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STATE AUDITOR

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January 12, 2006

Mayor Lawrence Plack  
City of Greenfield  
7738 Commerce Circle  
Greenfield, MN 55373

**VIA FACSIMILE and U.S. Mail**

Dear Mayor Plack:

We spoke on January 5, 2006 about a motion passed by the Greenfield City Council on January 3, 2006. The State Auditor's Office has also received numerous contacts from Greenfield residents voicing concern about the motion and the process used to approve the motion. You requested a position from the State Auditor's Office on whether there is a public purpose for the lawsuit approved in the motion and whether you have a conflict of interest.<sup>1</sup> We also address issues raised by citizens about the process. You provided a copy of the motion, which states:

Councilmember Jankowski made a motion that the City of Greenfield file a complaint in United States District Court against the Office of Administrative Hearings based on the unconstitutional interference regarding the 2004 municipal election and the City of Greenfield hereby retain Mohrman & Kaardal, P.A. to represent it in the lawsuit with a legal deposit, retainer of \$10,000.

Walsh seconded the motion.

The motion apparently passed three to two with you, Council Members Jankowski and Walsh voting for it and Council Members Harff and Lee voting against.

Mohrman & Kaardal P.A. currently represents you and Stephen Jankowski in an appeal from a decision by the Office of Administrative Hearings (OAH). The OAH found that

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<sup>1</sup> As we discussed on January 6, 2006, the State Auditor's Office cannot give you or the city legal advice. If the city needs legal advice, it should contact its city attorney. If you need legal advice personally, you should seek it from your own legal counsel. While the Office of the State Auditor does not have authority to order the city to act in a certain way, it serves as a watchdog for Minnesota taxpayers by helping to ensure financial integrity, accountability, and cost-effectiveness in local governments throughout the state. The purpose of this letter is to explain the position of the State Auditor's Office on the use of public funds pursuant to the resolution in question.

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you and Mr. Jankowski intentionally prepared and disseminated campaign material that included a false statement in violation of Minn. Stat. § 211B.06, and that you and Mr. Jankowski's failure to include the disclaimer required by Minn. Stat. § 211B.04(b) on the campaign material was an intentional attempt to mislead the voters of Greenfield as to the purpose of the material, which was to promote your candidacy and the candidacies of Leonard Jankowski and Sylvia Walsh.<sup>2</sup> The case, *Riley v. Stephen Jankowski and Lawrence Plack*, (Minn. Ct. App. No. A05-1125), is currently scheduled for oral argument before the Minnesota Court of Appeals on January 26, 2006.

In the appeal you and Mr. Jankowski are pursuing as private individuals with Mohrman & Kaardal's representation, you assert that various provisions of Minn. Stat. Ch. 211B violate (1) the separation of powers required by article III, section 1 of the Minnesota Constitution, (2) your right to a jury trial under article I, section 6 of the Minnesota Constitution, and (3) your rights under the 1<sup>st</sup> Amendment to the U.S. Constitution. These constitutional challenges are currently before the Minnesota Court of Appeals.

#### A. Process

We have been informed that the motion to pursue federal litigation was not listed on the meeting agenda for the January 3, 2006 meeting. Nor was the agenda amended to add the item. However, your private attorney, Mr. Kaardal, and Stephen Jankowski knew to attend the meeting to comment. Stephen Jankowski's father Leonard Jankowski made the motion, which was seconded by Council Member Walsh. The motion passed with yes votes by you and Council Members Jankowski and Walsh. All of these people either are or were involved in the OAH proceeding or appeal.

We are concerned that a matter of this magnitude, in which so many are personally involved, was not on the agenda so that the public, not just insiders, would know it was going to be considered. We also understand this was a deviation from the procedure usually followed by the City. In the future, we recommend that action items, in particular matters involving public expenditures, be placed on the meeting agenda available to all before the meeting.

#### B. Contracting Procedures

When a city considers hiring a new attorney or other provider of professional services, the State Auditor's Office suggests that it go through a process of soliciting quotes for the services to be provided. Under the circumstances, we question the decision to simply hire your personal attorney. We believe the public is better served when various providers of professional services have a chance to submit proposals on the fees and the services to be provided before a public contract is awarded.

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<sup>2</sup> *Riley v. Jankowski, Jankowski and Plack*, (OAH No. 12-6326-16420-CV) Findings of Fact, Conclusions, Order and Memorandum, May 5, 2005. Although they were originally named respondents in the OAH proceeding, no fines were assessed to Leonard Jankowski or Sylvia Walsh. The OAH determined that they were not involved in preparation or dissemination of the campaign material in question.

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We also find the large (\$10,000) retainer payment troubling. The normal process for paying city claims is for a service provider to perform services and submit an itemized claim showing that the services have been performed. *See* Minn. Stat. § 412.271. The city council audits the claim and determines whether it should be paid. The vendor is required to sign a declaration to the effect that under the penalties of perjury this claim is just and correct and no part of it has been paid. *Id.* We believe this type of claim approval process should be followed by the city. In addition, no payments should be made to a professional services provider unless they are made pursuant to a signed contract clearly setting forth the obligations of the city and the professional services provider.

C. Valid Public Expenditure

Based on the circumstances surrounding the OAH proceeding, the related appeal and the recent city council motion, we believe there are valid concerns about whether the contemplated expenditure is necessary, whether it serves the interests of private individuals rather than the interests of the City, and whether the City has other, more effective and economical means to seek a change in the law.

The laws you and Mr. Jankowski have been fined for violating, Minn. Stat. §§ 211B.04 and 211B.06, apply to candidates and persons involved in election campaign activities. At the January 3, 2006 meeting, you apparently explained that you had spent several thousand dollars defending yourself in the ongoing litigation, and Stephen Jankowski apparently noted adverse effects the ongoing proceedings had on him as well.

Municipalities, including cities, are not authorized to spend money on election advocacy. *See* Op. Atty Gen. 159a-3, May 24, 1966. In this opinion, the Attorney General found a school board could not spend public funds to advocate for the passage of a referendum. The opinion quotes *Citizens to Protect Public Funds v. Board of Education*, 98 A.2d 673 (N.J.), William Brennan, J., 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.

Candidates running for public office and their supporters are not acting as public officials, but as private persons. Just as a local government cannot advocate for particular candidates, they should not be involved in supporting the advocacy of candidates. The reference in the recently passed motion to alleged “interference regarding the 2004 municipal election” by the Office of Administrative Hearings necessarily refers to “interference” regarding campaign advocacy on the part of individuals, including you and

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Mr. Jankowski. It does not involve the functions of city government. For this reason alone, the State Auditor's Office believes it would be improper for the City to spend public funds on the contemplated lawsuit.

If the City does not have a valid interest in the proposed lawsuit, it is important to remember that the City cannot challenge the constitutionality of Minn. Stat. Ch. 211B to advance individuals' personal legal interests. The City has no authority to use public money to promote the private legal interests of individuals, and any such expenditure would be improper.<sup>3</sup>

Even if a city interest, rather than a personal interest, exists to challenge the constitutionality of Minn. Stat. Ch. 211B, no expenditure is necessary on the City's part to accomplish this. As noted above, the constitutional challenges have already been presented to the Minnesota Court of Appeals, which will consider and rule on them after hearing oral arguments on January 26, 2006. The expenditure of public funds to re-litigate issues that will be decided in your current appeal would be improvident and an unnecessary expenditure of taxpayers' money. We recommend that the city await the outcome of the appeal that has already been filed to challenge the constitutionality of the fair campaign practices laws.

If the City actually wants to change the law, it is free to seek a change by asking the Legislature to amend the law. We believe a city council that disagrees with the public policy of a state election law can be heard in the political process by making its objections known to lawmakers either directly or through an organization such as the Minnesota League of Cities. With this option available, we question the wisdom of spending public funds to pursue litigation to change the fair campaign practices laws, rather than seeking change through the legislative process.

#### D. Conflict of Interest

As noted, at the January 3, 2006 meeting, you apparently indicated that you had spent several thousand dollars defending yourself in the ongoing litigation. You then voted to have the City hire your attorneys to pursue litigation attacking the law under which you had been fined. Minnesota statute provides that "a public officer who is authorized to take part in any manner in making any . . . contract in official capacity shall not voluntarily have a personal financial interest in that . . . contract or personally benefit financially therefrom." Minn. Stat. § 471.87. We believe there is a grave danger that under the present circumstances, an expenditure of public funds to pay attorneys that you had already retained to attack fair campaign practices laws under which you were fined, would constitute a conflict of interest.

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<sup>3</sup> See *Visina v. Freeman*, 89 N.W.2d 635 (1958) (courts generally construe "public purpose" to mean "such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.").

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In order to prevent the appearance of the use of public funds for private purposes, we urge the City not to spend public funds on the contemplated litigation. We believe it is important that the City seek legal advice on this matter from sources other than your private attorneys. The City should seek advice from its city attorney and the attorney general's office on how to proceed. Taxpayers have a right to be confident that the public treasury is not being used to further private interests.

E. Conclusion

Finally, before it considers undertaking the contemplated litigation, the City should:

1. Place the item on the agenda as an action item;
2. Follow proper City Council process used to approve expenditures;
3. State the reasons for the proposed expenditure to make sure the expenditure furthers a valid City interest, rather than a personal view or personal interest;
4. Thoroughly review the City's fiscal condition to determine whether the proposed federal lawsuit is the best use of taxpayers' funds as opposed to waiting for resolution of the current litigation or seeking a legislative change;
5. Resolve the conflict of interest concern.

Thank you for contacting the State Auditor's Office. If you have any additional questions, feel free to contact us again.

Sincerely,

Mark F. Kerr  
Assistant Legal Counsel  
(651) 296-4717

cc: Susan Hoffman, Clerk Administrator  
Jeff Carson, City Attorney