JACK BAKER
ATTORNEY

March 26, 2009

Susan L. Segal, City Attorney
333 South 7th Street – Room 300
Minneapolis, MN 55402

Re: Final arguments by the Minneapolis City Attorney's Office ("City Attorney") in opposition to S.F. 194[1] [Session 2009-2010], a bill to amend Minnesota's graffiti statute[2]

I reviewed the arguments opposing S.F. 194, which were sent under your name to the Mayor and Council.[3] Attached is proof that none of the arguments proffered by the City Attorney rest on a solid legal footing. They appear instead to rely on conjecture.

I do not doubt that the City Attorney is "committed and supportive of any and all workable options to attack graffiti". For starters, we can agree that no one is above the law. By admission, though, cases presented to the City Attorney "are just a very small percentage of the total number of incidents of graffiti." In other words, most graffiti vandals remain outside the reach of the law. That, however, conflicts with the constitutional requirement of equal protection.

Next, we can agree that when prosecution for a graffiti **crime** does occur, the City Attorney's record is admirable. Unfortunately, safeguards in the criminal laws make most graffiti incidents a game of Hide-n-Seek, for which the City Attorney is ill equipped.

Finally, we can agree that the U.S. Constitution is not so rigid as to offer **no** solution to a public problem. *Out of sight, Out of mind* is not a principle of constitutional law. Within constitutional boundaries, but **outside** the criminal law, a solution to the graffiti problem does exist. S.F. 194 follows the road map enunciated by the U.S. Supreme Court to craft a workable option to attack graffiti.

With the Mayor's approval, perhaps we could meet to develop ground rules for an unbiased evaluation of arguments for and against S.F. 194. I am hopeful that the City Attorney will recommend to the Council and legislators an informal hearing to which legal scholars will be invited.

Respectfully,

S/
Jack Baker, Esq.
The Graffiti Task Force
of the Lyndale neighborhood

encl: Matrix – Objections of the City Attorney (11 March 2009) versus replies from the Graffiti Task Force

cc: Candidates
Senator Mee Moua, Chair
Senate Committee on the Judiciary
Senator Linda Berglin
Rep. Joe Mullery, Chair
House Committee on Civil Justice
Rep. Jeff Hayden
Rep Frank Hornsetin

1. Approved unanimously by the General Membership of the Lyndale Neighborhood Association, 23 April 2007
2. Minn.Stat. 617.90 (graffiti damage action)
3. Susan L. Segal, Minneapolis City Attorney. "RE: Graffiti resolution – Precinct 10-5" email to Mayor R.T. Rybak et al. 11 March 2009

Should an investigative police officer who is not an eye witness be allowed to identify in an informal hearing[A] the person responsible for graffiti?

NO **Email to Mayor et al., 11 March 2009, listing objections of the Minneapolis City Attorney to Graffiti Proposal (S.F. 194) [Session 2009-2010]**	**YES** **Reply from the Graffiti Task Force (GTF), Lyndale neighborhood**
Mayor and Council Members - As you know, we have previously outlined our Office's concerns with the Berglin-Baker proposal. Our concerns are based on the law and practicality, neither of which have been addressed in this bill. We share in the aims and goals of the Lyndale Neighborhood Association and are supportive of any and all workable proposals to assist in the battle against graffiti. To that end, we shared a number of legislative suggestions that would assist the City in combating graffiti. Melissa Reed, the City's IGR representative has copies of these proposals that she has shared with legislators.	The Office of City Attorney ("City Attorney") raised concerns about S.F. 587 (session 2007).[B] Those concerns were addressed[C] and incorporated by Senate Counsel into S.F. 3760 (session 2008), which was re-introduced as S.F. 194 (session 2009-2010). The City Attorney then objected to S.F. 194[D] on the basis of arguments that ignored relevant case law. GTF explained to the Mayor why objections raised by the City Attorney were not based on law.[E] The City Attorney now raises the same objections, this time with reference to the relevant case law, What follows is proof that **no objection** proffered by the City Attorney rests on a solid legal footing.
To respond to a few of the points raised by Mr. Baker in recent e-mail correspondence: * The City Attorney's Office aggressively prosecutes graffiti offenders, and does not support a "policy of punishing victims and letting vandals run free:" The City Attorney's Office Aggressively and Successfully Prosecutes All Cases Presented. In 2008, our conviction rate exceeded 90%. Our decline rate was zero; in other words, no graffiti cases were declined for charging. In 2007, our conviction rate was 82%. These statistics are derived from Practice Manager, our office's case management system. In his letter to me, Mr. Baker asserted that "[the City Attorney's graffiti conviction rate has been near zero over several decades." We know that the number of cases presented to our Office, however, are just a very small percentage of the total number of incidents of graffiti.	The City Attorney insists that ALL graffiti offenses must be charged as a crime. That procedure is not preordained by the U.S. Constitution. Consent by the Council makes the procedure *city policy.* It is that *policy* that guarantees a free ride for most graffiti vandals. Because vandals enjoy a free ride, a City Ordinance focuses its wrath on victims. Not only does the City Attorney support the *policy* that punishes victims and lets vandals run free, it is in fact the instigator. A "very small percentage", indeed. With that admission, both sides can now accept the following as a statement of fact: All things considered, the City Attorney's graffiti prosecution rate has been near zero over several decades. If the City Attorney can identify the graffiti vandal, we concede that it's record in the criminal courts is admirable. Unfortunately, its ability to identify most graffiti vandals in a **ciminal** court is hindered by the U.S. Constitution. *Out of sight, Out of mind* has painful consequences. Cleanup "costs the city and its property owners $2.5 million annually."[F]

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The problem with being able to prosecute more cases is not whether the case is a gross misdemeanor, misdemeanor or petty misdemeanor. It is being able to identify the offender. If the offender can be identified based on admissible evidence (and admissibility does not turn on the standard of proof - beyond a reasonable doubt or clear and convincing) we can prosecute that offender. The problem is being able to provide admissible evidence to establish the identity of the offender. In no case, civil or criminal, will a court allow a verdict to be based on a police officer's guess of who might be responsible.	Identifying the offender is indeed the key problem. The *city policy* that requires ALL graffiti offenses to be charged as a crime allows no solution to the problem. More than three decades of near-zero prosecutions is proof beyond any reasonable doubt. We agree that no court will convict "on a police officer's guess." Police investigators have access to search warrants and snitch money. They would use the same tools that have enabled the courts to convict criminals of all flavors since the founding of the democracy. S.F. 194 requires proof beyond a reasonable doubt to convict. A judge evaluates the sufficiency of proof. The only difference is, if the charge is not a crime, two Supreme Courts – U.S. and MN – said the rules of proof may be less rigid.
* As stated in the talking points, S.F. 194 runs afoul of several constitutional mandates: due process, or fundamental fairness, and separation of powers. As prosecutors, our mission is to seek justice. In doing so, however, we are cognizant of the requirements of the Constitution. The Constitution provides rights to those who are accused of wrongdoing. Because of the constitutional deficiencies of the proposal, we do not believe it would survive judicial scrutiny.	"Runs afoul" is a bit strong. Only by conjecture can one assume that the MN Supreme Court will: • disregard guidance from the U.S. Supreme Court – the **burden** of proof is sufficient if it strikes "a fair balance between the rights of the individual and the legitimate concerns of the state"[G] (emphasis added), and • disavow its own words – "the **legislature** has the power to determine the standard of proof in a statutorily created cause of action"[H] (emphasis added)
* The Rules of Criminal Procedure provide that the standard of proof for petty misdemeanors is proof beyond a reasonable doubt. Rule of Criminal Procedure 23.05, subd. 3, states: "A defendant charged with a petty misdemeanor violation is presumed innocent until proven guilty beyond a reasonable doubt." The Rules of Criminal Procedure are established by the judiciary and ordinarily cannot be modified by statute. Generally, when a statute conflicts with a rule of criminal procedure, the rule controls. Minn. Stat. § 480.059, subd. 7; see also State v. Keith, 325 N.W.2d 641, 642 (Minn. 1982). Insofar as S.F. 194 lowers the burden of proof in petty misdemeanor cases, it directly conflicts with this Rule of Criminal Procedure. Because of this conflict, passage of S.F. 194 would invite a legal challenge.	Rule 23.05 addresses only the standard of proof. It says nothing about the burden of proof. Lowering the burden of proof in a civil proceeding, while enforcing a criminal standard of proof, poses no conflict with Rule 23.05. Arguments to the contrary are a non-sequitur.

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The City Attorney's Office has reviewed the two cases cited by Mr. Baker, which purport to establish that the legislature could enact legislation that would change the burden of proof for petty misdemeanors. Although the cases address the general issue of burden of proof, both cases were civil actions. Addington v. Texas, 441 U.S. 418, 431 (1970) (addressing standard of proof in civil commitment proceeding); State v. Alpine Air Products, 500 N.W.2d 788, 790 (Minn. 1993) (addressing standard of proof in civil consumer protection action against air purifier manufacturer). Civil actions are subject to a different, and significantly lower, burden of proof than criminal cases. Neither case gives the Minnesota legislature the authority to change the burden of proof in a particular type of petty misdemeanor case. The burden of proof is based on constitutional due process principles that are in the exclusive purview of the courts, not the legislature. As such, these cases do not stand for the proposition for which Mr. Baker cites them.	The question addressed in Addington[G] is, "what standard of proof is required by the Fourteenth Amendment to the Constitution in a **civil proceeding** under state law to commit an individual involuntarily ..." (emphasis added). The difference between loss of liberty in a mental hospital and involuntary confinement to a jail is *de minimis*. A petty misdemeanor ignites a *civil proceeding* under state law because the legislature declared it to be a public offense that is not a crime.[I] Thus, Addington[G] upholds the legislative prerogative to adopt S.F. 194. The Court concluded that states are not required to "guarantee error-free convictions" but must remain "free to develop a variety of solutions to problems". The "substantive standards for civil commitment may vary from state to state". Likewise, "the procedures [i.e., burden of proof]" may vary "so long as they meet the constitutional minimum." What, exactly, is the "constitutional minimum"? The Court concluded that the "**burden** of proof (emphasis added)" required in a civil proceeding is one that "strikes a fair balance between the rights of the individual and the legitimate concerns of the state." It falls upon the legislature, not the courts, to strike that fair balance. S.F. 194 is well within the boundaries set by Addington:[G] • It creates a "civil proceeding". • It protects liberty by forbidding "involuntary commitment", i.e., jail time. • It requires the highest standard to convict – proof beyond a reasonable doubt. • It adjusts the "burden of proof" with an intent "to exclude as nearly as possible the likelihood of an erroneous judgment." • It varies "substantive standards" solely to develop a solution to a public problem. • It simplifies "procedures" to resemble the civil proceeding used to prosecute a parking ticket, where the charging official is likewise not an eye witness. To paraphrase Addington,[G] if the charge is not a crime, the rules of proof may be less rigid. The Minnesota Supreme Court concurs, and arguments dismissing State v. Alpine[H] are *de minimis*.

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The legislature could create a new civil cause of action, but individuals can already pursue a civil claim. This is not used because of the difficulty again of identifying the offender, the low chances of being able to collect on a judgment and the costs of civil court filing fees.	S.F. 194 **is** a new civil action. Following the road map set out in Addington[G], it avoids "the difficulty again of identifying the offender" – civil proceeding, respect for liberty, high standard of proof, simplified procedure, and due regard for legitimate concerns of the state.
* Probation supervision is a valuable tool in that it enables monitoring of the terms of a criminal sentence, and it is not available for petty offenders. Probation supervision is available when a person is convicted of a crime. It is an invaluable tool, which enables the courts to ensure that offenders comply with conditions that are imposed at sentencing. One of the most important probation conditions in graffiti cases is restitution, to be paid to the victim. When a person is convicted of a petty offense, probation cannot be imposed. When a graffiti offender has been identified, charged and convicted of a crime, probation is an important component of sentencing. This tool would not be available in graffiti cases charged as petty misdemeanors.	It does not matter how "invaluable" the tool is, if the *crime* cannot be prosecuted. The City Attorney refuses to accept the historical proof that taxpayers are better served if **some** graffiti offenses are resolved in a civil proceeding.
* Restorative justice is often sought as a condition of probation for graffiti offenders. For at least a decade, the Minneapolis City Attorney's Office has partnered with various restorative justice programs. These programs supplement or provide an alternative to court adjudication of criminal cases. Graffiti offenders can and do participate in restorative justice programs. Mr. Baker contends that "probation is not an appropriate response in all situations," and indicates that restorative justice may be more appropriate. We agree with this and do, in fact, seek restorative justice when it is appropriate.	There is no need for probation in a civil proceeding. As an alternative, city ordinance could allow the fine to be waived if the convicted vandal completes a Restorative Justice program successfully. Another alternative harnesses the incentives already offered to the Bar by the legislature.[J] Triple damages and attorney fees would very quickly make graffiti an expensive habit. Court records are public. That simplifies civil lawsuits, especially against repeat offenders.

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I hope this clarifies the record of the City Attorney's Office and the concerns we have with the Berglin-Baker proposal. We remain committed and supportive of any and all workable options to attack graffiti and suggest a review of the ideas our prosecutors have provided for legislative changes. Susan Segal Minneapolis City Attorney	If cases presented to the City Attorney "are just a very small percentage of the total number of incidents of graffiti", then obviously most graffiti vandals remain unpunished. The graffiti problem is self-inflicted. For decades, hard data has proven that the *city policy* of treating ALL graffiti offenses as a crime is a failure. Why continue a *policy* that is a proven failure? S.F. 194 offers "workable options to attack graffiti", yet the City Attorney is neither committed nor supportive. Why?

A. *Informal hearing* refers to a public trial before a judge, with no jury.

B. Dana Banwer, Deputy City Attorney – Criminal Division. "Response to Proposal to Amend Minn. Stat. § 617.90," *Minneapolis City Attorney's Office*. 27 Feb. 2008

C. Jack Baker (Graffiti Task Force). "Comments from the Graffiti Task Force of the Lyndale neighborhood," Letter to Dana Banwer (Deputy City Attorney – Criminal Division). 16 March 2008

D. Anon. "Graffiti Proposal (S.F. 194)," *Minneapolis City Attorney's Office*, email to multiple recipients. 12 Feb. 2009

E. Jack Baker (Graffiti Task Force). "Objections of City Attorney", email to Mayor R.T. Rybak et al. 18 Feb. 2009

F. Tom Horgen. "Leaving their mark across the metro," *Star Tribune*, 14 Oct. 2006, p. A8

G. Addington v. Texas, 441 U.S. 418, 431, 60 L.Ed.2d 323, 995 S.Ct. 1804 (1970)

H. State v. Alpine Air Products, 500 N.W.2d 788, 790 (Minn. 1993)

I. Minn.Stat. 609.02, Subd. 4a: "Petty misdemeanor" means a petty offense which is prohibited by statute, which does not constitute a crime and for which a sentence of a fine of not more than $300 may be imposed.

J. Minn.Stat. 617.90 (graffiti damage action)