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**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH**

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GREGORY P. HAWKINS, In his capacity as  
Salt Lake County Auditor

Plaintiff,

v.

Salt Lake County, a political subdivision of  
the State of Utah; Max Burdick, in his  
capacity as chair of the Salt Lake County  
Council; Randy Horiuchi, Richard Snelgrove,  
Jim Bradley, Arlyn Bradshaw, Michael  
Jensen, David Wilde, Jani Iwamoto, Steve  
DeBry, Max Burdick in their capacity as  
members of the Salt Lake County Council;  
and Peter Corroon, in his capacity as Mayor  
of Salt Lake County

Defendants.

APPLICATION FOR TEMPORARY  
RESTRAINING ORDER

Civil No.

Judge:

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Plaintiff, Gregory P. Hawkins, Salt Lake County Auditor, by and through undersigned  
counsel, makes this application for Temporary Restraining Order.

**FACTS JUSTIFYING A TEMPORARY RESTRAINING ORDER**

1. In November, 2010, Gregory P. Hawkins was duly elected by the people of Salt Lake County to serve as County Auditor. Mr. Hawkins qualified for and took office regularly in January 2011.

2. At the time of the election, the Auditor's office had four divisions, Property Tax Compliance which constituted about 23.4 % of the office budget and staffing; Fiscal Accountability and Compliance which constituted about 34.2 % of the office budget and staffing; Budget, Analytics, and Compliance which constituted about 22.1 % of the office budget and staffing, and Compliance and Performance Assessment which constituted about 20.3 %.

3. Beginning almost immediately after the election, Salt Lake County, through its mayor and county council continued a course that threatened to and looked for ways to "dismantle" the auditor's office and to consolidate the duties of the Salt Lake County Auditor into the office of the Salt Lake County Mayor.

A. In November of 2009 the Mayor tried to get the council to separate the budget officer role from the Auditor. That attempt failed to garner the necessary votes on the council to start the process. It was not attempted again until the motion, resolution and ordinance being challenged in this action.

B. In November, 2010, the Mayor proposed moving payroll and accounting to his office and moving auditing to the Council. In connection with the separation of Payroll from the Auditor, the Mayor promised \$500,000 in savings. The Council approved moving payroll. No savings were realized, and in fact the Mayor has sought additional personnel to perform these functions.

C. In January, 2011, the Mayor's CAO, Doug Willmore, stated that the Mayor and the council would reduce the Auditor down to one full time employee (FTE) if he did not "toe the line." The Mayor's and Council's staffs privately discussed "dismantling" the auditor's office. That conversation was overheard by a member of the Auditor's staff.

D. In February 2011, the Council approved a cursory "best practices" study regarding moving accounting and auditing and in March 2011 discussed removing all 9 FTE's from the Auditor's Audit division. At the November 8 COW, council member Arlyn Bradshaw stated that he thought the votes were there to dismantle the Auditor's office at that time.

E. In March, the Council established a Legislative Audit committee and discussed moving the Auditor's entire audit staff to the Council. In April, the Auditor entered into an MOU (Memorandum of Understanding) that he would do audits as the legislative audit committee of the Council directed.

F. In August 2011, the Mayor's staff issued budget instructions to elected officials that would disproportionately impact elected officials other than the Mayor. The Auditor has statutory responsibility to provide budget instructions and forms. When the Auditor stated that he intended to fulfill his role as budget officer, the Mayor's staff accused the Auditor of trying to "subvert the Mayor's budget process." The Mayor then suggested that the Budget Officer role be separated from the Auditor's office and reconsolidated into the office of the Mayor. Members of the Council advocated taking immediate action against the Auditor.

G. In November, the Mayor proposed eliminating 65% of the Auditor's budget and more than half of his full time employee allocations and adding the same full time employee allocations to the Mayor's staff, and transferring all budget and accounting functions to the Mayor.

H. In November, the Council declined the Auditor's request to hire additional deputy auditors to fulfill statutorily mandated duties. The Auditor felt he needed 18 additional FTEs, but would try to get by with only six. The Council has refused to provide sufficient resources to perform his mandatory statutory functions.

4. The threats to dismantle the Auditor's office for failing to "toe the line" finally resulted in a motion on November 8, 2011, which included an ordinance, a resolution to amend the optional plan of government, budget adjustments, and legislative intent to attempt to separate the accounting office and reconsolidate it with the mayors office. The ordinance passed the

County Council on November 15, 2011. The motion, resolution and ordinance attempt to separate the budget officer function of the Salt Lake County Auditor and reconsolidate it into the office of the mayor. That ordinance would separate about 22 % of the Auditor's office and consolidate it into the Mayor's office.

5. The ordinance was adopted on November 15, 2011 and is set, by its terms, to take effect on January 1, 2012.

6. Notwithstanding the effective date of the Ordinance, the Council's fiscal staff has ordered the Auditor to provide access to the County's budgeting system to the Mayor's staff to allow the Mayor to begin acting as budget officer immediately.

7. The next election for Salt Lake County Auditor is set for November 2014.

### **Argument**

By its motion, resolution and ordinance dated November 15, 2011, the Salt Lake County Council attempted to separate the role of budget officer from the Salt Lake County Auditor and consolidate that office with the office of County Mayor. Since the adoption of Salt Lake County's current form of government, the Salt Lake County Budget Officer has been the Salt Lake County Auditor. This ordinance that would wreck such havoc on the Salt Lake County Auditor's office was adopted on November 15, 2011 and, by its terms, unless enjoined by this court will take effect on January 1, 2012. This ordinance, the motion for its adoption and the resolution supporting it are invalid, both under Utah Statutory law, and they are unconstitutional.

**I. THE MOTION RESOLUTION AND ORDINANCE FAIL TO COMPLY WITH THE STRICTURES OF UTAH CODE ANNOTATED SECTION 17-16-3**

Utah Code Annotated, section 17-16-3 permits the county legislative body (in this case the county council) to consolidate county offices and establish the duties of those consolidated offices, or to separate and reconsolidate offices.

However, the County Council may not “consolidate the office of county executive with the office of county auditor, unless a referendum approving that consolidation passes.” There is thus considerable doubt, given the nature, history, and constitution of Salt Lake County Government whether this ordinance could ever be valid without an accompanying referendum. But the Court need not resolve that issue today in order to grant the Auditor’s application for a Temporary Restraining Order.

Even if it were at some time appropriate for the Council, without a referendum of the voters, to separate the budget officer from the Auditor, then reconsolidate the budget officer with the County Mayor as this ordinance proposes, The timing conditions delineated in section 17-16-3 for such a reconsolidation have not been met. In order to be a valid reconsolidation of offices:

(3) Each county legislative body shall ensure that any ordinance consolidating or separating county offices:

(a) is enacted before the February 1 of the year in which county officers are elected; and

(b) takes effect on the first Monday in January after the year in which county officers are elected. Utah Code Annotated section 17-16-3.

The Salt Lake County Auditor will not be elected until the year 2014. That is the earliest that an ordinance separating the Budget officer from the Auditor's office and then reconsolidating it into the Mayor's office could legally take effect. Because this motion, resolution and ordinance was not enacted before February 1 in the year in which the Auditor was elected, and because it does not take effect on January 1 of the year after he was elected, the ordinance is invalid under Utah Code Annotated Section 17-16-3.

## **II. THE MOTION, RESOLUTION, AND ORDINANCE ARE UNCONSTITUTIONAL**

It is a time honored principle of Constitutional law that although the legislative body has power to create and abolish offices of government, it cannot do so in bad faith, with the intent to nullify the appointment of government officials appointed by another elected official. State Ex Rel. Hammond Et Al. V. Maxfield Et Al. 103 Utah 1, 132 P.2d 660, (Ut. 1942). Likewise, one elected branch of government cannot legislate another elected officer out of the office to which he was elected. State Ex Rel. Connolly V. Haverly, County Clerk, 62 Neb. 767, 87 N.W. 959 (1901). See, also Utah Code Annotated [Section 10-3-202](#) "Each elected officer of a municipality shall hold office for the term for which he is elected and until his successor is chosen and qualified . . . ." Of course the defendants might argue that this ordinance does not legislate Mr. Hawkins out of office, it only separates a portion of his office and consolidates it with the mayor. However, as the Utah Supreme Court has repeatedly stated "in order to determine whether a new

office is in fact created, reference must be had to the ‘functions, duties and powers which appertain to it.’ Only when the so-called new office has \* substantially new, different or additional functions, duties and powers which the ‘old’ office did not possess, is there in fact the creation of a new office. State Board Of Education V. Commission Of Finance Et Al. 122 Utah 164, 247 P.2d 435 (1952). When one looks at the functions, duties, and powers that appertain to the office of the Salt Lake County Auditor now, and compare them to the functions, duties and powers the office will have after the reconsolidation takes place one will quickly conclude that this ordinance attempts to legislate Mr. Hawkins out of the office to which the voters elected him.

The Salt Lake County Attorney has acknowledged, that only the Auditor, who appointed his staff can terminate their employment. It is thus beyond the power of the Salt Lake County Council to remove the members of the Auditor’s staff who perform the Budget function. They cannot effect that goal through the back door by abolishing the Budget officer in the office of the Auditor and then reestablish it in the office of the Mayor. The reason for such restraints on the legislative power of government to remove employees of a coequal elected office are obvious:

If this separation were not observed, the legislature “could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to [the Council].” Such a result would be “constitutionally impermissible.” *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986).

In fact, it is just such impermissible motivation that lies at the heart of this motion, resolution and ordinance. For instance, what spawned this ordinance was the Auditor’s insistence on being the budget officer. The Mayor’s office usurped part of that function, and when the

Auditor's staff gently reminded the Mayor's staff that the Auditor is the County Budget officer. That reminder "set off a fire storm" that resulted in this attempt to unlawfully separate the budget officer function from the Auditor's office. Exhibit A attached to the Verified Complaint.

Like all constitutions, the Utah Constitution is not an instrument of detailed instructions on proper governance. Rather it is the embodiment of those principles on which free government must be based in order to remain a public thing deriving its authority from the people. Indeed, the Constitution itself calls upon legislators and judges to remember that "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Utah Constitution Article I, section 27. Albeit, the provisions of the Constitution are "mandatory and prohibitory, unless by express words they are declared to be otherwise."

Though our county governments differ some from our state government, we are counseled to look to the operation of the state and federal government to fill in the blanks where an issue may not be addressed statutorily with regard to county operations. In that regard, constitutional limitations on elected officials using the power of their elected office to aggrandize themselves are instructive. When the people of Salt Lake County elected Peter Carroon to be the Mayor of the county, they did not entrust him with the power associated with the Budget officer. By this ordinance, Mayor Carroon and the Council seek to legislate the elected County Auditor out of the Budget officer position to which he was elected and to legislate the Mayor into that Budget officer position to which he was not elected, all without a referendum of the people. Such conduct flies in the face of long established constitutional

principles. Provisions of law that either “accrete to a single Branch powers more appropriately diffused among separate Branches,” or that “undermine the authority and independence” of a coordinate branch, violate the separation of powers. [\*Mistretta v. United States\*, 488 U.S. 361, 382 \(1989\)](#).

And the Utah Constitution prohibits a legislator from being appointed to another civil office which is created, or the emoluments of which have been increased during his term of office. Constitution of the State of Utah Article VI section 7. If these “fundamental principles essential to the security of individual rights and the perpetuity of free government” were to be applied in this case the Court will see at once that it is improper for the mayor, during this term of his office to occupy the Budget office he was instrumental in creating for himself. Similarly, the legislative power should never be exercised to “create, increase or decrease fees, percentages or allowances of public officers during the term for which said officers are elected or appointed.” Utah Constitution, Article VI, Section 18. By this motion, resolution, and ordinance, the Salt Lake County Commission, at the insistence of, and with the signature of, the Mayor have both created an office for the Mayor to fill, and have decreased the allowances to the office of the Salt Lake County Auditor.

**III. THE SALT LAKE COUNTY AUDITOR IS ENTITLED TO A TEMPORARY RESTRAINING ORDER TO PREVENT THE DISMANTLING OF HIS OFFICE PENDING RESOLUTION OF THE SERIOUS ISSUES RAISED BY HIS COMPLAINT**

A temporary restraining order may issue upon a showing by the applicant that :

- (1) The applicant will suffer irreparable harm unless the order issues;

(2) The threatened injury to the applicant outweighs whatever damage the proposed order may cause the party restrained;

(3) The order would not be adverse to the public interest;

And

(4) there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation. Rule 65A(e) Utah rules of Civil Procedure.

All of these elements are present in this case.

Through their motion, resolution, and ordinance enacted on November 15, 2011, the Salt Lake County Council have expressed their intent to dismantle the Salt Lake County Auditor's office, and have taken the first very real concrete step in that direction by adopting an ordinance that would separate the Budget officer from the Auditor and reconsolidate that office into the Mayor.

The Ordinance, by its terms, is set to take effect at noon on January 1, 2012. If the ordinance takes effect at that time, more than 22% of the office of the Auditor of Salt Lake County would need to be dismantled. In fact, the Mayor is beginning to put pressure on the Auditor's staff to begin the process now even though the ordinance is not set to take effect until January 1, 2012. The dismantling of the office will create irreparable harm to the office of the Salt Lake County Auditor. In addition, the effect that the ordinance is having and will continue to have on the morale of those employees of the office of the Auditor who will be affected by the

ordinance creates irreparable harm. Employees who will become unemployed if the ordinance is enforced have already begun to search for new employment, that alone is an irreparable harm. Should any of them succeed in obtaining new employment additional irreparable harm will ensue. Perhaps the most important irreparable harm will be the inability of the Salt Lake County Auditor to fill the budget officer role to which he was elected.

The threatened injury to the office of the Salt Lake County Auditor outweighs whatever damage the restraining order may cause to the respondents. All that will happen to the defendants is a delay in enforcing the ordinance, on the other hand, a traditional and long standing office of the Salt Lake County Auditor will be devastated, its personnel disbursed, and its processes disrupted and its statutory duties left unfulfilled.

The Restraining order, if issued, would not be adverse to the public interest. The best definition of the public interest in this regard is the legislative pronouncement that such an ordinance is to be enacted by February 1 of the election year of the county officer involved, and not to take effect until January 1, after the election year. Thus the legislature contemplated nearly a year of transition and an election cycle before a reorganization and reconsolidation of an office such as the budget officer office is reconsolidated as is contemplated by this Salt Lake County ordinance. Salt Lake County would do it in a month and a half without input from the voters. Public policy cries out for them to be stopped.

The defendants may argue, or the court may have concerns that this case may present a political question into which the court should not inject itself. It does not. In Skokos v.

Corradini, 900 P.2d 539 (1995) the Utah Court of appeals pointed out that claims involving policies and decisions promulgated by government officials or entities are not automatically barred from judicial review as nonjusticiable political issues. [Ukrainian–American Bar Ass'n v. Baker](#), 893 F.2d 1374, 1380 (D.C.Cir.1990). If a claim involves the interpretation of a statute or questions the constitutionality of a particular political policy, courts are acting within their authority in scrutinizing such claims “so long as there are ... ‘judicially discoverable and manageable standards for resolving’ the dispute.” Id. (quoting Baker v. Carr, 369 U.S. 186). And here, just as in Skokos v. Corradini, “[w]hether the [county’s] actions pass constitutional muster is certainly a justiciable issue.” 900 P.2d at 542.

Furthermore, by violating the statutory timelines required for a change in the County Auditor’s duties, defendants have denied the current County Auditor and public who elected him the opportunity to seek a political solution. By the time a political solution might be sought, the damage to the currently serving County Auditor will have been done.

Parts I and II above show that there is a substantial likelihood that the Salt Lake County Auditor will prevail on the merits or the case presents serious issues on the merits which should be the subject of further litigation.

### **Conclusion**

Gregory P. Hawkins, Salt Lake County Auditor, is entitled to a Temporary Restraining Order Restraining the defendants, their agents, servants, employees, and attorneys and those acting in concert with them who receive notice of this order from taking any action to enforce or

prepare to implement the motion, resolution and ordinance of the Salt Lake County Council or to prevent the Salt Lake County Auditor to fulfill any of his responsibilities as the budget officer of Salt Lake County.

DATED THIS \_\_\_\_\_ day of November, 2011.

**ATKIN LAW OFFICES, PC**

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Blake S. Atkin  
*Attorneys for Plaintiff*