

## **COMMON LAW CONFLICTS OF INTEREST**

### **WHEN IS A SUPERVISOR DISQUALIFIED FROM PARTICIPATING IN A DECISION?**

Occasionally, a question is raised regarding whether a public officer may participate in the decision on a matter before the board when the supervisor has a direct interest in the outcome of the matter. If an interest exists that is significant enough to disqualify the official, he or she may not participate in making the decision.

Questions of disqualification are difficult to answer because they are fact-based and are somewhat subjective. Neither the legislature nor the courts have created hard and fast rules regarding common law disqualification. Instead, a few broadly worded statutes and judicially created factors and interpretations guide this area of law.

This resource reviews court decisions on that have addressed this issue to help towns resolve questions of disqualification when they arise.

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#### **I. WHICH OFFICIALS ARE AFFECTED?**

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Because disqualification is related to the eligibility of a public official to participate in deciding on a matter, it seems clear that only officials that have decision-making authority are subject to disqualification.<sup>1</sup> Since supervisors are the only officials on town boards that are authorized to make decisions, the question of disqualification will usually only apply to supervisors.<sup>2</sup> However, any “public official” participating in a decision must consider the

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<sup>1</sup> The question of disqualifying a non-decision maker was briefly discussed in the unpublished opinion of *Elm Lake Controlled Impoundment Project, Matter of*, 1988 WL 37473 (Minn. Ct. App. 1988).

<sup>2</sup> Town clerks are authorized to participate in the decision on who is appointed to fill a supervisor vacancy. Minn. Stat. § 367.03, subd. 6.

question of disqualification.<sup>3</sup> For example, members of a planning commission, as one of the cases discussed in this outline points out, may be subject to disqualification.

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## II. DETERMINING DISQUALIFICATION

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Public officials must decide for themselves whether they are disqualified from participating in a vote. The other supervisors cannot determine another member's interest and prevent them from voting. The other members, as well as members of the public, may raise a question of disqualification, but may not directly interfere with the official's participation short of bringing the issue to district court. Even then, such challenges are usually only appropriate after the decision has been made since the official's participation may not have mattered to the result.

There are at least two steps involved in deciding whether a public official is disqualified from being part of the decision-making process. The first is to ask whether the official has a direct interest in the outcome of the decision. If no interest exists, then there is no disqualification. However, if a direct interest is found, it must be determined whether the interest is significant enough to disqualify the official. If the interest is financial, the statutory prohibitions regarding contracting with one's own board must also be considered.

### A. Does an Interest Exist?

This is a base line question asked to determine whether disqualification is even an issue in a situation. It seems clear that to qualify as an interest worthy of examination, it must be greater than that generally shared by town residents. Otherwise an interest could be claimed in every situation. That is why the courts typically refer to "direct interests" when discussing disqualification.

There are no set criteria established for identifying exactly when an interest is present. Therefore, an official must use his or her own judgment to evaluate the factors that could support a claim that a direct interest exists. Because of the potential of a decision being voided if disqualification is found, if there is any doubt, officials should answer this first question in the affirmative.

Financial or pecuniary interests are easier to identify than non-pecuniary interests. Pecuniary interests are more likely to result in a challenge for disqualification and be more scrutinized by the courts. This arises from the fact that direct and indirect interests in contracts with one's own board are prohibited. Officials must also consider the appearance of impropriety that may arise even though a direct interest does not exist.

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<sup>3</sup> See *Mc Catkin v. City of St. Paul*, 216 N.W.2d 137, 139 (Minn. 1974) for a discussion on what qualifies as a public official and the related question of what constitutes a "Public office."

## **B. Does the Interest Disqualify the Official?**

Once a direct interest is identified, the official must examine whether it rises to the level of a disqualifying interest. Each question of disqualification must be decided on the facts of the situation. The Minnesota Supreme Court, in *Lenz v. Coon Creek Watershed District*,<sup>4</sup> set out the following factors that should be considered:

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 ensure that the officials will not act arbitrarily to further their selfish interests.<sup>5</sup>

If after going through this analysis the official decides that he or she is disqualified, a brief statement of the disqualification should be included in the minutes to explain the reason for the disqualification. As will be pointed out later, this explanation is important in determining how to tally the votes.

Officials should also keep in mind that courts will usually be reluctant to interfere with their decision to disqualify themselves.

### **i. Factors Applied**

In *Lenz*, the court addressed a challenge to the decision of the Board of Managers of the Coon Creek Watershed District to proceed with a drainage ditch improvement project. The County Commissioner of Anoka County petitioned for the project. One of the arguments raised was that the decision of the Board of Managers “must be set aside because the chairman of the county board and four of the five managers owned land affected and benefited by the proposed improvement.”<sup>6</sup> The court recognized Minnesota’s courts had not previously decided the issue of disqualifying public officials from participating in proceedings in a decision-making capacity. The absence of a rule on such matters prompted the court to set out factors to be used in resolving these questions.

It is important to note that the court expressly stopped short of creating a per se disqualification rule. The court understood that the situations in which the question of disqualification could be raised are too varied to establish automatic disqualification criteria.

When the court applied the factors it set out to the fact of the case, it found the officials were not disqualified.<sup>7</sup> The court recognized that the managers were statutorily required to be residents of the district. As such, a very good chance existed that any large improvement would

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<sup>4</sup> *Lenz v. Coon Creek Watershed District*, 153 N.W.2d 209, 219 (Minn. 1967).

<sup>5</sup> *Id.* at 219.

<sup>6</sup> *Id.*

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

necessarily benefit lands owned by the managers.<sup>8</sup> Furthermore, a public hearing was required before the managers made their decision, and various opportunities existed to have the decision reviewed by the courts.

In *Nolan v. City of Eden Prairie*,<sup>9</sup> the city's decision to approval of a variance was challenged on the basis on a claimed disqualifying interest of a city council member. The city council vote on the variance was 3 to 2 in favor of granting the variance. The challenger alleged the variance failed because one of the city council members voting on the question was disqualified because he was connected to the law firm that represented the applicant. The council member was a brother to someone in the firm and shared office space with the firm. After the court pointed out that the council member did not know that his brother's firm was representing the applicant until the day of the vote, the court found no disqualifying interest. It said that even if the council member's connection to the firm was considered a direct interest, applying the Lenz factors revealed that he was not disqualified. He had no obvious pecuniary interest and was not involved in any contractual way to the variance or the representation. "We conclude that there is no evidence supporting any reasonable argument that a conflict occurred here."

In *Tp. Bd. of Lake Valley Tp., Traverse Cty. v. Lewis*,<sup>10</sup> the court reviewed a claim that a town supervisor's participation in the initial decision to circulate a petition to establish a town road invalidated the board's order establishing the road. The court used the factors from Lenz and decided that such involvement alone did not disqualify the supervisor from acting in a decision-making capacity on the matter.<sup>11</sup> Decisions to create a road are by their very nature of interest to all citizens including town board members. "And those supervisors are often in the best position to be aware of the need for a town road." The supervisors had no pecuniary interest in the establishment of the road and appeal to the district court was available.

In *Rowell v. Board of Adjustment of the City of Moorhead*,<sup>12</sup> city residents challenged the decision of the Board of Adjustment of the City of Moorhead granting a church a zoning variance. One of the arguments raised claimed that one of four board members that voted for the variance was disqualified because he was a financially contributing member of the church. Being disqualified, the argument went, the variance should have failed since the board no longer had the necessary four affirmative votes.

The court rejected the argument, finding that the nature of the pecuniary interest was such that it could not have influenced the board member.<sup>13</sup> While the board member was found to have a non-pecuniary interest in the general welfare of the church, the interest was not likely to be contrary to the interest of the public. Disqualifying public officials in such cases would

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<sup>8</sup> *Id.* at 220.

<sup>9</sup> *Nolan v. City of Eden Prairie*, 610 N.W.2d 697 (Minn. App. 2000).

<sup>10</sup> *Tp. Bd. of Lake Valley Tp., Traverse Cty. v. Lewis*, 234 N.W.2d 815 (Minn. 1975).

<sup>11</sup> *Id.* at 819.

<sup>12</sup> *Rowell v. Board of Adjustment of the City of Moorhead*, 446 N.W.2d 917 (Minn. Ct. App. 1989).

<sup>13</sup> *Id.* at 921.

“unnecessarily tie the hands” of local agencies. The court recognized the problem that would occur in small communities where the likelihood of such involvement was greater. This line of reasoning is especially relevant and important to towns.

### **C. Conflicts Based on a Financial Interest**

When a public official has a financial interest in a matter, the statutory restrictions regarding public contract have been raised in reaching a decision on the disqualification issue. Local officials are prohibited from having a direct or indirect interest in a contract made by the board on which they serve. Violating the prohibition could result in prosecution for a misdemeanor or gross misdemeanor and forfeiture of the office. In some cases, the courts have used the conflict prohibitions in conjunction with the disqualifying factors in finding that an official was prohibited from participating in a decision. The Minnesota Supreme Court’s decision in *E.T.O. v. Town of Marion*,<sup>14</sup> is perhaps the best example of this connection.

In *E.T.O.*, the owner of a bar challenged a town board’s decision to not approve the renewal of his liquor license. One aspect of the challenge was a claim that one of the supervisors was ineligible to vote based on his interest in the outcome. The challenged supervisor owned property next to that bar and had previously stated that the liquor license devalued his property by \$100,000.<sup>15</sup>

The court started its analysis with the factors from *Lenz*, but then expanded its review to encompass the contracting conflict prohibitions. While the court acknowledging that the issuance of a license may not technically be a contract, it found a strong analogy to the contract prohibitions. The supervisor’s admitted financial impact created a “direct, substantial and flagrant conflict of interest.” Given the facts of the situation, the court felt that to allow the supervisor to vote would be a mockery to the statutes and decisions prohibiting conflicts of interest.

It seems the court could have easily reached the same result under the *Lenz* factors without having to rely on the conflict prohibitions. By analyzing a decision on whether to approve a liquor license to a prohibited interest in a contract, the court unnecessarily expanded the scope of the conflict statutes.

In *Singewald v. Minneapolis Gas Company*,<sup>16</sup> a city ordinance granting a non-exclusive franchise to a gas company was challenged based on disqualification. A competing gas company argued that the ordinance was void because an employee of the company receiving the franchise cast one of the votes needed to pass it.

Although it was found that the council member acted as a faithful servant of the community and without any intent to profit from the favorable vote, the court held the official was

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<sup>14</sup> *E.T.O. v. Town of Marion*, 375 N.W.2d 815 (Minn. 1985).

<sup>15</sup> *Id.* at 816.

<sup>16</sup> *Singewald v. Minneapolis Gas Company*, 142 N.W.2d 739 (Minn. 1966).

disqualified. This case predated Lenz, so rather than discussing factors of disqualification, the court focused on the statute prohibiting an official from having a direct or indirect interest in a contract with the council. The court expressly contracted this prohibition with another statute that prohibits a personal financial interest. The court did not discuss its basis for finding a prohibited interest, but it apparently believed the official has an indirect interest in the finance agreement that was not a personal financial interest.

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### III. THE EFFECT OF DISQUALIFICATION

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#### A. Voting Requirements

When officials are disqualified from participating in a vote, a board is occasionally left with less than a quorum, or less than the super-majority required by some statutes, to undertake an activity. For instance, board initiated special assessment projects require a four-fifths vote of all the members.

In *1989 Street Imp. Program (117 Street) v. Denmark Tp., Washington Cty., Mn.*,<sup>17</sup> owners challenged a 3 to 0 vote of a five-member town board to undertake a special assessment project. Two of the five supervisors disqualified themselves from the vote because they owned property on the street that was to be improved. The decision was challenged as not being supported by the required four-fifths vote of all the town board members.

The court recognized that “it would not be good public policy to encourage a council member who would otherwise be disqualified due to a conflict of interest, to vote on the matter merely to ensure that the statutory vote requirement is met.” Such a requirement would have the undesirable effect of creating mistrust of citizens in their government. “Where there is a choice, city officials should avoid actions which may appear tainted of impropriety, even though they are legal.” Taking these public policy considerations together, the court held that public officials should be able to abstain from voting to avoid appearances of impropriety and not be “second-guessed by a court” as to whether a significant enough interest was involved to justify the abstention. For the purposes of the special assessment statute, only those officials qualified to vote can be considered “members.

A more difficult issue is determining the effect of a disqualification on a three-member town board. What if two of the members have interests that may warrant disqualifying themselves from the vote? As with all questions of disqualification, the answer will depend on the facts of the circumstance. However, it seems that the Lenz factors (3) & (4) regarding the number of interested officials making the decision and the need to have interested officers vote would

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<sup>17</sup> *1989 Street Imp. Program (117th Street) v. Denmark Tp., Washington County, Mn.*, 483 N.W.2d 508 (Minn. Ct. App. 1991).

justify all the supervisors participating in the vote. Furthermore, nearly every decision of a town board is potentially reviewable to some extent by the district court. Even if the sole issue on review is the question of disqualification such an opportunity for review lends the support of Lenz factor (5) to the decision.

In these cases, the findings and analysis that led to the decision to participate in the decision should be recorded in the minutes of the meeting. The more thoughtful and complete officials are in analyzing and recording their findings on these issues, the less likely a court will be to overturn the decision.

### **B. Effect of Disqualification on the Vote**

If a town board vote is challenged based on disqualification, and the court finds that the official was disqualified to vote, what is the effect on the action that was the subject of the vote? The answer depends on whether the disqualified vote was determinative of the action taken.

In *Singewald*, the court invalidated a city ordinance granting a non-exclusive franchise to a gas company. An employee of the gas company cast one of the required votes. The fact that the council member was found to have acted in good faith as a faithful servant of the city did not overcome the disqualification.

Because the disqualified vote was necessary to achieve the 3 votes needed to pass the ordinance, the action was invalidated. However, the court expressly rejected the principle of invalidating actions when the disqualified vote was not necessary to the decision. To do otherwise would have unnecessarily cast a shadow on local decisions by exposing them to meaningless challenges.