

Chapter Ten

Conflicts of Interest

§ 10-1. Overview

Public office is considered a public trust. To protect that trust, public officers are subject to restrictions on what they may do while in office. One such restriction is the requirement to avoid self-dealing. Most everyone has a sense that self-dealing in public office is wrong, but the law applicable to conflicts of interest is much more nuanced than simply prohibiting all conflicts.

There are two types of conflicts of interest town officers face:

- (1) **statutory conflicts**, which arise when an officer has a direct or indirect financial interest in a contract with the town. and
- (2) **common law conflicts**, which arise when an officer has a direct interest in a matter to be acted upon by the town board.

While there is some potential overlap between the two types of conflicts, it is important to keep them separate when analyzing whether a conflict of interest exists. Supervisors must always be aware of the potential for a conflict of interest and err on the side of caution whenever possible.

A third type of situation, often referred to as a conflict of interest by mistake, involves an officer holding two public offices whose duties may be incompatible. Incompatibility of offices is an important issue and is discussed in Chapter Four.

Inside this chapter

10-1 Overview	67
10-2. Statutory Conflicts of Interest.....	68
10-3. Common Law Conflicts of Interest (Disqualifying Interests)	69
10-4. Consequences for Violating Conflict of Interest Laws	70

§ 10-2. Statutory Conflicts of Interest

An officer authorized to take part in making a contract is prohibited from having a direct or indirect personal financial interest in any payment, sale, lease, or contract with the town or to benefit financially from one. Minn. Stat. §§ 365.37, subd. 1; 471.87. This is a very broad and sweeping prohibition against officers having a financial interest in a matter they are authorized to decide or control. There is not a dollar threshold in this conflict; it applies to all contracts, even for a nominal amount of one dollar.

The purpose of this prohibition is to protect the public from a supervisor benefiting from a contract on which he or she is authorized to vote. Because the focus tends to be on those officers authorized to vote on a matter, the issue of a conflict of interest usually focuses on supervisors.

However, the prohibition goes beyond voting and includes those officers “taking part” in making a contract, something clerks are arguably doing when posting or publishing notices, collecting quotes, or even reviewing bids for compliance to the specifications. Also, the conflict exists for any contract in which an officer is “authorized” to take part in making. It does not matter whether the officer did not vote or participate in making the contract; abstaining does not clear up this type of conflict of interest.

Despite this broad prohibition, there are some important exceptions that allow an officer to have a personal financial interest in a contract with the town if **all** the conditions of the exception are satisfied. The exceptions listed in Minn. Stat. § 471.88 cover several situations. The two most common exceptions are found in Minn. Stat. § 471.88, subd. 5 & 12.

The first common exception allows an officer to enter a “contract for which competitive bids are not required by law,” Minn. Stat. § 471.88, subd. 5. Under the municipal contracting law, sealed bids are not required unless the esti-

mated amount of the contract is over \$175,000. Minn. Stat. § 471.345, subd. 3. This broad exception is sufficiently flexible to be a useful tool for boards when seeking goods and services. However, to use the exception, the resolution and affidavit requirements of Minn. Stat. § 471.89 must be followed.

Summary of Exception: An officer may contract with the township if:

- (1) the board expects the contract price to be \$175,000 or less;
- (2) the board passes a resolution described in Minn. Stat. § 471.89, subd. 2; and
- (3) the officer submits an affidavit with claims for payment as described in Minn. Stat. § 471.89, subd. 3.

For a contract with a supervisor to be valid, the board must pass a resolution setting out the essential facts of the contract and determining that the contract price is as low as or lower than could be obtained elsewhere. In addition, the interested officer must file an affidavit with the clerk before payment is received. An affidavit must be filed before each payment under the contract. The affidavit should essentially state that the contract is for a fair price.

MAT Recommendation: Each supervisor who could perform manual labor for the township for payment should have a resolution passed for him or her that authorizes the extra work. Such work could be considered as performed under contract, even if no written contract exists. The process should be added to the board’s reorganization meeting agenda.

A sample resolution and affidavits are available in MAT’s Information Library, Document **C6000**.

The second popular exception (Minn. Stat. §471. 88 subd. 12) allows an officer in a town

with a population 1,000 or less to contract with the town to provide construction materials and/or services provided the sealed bid procedure is used. The interested officer may not vote on awarding the contract. There is no cap on the amount of the contract under this exception, but the sealed bid procedure must be used even if the contract is for \$175,000 or less.

To rely on any of the exceptions, the board must authorize the contract with the interested officer by a unanimous vote. Minn. Stat. § 471.88, subd. 1. The interested officer should abstain from the vote even though the statute says “unanimous vote.” (See Abstention Conundrum below.)

Other exceptions may apply in some circumstances, but the two described here are commonly relied on by town officers.

Summary of Exception: An officer may contract with the township for construction materials and services if:

- (1) the population of the township is 1,000 or fewer;
- (2) the board uses the sealed bid procedure to award the contract;
- (3) the board unanimously votes on the award of the contract; and
- (4) the interested officer does not vote on awarding the contract.

Whenever the board is acting under one of the exceptions, it must keep accurate records of its actions and retain the related documentation (e.g., the resolution and affidavits completed pursuant to Minn. Stat. § 471.89).

§ 10-3. Common Law Conflicts of Interest (Disqualifying Interests)

The second type of conflict of interest arises when a supervisor has a personal financial interest in a matter to be acted upon by the board that is not a contract.

When an officer has an interest in a matter before the board that does not involve a contract, the officer is supposed to consider the following factors to decide whether he or she is disqualified from voting:

- 1) the nature of the decision being made;
- 2) the nature of any pecuniary (financial) interest;
- 3) the number of officers 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 officers will not act arbitrarily to further their selfish interest.

Lenz v. Coon Creek Watershed District, 153 N.W.2d 209, 219 (Minn. 1967). Unlike a statutory conflict of interest, abstaining from participation in the decision does solve a common law conflict of interest.

These factors can be difficult to apply; town of-

icers should seek the advice of an attorney in considering whether an officer has a disqualifying interest. Determining when there is a conflict of interest is rarely as clear as one might think. Often an officer is dealing with varying shades of gray. Sometimes an officer will abstain from participating in a decision because there is an appearance of impropriety even when there isn't a legal conflict of interest. This can be important for maintaining public confidence that the board is acting in the public's interest and not a self-interest.

Abstaining is not always appropriate, even when there is a common law conflict of interest. Sometimes abstaining deprives the board of enough members to conduct the town's business. In those situations, the board member should publicly acknowledge the conflict or apparent impropriety and the reasons it is necessary for him or her to participate in the decision. It's also important to remember that the people of your township elected you to do a job and voluntary abstention should not be used just to avoid taking a side on a controversial decision.

Each officer must decide if he or she is disqualified from voting because of a conflict of interest.

The town board does not have the authority to make that decision for its members. The board may, however, point out a possible conflict of interest to a board member.

Refer to Document Number **TP7000** for additional information on common law conflicts of interest.

§ 10-4. Consequences for Violating Conflict of Interest Laws

The importance of making the correct determination regarding a conflict of interest cannot be over emphasized. Violating the statutory conflict of interest prohibition can result in a criminal prosecution for a gross misdemeanor (up to one year in jail and a \$3,000 fine) and expulsion from office. Minn. Stat. §§ 365.37, subd. 5; 471.87. Voting despite a common law conflict of interest can invalidate the board's decision.

Abstention Conundrum

What happens when a supervisor abstains from a vote, yet the authorizing statute requires a unanimous or super-majority vote?

It depends on the reason the person is abstaining from the vote.

- If the supervisor is abstaining because of a disqualifying interest, like a statutory conflict of interest, the size of the town board is reduced to the number of remaining members, i.e., on a three member board, the number is reduced to two and on a five member board the number would be down to four. However, the board must have at least a quorum to take any action. If the abstentions of more than one supervisor prevent the board from reaching a quorum, the town will need direction from the town attorney.
- If the supervisor is simply abstaining for a non-disqualifying reason and a quorum is present, the courts have counted the abstaining member as part of the majority. The rationale is that members who refuse to vote should not be allowed to defeat a legitimate board action.

A good example of this is the requirement in Chapter 429, when the town board must approve a special assessment by a 4/5 vote. In one case, a five-member town board had two members abstain because they owned property bordering the proposed improvement. *In re 1989 Street Improvement Program (117th Street) v. Denmark Township, Washington County, Minnesota*, 483 N.W.2d 508 (Minn. Ct. App. 1992) The Court of Appeals held that "public policy demands that a majority of those remaining should have power to act." *Id.* At 510, *citing* Op.Atty.Gen. 471-M (October 30, 1986.) The Court said it would be bad public policy to encourage a town official, who would be otherwise disqualified due to a conflict of interest, to vote on a the matter simply to ensure the statutory vote requirement is met.