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June 30, 2006

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Representative Morrie Lanning
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Representative Loren Solberg
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Gentlemen:

Thank you for your correspondence of June 8, 2006 concerning the involvement of local governments in campaigns for and against a proposed constitutional amendment.

FACTS AND BACKGROUND

In 2005, the legislature passed ballot language and a proposed constitutional amendment related to use of proceeds of the Motor Vehicle Sales Tax ("MVST") for highway and public transit funding, to be voted on in the 2006 general election. Ch. 88, §§ 9,10, 2005 Minn. Laws 459. You state that several cities, counties and towns have taken positions on the proposed amendment, and associations of which they are members have also taken positions. In addition, some local governments have joined, and contributed resources to, Minnesotans for Better Roads and Transit ("MBRT"), which is registered as a political committee to advocate in favor of the proposed amendment. Many local governments are also members of the Minnesota Transportation Alliance ("MTA"), which consists of both local governments and private businesses. The MTA strongly advocates for the amendment. The Coalition of Greater Minnesota Cities ("CGMC"), a non-profit corporation composed of cities, has adopted a position opposed to the constitutional amendment. CGMC has not yet formed or joined a political committee or fund to advocate against the constitutional amendment, but may wish to do so in the future. Also, other individual cities may wish to form, join or contribute to a political fund to oppose the proposed constitutional amendment.

Based upon these facts, you request the opinion of the Attorney General regarding the following questions:

1. Can a local government or local government association bring or participate in a lawsuit to determine the validity of the proposed constitutional amendment or the ballot language?

2. Can a local government or local government association take a position for or against the MVST ballot question and promote that position with the public?

3. Can a local government or an association of local governments be a member of a political committee like MBRT and can they contribute to that political committee or fund? Does it make a difference whether the political committee or fund supports or opposes the constitutional amendment?

4. Can a local government or an association of local governments contract for services supporting or opposing the passage of the proposed constitutional amendment? Can they use local government resources (such as public funds, staff, and copiers) to promote a position on the constitutional amendment?

5. If it is not legal for local governments to take a position, fund, or participate in a campaign for or against the constitutional amendment, is the Attorney General authorized to seek injunctive or other relief to prevent the illegal activity?

6. If it is not legal for public resources to be used in a campaign for or against the constitutional amendment, is the Attorney General authorized to seek injunctive of other relief to prevent the illegal activity?

The Office of Attorney General has limited authority under Minnesota law. For instance, it is authorized by Minn. Stat. § 8.05 to provide written opinions on legal questions at the request of either house of the legislature or of legislative committees. It is not generally authorized to provide legal opinions at the request of individual legislators.[1] Notwithstanding these limitations, however, I can provide the following comments which I hope you will find helpful.

[1] On matters pertaining to local government law, county and city attorneys for local units of government are authorized by Minn. Stat. § 8.07 to request opinions of the Attorney General.

LAW AND ANALYSIS

First, all government actions and expenditures must primarily serve a public purpose, *See, e.g., Minnesota Highest Ed. Fac. Auth v. Hawk,* 305 Minn. 97, 232 N.W.2d 331 (1975). *City of Pipestone v. Madsen,* 287 N.W.2d 357, 178 N.W.2d 594 (1970). There would seem little doubt that discourse concerning the amending the state constitution, and the allocation of public resources, as a general matter serves a legitimate public purpose.

Second, public purpose is not sufficient in itself, however, to authorize an action or expenditure of resources by a unit of local government. Local governments have no inherent legal powers. As creations of the state government, they have only those powers expressly granted by statute or home rule charter and those implied as reasonably necessary to the exercise of their express powers. *See, e.g., Mangold Midwest Co. v. Village of Richfield,* 274 Minn. 347, 143 N.W.2d 813 (1966).

Third, previous Opinions of the Attorney General have concluded that absent express statutory authority local governments may not engage in certain actions such as contributing funds or paying membership dues to independent organizations, notwithstanding that the organizations may be engaged in activities that benefit city or the public. *See, e.g.,* Ops. Atty. Gen. 218-R, Feb. 24, 1949 (Chamber of Commerce), 59-A-3 May 21, 1948 (Boy Scouts); 59-A-3, August 19, 1941 (4-H Clubs), 442a-17, Jan. 17, 1938 (Red Cross) (copies enclosed).

In that regard, local governments have been granted express statutory authority to join, or pay contributions to certain organizations whose purpose is to work for the betterment of local government operations generally, *see, e.g.* Minn. Stat. § 471.96, subd. 1 (2004) or specifically to promote the local government unit itself. *See, e.g.,* Minn. Stat. § 469.191 (2004). In addition, previous Attorney General's Opinions have stated that local governments may pay money to independent organizations in exchange for goods or services directly related to their authorized governmental functions. *See, e.g.,* Op. Atty. Gen. 125-B-21 February 4, 1943 (county may pay dues to association that provides ongoing information important to the work of the county's highway department); 59-A-3, January 15, 1959 (city may contract with local historical to perform specific authorized services for the city).

Fourth, local governments have both expressed and implied authority to expend resources to promote and protect their own well-being and authority. For example, local governments have the general authority to take actions and enter contracts necessary to the exercise of their specified corporate powers and to "sue and be sued" when their own particular interests are at issue. *See, e.g.,* Minn. Stat. §§ 365.02 (towns), 373.01 (counties) , 412.211, 412.221 (statutory cities) (2004).

However, to participate in litigation a local government or association must be able to demonstrate that the matter at issue has a direct and substantial effect on its own governmental interests or those of its members that differs from that relating to the general public. For example, in *Minnesota State Bd. of Health v. Lawson,* 308 Minn. 24, 241 N.W.2d 624 (1976) the court held that the City of Brainerd had standing to challenge the constitutional authority of the

state to mandate fluoridation of drinking water, in view of the city's responsibility to provide safe drinking water to its citizens. Likewise, in *Associated Builders and Contractors v. Carlson*, 590 NW.2d 130 (Minn. Ct. App. 1999), *aff'd. sub nom Associated Builders and Contractors v. Ventura,* 610 N.W.2d 293 (Minn. 2000), the court upheld the standing of a school district to challenge a statute that directly affected the costs of a pending district construction contract.

However, the courts have not accorded local governments standing to litigate where the challenged action does not directly and adversely affect the governmental unit. *See, e.g., Village of Burnsville, v. Onischuck,* 301 Minn. 137, 222 N.W.2d 523 (1974) (allocation of tax revenues which did not harm city); *Commissioner of Taxation v. Crow Wing Co.,* 275 Minn. 9, 144 N.W.2d 717 (1966) (increase in assessed valuations did not adversely affect county).

Fifth, upon similar reasoning, previous opinions have concluded that local governments lack implied authority to expend resources on activities that do not pertain to the interests and functions of that governmental unit specifically. *Compare* Op. Atty. Gen. 125-B-21, March 19, 1921 (no authority to contribute to organization engaged in statewide effort to improve roads) *with* Op. Atty. Gen. 125-B-21, Feb. 4, 1943 (county may pay money to highway development organization that supplies information needed for county's own road projects.).

Sixth, several opinions have concluded that public resources may not be expended to seek to influence voters in upcoming elections. One category of such opinions deals with activities of a governing body in connection with elections required to approve its own proposed actions. For instance, Op. Atty. Gen. 159a-3, May 24, 1966 states that a school board could expend reasonable amounts to apprise voters of the facts pertinent to a district bonding proposal, and its members could individually and collectively voice their support for the proposal. Expenditure of public money for express advocacy for a favorable vote, however, was not authorized. The opinion quoted with approval the reasoning of then-State Supreme Court Judge William Brendon, Jr. in *Citizens to Protect Pub. Funds v. Board of Ed.* 13 N.J. 172, 98 A.2d 673 as follows:

> The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature.

Id. at 181, 98 A.2d at 677.

That reasoning was endorsed in the context of a local decision that was to be made by local voters. However, it cannot necessarily be generalized to include circumstances in which it is ultimately the legal responsibility of the governing body to act for the best interests of the local unit. Few, if any, decisions of local governing bodies concerning resource allocation will ever have unanimous approval of the citizens. Therefore, the foregoing opinions do not necessarily lead to the categorical conclusion that local government resources may never be used to advocate

for or against actions by other government agencies that could directly affect the interests of the local unit as determined by its governing body.

Seventh, there are also prior opinions that have concluded specifically that local government funds may not be paid for advocacy on behalf of proponents or opponents of a state constitutional amendment. *See, e.g.,* Ops. Atty. Gen. 125 B-21, March 19, 1921, Feb. 4, 1943, July 19, 1948 and 442-a-20, July 18, 1927. Coincidentally, at least three of these opinions related specifically to proposed amendments related to highways and highway funding. Those opinions all endorse the reasoning set forth in the March 19, 1921 Opinion, which stated:

> [An effort to obtain adoption of a constitutional amendment establishing a trunk highway system] is private in character. Individuals may appear before the legislature and in a proper way attempt to convince the legislature that a certain piece of legislation should be adopted. A private corporation may do likewise, but the legislature is powerless to authorize the municipalities of the state to appropriate public funds to aid either individuals or private corporations in such an undertaking. Such appropriations would be for a private purpose, and unauthorized under the constitution; the appropriation would have to be met by taxation, and taxes can only be imposed for public purposes. This is true irrespective of the character of the legislation, whether it involves private or public interests. The same rule applies with reference to the activation of individuals and private corporations in attempting to bring about the adoption or defeat of a proposed constitutional amendment. Such persons and corporations are engaged in private undertakings, entirely divorced from anything in which the government of the state or the officials of a municipality are or can be authorized to engage through the activities of individuals or private corporations.
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> An appropriation to the Minnesota Highway Improvement Association, to reimburse it for expenses incurred in bringing about the adoption of the constitutional amendment in question, would not only be for a private purpose but for a political purpose. An appropriation for such a purpose is against public policy, and a municipality cannot be authorized to make the same. A municipality could not be authorized by the legislature to appropriate the funds thereof to bring about the election of a certain person to public office, on the theory that his election would be for the public good; nor could public funds be appropriated for the purpose of persuading the people to issue bonds for a specified purpose, on the theory that the public interests would be promoted by the issuance of the same. The principle of law applicable to these matters is also applicable to a constitutional amendment.

Ops. Atty. Gen. 125B-21, March 19, 1921.

It is not necessarily the case, however, that support or opposition for a piece of legislation or a constitutional amendment will always affect only private, or purely political, interests. As discussed above in relation to standing, there can be circumstances in which a particular state action or proposal has such a direct and substantial effect upon the interests of a particular municipality that it has a legally recognizable interest in promoting or protecting those interests in a state-wide forum.

Therefore, we believe that the rationale of the 1921 opinion and its progeny are properly directed to circumstances in which the legislation or constitutional proposal does relate primarily to private interests or affects individual municipalities in only a general and indirect way. While the matter is to some extent subject to factual analysis, we are not aware of any manner in which the funding mechanisms to be established under the proposed amendment would directly affect the exercise of express governmental powers by any particular local government units. Rather it seems likely that such proposals pertaining generally to state-wide transportation systems and funding would not be appropriate for locally funded advocacy.

In light of the foregoing, we address your questions as follows:

1. Courts will likely recognize a right of a local government or association to participate in a lawsuit concerning the validity of a proposed amendment if it can demonstrate the requisite degree of direct adverse effect from the challenged measure upon the legal corporate interests of the local governmental unit.

2. Public officials are generally free, individually and collectively to announce their views on matters of public interest. Furthermore, it is not likely that local governments or associations can be precluded from taking and publicizing positions on such matters, even in those circumstances where the matters are not within the jurisdiction the governing bodies.

3. Absent specific authority, local governments are not generally authorized to become members of, or donate funds to, independent organizations. We are not aware of any statute expressly authorizing local government membership in or contributions to the organizations identified in your request. It is possible, however, that one or more of them could come within the definition of more general legislation.

   Where local governments do have specific statutory authority to be members of, or contract with, an association, that authority would not likely be affected by the position, if any, taken by the association on legal or political issues of interest to their membership. However, local government payments specifically to support or fund such advocacy would not likely be permitted.

4. While a local government unit may arguably be justified in expending resources to support or oppose a constitutional amendment that would affect it directly, previous opinions have concluded that resources may not be expended for such purposes where the effect upon the unit would be only indirect and in common with the public at large. As discussed above, proposed measures dealing generally with transporting funding have been found in previous opinions to fall within this category.

5. and 6. The Office of the Attorney General has substantial inherent power to engage in litigation when he or she determines it to be necessary in order to protect the interests of the State. *See, e.g., State ex re Hatch v. America Mutual Ins. Co.*, 609 N.W.2d 1 (Minn. Ct. App. 2000). However we are aware of no particular statutory responsibility or authority for the Attorney General to pursue litigation against local governments for unauthorized expenditures of this type. Instead, the responsibility for reviewing the propriety of local government expenditures is statutorily assigned to the Office of the State Auditor. *See, e.g.*, Minn. Stat. §§ 6.48-6.51 (2004). If an audit discloses improprieties, the Auditor's report is to be filed with the appropriate county attorney and, where appropriate, with the city attorney, who are to institute such proceedings as the law and the protection of the public interests may require." Minn. Stat. § 6.48, 6.49, 6.50, 6.51 (2004).

I hope these comments are helpful to you.

Very truly yours,

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Enclosures
AG: #1630716-v1