

Superceded by N.D.A.G. 99-L-78

**LETTER OPINION
94-L-327**

December 13, 1994

Doug Mattson
Ward County State's Attorney
Ward County Courthouse
Minot, ND 58701

Dear Mr. Mattson:

Thank you for your letter asking whether a county commissioner who owns a solid waste landfill facility and a garbage hauling business in the county can vote on a solid waste disposal and incineration facility zoning resolution before the county commission.

First, it is necessary to determine whether a conflict of interest exists for a county commissioner who owns a solid waste landfill facility and a garbage hauling business in the county when the county commission has before it a zoning resolution on solid waste disposal and incineration facilities. This is a question of fact to be determined at the local level based on the specific factual situation of the county commissioner.

Because this office does not issue opinions on questions of fact, I will proceed to the legal question of whether a county commissioner can vote on a solid waste disposal and incineration facility zoning resolution if it is determined that the commissioner has a conflict of interest based on the ownership of a solid waste landfill facility and a garbage hauling business in the county.

The only North Dakota statutes which address conflicts of interest that would apply generally to county commissioners are N.D.C.C. §§ 11-10-25 (prohibiting the head of any county department or agency from appointing a direct relative to any position under the official's control unless the appointment has been previously approved by resolution of the board of county commissioners), 12.1-12-03 (declaring it unlawful to receive compensation for assistance in

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government matters), 12.1-12-04 (declaring it unlawful to receive compensation for a political endorsement), 12.1-13-02 (declaring it unlawful for a public servant to acquire a pecuniary interest, speculate, or wager based on official action or information), and 12.1-13-03 (declaring it unlawful for a public servant to be interested in certain public contracts). Other North Dakota statutes which address conflicts of interest may apply to county commissioners under certain circumstances. See, for example, N.D.C.C. §§ 11-09-47 (prohibiting any officer or employee of a county under the county managership form of government from being interested in any contract to which the county is a party), and 48-02-12 (prohibiting any officer or employee from being interested in any public contract entered into pursuant to N.D.C.C. ch. 48-02 regarding construction of public buildings).

None of these statutes address the question presented here. Therefore, it is necessary to look at North Dakota case law to determine if the issue has been addressed by the courts. In 1973, the North Dakota Supreme Court decided Northwestern Bell Telephone Co. v. Board of Commissioners of City of Fargo, 211 N.W.2d 399 (N.D. 1973) which involved voting on a legislative matter when there is a conflict of interest.

One of the issues in Northwestern Bell was whether it was proper for certain members of the city commission to abstain from voting on a proposed ordinance when the ordinance placed a tax on the revenues of those members' employer. The court determined that it was improper for the city commission members to abstain from voting, in large part because the court interpreted a statute requiring that yea and nay votes be taken, as not leaving an option to abstain. Northwestern Bell, 211 N.W.2d at 402-404. The court further held that if a commissioner did abstain, the commissioner's vote would be counted as a vote with the majority. Id. at 404.

No statute comparable to the one relied upon in Northwestern Bell applies to a board of county commissioners. Without a statute that could be

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interpreted as eliminating the option to abstain, I believe that the supreme court would look closely at the conflict to determine whether it would be inappropriate for the commissioner to vote on a pending matter.

The only cases in which the North Dakota Supreme Court has addressed the effect of a conflict of interest on voting since Northwestern Bell have involved matters in which the administrative agency was acting in a quasi-judicial capacity rather than a legislative capacity. In First American Bank & Trust Co. v. Ellwein, 221 N.W.2d 509 (N.D. 1974), the court relied upon a "rule of necessity" to hold that a member of the State Banking Board could not abstain from voting even though he had a conflict of interest. In Danroth v. Mandaree Public School District, 320 N.W.2d 780 (N.D. 1982), the court addressed the question of whether a board member with an alleged conflict in a case involving a school district hearing on nonrenewal of teacher's contract should have disqualified himself. The court cited First American Bank for the rule of necessity and Northwestern Bell to state the same result would apply were the holding in that case to apply. In Larson v. Wells County Water Resource Bd., 385 N.W.2d 480 (N.D. 1986), the court relied upon the rule of necessity to hold that participation by a member with an alleged conflict did not invalidate the approval of a drain permit. In both Danforth and Larson the court also cited Northwestern Bell for the proposition that the vote of the person with the conflict would count as a vote with the majority. In A & H Services, Inc. v. City of Wahpeton, 514 N.W.2d 855 (N.D. 1994) the court addressed the question of whether action by a city council denying a license to haul waste was invalid due to the record's indicating a yea vote on the motion to deny the license by a council member who had a conflict of interest. The court determined that it made no difference whether the council member voted or not, since under the rule laid down in Northwestern Bell, the member's vote would count with the unanimous majority even if he abstained.

The North Dakota Supreme Court has determined that the enactment of zoning ordinances is legislative, as opposed to judicial, in nature. Shaw v. Burleigh County, 286 N.W.2d 792, 795 (N.D. 1979). Consequently, the rule of necessity which has been adopted by the supreme court in cases involving judicial and quasi-judicial matters would not apply to

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this situation.

In summary, in all the cases in which the North Dakota Supreme Court has determined that a conflict of interest does not authorize a board member to abstain from voting, either the case involved a judicial or quasi-judicial matter, or a specific statute existed which the court viewed as controlling on the question of abstention.

If the court were presented with a case in which a commissioner had a financial interest in the legislative matter being voted upon, and there was no statute which could be interpreted as requiring the commissioner to vote rather than abstain, it is my opinion that the court would look to the appearance of impropriety doctrine to determine whether the commissioner could vote. The North Dakota Supreme Court may determine that a county commissioner who has a personal financial interest in a matter of a legislative nature before the county commission may not vote on that matter.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

bab/jfl