

No. A07-925

State of Minnesota
In Court of Appeals

STATE OF MINNESOTA BY FRIENDS OF THE RIVERFRONT, GROVE STREET FLATS
ASSOCIATION, AND SIDNEY AND LOLA BERG,

Appellants,

vs.

CITY OF MINNEAPOLIS, MINNEAPOLIS PARK AND RECREATION BOARD, MINNEAPOLIS
COMMUNITY DEVELOPMENT AGENCY (NOW KNOWN AS MINNEAPOLIS COMMUNITY
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT),
DE LASALLE HIGH SCHOOL, AND BARBARA JOHNSON,

Respondents.

BRIEF OF RESPONDENT BARBARA JOHNSON

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Statement of Legal Issues

1. Whether Respondent Barbara Johnson has a disqualifying conflict of interest in quasi-judicial Minneapolis City Council decisions related to Respondent DeLaSalle High School.

Statement of the Case and Facts

Appellants State of Minnesota by Friends of the Riverfront, Grove Street Flats Association, and Sidney and Lola Berg (collectively, Appellants) filed a complaint against Respondents City of Minneapolis (City), Minneapolis Park and Recreation Board, Minneapolis Community Development Agency, now known as the Minneapolis Community Planning and Economic Development Department, DeLaSalle High School (DeLaSalle), and Barbara Johnson (Johnson) (collectively, Respondents), alleging, *inter alia*, that Johnson has an ethical conflict and is barred from voting on, or in any way influencing, matters relating to DeLaSalle's proposed athletic facility. (Appellants' App. 1-10) Johnson moved for dismissal pursuant to Minn. R. Civ. P. 12.02(e), and Judge Rosenbaum of the Hennepin County District Court granted her motion to dismiss. (*Id.* at 202-03) This appeal follows.

Johnson is the President of the Minneapolis City Council. (*Id.* at 204) At the time of DeLaSalle's application for a Certificate of Appropriateness (COA), she was also an officer on the Executive Committee of DeLaSalle's Board of Trustees. (*Id.*) Johnson voted to approve the COA, thereby allowing DeLaSalle to proceed with the further governmental approvals necessary to break ground for the new athletic field. (*Id.* at 206)

Argument

I. *Standard of Review*

In reviewing cases that were dismissed for failure to state a claim on which relief can be granted, the only question before the reviewing court is whether the complaint sets forth a legally sufficient claim for relief. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997).

II. *Argument overview*

Appellants argue that Johnson has (1) competing fiduciary duties, (2) a conflict of interest, (3) prejudged the issues, and (4) received *ex parte* information regarding DeLaSalle's application for a COA. But Appellants' fail to present facts and applicable law to support these averments. Therefore, based on the arguments set forth below, the district court's summary dismissal of Appellants' claim against Johnson should be affirmed by this court.

III. *The fiduciary duty owed by Johnson to DeLaSalle High School does not disqualify her from her role as a quasi-judicial decision maker*

Appellants allege that the fiduciary duty owed by Johnson to DeLaSalle automatically disqualifies her from hearing matters related to the school while acting as a member of the Minneapolis City Council. But Appellants fail to cite to any legal standard that prohibits Johnson's actions. Although Johnson has a fiduciary obligation to DeLaSalle, this does not indicate that she will at all times

support the efforts of the other members of the Board of Trustees. It is entirely possible that Johnson would have believed that it was in DeLaSalle's best interests *not* to build a new football field – an action that would equally satisfy her fiduciary obligation to DeLaSalle. As a member of the DeLaSalle Board of Trustees, Johnson could also support a new athletic field if, but only if, it could be constructed in accordance with all applicable laws. In short, there is no inherent conflict of interest between Johnson's two positions, despite her admitted fiduciary duty to each entity. *See Shepherd of the Valley Lutheran Church v. Hope Lutheran Church*, 626 N.W.2d 436, 441 (Minn. App. 2001) (“An officer of a nonprofit corporation owes a fiduciary duty to that corporation to act . . . in the best interests of the corporation”).¹

IV. Appellants have failed to provide a basis for their claim that Johnson has a conflict of interest in this matter

Appellants maintain that Johnson's positions as President of the Minneapolis City Council and as an officer on the Executive Committee of DeLaSalle's Board of Trustees create a conflict of interest that should bar her from council decisions related to the DeLaSalle. In Minnesota, conflicts of

¹ The court need not address this issue based on Appellants' failure to adequately brief the issue. *See State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issue “in the absence of adequate briefing”); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (acknowledging that an appellate court may refuse to address allegations lacking citation or analysis).

interest of government officials are regulated by ordinance, statute, and common law. None of the applicable regulations or limitations preclude Johnson's participation in city council actions relating to DeLaSalle's proposed athletic facility.

1. *Minneapolis City Ordinances do not provide Appellants any relief*

The City Minneapolis' Ethics Code provides the following definition of conduct that constitutes a conflict of interest:

A conflict of interest is present when, in the discharge of official duties, a local official or employee participates in a governmental decision, action or transaction in which he or she has a *financial* interest, except when that financial interest is no greater than that of another member of his her business classification, profession or occupation.

Minneapolis City Ordinances § 15.40(a) (emphasis added). The Ethics Code also defines a financial interest as "any interest, including loans, which shall yield, directly or indirectly, a monetary or other material benefit to the local official or employee (other than monetary or material benefits authorized by the city)." *Id.* at § 15.280(h).

Appellants' have failed to plead that Johnson has financial interests in matters relating to DeLaSalle or its proposed athletic facility. Therefore, a necessary element of a conflict of interest claim under Minneapolis City

Ordinances is absent, and Appellants are not entitled to relief under the ordinances.

2. *Minnesota Statutes do not provide Appellants any relief*

A local official must disclose a potential conflict of interest if he/she is required to “make a decision that would *substantially affect the official’s financial interests or those of an associated business*”. Minn. Stat. § 10A.07, subd. 1 (2006) (emphasis added) (outlining the requirements for public and local officials who are faced with a potential conflict of interest). Similarly, “a public officer who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom.” Minn. Stat. § 471.87 (2006).

Here, Johnson does not have a financial interest in the outcome of DeLaSalle’s application for a COA, and Appellants have failed to allege otherwise. Consequently, because there was no conflict of interest pursuant to Minn. Stat. §§ 10A.07 and 471.87, Johnson was not required recuse herself from the proceedings related to the COA.

3. *Minnesota’s case law does not provide Appellants any relief*

The final area in which Appellants’ allegations fail, and the basis for the district court’s decision, lies within longstanding Minnesota case law. The

seminal case on conflicts of interest involving a public official is *Lenz v. Coon Creek Watershed District*, 279 Minn. 1, 153 N.W. 2d 209 (Minn. 1967). The *Lenz* court explained:

The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a direct interest in its outcome is to insure that their decision will not be an arbitrary reflection of their own selfish interests. There is no settled general rule as to whether such an interest will disqualify an official. *Each case must be decided on the basis of the particular facts present.*

Id. at 15, 153 N.W. at 219 (emphasis added).

In *Lenz*, the court provided a five-factor test used in determining when a public official will be disqualified from participating in proceedings in a decision-making capacity: (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 insure that the officials will not act arbitrarily to further their selfish interests. *Id.* In *Lenz*, the court applied this test and determined that officials who owned land in the district that benefited from the official action were not per se disqualified from voting. *Id.* at 16, 153 N.W. 2d at 220.

In applying the *Lenz* test to the case at bar, Appellants have failed to allege facts which would disqualify Johnson. First, although Johnson is an officer on the Executive Committee of DeLaSalle's Board of Trustees, this fact alone does not constitute a disqualifying conflict of interest. Although Appellants would like this court to reach the conclusion that, because of her relationship with DeLaSalle, Johnson would categorically support every DeLaSalle proposal that might come before the city council, regardless of the impact to the City, there is no reason to reach such a conclusion. There is no indication in the record that Johnson will fail to act in accordance with the law in performing her official duties as a city council member. A public official's mere membership on the board of an organization, without evidence of a closer connection, does not create an impermissible conflict of interest. See *Rowell v. Board of Adjustment*, 446 N.W. 2d 917, 921 (Minn. App. 1989) (concluding that to disqualify a city official from every matter in which he/she has a cursory interest would "unnecessarily tie the hands of city agencies").

Second, while *Lenz* presupposes some sort of personal financial interest in the matter before the public body, no such interest exists in the case at bar. The nature of the decisions to be made by the City relate to land use and historic preservation - areas in which Johnson does not stand to benefit personally from any City decision. Accordingly, because Johnson does not have a recognized

“interest” in the matter, the balance weighs heavily in favor of dismissal of Appellants’ claim against Johnson. As a result, the third and fourth factors are rendered irrelevant. Finally, because the council’s decisions are reviewable by writ of certiorari and, potentially, under the Minnesota Environmental Rights Act, the fifth *Lenz* factor counsels against disqualification of Johnson from performing her official duties.

Based on applicable ordinances, statutes, and Minnesota case law, Johnson’s mere position as an officer on the Executive Committee of DeLaSalle’s Board of Trustees, without *any* further allegation, is insufficient to support Appellants’ averments that Johnson has a conflict of interest related to DeLaSalle’s application for a COA.

4. *Appellants’ arguments have no basis in applicable law*

a. *Inapplicable Minnesota Code of Judicial Conduct*

In support of their conflict of interest claims, Appellants erroneously rely on the Minnesota Code of Judicial Conduct (Code) to support their argument that Johnson has a conflict of interest. In relying on the Code, Appellants seek to supplant the established law of public official disqualification with the requirements of the Code. But Appellants cite no authority which suggests that the Code applies to a city council member. *See contra* Minn. Code of Jud.

Conduct Preamble (2006) (“The Code and its individual Canons are designed to provide guidance to *judges* and *candidates for judicial office*” (emphasis added)).

A judge is the final arbiter of a case. On the other hand, municipal governing bodies, while sometimes authorized to act quasi-judicial manner, act as a body. The nature of the power of any one member of a governing body is fundamentally different than the power of a judge. Thus, the rules governing the behavior of judges are different than the rules for municipal officials. Appellants ask the court to ignore the applicable conflict of interest ordinances, statutes, and case law because they recognize that those areas provide them no basis for relief. Instead they seek to graft judicial standards onto the existing limitations on city council members. There is no basis in law to apply the Code to the case at bar.

b. Unpersuasive laws from other jurisdictions

The law in Minnesota is clear that a court must look to the nature of the alleged interest of an elected official in a particular matter when evaluating whether the official has a disqualifying conflict of interest in the matter. *See Lenz*, 279 Minn. 1, 153 N.W. 2d 209 (outlining five factors necessary for a court to determine that a conflict of interest exists); *Rowell*, 446 N.W. 2d at 921 (concluding that to disqualify a city official from every matter in which he/she has a cursory interest would “unnecessarily tie the hands of city agencies”); *see also supra* Section IV. 3. (discussing the applicability *Lenz* to the case at bar). But

Appellants seek to avoid this well-established doctrine and apply case law from New Jersey.

There is no reason for this court to ignore controlling Minnesota precedent in favor of law from another jurisdiction. Furthermore, the New Jersey cases cited by Appellants are premised on a fundamentally different statutory scheme:

The statutory disqualification is markedly broadly couched, extending to personal as well as financial interest, "directly or indirectly." There is thus evidenced an intent that the bar is not confined to instances of possible material gain but that it extends to any situation in which the personal interest of a board member in the "matter" before it, direct or indirect, may have the capacity to exert an influence on his action in the matter.

Barrett v. Union Tp. Comm., 553 A.2d 62, 65 (N.J. 1989).

Conversely, Minnesota statutes are carefully and uniformly limited in defining conflicts of interest. *See* Minn. Stat. §§ 10A.07 and 471.87 (stating that a financial interest is necessary in order to establish a conflict of interest); *see also supra* Section IV. 2. (discussing the applicability of Minn. Stat. §§ 10A.07 and 471.87 to the case at bar); *cf. Lenz*, 279 Minn. 1, 153 N.W. 2d 209 (establishing factors necessary for a conflict of interest to exist). New Jersey cases interpreting a "markedly, broadly couched" statute are of no guidance to this court in this matter.

V. *Appellants are unable to establish a prejudgment bias on the part of Johnson*

Appellants argue that Johnson has a prejudgment bias that disqualifies her from participating in decisions related to DeLaSalle's proposed athletic field. In support of this assertion, Appellants again heavily rely on the inapplicable Minnesota Code of Judicial Conduct (Code). As previously discussed, the Code applies to "judges and candidates for judicial office", not city council members. Minn. Code of Jud. Conduct Preamble (2006); *see also supra* Section IV. 4. (discussing the inapplicability of the Code to the case at bar).

Additionally, Appellants maintain that the fiduciary duty that Johnson owes to DeLaSalle demands that she automatically side with the school's desires. Again, although Johnson has a fiduciary obligation to DeLaSalle, this does not indicate that she will at all times support the efforts of the other members of the Board of Trustees. Much like the differing views represented by members of the Minneapolis City Council, the members of the DeLaSalle Board of Trustees may too hold the best interests of the school in different regard. *See supra* Section III. (discussing Johnson's fiduciary duties). Directly contradicting Appellants' arguments on this issue, they seem to have lost sight of the fact that Johnson voted to approve the finding that the proposed project has an adverse impact on a historical resource - a fact that Appellants have repeatedly touted in their arguments. Appellants' App. 35. This fact belies Appellants' claim that Johnson

will not conscientiously perform her duties as a city council member. Following Appellants' thinking in this regard would have lead Johnson to disregard the historical impact. Appellants cannot have it both ways.

Because Appellants' have failed to provide a basis for their claim that Johnson has a prejudgment bias, the district court's dismissal must stand.

VI. *Johnson has not had ex parte communications regarding the DeLaSalle athletic field issue*

Finally, Appellants maintain that Johnson participated in *ex parte* communications related to DeLaSalle's application for a COA. Yet again, Appellants' arguments are unfounded in the facts and the law. This argument presumes that information obtained before a hearing will either be improperly used or result in prejudgment of the issues to be determined in the quasi-judicial hearing. Neither presumption is justified in this case.

First, Appellants rely primarily on the inapposite Minnesota Code of Judicial Conduct (Code) to support their *ex parte* argument. For the reasons previously stated, the Code does not apply to city council members. *See supra* Sections IV. 4. and V. (discussing the inapplicability of the Code to the case at bar).

Second, the documents submitted by Appellants to support their argument do not show any *ex parte* contact during the time when the matter was before the

council. *See, e.g.*, Appellants' App. at 140-44 (documents submitted years before DeLaSalle's application for a COA). The documents submitted were received or produced by Johnson in 2004 and early 2005, long before DeLaSalle made an application for a certificate of appropriateness. *Id.* Appellants offer no evidence of any alleged improper contacts by or with Johnson during the relevant period. If every councilperson were to recuse himself/herself when he/she has some prior knowledge of a given issue, the city council would cease to function. *See Rowell*, 446 N.W. 2d at 921 (concluding that to disqualify a city official from every matter in which he/she has a cursory interest would "unnecessarily tie the hands of city agencies").

Furthermore, Appellants have failed to show that Johnson relied on information outside of the record when making her council decision. *See Appellants' App.* at 152 (recommending that "[i]t is improper for decision-makers in a quasi-judicial proceeding to *rely* on information outside of the record" (emphasis added)). A blanket assertion by Appellants that Johnson *relied* on information outside of the record in making her decision is unfounded, and the exhibits that Appellants provide are from a period of time that predates any city council action related to the football field proposed by DeLaSalle. *See, e.g., id.* at 140-44.

Third, Appellants assert that Johnson disregarded the advice of the Minneapolis City Attorney in not recusing herself regarding the DeLaSalle COA. But this argument is erroneously based on a five-year-old letter from City Attorney Jay Heffern (the City Attorney), a document that is general in nature and *advisory* on its face - not binding.

Appellants imply that Johnson was given legal advice that she must refrain from voting on the DeLaSalle project. She was not. The letter from the City Attorney cited by Appellants is general legal advice given nearly five years earlier. *Id.* at 150-57. With the use of language such as, "guidance", "consider", and "best practices", the five-year-old letter from the City Attorney is far from binding when it comes to the actions of the Minneapolis City Council, including Johnson. *See id.* (using terminology that is suggestive rather than mandatory). Although they argue to the contrary, Appellants *de facto* conceded this argument with the use of similar phraseology in their memorandum to the district court. *See id.* at 122-124 (using phrases such as, "opinion letter", "advised", and "advice").

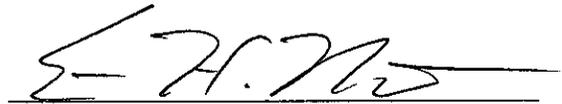
Accordingly, Appellants have failed to establish that Johnson received and relied on *ex parte* information during the time that DeLaSalle's application for a COA was pending before the Minneapolis City Council.

Conclusion

Because Appellants have failed to provide legal and factual support for their claims against Johnson, this court must affirm the decision of the district court.

Dated: Sep. 10, 2007

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Certificate of Compliance

The undersigned counsel for Respondents City of Minneapolis, Minneapolis Community Development Agency n/k/a Minneapolis Community Planning and Economic Development Department, and Barbara Johnson certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is printed in a 13-point, proportionally spaced typeface utilizing Microsoft Word 2003 and contains 3,108 words, excluding the Table of Contents, Table of Authorities, and Appendix.

Dated: Sep. 10, 2007

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