

October 9, 2009

Mr. Greg W. Hennessy
417 First Avenue East, Drawer 756
Williston, ND 58802-0756

Re: Letter of Advice

Dear Mr. Hennessy:

In your capacity as Town Attorney for the Town of Bainville, you have requested guidance from this office regarding the proper interpretation of two provisions of the Town Code and an ethical issue relating to the conduct of a council member with respect to matter involving the member's first cousin. Since your issue is of local interest only, it has been determined that a letter of advice rather than a formal opinion is appropriate in response to your queries.

First, you ask for an interpretation of the interaction between two sections of the Town Code dealing with extension of water and sewer lines within the city limits. The provisions state:

4.10.010 Cost of Extension Borne By Persons Desiring Extension. It is the policy of the town that whenever an extension of a water main or sewer main shall be made within the town limits in order to furnish water to any property or in order to furnish sewer service to any property, the entire cost of the extension of the main shall be borne by the person or persons desiring such extension.

4.10.020 Extension to be in Accord with Specifications. Persons making such an extension of water mains or sewer mains within the town limits shall carry out such construction and emplacement of

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water or sewer mains in accordance with specifications furnished by the town.

Your letter informs me that a dispute has arisen about allocation of the cost of engineering the extension under these provisions. You state that the developer of the project and two of the three members of your Town Council read the provision requiring that the project be carried out “in accordance with specifications furnished by the town” to require the Town to pay the roughly \$5,000 required to engineer the connection of the extension to the existing main. Your view is to the contrary.

I first note that matters of interpretation of the Town Code are ultimately subject to the discretion of the Council, which can modify the code to reflect the views of a majority of the Council on the subject. Having said that, I believe the clear meaning of the existing provisions places the engineering costs on the developer. Section 4.10.010 places “the entire cost of the extension” on the developer. Clearly, the Code contemplates that the developer, rather than the taxpayers of the Town, pay for the extension.

Section 4.10.020 does not change that conclusion. It requires the developer to “carry out such construction and emplacement of water and sewer mains in accordance with specifications furnished by the town.” (Emphasis added.) The reference to “construction and emplacement” suggests that the provision relates only to specifications furnished by the Town that govern the manner in which the project is constructed and emplaced. The provision seems intended to ensure that the project is built in a manner consistent with the engineering and construction of the Town’s existing mains.

This is especially true when one considers the captions of the two sections. Section 4.10.010 is entitled “Cost of Extension Borne By Persons Desiring Extension” and states clearly that the developer bears “the entire cost” of the extension. Section 4.10.020 is captioned “Extension to be in Accord with Specifications.” It says nothing whatsoever about cost. It would seem peculiar that the drafters would have required the developer to bear “the entire cost” in section 4.10.010 and at the same time have silently allocated a substantial part of the cost to the Town in section 4.10.020.

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You also ask whether a council member who is the first cousin of the developer can vote on the matter consistent with the ethics laws. I agree with your conclusion that the council member has no statutory conflict. Montana Code Annotated Title 2, ch. 2 provides the general ethical requirements for public officers, including members of the Town Council. It contains no provision that would require a council member to disqualify himself or herself with respect to an issue in which a first cousin has a financial interest. The Official Misconduct statute, Mont. Code Ann. § 45-7-401 does not include such conduct within the definition of the offense. Mont. Code Ann. § 7-5-4109 relates only to contracts between the Town and a third party, and is therefore not applicable here.

I hope you find this information helpful. This letter of advice may not be cited as an official opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym