

## Memorandum

To: Barry Clegg, Chair, Minneapolis Charter Commission

From: Caroline Bachun, Assistant City Attorney

Date: January 31, 2020

Subject: Applicable of the Kahn Amendment to Council Member Terms

### **I. Request for Legal Opinion**

At the January 8, 2020 Charter Commission meeting, the Charter Commission discussed options for complying with Minnesota Statutes, Section 205.84, subd. 1(b) (a/k/a the “Kahn Amendment”). As the Chair of the Charter Commission, you requested a legal opinion. To summarize, you requested a “definitive” legal opinion on the following question:

If the Minneapolis Charter is not amended by the time the Kahn Amendment affects the City, what would be the effect on City of Minneapolis redistricting and elections?

I cannot provide a “definitive” answer to your legal question. A definitive answer may only come through the courts. However, I can provide a legal opinion based on an analysis of the Kahn Amendment and other applicable laws. In my analysis, I will discuss whether the Kahn Amendment would apply to the City of Minneapolis and, assuming it would apply, what the impact would be.

## **II. What is the Kahn Amendment?**

The Kahn Amendment is the 2010 amendment that created the new language of Minnesota Statutes, Section 205.84, subdivision 1(b) as follows:

### **205.84 REDISTRICTING; CITIES WITH WARDS.**

#### **Subdivision 1. General provisions.**

....

(b) Notwithstanding any home rule charter provision to the contrary, in a city of the first class where council members are elected by ward to serve for four years to terms that are not staggered, if the population of any ward changes by five percent or more, all council members must be elected to new terms at the first municipal general election after ward boundaries are redefined under subdivision 2; provided, however, that if no municipal general election would otherwise occur in the year ending in "2" or the year ending in "3," a municipal general election must be held in one of those years.

## **III. Does the Kahn Amendment Apply to the City of Minneapolis?**

I will discuss whether the Kahn Amendment is applicable to the City of Minneapolis. If the Kahn Amendment is not applicable to the City of Minneapolis, there would be no need to revise statutes or Charter provisions to comply with the Kahn Amendment.

There are two main arguments for the proposition that the Kahn Amendment is not applicable to the City of Minneapolis.

### **A. First Argument that the Kahn Amendment may not apply to the City**

The City must comply with various election laws.<sup>1</sup> Two laws that have been legally analyzed, and which are relevant to the applicability of the Kahn Amendment, are Minnesota Statutes, Sections 205.02 and 410.21.

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<sup>1</sup> Minnesota Statutes, chapters 200, 201, 202A, 203B, 204B, 204C, 204D, 205, 205A, 206, 208, 209, 211A, 211B, and 211C shall be known as the Minnesota Election Law. See Minn. Stat. § 200.01. Minnesota Election Law applies to all elections held in Minnesota unless otherwise specifically provided by law. See Minn. Stat. § 200.015.

Minnesota Statutes, Section 205.02 provides as follows:

**205.02 STATUTES APPLICABLE.**

**Subdivision 1. Minnesota Election Law.**

Except as provided in this chapter the provisions of the Minnesota Election Law apply to municipal elections, so far as practicable.

**Subd. 2. City elections.**

In all statutory and home rule charter cities, the primary, general and special elections held for choosing city officials and deciding public questions relating to the city shall be held as provided in this chapter, except that sections 205.065, subdivisions 4 to 6; 205.07, subdivision 3; 205.10; 205.121; and 205.17, subdivision 3, do not apply to a city whose charter provides the manner of holding its primary, general or special elections.

Minnesota Statutes, Section 410.21 provides as follows:

**410.21 APPLICATION OF GENERAL ELECTION LAWS.**

The provisions of any charter of any such city adopted pursuant to this chapter shall be valid and shall control as to nominations, primary elections, and elections for municipal offices, notwithstanding that such charter provisions may be inconsistent with any general law relating thereto, and such general laws shall apply only in so far as consistent with such charter.

The application of Sections 205.02 and 410.21 was analyzed by the Minnesota Attorney General (“Minnesota AG”). See attached Minn. Op. Atty. Gen 64F (Oct. 27, 1995).<sup>2</sup> The Minnesota AG found that Section 410.21 was adopted in 1909 and has not been amended, which is still the case today. The Minnesota AG also found that Section 205.02 was first enacted in 1983 and was amended after that. The Minnesota AG analyzed the two statutes and found: (1) the statutes were incompatible; (2) neither statute was more specific than the other; and (3) Section 205.02 was enacted after Section 410.21. Based on this analysis, the Minnesota AG held that Section 205.02 would prevail.<sup>3</sup> In other words, Section 410.21 would have no applicability to municipal elections, as if Section 410.21 had been repealed; general state law related to nominations, primary elections, and municipal officer elections would prevail over charter provisions.

The same issue was considered in Minnesota Voters Alliance v. City of Minneapolis, No. 27-CV-08-35, 2009 WL 2761911 (Minn. Dist. Ct. Jan. 13, 2009). In that case, the court considered

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<sup>2</sup> As applicable here, the Minnesota AG provides opinions to cities on questions of public importance. See Minn. Stat. § 8.07. The opinions of the Minnesota AG are not binding on courts but are given careful consideration by courts where the opinions are long standing and are accompanied by administration reliance. See Governmental Research Bureau, Inc. v. St. Louis County, 104 N.W.2d 411 (Minn. 1960).

<sup>3</sup> The Minnesota AG analyzed the two statutes under Minn. Stat. § 645.26, which provides the means to analyze laws that conflict with each other.

whether Section 205.02 prohibits home-rule charter cities from controlling municipal general elections.<sup>4</sup> The court listed two examples when the legislature showed its intent to limit a city’s charter authority over its elections by specifically stating that the law applied, notwithstanding the provisions of section 410.21.

The first example relates to the boundaries of election precincts as follows:

**Example 1:** Minn. Stat. sec. 204B.14, subd. 7 (2019):

**Subd. 7. Application to municipalities.**

Notwithstanding the provisions of section 410.21, or any other law, ordinance or charter to the contrary, the provisions of subdivisions 1 and 3 apply to all municipalities.

The second example relates to finance reports of candidates and committees as follows:

**Example 2:** Minn. Stat. sec. 211A.12 (2019), provides in relevant part:

**211A.12 CONTRIBUTION LIMITS.**

....

Notwithstanding sections 211A.02, subdivision 3, and 410.21, this section supersedes any home rule charter.

Based on these two examples, the court in Minnesota Voters Alliance held that Section 410.21 is applicable to municipalities. The court stated that if a municipality’s authority under Section 410.21 is to be limited, it will be done using specific, clear language, including that the state law applies notwithstanding the provisions of Section 410.21.

The Kahn Amendment relates to elections for municipal offices, in that it requires the City to have an election for Council Members in a year ending in 2 or 3 under certain circumstances. The Kahn Amendment is in conflict with the Minneapolis Charter, in that Council Members should be elected in 2021 for a 4-year term.<sup>5</sup> The Kahn Amendment does not include language stating it supersedes Minnesota Statutes, Section 410.21. However, the Kahn Amendment does use the language, “notwithstanding any home rule charter provisions to the contrary.” Based on Minnesota Voters Alliance, and the language in the Kahn Amendment, it is possible that the Kahn Amendment is not applicable to the City, but a court could determine that the language – “notwithstanding any home rule charter provisions to the contrary” – is alone sufficient for the Kahn amendment to supersede any Charter provision. Further, the legislature could amend the

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<sup>4</sup> This case involved the question of whether the City of Minneapolis could use Instant Runoff Voting (i.e., Ranked Choice Voting) for its municipal elections. The district court decision in Minnesota Voters Alliance was appealed on different grounds (i.e., constitutional grounds), and the trial court decision was upheld. See Minnesota Voters Alliance v. City of Minneapolis, 766 N.W.2d 683 (Minn. 2009).

<sup>5</sup> Minneapolis Charter § 4.2(b) provides: “**Term; election.** Each Council member's term is four years. Each ward's voters elect their Council member in each year following a year whose number is evenly divisible by four.”

Kahn Amendment to clearly state that the Kahn Amendment is applicable to charter cities “notwithstanding section 410.21.”

## **B. Second Argument that the Kahn Amendment may not apply to the City**

The Kahn Amendment may be a special law that is not applicable to the City. A special law is “[e]very law which upon its effective date applies to a single local government unit or to a group of such units in a single county or a number of contiguous counties.”<sup>6</sup> At the effective date of the Kahn Amendment in 2010, the Kahn Amendment was only applicable to the cities of Minneapolis and St. Paul,<sup>7</sup> which are in contiguous counties. Special laws are only effective when approved by the affected unit.<sup>8</sup> The City did not approve the Kahn Amendment.

There are three exceptions to requiring local government approval when a special law is enacted:<sup>9</sup>

1. A law which enables one or more local government units to exercise authority not granted by general law.
2. A law which brings a local government unit within the general law by repealing a special law, by removing an exception to the applicability of a general statutory provision, by extending the applicability of a general statutory provision, or by reclassifying local government units.
3. A law which applies to a single unit or a group of units with a population of more than 1,000,000 people.

The third exception to approval is when the law applies to a single unit or group of units with a population of more than one million people. By its terms, the Kahn Amendment only applies to Minneapolis and St. Paul, which combined, do not have a population that exceeds one million people. The other two exceptions to approval also do not apply.

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<sup>6</sup> See Minnesota Constitution, article XII, sec. 2.

<sup>7</sup> Rochester, Duluth, Minneapolis, and St. Paul are cities of the first class. See Minn. Stat. § 410.01 (definition of city of the first class). Rochester has six Councilmembers who are elected for 4-year, staggered terms by ward, and one Councilmember who is elected at-large. See Rochester Charter, Sections 1.02, subd. 1, 3.04, and 3.05. This structure was in place in Rochester in 2010 when the Kahn Amendment was enacted. Duluth has five City Councilors who are elected for 4-year, staggered terms by “council districts,” and four City Councilors that are elected at-large for 4-year, staggered terms. See Duluth Charter, Chapter II, Section 2 and a link to past election results: <https://duluthmn.gov/city-clerk/elections-voter-services/election-results/> This structure was in place in Duluth in 2010 when the Kahn Amendment was enacted.

<sup>8</sup> See Minnesota Constitution, article XII, sec. 2 and Minn. Stat. § 645.021 (2019).

<sup>9</sup> See Minn. Stat. § 645.023 (2019). See also House Research Department, Minnesota House of Representatives, Information Brief on Special Legislation, which was updated October 2016: <https://www.house.leg.state.mn.us/hrd/pubs/specleg.pdf>.

Regardless of whether the Kahn Amendment is subject to City approval, the Kahn Amendment could be an unconstitutional special law. The amendment applies to cities of the first class where council members are elected by ward to serve for four years to terms that are not staggered. Through its terms, the Kahn Amendment only applies to two cities in Minnesota – Minneapolis and St. Paul. To survive a constitutional challenge, the limitation of the law to only Minneapolis and St. Paul must be germane to the purpose of the law.<sup>10</sup>

The Kahn Amendment was enacted to avoid a situation where council members elected by ward/district are elected based on ward lines drawn with old Census data. However, the Kahn amendment only applies to Minneapolis and St. Paul, and does not apply to other cities and towns that may be conducting elections using old district boundaries. Further, the Kahn Amendment only applies if council members are all elected at the same time (i.e., elected in unstaggered terms).

The Kahn Amendment does not apply to the City of Rochester, a city of the first class, because Rochester has staggered terms. However, Rochester will be electing its Council President, and its Councilmembers for the 2<sup>nd</sup>, 4<sup>th</sup>, and 6<sup>th</sup> wards in 2020.<sup>11</sup> The next election for those Councilmembers will be in 2024. So, these four Councilmembers will not be elected in the years ending in 2 or 3.

The Kahn Amendment does not apply to the City of Duluth, a city of the first class, because Duluth has staggered terms. However, Duluth will be electing two City Councilors at-large and City Councilors for the 2<sup>nd</sup> and 4<sup>th</sup> council districts in 2021.<sup>12</sup> The next election for those City Councilors will be in 2025. So, those four City Councilors will not be elected in the years ending in 2 or 3.

The Kahn Amendment presumes new ward boundaries should be used for elections soon after a census, and at the latest by the year ending in 3. However, Rochester will have four Councilmembers who will not be elected until 2024 and Duluth will have four City Councilors who will not be elected until 2025. A court could find that the scope of the Kahn Amendment, which only applies to elections in two cities, and does not apply to other municipalities that may be conducting elections with old district boundaries, including Duluth and Rochester, may not be germane to the purpose of the law, and may be unconstitutional.

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<sup>10</sup> See Hamlin v. Ladd, 14 N.W.2d 396 (Minn. 1944). See also George Benz Sons, Inc. v. Ericson, 34 N.W.2d 725 (Minn. 1948); and State ex rel. Paff v. Kelley, 50 N.W.2d 703 (Minn. 1952).

<sup>11</sup> See the City of Rochester web page: <https://www.rochestermn.gov/departments/city-clerk/elections/candidates>

<sup>12</sup> See the City of Duluth web page: <https://duluthmn.gov/city-clerk/elections-voter-services/election-results/2017/>

#### **IV. Impact of Kahn Amendment if Charter Provisions are not Amended**

Assuming that the Kahn Amendment would apply to the City, if Charter provisions are not amended, the following would likely occur:

1. The Charter Commission may redistrict wards in the year ending in 1 (i.e., 2021), but is not required to do so.<sup>13</sup> The City Council could, by ordinance, determine whether the City will redistrict in the year ending in 1 or after the legislature has been redistricted.<sup>14</sup> The following assumes the Charter Commission redistricts wards in the year ending in 1 (i.e., 2021).
  - a. There would be a tight timeline to redistrict wards, which would be approximately 90 days. In the year ending in 2, the Redistricting Group may have to reconvene to determine whether ward boundaries may have to be modified slightly (possibly to avoid small precincts that would be created after the legislative districts are drawn).
  - b. Park districts must be redistricted within 80 days of the time when the legislature has been redistricted or at least 15 weeks before the state primary election in the year ending in two, whichever comes first.<sup>15</sup> There is no law allowing the Park districts to be redistricted in the year ending in 1 (i.e., 2021), other than if the legislature redistricts quickly in the year ending in 1, and the Park Board is subsequently redistricted within the year ending in 1. Therefore, Park districts would have to be drawn after the legislature is redistricted.
  - c. If the legislature redistricts in 2022, or in 2021 with insufficient time to redistrict wards and park districts, the City would hold an election in 2021 for wards using new ward boundaries (based on 2020 census data) and for Park districts using old Park district boundaries (based on 2010 census data).
  - d. Under the Charter there must be four public hearings on any park-district boundary plan. Before holding the last two public hearings, the Charter Commission must notify the Park and Recreation Board of a draft plan or plans. The Commission must then consider any recommendation by the Park and Recreation Board. See Minneapolis Charter § 2.3. Arguably, the Redistricting Group could work on drawing the Park districts in 2021, including having the four public hearings, then approve the Park district boundaries in 2022 after the

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<sup>13</sup> See Minneapolis Charter § 2.2(c)(1)(b) and Minn. Stat. § 204B.135, subd. 1.

<sup>14</sup> See Minneapolis Charter §§ 2.2(c)(3) and 2.2(c)(5) and Minn. Stat. § 204B.135, subd. 1. Please note that if the legislature finishes its redistricting in the year ending in 1, redistricting must be done within 60 days. See Minn. Stat. § 204B.135, subd. 1. However, the City Council can pass an ordinance to ensure redistricting will be done in the year ending in 1, even if the legislature has not been redistricted in the year ending in 1.

<sup>15</sup> See Minneapolis Charter § 2.3 and Minn. Stat. § 204B.135, subd. 2.

legislature has completed its redistricting.<sup>16</sup> However, if any park boundaries would be changed after the last two public hearings, the Redistricting Group should reconvene to consider the boundary changes, the Park Board should be notified of the revised park district plan, and at least two additional public hearings should be held. Also, if any ward boundaries may need to be revised in 2022, additional public hearings should probably be held, although the number of hearings required under the Charter is not clear under these circumstances. Any needed precincts could be revised in 2022 after the legislature has redistricted, as well.<sup>17</sup>

- e. If Section 204B.135 is amended to allow redistricting of the Park districts in the year ending in 1, the Park districts and the wards could both be redistricted in the year ending in 1, even if the legislative districts have not been redistricted. In this case, a municipal election could be held for all municipal offices in 2021, as planned, but using the new ward and new Park district boundaries.
2. The Kahn Amendment provides that if the population of at least one ward in the City changes by at least 5%, an election must be held in the year ending in 2 or 3 for all council member offices. Therefore, even if the City finishes redistricting in 2021, then has an election in 2021 using new ward boundaries, an election would still be technically required in 2023 for council member offices. In future years, including those ending in 21, 41, 61, and 81, the same situation could occur. The City could try to amend the statute, Section 205.84, to avoid such a situation, and may be able to do so, because holding a 2021 election with new ward boundaries would comply with the spirit of the Kahn Amendment.
  3. If an election for Council Members is held in 2023, the Kahn Amendment does not specify the length of the term for Council Members elected in 2023. In other words, the Kahn Amendment is silent on what happens once the election is held in the year ending in 2 or 3. My legal opinion is that a court would likely determine that the council member term after the 2023 election would be a 2-year term, based on the following:
    - a. Minnesota Statutes, Section 205.07, subd. 1 provides that the term of a Council Member is four years.<sup>18</sup> There is no specific language in that section that provides that a 4-year term is required notwithstanding a city charter or notwithstanding Minn. Stat. § 410.21.

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<sup>16</sup> Park districts must be redistricted within 80 days of the time when the legislature has been redistricted or at least 15 weeks before the state primary election in the year ending in two, whichever comes first. Minn. Stat. § 204B.135, subd. 2 (2019).

<sup>17</sup> See Minn. Stat. §§ 204B.14, subd. 3 and 204B.135, subd. 1.

<sup>18</sup> The language in Section 205.07 is applicable to all cities, including charter cities. See Minn. Stat. § 200.02, subd. 8 (2019) (definition of City).

- b. The Minneapolis Charter, Section 4.2, also provides that Council Member terms must be 4 years. However, that same provision says that there would be an election in 2021 and then in 2025.
- c. Minn. Stat. § 205.02 provides that Minnesota Election Law applies to municipal elections, “so far as practicable.” This approach gives cities the support of statutes in the absence of a City’s own procedures. Section 4.2 of the Minneapolis Charter provides that there would typically be an election in 2025. One can argue that it would be not be practicable for the Council Members and the other local elected officials (Mayor, Park Board members, Board of Estimate and Taxation members) to have elections in alternative odd years starting in 2023 until 2033 as follows:

<b>Election Year</b>	<b>Mayor, Park Board and BET Elections</b>	<b>Council Member Election</b>
2021	X	X
2023		X
2025	X	
2027		X
2029	X	
2031		X
2033	X	X
2037	X	X

- 4. The Kahn Amendment requires an election in the year ending in 2 or 3 only “if the population of any ward changes by five percent or more.” While an election will be needed in 2023 because at least one ward should have a population change of at least 5%, an election may or may not be needed after future censuses (i.e., years ending in 23, 33, 63, and 83) under the current Kahn Amendment.

While I have provided you with a possible interpretation of the law, I recommend that to avoid lack of clarity in the law and the Minneapolis Charter provisions, and to avoid litigation, relevant statutes and Minneapolis Charter provisions should be amended to accommodate the intended outcome.

Thank you,

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