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STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

ANNUAL REPORT REQUIRED BY

Minnesota Statute Section 8.08 and 8.15, Subdivision 4 (2006)

Fiscal Year 2008

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INTRODUCTION

This report is intended to fulfill the requirements of Minnesota Statutes Section 8.15, Subdivision 4, for Fiscal Year 2008 (FY 08).

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

GOVERNMENT OPERATIONS SECTION

PUBLIC FINANCE DIVISION

The Public Finance Division represents the departments of Administration, Agriculture, Commerce, Employment and Economic Development, Finance, Labor and Industry, and Natural Resources, as well as the Housing Finance Agency, Iron Range Resources, Legislative Auditor, Minnesota State Board of Investment, Secretary of State, State Auditor, Board of Water and Soil Resources, and many other smaller boards, agencies and commissions. The division also represents the Minnesota State Colleges and Universities System and other state agencies in contract, lease, and other transactional matters. The division's work during FY 08 included:

- Represented the Minnesota Legislature in a lawsuit filed by private parties to recover per diem living expenses paid to members of the Legislature pursuant to state law; successfully moved to dismiss the case;

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

- Provided extensive advice to State clients on intellectual property, data practices, open meeting law, procurement, and other issues related to State government operations; assisted in drafting and revising leases, licenses and contracts; and registered trademarks on behalf of a number of State agencies;

- Advised the Department of Administration on various real estate matters, including on a decision to debar a contractor, and advised the Department of Administration, Plant Management Division, in negotiations with groups who applied for permits to hold demonstrations on the Capitol complex during the Republican National Convention in September 2008;

- Represented the Minnesota Department of Agriculture ("MDA") in various matters, including an administrative proceeding to revoke the license of a slaughter facility and in penalty assessments for pesticide violations; advised MDA regarding illegal pesticide sales, pesticide application violations, foreign farmland ownership, grain dealers, seed dealers, feed inspection fees, penalties, and numerous other matters;

- Advised the Board of Animal Health in implementing the bovine tuberculosis cattle buyout and fencing program enacted in 2007;

- Represented the Campaign Finance and Public Disclosure Board in court cases to enforce lobbyist and campaign finance laws and advised the Board regarding enforcement of campaign contribution, finance and lobbyist registration laws;

- Advised and represented the Department of Commerce, which is charged with regulating financial services industries in Minnesota, including insurance, banks and other financial

institutions, securities, mortgage lending, and the real estate industry;[1] and provided advice and representation to the Petroleum Release Tank Compensation Board ("Petrofund") and the Real Estate Education, Research, and Recovery Fund, both of which are administered by the Department of Commerce;

- Handled 61 contested cases for Department of Commerce involving disciplinary action against licensees; obtained over $300,000 in civil penalties and settlements, including disciplinary actions against mortgage originators; real estate salespersons; liquidation of collections agencies; securities salespersons; insurance salespersons; and notaries public;

- Filed an amicus brief with the Minnesota Supreme Court arguing for the reversal of a Minnesota Court of Appeals decision that held State securities statutes were preempted by federal law and the Minnesota Supreme Court, in July 2008, issued an opinion that agreed with the division's arguments and reversed the lower court's decision;

- Assisted Department of Finance with new State banking warrant processing, merchant processing, and prepaid debit card agreements; facilitated bond issuance by providing legal consultation to State agencies for over $2.7 billion in general obligation and revenue bonds; and represented the Commissioner of Finance in 3 claims made against the Torrens Assurance Fund;

- Advised the Housing Finance Agency ("HFA") regarding numerous loans to preserve low income housing and several variable rate bond transactions with interest rate swaps; represented the HFA in district court and before the Minnesota Court of Appeal in a case regarding a mortgage redemption; represented the HFA in an action asserting that an HFA loan be subordinated, and an action asserting that an HFA loan be assigned.

- Advised the Department of Human Services in connection with termination of a major software design and development contract;

- Advised Iron Range Resources Agency and Board ("Iron Range Resources") regarding various economic development loans and equity transactions, including Mesabi Nugget, Franconia Minerals (non-ferrous minerals extraction), Minnesota Steel Industries (integrated steel plant), Magnetation (stockpiled ore processing) and Excelsior Energy; as well as workouts, collections, data practices requests, and trademark registrations, licenses and oppositions (including "Business is Beautiful" defense); various land sales, acquisitions, development agreements, facility management agreements, mechanic's lien claim settlement, master association reformation and private sector transition plan, common interest community, title registration, and easement matters at Giants Ridge; employment matters; Motorplex related real estate transactions, title work and easements; Northwest Airlines

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

bankruptcy loan claim settlement; business corporation entity acquisitions of Iron Range Ventures and Mesabi Nugget, Inc; advice regarding various taconite production tax assessment and distribution statute enforcement and amendment matters, and bankruptcy claim settlement matters involving National Steel Pellet Co. and Eveleth Taconite Company; and ore producer Taconite Economic Development Fund financial assistance programs;

- Advised and represented the Department of Labor and Industry, Construction Codes and Licensing Division, including the Contractor's Recovery Fund; prosecuted numerous disciplinary actions against residential building contractors, remodelers, roofers, and manufactured home installers for violations, including unlicensed building contractor activity, failure to satisfy judgments, failure to complete jobs, and code violations;

- Handled 70 contract matters against licensed and unlicensed builders and obtained over $375,000 in civil penalties and settlements; provided legal advice, appeared in district court, and/or drafted pleadings that stipulated to payment of more than $1.2 million to victimized homeowners on over 50 applications to the Contractor's Recovery Fund;[2] and obtained summary judgment on 4 ineligible claims to the Contractor's Recovery Fund totaling $75,642;

- Represented the Minnesota Department of Natural Resources ("DNR") in State district court against takings and trespass claims related to drainage ditch repairs undertaken by a ditch authority/watershed district resulting in the unintentional draining of a public water and its subsequent restoration pursuant to a DNR restoration order;

- Represented DNR as an amicus in two federal district court challenges brought by environmental groups against the U.S. Forest Service challenging the national forest management plans for Superior National Forest;

- Represented DNR by filing an amicus brief in the 8th Circuit Court of Appeals supporting the U.S. Forest Service in a challenge to the existing boundaries of the Boundary Waters Canoe Area Wilderness;

- Represented DNR as an amicus in federal district court in an action brought by environmental groups against the U.S. Fish and Wildlife Service challenging the removal of the gray wolf from the federal Endangered Species list;

- Represented DNR before the Minnesota District Court regarding inverse wetlands condemnation and environmental review of a proposed taconite mining, iron, and steel making facility, and represented DNR before the Minnesota Court of Appeals regarding inverse wetlands condemnation and prescriptive easements in a wildlife management area;

[2] The actual payment amount will be reduced by the Contractor's Recovery Fund due to prorating claims to the maximum $75,000 per licensee limit.

- Represented DNR Forestry Division in collection and enforcement actions, including timber/resource trespasses and fire suppression; provided advice to DNR regarding the Minnesota Timber Act and the Minnesota Wildfire Act;

- Advised DNR regarding environmental review issues and represented DNR in district court case challenging adequacy of an EIS for the Minnesota Steel, Inc. project;

- Represented DNR in United States District Court, Minnesota District, in two legal challenges brought under the federal Endangered Species Act by animal protection groups to DNR's trapping and snaring regulatory and licensing program; settling one case and achieving a favorable resolution of the other through summary judgment;

- Provided general advice and district court representation to DNR Enforcement regarding numerous matters, including the Wetlands Conservation Act, and vehicle and equipment confiscations, and wild animal pelt confiscations;

- Provided legal services to DNR in a wide variety of Indian law matters, including resource management and harvest issues under the 1837 Treaty (Mille Lacs); continued negotiation of Phase II of the 1854 Treaty case (Fond du Lac); White Earth settlement land transfers; and issues of tribal sovereignty and state-tribal jurisdiction;

- Assisted DNR with approximately 134 real estate acquisitions totaling over $26 million and involving approximately 17,564 acres of land and prepared title opinions and drafted deeds with respect to approximately 22 land exchanges;

- Represented DNR in various district court and Minnesota Court of Appeals cases involving real estate transactions and disputes; condemnation proceedings; responded on behalf of DNR in approximately 90 quiet title actions and land registrations in order to preserve the State's mineral interests and regulatory rights on navigable waters; and in an action relating to forfeiture of severed mineral rights and in a Quiet Title action to resolve a dispute with the County over the existence of township roads within a wildlife management area;

- Represented the DNR in several district court cases in which a petition was filed to vacate certain land (typically roads) that abut upon, or provide access to, a public water;

- Represented DNR Waters Division in numerous administrative level, district court, and court of appeals matters regarding maintenance and repair of drainage ditches, issuance of permits for work in public waters, enforcement of lakeshore zoning regulations, and restoration of waters and wetlands;

- Represented DNR Waters Division in two appeals to the Minnesota Court of Appeals of DNR denials of certification of variances granted by municipalities to local Lower St. Croix River setback ordinances and have provided ongoing advice regarding other certification issues;

- Provided legal services to DNR relating to prescriptive easements across wildlife lands, establishment of Scientific and Natural Areas, issues arising in connection with the Wildlife Division's extensive regulatory programs;

- Represented DNR Fisheries Division in an administrative appeal of a private fish hatchery license revocation and settlement discussions involving the possible sale of the facility to DNR;

- Advised Department of Public Safety regarding drivers license vendor performance and card laminate failure issues and remedies;

- Advised and represented the Secretary of State in various election, corporate, and trade name registration matters, including matters pertaining to the use of electronic voting systems; wording of the ballot question for a constitutional amendment; candidate nicknames and petitioning requirements;

- Represented the State and Secretary of State in a suit challenging the City of Minneapolis' new policy to conduct municipal elections via instant runoff voting;

- Facilitated the filing of claims by the Minnesota State Board of Investment ("MSBI") in securities litigation and in becoming participant in class action in Australia; and advised MSBI in connection with various investment management agreements and alternative investments;

- Defended the Office of State Demographer and MnDOT against challenges to population estimate used in apportioning municipal street aid;

- Advised Minnesota State Retirement System regarding contractor's claims for unpaid computer system services and associated data security breaches;

- Advised numerous small boards and agencies, including the boards of Accountancy, Architecture, Arts, Barbers and Cosmetologists, Crime Victims Reparations, Electricity, Peace Officer Standards and Training, Teaching, and School Administrators and represented those boards in 25 contested matters;

- Advised and represented the Office of Administrative Hearings in connection with several municipal boundary adjustment matters and constitutional challenges to enforcement of the Fair Campaign Practices Act;

- Filed eight appeals to the Minnesota Court of Appeals regarding the denial of claims and argued five cases before the Minnesota Court of Appeals on behalf of the Public Safety Officers Benefit Eligibility Panel;

- Advised state agencies regarding enforceability of electronic transactions and signatures;

- Advised MnSCU regarding implications of injunctions against software users resulting from litigation alleging software patent infringement by a company supplying curriculum management software to the MnSCU institutions; advised MnSCU regarding contract, intellectual property and licensing matters and drafted licensing and services level agreements for marketing of State-owned software; and represented a State College accused of trademark infringement by a national brand name company;

- Represented the Board of Teaching in a mandamus action brought in Ramsey County District Court requiring the Board to extend the amount of time for certain speech language pathologists to meet additional educational requirements.

- Advised the Department of Transportation regarding contract and finance issues related to the North Star Commuter Rail project;

- Advised the Board of Water and Soil Resources ("BWSR") on real estate issues related to conservation easements, including reviewing approximately 160 Reinvest in Minnesota ("RIM") easement files, and the wetland banking program, Wetland Conservation Act program, its administrative penalty program, rules, and many other matters;

- Represented BWSR on Wetland Conservation Act appeal to Minnesota Court of Appeals for denial of wetland exemption and obtained dismissal of appeal;

- Advised the Minnesota Zoo on various contract matters including a multi-party lease, utility easement, construction, and co-generation agreement among the Zoo, ISD 196, Apple Valley Economic Development Authority, and Dakota Electric Association for a wind turbine generator and communications tower project at the Environmental Studies School located on Zoo grounds.

TELECOMMUNICATIONS AND ENERGY DIVISION

The Telecommunications and Energy Division primarily represents Telecommunications, Office of Energy Security, Energy Planning and Advocacy, Energy Facilities Permitting, and Weights and Measures divisions of the Minnesota Department of Commerce ("Department"). Division attorneys represent the Department before the Minnesota Public Utilities Commission, Office of Administrative Hearings, federal agencies, and state and federal courts. In FY 08, the Telecommunications and Energy Division provided legal advice and representation to the Department on many issues such as:

TELECOMMUNICATIONS

- **Wholesale Cost/Prices.** In an effort to promote the development of competition in local phone service, the U.S. Congress, in the 1996 Federal Telecommunications Act, required former Bell operating companies such as Qwest, which own the local telecommunications plant, to lease certain parts of the local phone network (the "271 elements") to competitors at "reasonable" prices. Qwest is also required by State law to charge competitors only

"reasonable" prices. Following complaints that Qwest assessed several-hundred-fold price increases, the Public Utilities Commission opened an investigation in 2005, and referred it to the Office of Administrative Hearings for record development in a contested case proceeding. In this case of first impression, the division has provided litigation assistance in pre-hearing motion practice on legal issues involving the Commission's authority, federal preemption of Minnesota statutes, and the potential applicability of a recent Eighth Circuit Court of Appeals decision on a related topic. Litigation is expected to resume before the Commission in the fall of 2008.

- **Local Service Competition - Network Elements and Resale.** Federal and State law require Qwest to lease certain parts of its network (the "251 elements") to competitors for a price that is equal to "cost." Division attorneys assisted the Department in several dockets regarding Qwest's attempts to minimize these obligations. The attorneys assisted with pretrial discovery and expert testimony, and parties reached tentative settlement on portions of the case, with post-trial briefing to be filed regarding those elements that remain contested. Other pending dockets involve Qwest's reclassifying hundreds of elements as non-regulated items, the commingling of regulated and non-regulated elements into bundled service packages, and the Commission's authority to price these elements and procedures regarding bundling of elements. Division attorneys have prepared legal motions and supporting memoranda, some of which are expected to be filed with the Commission in the fall and winter of 2008.

- **Qwest Forbearance from Dominant Carrier Regulations.** Qwest has filed with the FCC a request to be free from federal regulation by seeking permission to be classified as a "non-dominant" carrier. Division attorneys assisted the Department in gathering data demonstrating the significant damage a grant of forbearance would have on consumers and the competitive carriers that serve them. The Commission filed comments with the FCC opposing forbearance. The FCC recently denied Qwest's forbearance petition.

- **Investigation of Anti-Competitive Conduct/Interconnection.** The division represented the Department in various contested case proceedings involving allegations that Qwest violated competitive requirements, including alleged overcharging and failing to provide access to required parts of the Qwest network.

- **Competition - Reclassification of Qwest's Wire Centers.** The division provided legal assistance regarding Qwest's annual petitions to reclassify wire centers as "unimpaired" under FCC rules, which require that Qwest provide unbundled network elements at cost-based rates where competition is "impaired." Division attorneys assisted with discovery, negotiations, briefing and oral argument to the Administrative Law Judge and Commission on the Department's position that a reclassification of the Owatonna wire center to "unimpaired" is not permitted under FCC rules, and, therefore, Qwest must provide unbundled network elements at cost-based prices. Division attorneys continue to provide legal assistance on Qwest's recently-filed 2008 annual wire center impairment petition.

- **Interconnection of Voice, Data and Internet Networks.** The division continues to assist the Department in litigating a series of complex matters of first impression in Minnesota

regarding the interplay of the traditional public telephone network and the internet, and the obligations of incumbent telephone companies to competitors that operate networks in which voice and other audio (and video) traffic is transmitted only on digital networks. The Commission has ruled in favor of the Department's position on matters to date, and other matters are pending.

- **Price Discrimination and Non-Tariffed Rate Cases.** The division continues to represent the Department in several actions involving authority of the Commission to enforce Minnesota's statutory prohibitions on illegal price discrimination in the "access" market, and division attorneys have engaged in motion practice, evidentiary trials, and presented oral arguments before administrative law judges and the Commission. In the first of these matters, the Commission determined that AT&T intentionally violated State statutes and rules when it concealed from the public and regulators discriminatory contracts that that gave AT&T and its "preferred" competitors dramatically lower prices for "access" to in-state long-distance calls. The Commission ordered AT&T to pay $552,000 in penalties. This matter is now under appeal to the Minnesota Court of Appeals. A similar matter involving an AT&T affiliate is pending before the OAH for development of a record to determine appropriate penalties. Several other matters are pending before the Commission regarding additional actions by AT&T that appear to violate Minnesota's statutory prohibitions against unreasonable discrimination in the sale to long-distance competitors of access to end users.

- **Arbitration of Interconnection Agreements Between ILECs and CLECs.** Division attorneys represented the Department in several contested case proceedings that concerned disputed interconnection agreements between incumbent local exchange carriers ("ILECs"), such as Qwest, and competitive local exchange carriers ("CLECs"). For example, division attorneys assisted the Department in the trial and post-trial briefing of the Eschelon-Qwest interconnection agreement dispute, which resulted in an interconnection agreement that other CLECs are likely to adopt. Another matter, involving Charter Fiberlink's petition for arbitration with Frontier, has been set on an expedited trial schedule. Division attorneys have provided pretrial litigation support regarding discovery and motion practice, as well as assistance regarding filing of expert testimony.

- **Phantom Traffic Complaints.** The division continues to represent the Department in actions by local phone companies involving the failure of some carriers, such as Qwest or Level 3, to provide sufficient call identification information to allow them to bill other telecommunications carriers and digital Voice Over Internet Providers (VoIP) that pass voice traffic through their networks for termination on the complaining carriers' networks. The complaining carriers alleged that they are not properly compensated for such "phantom" traffic. In the largest of these dockets, involving Qwest, an interim settlement was reached in FY 07, but the matter is still pending before the Commission, as parties continue to negotiate a permanent solution.

- **Disconnection of ILEC to CLEC Interconnection.** Division attorneys assisted the Department on several matters involving Qwest's efforts to disconnect CLECs for nonpayment of charges. In one such matter, a CLEC alleges that Qwest threatens illegal disconnection for nonpayment of multiple types of charges for which the CLEC claims not to

owe Qwest. The division has provided pretrial litigation support, with the expectation that trial before an administrative law judge will take place in the fall of 2008.

- **Disconnection of Direct CLEC to CLEC Interconnection.** Division attorneys provided litigation support and post-trial briefing on a case of first impression in Minnesota, involving the tandem transit aspect of exchanging local traffic. The expedited matter concerned whether one competitive carrier may disconnect another competitive carrier simply to enhance its competitive advantage regarding local calling. The Commission and the administrative law judge agreed with the Department's position and disallowed disconnection under such circumstances.

- **Investigation of Industry-Wide Promotional Practices.** The division represented the Department in litigation concerning the Commission's effort to address promotional practices of certain telecommunications service providers that appear to violate State tariffing statutes, as well as federal prohibitions against unreasonable discrimination. Numerous individual dockets are pending before the Commission, as it completes a generic State-wide investigation scheduled for hearing in the fall of 2008.

- **Alternative Form of Regulation ("AFOR") Petitions.** Division attorneys appeared for the Department in litigation involving challenges by Qwest of Commission authority based on Qwest's claims that its AFOR plan preempts Minnesota laws that prohibit anti-competitive and discriminatory conduct. In other dockets, division attorneys also provided legal research and analysis concerning the rate implications of ILEC AFOR petitions. Qwest's AFOR for 2009-2012 was filed in the spring of 2008, and division attorneys are assisting the Department as needed in appearances before the Commission.

- ***Qwest Wholesale Service Quality - Monitoring and Enforcement.*** Division attorneys continue to provide legal advice to the Department with respect to the Commission's distribution of penalty monies associated with Qwest's past service quality violations. In response to the Commission's request for additional comments, the division performed legal research and drafting in support of the Department's position that Minnesota law requires the penalty funds to be deposited in the State's general fund.

- **Universal Service.** Division attorneys provided legal assistance regarding ongoing monitoring, enforcement, and other matters of State administration of a federal universal service fund ("USF") for all local exchange carriers and wireless providers that receive USF funding or desire designation as an "eligible telecommunications carrier, which allows carriers to receive USF funding.

- **Prepaid Calling Cards.** The division assisted the Department in monitoring FCC rulings concerning federal treatment of prepaid card service providers, interconnected Voice Over Internet Provider (VoIP) companies, and other digital services providers as "telecommunications service providers." Issues concern the payment of federal and State access charges and the responsibility of these entities to provide 911 services and contributing to universal service funds.

- **Rulemaking.** The division provided legal advice to the Department in a request for clarification or rulemaking filed by AT&T and its affiliate TCG to clarify Minnesota law and existing Commission rules. It is the Department's position that this request is a strategic effort to maintain the appearance that AT&T's failure to comply with Minnesota tariffing laws was not purposeful. Other rulemaking proceedings regarding State Universal Service funding and Intrastate Access Charge reform continue at informal stages.

ENERGY

- **Merger/Acquisitions.** The division continued to provide legal advice regarding accounting-type compliance issues in the merger of natural gas utility Aquila Natural Gas Company (doing business in Minnesota as Peoples Natural Gas and NMU) and Wisconsin Public Service Corporation, now Minnesota Energy Resources Company (MERC). Still pending before the Commission regarding a pre-merger sale concerns the circumstances under which retail ratepayers should be awarded the gain on the sale of regulated utility land as the Department maintains, as opposed to the utility's position that shareholders should receive all gains on the sale of such land.

- **Asset Sales: Transmission Lines.** Division attorneys assisted the Department in trial and post-trial proceedings before the Office of Administrative Hearings and the Commission concerning a case of first impression in which Alliant Energy, d/b/a Interstate Power and Light, proposed to sell all of its retail State-regulated transmission assets to ITC Midwest, LLC ("ITC"), a federally-regulated entity that essentially is not regulated by the Minnesota Commission. Following an expedited trial and a compressed schedule for submission of post-trial legal briefs, the Department and certain other parties agreed to settlement terms with ITC. The Commission approved the settlement and the asset sale in December 2007.

- **General Rate Increase Requests.** The division provided litigation support and post-trial legal briefing of the rate increase requests of two major regulated utilities: Xcel Energy, the State's second largest regulated natural gas company; and Otter Tail, an electric utility ordered by the Commission to file for a comprehensive rate review for the first time in more than twenty years. Division attorneys also provided preliminary legal advice regarding Minnesota Power Company's electric rate increase request filed in the spring of 2008, and assisted the Department with continuing compliance issues involving recent rate increase orders for Greater Minnesota Gas and CenterPoint Energy, the largest regulated natural gas utility.

- **Certificate of Need and Route Permitting for Electric Transmission Line Construction.** The division provided litigation support and legal advice concerning need and route permit requests for high voltage transmission lines. Attorneys assisted the Department with a second round of litigation and post-hearing briefing in the Big Stone II high voltage transmission line need request, following applicants' filing of a revised case after two of the initial seven utilities dropped out of the project. The Big Stone II certificate of need matter includes a request for several transmission lines in Minnesota from a planned coal plant in South Dakota. The Commission ordered a third administrative trial, which is scheduled for fall of 2008. Division attorneys also litigated and submitted legal briefs regarding the

controversial Xcel/GRE Chisago transmission line need request, and assisted with the route permitting proceeding. The Commission approved both the Chisago need and route permit. Moreover, division attorneys assisted the Department with pretrial proceedings of the first phase of the massive CapX high voltage transmission project need request of Xcel Energy and Great River Energy. The first phase of CapX is expected to affect over 70,000 Minnesota landowners. Trial of the CapX need matter is ongoing, after which route permitting efforts may begin. Finally, the division provided legal advice on routing issues for the second phase of CapX, a request to build a high voltage project from Bemidji to Grand Rapids, Minnesota.

- **Electric Transmission Lines Operation/Control.** The division provided on-going advice regarding the interpretation of federal and State enforcement jurisdiction for the regional Midwest Independent System Operator. Important issues of cost recovery continue to involve the division attorneys.

- **Certificate of Need for New Construction of Electric Generating Plants.** The division provided legal advice as needed on several wind turbine generation plant requests, such as the Wapsipinicon Wind Project. Attorneys also assisted the Department as to Xcel Energy's baseload generation need proposal to combine hydropower, wind energy and a purchase of energy from the market as a novel type of firm electrical power. Xcel withdrew its baseload need proposal following new legislation that requires aggressive renewable energy and conservation goals.

- **Coal Gasification Electric Generating Plant.** Division attorneys continued to provide the Department with litigation support, advice and representation before the Commission regarding the first phase of a proposed power purchase agreement of Excelsior Energy, an independent power producer, that would require Xcel Energy's ratepayers to pay for electricity generated by Excelsior's proposed coal gasification power plant. Following the proceedings of the previous year as to the first phase, and appeal by Excelsior of the Commission's phase one ruling (no approval but order to negotiate), division attorneys assisted the Department as to the second phase of Excelsior's proposal that would involve a second coal gasification power plant and associated power purchase agreement. The division provided pretrial litigation support and submitted legal briefs to the administrative law judges regarding the second proposed purchase agreement for power from a second plant. The division assisted the Department's permitting process in Northern Minnesota regarding phase one of Excelsior's proposal. The Minnesota Court of Appeals denied Excelsior's phase one appeal as premature and, in August 2008, the Commission established a deadline for negotiations such that phase one is likely to be considered to be denied, and the Commission affirmatively denied Excelsior's proposal as to phase two.

- **Certificates of Need and Route Permitting for Underground Pipeline Construction.** The division provided trial and post-trial assistance regarding the certificate of need and permitting requests for a 385 mile long crude oil pipeline project filed by Enbridge Energy from Alberta, Canada through Minnesota to Superior, Wisconsin. Attorneys provided trial and post-trial assistance on both need and routing as to the first phase of the pipeline project, called the LSR, which is a 108 mile long pipeline from the North Dakota/Minnesota border

to Clearbrook, Minnesota. The routing proceeding required evidentiary hearings in each of the six Minnesota counties involved. The Commission approved the need and route permit requests on phase one, and the administrative law judge has recommended approval of the phase two route permitting request. Phase two of the project includes the Alberta Clipper project and the associated Southern Lights project which involve the remaining distance between Clearwater, Minnesota to Superior Wisconsin. The division provided legal assistance to the Department on the Alberta Clipper and Southern Lights need and routing contested case proceedings. Attorneys continued to assist the Department with compliance matters involving the approximately 319 miles of Minnesota Pipeline Company's (MinnCan) crude oil pipeline approved by the Commission last year as to both need and route that will deliver crude oil to the Flint Hills refinery in Rosemount, Minnesota. The Court of Appeals affirmed the Commission's MinnCan rulings in June 2008. In a route-only matter, the division provided legal advice and eventually litigation support to the Department during the contest case proceeding involving the Nashwauk Public Utilities Commission application for route permit for a natural gas pipeline from Nashwauk to Blackberry. The Commission granted the permit request.

- **Certificate of Need for Crude Oil Pipeline Pumping Station.** Division attorneys provided pretrial assistance regarding the request of Enbridge Pipelines to construct additional pumping equipment at three of its existing pumping stations. The Commission ruled that a certificate of need is required, and referred the matter to the Office of Administrative Hearings for a contest case proceeding.

- **Routing and Siting Matters.** In addition to the specific routing and siting efforts, the division provides legal assistance to the Department's Energy Facility Permitting staff as to transmission line, pipeline and plant siting that do not also require a certificate of need from the Commission. Attorneys provide regular legal advice regarding public hearing and notice requirements, assistance as to environmental documents required for permitting particular types of facilities, and work with federal entities where federal environmental review of specific projects is required.

- **Decoupling of Utility Revenue from Energy Sales.** The division provided considerable legal advice and review to the Department with respect to the agency's white paper discussion of partial decoupling criteria and recommendations to the Commission for natural gas and electric utilities. The 2007 Legislature enacted a new law that requires the Commission to design criteria and standards to separate a utility's revenue from changes in energy sales as a means to reduce a utility's disincentive to promote energy efficiency.

- **Automatic Pass-through Charges.** The division provided legal advice concerning public utilities' automatic adjustment filings regarding energy costs which result in automatic rate changes for retail customers. The Commission continues to consider whether automatic adjustment requirements should be changed to better protect ratepayers in the event that a utility fails to pass through revenues as well as costs. Division attorneys provided legal assistance to the Department regarding CenterPoint Energy's petition for a variance to be allowed to retroactively collect from ratepayers over $20 million that CenterPoint failed to collect due to a repeated accounting error beginning in 2000. The Commission adopted the

Department's position that retroactive billing should not be permitted. CenterPoint appealed, and the Minnesota Court of Appeals reversed and remanded to the Commission. The Commission appealed to the Supreme Court, and certiorari was granted.

- **Certificate of Need for Nuclear Generation Capacity.** The division provided pretrial litigation support to the Department concerning Xcel Energy's request to expand the generating capacity of its Monticello Nuclear Generating Facility. Trial is expected to take place in the fall of 2008.

- **Conservation Improvement Plan ("CIP"), Renewable Energy, and Disbursed Renewable Generation Matters.** Attorneys advised the Department in analyzing programs designed to meet statutorily required utility conservation spending, and new legal requirements regarding renewable energy standards including renewable energy credits. The division also provided legal advice regarding creation by the Department of the Technical Review Committee, a group of various utilities and other interested parties, for the purpose of studying the extent to which 600 MW of disbursed renewable electrical power (mostly wind energy) could be injected onto Minnesota's transmission grid throughout the State, by first backing down existing generation in the amount of 600 MW, without the need for significant transmission line investment.

- **Utility Line Crossing of Railroad Property Matters.** Attorneys provided legal advice and assistance to the Department in its role as a mediator of valuation disputes between regulated utilities and railroads. Under Minnesota law, the Department has authority to determine the extent to which crossing of a railroad's property, such as its tracks by a utility's line or pipe, diminishes the value of the railroad's property.

- **Weights and Measures Matters.** The division provided legal advice to the Department's Weights and Measures Division concerning jurisdictional issues involving non-tribal property located on an Indian reservation.

TRANSPORTATION DIVISION

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

The Transportation Division advises both MnDOT and other state agencies involved in construction projects and represents the State when contractors, subcontractors, or third parties sue the State on construction-related matters. The division also protects taxpayers by filing claims on behalf of MnDOT against entities that perform defective work, fail to pay employees legally mandated wages, or otherwise fail to comply with contract requirements.

The division represents all non-regulatory State agencies in matters involving compliance with State and federal environmental requirements and when they are involved in environmental litigation. The division advises client agencies on the legal ramifications of proposed activities

and development projects, assists State agencies in real estate transactions, and evaluates and attempts to resolve claims before litigation arises.

In FY 08 the division's activities included:

- Advised MnDOT regarding multiple legal issues arising out of the I-35W bridge collapse, including representation in litigation challenging the contract for construction of the replacement bridge.

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

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

- Advised the Commissioner in adjudicating contested case decisions in regulatory matters such as prevailing wages, advertising sign permits, and railroad crossings.

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

- Represented the Minnesota National Guard regarding legal matters, including contract review and real estate transactions and litigation.

- Represented the Minnesota State College and University Board and the Minnesota Department of Administration in construction contractor claims.

CHARITIES DIVISION

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

REGISTRATION AND CONSUMER ASSISTANCE

Charitable organizations and professional fund-raisers must register and file regular reports with the Attorney General's Office. In the last fiscal year, about $471,000 in registration fees were remitted to the general fund through the Charities Division. At the end of the fiscal year, the Charities Division had registered and is maintaining public files for over 7,800 charitable (soliciting) organizations, over 2,700 charitable trusts, and about 340 professional fund-raisers. The information from these files is made available to the public in a public file room in the Charities Division and in summary form on the Charities Division section of the

Attorney General's website. The Charities Division makes available brochures relating to charitable giving that are accessible to the public through the website or in paper form.

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

OVERSIGHT

The Charities Division oversees laws relating to nonprofits and charitable organizations. By statute, the Attorney General's Office receives notice of certain charitable trust and probate matters filed in the district courts, including reviewing over 370 such notices in the last fiscal year. The Charities Division may become involved in those matters to protect charitable assets and represent the interests of charitable beneficiaries that might otherwise be unable to represent themselves. For example, the Jim and Mikki Anderson Charitable Remainder Annuity Trust petitioned the court for an approval of accounts and the trustee's actions despite the fact that the Trust was a defendant in a civil proceeding brought by the SEC in federal court. This Office objected to the petition and to the court's ratification of the trustee's actions because of the SEC's civil proceeding, which was stayed pending a criminal case against Jim Anderson. On December 5, 2007, Ramsey County District Court issued an order denying the petition in light of the circumstances involving the federal litigation.

The Charities Division also receives notice of the dissolution, merger, consolidation or transfer of all or substantially all assets of charitable nonprofit corporations, receiving about 170 such notices in the last fiscal year. These notices are reviewed to ensure that the assets are protected during such process and used for the purposes for which they were solicited and held.

ENFORCEMENT

Through the enforcement of laws governing nonprofit and charitable organizations, the Charities Division is able to help combat fraudulent solicitations and hold nonprofit organizations accountable to the public for how they raise, manage, and spend charitable assets. Examples of the matters handled by the Charities Division in the past fiscal year include:

- **ABC Humanitarian Trust.** In August 2007, this Office sued Sandra Belisle and ABC Humanitarian Trust ("ABC Trust"), a purported charity which accepted car donations, alleging a variety of violations of charitable trust and nonprofit corporation laws. In September 2007, the Hennepin County District Court issued a temporary injunction, enjoining ABC Trust and Belisle from transacting business on behalf of ABC Trust,

including soliciting, receiving, selling or otherwise disposing of charitable contributions and prohibiting defendants from engaging in any false or deceptive conduct. In June 2008, the Court granted partial summary judgment for the State finding violations of the charitable disclosure, nonprofit corporation and charitable trust laws. The State submitted evidence that ABC Trust failed to operate as charity and that Belisle commingled ABC Trust's funds with a for-profit business for at least 8 months and withdrew over $36,000 in cash during that time-period. The Court ordered Belisle to dissolve ABC Trust, permanently enjoined Belisle from incorporating, operating, or serving as an officer or director of another nonprofit or charitable organization in Minnesota, and determined that civil penalties would be determined at a later date.

- **Ashmore Family Foundation.** In August of 2007, this Office sued the Ashmore Family Foundation ("AF Foundation"), a charitable trust, alleging that it lured people to make loans to the AF Foundation by promising that the proceeds would help the AF Foundation perform charitable work and by offering rates of return on those loans of up to 72 percent. The Complaint further alleged that the AF Foundation defaulted on the loans and paid the trustees over $140,000 in "trustee fees" since 2004, while failing to carry out charitable programs other than paying $1,000 to a gymnastics organization and taking a child hunting. The AF Foundation invested its funds with investment advisors who promised high rates of return on foreign market investments, which have since been lost. The AF Foundation stipulated to a temporary injunction, which among other things, prohibited it from transacting any business, accepting any loans or soliciting charitable contributions, or making false representations.

- **Reaching Arms International, Incorporated.** In February of 2007, this Office obtained an order requiring an audit of Reaching Arms International, Incorporated, an international adoption agency ("Reaching Arms"), because its allegedly violated Minnesota law by requiring potential adoptive families to pay for adoption services before they were performed, to pay for fees not disclosed on its fee schedule and then threatening to withhold adoptions if the clients did not pay these additional fees, and increasing fees for services during the adoption process. This Office later entered into a Stipulation for the appointment of a receiver and dissolution of the adoption agency, so that its assets can be appropriately distributed. The Receiver liquidated Reaching Arms' assets and mailed claim forms to all of the known families who worked with Reaching Arms. This Office is awaiting the Receiver's filing regarding his proposed distribution of Reaching Arms' assets.

- **General Benevolence Association of Churches of Christ and Christian Churches of Minnesota.** The General Benevolence Association of Churches of Christ and Christian Churches of Minnesota (the "Association") was organized as a nonprofit corporation in 1957. Over the years, it appeared that its assets came under the control of a single individual and the organization engaged in related-party transactions that resulted in questionable expenditures of its funds. During the course of this Office's investigation of the Association in the prior fiscal year, the Association and this Office both filed Petitions for Dissolution of the Association. This Office alleged that the Association was operating without a duly elected board, was failing to follow its governing documents, did not have annual member's meetings, was failing to properly maintain board minutes, and did not have proper internal controls and governance policies to protect charitable assets. After these petitions were filed,

pursuant to a stipulation between the parties, the members voted to continue as a nonprofit corporation. Thereafter, the parties stipulated to a process for a nominating committee to be selected and board elections held. In May of 2008, the State and the Association entered into a settlement agreement, including that a new board must take over its assets and management.

- **Northstar Handicapped Helpers.** Northstar Handicapped Helpers, LLC ("Northstar") is a for-profit organization that uses telephone solicitations to sell products that are allegedly "hand-made" by disabled individuals or sold by disabled workers. After an investigation, this Office concluded that Northstar engaged in pattern of deceptive practices that gave consumers the impression that it sold products exclusively made by the disabled, was a charity, and the proceeds from sales went to support the disabled. In July of 2008, this Office entered into an Assurance under which Northstar paid a civil penalty of $2,500 and is enjoined from any behavior that leads consumers to believe, among other things, that Northstar is a charity or that proceeds from the sales of products are given to the disabled.

- **Anything Goes Salvage and Thrift.** Anything Goes Salvage and Thrift ("Anything Goes"), and its owners Jonathan and Bonnie Glassel, solicited vehicle donations in January 2008 on craigslist claiming that it was a nonprofit and that donors could receive a tax deduction. Anything Goes is not a nonprofit corporation or a tax-exempt organization. This Office entered into an Assurance whereby Anything Goes and the Glassels agreed to, among other things, stop representing themselves as a nonprofit or tax-exempt organization, notify all donors that they are not a charity and refund any damages such misrepresentation caused, and notify this Office if they seek status as a nonprofit or tax-exempt status.

- **Lift Kids, Inc.** Lift Kids, Inc. ("LK") is a charitable organization that purports to serve impoverished citizens all over the world by establishing villages with water, buildings and other amenities. The Charities Division investigated and determined that LK failed to register with this Office as a charitable organization, its board and management consisted solely of Joseph Barrett, who despite his public statements to the contrary received payments from LK, and failed to keep comprehensive accounting records. This Office entered into an Assurance where LK agreed to expanded its board to always include three members, implement comprehensive internal controls, register with this Office as a charity, and ensure that all of its solicitations comply with charitable solicitation laws.

SOLICITOR GENERAL SECTION

CIVIL LITIGATION DIVISION

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

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

- various civil rights actions brought against state officials in federal and state courts;
- the validity of legislation prohibiting railroads from withholding or delaying medical treatment to injured workers;
- the validity of legislation prohibiting the making of knowingly false reports of police misconduct;
- the validity of statutes giving the State Public Defender's Office discretion whether to represent misdemeanor post-conviction petitioners;
- the validity of provisions of the Minnesota Code of Judicial Conduct prohibiting judicial candidates and judges from endorsing other candidates and from personally soliciting campaign contributions;
- the system and procedures for bail bond forfeitures; and
- the temporary nonpublic classification of NTSB investigative data regarding the collapse of the I-35W bridge;
- the expungement of fraudulent UCC filings made against government officials

The division provides legal representation to all state agencies and the judicial and legislative branches of the State on a broad range of employment issues and claims, including claims under the Minnesota Whistleblower statute, Minnesota Human Rights Act, Americans with Disabilities Act ("ADA"), Family Medical Leave Act ("FMLA"), Fair Labor Standards Act ("FLSA"), and claims of discrimination and harassment under Title VII. The division also

represents the State in lawsuits involving labor issues. In addition, the division has represented state agencies in several class action lawsuits involving claims of discrimination. The division represents the State and state officials in actions filed in federal and state courts and before administrative tribunals.

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

With respect to employment lawsuits concluded in FY 08, the division has saved the State in excess of $29.6 million dollars based upon demands made and the ultimate resolution.

The division litigates tort claims against the State, its agencies and employees, in personal injury and property damage lawsuits. Most commonly, the allegations are of negligence, but they also involve defamation, infliction of emotional distress, excessive use of force, interference with business relations and violations of federal civil rights. Examples include: highway crash cases in which the Minnesota Department of Transportation is faulted for inadequate design, construction or maintenance of a state highway; suits against the Departments of Human Services and Corrections for deaths occurring in the institutions they operate; and claims against the Department of Natural Resources arising from snowmobile and ATV accidents on state trails. During FY 08 the division saved the State more than $2.5 million in its resolution of personal injury litigation.

The division represents the PUC in litigation in both state and federal courts. In the past year, the division has defended PUC decisions in state court involving matters related to the compensation due for acquisition of service territories, discrimination in the provision of switched access telecommunications service, electric and gas costs to be recovered via automatic adjustment provisions authorized by statute, and denial of a power purchase agreement and designation of a coal gasification facility as an innovative energy project under statute. The division also currently represents the PUC as an *amicus curiae* at the Minnesota Court of Appeals in a matter involving the application of the filed rate doctrine.

The division successfully defended the PUC in four of five decisions issued in the last year. In one case involving the recovery of gas costs in the purchased gas adjustment, the Court of Appeals reversed the Commission's decision. That matter, however, is currently on review before the Minnesota Supreme Court.

In federal court, the division currently represents the PUC in its appeal of a Federal Energy Regulatory Commission ("FERC") order interpreting federal law to authorize the FERC

to site an electric transmission line in a national interest electric transmission corridor even where the State has lawfully denied a permit.

The division also advises the PUC on energy, siting and telecommunications matters that come before the agency. Energy matters for which the PUC seeks advice involve, among others, the rates and practices of electric and natural gas utilities providing energy services in the State of Minnesota. The division also advises the PUC on matters related to the siting and routing of large energy facilities, including petroleum and natural gas pipelines, electric transmission lines, and electric generating facilities. In addition, the division advises the PUC on telecommunications matters before the PUC, including interconnection agreements between telecommunications providers, complaints filed with the PUC alleging violations of state telecommunications law, and rate and service quality issues. Finally, the division provides counsel to the PUC on issues related to the implementation of legislative directives, such as the development of the renewable energy credit tracking system.

TAX LITIGATION DIVISION

The Tax Litigation Division represents the Minnesota Department of Revenue ("Department") in taxpayer-initiated court cases appealing the Department's state tax assessments, seeking refunds, contesting collection actions, or challenging the validity of the State's tax laws. Division attorneys appear in the Minnesota Tax Court, State District Courts, Federal District Courts, the Federal Appellate Courts (8th Cir.) and Bankruptcy Courts. In FY 08, the Division opened 93 new cases, which does not include numerous bankruptcy matters.

The majority of new cases involved the State's income and sales taxes as well as personal liability assessments against corporate officers for corporations' unpaid withholding taxes and sales taxes. Some cases involve very substantial corporate refund claims and challenge Department assessments ranging in amounts of $2.5 Million to $20 Million. The Division also continues to handle a large volume of pro se matters. These include tax protestor cases, in which persons assert that the income tax is either unconstitutional or cannot be applied to particular forms of income. The following describes some of the activities that occupied significant time for the Division during FY 08.

SIGNIFICANT RESOLVED LITIGATION:

1. Obtained a favorable decision in the Eighth Circuit Court of Appeals dismissing a suit against both the Department and the Minnesota Legislature regarding the constitutionality of the state income tax statues.

2. Obtained a favorable settlement in a lawsuit against a national insurance company for underreporting of its Minnesota workers' compensation insurance premiums dating back over 20 years. The settlement resulted in the insurance company paying to the Department over $2.7 Million.

3. Defended the Department's assessment of sales and use tax on diesel fuel. The Federal District Court (Minnesota) issued a favorable ruling. The plaintiffs, two prominent interstate railroads, appealed the decision to the Eighth Circuit arguing that the tax is discriminatory against rail carriers in violation of federal law (4-R Act). The Eighth Circuit ultimately reversed the Federal District Court and found that the sales and use tax on railroad fuel did violate federal law (4-R Act).

4. Obtained a favorable decision at the Minnesota Supreme Court ("Court") sustaining Minnesota's residency and domiciliary requirements for purposes of determining individual income taxes and upholding the Department's tax assessment. The Court also upheld the Tax Court's affirmance of a Department determination and held that, to avoid paying Minnesota income tax, an individual must show that he not only resided outside of Minnesota for more than half of the year, but he must also show that he made his domicile outside of Minnesota.

5. Obtained two favorable decisions at the Minnesota Supreme Court ruling that the taxpayers in question were subject to tax liability on their individual income and upholding the applicable statutory and common law burden of proof.

6. Obtained a favorable decision at the Minnesota Court of Appeals upholding the state's right of reversion of tax-forfeited lands when the city or county who received the tax-forfeited lands from the State in the form of use-deeds fails to maintain the land consistent with the terms of the use-deed issued to it by the Department.

7. Obtained a favorable decision at the Minnesota Court of Appeals upholding the state district court's dismissal of a suit against the Department and other state agencies on the grounds that the taxpayer did not have standing to challenge the constitutionality of a state economic development program that provides tax exemptions.

8. Obtained a favorable decision at the Minnesota Tax Court affirming the Department's determination that insurance premiums tax applies to the total amount paid for a title insurance policy regardless of the amount of premium an agent remits to the insurer.

9. Obtained a favorable decision at the Minnesota Tax Court after a trial affirming the Department's personal liability assessment of a corporate officer for the payment of a corporation's unpaid sales tax.

10. Obtained a favorable settlement of a Department assessment and collection action against a corporation for unpaid tobacco and cigarette taxes.

11. Obtained a favorable settlement of a Minnesota Tax Court case on the issue of whether a corporate officer is personally liable for the sales tax his business failed to pay to the Department.

The Tax Litigation division also regularly files motions to dismiss in Tax Court and the State and Federal District Court in response to frivolous or non-jurisdictional appeals, including

Department collection actions in which the appellant has failed to timely exercise his rights to appeal.

SIGNIFICANT PENDING LITIGATION:

Pending litigation involves, for example, defending the constitutionality of Minnesota's use tax on fuel used in multiple interstate natural gas pipelines, and Minnesota's sales and use tax on diesel fuel used by major interstate railroads; the appropriate assessment of corporate franchise taxes; and the validity of the JOBZ and Bioscience Industry Zone Programs (which create tax free zones throughout the State spurring targeted job growth and economic development). Several cases also involve the indirect sales tax audits issued to cash businesses, where a lack of business records requires the reconstruction of taxpayer's sales through third party records. The following describes in more detail some of the significant pending litigation that occupied significant time for the Division during FY 08.

1. Defending the Department in Federal District Court (Minnesota) in a suit by a prominent interstate railroad which challenges the validity of the Department's assessment of sales and use tax on diesel fuel used by the railroad and argues that such tax violates federal law (4-R Act). Given that the Eighth Circuit ruled in late 2007 that the tax violates federal law with regard to two different similarly situated interstate railroads (see item number 2 in *Significant Resolved Litigation* section above), the Department no longer continues to assess this tax against these railroads. However, the Minnesota Supreme Court ruled in 2000 that this tax does not violate federal law (4-R Act) as it relates to this particular railroad. The Tax Litigation Division will continue to defend the Department in this federal action and in a future Tax Court or State District Court refund action which this railroad will file seeking a refund of the approximately $20 Million it has paid in sales and use tax on diesel fuel.

2. Defending the Department at the Minnesota Court of Appeals in a refund claim of approximately $10 Million by two major interstate natural gas pipelines which appealed the State District Court's ruling that the pipelines' use of natural gas in its pipelines is subject to Minnesota sales and use tax. The Tax Litigation Division successfully argued on cross-motions for summary judgment that the sales and use tax on the pipelines use of fuel was constitutional. We are awaiting the scheduling of oral argument at the Minnesota Court of Appeals. The outcome of this litigation will have an impact on similarly situated corporations, including the assessment (or subsequent claims for refunds) of those corporations.

3. Defending the Department in Tax Court in an appeal by a major financial corporation appealing both the Department's assessment of additional corporate franchise tax of about $250,000 and seeking a refund of about $1.2 Million in corporate franchise tax paid for multiple tax years. The case is set for trial in early 2009.

4. Defending the Department in Tax Court against a major interstate railroad appealing the Department's assessment and subsequent denial of the railroad's request for a refund of approximately $4.2 Million in corporate franchise tax for multiple tax years. The railroad contests the validity of several state tax statues regarding the deductibility of interest paid on debt instruments when the loans are issued by and then received by inter-related entities.

The Tax Litigation Division successfully defeated the railroad's motion for partial summary judgment and the case is set for trial in spring 2009. The outcome of this litigation will have an impact on similarly situated corporations, including the assessment (or subsequent claims for refunds) of those corporations.

5. Defending the Department in Tax Court in a suit by a large financial entity appealing the Department's assessment of corporate franchise tax of approximately $2.5 Million for transactions between a parent company and a foreign operating corporation (FOC). The ultimate issue in this case is whether the Minnesota Supreme Court will apply the economic substance and business purpose doctrine to individual FOC transactions. The outcome of this litigation will have an impact on similarly situated corporations, including the assessment (or subsequent claims for refunds) of those corporations.

Bankruptcy Matters: The Division also appears in proceedings and bankruptcy court involving individual or corporate debtors who have either failed to file the necessary income returns or are challenging the State's claims in bankruptcy.

Tax Protestors: The Division obtained several favorable decisions in state supreme court, federal district court, state district court and state tax court rejecting claims of tax protestors that their income was not subject to Minnesota income tax or concluding that protestors could not shield income from state taxation by shifting it into sham trusts.

Miscellaneous Liens for the Department: The Division also reviews and responds to numerous miscellaneous liens, lawsuits and filings involving the Department including foreclosure actions, quiet title actions, land registration, notices of property sales, etc., in state and federal court and successfully defended or preserved the priority of state tax liens over the liens and judgments of other claimants.

EDUCATION DIVISION

The Education Division ("Division") represents the State's complex and varied educational system, including most student related matters for the Minnesota State Colleges and Universities ("MnSCU") system. Other divisions throughout the Office of the Minnesota Attorney General, such as the Civil Litigation Division provide other legal services to MnSCU on such issues as employment law and contract and public finance issues. This brief summary below addresses only the legal services provided by the Education Division. The Education Division also represents the Minnesota Department of Education ("MDE"), the Office of Higher Education ("OHE"), and the Perpich Center for Arts Education ("PCAE").

MINNESOTA STATE COLLEGES AND UNIVERSITIES ("MNSCU")

The Education Division represents the Chancellor's staff and MnSCU administrators at 32 institutions throughout the state. The division represents MnSCU in formal lawsuits initiated by students against the schools. The division provides daily client advice on a wide range of issues including instituting best practices, student disciplinary proceedings, and various

additional constitutional issues that arise in the context of educating, counseling and the housing of students.

Special note is made of the following activities in the MnSCU area.

Litigation. Provide legal advice to and defend campus programs and staff and appear before the Minnesota Court of Appeals, in State and Federal District Court and the Minnesota Office of Administrative Hearings in suits initiated by students or former students against campus administrators and staff.

U.S. Department of Education, Office of Civil Rights (OCR). Provide legal advice to the campus staff and defend the 32 MnSCU campuses against complaints filed by students making various claims of discrimination.

Minnesota Department of Human Rights (MDHR). Provide legal advice to the campus staff and defend the 32 MnSCU campuses in response to complaints filed by students.

MINNESOTA DEPARTMENT OF EDUCATION

MDE administers and oversees the State's K-12 education programs. The division provides legal advice for MDE's many programs, including charter school issues, state merit pay legislation (Q Comp), data practices, the federal No Child Left Behind Act, graduation standards and testing, the child and adult food care program, and state financial audit issues.

OFFICE OF HIGHER EDUCATION (OHE)

The Office of Higher Education administers federal and state higher education programs, including (1) student loan and financial aid programs; (2) registration of private and out-of-state public higher education institutions that provide programs in Minnesota; and (3) licensure of private business, trade and correspondence schools.

THE PERPICH CENTER FOR ARTS EDUCATION (PCAE)

The Perpich Center for Arts Education, also called the Arts High School, is a residential public high school operated by the state.

MINNESOTA DEPARTMENT OF EDUCATION

Special note is made of the following activities in the education area.

- ***Charter Schools.*** Provided legal advice to MDE on numerous issues relating to charter schools, including accountability, state aid overpayments, lease aid, grants management, sponsorship contract appeals, and financial audits. Successfully defended MDE in lawsuits in state district court and Court of Appeals arising out of closure of charter schools. The division defends the Department decision making on school-based maltreatment of various cases.

- ***Special Education.*** Successfully defended MDE in numerous lawsuits in Minnesota federal district court and in the Eighth Circuit regarding special education. These lawsuits challenged MDE's supervision of local school districts in complying with federal and state special education laws. Also, successfully defended MDE in the Court of Appeals in two separate lawsuits brought by local school districts challenging MDE's complaint resolution decisions regarding special education services. In addition, provided legal advice in the interpretation of federal and state special education laws, and advises on private trade school and school related data practices issues.

- ***Maltreatment of Minors in Schools.*** Represented MDE in several maltreatment hearings. Reports of maltreatment of minors that occur in school buildings are investigated by MDE. After MDE makes a finding of maltreatment by a school worker (such as a teacher, assistant teacher or bus driver), the school worker may request an administrative hearing. Successfully defended several appeals of MDE's final determination of maltreatment to state district court.

- ***Alternative Teacher Compensation.*** Represented MDE in Court of Appeals in school district challenge to requirements of alternative teacher compensation (or "Q Comp") statute.

- ***Child and Adult Food Care Program Overpayments.*** Defended MDE's determination to recover fraudulent overpayment for meals served in day care homes.

HEALTH/ANTITRUST DIVISION

HEALTH DEPARTMENT MATTERS

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

Specific examples of the division's work in FY 08 include the following:

- ***Enforcing the Freedom to Breathe Act.*** The Department learned that several bars across the State were staging so-called "theater nights" and deeming all bar patrons and employees to be "actors" in "theatrical performances" in order to claim that smoking was allowed in the bars under the "theatrical performance" exception to the Freedom to Breathe Act, which prohibits smoking in public places. The Department, represented by division attorneys, filed suit against three bars, seeking declaratory and injunctive relief. In the first of the three lawsuits, the district court

granted the Department's motion for a temporary injunction. Thereafter, all three lawsuits were resolved with Consent Decrees filed with the courts and entered as judgments. By signing the Consent Decrees, the bar owners agreed to stop allowing smoking in their establishments, and pay a civil penalty to the Department.

- ***Protecting*** the ***Public from Asbestos Contamination.*** The Department learned that an individual was permitted to continue his asbestos-related employment, after having his supervisor certification revoked for committing asbestos-related violations at five different locations. The individual had also been cited for asbestos-related violations as a worker. The Department proposed to revoke his worker certification. A division attorney represented the Department at a contested case hearing. An administrative law judge recommended the individual's worker certification be revoked and the Commissioner affirmed the revocation. The individual had been responsible for air monitoring in individual homes where asbestos abatement work was done.

- ***HIV Health Threats.*** Division attorneys advised the Department in several matters involving people with HIV who engaged in at-risk behaviors after they were counseled how to avoid transmitting the disease to others. At least four of those cases required the Department to go to court to obtain a court order directing the non-compliant carrier to obtain additional counseling and to cease engaging in at-risk behaviors. In two cases, the HIV carriers were also subject to civil commitments due to mental health or chemical dependency problems. In one other case, the carrier, after agreeing in court to undergo counseling, refused to comply with the court order. In that case, a division attorney represented the Department in a court proceeding to obtain compliance with counseling. The court placed that individual under house arrest until such time as he completed the required counseling.

- ***Home Care Agency Licensing.*** Department inspections of a home care agency from May 2005 through April 2006 resulted in the discovery of numerous violations and failures to correct those violations. The home care agency was supposed to provide health services to vulnerable individuals. In addition, a background study of the home care agency's administrator revealed a disqualifying characteristic that caused him to be ineligible to hold a managerial position. The Department proposed to refuse to renew the home care agency's license. Following a contested case hearing, an administrative law judge recommended that the license not be renewed. While the matter was pending before the Commissioner of Health, the home care agency withdrew its application for renewal of his license.

- ***Licensure of a Resort.*** A timeshare facility which has been licensed as a resort for a number of years refused to renew its lodging license, claiming that it is not a resort, but rather an association of privately owned real estate, which may be rented out by individual owners. The timeshare, which has 58 units, sells each unit on a weekly basis, and thus it consists of approximately 3,000 parcels of privately owned "property." A division attorney represented the Department in a contested case, after

which the administrative law judge recommended that the penalty assessment by the Department be upheld, and that the timeshare facility be licensed as a resort. The Commissioner adopted that finding and required the facility to also pay an administrative penalty assessment. The timeshare appealed the Commissioner's decision to the Court of Appeals. An attorney from this division represented the Department at the Court of Appeals. This matter is still pending with the Court of Appeals.

- ***Violations of Mortuary Science Laws.*** A Department investigation found that a funeral home violated statutes governing the practice of mortuary science by allowing an unlicensed individual to make funeral arrangements. The Department issued an administrative penalty order assessing a $10,000 fine, and the funeral home appealed. After an evidentiary hearing, an administrative law judge issued a report recommending affirmance of the penalty order. The Commissioner of Health also affirmed the Department's action but cut the penalty amount in half.

A significant amount of the division's work in FY 08 involved defending the Department's determinations that individuals or health care facilities violated the Vulnerable Adults Act by neglecting, abusing or financially exploiting vulnerable adults. In addition, the division defended the Department decisions not to allow certain disqualified individuals to work in direct contact with patients or residents of health care facilities or health care service organizations (such as home care agencies). Examples of these cases include:

- ***Nursing Home Neglect.*** A nursing assistant neglected a vulnerable adult resident when transferring her from the toilet to her wheelchair. The nursing assistant failed to lock both brakes on the wheelchair and failed to use a transfer belt which contributed to the vulnerable adult falling and breaking open an incision on her left knee. Following a hearing, the human services judge recommended upholding the neglect and disqualification findings and the Commissioner affirmed.

- ***Nursing Home Neglect.*** A nurse neglected several nursing home residents by failing to assess them, failing to get them proper medical treatment, and failing to give them proper medications. A division attorney represented the Department in the appeal. The Commissioner ultimately issued an order, affirming the finding of neglect.

- ***Nursing Home Abuse.*** The Department determined that a nursing home assistant sexually abused a vulnerable adult while assisting her in the shower. Because of the sexual abuse finding, he was also disqualified for seven years from working in certain health care and other employment positions. Following a fair hearing, the Human Services Judge recommended upholding the finding of abuse, and the Commissioner affirmed that holding. The nursing assistant then appealed to district court and an attorney from the division represented the Commissioner in court where the district court upheld the finding of abuse.

- ***Nursing Home Abuse.*** A nursing assistant at a nursing home abused a vulnerable adult by hitting him in the head and chest. Following an evidentiary hearing, the Commissioner affirmed the abuse finding. The nursing assistant appealed to the district court. The district court affirmed the abuse finding.

- ***Nursing Home Abuse.*** A nursing assistant abused a nursing home resident by fighting the resident, causing bruises on the resident's hand and wrist. After a fair hearing, the Commissioner upheld the Department's finding of abuse.

- ***Assisted Living Financial Exploitation.*** A 2006 Department investigation found that a home health aide at an assisted living facility financially exploited a client by stealing money from him on multiple occasions. The home health aide did not file a timely administrative appeal of the financial exploitation determination, and thus the determination was "conclusive." The home health aide was subsequently disqualified as a result of the financial exploitation determination. She filed an appeal with the Minnesota Court of Appeals. The Court of Appeals rejected her constitutional and other arguments and affirmed the Department's refusal to rescind or set aside the disqualification.

- ***Nursing Home Financial Exploitation.*** A nursing assistant financially exploited and emotionally abused a vulnerable adult by beginning a relationship with the vulnerable adult so that he would become emotionally dependent upon her. The nursing assistant financially exploited the vulnerable adult by obtaining a $6,000 "gift" from him. The nursing assistant appealed and the Commissioner ultimately upheld the maltreatment finding.

- ***Disqualification Appeal.*** A nursing assistant was disqualified based on Hennepin County's finding in 2002 that she allowed her ex-husband, an untreated sex offender, to have unsupervised contact with her daughter. The ex-husband sexually abused the daughter and gave her marijuana to sell at school. The nursing assistant appealed, arguing that the Department should set aside the disqualification to allow her to work at a Department-licensed facility. After a fair hearing before a human services judge, the Commissioner issued a final order upholding the Department's decision not to rescind the disqualification or set it aside.

- ***Disqualification Appeal.*** A county social services agency found that a nursing assistant neglected her son because she left him in the care of her sister and her boyfriend, whom she knew to be involved in methamphetamine use. In addition, precursors of methamphetamine were found in her home. The nursing assistant was disqualified from having direct contact with nursing home residents. The nursing assistant appealed, arguing that the Department should set aside her disqualification to allow her to keep her job. The Commissioner ultimately affirmed the Department's refusal to set aside the disqualification.

- ***Disqualification Appeal.*** The Department of Human Services permanently disqualified a nurse based on a preponderance of the evidence that she had committed an act in Pennsylvania that was equivalent to second-degree manslaughter in Minnesota. The Department of Health denied the nurse's request for reconsideration and she appealed to the Minnesota Court of Appeals. An attorney from the division represented the Department at the Court of Appeals, which held that the Commissioner had correctly applied the current law to permanently disqualify the nurse.

ANTITRUST MATTERS

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

Examples of the division's work in FY 08 include:

- ***Commercial Waste Hauling Settlement.*** An investigation revealed that Waste Management of Minnesota had a market share of 80-90 percent in the commercial waste hauling market in the Mankato area. The State and Waste Management entered into a settlement, filed in Ramsey County District Court, pursuant to which Waste Management agreed to change certain of its commercial contract terms. The changes are intended to promote competition among other commercial waste haulers in the area and include reducing the commercial contract terms from three years to two years; providing a written notice that the contracts will automatically renew unless the customer cancels before a specified date; and allowing cancellations by fax rather than requiring certified mail.

- ***Multistate School Bus Merger Settlement.*** Two national school bus companies, Laidlaw and First Student, proposed to merge. Both school bus companies operated in Minnesota. Minnesota participated in a multistate investigation which revealed that the merger would result in a high market share for the merged company in the Twin Cities area. The states negotiated a settlement with the merging companies. Under the settlement, the companies agreed to give certain school districts the option to take over the companies' leases for school bus depots in certain areas of the Twin Cities. The State found that access to a school bus depot was a critical factor in allowing more competitors to bid on a school bus contract. Many school districts commented to the division that the settlement could result in significant cost savings as a result of increased competition.

- ***Investigating Minnesota's Health Care Markets.*** Based on reports of several acquisitions in the primary care market in the Twin Cities area, the division conducted an investigation into the potential anticompetitive effects of the increased consolidation. The division issued investigative demands to several health care entities, conducted a number of interviews, and reviewed data and documents relating to the acquisitions.

- ***Multistate Pharmaceutical Litigation.*** Minnesota, together with numerous other states, sued Abbott Laboratories, Fournier Industrie et Sante, and Laboratoires Fournier, S.A. in federal district court in Delaware, alleging illegal monopolization, restraint of trade, and other claims, relating to the companies' marketing and patenting of Tri-Cor, a drug used to treat patients with certain cholesterol-related disorders. The litigation is pending.

- ***Investigating Airline Consolidation.*** Northwest Airlines is a passive investor in a private equity firm that wished to acquire Midwest Air. The division participated in the United States Department of Justice's review of the proposed merger. The DOJ ultimately approved the merger.

- ***Multistate Enforcement of Final Judgment in Microsoft Litigation.*** Minnesota worked with several other states to obtain an extension of the 2002 final judgment prohibiting Microsoft from engaging in anti-competitive conduct in the middleware market. Minnesota and the other states argued that an extension was necessary because Microsoft had never fully complied with the requirements of the original judgment. The court granted the states' motion for an extension despite opposition by Microsoft and the United States Department of Justice.

CIVIL REGULATION SECTION

HEALTH LICENSING AND INVESTIGATIONS DIVISIONS

The Health Licensing Investigations Division performs investigative services on behalf of 17 health licensing and two non-health licensing boards. The division works in conjunction with the Health Licensing Division. Division investigations on behalf of the health licensing boards provides separation of the investigative function from the board's judicial responsibilities.

Complaints referred for investigation are reviewed to determine whether jurisdictional and/or multiple issues exist. Allegations in the complaints are often complex, involving multiple issues. This process ensures a coordinated and focused approach from the beginning of the investigation through its completion. Division staff investigate allegations of sexual misconduct, review allegations involving individual competency and quality of medical care, review allegations of billing fraud and inspect practice settings for infection control procedures. Investigations involving allegations which, if substantiated, present immediate danger to the public or the subject of the investigation are handled on an expedited basis. For example, two investigations on behalf of the Board of Medical Practice involved allegations of sexual misconduct by physicians and resulted in suspension of the doctors' license.

During FY 07/08 division investigators completed over 350 investigations.

The Health Licensing Division represents the State's health licensing boards, the Health Professional Services Program, Minnesota Board of Law Examiners, and the Minnesota Continuing Legal Education Board. During FY 08, the division provided legal representation to all 16 of the State's health licensing boards, which are the Board of Medical Practice, Board of Nursing, Board of Psychology, Board of Chiropractic Examiners, Board of Veterinary Medicine, Board of Optometry, Board of Social Work, Board of Dietetics and Nutrition, Board of Marriage and Family Therapy, Board of Physical Therapy, Board of Behavioral Health and Therapy, Board of Nursing Home Administrators, Board of Dentistry, Board of Podiatry, Board of Pharmacy, and Emergency Medical Services Board. The legal representation includes advising attorney services, representation at disciplinary conferences, and representation in contested cases and judicial proceedings. The division also serves as general counsel to the boards, which involves providing legal advice on license application matters, data practices questions, and open meeting law issues, and includes staying abreast of national trends in health licensing regulation.

The legal services primarily consist of participation in the complaint resolution process, which involve the board activities devoted to protecting the public. The division regularly advises the boards on procedural due process, statutory interpretation of disciplinary provisions, subpoena power, jurisdiction, and overall board authority. The division is responsible for reviewing investigative reports, assisting the boards with the complaint triage process, representing the boards at disciplinary conferences, negotiating settlements, and representing the boards at pre-litigation mediation. During FY08, the boards extensively used pre-litigation mediation and negotiation to resolve complaints. The division negotiated a number of

disciplinary and non-disciplinary agreements requiring physicians, pharmacists, nurses, psychologists, and dentists to attend training sessions designed to improve substandard skills. The division assisted the Board of Nursing in resolving over 280 complaints. The division also assisted the Board of Pharmacy in negotiating multiple settlements for pharmacists and a pharmacy who were found to have violated standards for internet prescription filling. The division also assisted the Board of Medical Practice with the administrative revocation of the license of a physician who pleaded to criminal sexual conduct in the third degree and with the suspension of another physician who admitted to sexual misconduct with a patient. Additionally, the division has advised the boards on multiple "return to practice" agreements and orders whereby health care practitioners who have been suspended are re-entering the health care field with conditions and limitations on their licenses.

During FY08, the division handled a number of administrative contested case proceedings involving professional misconduct, sexual misconduct, unlawful practice, and mental health/chemical dependency. The division represented the Board of Nursing in a contested case involving a licensed practical nurse who had repeated and regular medication errors, but refused to undergo remedial training. The division represented the Board of Chiropractic Examiners in a contested case involving a chiropractor who engaged in abusive and manipulative fee collection techniques, designed to induce his patients to continue treatment without an understanding that insurance coverage had been exhausted. These patients would continue treatment, the chiropractor would provide them with no information about the expiration of coverage or about the size of the fees they were incurring, and then the chiropractor would sue them in small claims court for his fees.

During FY08, the division represented the Boards in multiple actions in district court and in cases before the Minnesota appellate courts. First, the Minnesota Board of Veterinary Medicine was the subject of a lawsuit alleging that the laws regulating the practice of equine teeth floating were unconstitutional. The division successfully defended the constitutionality of the Board's statute in a trial that lasted over five days. Second, two chiropractors challenged the validity of the Board of Chiropractic Examiners' subpoena power. The division successfully defended the motion to quash the subpoena in district court, thereby confirming the strength of the health licensing boards' subpoena power. Third, the division successfully brought a motion for temporary injunction against a physician who continued to practice medicine after her license was suspended. Fourth, the division successfully defended an appeal of the Board of Veterinary Medicine's suspension of the license of a practitioner who regularly and repeatedly engaged in substandard veterinary care. Finally, the division successfully defended, in the appellate courts, multiple attempts to stay the decision of the Board of Chiropractic Examiners' in the matter involving the chiropractor who engaged in abusive and manipulative fee collection techniques.

The division assists the Health Professional Services Program, which is the boards' diversion program for health care providers diagnosed with mental health or chemical dependency issues, in establishing practice restrictions and setting boundaries for impaired physicians, nurses, pharmacists, dentists, and other health care practitioners.

HUMAN SERVICES DIVISION

The Human Services Division provides litigation services and legal counsel to the Minnesota Department of Human Services ("DHS"), one of the state's largest agencies, with an annual budget of nearly $11 billion and approximately 7,200 employees located throughout Minnesota. 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, MinnesotaCare, and General Assistance Medical Care, which together cover approximately 659,000 Minnesotans. In continuing care, division attorneys represent DHS on matters concerning nursing home rates, aging and adult services, disability services, deaf and hard-of-hearing services, and HIV/AIDS programs. 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. Division attorneys also represent the state in funding disputes between the state and the federal Department of Health and Human Services.

CHILDREN AND FAMILY SERVICES

Division attorneys in the children and family services area handle legal issues relating to public assistance programs, child support, and children protection matters. Public assistance programs include the Minnesota Family Investment Program, the General Assistance program, the Minnesota Supplemental Aid program, and the Food Stamp program. Division attorneys represent DHS in litigation contesting the operation of these programs and advise DHS on the legal issues raised by these programs. In the child support area, division attorneys defend challenges to child support statutes and programs, and advise the agency in its oversight role over counties in administering child support collection. In children's protection, attorneys represent 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 represent DHS' adult and children's mental health programs, chemical dependency programs, and 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"). In FY 08, division attorneys handled 47 active civil lawsuits related to the defense of the above-named programs. Division attorneys also handled 55 petitions for discharge or transfer from patients at MSH and MSOP in FY 08. Additionally, division attorneys handled 21 petitions in FY 08 related to the administration of neuroleptic medications and electroconvulsive therapy for patients at DHS-operated facilities.

LICENSING

Division attorneys represent 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, and services for mental health, developmental disabilities, and chemical health. Division attorneys appear in administrative proceedings and appellate courts seeking to uphold disqualifications of individuals providing services in programs licensed by DHS, respond to expungment 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. In FY 08, division attorneys represented DHS in over 158 licensing proceedings.

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

- ***Medical Assistance Plan Disapproval and Disallowance litigation***: represented DHS in several cases against the federal Centers for Medicare and Medicaid Services ("CMS") regarding CMS' disapproval of state MA plan provisions, and disallowance of federal funding for state plan expenditures. Two disallowance appeals were decided in favor of the State, resulting in savings to the state of approximately $25 million. Several matters are still pending, including DHS' appeal from CMS' disapproval of rehabilitative mental health services.

- ***Amendments to the Surveillance and Integrity Rule***: advised DHS on making improvements to the Minnesota Rule setting out procedures for investigating fraud, theft, abuse and error in the state's health care programs.

- ***Red Lake/Beltrami County Dispute***: mediated, at the request of DHS, a dispute between the Red Lake Band of Chippewa Indians and Beltrami County over the payment of foster care to families that were caring for Red Lake children.

- ***The Appeal of West Metro Recovery Services***: defended DHS in an appeal of DHS' order of revocation of the license of West Metro Recovery Services, a chemical dependency treatment facility. The revocation was based on West Metro's failure to comply with background study requirements, providing false or misleading information to DHS, providing false information in client files, failing to protect client records, and other violations.

- ***R.L.S. v. DHS Commissioner, Cal Ludeman, et al.***: defended the Commissioner and numerous other officials at the Minnesota Sex Offender Program from allegations that such defendants had violated the constitutional rights of RLS, who is committed to the sex offender program.

- ***In the matter of S.H.***: worked with the U.S. State Department to facilitate the return of three children who had been abandoned in Eritrea by their Minnesota adoptive family.

This Office coordinated a meeting with federal, state, and county agency staff and helped coordinate a plan that included a child protection investigation, district court proceeding, and licensing action to return the children within a three-week timeframe.

- ***L.D.D., Inc. v. DHS***: defended DHS against L.D.D.'s allegations that DHS violated the Minnesota Government Data Practices Act by sending copies of a L.D.D. license revocation order to entities doing business with L.D.D.

- ***Reimbursement and third-party liability collections:*** again in FY 08, division attorneys assisted DHS in recovering millions of dollars in MA and alternative care services through liens, tort claims and lawsuits against third parties, and from special needs trusts.

HUMAN RIGHTS/LABOR/CORRECTIONS DIVISION

The Human Rights/Labor/Corrections Division represents the Departments of Human Rights, Labor and Industry, Employment and Economic Security, Corrections, and Veterans Affairs as well as the Bureau of Mediation Services and the Client Security Board, and the Insurance Division of the Department of Finance and Employee Relations.

The division's major human rights activity is the handling of cases forwarded by the Department of Human Rights following a determination that there is probable cause to believe that illegal discriminatory conduct has occurred. The division participates in negotiation and litigation regarding these matters and seeks to obtain appropriate monetary and non-monetary relief. The division resolved more than 40 such cases in FY 08. The division's enforcement efforts resulted in Minnesota and its citizens receiving compensatory and injunctive relief for illegal discriminatory treatment. In FY 08, the division assisted the Department in obtaining compensatory relief for Minnesota citizens of approximately $378,000. On behalf of the Commissioner of the Department of Human Rights, the division filed a brief as amicus curiae at the Minnesota Supreme Court, successfully advocating for a change in the prima facie case for sexual harassment claims that is more favorable to claimants than that previously established by the Minnesota Court of Appeals.

The division provided advice and representation to the Minnesota Department of Employment and Economic Development (DEED), and participated in bankruptcy proceedings in order to protect the State's interest in collecting reemployment benefits overpayments. In FY08, cases brought by this Office prevented the discharge in bankruptcy of approximately $101,000 of improperly received benefits.

This division also provided advice and representation to the Minnesota Department of Labor and Industry (DOLI). In representing DOLI, the division engages in litigation to enforce occupational safety and health standards, including cases regarding workplace fatalities. In FY 08, the office assisted in resolving 17 OSHA cases and obtaining approximately $75,000 in OSHA fines. The division also engages in litigation to enforce other labor laws, such as fair labor standards laws, which include minimum wage and child labor laws. Litigation in these

other areas resulted in approximately $20,000 in fines. In addition to fines, the division's litigation and negotiation results in improvements to work conditions.

The division also provides a broad range of legal services to the Department of Corrections and all state correctional facilities. These legal services include a substantial amount of litigation. The division successfully defended a high volume of lawsuits brought by inmates against the Department. Last year, the division handled over 110 cases brought by inmates.

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

- Obtained court judgments for the State, based on debts owed to various State agencies;
- Protected the State's rights as a creditor in bankruptcies, receiverships, liquidations, and other such actions; and
- Trained and worked with State personnel on collection, financial, and bankruptcy matters.

ENVIRONMENTAL PROTECTION DIVISION

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

ENVIRONMENTAL LAW ENFORCEMENT

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

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

In FY 08, MPCA enforcement actions resulted in approximately 200 APOs and 50 stipulation agreements. The civil penalties imposed totaled approximately $1.8 Million. Enforcement matters handled by EPD attorneys during FY 08 included the following:

- Represented MPCA in negotiating a stipulation agreement with Granite Falls Community Ethanol Plant for overproducing in violation of its permit. Under the stipulation agreement, the company agreed to pay a $300,000 civil penalty.

- Represented MPCA in negotiating a stipulation agreement with Badger Foundry Company for violating its air permit. The company was required to install a new bag house to control air emissions and paid a civil penalty of $70,000.

- Represented MPCA in negotiating a stipulation agreement with Fabcon, Inc. for discharging contaminated industrial water to wetland and wildlife areas. The company agreed to corrective actions, completed major erosion control work, and paid a civil penalty of $32,000.

CLIENT ADVICE AND OTHER LITIGATION

EPD provides legal advice and litigation services to the MPCA on a variety of non-enforcement issues. On average approximately 200 files are maintained in the EPD at any given time regarding ongoing legal advice. The majority of issues on which MPCA seeks legal services involve permitting, rulemaking, and environmental review. For example, in FY 08 the EPD represented the MPCA on numerous environmental review and permitting appeals in state district courts, the Office of Administrative Hearings, the Minnesota Court of Appeals, the Minnesota Supreme Court, and in federal district court. One of the more noteworthy matters that is presently before the Supreme Court is a challenge to the issuance of Alexandria Lake Area Sanitary District's wastewater treatment facility permit. Another ongoing noteworthy matter is litigation involving permits for ballast water discharge into Lake Superior and advising on the implementation of a new ballast water permit to be issued by the MPCA.

The EPD is also representing the MPCA in the thirty year old Reserve Mining (now Northshore Mining) litigation. EPD successfully argued to the Federal District Court that the thirty year old control city standard, used to control discharge of asbestos like fibers at the company's Silver Bay facility, is still necessary and is a valid state permit condition.

The EPD also assisted in recovering over $4 Million from insurers and netting $2.8 Million to recover landfill cleanup costs under the Landfill Cleanup Act. There are presently two active lawsuits filed by the state to recover landfill cleanup costs from the insurers. These are the fifth and sixth such lawsuits. In addition to insurance recoveries, the EPD also assisted in recovering $700,000, which included slightly over $500,000 from Chemart's Insurance for the Chemart superfund site. The EPD also assisted in negotiating a $360,000 cash purchase of MPCA's claim in the W.R. Grace bankruptcy.

The EPD also provided legal services to the MPCA on a variety of real estate and contract matters in FY 08, including several real estate transactions for MPCA's closed landfill program. Other areas in which the EPD provided legal advice and services included tank leak cleanup cost recoveries; superfund cleanups; natural resource damages; asbestos removals; bankruptcies; contract disputes; hazardous and solid waste disposal; creation of sewer districts; creation of conservation easements; purchases of easements and real property; groundwater contamination; federal facility superfund cleanups; individual septic treatment systems; administrative inspection orders; storm water runoff; air toxics; and federal new resource review.

The EPD also provides legal services to the MPCA division of Office of Environmental Assistance ("OEA") which awards grants for innovative projects to reduce and prevent waste and pollution, improve recycling and composting, conserve resources, conduct resource recovery, and provide environmental education. OEA also has responsibility to: assist businesses and local governments in all areas of solid waste matters, coordinate the state-wide household hazardous waste program, approve county solid waste management plans, and issue certificates of need for mixed municipal solid waste capacity. In FY 08 the EPD provided a variety of general legal services to OEA, including loan document preparation, contract review and grant terms review.

LEGAL SERVICES TO ENVIRONMENTAL QUALITY BOARD

EPD provides legal advice to the Environmental Quality Board ("EQB") with respect to the implementation of its delegated legal authorities. EQB operates as a general interagency coordinating board for environmental quality issues involving the State and its citizens. During FY 08 EQB continued to oversee the environmental review process as carried out by local and state governmental units under the Minnesota Environmental Policy Act.

CIVIL PROTECTION SECTION

RESIDENTIAL AND SMALL BUSINESS UTILITIES DIVISION

The Residential and Small Business Utilities Division ("RUD") represents and advances the interests of residential and small business utility consumers in the complex and changing telecommunication, natural gas, and electric industries, particularly with regard to utility rates, reliability of service, and service quality. The issues presented by this area of the law have grown increasingly complicated, due to the complex interplay of federal and state jurisdiction with regard to utility regulation and to the development of new telecommunications technologies. Staff members working in this field have developed highly specialized knowledge and experience which they utilize to advocate for the interests of consumers and small businesses at the Minnesota Public Utilities Commission and other regulatory agencies, in the courts, and at the legislature. Examples of RUD's work include:

- ***Xcel Energy Natural Gas Rate Case.*** The RUD opposed portions of the rate increase requested by Xcel. The RUD prevailed on several key issues it raised in this case, including the company's rate of return, the monthly residential customer charge, and the recovery mechanism for the affordability program's costs. Xcel had requested an authorized rate of return on equity ("ROE") of 10.75 percent, but RUD argued for an ROE in the 9.29 - 9.71 percent range. The Commission agreed with RUD and granted Xcel an ROE of 9.71 percent, saving ratepayers more than $3 million per year. Xcel had requested a monthly residential customer charge of from $8.00 to $9.49. RUD convinced the Commission to hold the customer charge at $8.00, as the RUD stressed that such an increase was unwarranted and would be contrary to state policies aimed at promoting conservation. In addition, RUD successfully argued for a recovery mechanism using a volumetric charge for the costs of a $2.5 million affordability program aimed at helping ratepayers having difficulty paying their bills, rather than through the customer charge. RUD convinced the Commission to collect the costs of this program from all of Xcel's firm customers and not just residential ratepayers. Xcel filed a petition for reconsideration which focused entirely on the ROE authorized by the PUC. Xcel argued that the 9.71 percent ROE granted by the PUC did not include flotation costs, which are the costs associated with the issuance of new securities. Xcel also argued that the PUC improperly included investment analysts' expected dividend growth rate in determining the ROE. The RUD succeeded in convincing the Commission not to increase the authorized ROE.

- ***Otter Tail Power Electric Rate Case.*** RUD participated in Otter Tail Power's Electric Rate Case. The Public Utilities Commission ordered Otter Tail Power to file a rate review petition after learning of allegations made by employees in calls to the company's Ethics Hotline claiming that Otter Tail had been overearning for many years and hiding its true revenues from regulators. On October 1, 2007 Otter Tail Power filed its rate case and sought to increase rates by approximately $14.5 million, or 11.02 percent. The RUD opposed many of Otter Tail Power's requests including its request for rates to increase by 11.02 percent. The RUD also objected to Otter Tail Power's request for retaining almost

all the profits it makes in the wholesale market using its personnel and facilities. RUD helped to convince the Commission to credit ratepayers with nearly $1 million annually in these non-asset-based wholesale margins. RUD also succeeded in convincing the Commission to credit ratepayers with $400,000 more annually in asset-based margins than was recommended by the Administrative Law Judge. In addition, RUD succeeded in trimming $170,000 in economic development costs that would have been charged to ratepayers annually. By convincing the Commission to grant a lower rate of return on equity ("ROE") than had been recommended by the Administrative Law Judge, RUD saved ratepayers more $600,000 per year. RUD saved ratepayers another $290,000 annually in lowering the amount of expenses allocated to regulated operations. The Administrative Law Judge assigned to the case recommended a $6.9 million rate increase, however, RUD argued before the Commission that $6.9 million was too high and sought the Commission to lower it to virtually no increase at all. Ultimately the Commission ordered a reduced rate increase of $2.46 million instead of the $6.9 million ordered by the ALJ. RUD was instrumental in reducing the rates by $4.44 million per year, a benefit to consumers and small businesses being served by Otter Tail Power.

- ***Letter Regarding Otter Tail Company's Wholesale Power Marking Practices.*** The RUD received a letter regarding the use of generation from Otter Tail's base load plants and that questioned whether retail customers were receiving Otter Tail's self-generation or whether these customers were being served with more expensive power bought on the wholesale market. After receiving the letter the RUD filed the letter with the Commission. As a result, the Commission opened an investigation. The Commission determined that if the investigation shows that ratepayers were overcharged, the Commission wanted to be able to provide refunds to the ratepayers. RUD argued to the Commission that Otter Tail had to agree to provide refunds or Otter Tail could claim that the Commission has no authority to order refunds because it is bound by the filed rate doctrine and the prohibition against retroactive ratemaking. Otter Tail fought this, but as a result of the RUD's intervention eventually relented and agreed to provide refunds to ratepayers if ratepayers were overcharged. This matter is pending before the Commission.

- ***Other Otter Tail Power Affiliated Contracts.*** Minnesota law and Commission rules and orders require companies such as Otter Tail Power to file affiliate interest contracts with the PUC for review and approval. The RUD learned that Otter Tail Power did not file its affiliate contract with Cascade Investment L.L.C., which owns 9 percent of Otter Tail, and thus is clearly an affiliate under Minnesota law. RUD filed a complaint with the Commission requesting that the Commission investigate Otter Tail Power's failure to comply with Minnesota Laws by not filing the affiliate contract with the Commission and by not requesting Commission approval to enter into the affiliate agreement. As a result of RUD's filing, the Commission required Otter Tail to file the affiliate agreement and seek approval by the Commission.

- ***Otter Tail Power Debt.*** Otter Tail Power filed a petition requesting Commission authority to issue securities for 2008. RUD objected to Otter Tail's petition on several concerns including the fact that it appeared that Otter Tail was attempting to use its utility

operation to guarantee the debt that was going to be used for non-utility operations. As a result of the RUD's intervention, the Commission agreed with RUD and ruled that Otter Tail shall not pledge any utility property or any regulated asset to secure any debt incurred for non-utility or unregulated purposes without explicit Commission consent.

- ***Otter Tail Corporation Holding Company.*** Otter Tail Corporation filed a petition requesting Commission approval to form a new holding company. Otter Tail's filing indicated that this would make the utility a separate, wholly owned subsidiary of Otter Tail Corporation. The RUD presented argument to the Commission to rule that ratepayers should not pay any of the $1.1 million in restructuring costs and urging the Commission to not grant approval for the holding company unless significant ratepayer protections are included because otherwise there is the danger of Otter Tail subsidizing non-utility operations with utility revenue. The matter is pending.

- ***Xcel Energy Fixed Bill* and *CenterPoint Energy No Surprise Bill Complaint.*** The OAG continued its investigation of Xcel's and CenterPoint's No Surprise Bill Program. This investigation resulted after the Office filed a complaint with the Public Utilities Commission asking it to open an investigation into the programs, and either terminate or substantially modify them. The Commission granted this Office's request to open an investigation and requested that RUD conduct the investigation on behalf of the PUC. Both Xcel and CenterPoint promoted these programs to ratepayers as though there was an equal chance that customers might pay more or less for their gas on the programs than they would as standard bill payers. Yet the customers participating in the programs actually paid over $20 million dollars more for natural gas than standard bill payers and almost all of these utility customers lost money. The Commission suspended both programs, finding that these programs are no longer in the public interest, and effectively terminating them. The Commission also ordered that low-income customers participating in the federally-funded LIHEAP program be allowed to exit the current year's fixed billing programs without a fee, which will recapture scarce low-income funding that otherwise would go to pay far more than necessary for the energy actually used. The final resolution of these matters is pending.

- ***Accounting Treatment for Xcel's Nuclear Refueling Outage Costs.*** Xcel filed a petition requesting Commission authorization to change its accounting method for expenses associated with nuclear refueling of its three nuclear plants. In Xcel's last electric rate case, $25 million was included annually for nuclear refueling regardless of actual costs of refueling. Xcel's proposal would have continued recovery of the $25 million from Minnesota ratepayers, but would have deferred the actual refueling costs to a future rate case and amortize it over an 18 month period rather than expense it in the year in which it occurred. These accounting changes would have amounted to a windfall of an additional $25 million (or more) per year. RUD's efforts were instrumental in preventing this double recovery, with Xcel withdrawing its proposal.

- ***Sale of Aquila's (now MERC's) Liquid Propane Peak Shaving Plants.*** Aquila attempted to retain all the profits it has made from selling propane plants that it used in its natural gas operations, while at the same time collecting the expenses for operating these

plants after they were sold. RUD objected to Aquila's action and argued that the Commission should rule that the gain on the sale of Aquila's (now MERC's) Liquid Propane Peak Shaving Plants and the land underneath them should be credited to ratepayers who paid for these assets in their rates rather than allow Aquila to retain the profit on sale. Aquila claimed that the plants were sold for scrap, which the company argued would allow them to keep the profit on the sale. RUD argued that the buyer would not have bought the land under the plants if it were buying scrap. RUD also provided evidence that the buyer sold them as plants with a 10-year guarantee thus further supporting that the plants were not sold as scrap. The matter is pending before the Commission.

- ***Qwest AFOR.*** The RUD actively advocated on behalf of the interests of Qwest customers in connection with Qwest's proposed new alternative form of regulation ("AFOR") plan. Rather than submit to rate regulation, Qwest operates under an AFOR plan, and Qwest's current plan was set to expire as of the end of 2008. Qwest filed a proposed new AFOR plan in March of 2008. As proposed, Qwest's new AFOR plan would have been effective for four years, 2009-2012, and could have been renewed for an additional year at Qwest's request. In pertinent part, Qwest's proposed new AFOR plan would have given Qwest the right to increase installation and reconnection rates by $1 per year as well as increase basic local residence and business rates up to $1 per month, per year ($60 over the life of the plan). On June 30, 2008 Qwest sent a letter notifying the Commission of its intent to extend its current AFOR plan for an additional year pursuant to a provision in its current AFOR plan. The election to extend its current AFOR plan for an additional year means that it will terminate December 31, 2009. Despite the request to extend its current AFOR, Qwest requested the Commission continue to consider the proposed new AFOR plan pursuant to the current schedule, and order the new AFOR plan to take effect December 31, 2009. The RUD objected to Qwest's requests arguing that Minnesota law prohibits the simultaneous consideration of an AFOR extension request and a proposed new AFOR plan. The Commission agreed and dismissed Qwest's proposed new AFOR plan. Qwest's current AFOR plan was extended an additional year and will terminate at the end of 2009. Qwest is permitted to propose its new AFOR plan in 2009 and the RUD will work to ensure any new AFOR plan proposal sufficiently protects the interests of residential and small business customers.

- ***Access Charge Complaint.*** Verizon filed a Complaint against Embarq Minnesota, Inc. requesting that the Commission find that Embarq's intrastate switched access rates are not just and reasonable and to require Embarq to reduce its rates. The RUD filed Comments for the Commission's review that highlighted the potential negative impact ratepayers will suffer if the Commission orders Embarq (the local provider) to reduce its access charge rates. The RUD noted that Embarq indicated that it will offset any access charge reductions by increasing its basic local rates. Verizon, and all other long distance providers operating in Minnesota, have not made any commitment to lower their rates if the reduction is ordered, despite the fact that the access rate reduction would reduce their cost to provide service. The RUD argued that if the Commission orders Embarq to reduce its access charges ratepayers could potentially face a net economic detriment,

Embarq would remain revenue neutral, and Verizon and other long distance carriers would make more money. This issue is currently pending before the Commission, but the RUD will continue to urge the Commission to consider the effect of its decision on the basic local rates of Minnesota ratepayers.

COMPLEX LITIGATION AND CONSUMER SERVICES DIVISION

The Complex Litigation and Consumer Services Divisions, sometimes coordinating efforts with other divisions of the Office, seek to protect Minnesota consumers from unfair and deceptive conduct by taking legal action against violators of Minnesota consumer protection laws and laws protecting consumers from unfair, discriminatory and other unlawful practices in business, commerce or trade. The divisions consistently return restitution dollars to Minnesota consumers. The divisions also obtain court orders halting unfair and deceptive practices, which provide consumers protection on an ongoing basis. The monetary effect of enjoining deceptive practices on a going-forward basis provides immeasurable monetary value to Minnesota consumers.

Examples of complex litigation cases handled by the Office during the last fiscal year include the following:

- ***Unsuitable Sales of Annuities and Living Trusts to Seniors.*** The Office has continued to take action against insurance companies that unlawfully market and sell unsuitable long-term deferred annuities to seniors and misrepresent the terms of the marketed annuities in violation of Minnesota law. During the past fiscal year, the Office reached settlements with two companies, Allianz Life Insurance Company of North America and American Equity Investment Life Insurance Company, which provide for full notice and restitution to seniors who purchased unsuitable annuities and require detailed changes to each company's business practices going forward. Pursuant to the consent judgments, Minnesota seniors will receive up to $400 million in restitution offers from Allianz and up to $125 million in restitution offers from American Equity. The Office also brought lawsuits against Midland National Life Insurance Company and Aviva USA, formerly known as AmerUs Group Co. Similar to the lawsuits against Allianz and American Equity, the lawsuits against Midland and Aviva allege that each company sold unsuitable annuities to seniors and engaged in fraudulent and deceptive sales and marketing practices. In addition, the Office continues to litigate its action, filed last year, against American Family Legal Plan and Heritage Marketing and Insurance Services, for the alleged sale of boilerplate living trusts and unsuitable annuities.

- ***Foreclosure Equity Stripping.*** The Office continues to combat the problem of equity stripping of homeowners in foreclosure. This past fiscal year, the Office went to trial and prevailed in its lawsuit against several related business entities. The lawsuit alleged that the defendants engaged in a variety of illicit and deceptive schemes to defraud homeowners facing foreclosure and investors out of savings or the equity in their homes. After a 10-day bench trial, the Honorable Lloyd Zimmerman issued a decision requiring the defendants to pay nearly $3.1 million in restitution and civil penalties, and issued a

permanent injunction barring them, among other things, from participating in any transaction related to real estate, mortgages, or real estate financing. Through litigation and mediation efforts, the division has obtained the return of title, money or other interests to numerous individual homeowners subjected to various equity stripping schemes, as well as many consumers to remain in their homes after the homes were set to go into foreclosure.

- ***Unlawful Foreclosure Consulting.*** During the past fiscal year, the Office brought a total of eight lawsuits against out-of-state companies for allegedly violating state foreclosure consulting laws, passed by the Legislature in 2004, as well as Minnesota's Consumer Fraud Act. The suits allege that the defendant companies used websites, targeted mailings, and/or the telephone to solicit financially-distressed homeowners by assuring them that the companies could stop the foreclosure process and save their homes from foreclosure, but failed to deliver on their promises. The suits also allege that the defendants unlawfully charged customers an up-front fee before any services were performed, and failed to include required safeguards in their contracts with Minnesota homeowners in violation of Minnesota law.

- ***Predatory Lending.*** During the past fiscal year, the Office returned over $20 million to more than 18,000 Minnesota consumers as a result of a January 2006 multi-state settlement with Ameriquest Mortgage Co. and certain of its affiliates for abusive and deceptive predatory subprime mortgage lending practices, including misleading consumers about loan costs and terms, misleading consumers about points and fees they would be charged, obtaining falsely inflated appraisals, and abusing the stated income process, among other practices.

- ***Abusive Practices by Wireless Carriers.*** The Office filed a lawsuit against Sprint Nextel, one of the nation's largest wireless carriers, alleging that Sprint Nextel violated Minnesota's Consumer Fraud Act and Deceptive Trade Practices Act by improperly entering consumers into wireless contracts and by extending customers' contracts without providing notice or obtaining meaningful consent from the affected consumers. The suit alleges that, as a result of these unauthorized contracts and contract extensions, consumers were locked into a wireless contract with Sprint Nextel against their will or were improperly charged an early termination fee for ceasing service under an unauthorized "contract."

- ***Telemarketing Fraud.*** The Office brought suit against a Florida company for violating Minnesota's consumer protection laws through a telemarketing scheme aimed at coercing government agencies and small businesses to pay for unwanted chemical products. The lawsuit alleges that the defendant called and offered its targets a "free" product sample, and then proceeded to bill the receiving parties hundreds of dollars for the supposedly free samples. In other instances, the lawsuit alleges that the defendant simply shipped merchandise to "customers" without authorization, and submitted an invoice for the goods.

- ***Debt Mitigation.*** As part of a multi-state negotiation effort, the Office entered into a Consent Judgment with a group of South Carolina businesses, which offered debt mitigation services to customers for an up-front fee but allegedly failed to deliver on promises that they could settle customers' debts with the IRS for "pennies on the dollar" and would staff customers' files with "tax experts," "tax professionals," and "ex-IRS agents." Under the terms of the settlement, the defendants agreed to pay $1.8 million, $1.5 million of which will be used to provide restitution to consumers in the 18 participating states, including Minnesota. The settlement also requires the defendants to make several changes to their business practices that are designed to protect consumers.

- ***Manufactured Home Parks.*** The Office reached a settlement in its action against the owner of a manufactured home park in Moorhead, Minnesota. The lawsuit alleged that the defendant deceptively sold and financed mobile home purchases without a license or title to the homes, failed to transfer proper title to the new owners, brought illegal eviction actions, and engaged in other unlawful practices. Under the terms of the settlement, the defendant paid $112,500 in restitution which will be paid to affected residents of the park. In addition, the settlement prohibits the defendant from owning or operating any manufactured home park, or selling or financing the purchase of any manufactured home.

- ***Abusive Home Sales Practices.*** The division returned approximately $375,000 in restitution to consumers in a case it settled involving an agent who took advantage of dozens of Hispanic consumers who predominantly communicated in Spanish. The agent sold these consumers homes with substantial repair issues and misled them about the condition of the properties and their right to inspections. The agent also failed to disclose that some of the homes he was selling were actually owned by him.

- ***Fraudulent Direct Mail Solicitations.*** The Office obtained $45,000 in restitution and distributed the money to victims of an internet yellow pages directory service that used live checks as part of its direct mail solicitation. The back of the check's fine print states that cashing the checks constituted an agreement to purchase the company's service and authorized monthly billing. The company targeted small businesses, schools, churches and other organizations. The settlement provided for injunctive relief in addition to the restitution.

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

PUBLIC ENFORCEMENT SECTION

APPEALS DIVISION

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

The cases handled by the Appeals Division in FY 08 involved, among other crimes: murder, sexual assault, drug distribution and manufacturing, child sexual abuse and felony assault.

Cases handled by the Appeals Division this fiscal year include, for example, the following: *State v. Medrano* (Dodge County; first-degree murder); *State v. Green* (Watonwan County; first-degree criminal sexual conduct); *State v. Jones* (Sherburne County; first-degree murder); *State v. Shane* (Nobles County; second-degree murder); *State v. Avalos* (Stearns County; first-degree methamphetamine crime); *State v. Sybrandt* (Chisago County; kidnapping/assault); *State v. Hughes* (Freeborn County; first-degree murder); *State v. Shelton* (Benton County; first-degree robbery); *State v. Miller* (St. Louis County; first-degree murder); *State v. Weiss* (Lyon County; first-degree criminal sexual conduct).

The Appeals Division also handled numerous federal habeas corpus petitions challenging state-court convictions for non-metro counties during FY 08. Attorneys in the Appeals Division appeared on behalf of the State on eight habeas petitions in federal district court and three at the 8th Circuit Court of Appeals in FY 08.

In addition to handling appellate cases, division attorneys assist Attorney General's Office prosecutors by providing legal research and preparing legal memoranda, and assist local prosecutors on legal questions. Attorneys in the division are also responsible handling property forfeiture proceedings arising from criminal conduct in cases investigated by the Metro Gang Strikeforce and by state law enforcement agencies.

Appeals Division attorneys provide training to prosecutors and law enforcement officers on a variety of legal issues in the criminal justice system.

PUBLIC PROTECTION DIVISION

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

The division prosecutes serious crimes in trial courts throughout Minnesota when requested by a county attorney. Representative work during FY 08 included:

- Convicted Eric Wojciechowski of two counts of first-degree murder for killing his parents, Roger and Jeanne Wojciechowski, in Morrison County. The court sentenced Wojciechowski to serve two consecutive life terms.

- Convicted Jeffrey Pendleton, Jr. of first-degree murder for killing Robert Berry, Jr. in the Lower Sioux Community in Redwood County. Pendleton was the fifth person convicted of murder for the death of Berry. The court sentenced Pendleton to serve life in prison.

- Convicted Salvador Gallegos of first-degree murder for killing Jose Gallegos, Salvador's uncle, in Dodge County. The co-defendant, Jose Medrano, was convicted of first-degree murder last year. The court sentenced Medrano and Gallegos to serve life in prison.

- Convicted Bruce Christenson of first-degree murder for killing Carl Moyle while they were both inmates in the Sherburne County jail. The court sentenced Christenson to serve life in prison.

- Convicted Kenneth Anderson of first-degree murder for killing Chad Swedberg in Becker County. The court sentenced Anderson to serve life in prison.

- Convicted Jason Nordin of second-degree murder for the shaking death of his four-month old child, Joshua, in Chisago County. Nordin was also convicted of assault in the first degree for shaking Joshua on a prior occasion. The court sentenced Nordin to serve 15 years in prison

- Convicted Robert O'Jala of second-degree murder for killing Dylan Martin, his girlfriend's 19-month-old son, in Morrison County. The court sentenced O'Jala to serve fifteen years in prison.

- Convicted Jurez Slaughter of second-degree murder for the beating death of Paul Cohen in Stevens County. Cohen was five months old at the time of his death. The court sentenced Slaughter to serve 12 years in prison.

- Convicted Thorpe Bradley of second-degree murder for the killing of Thomas Hensel in Wadena County. The court sentenced Bradley to serve 18 years in prison.

- Conducted grand jury proceedings in three cases and obtained first-degree murder indictments.

- Prosecuted numerous manufacturers and dealers of methamphetamine in multiple counties throughout the state. In nine cases from Southwestern Minnesota, law

enforcement officers began their investigations based on the records of pseudoephedrine purchases at drug stores throughout Minnesota and South Dakota.

- Provided continuing legal advice and prosecution support to the Metro Gang Strike Force.

- Provided continuing legal advice and assistance to the Forensic Laboratory Advisory Panel for the Bureau of Criminal Apprehension, the Homicide Subcommittee of the Child Mortality Review Board, the Advisory Committee on the Rules of Criminal Procedure, CriMNet, the Stop it Now Advisory Committee, the Gang and Drug Oversight Council, the Metro Gang Strike Force, and the Environmental Crimes Screening Committee.

- Provided continuing review of Extradition paperwork for the Office of the Governor.

Division attorneys 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 are available to 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 number of these commitments and complexity of the cases increased significantly during the latter half of FY 04, a pace which has continued since that time.

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

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

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

PUBLIC SAFETY DIVISION

The Public Safety Division represents the Commissioner of Public Safety at thousands of implied consent hearings each year in which drivers contest the revocation of their licenses due to having been impaired by alcohol or drugs while driving. The division is responsible for defending actions that resulted in the collection of over $3.5 million in driver's license reinstatement fees paid to state government over the last fiscal year. The division's litigation of overweight truck violations also resulted in substantial fines paid to the state. Efforts by the division during the last fiscal year to reduce deaths, injuries, and property damage on Minnesota's streets and highways included:

- Handled over 5,800 district court implied consent proceedings and associated appeals challenging the revocations of driving privileges under Minn. Stat. § 169A.50-.53.

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

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

- Published the 2007 DWI/IC Elements Handbook, utilized statewide by prosecutors, judges, defense attorneys and law enforcement professionals.

- Handled over 225 district court challenges and resulting appeals to other driver's license cancellations, withdrawals, revocations, suspensions, and license plate impoundments under Minn. Stat. § 171.19.

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

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

The Public Safety Division continues to face a significant challenge from a dramatically increased workload. For example, in 1993 a mere six percent of all revocations were challenged in court. By 1997, the rate of challenges rose to ten percent. In FY08, nearly 15 percent of all drivers' license revocations were challenged in court. Today's challenge rate is the result of the

toughening of DWI laws by the Legislature over the last few years including the ability to use an implied consent revocation to impound license plates, forfeit motor vehicles, and enhance subsequent criminal offenses to gross misdemeanor and felony violations. Because drivers have more at stake from an alcohol-related license revocation on their driving records, they are more willing to challenge the underlying revocations in the state's district and appellate courts. Moreover, the increasing complexity of our state's DWI law has created a specialized DWI defense bar which vigorously challenges more revocations in the hopes of getting prosecutors to negotiate or dismiss the underlying DWI charges.

For example, in FY96, the Public Safety Division defended 2,121 implied consent cases in district court. In FY08, it handled 5,809 implied consent cases, a 174 percent increase from FY96. Implementation of the felony DWI law and recent challenges over accessibility to the Intoxilyzer instrument's computer source code continue to increase division caseload. Moreover, the Minnesota Supreme Court's recent rulings in *Fedziuk v. Commissioner of Public Safety,* 696 N.W.2d 340 (Minn. 2005) and *Bendorf v. Commissioner of Public Safety*, 727 N.W.2d 410 (Minn. 2007) resulted in a sharp increase in petition filings during FY07 and continued throughout FY08. The Court's implied mandate that all implied consent hearings be held within 60 days of filing of the petition for judicial review will continue to present a significant challenge for both the district courts and the division in FY09.

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

With regard to the Racing Commission, this division represents the commission and stewards in appeals of disciplinary action taken against horse owners, trainers, and jockeys. The division also provides representation as it relates to the commission's daily activities and regulation at both Canterbury Park and the North Metro Harness Race Track in Anoka County. The opening of the Anoka track and recent award of its Class A card club license is expected to increase the work on behalf of the Racing Commission during FY09. The division provides the State Lottery with a wide range of advice, from internet issues to lottery retailer contract suspensions, and represents that client in disciplinary hearings against lottery retailers and other licensees. A committee of the Gambling Control Board meets monthly with a number of licensees to discuss alleged violations of statutes and rules. The division provides representation at these settlement meetings, drafts the appropriate orders, and litigates the cases on that client's behalf in the Office of Administrative Hearings and the Minnesota Court of Appeals. The division's representation of the Racing Commission, Gambling Control Board, and the Alcohol and Gambling Enforcement Division has resulted in recovery of fines and costs in excess of $50,000.00 during FY08.

MEDICAID FRAUD DIVISION

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

1. Review and investigate reports of vulnerable adult abuse, neglect, and financial exploitation in nursing homes, group homes, foster care homes, hospitals, board and care residences, and by home care providers.

2. Investigate and prosecute health care providers who commit fraud in delivery of the Medical Assistance program.

One goal of the division is to recover Medicaid funds from providers who fraudulently bill the program. The division does this through local criminal and civil prosecutions and by participating on a national basis with other Medicaid fraud units in the country. Total recoveries to the Minnesota Medicaid program for pharmaceutical settlements during FY 08 were over $10 million dollars.

The division obtained convictions of co-owners of a personal care provider organization who billed the Medicaid programs for services not provided. The co-owners were ordered to pay $75,000 in Medicaid restitution and to each serve six months in the county jail. In total, through criminal prosecutions of Medicaid providers, restitution in the amount of $84,936.44 was ordered paid to the Department of Human Services.

Civil settlements were negotiated with a personal care provider organization for more than $26,000 for billing for registered nursing services that were not provided. In total, through civil settlements with Medicaid providers, the division recovered restitution in the amount of $28,409.08 to be paid to the Department of Human Services.

The division receives referrals from citizens, police, county adult protection workers, and state agencies. The staff in the division follow up on investigations to ensure that law enforcement is involved in criminal cases, and interact with city and county attorneys to request the issuance of criminal complaints for assault, abuse, and financial exploitation of vulnerable adults. Division investigators assist local and federal prosecutors in the investigation phase of cases by interviewing, reviewing documentation, and scheduling out complex financial records obtained by search warrant. Division attorneys also assist local prosecutors and accept referrals to prosecute these cases around the State.

Many of the investigations involve financial exploitation of vulnerable adults. One case involved a salesman who financially exploited a vulnerable adult by selling her a living trust and continually returned to borrow money in excess of $200,000. He pleaded guilty to theft by false representation and was ordered to pay restitution to the victim in the amount of $181,000.

In another case, a daughter financially exploited her mother and brother, both vulnerable adults. The daughter, power of attorney for her mom, sold her mother's house and sold or took

all of her mother and brother's personal possessions. She tricked her brother into signing a quit claim deed to herself, for the family farm. In addition, while her mother was hospitalized, the daughter wrote checks on her mother's account and withdrew in excess of $60,000. The daughter pleaded guilty to financial exploitation of a vulnerable adult and theft by false representation. As part of the plea agreement and prior to sentencing, the daughter paid restitution to her mother and brother in the amount of $100,000.

The division continues to provide training to social services, law enforcement, and provider groups on financial exploitation, white collar fraud investigation and prosecution, and crimes against vulnerable adults.

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APPENDIX A: SERVICE HOURS By Agency or Political Subdivision for FY 2008				
Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
Partner Agencies				
Administration--Risk Management		2,340.0		$ 218,091.80
AURI		0.4		$ 40.40
Corrections (3)	2,379.9	2,270.5	$ 211,921.00	$ 200,854.13
Education Department	2,625.0	2,444.9	$ 265,125.00	$ 244,055.30
Gambling Control Board	300.0	163.8	$ 30,300.00	$ 16,543.80
Health	6,168.0	6,097.9	$ 600,000.00	$ 589,815.10
Housing Finance Authority	3,750.0	3,665.6	$ 378,750.00	$ 370,184.20
Human Services	24,219.3	22,010.5	$ 2,335,750.00	$ 2,117,090.30
Iron Range Resources & Rehabilitation (3)	2,800.0	2,800.0	$ 282,800.00	$ 282,800.00
Medical Practices Board	13,107.0	7,533.1	$ 953,819.00	$ 534,559.90
Minnesota Racing Commission	500.0	230.5	$ 50,500.00	$ 23,280.50
Minnesota State Retirement System		145.4		$ 14,105.80
MnSCU	8,750.0	8,014.6	$ 812,450.00	$ 752,273.60
Natural Resources	7,446.0	8,535.7	$ 720,030.00	$ 800,488.70
Petro Board		27.7		$ 2,797.70
Pollution Control	19,527.0	18,783.5	$ 1,903,227.00	$ 1,830,957.90
Public Employees Retirement Association		1,011.5		$ 99,654.50
Public Safety (3)	3,000.0	3,000.0	$ 303,000.00	$ 303,000.00
Teachers Retirement Association		149.8		$ 15,010.20
Transportation	14,995.0	17,727.6	$ 1,496,095.00	$ 1,759,419.20
TOTAL PARTNER AGENCIES	**109,567.2**	**106,953.0**	**$ 10,343,767.00**	**$ 10,175,023.03**
Specialized Boards				
Accountancy Board		162.7		$ 14,574.30
Agricultural Chemical Response Comp Board		0.0		$ -
Animal Health Board		105.6		$ 10,509.20
Architecture Board		331.7		$ 30,097.70
Assessors Board		11.8		$ 1,191.80
Barber/Cosmetology Board		104.0		$ 10,182.00
Client Security Board		181.4		$ 17,166.80
Crime Victims Reparations Board		427.4		$ 41,451.60
Land Exchange Board		5.0		$ 505.00
Peace Officers Standards and Training Board		96.2		$ 8,980.20
Private Detective Board		111.0		$ 11,211.00
School Administrators Board		167.0		$ 16,660.00
State Fair Board		33.3		$ 3,363.30
State Investment Board		301.2		$ 29,308.00
Teaching Board		994.5		$ 93,024.70
Zoological Board		47.0		$ 4,682.60
SUBTOTAL		**3,079.8**		**$ 292,908.20**
Health Boards/Offices				
Behavioral Health & Therapy Board		55.5		$ 5,030.50
Chiropractic Board		1,723.5		$ 140,061.10
Dentistry Board		3,898.1		$ 293,957.10
Dietetics & Nutrition Practice Board		14.4		$ 1,109.40
Emergency Medical Services Regulatory Board		414.0		$ 39,615.20
Health Professionals Services Program		7.9		$ 797.90
Licensed Drug & Alcohol Counselor Program		736.9		$ 52,029.50
Marriage & Family Therapy Board		460.2		$ 28,140.00
Mental Health Practice Office		67.5		$ 4,310.50
Nursing Board		5,264.3		$ 422,973.30
Nursing Home Administrators Board		35.0		$ 3,535.00
Optometry Board		105.8		$ 7,741.80
Pharmacy Board		571.6		$ 42,924.20
Physical Therapy Board		372.4		$ 27,041.60
Podiatry Board		161.8		$ 11,746.40
Psychology Board		2,065.1		$ 148,393.30
Social Work Board		767.2		$ 48,760.20
Veterinary Medicine Board		2,192.0		$ 190,061.40
SUBTOTAL		**18,913.2**		**$ 1,468,228.40**
Higher Education				
Higher Education Board		0.0		$ -
Higher Education Facilities Authority		4.1		$ 414.10
Higher Education Services Office		370.0		$ 36,762.80
SUBTOTAL		**374.1**		**$ 37,176.90**

APPENDIX A: SERVICE HOURS By Agency or Political Subdivision for FY 2008				
Agency/Political Subdivision	**Estimated Service Hours (1)**	**Actual Service Hours**	**Estimated Expenditures**	**Actual Expenditures (2)**
Other Executive Branch Agencies				
Administration Department		654.0		$ 59,816.40
Administrative Hearings Office		242.1		$ 23,647.10
Agriculture Department		662.5		$ 65,426.70
Amateur Sports Commission		93.4		$ 9,433.40
Archaeologist Office		4.0		$ 404.00
Black Minnesotans Council		6.9		$ 678.50
Campaign Finance Board		298.5		$ 21,482.10
Capitol Area Architectural Planning Board		43.6		$ 4,343.80
Center for Arts Education		66.0		$ 6,518.80
Chicano/Latino Peoples Affairs Council		38.5		$ 3,865.50
Commerce Department		8,577.0		$ 865,927.40
Corrections Department (3)		4,071.8		$ 376,748.77
Corrections Department/Community Notification		1,108.1		$ 95,036.10
Disability Council		1.8		$ 172.60
Employment & Economic Development Department		1,055.8		$ 95,388.80
Environmental Quality Board		88.1		$ 8,898.10
Executive Council		4.0		$ 404.00
Explore Minnesota Tourism		21.6		$ 1,942.40
Faribault Academies		32.5		$ 3,282.50
Finance		999.8		$ 99,880.40
Governor's Office		298.4		$ 30,138.40
Historical Society		26.7		$ 2,696.70
Human Rights Department		2,804.9		$ 251,099.50
Iron Range Resources & Rehabilitation (3)		125.8		$ 12,604.60
Judiciary Courts		600.3		$ 59,926.50
Labor and Industry Department		5,793.4		$ 572,837.60
Law Examiner's Board		93.8		$ 9,473.80
Lawyer's Professional Responsibility Board		84.2		$ 8,430.60
Legislative Auditor		1.2		$ 121.20
Legislature		258.7		$ 26,128.70
Mediation Services Bureau		119.9		$ 12,109.90
Military Affairs Department		318.4		$ 32,158.40
Minnesota Commission Serving Deaf & Hard of Hearing People		1.3		$ 131.30
Minnesota Gang Strike Force		128.8		$ 13,008.80
Office of Enterprise Technology		292.3		$ 25,957.30
Ombudsman for Mental Health/Retardation Office		15.2		$ 1,498.40
Ombudsperson for Families		72.0		$ 7,272.00
Public Defender, Local		137.2		$ 13,857.20
Public Defender, State		7.3		$ 737.30
Public Safety Department (3)		29,520.0		$ 2,556,815.80
Public Utilities Commission		4,090.8		$ 409,150.40
Revenue Department		7,776.5		$ 784,708.90
Rural Finance Authority		32.9		$ 3,322.90
Secretary of State		412.6		$ 41,456.40
Sentencing Guidelines Commission		27.3		$ 2,757.30
State Arts Board		80.3		$ 7,696.30
State Auditor		18.0		$ 1,818.00
State Lottery		31.1		$ 2,952.50
Strategic and Long Range Planning Office		386.0		$ 38,963.00
Veterans Affairs Department		84.0		$ 8,235.60
Veterans Homes Board		1,065.5		$ 88,654.30
Water & Soil Resources Board		687.4		$ 69,133.00
SUBTOTAL		**73,462.2**		**$ 6,839,149.97**

APPENDIX A: SERVICE HOURS By Agency or Political Subdivision for FY 2008				
Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
OTHER GOVERNMENT				
Becker County Attorney		1,783.6		$ 148,537.00
Benton County Attorney		9.5		$ 959.50
Carlton County Attorney		18.6		$ 1,878.60
Chisago County Attorney		898.3		$ 77,599.90
Cottonwood County Attorney		2.0		$ 202.00
Dodge County Attorney		627.9		$ 48,408.10
Fillmore County Attorney		4.3		$ 434.30
Freeborn County Attorney		33.1		$ 3,343.10
Hubbard County Attorney		219.6		$ 14,313.60
Kanabec County Attorney		39.9		$ 3,983.90
Koochiching County Attorney		4.5		$ 454.50
Lincoln County Attorney		52.8		$ 4,688.80
Mahnomen County Attorney		15.8		$ 1,595.80
Marshall County Attorney		35.7		$ 3,605.70
Mille Lacs County Attorney		1,186.7		$ 93,222.70
Morrison County Attorney		358.5		$ 28,020.50
Nobles County Attorney		243.4		$ 19,523.40
Norman County Attorney		32.8		$ 3,312.80
Ramsey County Attorney		6.5		$ 656.50
Redwood County Attorney		310.0		$ 24,419.20
Renville County Attorney		9.3		$ 939.30
Rice County Attorney		8.0		$ 808.00
Rock County Attorney		1,114.0		$ 79,072.00
Roseau County Attorney		2.0		$ 202.00
Sherburne County Attorney		553.0		$ 37,177.00
Stearns County Attorney		13.7		$ 1,383.70
Stevens County Attorney		580.2		$ 48,296.20
Swift County Attorney		191.3		$ 17,389.30
Todd County Attorney		27.9		$ 2,817.90
Wadena County Attorney		736.0		$ 59,823.00
Waseca County Attorney		457.6		$ 42,588.20
Washington County Attorney		39.0		$ 3,939.00
Watonwan County Attorney		10.4		$ 1,050.40
Various Cities		221.8		$ 21,849.80
Various School Districts		96.8		$ 9,776.80
Townships / Associations / Local Governments / Other		27.3		$ 2,757.30
Various Counties Psychopathic Personalities Commitments		17,639.5		$ 1,521,178.90
Various Counties/Criminal Appeals		9,030.2		$ 911,843.20
SUBTOTAL		**36,641.5**		**$ 3,242,051.90**
TOTAL NON-PARTNER AGENCIES SUBDIVISIONS		**132,470.8**		**$ 11,879,515.37**
TOTAL PARTNER/SEMI-PARTNER AGENCIES (from page A-1)		**106,953.0**		**$ 10,175,023.03**
TOTAL NON-PARTNER AGENCIES SUBDIVISIONS		**132,470.8**		**$ 11,879,515.37**
GRAND TOTAL HOURS/EXPENDITURES (4)		**239,423.8**		**$ 22,054,538.40**
Notes:				
(1) The projected hours of service were agreed upon mutually by the partner agencies and the AGO. Actual hours may reflect a different mix of attorney and legal assistant hours than projected originally.				
(2) Billing rates: Attorney $101.00 and Legal Assistant $55.00.				
(3) A number of agencies signed agreements for a portion of their legal services.				
(4) Not all AGO expenditures are included in M.S. 8.15 reporting. This amount does not include Civil Enforcement and Medicaid Fraud legal services.				

APPENDIX B: SPECIAL ATTORNEY EXPENDITURES FOR FY 2008, BY AGENCY	
AGENCY	**Amount**
Administration	$ 252,011.51
Agriculture	$ 1,898.25
Employee Relations	$ 54,601.82
Finance	$ 104,759.06
Human Services	$ 12,262.12
Labor and Industry	$ 18,188.71
Medical Practice Board	$ 3,519.00
MnSCU	$ 20,671.77
Transportation	$ 9,165.00
TOTAL	**$ 477,077.24**

APPENDIX B: SPECIAL ATTORNEY EXPENDITURES BOND COUNSEL FOR FY 2008, BY AGENCY	
AGENCY	**Amount**
Employment and Economic Development	$ 259,487.65
Finance	$ 138,063.29
Higher Education Facilities Authority	$ 177,821.96
Higher Education Services Office	$ 72,394.62
Housing Finance Agency	$ 242,088.16
IRRRA	$ 6,157.74
MnSCU	$ 2,758.50
Rural Finance Authority	$ 3,743.92
TOTAL	**$ 902,515.84**
NOTE: Certain bond fund counsel are paid from proceeds.	

GOVERNMENT DATA: Where members of governing body are considered employees of governmental unit, personal information submitted by applicants for appointment to fill vacancies on the body is private personnel data except for items designated as public by Minn. Stat. § 13.43, subd. 3 and 13.601, subd. 3.

852

July 14, 2006

Terry Adkins
Rochester City Attorney
201-4th Street SE, Room 247
Rochester, MN 55904-3780

Dear Mr. Adkins:

Thank you for your correspondence of January 27, 2006 requesting an opinion from the Attorney General with respect to the issue discussed below.

FACTS AND BACKGROUND

You state that prior to 2005, in cities that considered council members to be "city employees," data pertaining to persons seeking appointment to fill vacancies in council positions was classified as personnel data pursuant to Minn. Stat. § 13.43, subd. 3. This treatment was based on opinions of the Commissioner of Administration dated November 29, 1999 and May 7, 2003.

In 2005, the legislature adopted Minn. Stat. § 13.601, subd. 3 which states:

> The following data on all applicants for election or appointment to a public body, including those subject to chapter 13D, are public: name, city of residence, education and training, employment history, volunteer work, awards and honors, and prior government service or experience.

On November 18, 2005, the Commissioner of Administration issued an Opinion 05-036, which concluded that Minn. Stat. § 13.601, subd. 3 merely restated in part the general presumption that all government data are public, and did not have the effect of classifying any data not mentioned in the subdivision as other than public. The Commissioner further concluded that, since no other provisions of law provided for classification of "contact information" for city council applicants or candidates, all data pertaining to applicants or candidates maintained by the city must be considered public.

Based upon the foregoing, you request the opinion of the Attorney General on the following question:

> Is government data beyond that listed in Minn. Stat. § 313.601, subd. 3 contained in applications for election or appointment to a public body, whose members are considered to be city employees, classified as public?

LAW AND ANALYSIS

First, pursuant to Minn. Stat. § 13.03, subd. 1, all government data is considered public unless it is otherwise classified by state statute, federal law or temporary classification. Consequently, the bulk of Minn. Stat. ch. 13, the Minnesota Government Data Practices Act (MGDPA), consists of statutes that classify data as other than public.

Second, one such section is Minn. Stat. § 13.43 which deals with personnel data, defined as:

> Data on individuals collected because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a government entity.

Id., subd. 1. As to personnel data, the MGDPA's normal presumption that government data is public, is reversed. Instead, that section specifically identifies the elements of personnel data that are public and classifies the remainder as private data on individuals. *Id.*, subd. 4.

Subdivision three provides:

> Subd. 3. Applicant data. Except for applicants described in subdivision 5 [under-cover law enforcement officers] the following personnel data on current and former applicants for employment by a government entity is public: veteran status; relevant test scores; rank on eligible list; job history; education and training; and work availability. Names of applicants shall be private data except when certified as eligible for appointment to a vacancy or when applicants are considered by the appointing authority to be finalists for a position in public employment. For purposes of this subdivision, "finalist" means an individual who is selected to be interviewed by the appointing authority prior to selection.

Third, the MGDPA does not expressly state whether elected officials are to be considered employees for purposes of section 13.43. Consequently, prior to 2005, opinions of the Commissioner of Administration consistently stated that data concerning elected officials would be classified under section 13.43 if the governmental unit that the official serves considers the official to be an employee. *See, e.g.,* Opinions of the Commissioner of Administration 95-041, 01-039, 02-013, 03-011 and 04-064. Specifically, Opinion 01-039 determined that, in a city where council members were considered to be employees, data concerning applicants for

appointment to a vacant council position were classified according to Minn. Stat. § 13.43, subds. 3 and 4.

Fourth, in accordance with these opinions, local officials in many cases would not disclose even the identity of persons seeking appointment to vacant elective offices, and in some instances were also reluctant to disclose information contained in election filings. Consequently, legislation was introduced in the 2005 legislative session to address the issue.

In the March 29, 2005 hearing of the House Civil and Election Committee, Sandy Maron, on behalf of the Minnesota Newspaper Association, addressed a proposed amendment to Minn. Stat. § 13.43, subd. 3 intended to clarify that the names and addresses of applicants for council positions would be treated as public.

> This is a very simple bill. [HF 1129] We found that some local officials were nervous about disclosing the names of people who were filing to fill vacancies in elected office. In other words, a city councilperson resigned, they needed to fill the vacancy and then people who were applying, when the public asked for the names of people who are applying to fill these vacancies, some city officials were nervous about disclosing this saying names because it fell under personnel data and they would be in violation of the Data Practices Act. So this bill is simply narrowly directed to say that anyone who is applying to fill a vacancy in elected office is clearly public data and we have spoken about this with the League of Cities, township associations school boards. None of them have a problem with those issues of narrowing it.

Likewise, in a February 24, 2005 hearing on SF 965, the companion bill, before the Senate Judiciary Subcommittee on Data Practices, Senator Don Betzold stated:

> Mr. Chair, the issue came up which was brought to my attention that when you have some government entities that are filling positions such as when a city council has a vacancy and the leading members of the city council are trying to fill the vacancy, there is no requirement in the statute that the applicants applying for the vacancy be made public. So you can have a situation where a city council is taking applicants for the vacant city council position, but members of the public might want to know who's applying for the vacancy and they know the public doesn't have to be told until such time that the appointment is actually made. And I think that is clearly an oversight in the statute. I think this is something that the public would have an interest in knowing. *So this would require that the identity of the applicants to these government entities become public.*

(Emphasis added).

When the proposed clarification was amended into the 2005 Omnibus Data Practices Bill, HF 225, however, the proposed language was much broader than that described in these statements. It would have amended Minn. Stat. § 13.601 to add a subdivision which would read:

> Subd. 3. [Applicants For Election Or Appointment.] *All data* about applicants for election or appointment to a public body, including those public bodies subject to chapter 13D, are public.

(Emphasis added). *See* Journal of the Senate for April 7, 2005 at 1617, 1639; Journal of the House for April 14, 2005 at 1717, 1813. Ultimately, such all-inclusive language was considered too broad, and was therefore amended to the more limited version quoted above, which passed as section 13.601, subdivision 3. *See* Journal of the House for May 17, 2005 at 4073, 4075; Journal of the Senate for May 21, 2005 at 3025. As Senator Betzold explained on the Senate floor:

> Mr. President, members we already have language in the bill that describes the situation where somebody is applying for an appointment either for say a city council vacancy or some commission appointment. Right now there is no requirement that that information even be public information, so we don't even know whose applying for this situation. But the language that we have in the bill right now was reviewed over the last few weeks and found to be overly broad. This narrows it down as to the information that will be disclosed.

Fifth, Minn. Stat. § 645.16 (2004), provides:

> When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:
>
> (1) the occasion and necessity for the law;
> (2) the circumstances under which it was enacted;
> (3) the mischief to be remedied;
> (4) the object to be attained;
> (5) the former law, if any, including other laws upon the same or similar subjects;
> (6) the contemporaneous legislative history; and
> (7) legislative and administrative interpretations of the statute.

Furthermore, statutes should be interpreted to give effect to all their provisions so that no statutory language is superfluous. *See, e.g., American Family Ins. Co. v. Schroedl,* 616 N.W.2d 273, 277 (Minn. 2000).

The foregoing legislative and administrative history shows that the enactment of Minn. Stat. § 13.601, subd. 3 (Supp. 2005) was intended to be a measured response to the Commissioner of Administration's numerous opinions that data on applicants for appointment to elective positions would be treated as personnel data if those positions are considered

"employment," resulting in a "private" classification for information including the identity and residency of applicants. There is no indication, however, that the legislature intended to supersede the Commissioner's interpretation in its entirety, and render all data on such applicants public under the general presumption of section 13.03. Such an interpretation is inconsistent with the legislature's deliberate decision to reject all-inclusive language in favor of a narrower list of data elements that must be considered public. Such an interpretation would also render the specific terms of section 13.601, subdivision 3 essentially meaningless.

In our view that subdivision is not merely a partial restatement of the general presumption that all government data are public, but a limited exception to a private classification that might be imposed under another statute such as Minn. Stat. § 13.43. Therefore, while we agree with the Commissioner's conclusion that the listing of public data elements in section 13.601, subdivision 3 does not mean that "all other data on applicants" is private, we do not agree that "there is no provision classifying [any] contact information on city council candidates as private." Rather, some data concerning such applicants as well as incumbents of those offices may be classified as private under section 13.43 if the incumbents are considered to be employees of governmental unit they serve.

OPINION

Based upon the foregoing it is our opinion that, where members of a governing body are considered employees of the governmental unit, data submitted by applicants for appointment to positions on the body would be classified as private personnel data pursuant to Minn. Stat. § 13.43, *except for* those items expressly made public by Minn. Stat. § 13.43, subd. 3 or 13.601, subd. 3.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

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

AG: #1577697-v1

GOVERNMENT DATA: CANDIDATES FOR PUBLIC OFFICE: Criminal history data collected by city on council candidates is not private "applicant" data under Minn. Stat. § 13.43 (2004). Authority of city to collect such data questioned, Minn. Stat. §§ 13.03, 13.43, 13.601.

852
(Cr. ref. 64, 184-a)

October 6, 2006

Michael J. Waldspurger
Kimberly K. Sobieck
Ratwik, Roszak & Maloney, P.A.
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402

Dear Mr. Waldspurger and Ms. Sobieck:

Thank you for your correspondence of August 7, 2006 requesting an opinion of the Attorney General concerning the proper classification of criminal background data collected on behalf of the City of Red Wing relating to candidates for election to the city council.

FACTS AND BACKGROUND

You state that after receiving written consent from candidates for city council, the City of Red Wing (the "City") contracted with a private firm to conduct criminal background searches on the candidates. You state further that the City received the results of the searches, and utilized the information "solely to confirm the candidates' eligibility to run for public office."[1] The City considers the data to be private under Minn. Stat. § 13.601, subd. 3 (Supp. 2005).

The *Red Wing Republican-Eagle* recently requested that the City provide it with the results of criminal background checks made on city council candidates. The City denied the request, asserting that the data is private under Minn. Stat. § 13.601, subd. 3 (Supp. 2005). The newspaper has disagreed with the City's characterization of the data as private, citing Commissioner of Administration, Advisory Opinion 05-036, November 18, 2005 (copy enclosed).

You refer to a July 14, 2006 opinion from this Office to the Rochester City Attorney (copy enclosed) which you characterize as stating that, in cities where city council members are

[1] The facts supplied do not indicate who has been granted access to the data for purposes of making this determination, or whether the background searches were also performed on council incumbents.

considered to be "employees" of the city, "candidate data" is presumptively private. You do not believe that opinion to be a formal opinion of the Attorney General for purposes of superseding the Commissioner of Administration's opinion pursuant to Minn. Stat. § 13.072, subd. 1(f) (2004).

Based upon the foregoing, you request that the Attorney General issue a "formal" opinion on the following question:

> Are data on candidates who run for public office classified as private data, except as enumerated in Minn. Stat. § 13.601, subd. 3 and § 13.43, when the elected official is considered to be an employee of the governmental entity?

LAW AND ANALYSIS

First, while the question stated in the July 14, 2006 opinion of this Office did refer to "applications for election or appointment to a public body," the opinion itself only addressed "data submitted by applicants for appointment." Thus, that opinion was not intended to address "candidate data" on individuals running for election to public office.

Furthermore, the July 14, 2006 opinion did not conclude that data submitted by applicants for appointment could be classified as private pursuant to Minn. Stat. § 13.601, subd. 3. That subdivision lists particular data items that are public, and does not itself classify any data as private. Our opinion agreed with the Commissioner's Advisory Opinion 05-036 insofar as it stated that the listing of certain data on applicants for public office as public under section 13.601, subd. 3 does not imply that all other applicant data is private. We disagreed however with the Commissioner's conclusion that enactment of section 13.601, subdivision 3 in effect classified all data on such applicants as public. Our opinion concluded instead that the listing of items of public data in section 13.601 did not preclude other data from being classified as private under another statute such as Minn. Stat. § 13.43.

Second, under the Minnesota Government Data Practices Act, all government data is considered public unless classified otherwise by Minnesota statute, federal law, or temporary classification. Minn. Stat. § 13.03, subd. 1 (2004).

Third, the classification of particular data may be dependent, not only upon its substantive content, but also upon the government purpose for which it has been created or collected. An item of data concerning an individual may be private or confidential in certain contexts and public in others. For example, a listing of a public official's personal investments would be private as disclosed on a personal tax return, but public when submitted with a mandated economic disclosure statement. *See* Minn. Stat. §§ 10A.07, 13.601, subd. 1, 270B.02 (2004). Therefore, in order to determine the correct classification for particular data, it is often necessary to determine the specific legal authority pursuant to which it has been created, collected or retained.

Fourth, Minn. Stat. § 13.05, subd. 3 provides:

> Subd. 3. *General standards for collection and storage.* Collection and storage of all data on individuals and the use and dissemination of private and confidential data on individuals shall be limited to that necessary for the administration and management of programs specifically authorized by the legislature or local governing body or mandated by the federal government.

Fifth, data on candidates for election to various public offices is collected in accordance with several statutes. These include, for example, Minn. Stat. §§ 10A.09 (statements of economic interest); 10A.20, 211A.02 (campaign reports); 204B.06, 204B.07, 205.13 (affidavits of candidacy and nominating petitions). Information contained in those filings is plainly public, either by express statutory mandate or under the presumption set forth in Minn. Stat. § 13.03, subd. 1.

Sixth, unlike one applying for appointment by a city council to a vacant council position, candidates for election cannot be reasonably viewed as "applicants for employment" by the governmental units they seek to serve. Candidates for election do not make application to, nor is their selection made by, officials of the governmental unit acting as an "appointing authority." They are instead elected by the voters,[2] and all persons who meet basic qualifications specified in the Constitution[3] and statutes[4] are eligible to seek election. Consequently, it is our view that candidates for election to public office by the voters are not "applicants for employment" by the City within the meaning of Minn. Stat. § 13.43, subd. 3. Nor are we not aware of any other statute, federal law, or temporary classification that would classify government data supplied by, or on behalf of, candidates in the course of the official election process as other than public.

Seventh, as noted above, collection, storage and use of data on individuals is limited by law to that necessary for a government agency to carry out some specifically authorized activity. We are aware of no authorized government program under which it would be necessary or appropriate for city officials to delve into the backgrounds of persons seeking election to city offices for purposes of obtaining information that would reflect negatively on their eligibility or qualifications for office.

A filing officer, such as the city clerk, has limited authority to withhold the name of a candidate from the ballot in certain narrowly defined circumstances. *See, e.g.,* section 204B.10 (2004). However, that authority does not extend to other local officials, or to undertaking of any independent investigation of candidates, or otherwise passing judgment upon their eligibility. *See* Ops. Atty. Gen. 911-j, September 15, 1970 (no authority for secretary of state to make

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[2] According to the facts given, however, the results of the criminal background investigations are not made available to the voters, but are apparently restricted to use by unspecified city officials.
[3] *See* Minn. Const. art. VII, § 6 and XII, §§ 3, 4.
[4] *See, e.g.,* Minn. Stat. §§ 201.014, 204B.06 (2004).

independent inquiry into candidates' qualifications); 184-I, August 8, 1940 (County auditor not authorized to withhold name from ballot on basis of information concerning candidate's criminal history). Further, while a convicted felon whose civil rights have not been restored is ineligible to appear on the ballot,[5] candidates for office must submit a sworn statement at the time they file indicating that they are "eligible" voters. Excluded from the definition of "eligible voter" is a person who has been convicted of a felony who has not had his civil rights restored. Minn. Const. art VII, § 1; Minn. Stat. § 201.014, subd. 2 (2004).

Finally, implicit in the facts provided is the suggestion that "the City's" intent was to take some sort of action in opposition to the candidacy of any person it determined to be ineligible on the basis of information revealed in the criminal background checks. As a general proposition, it is considered contrary to public policy for the resources or authority of a government agency to be used for purposes of attempting to influence the outcome of an election for public office. *See, e.g., Stanson v. Mott,* 17 Cal.3d 206, 217, 551 P.2d 1, 9 (Cal. 1976); Op. Atty. Gen. 125B-21, March 19, 1921 (copy enclosed).

OPINION

For the foregoing reasons, it is our opinion that information collected by the City in the course of criminal background investigation of candidates for election to city offices would not be classified as private "applicant data" under Minn. Stat. § 13.43, subd. 3. Therefore, unless it may be classified as private under another statute, federal law, or temporary classification, it would be presumptively public under Minn. Stat. § 13.03, subd. 1. We are unable to identify any other applicable statutory classification because we are not aware of any source of authority for collection of criminal history data in the circumstances described. Consequently, we answer your question in the negative.

Respectfully submitted,

MIKE HATCH
Attorney General

KRISTINE L. EIDEN
Chief Deputy Attorney General

Enclosures

AG: #1667586-v1

[5] Minn. Const. art. VII §§ 1, 6; Minn. Stat. §§ 201.014, subd. 2(a); 204B.06 (2004).

SCHOOL ELECTIONS: PETITIONS: Petition Rules promulgated by the Secretary of State generally apply to petition for school district referendum. School district clerks should perform the functions of "filing officer under those rules.:" Minn Stat. §§ 204B.071, 205A.05, subd. 1, 205A.13 (2006); Minn. R. ch. 8205

185-b
(Cr.Ref. to 159-a-3)

June 15, 2007

Paul C. Ratwik
Julia H. Halbach
Ratwik, Roszak & Maloney, P.A.
Suite 300, 730 Second Avenue South
Minneapolis, MN 55402

Dear Mr. Ratwik and Ms. Halbach:

Thank you for your correspondence of April 24, 2007. In your letter you present the following facts:

FACTS AND BACKGROUND

You state that in November, 2006, the voters of Independent School District No. 15 (the "District") passed a referendum authorizing the issuance of $6,500,000.00 in bonds to renovate the District's high school. The District sold the bonds on April 3, 2007, and began to solicit bids for the reconstruction project.

You state further that at its meeting on March 26, 2007, the School Board was presented with a petition for a special election. The petition presented two questions characterized as "bond questions." The first question asks whether the proceeds from the April 3 bond sale should be "reallocated to a new fund for the construction of a new 2,100 student high school." The second question calls for the approval by the voters of the District of $65,000,000 in general obligation bonds for the purpose of constructing a new high school. The petition was "filed" with the School Board, and requests that the questions be presented to the District's voters at the November, 2007 general election.

You state that, because the District includes areas in both Isanti and Anoka Counties, the District was uncertain who should serve as the "filing officer" for the petition pursuant to Minn. R. Ch. 8205 (2005) relating to the form, circulation, filing, and inspection of election-related petitions. The District contacted the Secretary of State's Office to determine if the Secretary of State was the proper filing officer. The Secretary of State responded that because the election is not "for an office," it is not the correct filing officer. As the District's counsel you have determined that the applicable statutes, rules, and case law are unclear as to who serves as the filing officer.

Based on this determination, the District submits the questions set forth below:

QUESTION 1:

Does Minn. R. ch. 8205 apply to "any petition required for any election in this state," as the Rules state? Specifically, does this Chapter apply to special school district elections relating to referendums?

OPINION

As qualified below we answer this question in the affirmative.

Minn. Stat. § 205A.05, subd. 1 (2006) provides in part:

> Special elections must be held for a school district on a question on which the voters are authorized by law to pass judgment. The school board may on its own motion call a special election to vote on any matter requiring approval of the voters of a district. Upon petition of 50 or more voters of the school district or five percent of the number of voters voting at the preceding regular school district election, the school board shall by resolution call a special election to vote on any matter requiring approval of the voters of a district. The election officials for a special election are the same as for the most recent school district general election unless changed according to law. Otherwise, special elections must be conducted and the returns made in the manner provided for the school district general election.

Minn. Stat. § 205A.13 (2006) provides:

> Any petition to a school board authorized in this chapter or sections 126C.17, 126C.40, 126C.41 to 126C.48, and 124D.22, or any other law which requires the board to submit an issue to referendum or election, shall meet the requirements provided in section 204B.071.

Minn. Stat. § 204B.071 (2006) provides:

> The secretary of state shall adopt rules governing the manner in which petitions required for any election in this state are circulated, signed, filed, and inspected. The secretary of state shall provide samples of petition forms for use by election officials.

Minn. R. 8205.1040 provides:

> Subpart 1. **Applicability.** This *part applies to any petition required for any election in this state*, including nominating petitions, recall petitions, and proposed recall petitions.

> Subp. 2. **Definition of filing officer.** As used in this part and part 8205.1050, "filing officer" refers to:
>
> A. the county auditor *if a petition is for an office* to be voted upon only in one county; or
>
> B. the secretary of state *if a petition is for an office* to be voted on in more than one county.
>
> Subp. 3. **Filing procedures.** The person filing the petition must submit the entire petition at one time to the filing officer. The petitioners may submit the petition by mail, messenger, or similar delivery service. Filing of a petition is effective upon receipt by the filing officer. Petition pages must not be altered by anyone except the filing officer for verification purposes after the petition has been filed.
>
> Subp. 4. **Receipt.** The filing officer must provide the person filing the petition with a receipt for the petition. The receipt must include the type of petition filed; the name, address, and telephone number of the person submitting the petition; the date on which the petition was filed; and the total number of pages in the petition submitted.

(Emphasis added.)

As originally proposed Part 8205.1040 did not include a separate definition of the term "filing officer."[1] The present subpart 2 was added to the rule in response to the following statement in Finding 95 of the Report of the Administrative Law Judge on the Proposed Rules (copy enclosed):

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[1] *See* Proposed Permanent Rules Relating to Elections, 24 State Register 1716, 1722 (2000). Election statutes themselves contain several references to the "filing officer" without providing a specific definition, apparently in the belief that the term's meaning can be determined from the context in which it appears. *See, e.g.,* Minn. Stat. §§ 10A.321, subd. 2; 10A.322, subd. 1(b); 204B.09, subd. 1a, subd. 3; 204B.10, subd. 5, 6; 204B.11, subd. 1; 204B.13, subd. 5, 6; 204C.35, subd. 2; 205.13, subd. 1b; 205A.06, subd. 1c (2006). The only statutory definition of the term that we have located also relies upon reference to other authorities to determine identity. *See* Minn. Stat. § 211A.01, subd. 7 (2006), relating to campaign finance reports, which provides:

> "Filing officer" means the officer authorized by law to accept affidavits of candidacy or nominating petitions for an office or the officer authorized by law to place a ballot question on the ballot.

> It appears that the identification of the "filing officer" will vary depending upon the precise nature of the petition being filed. Although the lack of a definition of *t* the "filing officer" does not render the proposed rules defective, the Secretary of State's Office may wish to consider incorporating a definition of this term into the proposed rules, or including a cross-reference to an existing definition. Such a modification, if made, would serve to clarify the application of the proposed rules, would be within the scope of the matter announced in the notice of hearing, and would be a logical outgrowth of the comments submitted during the rulemaking proceeding. Accordingly, it would not make the rule substantially different from the rule as originally proposed.

Id. Finding of Fact 95 at p. 20.

A footnote to that finding refers to Minn. Stat. § 204B.09, subd. 1 (2000) which related only to filing of affidavits of candidacy and nominating petitions for county, state and federal offices to be filled at the state general election and contained no reference to school district elections or to elections on ballot questions. Nevertheless, the Secretary of State, in adopting the final rules included 8205.1040, subp. 2 which basically duplicates the limited filing directions of section 204B.09, subd. 1. In the Order Adopting the Permanent Rules, the Secretary of State stated:

> In accordance with Finding 95 of the Report, the Secretary has adopted the recommendation of the Administrative Law Judge by adding a new Subpart 2 to 8205.1040 reading "Subp. 2. Definition of filing officer. As used in this part and part 8205.1050 'filing officer' refers to: A. the county auditor if a petition is for an officer to be voted upon only in one county; or B. the secretary of state if a petition is for an office to be voted on in more than one county." To implement this recommendation, the Secretary added the cross-reference to part 8205.1050 since the term "filing officer" is used in that part as well. The Administrative Law Judge stated in Finding 95 that such a modification would not make the final rule substantially different from the rules as originally proposed.

25 State Register 616, 618 (2000) There is nothing in the rule-making record, however, to indicate any intent that those definitions were to apply to school district referendum petitions.

It is our opinion that the provisions of Minn. R. ch. 8205 apply to petitions for special school district referenda, to the extent that individual rules, as written, have relevance to such elections.[2] Indeed, section 205A.13 expressly states that petitions that require a school board to

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[2] Accordingly, a petition for a school district referendum will be subject to those provisions of chapter 8205 that apply to petitions generally, but will not be subject to rules that, by their express terms, apply only to petitions for other types of elections.

call elections must meet the requirements of Minn. Stat. § 204B.071, and chapter 8205 contains rules adopted pursuant to that section.

Therefore, as so qualified, we answer your first question in the affirmative.

QUESTION 2:

Who is the proper filing officer for a school district special election petition when the school district sits in more than one county? If neither the Secretary of State nor county auditor is the proper filing officer, does the School District clerk serve as the filing officer, and what is the authority for this conclusion?

It is clear from the plain language of Minn. R. 8205.1040, subp. 2 that the definitions of "filing officer" contained therein are not relevant to a petition for any election that does not involve any public office. Thus, it is our view that Minn. R. 8205.1040 simply does not provide an independent definition of the term for purposes of such elections. Consequently, the identity of the "filing officer" for school district referenda must be determined from other sources. *Cf. In re Referendum to Amend City of Grand Rapids, Minn. Munic. Election Ord. No. 04-08-11 2006 WL 1985595* (Minn. Ct. App.), wherein the court determined that, while the verification requirements of Minn. R. 8205.1050 applied to a petition for a municipal ordinance referendum, the definition of "filing officer" contained in Minn. R. 8205.1040, subp. 2 did not apply.

Unlike the language of Minn. Stat. § 205.07 addressed in the *Grand Rapids* case, section 205A.05 does not specify any particular official with whom a petition is to be filed. It merely requires a school board to call an election "[u]pon petition of fifty or more voters..." The section does, however, state that "the election officials for a special election are the same as for the most recent school districts general election." In that regard, the only school board official expressly designated to receive election-related filings is the clerk of the district. *See, e.g.,* Minn. Stat. §§ 123A.48, subd. 11 (petition for referendum on school district consolidation); 123B.94, subd. 2, (candidates for office - common school dist.); 128D.05, subd. 2 (petitions for referendum on election year change in Sp. Sch. Dist. #1); 203B.05, subd. 2 (application for absentee ballots); 204C.36, subd. 1 (request for election recount); 205A.06, subd. 1 (candidate affidavits); 205A.09, subd. 2 (petition for longer voting hours); and 209.02, subd. 3 (notice of election contest on ballot question).

As noted above, the only statutory definition of the term "filing officer" we have located defines it as the officer authorized by law to accept affidavits of candidacy or nominating petitions for an office or the officer authorized by law to place a ballot question on the ballot. See note 1, *supra.* In a school district, it is the clerk that accepts affidavits of candidacy, and also oversees placement of referendum questions on the ballot. *See,* Minn. Stat. § § 205A.06, 205A.08, subd. 4.

For the foregoing reasons it is in our opinion that the District Clerk is the appropriate official to perform the functions of the "filing officer" under Minn. R. Ch. 8205 for petitions submitted pursuant to Minn. Stat. § 205A.05.

Very truly yours,

LORI SWANSON
Attorney General

KENNETH E. RASCHKE, JR.
Assistant Attorney General

AG: #1815807

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

MIKE HATCH
ATTORNEY GENERAL

August 15, 2006

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Michael A. Fahey
Carver County Attorney
Carver Count Government Center
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Dear Mr. Fahey:

Thank you for your correspondence dated July 19, 2006 requesting an opinion of the Attorney General concerning the Carver County Board's wish to enact an ordinance that would make it unlawful for individuals to knowingly host minor drinking parties.

FACTS AND BACKGROUND

You indicate that the Carver County Board is considering whether to enact an ordinance that would hold individuals who knowingly host minor drinking parties criminally responsible, even if the host did not supply the alcohol. You believe the board's authority comes from Minn. Stat. § 145A.05, subd. 7 (2004), which allows the county to adopt ordinances to "define public health nuisances and to provide for the prevention or abatement." *Id.* You state that the ordinance is necessary because even though Minn. Stat. § 340A.503, subd. 2(1) makes it illegal to give or furnish alcohol to a minor, it is a difficult crime to prove and that such an ordinance would be more effective in combating underage drinking.

Based upon these facts, you ask the following questions:

1. Does any state statute governing liquor consumption and regulation preempt a county ordinance that would make it a crime for an individual to knowingly host a minor drinking party, even if the host did not provide the alcohol?

2. If such an ordinance would not be preempted by state law, does the Board have authority under state law to adopt it?

LAW AND ANALYSIS

Absent legislative language expressly precluding local regulation, statutory preemption is inferred "when the legislature has so completely regulated the field or has indicated that a field is solely a matter of state concern, and the subject matter of the regulation is such that local regulation would have adverse effects on the general population of the state." *State v. Westrum,* 380 N.W.2d 187, 190 (Minn. Ct. App. 1986). A determination of whether preemption exists should consider four criteria: 1) the subject matter to be regulated; 2) whether the subject matter

has been so fully covered by state law that it has become solely a matter of state concern; 3) whether the legislature in partially regulating the subject matter indicates that it is a matter solely of state concern; and 4) whether the subject matter is of such a nature that local regulation would have an unreasonably adverse effect on the general population of the state. *See Mangold Midwest Co. v. Village of Richfield,* 274 Minn. 347, 357, 143 N.W.2d 813, 819-820 (1966). The question of preemption must be answered in the light of the facts and circumstances surrounding each case. *See id.*

The subject matter of the proposed ordinance is underage drinking.[1] Although Minnesota Statutes chapter 340A regulates procurement and consumption of liquor as it relates to minors, there is no express state preemption precluding local regulation. Nor is there any statutory provision that suggests the subject matter is fully covered by state law and is solely a matter of state concern "in the clearest of terms" in accordance with the urging of the Minnesota Supreme Court that the legislature plainly express preemptive intent. *See State v. Dailey,* 284 Minn. 212, 214-15, 169 N.W.2d 746, 748 (1969). In fact, there is evidence to the contrary given the express recognition of local power provided in Minnesota Statutes section 340A.509.[2] Indeed, an exceptional case in which it can be said that the legislature intended to have a uniform state policy on this topic. *Cf.* Op. Atty. Gen. 218j-12, May 30, 1973 (rejecting ability of local authorities to maintain ordinances keeping drinking age at 21 when state had lowered it to 18 by statute when intent of legislation was to remove those people from 18 to 21 years of age from the "shield of minority with regard to many obligations and to grant them the status of adulthood with regard to many privileges").

Such a regulation would not appear to have an adverse effect on the general population of the state since it would be contained to activity within the county. *Compare Village of Brooklyn Center v. Rippen,* 255 Minn. 334, 96 N.W.2d 585 (1959) (local ordinance requiring licensing of boats invalid given that the nature of the subject matter would lead to unreasonably adverse effects upon the general populace of state if such local licensing were allowed). Thus in our

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[1] You have provided copies of potential ordinances from different areas of the country as examples of the language the Board is interested in adopting. It has long been established that the Attorney General does not ordinarily make a general review of a local ordinance to determine the validity or to ascertain possible legal problems that might arise as a result of it, since that is the task of local officials. *See* Op. Atty. Gen. 477b-14, Oct. 9, 1973. Given this limitation, the Attorney General's Office is unable to evaluate the content of any particular ordinance the county may be considering inquiring about and this opinion is limited to your specific questions regarding preemption and authority to adopt an ordinance that addresses the general issue you discuss.

[2] This section preserves the power of local government "to impose further restrictions and regulations regarding the sale and possession of alcoholic beverages within its limits". Minn. Stat. § 340A.509 (2004).

view, a county is not preempted from regulating the facilitation of underage drinking in this manner.

It appears that the county has the authority to pass such an ordinance. Both counties and townships are entities of state creation and have only the powers conferred to them by the state. *See County of Pine v. State, Dep't. of Natural Resources,* 280 N.W.2d 625, 629 (Minn. 1979) (county ordinances may not exceed a "valid exercise of police power"). The legislature adopted Minn. Stat. § 145A.05, subdivision 1 (2004), which vests a county board with authority to adopt ordinances "to regulate actual or potential threats to the public health" unless such ordinances are "preempted by, in conflict with, or less restrictive than standards in state law or rule." *Id.*

There can be little doubt that alcohol use by minors poses threats to the public health. In fact, in comparing the increased public policy concerns of underage alcohol consumption compared to alcohol consumption in general, the Minnesota Supreme Court stated that the prohibition against underage drinking "operates directly to protect both minors and the public from physical and other injuries resulting from alcohol consumption." *State v. Robinson,* 572 N.W.2d 720, 724 (Minn. 1997). The Court in *Robinson* expressed that such injury could be direct, as in the case of alcohol poisoning, or indirect, as in the case of an alcohol-related traffic accident. *See id.* Given the addictive nature of alcohol and its possible effects on those who use it irresponsibly or are who are affected by those who use it irresponsibly, it is alcohol use by minors that is a threat to public health.

Finally, as discussed above, such an ordinance would not be preempted by state law. Further, it would not conflict with or be less restrictive than the standards already set in state law or rule. As an initial consideration, there is no statute which authorizes the general activity which the ordinance would criminalize. There are two statutory provisions which seem to address the conduct at issue most directly. The first is Minnesota Statutes section 340A.503, subdivision 2(1), which makes it a crime to "sell, barter, furnish or give" alcohol to a minor. *See id.* The proposed ordinance would not be less restrictive than the "sell, barter, furnish or give" provision because it would address those individuals who knowingly host a minor party where alcohol is present, even if it cannot be established that those individuals "sold, bartered, furnished or gave" the alcohol to the minors. Such an ordinance does not conflict with, but adds to the restrictions set forth in this provision.

The other statutory provision is Minnesota Statutes section 340A.90, which addresses civil liability regarding those who "had control over the premises" and "being in a reasonable position to prevent the consumption of alcoholic beverages by (a person under 21), knowingly or recklessly permitted that consumption and the consumption caused the intoxication of that person." *See* Minn. Stat. § 340A.90, subd. 1 (2004). Further, it also addresses civil liability regarding those who "sold, bartered, furnished or gave" alcohol to someone under the age of 21. *See* Minn. Stat. § 340A.90, subd. 2 (2004). The proposed ordinance is not less restrictive nor does it conflict with this provision since it adds a criminal sanction for similar behavior, but does

not address civil liability. Given these considerations, it is our view that the proposed ordinance meets the requirements of the authorizing statutory provision.

OPINION

For the foregoing reasons, we answer your first question in the negative and your second question in the affirmative.

Very truly yours,

KRISTINE L. EIDEN
Chief Deputy Attorney General

KLE/ab
AG: #1646590-v1

STATE OF MINNESOTA

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December 4, 2006

By First Class Mail
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Re: Request for Opinion/Operation of EBS Spectrum Service

Dear Ms. Wallner:

Thank you for your letter of October 25, 2006, in which you request an opinion of the Attorney General with respect to the issues discussed below.

FACTS

You state that Independent School District No. 2365 ("School District") holds a license from the Federal Communications Commission ("FCC") for four Educational Broadband Service ("EBS"),[1] or "wireless cable," channels.

EBS licenses generally are available only to accredited educational institutions and certain non-profit education-serving entities. *See* 47 C.F.R. § 27.1201(a). EBS stations primarily are intended to further the educational mission of accredited public and private schools, and colleges and universities providing a formal educational and cultural development to enrolled students. 47 C.F.R. § 27.1203(b). In additional to educational programming, EBS stations may be used to further the licensee's educational mission through professional training and back-office administrative communications. *See* 47 C.F.R. § 27.1203(c). A wireless cable entity may be licensed to operate on EBS frequencies under certain limited circumstances. *See* 47 C.F.R. § 27.1201(c). Under FCC regulations, school districts may use their EBS spectrum to transmit educational and instructional material via wireless technology. *See generally* 47 C.F.R. Part 27. EBS licensees, such as the School District, may provide fixed or mobile service. *See* 47 C.F.R. § 27.1203(a).

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[1] Prior to January 10, 2005, this service was known as the Instructional Television Fixed Service ("ITFS"). *See, e.g.,* 69 Fed. Reg. 72020 (Dec. 10, 2004) (final FCC rules amending, *inter alia,* 47 C.F.R. Part 27).

Under FCC regulations, an EBS licensee that has met minimum instructional programming requirements may lease any excess EBS capacity to private entities under what are known as "spectrum leasing agreements." *See* 47 C.F.R. § 27.1214.[2] A private EBS lessee, such as a cable company, may then use the license to provide services to paying subscribers within the applicable geographic area. FCC regulations are silent as to whether school districts may use excess capacity to provide wireless services directly to paying subscribers.[3]

You state that the School District currently leases a portion of its excess EBS capacity to a private entity that provides "premium television programming" to paying customers. You indicate that the School District may wish to use a portion of its EBS spectrum to establish a student-operated wireless service that would provide services to paying subscribers. Specifically, the School District would offer a class in the high school business curriculum whereby students would learn business skills by operating a wireless service, by engaging in market analysis, advertising, customer surveys, cash flow analysis, budgeting and capital return. Part-time work, field trips and class projects would be incorporated into the schools' curriculum.

Although not stated in your letter, we assume for the purposes of analysis that the proposed subscription service would be operated on a non-profit basis.

QUESTIONS

1. In addition to or in lieu of leasing excess EBS spectrum capacity to a private entity, may a school district provide wireless services to paying subscribers?

2. If the answer to Question One is "yes," may a school district incur operational and/or capital expenses to establish and maintain such service?

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[2] Though subject to additional caveats, in general, minimum instructional programming for EBS licensees using analog transmission is defined as at least 20 hours per week per channel plus an additional 20 hours in reserve, or, for EBS licensees using digital transmission, at least five percent of the capacity of its channels and at least 20 hours per week per channel. 47 C.F.R. § 27.1214(a) and (b).

[3] It does not appear under *federal* law that EBS licensees are prohibited from providing services to paying subscribers, based on the general authority of EBS licensees to provide fixed or mobile service. *See* 47 C.F.R. § 27.1203(a). This does not, however, resolve questions of state constitutional law.

OPINION

We answer Question One in the negative.

In order to expend public funds, a school district must satisfy two conditions: (1) the funds must be spent for a "public purpose," and (2) the school district must have the authority to make the specific expenditure. *See Borgelt v. City of Minneapolis*, 135 N.W.2d 438, 441 (Minn. 1965), citing *Tousley v. Leach*, 230 N.W.788, 789 (Minn. 1930) ("If the purpose is a public one for which tax money may be used, and there is authority to make the expenditure, and the use is genuine as distinguished from a subterfuge or something farcical, there is nothing for the court"). We will discuss these conditions in turn.

Public Purpose

First, it is clearly established in Minnesota that an expenditure of school district funds, whether direct or indirect, may be made only for a public purpose. Minn. Const. art. 10, § 1. The Minnesota Supreme Court has commented that, while "public purpose" is an "elusive" concept requiring "case-by-case disposition," *R.E. Short Co. City of Minneapolis*, 269 N.W.2d 331, 337 (Minn. 1978), the courts "generally construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government." *Visina v. Freeman*, , 89 N.W.2d 635, 643 (Minn. 1958). *See also City of Pipestone v. Madsen*, 178 N.W.2d 594, 600 (Minn. 1970) *citing* 37 Am. Jur., Municipal Corporations § 120 ("Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment" of those over whom the public body has charge). The Court has stated that the term "public purpose" should be "broadly construed to comport with the changing conditions of modern life," *R.E. Short Co. City of Minneapolis*, 269 N.W.2d 331, 337 (Minn. 1978) (construction of public parking ramp partially leased to private developer served public purpose), and changes in science and technology. *See, e.g., City of Pipestone v. Madsen*, 178 N.W.2d 594, 600 (Minn. 1970) (citation omitted) (public purpose served in city's lease of public land to private meat packing plant for industrial development).

The "public purpose" concept, however, is not unlimited. The primary purpose of the activity must be public. *See R.E. Short*, 269 N.W.2d at 337 (citing *Visina*). As the Supreme Court stated in *Burns v. Essling*, 194 N.W. 404, 405 (Minn. 1923):

> (I)f the primary object of an expenditure of municipal funds is to subserve a public purpose, the expenditure is legal, although it may also involve as an incident an expenditure which, standing alone, would not be lawful. It is equally well-settled that, if the primary object is to promote some private end, the expenditure is illegal, although it may incidentally serve some public purpose also.

Applying these principles to the School District's inquiry, on one hand, the scenario the School District describes shares some characteristics with the generally accepted practice of charging a modest rental fee for after-hours use of classroom or other school building space, which does not depart significantly from the building's public purpose. On the other hand, it is doubtful whether the School District's entry into a non-educational market traditionally occupied by private business is directly related to the School District's educational function, as required by *Visina*.

Authority to Make Expenditure

Even if the School District's proposal would satisfy the "public purpose" requirement, however, the School District also must have the authority to engage in the activity. *Cf. Borgelt v. City of Minneapolis*, 135 N.W.2d 438, 443 (Minn. 1965). In this case, it does not appear that the School District has the legal authority to engage in this particular enterprise.

School districts are created by statute and generally have no authority beyond that given by statute. The general powers of independent school districts are set forth in Minnesota Statutes section 123B.02, subdivision 1, which provides that:

> The [school] board must have the general charge of the business of the district, the schoolhouses, and of the interests of the schools thereof. The board's authority to conduct the business of the district includes implied powers in addition to any specific powers granted by the legislature.

This statute does not grant the School District express authority to provide wireless services to paying customers. Thus, it is necessary to determine whether this enterprise falls within the School District's implied powers. As stated in *Borgelt*:

> It is not easy to define precisely what a municipal corporation may or may not do under its implied powers. At one extreme are those activities, clearly outside the performance of municipal functions, which will be restrained. . . .
>
> At the other extreme are those activities which are clearly necessary for, or aid, performance of a municipal function.

135 N.W.2d at 443. The question, therefore, comes down to whether offering wireless services to paying subscribers falls within "the business of district," as contemplated by Minnesota Statutes section 123B.02, subdivision 1. *Cf. Borgelt.* We conclude that it does not.

Unlike leasing excess EBS capacity to private entities, or renting excess classroom space to community users -- both of which are incidental uses to avoid waste of goods that otherwise exist primarily to promote the educational function of the School District -- the sale of paid

subscriptions appears to be engaging in direct competition with private industry, for which the School District has no express authority.[4] *Cf. Goodman v. School Dist. No. 1*, 32 F.2d 586 (8th Cir. 1929) (upholding Colorado school district's authority to operate on-site cafeterias for students and district employees, where operation of cafeteria "does not subserve a private mercantile purpose," and public use by parents and "other occasional visitors" was minimal and incidental to public benefit provided to student body). In this respect, the School District's circumstances are more like those of the City of Red Wing in *John Wright* than of the University in *Northland*. Similarly, the Court's holding in *Borgelt* turned precisely on the fact that the City was not trying to sell asphalt to private customers, but only to supply itself with required paving material. Presumably, the School District's four channels already serve the District's educational needs (with room to spare, if excess already is being leased to a private entity). On the same grounds, this Office informally has opined that a school district has no authority to operate a student-run cafeteria in commercial space with the general public as its customer base. April 25, 2001 letter from Asst. Att'y Gen. Mottl to Squire and Mace (copy enclosed).

In fact, in cases where school districts have operated an enterprise in direct competition with private industry, the Minnesota legislature specifically has authorized the activity in question. For example, Minnesota Statutes, section 123B.29, authorizes a school district to sell to the public a building constructed, as part of a school assignment, by a high school student or a high school class. These buildings often are houses, the construction and sale of which would compete with the private home construction industry. The legislative authority to sell these student-constructed buildings is consistent with the Supreme Court's observation in *John Wright & Associates* that:

> *In the absence of express legislative authority*, [a municipality] may not engage in any private business enterprise or occupation such as is usually pursued by private individuals.

93 N.W.2d at 664 (emphasis added.)

Because we responded to Question One in the negative, no response to Question Two is necessary.

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[4] This is not to say that the legislature could not authorize such use, only that school districts currently do not have this authority.

CONCLUSION

Based on the foregoing, we conclude that the School District does not have the authority to directly provide wireless services to paid subscribers.

Very truly yours,

KRISTINE L. EIDEN
Chief Deputy Attorney General

Enc.

KLE:ab
AG: #1703669-v1

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

FILE

MIKE HATCH
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December 13, 2006

Mary D. Tietjen
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Minneapolis, MN 55402

Dear Ms. Tietjen:

You indicate that you are the City Attorney for the City of Mound, Minnesota, and you request an opinion of the Attorney General with respect to the matter discussed below.

You state that at the 2006 city election, Greg Skinner was elected to the City Council of Mound, which is a Plan B statutory city. You further state that Mr. Skinner is currently employed as superintendent of public works ("superintendent") for the City of Mound, and in that capacity, he reports to the Public Works Director and the City Manager. You also state that the superintendent is a full-time, salaried, non-union city employee. The superintendent supervises and directs the day-to-day maintenance activities of 11 employees. In your letter requesting the opinion, you state that the superintendent has no authority over the employees beyond the supervision of daily tasks, nor does the superintendent negotiate wages or salaries for the employees that he supervises.

You indicate that the superintendent position is not appointed or otherwise supervised by the city council. You state that as part of the city budgeting process, the City Manager obtains input from the superintendent regarding items for the proposed budget for the Mound Public Works Department. The Public Works Director and the City Manager are responsible for reviewing and approving all proposed items. You state that the City Manager prepares the final annual budget estimates from each department of the City, subject to the approval of and adoption by the Mound City Council. The City Manager is responsible for presenting the budget to the City Council, although in the past, she has requested that the superintendent participate in that presentation.

You state that the Public Works Director, who is a department head, and the City Manager make and implement policy decisions for the City and the Public Works Department. You further state that the superintendent does not set or implement policy for the City or the Public Works Department. In a follow-up telephone conversation, you were asked whether a written position description for the superintendent's position is available, and you indicated that none exists.

In your letter, you also provided information regarding compensation of city employees. You state that as with all non-union employees, the superintendent's salary and benefits are governed by the City's administrative code. You further state that with respect to salary, the administrative code provides: 1) the City Manager is directly responsible to the City Council for the coordination and administration of the salary program; 2) all salary adjustments for employees are based upon the City's pay equity plan accepted by the City Council in 1988; and 3) annual cost of living adjustments for all non-union employees shall be equal to the highest percentage given to union contract personnel each year. The union contract is subject to approval by the City Council. You state that in addition, the administrative code may be amended from time to time by the City Council. Further, salary and cost of living adjustments are applied to employee classifications, not individuals, and employees do not receive merit increases. Under the administrative code, an employee's eligibility for other benefits such as sick time, vacation leave and severance pay is based on objective criteria such as years of service.

Based on these facts, you then asked three questions. Your first question is whether the public works superintendent position is an "office" to which the incompatible offices doctrine applies.

First, as you point out, the City of Mound is a statutory, Plan B city. *See* Minn. Stat. §§ 412.601–412.751 (2006). Under this form of government, known as the "council–manager plan," the council exercises the legislative power of the city and determines all matters of policy. *See* Minn. Stat. § 412.611 (2006) The city manager alone has the authority to hire and fire city employees. *See* Minn. Stat. § 412.651, subd. 3 (2006). ("[t]he city manager shall appoint upon the basis of merit and fitness...all heads of departments, and all subordinate officers and employees....") Thus, the city manager is the head of the administrative branch of government and is responsible to the council for the proper administration of all affairs relating to the city. Minn. Stat. § 412.661(2006). As you state, in a plan B city, the law strictly limits the authority of the city council in administrative matters:

> Neither the council nor any of its members shall dictate the appointment of any person to office or employment by the manager, or in any manner interfere with the manager or prevent the manager from exercising judgment in the appointment of officers and employees....Except for the purpose of inquiry, the council and its members shall deal with and control the administrative service solely through the manager, and neither the council nor any of its members shall give orders to any subordinate of the manager, either publicly or privately.

Minn. Stat. § 412.661 (2006).

Under the council-manager plan, the city council is empowered to "create such departments, divisions and bureaus for the administration of the affairs of the city as may seem necessary, and from time to time may alter their powers and organization." Minn. Stat. § 412.671 (2006). The Mound City Council has established the Public Works Department as a

department of the City and designated the Director of Public Works as the head of the Department. Mound City Code, Chapter II, section 205.05. The City Council has further provided that "the Director of Public Works is responsible to the manager for the organization, planning, administration and coordination of public works of the city. The Director of Public Works shall perform the duties described in the job description for that position and any additional duties assigned by the manager." Mound City Code, Chapter II, section 205.20. The council has not created by ordinance any other positions subordinate to the Director of Public Works.

Second, at common law, public offices are considered to be incompatible, and may not be held by the same person, when the functions of the two are inconsistent such that antagonism would result if the person attempted to perform the duties of both. The determination focuses on whether there is an inherent inconsistency in the duties themselves. *See, e.g., State ex rel. Hilton v. Sword*, 157 Minn. 263, 196 N.W. 467 (1923); *State ex rel. Young v. Hays*, 105 Minn. 399, 117 N.W. 615 (1908); Op. Atty. Gen. 358-E-9, April 5, 1971. Some prior cases and opinions have stated that public positions are incompatible if one is subordinate to the other. *See, e.g., Young v. Hays*, *Kenney v. Georgen*, 36 Minn. 190, 31 N.W. 210 (1886); Atty. Gen. 358-E-9, April 5, 1971 (council member may not serve as fire chief). However, more recent decisions indicate that, in order for two positions to be considered incompatible offices for the purposes of applying the *Hilton v. Sword* principles, each must be a public office as opposed to mere employment. The distinction was explained by the Minnesota Supreme Court in *McCutcheon v. City of St. Paul*, 298 Minn. 443, 216 N.W.2d 137 (1974):

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

Id. 216 N.W.2d at 139. Thus, we have previously concluded that an employee in a city utility department was not foreclosed by the incompatibility doctrine from serving on the city council. *See* Letter to Paul Ihle, Thief River Falls City Attorney, dated April 9, 1998.

Third, while the powers and duties of council members in a statutory city are prescribed by statutes, the particular responsibilities of a "superintendent of public works" are not defined in

state law or city ordinance, but are presumably defined by the council or the city manager.[1] Thus, it does not appear that the office of city council member and positions of superintendent of public works are necessarily or inherently incompatible. Rather, the issue turns largely upon fact determinations concerning the duties of the respective positions in question. Consequently, local officials, and not the Attorney General, are in the best position to evaluate whether the position would constitute a public office under the above definitions.

Next, you ask whether the office of superintendent is incompatible with the position of council member in a statutory plan B city if the answer to the first question is "yes."

Since we are not able to answer your first question above, we cannot answer your second question. Because it is not clear whether the position of superintendent of public works, as you have described it, is a "public office" for purposes of the incompatibility doctrine, it necessarily follows that we cannot determine whether the position of superintendent of public works is incompatible with the office of city council member. We believe that the principles regarding the incompatible offices doctrine set forth in the precedents and authorities set forth above will assist you in resolving that question.

Finally, you ask whether apart from the incompatibility doctrine, there a conflict of interest under 471.87 – .89 or 412.311 that would prohibit the public works superintendent from holding the office of council member?

First, while the incompatible office doctrine addresses conflicting public duties, other legal principles deal with conflicts between public responsibilities and the personal interests of public officials. For example, Minnesota Statutes §§ 412.311 and 471.87 (2006) prohibit statutory city council members from having a personal financial interest in contracts of the council. A violation of section 471.87 is a gross misdemeanor. This prohibition has been construed to include contracts of employment. *See, e.g.*, Op. Atty. Gen. 469a-2, Jan. 13, 1961. If the official has a prohibited personal financial interest under these sections, the existence of a violation is not dependent upon whether the official actually participates in approval of a contract. *See, e.g.*, Op. Atty. Gen. 90-E-5, November 13, 1969. Whether an official actually has a personal financial interest in a particular contract is often a factual issue, however, which is beyond the scope of this Office's opinion-rendering authority. *See, e.g.*, Op. Atty. Gen. 90e-5, May 25, 1966. Where a person has a personal interest in a contract that was approved before becoming a council member, continuation of the contract has not been considered a violation. *See, e.g.*, Op. Atty. Gen. 90-a-1, March 30,1961.

Second, to the extent that the union contract, pay equity policy, city administrative code and any other items affecting the terms and conditions of the superintendent's employment were in place prior to his taking office as council member, there was no statutory conflict at the time they were adopted, and the council member could continue to be employed by the city without a

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[1] *See, e.g.*, Minn. Stat. §§ 412.191, 412.221 and 412.241-412.311(2006).

conflict until the expiration, renewal or amendment of any relevant contracts, codes or policies. However, at such time as the contract is renewed or extended, or the city's pay equity policy or compensation-related provisions of the administrative code are readopted or amended, the council member would be in violation of sections 412.311 and 471.87 unless one of the exceptions contained in section 471.88 applies.

Third, Minn. Stat. § 471.88 (2006) provides for a number of exceptions to this general prohibition whereby a governing body may, by unanimous vote, approve a contract with an interested official. These include "a contract for which competitive bids are not required by law." *Id.*, subd. 5. Generally, cities are not required to seek competitive bids for employment contracts; Minn. Stat. § 471.345 (2006), the Uniform Municipal Contracting Law, does not generally apply to employment contracts. Furthermore, the procedures for negotiating collective bargaining agreements as set forth in the Public Employment Labor Relations Act (Minn. Stat. ch. 179A (2006)) does not involve the concept of public bidding. Therefore, it appears that the exception contained in section 471.88, subd. 5 may be utilized in renewing the relevant employment agreement to avoid a violation of section 412.311 or section 471.87.

Of course, the city's pay equity policy and administrative code are not, strictly speaking, "contracts." However, to the extent that their terms may affect the superintendent's compensation, a cautious approach would be to treat them as contracts with an interested official for purposes of sections 412.311 and 471.87.

Fourth is important to note that a governing body that contracts with an interested member must still comply with several procedural requirements, despite the fact that an exemption exists. *See* Minn. Stat. § 471.88, subd. 1 (requiring a unanimous vote approving the contract);Minn. Stat. § 479.89 (2006) (requiring adoption of a special resolution and the filing of affidavits).

Fifth, in circumstances not specifically addressed by statute, courts have not applied a bright-line rule prohibiting public officials from participating in matters where they have a personal interest. Rather, courts consider such situations on a case-by-case basis, evaluating the circumstances in light of several factors. In *Lenz v. Coon Creek Watershed Dist.*, 278 Minn. 1, 153 N.W.2d 209 (1967), the Court said:

> 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.

Id. at 15, 153 N.W.2d at 219 (footnote omitted). *See also E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815 (Minn. 1985).

Sixth, we are not aware of any controlling authority providing that the existence of a conflict or potential conflict of interest categorically excludes a person from taking an office. Instead, when such a conflict arises, the conflicted person should take appropriate corrective action. Applying the five factors set forth in the *Lenz* decision, there may well be circumstances in which the council member will be disqualified from participating in council meetings. Each occasion will need to be separately evaluated as it arises. *Cf. 1989 Street Improvement Program v. Denmark Twp.*, 483 N.W.2d 508 (Minn. App. 1992); *Rowell v. Board of Adjustment,* 446 N.W.2d 917 (Minn. App. 1989), *review denied* Dec. 15, 1989; *E.T.O., Inc. v. Town of Marian,* 375 N.W.2d 815 (Minn. 1985).

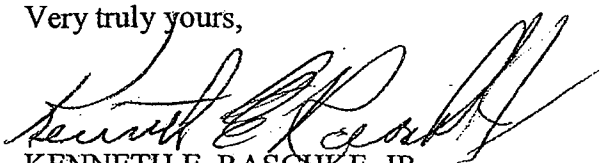
Finally, apart from the conflict of interest question addressed above, for a Plan B city such as Mound, there is the statutory prohibition contained in Minn. Stat. § 412.661 (2006), which states as follows:

> Except for the purpose of inquiry, the council and its members shall deal with and control the administrative service solely through the manager, and neither the council nor any of its members shall give orders to any subordinate of the manager, either publicly or privately.

We are not aware of any previous cases or opinions that address the scope of this prohibition. It could be argued that, to the extent the duties of the Superintendent of Public Works include directing other city employees, such actions would be contrary to law if performed by a member of the council. However, it could also be argued that the purpose of the statutory prohibition is to prevent the council or its members from circumventing the authority of the city manager and attempting directly to control the work of city employees. Thus, the prohibition might not be violated if the person directed that actions of city employees not as a council member, but as a subordinate of the city manager implementing the manager's policies and directives. Since the manager has ultimate supervisory authority over all city employees including the superintendent, she is presumably well situated to assure that her authority is not compromised.

We hope the foregoing analysis is responsive to your questions. For your convenience, we have enclosed copies of the cited cases and opinions.

Very truly yours,



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Enclosures

cc: Mayor-elect Mark Hanus

AG: #1711020-v1

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January 17, 2007

Donald B. Davison
Grand Marais City Attorney
City Hall
15 Broadway
Grand Marais, MN 55604-0006

Dear Mr. Davison:

Thank you for your correspondence, received by this Office on November 20, 2006, concerning the granting of an easement over a Grand Marais city sidewalk.

FACTS AND BACKGROUND

In your letter you state that, earlier in 2006 a hotel in the city of Grand Marais built a concrete handicap ramp on city street/sidewalk right-of-way to provide access to the hotel. The property owner did not seek any permission from the city council prior to construction of the ramp, and was asked by the city administrator to have it removed. The property owner claimed that there was no other practical location for the ramp and requested permission of the city council. You state that the city council has said that they are willing to agree to permit the ramp and directed you, as city attorney, and city administrator to work with the property owners' attorney on a binding agreement.

You proposed a revocable license for a term of years, with the following provisions:

1. Ten-year term, renewable for ten year terms, unless cancelled upon 9 months' notice.

2. Standard Hold Harmless and Liability Insurance Requirements.

3. Payment of a yearly permit fee.

4. Property owner maintains the ramp area.

5. Property owner warrants that the improvement meets applicable standards for handicap accessibility.

The property owners proposed:

1. A "permanent" easement that would expire only if the hotel were totally destroyed, the property no longer needed the ramp, or there was a material breach of the easement that remained uncured for more than 120 days after written notice is provided to the owner.

2. Standard Hold Harmless and Liability Insurance Requirements.

3. No payment of any fee of any kind.

4. Property owner maintains the ramp area.

5. Property owner will not warrant that the current improvement meets applicable standards for handicap accessibility.

You have opined that granting a permanent easement for no consideration would violate public policy, and could put potential future councils in the position of condemning the easement area if the area were needed in the future for public purposes.

Based upon the foregoing, you state that the city council has asked that an opinion be obtained from the Attorney General regarding the following question:

> Can a city enter into an agreement with a private party for a perpetual easement, with terms as set forth above?

LAW AND ANALYSIS

As you know, this Office is authorized under Minn. Stat. § 8.07 to provide legal opinions in appropriate circumstances at the request of attorneys for local units of government, but is not authorized to provide legal opinions or advice to other local officials or private citizens. Therefore, we do not ordinarily accommodate requests by local officials for a "second opinion in lieu of one provided by their own counsel. Furthermore, as noted in Op. Atty. Gen. 629a, May 9, 1975, this Office does not ordinarily undertake to review the particulars of proposed local transactions to identify potential legal problems. Notwithstanding these limitations, I can offer the following comments which I hope you will find helpful.

First, it is a basic principle of public law that government funds and other resources may only be used in connection with activities that primarily serve a public purpose. *See, e.g., Walser Auto Sales v. City of Richfield,* 635 N.W.2d 391 (Minn. Ct. App. 2001), *Affirmed* 644 N.W.2d 425 (Minn. 2002); *Port Authority of St. Paul v. Fisher,* 269 Minn. 276, 132 N.W.2d 183 (1964).

Second, local governments have only those powers that are expressly granted by statute or charter, or may be reasonably inferred as reasonable and necessary to the exercise of such express powers. *See, e.g., Welsh v. City of Orono,* 355 N.W.2d 117 (Minn. 1984); *Mangold Midwest Co. v. Village of Richfield,* 274 Minn. 347, 357m 143 N.W.2d 813, 820 (1966).

Third, as a general matter, Minnesota municipalities do not own platted streets and sidewalks in fee. Rather the owners of property abutting dedicated streets and sidewalks generally hold underlying title to the land up to the center of the public way, subject to the rights of the public to use the easement. The municipalities hold the easements represented thereby in trust for the public. *See, e.g., Etzler v. Mondale,* 266 Minn. 353, 362, 123 N.W.2d 603, 609 (1963); *Betcher v. Chicago M & St. P. Ry. Co.,* 110 Minn. 228, 124 N.W.2d 1096 (1910). Consequently, abutting owners may be entitled to use such property for their own purposes so long as their use does not obstruct or interfere with the free use of the easement by the public. *See, e.g., Foote v. City of Crosby,* 306 N.W.2d 883 (Minn. 1981) rehearing denied August 5, 1981); *Kelty v. City of Minneapolis,* 157 Minn. 430, 196 N.W.2d 487 (1923).

Fourth, the municipalities, in turn, pursuant to their police powers, have the authority and responsibility to regulate the use of the public streets and sidewalks to prevent encumbrances or obstructions. *See, e.g.,* Minn. Stat. 412.221, subd. 6; Op. Atty. Gen. 63--b-17, June 23, 1938. Whether encroachments from abutting property owners by such items as walls, entryways, steps, and the like constitute impermissible obstructions of a public way at any given point in time is a question of fact to be determined by the municipality on a case-by-case basis. *See, e.g., Kelty; Kochevar v. City of Gilbert,* 273 Minn. 274, 141 N.W.2d 24 (1966); 10 McQuillin, Municipal Corporations, § 30.93 (3d Ed.)

Fifth, consequently municipalities in the exercise of reasonable discretion, may suffer, or authorize, minor encroachments of a temporary nature. *See, e.g., Kochevar;* Ops. Atty. Gen. 59-A-53, March 10, 1959; 10A McQuillin Mun. Corp. § 30.48 (3d Ed.). However, they may not ordinarily authorize permanent occupancy for private purposes, or contractually relinquish their authority to regulate use of the right of way, should the public interest require it in the future. *See, e.g., Foote v. City of Crosby; State v. Board of Park Commrs.;* Op. Atty. Gen. 59-A-53, March 19, 1959; 10A McQuillin, Mun. Corp., §§ 30.43, 30.79 (3d. Ed.).

Finally, for those circumstances in which a permanent relinquishment of jurisdiction is appropriate, Minn. Stat. § 412.851 (2006) provides a procedure whereby a statutory city such as Grand Marais may vacate all or part of a street or other public way if such vacation is found to be in the public interest after a public hearing.

CONCLUSION

Based upon the foregoing principles, it seems unlikely that a court would uphold the power of a city to grant an abutting property owner a permanent right to maintain a private structure on a public sidewalk.

I hope these comments are helpful to you in advising the City. For your convenience, I have enclosed copies of the cited Attorney Generals' Opinions.

Very truly yours,

KENNETH E. RASCHKE, JR.
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Enclosures

AG: #1723284-v1

STATE OF MINNESOTA

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April 17, 2007

Mr. Frederic W. Knaak
Knaak & Kantrud, P.A.
Suite 800
3500 Willow Lake Road Blvd.
Vadnais Heights, MN 55110

Re: ***Opinion Request from the City of Fridley***

Dear Mr. Knaak:

I thank you for your February 27, 2007 correspondence concerning municipal water and sewer charges imposed by the City of Fridley (the "City").

FACTS AND BACKGROUND

You state that, in 2001, the citizens of the City amended the Fridley City Charter to impose restrictions on the rate of growth in fees or taxes imposed by the City. Included in the restrictions were increases in utility rates for water and sewer services. Under the limitation, any increase is capped at the lesser of the rate of inflation or five percent (5%) (hereinafter the "charter cap"). An increase could be permitted beyond the limits only after a vote by the citizens in a general election in which 51% of all persons voting in the election voted in favor of the change.[1] You state that a ballot proposal at the last election to exempt utility rates from the charter cap was not successful.

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[1] Section 7.02 of the Fridley Charter, submitted with your correspondence provides in part:

1. The City shall have, in addition to the powers by this Charter expressly or impliedly granted, all the powers to raise money by taxation pursuant to the laws of the State which are applicable to cities of the class of which it may be a member from time to time, provided that the amount of taxes levied against real and personal property within the City for general city purposes shall not exceed in dollars, a tax levy that is greater than the prior year tax levy increased by an inflationary index, or 5%, whichever is least. Said inflationary index shall be that as defined by the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for all Urban Consumers in the Minneapolis, St. Paul metropolitan area.

(Footnote Continued on Next Page)

You state further that most municipal sewer costs in the Twin Cities metropolitan area are outside of City control. For example, you indicate that three-fourths of the charges for sewer service in Fridley consists of treatment charges imposed on the City by the Metropolitan Council's Environmental Services Division, and many other water and sewer costs result from mandates imposed by state and federal law. In addition, you note that health and safety issues often force action by the City in dealing with its utility infrastructure, such as emergency water main repair breaks, as well as repair to wells, water storage tanks and sewer lift stations. You further point out that the cost of many items, such as energy and specialty chemicals, which are required to operate utilities bear no necessary relationship to the general rate of inflation. Thus, you state that since 2001, the City's actual expenses in providing water and sewer services have significantly outstripped the rate of inflation. The operating deficit for the three enterprise funds that support water, sewer and storm water utility costs currently exceeds $600,000. That deficit is projected to exceed $800,000 in less than four years. You enclosed with your letter a copy of Resolution No. 2007-15 adopted by the Fridley City Council which states in part:

(Footnote Continued From Previous Page)

. . .

2. The City Council may also levy a tax against real and personal property within the City in addition to said limit as defined in paragraph 1 provided the Council shall:

   A. Adopt a resolution declaring the necessity for an additional tax levy and specifying the purposes for which such additional tax levy is required.

   B. Hold a public hearing pursuant to three (3) weeks' published notice in the official newspaper of the City setting forth the contents of the resolution described in subdivision A.

   C. Adopt after such a public hearing a resolution by an affirmative vote of at least four (4) members of the council which shall be presented as a clear and concise 'plain language' ballot question at the next regular municipal election. (Ref. Ord. 592, 1102 and 11/7/00 Amendment)

   D. The additional tax levy shall take effect if 51% of the votes cast at said election are in favor of its adoption.

3. Any other fees created, or increased beyond the limits set forth in subsection 1, shall require voter approval as stipulated in subsection 2.

   A. For the purposes of this subsection, "fees" includes sales and use taxes, utility charges, recycling fees, gas and electric franchise fees and any other fee that produces a tax burden or direct financial obligation for all property owners and/or residents of Fridley.

WHEREAS, the current deficits have created a very significant hardship for the City of Fridley in the form of significant use of utility fund cash reserves; and

WHEREAS, a serious legal issue has been raised by the City's former outside bond counsel and financial advisors as to whether the imposition of such restrictions by the City in its Charter represents a direct conflict with the provision of Minnesota law as it applies to the obligations of cities to provide such services; and

WHEREAS, the City has determined that it is essential that, prior to taking any other action, it obtains a binding legal opinion as to whether the restrictive provisions of its Charter are beyond the scope of authority authorized under Minnesota law; and

WHEREAS, Minnesota law, under Minnesota Statutes Section 8.07, provides a procedure for obtaining a legal opinion from the Minnesota Attorney General on important legal matters for Minnesota cities.

NOW, THEREFORE, BE IT RESOLVED, that the City Manager is hereby directed to seek and obtain, through legal counsel or any other appropriate means, a legal opinion from the Minnesota Attorney General to determine whether the current restrictions contained in the City Charter are authorized by law, and, if not, the extent to which any such restrictions may properly be imposed in the Charter.

(Emphasis added.)

Based upon the foregoing, you request the Opinion of the Attorney General on the following questions:

1. Does Minnesota state law preempt the City of Fridley charter provision that results in costs and expenditures of its utilities substantially exceeding the revenues generated by the utilities?

2. If the answer to the foregoing question is "yes," what, if any, restrictions may a city place in its charter limiting such expenditures?

I note that enclosed with your correspondence was a lengthy memorandum of law in support of the proposition that Minn. Stat. § 444.075 (2006) authorizes the Fridley City Council to impose "just and equitable" water and sewer charges notwithstanding the limitations imposed by the City Charter. While it is not clear who authored the memorandum, the memorandum does not identify any uncertainty regarding the analysis of the issues you have raised and, in fact, concludes that Minnesota law supersedes the Charter provisions.

LAW AND ANALYSIS

Limitations on Attorney General Opinions

It is important to point out that, with limited exceptions not applicable here,[2] opinions of the Attorney General are advisory in nature and not "binding" *per se*. *See, e.g., West St. Paul Fed. of Teachers v. ISD No. 197,* 173 N.W.2d 366, 373 (Minn. Ct. App. 2006); Op. Atty. Gen. 629a, May 9, 1975, May 21, 1945, September 28, 1915. Accordingly, this Office is unable to issue a binding legal opinion as requested by the City Council.

In addition, for the reasons discussed in Op. Atty. Gen. 629A, May 9, 1975, Attorney Generals' Opinions do not generally address interpretation of municipal charters. Consequently, we express no opinion regarding whether, or in what fashion, the charter cap must be applied to charges not under Council control such as those imposed by the Metropolitan Council, and passed on to the users of wastewater treatment services. *See, e.g.,* Minn. Stat. §§ 473.517-473.519 (2006); *Cf. Crown Cork & Seal Co. v. City of Lakeville,* 313 N.W.2d 196 (Minn. 1981). Indeed the intended scope of the charter cap is not clear. For example, it is not clear whether the cap is intended to limit increases in gross city revenues from utility charges, gross charges to individual users or classes of users, in per unit charges, or some other measure. Accordingly, while we are unable to provide a "legally binding opinion" with regard to the questions you raised, we can provide the following comments, which I hope you will find helpful.

Statutes Generally Applicable

In accordance with Article XII, section 4 of the Minnesota Constitution, the legislature has authorized cities to adopt home-rule charters addressing the form and functions of their local governments. Minn. Stat. §§ 410.04-410.33. Among other things, charters may provide for:

> submitting ordinances to the council by petition of the electors of such city and for the repeal of ordinances in like manner; and may also provide that no ordinance passed by the council, except an emergency ordinance, shall take effect within a certain time after its passage, and that if, during such time, a petition be made by a certain percentage of the electors of the city protesting against the passage of such ordinance until the same be voted on at an election held for such purpose, and then such ordinance to take effect or not as determined by such vote.

Minn. Stat. § 410.20 (2006).

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[2] *See* Minn. Stat. §§ 8.07 (laws pertaining to public schools) and 270C.09 (Opinions to the Commissioner of Revenue relating to tax laws).

The scope of initiative and referendum provisions so authorized has generally been narrowly construed, and confined to legislative measures enacted, or to be enacted, in the form of ordinances. *See, e.g., Housing and Redevelopment Authority of Mpls. v. City of Mpls.*, 293 Minn. 227, 198 N.W.2d 531 (1972) (charter provision conferring referendum rights as to "any action" of the council would be invalid) *Hanson v. City of Granite Falls,* 529 N.W.2d 485 (Minn. Ct. App. 1995) (referendum may not be used to reverse council approval of airport plan).

The courts have also affirmed that, while charter provisions generally prevail over general legislation on subjects appropriate for local regulation, acts of the legislature may, expressly or by implication, supersede authority or restrictions provided in municipal charters. *See, e.g., Nordmarken v. City of Richfield*, 641 N.W.2d 343 (Minn. Ct. App. 2002) *review denied* (June 18, 2002) (council's statutory authority to enact zoning ordinances preempts general right of referendum under charter); *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. App. 1995), *review denied* (March 29, 1995) (statutory provisions concerning health care benefits for public employees preempt city authority pursuant to charter to extent benefits to "domestic partners"). The court in *Nordmarken* stated:

> A city governed by a home rule charter enjoys as to local matters all the powers of the state, except when those powers have been expressly or impliedly withheld. Despite the broad governance authority conferred through a home rule charter, any charter provision that conflicts with state public policy is invalid. Furthermore, all charter provisions remain subject to state law.
>
> The power conferred upon cities to frame and adopt home rule charters is limited by the provisions that such charter shall always be in harmony with and subject to the constitution and laws of the state.

641 N.W.2d at 347.

In *Lilly*, the court articulated the rule as follows:

> A home rule charter city is exactly that- "home rule" on matters of a purely local nature. A home rule city may not exceed statutory authority by its mere fiat as was done here. *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 437, 107 N.W. 405, 408 (1906).... The *Welsh [v. City of Orono,* 355 N.W.2d 117 (Minn. 1984)] doctrine requires that we narrowly construe the power of a city to legislate on a matter of statewide concern. Accordingly, the action taken here by the City, whether by resolution or ordinance, is *ultra vires*, beyond the limits of the power granted to the home rule charter city, and is without legal force or effect.

527 N.W.2d at 113.

There appears little doubt that the safety and availability of potable water and the adequate treatment of wastewater are not matters of merely local interest, but are of critical concern at the state and regional level, especially in the metropolitan area. *See, e.g., City of Lake Elmo v. Metropolitan Council,* 685 N.W.2d 1, 5 (Minn. 2004); Minn. Stat. §§ 115.42, 144.383. Thus, the legislature has enacted numerous statutes authorizing or requiring local units of government to take various actions relating to provision of water and sewer services to their residents.

For example, Minn. Stat. § 444.075 provides comprehensive authority for cities to acquire, construct and operate facilities for providing water and sewer services to their residents. Subdivision 1a of that section expressly provides that "[t]he authority hereby granted is in addition to all other powers with reference to the facilities otherwise granted by the laws of this state or by the charter of any municipality."

The section also contains comprehensive authority and directives relating to the financing of such services. Indeed the bulk of the section is devoted to the subject of bonding, charges and assessments. *Id.* Subd. 2-5. Significantly, while Section 444.075 contains many general references to the authority granted to "a municipality," subdivision 3 expressly vests the authority and responsibility to impose "just and equitable charges for the use and availability of sewer and water services" in "the governing body," and specifies that "charges for services rendered shall be as nearly as possible proportionate to the cost of furnishing the service." In addition, subdivision 2 specifically limits the use of general tax revenues to circumstances in which other revenue sources are temporarily insufficient to pay general and special obligations.

Subdivision 2 expressly authorizes a municipality to use either the process contained in Chapter 429 or one provided in a city charter for adopting special assessments to pay for sewer and water improvements. It is the *governing body*, however, that makes the election under that subdivision. The fact that subdivision 3 does not refer to the option of proceeding in accordance with the city charter suggests that charter provisions were not intended to affect the billing and collection of water and sewer charges under section 444.075.

Delegation of Authority to the Metropolitan Council

In the Twin Cities Metropolitan Area, the legislature has made detailed provision for the operation of wastewater treatment systems on a regional basis, primarily through actions of the Metropolitan Council (the "Council"). *See* Minn. Stat. §§ 473.501-473.549. Among other things, those sections provide:

1. Local government units must adopt sewage disposal plans that are compatible with council policies. Minn. Stat. § 473.513 (2006).

2. The Council may require any person or government units to utilize the metropolitan sewage disposal system. Minn. Stat. § 473.515, subd. 3 (2006).

3. Costs of operating the metropolitan disposal system must be allocated among, and paid by, all local governments served by the system. Minn. Stat. § 473.517, subd. 1 (2006).

4. As provided in Minn. Stat. § 473.519:

> Each local government unit shall adopt a system of charges for the use and availability of the metropolitan disposal system which will assure that each recipient of waste treatment services within or served by the unit will pay its proportionate share of the costs allocated to the unit by the council under section 473.517, as required by the federal Water Pollution Control Act amendments of 1972, and any regulations issued pursuant thereto. Each system of charges shall be adopted as soon as possible and shall be submitted to the council. The council shall review each system of charges to determine whether it complies with the federal law and regulations. If it determines that a system of charges does not comply, the adopting unit shall be notified and shall change its system to comply, and shall submit the changes to the council for review. All subsequent changes in a system of charges proposed by a local government unit shall also be submitted to the council for review.

The materials submitted by the City do not indicate whether notice of the charter provisions which cap utility rate increases was provided to the Metropolitan Council. Nor do the materials indicate whether the Metropolitan Council determined that the City's system of charges under the charter cap complies with the provisions of federal law that "each recipient of waste treatment services within or served by the unit will pay its proportionate share of the costs allocated to the unit by the [metropolitan] council". *See* Minn. Stat. § 473.519.

CONCLUSIONS

Based on the above facts and legal principles, our comments are as follows:

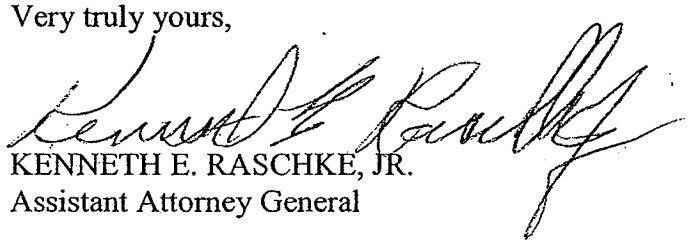
First, the above laws indicate a strong state policy for enabling local governing bodies to exercise substantial authority and flexibility in acquiring, operating and funding municipal water and sewer systems, but also ensuring that those services comport with regional and state standards and that the costs of operations are borne proportionately by those served by the utilities.

Second, in the Twin Cities metropolitan area, the legislature has granted the Metropolitan Council the responsibility and authority to ensure that recipients of waste treatment services pay their fair share of costs. You have indicated the three-fourths of the charges for sewer services in Fridley consists of treatment charges imposed by the Metropolitan Council. Accordingly, the issue of whether the City's approach to charging residents for waste treatment is consistent with state and federal law rests with the Metropolitan Council.

Third, while the fixing of utility rates may generally considered to be legislative -- as opposed to executive -- in nature,[3] it is unclear whether the Fridley Charter requirement that the voters approve increases in utility charges in advance falls within the definition of "ordinance" as authorized by Minn. Stat. § 410.20 (2006).

If you have any questions or would like to discuss the matter further, please contact me.

Very truly yours,



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AG: #1770627-v1

[3] *See, e.g., Northern States Power Co. v. City of St. Paul*, 256 Minn. 324, 493 99 N.W.2d 207, 211 (1959).

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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August 10, 2007

Kingsley D. Holman, Esq.
Holman Law Offices
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220 West 98th Street
Bloomington, MN 55420

Dear Mr. Holman:

Thank you for your letter of June 27, 2007, in which you request an Opinion of the Attorney General with respect to the question described below.

FACTS

You write on behalf of Independent School District No. 271 (Bloomington Public Schools) ("School District"), presenting the following facts.

The School District holds an annual graduation ceremony for graduates of its two high schools. Because no single School District facility has the capacity to host this event, the School District historically has rented space from an outside facility, namely the Target Center in downtown Minneapolis. You indicate that the School District is considering alternative sites for future ceremonies because the Target Center is costly and parking is difficult.

You state that a "mega-church" in nearby Eden Prairie has facilities that would accommodate the ceremonies. You state that this location is cheaper and has adequate parking. You state that the School District has inspected the premises and that the place of assembly can be made "entirely free of religious objects or religious statements." You indicate, however, that the public hallway leading to the assembly area contains "racks of religious literature and religious information and also a large assortment of pictures of the church[']s pastors, with the message to pray for them." You also state that "[o]n the outside of the doorway leading to the hallway is a concrete monument stating the religious offices inside" and that there is a cross on top of the church. A "church official" states that "none of the above will be removed." It is not clear from your letter whether this last statement refers only to the cross and the concrete monument, or also to the racks of literature and pictures/message in the hallway.

QUESTION

Based on the above facts, you ask the following question:

Whether, based on the facts set forth above, the rental of the facility from the church for commencement exercises (graduation) would constitute advancing or impeding religion or be an excessive entanglement?

OPINION

Your question implicates the Establishment Clauses of the state and federal constitutions. Because this situation is intensely fact-specific, we are unable to answer your question with the facts as presented. We can, however, summarize the list of factors that the courts have considered in addressing similar questions.

We start with an analysis of federal law because, while interpretations of federal law generally are outside the scope of our opinion authority, *see* Op. Att'y Gen. 529-a (May 9, 1975), federal law provides important guidance in this area.

FIRST AMENDMENT. The Establishment Clause of the First Amendment to the United States Constitution prohibits Congress from making any law "respecting an establishment of religion." U.S. Const. amend. 1. This prohibition applies to the states (and to political subdivisions of the state such as the School District) through the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Historically, courts have applied the U.S. Supreme Court's three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to Establishment Clause claims. Under the *Lemon* test, government practice is permissible for purpose of Establishment Clause analysis only if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion. *Id.* at 612-13 (citations omitted) *See ACLU Nebraska Found. v. Plattsmouth*, 419 F.3d 772, 775 (8th Cir. 2005).

Over the last 35 years, the *Lemon* test has been modified by the Supreme Court, and sometimes not applied at all, thus muddying the status of the test. For example, in *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997), the Supreme Court merged steps two and three of the *Lemon* test into a single "effects" test. A plurality of the Supreme Court also has referred to this prong as the "endorsement" test, which asks whether the government action has the purpose or effect of endorsing religion. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 690-94 (1984) (O'Connor, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 594-97 (1989) (plurality opinion). On occasion, the Court has declined to apply the *Lemon* factors at all, even if it previously applied *Lemon* to similar challenges. *Compare Van Orden v. Perry*, 545 U.S. 677 (2005) (finding *Lemon* "not useful" in analyzing a challenge to a "passive" Ten Commandments monument, and instead looking at historical context and nature of monument), *with McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (applying a modified *Lemon* test). As

recently as 2005, however, the U.S. Supreme Court declined an invitation to abandon *Lemon* altogether. *See McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 861-63 (2005). *See also ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 635 (2005).

While the issue of leasing church space for a high school graduation does not appear to have been addressed by the Minnesota courts or this office, courts in other jurisdictions and other attorneys general have had the opportunity to address this question, as discussed further below. All have applied a version of the *Lemon* test. *See also* Op. Minn. Att'y Genl. 169-j (Feb. 14, 1968) (applying similar pre-*Lemon* U.S. Supreme Court precedents) (copy attached). *Lemon*'s principles embodied in the *Lemon* decision thus appear to provide the most useful guidance in analyzing the issue you have presented.

As an initial matter, many jurisdictions have concluded that it is not a *per se* violation for a government entity to enter into an arms-length commercial transaction with a religious institution. *See, e.g., Taetle v. Atlanta Indep. Sch. System*, 625 S.E.2d 770 (Ga. 2006) (lease for kindergarten annex) (citing cases); *Porta v. Klagholtz*, 19 F. Supp.2d 290, 303 (D.N.J. 1998) (lease for classroom space); Op. Wis. Att'y Genl., OAG 45-86, 1986 WL 288983 (Nov. 14, 1986) (lease for classroom space). That is, while a church may receive a benefit from a commercial contract in the form of the rental or lease fee, the benefit would not appear to be directed toward -- and thus only incidentally affects -- the church's religious stature. *In re: Minneapolis Comm. Devel. Agency*, 439 N.W.2d 708, 713 (Minn. 1989) (in upholding public financing for community development plan involving YMCA, court concluded that "indirect considerations do not impose upon the neutrality required by the establishment clause") (citation omitted); *Minnesota Federation of Teachers v. Mammenga*, 500 N.W.2d 136, 139 (Minn. Ct. App. 1993) (upholding state reimbursement for high school student enrollment in nonsectarian post-secondary classes at religious institutions); *Minnesota Higher Ed. Facil. Auth. v. Hawk*, 232 N.W.2d 106, 107-08 (Minn. 1975) (upholding religious institution's eligibility to participate in state refinancing bond program for construction of nonsectarian facilities); *Woodland Hills Homeowners Org. v. Los Angeles Comm. Coll. Dist.*, 218 Cal. App. 3d 79, 94 (Cal. Ct. App. 1990) (upholding long-term lease of surplus community college property to religious institution where any benefits to religious institution, "other than the ordinary consequences resulting from the lease of real property," were incidental). *Cf. Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[G]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.").[1] The issue, therefore, is under what circumstances such a commercial contract is constitutionally acceptable.

---

[1] I note that Minnesota charter schools are expressly permitted by statute to lease space from sectarian institutions under certain circumstances. *See* Minn. Stat. § 124D.10, subd. 17.

Applying the *Lemon* framework, the School District first should determine whether it has a secular purpose in renting the church facility for the graduation ceremony. Factors that other jurisdictions have considered in upholding a secular purpose include:

- function of use is academic (teaching secular classes, awarding degrees) and not religious;
- need for extra space not otherwise available;
- religious institution is convenient and/or close to school.

See, e.g., Taetle, 625 S.E.2d at 138 & n.6; *Porta*, 19 F. Supp.2d 290 at 303; *Thomas v. Schmidt*, 397 F. Supp., 203 (D.R.I. 1975); Op. Tenn. Att'y Genl., No. 84-034, 1984 WL 186127 (Jan. 31, 1984).[2]

If the School District satisfies the secular purpose test, it should next analyze whether rental or lease of this particular church space would have the effect of advancing religion. The following is a sampling of factors some courts have concluded that, taken alone, did not have the effect of advancing religion:[3]

---

[2] If the content of the graduation ceremony remains secular, such a ceremony also does not appear to involve the type of "sham" purpose rejected by other courts in cases involving government entanglement with religion. *Compare, e.g., Porta*, 19 F. Supp.2d at 303 (classroom lease upheld where lease had secular purpose of providing suitable space for conducting classes and school was exclusively secular), *with Knowlton v. Baumhover*, 166 N.W. 202 (Iowa 1918) (invalidating school lease of parochial school classroom space where operation of public school was virtually indistinguishable from parochial school). *Cf. ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) (Ten Commandments display upheld where displayed with a secular explanatory statement and eight other objectively historical and secular documents); *Buono v. Norton*, 364 F. Supp.2d 1175 (C.D. Cal. 2005) (federal government's transfer of land containing cross in national park was sham transaction with sectarian purpose of maintaining cross on park property); *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (city's sale of top of mountain containing Latin cross monument to group city knew would maintain monument, as well as city's solicitation of buyers for the mountaintop using the phrase "Save the Cross," did not show secular purpose).

[3] *See generally Porta*, 19 F. Supp.2d at 298 (citing cases); *Spacco v. City of Bridgewater Sch. Dept.*, 722 F. Supp. 834, 843 & n.1 (D. Mass. 1989) (same); *Thomas*, 397 F. Supp. at 209-10.

- school officials have full control over leased space;
- no visible iconography (including church signs, religious symbols, artwork or literature) in leased space, lavatories, hallways or other common areas accessible to public (iconography covered or removed);
- no church functions during school district event;
- church space often used for public meetings;
- church building has secular appearance;
- pastor's office bears sign prohibiting entry by children/school staff;
- reasonable rental fee;
- space in religious institution was selected only after consideration and rejection of other options; and
- benefit to religious institution through rental fee is only "incidental."

Factors that, according to some courts, have constituted improper advancement include:[4]

- religious symbols and messages present in areas accessible to public (insufficient to cover religious iconography in classrooms but not common areas such as hallways);
- lease arrangements prevented school district from teaching anything offending tenets of church;
- church retained control over content of school district curriculum;
- church functions held while public use underway;
- public required to pass through cemetery in connection with leased use;
- robed priest greeted students as they arrived each day.

Finally, the School District must consider whether entering into a rental or lease arrangement for the graduation ceremony would excessively entangle the School District with religion. While it is sometimes difficult to distinguish between prongs two and three in court opinions, arrangements that have not been found to excessively entangle school officials with religion include:

[4] *See* note 3, *supra*.

- temporary or short-term arrangements;
- minimal contact between religious and secular officials;
- absence of need for comprehensive or continuing surveillance to ensure church-state separation; and
- minimal lease/rental payments.

E.g., *Thomas*, 397 F. Supp. at 213-14 (discussing cases); Op. Tenn. Att'y Genl., No. 84-034, 1984 WL 186127 (Jan. 31, 1984); *Conway*, 156 N.W. at 480. The mere fact that the land owner is a church does not amount to excessive entanglement. *See Woodland Hills*, 218 Cal. App.3d 79, 95 (Cal. Ct. App. 1997) ("administerial rights of a landlord . . . do not cause impermissible entanglement in the religious affairs of the [institution]").

Where these factors are satisfied, courts and other attorneys general generally have upheld graduation ceremonies held in church space. Op. Tenn. Att'y Genl., No. 84-034, 1984 WL 186127 (Jan. 31, 1984) (upholding rental of church space for college graduation where no college building had capacity to hold graduation; facilities were under state control and used for secular purpose; and no more than reasonable amount paid for use); *Conway v. Dist. Board of Joint Sch. Dist. No. 6*, 156 N.W. 477 (Wis. 1916) (upholding graduation ceremony in church where graduation was one day out of year and no other adequate space available). *But see Lemke v. Black*, 376 F. Supp. 87 (E.D. Wis. 1974) (finding no *per se* constitutional violation in church-state arrangements, but invalidating use of church for graduation ceremony on specific facts of case, including lack of overriding need for particular church space), *vacated and remanded without op.*, 525 F.2d 694 (7th Cir. 1975).

The same is true for school districts that seek to rent classroom space from a religious institution, where the court is satisfied that the effect of the arrangement does not advance or excessively entangle the school district with religion. *E.g.*, *Taetle*, 625 S.E.2d at 138; *Porta*, 19 F. Supp.2d 290; Op. Wis. Att'y Genl., OAG 45-86, 1986 WL 288983 (Nov. 14, 1986); Op. Tenn. Att'y Genl., No. 84-034, 1984 WL 186127 (Jan. 31, 1984) (summarizing many classroom cases). *Cf. Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249 (10th Cir. 2005) (applying *Lemon*, upholding city's sale of public easement to religious organization where city had secular purpose in securing income from the sale and sale did not have primary effect of endorsing or inhibiting religion).

MINNESOTA CONSTITUTION. Minnesota's Constitution includes two establishment clauses: Article I, section 16 prohibits "any money [to] be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries," and Article 13, section 2 provides that "[i]n no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught."

While the Minnesota Supreme Court has stated that the Minnesota Constitution is "substantially more restrictive" than the First Amendment, *see Americans United Inc. v. Indep.*

Sch. Dist. No. 622, 179 N.W.2d 146, 155 (Minn. 1970), Minnesota courts often have drawn on First Amendment principles when analyzing state establishment clause claims because there have been so few establishment clause challenges under the Minnesota constitution. *See, e.g., Americans United*, 179 N.W.2d at 157 (the "fundamental concept" is "that the state may neither advance nor inhibit religion"); *Minnesota Higher Educ. Fac. Auth. v. Hawk*, 232 N.W.2d 106 (Minn. 1975) (drawing on Supreme court caselaw and first amendment caselaw from other states in analyzing whether a bond refinancing program provided improper aid to religious affiliated colleges). *Cf. Stark v. Indep. Sch. Dist. No. 640*, 123 F.3d 1068 (8th Cir. 1997) (analyzing proposed closure of Minnesota elementary school under both federal and state constitutions); Op. Att'y Genl. 169-j (Feb. 14, 1968) (drawing on pre-*Lemon* U.S. Supreme Court precedents in analyzing whether school-sponsored baccalaureate service violated state constitution).

Other state courts faced with state establishment clause challenges -- and high constitutional thresholds similar to Minnesota's -- also draw on federal law for guidance. *See, e.g., Woodland Hills*, 218 Cal. App.3d at 93-95 (noting that California courts opine that state constitutional requirements are "broader or more comprehensive than the federal Establishment Clause," but have never actually interpreted provision in such a fashion; court thus used *Lemon* principles to analyze state establishment clause challenge).

Thus, it appears that similar factors will be relevant in determining whether the School District's proposed graduation ceremony satisfies both state and federal law.[5]

Very truly yours,

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Assistant Attorney General

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AG: #1831027-v1

[5] Of course, regardless of location, any school-sponsored content of the graduation ceremony would need to remain secular. *Cf.* Op. Att'y Genl. 169-j (Feb. 14, 1968) (finding proposed school-sponsored baccalaureate service unconstitutional where service was sectarian in nature and contained religious content, and supplying general guidelines for future services).

STATE OF MINNESOTA

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October 25, 2007

Mr. David K. Hebert
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Hebert and Welch, PA
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20 North Lake Street, Suite 301
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Dear Mr. Hebert:

I thank you for your correspondence dated June 27, 2007 concerning the authority of the City of Forest Lake (the "City") to require inclusion of affordable housing in new residential developments.

Facts and Background

You state that as part of a settlement of a recent lawsuit relating to allowance of affordable housing in Forest Lake, the City agreed to review its comprehensive plan and land use controls, with the goal of increasing the amount of affordable housing in the City. You also state that following a study by a City task force, a draft ordinance to encourage affordable housing was discussed. You state that options proposed to accomplish that goal included the following:

1. Requiring developers of developments of ten or more dwelling units to provide 20% of new rental units or 20% of new owner-occupied units to be "affordable" as defined by certain standards.

2. Requiring developers who did not wish to provide affordable units in their developments to pay a fee based on the difference between market rate units and affordable units to be placed in a trust fund to subsidize construction of affordable housing units in other subdivisions or to aid in converting existing units from market rate to affordable housing.

3. Limiting the amount of housing costs for affordable rental units to an amount not exceeding a monthly rental affordable at 30% of area median income for Washington County.

4. Limiting the amount of housing costs for for-sale units to an amount not exceeding monthly costs affordable at 50% of area median income for Washington County.

5. Establishing a number of City-sponsored initiatives such as waiving part or all of various utility and building permit fees, tax abatement and similar tools.

You ask the following questions:

1. In light of Minnesota Statutes § 462.358 and/or any other applicable law, does a city have express or implied authority to mandate affordable housing in the manner described in items 1 and 2 above?

2. Does mandating a percentage of affordable housing in the manner described in items 1 and 2 above constitute a regulatory taking for which compensation must be paid?

3. Can a city require that a developer/contractor include procedures for determining and reviewing the eligibility of proposed buyers and both proposed and existing renters of affordable housing in satisfaction of the mandate to provide affordable housing as described in item 1?

4. Can a city mandate the formula or standard by which prices or rents of affordable units are established?

5. Can a city require that any affordable housing receiving city funds or incentives remain affordable if resold within a specified term such as 30 years?

Law and Analysis

First, as you point out, an October 1, 2001 opinion letter from this Office to the St. Cloud City Attorney (copy enclosed) concluded on the basis of the language in Minn. Stat. § 462.358, subd. 1a, that municipalities were authorized, in general, to impose subdivision regulations requiring that portions of new residential subdivisions consist of "affordable" housing. This statute recognizes that, in order "to promote the availability of housing affordable to persons and families of all income levels," "a municipality may by ordinance adopt subdivision regulations establishing standards, requirements, and procedures for the review and approval or disapproval of subdivisions."[1] The letter expressed doubt, however, as to whether a city has the authority to collect monetary payments from developers in lieu of providing such affordable housing units.

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[1] Consistent with Op. Atty. Gen. 629a, May 9, 1975, the letter did not express any opinion concerning the validity of any specific ordinances designed to accomplish that result.

Second, in 2002, the Legislature enacted a new subdivision to Minn. Stat. § 462.358, which provides as follows:

> Subd. 11. AFFORDABLE HOUSING. For the purposes of this subdivision, a "development application" means subdivision, planned unit development, site plan, or other similar type action. If a municipality, in approving a development application that provides all or a portion of the units for persons and families of low and moderate income, so proposes, the applicant may request that provisions authorized by clauses (1) to (4) will apply to housing for persons of low and moderate income, subject to agreement between the municipality and the applicant:
>
> (1) establishing sales prices or rents for housing affordable to low- and moderate-income households;
>
> (2) establishing maximum income limits for initial and subsequent purchasers or renters of the affordable units;
>
> (3) establishing means, including, but not limited to, equity sharing, or similar activities, to maintain the long-term affordability of the affordable units; and
>
> (4) establishing a land trust agreement to maintain the long-term affordability of the affordable units.
>
> Clauses (1) to (3) shall not apply for more than 20 years from the date of initial occupancy except where public financing or subsidy requires longer terms.

Act of April 5, 2002, Ch. 315, § 1, 2002 Minn. Laws 517, codified as Minn. Stat. § 462.358, subd. 11 (hereinafter referred to as "The 2002 Act").

Third, we find nothing in the 2002 Act that calls for any change in the opinion of this Office as expressed in the October 1, 2001 letter to the St. Cloud City Attorney. The general language of § 462.358, subd. 1a authorizing municipalities to impose subdivision regulations requiring that portions of new residential subdivisions consist of "affordable" housing was not modified or repealed by the Legislature. We do not agree with the conclusion expressed by the League of Minnesota Cities Insurance Trust in its May 15, 2007 letter to you that the 2002 Act curtailed existing municipal authority to include affordable housing requirements in subdivision regulations. Rather, we see the added provisions as complementary to a municipality's general authority under Minn. Stat. § 462.358, subd. 1a, by clarifying municipal authority to utilize particular means and processes in achieving affordable housing goals. Further, we note that for municipalities in the metropolitan area, additional authority for requiring affordable housing is found in Minn. Stat. § 473.859, which among other things, requires municipal comprehensive

plans and implementation programs to promote the development of low and moderate income housing.

Fourth, legislative history indicates that the bill was prompted to a substantial degree by uncertainty on the part of municipalities as to their authority to utilize the specified mechanisms in promoting the inclusion of affordable housing in new real estate developments. For example, Mr. Tom McElveen testified as a representative of the Builders' Association of Minnesota before the House Commerce, Jobs and Economic Development Committee on February 27, 2002 as follows:

> Any time there is a direct subsidy in a unit, whether it be from local sources like tax increment financing, state sources, through your own housing finance agency, for federal sources such as taxes and revenue bonds or home money through other such federal sources, it's absolutely clear that you can have sale price restrictions, income restrictions, and long term affordability restrictions. What this bill does is take us all to the next level. What we're trying to do out there is create affordable housing without the use of these deep subsidies. And we've actually got two case studies right now, one in Chanhassen and one in the city of Chaska where, through density bonuses and other regulatory relief, the developer has been able to bring the for-sale price down to below market prices, and has accomplished that without the use of local, state, or federal subsidies. Lacking those subsidies, the testimony the city of Chaska provided to the inclusionary Housing Task Force through the Minnesota Housing Finance Agency last fall, it's unclear as to whether or not a city and a developer can establish sale price limitations, income limits, and long term portability requirements. So in my view, this bill adds to the toolbox, would make it explicit that where we're to achieve those affordability objectives and those public policy objectives of workforce, providing workforce housing, we have the legal means explicitly to do those things.

Fifth, while the 2002 Act perhaps could have benefited from less convoluted language, it seems clear that municipalities are authorized to require the developer's agreement to some or all of the listed restrictions as a condition of approval of a subdivision or planned unit development. The new language acknowledges that, if a municipality's regulations provide for the inclusion of some "affordable housing," approval of the development application may be conditioned on the developer's agreement to terms referenced in clauses (1) to (4) of that provision. Indeed, the prefatory language of section 462.358, subd. 11 is written in the following context: "[i]f a municipality, in approving a development application ...." If the legislature did not intend to allow a municipality to disapprove a development application on the basis provided for in the statute, there would have been no need to refer to the municipality's approval of the application. A contrary result would essentially give a developer a "veto" over a municipality's affordable

housing ordinance.[2] *See* Minn. Stat. §§ 645.17(2) (legislature intends entire statute to be effective). Had the Legislature intended such a departure from existing law, it presumably would have stated so expressly and would have repealed subdivision 1a of the statute, which it left intact. For municipalities in the metropolitan area, such "veto" authority by a developer could impede a municipality's ability to comply with its requirement to have comprehensive plans and implementation programs to promote the development of low and moderate income housing under Minn. Stat. § 473.859.

Sixth, we similarly find nothing in the 2002 Act that calls for any change in the opinion of this Office as expressed in the October 1, 2001 letter to the St. Cloud City Attorney concerning whether a municipality is authorized to impose fees in lieu of providing affordable housing. That is not one of the mechanisms specifically authorized by the 2002 Act, or by any other legislation that of which we are aware.

Seventh, for reasons discussed in Op. Atty. Gen. 629a, May 9, 1975 (copy enclosed), Attorney Generals' Opinions are not ordinarily directed to questions that are hypothetical or fact-dependent in nature. For that reason, we do not formally opine on whether application of a hypothetical ordinance might be seen as a taking in some hypothetical future setting. I should note, however, that we are not aware of any authority for the categorical proposition that requiring residential property developments to include a portion consisting of affordable housing units would in itself constitute a taking. Indeed, we are aware of a number of municipalities in the metropolitan area that have affordable housing ordinances, and we are not aware of a successful challenge to these ordinances under a "takings" analysis. In *Nolan v. California Coastal Community,* 483 U.S. 825, 107 S. Ct. 3191 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S. Ct. 2309 (1994), the Court held that requiring property developers to permanently dedicate a portion of their property for public use as a condition for obtaining needed building permits, could be considered a taking if the requirement was not reasonably related, and proportional, to the impact of the proposed development on local resources. *Cf.* Minn. Stat. § 462.358, subd. 2b(e) (dedication requirements must be based upon need attributable to subdivision). Requiring a proposed subdivision to meet legitimate requirements related to land use does not ordinarily involve the type of transfer of actual ownership rights that was present in *Nolan* and *Dolan.* Nor should such requirements in general result in a taking determination based upon denial of all economically beneficial uses of a developer's land as discussed in *Lucas*

---

[2] Should a developer challenge a municipality's refusal to approve a particular application in the absence of such an agreement as unreasonable under the facts and circumstances of any particular case, the matter may be addressed by a court on a case-by-case basis. *See, e.g., Concept Properties, LLP v. City of Minnetrista,* 694 N.W.2d 804, 815 (Minn. Ct. App. 2005) (*rev. denied* July 19, 2005); *Wensmann Realty Inc. v. City of Eagan,* 734 N.W.2d 623, 630 (Minn. Ct. App. 2007).

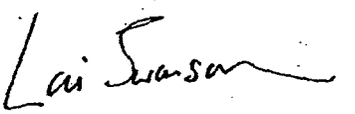
v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992). *See also Wensmann Realty Inc. v. City of Eagan,* 734 N.W.2d 623 (Minn. 2007).

Finally, the legislative history of section 462.358, subd. 11 reflects a general understanding that, even before the enactment of the 2002 Act, the establishment of the requirements described therein could well be an element in the process of negotiating terms for municipal financial subsidies. The scope of a municipality's authority or responsibility to impose conditions upon the development of housing projects receiving public subsidies must also be determined with reference to the statutes governing the particular programs under which the subsidies are provided. *See, e.g.,* Minn. Stat. Ch. 462C, §§ 469.012-469.022, 469.034 (2006).

Opinion

In summary, we adhere to our previous opinion that municipalities have authority under Minn. Stat. § 462.358 (and under section 473.859 for metropolitan-area cities) to require that subdivision developments include affordable housing and that developers agree to reasonable measures of the type listed in Minn. Stat. § 462.358, subd. 11 designed to aid in achieving affordable housing goals.

Sincerely,



LORI SWANSON
Attorney General

Enclosures: *Op. Atty. Gen. (Oct. 1, 2001)*
Op. Atty. Gen. 629a (May 9, 1975)

AG: #1887660-v1

STATE OF MINNESOTA

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MIKE HATCH
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October 1, 2001

Mr. Jan F. Petersen
St. Cloud City Attorney
400 Second Street South
St. Cloud, MN 56301-3699

Dear Mr. Petersen:

Thank you for your letter dated July 25, 2001 and supplemental materials received on August 16, 2001 concerning St. Cloud's proposed affordable housing ordinance.

FACTS

You state that the City of St. Cloud has under consideration a 16-page ordinance that would generally require residential housing developments comprising more than six owner-occupied dwellings to include a specific percentage of "affordable residential units" (ARUs). Furthermore, the ARUs may only be sold to "eligible persons" as defined by the ordinance for a maximum price as determined by a designated "service provider."

ARUs may be resold during the first 10 years after original sale for no more than a "maximum resale price" as determined according to the terms of the ordinance. During the second 10 years after the first sale the seller must pay 50 percent of the capital gains realized to the city's service provider for the city's "affordable housing fund." The developer will be required to execute and record restrictive covenants assuring that restrictions on the ARUs will run with the land for at least 20 years.

A developer of less than 20 housing units who does not wish to build the required number of ARUs may make an in lieu payment to the affordable housing fund for each ARU not built. Developers of larger projects may be required by the city to make payments in lieu of constructing ARUs. The money in the affordable housing fund will be spent by the service provider for costs of administering the ordinance and for "other city efforts" to assist prospective homeowners to purchase ARUs. The ordinance provides for a density bonus pursuant to which a developer which constructs ARUs is allowed to develop 20 percent more residential units in the development than would otherwise be permitted.

You inquire whether a Minnesota city has the authority to adopt an affordable housing ordinance which would require a specific percentage of the dwelling units constructed in each development to be classified as affordable or, in the alternative, require a payment in lieu of providing the units.

ANALYSIS

As noted in Op. Atty. Gen. 629a, May 9, 1975, the Attorney General's Office does not normally undertake by way of opinion a general review of a local ordinance to determine its validity or to ascertain possible legal problems. Therefore, while we can address the general authority of a city to enact an ordinance requiring construction of affordable housing units in connection with residential property development, we decline to render an opinion concerning the validity of the particular proposed ordinance submitted.

It should be noted, however, that a city does have general statutory authority to enact requirements for construction of affordable housing units in connection with development of residential subdivisions. As political subdivisions of the state, cities have those powers that are conferred by statute or charter or necessarily implied therefrom. *See, e.g., Mangold Midwest Co. v. Village of Richfield,* 274 Minn. 347, 143 N.W.2d 813 (1966). The authority for cities to adopt official controls regulating private land use and development is contained in Minn. Stat. §§ 462.351-462.365. We are not aware, however, of express statutory authority for the specific type of regulation proposed by the city.[1] General authority to regulate land subdivision is contained in Minn. Stat. § 462.358, which provides in subdivision 1a:

> To protect and promote the public health, safety, and general welfare, to provide for the orderly, economic, and safe development of land, to preserve agricultural lands, *to promote the availability of housing affordable to persons and families of all income levels*, and to facilitate adequate provision for transportation, water, sewage, storm drainage, schools, parks, playgrounds, and other public services and facilities, a municipality may by ordinance adopt subdivision regulations establishing standards, requirements, and procedures for the review and approval or disapproval of subdivisions. The regulations may contain varied provisions respecting, and be made applicable only to, certain classes or kinds of subdivisions. The regulations shall be uniform for each class or kind of subdivision.

(Emphasis added.)

This language, in our view, provides statutory authority for enactment of a subdivision regulation providing for a reasonable portion of residential subdivisions to consist of housing units that would be affordable to persons of low or moderate income. However, as noted above, we express no opinion as to whether the proposed sample ordinance submitted would be a permissible mechanism to exercise that authority.

---

[1] Bills have been introduced in the current legislative session that would expressly authorize municipalities to require residential subdivisions to include affordable housing. *See* H.F. 1952, 1953, and 2400; S.F. 1217. However, none have been enacted to date.

Whether a city has the authority to collect monetary charges in lieu of providing affordable housing units is less likely. Minn. Stat. § 462.358, subd. 2a specifically authorizes a city to require a monetary deposit to assure that required public improvements are made within a development. Subdivision 2b further provides that a city may require a certain portion of a subdivision to be dedicated for purposes of conservation, parks, recreational facilities, playgrounds, trails, wetlands, or open space, but may choose to accept cash payment in lieu of the dedications.[2]

Neither of these provisions or other statutes, to our knowledge, authorize collection of money in lieu of providing affordable housing. Absent such authority, we doubt that such a cash payment alternative requirement would be permissible. Minnesota courts have, as a general matter, broadly construed the regulatory authority granted by land use control statutes. *See, e.g., Naegele Outdoor Advertising v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206 (1968); (City has implied power under zoning laws to eliminate nonconforming uses); *Almquist v. Town of Marshall*, 308 Minn. 52, 245 N.W.2d 819 (1976); (Town had implied power to impose temporary moratorium on land development). However, they have not been inclined to infer authority for a municipality to impose revenue raising monetary charges from general statutory authority for zoning and subdivision regulation. This is especially the case where the other statutes specifically provide for means of funding actions sought to be financed by the disputed charges. *Cf. Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681 (Minn. 1997) (no implied authority for city to impose road "connection charge" to raise revenue for street projects for benefit of the public in general).

Minnesota statutes that authorize municipalities to subsidize construction or purchase of low and moderate income housing also authorize particular forms of funding for such activities. *See, e.g.*, Minn. Stat. §§ 462C.07 (revenue bonds), 469.033 (federal grants, bonds, special benefit taxes on all taxable property), 469.174, *et seq.* (tax increment financing). These do not, however, appear to include the sort of in-lieu charge contemplated here.

CONCLUSION

We believe that cities are generally authorized to enact regulations requiring residential subdivisions to include a reasonable proportion of housing affordable to low or moderate income purchasers, but may not, absent more specific statutory authority, be authorized to provide for payment of a monetary charge in lieu of the required units.

---

[2] *But see Kottschade v. City of Rochester*, 537 N.W.2d 301 (Minn. Ct. App. 1995) (City must show relationship between the property development and the city's need for land dedication).

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

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

(651) 297-1141

AG: 509377.v. 01

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.

COUNTY: POLLUTION CONTROL: SOLID WASTE: A county may require all households to pay for solid waste collection services if such a requirement is necessary in order to carry out the purposes of Minn. Stat. ch. 400. Minn. Stat. §§ 400.01, 400.04, and 400.08 (1974).

Luther P. Nervig, Esq.
Wadena County Attorney
503 South Jefferson
Wadena, Minnesota 56482

May 21, 1975
125a-68

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

FACTS

Wadena County has enacted a solid waste disposal ordinance pursuant to Minn. Stat. ch. 400, the "County Solid Waste Management Act." Pursuant to the ordinance, a solid waste collection service is made available to all households in most cities of the county and a mandatory service charge is imposed for the availability of this service. Because of the relatively small population in those cities it was apparent that the service and charges had to apply to all households in order for the collection system to survive financially. Some persons do not desire to use this service and pay the charges.

You then ask substantially the following

QUESTION

Does a county have authority pursuant to Minn. Stat. ch. 400 (1974) to impose a mandatory service charge on all households in a municipality for the availability of a solid waste collection service if it has determined that this requirement is necessary in order to carry out the purposes of that chapter?

OPINION

Based upon the language of Minn. Stat. ch. 400 (1974) and prior opinions of this office interpreting the provisions of that chapter, we answer your question in the affirmative. Since factual questions are involved in determining whether a particular requirement is necessary to carry out the purposes of chapter 400, such a determination is, of course, for the county board and not this office to make.

Chapter 400 authorizes counties to operate or contract for the operation of a solid waste collection service and to obligate persons to pay "for solid waste management services to their properties." See Minn. Stat. §§ 400.03, 400.04 and 400.08 (1974). Although no provision in chapter 400 specifically authorizes a county to establish a program which makes a collection service available to all households and imposes a fee payable by all such households, Minn. Stat. § 400.04 subd. 1 (1974) provides that a county may conduct a solid waste management program which includes activities authorized by chapter 400 and other activities which are "necessary and convenient to effectively carry out the purposes" of that chapter.

Minn. Stat. § 400.01 (1974) sets forth the purposes of chapter 400 as follows:

> In order to protect the state's water, air and land resources so as to promote the public safety, health, welfare and productive capacity of its population, it is in the public interest that counties conduct solid waste management programs.

A solid waste management program includes solid waste collection. Minn. Stat. § 400.03 subd. 2 (1974). It is our opinion that a county may determine that a mandatory charge of the type in question is necessary and convenient to carry out the purposes of chapter 400.

This conclusion is consistent with that reached in Op. Atty. Gen. 125a-68, Oct. 26, 1973, which held that a county could make a determination to award an exclusive contract for the collection, transportation and disposal of solid wastes within the county. That opinion stated:

> Since the execution of an exclusive contract is not expressly prohibited, it is a proper activity if "necessary and convenient" to carry out the purposes of chapter 400. These purposes are summarized in Minn. Stat. § 400.01 (1971) . . . In our opinion, under appropriate factual circumstances a county may determine that promoting the objectives stated in section 400.01 requires the award of an exclusive contract for the provision of collection, transportation and disposal services. As this is a factual determination for the county board, we express no opinion as to the existence of appropriate factual circumstances in Lincoln County.

Our conclusion is also consistent with that in Op. Atty. Gen. 125a-68, June 7, 1973, where the question was whether a county could require that all solid waste generated within a county be collected and hauled only to disposal sites designated in the county solid waste management plan. It was stated:

> In our opinion a county may determine, under appro-

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON
ATTORNEY GENERAL

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ST. PAUL, MN 55155
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February 19, 2008

Mark R. Azman
Johnson & Condon, P.A.
7401 Metro Boulevard, Suite 600
Minneapolis, MN 55439-3034

Dear Mr. Azman:

Thank you for your correspondence of January 10, 2008 as counsel for Independent School District 640 (Wabasso) (the "District").

In your letter you relate substantially the following facts:

> The District is a member of a joint powers entity created to pursue a Wind Energy Conversion System (WECS) Project. Under consideration is the use of Minnesota limited liability company (LLC) in connection with the development and operation of a WECS, A private investor and the joint powers entity would each own a membership interest in the LLC. The contemplated arrangement will utilize the "Equity Transfer Model." This arrangement calls for an investor-member of the LLC to provide, for example, half of the funds necessary for the Project. The remaining half of the funds would be provided through a loan taken out by the LLC. For the first 10 years, the investor member would own 99% of the LLC while the joint powers entity would own 1%. During the initial 10 year period, the investor would utilize available tax credits. After 10 years, the ownership would "transfer," meaning that the investor would then own 1% and the joint powers would own 99%.It is the intent of the school districts to obtain revenue from the sale of energy generated by the WECS.

Based upon these facts you seek, the opinion of this Office as to whether Minnesota independent public school districts acting through a joint powers entity may acquire a membership interest in a for-profit limited liability company for the purpose of pursuing a wind energy conversion system project in association with a private investor?

LAW AND ANALYSIS

As you have noted, "[s]chool boards and school districts are created by statute and have only such powers as are conferred upon them by the legislature." *Perry v. Independent School District No. 696*, 210 N.W.2d 283, 286 (Minn. 1973). These include powers expressly granted and those that are implied as reasonable and necessary to exercise the express powers. *See, e.g.*, Minn. Stat. § 123B.02, subd. 1 (2006); Ops. Atty. Gen. 174, March 29, 2002; 622J-3, May 12, 1978. As a general matter, however, express statutory authority has been required to empower a

political subdivision to engage in any business enterprise usually conducted in the private sector. *See, e.g., John Wright & Assoc. v. City of Red Wing*, 264 Minn. 1, 93 N.W.2d 660 (1959).

In a similar vein, this Office has expressed the view that general statutory authority for a local government unit to perform a function does not imply authority to form or participate in an independent legal entity to support or carry out that function. *See, e.g.,* Ops. Atty. Gen. 733, July 29, 1988 (Receipt of charitable gambling proceeds); 92a - 30, January 29, 1986 (Mental health services); 218R, February 24, 1949 (Chamber of Commerce). More recently the legislature has acted to generally prohibit political subdivisions and joint powers entities operating under section 471.59 from creating separate corporations unless explicitly authorized by law. *See* Minn. Stat. § 465.717, subd. 1 (2006), 2000 Minn. Laws ch. 455 art. 1 § 1. Subdivision 2 of that section permits a joint powers entity created under section 471.59 to incorporate itself as a nonprofit corporation but that corporation may exercise no greater authority than the joint powers entity, and it will be subject to all laws applicable to the members.

Minn. Stat. § 123B.02, subd. 21 does provide express authority for school districts to acquire, own and operate wind energy conversion systems and to generate revenue from selling energy produced. However, neither that statute, nor any other to our knowledge contains authority to form or join a private for-profit entity for that purpose. The definition of a limited liability company "member" as a "person" shown in company records as owning certain governing rights is not supportive of such authority. First, it begs the question inasmuch as it assumes what it is intended to prove, *i.e.* that a school district has authority to acquire and hold such governance rights. Second, it cannot be said to provide the type of explicit authority contemplated by section 465.717 and the opinions cited above. Indeed, that definition, and a very similar one in section 317A.011, subd. 12 for members of nonprofit corporations were both in place when section 465.717 was enacted in 2000. Likewise, other general powers of school districts such as ownership of property and investment of funds fall short of the required specificity needed to permit them to form or join private corporate entities. *Cf.* Minn. Stat. § 144.581, subd. 1 (2006), which expressly authorizes certain public hospital authorities, *inter alia*, to enter partnerships and incorporate other corporations.

Section 471.59 authorizes two or more "governmental units" to act jointly in exercising common powers. This is presumably the authority relied upon for formation of the joint powers entity previously created by District 640 and other districts to pursue the Wind Energy Conversion Project. While that joint powers entity could itself be incorporated under the authority granted by section 645.717, subd. 2, it could not be a for-profit corporation, and participation would be limited to "governmental units" as defined in section 471.59, subd. 1. With the exception of specific nonprofit health care, rehabilitation and training entities, private persons and businesses are not included in that definition.

OPINION

In light of the foregoing, it is our opinion that a school district, whether acting individually or in concert with other districts through a joint powers organization, is not authorized to form or participate in a for-profit limited liability company for purposes of owning or operating a wind energy conversion system. We therefore answer your question in the negative.

For your convenience I have enclosed copies of the cited Attorney Generals' Opinions.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

(651) 297-1141 (Voice)
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Enclosures

AG: #1948994-v1

STATE OF MINNESOTA

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February 28,2008

Mr. Carl E. Malmstrom
Thorwaldsen, Malmstrom, Sorum
& Majors, P.L.L.P.
P.O. Box 1599
1105 Highway 10 East
Detroit Lakes, MN 56502-1599

Dear Mr. Malmstrom:

Thank you for your correspondence of December 27, 2007.

FACTS AND BACKGROUND

You state that the City of Mahnomen (the "City"), which you represent as city attorney, is located within the boundaries of the White Earth Indian Reservation. You further state that the City operates a municipal liquor establishment in which the White Earth Reservation Tribal Council licenses and conducts "Class II" gaming operations (*e.g.* bingo, pull tabs, punch cards, etc.) under a "lease" with the City. You enclosed a copy of a September 28, 2007 letter to the City's liquor store manager from an attorney for the White Earth Tribal Council. That letter notes the passage in 2007 of the so-called "Freedom to Breathe Act" ("FTBA"), 2007 Minn. Laws ch. 82, which prohibits indoor smoking in most public places and places of employment, including liquor establishments. In his letter, the attorney takes the position that the FTBA is a "civil regulatory law," and as such has "diminished applicability" within the limits of an Indian reservation. The letter informs the manager that the Tribal Council has determined to permit the management of each establishment it licenses for gaming activities to determine whether to permit indoor smoking within the establishment. Based upon these facts you present the following questions:

1. Does the State of Minnesota have jurisdiction to enforce the Freedom to Breathe Act within the territorial boundaries of the White Earth Indian Reservation;

2. If the answer to paragraph 1 is yes, does the State of Minnesota have jurisdiction to enforce the Freedom to Breathe Act against tribal members in locations that are not owned by the Tribe, or owned by tribal members; and

3. Whether the fact that the White Earth Reservation Tribal Council, acting as the White Earth Gaming Commission, has a lease with the City of Mahnomen to conduct gaming at the municipal liquor operations, and licenses gaming at the municipal liquor operation,

affects the jurisdiction of the State of Minnesota to enforce the Freedom to Breath Act at the city-operated municipal liquor operation.

For the reason noted in Op. Atty. Gen. 629a; May 9, 1975 (copy enclosed), this Office does not generally render opinions on the constitutionality of state statutes, or upon interpretation of federal law. For similar reasons, this Office generally does not, in the absence of express statutory language or binding judicial decisions, render any opinion that may be seen as imposing limitations on the authority of the State to enforce its laws. This Office does not have a direct role in enforcement of the FTBA. Rather violations are classified as petty misdemeanors to be prosecuted by the city or county attorney, as appropriate. *See* Minn. Stat. §§ 144.417, subd. 2 (Supp 2007), 484.87, subd. 3 (2006). Absent extraordinary circumstances, this Office does not undertake to direct the charging decisions of local prosecutors. Furthermore, under Minn. Stat. § 144.417, subd. 3 the Commissioner of Health has discretion to institute actions to enjoin repeated violations. It would be the responsibility of this Office to represent the Commissioner in any such action. *See* Minn. Stat. § 8.06. Because we must represent the Commissioner, we are not in a position to provide you with a definitive legal opinion addressing the questions raised in your letter. Notwithstanding these limitations, I can point you to the following authorities which I hope you will find helpful.

The Minnesota Clean Indoor Act (the "Act") was enacted in 1975 to regulate smoking in certain indoor places, and has been amended from time to time. The Act was codified in Minn. Stat. § 144.411-144.417. In 2007, the Act was amended by the FBTA, effective October 1, 2007. As amended, the purpose of the Act is to protect employees and the general public from the hazards of secondhand smoke by eliminating smoking in public places, places of employment, public transportation, and at public meetings. *See* 2007 Minn. Laws ch. 82, § 2. For the sake of convenience, I will refer to the amended Act simply as the FTBA. The FTBA contains certain exemptions, including an exemption for smoking by members of Indian tribes as part of a traditional Native American spiritual or cultural ceremony. *See id.,* § 10 (Minn. Stat. § 144.4167, subd. 2 (Supp. 2007)). There is, however, no general exception for premises located within the boundaries of Indian reservations. Nor do I know of any other statute or applicable court decision specifically addressing the enforcement of state smoking bans on property located within the boundaries of Indian reservations.

While the FTBA broadens the scope of coverage of the Clean Indoor Air Act, the fundamental nature and purposes remain the same as those of the original Act, *i.e.* to curtail smoking in public places in order to protect people from secondhand smoke. Consequently, it seems unlikely that the 2007 amendments would be found to affect any significant change in the enforceability of Minn. Stat. § 144.411 - 144.417 as it has existed over the past 32 years.

I. REGULATION OF TRIBAL MEMBERS

Under federal law Indian tribes are recognized as having substantial sovereign control over their internal affairs. An individual tribe's sovereignty is subject only to the authority of the federal government. *See* U.S. Const. Art. I, § 8, cl. 3. State laws may be applied to members of

Indian tribes on their reservations only in the following cases: (1) where Congress has expressly authorized state regulation; and (2) in "exceptional circumstances," so long as the state law is not preempted by federal law. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 103 S.Ct. 2378 (1983).

The enactment in 1953 of "Public Law 280", Pub. L. 83-280, 67 Stat. 588-89 (*see* 18 U.S.C. § 1162 and 28 U.S.C. § 1360) gave Minnesota substantial criminal jurisdiction, and some limited civil jurisdiction, over certain reservations, including the White Earth Reservation. However, the U.S. Supreme Court has interpreted Public Law 280 as granting only criminal jurisdiction, and limited civil jurisdiction over private civil litigation involving reservation Indians in state court, but not general "civil regulatory" authority. *See Cabazon,* 408 U.S. at 208, 107 S.Ct. at 1087. To be fully applicable within a reservation under the authority of Public Law 280, a state law must be a criminal/prohibitory law (*i.e.*, it prohibits certain conduct) rather than a "civil/regulatory" law (*i.e.*, it permits the conduct at issue, subject to regulation). *See Cabazon,* 408 U.S. at 207, 209, 107 S.Ct. at 1087-88; *State v. Stone,* 572 N.W.2d 725, 729-730 (1997). Determination of that issue generally calls for a case-by-case analysis by the courts. I am not aware of any cases in which the courts have addressed state indoor smoking restrictions in this context.

Minnesota courts have applied a two-step process for conducting the analysis. The first step is to determine whether the conduct at issue should be defined broadly (*e.g.* driving, smoking), or narrowly (*e.g.*, expired driver's license, drunk driving, smoking indoors in a public establishment) *see, e.g., State v. Stone*, 572 N.W.2d 725, 730 (Minn. 1997). Next the court must determine whether the defined conduct is generally prohibited as against public policy, or is generally permitted, albeit subject to regulation. *Id.* The court may consider the following factors among others:

> (1) the extent to which the activity directly threatens physical harm to persons or property or invades the rights of others; (2) the extent to which the law allows for exceptions and exemptions; (3) the blameworthiness of the actor; (4) the nature and severity of the potential penalties for a violation of the law.

A state may also assert jurisdiction over the on-reservation activities of tribal members in "exceptional circumstances." *Cabazon,* 480 U.S. at 215, 107 S.Ct. at 1091 citing *Mescalero.* Based on the case law surveyed in *State v. Stone*, cases presenting "exceptional circumstances" have primarily involved state laws with the indirect purpose of regulating non-Indians. The court cited only one U.S. Supreme Court case permitting state regulation of Indians on a reservation in the absence of either a federal grant of authority or a primary purpose of regulating non-members of tribes. *See Puyallup Tribe v. Washington Game Dep't,* 433 U.S. 165, 97, S.Ct. 2616 (1977) (state could regulate fishing by Indians on land that no longer belonged to the tribe but was within the reservation).

In *Stone,* the state argued that, aside from Public Law 280, the lack of established law enforcement on the reservation, and the importance of the roadways to non-tribe members presented exceptional circumstances justifying state enforcement of traffic laws against tribal members. The court concluded, however, that these circumstances were not sufficiently "extraordinary" to overcome the right of the tribe to make and enforce its own laws. The court stated:

> [W]e express our confidence that members of Indian tribes around the state will demand safe driving conditions on their reservations and that tribes will respond to these demands with basic traffic and driving regulations and reasonable enforcement mechanisms. We anticipate that tribes without the resources to sustain their own enforcement systems will enter into cooperative agreements with state and local governments to obtain these services.

Id. at 732.

II. REGULATION OF NON-MEMBERS

The State has general authority to regulate non-Indians within a reservation unless such regulation is preempted by federal law. *See Mescalero,* 462 U.S. at 333, 103 S.Ct. at 2386. Preemption may result from either a direct conflict with a federal law;[1] or, by "operation of federal law" due to incompatibility with interests reflected in federal law.

Although there are several federal laws that address smoking in specific types of facilities[2] and modes of transportation,[3] I am not aware of any federal law similar in scope to, or conflicting with, the FTBA.

In addition, a state law may be found to be preempted by the "operation of federal law" if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests are sufficient to justify the assertion of the state authority. *See*

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[1] *See English v. General Electric Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 2276 (1990) (state law is preempted to the extent it actually conflicts with federal law).

[2] *See* 20 U.S.C. § 6083-6084 (providers of children's health, day care, education or library services funded by the federal government or administered under the authority of the U.S. Health and Human Services Agency); 41 C.F.R. § 102-74.315 (offices owned or used by the executive branch of the federal government); 38 U.S.C. § 1715 (medical centers, nursing homes or domiciliary care facilities operated by the U.S. Department of Veterans Affairs); and 28 C.F.R. §§ 551.160-.62 (federal correctional facilities and vehicles).

[3] *See* 49 U.S.C. § 41706(a) (airlines); and 49 C.F.R. § 374.201 (buses transporting passengers in interstate service, except charter carriers).

Mescalero, 462 U.S. at 334. The inquiry into whether federal law preempts state law calls for "a particularized inquiry into the nature of the state, federal and tribal interests at stake." *State v. R.M.H.,* 617 N.W.2d 55, 64 (Minn. 2000). The court must "focus on the specific factual context in which this case comes before us and then weigh the competing interests at stake." *Id.* The court in *R.M.H.* determined that the tribal interests in self government were not implicated in regulation of non-member drivers, as it was in the case of its own members. *C.f. Stone.* Furthermore, the enforcement of state traffic regulations against non-members did not seriously threaten the economic well-being of the tribe. *Compare Cabazon* (state may not regulate reservation gambling operations attended primarily by non-Indians, *with Washington v. Confederated Tribes of the Colville Indian Res.*, 447 U.S. 134, 100 S.Ct. 2069 (1980) (state has authority to tax on-reservation cigarette sales to non-tribal members). Consequently, the court determined that federal and tribal interests did not outweigh the state's interest in enforcing traffic laws against an Indian driver who was not member of the White Earth Tribe. *R.M.H,* 617 N.W.2d at 65.

III. FEDERAL LICENSING AUTHORITY

In addition to Public Law 280, Congress has enacted legislation specifically directed at the subjects of liquor sales and gambling on Indian reservations. 11 U.S.C. § 1161 states that sale of liquor in Indian country is lawful only if it conforms to both state law, and any applicable tribal ordinance. Further, Minn. Stat. § 340A.4055 (2006) exempts from city, county or town licensure, liquor establishments in Indian country operating under licenses issued pursuant to tribal ordinances to tribal entities or tribal members.

The federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* generally governs the conduct of gambling in Indian county. Among other things, that Act authorizes tribal regulation and licensing of "Class II" gaming activities subject to certain conditions. In a March 14, 2005 decision (copy enclosed) the National Indian Gaming Commission concluded that the State of Minnesota lacks authority to regulate Class II gaming activities conducted within the White Earth Reservation, including those conducted by non-members on fee lands. That Act does not, however, appear to extend such jurisdiction to non-gaming activities.

Neither of these federal laws specifically deals with the regulation of smoking in Indian country, nor is there any indication that the licensing authority provided by those Acts is intended to implicitly convey any independent regulatory authority that is not directly related to the gaming or liquor sales activities licensed thereunder. Consequently there would not necessarily be any connection between Tribal licensing and state enforcement of the FTBA.

IV. CONDUCT OF CITY BUSINESS

As political subdivisions of the State, statutory cities such as Mahnomen have no inherent powers. They may exercise only those powers that are expressly granted by the Minnesota Legislature, and those that are implied as necessary in aid of such expressly conferred powers. *See, e.g., County Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 683 (Minn. 1997); *Mangold*

Midwest Co. v. Village of Richfield, 274 Minn. 347, 357, 143 N.W.2d 813, 820 (1966). Cities are expressly authorized in certain circumstances to operate on-sale and off-sale municipal liquor establishments. *See* Minn. Stat. § 340A.601. Such general authority may imply ability to perform functions ordinarily associated with operating such an enterprise. *See, e.g.,* Op. Atty. Gen. 218R, September 26, 1978 (copy enclosed) (sales on credit). I am not aware of any circumstances, however, in which a city may be found to have implied authority to perform any of its discretionary functions in a manner contrary to express statutory mandates or prohibitions.

I am not aware of the particular terms, or coverage, of the Tribe's "lease" with the City, and consequently am not in a position to comment on the extent to which the Tribe may be entitled to exercise exclusive control over any portion of the leased premises. In any event, I am aware of no basis upon which it may be concluded that the Tribe may grant the City authority to conduct its own affairs, including its liquor business, in a manner contrary to applicable state laws.

As noted above, I am not in a position to provide more definitive responses to your specific questions in light of this Office's responsibility to advise and represent the Commissioner of Health in connection with any enforcement action that office may determine to take under the FTBA. Nonetheless, I hope these comments are helpful to you.

Very truly yours,

KENNETH E. RASCHKE, JR.
Assistant Attorney General

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Enclosures

AG: #1951030-v1

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June 13, 2008

Mr. Jay T. Squires
Ratwik, Roszak & Maloney, P.A.
Suite 300, 730 Second Avenue S
Minneapolis MN 55402

Dear Mr. Squires:

Thank you for your correspondence dated April 24, 2008, concerning an appointment to fill a vacancy on the Roseville City Council.

You state that a member of the Roseville City Council ("Council") whose seat will be up for election in November of this year recently passed away and the Council is considering acting to fill the vacancy by making a "provisional" appointment of an individual to serve only until the November election has been held. After the election, the Council would appoint the person elected for the 2009-2012 term to serve the remainder of the current term as well. You request the opinion of this Office as to whether the described procedure is authorized.

First, the filling of vacancies in elective offices of statutory cities is addressed in Minn. Stat. § 412.02, subd. 2a (2006) as follows:

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

Thus, the Council is required to appoint a person to fill the vacancy in the current term until the election and qualification of a successor.

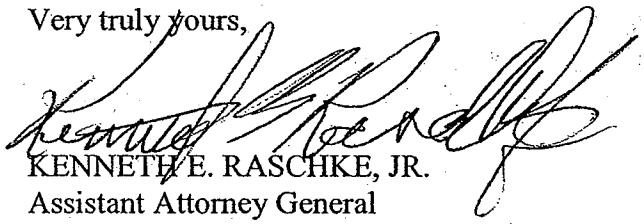
Second, in cases where a successor is elected to fill the unexpired portion of the current term, that person would be eligible to qualify and assume office immediately upon receiving a certificate of election, and the tenure of the appointee would terminate at that time. *See* Op. Atty. Gen. 471-M, November 23, 1999 (copy enclosed).

Third, when no special election is held to choose a person to serve for the remainder of the unexpired term, the successor to the appointee will be the person elected at the regular city election to the term beginning the following January.[1] You indicate there was less than two years remaining in the term of the deceased Council member. Therefore a special election is not required by statute, and the appointee would be entitled to serve out the remainder of the term.

Finally, while the language of section 412.02, subdivision 2a does not preclude the City from holding a special election, pursuant to ordinance, to choose someone to serve the remainder of a vacant term of less than two years,[2] the statute contains no authority for the Council to shorten the initial appointee's tenure unilaterally in order to appoint a replacement.[3]

For the foregoing reasons we answer your question in the negative.

Very truly yours,



KENNETH E. RASCHKE, JR.
Assistant Attorney General

(651) 297-1141 (Voice)
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Enclosure: Op. Atty. Gen. 471-M, November 23, 1999

AG: #2248255-v1/393734/KER

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[1] *See* Minn. Stat. § 412.02 (2006) (terms of elected statutory city officers commence on the first Monday in January following their election).

[2] Prior to 1999, subdivision 2a provided that when less than two years remained in the unexpired term "there shall be no special election to fill the vacancy."

[3] Should the original appointee vacate the position, however, the Council would again have the authority and responsibility to make a new appointment to fill the vacancy.

70.6785.310

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June 13, 2008

Ms. Kristi A. Hastings
Pemberton Sorlie Rufer Keshner PLLP
110 North Mill Street
PO Box 866
Fergus Falls MN 56538

Dear Ms. Hastings:

Thank you for your correspondence dated April 24, 2008 seeking an opinion of the Attorney General on behalf of ISD No. 542, Battle Lake (the "District").

You state that the District is experiencing declining enrollment as a consequence of a general decline in population of the region. A non-profit organization, the Lakes Area Development Association ("LADA"), has been formed to try to address economic development and educational issues in the area. LADA is seeking financial support in the amount of $10,000 each from the City of Battle Lake, Clitherall Township, and the District, which it plans to use to retain an economic development consultant, and to implement a plan to bring new enterprises and ultimately added population to the Battle Lake area. You seek an opinion as to whether the District has authority to contribute funds to LADA in the form of a donation, membership dues, or in exchange for professional services related to increasing student enrollment.

First, under Minnesota law political subdivisions, including school districts, have no inherent powers but may exercise only those that are conferred by statute expressly or by reasonable implication from such express powers. *See, e.g.,* Minn. Stat. § 123B.02, subd. 1 (2006); *Board of Ed. v. Sand,* 227 Minn. 202, 34 N.W.2d 689 (1948); Op. Atty. Gen. 159b-10, March 1, 1966. Furthermore, opinions of this Office have uniformly concluded that express legislative authority is required for grants or donations of public funds to other persons or organizations. *See, e.g.,* Ops. Atty. Gen. 476B-2, May 11, 1949 (village donation to VFW); March 6, 1947 (village donation to private library association); 159B-11, November 29, 1957 (school district contribution to city planning comm'n.). Express statutory authority has also been required for a unit of local government to join or pay dues to a private organization. *See, e.g.,* Ops. Atty. Gen. 159b-10, March 1, 1966 (research and development council); 218-R, February 24, 1949 (Chamber of Commerce). We are not aware of any statutory provision that would authorize a school district to donate public funds to a non-profit development association of the type described, nor have you cited any that might apply. In the absence of such authority it is our view that the District is not permitted to donate money to the LADA.

Second, the boards of independent school districts are, however, expressly authorized by Minn. Stat. § 123B.02, subd. 24 (Supp. 2007) to "authorize and pay for the membership of the school district or of any district representative designated by the board in those local economic development associations or other community or civil organizations that the board deems appropriate." Therefore, the District does appear to have general authority to pay for membership in the LADA if the board

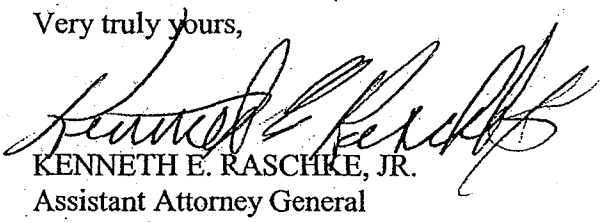
deems it appropriate. We do not, however, believe that such authority would extend to making gratuitous payments in excess of the reasonable dues or fees payable by other members of such organizations. The LADA Articles of Incorporation, which you included with your letter, state that the corporation shall have members, but contain no information concerning member eligibility, rights or obligations which are all to be prescribed in bylaws. Therefore, it is not clear what , if any, membership dues or fees will be charged to members.

Third, boards of independent school districts also have broad powers to contract for goods and services as necessary to operate the District. *See, e.g.,* Minn. Stat. §§ 123B.02, 123B.52. We are not, however, aware of any statutory provisions that make local economic development generally, or increasing population in particular, a function of the school board. While it is possible that the LADA may be in a position to provide some contract services that the District requires, a contract for services with LADA or any other entity may not be merely a device to facilitate making a "financial contribution" to the contractor. *Cf.* Ops. Atty. Gen. 159b-11, December 17, 1957 (may not donate to educational television corporation, but may contract to pay for the value of services rendered); 159b-10, March 1, 1966 (may not pay for membership in educational research and development corporation, but could contract for needed services). We offer no opinion, however, as to what services, if any, would be an appropriate subject for a contract between LADA and the District. *See* Op. Atty. Gen. 629a, May 9, 1975 (opinions of Attorney General are not addressed to hypothetical questions or resolution of factual issues).

In sum, it is our opinion that the District is authorized to pay reasonable membership fees to a development association, and could contract with such an organization for services that are reasonably necessary to carrying out of the District's responsibilities. We do not, however, find any authority for the District to make gratuitous financial contributions to such an organization, regardless of how such contributions may be characterized.

For your convenience I have enclosed copies of the cited Attorney Generals' Opinions. I thank you again for your correspondence.

Very truly yours,



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Assistant Attorney General

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Enclosures: Op. Atty. Gen. 159b-10, March 1, 1966
Ops. Atty. Gen. 476B-2, May 11, 1949, March 6, 1947
Op. Atty. Gen. 159B-11, November 29, 1957
Op. Atty. Gen. 218-R, February 24, 1949
Op. Atty. Gen. 629a, May 9, 1975

AG: #2005670-v1/KER

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August 13, 2008

Mr. Mitchell W. Converse
Jensen, Bell, Converse & Erickson, P.A.
1500 Wells Fargo Place
30 E Seventh Street
St. Paul MN 55101

Dear Mr. Converse:

Thank you for your correspondence dated May 19, 2008 concerning the proposed Charter for the City of Afton.

You state that a charter commission has been appointed for the City of Afton ("the City") which is currently a statutory city in Washington County. You further state that the charter commission has prepared a draft Home Rule Charter which contains provisions (copies attached) that purport to exempt the City from the operation of Minn. Stat. §§ 473.175 (Metropolitan Council review of municipal comprehensive plans); 473.501-473.549 (metropolitan wastewater services), and 473.851-473.871 (metropolitan area land-use planning). You request the opinion of this Office as to whether those provisions, if adopted as part of an Afton City Charter, would operate to exclude the City from operation of the above-mentioned laws governing the Twin Cities metropolitan area, as defined in Minn. Stat. § 473.121, subd. 2 (2006).

First, as noted in Op. Atty. Gen. 629-a, May 9, 1975, Attorney Generals' Opinions do not generally undertake to construe, or determine the validity of, local enactments. Consequently we will address the general issue of the authority of the City, by charter, to exempt itself from the specified statutes, but express no opinion as to the efficacy of the specific wording of the proposed charter sections.

Second, support for the provisions in question appear to be based upon the wording of Minn. Const. art. XII, §§ 2 and 4 which provide:

> Sec. 2. **Special laws; local government.** Every law which upon its effective date applies to a single local government unit or to a group of such units in a single county or a number of contiguous counties is a special law and shall name the unit or, in the latter case, the counties to which it applies. The legislature may enact special laws relating to local government units, but a special law, unless otherwise provided by general law, shall become effective only after its approval by the affected unit expressed through the voters or the governing body and by such majority as the legislature may direct. Any special law may be modified or superseded by a later home rule charter or amendment applicable to the same local government unit, but this does not prevent the adoption of subsequent laws on the same subject. The legislature may repeal any existing special or local law,

> but shall not amend, extend or modify any of the same except as provided in this section.
>
> Sec. 4. **Home rule charter.** Any local government unit when authorized by law may adopt a home rule charter for its government. A charter shall become effective if approved by such majority of the voters of the local government unit as the legislature prescribes by general law. If a charter provides for the consolidation or separation of a city and a county, in whole or in part, it shall not be effective without approval of the voters both in the city and in the remainder of the county by the majority required by law.

Section 202 of the proposed Charter purports to supersede and repeal Minn. Stat. §§ 473.175, 473.501-473.549 and 473.851-473.871 on the grounds that they are special laws within the meaning of Minn. Const. art. XII, § 2 that "apply" to the City and may therefore be modified or superseded by a home rule charter "applicable" to the City.

Third, the cited sections of Minnesota Statutes are not themselves special laws, but compilations of a series of individual laws[1] enacted and amended over several decades. *See, e.g.,* 1967 Minn. Laws ch. 896; 1969 Minn. Laws. ch. 237; 1976 Minn. Laws ch. 2; Section 473.123 *Historical and Statutory Notes*, 26A M.S.A. at 19-23. It might be assumed that the various individual laws that enacted and amended the cited statutory sections fit the definition of special laws contained in Minn. Const. art. XII, § 2 because they only apply within the defined seven-county Metropolitan area.[2] It does not follow, however, that the City of Afton can be considered the relevant local government unit for purposes of that section. Minnesota courts have recognized that the mere fact that a piece of legislation may affect a specific community, or identified group of communities, in a particular fashion does not in itself give every such community the authority to veto or modify the legislation. For example, in *Blanch v. Suburban Hennepin Regional Park District,* 449 N.W.2d 150 (Minn. 1989), the county rejected an argument that a 1988 act authorizing the Suburban Hennepin Regional Park District to acquire certain property on Lake Minnetonka over the City of Minnetrista's objection was invalid as special legislation that took effect without City approval. While the court agreed that the act was special legislation, it concluded that the provision's focus was on the Metropolitan Council, and the authority of its Park District, rather than the City. The court stated:

> Minnetrista chooses to characterize itself as the only affected unit, but it is apparent that the park bill, which charges the Metropolitan Council and the park

---

[1] *Cf/ Ledden v. State,* 686 N.W.2d 873, 876-77 (Minn. Ct. App. 2004).

[2] It has been held, however, that a law may be considered general even though it affects a class with only one member if the relevant distinctions which define the class and the law's provisions are directly related to the distinctive needs of the class. *See, e.g., In re Tveten,* 402 N.W.2d 551, 558-59 (Minn. 1987); *Larson v. Sando,* 508 N.W.2d 782 (Minn. Ct. App. 1993). There can be little doubt that the character, and needs of the Twin Cities metropolitan area are unique within the state.

> district by name with the establishment of a regional park on Lake Minnetonka, also affects both the Metropolitan Council and the park district. ... Surely, article 12, section 2 does not empower Minnetrista, whose comprehensive plans are subject to modification by the Metropolitan Council [Minn. Stat. § 473.175, subd. 1 (1988)], to veto the park bill to which both the Metropolitan Council, which is charged with the duty of ultimate approval of the comprehensive plans of all local governmental units in the seven-county metropolitan area as well as the Lake Minnetonka regional park, and the park district, which must carry out the master plan for the regional park, have consented.

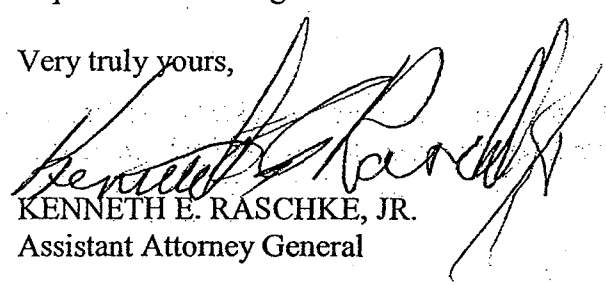
Id. at 154.

See also Masters v. Commissioner of Nat. Resources, 604 N.W.2d 134 ((Minn. Ct. App. 2000) where the Court rejected a special legislation challenge to legislation authorizing state acquisition of particular land to create and operate an off-highway vehicle recreation area. The Court acknowledged that the law did affect the city where the land was situated, but held that it did not "apply" to the city within the meaning of Minn. Const. art. XII, § 2. *Id.* at 139.

Third, the Minnesota Supreme Court has recognized the important role played by the Metropolitan Council in guiding "the orderly and economical development...of the Metropolitan area." *City of Lake Elmo v. Metropolitan Council,* 685 N.W.2d 1, 6 (Minn. 2004). Therefore, it is extremely unlikely that a Minnesota court would construe Minn. Const. art. XII, § 2 to authorize each city in the Metropolitan area as an affected "unit of government" independently empowered to veto, modify or supersede legislation intended to coordinate government activities within the Metropolitan area. It is more likely that, if a court did conclude the Minn. Stat. Ch. 473 comprises "special legislation, the "local government unit" for purposes of article XII, § 2 would be considered to be the Metropolitan Council itself, which is a "political subdivision of the state." *See* Minn. Stat. § 473.123; *City of New Brighton v. Metropolitan Council,* 306 Minn. 425, 428, 237 N.W.2d 620, 623 (1975).

For the foregoing reasons we answer your question in the negative.

Very truly yours,



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AG: #2279979-v1/KER

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August 20, 2008

Mr. Kevin J. Rupp
Mr. Christian R. Shafer
Ratwik, Roszak & Maloney, P.A.
730 Second Avenue S, Suite 300
Minneapolis MN 55402

Dear Gentlemen:

Thank you for your correspondence dated May 20, 2008 on behalf of Independent School District No. 709, Duluth (hereinafter "the District").

FACTS AND BACKGROUND

You state the following facts: The District has struggled for many years to develop and implement a long-range facilities plan. In April of 2006, a group consisting of District staff, community volunteers, and a private consultant was formed to develop such a plan, addressing immediate needs presented by declining enrollment and focusing on specific goals. The process, which included 10,000 hours of expert analysis and numerous group and community meetings, culminated in development of three alternative plans which were released for community consideration in March of 2007. Based upon a number of sources of public opinion formation, the School Board determined that community opinion favored the "Red Plan," which calls for closure and sale of ten District facilities, major repairs to remaining facilities and acquisition of sites for future facilities. The funding necessary to carry out the Red Plan would be accomplished under a number of statutory mechanisms that do not require voter approval. The School Board unanimously approved the Red Plan and above-referenced funding mechanisms on June 19, 2007.

On August 8, 2007, the Red Plan was submitted to the Minnesota Department of Education ("Department") pursuant to Minn. Stat. § 123B.59 as the District's long-range facilities plan. By letters dated November 2 and 13, 2007, the Department approved the Red Plan with the exception of two proposed property acquisitions for which sufficient information was not available.[1] Subsequent to Department approval, the District issued bonds pursuant to Minn. Stat. § 123B.59 in the amount of approximately $60,000,000, solicited purchase

[1] The Department letters included with your request indicate that they represent the Education Commissioner's "Review and Comment" on the District's proposed construction project pursuant to Minn. Stat. § 123B.71. Section 123B.59 is mentioned on page 6 of the Review and Comment as authority for one of the three proposed means of funding the project.

agreements for several properties, and approved bids for various services, all in furtherance of the Red Plan.

On March 21, 2008, the District received a petition calling for a special district election to authorize the issuance of bonds to support an alternative to the Red Plan which proponents refer to as "Plan B." The petition was circulated in two forms. One petition was circulated in a local newspaper and bore the title "Petition Against the School Board's Red Plan." The other petition was circulated on 14" x 8 ½" pieces of paper. The second form of the petition was not titled "Petition Against the School Board's Red Plan." With that exception, the two versions of the petition contained the following identical language:

> PETITION: ISD 709 SCHOOL DISTRICT SPECIAL ELECTION,
> BOND AUTHORIZATION
>
> We (the undersigned) do hereby petition under MN Statute 205A.05 the following school district question, by special election, as soon as possible.
>
> Shall ISD 709 be authorized to issue general obligation bonds totaling $128,000,000 to be used with an estimated $66,902,086 in bonds and investment earnings previously approved by the Board for alternative facilities to build two new middle schools and two new elementary schools; repair and remodel three high schools, one middle school, and five elementary schools; repair and expand two elementary schools; and repair and remodel "Old Central High" and the Secondary Technical Center? YES_____ NO_____

The petition contained the required signer's oath, directions, disclosures, and lines for signatures, including all fields required by Minn. R. 8205.1010.

The petition was circulated by a citizen group calling itself "Let Duluth Vote." Let Duluth Vote has issued numerous statements opposing the Red Plan for a variety of reasons including its cost, the method the Red Plan has been implemented, and the associated school closings. The group has published statements indicating that it considers its ballot question to be not merely a bond issue, but a vote on an alternative long-range facilities plan. To this end, the ballot question specifically calls for the reallocation of funds from alternative facilities revenue under Minn. Stat. § 123B.59, already designated for use on the Red Plan projects, to be used with the funds which it purports to authorize.

After completing the verification process required by Minn. R. 8205.1050, the District noticed that neither version of the petition contained a summary under Rule 8205.1010, subp. 2.D. The District completed its review process within the ten (10) working day period required by Rule 8205.1050. The District sent a letter to the person who filed the petition notifying her of the sufficiency of the signatures to the petition and the District's concerns with respect to the form of the question and the petition itself.

Based on the above factual background, the District asks the questions set forth below:

QUESTION 1

Is the petition invalid because it seeks to unlawfully re-delegate to the voters the control and use of alternative facilities dollars raised pursuant to Minn. Stat. § 123B.59?

LAW AND ANALYSIS

For reasons discussed in Op. Atty. Gen. 629a, May 9, 1975, opinions of the Attorney General are not normally addressed to hypothetical questions or, to issues requiring factual determinations. Therefore, we are not in a position to render opinions on the above questions to the extent that they fall into those categories. I can, however, state the following:

Acquisition, construction and improvement of school facilities are purposes for which school districts are authorized to issue bonds. *See* Minn. Stat. §§ 123B.02, 475.52, subd. 5 (2006). Generally, issuance of general obligation bonds for such purposes must be approved by the voters of the district. *See* Minn. Stat. § 475.58, subd. 1 (2006). Consequently, in Op. Atty. Gen. 159a-3, March 11, 1998, this Office concluded that issuance of general obligation bonds to fund construction of school facilities is "a question upon which the voters are authorized to pass judgment" and "a matter requiring approval of the voters" within the meaning of Minn. Stat. § 205A.05, subd. 1.[2] Therefore, the language of that subdivision requiring the school board to call a special election upon petition of five percent of the voters applies to petitions for bond referenda. That opinion also concluded, however, that a bond referendum to be held in response to a voter petition would be subject to the "review and comment" provisions of Minn. Stat. §§ 121.148 and 121.15, now encoded as sections 123B.70, 123B.71, which require that all proposals for school construction expansion or remodeling costing in excess of $500,000 be submitted to the Commissioner of Education ("Commissioner") for review and comment before holding a bond referendum or soliciting bids for construction.

---

[2] That subdivision provides, in part:

> Special elections must be held for a school district on a question on which the voters are authorized by law to pass judgment. The school board may on its own motion call a special election to vote on any matter requiring approval of the voters of a district. Upon petition of 50 or more voters of the school district or five percent of the number of voters voting at the preceding school district general election, whichever is greater, the school board shall by resolution call a special election to vote on any matter requiring approval of the voters of a district.

While voter approval is normally necessary to authorize the sale of general obligation bonds for a particular project, the decision whether or not to go forward with the bond sale and project remains with the school board. *Id.*, Op. Atty. Gen. 159a-3, May 25, 1970. In addition, the electors in an independent school district generally lack authority to remove pre-existing school board bonding authority. *See, e.g.,* Op. Atty. Gen. 159a-3, March 18, 1942 (voters may not rescind previous approval of bond issue).

One exception to the general requirement for voter approval of bond issuance is the "Alternative Facilities Bonding and Levy program" authorized by Minn. Stat. § 123B.59 (2006). Under that section, a district may issue bonds to fund projects that are part of a ten-year facility plan approved by the school board and the Commissioner. The facts submitted state that the "Red Plan" for development of the District facilities was submitted to the Commissioner and received a favorable review with the exception of two specific property acquisitions. You state that, on the basis of that approval, the District has issued bonds totaling approximately $60 million pursuant to section 123B.59 and has made other contractual commitments pursuant to that Plan.

Since the specific projects envisioned by the petitioners' "Plan B" differ from those contained in the District's Red Plan, your letter argues that the proposed ballot measure constitutes an unlawful delegation of the School Board's control over the dollars already raised pursuant to section 123B.59. As noted above, however, voter approval of a bond referendum measure, whether pursuant to petition or otherwise, authorizes, but does not require, a school board to sell bonds, or to proceed with the contemplated projects. Nor would voter approval of the new bond proposal negate other existing bonding or construction authority held by the Board. Therefore, we see no basis upon which to conclude that voter approval of the proposed ballot question would affect the ultimate authority of the School Board to control expenditure of funds raised pursuant to section 123B.59, or to continue with its current Red Plan, although approval of the ballot question would provide the School Board with authority to pursue other options as well. Therefore, we cannot say that voter approval of the question proposed by the petition would in itself constitute an unlawful usurpation of authority properly belonging to the School Board, or other authorities.

QUESTION 2

Is the petition invalid for being vague or misleading?

LAW AND ANALYSIS

In your letter you argue that the ballot question proposed by the petition is impermissibly vague in that it fails to specify where new schools are to be built, which schools will be repaired, and the propositions of the costs of each project that is to be borne by bond proceeds versus other available funding.

Pursuant to Minn. Stat. § 475.59 (2006) school districts have a great deal of latitude in determining the degree of generality or precision to be employed in the framing of a ballot question for the approval of bonds. That section provides, in part:

> In any school district, the school board or board of education may, according to its judgment and discretion, submit as a single ballot question or as two or more separate questions in the notice of election and ballots the proposition of their issuance for any one or more of the following, stated conjunctively or in the alternative: acquisition or enlargement of sites, acquisition, betterment, erection, furnishing, equipping of one or more new schoolhouses, remodeling, repairing, improving, adding to, betterment, furnishing, equipping of one or more existing schoolhouses.

Consistent with that broad authority, the court in the case of *Lindahl v. Ind. Sch. Dist. No. 306,* 270 Minn. 164, 133 N.W.2d 23 (1965), found a ballot question on the issuance of bonds "for the acquisition and betterment of school buildings" to be acceptable. Thus it is highly unlikely that a court would find the proposed ballot question in this case impermissibly vague for lack of specificity concerning the location or cost of each new facility and remodeling project.

QUESTION 3

Is the petition invalid for failing to comply with the requirements of Rule 8205.1010, specifically, the absence of a summary of the purpose of the petition?

LAW AND ANALYSIS

Minn. Stat. §§ 205A.13 and 204B.071 (2006) require that any petition to a school board under a law that requires the board to submit an issue to the voters, must be circulated, signed, filed, and inspected in accordance with rules adopted by the Secretary of State. Among other things, those rules require that:

> C. Each petition page must have a short title describing the purpose of the petition.
>
> D. Each petition page must have a statement summarizing the purpose of the petition.

Minn. R. 8205.1010, subp. 2.C., D.

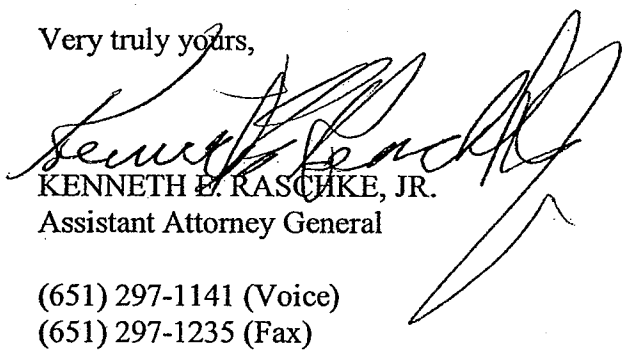
According to the materials submitted, all of the petition pages included the heading PETITION: ISD 709 SCHOOL DISTRICT SPECIAL ELECTION, BOND AUTHORIZATION. In addition, the petition forms published in the newspaper were headed by the legend PETITION AGAINST THE SCHOOL BOARD'S RED PLAN. It is your position that, while all of the

petition pages contain the necessary title, "they lack the required statement summarizing the purpose of the petition," and should therefore be considered invalid. However, the technical failure of a petition form to satisfy every aspect of the rule will not necessarily invalidate the petition. *Cf. In re Referendum to Amend City of Grand Rapids, MN Munic. Election Ord.*, 2006 WL 1985595 (Minn. Ct. App.). The extent to which the results of the petition drive may have been prejudiced by the absence of a separate statement "summarizing the purpose," given that there was in place a "title describing the purpose" is a factual determination beyond the scope of opinions of this Office.

CONCLUSION

For the foregoing reasons, we cannot conclude, on the basis of the materials submitted, that the Petition in question is invalid as a matter of law.

Very truly yours,



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