage of his personal vehicle. All expenses for its operation, including insurance and maintenance, shall be borne by the School District."

You then ask the following question:

## QUESTION FIVE

Does a school district have the statutory authority to pay the insurance, maintenance, fuel, or other expenses of their superintendent's personal vehicle in addition to mileage or periodic reimbursement authorized by Minn. Stat. § 471.665?

## OPINION

We answer this question in the negative. Prior Opinions have clearly established our view that, absent specific statutory authority a political subdivision may not provide an officer or employee a vehicle for personal use or pay the costs associated with such a vehicle. See, e.g., Ops. Atty. Gen. 359b, October 24, 1989, 104a-9, December 28, 1994.

Minn. Stat. § 471.665 permits a mileage or periodic allowance to be paid to an employee for use of a personal automobile "in the performance of official duties."

*7 We are aware of no statute authorizing any payments associated with employees' personal vehicles in addition to those authorized by section 471.665. See Op. Atty. Gen. 104a-9, December 28, 1994. Since the payments of all fuel, insurance, maintenance, etc., would underwrite both business and personal use, such payments would be unauthorized.

Furthermore, insofar as payments to an employee for use of a personal vehicle on official business are intended to reimburse the employee in part for personal expenses associated with ownership and operation of such a vehicle, the payments you describe would result in reimbursing the employee for expenses not incurred.

## FACTS

During the OSA's review of the superintendents' contracts, several contracts were discovered in which the superintendent received expense allowances. For example, one district's contract states as follows:

The Superintendent shall receive an allowance of $615.00 per month for general business related expenses not otherwise covered in this contract. Effective January 1, 1992 and each January thereafter, the allowance for the calendar year shall be increased by 3% per year.

Under this provision, the superintendent received a set payment of $615 or more each month. This amount was paid in addition to the Superintendent being reimbursed for other expenses under the superintendent's contract. There was no procedure under which the superintendent presented for reimbursement receipts or proved any claim for individual expenditures to be reimbursed by this particular allowance. The OSA determined that this monthly payment constitutes "salary" under Minn. Stat. § 43A.17, subd. 9.

You then ask the following question:

## QUESTION SIX

Must expense reimbursements paid to officers or employees of school districts be paid in accordance with Minn. Stat. § 471.38 and related provisions including § 471.391?

## OPINION

We answer this question in the affirmative. Minn. Stat. § 471.38 requires that any account, claim or demand against a school district shall not be allowed until the person claiming payment submits the claim, itemized to the extent possible, in writing, and signs a declaration that the amount is just and correct, and that no part has been paid. This statute covers claims for reimbursement of expenses, and payment of a claim is conditioned on an expense actually having been incurred. See, e.g., Leskinen v. Pucelj, 262 Minn. 461, 115 N.W.2d 346 (1962) (claims of town officers for traveling expenses must be supported by specific showing of each expense incurred); Van Loh v. Waseca County, 265 N.W. 298 (Minn. 1936) (county school superintendent's claims for expenses must be itemized and verified).

On the other hand, if there is no requirement that an expense actually be incurred to trigger "reimbursement," then the only requirement for payment is that the employee be on the payroll. If that is the case, the payment is not an expense reimbursement, but salary.

## QUESTION SEVEN

*8 Does a school district have the authority to pay an "expense allowance" without receiving receipts or proof of claim and exclude the amounts paid from the computation of salary under Minn. Stat. § 43A.17?

## OPINION

We answer this question in the negative. Minn. Stat. § 43A.17, subd. 9(3) only allows an exclusion from the calculation of total compensation for "actual expenses incurred" which have been reimbursed. Accordingly, for a reimbursement to qualify as an amount excluded from an employee's total compensation, it must have been reimbursed in accordance with Minn. Stat. § 471.38.

In the situation you describe, the superintendent's expense allowance is paid monthly, at a rate set by the contract, and escalates each year. It is paid in addition to the "Duty Related Expenses" reimbursed under another provision of the contract. It is not contingent upon the superintendent actually incurring any expenses, but merely being on the payroll. These characteristics demonstrate that the "allowance" is simply an escalating payment of salary.

A similar conclusion was reached in Op. Atty. Gen., 161b-4, Jan. 24, 1989, which stated that any amount paid for a housing allowance was an element of salary authorized by the school board's general authority to compensate its employees. That allowance was therefore included in the calculation of salary for purposes of applying Minn. Stat. § 43A.17, subd. 9.

## FACTS

Split dollar insurance arrangements allow an employer to fund the purchase of cash value insurance for an employee. Under a split dollar life insurance policy, the employer pays premiums, styled as advances. These premiums and the earnings they generate fund the provision of life insurance protection to the employee and, it appears, an accumulating cash value which the superintendent can obtain in lieu of death benefit upon terminating the policy prior to death. Such policies may also permit the owner to borrow against the cash value while the policy remains in force. The advanced premiums are ultimately repaid to the employer from the death benefit if the employee dies while the agreement is in effect. If the agreement terminates before the employee dies, the advanced premiums are repaid from the policy's cash value (assuming it is sufficient). However, during the intervening time, the school district has lost both the use of the funds and any return which could have been received if the funds had been invested.

One District agreed to pay for a $300,000 "split dollar life insurance agreement to provide life insurance protection for the Superintendent." This benefit was in addition to term life insurance. In response to an OSA inquiry concerning the split dollar life insurance policy, the District averred that the split dollar life insurance policy was a whole life insurance policy with ultimately "no cost to the School District." The school district also stated that, under the terms of the Agreement, the School District is ultimately fully reimbursed for its premium contribution. Further, the School District had the protection of a lien against the death benefit to fully reimburse the School District in the event of the untimely death of the superintendent.

*9 Based upon these facts you present substantially the following question:

## QUESTION EIGHT

Does the split dollar life insurance policy have a cost to the school district that must be included in the computation of salary and other forms of compensation for the employee? If so, is the cost to the school district the annual premium payments paid by the school district or is some other method of cost valuation appropriate?

## OPINION

We answer the first part of this question in the affirmative. While Minn. Stat. § 43A.17, subd. 9(3) provides for an exclusion from total compensation for term life insurance, there appears no exclusion for the cost of other forms of life insurance including the "split dollar" insurance you have described. Thus, assuming the district is authorized to provide this type of insurance,[2] its cost must be included in computing compensation pursuant to Minn. Stat. § 43A.17, subd. 9.

While the matter is not entirely clear, it is our view the amount to be included as compensation is the amount of the premium paid by the district less any reimbursement actually received by the district in the year in which the premium is paid. Minn. Stat. § 43A.17, subd. 9 provides that "The value of other forms of compensation shall be the *annual cost* to the political subdivision" (emphasis added).

Thus, while the district may eventually recover part or all of the money paid out for the policy,[3] it is the "annual cost" rather than the net cost over the life of the policy that must be used in computing the value of compensation in any one year for purposes of applying this compensation limit. In that regard, it is our view that each year of the superintendent's contract must be considered separately without regard to the potential that all or part of the district's costs might be recovered at some indefinite future time. Consequently, for any year in which the district receives no reimbursement of the premium payments, the amount to be included in computing the superintendent's compensation would be the total premium paid by the district.

It might be argued that, where the district, in consideration for the premium payment, receives an absolute claim for repayment of the premium at an indefinite future date, the annual cost could, theoretically, be computed as the amount of the premium, less the present value of the lien against the death benefit or cash value for the amount of the premium as determined pursuant to actuarial and accounting tables. We disagree. Even if it were possible to value accurately the right to receive reimbursement at an uncertain future date, we think it is clear that the term "cost" does not imply any netting of the funds given against the value of property received.

## QUESTION NINE

Does the Commissioner of Children, Families and Learning have the authority to compel school districts' compliance with the compensation cap set forth in Minn. Stat. § 43A.17, subd. 9 either directly, by reducing a superintendent's salary, or indirectly, by withholding state school aids from a school district which is not in compliance with the compensation cap statute?

## OPINION

*10 We answer in the negative. The general authority and responsibility for managing the affairs of a school district and for fixing the compensation lies in the school board. See, e.g., Minn. Stat. §§ 123.33 - 123.35. We are aware of no statutory authority for the Commissioner to modify, administratively, compensation fixed by the school board.

Likewise, we are not aware of any authority for the Commissioner to reduce state aids to districts for violations of the section 43A.17 limitations. There are a number of statutory violations for which the Commissioner is expressly directed to reduce aids. See, e.g., Minn. Stat. § 124.15. Transgressions of the salary cap, however, are not included.

Absent any such statutory authority, it is our opinion that the Commissioner is not empowered either to modify a superintendent's contract or to withhold state aids to which a district is otherwise entitled, pursuant to statute. See, e.g.,

Waller v. Powers Dept. Store, 343 N.W.2d 655, 657 (Minn. 1989) (administrative agency can only exercise power in manner prescribed by legislative authority).

Very truly yours,

Hubert H. Humphrey III
Attorney General
Kenneth E. Raschke, Jr.
Assistant Attorney General

Footnotes

1 The next section prohibits establishment of any local pension plan or fund financed from public funds other than a volunteer firefighter's relief association. Minn. Stat. § 356.25 (1996).

2 Minn. Stat. § 471.61 authorizes school districts to insure or protect officers and employees: "under a policy ... or contract,.. of group insurance or benefits, covering life...." Absent other express statutory authority, this section defines this limit of the district's power to provide insurance for employees. See Lily v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995) To the extent that the policy described is not a group policy and provides for benefits in addition to a death benefit, it might be deemed outside the authority granted by the statute.

3 It appears, however, that in the example presented, the district has waived any lien or claim against the superintendent for repayment of premiums paid by this district.

Minn. Op. Atty. Gen. 161B-12 (Minn.A.G.), 1997 WL 471778

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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July 25, 2017

Mr. Mark W. Shepherd
Malters, Shepherd & Von Holtum
727 Oxford Street
P.O. Box 517
Worthington, MN 56187

**Re: Attorney General Opinion Request**

Dear Mr. Shepherd:

I thank you for your correspondence dated June 13, 2017.

You state that the Worthington City Administrator is a former employee of an engineering firm that frequently contracts with the City. While employed by the firm, the Administrator participated in a retirement program that allowed him to purchase shares of the company's stock, which he continues to hold.

Although the City Administrator is not a member of City Council and does not vote, you indicate that he attends City Council meetings. You note that the Administrator once recommended to City Council that it choose the engineering firm for a development project, without first disclosing to the Council that he is a shareholder of the firm. When the Administrator's conflict of interest with the engineering firm came to light, he withdrew from any future involvement in choosing engineering firms.

You ask whether the City Administrator is a "public officer" within the meaning of Minn. Stat. § 471.87. You also ask whether the Administrator can avoid a conflict under § 471.87 if he does not participate in the making of contracts involving the engineering firm, or if the City passes a resolution prohibiting him from participating in contracts involving the firm.

This Office generally does not issue opinions on fact-dependent or hypothetical questions. Op. Atty. Gen. 629a (May 9, 1975) (enclosed). Whether a conflict of interest exists is a question of fact for the governing body to resolve in the first instance. Notwithstanding the above limitations, I can offer the following comments, which I hope you will find helpful.

You first ask whether Worthington's City Administrator is a "public officer" within the meaning of Minn. Stat. § 471.87. It provides:

> Except as authorized in section 123B.195 or 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.

(2015).

The statute does define the term "public officer," and I could locate no authority addressing whether a city administrator is a public officer for the purposes of § 471.87.[1] In deciding whether the City Administrator ought to be considered a "public officer" under § 471.87, the City may find the analysis of incompatible offices instructive.[2] The answer to the question of whether two offices are incompatible sometimes hinges on whether a person is a "public employee" or "public officer."

In *McCutcheon v. City of Saint Paul*, 216 N.W.2d 137 (Minn. 1974), the Minnesota Supreme Court noted that the meaning of the terms "office" and "officer" varied greatly depending on context. *Id.* at 446. It concluded that a person holds an "office" when he 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." *Id.* at 447. Turning to the record before it, the court determined that the police officers at issue were public employees, rather than public officers. *Id.* at 447-48. In so holding, the court attached significance to the fact the police officers' duties were prescribed by others and performed at the discretion of superiors. *Id.* at 448.

The City may also look to other statutes' definitions of the term "public officer." Courts often look to other statutes when determining the meaning of an undefined word or phrase.[3] For example, Minn. Stat. § 609.43 prohibits a public officer or employee from doing an act while knowing that it is in excess of lawful authority. The statute defines "public officer" as:

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[1] Although the City of Worthington is a home-rule charter city, I note that "city administrator" is a "city administrative official" under Minnesota law governing statutory cities. Minn. Stat. § 412.271, subd. 7 (2015).

[2] Minnesota law prohibits public officials from holding certain combinations of public offices. *See, e.g.,* Minn. Const. art IV, § V (state legislator incompatible with any other federal or state office except postmaster or notary public); Minn. Stat. § 273.061 (describing city assessor incompatibility); Minn. Stat. § 481.17 (city attorney incompatibility).

[3] *See, e.g., County of Dakota v. Cameron*, 839 N.W.2d 700, 707 (Minn. 2013) (finding general support for the court's interpretation of "community" in other statutes' definitions of that term); *Dayton Hudson Corp. v. Johnson*, 528 N.W.2d 260, 262 (Minn. Ct. App. 1995) (adopting the definition of "person" in other statutes to determine the meaning of that term in a particular context).

> (a) an executive or administrative officer of the state or of a county, municipality or other subdivision or agency of the state; [or]
>
> . . .
>
> (f) any other person exercising the functions of a public officer.

Minn. Stat. § 609.415 (2015). The term "lawful authority" is determined by state statutes that define or describe a public official's authority. *State v. Serstock*, 402 N.W.2d 514, 517 (Minn. 1987). As such, this Office has previously opined that a public officer who knowingly violates § 471.87 may be subject to the criminal sanctions found in § 609.415. Op. Atty. Gen. 90a-1 (April 22, 1971) (enclosed).

You also ask whether the Administrator can avoid a conflict under § 471.87 if he does not participate in the making of contract involving the engineering firm, or if the City passes a resolution prohibiting him from participating in making such contracts. As noted above, this Office does not issue opinions on hypothetical questions. Op. Atty. Gen. 629a (May 9, 1975). It should be noted, however, that the Office has interpreted the phrase "making a contract" to include not only voting, but also participating in contract discussions and deliberations. Op. Atty. Gen. 90e-6 (June 15, 1988) (quoting *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 236-37 (Cal. Ct. App. 1968)) (enclosed). Should the City ultimately determine that the City Administrator is a "public officer" within the meaning of § 471.87, the Administrator's participation in City Council discussions regarding the selection of an engineering firm may fall within the statute's ambit.

Finally, the City may wish to consider the common law approach to determining whether a public official should be disqualified from participating in proceedings in a decision-making capacity. In *Lenz v. Coon Creek Watershed District*, 153 N.W. 2d 209 (Minn. 1967), the court explained:

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

*Id.* at 219 (emphasis added). The *Lenz* court established a five-factor test used in determining when a public official will be disqualified from participating in proceedings in a decision-making capacity: (1) The nature of the decision being made; (2) the nature of the pecuniary interest; (3) the number of officials making the decision who are interested; (4) the need, if any, to have interested persons make the decision; and (5) the other means available, if any, such as the

opportunity for review, that serve to insure that the officials will not act arbitrarily to further their selfish interests. *Id.*

The court determined that, although the officials who owned land in the district benefited from the official action, they were not *per se* disqualified from voting. *Id.* at 220. The court gave weight to the fact that procedural safeguards were available to members of the public who might challenge the officials' decisions. *Id.*; *see also Traverse County v. Lewis*, 234 N.W.2d 815, 819 (1975) (discussing the *Lenz* facts that weighed in favor of holding that the officials were not *per se* disqualified from voting).

Although *Lenz* involved public officials voting on a non-contractual matter, the City may nevertheless consider the five-factor test in determining whether its City Administrator should withdraw from deliberations involving selection of engineering firms. If the City so chooses, it may wish to focus particularly on whether procedural safeguards are available to members of the public who wish to challenge the Administrator's recommendations or City Council decisions that adopt them.

Very truly yours,

IAN M. WELSH
Assistant Attorney General

(651) 757-1018 (Voice)
(651) 297-1235 (Fax)

Enclosures: Op. Atty. Gen. 90a-1 (April 22, 1971)
Op. Atty. Gen. 629a (May 9, 1975)
Op. Atty. Gen. 90e-6 (June 15, 1988)

CONTRACTS: CONFLICT OF INTEREST: VILLAGES: COUNCILMEN. Minn. Stat. § 471.88 (8) (1969) permits a councilman to maintain contracts with his municipality totaling not more than $1,000 in any year provided the requirements of Minn. Stat. § 471.88 (1) (1969) are met. The governing body of a village under 5,000 population may award part of a municipal project to a village councilman regardless of the dollar consideration of the total project provided that the part awarded is less than $1,000 and that the other requirements of Minn. Stat. §471.88 are met. The criminal provisions of Minn. Stat. § 471.87 apply only to a councilman who has a prohibited financial interest in a contract with his municipality. A councilman who does not have a prohibited financial interest in a contract with his municipality but who knowingly authorizes a contract in which another councilman has a prohibited interest, may be subject to the criminal penalties of Minn. Stat. § 609.43 (1969). Minn. Stat. §§ 471.87, 471.88, 471.88(1), 471.88(5), 471.88(8), 609.43; Stone v. Bevans, 88 Minn. 127,192 NW 520 (1902); Town of Martinsburg v. Butler, 112 Minn. 1, 127 NW 420 (1910), Ops. Atty. Gen. 90a-1, November 18, 1965, 90b, January 23, 1956.

April 22, 1971

90a-1

Mr. Patrick McGuire
Attorney for the Village of Branch
% McGuire and McGuire
Rush City, Minnesota 55069

Dear Mr. McGuire:

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

FACTS

"A" is a councilman in the Village of Branch, a municipality with a population of 875. "X" Corporation is a road contractor. "X" Corporation supplies hot mix asphalt for roads and undertakes general road construction and maintenance. "A" is a son of one of the owners of "X" Corporation and is buying into the corporation.

"X" Corporation is not located in the village, nor is any other company which does this type of work. However, several other companies which offer this service in the area have expressed an interest in performing work for Branch Village.

The total amount of services performed for roadwork will be in excess of $1,000 per year and could run as high as $10,000 or $15,000. The roadwork itself is not done on a yearly contract basis, but is billed out on a monthly basis at an hourly rate for labor and equipment plus material.

You then ask substantially the following

QUESTIONS

1. May "X" Corporation do all of the above work for the village by means of monthly billing, provided each bill is less than $1,000?

2. May "X" Corporation do part of the above work, up to $1,000 per year?

3. Do the criminal provisions of Minn. Stat. § 471.87 (1969) apply to members of the council other than the councilman who has a personal financial interest in the transactions?

OPINION

1. In our opinion the village council may not authorize "X" Corporation to perform the indicated work by means of monthly billings, each in an amount less than $1,000. Such a procedure is prohibited by the terms of Minn. Stat. § 471.87 (1969), and does not fall within any of the enumerated exceptions to that prohibition.

Minn. Stat. § 471.87 (1969) 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 his official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor."

Minn. Stat. § 471.86 (1969) provides, in part:

"Subdivision 1. The governing body of any part authority,

> seaway port authority, town, school district, village, 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. A contract for which competitive bids are not required by law and where the amount does not exceed $1,000 when the commodity or service contracted for is not otherwise available in the affected governmental unit;
>
> * * *
>
> "Subd. 8. Contracts for goods or services when the consideration does not exceed $1,000 in any year and the contracting governmental unit has a population of less than 5,000."

The rule set forth in § 471.87 would become a useless formality in municipalities under 5,000 population if such municipalities could circumvent its provisions simply by dividing forbidden contracts into units, each less than $1,000. Nor do the facts here fit any of the exceptions enumerated in § 471.88. Since none of the prospective contractors, including "X" Corporation, is located in the Village of Branch, Subd. 5 of § 471.88 has no application. Moreover, the $1,000 limitation set forth in Subd. 8 of § 471.88 is an absolute limitation on contracts which can be made with any one councilman in a particular year.

Any exception to the "salutary rule . . . against a public officer being interested in contracts with the municipality"

must be narrowly construed. Town of Martinsburg v. Butler, 112 Minn. 1, 4, 127 N.W. 420, 422 (1910). Accordingly, we hold that Minn. Stat. § 471.88 (8) (1969) permits a councilman to contract with his municipality only when the consideration of all contracts which he has with his municipality under this provision totals less than $1,000 in any one year, regardless of the number of contracts or the dollar consideration of each contract. See Op. Atty. Gen. 90a-1, November 18, 1965, copy enclosed.

Therefore, your first question is answered in the negative.

2. In the absence of a statutory or common law restriction upon the manner of dividing municipal contracts, a village may contract with a councilman for a portion of a municipal project, provided such contract complies with the provisions of Minn. Stat. § 471.88 (1969).

Minn. Stat. § 471.88 (8) (1969) provides no restriction on how a municipality may divide its municipal contracts. No other statutory limitation of this nature has been called to our attention. Accordingly, we conclude that the council may award such part of its road construction contracts to an individual councilman provided that the requirements of Minn. Stat. § 471.88 (1) (1969) are met and, provided further, that the total consideration in contracts which the municipality has with the councilman does not exceed $1,000 in that year.

Therefore, your second question is answered in the affirmative.

3. The criminal prohibition of Minn. Stat. § 471.87 (1969) focuses upon the officer having a personal financial interest in a contract with his municipality; hence those not having a personal interest in such an illegal contract cannot be convicted of an offense under the above statute.

Minn. Stat. § 471.87 (1969) provides, in part:

> "Every public officer who violates this provision is guilty of a gross misdemeanor."

The forbidden act, as provided in this section, is voluntarily to "have a personal financial interest in that sale, lease or contract, or personally benefit financially therefrom." Accordingly, the criminal provisions of Minn. Stat. § 471.87 (1969) apply only to the officer guilty of such conflict of interest. Op. Atty. Gen. 90b, January 23, 1956, copy enclosed.

We call your attention, however, to the fact that such contracts are beyond the lawful authority of a municipality. Stone v. Bevans, 88 Minn. 127, 192 N.W. 520 (1902). Minn. Stat. § 609.43 (1969) provides in part:

> "A public officer or employee who does any of the following, for which no other sentence is specifically provided by law, may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $1,000, or both:
>
> * * *
>
> "(2) In his capacity as such officer or employee, does

> an act which he knows is in excess of his lawful authority or which he knows he is forbidden by law to do in his official capacity; . . ."

Thus, a public officer who knowingly authorizes an unlawful contract, even though he does not receive a personal benefit therefrom, may be subject to the criminal provisions of Minn. Stat. § 609.43 (1969).

Therefore, while we answer your third question, as phrased, in the affirmative, criminal provisions (other than those set forth in § 471.87) are applicable to all the members of the village council.

Very truly yours,

WARREN SPANNAUS
Attorney General

WILLIAM G. PETERSON
Special Assistant
Attorney General

WS:WGP:daw
Enclosures

# Opinions of the Attorney General

Hon. WARREN SPANNAUS

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

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

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

FACTS

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

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

You then ask substantially the following

QUESTION

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

OPINION

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

IN THIS ISSUE



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

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

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

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

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

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

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

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

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

See also Minn. Stat. §§ 8.06 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

Minn. Op. Atty. Gen. 90E-6 (Minn.A.G.), 1988 WL 483427

Office of the Attorney General

State of Minnesota
90e-6
June 15, 1988

*1 CONTRACTS: OFFICERS' INTEREST IN: CITIES: PURCHASE OR LEASE OF REALTY:
Mayor would not come within conflict of interest prohibitions of Minn. Stat. § 471.87 (1986) under facts herein where, as member of city council, he is authorized to take part in his official capacity in making city contract for purchase or lease of building but his financial interest in, or benefit from, such contract does not appear to be voluntary.

Mr. Richard D. Berens
City Attorney
City of Fairmont
P.O. Box 751
100 Downtown Plaza
Fairmont, Minnesota 56031

Dear Mr. Berens:
In your letter to Attorney General Hubert H. Humphrey, III, you direct attention to Minn. Stat. § 471.87 [Public Officers, Interest In Contract; Penalty] (1986) and submit substantially the following:

FACTS

Several years ago a group of investors in Fairmont established a limited partnership whose only asset is a large building which is suitable for industrial development. The general partner in the limited partnership is a local development corporation. Several individuals purchased the limited partnership interests. The current mayor, before becoming involved in municipal government, purchased several of the limited partnership shares. As part of the financing, the limited partners guaranteed a pro rata portion of the debt against the real estate. That debt is secured by a first mortgage held by a local lending institution. The building is currently empty. Owners of the limited partnership interests have, on occasion in the past, been making monthly payments to the lending institution involved.

The city has been considering purchasing the building as part of an industrial development program. The city will, in turn, lease the building to an unrelated private entity. As an alternative, the city may lease the building from the limited partnership and enter into a sublease with a private entity.

When the current mayor was elected, he transferred his limited partnership interest to his adult child. For the purpose of this opinion, it is assumed that the transfer was made in good faith and that the mayor does not retain any incidents of ownership in his partnership interest. He has not been released from his personal guarantee of the note which is secured by a first mortgage against the real estate.

Fairmont is a home-rule charter city which operates under the 'Mayor-Council Plan.' The city charter provides that the city council consists of the mayor and eight aldermen. The mayor has a vote, as a member of the council, only in the case of a tie. It is anticipated that the mayor will refrain from voting on the question of whether the city should purchase or lease the building from the limited partnership, even if there is a tie.

*3 Under Government Code section 1090 the test is whether the officer or employee participated in the making of the contract in his official capacity. Although section 1090 refers to a contract 'made' by the officer or employee, the word 'made' is not used in the statute in its narrower and technical contract sense but is used in the broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. Such construction is predicated upon the rationale that government officers and employees are expected to exercise absolute loyalty and undivided allegiance to the best interests of the governmental body or agency of which they are officers or employees, and upon the basis that the object of such a statute is to remove or limit the possibility of any personal influence, either directly or indirectly which may bear on an officer's or employee's decision.

Id. at 236 and 237, 69 Cal. Rptr. at 262 (footnote and citations omitted). See also, People v. Vallerga, 67 Cal. App. 3d 847, 136 Cal. Rptr. 429 (Cal. Ct. App. 1977), and People v. Sobel, 40 Cal. App. 3d 1046, 115 Cal. Rptr. 532 (Cal. Ct. App. 1974).

We think a similar approach to our statute is supported by the rationale articulated by the Millbrae court, supra. It follows, therefore, that since the mayor under the facts herein is a member of the city council and, as such, is entitled to participate in its discussions and deliberations, he should, for purposes of this statute, be viewed as authorized to take part in 'making' any contract under consideration by that body. Whether he, in fact, exercises that authority is immaterial insofar as this statute is concerned. See, e.g., Ops. Atty. Gen. 90-e-1, May 12, 1976; 90-e-5, November 13, 1969; 470 June 9, 1967; and 90-e-5, February 25, 1954, in which we have consistently held that whether the interested council member actually takes part in making the particular contract in his official capacity is not relevant under this statute. [3] The mayor may, however, be precluded from taking part in making this contract under the common law rule disqualifying public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome. See generally, Lenz v. Coon Creek Watershed District, 278 Minn. 1, 153 N.W.2d 209 (1967).

Although the mayor would, as above-indicated, be authorized to make part in making the contract in question in his official capacity, he would not in our opinion, and absent any information in your letter to indicate otherwise, 'voluntarily have a personal financial interest in that . . . contract or personally benefit financially therefrom,' as contemplated by the statute. It appears from the information in your letter than any financial interest the mayor may be deemed to have in a purchase or lease of the building by the city from the limited partnership exists solely by virtue of his status a personal guarantor of the partnership's indebtedness with respect to such building. However, he cannot be said to 'voluntarily' have this interest at this point, since he does not appear, from the information furnished, to be in a position by his own action to release himself from this commitment so long as the debt remains outstanding.

*4 We think the element of voluntariness should also be read into the financial benefit to which the statute alludes. To hold otherwise could be to subject an officer to criminal penalties for receipt of a benefit which he may, as here, be powerless to avoid. Such a result is absurd and unreasonable and contrary to the presumed legislative intent. Minn. Stat. § 645.17(1) (1986).

We conclude, therefore, that the mayor would not come within the prohibitions of section 471.87 by virtue of the city council's approval of the proposed contract since all elements of the statute do not appear to be present under the facts herein.

Very truly yours,

Hubert H. Humphrey, III
Attorney General
Michael R. Gallagher
Special Assistant

Minn. Op. Atty. Gen. 90E-6 (Minn.A.G.), 1988 WL 483427

Office of the Attorney General

State of Minnesota
90c-6
June 15, 1988

*1 CONTRACTS: OFFICERS' INTEREST IN: CITIES: PURCHASE OR LEASE OF REALTY:
Mayor would not come within conflict of interest prohibitions of Minn. Stat. § 471.87 (1986) under facts herein where, as member of city council, he is authorized to take part in his official capacity in making city contract for purchase or lease of building but his financial interest in, or benefit from, such contract does not appear to be voluntary.

Mr. Richard D. Berens
City Attorney
City of Fairmont
P.O. Box 751
100 Downtown Plaza
Fairmont, Minnesota 56031

Dear Mr. Berens:
In your letter to Attorney General Hubert H. Humphrey, III, you direct attention to Minn. Stat. § 471.87 [Public Officers, Interest In Contract; Penalty] (1986) and submit substantially the following:

FACTS

Several years ago a group of investors in Fairmont established a limited partnership whose only asset is a large building which is suitable for industrial development. The general partner in the limited partnership is a local development corporation. Several individuals purchased the limited partnership interests. The current mayor, before becoming involved in municipal government, purchased several of the limited partnership shares. As part of the financing, the limited partners guaranteed a pro rata portion of the debt against the real estate. That debt is secured by a first mortgage held by a local lending institution. The building is currently empty. Owners of the limited partnership interests have, on occasion in the past, been making monthly payments to the lending institution involved.

The city has been considering purchasing the building as part of an industrial development program. The city will, in turn, lease the building to an unrelated private entity. As an alternative, the city may lease the building from the limited partnership and enter into a sublease with a private entity.

When the current mayor was elected, he transferred his limited partnership interest to his adult child. For the purpose of this opinion, it is assumed that the transfer was made in good faith and that the mayor does not retain any incidents of ownership in his partnership interest. He has not been released from his personal guarantee of the note which is secured by a first mortgage against the real estate.

Fairmont is a home-rule charter city which operates under the 'Mayor-Council Plan.' The city charter provides that the city council consists of the mayor and eight aldermen. The mayor has a vote, as a member of the council, only in the case of a tie. It is anticipated that the mayor will refrain from voting on the question of whether the city should purchase or lease the building from the limited partnership, even if there is a tie.

You ask substantially the following:

## QUESTION

Under the facts herein, would the mayor come within the conflict of interest prohibitions of Minn. Stat. § 471.87 (1986) if the city council, without participation by the mayor, were to approve the purchase or lease of the building from the limited partnership?

## OPINION

*2 In our opinion, your question should be answered in the negative. Lack of participation by the mayor would not be a controlling factor under section 471.87, although it would be relevant under common law conflict of interest restrictions. The statute 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.

None of the exceptions in section 471.88, cited above, is applicable here. That section authorizes the governing body of a city, by unanimous vote, to contract for 'goods or services' with an interested officer of the governmental unit in certain cases, including '[a] contract for which competitive bids are not required by law and where the amount does not exceed $5,000.' See section 471.88, subds. 1 and 5. However, neither a purchase nor a lease of realty is a contract for 'goods or services' within the contemplation of these provisions. See Ops. Atty. Gen. 90-a-1, September 28, 1955 (purchase of realty) and March 12, 1959 (lease of realty) construing comparable prior provisions of this statute.

Since none of the exceptions in section 471.88 is applicable here, we will focus our attention exclusively on section 471.87 in addressing your question. [1] This office has previously ruled that the prohibitions of this statute are operative only where all elements are present. Ops. Atty. Gen. 59-a-32, September 11, 1978, and 90-c-5, January 15, 1960. All elements would be present under the facts herein only if the contract approved by the city council were one which the mayor (1) was authorized to take part in any manner in making in his official capacity, and (2) in which he voluntarily had a personal financial interest or from which he received a personal financial benefit.

While the elements in (1) would, in our opinion, be present under the facts herein if the contract in question were to be approved by the city council, those in (2) would not.

The mayor, as a member of the city council, would, in our view, be authorized to take part in making this contract in his official capacity, notwithstanding the fact that he can only vote in case of a tie. [2] We think that 'making' a contract under this statute should be understood in a broad sense as including not only the actual vote on the contract, but also any council discussions and deliberations preliminary thereto. Such a construction is consistent with the reference in the statute to taking part 'in any manner' in making a contract in official capacity.

We have found no Minnesota case directly in point. However, we are guided by a California case in so construing this statute. In Millbrae Ass'n For Residential Survival v. City of Millbrae, 262 Cal. App. 2d 222, 69 Cal. Rptr. 251 (Cal. Ct. App. 1968), the court had before it a comparable conflict of interest statute which prohibited specified state and local officers and employees from being financially interested 'in any contract made by them in their official capacity, or by any body or board of which they are members.' Addressing the question of what constituted the making of a contract within the contemplation of the statute, the court said:

*3 Under Government Code section 1090 the test is whether the officer or employee participated in the making of the contract in his official capacity. Although section 1090 refers to a contract 'made' by the officer or employee, the word 'made' is not used in the statute in its narrower and technical contract sense but is used in the broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. Such construction is predicated upon the rationale that government officers and employees are expected to exercise absolute loyalty and undivided allegiance to the best interests of the governmental body or agency of which they are officers or employees, and upon the basis that the object of such a statute is to remove or limit the possibility of any personal influence, either directly or indirectly which may bear on an officer's or employee's decision.

Id. at 236 and 237, 69 Cal. Rptr. at 262 (footnote and citations omitted). See also, People v. Vallerga, 67 Cal. App. 3d 847, 136 Cal. Rptr. 429 (Cal. Ct. App. 1977), and People v. Sobel, 40 Cal. App. 3d 1046, 115 Cal. Rptr. 532 (Cal. Ct. App. 1974).

We think a similar approach to our statute is supported by the rationale articulated by the Millbrae court, supra. It follows, therefore, that since the mayor under the facts herein is a member of the city council and, as such, is entitled to participate in its discussions and deliberations, he should, for purposes of this statute, be viewed as authorized to take part in 'making' any contract under consideration by that body. Whether he, in fact, exercises that authority is immaterial insofar as this statute is concerned. See, e.g., Ops. Atty. Gen. 90-e-1, May 12, 1976; 90-e-5, November 13, 1969; 470 June 9, 1967; and 90-e-5, February 25, 1954, in which we have consistently held that whether the interested council member actually takes part in making the particular contract in his official capacity is not relevant under this statute.[3] The mayor may, however, be precluded from taking part in making this contract under the common law rule disqualifying public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome. See generally, Lenz v. Coon Creek Watershed District, 278 Minn. 1, 153 N.W.2d 209 (1967).

Although the mayor would, as above-indicated, be authorized to make part in making the contract in question in his official capacity, he would not in our opinion, and absent any information in your letter to indicate otherwise, 'voluntarily have a personal financial interest in that . . . contract or personally benefit financially therefrom,' as contemplated by the statute. It appears from the information in your letter than any financial interest the mayor may be deemed to have in a purchase or lease of the building by the city from the limited partnership exists solely by virtue of his status a personal guarantor of the partnership's indebtedness with respect to such building. However, he cannot be said to 'voluntarily' have this interest at this point, since he does not appear, from the information furnished, to be in a position by his own action to release himself from this commitment so long as the debt remains outstanding.

*4 We think the element of voluntariness should also be read into the financial benefit to which the statute alludes. To hold otherwise could be to subject an officer to criminal penalties for receipt of a benefit which he may, as here, be powerless to avoid. Such a result is absurd and unreasonable and contrary to the presumed legislative intent. Minn. Stat. § 645.17(1) (1986).

We conclude, therefore, that the mayor would not come within the prohibitions of section 471.87 by virtue of the city council's approval of the proposed contract since all elements of the statute do not appear to be present under the facts herein.

Very truly yours,

Hubert H. Humphrey, III
Attorney General
Michael R. Gallagher
Special Assistant

Attorney General

Footnotes

1 No attempt is made here, nor have we been asked, to consider the application of any conflict of interest provisions of the city's home rule charter. This office does not construe city charter provisions since local, rather than state, officials are in the most advantageous position to recognize and evaluate the factors, many of which are of a peculiarly local nature, which have to be considered in construing such provisions. Op. Atty. Gen. 629-a, May 9, 1975.

2 We assume, in the absence of information to the contrary, that the mayor is otherwise fully authorized to participate in council proceedings.

3 This statute can be contrasted with Minn. Stat. § 10A.07 (1986), which is applicable to conflicts of interest of specified state public officials and provides for disclosure of conflicts and nonparticipation by such officials in actions or decisions relative thereto.

Minn. Op. Atty. Gen. 90E-6 (Minn.A.G.), 1988 WL 483427

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

August 29, 2017

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

Mr. Robert J. V. Vose
Kennedy & Graven, Chartered
470 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, MN 55402

**Re: Attorney General Opinion Request**

Dear Mr. Vose:

I thank you for your correspondences dated July 19, 28 and 31, 2017.[1]

Your July 19, 2017, letter relays the following information: you state that the City of Victoria ("the City") operates under Minnesota's Optional Plan B, council-manager form of government. The council is composed of a mayor and four council members.

In May 2014, several City residents ("plaintiffs") filed lawsuits against then-Mayor Thomas O'Connor, then-council member Lani Basa, and council members James Crowley and Thomas Strigel (collectively, "defendants") alleging violations of Minnesota's open meeting law ("OML"). You state that the City used a League of Minnesota Cities ("LMC") insurance policy to pay for defendants' attorneys' fees. The policy provided $400,000 in coverage.

On March 31, 2016, a Carver County District Court judge found that defendants intentionally violated the OML on multiple occasions. Plaintiffs filed post-trial motions and an appeal. Defendants filed a notice of related appeal. By the time the court issued its order, defendants had exhausted $399,995 of the $400,000 in coverage, so they requested that the City pay appeal-related attorneys' fees. To that end, city council approved several attorneys' fees payments.

In November 2016, one of the plaintiffs, Thomas Funk, unseated defendant-Mayor O'Connor.[2] In February and March of 2017, attorneys' fees again appeared on the council's agenda. Mayor Funk concluded that a conflict of interest precluded him from voting on whether

[1] I am also in receipt of two e-mails from Victoria Mayor Tom Funk and resident Ken Goulart dated July 20, 2017, requesting that this Office defer a response to your July 19, 2017 letter.

[2] Defendant-council member Basa's term expired and she did not seek reelection. Defendant-council members Crowley and Strigel remain on the council.

to approve payment. He also concluded that conflicts of interest precluded council member-defendants Crowley and Strigel from voting.

Based on the above facts, you ask whether Minn. Stat. § 13D.06 authorizes the Victoria City Manager to pay OML-related attorneys' fees on behalf of the City, and, if so, whether § 412.691 limits that authority to $20,000 in total reimbursements. Next, you ask whether the City is required to seek a district court order addressing reimbursement, or if certain combinations of conflicted and non-conflicted council members may vote. Finally, you ask whether a 1992 Attorney General Opinion applies with equal effect to reimbursements under §§ 465.76 and 13D.06, subd. 4(c).[3]

This Office generally does not issue opinions on fact-dependent or hypothetical questions, or questions that turn on interpretation of local enactments. Op. Atty. Gen. 629a (May 9, 1975) (enclosed). Nor does the Office issue opinions on questions arising from ongoing litigation. *See id.* Notwithstanding the above limitations, I can offer the following comments, which I hope you will find helpful.

You first ask whether § 13D.06 authorizes the city manager to pay OML-related attorney's fees. Section 13D.06, subd. 4(c) states that "[a] public body may pay any costs, disbursements, or attorney fees incurred by or awarded against any of its members in an action under [the OML]."

This Office could locate no legal authority determining whether an Optional Plan B city may pay for OML-related attorneys' fees unilaterally through its manager or must do so through council approval. You suggest support for the manager's authority in Victoria's Code of Ordinances, which charges her with responsibility for "planning and procuring adequate insurance coverage," and for the "day-to-day general administration of the affairs of the city." Section 2-159(a)(7). To the extent that the answer is found in city ordinances, this Office generally does not undertake to construe or determine the validity of such enactments. Op. Atty. Gen. 629-a (May 9, 1975) (explaining that interpretation of local enactments is more

[3] Attached to Mr. Goulart's July 20, 2017 e-mail is an edited version of your July 19, 2017 correspondence that includes information about the underlying lawsuit, attorneys' fees payments, and City Council deliberations, among other topics. Mr. Goulart also inserts additional questions about legal standards, attorneys' fees, and conflicts of interest under § 471.87. Although I have considered Mr. Goulart's letter and attachments in drafting this response, I am unable to provide an answer to his questions because, as noted above, the Office does not issue opinions on fact-dependent or hypothetical questions, or on questions arising from ongoing litigation. Op. Atty. Gen. 629a (May 9, 1975).

appropriately left to local officials who are better positioned to evaluate factors to be considered in construing them).[4]

Next, you ask whether certain combinations of conflicted and non-conflicted council members may vote on OML reimbursement. Again, the Office generally does not resolve questions of fact or issue opinions in response to hypothetical questions. Op. Atty. Gen. 629a (May 9, 1975). Whether a conflict of interest exists is a question of fact for the governing body to resolve in the first instance. When determining whether a public official should be disqualified from participating in proceedings in a decision-making capacity, the City may wish to consider *Lenz v. Coon Creek Watershed District*, 153 N.W. 2d 209 (Minn. 1967). In *Lenz*, the court explained:

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

Id. at 219 (emphasis added).

The *Lenz* court established a five-factor test used to determine when a public official will be disqualified from participating in proceedings in a decision-making capacity: (1) The nature of the decision being made; (2) the nature of the pecuniary interest; (3) the number of officials making the decision who are interested; (4) the need, if any, to have interested persons make the decision; and (5) the other means available, if any, such as the opportunity for review, that serve to insure that the officials will not act arbitrarily to further their selfish interests. *Id.*

Applying this test to the record before it, the court determined that although certain officials who owned land in a watershed district benefited from voting on an improvement to the district, they were not *per se* disqualified from voting. *Id.* at 220. In so holding, the court gave weight to the fact that procedural safeguards were available to members of the public who might challenge the officials' decisions. *Id.*; *see also Traverse County v. Lewis*, 234 N.W.2d 815, 819 (1975) (discussing the *Lenz* facts that weighed in favor of holding that the officials were not *per se* disqualified from voting).

If the City determines that certain council members are disqualified from voting, it may wish to consider *Shaw v. Minn. Board of Teaching*, 2001 WL 605096 (Minn. App. June 5, 2001)

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[4] Because the Office does not decide whether Victoria's city manager is authorized to pay for defendant's attorneys' fees, it does not reach your second question regarding whether the manager's authority is limited to payments under $20,000, pursuant to § 465.76.

to decide how to tally an abstention. In *Shaw*, the respondent-Board of Teaching disciplined a teacher for improper conduct at a work-related conference. *Id.* at *1-2. Ten of 11 Board members were present at respondent's disciplinary hearing. *Id.* at *8. Two members abstained from voting because they were legally disqualified from doing so under Minn. Stat. § 214.10, subd. 2. *Id.* Four of the remaining eight members voted in favor of discipline, three voted against it, and one member abstained for reasons other than legal disqualification. *Id.* The board imposed discipline based on the result of the vote. *Id.*

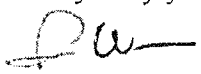
On appeal, the teacher argued that a majority of the eight, non-abstaining board members—or five affirmative votes—was needed to carry the motion to approve his discipline. *Id.* The court rejected this argument, reasoning that the nature of an abstention determines how it should be counted. *Id.* If an abstention is not the result of legal disqualification, the Court held, the abstention may be considered to be agreement with the majority and, therefore, counted with the majority's votes. *Id.* (citing *In re 1989 St. Improvement Program*, 483 N.W.2d 508, 511 (Minn. Ct. App. 1992). Should the City wish to apply *Shaw's* holding to Victoria City Council deliberations, it may first consider whether quorum is present and next determine whether any abstentions are due to legal disqualification or some other reason.

Finally, you ask whether, in the event that a quorum of city council members is not disinterested in voting, the City must seek a district court order addressing OML reimbursement, citing Op. Atty. Gen. 471-A (Dec. 31, 1992) (enclosed). The 1992 Opinion references § 465.76 (1990), requiring court approval of criminal defense reimbursement "[i]f less than a quorum of the governing body is disinterested," subd. 2.

Section 465.76, which continues to govern reimbursement for criminal defense costs, is inapposite to OML reimbursement for two reasons. First, as stated in the 1992 Opinion, "an action to impose punitive sanctions pursuant to the Open Meeting Law is not a criminal prosecution." Second, since the 1992 Opinion was issued, OML's predecessor statute, § 471.705, was amended to expressly grant public bodies discretion to reimburse OML-related

attorneys' fees. 1994 Minn. Laws 1435 (amending Minn. Stat. § 471.05, subd. 2 (recodified as § 13D.06, subd. 4)). Thus, the authority to reimburse a public official for OML defense costs is now exercised within the bounds of OML.[5]

Very truly yours,



IAN M. WELSH
Assistant Attorney General

(651) 757-1018 (Voice)
(651) 297-1235 (Fax)

Enclosures: Op. Atty. Gen. 629a (May 9, 1975)
Op. Atty. Gen. 471-A (Dec. 31, 1992)

[5] With regard to your question regarding whether the December 31, 1992 Opinion applies with equal force to §§ 465.76 and 13D.06, subd. 4(c), as further explained herein, Legislature has amended OML since issuance of the Opinion.

# Opinions of the Attorney General

Hon. WARREN SPANNAUS

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

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

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

FACTS

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

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

You then ask substantially the following

QUESTION

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

OPINION

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

In construing a charter provision, the rules of statutory construction are generally applicable. See 2 McQuillin, Municipal Corporations § 9.22 (3rd ed. 1968). The declared object of statutory construction is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1974). When the words of a statute are not explicit, the legislature's intent may be ascertained by considering, among other things, the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. Id.

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

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

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

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

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

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

IN THIS ISSUE



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

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

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

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

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

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

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

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

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

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

Minn. Op. Atty. Gen. 471-A (Minn.A.G.), 1992 WL 531670

*1 Office of the Attorney General

State of Minnesota
471-a(Cr.Ref.to 59-a-12)
December 31, 1992

CITY COUNCILS; CLAIMS; LEGAL EXPENSE REIMBURSEMENT;
City officials may be reimbursed for expenses in connection with defense of action seeking civil penalty for violations of the Open Meeting Law in certain circumstances. Minn.Stat. §§ 465.76, 466.07, 471.705 (1990)

Mark Dayton
State Auditor
525 Park Street
Suite 400
St. Paul, MN 55103

Dear Mr. Dayton:
In your letter to the office of the Attorney General you set forth substantially the following:

FACTS

On October 20, 1992, Judge Berger of the Sixth Judicial District issued an Order which found that members of the city council of the City of Hibbing had held closed meetings on five separate occasions in violation of the Open Meeting Law, Minn.Stat. § 471.705.[1] His findings included a determination that the four defendant council members had intentionally violated the Open Meeting Law. Two additional council members, who were originally defendants in this action, admitted to two violations of the Open Meeting Law and were subsequently dropped from the lawsuit.

The Hibbing Council passed a resolution to appoint an attorney to defend the six council members, at the expense of the City. A question has arisen regarding the authority of the Hibbing Council to provide legal defense of an action under Minn.Stat. § 471.705.

You then ask substantially the following:

QUESTION

Does a city council have authority to pay for legal defense in a case asserting violation of the Open Meeting Law by city officials, and, if so, what standard should be applied by the council in determining whether to exercise its authority?

OPINION

In our opinion a council in a statutory city does have limited authority in appropriate circumstances to pay from public funds for defense of an Open Meeting Law case. The standard to be employed would depend, in our view, upon whether the city as a governmental unit has an interest in the case apart from the individual officers who are alleged to have violated the statute.

The cases in which allegations concerning violation of the Opening Meeting Law arise are not all alike. In some cases, an action is brought against a government agency itself seeking a declaration that certain meetings must be opened to the public or enjoining closed sessions thereof. See, e.g., Channel 10, Inc. v. Independent Sch. Dist. No. 709, 298 Minn. 306, 215 N.W.2d 814 (1974); Minnesota Daily v. University of Minnesota, 432 N.W.2d 189 (Minn.App.1988).

In some other cases, the plaintiff seeks invalidation of some official action of the governmental unit based in whole or in part upon alleged violations of the Open Meeting Law by the governing body or its members. See, e.g., Moberg v. Ind. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn.1983); Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757 (Minn.1982). In such cases, it might reasonably be determined that it is appropriate to expend public funds for defense of the official acts of the government unit or to seek determination of a proper balance between the public's interest in open government and the interest of the public in the integrity of certain decision-making processes. See, e.g., Minneapolis Star & Tribune Co. v. Housing and Redev. Auth., 310 Minn. 313, 251 N.W.2d 620 (1976) (balancing of public interests involved in permitting certain closed meeting under attorney-client privilege). In many circumstances, such defense may be appropriate even if the case may also involve action against public officers in their individual capacity as in Moberg. Any such circumstance will need to be evaluated, however, on a case-by-case basis to determine to what extent the public interest to be defended coincides or conflicts with the private interests of the officials in avoiding sanctions under section 471.705. See, e.g., Besemen v. Board of Commissioners, 357 N.W.2d 365 (Minn.Ct.App.1984), wherein the court determined that there was no way to separate attorneys' fees incidental to an appeal of the budget of the Clerk of Court's Office from those connected with addressing the clerk's personal salary.

*2 The situation which gives rise to your question does not, however, appear to include such dual interests. Rather, it appears that the case at issue was directed only against the members of the Hibbing City Council personally and sought assessment of and penalties personally against those defendants and their removal from office in accordance with Minn.Stat. § 471.705, subd. 2 (1990). In such circumstances there appears no argument that payment of the attorney's fees would in whole or part directly support defense of the interests of the city per se. Rather, the issue is whether authority exists to expend public funds to defend the personal interests of the defendants in avoiding monetary penalties and ouster from office. [2]

In Op.Atty.Gen. 471–a, April 29, 1983, we determined that, inasmuch as an action seeking penalties for Open Meeting Law violation was penal in nature, Minn.Stat. § 466.07 was not applicable to require a city to reimburse members for attorney's fees in connection with defense of such an action. That opinion was based, in part, upon the determination that an action to penalize a violation of the Open Meeting Law was not an action in tort within the meaning of Minn.Stat. § 466.07, subd. 1a (1982) which required defense and indemnification of an officer or employee in connection with "any tort claim or demand." We also noted that Minn.Stat. § 466.04 excluded claims for punitive damages.

In 1987, Minn.Stat. § 466.07 was amended to repeal subdivisions 1a, 2 and 4 and to rewrite subdivision 1. Act of May 11, 1978, ch. 79, § 2, 1987 Minn.Laws 145. Section 466.07, subd. 1, now read as follows:
Subject to the limitations in section 466.04, a municipality or an instrumentality of a municipality shall defend and indemnify any of its officers and employees, whether elective or appointive, for damages, including punitive damages, claimed or levied against the officer or employee, provided that the officer or employee:
(1) was acting in the performance of the duties of the position; and

(2) was not guilty of malfeasance in office, willful neglect of duty, or bad faith.

Notwithstanding any provisions to the contrary in section 127.03, subdivision 2 or 466.12, this section applies to all school districts, however organized.

It may be argued that the removal of the reference to "tort" and addition of indemnification for "punitive damages," in section 466.07 has broadened the scope of the section to the point, where defense and indemnification of officers charged with open meeting violations would now be required by that section. We do not believe, however, that such is the case. As noted in the 1983 opinion, chapter 466 and section 466.07 were designed essentially for the redress of private injuries in the form of damages while the Open Meeting Law is intended for the protection of public rights and the sanctions provided are intended to secure obedience to the law and punish those who disobey it. We likened the civil penalty provisions of the Open Meeting Law to those provided for a petty misdemeanor. We do not believe that the amendments to section 466.07 change this fundamental analysis. Indeed, while the 1987 amendment deletes the reference to "tort," it specifically incorporates the notion that the defense and indemnification requirements are directed to actions for "damages." [3]

*3 As noted in our 1983 opinion an action to impose sanctions under the Open Meeting Law is wholly unrelated to the establishment of monetary damages. Furthermore, a blanket provision for defense and indemnification of officers charged with violation of the Open Meeting Law would substantially eliminate the intended punitive and coercive effect of those sanctions. Furthermore, any indemnification of the penalties assessed would be directly contrary to the mandate of section 471.705, subd. 2, that violators be subjected to "personal liability." Thus, it continues to be our view that Minn.Stat. § 466.07 does not expressly provide authority for defense and indemnification of officers charged personally with Open Meeting Law violations and we have declined in the past to imply such authority in cases of alleged personal misconduct. See, e.g., Op.Atty.Gen. 125–A–25, July 28, 1980, which concluded that a county could not reimburse an officer or employee for criminal defense costs absent specific statutory authority and Op.Atty.Gen. 125–A–2, June 15, 1917, which reached a similar conclusion with respect to proceedings akin to prosecution to remove officials from office.

Subsequent to our 1980 opinion the legislature enacted Minn.Stat. § 465.76 which provides:
If reimbursement is requested by the officer or employee, the governing body of a home rule charter or statutory city or county may, after consultation with its legal counsel, reimburse a city or county officer or employee for any costs and reasonable attorney's fees incurred by the person to defend charges of a criminal nature brought against the person that arose out of the reasonable and lawful performance of duties for the city or county, provided if less than a quorum of the governing body is disinterested, that such reimbursement shall be approved by a judge of the district court.

It is true that an action to impose punitive sanctions pursuant to the Open Meeting Law is not a criminal prosecution. We do not believe, however, that the legislature intends to require in most circumstances, defense of officers in cases involving claims for damages and to permit, subject to more stringent conditions, reimbursement for defense of criminal charges, but provide no authority at all for defense of actions seeking civil punishment of officers. Therefore, we believe that the authority of cities to reimburse officers for criminal defense may be construed to include as well defense of allegations of violation of the Open Meeting Law. We have noted on a number of occasions that a statutory grant of a power can include, by implication, a lesser power. See, e.g., Ambrozich v. City of Eveleth, 200 Minn. 473, 274 N.W. 635 (1937) (power to purchase includes power to lease); Op.Atty.Gen. 408–C, January 17, 1992 (power to defer entire assessment includes power to defer remaining portion of assessment); Op.Atty.Gen. 624–e–9, August 14, 1984 (power to transfer funds includes power to loan funds). Thus, we believe that the authority to reimburse officials for defense against serious charges "of a criminal nature" which could result in incarceration may include the authority to reimburse for defense of less serious charges which may result in a monetary penalty and removal from office.

*4 Therefore, a city may provide reimbursement for defense of city officials against whom sanctions are sought under the Open Meeting Law pursuant to the authority and subject to the conditions of section 465.76 (1990). The city council may, after consultation with the city attorney, provide reimbursement to an officer, including a council member, for expenses incurred in defending a charge of violating the Open Meeting Law if the charges "arose out of the reasonable and lawful performance" of the public duties. In virtually all cases, this standard would in our opinion require that officer not be guilty of the violation charged if reimbursement is to be granted. The requirements are in contrast to those in

section 466.07 which merely require that the person to be defended was acting in performance of duties and was not guilty of malfeasance, willful neglect or bad faith.

In the instant case, it appears that four of the defendants were found by the district court to have intentionally violated the Open Meeting Law on a number of occasions and that the remaining two original defendants admitted violations as well. Unless these determinations are amended or overturned on appeal, it would seem unlikely that the council could credibly determine that its members were acting in the "reasonable and lawful" performance of their duties in the events giving rise to the action.

There may be situations in which the result of the underlying action are not binding for purposes of evaluating a claim for reimbursement under section 465.76. See, e.g., Douglas v. City of Minneapolis, 304 Minn. 259, 230 N.W.2d 577 (1975), wherein the court concluded that federal court findings in a civil rights action against police officers were not binding in a city's determination to indemnify the officers. In that situation, the Minnesota Supreme Court noted that the city was not itself a party to the underlying action and might reach different conclusions in the indemnity decision than those of the court in the underlying case. Here, while the city was not itself a party to the underlying case, the members of its governing body were. Furthermore, since it appears that a quorum of the council is not disinterested in the decision, any reimbursement would have to be approved by the district court in any event. Thus, it is difficult to see how a finding that the officers were acting in the reasonable and lawful performance of their duties could be supported.
Very truly yours,

Hubert H. Humphrey III
Attorney General
Kenneth E. Raschke JR.
Assistant Attorney General

Footnotes

1 You included with your letter a complete copy of the Findings of Fact, Conclusions of Law and Order for Judgment issued in the case. Claude, et al. v. Collins et al., No. C5-92-300440, St. Louis Co. Dist. Ct.

2 Minn.Stat. § 471.705, subd. 2, specifically mandates that officials found in violation be subject to "personal liability" for civil penalties

3 This language is in contrast to the broader coverage of Minn.Stat. § 3.736, subd. 9 (1990), which requires indemnification subject to certain conditions and exclusions against:
expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any tort, civil, or equitable claim or demand, or expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any claim or demand arising from the issuance and sale of securities by the state, whether groundless or otherwise, arising out of an alleged act or omission occurring during the period of employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee was acting within the scope of employment.
(Emphasis added.)

Minn. Op. Atty. Gen. 471-A (Minn.A.G.), 1992 WL 531670

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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

September 27, 2017

Mr. James J. Thomson
Kennedy & Graven, Chartered
470 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, MN 55402

**Re: Attorney General Opinion Request**

Dear Mr. Thomson:

I thank you for your correspondence dated August 25, 2017.

You state that the City of Brooklyn Park fire department consists of full- time, salaried and paid-on-call ("POC") firefighters. The department is headed up by a fire chief. With respect to POC firefighters, the fire chief has the following responsibilities, duties and roles:

- the fire chief must approve the promotion of a POC firefighter to the position of either POC captain or POC division chief;
- the fire chief must approve the selection of a POC firefighter as a full-time firefighter;
- the fire chief signs off on, and may add comments to, the performance review of a POC firefighter;
- the fire chief can issue an oral or written reprimand to a POC firefighter;
- the fire chief can demote or transfer a POC firefighter;
- with the approval of the city manager, the fire chief can suspend a POC firefighter for up to 30 days in any 12-month period; and
- the fire chief can recommend to the city manager that a POC firefighter be terminated from employment.

You indicate that Brooklyn Park's city charter requires that the City Council approve the appointment of the fire chief. City of Brooklyn Park City Charter § 7.02(2) (2014).

Based on the above facts, you ask whether a city council member, who is also a POC firefighter, is conflicted from participating in the selection and appointment process for a new fire chief.

This Office generally does not issue opinions on fact-dependent questions. Op. Atty. Gen. 629a (May 9, 1975) (enclosed). Having said that, I can offer the following comments, which I hope you will find helpful.

First, Minn. Stat. § 471.87 (2015) generally prohibits city council members from having any personal financial interest in, or personally benefitting from, contracts over which the council has approval authority. Minn. Stat. § 471.88, however, provides that a city council may, by unanimous vote, contract for goods or services with an interested officer of the governmental unit under certain circumstances. *See* Letter from Kenneth Raschke to James Thomson dated February 25, 2005 at 2-3 (concluding that city council may contract with interested council members in certain circumstances under §§ 471.88-471.89) (enclosed). Those circumstances include contracts for which competitive bids are not required. Minn. Stat. § 471.88, subd. 5; Op. Atty. Gen. 90-E (Apr. 17, 1978) (enclosed).

Second, Minnesota courts have concluded that there is no absolute rule disqualifying public officials from participating in all official decisions in which they might have a personal interest. In *Lenz v. Coon Creek Watershed District*, 153 N.W.2d 209 (Minn. 1967), the court explained:

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

*Id.* at 219.

Whether a council member has a personal financial interest in a particular contract is therefore, in many cases, a question of fact that falls outside the scope of this Office's opinion guidance. *See, e.g.*, Op. Atty. Gen. 90a-1 (Oct. 7, 1976) (fact question whether council member has financial interest in contract between city and employer) (enclosed); Op. Atty. Gen. 90C-5 (July 30, 1940) (school board member's interest in contract of spouse is question of fact) (enclosed). It is for the City to determine if a council member's position as a POC firefighter gives rise to a personal financial interest in the hiring of the fire chief that would be his supervisor.

Third, the *Lenz* court held that the following factors should be considered when determining whether a public official should be disqualified from participating in proceedings in a decision-making capacity: (1) The nature of the decision being made; (2) the nature of the pecuniary interest; (3) the number of officials making the decision who are interested; (4) the need, if any, to have interested persons make the decision; and (5) the other means available, if any, such as the opportunity for review, that serve to insure that the officials will not act arbitrarily to further their selfish interests. *Id.*

The Minnesota Supreme Court applied the *Lenz* test in *E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815 (1985). In *E.T.O.*, a bar owner challenged a town board's decision to deny his liquor license renewal application. *Id.* at 816-19. One town board member owned property next to the bar and publicly claimed that his property would be devalued by $100,000 if the liquor license issued. *Id.* at 816. Applying the *Lenz* factors, the Supreme Court found that the town board member's decision was adjudicative in nature, and the interest much greater than that of the officials in *Lenz*. *Id.* at 819. The Court also determined that there was no need for the board member to have voted on the liquor license decision. *Id.* Based on its application of the *Lenz* test, the Court concluded that the interested board member was ineligible to vote on the bar owner's license renewal application. *Id.* at 820.

In addition to reviewing Sections 471.87 and 471.88, the City Council should also consider and apply *Lenz* and *E.T.O.* when determining whether a city council member, who is also a POC firefighter, is conflicted from participating in the selection and appointment of a new fire chief.

I hope this is helpful to you.

Very truly yours,

IAN M. WELSH
Assistant Attorney General

(651) 757-1018 (Voice)
(651) 297-1235 (Fax)

Enclosures: Op. Atty. Gen. 629a (May 9, 1975)
Op. Atty. Gen. 90a-1 (Oct. 7, 1976)
Op. Atty. Gen. 90C-5 (July 30, 1940)
Op. Atty. Gen. 90-E (Apr. 17, 1978)
Letter dated February 25, 2005

# Opinions of the Attorney General

Hon. WARREN SPANNAUS

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

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

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

**FACTS**

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

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

You then ask substantially the following

**QUESTION**

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

**OPINION**

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

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

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

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

IN THIS ISSUE



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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONTRACTS; OFFICERS INTEREST IN; STATUTORY CITIES: Under facts herein, councilmen employed on salary or hourly wage basis by firms contracting with city would not, solely by virtue of such employment, have an interest in such contracts within meaning of Minn. Stat. § 412.311 (1974) as amended. Op. Atty. Gen. 90b-7, Aug. 8, 1969, superseded to extent inconsistent herewith.

October 7, 1976

90a-1

Robert A. Schmitz, Esq.
Saint Peter City Attorney
P.O. Box 77
St. Peter, Minnesota 56082

Dear Mr. Schmitz:

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

FACTS

The City of St. Peter is a statutory city operating pursuant to the provisions of Minn. Stat. ch. 412 (1974), as amended. One member of the city council works part-time for a construction company which regularly bids on street construction in the city and another member works for an automobile dealership which bids on motor vehicle sales to the city and also does repair work on such vehicles. Neither councilman has an ownership interest in the firm employing him nor is an officer or director thereof. Both councilmen are compensated by their respective employers solely on a salary or hourly wage basis. Neither councilman would be acting in a supervisory capacity on behalf of his employer with respect to the performance of any contract between such employer and the city. Moreover, neither councilman would have a personal financial interest in, or personally benefit financially from, such contract within the meaning of Minn. Stat. § 471.87 [Public Officers, Interest In Contract; Penalty] (1974). However, a question arises whether either councilman may, by virtue of his employment, have a direct or indirect interest in such contract within the meaning of Minn. Stat. § 412.311 [Contracts] (1974), as amended.

You ask substantially the following

QUESTION

Under the facts herein, if a contract were entered into between the city and either of the two described firms, would the councilman employed by such firm have, solely by virtue of such employment, an interest in that contract within the meaning of Minn. Stat. § 412.311 (1974), as amended?

OPINION

We answer your question in the negative. Minn. Stat. § 412.311 (1974), as amended, relates to contracts made by councils of statutory cities and provides in part:

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

This office has long held that a councilman employed by a firm which contracts with the municipality does not, solely by virtue of such employment, have an interest in that contract within the meaning of the above quoted statute, and its substantially identical predecessor, provided (1) he has no ownership interest in the firm, (2) he is neither an officer nor director thereof, (3) he is compensated on a salary or hourly wage basis and receives no commission, bonus or other remuneration and (4) he is not involved in supervising the performance of the contract on behalf of his employer and has no other interest in such contract. *See, e.g.*, Ops. Atty. Gen. 90-a-1, Sept. 21, 1955; 90-a, Jan. 21, 1938, 90-a-1, Feb. 13, 1935 and 358-E-8, July 20, 1934. See also, Ops. Atty. Gen. 90-a-1, April 5, 1966; 90-b-7, July 1, 1964; 90-e-2, June 20, 1962; 90-e, June 16, 1952 and March 18, 1940 which construed statutory and charter provisions comparable to the above statute.

Subsequent to the issuance of the foregoing opinions, the Minnesota Supreme Court rendered its decision in John F. Singewald and Another v. Minneapolis Gas Company and Others, 274 Minn. 556, 142 N.W.2d, 739 (1966). That case involved an action to have a village ordinance granting a franchise to a gas company declared void upon

the ground that a member of the council employed by such company was interested in the franchise contract within the meaning of section 412.311, supra. The lower court sustained the validity of the ordinance upon a finding that while the aforementioned council member cast one of the votes required for passage of the ordinance, he acted as a faithful servant of the village and without intent to profit by his vote. Noting that the lower court had made no specific finding on the "determinitive issue" of whether the council member was directly or indirectly interested in the contract, the Supreme Court reversed and remanded for additional findings.

Citing the above decision, this office in Op. Atty. Gen. 90-b-7, Aug. 8, 1969 held that a county commissioner employed by a construction company contracting with the county would, by virtue of such employment, have an interest in that contract within the contemplation of county conflict statutes similar to the one involved herein. We said:

> The Minnesota Supreme Court has held 'direct or indirect interest' in a similarly worded statute . . . to include mere employment by a company which contracts with the county. [Citation omitted.] That case overruled a line of decisions by this office which found non-participating, non-supervisory, salaried employees not to be within the conflict of interest prohibitions.

Upon a re-examination of Singewald, supra, it appears unclear whether the Court reached the conclusion above indicated. Had it done so, there would seem to have been no need to remand the case for further findings as to whether the council member in question had a prohibited interest in the franchise contract since the lower court had already found such member to be an employee of the franchisee. The disposition of the case suggests, rather, that factors other than employment per s

may have to be taken into account in determining whether a prohibited interest is present in any given instance. A similar approach was taken by this office in Op. Atty. Gen. 90-a-1, Feb. 25, 1954 where we held it to be a fact question for determination by the village council whether employment of a councilman by a firm contracting with the village would give rise to a prohibited interest. We said there that the council's inquiry would have to include, among other things, consideration of the nature as well as the terms and conditions of employment.

In view of the uncertainty as to its intended effect relative to this issue, we do not think that Singewald should be deemed to overrule the prior opinions of this office, as stated in the above quoted opinion. Nor is the common law on this subject so settled in other jurisdictions as to dictate such a result. On the contrary, Singewald alludes to the apparent conflict in the decisions of other appellate courts on this question. Moreover, following our opinions of the 1930's, the pertinent statutory language construed thereby was reenacted in substantially identical form by Minn. Laws 1949, ch. 119 indicating legislative approval of such construction. In Re Order of Superintendent of Schools, Nobles Co., 239 Minn. 233, 58 N.W.2d 465 (1953); see generally, 17B Dunnell, Minnesota Digest, Statutes, § 8952 (3rd ed. 1970).

Having in mind not only the foregoing considerations, but also the long reliance placed upon our prior opinions by municipal officials, we conclude that said opinions may continue to be followed until such time as further judicial clarification or legislative action may indicate otherwise. Consistent with those opinions and the decision in

Singewald, it is our view that the bare fact of a councilman's employment by a firm having a contract with the municipality does not, as a matter of law and absent other facts, compel a finding that such councilman has an interest in that contract within the contemplation of section 412.311. To the extent inconsistent with this conclusion, Op. Atty. Gen. 90b-7, Aug. 8, 1969, supra, is hereby superseded.

Whether either of the councilmen in question would have an interest in a contract between the firm employing him and the city involves questions of fact for determination, in the first instance, by the council. In our opinion, however, no such interest is disclosed by the facts presented herein.

Copies of all cited opinions of this office are enclosed.

Very truly yours,

WARREN SPANNAUS
Attorney General

MICHAEL R. GALLAGHER
Special Assistant
Attorney General

WS:MRG:bw
encs.

CONTRACTS: OFFICERS INTEREST IN: Insurance

July 30, 1940

90C-5

Dr. A. B. Caldwell
Deputy Commissioner
Department of Education
State Office Building

Dear Sir:

Yours of the 24th received enclosing letter from the Superintendent at Pillager, Minnesota, requesting our opinion on the following matter and on the following facts:

A lady school board member is the wife of the cashier of the local bank. Said cashier acts as agent for the bank in selling insurance to the school. The commission goes directly to the bank, but the cashier draws a salary and as a stockholder participates in dividends at the bank. Is it legal for the bank under these circumstances to sell insurance to the local school?

Section10395, Mason's Minnesota Statutes of 1927, provides that every officer, etc., who shall voluntarily become interested individually in the sale, lease or contract, directly or indirectly shall be guilty of a gross misdemeanor.

If the profits accruing to the husband by such a transaction are used for the support of the family, we are of the opinion that the lady school board member has an indirect interest in the contract. This was held in a former opinion of this office dated June 28, 1928. We made a similar holding in an opinion dated July 14, 1939, in regard to a bus driver contract made with the husband of a lady school board member. It would be difficult to arrive at any other conclusion.

As stated in the opinion of July 14, 1939, it is better for the school board to avoid the suspicion and criticism which would result from such a contract. In the final analysis, the question of the school board member's interest in the contract is a question of fact to be determined from all the circumstances in each transaction and the family relationship.

Very truly yours

J. A. A. BURNQUIST
Attorney General

MTE:BT

M. TEDD EVANS
Assistant Attorney General

CONTRACTS: OFFICERS INTEREST IN: CITIES: Under facts herein, city councilman who is member of city volunteer fire department has no prohibited conflict of interest under Minn. Stat. § 471.87 (1976) provided that, during time he serves on council, any renewal, extension or modification of contract between city and volunteer fire department is approved by unanimous vote of council as provided in Minn. Stat. § 471.88, subdivisions 1 and 6 (1976).



April 17, 1978

90-E

Mr. Tom Wangensteen
Chisholm City Attorney
Chisholm, Minnesota 55719

Dear Mr. Wangensteen:

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

FACTS

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

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

You ask substantially the following

QUESTION

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

OPINION

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

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

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

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

> Subdivision 1. The governing body of any port authority, seaway port authority, town, school district, county, or city, by unanimous vote, may contract for goods or services with an interested officer of the governmental unit in any of the following cases.
>
> Subd. 6. A contract with a volunteer fire department for the payment of compensation to its members or for the payment of retirement benefits to these members;

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

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

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

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

Very truly yours,

WARREN SPANNAUS
Attorney General

MICHAEL R. GALLAGHER
Special Assistant
Attorney General

WS:MRG:bw

MIKE HATCH
ATTORNEY GENERAL

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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

February 25, 2005

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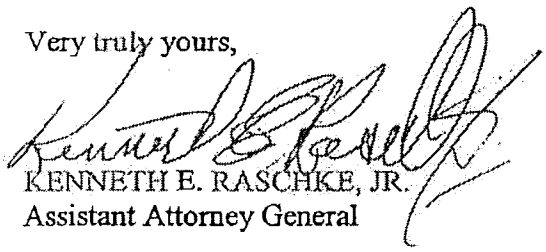
[1] *See also* Minn. Stat. § 471.89 (2004) which imposes certain additional procedural requirements upon contracts approved under Minn. Stat. § 471.88, subd. 5.

## 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

**LEGISLATURE: LIEUTENANT GOVERNOR: INCOMPATIBLE OFFICES:** Last elected president of state senate becomes lieutenant governor as a result of vacancy in that position; strong argument can be made president of senate cannot simultaneously serve as state senator and lieutenant governor in light of lieutenant governor's executive branch functions. Minn. Const. art. IV §§ 5, 15, art. V §§ 3, 5 (2017); Minn. Stat. §§ 3.05, 4.04, subd. 2, 9.011, 15B.03 (2016).

280k

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

SUITE 1100
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TELEPHONE: (651) 282-5700

December 21, 2017

Ms. Kimberly Slay Holmes
General Counsel to Governor Mark Dayton
130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

***Via Email and U.S. Mail***

Dear Ms. Holmes:

I thank you for your letter dated December 12, 2017.

## BACKGROUND

On December 7, 2017, United States Senator Al Franken announced his intention to resign as a United States Senator. Minnesota Statutes Section 204D.28, subdivision 11 provides that, in the event of a vacancy in the Office of United States Senator for Minnesota, the Governor may appoint a successor to fill the vacancy. On December 13, 2017, Governor Mark Dayton announced that he intended to appoint Lieutenant Governor Tina Smith to fill the vacancy created by Senator Franken's resignation. The appointment of Lieutenant Governor Smith would create a vacancy in the position of lieutenant governor.

Article V, Section 5 of the Minnesota Constitution states that the "last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office." Senator Michelle Fischbach is the President of the Minnesota Senate. Shortly after Governor Dayton announced his intention to appoint Lieutenant Governor Smith to the United States Senate seat, Senator Fischbach stated that she will hold both the position of senator and lieutenant governor. She refers to a recent opinion issued by Senate Counsel, which relies on an 1898 decision of the Minnesota Supreme Court discussed below. On December 13, 2017, Senator Fischbach stated: "I've been told by Senate Counsel the Minnesota Constitution allows the Senate President to serve both roles so that's what I plan to do for the remainder of Gov. Dayton's term."

In contrast, Governor Dayton argues that Senator Fischbach cannot simultaneously hold both positions. The Governor refers to a provision of the Minnesota Constitution that prohibits one person from holding two offices in different branches of government. At his December 13, 2017 news conference announcing his intention to appoint Lieutenant Governor Smith to the United States Senate seat, Governor Dayton said: "I am told by my in-house legal counsel that the constitution and the state statutes are clear that the . . . president of the senate becomes the lieutenant governor and that she cannot hold two offices simultaneously."

Senate Majority Leader Paul Gazelka states that he requested Governor Dayton to seek a legal opinion from the Attorney General's Office regarding this matter.[1] Article V, Section 3 of the State Constitution provides that the Governor "may require the opinion in writing of the principal officer in each of the executive departments upon any subject" relating to their duties. On behalf of the Governor—and in accordance with the request of the Senate Majority Leader—you ask for a legal opinion from this Office regarding two questions arising out of the Governor's appointment of the Lieutenant Governor to fill a vacancy in the position of United States Senator from Minnesota. Specifically, you ask whether under the Minnesota Constitution (1) the last elected president of the state senate becomes lieutenant governor as a result of a vacancy in the position of lieutenant governor; and (2) if she becomes lieutenant governor, the president of the senate can simultaneously serve as state senator and lieutenant governor.

## LEGAL ANALYSIS

As noted above, Article V, Section 5 of the Minnesota Constitution states that the "last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office." Accordingly, the answer to your first question is that the president of the senate becomes lieutenant governor if there is a vacancy in that office.

As to your second question, in 1898, the Minnesota Supreme Court considered whether an individual may simultaneously serve as a state senator and lieutenant governor. *State ex rel. Marr v. Stearns*, 75 N.W. 210 (Minn. 1898), *rev'd on other grounds sub nom. Stearns v. State of Minn.*, 179 U.S. 223 (1900). The case involved Governor Knute Nelson who resigned to become a United States Senator. *Id.* at 211. Pursuant to the provisions of the Minnesota Constitution in effect at that time, Lieutenant Governor David Clough became governor, and the president pro tempore of the senate, Senator Frank Day, became lieutenant governor. *Id.* For the remainder of the legislative session, Mr. Day simultaneously served as lieutenant governor and state senator. *Id.*

In 1898, the position of lieutenant governor had no executive branch responsibilities. *Id.* at 213. Rather, as ex officio president of the senate, the lieutenant governor's sole constitutional duties were "to preside over the senate" and "to authenticate by his signature the bills passed by the senate." *Id.* at 211, 213.

A lawsuit was filed challenging Mr. Day's ability to be a state senator at the same time he was lieutenant governor. The Court concluded that Mr. Day could serve simultaneously in both positions. *Id.* at 212–14. The Court found no language in the Minnesota Constitution that "imperatively require[d]" Mr. Day to vacate his senate seat. *Id.* at 213. The Court reasoned that a contrary conclusion "cannot be sustained without disregarding both the letter and spirit of the

[1] Minnesota Senate Republicans (@mnsrc), Twitter (Dec. 14, 2017, 2:27 p.m.), https://twitter.com/mnsrc/status/941434602614415361 (video of Senate Majority Leader Gazelka stating, "I think Senator Fischbach has the right to do both just like it's been done in the past, but that's what we're gonna have to wait and see. I did ask the Governor to get an opinion from the Attorney General, he agreed that that's a good idea. We're waiting for that.")

constitution, when considered as a whole, and without adopting a construction well calculated, when party strife and spirit are intense, to disturb the public peace and order." *Id.* at 212.

The Court also determined that the Minnesota Constitution recognized "the fact that a senator may be a lieutenant governor" because the Constitution prohibited the lieutenant governor from acting "as a member of the court" during an impeachment trial against a governor. *Id.* at 214 (citing Minn. Const. art. XIII, § 4). The Court reasoned that only senators can act as members of the court in an impeachment trial, so "[t]his prohibition would be wholly unnecessary, except upon the assumption that a senator did not vacate his office on becoming lieutenant governor." *Id.* The provision referred to by the Court was removed from the State Constitution in 1974 because it was believed to be "obsolete" and/or "inconsequential." *See* Minn. Const. art. VIII (1976); Minnesota Constitutional Study Commission, Final Report at 14, 47, https://www.leg.state.mn.us/docs/2012/mandated/120607.pdf (last visited December 21, 2017); Statement of Purpose and Effect of Amendment No. 1 - Revise Organization and Language of Constitution, Finance and Commerce, Oct. 18, 1974 at 5 (same); *see also* 1974 Minn. Laws ch. 409 at 801 (legislation placing constitutional amendment on ballot).

You note that Article IV, Section 5 of the Minnesota Constitution states that "[n]o senator or representative shall hold any other office under the authority of the United States or the state of Minnesota, except that of postmaster or of notary public." This or a similar provision has been in the State Constitution since its ratification by Congress in 1858.[2] The 1898 opinion of the Supreme Court concluded that this provision was not violated by the state senator who simultaneously served as lieutenant governor. In so doing, the Court reasoned in part as follows:

> It is obvious that this section of the constitution does not, explicitly or otherwise, make the offices of lieutenant governor and senator incompatible, or a senator ineligible to the office of lieutenant governor during the term for which he was elected; for it is otherwise expressly provided by the constitution, —that a senator who is president pro tempore shall become lieutenant governor in case of a vacancy. Indeed, this particular section has but little relevancy to the question under consideration, except to emphasize the necessity of construing the several provisions of the constitution as a harmonious whole, and not each section by itself.

*Marr*, 75 N.W. at 214.

[2] In 1858, as well as at the time of the *Marr* decision, the Constitution stated in relevant part:

> No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States, or the state of Minnesota, except that of postmaster ....

Minn. Const. art. IV, § 9 (1858); *Marr*, 75 N.W. at 211, 214.

A related and longstanding common law doctrine in Minnesota prohibits a public official from holding two offices that are factually "incompatible" with each other. *See, e.g., Kenney v. Goergen*, 31 N.W. 210, 211 (Minn. 1886). Public offices are incompatible under the common law "when their functions are inconsistent, their performance resulting in antagonism and conflict of duty, so that the incumbent of one cannot discharge with fidelity or propriety the duties of both." *State ex rel. Klitzke v. Indep. Consol. Sch. Dist. No. 88*, 61 N.W.2d 410, 419 (Minn. 1953). In *Marr*, the Supreme Court reasoned that its opinion (that the state senator could simultaneously serve as lieutenant governor) was "further supported by the character of the duties of lieutenant governor and the president pro tempore," which at that time were "identical." *Marr*, 75 N.W. at 213. As noted above, the lieutenant governor's sole constitutional duties in the 1890s were to preside over the senate and to authenticate the bills passed by the senate. *Id.* The Court stated that the lieutenant governor's classification as an executive branch official "is simply one of convenience" as "*he is not authorized to exercise a single power or perform a single duty . . . properly belonging to the executive department.*" *Id.* (emphasis added).

The duties of the lieutenant governor have changed since 1898. In 1972, the State Constitution was amended to provide that the lieutenant governor is no longer the ex officio president of the senate. *See* Minn. Const. art. V, § 6 (1973); *see also* 1971 Minn. Laws ch. 958, § 2, at 2034 (legislation placing constitutional amendment on ballot). An Executive Branch Committee Report in November, 1972 stated that if the constitutional amendment was adopted (which it was), "the lieutenant governor would become a purely executive officer without legislative functions." Minnesota Constitutional Study Commission, Executive Branch Committee Report at 3, https://www.leg.state.mn.us/docs/2012/mandated/120607.pdf (last visited Dec. 21, 2017). The Report further stated that "[t]he lieutenant governor would then be in a position to be a full-time member of the executive branch of state government" and "the duties of the office could be substantially increased by the legislature or by the governor through executive order." *Id.* at 5.

It is no longer the case today, as the Supreme Court found it was in 1898, that the lieutenant governor performs no duties "belonging to the executive department." Although the lieutenant governor still calls the senate to order at the beginning of each session, Minn. Stat. § 3.05, the senate now elects its own presiding officer. Minn. Const. art. IV, § 15. In 1973, the lieutenant governor was designated as a member of the Executive Council,[3] 1973 Minn. Laws ch. 394, § 1, at 858 (codified as Minn. Stat. § 9.011), and in 1974 was made the chair of the Capital Area Architectural and Planning Board, 1974 Minn. Laws ch. 580, § 4, at 1442 (codified as Minn. Stat. § 15B.03). In addition, a law enacted by the Legislature in 1971 states that "[t]he governor may delegate to the lieutenant governor such powers, duties, responsibilities and functions as are prescribed by law to be performed by the governor" as long as they are not specifically imposed upon the governor by the Constitution. 1971 Minn. Laws ch. 949, § 1, at 1981 (codified as Minn. Stat. § 4.04, subd. 2).

[3] The other members of the Executive Council are public officials in the executive branch of government: the Governor, Attorney General, Secretary of State, and State Auditor. Minn. Stat. § 9.011, subd. 1.

Subsequent to these changes in Minnesota law, in 1976 Lieutenant Governor Rudy Perpich filled a vacancy in the office of the governor, and in turn, the then-presiding officer of the senate, Alec Olson, became lieutenant governor. In a memorandum dated December 17, 1976, the Minnesota Attorney General's Office advised Mr. Olson to resign from the Senate upon taking the oath of office as lieutenant governor, noting that the "rationale of [*Marr*] is sufficiently weak to raise serious doubts as to whether it would be adopted by the Court if the issue were presented to it again." *Id.* at 1 n.1. Mr. Olson then resigned from his position as a state senator upon becoming lieutenant governor. Minnesota Legislative Reference Library, *Minnesota Lieutenant Governors, 1858-present*, https://www.leg.state.mn.us/lrl/mngov/ltgov (last visited Dec. 21, 2017).[4]

The current responsibilities of the lieutenant governor are therefore materially different than they were in 1898 and involve powers exercised by the executive branch of government. Unlike in 1898 when *Marr* was decided, the lieutenant governor is now expressly charged by statute with executive branch functions, including service on the Executive Council, and may be delegated executive branch responsibilities directly by the governor. *See supra* at 4–5. *See also State v. Victorsen*, 627 N.W.2d 655, 662–63 n.2 (Minn. App. 2001) (concluding that "changes in relevant statutes" warranted a different conclusion from the one rendered in the court's prior precedent). Under the current constitutional and statutory framework, potential conflicts exist if the same individual were to fulfill both executive and legislative responsibilities (*e.g.*, if the lieutenant

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[4] Prior to the changes in the duties of the lieutenant governor, some state senators who filled a vacancy in the office of lieutenant governor or took the title "acting lieutenant governor" continued to simultaneously serve as a state senator, at least briefly. For example, President Pro Tempore of the Senate Charles Adams became lieutenant governor in late June or early July 1929, when Lieutenant Governor William Nolan resigned after being elected to the United States House of Representatives. Mr. Adams continued to serve as a state senator, but the senate never met in session during Mr. Adams's term as lieutenant governor. *Id.*; Minnesota Legislative Reference Library, *Adams, Charles Edward "Chas., Charlie,"* https://www.leg.state.mn.us/legdb/fulldetail?ID=10842 (last visited Dec. 21, 2017).

President Pro Tempore of the Senate William Richardson served as "Acting Lieutenant Governor" from late August 1936 to early January 1937, after Governor Floyd B. Olson died, and Lieutenant Governor Hjalmar Petersen became governor. Mr. Richardson was never sworn in as lieutenant governor and voted as a member of the senate throughout an extra session that was convened in December 1936. *Minnesota Lieutenant Governors, 1858-present*; Sen. Journal, Extra Sessions 1936-1937, December 17–23, 1936, at 4–98.

President Pro Tempore of the Senate Archie Miller was sworn in as lieutenant governor on May 6, 1943, after Governor Harold Stassen resigned, and Lieutenant Governor Edward Thye became governor. Mr. Miller resigned from the senate four days after being sworn in as lieutenant governor. The senate was not in session during this four-day period. *Id.*; Minnesota Legislative Reference Library, *Sessions of the Minnesota State Legislature and the Minnesota Territorial Legislature, 1849-present*, https://www.leg.state.mn.us/lrl/history/sessions (last visited Dec. 21, 2017).

governor in a legislative capacity considers whether to vote in favor of legislation proposed by the governor or whether to override the governor's veto of legislation).[5]

The simultaneous discharge of executive and legislative branch functions implicates the incompatibility doctrine, as well as principles of separation of powers. Any dispute regarding the lieutenant governor exercising these dual functions under current law can ultimately only be resolved by judicial decision. Having said that, for the reasons discussed above, a strong argument can be made that the 1898 decision of the Minnesota Supreme Court in *Marr* does not control the outcome of this dispute in light of the subsequent changes to the duties of the lieutenant governor.[6]

Very truly yours,

Alan J. Gilbert

ALAN I. GILBERT
Solicitor General

(651) 757-1450 (Voice)
(651) 282-5832 (Fax)

cc: The Honorable Paul Gazelka, Senate Majority Leader, *via Email and U.S. Mail*
The Honorable Michelle Fischbach, President of the Senate, *via Email and U.S. Mail*
The Honorable Thomas Bakk, Senate Minority Leader, *via Email and U.S. Mail*

[5] I also note that the vacancy in the office of lieutenant governor in this particular situation is not "temporary." *See Marr*, 75 N.W. at 214 (recognizing that vacancy in the office of lieutenant governor could be "temporary"). It is publically reported that Governor Dayton expects to appoint Lieutenant Governor Smith to the United States Senate in early January 2018, at which time the vacancy in the office of lieutenant governor would occur. Thus, the remaining term of the lieutenant governor's position will be for a time period of approximately one year during which the entirety of the 2018 legislative session will take place. Sen. Journal, May 22, 2017, at 6101; House Journal, May 22, 2017, at 7022 (providing that 2018 legislative session commences on February 20, 2018).

[6] A similar conclusion was reached in an opinion that Senate Counsel provided to the then-President of the Senate Alec Olson in November 1976. Senate Counsel recognized that subsequent to the Supreme Court's 1898 decision, changes had been made to the lieutenant governor's duties. He therefore concluded that "[i]n view of this change in the character of the lieutenant governor's duties, the Minnesota Supreme Court, if again faced with the question, would have some justification for ruling that the presiding officer of the Senate can no longer retain his Senate seat upon the occurrence of a vacancy in the office of lieutenant governor." *Id.* at 4.

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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TELEPHONE: (651) 297-2040

March 5, 2018

Mr. Robert J. V. Vose
Kennedy & Graven, Chartered
470 U.S. Bank Plaza
200 South Sixth Street
Minneapolis, MN 55402

**Re: Attorney General Opinion Request**

Dear Mr. Vose:

I thank you for your correspondence dated February 15, 2018. As noted in your letter, this opinion request is the second of two requests arising from ongoing litigation involving the City of Victoria's City Council. By letter dated August 29, 2017, this Office responded to your first request.

You report the following: Thomas Funk, mayor of the City of Victoria, was a plaintiff in an Open Meeting Law ("OML") lawsuit against members of Victoria City Council. The lawsuit is now pending before the Minnesota Supreme Court. You state that Mayor Funk did not petition the Minnesota Supreme Court for further review, suggesting that he is no longer party to the suit.[1]

You anticipate that the council member-respondents will request reimbursement for appeal-related attorneys' fees. You state that Mayor Funk opposes reimbursement, and has requested that the reimbursement issue be placed on the Council's agenda for a vote. You also indicate that Mayor Funk previously declared that he had a conflict of interest regarding the reimbursement issue, but now intends to vote on the matter.

Based on the above, you ask whether Mayor Funk is conflicted from voting on the reimbursement issue, and, if so, whether the mayor should be prohibited from voting. You also ask how Mayor Funk's vote should be tallied if it is determined that he has a conflict of interest, but votes anyhow.

[1] Although Mayor Funk was not named in petitioners' Petition for Further Review, the Minnesota Supreme Court named him as a co-petitioner when issuing its order granting review. *Compare* Petition – Further Review, *Funk, et al. v. O'Connor, et al.*, A16-1645 (Minn. Ct. App. 2017), *with* Order – PFR – Grant, *Funk, et al. v. O'Connor, et al.*, A16-1645 (Minn. 2018).

As indicated in its August 29, 2017 letter to you, this Office generally does not issue opinions on fact-dependent or hypothetical questions. Op. Atty. Gen. 629a (May 9, 1975) (enclosed). Nor does the Office issue opinions on questions arising from ongoing litigation. *See id.* Notwithstanding the above limitations, I can offer the following comments, which you may find helpful.

You first ask whether Mayor Funk is conflicted from voting on the question of whether the City should reimburse the respondent-council members' attorneys' fees. Whether a conflict of interest exists is a question of fact for the governing body to resolve in the first instance. When determining whether a public official should be disqualified from participating in proceedings in a decision-making capacity, the City may wish to consider *Lenz v. Coon Creek Watershed District*, 153 N.W. 2d 209 (Minn. 1967), which was discussed in this Office's August 29, 2017 response to your first opinion request.

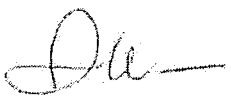
You next ask whether Mayor Funk should be prohibited from voting on the reimbursement issue if it is determined that he has a conflict of interest. You also ask how Mayor Funk's vote should be tallied if he is found to have a conflict of interest, but votes anyhow. Again, this Office generally does not issue opinions on fact-dependent or hypothetical questions. Op. Atty. Gen. 629a (May 9, 1975) (enclosed). However, in analyzing these questions, the City may wish to consider the Minnesota Supreme Court's holding in *E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815 (Minn. 1985).

In *E.T.O.*, a town resident voiced opposition to a bar's liquor license renewal because the bar was said to have decreased the value of the resident's land. *Id.* at 816. After voicing his opposition, the resident successfully ran for town board. *Id.* When the bar's license application was put before the board for a vote, the resident-council member voted in the majority, 2-1, against the application. *Id.*

The bar petitioned the state district court for relief, arguing that the resident-council member was conflicted from voting on its liquor license application. *Id.* at 817. The district court ruled in favor of the bar, voiding the board's vote, and ordering it to reconsider the bar's license application without the conflicted council member's participation. *Id. See also* Op. Atty. Gen. 59a-32 (Sept. 11, 1978) (participation by a conflicted council member may be cause for invalidation of a council's action) (enclosed). The Minnesota Court of Appeals reversed, but the Minnesota Supreme Court reversed again, ruling in favor of the bar. *Id.* at 820. The court held

that because the resident-council member admitted that he had an interest in the outcome of the bar's license application, he should not have been permitted to vote. *Id. Cf. 1989 St. Improvement Program v. Denmark Twp.*, 483 N.W.2d 508, 510 (Minn. App. 1992) (a city official should avoid impropriety and the appearance of impropriety).

Very truly yours,



IAN M. WELSH
Assistant Attorney General

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Enclosures: Op. Atty. Gen. 629a (May 9, 1975)
Op. Atty. Gen. 59a-32 (Sept. 11, 1978)

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



May 9, 1975

629-a
(Cr.Ref. 13)

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

Dear Mr. Sweeney:

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

FACTS

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

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

You then ask substantially the following

QUESTION

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

tricts of 10 percent of the average population per district?

OPINION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

WARREN SPANNAUS
Attorney General

THOMAS G. MATTSON
Assistant Attorney General

WS:TGM:bw

CITIES: ZONING: INTEREST OF COUNCILMAN: Council not prevented by Minn. Stat. § 471.87 from rezoning property owned by council member or his client. Council member may not participate in consideration. Minn. Stat. §§ 412.311, 471.87 (1976).

September 11, 1978

59a-32
(Cr. Ref. 90)

Ms. Deborah Hedlund
Minnetonka City Attorney
14600 Minnetonka Boulevard
Minneapolis, Minnesota 55343

Dear Ms. Hedlund:

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

FACTS

Minnetonka City councilman X is the owner of certain property located within the City of Minnetonka, a home rule charter city. On October 20, 1975 such property was rezoned from R-1 to R-2 and B-1. Councilman X took no part in the portion of the meeting involving the rezoning. In August 1977, Councilman X applied again to have the lots rezoned. Following a public hearing and conditional approval of the application by the Planning Commission, Councilman X contracted to sell part of the property contingent upon rezoning. On November 21, 1977, a proposed ordinance to rezone the property was tabled.

On November 28, 1977, the prospective purchaser Y applied for rezoning of the property based upon the previously submitted site plans. Following approval of Y's application by the Planning Department, the council approved the application on January 23, 1978 and ultimately adopted the rezoning ordinance on February 21, 1978.

Councilman X did not participate in any council votes affecting the rezoning. His application to rezone a portion of the property is still pending.

You then ask substantially the following

QUESTION ONE

Is a rezoning, by a city council, of property owned by a member of the council, precluded by the prohibitions of Minn. Stat. § 412.311, or § 471.87.

OPINION

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

Minn. Stat. § 471.87[1] 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 his official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor.

(Emphasis added.)

This office has previously ruled that the prohibitions of this statute are operative only where all elements are present. Op. Atty. Gen. 90c-5, Jan. 15, 1960. Plainly, section 471.87 only precludes certain officers from interest in or benefits from a government "sale, lease or contract." Municipal zoning is justified as an exercise of the delegated police power to enact ordinances for the health, safety and welfare of the citizenry. See, e.g., State ex rel. Berndt v. Iten, 259 Minn. 77, 106 N.W.2d 366 (1960); Riges v. City of St. Paul, et al., 240 Minn. 522, 62 N.W.2d 363 (1953). As such, it cannot be seen as a matter of "sale, lease or contract" within the meaning of Minn. Stat. § 471.87.

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[1] Minn. Stat. § 412.311 (1976), which imposes similar restrictions upon council members, is applicable only to statutory cities.

A similar result was reached in Op. Atty. Gen. 90E-4, Aug. 18, 1949 wherein it was determined that Minn. Stat. § 412.311, which prohibited any direct or indirect interest of village council members in village contracts, did not preclude issuance of a beer license to a councilman.

It is significant to note that, by virtue of required residence in the city, council members are affected, to their benefits or detriments, by many exercises of the local police power including zoning. To hold that a city council is powerless to act whenever an ordinance will affect the individual interests of any member would render the police power wholly ineffectual in many situations.

Thus, it is our opinion that Minn. Stat. § 471.87 does not operate to prohibit enactment or amendment of a zoning ordinance which affects property of a council member. Substantial self-interest by a council member may, however, disqualify the member from participation in the council proceedings involving the zoning. Participation by such an interested member may be cause for invalidation of the action. See generally, Ops. Atty. Gen. 477B-34, June 19, 1967 and 396g-16, Oct. 15, 1957 (copies enclosed); Rathkopf, The Law of Planning and Zoning, § 22.03; 4 McQuillin, Municipal Corporations, §§ 13.35, 13.35a. As the court noted in Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 15, 153 N.W.2d 209, _____ (1967):

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

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

(Footnote omitted.)

These standards would, in our view, preclude the participation by a member in consideration of a zoning ordinance of narrow applicability affecting property of the member, such as appears to be the situation described in the facts presented.

QUESTION TWO

> Is the council precluded from acting upon proposed rezoning where a council member has been employed as an architect or planner for the persons seeking the rezoning?

OPINION

In our view, the response to Question One applies whether the interest of the council member in the council's action stems from property ownership or from an employment relationship with interested parties. Thus, the interest in council action, while not directly proscribed by the terms of section 471.87, would, in many circumstances preclude participation by the interested member in the action of the council.

Where the council member in his private capacity has been involved in preparation of the specific proposal upon which council action is contemplated, the considerations set forth in Lenz v. Coon Creek

Watershed District, supra, would dictate that such a member would be disqualified from acting in his official capacity upon the proposal.

Very truly yours,

WARREN SPANNAUS
Attorney General

KENNETH E. RASCHKE, JR.
Assistant Attorney General

WS:KER:bw

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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

June 5, 2018

Honorable Molly Hicken
Cook County Attorney
Cook County Courthouse
411 West 2nd Street
Grand Marais, MN 55604

**Re: Request for Opinion Concerning County Commissioner Eligibility to Serve While an Elected Member of Reservation Tribal Council**

Dear Ms. Hicken:

I thank you for your April 16, 2018 letter on behalf of Cook County ("County").

The County is governed by a board of five elected Commissioners, each representing a specific geographical district in the County and serving staggered four-year terms. The Grand Portage Reservation ("Reservation") is located within the boundaries of District 1. Reservation members vote in county commissioner elections and are represented by the District 1 commissioner, whose term will expire at the end of 2018.[1] The District 1 County commissioner currently is running for the position of Secretary/Treasurer of the Grand Portage Tribal Council ("Tribal Council"), the election for which will be held in June. The Reservation is a sovereign government separate from the County and contracts with the federal Bureau of Indian Affairs to administer its own programs. The Reservation is a member of the Minnesota Chippewa Tribe and is subject to the Tribe's constitution and bylaws. The Tribal Council Secretary/Treasurer serves on the Tribal Executive Committee, which is part of the governing body of the Minnesota Chippewa Tribe.

You report that the County and the Reservation are engaged in a number of formal and informal relationships. Specifically: (1) among other functions, County commissioners are voting members of the Cook County Public Health and Human Services Board, which has entered into various contracts with entities managed by the Tribal Council. These include contracts for day care, housing, human services, health services, and tourism; (2) the County and the Reservation also have a Memorandum of Understanding with the County Sheriff's Office to provide a special Reservation patrol; and (3) commissioners set priorities for County road work, some of which exist within the boundaries of the Reservation.[2]

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[1] You indicate this person was first elected to the position in a special spring 2017 election.

[2] According to the County's website, the District 1 Commissioner also serves on the Highway Advisory Board.

You ask whether, if the District 1 commissioner is elected to the Tribal Council position, those elected positions are incompatible by law. For the reasons noted in Op. Atty. Gen. 629a (May 9, 1975) (copy enclosed), this Office does not generally render opinions upon hypothetical or fact-dependent questions. That said, I can provide you with the following information, which I hope you will find helpful.

## Law and Analysis

First, as you note, under Minnesota law, "[n]o county commissioner shall hold another elected office during tenure as a commissioner nor be employed by the county in which he is a commissioner." Minn. Stat. § 375.09, subd. 1. The legislature thus has determined that the position of county commissioner is incompatible with another elected office. Accordingly, the plain language of the statute prevents a county commissioner from serving in another elected position to avoid any responsibilities of a different elected position that are or may be inconsistent with the commissioner's duties. Section 375.09, subd. 1 does not define the type of elected office subject to its prohibition. The related common law incompatibility doctrine (discussed below) applies to "public" offices.

Second, under the common law, "[p]ublic offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both." *State ex rel. Hilton v. Sword*, 196 N.W. 467, 467 (Minn. 1923) (citations omitted). For two positions to be considered incompatible, each must be a public office (appointed or elected) as opposed to mere public employment. *McCutcheon v. City of St. Paul*, 216 N.W.2d 137, 139 (Minn. 1974). A public office is not determined by an individual's title, but rather refers to an official (elected or appointed) who "has independent authority under the law, either alone or with others of equal authority, to determine public policy or to make a final decision not subject to the supervisory approval or disapproval of another." *Id.* at 139. *See* Op. Atty. Gen. 358e-3 (Aug. 18, 1982).

The common law incompatibility determination focuses on whether there is inherent inconsistency in the duties themselves. *Hilton*, 196 N.W. at467 (school district treasurer and county commissioner incompatible); *State ex rel. Young v. Hayes*, 117 N.W. 615, 615 (Minn. 1908) (county superintendent compatible with school superintendent in different county, confirming that positions are incompatible where there is "some inconsistency in the functions of the two, some conflict in the duties required of the officers"); *Kenney v. Gergen*, 31 N.W. 210, 211 (Minn. 1886) (district court clerk and court commissioner are compatible where "[t]he one is not subordinate to the other, . . . neither officer can interfere with or has any supervision over the other[, and] [t]here is no such inconsistency in the functions of the two offices as would necessarily prevent one person from properly performing the duties of both."). "[W]here two

offices are incompatible, the acceptance of the second office operates as a resignation of the first." *Hoffman v. Downs*, 177 N.W. 669, 670 (Minn. 1920).[3]

I thank you again for your correspondence.

Very truly yours,

Christie B. Eller

CHRISTIE B. ELLER
Deputy Attorney General

(651) 757-1440 (Voice)
(651) 297-1235 (Fax)

Enclosures: Ops. Atty. Gen. 629a (May 9, 1975), 358e-3 (Aug. 18, 1982)

[3] In addition, as you may be aware, Minnesota law distinguishes between incompatible offices and conflicts of interest. Conflicts of interest contrast an official's public responsibilities and his or her *private* financial interests. *See, e.g., E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815, 819 (Minn. 1985); Minn. Stat. § 471.87 (prohibits public elected officials from having certain personal financial interests in official contracts).

# Opinions of the Attorney General

## Hon. WARREN SPANNAUS

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

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

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

### FACTS

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

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

You then ask substantially the following

### QUESTION

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

### OPINION

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

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

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

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

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

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

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

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

IN THIS ISSUE



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

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

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

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such cases. See Ops. Atty. Gen. 519M, Oct. 18, 1956, and 198n, March 30, 1951.

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

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

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

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

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

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

INCOMPATIBLE OFFICES: CITY ATTORNEY AND ASSISTANT COUNTY ATTORNEY; LAW PARTNERSHIPS: In county, not within incompatibility exemption in Minn. Stat. § 481.17 (1980), attorney furnishing legal services to cities therein and to county, in circumstances where it appears he does not hold offices of city attorney or assistant county attorney, may continue to do so, although care must be taken to avoid conflicts which could arise in particular instances where respective interests of governmental units may differ. Same is true even though he holds office of assistant county attorney and is also law partner of county attorney.

August 18, 1982

Mr. John A. Masog
City Attorney
City of Park Rapids
204 West Second Street
Park Rapids, MN 56470

358e-3
(Cr. Ref. to 358a-1)

Dear Mr. Masog:

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

FACTS

Minn. Stat. § 481.17 (1980) provides that, in all counties in this state having a population of not more than 12,000, the offices of county attorney, city attorney and school district attorney shall not be deemed incompatible and may be held by the same person.

I act as a part-time, "independent contractor" city attorney for three statutory cities in Hubbard County, which has a population of 14,000. I am compensated for these services at an hourly rate. In addition, I, from time to time, act as a "special" assistant county attorney for the purpose of prosecuting cases where the county attorney, who is part-time and has no assistant, is disqualified by reason of a conflict of interest.

You ask the following questions:

QUESTION ONE

In view of section 481.17, supra, may I continue to furnish legal services to the cities and the county as above indicated?

OPINION

Since it appears, in the absence of information indicating otherwise, that you do not hold the offices of city attorney or assistant county attorney, you are not barred by restrictions on incompatible office-holding from continuing to furnish these services as indicated, although care must be taken to avoid conflicts which could arise in particular instances where the respective interests of these governmental units may differ. As so qualified, your question is answered in the affirmative.

It should be pointed out, by way of background, that opinions of the attorney general have long held that the offices of city or village attorney and county attorney within the same county are incompatible and, consequently, may not be held simultaneously by the same person; Ops. Atty. Gen. 121-A, June 2, 1970; 358-a-1, July 27, 1939 (1940 Attorney General Reports No. 178); December 22, 1938 and January 23, 1911. The same is true for the offices of cit attorney and assistant county attorney; Op. Atty. Gen. 358-a-1, January 20, 1941.

Section 481.17 was enacted in 1969 apparently in response to difficulties encountered in smaller counties in attempting to fill these offices from a limited number of available attorneys without at the same time running afoul of incompatibility restrictions. Such counties were exempted from these restrictions but the restrictions continue in effect, as before, in counties, such as Hubbard, with a population in excess of the specified limit.

However, these restrictions apply only to the holding of the "offices" named as opposed to being employed by the respective governmental units to perform selected legal services. Since the office of city attorney or county or assistant county attorney is seen in our prior opinions as vesting the incumbent with a general duty to attend to all of the legal needs of the respective unit, the opinions conclude that the same person may not properly serve both of these units in this capacity in view of certain inevitable conflicts of duty.[1/] At the same time, the opinions acknowledge that one holding the office of city attorney may be employed by the county on a limited basis to handle specific legal matters which do not conflict with his duties as city attorney (Op. Atty. Gen. 358a-1, August 13, 1943) and, conversely, one holding the office of county or assistant county attorney may be employed on a similar nonconflicting basis by the city (Ops. Atty. Gen. 358-a-1, July 27, 1939 and January 23, 1911, supra, and March 23, 1965, February 25, 1948, April 8, 1947 and May 7, 1931).

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1/ See generally, State ex rel. Hilton v. Sword, 157 Minn. 263, 196 N.W. 467 (1923), indicating that public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both; see also, 15B Dunnell Minn. Digest 2d Public Officers § 3.03 (3rd ed. 1980).

Whether an attorney's performance of legal services for a local governmental unit makes him an officer thereof involves factors such as those considered in Op. Atty. Gen. 280-H, September 30, 1954, which dealt with the question of whether a state legislator could act as village attorney in view of former Minn. Const. art. IV § 9 which prohibited a legislator from holding any other "office" under the authority of the United States or the State of Minnesota, except that of postmaster.[2/]

The opinion observed that a village probably had authority, under a statute empowering it to appoint necessary officers, employees and agents, either to create an office of village attorney and appoint an attorney to fill the same, or, to employ an attorney to perform legal services without creating such office and appointing an attorney as an officer. Concluding that the application of the constitutional prohibition would depend upon the alternative selected, the attorney general said:

> It is my opinion that above cited Art. IV, § 9, of our Constitution is to be applied when an attorney who is a member of the legislature has been appointed village attorney as an officer of the village or appointed to fill a duly created office of village attorney. But there may be a situation when the provision above cited need not be applied if the attorney in question is hired in the capacity of an independent contractor to perform certain legal services for the village or in circumstances when it is clear that he is employed as an attorney for the village but not to act in the capacity of a village officer.

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2/ This prohibition, as subsequently amended, is now found in Minn. Const. Art. IV § 5.

> It is also possible that the constitutional provision need not be applied when there is no legally established office of village attorney to be filled and no such office is intended to be created. In such a case the attorney may, as above stated, be hired to act, not in the capacity of an officer, but only as an employee to perform legal services as specified by the village council, thereby creating a relationship between the village and the attorney of employer and employee.

The attorney general further indicated that no definite conclusion could be reached in any given instance without knowing the contents of the particular contract of employment or resolution or motion pertaining to the appointment and all other relevant facts. In a number of related opinions this office concluded, from the information there presented, that state legislators could be employed as attorneys by certain governmental units without being in violation of the constitutional prohibition; see Ops. Atty. Gen. 273-A-17, October 13, 1958; 280-H, November 4, 1955; January 28, 1947; March 9, 1944; and 121-a-10, May 21, 1929.

Since the facts you have given us indicate that you are furnishing legal services to the cities on an "independent contractor" basis, it would appear, under the guidelines in the above-quoted opinion and absent information to the contrary, that you do not hold the office of city attorney in any of them. Moreover, although you do not specifically so state, it appears tha your employment by the county is pursuant to Minn. Stat. § 388.09 (1980) which authorizes the employment of an attorney in specific matters where the regular county attorney cannot for some reason

represent the county; see Keiver v. County of Koochiching, 141 Minn. 64, 169 N.W. 254 (1918).[3/] A person acting as such an attorney has been held not to be holding an office; Op. Atty. Gen. 121-a-10, May 21, 1929, supra. This is in contrast to the status of a person appointed as a salaried assistant county attorney pursuant to Minn. Stat. § 388.10 (1980), as discussed in our answer to question two, infra.

Given the foregoing, it necessarily follows that your performance of these legal services in these circumstances cannot be subject to restrictions upon the holding of incompatible offices. However, this does not preclude the possibility that, in particular instances where the respective interests of these governmental units may differ, attempts to represent them could give rise to conflicts prohibited by the lawyers code of professional responsibility. Needless to say, such conflicts must be avoided.

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3/ In Keiver v. County of Koochiching, 141 Minn. 64, 169 N.W. 254 (1918), the court construed G.S. 1913 § 970 which contained language substantially identical to that found in Minn. Stat. § 388.09 (1980) which provides:

> When there is no county attorney the county board may employ any competent attorney to perform such legal services for the county as may be necessary. The board may employ an attorney other than the county attorney either to assist him or to appear for the county or any officer thereof in any action in which such county or officer in his official capacity is a party, or to advise the board or its members in relation thereto, or in relation to any other matter affecting the interests of the county, and may pay such attorney out of the funds of the county.

QUESTION TWO

May I continue as an "independent contractor" city attorney and become a salaried assistant county attorney and, if so, may I also become a law partner of the county attorney?

OPINION

Since it appears that you do not hold the office of city attorney in any of the cities to which you furnish legal services (see answer to question one, supra), you are not barred by restrictions on incompatible office-holding from becoming a salaried assistant county attorney pursuant to section 388.10, notwithstanding the status of such position as an office;[4/] cf. section 388.09 relating to the employment of an attorney where the regular county attorney cannot for some reason represent the county (see answer to question one, supra). Accordingly, the first portion of your question is answered in the affirmative, assuming, of course, that no attempt is made by you to represent the cities in situations where their interests may differ from those of the county

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4/ Minn. Stat. § 388.10 (1980) provides in part:

> The county attorney of any county in this state who has no assistant is hereby authorized to appoint, with the consent of the county board of the county, one or more attorneys to assist him in the performance of his duties. Each assistant shall have the same duties and be subject to the same liabilities as the county attorney and hold office during the pleasure of the county attorney. Each assistant shall be appointed in writing and his oath and appointment shall be filed for record with the county recorder.

(Emphasis added.)

so as to give rise to conflicts; see generally, Ops. Atty. Gen.358-a-1, March 23, 1965 and February 25, 1948, indicating that an assistant county attorney could be employed by a city to handle specific legal matters where no such conflicts were present.

The second portion of your question is likewise answered in the affirmative since, presumably, you will not be representing the cities in matters which give rise to conflicts with your, or the county attorney's, representation of the county; cf. Op. Atty. Gen. 121-a, June 2, 1970, indicating that even though an attorney may hold an office which is incompatible with an office held by another attorney, the two may become law partners but, in so doing, must be alert to problems of legal ethics and propriety which might arise in particular instances.

Very truly yours,

WARREN SPANNAUS
Attorney General

MICHAEL R. GALLAGHER
Special Assistant
Attorney General

MRG:dml

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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June 11, 2018

Mr. Steven M. Shermoen, Esq.
Office of City Attorney
City of International Falls
501 Fourth Street
P.O. Box 1152
International Falls, MN 56649

**Re: Request for Opinion Concerning City of International Falls, Minnesota**

Dear Mr. Shermoen:

I thank you for your April 30, 2018, letter requesting a legal opinion on behalf of the City of International Falls ("City").

With a population of fewer than 10,000 residents, the City is designated as a fourth-class city. Minn. Stat. § 410.01. The City has a Home Rule Charter ("Charter") and Code of Ordinances ("Ordinances"). The Charter requires the salaries of the City's officers and employees to be fixed by resolution. Charter, Sec. 19. Nevertheless, the Ordinances set forth the salaries of the mayor and councilors, Ordinances, Sec. 2-9, as well as a contingency fund for the mayor and council members. *Id.*, Sec. 2-10(a). The Ordinances further require "[a]ll further increases or decreases in the amount of contingent funds [to] be determined by resolution of the council." *Id.*, Sec. 2-10(b). All of these provisions were adopted in 1989 or later. *See* Charter Preface.

You ask whether the Charter should be amended to comply with Minn. Stat. § 415.11, which states a governing body "may by ordinance fix their own salaries". You also ask whether Minn. Stat. § 15.0596 applies to the mayor and council members of International Falls. Lastly, you ask "if the City may have a contingency fund to supplement the salaries of the Mayor and Councillors, may the amounts payable be altered in advance of the next municipal election".

We note that much of your request falls outside the types of matters on which this Office generally renders legal opinions. *See* Op. Atty. Gen. 629a (May 9, 1975) (copy attached). For example, it has been the longstanding policy of this Office that legal opinions are generally not rendered on the meaning of city charters and local ordinances and resolutions. *Id.* It has similarly long been the general policy of this Office not to conduct a general review of a city's ordinances and resolutions. *Id.* Lastly, this Office does not decide hypothetical questions. *Id.* That said, we can point you in the following direction to help inform your analysis:

First, whether or not a home rule charter city elects to amend its charter is a local decision. Since you indicate that the City is considering amending its Charter, I note that this Office has previously issued an opinion concerning Minn. Stat. § 415.11 that you may find informative. *See* Op. Atty. Gen. 471-K (May 10, 1976) (copy attached). As you are aware, Minn. Stat. § 415.11, subd. 1, states as follows:

> Notwithstanding the provisions of any general or specific law, charter, or ordinance, the governing body of any statutory or home rule charter city of the second, third or fourth class may by ordinance fix their own salaries as members of such governing body, and the salary of the chief executive officer of such city, in such amount as they deem reasonable.

Op. Atty. Gen. 471-K concerned a statutory city that passed a motion increasing the salaries of its mayor and council members above the amount that had been set by ordinance. *Id.* at 1. The statutory city asked whether the motion was valid in light of Minn. Stat. § 415.11. *Id.* at 2. This Office noted that Minn. Stat. § 415.11 did not impose any consequences if a governing body failed to comply and concluded the requirement to fix salaries by ordinance was directory or permissive and not mandatory. *Id.* at 4-5. The opinion also observed that through the motion the public had the opportunity to become informed and that there were no facts to indicate any individual who properly objected had been prejudiced. *Id.* at 5-7. As a practical matter, we note that were the City to amend the Charter to fix salaries by ordinance, this would eliminate any doubt about compliance with Minn. Stat. § 415.11 and apparently be consistent with its past practice for setting the salaries.

Second, you ask whether Minn. Stat. § 15.0596 applies to the Mayor and Council members of International Falls. Minn. Stat. § 15.0596 states, in part, as follows:

> In all cases where the compensation of an officer of the state is fixed by law at a specific sum, it shall be unlawful for any such officer or employee to receive additional compensation for the performance of official services out of the contingent fund of the officer or the department, and it shall be unlawful for the head of any department of the state government to direct the payment of such additional compensation out of the contingent fund; and the commissioner of management and budget is hereby prohibited from issuing a warrant upon such contingent fund in payment of such additional compensation.

When interpreting statutes, absent "a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute," "words and phrases are construed according to the rules of grammar and according to their common and approved usage." Minn. Stat. § 645.08. Although it does not appear there are any judicial opinions interpreting Minn. Stat. § 15.0596, we see no reason to construe the terms "officer of the state" and "state government" differently from their common and approved usage as referring to state rather than local officials. *See also* 2017 MN H.F. 1936 (NS) ("A bill for an act relating to state

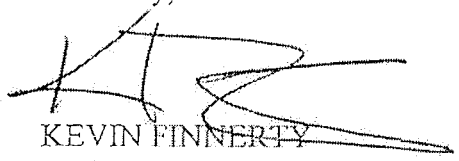
government" that proposed technical changes to Minn. Stat. § 15.0596, among other provisions). We also note that Minn. Stat. § 15.0596 appears in Chapter 15 of the Minnesota Statutes, which is entitled "State Agencies in General" and that Minn. Stat. § 15.01 specifically designates a list of agencies "as the departments of state government." *Compare* Minnesota Statutes Chapter 15 *with* Minnesota Statutes Chapter 15A: "Public Officers and Employees; Compensation and Allowances," *generally*, & at section 15A.01, subdivision 1 ("The yearly salaries of the state officers and employees mentioned in this chapter . . .") & at section 15A.22 ("An employee of the state, its political subdivisions, or a municipality therein . . .").

Finally, the third question you ask is as follows: "[I]f the City may have a contingency fund to supplement the salaries of the Mayor and Councillors, may the amounts payable be altered in advance of the next municipal election?" For the reasons stated above and described in Op. Atty. Gen. 629a (May 9, 1975), this presents the sort of question on which this Office does not opine. We note, however, that you do not indicate how the contingent funds are being used, whether it is to pay expenses incurred for job-related duties, to supplement salary, or some other reason. As you appear to be aware, Minn. Stat. § 415.11, subd. 2, states: "No change in *salary* shall take effect until after the next succeeding municipal election." (Emphasis added.) We also note that Minn. Stat. § 43A.17, subd. 10, specifically states: "The compensation plan for an elected official of a statutory or home rule charter city, county or town may not include a provision for vacation or sick leave." Finally, as a practical matter, waiting until after the next election would eliminate one potential concern you may have about the validity of the action.

I hope this information is helpful to you in your review of the matter.

I thank you again for your correspondence.

Sincerely,



KEVIN FINNERTY
Assistant Attorney General

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(651) 297-1235 (Fax)

Enclosures: Ops. Atty. Gen. 629a (May 9, 1975); 471-K (May 10, 1976)

# Opinions of the Attorney General

## Hon. WARREN SPANNAUS

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

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

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

FACTS

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

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

You then ask substantially the following

QUESTION

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

OPINION

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

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

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

See also Minn. Stat. §§ 8.06 (regarding opinions to the legislature and legislative committees and commissions and to state officials and agencies) and 270.09 (regarding opinions to the Commissioner of Revenue).

IN THIS ISSUE



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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STATUTORY CITIES: COUNCIL: SALARY INCREASE: Under facts herein, motion adopted with formalities substantially equivalent to those prescribed by Minn. Stat. § 412.191, subd. 4 (1974) for enactment of ordinances had legal effect of amending prior salary ordinance and increasing salaries of mayor and councilmen since requirement of Minn. Stat. § 415.11 (1974) that such salaries be fixed by ordinance is directory rather than mandatory.

May 10, 1976

471-K

Mr. B. Joseph Majors, II
Wadena City Attorney
Box 231
Wadena, Minnesota 56482

Dear Mr. Majors:

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

FACTS

Wadena is a statutory city operating under the Plan "A" form of government with a city council composed of five members consisting of a mayor and four councilmen. Following published notice thereof, a meeting of the Council was held on December 12, 1974, with all members present, at which a motion was passed by a 4/5 majority of the Council increasing the salaries of the Mayor and the Councilmen above the amounts previously fixed by Ordinance No. 117 enacted in 1967. The motion provided that the salary increases were to become effective January 1, 1976, which was subsequent to the regular city election held on November 4, 1975.

The minutes of the above meeting were signed by the Mayor, attested by the Clerk, published in the official newspaper on January 9, 1975, and an affidavit of publication was executed. However, the motion was neither recorded in the ordinance book within the time specified for ordinances nor did it contain the enacting clause prescribed for ordinances. On December 5, 1975, an extract of the minutes showing the adoption of the motion was entered in the ordinance book as Ordinance No. 155 entitled "An Action of the City Council of the City of Wadena, Minnesota, Increasing the Salaries of the Mayor and Council and Having the Purpose of Amending Sec. I of Ordinance No. 117."

In view of the provision of Minn. Stat. § 415.11 (1974) that salaries of city councilmen and the chief elected executive officer of a city be fixed "by ordinance," you ask substantially the following

QUESTION

> Under these facts, did the described motion have the legal effect of increasing the salaries of the Mayor and the Councilmen?

OPINION

We answer your question in the affirmative. At all times herein material the procedure for fixing the salaries of the Mayor and the Councilmen was that prescribed by Minn. Stat. § 415.11 (1974) which provided as follows:

> Subdivision 1. Notwithstanding the provisions of any general or special law, charter, or ordinance, the governing body of any city of the second, third or fourth class may by ordinance fix their own salaries as members of such governing body, and the salary of the chief elected executive officer of such city, in such amount as they deem reasonable.
>
> Subd. 2. No change in salary shall take effect until after the next succeeding municipal election.

(Emphasis added.) This statute was made applicable to statutory cities by Minn. Stat. § 412.017 subd. 2 (1974).[1] The enactment of ordinances

---

[1] Minn. Stat. § 412.017 (1974) has been repealed by Minn. Laws 1976, ch. 44, which also amended Minn. Stat. § 415.11 subd. 1 (1974) to read as follows:

> Notwithstanding the provisions of any general or special law, charter, or ordinance, the governing body of any statutory or home rule charter city of the second, third or fourth class may by ordinance fix their own salaries as members of such governing body, and the salary of the chief elected executive officer of such city, in such amount as they deem reasonable.

in such cities is governed by Minn. Stat. § 412.191 subd. 4 (1974) which states:

> Every ordinance shall be enacted by a majority vote of all the members of the council except where a larger number is required by law. It shall be signed by the mayor, attested by the clerk and published once in the official newspaper. Proof of the publication shall be attached to and filed with the ordinance. Every ordinance shall be recorded in the ordinance book within 20 days after its publication. All ordinances shall be suitably entitled and shall be substantially in the style. "The City Council of ..... ordains:".

The primary issue raised by your question is whether the requirement of section 415.11, supra, that salaries be fixed by ordinance is mandatory or directory. While a failure to follow a mandatory statutory provision renders the proceeding to which it relates illegal and void, a failure to follow a directory provision does not necessarily do so. 82 C.J.S. Statutes, § 374 (1953). The determination of whether a provision is mandatory or directory rests upon the application of the principles summarized in State, By Lord, v. Frisby, 260 Minn. 70, 108 N.W.2d 769 (1961):

> It is generally said that, where the provisions of the statute do not relate to the essence of the thing to be done, are merely incidental or subsidiary to the chief purpose of the law, are not designed for the protection of third persons, and do not declare the consequences of a failure of compliance, the statute will ordinarily be construed as directory and not as mandatory. Where no substantial rights depend on compliance with the particular provisions and no injury can result from ignoring them and where . . . the legislative intent can be accomplished in a manner other than that prescribed with substantially the same results, the provision is directory.

Id. at 76, 108 N.W.2d at 773. See generally, 17B Dunnell, Minnesota Digest, Statutes, § 8954 (3rd ed. 1970).

It seems apparent that the requirement that salaries be fixed by ordinance relates to the form rather than the essence of the thing to

be done. It is merely incidental or subsidiary to the chief purpose of the law which is to authorize city councils to "fix their own salaries . . . and the salary of the chief elected executive officer . . . in such amount as they deem reasonable." It appears designed, not for the protection of specific third parties, but to assure that council decisions in this regard be evidenced by formal acts of which the public has an opportunity to become informed prior to the municipal election next succeeding their adoption. The statute does not declare the consequences of a failure of compliance. Furthermore, the facts supplied do not disclose that any substantial rights depend upon strict compliance with the ordinance requirement, nor that any injury has resulted from a lack thereof. Most importantly, the legislative intent can be accomplished in a manner other than that prescribed with substantially the same results.

The council action under consideration herein represents one such alternative method of accomplishing that intent. It was adopted with formalities substantially equivalent to those prescribed by section 412.191 subd. 4, supra, for the enactment of ordinances, i.e., it was enacted by the required majority of all the members of the Council, the minutes of which it forms a part were signed by the Mayor, attested by the Clerk and published once in the official newspaper; in addition, proof of publication was executed and the motion recorded in the ordinance book, although not within the time specified. While the motion does not contain the prescribed enacting clause, there would seem to

be no mistaking either the identity of the governmental body adopting it,[2] or the substance and intent of the enactment. Accordingly, the motion was an essentially formal act of which the public had an opportunity, under these facts, to become informed prior to the municipal election next succeeding its adoption.

It is our conclusion, therefore, that the requirement of section 415.11 that salaries be fixed by ordinance is directory rather than mandatory and may be deemed satisfied by the described motion. In prior Minnesota cases, statutory directions concerning the form in which an act of the local governing body may be accomplished have been deemed satisfied in certain circumstances where such body acted through an alternative format which was not found to prejudice substantial rights of interested parties. In Lindahl v. Independent School District No. 306, 270 Minn. 164, 133 N.W.2d 23 (1965), the court ruled that, after a bond issue election had already been held, a statutory requirement that proceedings therefor be initiated by resolution should be treated as directory and deemed satisfied by a motion. In Renner v. New Ulm Police Relief Assn., 282 Minn. 411, 165 N.W.2d 225 (1969), a long standing resolution which had been duly adopted by the city council was held to satisfy a statutory reference to "laws or ordinances."

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2 In addition to securing uniformity in the style of all laws, one of the objects of an enacting clause is to provide that laws bear upon their face the authority by which they are enacted so that the people who are to obey them need not search legislative and other records to ascertain such authority. See Sjoberg v. Security Savings & Loan Assn., 73 Minn. 203, 75 N.W. 1116 (1898) which considered the enacting clause requirement of Minn. Const. art. 4, § 13 (Restructured Constitution -- 1974 art. 4 § 22).

In a similar vein, the court in State ex rel. Child v. City of Waseca, 195 Minn. 266, 262 N.W. 633 (1935) noted that:

> A resolution fixing the salary is required to be enacted with the same formalities as an ordinance. The resolution must be adopted by the vote of four-fifths of the members of the council and approved by the mayor. It appears also to be required that it must be published. A resolution passed with the same formalities required for enactment of an ordinance may be held to have the same force as an ordinance.

Id. at 269, 262 N.W. at 635. See also Steenerson v. Fontaine, 106 Minn 225, 119 N.W. 400 (1908), where the court determined that a resolution enacted with substantial formality was to be considered to have the effect of an ordinance which could not be repealed by a subsequent resolution enacted without publication, proper approval and recording.

We are mindful of the following admonition in State, By Lord, v. Frisby, supra:

> While noncompliance with the directory provisions of the statute does not require that the proceedings be invalidated, there is nevertheless a duty to comply with them as nearly as practicable, and the provisions of the statute may not be ignored to the prejudice of one making timely objection.

Id. at 77, 108 N.W.2d at 773. The facts submitted, however, suggest that a reasonable effort was made to accord the motion the same kind of formalities demanded of an ordinance. Presumably, the Council's failure to strictly comply with the requirement that salaries be fixed by ordinance was an unintentional oversight rather than a deliberate disregard of the statute and there is nothing to indicate the statute was ignored to the prejudice of one making timely objection.

Therefore, absent facts which would indicate that any procedural defect in the Council's action has prejudiced the rights of any person

properly objecting thereto in timely fashion, it is our view that the motion in question had the effect of amending the prior salary ordinance to increase the salaries of the Mayor and Councilmen as indicated.

Very truly yours,

WARREN SPANNAUS
Attorney General

MICHAEL R. GALLAGHER
Special Assistant
Attorney General

WS:MRG:bw

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3 Citing the rule in Steenerson v. Fontaine, 106 Minn. 225, 119 N.W. 400 (1908) that an ordinance cannot be amended, repealed or suspended by an order, resolution or other council act of less dignity than the ordinance itself, Op. Atty. Gen. 477-a, March 14, 1935 (1936 Attorney General Reports No. 21) held that a village council motion was ineffective in repealing an ordinance even though the minutes of which the motion was a part were signed by the president and recorder and subsequently published. However, the ordinance in question appears to have been a zoning ordinance which, at least under present law, can only be enacted or amended following a public hearing. Minn. Stat. § 462.357 subd. 3 (1974) Since the formalities of such an ordinance, as well as considerations of third party and other substantial rights, distinguish it from the one involved herein, that Attorney General opinion may be thereby distinguished and not regarded as controlling here.

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

SUITE 900
445 MINNESOTA STREET
ST. PAUL, MN 55101-2127
TELEPHONE: (651) 297-1075


June 11, 2018

Mr. Delray Sparby
Attorney at Law
Ihle Sparby & [redacted]ase P.A.
312 Main Ave. N.
P.O. Box 574
Thief River Falls, MN 56701

Dear Mr. Sparby:

I thank you for your email correspondence received on May 9, 2018, on behalf of the Red Lake Watershed District Board of Managers ("Board").

You state that the Red Lake Watershed District ("District") was established pursuant to Minnesota Statutes chapter 103D, and it encompasses a large geographical area containing land in several counties. You indicate that the District includes land on which the Red Lake Reservation is located. The Red Lake Reservation is a closed reservation in which all lands are held communally by the Red Lake Band of Chippewa Indians ("Band"), a federally-recognized tribe. The Red Lake Tribal Council ("Tribal Council") is the governing body of the Band.

You state that the Band has requested that the District's Board include a manager appointed by the Band's Tribal Council. As attorney for the District Board, you ask the following questions:

(1) whether the Board of Water and Soil Resources ("BWSR") could address the appointment to the District Board of a manager by the Band's Tribal Council;

(2) whether a statutory amendment is needed to allow the appointment and representation of a Band member to the Board; and

(3) whether other state boards or boards of political subdivisions of the State of Minnesota have tribal members and, if so, how such appointment was accomplished.

## Statutory Framework

Minnesota Statutes chapter 103D sets out the roles and responsibilities of BWSR as it relates to watershed districts. BWSR is authorized to act on petitions requesting establishment of a watershed district by holding a hearing and, after determining that the proposed watershed

district would benefit the public welfare and public interest, ordering the establishment of the watershed district. Minn. Stat. §§ 103D.205-103D.231. BWSR also is given the authority to grant or deny petitions requesting the following actions for existing watershed districts: boundary changes; withdrawal of territory; enlargement; consolidation of multiple districts; and termination. *See* Minn. Stat. §§ 103D.251-103D.271.

Once BWSR orders the establishment of a watershed district, the watershed district becomes "a political subdivision of the state with the power, authority, and duties prescribed" in Minnesota Statutes chapter 103D. Minn. Stat. § 103D.225, subd. 6. BWSR's role in ongoing oversight of a watershed district is narrowly circumscribed and is primarily in the form of review and approval of watershed management plans developed by the board of managers of a watershed district. *See* Minn. Stat. § 103D.401.

With respect to a watershed district board, BWSR is authorized only to appoint the first board of managers. Minn. Stat. § 103D.101, subd. 1(3). BWSR also determines how managers will be distributed among the counties affected by the watershed district. Minn. Stat. § 103D.301. If more than five counties are affected by a watershed district, BWSR may identify "manager areas within the watershed district" and then select "the county board of commissioners for each manager's area to appoint a manager." Minn. Stat. § 103D.301, subd. 2. Shortly before expiration of the term of the initial managers—those who were appointed by BWSR—the county commissioners of each county responsible for appointing a manager "must meet and appoint successors." Minn. Stat. § 103D.311, subd. 2(a). Any person appointed as a manager must be a voting resident of the watershed district and must not be a public officer of the county, state, or federal government, with one exception not relevant here. Minn. Stat. § 103D.311, subd. 1.

## Discussion

The Office of the Attorney General has limited jurisdiction under Minnesota law. For instance, it has authority to provide opinions on specific legal questions at the request of attorneys for local governments. It does not, however, have jurisdiction to provide legal advice or recommendations on various courses of action to local officials or governing bodies as that is the appropriate function of their own legal counsel. Thus, this response points you to the statutory framework that applies to the questions you pose. To the extent that the existing statutory language does not answer your questions or answers those questions in the negative, this response provides no legal advice or recommendations but leaves it to the Board to confer with its attorney regarding its options.

First you ask if BWSR could address the issue of appointment of a Band member as a manager to the Board. Given the statutory framework, whether you are asking if BWSR has authority to appoint a member of the Band to the District's Board, or if BWSR has a role in deciding whether a member of the Band may be appointed as a manager, the answer is no. Under chapter 103D, BWSR may appoint the first set of managers to the board, but all subsequent managers are appointed by county commissioners. Nothing prohibits a Band

member from serving as a manager on the District's Board if he or she is a voting resident of one of the counties comprising the watershed district. A Band member could be appointed by the county commissioners in the same manner any other individual is appointed. BWSR, however, would have no role in such an appointment. Nor does BWSR have authority to allow appointment of managers by the Band's Tribal Council, rather than by county commissioners. The plain language of the statute states that county commissioners will appoint managers and provides no mechanism for appointment of a manger by the Tribal Council. *See* Minn. Stat. § 103D.311, subd. 2(a).

Second you ask whether the issue of having a Tribal Council-appointed manager of the Watershed District would require a statutory amendment. As noted above, the statute provides for county commissioners to appoint managers, and a change to that procedure would likely require a change to the statute.

## Other State Boards

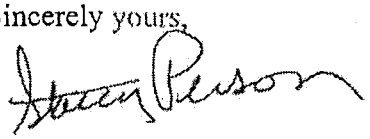
Finally, you ask whether other state boards or boards of political subdivisions of the State of Minnesota have board members appointed by tribal councils and, if so, how such appointment was accomplished. The Office of the Attorney General does not maintain records of the membership of state boards or boards of political subdivisions, but I can point you to two statutory provisions that I hope will be helpful in considering a statutory mechanism for tribal participation on the District Board. The following two statutes provide examples of addressing tribal participation in boards.

- Minnesota Statutes section 103C.305, subdivision 5, addresses American Indian tribes or bands in soil and water conservation districts. A member of a board of a soil and water conservation district is called a "supervisor," and supervisors are elected through the state general election. Minn. Stat. § 103C.305. In a supervisor nomination district "entirely within lands of an American Indian tribe or band to which county election laws do not apply," however, a supervisor "shall be elected or appointed as provided by the governing body of the tribe or band." Minn. Stat. § 103C.305, subd. 5.

- Minnesota Statutes section 103F.367, subdivision 8, addresses involvement of the governing body of the Leech Lake Indian Reservation in the Mississippi Headwaters Board. The statute directs the Mississippi River Headwaters Board to "initiate and maintain contacts with the governing body of the Leach Lake Indian Reservation" and to "negotiate a cooperative management and jurisdiction agreement with the reservation governing body." Minn. Stat. § 103F.367, subd. 8.

For your convenience, I have enclosed copies of statutes cited above. I hope these comments are helpful to you, and I thank you again for your correspondence.

Sincerely yours,



STACEY W. PERSON
Assistant Attorney General

(651) 757-1412 (Voice)
(651) 297-4139 (Fax)

Encs. Minn. Stat. § 103C.305
Minn. Stat. § 103D.101
Minn. Stat. § 103D.301
Minn. Stat. § 103D.311
Minn. Stat. § 103F.367

bcc: Christie Eller

LORI SWANSON
ATTORNEY GENERAL

# STATE OF MINNESOTA

**OFFICE OF THE ATTORNEY GENERAL**

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

July 2, 2018

Mr. Marc A. Sebora
Hutchinson City Attorney
111 Hassan Street SE
Hutchinson, MN 55350-2522

Dear Mr. Sebora:

I thank you for your correspondence received on May 21, 2018.

## Background

You state that McLeod County owns the McLeod County fairgrounds, which is located in the City of Hutchinson ("City"). You indicate that reconstruction plans are in development to erect a new garden pavilion on the fairgrounds. You note that the City adopted the State Building Code ("the Code"). You state that the Minnesota Department of Labor and Industry's ("DLI") Regional Services Supervisor informed a City official that a public accommodation located on county fair property within city limits is subject to permitting and inspection in cities that have adopted the Code. You note that in 2009, DLI issued an opinion letter that concluded county fair buildings used for agricultural fair purposes are exempt from municipal zoning, building, and other ordinances under Minn. Stat. § 38.16. You seek an opinion as to whether the construction of the new garden pavilion is subject to the Code's standards under Minn. Stat. § 326B.121, or exempt under Minn. Stat. § 38.16.

## Analysis

Minn. Stat. § 326B.121, subd. 1 (2016), provides the Code is the "standard that applies statewide for the construction, reconstruction, or alteration and repair of buildings and other structures," and the Commissioner of DLI is charged with its promulgation. Minn. Stat. § 326B.106 (2016). In 2017, the Code was amended to expressly provide that the construction of, additions to, and "alterations to a place of public accommodation must be designed and constructed to comply with the State Building Code." Minn. Laws 2017, ch. 94, art. 2, § 4, to be codified as Minn. Stat.§ 326B.108, subd. 2 (Supp. 2017). A public accommodation is defined as "a publicly or privately owned facility that is designed for occupancy by 200 or more people and is a sports or entertainment area, stadium, theater, community or convention hall, special event center, indoor amusement facility or water park, or indoor swimming pool." Minn. Stat. § 326B.108, subd. 1 (Supp. 2017). The public accommodation provision in the Code is a standalone state law that applies to every public accommodation in the State whether or not it is located in a jurisdiction that has adopted the Code.

Certain lands or buildings may be exempt from the Code. Minn. Stat. § 38.16 provides that:

> 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 to be obtained from nor fee paid to, the town or city in connection with the use of lands.

Minn. Stat. § 38.16 (2016). First enacted in 1927, Section 38.16, by its express terms, provides an exemption solely from ordinances of a *town or city*. Minn. Laws.1927, ch. 212. According to DLI, this exemption does not exempt a county agricultural society from county regulations or state laws applicable to its structures or land. *Id.* DOLI Inquiry 2009-6.

When two Minnesota laws are in conflict, Minn. Stat. § 645.26 (2016) provides:

> [T]the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.

If a place of public accommodation is located on county fairgrounds, it is subject to permitting and inspection under the Code, because Section 326B.108, the public accommodation provision of the Code, is more recently enacted than Section 38.16, and by its terms applies to all public accommodations. Whether the garden pavilion is a public accommodation is a fact question to be determined by the City (this Office does not generally undertake to resolve fact question, Op. Atty. Gen. 629-8, May 9, 1975), but if the garden pavilion is a public accommodation, then the Code would apply to its construction.

I thank you again for your correspondence.

Sincerely,

Christie L. Eller

CHRISTIE ELLER
Deputy Attorney General

Enclosure: Op. Atty. Gen. 629-A, May 9, 1975

# Opinions of the Attorney General

Hon. WARREN SPANNAUS

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

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

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

FACTS

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

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

You then ask substantially the following

QUESTION

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

OPINION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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


July 25, 2018

Mr. Paul Kiltinen
Dodge County Attorney
Dodge County Courthouse
22 6th Street East, Department 91
Mantorville, MN 55955

Re: Request for Legal Opinion

Dear Mr. Kiltinen:

I thank you for your e-mail correspondence dated July 5, 2018, requesting a legal opinion on behalf of Dodge County.

## Background

You state that private developers of solar projects and large wind energy conversion systems (LWECS or wind projects) have proposed to use county highway rights-of-way in Dodge County to locate transmission lines carrying energy from their projects to a local substation. You believe that a "public utility," as defined by Minn. Stat. § 216B.02 subds. 4 and 6, has a right to use county highway rights-of-way but you question whether that right is available to companies that do not provide retail services. You indicate that this issue has arisen in connection with a pending project in Dodge County.[1]

## Discussion

Minn. Stat. § 222.37 (2017) allows "any water power, telegraph, telephone, pneumatic tube, pipeline, community antenna television, cable communications or electric light, heat, power

[1] I understand that the Minnesota Public Utilities Commission (MPUC) has requested comments on completeness of an application filed on June 29, 2018 for a 23-mile long 345 kilovolt transmission line that a private developer intends to use, to connect a proposed LWECS to a substation in Olmsted County by means of single-circuit monopole structures in a 150-foot right-of-way. *In re Application of Dodge County Wind, LLC for a Route Permit for the 345 kV High-Voltage Transmission Line Associated with the Dodge County Wind Project in Dodge and Olmsted Counties, Minnesota*, MPUC Docket No. IP-6981/TL-17-308.

company, or fire department" to "use public roads for the purpose of constructing, using, operating, and maintaining lines, subways, canals, conduits, hydrants, or dry hydrants, for their business." The lines or other facilities cannot interfere with the safety and convenience of ordinary travel, and the use of the public right-of-way is subject to reasonable regulations imposed by the governing body of the county in which the public road is located. Utilities can ordinarily be constructed within a public road. *In re Application for A Route Permit for the Hiawatha transmission Line Project,* OAH Docket 15-2500-20599-2 (2010). WL 4004474, at *73 and fn. 450 (Oct. 8, 2010).

Minn. Stat. § 222.37 (2017) includes any company that provides power as an entity with access to the public right of way, and does not limit such access to regulated public utilities as defined in Minn. Stat. § 216.02. In *Kuehn v. Village of Mahtomedi,* 207 Minn. 518, 522-23, 292 N.W. 187, 189-90 (1940), the court recognized that the plain language section 222.37, as then written, identified specific entities, and those terms should be given their plain reading. The court also observed that facilities used for "power purposes" are facilities "usually furnished by private capital for pecuniary gain". *Id.* Accordingly, that case supports reading the language of section 222.37 to permit any company that provides power, access to right-of-way whether or not it is a regulated public utility as defined in section 222.37.

I thank you again for your correspondence.

Very truly yours,

Christie B. Eller

CHRISTIE B. ELLER
Deputy Attorney General

(651) 757-1440 (Voice)
(651) 297-1235 (Fax)

Enclosure: Op. Att'y Gen. 629a (May 9, 1975)

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