

CITY OF SAINT PAUL

**CONFLICTS OF INTEREST
AND
GOVERNMENT ETHICS**

Office of the City Attorney

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INDEX

	<u>Page</u>
Purpose	2
Summary of Conflict of Interest Rules	3
Memorandum	8
Outline of Memorandum	8
Memorandum	9
Appendix	A-34
Minnesota Statutes	A-35
Saint Paul Legislative Code	A-84
Saint Paul Administrative Code	A-93
Office of the City Attorney Opinions	A-126
Cases	A-170

PURPOSE

This notebook is intended to provide a guide on conflict of interest issues for all City officials both elected and appointed. Conflict of interest issues will likely arise and be of particular concern to those Councilmembers whose part-time status requires them to engage in other employment or work.

This notebook is not a comprehensive encyclopedia that answers all questions. It is a tool that we hope will help City officials recognize the possibility of a conflict of interest, or of problems involving disclosures of interests, or other ethical-legal issues, and follow up with specific questions for advice from the office of the City Attorney.

SUMMARY OF RULES

CONFLICT OF INTEREST RULE:

A City official or employee, which includes an elected official, whose job requires him or her to make, or to take action on, any sale, lease or contract, or any other transaction of public business, cannot have a financial interest in that sale, lease or contract, or other public business.

What is a financial interest?

A financial interest means any direct or indirect monetary or other material benefit to the City official, to his or her spouse or dependents, to his or her employer (except the City itself), or to any person who lives with that official. This is the definition from the City Administrative Code in section 24.03(A)(2)©. The term benefit includes both gain and the avoidance of loss.

What are some examples of a conflict of interest?

It would be a conflict for a Council member to vote on a City contract with a company that he/she is a partner in or a major shareholder of, or that will compensate that member out of the proceeds of the contract. This would violate both the state statute and the City ordinance.

It would be a conflict of interest for a Council member to vote to lease property to a spouse or dependent, to an employer, or to any person who lives with that Council member. This would be a violation of the City ordinance, but not of the state statute and not necessarily of the case law.

It would be a conflict of interest to award a license to a corporation owned by a spouse, where the corporate income is used for the joint expenses of both spouses.

What do you do if you have a conflict of interest?

Sale, lease, or contract. If the conflict relates to a City sale, lease or contract, you must seek the advice of the City Attorney immediately. If you are a Council member, or an officer or employee who has the authority to make or participate in making that sale, lease or contract, both

criminal and civil repercussions may result for you and for the City. You may either have to resign from City office or employment, or have to remove the financial interest which is the source of the conflict. There are also exceptions in the statute which may apply to the specific case, and avoid the harsher ramifications referred to above.

Collective bargaining agreements.

Section 24.03(A)(3)(a) removes the authorization of Council members who are members of bargaining units to participate in the consideration or approval of collective bargaining agreements, thereby avoiding both personal criminal liability for them and statutory nullification of bargaining contracts which are approved while they are a member of the Council. Under this ordinance, such a member must abstain completely from any role whatsoever in the making of a collective bargaining contract for a group of which the Council member is a member.

Sections 23.02(3), (4), and (5) allows Council members who are members of a bargaining unit to participate in the consideration or approval of all collective bargaining contracts if they waive all personal voluntary financial interest whether by gain or avoidance of loss in such contracts. It should be emphasized that there will still be some issues, as for example, on a motion to reduce benefits, where there will be a financial interest which is not covered by the waiver, and where the advice of the City Attorney must be sought. This section also avoids criminal liability and statutory nullifications of contracts. A Council member is not required to make this waiver. In the absence of a waiver, Section 24.03(A)(3)(a) applies.

Other City actions: licensing, zoning, and so on. If the conflict relates to any action relating to a license, or the consideration of zoning variances, special condition use permits, street vacations, or other City action, the Council member must abstain completely from taking any part or playing any role in that action. Failure to do so might subject the individual to criminal and civil sanctions.

A City employee or officer who is not a “public officer” under state law is permitted to have a financial interest in such other actions, but may in some cases be required to make a formal disclosure of that interest.

INTEREST DISCLOSURE REQUIREMENTS:

State law requires that a local elected or appointed official, whose official duties involve responsibility for major decisions over the expenditure of public money, and require him or her to take an action or make a decision that would “substantially affect the official’s financial interest or those of an associated business,” must disclose that potential conflict of interest.

Are there any exceptions?

If you are a member of a business classification, profession or occupation, and the action applies to all others in that category or class the same as it does to you, then you need not disclose the conflict.

Are there City disclosure requirements?

Yes, the City Administrative Code requires a list of specified City officials to file a statement with the City Clerk which discloses:

1. The name of each business with whom the official is associated.
2. A list of all real property, excluding your homestead, within the City, in which you have a specified interest in excess of \$2,500,000.

The officials to whom this requirement applies are Council members and their aides, the Mayor and his or her aides, Affirmative Action Director, Budget Director, the Police Chief and deputies, City Attorney and the deputies, the City Clerk, the Complaint and Information Director, the directors of the other Charter Departments, the Property Manager, the Director of Human Rights, PED deputy directors, the Fire Chief and his or her assistant chief, and the Labor Relations and

Personnel directors.

Members of City committees also have disclosure requirements similar to those under state law.

GIFTS

Under the current City ordinance, there are a number of situations in which it has been and is lawful to take gifts from persons having contractual and business dealings with the City. For example, a City official or employee could take gifts of under \$50.00 in value, or tickets to sporting, theatrical and other events, or meals at restaurants, without violating the law.

However, under Minnesota Statute §471.895, those gifts will be unlawful if the person attempting to make the gift has a “direct financial interest” in a decision that the City official or employee has authority to make. A council member or PED official could not, for example, be treated to lunch by a developer (or the developer’s lawyer or lobbyist) whose project will be considered by PED and the Council. The only meal or food a City official or employee can now accept is at a meeting or banquet where that person is invited to speak or answer questions.

To be safe under the statute, an official or employee should not take anything of value from a group or person who is affected financially by decisions of that official or employee. The combination of the state law and local ordinance bans the vast majority of all gifts, meals and entertainment provided to City officials.

LIMITATION OF STATUTES AND ORDINANCE:

The statutes and ordinances do not cover all situations in which reasonable people would recognize conflicts of interest. The fact that a particular action or vote is not made unlawful by the law does not insure that it will always be perceived as ethical, moral or politically wise.

There may very well be conflicts of interest which require, as a matter of sound public

policy, abstention from a public action, or removal of the conflict, by the elected or public official even though one is not required by law.

These are judgments which are now left by the law to the collective wisdom of the electorate and their elected and public officials.

OUTLINE OF MEMORANDUM

I. CONFLICTS OF INTEREST

- A. Definitions and Introduction
- B. Case Law
- C. Statutory Provisions
- D. Charter Provisions
- E. Ordinance Provisions
- F. Typical Situations
 - 1. Family relationships
 - 2. Employee of a company
 - 3. Employee of the City

II. DISCLOSURE PROVISIONS

- A. State Law
- B. City Ordinance

III. ETHICAL AND GOOD GOVERNMENT PROVISIONS

- A. Ex parte contacts in quasi-judicial matters
- B. Use of City property
- C. Gifts to City officials and employees
- D. Solicitation of funds by City officials
- E. City lobbyists
- F. Employee reports of violations (“whistle blower law”)
- G. Honoraria, Per Diem, and other Fees

MEMORANDUM

I. CONFLICTS OF INTEREST

A. Definition and Introduction.

The term “conflict of interest” is a broad one. It is not limited only to those conflicts in which restrictions or limitations are imposed on the ability of a public official to take action or participate in the action giving rise to the conflict.

The term conflict of interest, as applied to a public official¹ of the City of Saint Paul, covers all situations in which the personal interests² of the official involved are or may be in conflict with,

¹This includes for this memo the Mayor, Councilmembers, and department and office heads. It may also for specific statutes or ordinances be broadened to include other officials and/or employees. For example, the disclosure requirements in section 24.03 of the Administrative Code apply to specified public officials, including mayoral and council aides, and assistants and deputies in various offices and departments as listed in that section. The statutory prohibition in Minn. Stat. §471.87 applies to “public officers” who are authorized to take part in making contracts, sales or leases. The statute does not define who are officers, and whether there is a distinction between officers and employees. Various Attorney General Opinions have concluded, for example, that an attorney employed by a port authority, a village clerk and a bookkeeper were not public officers, but that the term covers both elected and non-elected officers. There is a common law distinction between officers and employees. See, e.g., McQuillin, Municipal Corporations, §12.30; and Oehler v. City of Saint Paul, 174 Minn. 410, 219 N.W. 760, 763 (1928). In our opinion that distinction applies to Minn. Stat. §471.87.

We believe that the term “officer,” for the purpose of the statute, would at the very least include the listing of officials in section 24.03(B)(1)(d) of the Administrative Code (even though that definition relates to disclosure and not conflict), as well as any official whose City job requires him or her to make or recommend major decisions regarding the expenditure of public money (see Minn. Stat. §10A.01, subd. 22). Other City personnel might also be determined to be officers on a case by case basis. Key factors would include the legal authority by which the position was created, whether an oath is required, the degree of discretion in the position, and the apparent authority to commit the City or act on its behalf.

²Such personal interests may include personal political views, social philosophy, agreement with the views or interests of private business entities, agreement with the views or interests of charitable or nonprofit entities, the personal financial interests of the official or close friend or relative, and so on. In most cases, if the official’s personal interest is financial or pecuniary, or relates to the financial interest of someone the official has an obligation to support, then the law places restrictions on the freedom of the official to act in a way that furthers his or

adverse to, or different from, what is in the best interests of the City and its citizens, whether expressed in official policy (such as ordinances or resolutions) or not.

An example of a conflict of interest in which the ability of the official to act, or take part in an official action, will be restricted is a Councilmember voting on the re-zoning of a parcel of land owned by a development corporation in which the Councilmember is a major shareholder.

An example of a conflict in which the official could, without violation of any law or ordinance, act or take part would be the award of a City loan or grant to an organization providing shelter for the homeless, where the official was an uncompensated member of that organization's board of directors.³

The purpose of this memorandum is to give City public officials a summary guide to the possibility of those conflicts of interest which do, in fact, have consequences for them as public officials.

It is not intended to answer all questions. Many, if not all, conflict of interest situations are

her interest (regardless of whether it is necessarily to the detriment of the City's interest). In the absence of a statute providing broader coverage, if the interest of the official is not financial or pecuniary, the common law does not prevent that official from advocating or working for that personal, non-financial interest.

³The Minnesota Court of Appeals held in Rowell v. Board of Adjustment, 446 N.W.2d 917, 920-21 (Minn. App. 1989), that a setback variance granted to a church was not invalidated by the fact that the board member casting the deciding vote was a contributing member of the church. In reaching its decision, the Court of Appeals considered both Minn. Stat. §471.87, and Lenz v. Coon Creek Watershed District, 278 Minn. 1, 153 N.W.2d 209 (1967). It found that there was not a sufficient pecuniary interest to disqualify the official or invalidate the action, and that the non-pecuniary interest was not likely to be contrary to the interests of the general public.

This is not to say that situations like Rowell or others do not raise ethical problems for the official, nor that he or she can expect to be immune from editorial and public criticism for taking such actions. It is only to say that the case law and statute do not appear at this time to restrict the ability of the official in such private, non-compensated matters.

heavily dependent upon the facts in each case. A public official concerned about a conflict, a potential conflict, the appearance of conflict, or the ethics of a particular situation, should seek the advice of the Office of the City Attorney as soon as the situation becomes apparent.

B. Case Law.

Generally, public officials are disqualified from participating in proceedings in a decision-making capacity when they have a financial interest in the outcome of the proceedings.⁴

Whether or not an official should be disqualified from taking part in a decision or action depends on the facts presented. In Lenz v. Coon Creek Watershed District, 278 Minn. 1, 153 N.W.2d 209 (1967), four of the five watershed district board members, and the chairman of the county board, owned land which was benefitted by a proposed improvement (drainage canal improvement), which improvement was approved by the watershed district upon the petition of the county board. The Supreme Court found that the improvement would substantially benefit the lands

⁴1989 Street Improvement Program v. Denmark Township, 483 N.W.2d 508, 510 (Minn. App. 1992) (abstention from voting on assessment proper where abstaining town board members owned property bordering the proposed improvement, and they would be assessed); Lenz v. Coon Creek Watershed District, 278 Minn. 1, 153 N.W.2d 209, 219 (1967) (no per se rule of disqualification even where material benefit to officials); E.T.O. Inc. v. Town of Marion, 375 N.W.2d 815, 819 (Minn. 1985) (Lenz test applied to invalidate denial of liquor license because one town board member owned land near licensed premises which had been devalued by the proximity of the bar, and voted to deny the renewal application; one court of appeals panel read E.T. O. to stand for the proposition that Minn. Stat. §471.87 applies by analogy to the issuance of a liquor license [see Rowell v. Board of Adjustment, 446 N.W.2d 917, 920 (Minn. App. 1989)]); Petition of Northern State Power Co., 414 N.W.2d 383 (Minn. 1987) (gas rate proceedings tainted and subsequently dismissed upon disclosure that PUC commissioner had during time of deliberations discussed future employment with top NSP officials); and Stone v. Bevans, 88 Minn. 127, 92 N.W. 520 (1902) (council president was compensated for extra services to the village in connection with the extension of the waterworks, and although he was not present and did not participate, the Supreme Court held that this was a prohibited conflict of interest, and that the contract was void).

they owned.⁵

The Court, however, refused to nullify the actions of the district and the board. It declined to impose a per se rule that would disqualify officials having a financial interest in a decision, establishing the following test:

“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.” 153N.W.2d at 219.⁶

The Court found on the particular facts in that case that there were ample safeguards in the public nature of the decision-making, and in the opportunities for judicial review of the decision.

The kinds of situations which would be covered by the Lenz case and those following it include (1) cases determining the official’s right to office, (2) fixing the official’s own compensation, (3) land condemnation, (4) zoning and variance matters, (5) quasi-judicial decision-making on licenses, variances and other matters, and (6) street vacations.

In these situations, if the official does not participate in or vote on the matters, the action of the council is not invalidated if there are sufficient non-interested councilmembers to take the action. Nodes v. City of Hastings, 284 Minn. 552, 170 N.W.2d 92 (1969).

⁵Township Board of Lake Valley Twp. v. Lewis, 234 N.W.2d 815, 819 (Minn. 1975), followed the authority of Lenz in a case in which one of the town board members participated in circulating a petition for establishment of a town road, and did not require disqualification of the member or invalidation of the action.

⁶The Lenz factors have been applied to a case determining whether a council member sharing office space with his brother’s law firm representing a client challenging a plat was enough to disqualify the council member. The court decided it was not. Nolan v. City of Eden Prairie, 610 N.W.2d 697 (Minn. Ct. App., 2000)

C. Statutory Provisions.

There are two statutes that are relevant here, and are found in the Appendix.

1. Minn. Stat. §471.87 provides:

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

Minn. Stat. §471.88-.89 provide for exceptions to the rule stated above.

The Attorney General has opined that all of the elements of Minn. Stat. §471.87 must be present before the statute is violated.⁷ Therefore, it must be a (1) public officer, (2) who is authorized⁸ to take part in any manner in making (3) any sale, lease or contract⁹ (4) in official capacity shall not (5) voluntarily have a (6) personal financial interest¹⁰ in that sale, lease or contract

⁷Op. Atty. Gen. 90e-6, June 15, 1988.

⁸Whether the officer actually participates is not a relevant issue under the statute. The key question is whether he or she is authorized to participate. See Op. Atty. Gen. 90e-6, June 15, 1988.

⁹All forms of contracts are covered. The Attorney has opined that a re-zoning is not a “sale, lease or contract” under section 471.87. Op. Atty. Gen. 59a-32, Sept. 11, 1978. However, if a councilmember were to participate in a re-zoning in a matter in which he or she had a financial interest, the Attorney General would apply the analysis of the Lenz case, and may find that the councilmember was disqualified from participating, or that the action was invalidated if the councilmember participated. Id.

¹⁰There is also a statute which relates to the councilmembers of statutory cities. Minn. Stat. §412.311. It prohibits such a councilmember from being “directly or indirectly” interested in any contract made by the council. However, home rule charter cities, such as Saint Paul, are excluded from the definition of statutory city under Minn. Stat. §412.016, subd. 1. Singewald v. Minneapolis Gas Company, 142 N.W.2d 739 (Minn. 1966), was decided on the basis of the language in section 412.311, dealing with the passage of a gas franchise ordinance which awarded a franchise to Minnegasco. The Court held that, since one of the three votes necessary for passage of the ordinance was cast by a councilmember who was an employee of Minnegasco, that employee was “indirectly interested” in the contract, regardless of the councilmember’s good faith, and regardless of the reasonableness of the ordinance. The case was remanded for

(7) or personally benefit financially therefrom.¹¹

Minn. Stat. §471.88 goes on to allow contracts with an interested officer in certain cases where the council enters into the contract by a unanimous vote.¹² These exceptions are not immediately pertinent, and can be reviewed in the attached statute. One of the exceptions states that the council can enter into a contract with an interested officer in a “contract for which competitive bids are not required by law.” Minn. Stat. §471.88, subd. 5.¹³ This exception clearly applies to contracts for equipment and supplies which are for amounts under the threshold set in the Uniform Municipal Contracting Act, Minn. Stat. §§471.345-.37.¹⁴ Whether this exception applies to collective bargaining contracts, on the other hand, has not been determined by a court, and has not

further proceedings. The Court did not expressly declare that the ordinance was invalid, but that seems to be the necessary result of the decision.

¹¹Op. Atty. Gen. 90e-1, May 12, 1976, opines that where a councilmember is a shareholder in and shares in the profits of a corporation seeking to lease space to the city for consideration in excess of \$5,000, the councilmember has a conflict of interest under Minn. Stat. §471.87. Under §471.87, a mere employee whose salary is not affected by the contract would not violate the statute. Op. Atty. Gen. 90-E-5, LMC 130d, November 13, 1969. This would be in contrast to the result in Singewald, where the statutory provisions there at issue (Minn. Stat. §412.311) apply both to direct and indirect interests.

¹²Excluding the interested councilmember.

¹³Minn. Stat. §471.89 also requires for all subd. 5 contracts that there be a resolution of the governing body in advance of the contract, together with an affidavit setting forth facts about the nature of the contract and whether it is a reasonable arrangement for the City.

¹⁴When it was amended by 1992 Minn. Laws. Ch. 380, the statute related primarily to changes in dollar amounts of contracts that are suppose to be put out to bid, and did not have any language that showed an intent to widen the exceptions for “interested officer” contracts. The provisions in section 471.89 appear to relate to procedures for purchasing supplies or materials which would normally be bid competitively. For example, the interested officer is required to file an affidavit, before a “claim is paid,” stating a number of facts, including that the officer believes that the contract price is as low or lower than the price at which the services could be obtained from other sources. Such a procedure would not appear to fit the situation of a collective bargaining contract.

been ruled on by the Attorney General.

The relation of Minn. Stat 471.87 to other statutes addressing conflict of interests specifically

Op. Atty. Gen. 90 Cr. Ref. 430, 1994 deals with the interplay between Minn. Stat. §471.87 and §469.009 which specifies conflicts of interest in the HRA. The Attorney General was asked which one should be followed since both are slightly different statutes. Minn. Stat. §471.87 prohibits a public officer “who is authorized to take part” from “voluntarily having a personal financial interest” in a sale, lease or contract. On the other hand, Minn. Stat. §469.009, states that an HRA commissioner or employee shall be guilty of a gross misdemeanor if they “knowingly take part in any sale, lease or contract” for which there are a personal financial interest. The Attorney General decided that based on the principle of statutory construction (special laws trump general laws) an HRA commissioner should follow Minn. Stat. §469.009 with respect to the notice and disclosure requirements “whenever the commissioner intends to bid on work.” Op. Atty. Gen. 90 Cr. Ref. 430, 1994.

In another Attorney General Opinion, the Attorney General was also faced with a more specific law in conflict with Minn. Stat. §471.87. Op. Atty. Gen. 90e Cr. Ref. 90a-1, 1997. In this case the question was whether the Mayor of Northfield can keep his position when he was also the employee, incorporator and director of Northfield’s public access cable television provider. The Attorney General stated that the mayor could keep his position because Minn. Stat. §238.15 prohibits interested members from participating in the granting or administration of the franchise only. *Id.* at 2. The statute, according to the Attorney General, “implicitly permits an elected official to retain his or her financial interest . . . if he or she abstains from participation in the franchising of the company or the administration of such franchise.” *Id.* The Attorney General’s opinion is that the general language of Minn. Stat. §471.87 can be superceded by more specific language in other

statutes. *Id.* The Attorney General also felt that in the alternative the other statutes merely define who is “authorized to take action.” *Id.*

Therefore in deciding which statute to follow in cases of conflict, city officials need to look at relevant statutes on the topic at hand before looking to Minn. Stat. §471.87, which is considered general law that can be superceded.

Effects of Contracts in Violation.

Where a city enters into a contract with a councilmember which violates Minn. Stat. § 471.87, the contract is void and cannot be used as the grounds for an action to enforce the contract. Currie v. School District No. 26, 35 Minn. 163, 27 N.W. 933 (1886); Bjelland v. City of Mankato, 112 Minn. 24, 127 N.W.397 (1910).

It does not make a difference that the official having the conflict did not participate in the proceedings, or that his or her vote was not necessary to the approval of the contract. Stone v. Bevens, 88 Minn. 127, 92 N.W. 520 (1902); City of Minneapolis v. Canterbury, 122 Minn. 301, 142 N.W. 812 (1913).

2. Minn. Stat. §10A.07 applies to local officials and provides for disclosure of conflicts of interest, together with possible abstention from participation in the decision-making process.

It provides, in subd. 1, as follows:

“Subdivision 1. **Disclosure of potential conflicts.** A public official or a local official elected to or appointed by a metropolitan governmental unit who in the discharge of official duties would be required to take an action or make a decision that would substantially affect the official’s financial interests or those of an associated business, unless the effect on the official is no greater than on other members of the official’s business clarification, profession or occupation, shall take the following actions:

- (1) prepare a written statement describing the matters requiring action or decision and the nature of the potential conflict of interest;

(2) deliver copies of the statement to the official's immediate superior, if any; and

(3) if a member of the legislature or of the governing body of a metropolitan governmental unit, deliver a copy of the statement to the presiding officer of the body of service.

If a potential conflict of interest presents itself and there is insufficient time to comply with clauses (1) or (3), the public or local official shall orally inform the superior or the official body of service or committee of the body of the potential conflict.”

Subdivision 2 goes on to provide what remedial actions are required when such disclosures are made by a covered official. Abstention from voting, and assignment of the matter to another employee (in the case of non-legislative officials), are required if possible. The statute does not further define what is “possible,” and so this could be an issue in each case.

“Local officials” are defined in Minn. Stat. §10A.01, subd. 22, to mean a “person who holds elective office in a political subdivision or who is appointed to or employed in a public position in a political subdivision in which the person has authority to make, to recommend, or to vote on as a member of the governing body, major decisions regarding the expenditure or investment of public money.”

While there are no case decisions on point, one issue arising in the consideration of this statute is whether its enactment was intended by the Legislature to overrule the decision in Lenz, supra. The legislature can abrogate the common law by statutory enactment. See, e.g., Jung v. St. Paul Fire Department Relief Ass’n, 223 Minn. 402, 27 N.W.2d 151 (1947). Whether it has done so depends on a number of rules of construction. See 17B Dunnell’s Digest, “Statutes,” §5.04(b); 73 Am. Jur.2d, “Statutes,” §§ 184-85, 287-92.

Minn. Rules part 4515.0100 - .0500 were amended in 1996 and mostly repealed. However it is not possible to infer anything about the legislative intent from the repeals that the procedures

and definitions of Minn. Stat. §10A.07 have been modified.

For now, until there is a case decision in the area, it will be the position of this office that local officials subject to Minn. Stat. §10A.07 will be advised to comply with those procedures, and abstain from voting or participation if possible. The Lenz decision, which probably is more permissive in terms of allowing voting or participation by an official having an interest, will have less impact on each case, but will still be used with reference to each case, particularly where it appears that it is not possible for an official to abstain from voting, or to assign a matter to another official not having an interest.¹⁵

D. Charter Provision.

Section 17.04 of the Saint Paul City Charter provides:

“Except as otherwise permitted by law, no city official or employee shall knowingly be a party to or have a financial interest in any sale, lease or contract with the City.”

It goes on to provide that violation of this prohibition shall be grounds for removal from office or employment, and that contracts in violations of this section are voidable. Public funds spent may be recovered from the parties to the sale or contract and the public official employee interested in it.

This section is further developed and amplified in section 24.03(A) of the Saint Paul Administrative Code, infra.

E. Ordinance Provisions.

¹⁵One unpublished case decided by the Minnesota Court of Appeals uses the Lenz factors to determine whether the board members had an actual conflict that would disqualify them. Cartway in Sandville Township, 2000 WL 760735 (Minn. Ct. App.). In another case the court stated that in order for a law to pass, there must be a quorum of qualified voters (not those disqualified for a conflict of interest reason) and a majority of those must vote for the law. Shaw v. Minnesota Board of Teaching, 2001 WL 605096 (Minn. Ct. App.).

1. Section 24.03(A) of the Saint Paul Administrative Code provides that “. . . no city official or employee shall knowingly be a party to or have a financial interest in any sale, lease or contract with the city.”

In this ordinance, the term financial interest is broadly defined to include any interest which could yield, whether directly or indirectly, a monetary or other material benefit to the official or employee, to the spouse or any dependent of the official or employee, to the employer of the official or employee, or to any other person who resides with that official or employee. This is the most broad definition of financial interest in any ordinance or statute.

In 1998, Section 24 of the Administrative Code was amended to address the issue of a city employee also working for a private employer by adding subsection A(ii). Section 24 now addresses this issue by stating that a city employee or official who is authorized to take action in the sale, lease, or contract with the city and in situations such as zoning, street vacations, acquisition or release of real property will not take part if that would directly or “indirectly” affect his/her employer. This amendment also provides disclosure of any job offers from another employer. Section 24A(iv). It also provides that no employee after working for the city can take part in any action or work in which the City is substantially interested for a year. Section 24(iii).

However, Section 24.03(A)(3) of the ordinance expressly provides a limited exemption from the prohibition on conflicts of interest. It permits a City employee who is not a public officer under Minn. Stat. §471.87¹⁶ to have financial interest in a sale, lease or contract with respect to seven

¹⁶This provision has been revised twice: first, in order to conform its language to the removal of the authority of Councilmembers to participate in the consideration and approval of bargaining contracts relating to a unit in which they may be a member, unless they have waived financial benefit; and second, in order to remove the conflict with state law as to non-councilmembers who may be considered to be public officials. See C.F. Nos. 94-121 and 94-380, eff. April 12, 1994.

specific areas:

1. Collective bargaining agreements;
2. Sales and purchase of surplus City property;
3. Licenses;
4. Zoning variances;
5. Street variances;
6. Acquisition or grant of easements; and
7. Chapter 51 property transactions.

Both the prohibition and exceptions apply by their express terms to sales, leases or contracts.

There may be cases in which an official or employee applies for a license, zoning variance, or other government action, which does not involve and is not carried out by a sale, lease or contract. In those cases, there would not be a violation of Minn. Stat. §471.87 or Section 24.03 of the Administrative Code.

However, such an action may violate the test in Lenz v. Coon Creek Watershed District, 278 Minn. 1, 153 N.W.2d 209 (1967), which was discussed above, in which each case is determined on its individual facts. In such cases, if the official or employee abstains from taking or voting on the action, the fact of the interest will not invalidate the action taken.

2. In addition, Chapter 100 of the Administrative Code provides, for all persons appointed to City boards, commissions, task forces and committees, for the disclosure of conflicts of interest, and for abstention from voting or participation in the decisions in which the conflict occurs.

F. Typical Situations.

1. Family Relationships.

The statutes and case law relating to prohibited interests do not automatically find a violation in a contract, sale or lease with the spouse or other relative of the official. The facts must

demonstrate that there is a financial interest.¹⁷

In general, the mere fact of a relationship, such as husband-wife, parent-child, and so on, does not constitute a financial interest. Thus, if a city council contracts with the spouse of a city councilmember, that fact alone will not create an unlawful financial interest.

Almost all of the opinions of the Attorney General on this question appear to conclude that in each case there is a fact question to be resolved by the local body itself. See, e. g., Op. Atty. Gen. 90e-5, May 25, 1966, where the interest of a spouse sitting on a municipal board, which contracted with her husband's business, would or would not be a disqualifying interest depending on the facts of the case. The question is whether on all of the facts in the case, the public official has a prohibited financial interest in the contract. For example, if the facts show that the proceeds of the contract are used for general family support, or co-mingled in general family funds, then there will likely be a prohibited financial interest. See, e.g., Op. Atty. Gen. 90-C-6, July 14, 1939, and Op. Atty. Gen. 90-C-5, July 30, 1940.

2. Employee of a Company.

Despite the decision in Singewald, supra, the Attorney General concluded in 1976 that mere employment alone would not create an invalidating financial interest. The Opinion stated that a city council could enter into a contract with a company which employed a councilmember where the councilmember (a) has no ownership interest in the firm; (2) is neither an officer nor a director; (3) is compensated on a salary or hourly wage basis and receives no commissions, bonuses or other forms of contingent remuneration; and (4) is not involved in supervising the performance of the contract for the company, and has no other interest in the contract. Op. Atty. Gen. 90a-1, Oct. 7,

¹⁷Since Saint Paul is a home rule charter city, the indirect interest provisions of Minn. Stat. §412.311 do not apply to its officers and employees.

1976.

Ownership of stock shares in a company would, on the other hand, create an unlawful interest under Village of Courtland v. Courtland Elec. Co., 172 Minn. 392, 215 N.W. 673 (1927).

3. Employee of the City.

This office has already issued opinions with respect to a Councilmember currently employed as a City employee. Those opinions are related only to the specific factual situation which is raised.¹⁸

In a number of cases, there are Attorney General opinions dealing with the hiring of persons who are members of municipal boards or commissions under employment contracts for a city function. These cases are distinguishable from the situation normally faced in the City of Saint Paul with respect to employees who are in bargaining units, who do not directly contract with the City of Saint Paul, but who stand in the position of third-party beneficiaries to collective bargaining contracts between the unit and the City. See, e.g., Op. Atty. Gen. 59b-11, May 15, 1963, which opined that a member of a city golf commission, whose duties involved advice to the municipal park board about the golf course, could not be hired to manage the golf course concession at the municipal golf course.

II. DISCLOSURE REQUIREMENTS

A. State Law.

¹⁸A copy of that opinion and of a follow-up opinion are included as part of the Appendix of this memorandum. The first opinion also dealt with the issue of incompatibility of offices. The Minnesota Supreme Court in State ex rel. Hilton v. Sword, 157 Minn. 263, 264, 196 N.W. 467 (1923), stated that “Public offices are ‘incompatible’ when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both.” In the case of a Councilmember serving also as a firefighter, this office had opined that there is no incompatibility. With respect to a different job or position with the City, the result might be otherwise.

Minn. Stat. §10A.09, was amended in 1990 to include local officials from metropolitan governmental units in the seven-county area, requiring them to file statements of economic interest with the “governing body of the official’s political subdivision.”

It applies to a local official, which is defined in Minn. Stat. §10A.01, subd. 22, to mean a “person who holds elective office in a political subdivision or who is appointed to or employed in a public position in a political subdivision in which the person has authority to make, to recommend, or to vote on as a member of the governing body, major decisions regarding the expenditure or investment of public money.”

This definition will in most cases cover all of the employees listed in the City ordinance, who now do in fact file statements of economic interest with the City Clerk under the terms of the ordinance. However, it would be wise for each department and office head to review the job responsibilities of their staffs to determine whether there are any other individuals who on the basis of the particular facts of their job might meet the state definition.

State law requires disclosure of real estate holdings, and associated businesses. It is more limited than the City ordinance in that respect.

B. City Ordinance.

Section 24.03(B) of the Saint Paul Administrative Code also requires specified City officials to file statements of economic interest with the City Clerk.

It lists specified officials and job titles which are subject to the disclosure requirements. A copy of Chapter 24 is attached to this memorandum.

It requires disclosure of associated businesses, and “financial interests.” The definition of “financial interest” is broader than that in state law, and includes:

“Any interest which shall yield, directly or indirectly, a monetary or other material

benefit (other than duly authorized salary or compensation for services to the city) to the public official, the spouse of the public official and all minor children within the custody and control of the public official.”

III. ETHICAL AND GOOD GOVERNMENT PROVISIONS

A. Ex parte contacts in quasi-judicial matters.

There are a number of situations in which the City Council takes action in a judicial or quasi-judicial capacity. These most often occur when it is dealing with the rights and duties of an individual person, deciding how the laws and ordinances should be applied to the facts of the case as they affect that person.

This is in contrast to legislative and/or policy matters, which deal with the application or formulation of rules or regulations that cover all persons generally or all persons in a general class without regard to specific rights or responsibilities.

Common examples of quasi-judicial council actions are those revoking or suspending licenses, and those granting or denying individual zoning variance applications.

In general, no Councilmember should receive a private communication from or on behalf of one side of the case in a matter that is before the Council for a quasi-judicial hearing or decision. Such private communications violate the due process principle that both sides to a dispute should have the chance to present evidence, and to have the opportunity to rebut or qualify the evidence offered by the other side.

Often this due process principle is embodied in an ordinance or statute. For example, Section 310.05(c-2) of the Saint Paul Legislative Code provides:

“If a license matter has been scheduled for an adverse hearing, council members shall not discuss the license matter with each other or with any of the parties or interested persons involved in the matter unless such discussion occurs on the record during the hearings of the matter or during the council’s final deliberations of the matter.”

A more detailed provision is found in Chapter 11 of the Saint Paul Administrative Code relating to utility regulatory cases.

However, whether or not there is an ordinance or statute which forbids ex parte contacts, due process forbids ex parte contacts in all quasi-judicial decision making.¹⁹ The decision of the City Council in license, zoning, and other quasi-judicial hearings, should be made on the record of the evidence and testimony before it, and not on the basis of information that was communicated to particular members privately and out of the hearing of the other party to the case.

In the case of an inadvertent violation, or when the Councilmember receives the information under circumstances giving no hint that the information was to be about a quasi-judicial matter pending before the Council, the problem can be remedied. The other party must be afforded an opportunity to rebut and confront the information using the normal procedures for that type of matter.²⁰

B. Use of City property.

1. Political use of City property. Chapter 29 of the Saint Paul Legislative Code forbids any person from using City property for a political purpose. The definitions of “person,” “City property,” and “political purpose” are expansive and have broad coverage.

It does not apply to (a) public lands or areas which are or can be used by City permit for public meetings or political activities, or (b) those portions of public buildings which are open to and

¹⁹See Minnesota Administrative Procedure, Beck, et al., 1990, §12.2 (p.240), which states that administrative decision-makers must make their decisions on the record. Cases “may not be decided on the basis of information acquired by the decision makers from ex parte contacts.” Such contacts violate due process. The treatise cites to Nevels v. Hanlon, 656 F.2d 372, 376 (8th Cir. 1981); and other authorities.

²⁰See Simer v. Rios, 661 F.2d 655, 679 (7th Cir. 1981); and Barlau v. City of Northfield, 568 F. Supp. 181, 187 (D. Minn. 1983) (actual bias is the test of the due process violation).

used by the public, or © the civic center. Nor does it apply to the use of the telephones.²¹ Section 29.02(d).

2. City vehicles. A 1993 state law regulates the use of City-owned automobiles. Minn. Stat. §471.666. It applies to all employees and officials, including elected officials. Its basic provision limits the use of local government vehicles²² to “authorized local government business, . . . and personal use that is clearly incidental to” the government use. Section 471.666, subd. 2.

Such vehicles may be used for transportation to and from the employee’s residence only under certain criteria outlined in subdivision 3 of the statute.

3. Purchase of City property. Minn. Stat. §15.054 limits the ability of public employees or officials to purchase public property as a general rule only to purchasing at public auction after notice and as long as they are not involved in the auction or are part of the administrative or collection process of sealed responses.

C. Gifts to City officials and employees.

1. City Ordinance

Section 24.03 (c) of the Saint Paul Administrative Code contains a general prohibition against City officials or employees from receiving gifts from:

- a person, firm or corporation having business, administrative, legislative or contractual relationships with the City;
- a person, firm or corporation under circumstances that would subject the employee

²¹Please note that telephone charges for other than City or public business are the personal obligation of the person incurring them, and may result in other sanctions if the use of the telephone for such purposes is not approved in advance as a lawful use of the telephone.

²²This would cover all automobiles owned or leased by the City or the HRA, but public safety vehicles are specifically excluded from coverage. Minn. Stat. §471.666, subd. 1(a), subd. 4.

- or official to pressure or influence in doing his or her job; and
- any corporation, labor union, partnership or professional association.

From this broad coverage, a list of seven specific exceptions are outlined in Section 24.03(c)(1)(a).

They include gifts under \$50.00, campaign contributions, tickets to certain events, and meals.

Violations are misdemeanors under the ordinance.

2. Minnesota Statute §471.895

Minnesota Statute §471.895 prohibits both the giving of a gift to a local elected or appointed official, and the receipt of the gift by the official.²³ It is different from the ordinance in several respects.

First, state law prohibits the receipt of a gift from an “interested person,” who is defined as a person or representative having a “direct financial interest” in a decision the official is authorized to make. This language is not the same as the ordinance, which as noted above prohibits gifts from persons having a relationship with the City, from persons where there would be a danger of compromise or influence, and from unions, corporations and similar associations. State law may prohibit a gift when the ordinance would not. Conversely, the ordinance may in a given fact situation prohibit gifts that would not necessarily be prohibited by the statute.

Second, the definition of a gift in the statute is different from the one in the ordinance. Minn. Stat. §471.895 defines “gift” as the same as in Minn. Stat. §10A.071. This statute (which will be discussed in the next section) defines a gift as “money, real or personal property, a service, a loan, a forbearance or forgiveness or indebtedness, or a promise of future employment.” The ordinance defines a gift as any “favor, service or services, money, or thing of value.” While the ordinance may

²³The ordinance prohibits only the receipt of the gift.

be considered broader including anything of value, the recent opinions of the Campaign Finance and Disclosure Board have broadened the statute to even include situations that may be covered as exceptions by the ordinance.²⁴ The Campaign Finance and Disclosure Board does not have jurisdiction of Minn. Stat. §471.895, but the definition of a gift is based on the Minn. Stat. §10A.071 (under Board jurisdiction), therefore public officials are advised to look carefully at the advisory opinions since courts will look to the Board's definition of a gift to determine it under Minn. Stat. §471.895.

Third, the exceptions from coverage in the new statute are much narrower than those in the ordinance. There is, for example, no state law exemption for gifts up to \$50.00. There is no state law exemption for gifts from other City officers or employees. There is no exemption in the state law for free tickets to events. The only type of free meal one can accept under state law is a dinner where the official is invited to speak or answer questions or when invited to participate in a conference by a multi-state or national organization where all attendees are treated similarly, as opposed to the local ordinance under which meals may be accepted by the official.

There are other minor differences, including the definition of what is a gift.

The net result of the state law is that each official faced with the possibility of a gift will have to look at both the City ordinance and state law to determine whether to accept or reject the gift.

3. Minnesota Statute 10A.071

Minnesota Statute §10A.071 deals only with gifts by lobbyists and principals. Using

²⁴They have also included other items and benefits such as “meals and entertainment, loans of person property for less than payment of fair market value, giving preferential treatment for services, honoraria as defined in Minn. Rules, part 4501.0100, subp. 5, and payment of loans or other obligations”. *Guide to Interpretation of Minnesota Statutes 10A.071*, 2002 (p.13).

basically the same language as Minn. Stat. §471.895, the Campaign Finance and Disclosure Board has issued opinions and definitions for each of the sections. It is very likely that courts will look to the Board and apply those opinions to Minn. Stat. §471.895.

The Board has interpreted the exceptions are much more narrowly than the language would appear to support. In some cases the exceptions in Minn. Stat. §10A.071 will be in direct conflict with the city ordinance. The first exception deals with campaign contributions as defined under Minn. Stat. §10A.01. The second exception dealing with “services to assist an official in the performance of official duties” does not include complementary registration (Opinion #162, 166), personal tax guides for legislators (Opinion #203), and complimentary professional services (Opinion #167, 250).²⁵

The third and sixth exceptions allow for “services of insignificant monetary value,” or “informational material of unexceptional value.” Minn. Stat. §10A.071(a)(3), (6). The Board has not defined the monetary limit that would make something a gift. There are a number of advisory opinions that suggest the value has to be very low. Opinion #317 allowed a history book by a corporation to be given to the officials as a gift because the book was also going to be provided to the general public for free. Plaques valued at \$20 to \$100 were not considered of insignificant value to fall under the exception (Opinion #238). However, informational calendars, mugs, and a computer mouse pad were considered of an insignificant value.²⁶ The fourth exception, Minn. Stat. § 10A.071(a)(4), allows for plaques for services related to a field of specialty or a charitable cause

²⁵*Guide to Interpretation of Minnesota Statutes 10A.071*, 2002 (p. 10-11).

²⁶*Guide to Interpretation of Minnesota Statutes 10A.071*, 2002 (p. 13), Opinions #235, 337, 226.

and may not be for official duties (such as voting records).²⁷ The fifth exception allows gifts of “a trinket or memento costing \$5 or less.” Minn. Stat. § 10A.071(a)(5).

The exception found in Minn. Stat. § 10A.071(a)(7) for food or beverage given at a reception where the official is to speak or answer questions have also been limited in its interpretation by the Board. The Board, in its advisory opinions, has stated the public official must take part in a formal program where he or she incurs the obligation to participate and not simply to be present to answer casual questions.²⁸

The exception for gift given because of membership to a group also has strict factors in order to be applied. Minn. Stat. §10A.071 subd. 3(b)(1). The Board has said that the membership must be formal such as payment of dues, a formal process, and the gift must include all the members of the group.²⁹

The interpretation of the exceptions and the definitions by the Board are crucial in two additional respects. The Board in two opinions has interpreted the statute broadly to include social gifts.³⁰ The Board also issued an opinion dealing with making gifts to the city retroactively. That opinion was challenged in Kelly v. Campaign Finance and Public Disclosure Board, 679 N.W.2d

²⁷*Guide to Interpretation of Minnesota Statutes 10A.071*, 2002 (p. 11), Opinion #218.

²⁸*Guide to Interpretation of Minnesota Statutes 10A.071*, 2002 (p. 8), Opinions #252, 259, 278.

²⁹*Guide to Interpretation of Minnesota Statutes 10A.071*, 2002 (p. 10), Opinions #190, 210, 258, 335.

³⁰*Guide to Interpretation of Minnesota Statutes 10A.071*, 2002 (p. 12), Opinions #217, 232, 330: a lobbyist may not give a wedding gift to an official, may not provide refreshments to officials attending a baby shower not give a gift, an employer may not give a party to an employee leaving his service for public office.

178 (Minn. Ct. App. 2004), and was reversed in favor of the Mayor.³¹ The court stated that under Minn. Stat. §465.03, gifts made to a city do not violate Minn. Stat. §10A.071 even if they are later given to public officials to use for a public purpose. Id. at 180. The court does mention that the Board can determine how Minn. Stat. §10A.071 and Minn. Stat. §465.03 interact with one another through opinions and rule making. Id. at 181.

In response to Kelly, the Board adopted Minn. Rule § 4512.0200, which prohibits the use by an official of a gift to a metropolitan governmental unit until the gift has been formally accepted by official action of the governing body. 30 State Register 903. Thus Kelly still stands for the proposition that the City has the authority to accept a gift that is ultimately used by a city official for city purposes, but such a gift can no longer be used before the acceptance of the gift. Given the textual similarities between Minn. Stat. § 10A.071 and Minn. Stat. § 471.895, we advise that this new rule should be applied in the case of gifts from “interested persons” as well.

Minnesota Statute §10A.071 also limits the gifts that City lobbyists can give to legislators and state administrative officials in the course and scope of their duties. All such officials should study the existing law and new statute carefully to determine how those provisions apply to their work.

D. Solicitation of Funds by City Officials

Chapter 41 of the Saint Paul Administrative Code in general prohibits any City official³² or employee from soliciting funds or property for “employer-related or occupational-related purposes.”

³¹The Board sought review by the Supreme Court of Minnesota but review was denied. 679 N.W.2d 178 (Minn. Ct. App. 2004) review denied (July 20, 2004)

³²The Mayor and Councilmembers are excluded from the definition of City officer or employee, but are subject to limitations on their solicitations in Section 41.04. These relate to dollar amount and prior authorization by the Mayor and/or Council.

This phrase is not further defined.

This does not prevent the receipt by the City of donations, nor applications for grants or assistance by the City to other governmental agencies or foundations, nor the hiring of fund-raising agencies by contract to raise funds for public purposes.

There are many exceptions, and therefore the facts of each proposed solicitation would have to be checked against the provisions of the ordinance.

E. City lobbyists

Section 24.03(D) of the Saint Paul Administrative Code prohibits lobbyists in the employ of the City from lobbying the City or City Councilmembers for other clients whose positions are in conflict with City policies or positions.

F. Employee reports of violations (“Whistle Blower Law”)

Chapter 42 of the Saint Paul Administrative Code provides protections against disciplinary action for employees who (1) report violations or suspected violations of law, (2) cooperate with a public investigation or hearing, (3) refuse to obey an order or directive that violates the law, or (4) act in relation to the ethical practices of board (not now functioning).

Similar provisions are also found in Minn. Stat. §181.931-.935.

G. Honoraria, Per Diem, and Other Fees

1973 Minn. Laws, ch. 691, §4, is special legislation which provide the City Council the authority to fix its term of office and compensation as well as the compensation of other elected officials. Subd. 3 of this legislation provides as follows:

“No elected official shall receive any other compensation than that provided for pursuant to this section for the performance of his official duties and such compensation shall include compensation for all services rendered in any office of employment for said city. All fees, moneys or remuneration of whatever kind that accrue to any official in his elected capacity shall be reported to the city council and

paid monthly into the treasury of the city.” (Emphasis added.)

The City Attorney’s Office has previously opined that a subsequent 1991 Chapter amendment³³ creating a part-time Council supersedes that part of subd. 3 above that could be construed to prohibit Councilmembers from receiving compensation for other employment by the City. In all other respects, the provisions of 1973 Minn. Laws, Ch. 691, §4, subd. 3, remain in force and effect, particularly as they govern compensation for individuals serving as elected officials for the City.

Section 32.01, Saint Paul Administrative Code, provides for the salary and compensation of the Mayor and Council. Any monies in excess of those amounts that “accrue to any official in his elected capacity shall be reported to the City Council and paid monthly into the treasury of the City.” See 1973 Minn. Laws, Ch. 691, §4, subd. 3.

Consequently, the retention of honoraria, per diem, and other similar fees depends on whether the payments accrue to the elected official as a result of their status as elected officials. For example, assume a Councilmember is asked to appear at a meeting of a local charitable or nonprofit organization to participate in a discussion panel about future economic development projects in Saint Paul neighborhoods. In that case, the Councilmember is present as an elected official for the City, and any funds paid for this appearance, if accepted, must go to the City treasury.

All elected officials will have to exercise their best judgment and decide each payment situation on this basis.

³³Council File No. 91-1645, effective 1-3-94.

APPENDIX

Minnesota Statutes

§10A.01, subd. 22
§10A.07
§10A.071
§10A.09
§181.931-.935
§471.666
§471.87-.89
§471.895

Saint Paul Legislative Code

Chapter 29
Chapter 42
Chapter 310.05

Saint Paul Administrative Code

Chapter 11
Chapter 24
Chapter 23.02
Chapter 41
Chapter 100
Council File No. 91-121
[amending §§23.02, 24.04(A)]
Council File No. 93-380
[amending the same sections]

Office of the City Attorney Opinions (2)

[Councilmember as firefighter]
Marie Grimm Opinion

Lenz v. Coon Creek Watershed District, 278 Minn. 1, 153 N.W.2d 209 (1967).