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March 27, 2012

The Honorable Bernard C. Suchy
Chair, Leaf Mountain Town Board of Supervisors
45288 – 120th Street
Vining, Minnesota 56588

Dear Chair Suchy:

The Office of the State Auditor (“OSA”) received concerns that the Town of Leaf Mountain (“Town”) plowed driveways for Town Board Supervisors and the Town Clerk at no charge. In addition, the OSA learned that the Town hired Town Board Supervisors to perform work for the Town without obtaining the affidavits and adopting the resolutions required by Minnesota law.

This letter will provide the Town with guidance to comply with Minnesota law in the future.

Snow Removal

The Town Clerk informed the OSA that the Town does not plow driveways as a general practice, but the Town plows the driveways of Town Supervisors and the Town Clerk at no charge. According to the Town Clerk, this practice began as an alternative to providing Town officials with a raise.

Minnesota law permits a town to remove snow from private property when the snow removal does not unduly delay or interfere with the removal of snow from public highways. However, the law requires that towns, at a minimum, be reimbursed for their costs.¹

In addition, providing free snow removal services to Town employees and officials appears to be an “in kind” benefit. The Minnesota Attorney General’s Office has consistently held that local units of government may not provide “in kind” benefits to its employees or officers without explicit authority to do so.²

¹ Minn. Stat. § 160.21, subd. 2, provides: “The road authority of any county or town may remove snow from private property upon payment of not less than the cost thereof when such snow removal does not unduly delay or interfere with the removal of snow from public highways under its jurisdiction.”

² See, e.g., Ops. Atty. Gen. 359b (Oct. 24, 1989) and 161b-12 (Jan. 24, 1989).

The OSA knows of no authority for the Town to provide free snow removal services to Town officials.

Work Performed by Town Board Supervisors

The Town Clerk informed the OSA that you operate the plow for the Town, and that another supervisor mows ditches for the Town. While claim forms are submitted for the work performed, the OSA understands that the Town did not obtain the affidavits and adopt the resolutions required by law to permit the officials to work for the Town.

Under Minnesota's general conflict of interest statute, "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."³ Because the general rule is so strict, the legislature created a number of exceptions. For example, a town board, "by unanimous vote, may contract for goods or services with an interested officer" if the contract is one "for which competitive bids are not required by law."⁴

To use this broad exception, however, a town and the interested supervisor must follow the procedures set forth in Minn. Stat. § 471.89. This section requires the town board to "authorize the contract in advance of its performance by adopting a resolution setting out the essential facts and determining that the contract price is as low as or lower than the price at which the commodity or services could be obtained elsewhere."

In addition, before claims are paid on the contract, the interested officer must file with the town clerk "an affidavit stating:

- (a) The name of the officer and the office held by the officer;
- (b) An itemization of the commodity or services furnished;
- (c) The contract price;
- (d) The reasonable value;
- (e) The interest of the officer in the contract; and
- (f) That to the best of the officer's knowledge and belief the contract price is as low as, or lower than, the price at which the commodity or services could be obtained from other sources."⁵

Enclosed is a copy of the Minnesota Association of Townships ("MAT") document *Statutory Conflicts of Interest: Contracting with your own Town*. It discusses the relevant statutes and contains a sample resolution and sample affidavits.⁶

³ See Minn. Stat. § 471.87. See also Minn. Stat. § 365.37 (town board conflicts of interest).

⁴ See Minn. Stat. § 471.88, subs. 1 and 5. Generally, competitive (sealed) bids are not required unless the amount of the contract is estimated to be over \$100,000. See Minn. Stat. § 471.345.

⁵ See Minn. Stat. § 471.89.

The Honorable Bernard Suchy
Town of Leaf Mountain
March 27, 2012
Page 3

Recommendations

The OSA recommends that the Town remove snow from private property only as permitted under Minnesota law. In addition, the OSA recommends that the Town follow Minnesota law when hiring a Town official to perform services for the Town.

If you have any questions or concerns regarding these recommendations, please feel free to contact me directly at 651-297-5853, or by email at Nancy.Bode@osa.state.mn.us. As required by Minn. Stat. § 6.51, a copy of this letter is being provided to the Otter Tail County Attorney and the Otter Tail County Auditor.

Sincerely,

/s/ Nancy J. Bode

Nancy J. Bode
Assistant Legal Counsel

Enclosure

cc. The Honorable Arthur Dorn, Jr., Town Board Supervisor
The Honorable Lester Becker, Town Board Supervisor
Mr. Charles Klimek, Town Clerk
Ms. Pamela Reger, Town Treasurer
The Honorable David Hauser, Otter Tail County Attorney
The Honorable Wayne Stein, Otter Tail County Auditor

⁶ The document is also available on MAT's website, www.mntownships.org. Supervisors operating town machinery are specifically discussed on pages 3-4.