



Metropolitan Governance Task Force

October 13, 2023

Metropolitan Council
390 Robert St. North
St. Paul, MN. 55101

Sent via e-mail to Judd Schetnan

Dear Metropolitan Council,

During the last legislative session, the Metropolitan Governance Task Force was established to study and evaluate options to reform and reconstitute governance of the Metropolitan Council. To properly address the governance options as mandated in the legislation, several task force members feel it would be helpful to address what the exact governmental status of the Metropolitan Council is. On behalf of these task force members, I am sharing a Memorandum written by one of our task force members, Professor Myron Orfield.

The primary questions in the memorandum are as follows:

- 1.) Is the Metropolitan Council a local government? If so, how can its enabling statute survive Minnesota's constitutional prohibition on special legislation?
- 2.) Is the Metropolitan Council a state agency? If so, how can it constitutionally exercise the legislative power of taxation or operate with such broad discretionary authority?
- 3.) Is the Metropolitan Council a special district or public authority? If so, how can it exercise the legislative power of taxation, operating in so many areas, without being directly subordinate to an elected government.

The Metropolitan Governance Task Force has a meeting scheduled for October 25, 2023, and the Task Force has requested attendance of the Metropolitan Council's Office of General Counsel at that time. To facilitate task force members' engagement on the Memorandum's questions on October 25th, it would be helpful if the questions could be addressed in advance of the meeting in writing. Ideally, General Counsel would then also be prepared to answer questions task force members may have regarding the prepared written responses on October 25, 2023.

Please email the written responses to Professor Orfield's Memorandum to Representative Hornstein at rep.frank.hornstein@house.mn.gov and Taylor Koehler at taylor.koehler@lcc.mn.gov by 5:00 PM on Monday, October 23, 2023.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank Hornstein". The signature is written in a cursive style with a small flourish above the first letter.

Representative Frank Hornstein
Metropolitan Governance Task Force Chair

Attachment

cc: Judd Schetnan, Government Affairs Director, Metropolitan Council
Representative Frank Hornstein, Metropolitan Governance Task Force Chair
Professor Myron Orfield, University of Minnesota Law School Professor and
Metropolitan Governance Task Force Member

MEMORANDUM

To: Metropolitan Governance Task Force and the Metropolitan Council
From: Professor Myron Orfield
Date: October 9, 2023
Re: Background Material to help Met Council Answer Questions of the Task Force

The following are the questions the Task Force is posing to the Metropolitan Council:

- 1) Is the Metropolitan Council a local government? If so, how can its enabling statute survive Minnesota's constitutional prohibition on special legislation?
- 2) Is the Metropolitan Council a state agency? If so, how can it constitutionally exercise the legislative power of taxation or operate with such broad discretionary authority?
- 3) Is the Metropolitan Council a special district or public authority? If so, how can it exercise the legislative power of taxation, operating in so many areas, without being directly subordinate to an elected government?

The following is background information to help the Council answer the Task Force's questions.

Minnesota statutes declare that the Met Council is "a public corporation and political subdivision of the state." But this is not a sufficient definition. A "public corporation" or a "political subdivision" would still have to be either a: 1) local government, 2) an agency or 3) some sort of special district/ public authority. In searching the statutes, we have been unable to find another "political subdivision" that is not a directly elected local governmental unit. Can you point to another "political subdivision" that is not a directly elected local government? Similarly, we have not been able to find a public corporation that is not a local government, an agency, or a special district/public authority.

The Attorney General's Opinion

In an opinion issued in 1967, Minnesota's Attorney declared that the Met Council was "unique form of local government," that had "attributes of a state agency." See Opinion October 6, 1967. The Attorney General declared the Met Council could not be a state agency. The opinion clearly stated the Met Councils' power to tax was legislative and that assigning such taxing power to a state agency would violate the separation of powers.

Specifically, the opinion stated:

“The Metropolitan Council has undoubted authority to levy taxes under L. 1967, ch. 896, § 8...The power to tax is recognized as an exercise of legislative power, and Minn. Const. Art. III, § 1 prohibits the delegation of any power by one branch of government (in this case, the legislative) to another branch of government (in this case the executive).

The opinion found that the Metropolitan Council had the “attributes of a local government,” but noted that it was higher in the hierarchy than another local government in the seven-county metropolitan area. The opinion thus seemed to say that the Met Council was uniquely powerful local government.

The opinion did not discuss whether the Metropolitan Council was a special district or public authority. Moreover, because the question was not before it, the Attorney did not address the question of whether the council’s enabling statute was special legislation prohibited by Minn. Const. art. XII §2.

After 1994, the Metropolitan Council became far more powerful. At the same time, the previously staggered appointments to the council were made to be at will by the governor. This appointment structure made the council even more like an agency, most clearly resembling the structure of the Minnesota Pollution Control Agency.

A. If the Met Council is a local government, does its enabling statute violate Minnesota’s constitutional prohibition on special legislation?

If the attorney general is right, that the Met Council is the state’s most powerful local government, we are worried that Minn. Stat. § 473 et seq. is “special legislation” that violates the Minnesota Constitution.

Minn. Const. art XII, § 2 states:

Every law which upon its effective date applies to a single local government unit... is a special law....The legislature may enact special laws relating to local government units, but a special law, unless otherwise provided by general law, shall become effective only after its approval by the affected unit expressed through the voters or the governing body and by such majority as the legislature may direct.

Unlike legislation involving a city, county, or school district, where statutes refer in general terms to a class of local governments having certain characteristics, the Metropolitan Council’s enabling legislation names the Council specifically. If the Council is a local government, as the Attorney General has suggested, its enabling statute would be unconstitutional, unless it was approved by referendum of the voters in the seven-county metropolitan area.

B. If the Met Council is a state agency, does its taxing power and broad delegation of discretion violate the Minnesota Constitution’s separation of powers provisions?

The Attorney General found that the council could not be a state agency, because the inherent legislative power of taxation cannot be delegated the executive, but only to a legislative (directly elected) body. Do you agree with the attorney general’s opinion? If not, please explain.

Moreover, there are additional reasons that the Council cannot be a state agency. If the council were a state agency is extremely broad and unfettered discretionary would likely be an excessive delegation of legislative authority. Under Minnesota law, a delegation of authority to a state agency is only valid:

if the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.

Lee v. Delmont, 228 Minn. 101, 36 NW2d 530 (1949).

Clearly the Met Council Statute which gives it virtually limitless power to shape the development of the Metropolitan Area and additionally all powers “necessary or convenient” to carry out its broad mandate does not likely fit the “the clear policy or standard” requirement of *Delmont*. Indeed, administrative agencies with discretion authority like the Met Councils have been found unconstitutional as excessive delegations of legislative authority. See generally *Askew v. Cross Key Waterways*, 372 So.2d 913 (Flor. 1978). Do you agree? If not, why not?

C. How Could the Met Council be a constitutionally valid special district or public authority?

American black letter local government law states “special function districts differ from general units of local government as municipalities in that the special districts provide only one function or a few related functions.” See generally, *Osborne Reynolds, Local Government Law Third Addition pp 33-40 (2009)*. Common forms of special districts are water or sewer or housing districts. They are usually very simple and straightforward and often directly elected. We are unable to find any unelected special district in the United States that possessed the legislative authority to impose taxes, or the broad scope of authority possessed by the Met Council.

Public authorities like port authorities have “little if any legislative power and are more thoroughly under the control of their creating unit of government than are special districts.” *Id.* Again, we are unable to find any public authority in the United States that has the authority to operate in so many areas with such broad discretion and the legislative powers such as taxation that the Council enjoys.

If you believe that the Council is a special district or public authority, please furnish us with an example of an unelected entity with powers like the Met Councils that has found to be legal and constitutional.