

**LETTER OPINION  
2008-L-07**

May 20, 2008

Mr. John T. Shockley  
Harwood City Attorney  
PO Box 458  
West Fargo, ND 58078-0458

Dear Mr. Shockley:

Thank you for your letter inquiring whether members of a city council, who are affiliated with a nonprofit corporation that is proposing to donate a community center to the city on the condition that the city assumes the mortgage on the building, have a conflict of interest under N.D.C.C. § 44-04-22. For the reasons explained below, it is my opinion that, under the facts of this case, N.D.C.C. § 44-04-22 is inapplicable and the members of the city council have a duty to vote on the question.

**ANALYSIS**

According to the information you provided to this office, the city of Harwood ("City") is considering entering into an agreement with the Harwood Community Center committee ("HCC").<sup>1</sup> The HCC is a nonprofit corporation that owns the Harwood Community Center. Its main functions are to manage the community center and promote community events. Currently, the City leases office space in the community center, where it conducts activities normally associated with a city hall. The majority of the rest of the community center is used for community activities.<sup>2</sup> The HCC has offered to donate the community center to the City on the condition that the City assumes the mortgage on the building.<sup>3</sup> If the City were to accept the transfer, the HCC would

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<sup>1</sup> In your letter you refer to the "Harwood Community Center Committee" as the name of the nonprofit corporation. However, the Articles of Incorporation on file with the Secretary of State list the name of the corporation as simply "Harwood Community Center."

<sup>2</sup> A private business also leases office space in the community center.

<sup>3</sup> In your letter you state that, under the HCC's proposal, the City will negotiate with the HCC for the potential ownership of personal property in the community center. For the purposes of this opinion, I will assume that the transfer of any personal property to the City will be a donation and that no competitive bidding requirements apply to the transaction. See N.D.C.C. § 40-05-01(52) (the governing body of a municipality has the power "[t]o provide that supplies needed for the use of the municipality shall be furnished by contract let to the lowest responsible bidder").

continue to exist as a nonprofit corporation but would no longer be responsible for managing the community center. After the transfer, the HCC would still be able to use space in the community center, but, like any other group, would have to get the City's permission.

The City has a council form of government.<sup>4</sup> The city council consists of four council members. The mayor also sits on the council but only votes in the event of a tie.<sup>5</sup> Three of the council members are affiliated with the HCC in some way. One council member is a director, another is an officer as well as a director, and a third council member's wife is an officer. The HCC does not compensate its directors and officers, and you state in your letter that you have been told that the council members affiliated with the HCC "will not personally receive any compensation, whether direct or indirect" from the transfer of the building. However, the mayor is concerned that these council members might have a conflict of interest in determining whether the City should accept the HCC's offer to donate the community center.

Section 44-04-22, N.D.C.C., provides:

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.

As I explained in an earlier opinion, "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."<sup>6</sup> Where, as here, there is a lack of determination on the question, I may offer an opinion as to whether a conflict exists within the meaning of the statute.<sup>7</sup> My opinion is based on the facts you presented to this office, which I assume are accurate and unaffected by additional information.

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."<sup>8</sup> It "only applies to personal or

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<sup>4</sup> See N.D.C.C. ch. 40-08.

<sup>5</sup> See N.D.C.C. § 40-08-18.

<sup>6</sup> N.D.A.G. 2007-L-12.

<sup>7</sup> *Id.*

<sup>8</sup> N.D.A.G. 2002-L-54.

pecuniary interests that are direct and substantial.”<sup>9</sup> The terms used in N.D.C.C. § 44-04-22 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 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.<sup>10</sup>

In this case, it cannot reasonably be said that the city council members have a personal or pecuniary interest that is direct and substantial.<sup>11</sup>

First, there is no indication that the council members’ involvement is subject to personal financial motivation. A nonprofit corporation’s members do not have a personal stake in its gains or losses because a nonprofit corporation cannot directly or indirectly make payments to its members, unless the members are “nonprofit organizations or subdivisions, units, or agencies of the United States, a state, or a local government.”<sup>12</sup> So, even assuming that the HCC will financially benefit if the City assumes the mortgage on the community center,<sup>13</sup> the HCC may not pass this benefit onto its members. Thus, the HCC’s directors and officers, who are presumably members of the nonprofit corporation, do not have a personal financial interest in the transaction based on their status as members.<sup>14</sup> And, because the HCC does not compensate its directors and officers for their services, there is no concern that their compensation is

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<sup>9</sup> N.D.A.G. 2007-L-12.

<sup>10</sup> N.D.A.G. 2002-L-54 (quoting N.D.A.G. 95-F-06).

<sup>11</sup> N.D.A.G. 2007-L-12.

<sup>12</sup> N.D.C.C. § 10-33-04.

<sup>13</sup> *Old Colony Trust Co. v. Comm’r*, 279 U.S. 716, 729 (1929) (third party’s payment of a person’s legal obligation is taxable income to that person).

<sup>14</sup> *Cf. State v. Robinson*, 2 N.W.2d 183, 189 (N.D. 1942) (“The interest of a stockholder in a [business] corporation is a personal interest.”).

dependent on the council's decision.<sup>15</sup> Therefore, based on the facts presented, it cannot reasonably be said that the council members have a direct and substantial pecuniary interest in the transaction, due either to their own or a spouse's affiliation with the HCC.<sup>16</sup> Other states' Attorneys General have reached similar conclusions.<sup>17</sup>

The question then remains as to whether the council members otherwise have a personal interest in the transaction that is both direct and substantial. Although it is unclear why exactly the HCC has decided to transfer the building, there is no indication that, as a result of the transfer, its directors and officers will gain or lose anything of personal significance. Although they are presumably concerned about the welfare of the HCC, this does not, without more, rise to the level of a direct and substantial personal interest.<sup>18</sup> Therefore, based on the facts presented, it cannot reasonably be said that the council members have a direct and substantial personal interest in the transaction, due either to their own or a spouse's affiliation with the HCC.<sup>19</sup>

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<sup>15</sup> See N.D.A.G. 95-F-06 (employee was not prohibited from voting as a member of a city governing body on an issue affecting the employer based, in part, on the fact that the member's compensation or job security was not dependent on the city governing body's decision); cf. Tenn. Op. Atty. Gen. no. 03-120, 2003 WL 22321832 (indicating that county commissioners who served on board of directors of nonprofit corporation would have pecuniary interest in sale of county assets to corporation if monthly fee paid to directors increased as a result of the transaction).

<sup>16</sup> Similarly, it cannot be reasonably said, under these facts and circumstances, that the council members would be in violation of N.D.C.C. § 12.1-13-03 which prohibits a public servant with contracting authority to voluntarily become interested individually in a sale or contract, whether directly or indirectly.

<sup>17</sup> See Tenn. Op. Atty. Gen. no. 98-112, 1998 WL 423974 (county commissioners did not have financial interest in contract between the county and volunteer fire department when three of the commissioners were volunteer fire fighters and one also served as treasurer because none of them received any pay or fringe benefits for the services they provided to the volunteer fire department); Tex. Op. Atty. Gen. no. JM-1065, 1989 WL 430714 (city council member who served on board of directors of nonprofit corporation did not have substantial financial interest in contract between the city and corporation where he did not receive compensation from corporation but was only reimbursed for expenses and given token gifts); Ariz. Op. Atty. Gen. no. 185-052, 1985 WL 70268 (member of state parks board who served on governing bodies of park-related groups did not have substantial financial interest in the groups' affairs because participation with groups was "on an entirely voluntary basis"); Ky. Op. Atty. Gen. no. 78-337, 1978 WL 26381 (member of board of city trustees who was on board of directors of volunteer fire department had no financial interest in lease agreement between city and volunteer fire department).

<sup>18</sup> See N.D.A.G. 2007-L-12 (a county commissioner's sympathy or concern for his relatives who lived near proposed paving project did not amount to a direct and substantial personal interest in the matter).

<sup>19</sup> Likewise, it cannot be reasonably said that the council members would be in violation of N.D.C.C. § 40-13-05.1 which makes it an infraction to fail to disclose any direct or indirect personal interest in any contract requiring the expenditure of public funds.

LETTER OPINION 2008-L-07

May 20, 2008

Page 5

In conclusion, I believe that the council members do not have a conflict of interest under N.D.C.C. § 44-04-22. Therefore, under the facts and circumstances present here, the council members will have a duty to vote on whether the City will accept the donation of the community center.<sup>20</sup> Because I have determined that N.D.C.C. § 44-04-22 does not apply under the circumstances and facts of this particular case, it is unnecessary to address your questions regarding the voting procedure that members of a city governing body should follow when one or more of them have a conflict of interest under that statute.

Sincerely,

Wayne Stenehjem  
Attorney General

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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.<sup>21</sup>

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<sup>20</sup> N.D.A.G. 2007-L-12; see Northwestern Bell Telephone Co. v. Board of Commissioners, 211 N.W.2d 399, 404 (N.D. 1973) (member of governmental body who is present has a duty to vote unless excused by law).

<sup>21</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).