

**LETTER OPINION
2007-L-12**

July 20, 2007

Mr. Richard J. Riha
Burleigh County State's Attorney
514 East Thayer Avenue
Bismarck, ND 58501-4413

Dear Mr. Riha:

Thank you for your letter raising several questions about the application of the conflict of interest statute for political subdivision officials, N.D.C.C. § 44-04-22. For the reasons stated below, it is my opinion that N.D.C.C. § 44-04-22 only applies to personal or pecuniary interests that are direct and substantial; that whether a conflict of interest arises under this statute is usually to be determined by the official involved with the assistance of the attorney for the political subdivision, or if not resolved, then by the governing body of the political subdivision. Under the facts and circumstances of this particular case, the conflict statute is not applicable and the commissioner has a duty to vote on the question.

ANALYSIS

According to information provided by you and other county officials to a member of my staff, the county has been dealing with an issue of whether to pave a certain road. Concerns have been raised that a landfill located on this road has increased the associated truck traffic allegedly causing debris on the road and tire damage. Concerns about safety and dust have also been publicly aired. The paving was to be paid for by a combination of special assessments on the adjoining landowners, contributions by the landfill owner and two townships, and a contribution by the county.

The Burleigh County Commission ("Commission") took up the question of paving the road at its June 4, 2007, meeting. At this meeting, the Commission received an updated estimate of the cost of the project which significantly exceeded the original estimated cost. This issue was discussed along with a proposal to have the county pay the additional cost. You indicate that after the Commission discussed the issue, one of the commissioners stated he had a conflict of interest and removed himself from the Commission table.

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The purported conflict related to the fact that the county commissioner in question previously lived in the area of the road project, and his brother, sister, and cousins currently own land adjacent to the road and reside near the road or on the adjacent land. The commissioner, who is a real estate agent, also perceived that a conflict existed because of the potential for increased sales commissions on the possible sale of additional 40-acre tracts owned by his brother if the road is paved. The commissioner has sold and received commission on the sale of three 40-acre tracts owned by his brother in the past three years. Paving of the road would likely make land in the area more valuable. In addition, the commissioner may sell more lots for his brother in the future if his brother decides to sell more land and engages the commissioner as his agent, potentially resulting in higher commissions if the road is paved.

You indicate that after the commissioner removed himself from the table and the Commission voted on the question of moving ahead with paving the road with the county paying for the additional cost, the vote was a 2-2 tie. The matter was again placed on the agenda for the June 18, 2007, meeting, at which time the Commission tabled the matter pending the receipt of an opinion from this office, again with the one commissioner abstaining. A concern was discussed that N.D.C.C. § 11-11-07¹ would require the paving question to be repeatedly deferred to the next meeting if a vote on the matter continued to result in a tie.

You first ask who is to make the determination on whether a conflict of interest exists under N.D.C.C. § 44-04-22, which provides as follows:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

I addressed that question in a previous opinion as follows:

¹ N.D.C.C. § 11-11-07 provides:

A majority of the members elected or appointed to the board of county commissioners shall constitute a quorum for the transaction of its business. When the board is equally divided on any question, it shall defer its decision thereon until its next meeting, at which time the matter shall be decided by a majority of the members of the board.

Obviously, the existence of the regulated relationship under N.D.C.C. § 44-04-22 is highly fact specific. It is an issue that public officials should review closely with the city's attorney. If that review is not dispositive, then I suggest that whether a member may participate in a matter be decided by a majority vote of the remainder of the city governing body.²

In the present case, the commissioner in question evidently believes he has a conflict of interest under the statute. You indicate in your letter that the other commissioners seem to concur, although no formal declaration to that effect has been made.

However, as you correctly note in your letter, the threshold question is whether a conflict actually exists within the meaning of the statute. Because of the lack of a determination on this question and assuming for the purpose of this opinion that the facts provided are accurate and not affected by other additional information, I can offer an answer to the threshold question.³

Section 44-04-22, N.D.C.C., "does not apply to all interests a city governing board member may have in a 'matter' before a board. It applies to those interests in the matter that are 'direct and substantial' and 'personal or pecuniary.'"⁴ These terms from the statute have been defined as follows:

Direct means "operating by an immediate connection or relation, instead of operating through a medium." Black's Law Dictionary 459 (6th ed. 1990). "A direct interest, such as would render the interested party incompetent to testify in regard to the matter, is an interest which is certain, and not contingent or doubtful." Id. at 460. Substantial means "[o]f real worth and importance; of considerable value; . . . something worthwhile as distinguished from something without value or merely nominal." Id. at 1428, citing Seglem v. Skelly Oil Co., 65 P.2d 553, 554 (Kan. 1937); see also Miller v. Commissioner of Internal Revenue, 84 F.2d 415, 418 (6th Cir. 1936) ("In

² N.D.A.G. 2002-L-54; see also N.D.A.G. 95-F-06 ("Whether a member of a governing body has a 'direct and substantial personal or pecuniary interest' is very fact specific. See e.g., State v. Robinson, 2 N.W.2d 183, 190 (N.D. 1942). Most questions of this type can be answered with the assistance of the city attorney. However, if the issue is still in doubt, I suggest that whether a member may participate on a matter be decided by a majority of the rest of the body under N.D.C.C. § 44-04-22.").

³ See N.D.A.G. 96-L-235; N.D.A.G. 99-L-78 ("Whether a conflict of interest exists is usually a question of fact to be resolved by the local governing body rather than in an Attorney General's opinion. However, when provided sufficient facts, this office has issued an opinion on whether a conflict exists in a given situation.").

⁴ N.D.A.G. 2002-L-54.

the commonly accepted legal sense, a substantial interest is something more than a merely nominal interest. . . ."); Yetman v. Naumann, 492 P.2d 1252, 1255 (Ariz. Ct. Ap. 1972) ("substantial interest" defined in statute as any interest other than a "remote interest"). Personal means "[a]ppertaining to the person; belonging to an individual; limited to the person." Black's Law Dictionary at 1143. A pecuniary interest is "[a] direct interest related to money in an action or case." Id. at 1131. It is my opinion that the terms "direct," "substantial," "personal," and "pecuniary," as used in N.D.C.C. § 44-04-22, have the meanings indicated above.⁵

In N.D.A.G. 95-F-06, a question was raised about whether an employee of a state university who was also a member of a city governing body could vote on a matter relating to the university. The opinion noted:

Applying these definitions in light of the purpose behind the enactment of N.D.C.C. § 44-04-12 [sic], it does not appear that the member described in this opinion would have a "direct and substantial personal or pecuniary interest" that would prohibit the member from voting without majority vote. First, as explained above, this opinion assumes that the member's compensation or job security is not dependent on the city governing body's decision, therefore the member's involvement cannot be subject to personal financial motivation and is not a "direct and substantial pecuniary interest."

Second, although it is a close question, the member does not appear to have a direct and substantial interest, i.e. an important or significant interest, under these circumstances. . . . There is no suggestion that the member will receive significant personal or financial benefit from the construction of the facility. Under the circumstances described in this opinion, it appears that any benefit the member could possibly receive from the construction of the facility is not significant and therefore not a "substantial interest."⁶

(Emphasis supplied.)

In this case, since the commissioner neither resides nor owns land near the paving project, it cannot reasonably be said that he has a direct and substantial personal or pecuniary

⁵ N.D.A.G. 2002-L-54 (quoting N.D.A.G. 95-F-06).

⁶ N.D.A.G. 95-F-06; see also Hughes v. Jorgenson, 50 P.3d 821 (Ariz. 2002) (neither sheriff nor sibling had a substantial interest in possible prosecution of the sibling for purposes of a conflict of interest statute (prohibiting public officers from participating in decision if they or their relative had substantial interest in that decision) and sheriff's participation in criminal investigation of sibling did not violate conflict of interest statute).

interest in the outcome of a vote on whether to pave the road. It is difficult to see what significant or important personal or monetary benefit or detriment the commissioner would receive from paving the road. Although it may well be that the commissioner is uncomfortable with voting on the matter or possibly believes that voting on the matter may create an appearance of impropriety, those are not sufficient reasons under the conflict statute. The statute is very specific in requiring a direct and substantial⁷ personal or pecuniary interest; it does not deal with such matters as an appearance of impropriety or a potential for a conflict. Nor is the statute by its terms concerned with former interests such as past residence in an area or former ownership of land. The fact that the commissioner's relatives may own land or reside in the area or that a relative may engage the commissioner in his capacity as a realtor to sell land in the area at some unspecified time in the future, while relevant to consider, does not, without more, rise to the level of a direct, immediate, and substantial personal interest on the part of the commissioner.⁸

In N.D.A.G. 96-F-11 a similar conflict of interest statute applicable to the Public Service Commission was construed.⁹ That statute provided that a Public Service Commission commissioner "shall not participate in any hearing or proceeding in which that commissioner has any direct personal pecuniary interest."¹⁰ The opinion concluded that the conflict statute did not prohibit a commissioner from participating in a proceeding in which one of the corporate parties employed the commissioner's adult child and the spouse of the adult child and in which the commissioner's child owned stock. The opinion stated that under the facts involved, the commissioner "does not have a direct personal pecuniary interest" which would prohibit the commissioner from participating.

Because I believe that the commissioner does not have a conflict as contemplated by N.D.C.C. § 44-04-22, it must be determined what course of action is available to the commissioner.

⁷ The words "direct and substantial" did not appear in the original draft of the bill creating N.D.C.C. § 44-04-22. The bill was specifically amended to include those terms at the suggestion of several of the witnesses testifying on the bill. See Hearing on S.B. 2383 Before the Senate Comm. on Government and Veterans Affairs, 1995 N.D. Leg. (Feb. 3) (Statements of Bill Delmore and Lyle Witham).

⁸ Compare N.D.A.G. 96-L-174 ("This office has previously defined 'interest' as a pecuniary or proprietary interest by which a person will gain or lose something, rather than general sympathy or concern."). Even a vote by the commissioner for the paving project because of the interests of relatives would not cause him to necessarily personally gain or lose something significant; while he may have sympathy or concern on the effect of the vote on his relatives or on how the public might perceive such a vote, those concerns do not necessarily gain or lose the commissioner anything of personal or monetary significance.

⁹ See N.D.C.C. § 49-01-07.

¹⁰ Id.

Unless a statute applies that would require or permit abstention, a member of a city governing body who is present has a duty to vote. Northwestern Bell Telephone Co. v. Board of Commissioners of City of Fargo, 211 N.W.2d 399, 403 (N.D. 1973).

Likewise, unless a statute like N.D.C.C. § 44-04-22 applies that would require or permit abstention, a member of a county governing body has a duty to vote.

Based on the foregoing, it is my opinion that N.D.C.C. § 44-04-22 only applies to personal or pecuniary interests that are direct and substantial; that whether a conflict of interest arises under this statute is usually to be determined by the official involved with the assistance of the attorney for the political subdivision, or if not resolved, then by the governing body of the political subdivision. Under the facts and circumstances of this particular case, the conflict statute is not applicable and the commissioner has a duty to vote on the question.

Because I have determined that N.D.C.C. § 44-04-22 does not apply under the facts and circumstances of this particular case, it is unnecessary to address the other questions you raised; I do not need to determine whether it generally mandates a vote by the remaining commissioners on whether to allow a conflicted commissioner to vote. Also, because the commissioner in question may not abstain from voting here, it is unnecessary to decide if N.D.C.C. § 11-11-07 would require repeatedly deferring the question to the next meeting because of tie votes.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹¹

¹¹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).